App. No. _____

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,
Petitioners,

v.

James Owens, et al.,
Respondents.

APPLICATION TO EXTEND THE TIME IN WHICH TO FILE
A PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

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August 23, 2019

APPLICATION FOR EXTENSION OF TIME

To the Honorable John G. Roberts, Jr., Chief Justice of the United States and Circuit Justice for the District of Columbia Circuit:

Pursuant to Supreme Court Rules 13.5, 22, and 30.3, Petitioners the Republic of the Sudan and the Ministry of External Affairs and Ministry of Interior of the Republic of the Sudan (collectively "Sudan") respectfully request that the time in which Sudan may file a Petition for a Writ of Certiorari in this matter be extended 60 days, until Friday, November 16, 2019.

The United States Court of Appeals for the District of Columbia Circuit issued its decision on May 21, 2019 (attached as Exhibit A). The Court of Appeals denied Sudan's petition for rehearing *en banc* on June 18, 2019 (order attached as Exhibit B). Absent an extension of time, the Petition for a Writ of Certiorari would be due on September 16, 2019. Petitioners are filing this Application at least ten days before that date (*see* Sup. Ct. R. 13.5). The jurisdiction of this Court will be invoked under 28 U.S.C. § 1254(1).

BACKGROUND

This case involves a challenge to a decision of the United States Court of Appeals for the District of Columbia Circuit affirming multi-billion-dollar default judgments issued against Sudan in six consolidated actions brought under 28 U.S.C. § 1605A, the terrorism exception to sovereign immunity under the Foreign Sovereign Immunities Act of 1976, as amended ("FSIA"). (A seventh consolidated action does not involve claims at issue here.)

The plaintiffs whose claims are the subject of the review sought here ("Plaintiffs") are non-U.S.-national family members of victims of the August 1998 bombings of the U.S. Embassies in Kenya and Tanzania perpetrated by al Qaeda and Osama Bin Laden. Plaintiffs allege that Sudan (and Iran) provided material support to al Qaeda and Bin Laden that

proximately caused the attacks. Sudan vehemently denies these allegations and expresses its deep condolences to the victims of these horrific attacks and their families.

Plaintiffs' default judgments were based upon claims of intentional infliction of emotional distress ("IIED") under District of Columbia law because Plaintiffs, as foreign-national family members who were not direct victims, did not qualify for the private right of action under § 1605A(c). Shortly after the district court entered the default judgments, Sudan appeared in that court, moved to vacate the default judgments, and timely appealed the entry of the default judgments. The district court denied the motions to vacate and Sudan appealed. The D.C. Circuit consolidated Sudan's appeal of its vacatur motions with Sudan's direct appeal from the default judgments. The D.C. Circuit affirmed denial of the vacatur motions and denied Sudan's appeal in part. As part of its order, the D.C. Circuit, among other things, certified the following question to the District of Columbia Court of Appeals, the local jurisdiction's highest court, in respect of Plaintiffs in this case: "Must a claimant alleging emotional distress arising from a terrorist attack that killed or injured a family member have been present at the scene of the attack in order to state a claim for intentional infliction of emotional distress?" *Owens v. Republic of Sudan (Owens I)*, 864 F.3d 751, 812 (D.C. Cir. 2017).

In answering the certified question, the D.C. Court of Appeals held "as a general matter" that an IIED claimant must have been present at the scene in order to have a valid claim under D.C. law. *Republic of Sudan v. Owens (Owens II)*, 194 A.3d 38, 40-42 (D.C. 2018) (attached as Exhibit C). The D.C. Court of Appeals then, however, created a special exception to the general requirement of presence, a new rule that the court termed "The FSIA Terrorism Exception to the Presence Requirement." *Id.* at 42-45. This new rule applies exclusively to foreign sovereigns over which a court has jurisdiction under 28 U.S.C. § 1605A. Through supplemental briefing,

Sudan argued that the D.C. Circuit was prohibited from applying this special exception to the IIED presence requirement because it was unconstitutional. The D.C. Circuit disagreed, and Sudan filed a Petition for Rehearing En Banc, which was denied.

The D.C. Circuit's error resulted in the affirmance of more than $3.9 billion in default judgments in favor of foreign-national family members who were not present at the scene of the attacks and undisputedly have no standing to seek a remedy under the private federal right of action. Sudan's Petition for Writ of Certiorari before this Court will argue, among other arguments, that the D.C. Circuit's decision, unless corrected, will have established a precedent that will apply in many future terrorism-related actions under § 1605A despite conflicting with the Constitution and other principles of federal law.

REASONS JUSTIFYING AN EXTENSION OF TIME

In support of its application for an extension of time to file its Petition, Sudan states as follows:

1. The issues and record in this case are sufficiently complex and weighty that Sudan requires additional time to prepare its Petition for a Writ of Certiorari.

    a. This case involves issues of profound importance in the area of terrorism litigation under the FSIA. The United States District Court for the District of Columbia is the default venue for cases against foreign sovereigns. 28 U.S.C. § 1391(f). Accordingly, the D.C. Circuit's passive acceptance of the constitutionality of the District of Columbia's new rule not only has significant implications for over $3.9 billion in default judgments in this case, but also potentially affects state-law claims brought by any foreign-national family members in terrorism cases against foreign sovereigns more generally.

b. The case presents complex constitutional and federal-law issues involving foreign relations and retroactive liability for the conduct of foreign sovereigns. Specifically, the "FSIA Terrorism Exception to the Presence Requirement" that the D.C. Court of Appeals created (i) impermissibly encroaches upon the federal foreign-affairs powers; (ii) conflicts with — and is therefore superseded by — federal law requiring that foreign states be liable to the same extent as private individuals in like circumstances; and (iii) would retroactively increase Sudan's liability for past conduct, in conflict with longstanding legal principles. The decision of the D.C. Circuit to apply the unconstitutional rule is not merely an instance of injustice to Sudan, a foreign sovereign with which the United States has warming relations. *See* Exec. Order No. 13,761, 82 Fed. Reg. 5331 (Jan. 13, 2017) (lifting certain sanctions against Sudan). Unless corrected, the decision also threatens reciprocal consequences for the United States as it defends itself in litigation in foreign courts. *E.g.*, *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1321-22 (2017) (observing that decisions by U.S. courts against foreign states may be applied reciprocally by foreign courts against the United States).

2. In addition, Counsel must coordinate extensively with overseas client representatives who are in the midst of a governmental transition, which may complicate counsel's ability to finalize the intended Petition by September 16.

3. Counsel also has a heavy caseload with preexisting deadlines that interfere with the current deadline for the petition in this case.

CONCLUSION

For the foregoing reasons, Sudan respectfully requests that this Court grant Sudan a 60-day extension of time, to and including November 16, 2019, in which to file its Petition for a Writ of Certiorari. Sudan expressly reserves all of its rights, defenses, privileges, and immunities, including without limitation the defense of sovereign immunity.

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Counsel for Petitioners Republic of Sudan, Ministry of External Affairs and Ministry of the Interior of the Republic of Sudan

August 23, 2019

Exhibit A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 11, 2016 Decided May 21, 2019

No. 14-5105

JAMES OWENS, ET AL.,
APPELLEES

v.

REPUBLIC OF SUDAN, MINISTRY OF EXTERNAL AFFAIRS AND MINISTRY OF THE INTERIOR OF THE REPUBLIC OF THE SUDAN,
APPELLANTS

Consolidated with 14-5106, 14-5107, 14-7124, 14-7125, 14-7127, 14-7128, 14-7207, 16-7044, 16-7045, 16-7046, 16-7048, 16-7049, 16-7050, 16-7052

Appeals from the United States District Court
for the District of Columbia
(No. 1:01-cv-02244)
(No. 1:08-cv-01377)
(No. 1:10-cv-00356)
(No. 1:12-cv-01224)
(No. 1:08-cv-01349)
(No. 1:08-cv-01361)
(No. 1:08-cv-01380)

Christopher M. Curran, *Nicole Erb*, *Claire A. DeLelle*, and *Celia A. McLaughlin* were on the supplemental brief for appellants. *Bruce E. Fein* entered an appearance.

Stuart H. Newberger, *Clifton E. Elgarten*, *Aryeh S. Portnoy*, *Emily Alban*, *John L. Murino*, *Matthew D. McGill*, *Lochlan F. Shelfer*, *Steven R. Perles*, *Edward B. MacAllister*, *John Vail*, *Thomas Fortune Fay*, *Jane Carol Norman*, *Michael J. Miller*, and *David J. Dickens* were on the supplemental brief for appellees. *Annie P. Kaplan*, *John D. Aldock*, and *Stephen A. Saltzburg*, entered appearances.

Before: HENDERSON and ROGERS, *Circuit Judges*, and GINSBURG, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge* GINSBURG.

GINSBURG, *Senior Circuit Judge*: The court originally heard this appeal during the 2016-17 term. *See* 864 F.3d 751 (2017). In the resulting order we certified to the D.C. Court of Appeals the following question regarding the plaintiffs' intentional infliction of emotional distress (IIED) claims: "Must a claimant alleging emotional distress arising from a terrorist attack that killed or injured a family member have been present at the scene of the attack in order to state a claim for intentional infliction of emotional distress?" The D.C. Court of Appeals has now answered the question in the negative. *See Republic of Sudan v. Owens*, 194 A.3d 38, 39 (2018). Sudan nonetheless asks us not to accept the D.C. court's answer on the grounds that it encroaches upon the federal government's foreign affairs power, impermissibly discriminates against certain foreign sovereigns, and violates the presumption against retroactivity. For the reasons that

follow, we reject Sudan's arguments and affirm the default judgments with respect to the plaintiffs' IIED claims.

I. Background

The underlying facts and the history of this litigation are recited at length in our initial opinion. 864 F.3d at 762-69. Here we briefly summarize and highlight matters relevant to Sudan's present challenge.

A. Litigation History

The cases in this consolidated appeal are among the many lawsuits arising out of the August 1998 bombings of the U.S. embassies in Nairobi, Kenya and Dar es Salaam, Tanzania, which were committed by al Qaeda. *Id.* at 762. Beginning in 2001, victims of the bombings and their family members brought suits against the Republic of Sudan and the Islamic Republic of Iran for providing material support to al Qaeda. *Id.* at 765-66. They were able to do so through the so-called "terrorism exception" in the Foreign Sovereign Immunities Act (FSIA), which covers suits against state sponsors of terrorism for "personal injury or death" arising out of certain acts. *Id.* at 762; *see* 28 U.S.C. § 1605A(a).

The original terrorism exception was codified as a subsection of 28 U.S.C. § 1605, alongside all the other exceptions to the jurisdictional immunity of foreign states. 864 F.3d at 763. Under that scheme, a plaintiff suing a foreign sovereign for acts of state-sponsored terrorism had to rely solely upon state substantive law; this is known as the "pass-through" approach. *Id.* at 764. In 2008 the Congress moved the terrorism exception from § 1605 to the newly enacted § 1605A. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083, 122 Stat. 3,

338-44 (2008). Unlike the other exceptions in the FSIA, the § 1605A terrorism exception not only withdraws sovereign immunity and grants the federal courts jurisdiction over qualifying cases, it also provides a substantive cause of action against foreign sovereigns. 864 F.3d at 765; *see* § 1605A(c). In addition, as we held in our earlier opinion, plaintiffs can continue to bring pass-through state law claims through the jurisdictional grant in § 1605A. 864 F.3d at 808; *see* § 1605A(a).

Because Sudan failed to appear and defend against the claims, in May 2003 the district court entered an order of default. Over the next decade, the litigation took many twists and turns, producing a tangle of related actions and appeals. *See* 864 F.3d at 765-68. Finally, in 2014, the district court entered final judgments in favor of the plaintiffs. The total damages awarded came to $10.2 billion, $4.3 billion of which were punitive damages. *Id.* at 767.

In April 2015 Sudan filed Rule 60(b) motions to vacate the default judgments; it also appealed each case, but we stayed those appeals pending resolution of the motions to vacate. *Id.* at 768. In those motions, Sudan raised both jurisdictional and nonjurisdictional arguments, none of which persuaded the district court. Sudan appealed the district court's denials of its motions to vacate, and those appeals were consolidated with the earlier appeals, all of which were addressed in our prior opinion. *Id.*

B. This Appeal

In our 2017 decision, we affirmed the default judgments in most respects. We exercised our discretion to reach the merits of Sudan's argument for invalidating the family members' state law claims for IIED on the ground that "D.C.

tort law requires a plaintiff to be present at the scene of a defendant's outrageous and extreme conduct in order to recover for IIED," even though it is nonjurisdictional and would ordinarily have been forfeited by Sudan's default. *Id.* at 809-11. We did not resolve that issue, however, because we were "genuinely uncertain whether the D.C. Court of Appeals would apply the presence requirement in the Second Restatement of Torts to preclude recovery for IIED by family members absent from the scene of a terrorist bombing." *Id.* at 812. Instead we certified the question to that court. *Id.*

In September 2018, the D.C. Court of Appeals answered the certified question, in a word: "No." *Sudan*, 194 A.3d at 39. On its way to doing so, the court first adopted § 46(2)(a) of the Second Restatement as the general rule for IIED claims under D.C. law. *Id.* at 41. That is, it held that when emotional distress is caused by conduct directed at a member of a plaintiff's family, the plaintiff must be "present at the time" of the conduct in order to make out an IIED claim. *Id.* The court then carved out an exception to the general rule for cases brought under § 1605A, which it referred to as "the FSIA Terrorism Exception" to the presence requirement. *Id.* at 42. Sudan now urges us not to apply the exception in this case.

II. Analysis

Sudan makes three arguments why this court should not apply the D.C. court's ruling here: It (1) "impermissibly encroaches upon the federal foreign affairs powers"; (2) violates the non-discrimination principle in the FSIA, i.e., the principle that a foreign state is liable "to the same extent as a private individual under like circumstances"; and (3) would, if applied in this case, increase Sudan's liability for past conduct, in contravention of the presumption against

retroactivity. All of these arguments depend upon the assumption that the exception crafted by the D.C. Court of Appeals "creates a new rule of D.C. law applicable only to certain foreign states." We reject this assumption, wherefor all Sudan's challenges fail.

A. Forfeiture

First, we pause to consider the plaintiffs' contention that Sudan forfeited its arguments because it failed to raise them in its initial appeal to this court and before the D.C. Court of Appeals. "The rule in this circuit is that litigants must raise their claims on their initial appeal and not in subsequent hearings following a remand." *Eli Lilly & Co. v. Home Ins. Co.*, 794 F.2d 710, 717 (D.C. Cir. 1986) (finding "appellants waived their constitutional claims" against the Supreme Court of Indiana's answer to this court's certified question). In this case, Sudan made its arguments for the first time in its petition for rehearing to the D.C. Court of Appeals.

In *Eli Lilly* "all of the legal rulings that appellants find to be constitutionally offensive were stated with some precision in the District Court's memorandum opinion." *Id.* Not so here. As explained in greater detail below, Sudan's arguments are predicated upon the way in which the D.C. Court of Appeals characterized the substantive legal rule it crafted in its opinion, as contrasted with this court's formulation of the certified question. Sudan cannot reasonably be faulted for having failed to bring these issues to our attention during its initial appeal; they did not arise until the D.C. Court issued its opinion in response to the certified question. We therefore conclude Sudan's objections are not forfeit and proceed to address them on the merits.

B. Merits

Again, each of Sudan's arguments proceeds from the premise that the D.C. Court of Appeals crafted a new rule of substantive law applicable only to foreign states lacking immunity under § 1605A and not to other possible defendants in terrorism cases. Sudan's first argument invokes the foreign affairs preemption doctrine, which provides that, because the Constitution entrusts foreign policy exclusively to the National Government, even if those subject to the state law could comply with both it and federal law, the "imposition of any state law create[s] a conflict with federal foreign policy interests." *Saleh v. Titan Corp.*, 580 F.3d 1, 13 (D.C. Cir. 2009). Here, says Sudan, "by fashioning a new rule of law targeting a subset of foreign states ... the D.C. Court of Appeals ... makes an impermissible foray into the delicate realm of foreign affairs." Appellant's Br. 5.

Next, Sudan contends the D.C. court's rule violates the principle that foreign states lacking immunity "shall be liable in the same manner and to the same extent as a private individual under like circumstances," as codified in 28 U.S.C. § 1606, because it "applies only to foreign states lacking immunity under § 1605A." Appellant's Br. 7. In our prior opinion, we explained that § 1606 covers claims brought under § 1605 but not under § 1605A. 864 F.3d at 809. Sudan's argument is that the Congress nevertheless intended to preserve the non-discrimination requirement for § 1605A cases that use the pass-through approach. Finally, Sudan argues in the alternative that, if the non-discrimination principle "no longer applies by reason of § 1605A's enactment," then the "backdoor lifting" of that limitation on Sudan's liability violates the presumption against retroactivity, as set out in *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994). Appellant's Br. 12-13.

In short, Sudan's objections to the D.C. court's exception to the presence requirement all presume that D.C law treats state actors differently from non-state actors. Because we reject Sudan's interpretation of the D.C. court's holding, we do not reach the substantive question whether it would be impermissible for the D.C. court to single out certain foreign sovereigns for IIED liability in terrorism cases.

We formulated the question certified to the D.C. Court of Appeals as follows:

> Must a claimant alleging emotional distress arising from a terrorist attack that killed or injured a family member have been present at the scene of the attack in order to state a claim for intentional infliction of emotional distress?

Owens, 864 F.3d at 812. That court responded, "For the reasons that follow, we answer this question 'No.'" *Sudan*, 194 A.3d at 39.

The D.C. court went on, however, to restate the certified question and to describe its holding with specific reference to the FSIA. The court restated the certified question as follows: "The D.C. Circuit has asked us to determine whether the caveat [to § 46] applies to the scenario presented here — an IIED case where the defendant is a state sponsor of terrorism denied sovereign immunity by the FSIA." *Id.* at 43. Then the court made clear that its opinion was addressed to "IIED cases where the jurisdictional elements of § 1605A are satisfied and the plaintiff's severe distress arises from a terrorist attack that killed or injured a member of his or her immediate family." *Id.* at 45; *see also id.* at 44 ("Our holding excuses the presence

requirement only when plaintiffs demonstrate that [the] predicates [to § 1605A] are met").

The D.C. Court of Appeals has previously asserted its "latitude ... to consider nondesignated questions and to reformulate, if necessary, the questions as certified." *District of Columbia v. Beretta*, 872 A.2d 633, 641 (D.C. 2005) (cleaned up). Several circuits have, for their part, allowed as how their "phrasing of the [certified] question is not intended to restrict the scope or inquiry by" the state supreme court to which it is directed. *Tillman v. R.J. Reynolds Tobacco*, 254 F.3d 1302, 1308 (11th Cir. 2001); *see also Mineral County v. Walker River Irrigation Dist.*, 900 F.3d 1029, 1034 (9th Cir. 2018); *Penguin Group, Inc., v. American Buddha*, 640 F.3d 497, 499-500 (2d Cir. 2011); *Lamar Homes v. Mid-Continent Casualty Co.*, 428 F.3d 193, 201 (5th Cir. 2005). Here, the D.C. court narrowed its inquiry to cases brought under § 1605A of the FSIA, even though our certified question asked more generally about a "terrorism exception."

Nevertheless, we do not construe the D.C. court's opinion as creating a disparity between state and non-state actors. We agree with the plaintiffs that the D.C. court was simply "reasoning by reference to the facts of the case before it." Because the court was not faced with a terrorism case involving a non-state actor, it was not necessary to decide whether the exception would apply there. We see no reason to anticipate that, in an appropriate case, the D.C. court would refuse to extend the exception to a private actor, such as al Qaeda.

Indeed, as the appellees point out, the D.C. court's reasoning as to the purposes of the presence requirement "was not limited to cases involving foreign sovereigns." The court identified three objectives of the presence requirement: to (1)

"shield defendants from unwarranted liability"; (2) "ensure that compensation is awarded only to victims with genuine claims of severe emotional distress"; and (3) "provide a judicially manageable standard that protects courts from a flood of IIED claims." 194 A.3d at 43 (cleaned up). The court then concluded the first and second objectives are inapplicable "in this special context" for reasons true of "acts of terrorism" more generally. *Id.* at 42. The court explained that "acts of terrorism are, by their very nature, designed to create maximum emotional impact, particularly on third parties" and "the risk of trivial or feigned claims is exceedingly low when the anguish derives from a terrorist attack." *Id.* at 43. Hence, although the D.C. court's opinion addresses only FSIA cases, its rationale invites application of the exception to terrorism cases against non-state actors.

Under these circumstances, we decline Sudan's invitation to construe the D.C. Court of Appeals's rule as singling out certain foreign sovereigns.

III. Conclusion

We therefore affirm the district court's judgments as to the plaintiffs' IIED claims to the extent they are not inconsistent with our initial panel opinion at 864 F.3d 751 (2017).

So ordered.

Exhibit B

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-5105 **September Term, 2018**

1:01-cv-02244-JDB
1:08-cv-01349-JDB
1:08-cv-01361-JDB
1:08-cv-01377-JDB
1:08-cv-01380-JDB
1:10-cv-00356-JDB
1:12-cv-01224-JDB

Filed On: June 18, 2019

James Owens, et al.,

Appellees

v.

Republic of Sudan, Ministry of External Affairs and Ministry of the Interior of the Republic of the Sudan,

Appellants

Islamic Republic of Iran, Ministry of Foreign Affair, et al.,

Appellees

Consolidated with 14-5106, 14-5107, 14-7124, 14-7125, 14-7127, 14-7128, 14-7207, 16-7044, 16-7045, 16-7046, 16-7048, 16-7049, 16-7050, 16-7052

BEFORE: Garland, Chief Judge; Henderson, Rogers, Tatel, Griffith, Srinivasan, Millett, Pillard, Wilkins, Katsas, and Rao, Circuit Judges; Ginsburg, Senior Circuit Judge

ORDER

Upon consideration of appellants' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-5105 **September Term, 2018**

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken R. Meadows
Deputy Clerk

Exhibit C

Recommendation of the Board on Professional Responsibility, it is

ORDERED that the said Carlos E. Perez-Acosta is hereby disbarred by consent.

The Clerk shall publish this order, but the affidavit shall not be publicly disclosed or otherwise made available except upon order of the court or upon written consent of the respondent.

The Clerk shall cause a copy of this order to be transmitted to the Chairman of the Board on Professional Responsibility and to the respondent, thereby giving him notice of the provisions of Rule XI, §§ 14 and 16, which set forth certain rights and responsibilities of disbarred attorneys and the effect of failure to comply therewith.

REPUBLIC OF SUDAN, Ministry of External Affairs, et al., Appellants,

v.

James OWENS, et al., Appellees.

No. 17-SP-837

District of Columbia Court of Appeals.

Argued February 14, 2018

Decided September 20, 2018

Background: Non-U.S. nationals related to someone who died or suffered injuries in bombings outside of United States embassies in Tanzania and Kenya filed suit against the Republic of Sudan, alleging that the injuries to their family members caused them severe emotional distress, and seeking to recover damages for those injuries themselves. Following entry of default judgments, the Republic of Sudan filed motions for relief from the judgments. The District Court, Bates, J., 174 F.Supp.3d 242, denied Sudan's motion. Sudan appealed. The Court of Appeals, Ginsburg, Senior Circuit Judge, certified the question of whether a claimant alleging emotional distress arising from a terrorist attack that killed or injured a family member had to be present at the scene of the attack to state a claim for intentional infliction of emotional distress.

Holdings: As matters of first impression, the Court of Appeals, Fisher, J., held that:

(1) to recover for intentional infliction of emotional distress, a plaintiff whose distress arises from harm suffered by an immediate family member must be present when the harm occurs, and

(2) presence requirement does not apply in a case where the defendant is a state sponsor of terrorism denied immunity by the Foreign Sovereign Immunities Act.

Certified question answered.

1. Damages ⚿57.27

As a general matter, to recover for intentional infliction of emotional distress, a plaintiff whose emotional distress arises from harm suffered by a member of his or her immediate family must be present when the harm occurs and otherwise satisfy the requisites established in Restatement (Second) of Torts. Restatement (Second) of Torts § 46(2)(a).

2. Damages ⚿57.27

Requirement in the Restatement (Second) of Torts that a plaintiff asserting a claim of intentional infliction of emotional distress for injuries suffered by a family member is present when the family member suffered the injury does not apply in a case where the defendant is a state sponsor of terrorism denied immunity by the Foreign Sovereign Immunities Act. 28

U.S.C.A. § 1602 et seq.; Restatement (Second) of Torts § 46(2)(a).

On Certified Question From the United States Court of Appeals For the District of Columbia Circuit (14-5105)

Christopher M. Curran, with whom Nicole Erb, Claire A. DeLelle, Washington, DC, and Celia A. McLaughlin, were on the brief, for appellants.

Matthew D. McGill, with whom Stuart H. Newberger, Clifton S. Elgarten, Aryeh S. Portnoy, Thomas Fortune Fay, Lochlan F. Shelfer, Steven R. Perles, Edward B. Macallister, Jane Carol Norman, Washington, DC, John Vail, Michael J. Miller, and David J. Dickens, Orange, VA, were on the brief, for appellees.

Karl A. Racine, Attorney General for the District of Columbia, Todd S. Kim, Solicitor General at the time the brief was filed, Loren L. AliKhan, Deputy Solicitor General at the time the brief was filed, and Lucy E. Pittman, Assistant Attorney General, were on the brief for the District of Columbia as amicus curiae in support of appellees.

Ellen M. Bublick and George Anhang were on the brief for Law Professors Ellen M. Bublick and Paul T. Hayden as amici curiae in support of appellees.

Before Fisher and Thompson, Associate Judges, and Farrell, Senior Judge.

Fisher, Associate Judge:

Almost simultaneously on August 7, 1998, al Qaeda terrorists detonated powerful truck bombs outside the United States embassies in Dar es Salaam, Tanzania, and Nairobi, Kenya, killing over two hundred people and injuring more than a thousand others. *Owens v. Republic of Sudan*, 864 F.3d 751, 762 (D.C. Cir. 2017). Three years after the attacks, groups of plaintiffs began filing suit in the United States District Court for the District of Columbia, seeking to hold Sudan accountable for its role in the bombings. *Id.* Eventually, the case reached the United States Court of Appeals for the District of Columbia Circuit and, pursuant to D.C. Code § 11-723 (2012 Repl.), it certified the following question of District of Columbia law to this court:

> Must a claimant alleging emotional distress arising from a terrorist attack that killed or injured a family member have been present at the scene of the attack in order to state a claim for intentional infliction of emotional distress?

Id. at 812. For the reasons that follow, we answer this question "No."

I. Background

The D.C. Circuit and the district court have fully recounted the relevant facts and procedural history, *see id.* at 765–69, 781–84; *Owens v. Republic of Sudan*, 826 F.Supp.2d 128, 133–35, 139–46 (D.D.C. 2011), *aff'd in part, vacated in part*, 864 F.3d 751 (D.C. Cir. 2017), so we will discuss them only briefly here.

Much of the litigation in federal court centered on the Foreign Sovereign Immunity Act (FSIA), which generally bars suits against foreign sovereigns in federal and state courts. 28 U.S.C. § 1604 (2012). The FSIA contains exceptions, including the "[t]errorism exception," 28 U.S.C. § 1605A, which strips foreign states of immunity, and grants courts jurisdiction, in cases where certain plaintiffs sue state sponsors of terrorism for committing, or "provi[ding] material support" for, enumerated terrorist activities.[1] § 1605A(a)(1),

1. In general, the terrorism exception to the jurisdictional immunity of a foreign state applies where plaintiffs seek "money damages . . . against a foreign state for personal injury

(2). Section 1605A(c) establishes a private right of action for the same conduct that gives rise to jurisdiction; however, only a subcategory of those plaintiffs who obtain jurisdiction under the terrorism exception can also invoke the statutory cause of action. 864 F.3d at 809. The remainder must assert claims based "upon alternative sources of substantive law," such as state tort law. *Id.* at 808 (analyzing §§ 1605A and 1606).

Appellees are a subset of the plaintiffs who sued Sudan for its role in the embassy bombings. All of them are non-U.S. nationals related to someone who died or suffered injuries in one of the attacks. They allege that the injuries to their family members caused them severe emotional distress, and seek to recover damages for that injury to themselves.

The district court determined, 826 F.Supp.2d at 148, and the D.C. Circuit later affirmed, 864 F.3d at 769, that it had jurisdiction over appellees' claims under § 1605A. However, the district court also concluded that appellees could not rely on § 1605A(c)'s cause of action and would instead need to invoke an independent legal basis for recovery. 826 F.Supp.2d at 153. After conducting a choice of law analysis, the court determined that District of Columbia law governed the "claims that [did] not arise under the federal cause of action at § 1605A(c)," *id.* at 157, and, applying our tort law, held Sudan liable to appellees for intentional infliction of emotional distress ("IIED"). *See, e.g.*, *Onsongo v. Republic of Sudan*, 60 F.Supp.3d 144, 149 (D.D.C. 2014), *aff'd in part, vacated in part sub nom. Owens v. Republic of Sudan*, 864 F.3d 751 (D.C. Cir. 2017).

The orders finding Sudan liable and awarding damages to appellees took the form of default judgments. 864 F.3d at 767. Sudan did not participate in much of the litigation and even declined to engage in the evidentiary hearings held on issues related to jurisdiction, liability, and damages. *Id.* However, after the entry of default judgments, Sudan adopted a more active strategy. It filed motions for relief from the judgments under Fed. R. Civ. P. 60(b), and appealed the denial of that motion, as well as the underlying default judgments, to the D.C. Circuit. *Id.* at 768.

In both proceedings Sudan argued that appellees could recover for IIED only if they were present when their family members were killed or injured, *id.* at 809–10; *Owens v. Republic of Sudan*, 174 F.Supp.3d 242, 286–87 (D.D.C. 2016), a requirement the district court had not imposed, *see, e.g.*, *Onsongo*, 60 F.Supp.3d at 149. On appeal, the D.C. Circuit reviewed our case law and was "genuinely uncertain" whether this jurisdiction "would apply the presence requirement in the Second Restatement of Torts to preclude recovery for IIED by family members absent from the scene of a terrorist bombing." 864 F.3d at 812. Consequently, it certified to us the question of law quoted above. *Id.*

II. The General Rule

The certified question raises two issues of first impression. We must, as a general matter, identify the elements of an IIED claim arising from injury to a member of the plaintiff's immediate family. Depending on the answer to that question, we may then need to determine whether to permit more expansive liability when injury to the

or death ... caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if ... engaged in by an official, employee, or agent of [a] foreign state ... designated as a state sponsor of terrorism." 28 U.S.C. § 1605A(a)(1)–(2)(A)(i)(I).

family member was caused by a terrorist attack.

Our analysis starts with § 46 of the Restatement (Second) of Torts (Am. Law Inst. 1965) ("Second Restatement" or "Restatement Second"), which defines the elements of IIED liability as follows:

> (1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.
>
> (2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress
>
> (a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or
>
> (b) to any other person who is present at the time, if such distress results in bodily harm.

Section 46(1) governs IIED claims where the defendant "intentionally or recklessly causes severe emotional distress" to the plaintiff. In such cases the defendant typically has targeted the plaintiff. *See, e.g.*, *Howard Univ. v. Best*, 484 A.2d 958, 985–86 (D.C. 1984) (holding that plaintiff "made out a prima facie case of intentional infliction of emotional distress ... [by] demonstrat[ing] repeated 'sexual harassment' by ... her supervisor"). By contrast, § 46(2)(a) applies when defendants "direct" their extreme and outrageous acts at a third person and "intentionally or recklessly cause[ ] severe emotional distress" to a member of that person's "immediate family who is present at the time."[2] This court has addressed many § 46(1)-type claims and, in doing so, has expressly adopted the Second Restatement's approach. *See, e.g.*, *Sere v. Grp. Hospitalization, Inc.*, 443 A.2d 33, 37 (D.C. 1982) (quoting elements of IIED from Second Restatement § 46(1)); *Waldon v. Covington*, 415 A.2d 1070, 1076 & n.21 (D.C. 1980) (quoting from § 46 of Second Restatement). However, none of our published opinions has analyzed an IIED claim where § 46(2)(a) might apply. As a result, before we can discuss cases involving terrorist attacks, we must determine whether § 46(2)(a), and with its requirement that the plaintiff be "present at the time," generally governs IIED claims where the plaintiff's distress was caused by harm to a member of his or her immediate family.

We conclude that it does. As noted, this court has embraced the Restatement Second's approach to IIED liability. Subsection (2)(a) is an integral part of that regime and, in formally adopting that subsection today, we make explicit what our earlier cases implied. This holding is consistent with our customary caution when facing "the problem of potentially infinite liability that has been of central judicial concern in emotional distress cases." *Hedgepeth v. Whitman Walker Clinic*, 22 A.3d 789, 801–02 (D.C. 2011) (en banc). For decades, this court permitted relief for *negligent* infliction of emotional distress only "if the distress result[ed] from a physical impact and [was] accompanied by physical injury." *Id.* at 796. While we ultimately abandoned that rule, we replaced it with new ones deliberately crafted to contain "self-limiting principle[s]," *id.* at 812, and to avoid "vir-

2. It appears that we have not applied § 46(2)(b) in the District of Columbia, and there is no need to discuss that section here.

tually infinite liability," *Williams v. Baker*, 572 A.2d 1062, 1069 (D.C. 1990) (en banc).[3]

[1] Like the rules cabining relief for negligent infliction of emotional distress, § 46(2)(a) defines this related tort to guard against potentially unbounded liability. Indeed, the reporters of the Second Restatement explained that § 46(2)(a)'s "presence" requirement exists, in part, to serve that very goal. § 46 cmt. *l*. Limiting recovery to those who are present and perceive the harm as it happens prevents excessive liability while affording relief to plaintiffs who suffer a uniquely traumatic experience. Accordingly, we hold that, as a general matter, to recover for IIED, a plaintiff whose emotional distress arises from harm suffered by a member of his or her immediate family must be "present" when the harm occurs and otherwise satisfy the rule established in Restatement Second § 46(2)(a).[4]

III. The FSIA Terrorism Exception to the Presence Requirement

[2] A caveat to § 46 of the Second Restatement leaves open the possibility of "other circumstances" in which a defendant could face liability for IIED, including "situations in which [the plaintiff's] presence at the time may not be required." § 46 Caveat & cmt. *l*.[5] The D.C. Circuit has asked us to determine whether the caveat applies to the scenario presented here—an IIED case where the defendant is a state sponsor of terrorism denied sovereign immunity by the FSIA. *See* 864 F.3d at 812. Having considered the reasons for the requirement in more typical cases, we conclude that presence at the scene is not required in this special context. Accordingly, we answer the certified question in the negative.

The presence requirement serves many purposes. It shields defendants from unwarranted liability, tries to ensure that compensation is awarded only to victims with genuine claims of severe emotional distress, and provides a judicially manageable standard that protects courts from a flood of IIED claims. *See* Restatement Second § 46 cmt. *l*. In FSIA terrorism cases, however, the presence requirement is not needed to achieve these goals: the very facts that justify stripping foreign

3. For example, in *Williams*, we held that "[w]here the plaintiff was within the zone of physical danger and as a result of defendant's negligence feared for his or her own safety, . . . it is reasonable to permit the plaintiff to recover as an element of damages mental distress caused by fear for the safety of a member of the plaintiff's immediate family who was endangered by the negligent act." 572 A.2d at 1069. This "zone of danger" test is essentially a requirement that the plaintiff be present.

4. We adhere to the Second Restatement even though the American Law Institute has published a new version with a slightly modified approach to IIED liability. *See* Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 46 (2012). This court has proceeded cautiously in adopting the Third Restatement. *See Hedgepeth*, 22 A.3d at 800 n.15 (declining, even while sitting en banc, to endorse more than select comments from the (then-draft) Restatement Third section on negligent infliction of emotional distress). Moreover, as a panel of the court, we cannot overrule prior decisions that have relied upon § 46(1) of the Second Restatement. *See M.A.P. v. Ryan*, 285 A.2d 310, 312 (D.C. 1971). Adopting the Restatement Third approach for § 46(2)-type claims would create a confusing and unseemly situation where some IIED claims were governed by the Second Restatement and others by the Third.

5. "The Institute expresses no opinion as to whether there may not be other circumstances under which the actor may be subject to liability for the intentional or reckless infliction of emotional distress." Restatement (Second) of Torts § 46 Caveat (Am. Law Inst. 1965)

sovereigns of their immunity allay the concerns that the presence requirement was designed to address. As a result, adhering to the rule in this context would serve only to create a high risk that compelling claims will go uncompensated. By establishing the caveat, the Restatement Second sought to prevent such unfair outcomes; by invoking it here, we do just that.

We begin our analysis by considering the role of the presence requirement in ensuring fairness to defendants. As noted previously, § 46(2)(a) governs cases in which the plaintiffs suffer severe emotional distress from conduct directed at a member of their immediate family. The Restatement Second appreciated that, in such cases, defendants might not anticipate the degree to which their conduct would affect family members absent from the scene—individuals whom such defendants did not target and did not see when they engaged in their extreme and outrageous conduct. *See* § 46 cmt. *l*. Requiring that the plaintiff have been "present at the time" mitigated this concern. "[W]here, for example, a husband is murdered in the presence of his wife, the actor may know that it is substantially certain, or at least highly probable, that it will cause severe emotional distress to the plaintiff." *Id.* Although § 46(2)(a) separately requires that the defendant "intentionally or recklessly cause" the plaintiff's anguish, the wife's presence at the time gives added assurance that the defendant knew he would cause her severe emotional distress.[6]

Defendants in FSIA terrorism cases do not need this additional protection. Acts of terrorism are, by their very nature, designed " 'to create maximum emotional impact,' particularly on third parties." *Estate of Heiser v. Islamic Republic of Iran*, 659 F.Supp.2d 20, 27 (D.D.C. 2009) (quoting *Eisenfeld v. Islamic Republic of Iran*, 172 F.Supp.2d 1, 7 (D.D.C. 2000)); *see* 18 U.S.C. § 2331(1) (definition of "international terrorism" includes violent acts that "appear to be intended . . . to intimidate or coerce a civilian population . . . [or] to influence the policy of a government by intimidation or coercion"); D.C. Code § 22-3152 (1) (2012 Repl.) ("act of terrorism" similarly defined). Therefore, when foreign states provide material support for terrorist attacks, it should come as no surprise that the acts they facilitated have caused severe emotional distress to persons who were not present at the time.

Another purpose of the presence requirement is to increase the likelihood that only plaintiffs with "genuine" complaints of severe distress can recover. *See* Restatement Second § 46 cmt. *l*. Yet, the risk of trivial or feigned claims is exceedingly low when the anguish derives from a terrorist attack that *killed or injured* a member of the plaintiff's *immediate family*. Individuals naturally experience severe distress in response to such horrific events. Consequently, in such circumstances, courts need not rigidly enforce the presence requirement to ward off disingenuous claims.

Lastly, the presence requirement serves the goal of avoiding "virtually unlimited" liability and recognizes "the practical necessity of drawing the line somewhere." *Id.* Sudan emphasizes this point, arguing that invoking the caveat in this case would untether the tort from judicially manageable standards and unwisely discard our

6. Sudan contends that it did not recklessly disregard the risk that its conduct would harm appellees, much less intend that result. We reiterate that Sudan defaulted on the issue of liability, 864 F.3d at 767, and belatedly challenged the district court's conclusions regarding that issue under the demanding standard of Fed. R. Civ. P. 60(b). Perhaps more importantly, whether Sudan acted with the requisite mental state is beyond the scope of the question certified to us. *See id.* at 812.

carefully considered limits on liability for causing emotional distress. Indeed, Sudan suggests that any resort to the caveat is suspect.

We agree that the caveat should be invoked only rarely, but Sudan's argument seems to treat it as a nullity. Relaxing the presence requirement in cases where § 1605A applies should not open the floodgates to litigation. Indeed, the *FSIA terrorism exception* we recognize here is quite limited in scope. The provisions of 28 U.S.C. § 1605A are restricted to (1) plaintiffs who meet precise qualifications, § 1605A(a)(2)(A)(ii); (2) a limited range of conduct (in this instance "extrajudicial killing"), § 1605A(a)(1); and (3) defendants that have been classified as state sponsors of terrorism, § 1605A(a)(2)(A)(i). Our holding excuses the presence requirement only when plaintiffs demonstrate that these predicates are met. And even when they can make such a showing, plaintiffs may obtain relief only upon satisfying the remaining elements of § 46(2)(a)—that is, they must establish that the defendant engaged in "extreme and outrageous conduct" and "intentionally or recklessly" caused the plaintiffs' "severe emotional distress" by harming a member of their "immediate family." These are judicially manageable standards that should be sufficient to prevent a precipitous slide down the proverbial slippery slope.

This analysis demonstrates that when § 1605A applies, the need for the presence requirement does not. In such circumstances, rigid adherence to the rule would do little more than shield culpable defendants from liability and deny relief to deserving plaintiffs. The caveat exists precisely to avoid such unfair results, which is why we choose to invoke it.

Furthermore, precluding liability in contexts like the one at bar is not simply unjust but also unwise, as doing so would forego an opportunity to advance a policy goal of national importance. Congress enacted § 1605A "to deter [sovereign nations] from engaging, either directly or indirectly, in terrorist acts." 864 F.3d at 776. It viewed the goal of deterrence as sufficiently important—and the means of civil liability sufficiently effective—that it curtailed sovereign immunity to promote it. Invoking the caveat here will increase the IIED liability of foreign states if they sponsor terrorism, furthering the objective of deterrence that Congress has emphasized. While § 1605A does not dictate our response to the certified question and we are not obligated to promote the purposes of that statute, it is sound jurisprudence to consider how our decisions will affect policies of national significance. Here, Congress deems civil litigation a useful tool in the nation's efforts to deter foreign states from sponsoring terrorism. Our holding today is consistent with that legislative judgment.[7]

At the same time, we emphasize that our decision is not based simply on the outrageousness of the actions at issue. Sudan correctly reminds us that conduct must always be "extreme and outrageous" even to make out a prima facie case of IIED. And we take Sudan's point that creating gradations among extreme and outrageous wrongs is a precarious basis for determin-

7. Sudan argues that if Congress wanted appellees and similarly situated plaintiffs to recover damages, it would have made them eligible to plead the cause of action created by § 1605A(c). Instead, it required such plaintiffs to rely on state tort law, which in some instances bars their recovery. However, the fact that Congress left it to the states to decide whether plaintiffs such as appellees may recover in no way suggests that it wanted to *prevent* such plaintiffs from obtaining relief. Nor does that legislative decision curtail our common law authority to shape our own tort law.

ing whether and when to enforce the presence requirement. Rather, we endorse an FSIA terrorism exception because few IIED claims involve facts that address the concerns of the presence requirement while simultaneously touching a matter of such national significance.

Arguing against excusing the presence requirement, Sudan relies heavily on the note to Restatement Third § 46. There, the reporters reviewed federal district court decisions that have declined or failed to apply the presence requirement in terrorism cases and concluded that this trend, although "worthy of note, ... falls well short of the development of another exception to the presence requirement that the Institute would endorse." Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 46 reporter's note cmt. *m* (Am. Law Inst. 2012). This statement does not draw our holding into question. The reporters primarily criticized the district courts for treating family members of those harmed in terrorist attacks as "direct" victims under Restatement Second § 46(1), *see id.*, a rationale we do not rely on here.[8]

In sum, this is a situation contemplated by the Second Restatement "in which presence at the time [should] not be required." § 46 cmt. *l*. We see little need to enforce the presence requirement in IIED cases where the jurisdictional elements of § 1605A are satisfied and the plaintiff's severe distress arises from a terrorist attack that killed or injured a member of his or her immediate family. Excusing the presence element in such cases may further deter foreign states from sponsoring terrorism and allow deserving plaintiffs to hold culpable defendants accountable for their conduct. At the same time, making such an exception is not likely to produce the type of unfair and unbounded liability that the presence element is intended to prevent. In this limited context, therefore, we hold that the presence requirement does not apply.

IV. Conclusion

For the reasons stated, we answer the certified question "No." In accordance with D.C. Code § 11–723 (g) (2012 Repl.), the Clerk is directed to transmit a copy of this opinion to the United States Court of Appeals for the District of Columbia Circuit, to each of the parties, and to *amici*.

8. Indeed, we share the reporters' skepticism. Terrorists undoubtedly intend to distress the public at large—see, for example, the definitions of terrorism found in 18 U.S.C. § 2331(1) and D.C. Code § 22-3152 (1), quoted above. Perhaps it could be proven in an individual case (such as hostage taking) that the terrorists intended to cause distress to family members in particular, but we are unwilling to conclude as a matter of law that they do so in all circumstances. In other words, we think this case is governed by § 46(2)(a) of the Second Restatement, not by § 46(1).