No. 19-634

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.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF IN OPPOSITION

STUART H. NEWBERGER
CLIFTON S. ELGARTEN
ARYEH S. PORTNOY
CROWELL & MORING LLP
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 624-2500

MATTHEW D. MCGILL
Counsel of Record
LOCHLAN F. SHELFER
JOSHUA M. WESNESKI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 887-3680
mmcgill@gibsondunn.com

Counsel for Respondents

[Additional Counsel Listed on Inside Cover]

THOMAS FORTUNE FAY
FAY LAW GROUP, P.A.
777 6th St., N.W.
Suite 410
Washington, D.C. 20001
(202) 589-1300

JANE CAROL NORMAN
BOND & NORMAN LAW, P.C.
777 6th St., N.W.
Suite 410
Washington, D.C. 20001
(202) 682-4100

STEVEN R. PERLES
EDWARD B. MACALLISTER
PERLES LAW FIRM, P.C.
1050 Connecticut Ave., N.W.
Suite 500
Washington, D.C. 20036
(202) 955-9055

JOHN VAIL
JOHN VAIL LAW PLLC
777 6th St., N.W.
Suite 410
Washington, D.C. 20007

MICHAEL J. MILLER
DAVID J. DICKENS
THE MILLER FIRM, LLC
108 Railroad Ave.
Orange, VA 22960
(540) 672-4224

QUESTIONS PRESENTED

The questions presented are:

1. Did the D.C. Circuit correctly interpret the scope of the D.C. Court of Appeals' decision establishing a local tort-law rule for intentional infliction of emotional distress claims in terrorism cases?

2. If not, does the D.C. Court of Appeals' ruling violate the federal foreign-affairs powers or conflict with federal law, and may it be applied to the facts of this case?

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BRIEF IN OPPOSITION

Respondents James Owens et al. respectfully submit that the petition for a writ of certiorari filed by the Republic of Sudan et al. should be denied.

INTRODUCTION

In its third petition from the proceedings of the court of appeals, Sudan asks this Court to review two "questions concerning the constitutionality of a judicially pronounced state-law rule of substantive liability that specifically targets foreign sovereigns."[1] Pet. 3. But as Sudan concedes (at 15), the D.C. Circuit determined that D.C. law did not incorporate any such "state-law rule … target[ing] foreign sovereigns," and accordingly never applied the "state-law rule" of which Sudan complains. Instead, the D.C. Circuit "decline[d] Sudan's invitation to construe the D.C. Court of Appeals's rule as singling out certain foreign sovereigns." Pet. App. 11a. The D.C. Circuit did not "construe the D.C. court's opinion as creating a disparity between state and non-state actors," and, indeed, saw "no reason to anticipate that, in an appropriate case, the D.C. court would refuse to extend the [rule] to a private actor, such as al Qaeda." Pet. App. 10a. The D.C. Circuit's ruling undermines the central pillar of Sudan's latest petition.

Sudan complains that the D.C. Circuit's interpretation of the D.C. Court of Appeals' ruling was "erroneous[]," Pet. 20, but that claim of error in the D.C.

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[1] Sudan's earlier petitions from the proceedings of the D.C. Circuit, *Republic of Sudan* v. *Owens*, No. 17-1236 (U.S.); *Republic of Sudan* v. *Opati*, No. 17-1406 (U.S.), remain pending.

Circuit's interpretation of D.C. tort law does not warrant this Court's review. This Court "will not ordinarily review decisions of the United States Court of Appeals … which declare the common law of the District," *District of Columbia* v. *Pace*, 320 U.S. 698, 702 (1944) (quoting *Del Vecchio* v. *Bowers*, 296 U.S. 280, 285 (1935)), and there is no reason for the Court to take that unusual step in a case in which the petitioner advances no gripe with the state-law rule actually applied to it. The petition should be denied.

STATEMENT

1. At half-past ten in the morning of August 7, 1998, al Qaeda suicide bombers drove trucks filled with explosives into the U.S. Embassies in Nairobi, Kenya and Dar es Salaam, Tanzania. Pet. App. 35a. The massive, near-simultaneous explosions killed more than 200 people, including twelve Americans and dozens of other employees and contractors of the United States, and injured more than a thousand. *Ibid.*; Pet. App. 249a. As the district court that heard extensive evidence in these consolidated cases found, al Qaeda was able to carry out those attacks only because, throughout the 1990s, the Sudanese government deliberately provided material support to the terror group's planning, recruitment, and training activities. *See*, *e.g.*, Pet. App. 227a–31a.

James Owens, a United States citizen injured in the Tanzania attack, sued Sudan in October 2001 under the "terrorism exception" to the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602–1611, for its material support of al Qaeda.[2]

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[2] Owens was later joined by others injured or killed in the bombings and their immediate family members. Pet. App. 13a.

The FSIA's "[t]errorism exception" abrogates foreign sovereign immunity for suits "against a foreign state for personal injury or death that was caused by" terrorist acts, including "extrajudicial killing[s]"—such as lethal bombings—or was caused by "the provision of material support or resources for such an act." 28 U.S.C. § 1605A(a)(1). Respondents proceeded under this provision (and its pre-2008 predecessor, 28 U.S.C. § 1605(a)(7) (2006) (repealed)). The FSIA also provides a federal cause of action against state sponsors of terrorism for personal injury or death caused by such an act of terrorism. *Id.* § 1605A(c). This cause of action is available to plaintiffs who are U.S. nationals, members of the armed forces, employees and contractors of the U.S. government, and the legal representatives of such persons, *ibid.*; all other plaintiffs must proceed under state-law causes of action. Here, those plaintiffs were held to be governed by the tort law of the District of Columbia. Pet. App. 141a–42a.

2. After initially defaulting, Sudan appeared in 2004 and moved to vacate the default and dismiss the case, arguing that it was immune under the FSIA because its support for al Qaeda did not cause respondents' injuries. Pet. App. 44a. The district court vacated the default, but, after allowing respondents to

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These consolidated proceedings currently consist of seven cases involving eight plaintiff groups: *Owens* v. *Republic of Sudan*, No. 01-cv-2244 (D.D.C.); *Wamai* v. *Republic of Sudan*, No. 08-cv-1349 (D.D.C.); *Amduso* v. *Republic of Sudan*, No. 08-cv-1361 (D.D.C.); *Mwila* v. *Islamic Republic of Iran*, No. 08-cv-1377 (D.D.C.); *Onsongo* v. *Republic of Sudan*, No. 08-cv-1380 (D.D.C.); *Khaliq* v. *Republic of Sudan*, No. 10-cv-356 (D.D.C.); *Opati* v. *Republic of Sudan*, No. 12-cv-1224 (D.D.C.); and the Aliganga Plaintiffs, who intervened in the *Owens* case in 2012, *Owens*, No. 01-cv-2244, ECF No. 233.

amend their complaint, denied Sudan's motion to dismiss. Pet. App. 45a. The D.C. Circuit affirmed, holding that respondents' pleadings demonstrated "a reasonable enough connection between Sudan's interactions with al Qaeda in the early and mid-1990s and the group's attack on the embassies in 1998" to meet the jurisdictional causation requirement. Pet. App. 46a. Sudan did not seek this Court's review of that decision.

Instead, facing the prospect of discovery and a trial on the merits, Sudan abandoned the litigation. Pet. App. 19a, 46a. The FSIA, however, does not allow a court to enter a judgment against a defaulting foreign state like Sudan unless plaintiffs first demonstrate the existence of jurisdiction and establish their "right to relief by evidence satisfactory to the court." 28 U.S.C. § 1608(e). Accordingly, in 2010, the district court held a three-day evidentiary hearing to determine whether Sudan provided al Qaeda with material support that caused respondents' injuries in the 1998 U.S. Embassy bombings. Pet. App. 47a.

3. In 2011, the district court concluded that Sudan had provided al Qaeda with a safe harbor and financial, military, and intelligence assistance that caused the bombings. Pet. App. 47a. In 2012, the court's opinion was translated into Arabic and served on Sudan, Pet. App. 47a–48a, yet Sudan still did not move to reenter the proceedings to dispute or otherwise object to the district court's finding of liability. Seven district court-appointed special masters then spent years assessing the damages of each of the hundreds of individual plaintiffs. Pet. App. 48a. After receiving the special masters' reports, the district court issued final judgments in the cases in 2014. *Ibid.*

Only then did Sudan appear, appeal each of the judgments, and move the district court to vacate the judgments under Rule 60(b). Pet. App. 48a–49a. The court of appeals held the appeals in abeyance pending the district court's disposition of the Rule 60 motions. *Ibid*. The district court denied Sudan's motions to vacate the judgments in all respects. Pet. App. 50a.

4.a. Sudan then reactivated its appeals, consolidating its challenge to the district court's denial of Rule 60 relief with its appeals of the underlying judgments. The D.C. Circuit unanimously held that the district court's "findings established both jurisdiction over and substantive liability for claims against Sudan." Pet. App. 47a.

First, the D.C. Circuit affirmed the district court's conclusion that the grant of jurisdiction in the FSIA's terrorism exception over claims for death caused by an "extrajudicial killing" did not contain a "state actor" requirement. Pet. App. 52a–71a. The court then held that "the plaintiffs have offered sufficient admissible evidence that establishes that Sudan's material support of al Qaeda proximately caused the 1998 embassy bombings." Pet. App. 119a. The court rejected Sudan's arguments that Section 1605A's statute of limitations is jurisdictional, Pet. App. 119a–31a, that family members may not bring a claim under Section 1605A, Pet. App. 131a–37a, that plaintiffs may not bring state-law causes of action under the terrorism exception, Pet. App. 137a–42a, and that the defaults should have been vacated under Rule 60(b), Pet. App. 161a–77a. The court also reversed the award of punitive damages, Pet. App. 148a–61a; this Court granted certiorari to review that portion of the decision, *see Opati* v. *Republic of Sudan*, No. 17-1268 (U.S.).

Finally, relevant to those plaintiffs proceeding under D.C.-law causes of action, the D.C. Circuit considered whether a plaintiff who brings an IIED claim under D.C. law based on emotional injuries arising from the death or physical injury of an immediate family member in an act of terrorism must have been physically present at the scene of the terrorist attack. Pet. App. 142a. Under the traditional tort-law rule, an IIED plaintiff claiming emotional injury as a result of the death or physical injury of a family member generally must have been present at the scene with the family member at the time of the injury. *See* Restatement (Second) of Torts § 46 (1965). But the Second Restatement also expressly "le[ft] open the possibility of situations in which the presence at the time may not be required." Pet. App. 143a (quoting Restatement (Second) of Torts § 46 cmt. *l*).

Here, the D.C. Circuit recognized that numerous federal district courts applying both federal common law and D.C. law had held that acts of terrorism comprised a category of such "situations in which presence at the time" should not be required. Pet. App. 143a n.6. The D.C. Circuit observed that, while "there are convincing reasons" to believe the D.C. Court of Appeals would adopt the reasoning of these cases, "there are also good reasons to draw back," Pet. App. 144a, including that the D.C. Circuit previously had applied the Second Restatement's "presence" requirement to an IIED claim arising under D.C. law, *see Pitt* v. *District of Columbia*, 491 F.3d 494 (D.C. Cir. 2007). The D.C. Circuit accordingly certified to the D.C. Court of Appeals the following "question of D.C. tort law":

> 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?

Pet. App. 147a–48a.

b. The D.C. Court of Appeals answered the certified question: "No." Pet. App. 17a. The court first adopted the general rule for IIED claims set forth in the Second Restatement of Torts: "[A]s 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." Pet. App. 23a.

The D.C. Court of Appeals then proceeded to consider "whether to permit more expansive liability when injury to the family member was caused by a terrorist attack." Pet. App. 20a. The D.C. court noted that "[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.'" Pet. App. 24a (second alteration omitted) (quoting Restatement (Second) of Torts § 46 Caveat & cmt. *l*). As to "cases involving terrorist attacks," Pet. App. 22a, the D.C. court concluded that "presence at the scene is not required in this special context," Pet. App. 24a.

The D.C. Court of Appeals observed that the traditional presence requirement is supported by three rationales: "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." Pet. App. 24a. But, in "FSIA terrorism cases, … the presence requirement is not needed to achieve

these goals." Pet. App. 25a. The court first explained that defendants in terrorism cases do not need protection from unwarranted or unanticipated liability for emotional distress, because "[a]cts of terrorism are, by their very nature, designed to create maximum emotional impact, particularly on third parties." Pet. App. 26a (quotation marks omitted). With respect to the need to ensure that only plaintiffs with "genuine" complaints of emotional distress can recover, the court stated that "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*." Pet. App. 26a–27a. And as for the need to provide manageable standards that circumscribe IIED claims, the court explained that the exception was limited in scope. Pet. App. 27a–28a.

For these reasons, in the circumstances of the instant case, "rigid adherence to the [presence] rule would do little more than shield culpable defendants from liability and deny relief to deserving plaintiffs." Pet. App. 28a. The D.C. Court of Appeals therefore answered "No" to the D.C. Circuit's question whether the court "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." Pet. App. 20a, 31a.

Sudan petitioned the D.C. Court of Appeals for rehearing en banc, contending that the panel's terrorism exemption from the IIED's presence requirement applied only to foreign states, and therefore encroached on the federal foreign-affairs powers and conflicted with federal law; the D.C. Court of Appeals denied the petition without any judge calling for a vote. Pet. App. 181a.

c. The parties then filed supplemental briefs in the D.C. Circuit. Sudan again contended that the D.C. Court of Appeals' rule was limited to foreign sovereigns, and that as a result, the ruling encroached on the federal foreign-affairs powers, conflicted with federal law, and could not be applied retroactively. Sudan C.A. Supp. Br. 1–17.

The D.C. Circuit rejected Sudan's arguments because each proceeded from the false "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." Pet. App. 7a; *see* Pet. App. 6a ("All of [Sudan's] 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." (quotation marks omitted)); Pet. App. 8a ("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."). The D.C. Circuit "reject[ed] this assumption, wherefor all Sudan's challenges fail." Pet. App. 6a; *see* Pet. App. 8a ("[W]e reject Sudan's interpretation of the D.C. court's holding."); Pet. App. 10a ("[W]e do not construe the D.C. court's opinion as creating a disparity between state and non-state actors.").

The D.C. Circuit observed that the D.C. Court of Appeals had answered the certified question—which was not limited to foreign sovereigns—with a simple "No." Pet. App. 9a. To be sure, the D.C. Circuit noted, the D.C. Court of Appeals "describe[d] its holding with specific reference to the FSIA." *Ibid*. But "the D.C. court was simply reasoning by reference to the facts of the case before it." Pet. App. 10a (quotation marks

omitted). "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." *Ibid.* The court saw "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." *Ibid*. Moreover, the D.C. Circuit stated, "the D.C. court's reasoning as to the purposes of the presence requirement was not limited to cases involving foreign sovereigns." *Ibid*. (quotation marks omitted). "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." Pet. App. 11a. For that reason, the court "decline[d] Sudan's invitation to construe the D.C. Court of Appeals's rule as singling out certain foreign sovereigns" and affirmed the district court's judgments on respondents' IIED claims brought under D.C. local law. *Ibid*.

Sudan's petition for panel and en banc rehearing was denied without recorded dissent. Pet. App. 571a–72a, 573a–74a.

REASONS FOR DENYING THE PETITION

Sudan's latest questions presented do not warrant this Court's review because they are not presented by the decision of the D.C. Circuit, and Sudan's substantive contentions lack merit in any event.

Both of Sudan's questions presented ask this Court to review the D.C. Circuit's application of a "rule of substantive liability created by the D.C. Court of Appeals … specially targeting foreign sovereigns." Pet. i. But the D.C. Circuit did not apply any such "rule of substantive liability" to Sudan. Instead, the D.C. Circuit emphatically rejected Sudan's contention

that the D.C. Court of Appeals had created a tort-law rule specific to foreign governments, concluding instead that the D.C. Court of Appeals had laid down a tort rule that would apply as readily to al Qaeda as it does to Sudan. *That* is the D.C. rule of tort law that the D.C. Circuit actually applied to Sudan, and Sudan has raised no objection to *that* rule—either below or in this Court. Sudan's questions presented therefore are not presented in the decision below.

Sudan's real complaint is that the D.C. Circuit "side-stepped" Sudan's new arguments by "erroneously" interpreting the D.C. Court of Appeals' certified-question response. Pet. 20. That contention does not warrant review. Even if Sudan were correct that "[t]he only reasonable interpretation of the D.C. Court of Appeals' decision" is that it set up a rule applicable only to foreign governments, Pet. 22—and it is not—this Court generally does not sit to review circuit courts' interpretations of state law, *see Huddleston* v. *Dwyer*, 322 U.S. 232, 237 (1944). And Sudan identifies no precedent for reviewing a circuit-court interpretation of state law that *avoids* purported constitutional problems.

This Court should not adopt Sudan's construction of the D.C. Court of Appeals' certified-question response, but even if it were inclined to do so, it would find only that Sudan's objections to that contrived construction lack merit. The imposition of state-law liability on foreign governments is not only constitutional, it is expressly contemplated in the FSIA. State laws implicating foreign affairs are unlawful only to the extent they are preempted, but the District's decision to allow family members of victims of terrorism to recover under D.C. law against state sponsors of terrorism accords fully with federal policy and the

FSIA itself. Indeed, federal common law allows similarly situated plaintiffs—including numerous plaintiffs in these cases—to recover for IIED without satisfying a presence requirement.

Sudan's retroactivity objection also lacks merit. The D.C. Court of Appeals' certified-question response applied the Second Restatement of Torts, which was published in 1965 and long had been presumed to govern IIED claims in the District. Rather than authoring a "new rule," the D.C. court engaged in the common-law practice of applying established rules to a new set of facts. But even if one viewed the D.C. Court of Appeals as creating a "new" rule, it would create no conflict with this Court's decisions in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971), and *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994). *Chevron Oil*, to the extent it has any remaining force at all, has none where "questions of state law are at issue." *Am. Trucking Ass'ns, Inc.* v. *Smith*, 496 U.S. 167, 177 (1990) (plurality). And *Landgraf*'s anti-retroactivity principle of construction applies only to certain federal statutes; it does not apply to state- and D.C.-law judicial decisions. *Landgraf*, 511 U.S. at 280. Sudan's arguments thus fail even on their own flawed terms.

The petition should be denied.

I. SUDAN'S QUESTIONS PRESENTED ARE NOT PRESENTED IN THE DECISION BELOW.

Sudan's questions presented are not presented by the decision of the D.C. Circuit. Certiorari should be denied.

1. Both of Sudan's questions presented presuppose that "the D.C. Circuit applied" a D.C.-law rule of

tort liability that "specially target[s] foreign sovereigns." Pet. i; *see also ibid.* (second question challenging "the D.C. Circuit's decision retroactively applying the new special liability rule"). But, as the decision below makes plain, the D.C. Circuit did not apply any such rule. The D.C. Circuit unequivocally rejected Sudan's argument that the D.C. Court of Appeals' certified-question response established a "rule of substantive law applicable only to foreign states lacking immunity under § 1605A and not to other possible defendants in terrorism cases." Pet. App. 7a. It declined to "construe the D.C. court's opinion as creating a disparity between state and non-state actors." Pet. App. 10a. The D.C. common-law rule that the D.C. Circuit actually applied to respondents' tort claims therefore was not "applicable only to certain foreign states"; rather, the D.C. Circuit recognized, the rule also could be applied in "terrorism cases against non-state actors." Pet. App. 6a, 11a.

The factual premise for Sudan's questions—that "the D.C. Circuit applied" a D.C.-law rule specific to foreign governments, Pet. i—therefore is false, and Sudan's questions thus are not presented. That alone is a sufficient basis to deny certiorari. *See Rogers* v. *United States*, 522 U.S. 252, 259 (1998) (O'Connor, J., concurring) (dismissing writ of certiorari as improvidently granted when "it is at least unclear whether the question [the Court] intended to address in this case is … squarely presented"). And the case for denial here is strengthened by the fact that, because it resolved Sudan's objections simply by rejecting the false premise on which they were based, the D.C. Circuit had no occasion to pass on the substantive arguments Sudan raises in this Court. In keeping with its role as "a court of review, not of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005), this Court

"do[es] not ordinarily consider questions not specifically passed upon by the lower court," *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697–98 (1984).

Sudan's answer to all this is that the D.C. Circuit's interpretation of the certified-question response of the D.C. Court of Appeals is "erroneous[]" and that "[t]he only reasonable interpretation" of that response is that it creates a rule of D.C. tort law specific to foreign sovereigns. Pet. 20–22. That response is an inadequate basis for a grant of certiorari for two independent reasons. First, it necessarily requires this Court, before review of any federal question supposedly presented by the D.C. Court of Appeals' certified-question response, to review the D.C. Circuit's decision interpreting the D.C. Court of Appeals' ruling laying down the tort law of the District. But this Court "will not ordinarily review decisions of the United States Court of Appeals … which declare the common law of the District." *District of Columbia* v. *Pace*, 320 U.S. 698, 702 (1944). That is because this Court "accept[s] and therefore do[es] not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts." *Huddleston* v. *Dwyer*, 322 U.S. 232, 237 (1944). And if this Court will not review the D.C. Circuit's own guesses at the common law of the District, there is even less reason for it to review the D.C. Circuit's reading of a D.C. Court of Appeals ruling that authoritatively declares the common law of the District.

Second, the D.C. Circuit's interpretation of the D.C. Court of Appeals ruling is obviously correct, and Sudan's is just as obviously contrived to set up a new series of constitutional objections as support for its third petition from the proceedings below. The D.C.

Circuit's certified question to the D.C. Court of Appeals involved terrorism claims generally, without regard to the defendant's identity:

> 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?

Pet. App. 148a. And the D.C. Court of Appeals' answer, likewise, was not limited to foreign-sovereign defendants: "No." Pet. App. 24a ("[W]e answer the certified question in the negative."); Pet. App. 31a ("[W]e answer the certified question 'No.'").

Sudan rests its claim of a foreign-sovereign specific rule on the fact that the D.C. Court of Appeals addressed "the scenario presented here—an IIED case where the defendant is a state sponsor of terrorism denied sovereign immunity by the FSIA," and titled that section of its opinion "The FSIA Terrorism Exception to the Presence Requirement." Pet. App. 24a. But as the D.C. Circuit concluded, "the D.C. court was simply reasoning by reference to the facts of the case before it." Pet. App. 10a (quotation marks omitted). The D.C. Court of Appeals "was not faced with a terrorism case involving a non-state actor," so "it was not necessary to decide whether the exception would apply there." *Ibid.* And, at the same time, the D.C. Court of Appeals' decision nowhere even remotely suggests that it would "refuse to extend the exception to a private actor, such as al Qaeda." *Ibid.* Moreover, "the D.C. court's reasoning as to the purposes of the presence requirement was not limited to cases involving foreign sovereigns." *Ibid.* (quotation marks omitted); *see* Pet. App. 11a ("[A]lthough the D.C. court's

opinion addresses only FSIA cases, its rationale invites application of the exception to terrorism cases against non-state actors."); *see also* Pet. App 25a–28a (D.C. Court of Appeals examining rationales for presence requirement and finding them inapplicable to claims brought by family members of those killed or injured by acts of terrorism). Sudan's construction of the D.C. Court of Appeals' certified-question response lacks foundation.[3]

Even if there were any merit to Sudan's contention that the D.C. Court of Appeals' certified-question response created a foreign-sovereign specific rule that raises "[c]onstitutional [i]ssues" (Pet. 16)—and there is not—under principles of constitutional avoidance, the D.C. Circuit's appropriate course would have been to adopt an interpretation of state law that *avoids* those constitutional issues. *See Veilleux* v. *Nat'l Broad. Co.*, 206 F.3d 92, 122 (1st Cir. 2000) ("State courts," and "their federal counterparts, normally seek to avoid construing [state] common law rules so

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[3] In discussing the presence requirement's "goal of avoiding 'virtually unlimited' liability," the D.C. Court of Appeals found the goal adequately satisfied when cases are brought under "the FSIA terrorism exception." Pet. App 27a. That is true because a case under the FSIA's terrorism exception necessarily involves an act widely (if not universally) recognized as an act of terrorism. *See* 28 U.S.C. § 1605A(a)(1) (withdrawing immunity in a claim "for personal injury 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"). The exception to the presence requirement recognized by the D.C. Court of Appeals thus will remain within its appropriate limits when it is applied in FSIA terrorism cases. But, as the D.C. Circuit recognized, it does not follow that the exception could not be applied appropriately to other claims against private parties based on the same or similar acts of terrorism.

as to create serious constitutional problems."); *Watters* v. *TSR, Inc.*, 904 F.2d 378, 383 (6th Cir. 1990) (state courts should "avoid applying the[ir] common law in a way that would bring [any] constitutional problems to the fore"). Sudan's protestations to the contrary notwithstanding, the D.C. Circuit's reading of the D.C. Court of Appeals' certified-question response is at least "plausible," and therefore under Sudan's theory it "should prevail" over any interpretation that raises purported "constitutional problems." *Clark* v. *Martinez*, 543 U.S. 371, 380–81 (2005). There accordingly is no basis for disturbing the D.C. Circuit's interpretation of the D.C. Court of Appeals' response to the certified question. And if the D.C. Circuit's interpretation of the D.C. court's ruling stands, Sudan's questions presented cannot.[4]

II. SUDAN'S SUBSTANTIVE OBJECTIONS LACK MERIT IN ANY EVENT.

Even under Sudan's strained reading of the D.C. Court of Appeals' opinion, there would be no conflict with the federal government's foreign-affairs powers or any other federal law. First, rather than *conflicting* with federal law or policy, aligning D.C. law with the federal standards governing identical cases *reflects* the federal government's foreign policy. Second, the only federal law that Sudan argues is in conflict with the D.C. court's opinion is 28 U.S.C. § 1606, but, as the D.C. Circuit rightly held, that provision simply does

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[4] In a transparent effort to postpone its day of reckoning, Sudan asks this Court to seek the views of the United States. Pet. 34–35. But whether and when this Court should review a circuit court's interpretation of local tort law is not a subject on which the Solicitor General has any special expertise. Indeed, it does not even implicate a question of federal law.

not apply here. And Sudan's retroactivity arguments fail because both *Chevron Oil* and *Landgraf* apply only to *federal* law, not a decision of local law like that of the D.C. Court of Appeals.

A. The D.C. Court Of Appeals' Decision Does Not Encroach Upon The Federal Government's Foreign-Affairs Powers Or Conflict With Any Federal Law.

1. Sudan contends that the D.C. Court of Appeals' ruling encroaches "on the authority of the political branches to shape foreign policy." Pet. 18–20 (citing *Zschernig* v. *Miller*, 389 U.S. 429 (1968)). But Sudan misstates the foreign-affairs doctrine when it asserts that "expand[ing] the scope of liability" for foreign sovereigns infringes on the prerogative of the national government to set foreign policy. *Ibid*. If that were so, then there could be no state-law liability on foreign sovereigns in *any* context, even though the vast majority of FSIA cases are based on state-law causes of action. *See*, *e.g.*, *Republic of Argentina* v. *NML Capital, Ltd.*, 573 U.S. 134, 136 (2014) (contract-law causes of action); *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 354 (1993) (tort-law causes of action). In reality, *Zschernig* contemplated only two "theories" under which state laws must yield to the federal foreign-affairs power: "field [preemption] and conflict preemption." *Am. Ins. Ass'n* v. *Garamendi*, 539 U.S. 396, 419 (2003) (citing *Zschernig*, 389 U.S. 429). Neither of these theories applies here.

First, field preemption would apply only "[i]f a State were simply to take a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility." *Garamendi*, 539 U.S. at 419 n.11. But tort common law is a core "state responsibility" of "traditional importance." *Ibid.* As this

Court has noted, the state interest in the IIED cause of action is "substantial." *Farmer* v. *United Bhd. of Carpenters & Joiners of Am., Local 25*, 430 U.S. 290, 302–04 (1977). Moreover, the D.C. Court of Appeals did not take its own "position on a matter of foreign policy," *Garamendi*, 539 U.S. at 419 n.11; rather it adopted a rule that "further[ed] the objective" that "Congress has emphasized," Pet. App. 28a. Thus, the so-called "dormant foreign affairs preemption," *Movsesian* v. *Victoria Versicherung AG*, 670 F.3d 1067, 1072 (9th Cir. 2012), has no application here.

Conflict preemption, meanwhile, applies only when a state law presents "an obstacle to the accomplishment of Congress's full objectives under [a] federal Act," *Crosby* v. *Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000), or a "clear conflict" with federal law, *Garamendi*, 539 U.S. at 425.

Here, far from *conflicting* with the federal government's foreign-policy judgments, the decision below *effects* those judgments. Sudan is subject to suit only because the Executive Branch has determined that Sudan is a state sponsor of terror. *See* 58 Fed. Reg. 52,523 (Oct. 8, 1993). Both Congress and the Executive Branch knew that passage of the FSIA's terrorism exception in 1996 would subject Sudan to liability for its material support of terrorism. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221, 110 Stat. 1214, 1241–43 (codified at 28 U.S.C. § 1605(a)(7) (2006) (repealed)). Congress and the Executive Branch affirmed this decision twelve years later when they expanded Sudan's scope of liability through a recodification and amendment of the FSIA's terrorism exception in 2008. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No.

110-181, § 1083, 122 Stat. 338–44 (2008) (codified at 28 U.S.C. § 1605A).

Moreover, otherwise identical American family members, who are able to bring suit under the federal cause of action, are permitted under *federal* common law to recover without satisfying the presence requirement. *See*, *e.g.*, 176 A.L.R. Fed. 1 § 18 (collecting cases). Thus, far from "adopting" an "'express federal policy' of disfavoring domestic litigation of" terrorism-related claims against terror states, "the United States has repeatedly made clear that it favors such litigation." *Philipp* v. *Fed. Republic of Germany*, 894 F.3d 406, 418 (D.C. Cir. 2018) (citation and emphasis omitted). Because Congress explicitly contemplated these very state-law and federal common-law IIED claims being brought against state sponsors of terrorism, there is "no direct conflict between" the rule laid down by the D.C. Court of Appeals "and United States foreign policy." *Ibid.* (alterations and quotation marks omitted). As the D.C. Court of Appeals recognized, though it was "not obligated to promote the purposes" of the federal law, its decision "is consistent with" Congress's "legislative judgment," and "advance[s] a policy goal of national importance." Pet. App. 28a–29a.

Thus, even Sudan's contrived interpretation of the D.C. Court of Appeals' decision would not intrude on the federal government's foreign-affairs authority.

2. Moreover, to argue that the D.C. Court of Appeals' decision was conflict-preempted by federal law, Pet. 26, Sudan must adduce some preempting federal law. But the only federal statute Sudan points to is 28 U.S.C. § 1606. *See* Pet. 23. And, as Sudan concedes (at 25), that law does *not even apply* to the Section

1605A claims brought here. The D.C. Circuit recognized that Section "1606, by its terms, applies only to claims brought under § 1605 and § 1607 of the FSIA," and "therefore has no bearing upon state law claims brought under the jurisdictional grant in § 1605A." Pet. App. 160a. Indeed, in briefing before that court, Sudan itself agreed. Sudan C.A. Br. 48 ("§ 1606 continues to pertain only to §§ 1605 and 1607, not … § 1605A."); Sudan C.A. Reply Br. 23 ("§ 1606 does not apply to § 1605A"). Thus, even if Section 1606 established a non-discrimination principle, as Sudan contends, the D.C. Court of Appeals' opinion could not conflict with it, because Section 1606 does not apply here.

Lacking any statutory authority, Sudan asserts that the D.C. Court of Appeals' decision conflicts with a purported background "principle of non-discriminatory treatment of foreign states." Pet. 25. But this Court has made clear that the FSIA is the *only* source of sovereign immunity from American litigation; that is, the FSIA's immunity framework is "comprehensive," *NML Capital*, 573 U.S. at 141, and supersedes the "pre-existing common law," *Samantar* v. *Yousuf*, 560 U.S. 305, 313 (2010). For that reason, "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." *NML Capital*, 573 U.S. at 141–42. Here, Sudan cannot point to any provision of the FSIA that accords a non-discrimination principle in this context, and its preemption argument therefore fails.

Moreover, Sudan is wrong to assert that there ever existed a free-floating non-discrimination principle in the first place. Sudan cites *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682 (1976), to sustain its claim of such a rule. Pet. 23. But that

pre-FSIA case simply endorsed the rule that when sovereigns act in a commercial capacity, they are subject "to the same rules of law that apply to private citizens." *Alfred Dunhill*, 425 U.S. at 704. And as Sudan admits (at 23), *Pfizer, Inc.* v. *Government of India*, 434 U.S. 308 (1978), involved only whether foreign states could bring suit under the Sherman Act. Sudan cites no case recognizing a background legal principle that foreign sovereigns can never be subjected to liability unless a private party could be held liable to the same extent.

B. Certiorari Is Not Warranted To Address Retroactivity.

Like Sudan's other arguments, its retroactivity arguments are not presented in this case, are burdened by threshold questions of local tort law, and were never addressed by a lower court. Moreover, even on their own terms, they are erroneous.

Sudan first makes the strange argument that the D.C. Circuit should have applied this Court's decision in *Chevron Oil*, 404 U.S. 97, to determine whether to apply the "D.C.-law rule" retroactively. Pet. 28. But *Chevron Oil*—to the extent it retains any vitality, *but see* Pet. 29–30—applies only to matters of *federal* law. "When questions of state law are at issue," meanwhile, "state courts generally have the authority to determine the retroactivity of their own decisions." *Am. Trucking Ass'ns*, 496 U.S. at 177 (plurality). And that precept applies equally here, because "the decisions of the District of Columbia Court of Appeals on matters of local law—both common law and statutory law—will be treated by this Court in a manner similar to the way in which it treats decisions of the highest court of a State on questions of state law." *Pernell* v.

Southall Realty, 416 U.S. 363, 368 (1974). *Chevron Oil* therefore has no application here.

Sudan likewise misunderstands the presumption against retroactivity enunciated in *Landgraf*, 511 U.S. at 280. Sudan wants to use that principle to limit "the retroactive application of the D.C. Court of Appeals' new FSIA rule." Pet. 32. But the *Landgraf* presumption is relevant only "[w]hen a case implicates a *federal* statute," 511 U.S. at 280 (emphasis added); it does not apply to judicial interpretations of state or local common law, as here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

STUART H. NEWBERGER
CLIFTON S. ELGARTEN
ARYEH S. PORTNOY
CROWELL & MORING LLP
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 624-2500

THOMAS FORTUNE FAY
FAY LAW GROUP, P.A.
777 6th St., N.W.
Suite 410
Washington, D.C. 20001
(202) 589-1300

JANE CAROL NORMAN
BOND & NORMAN LAW, P.C.
777 6th St., N.W.
Suite 410
Washington, D.C. 20001
(202) 682-4100

JOHN VAIL
JOHN VAIL LAW PLLC
777 6th St., N.W.
Suite 410
Washington, D.C. 20007

MATTHEW D. MCGILL
Counsel of Record
LOCHLAN F. SHELFER
JOSHUA M. WESNESKI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 887-3680
mmcgill@gibsondunn.com

STEVEN R. PERLES
EDWARD B. MACALLISTER
PERLES LAW FIRM, P.C.
1050 Connecticut Ave., N.W.
Suite 500
Washington, D.C. 20036
(202) 955-9055

MICHAEL J. MILLER
DAVID J. DICKENS
THE MILLER FIRM, LLC
108 Railroad Ave.
Orange, VA 22960
(540) 672-4224

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