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

REPLY BRIEF FOR PETITIONERS

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December 20, 2019

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

REGULATIONS

LEGISLATIVE MATERIALS

OTHER AUTHORITIES

REPLY BRIEF FOR PETITIONERS

Respondents either misapprehend or purposefully misconstrue Sudan's questions presented. Sudan is seeking review of the constitutionality of a local court's new rule of liability that targets certain foreign states. Far from avoiding the constitutional problem, the D.C. Circuit enabled it. The Petition does not present simply an "as applied" constitutional challenge, as Respondents assert. The rule on its face is unconstitutional. The D.C. Circuit could have avoided the constitutional issue by applying the only tort principle of general application announced by the D.C. Court of Appeals — that presence is required for IIED claims.

Instead, the D.C. Circuit turned a blind eye to the constitutional problem and asserted that the new rule does not target foreign states. But this assertion cannot be seriously credited: the D.C. Court of Appeals stated repeatedly and expressly that it was creating an "FSIA Terrorism Exception to the Presence Requirement," limited only by the jurisdictional requirements of §1605A, and with the purpose of deterring "foreign states from sponsoring terrorism."

This Court should grant Sudan's petition because the local court's rule runs headlong into established principles of federalism. Left unchecked, the new liability rule creates a dangerous precedent that allows local courts the discretion to legislate against foreign states.

Sudan is amidst a historic transition. Its people are celebrating one year since the start of their path to a civilian-led government. The sheer magnitude of the default judgments at issue — in the multiple billions — jeopardizes Sudan's road to recovery. In times such as these, this Court's review and intervention are especially warranted to ensure the sound application of the rule of law.

Sudan therefore respectfully requests that the Petition be granted.

I. Sudan's Questions Presented Are Properly Subject To Review By This Court

1. Respondents suggest (at 10-11, 13-14) that because the D.C. Circuit rejected Sudan's constitutional arguments, those questions are not properly "presented" to this Court. Respondents' sleight-of-hand argument is meritless.

Sudan is challenging the constitutionality of a state-level law, a subject indisputably appropriate for Supreme Court review. *See, e.g.*, *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2457 (2019) (reviewing Sixth Circuit decision on whether Tennessee law violated Commerce Clause). Sudan presented its constitutional challenges squarely before the D.C. Circuit in supplemental briefing following the D.C. Court of Appeals' decision. Rather than avoid the constitutional question by applying the D.C. IIED law of general application, the D.C. Circuit underscored the constitutional problem by applying the new "FSIA terrorism exception to the presence requirement" against

Sudan. There is nothing unusual or improper about Sudan now seeking further review of the rule's constitutionality. *See Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1150-51 (2017) (remanding issue of New York statute's constitutionality to Second Circuit where appeals court previously concluded that statute "posed no First Amendment problem").

Contrary to Respondents' assertion (at 13), in denying the existence of a constitutional problem, the D.C. Circuit *did* sufficiently "pass on" Sudan's constitutional challenges. Sudan raised these arguments before the D.C. Circuit in supplemental briefing, and Plaintiffs had the opportunity to respond. In *Capital Cities*, which Respondents cite (at 14), this Court commented on its "flexib[ility]" to review "questions not specifically passed upon by the lower court," particularly where a case arises "from the federal courts." 467 U.S. 691, 697 (1984). The Court then reviewed a preemption question petitioners previously had raised and courts below had only "acknowledged." *Id.* at 698.

Respondents are wrong to suggest (at 13, 16-17) that the D.C. Circuit's *reasoning* in denying the existence of any constitutional problem can foreclose Sudan's access to further review. This Court routinely reviews constitutional challenges where the courts below have failed to address a constitutional issue. *E.g.*, *Expressions Hair*, 137 S. Ct. at 1148-51 (considering First Amendment implications of state statute where court of appeals had "abstained from reaching the merits of the constitutional question").

In any event, the questions presented here comprise pure questions of law for which the D.C. Circuit's reasoning is entitled to no special deference.

Respondents' reliance (at 14) on *Pace* and *Huddleston* is inapposite. Those cases involve Supreme Court review of *statutory-interpretation* questions of state law. Sudan's challenges to the D.C. rule raise constitutional concerns with broader consequences than would a "local statute confined in its operation to the District of Columbia." *District of Columbia v. Pace*, 320 U.S. 698, 702 (1944). Sudan's challenges did not require the D.C. Circuit to speculate or offer interpretation about the scope of the rule. The pertinent part of the D.C. rule was plain, as answered *in response to the certified question*: foreign sovereigns subject to the FSIA terrorism exception, §1605A, may be sued for D.C.-law IIED claims by plaintiffs who were not present at the scene of the attack. Whether, as the D.C. Circuit suggests, that rule might someday extend to certain non-state actors is beside the point and does not change that the rule violates the foreign-affairs powers and preemption doctrines. Nor does that theoretical possibility affect whether the D.C. Circuit should have applied the new rule retroactively.

2. Even if, as Respondents suggest (at 13-14), the Court must first determine that the D.C. Circuit was incorrect in its interpretation of the new D.C. rule, that conclusion is evident. As explained in Sudan's Petition, the D.C. Court of Appeals repeatedly and expressly referred to the "FSIA terrorism exception to the presence requirement" and emphasized its

intention to "deter foreign states from sponsoring terrorism." *E.g.*, Pet. App. 24a, 27a, 28a, 29a-30a.

The D.C. Court of Appeals' reasoning also confirms the targeted nature of the new rule. For example, the court explained that its foreign-state-specific exception to the presence requirement could satisfy the requirement's underlying policy objective of limiting the scope of liability because the statutory requirements of §1605A would act as a gatekeeper to unlimited liability. Pet. App. 27a-28a. Respondents suggest the D.C. Circuit understood that the D.C. Court of Appeals "was simply reasoning by reference to the facts of the case before it." Opp'n 15 (citing Pet. App. 10a). But *nothing* in the D.C. Court of Appeals' decision suggests that the rule was driven by anything other than the presence of a state sponsor of terrorism.

Contrary to Respondents' characterization (at 7-8), the D.C. Court of Appeals answered the D.C. Circuit's certified question by reference to objective criteria, i.e., presence would be excused for plaintiffs bringing IIED claims against foreign states subject to jurisdiction under §1605A. The D.C. Court of Appeals did not answer the question, or invoke the Restatement's caveat, with reference to Sudan specifically or to "the facts of the case before it."

Rather than speculate whether the D.C. Court of Appeals' new rule might extend to circumstances beyond those expressly considered in the D.C. Court of Appeals' decision, the D.C. Circuit should have applied to Sudan the general rule applicable to private persons — i.e., that presence is required — to

avoid the constitutional issue the D.C. Court of Appeals created.

II. Sudan's Constitutional Arguments Are Meritorious

A. The D.C. "FSIA Terrorism Exception to the Presence Requirement" Is Unconstitutional and Sets a Dangerous Precedent Regarding the Powers of Local Courts

1. In an attempt to discredit Sudan's argument that the D.C. Court of Appeals' new rule encroaches upon the exclusive foreign policy authority of the federal government, Respondents contend that if the new D.C.-law rule is invalid here, then "there could be no state-law liability on foreign sovereigns in *any* context." Opp'n 18. Respondents miss the point. Of course foreign states over which jurisdiction exists under the FSIA can be subject to general rules of state-law liability. In cases brought under §1605A, a foreign state could be held liable under a generally applicable state IIED law that does not require presence at the scene (to the extent state-law causes of action survive under §1605A at all, which Sudan contends they do not (Pet. 25)). *See, e.g.*, *Estate of Heiser v. Islamic Republic of Iran*, 466 F. Supp. 2d 229, 305 (D.D.C. 2006) (applying California law which does not require presence for IIED claim "where the defendant is aware of the high probability that the defendant's acts will cause a plaintiff severe emotional distress"). The new D.C.-law rule is *not* a general rule of state tort law; rather, it is an exception that *specifically targets certain foreign*

sovereigns for potential liability under D.C. law without any authorization from Congress or the Executive Branch. The District of Columbia, like the 50 states, certainly remains free to craft general tort law to be applied without discrimination against foreign states or a subset thereof. The D.C. Court of Appeals could have done so by finding that presence is excused in terrorism cases. But the D.C. rule here purposefully increases the scope of liability for only particular foreign states, outside of any authorization by the federal government, thereby "impair[ing] the effective exercise of the Nation's foreign policy" in an area that often calls for delicate, case-specific diplomacy. *Zschernig*, 389 U.S. at 440.

Respondents argue that the new D.C. rule does not intrude into an area in which the federal government occupies the "field." Opp'n 18-19. But Respondents can make "no serious claim [that the D.C. rule] address[es] a traditional state responsibility." *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 419 n.11 (2003). The D.C. rule expressly carves out a state tort-law exception that increases liability for *only* those states that the Secretary of State has designated as state sponsors of terrorism. Respondents cannot credibly suggest that Congress and the President do not "occupy" the "field" of regulating "state sponsors of terrorism." To the contrary, the federal government's extensive activity in this area demonstrates its exclusive authority to designate and de-designate certain foreign sovereigns as state sponsors of terrorism and to determine the consequences that arise from such classifications. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218,

230 (1947) ("[An] Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."); *see also* Pet. 16-18.

For example, Congress has enacted three statutes giving the Secretary of State authority to designate foreign states as state sponsors of terrorism, each imposing immediate economic consequences on designees. *See* Foreign Assistance Act of 1961 §620A, 22 U.S.C. §2371 (2019) (prohibiting SSTs from receipt of assistance otherwise available under the Foreign Assistance Act and other statutes); Arms Export Control Act §40, 22 U.S.C. §2780 (2019) (prohibiting exports, loans, grants, and other facilitation of acquisition of munitions to SSTs); Export Controls Act of 2018 §1754(c), 50 U.S.C. §4813 (2019) (requiring license for export or transfer of items that could increase military potential of SSTs). These statutes contemplate a strictly federal scheme in which the Secretary of State can designate a foreign state as a state sponsor of terrorism and the President can rescind the designation under specified circumstances. *See* Dianne Rennack, Cong. Research Serv., R43835, State Sponsors of Acts of International Terrorism – Legislative Parameters 2-3, 5-6 (2018).

Federal administrative agencies likewise have imposed additional consequences on states deemed sponsors of terrorism pursuant to the above statutes. *See, e.g.*, 31 C.F.R. §596 et seq. (Treasury Department regulations on sanctions applied to SSTs); 48 C.F.R. §252.225-7050 (Defense Department

regulation prohibiting award of defense contracts to firm if SST owns or controls interest). These consequences are of course in addition to the exception to sovereign immunity and the federal cause of action for state sponsors of terrorism under §1605A.

By carving out the "FSIA terrorism exception to the presence requirement," the D.C. Court of Appeals imposed its own D.C.-specific liability on these designees, on top of the consequences that Congress and federal agencies carefully crafted in an exercise of their constitutional foreign affairs powers. Though Respondents contend otherwise (at 19-20), the D.C. Court of Appeals' assertion that its new rule "advance[s] a policy goal of national importance" (Pet. App. 28a) does not make it so. A rule that specifically creates additional, discriminatory exposure to state tort law liability for a foreign state may very well *frustrate* the ends of Congress and the President — who, for example, have historically been directly involved in limiting the impact of liability for state sponsors of terrorism upon removal from that list. *See, e.g.*, Libyan Claims Resolution Act, Pub. L. No. 110-301, 122 Stat. 2999 (2008) (resolving terrorism-related judgments against Libya after SST designation withdrawn); 154 Cong. Rec. 11-12 (2008) (President Bush Memorandum considering veto of terrorism-liability statute due to possible increased liability exposure for Iraq after SST designation withdrawn). For this reason, among others — and not to "postpone" any resolution of this case (*see* Opp'n 17 n.4) — the views of the United States are critical here.

In any event, the aim of the D.C. Court of Appeals to "further[ ] the objective of" Congress (Pet. App. 28a) does not excuse the court's encroachment into a field of exclusively federal law: "a common end hardly neutralizes conflicting means." *Crosby*, 530 U.S. at 379.

2. Respondents' arguments on conflict preemption (at 19-20) also fall flat. As Sudan explained (Pet. 22-27), the new D.C.-law "FSIA terrorism exception to the presence requirement" conflicts with longstanding federal law requiring the non-discriminatory treatment of foreign states in U.S. courts.

Section 1606 is one source of that law, but the exclusion of §1605A from §1606 does not mean that states have carte blanche authority to enact substantive rules of liability that are discriminatory against foreign states. Rather, the exclusion of §1605A from §1606 means that state laws are not applicable to foreign sovereigns in §1605A cases *at all*. *See* Pet. 25. As Sudan has argued in *Opati v. Republic of Sudan*, No. 17-1268, the state-law causes of action any §1605A claimant relies on are foreclosed by Congress's enactment of §1605A(c).

Selectively quoting *Samantar*, Respondents suggest (at 21) that because the FSIA "supersedes the pre-existing common law" on immunity, the FSIA also overtakes the federal common-law non-discrimination principle. This Court has made clear, however, that the FSIA was not intended to affect the substantive law determining liability for foreign states or instrumentalities. *See First Nat'l City Bank*

v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 620, 622 n.11 (1983). And the non-discrimination principle is *not* about immunity; rather, it concerns courts' treatment of explicitly *non-immune* sovereigns, regarding both liability against states (i.e., *Alfred Dunhill*) and states' ability to assert claims in U.S. courts (i.e., *Pfizer*). Notably, *Pfizer* endorsed the non-discrimination principle several years *after* the FSIA's enactment.

Respondents' attempt (at 22) to narrow the non-discrimination principle to commercial liability issues is unsupportable. *Alfred Dunhill* refers to commercial activities of foreign states because prior to the FSIA, under the restrictive theory of foreign sovereign immunity, states could *only* face liability arising from their commercial acts. But nothing about the non-discrimination principle is so limited. As explained, the principle extends broadly to treatment of foreign sovereigns under the law, including where sovereigns attempt to access courts as a claimant. *See* Pet. 23 (citing *Pfizer*).

Finally, Respondents suggest (at 20) that because U.S.-national family-member plaintiffs have recovered emotional damages under federal common-law without being present at the scene of an attack, the D.C.-law rule furthers the intent of Congress. None of the cases in the ALR or Respondents' brief, however, endorses a discriminatory exception to the presence requirement solely for certain foreign states.

B. The D.C. Circuit's Retroactive Application of the New D.C. Rule Conflicts with this Court's Precedents and the Decisions of Other Circuits

Respondents disregard Sudan's retroactivity arguments by arguing that *Chevron Oil* does not apply when assessing the retroactivity of a judicial decision of *state* law. Opp'n 22-23. But *American Trucking*, on which Respondents rely (at 22), merely instructs that *state courts* applying state law will refer to their own retroactivity rules — while state courts applying a federal question will look to *Chevron Oil*. *See Am. Trucking Ass'ns v. Smith*, 496 U.S. 167, 177-78 (1990) (considering whether Arkansas Supreme Court applied *Chevron Oil* correctly with respect to federal law question). Respondents identify no case requiring *federal courts* — like the D.C. Circuit here — to use state retroactivity rules when applying state law. Indeed, the courts of appeals have routinely applied *Chevron Oil* in this context. *See, e.g.*, *Silverman v. Barry*, 845 F.2d 1072, 1085-86 (D.C. Cir. 1988) (applying *Chevron Oil* factors in denying retroactive application of D.C. Superior Court decision). Regardless, Respondents acknowledge the uncertainty regarding *Chevron Oil*'s continued "vitality" (Opp'n 22), underscoring the need for this Court's review of *Chevron Oil*'s continued relevance. *See* Pet. 28-31.

While Respondents cursorily dismiss Sudan's retroactivity arguments under *Landgraf* — asserting that *Landgraf* "is relevant only" to federal statutes, not to "judicial interpretations" of state law (Opp'n

23) — Sudan's retroactivity arguments *do* arise in part from a change in a federal statute: namely, the 2008 amendment of the FSIA to remove the state-sponsor of terrorism exception from the provisions covered by §1606. Before 2008 — at the time Sudan's alleged tortious conduct occurred — a rule such as the new D.C.-law IIED rule could not have applied to Sudan because §1606 expressly prohibited discriminatory treatment of states. Applying the rule to Sudan now retroactively increases liability for pre-enactment conduct, in violation of *Landgraf*. Pet. 32-33.

Moreover, nothing in *Landgraf* indicates that the presumption against retroactivity extends only to federal statutes. And, though state courts may be "free to adopt different rules regarding the retroactive effect of their own interpretations of state law," the D.C. Court of Appeals has in fact "adopt[ed]" *Landgraf*'s "firm rule of retroactivity." *Davis v. Moore*, 772 A.2d 204, 227, 230 n.25 (D.C. 2001).

* * *

The decisions of the D.C. Circuit and D.C. Court of Appeals together unconstitutionally expand liability for certain foreign states. In this case alone, they resulted in the D.C. Circuit upholding a multi-billion-dollar default judgment against a foreign sovereign whose new transitional government is engaged in sensitive negotiations to improve relations with the United States and the broader international community, including through the removal of Sudan from the state-sponsors-of-terrorism list. The

importance of this Court's review here is therefore paramount.

Respectfully submitted,

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