No. 17-1268

IN THE
Supreme Court of the United States

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

Petitioners,

v.

REPUBLIC OF SUDAN, ET AL.,

Respondents.

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

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

Rules

Other Authorities

INTRODUCTION

Sudan concedes (at 44) that the federal cause of action for "money damages" created by 28 U.S.C. § 1605A(c) may be invoked by victims of acts of state-sponsored terrorism that occurred prior to Section 1605A's 2008 enactment, such as petitioners here. Section 1605A(c) provides that "[i]n any such action, damages may include economic damages, solatium, pain and suffering, and punitive damages." 28 U.S.C. § 1605A(c). Sudan does not dispute that petitioners who brought claims under Section 1605A(c) may recover "economic damages, solatium, [and] pain and suffering" damages for their injuries. But it contends that they may not recover punitive damages because Congress (according to Sudan) did not state clearly enough its intention that punitive damages be available in cases based on pre-enactment conduct. That argument—which demands an exceedingly peculiar construction of Section 1605A(c) under which the cause of action and the first three enumerated types of money damages have retroactive effect, but not the last—has no footing in this Court's decisions, the text of the statute, or any other indicator of Congress's intention. This Court should reject Sudan's approach and recognize instead that the whole of Section 1605A(c) may be applied to pre-enactment conduct as provided in Section 1083(c) of the 2008 amendments.

Sudan's contrary argument is premised on misreadings of this Court's decisions in *Republic of Austria* v. *Altmann*, 541 U.S. 677 (2004), and *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994). The reasoning of those decisions makes clear that the *Landgraf* presumption should not apply in the realm of foreign affairs. This is so for at least two reasons: First, leg-

islation with respect to foreign affairs, whether involving foreign sovereign immunity, foreign aid, or economic sanctions, necessarily is a matter of "grace and comity" among sovereigns; and one government cannot have any justifiable reliance interest in another's grace. *Altmann*, 541 U.S. at 689. Second, the *Landgraf* presumption's role as a check against "legislation as a means of retribution," 511 U.S. at 266, is totally misplaced in the field of foreign affairs, where "retribution" often is an appropriate policy objective and the potential costs of impeding that policy could be grave. This is why, in *Altmann*, this Court decided to "defer to the most recent decision" of the political branches rather than apply *Landgraf*'s canon of statutory construction to the FSIA's adjustments to the doctrine of foreign sovereign immunity. 541 U.S. at 696.

But even where it applies, the *Landgraf* presumption does not permit courts to isolate for special scrutiny single words of a larger provision that undisputedly applies retroactively. Sudan concedes that, except for "punitive damages," Section 1605A(c)'s cause of action for money damages properly applies retroactively. If the *Landgraf* presumption applies at all to Section 1605A(c)—and it should not—"the court's first task is to determine whether Congress has prescribed *the statute's* proper reach." *Landgraf*, 511 U.S. at 280 (emphasis added). Where Congress has prescribed the "proper reach" of its enactment, nothing in *Landgraf* or in logic requires Congress to reiterate its prescription as to each individual form of damages.

Here, the text of the 2008 amendments expressly prescribes Section 1605A(c)'s "proper reach." Sudan

does not dispute that Section 1083(c)(3) permitted petitioners to bring claims under Section 1605A for the 1998 U.S. Embassy bombings. And Section 1083(c)(1) provides that "[t]he amendments made by [Section 1083]" (which includes Section 1605A(c)'s cause of action for money damages), "shall apply to any claim arising under section 1605A." The NDAA thus expressly made available Section 1605A(c)'s cause of action, including its punitive damages remedy, to petitioners' claims arising from the 1998 U.S. Embassy bombings. Congress's express prescription of Section 1605A(c)'s retroactive reach in Section 1083(c) means that "there is no need to resort to judicial default rules." *Landgraf*, 511 U.S. at 280. And in any event, Section 1083(c) demonstrates "clear congressional intent favoring" the availability of punitive damages under Section 1605A(c) for pre-enactment acts of state-sponsored terrorism. *Ibid.* *Landgraf* does not require more.

Because it was explicitly tethered to its flawed retroactivity analysis of the federal cause of action, the D.C. Circuit's holding with respect to state-law causes of action also should be reversed. Congress's decision to remove actions against state sponsors of terrorism from Section 1606's protection against punitive damages is functionally indistinguishable from the immunity exception at issue in *Altmann*. The *Landgraf* presumption therefore should not apply. Moreover, the only provision of the FSIA that ever precluded awards of punitive damages under state law is Section 1606, and that provision has *never* had *any* application to petitioners' causes of action under 1605A. Not even the strongest form of the *Landgraf* presumption would allow a court to apply Section 1606 to actions that were originally filed under Section 1605A.

Finally, this Court should not consider Sudan's passel of extraneous arguments that it has presented in other petitions for certiorari that this Court has not accepted for review. And as explained in the briefs in opposition and the United States' briefs as *amicus curiae*, and as both courts below concluded, these additional arguments are meritless.

ARGUMENT

I. PUNITIVE DAMAGES ARE AVAILABLE UNDER SECTION 1605A(C)'S FEDERAL CAUSE OF ACTION TO PUNISH PRE-ENACTMENT ACTS OF STATE-SPONSORED TERRORISM.

Landgraf's presumption against retroactive application does not apply to Section 1605A of the FSIA. Moreover, even if that presumption could apply in this context, it would require analysis of the statute Congress enacted, not just the punitive damages remedy. Here, as Sudan concedes, Section 1083(c)(3) of the 2008 amendments allowed petitioners to bring their claims arising from the 1998 U.S. Embassy bombings under the new Section 1605A. Congress further provided that the 2008 amendments "shall apply to any claim arising under section 1605A." NDAA § 1083(c)(1). That "Section 1083(c) does not expressly refer to the new authorization of punitive damages under § 1605A(c)," Sudan Br. 11, is of no moment. Congress prescribed the reach of the 2008 amendments *in their entirety*, providing that all of those amendments apply to "any claim arising under section 1605A." NDAA § 1083(c)(1). And the phrase "any claim arising under section 1605A" cannot sensibly be construed to exclude petitioners' claims for pre-enactment conduct that *the very same subsection* provides "may be brought under section 1605A," *id.*

§ 1083(c)(3). All of the 2008 amendments therefore apply to petitioners' claims, and petitioners accordingly may recover punitive damages under Section 1605A(c).

A. The *Landgraf* Presumption Does Not Apply To The FSIA.

Sudan contends (at 38-41) that the *Landgraf* presumption applies with full force to the 2008 amendments to the FSIA. But that presumption is fundamentally misplaced in the domain of foreign affairs, in which courts "[t]hroughout history" have "deferr[ed] to the decisions of the political branches." *Altmann*, 541 U.S. at 696 (quotation marks omitted). No less than regulations of foreign trade or foreign aid, restrictions on litigation against foreign sovereigns are matters of "grace and comity" among sovereigns; they do not involve "private rights." *Id.* at 689. Revisions to such regulations therefore do not implicate the primary rationale underpinning *Landgraf*'s presumption: the protection of reliance interests in the continuation of legal rules on which private persons had based their primary conduct. *See Landgraf*, 511 U.S. at 270. And to the extent *Landgraf*'s presumption also operates as a check against arbitrary or retributive legislation, it is an inappropriate (indeed, dangerous) constraint on Congress's power to confront myriad crises generated by foreign states.

Altmann observed that "*Landgraf*'s antiretroactivity presumption … is most helpful in th[e] context" of "cases involving private rights." 541 U.S. at 696. That is because, as *Landgraf* itself details, it is in that context—"statutes burdening private rights," particularly those "affecting contractual or property rights,"

511 U.S. at 270-71—that the anti-retroactivity presumption most often has been applied. *Landgraf* also observed that the anti-retroactivity presumption can operate as a hurdle against "retributive," "vindictive," or "arbitrary" legislation targeting the politically unpopular. *Id.* at 267, 282. These functions accord with the presumption's constitutional underpinnings—the Ex Post Facto, Contracts, Bill of Attainder, Takings, and Due Process Clauses—all of which apply only to private persons. *See id.* at 266-67 & n.20 (noting that these Clauses protect "private persons," "private citizens," and "individuals"). As the D.C. Circuit has explained, "foreign states are not 'persons' protected by the Fifth Amendment." *Price* v. *Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 96 (D.C. Cir. 2002). Indeed, "[*n*]*ever* has th[is] Court suggested that foreign nations enjoy [*any*] rights derived from the Constitution, or that they can use such rights to shield themselves from adverse actions taken by the United States." *Id.* at 97 (emphases added). "[L]egal disputes between the United States and foreign governments [simply] are not mediated through the Constitution." *Ibid.*; *see also Principality of Monaco* v. *Mississippi*, 292 U.S. 313, 330-31 (1934) ("Foreign State[s] lie[] outside the structure of the Union.").

Rather than being restrained by constitutional commands, Congress's interactions with foreign governments are matters of "grace and comity." *Altmann*, 541 U.S. at 689. In particular, foreign sovereign immunity is a "gesture of comity" that offers "present protection" to other sovereigns from civil litigation in U.S. courts. *Id.* at 696 (emphasis and quotation marks omitted). And, of course, foreign governments could have no justifiable reliance interests in

Congress's continued "grace." To the contrary, as *Altmann* explained, the "purpose of foreign sovereign immunity has never been to permit foreign states … to shape their conduct in reliance on the promise of future immunity from suit in United States courts." *Ibid*. Thus, while in "private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties," it will not do so in cases involving "great national concerns," such as the relations with foreign governments. *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801) (Marshall, C.J.).

Within that area of "great national concerns," *Altmann*, addressing the FSIA, recognized that it was appropriate for the Court to "defer to the most recent" decision of the political branches, and apply its provisions to pre-enactment conduct "absent contraindications." 541 U.S. at 696. Without addressing *Altmann*'s decision to "defer," Sudan now argues that applying the *Landgraf* presumption in this field "is not inconsistent with deference to the political branches" because Congress "can always dictate, by explicit legislative command" whether a statute "touching on foreign affairs" "should be applied retroactively." Sudan Br. 40. But the same could have been said of the FSIA in *Altmann*. Moreover, Sudan's argument underrates the potential costs of impeding the political branches' foreign policy. While the *Landgraf* presumption exists in part to prevent "vindictive" and "retributive" legislation, 511 U.S. at 267, 282, vindication and retribution not only are legitimate foreign policy objectives, they are often essential ones, *see*, *e.g.*, North Korea Sanctions and Policy Enhancement Act of 2016, Pub. L. No. 114-122, 130 Stat. 93 (issuing sanctions in

retaliation to North Korea's willful violations of U.N. resolutions, among other things); Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, § 502, 126 Stat. 1214, 1258 (codified at 22 U.S.C. § 8772) (subjecting certain Iranian assets to postjudgment execution by victims of Iran-sponsored terrorist acts).

In the realm of private rights, the costs to the Nation of delaying legislation are unlikely to be significant, but conflicts and crises among foreign nations are nearly always time-sensitive and often enough present grave (even existential) risks to the security of the Nation. State-sponsored terrorism is one such crisis. A court decision that rejects retroactive application of legislation on the basis of an inadequately clear expression of intent risks impeding urgent national policy objectives, possibly to our Nation's great detriment. Thus this Court has observed that "it is essential the congressional role in foreign affairs be understood and respected." *Zivotofsky ex rel. Zivotofsky* v. *Kerry*, 135 S. Ct. 2076, 2090 (2015). Foreign policy is uniquely an area in which the political branches' judgments should be executed immediately and faithfully, rather than subjected to a heightened burden of clarity.

Sudan attempts to distinguish *Altmann* on the ground that, unlike Section 1605A(c), the FSIA did not "create or modify any causes of action" when first enacted. Sudan Br. 39 (quoting *Altmann*, 541 U.S. at 695 n.15). Whether legislation creates a new cause of action, however, goes only to whether a statute "affects substantive rights" (as opposed to "address[ing] only matters of procedure") and thus potentially capable of triggering *Landgraf*'s presumption. *Altmann*,

541 U.S. at 694, 697. But *Altmann* did not hold the *Landgraf* presumption inapplicable on the ground that the FSIA was procedural. As *Altmann* explained, the FSIA, even as originally enacted, was addressed "not just to the power of a particular court but to the substantive rights of the parties as well," and its standards were then (as now) "aspect[s] of *substantive* federal law." *Id*. at 695 (emphasis added); *see also Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 497 (1983) (FSIA "necessarily involves application of a body of substantive federal law"). Because the FSIA "def[ied] … categorization" as substantive or procedural, the Court "examine[d] the entire statute in light of the underlying principles governing [its] retroactivity jurisprudence." *Id.* at 694, 695 n.15. And applying those "underlying principles," the Court found the rationales for the *Landgraf* presumption to be absent in the realm of foreign affairs, and thus "defer[red]" to the most recent statement of the political branches. *Id.* at 696. This Court should similarly recognize that the presumption is inapplicable in the field of foreign affairs, including legislation that adjusts foreign sovereign immunity.

But even if this Court determines that the *Landgraf* presumption possibly may apply to newly enacted statutes involving foreign affairs, it still should not apply the presumption to the 2008 amendments here at issue. Just four years before Congress enacted those amendments, this Court held that the FSIA is "freed from *Landgraf*'s antiretroactivity presumption." *Altmann*, 541 U.S. at 700. "Congress legislate[d] against the backdrop of [this] existing [precedent]." *McQuiggin* v. *Perkins*, 569 U.S. 383, 398 n.3 (2013). It is thus "not only appropriate but also real-

istic to presume that Congress was thoroughly familiar with" *Altmann*, and "that it expect[ed] its enactment[] to be interpreted in conformity with" that case. *Edelman* v. *Lynchburg Coll.*, 535 U.S. 106, 117 n.13 (2002). The FSIA having been "freed" from *Landgraf*'s clear statement rule in 2004, *Altmann*, 541 U.S. at 700, Congress had no reason in 2008 to believe that *Landgraf*'s presumption would apply to its amendments to the FSIA.

B. Even Under *Landgraf*, Section 1605A(c) Applies Retroactively As Provided In The 2008 Amendments.

Whether or not *Landgraf*'s presumption applies, "Congress has expressly prescribed the [2008 amendments'] proper reach." *Landgraf*, 511 U.S. at 280. It did so in two steps: First, Congress specified that "[t]he amendments made by this section"—which include both the new federal cause of action and its punitive-damages remedy, *see* NDAA § 1083(a)(1)—"shall apply to *any* claim arising under Section 1605A." *Id.* § 1083(c)(1) (emphasis added). Then, in the same subsection, Congress provided that certain claims arising from pre-enactment conduct may be brought under Section 1605A, *see id.* § 1083(c)(2)-(3). There accordingly "is no need to resort to judicial default rules." *Landgraf*, 511 U.S. at 280.

Sudan asserts that Congress did not clearly provide for punitive damages based on pre-enactment conduct, but it *admits* that the text of Section 1083(c) makes Section 1605A(c)'s federal cause of action (of which the punitive damages remedy is a part) available to redress such conduct. *See* Sudan Br. 44 (it is "correct" that Section 1083(c) allows "a plaintiff to access the cause of action under § 1605A(c)"). In fact,

except for the two words "punitive damages," Sudan does not dispute that *every* section, subsection, clause, word, and element of punctuation of the 2008 amendments applies to pre-enactment conduct. That concession is dispositive of this case. Section 1605A(c)'s federal cause of action is available to petitioners because Section 1083(c)(1) made the 2008 amendments *in their entirety* applicable to "any claim arising under section 1605A." NDAA § 1083(c)(1); *see also* Sudan Br. 43 ("Section 1083(c)(1) simply provides that all the amendments in §1083 apply to a claim arising under §1605A."). There is no textual basis for extracting Section 1605A(c)'s punitive damages remedy from the 2008 amendments and applying to that remedy a heightened burden of clarity that exceeds whatever burden applies to Section 1605A(c)'s cause of action for money damages. Because, as Sudan concedes, Section 1083(c) provides for retroactive application of Section 1605A(c) such that petitioners could bring actions for money damages based on the 1998 U.S. Embassy bombings, Section 1083(c) just as surely makes available to petitioners each form of money damages enumerated in Section 1605A(c)—including punitive damages.

Sudan responds that *Landgraf* demands a "provision-by-provision approach" under which the Court must ask whether Congress adequately specified the retroactive effect of each form of damages that would "increase Sudan's liability for past conduct." Sudan Br. 45 (citing *Landgraf*, 511 U.S. at 261). That argument misreads *Landgraf*. While the Court in *Landgraf* did separately analyze the compensatory and punitive damages remedies newly provided by Section 102 of the Civil Rights Act of 1991, it did so only to determine whether each had substantive retroactive

effect. *See* 511 U.S. at 281-85. The Court already had concluded earlier in its decision that "the statutory text" of the Civil Rights Act of 1991 did not clearly specify that it "should be applied to cases that arose and went to trial before its enactment." *Id.* at 257. Thus, the Court held that the various provisions of Section 102 could apply to cases already pending its enactment only if they did *not* "operate retroactively." *Id*. at 280. Because Section 102's compensatory and punitive damage awards each would have retroactive effect if applied to pending cases but lacked "clear evidence of congressional intent" of retroactive application, the Court held Section 102's new damages remedies could apply only prospectively. *Id.* at 286.

Here, the retroactive effect of Section 1605A(c)'s cause of action for money damages and the punitive damages remedy is not disputed. The pertinent question under *Landgraf* thus is whether Congress in the statutory text "manifest[ed] an intent" that it apply to pre-enactment conduct. 511 U.S. at 257. Nothing in *Landgraf*'s analysis of *that* question suggests that Congress must separately specify retroactive application of compensatory and punitive damages, or that, where Congress does provide guidance as to a statute's retroactive effect, it must do so on a word-by-word basis.

Quite to the contrary, the Court observed that an earlier, unenacted version of the Civil Rights Act "expressly call[ed] for application" of the damages provision "to cases arising before its (expected) enactment." *Landgraf*, 511 U.S. at 255-56. But all the relevant provision said was that it "shall apply to all proceedings pending on or commenced after the date of enactment of this Act." *Id.* at 255 n.8 (quoting S. 2104,

101st Cong., 2d Sess. § 15(a)(4) (1990)); *see also* U.S. Br. 20 & n.3. That precursor legislation did not separately discuss compensatory and punitive damages, but *Landgraf* leaves no doubt that it would have established Congress's intent that the statute apply retroactively, had it been enacted.[1]

Here, Congress has more-than-adequately specified the 2008 amendments' application to pre-enactment conduct. Congress first provided that "[t]he amendments made by [Section 1083] shall apply to any claim arising under section 1605A," NDAA § 1083(c)(1), and then it specified with exacting precision when persons would have claims under Section 1605A to redress pre-enactment conduct. *See* NDAA § 1083(a)(1) (enacting Section 1605A(b)'s limitations provision, allowing claims when a "related action was commenced" within 10 years of April 24, 1996); *id.* § 1083(c)(2) (requiring certain prior claims to be "given effect as if the action had originally been filed under section 1605A(c)"). Most relevant here, Section 1083(c)(3) provided that where an action previously had been filed under the FSIA's prior terrorism exception (which the 2008 Amendments repealed, *see* NDAA § 1083(b)(1)(A)(iii)), "any other action arising out of the same act or incident may be brought under Section 1605A," *id*. § 1083(c)(3).

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[1] Sudan contends that this Court "has since questioned whether the language in that 1990 civil rights bill was sufficiently clear." Sudan Br. 46. In fact, *Lindh* v. *Murphy* described the precursor bill's language as "absolute," 521 U.S. 320, 328 n.4 (1997), and *Martin* v. *Hadix* stated that the language "unambiguously addresse[d] the temporal reach of the statute," 527 U.S. 343, 354 (1999).

As Sudan concedes, in this way, Congress in 2008 granted to victims of the 1998 U.S. Embassy bombings (and numerous other pre-2008 acts of terrorism) the ability to file an action under new Section 1605A. Having granted persons injured in 1998 access to Section 1605A(c)'s cause of action for money damages (as Sudan also concedes), Congress did not need to further specify the particular availability of punitive damages. Congress already had provided that "[t]he amendments made by this section shall apply to any claim arising under section 1605A." *Id.* § 1083(c)(1). Those "amendments" include a federal cause of action for money damages that allows recovery of "economic damages, solatium, pain and suffering, *and punitive damages*." 28 U.S.C. § 1605A(c) (emphasis added). There is no textual basis for excluding the new punitive-damages remedy from Section 1083(c)(1)'s express command that all of the 2008 amendments "shall apply to any claim arising under section 1605A." NDAA § 1083(c)(1). That Congress chose to make the 2008 amendments applicable "in general" (*ibid.*) to all cases filed under Section 1605A "does not demonstrate ambiguity. It demonstrates breadth." *PGA Tour, Inc.* v. *Martin*, 532 U.S. 661, 689 (2001) (quotation marks omitted).

If Section 1083's plain text itself were not enough to establish Congress's intent that punitive damages be available for pre-enactment conduct, the operation of Section 1083(c)(3)'s provision for "[r]elated actions" should put any lingering doubt to rest. In addition to allowing new actions by plaintiffs (like petitioners here) that had not previously filed suit, Section 1083(c)(3) also provided that "plaintiffs with pending cases could file related actions under § 1605A within 60 days of enactment of the new law or within 60 days

of judgment in their original case, whichever was later." *Bakhtiar* v. *Islamic Republic of Iran*, 668 F.3d 773, 774 (D.C. Cir. 2012) (Kavanaugh, J.). "For plaintiffs with suits pending against foreign nations as of January 28, 2008," this was one of the "three options for obtaining the benefits of § 1605A and seeking punitive damages" reflecting "the balance that Congress struck in allowing punitive damages against foreign nations but simultaneously imposing procedures and time limits for plaintiffs with pending cases to obtain such damages." *Id*. at 775. And this option to seek punitive damages was available for 60 days *after entry of judgment in the original case*. "The only reasonable explanation for allowing" related actions by plaintiffs that had already received final judgments was "to ensure that plaintiffs who had obtained compensatory relief against terrorist-defendants could return to seek punitive damages against those same defendants." *Rimkus* v. *Islamic Republic of Iran*, 750 F. Supp. 2d 163, 179 (D.D.C. 2010). Section 1083's related-action provision thus makes manifest Congress's intention that punitive damages be available to punish pre-enactment acts of state-sponsored terrorism.[2]

With no argument in the text of the statute, and hemmed in by its concession that petitioners properly invoked Section 1605A(c)'s cause of action for money

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[2] Sudan thus is incorrect when it claims that plaintiffs "who appropriately invoked state or foreign law for their cause of action … would not be able to obtain punitive damages." Sudan Br. 44. As *Bakhtiar* describes, such plaintiffs could obtain punitive damages by filing related actions in conformity with Section 1083(c)(3). 668 F.3d at 775.

damages, Sudan finally suggests that *Landgraf* establishes that a special heightened burden of clarity applies to "retroactive punitive damages." Sudan Br. 45. While "the possibility of retroactive compensatory damages" does not implicate fairness grounds with the "'greatest force," Sudan argues, "retroactive punitive damages" raise "a serious constitutional question." Sudan Br. 45-46 (quoting *Landgraf*, 511 U.S. at 282). This argument founders for two separate reasons. First, in *Landgraf*, even though fairness objections to retroactive application of Section 102's compensatory-damages remedy did not have great force (because it reached only "conduct already prohibited by Title VII"), the anti-retroactivity presumption nevertheless applied to it. 511 U.S. at 282. And the presumption's requirement—"clear evidence of congressional intent"—applied uniformly across Section 102. *Id.* at 286; *see also* U.S. Br. 24-25.

Second, whatever constitutional barriers might exist to the retroactive imposition of punitive damages on private persons, they do not protect Sudan. It is only the Due Process Clause of the Fifth Amendment that would provide such protection, and that clause protects only "person[s]." U.S. Const. Amend. V. "Sudan is a sovereign nation," Sudan Br. 1, not a "person." It accordingly obtains no protection from the Due Process Clause. *See Price*, 294 F.3d at 96; *see also South Carolina* v. *Katzenbach*, 383 U.S. 301, 323 (1966) ("The word 'person' in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union."). There accordingly is no support for Sudan's contention that, among the various forms of relief made available under Section 1605A(c)'s federal cause of action, this Court should

single out the punitive damages remedy for special scrutiny.

II. PUNITIVE DAMAGES ARE AVAILABLE UNDER STATE LAW TO PUNISH PRE-2008 ACTS OF STATE-SPONSORED TERRORISM.

Punitive damages are available for petitioners' state-law claims brought pursuant to Section 1605A(a)'s immunity exception.

A. Sudan now claims that the availability of punitive damages for state-law claims is not before the Court. Sudan Br. 50-52. That is a curious position given that petitioners raised the issue in their petition, *see* Pet. 28-29, and Sudan addressed the issue in its Brief in Opposition without objecting to this Court's consideration of the issue, *see* Br. in Opp. 25. Sudan's merits-stage objection is waived. *See* S. Ct. Rule 15.2.

In any event, the availability of punitive damages for state-law claims is "inextricably linked" to the question under Section 1605A(c)'s cause of action. *City of Sherrill* v. *Oneida Indian Nation of New York*, 544 U.S. 197, 214 n.8 (2005). After holding that punitive damages were not available for pre-enactment conduct under Section 1605A(c), the D.C. Circuit concluded that "[t]he same principle applies to the awards of punitive damages to plaintiffs proceeding under state law," Pet. App. 128a, and that "the retroactive authorization of punitive damages under state law fails for the *same reason* it does under the federal cause of action," Pet. App. 129a (emphasis added). In the D.C. Circuit's view, the propriety of punitive damages under a federal cause of action and under a state-law cause of action were not just related issues;

they were one and the same. The issue under state-law claims thus is "fairly included" within the issue under the federal cause of action. S. Ct. Rule 14.1(a).

B. The merits of the issue with respect to state-law claims are not difficult to resolve. The enactment of an exception to sovereign immunity is the *precise* circumstance in which this Court in *Altmann* held that the *Landgraf* rule does not apply. *See Altmann*, 541 U.S. at 686. By moving the terrorism exception to sovereign immunity from Section 1605(a)(7) to new Section 1605A, the 2008 amendments withdrew those claims against state-sponsors of terrorism from Section 1606's protection against punitive damages. That "lifting of the prohibition on punitive damages" (Sudan Br. 61) with respect to terrorism claims is functionally indistinguishable from the withdrawal of immunity challenged as impermissibly retroactive in *Altmann*, and the same result should obtain here, *see* U.S. Br. 27-33.

Sudan's only response is that Section 1606 "does not provide immunity." Sudan Br. 61. Of course, neither does Section 1605 of the FSIA, but in any event, *Altmann*'s reasoning is not limited to statutes adjusting sovereign immunity. If *Altmann* turned only on FSIA's grant of jurisdiction, then it would have been of a piece with the "statutes conferring or ousting jurisdiction" to which the *Landgraf* presumption does not apply. *Landgraf*, 511 U.S. at 274; *see also ibid.* ("Present law normally governs in such situations."). But in *Altmann*, Austria emphasized—and the Court accepted—that the enactment of the FSIA's immunity exceptions exposed it, for the first time, to liability it had never before faced. 541 U.S. at 681. That is the same argument raised by Sudan here. *See* Sudan Br.

62 (complaining of the "increase in potential liability"). And just as *Altmann* rejected application of the *Landgraf* presumption to a law exposing a foreign sovereign to new liability, so too should this Court reject application of the *Landgraf* presumption to Congress's decision here to expose state-sponsors of terrorism to the new liability of punitive damages.

But even if *Landgraf*'s presumption were to apply, it is only a canon of *statutory* construction, and as respects state-law claims, Sudan fails to point to any statutory provision of Section 1605A that is being impermissibly applied retroactively. The 2008 Amendments did not alter the text of Section 1606's prohibition on punitive damages. And Sudan does not dispute that prior to 2008, the relevant state law permitted punitive damages for intentional torts. *See Oliver* v. *Mustafa*, 929 A.2d 873, 878 (D.C. 2007) ("[P]unitive damages are available in actions for intentional torts."). The only federal statute that petitioners with state-law claims are applying retroactively is Section 1605A(a)'s immunity exception, and Sudan concedes that provision "applies retroactively under *Altmann*." Sudan Br. 61. There simply is no statutory provision here on which the *Landgraf* presumption can operate.

What Sudan really is requesting is for this Court to apply Section 1606's prohibition on punitive damages to the state-law claims in this case, even though Section 1606 on its face does not apply. Indeed, petitioners' state-law claims have *never* been subject to Section 1606's prohibition against punitive damages, because all of them were filed under Section 1605A(a). JA24a, 31a, 64a, 72a. Not even the strongest imaginable form of the *Landgraf* presumption can make

Section 1606's prohibition of punitive damages apply to claims that never were brought under Section 1605.

The D.C. Circuit admitted that "Section 1606 … has no bearing upon state law claims brought under the jurisdictional grant in § 1605A." Pet. App. 128a. Yet the court nonetheless precluded punitive damages solely on the ground that it would be "puzzling" if plaintiffs pursuing state-law claims could obtain punitive damages for pre-enactment conduct, whereas plaintiffs proceeding under Section 1605A(c) could not. *Ibid*. Nothing in the current version of the FSIA precludes the assessment of punitive damages in state-law claims brought pursuant to Section 1605A(a). The D.C. Circuit's atextual prohibition on punitive damages obtained under state laws should be rejected.

III. SUDAN'S "THRESHOLD" ARGUMENTS ARE NOT BEFORE THE COURT AND LACK MERIT.

Sudan also attempts to interject several purportedly "jurisdictional" arguments that Sudan has presented in certiorari petitions that the Court has not granted. *See* Pet. at 13-19, *Republic of Sudan* v. *Owens*, No. 17-1236 (U.S.); Conditional Cross-Pet. at 15-35, *Republic of Sudan* v. *Opati*, No. 17-1406 (U.S.). Although this Court has held that it will assess its own jurisdiction when "fairly in doubt," *Ashcroft* v. *Iqbal*, 556 U.S. 662, 671 (2009), there is no "doubt" here. As every other court to address them and the United States have each concluded, these arguments lack merit.

1. Sudan argues that the U.S. Embassy bombings at issue here do not qualify as "extrajudicial killings"

because they were not committed by a state actor. Sudan Br. 21-27. But the statutory definition of "extrajudicial killing" has no state-actor requirement. *See* 28 U.S.C. § 1605A(h)(7) (adopting definition from 28 U.S.C. § 1350 note). Indeed, if it did, then the FSIA's "[t]errorism exception" would not apply to attacks by *terrorists*. As the D.C. Circuit correctly held, the statutory definition of "extrajudicial killing" includes every "deliberated killing" that is not legally authorized, 28 U.S.C. § 1350 note. Pet. App. 19a; *see also* Owens Br. in Opp. at 11-15, *Opati*, No. 17-1406; U.S. Br. at 11-16, *Opati*, No. 17-1406. Terrorist attacks clearly fall within the statutory term "extrajudicial killing."

2. Sudan's argument regarding the standard for causation also lacks merit. Sudan argues (at 27-28) that the D.C. Circuit ignored *Bolivarian Republic of Venezuela* v. *Helmerich & Payne International Drilling Co.*, 137 S. Ct. 1312 (2017). In fact, the D.C. Circuit *expressly applied* that decision. Pet. App. 39a-40a. Sudan's real disagreement is with the district court's factual findings, but the D.C. Circuit correctly reviewed those findings for clear error—a standard of review *Sudan itself* urged, *see* Sudan C.A. Br. 14; Sudan C.A. Reply 2—and found none, Pet. App. 40a; *see also* Br. in Opp. at 14-23, *Owens*, No. 17-1236; U.S. Br. at 10-15, *Owens*, No. 17-1236.

3. Sudan next reiterates its forfeited argument that some of petitioners' actions were filed beyond Section 1605A(b)'s statute of limitations. Sudan Br. 28-30. But as the D.C. Circuit and the United States recognized, that provision is not jurisdictional. *See* Pet. App. 98a; U.S. Br. at 19-22, *Opati*, No. 17-1406. Nothing in Section 1605A "clearly state[s]" that the

statute of limitations is jurisdictional. *Musacchio* v. *United States*, 136 S. Ct. 709, 717 (2016). And Sudan does not dispute that non-jurisdictional limitations provisions may be forfeited. *Day* v. *McDonough*, 547 U.S. 198, 202-05 (2006); *see also* Owens Br. in Opp. at 21-25, *Opati*, No. 17-1406.

4. Sudan argues that some petitioners are not "claimant[s]" that may recover under Section 1605A(a)(2)(A)(ii), because, Sudan contends, when Congress said "claimant," it really meant "legal representative in a wrongful death suit brought on behalf of the victim." Sudan Br. 52-55. That issue, too, is not jurisdictional: The term "claimant" appears in Section 1605A(a)(2), which is distinct from the withdrawal of immunity in Section 1605A(a)(1). Moreover, as the D.C. Circuit correctly observed, the text of the statute does not limit the term "claimant," Pet. App. 100a-01a, unlike Section 1605A(c), which *does* use the term "legal representative." For this reason, every court to consider the issue has rejected Sudan's reading of Section 1605A and its similarly worded predecessor, Section 1605(a)(7). *See* Owens Br. in Opp. at 15, *Opati*, No. 17-1406 (citing cases); *see also id.* at 15-18; U.S. Br. at 16-17, *Opati*, No. 17-1406.

5. Finally, Sudan contends that Section 1605A(c) implicitly preempts all state-law causes of action against state sponsors of terrorism. Sudan Br. 55-58. Again, as the D.C. Circuit concluded, this argument is not jurisdictional, and Sudan has "forfeited" it. Pet. App. 107a. Moreover, Section 1605A(c) says nothing about preempting state-law claims, and this Court has long counseled against inferring preemption from statutory silence. *See Wyeth* v. *Levine*, 555 U.S. 555, 565 & n.3 (2009). Here, the class of plaintiffs eligible

to take advantage of the exception to immunity is *broader* than that eligible to pursue a federal cause of action. *Compare* 28 U.S.C. § 1605A(a), *with id.* § 1605A(c). This demonstrates Congress's intention that plaintiffs ineligible for the federal cause of action continue to have remedies under state law. *See* Owens Br. in Opp. at 18-21, *Opati*, No. 17-1406; U.S. Br. at 17-19, *Opati*, No. 17-1406. Nothing in the 2008 Amendments even remotely suggests an intent to close the courthouse doors to victims of state-sponsored terrorism with state-law claims.

CONCLUSION

The Court should reverse the portion of the judgment of the court of appeals respecting the availability of punitive damages.

Respectfully submitted.

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