No. 17-1268

IN THE

Supreme Court of the United States

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

v.

REPUBLIC OF SUDAN, MINISTRY OF EXTERNAL AFFAIRS AND MINISTRY OF THE INTERIOR OF THE REPUBLIC OF SUDAN,
Respondents.

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

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDINGS

Respondents here are the Republic of the Sudan, the Ministry of External Affairs of the Republic of Sudan, and the Ministry of the Interior of the Republic of the Sudan (collectively, "Sudan"). Sudan is a sovereign nation and qualifies as a "foreign state" under the U.S. Foreign Sovereign Immunities Act, Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended at 28 U.S.C. §§ 1330, 1391(f), 1441(d), 1602-1611). A full listing of the parties to this proceeding is set forth in the Appendix to the Petition, beginning at App. 369a.

RULE 29.6 STATEMENT

None of the Respondents here is a non-governmental corporation. None of the Respondents here has a parent corporation or shares held by a publicly traded company.

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The Petition here (No. 17-1268) arises from an important and consequential decision by the D.C. Circuit, but the particular questions presented by the Petition — involving the D.C. Circuit's vacatur of punitive damages — are not worthy of a writ of certiorari. In contrast, Sudan's pending Petition (No. 17-1236), arising from the same D.C. Circuit decision, raises important and recurring questions that are worthy of a writ of certiorari. Furthermore, in the event that this Court considers the Petition here to be worthy of a writ of certiorari, this Court should extend that writ to include the questions presented in Sudan's Conditional Cross-Petition being filed herewith.

INTRODUCTION

The Foreign Sovereign Immunities Act ("FSIA"), Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended at 28 U.S.C. §§ 1330, 1391(f), 1441(d), 1602-1611), did not permit the imposition of punitive damages upon a foreign sovereign until January 2008, when the Act was amended to permit the imposition of punitive damages on a foreign sovereign liable for an act of terrorism. *See* 28 U.S.C. § 1605A(c) ("In any such action, damages may include . . . punitive damages."). Here, the district court imposed over $4.3 billion in punitive damages upon Sudan in a default judgment, even though the terrorist attack in question took place in 1998, a decade before the FSIA was amended to permit the imposition of punitive damages on a foreign sovereign. On Sudan's appeal — a consolidated appeal from the default judgment directly and from the district court's denial of Sudan's motion to vacate the default judgment — the D.C. Circuit vacated the

award of punitive damages, leaving intact billions of dollars of compensatory damages and prejudgment interest. The Petition presents questions relating to (i) the D.C. Circuit's decision even to entertain Sudan's challenge to punitive damages in light of Sudan's default (and supposed lack of good faith), and (ii) the D.C. Circuit's decision to vacate the punitive damages as an impermissible retroactive application of the FSIA's 2008 amendment authorizing the imposition of punitive damages on a foreign sovereign. Neither issue warrants review by this Court.

STATEMENT

A. The District Court Proceedings

1. *Owens* Action

In late 2001, plaintiff James Owens filed his initial complaint seeking to hold Sudan liable for providing material support for Al Qaeda's 1998 bombings of the U.S. embassies in Kenya and Tanzania. In September 2002, an amended complaint added additional plaintiffs. None of the *Owens* plaintiffs is a Petitioner here.

As Petitioners note (Pet. 4), Sudan was served with the amended *Owens* complaint on February 4, 2003. Faced with a devastating civil war and the "press of events surrounding the peace accords" in Sudan (*see* Mem. in Support of Agreed Mot. 1, *Owens v. Republic of Sudan*, 826 F. Supp. 128 (D.D.C. June 18, 2004) (No. 01-cv-02244), ECF No. 78), Sudan did not immediately respond or appear. Nevertheless, in early 2004, Sudan retained U.S. counsel to defend

itself in the *Owens* case. Sudan's counsel contested the entry of default and moved to dismiss the case. C.A. App. 62-63.

Petitioners incorrectly assert that Sudan "selectively entered" the *Owens* litigation "only to exit again when it received adverse rulings from the district court and D.C. Circuit." Pet. 4. In fact, on January 5, 2005, while Sudan's motion to dismiss was still pending, Sudan's initial counsel moved to withdraw from the case citing an "absence of the ability [to] obtain the necessary guidance" and a "lack of effective communication from the client" making it impossible for counsel "to render effective legal representation." C.A. App. 128-29. Sudan's counsel explained that Sudan had not responded to "ample warning" of their intent to withdraw, having been sent multiple letters beginning on September 13, 2004. C.A. App. 131. Counsel's difficulties in communicating with Sudan coincided with a period of protracted political turmoil in Sudan. In the time leading up to counsel's first motion to withdraw, Sudan was deeply engaged in negotiating and concluding the Comprehensive Peace Agreement, which set forth a ceasefire and rigorous implementation procedures aimed at achieving peace in the country. *See* The Comprehensive Peace Agreement Between The Government of The Republic of The Sudan and The Sudan People's Liberation Movement/Sudan People's Liberation Army, Jan. 9, 2005, https://peaceaccords.nd.edu/sites/default/files/accords/SudanCPA.pdf.

The district court denied counsel's motion to withdraw in January 2005, but it did not deny

Sudan's motion to dismiss until March 29, 2005 (C.A. App. 67, 139) — several months after Sudan's counsel had lost contact with its client — at which point Sudan was in the midst of "the enormity of the tasks" involved in implementing the rigorous procedures set forth in the Comprehensive Peace Agreement. *See* Comprehensive Peace Agreement, Chapeau at xiii.

Prohibited from withdrawing from the case, Sudan's counsel then (unsuccessfully) appealed the *Owens* district court decision denying Sudan's motion to dismiss. Sudan's counsel was finally permitted to withdraw from *Owens* on January 26, 2009. C.A. App. 72.

2. Petitioners' Cases

While *Owens* was pending in the D.C. Circuit in 2008, Congress amended the FSIA, replacing the prior "terrorism exception" to immunity, 28 U.S.C. § 1605(a)(7), with § 1605A, which not only set forth an exception to immunity but also, for the first time, created a private right of action against a foreign state for certain categories of plaintiffs. National Defense Authorization Act for Fiscal Year 2008 ("2008 NDAA"), Pub. L. No. 110-181, § 1083, 122 Stat. 3, 338-41. The new private right of action, § 1605A(c), provided for the possibility of punitive damages, which are otherwise prohibited against a foreign state (except an agency or instrumentality thereof) under 28 U.S.C. § 1606.

While *Owens* was still pending in the D.C. Circuit, the *Owens* plaintiffs amended their complaint to assert claims under § 1605A(c), and several new groups of plaintiffs, some of them Petitioners here,

filed separate actions in the district court against Sudan for claims under § 1605A(c) and state tort law arising from the 1998 embassy bombings. *See* C.A. App. 191 (granting motion to amend *Owens* Compl.); C.A. App. 915 (*Amduso* Compl.); C.A. App. 1216 (*Wamai* Compl.); C.A. App. 1829 (*Onsongo* Compl.). Though Petitioners' complaints sought punitive damages, the *Owens* plaintiffs and several of the other plaintiff groups did not see fit to seek punitive damages retroactively under the newly enacted law.

Sudan was served in the new actions in 2009, but, still facing profound domestic turmoil, did not appear. As explained by Ambassador Maowia O. Khalid, Charge d'Affaires of the Embassy of the Republic of the Sudan in Washington, D.C.:

> From 2005 until 2014, Sudan was not in active communication with U.S. counsel and was absent from litigation in the United States. This was principally during periods of well-known civil unrest and political turmoil in Sudan, in addition to times of natural disaster wrought by heavy flooding, which killed many, displaced many more, and spread waterborne illness, affecting over half a million people. The cession of south Sudan and the attendant and protracted diplomatic moves and negotiations completely pre-occupied the Government of Sudan and necessitated the diversion of all meager legal and diplomatic personnel to that process.

Ambassador Decl., ¶ 4 (C.A. App. 648).

The *Opati* Petitioners subsequently filed and served their complaint (also including demands for punitive damages) in 2012 (C.A. App. 2514), and Sudan, still confronting serious political turmoil and natural disasters, did not appear. Contrary to Petitioners' repeated suggestions and attempts to conflate their cases with those of earlier plaintiffs (Pet. 11, 14, 35), Sudan did not "double-default" or "strategically" enter and exit in Petitioners' cases; Sudan, mired in domestic crises, simply did not appear.

In 2014, the district court entered default judgments against Sudan in each of Petitioners' actions, as well as in the other related actions. *See* Pet. App. 294a (*Amduso*); Pet. App. 315a (*Wamai*); Pet. App. 249a (*Onsongo*); Pet. App. 267a (*Opati*). In addition to compensatory damages and prejudgment interest, the district court awarded Petitioners over $4.3 billion in punitive damages.

3. Sudan's Appearance And Motions To Vacate

Sudan, emerging from a decade of unrelenting turmoil, began engaging new U.S. counsel in 2014 and timely appealed the default judgments below, including in Petitioners' cases. Sudan retained the undersigned counsel in April 2015 and began entering appearances and contesting virtually all pending U.S. litigation against it, regardless of the stage of the case. Sudan filed motions to vacate the default judgments in each of Petitioners' cases (*see* C.A. App. 1053 (*Amduso*); C.A. App. 1700 (*Wamai*); C.A. App. 1925 (*Onsongo*); C.A. App. 2611 (*Opati*)), as well as in numerous other cases against Sudan,

including many cases unrelated to the *Owens* action. The D.C. Circuit stayed Sudan's direct appeal pending the outcome of the motions to vacate.

The district court denied Sudan's motions to vacate. Pet. App. 147a. In its opinion, the district court acknowledged that "the sheer magnitude of the punitive damages" may present an "extraordinary circumstance" warranting relief under Rule 60(b)(6) of the Federal Rules of Civil Procedure. Pet. App. 241a. The district court further acknowledged "the apparent strength of Sudan's underlying arguments about the unavailability of punitive damages" and noted that the presumption against retroactivity "leaves the Court with serious doubt about whether § 1605A(c) should be read as authorizing punitive damages for pre-enactment conduct." Pet. App. 242a, 245a. Nonetheless, the district court did not vacate the award of punitive damages.

Sudan then appealed the denial of its motions to vacate, and the appeal was consolidated with Sudan's direct appeal of the default judgments.

B. The D.C. Circuit Opinion

In its decision on Sudan's consolidated appeal, the D.C. Circuit exercised its discretion to review "some, but not all," of Sudan's nonjurisdictional arguments. Pet. App. 17a. Among the nonjurisdictional arguments the court did review, the D.C. Circuit considered whether the district court erred in awarding Petitioners over $4.3 billion in punitive damages under the newly enacted § 1605A(c) and Petitioners' state-law claims, based on Sudan's pre-enactment conduct. Pet. App. 116a. The D.C. Circuit

found "sound reasons" to review the award of punitive damages "whether under Rule 60(b)(6) *or* on direct appeal." Pet. App. 117a. (emphasis added).

First, the D.C. Circuit noted this Court's characteristic scrutiny of punitive damages, owing to the constitutional concerns implicated by the imposition of damages that are "in the nature of criminal punishment." Pet. App. 117-118a.

As to Rule 60(b)(6), the D.C. Circuit found that "extraordinary circumstances" surrounding the award of punitive damages warranted review, citing "the size of the awards (totaling $4.3 billion), the presentation of a novel question of constitutional law (retroactivity), and the potential effect on U.S. diplomacy and foreign relations." Pet. App. 119a.

As to Sudan's direct appeal of the issue, the D.C. Circuit found that "exceptional circumstances" called for direct review of the punitive damages. The court noted the "sensitive matters of international relations" and the need for guidance on a recurring FSIA issue in the D.C. district court. Pet. App. 119a-120a. Emphasizing the uniqueness of the circumstances and the fact that the issue was a "pure question[] of law," the D.C. Circuit concluded: "Given the size of the awards, the strength of Sudan's contentions, and the likelihood of this question recurring, we believe reviewing the award of punitive damages both promotes 'the interests of justice' and 'advance[s] efficient judicial administration.'" Pet. App. 120a (quoting *City of Newport v. Fact Concerts*, 453 U.S. 247, 257 (1981)).

Addressing the merits of Sudan's challenge to the punitive damages awards, the D.C. Circuit applied "the presumption against retroactive legislation" under *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994). Pet. App. 121a-129a. The court stated: "If the statute operates retroactively but lacks a clear statement of congressional intent to give retroactive effect, then the *Landgraf* presumption controls and the court will not apply the statute to pre-enactment conduct." Pet App. 121a.

Rejecting Petitioners' arguments, the D.C. Circuit held that *Republic of Austria v. Altmann*, 541 U.S. 667 (2004), does not alter this presumption with regard to the § 1605A(c)'s "essentially substantive" punitive damages provision. Pet. App. 122a-123a. The D.C. Circuit reasoned that, "[u]nlike the grant of jurisdiction held retroactive in *Altmann*, the authorization of punitive damages 'adheres to the cause of action' under § 1605A(c), making it 'essentially substantive.'" Pet. App. 123a (citing *Altmann*, 541 U.S. at 695 n.15). The court concluded that the prospect of a 2008 enactment imposing punitive damages upon Sudan for activities a decade earlier "goes to the heart of the concern in *Landgraf* about retroactively penalizing past conduct." Pet. App. 125a.

Applying *Landgraf*'s framework for assessing retroactivity, the D.C. Circuit then examined the text of § 1605A(c), which states that damages for a claim under that cause of action "*may* include . . . punitive damages" (emphasis added). *See* Pet. App. 125a. The court thus found that Congress made no clear

statement authorizing punitive damages for past conduct in § 1605A(c). Pet. App. 125a-126a.

The D.C. Circuit further rejected Petitioners' argument that the combination of § 1605A(c) and its enacting legislation, the 2008 NDAA § 1083(c), provides the requisite clear statement, finding that their argument required "one too many a logical leap." Pet. App. 126a. Lacking a clear statement from Congress of an intent to permit retroactive imposition of punitive damages, the D.C. Circuit accordingly vacated the punitive damages awarded under § 1605A(c).

The D.C. Circuit applied the same reasoning to vacate the punitive damages awarded against Sudan for Petitioners' state-law claims. Pet. App. 128a-129a. The court found that the 2008 enactment of § 1605A implicitly removed § 1606's prohibition on imposing punitive damages on foreign sovereigns for state-law claims arising under § 1605A(a)'s exception to sovereign immunity. But, the court held, "[i]f the express authorization of punitive damages under § 1605A(c) lacks a clear statement of retroactive effect, then the implicit, backdoor lifting of the prohibition against punitive damages in § 1606 for state law claims fares no better." Pet. App. 129a (citing *Landgraf*, 511 U.S. at 259-60).

REASONS FOR DENYING THE PETITION

I. The D.C. Circuit's Decision To Review The Imposition Of Punitive Damages Does Not Warrant This Court's Review

The D.C. Circuit acted well within its discretion in deciding to entertain Sudan's challenge to the imposition of punitive damages. That decision did not conflict with any decision of this Court or of any other court of appeals.

A. The D.C. Circuit's Decision Is Not Inconsistent With *Pioneer* And, Even If It Were, The Inconsistency Would Be Inconsequential Because The Decision Is Sound On Alternative Grounds

The Petition seeks to cast the D.C. Circuit's entertainment of Sudan's challenge as in conflict with *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S. 380 (1993). But the Petition overstates *Pioneer* as establishing a categorical rule prohibiting Rule 60(b)(6) relief where the movant bears any fault whatsoever. As numerous cases make clear, *Pioneer* establishes no such rule.

Furthermore, *Pioneer* applies in the context of a motion for relief from a final judgment under Rule 60(b) of the Federal Rules of Civil Procedure (or an appeal therefrom). *Pioneer* does not have any application on a direct appeal from a default judgment. Here, the D.C. Circuit determined that consideration of Sudan's challenge to punitive damages was warranted as a matter of discretion

both under Rule 60(b)(6) and on Sudan's direct appeal. Pet. App. 117a.

In short, *Pioneer* did not preclude the D.C. Circuit from considering the retroactivity of punitive damages under Rule 60(b)(6), and — even if it did — the D.C. Circuit was nonetheless within its discretion to consider the issue on direct appeal.

1. Contrary to Petitioners' contention, *Pioneer* does not establish a categorical bar on Rule 60(b)(6) vacatur where the movant bears some blame for the default. The issue addressed in *Pioneer*, a case arising from bankruptcy court, was whether "excusable neglect" under the bankruptcy rules could be established only if the neglect was based on actions beyond the control of the movant. In holding that "excusable neglect" in that context was not so limited, the Court analogized to the Federal Rules of Civil Procedure. 507 U.S. at 393-95. The Court observed that relief under Rule 60(b)(1) and 60(b)(6) were "mutually exclusive," and it confirmed that excusable neglect could not form the basis of a Rule 60(b)(6) motion.

Petitioners essentially argue that the D.C. Circuit ignored *Pioneer*'s statement that "[i]f a party is partly to blame for the delay, relief must be sought within one year under subsection (1) and the party's neglect must be excusable." *Pioneer*, 507 U.S. at 393); Pet. 14-15. But Petitioners take that statement from *Pioneer* out of context. That statement merely condemns circumventing Rule 60(b)(1)'s one-year time limit by bringing a motion to vacate *for excusable neglect* under Rule 60(b)(6). The application of that limit was illustrated plainly by the

D.C. Circuit in this case, when the court, relying on *Pioneer*, denied Sudan's motions to vacate two judgments, more than a year old, for plaintiffs in two of the related actions. Pet. App. 144a-145a (denying Sudan's Rule 60(b)(6) motions as to the *Mwila* and *Khaliq* plaintiffs on the grounds that the motions purportedly were based upon "arguments asserting 'excusable neglect'").

Notwithstanding the limitation on "excusable neglect" claims under Rule 60(b)(6), *Pioneer* cannot fairly be read to suggest that 60(b)(6) relief is *foreclosed* simply because of some fault on the part of the movant. Petitioners latch on to a passing comment in *Pioneer* regarding extraordinary circumstances. *See* Pet. 14 (quoting 507 U.S. at 393 ("To justify relief under subsection (6), a party must show 'extraordinary circumstances' suggesting that the party is faultless in the delay.")). But this dictum, in context, merely suggests that Rule 60(b)(6)'s "extraordinary circumstances" must be based on factors other than the fault of the movant.

Indeed, cases before and after *Pioneer* make clear that 60(b)(6) relief is a more flexible concept than Petitioners contend, and courts often will weigh the movant's fault against other potentially "extraordinary" circumstances. *See, e.g.*, *Klapprott v. United States*, 335 U.S. 601, 613-14 (1949) (granting relief under Rule 60(b)(6) where motion did not rest only on "mere allegations of 'excusable neglect'" but also on "other reason[s]" justifying relief); *Gonzalez v. Crosby*, 545 U.S. 524, 537 (2005) (evaluating whether movant demonstrated "extraordinary circumstances" under 60(b)(6) despite "his lack of diligence in

pursuing review"); *Osborne v. Homeside Lending, Inc.*, 379 F.3d 277, 284 (5th Cir. 2004) (in reversing denial of Rule 60(b)(6) motion, weighing equities of the circumstances against movant's blameworthiness); *Ungar v. Palestine Liberation Org.*, 599 F.3d 79, 86 (1st Cir. 2010) (stating that "even for a willful defaulter, relief is not *categorically* barred" under Rule 60(b)(6) in the presence of necessary, extraordinary circumstances); *Michael v. Wetzel*, 570 Fed. App'x 176, 181 (3rd Cir. 2014) (describing a Rule 60(b)(6) movant's willful default as merely a factor that "weighs heavily when considering whether extraordinary circumstances exist"); *United States v. Doe*, 810 F.3d 132, 152 (3d Cir. 2015) (citing *Gonzalez* and describing the movant's "diligence" as an "important factor" in the long-held "flexible, multifactor approach to Rule 60(b)(6) motions"). The D.C. Circuit's decision is not inconsistent.

Moreover, whether the D.C. Circuit's consideration of the punitive damages issue under Rule 60(b)(6) would have been inconsistent with a "faultless" standard is unclear. The D.C. Circuit stated that the "rationale for leniency" under Rule 60(b) "is necessarily weaker when a defendant seeks to excuse its second default." Pet. App. 137a. But the D.C. Circuit's characterization of Sudan as "double-defaulting" does not extend to Sudan's conduct in any of the actions in which plaintiffs were awarded punitive damages (that is, any of the actions before the Court here). As described above, Sudan did not "strategically" enter and exit Petitioners' cases. Rather, Sudan, emerging from existential crises, appeared for the *first* time in Petitioners' cases early enough to timely appeal the judgments. *See*

Klapprott, 335 U.S. at 613-14 (party is not neglectful where circumstances prevent it from acting at all).

In any event, Petitioners did not raise their *Pioneer* argument in the D.C. Circuit. They never argued that fault on the part of Sudan precluded the D.C. Circuit from entertaining Sudan's punitive damages argument under Rule 60(b)(6) or otherwise. Petitioners did not even cite *Pioneer* in their brief to the D.C. Circuit. As such, Petitioners waived any reliance upon *Pioneer* here. *See Dep't of Treasury v. Fed. Labor Relations Auth.*, 494 U.S. 922, 934 (1990) ("As this argument was not raised or considered in the Court of Appeals, we do not reach it."); *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250, 2255 n.2 (2014) (declining to entertain forfeited argument raised in reply brief).

2. Regardless of the propriety of review under Rule 60(b)(6), the D.C. Circuit nevertheless acted within its discretion in entertaining the argument on direct appeal.

The Petition artfully attempts to conflate the standard under Rule 60(b)(6) with the standard for considering forfeited arguments on direct appeal, suggesting that the purported "faultless" requirement of *Pioneer* applies equally to each. Pet. 15 (asserting, without authority, that the standards are "substantially similar"). But the Petition does not and cannot offer any authority for such conflation. In fact, the standards are quite different and for good reason.

Rule 60(b)(6) permits district courts to reopen final judgments even after the passage of a year.

Reading that provision together with Rule 60(b)(1), which permits district courts to reopen final judgments within a year on a showing of a party's "excusable neglect," this Court reasoned in *Pioneer* that Rule 60(b)(6) requires a party to "show 'extraordinary circumstances' suggesting that the party is faultless in delay." 507 U.S. at 393. A high standard is understandable given the movant's delay in excess of a year and the interests of finality.

When a party has taken a timely appeal from a judgment, in contrast, different standards apply to an appellate court considering whether to entertain a forfeited argument. In the circumstances of a direct appeal, appellate courts have considerable discretion to entertain the forfeited argument, without regard to whether the proponent of the argument is "faultless." *See Singleton v. Wulff*, 428 U.S. 106, 121 (1976) ("The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases."); *Hormel v. Helvering*, 312 U.S. 552, 557 (1941) ("There may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below."); *accord City of Newport v. Fact Concerts*, 453 U.S. 247, 254-55 (1981) (finding review of a "novel question" appropriate despite respondent having failed to timely challenge jury instruction on punitive damages). While the cases frequently state that "exceptional" (or "extraordinary") circumstances must

be present before a forfeited argument will be considered on direct appeal, the cases do not hold or even suggest that those "exceptional" circumstances are limited to where the proponent is "faultless." Nor do those cases hold or suggest that the considerations for entertaining arguments on direct appeal are the same as those for granting relief under Rule 60(b)(6), even if the cases use the adjectives "exceptional" or "extraordinary" in both contexts.

Indeed, a court deciding whether to hear an argument for the first time on direct appeal is concerned primarily not with "fault," but with whether the argument constitutes a pure legal question and whether the opposing party has had a chance to advocate its position, either in the court below or in appellate briefing. *See, e.g.*, *Hormel*, 312 U.S. at 556 (explaining that the reason appellate courts do not "ordinarily" consider issues for the first time on appeal is because "parties should have an opportunity to offer evidence"); *Singleton*, 428 U.S. at 120 (noting that even where additional evidence would not aid the court's decision, the opposing party "should have the opportunity to present whatever legal arguments he may have"); *Texas Rural Legal Aid, Inc. v. Legal Servs. Corp.*, 940 F.2d 685, 697 (D.C. Cir. 1991) ("[I]n exercising this discretion we will look to factors such as whether the issue in question has been fully briefed by the parties and whether decision of the issue would be aided by the development of a factual record in the district court."); *cf. NML Capital, Ltd.*, 134 S. Ct. at 2255 n.2 ("We will not revive a forfeited argument simply because the petitioner gestures toward it in its reply brief.").

Here, the D.C. Circuit identified several sound bases for exercising its discretion to review the punitive damages question, including that the issue of retroactivity of punitive damages was a "pure question[] of law," involved "sensitive matters of international relations," had confounded the district court and resulted in disparate outcomes there, implicated billions of dollars, was subject to strong arguments by Sudan, and was likely to confront the district court again in the future. Pet. App. 119a-120a. Given all these considerations, the D.C. Circuit comfortably concluded that entertaining Sudan's argument promoted the interests of justice and the efficient administration of justice notwithstanding the D.C. Circuit's additional conclusion that the district court did not abuse its discretion in finding that it could not conclude Sudan had acted in good faith.

Petitioners argue that the D.C. Circuit's reasoning "would nearly always allow a state sponsor of international terrorism to . . . obtain review of forfeited nonjurisdictional issues." Pet. 17. But, even assuming such a state of affairs is undesirable, the D.C. Circuit's own decision proves this assertion untrue. The D.C. Circuit only entertained "some, but not all," of the nonjurisdictional issues Sudan had raised in its direct appeal. Pet. App. 17a. Thus, the D.C. Circuit's issue-specific exercise of its discretion cannot be read to establish any categorical basis for review of forfeited nonjurisdictional issues in FSIA terrorism cases.

B. The D.C. Circuit's Decision Is Consistent With Decisions Of Other Circuits And This Court

1. Petitioners make a half-hearted attempt to artificially manufacture a circuit split where there is none. Pet. 19.

With respect to Rule 60(b)(6), Petitioners cite two cases, both of which state (one merely in a footnote) that correction of legal errors "without more" would not warrant relief under Rule 60(b)(6). Pet. 19 (citing *Martinez-McBeam v. Gov't of the Virgin Islands*, 562 F.2d 908, 912 (3d Cir. 1977); *Venegas-Hernandez v. Sonolux Records*, 370 F.3d 183, 189 n.4 (1st Cir. 2004)). The D.C. Circuit's decision is not contrary. Indeed, the D.C. Circuit made clear that legal error alone was not the basis for its decision to review the punitive damages, but rather it was motivated by "the size of the awards (totaling $4.3 billion), the presentation of a novel question of constitutional law (retroactivity), and the potential effect on U.S. diplomacy and foreign relations." Pet. App. 119a.

The D.C. Circuit's decision to review Sudan's direct appeal of the district court's punitive damages award is also consistent with the circuit court decisions Petitioners cite. Those decisions permit review of forfeited nonjurisdictional questions for "plain error." *See* Pet. 19 (citing *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1128-29 (10th Cir. 2011); *Robb Evans & Assocs., LLC v. United States*, 850 F.3d 24, 36 (1st Cir. 2017)). Here, the error of the district court's decision to apply retroactive punitive damages was so plain that it was flagged even by the district court itself in its denial of Sudan's motions to vacate. Pet. App. 242a, 245a (noting "the apparent

strength of Sudan's underlying arguments about the unavailability of punitive damages" and stating that *Landgraf*'s presumption against retroactivity "leaves the Court with serious doubt about whether § 1605A(c) should be read as authorizing punitive damages for pre-enactment conduct").

2. Petitioners further contend that the D.C. Circuit improperly afforded Sudan "greater deference" than non-sovereign litigants, in defiance of § 1606 and this Court's decision in *NML Capital*. Pet. 20-21 (citing 28 U.S.C. § 1606 ("As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances"); *NML Capital, Ltd.*, 134 S. Ct. at 2256 (finding that "international-relations consequences" do not warrant special application of discovery rules for foreign sovereigns where the FSIA has not prescribed any alterations to those rules)). Petitioners' argument is unavailing.

First, § 1606 by its terms does not apply to Petitioners' cases, where the basis for immunity was not § 1605 or § 1607, but rather § 1605A.

Second, even if § 1606 did apply here, the D.C. Circuit did not apply any special rule of liability or procedure in its decision to review Sudan's challenge to punitive damages, as Petitioners suggest. Rather, as a *matter of its discretion*, the court properly weighed "sensitive matters of international relations," particularly in the context of multi-billion dollar default judgments, against other relevant considerations. *See* Pet App. 119a-120a.

And third, Petitioners' argument is belied by the fact that the D.C. Circuit actually rejected most of Sudan's arguments on appeal and declined to even entertain some of Sudan's other nonjurisdictional arguments. *See* Pet. App. 17a. Arguably, Sudan was held to an even higher standard than a non-sovereign litigant in the D.C. Circuit's refusal to find that the extreme circumstances of civil war and turmoil in Sudan warranted relief from judgment or constituted excusable neglect. *Cf. Klapprott*, 335 U.S. at 613-14 (finding Rule 60(b) relief appropriate where circumstances prevented movant from acting at all).

Accordingly, contrary to Petitioners' suggestion, the D.C. Circuit's decision to review the punitive damages question is not inconsistent with *NML Capital* or any other decision of this Court.

II. The D.C. Circuit's Decision That Punitive Damages May Not Be Imposed Retroactively Under § 1605A Does Not Warrant This Court's Review

A. The D.C. Circuit's Decision Is Consistent With Decisions Of This Court, Including *Altmann*

In deciding that a 2008 amendment to the FSIA could not be the basis for imposing punitive damages on Sudan for conduct a decade earlier, the D.C. Circuit did not "disregard[]" or "reject[]" this Court's decision in *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), as the Petition contends. Pet. 24-26. In fact, the D.C. Circuit properly considered *Altmann* and correctly concluded that it did not apply. Instead, the D.C. Circuit applied the controlling precedent of *Landgraf v. USI Film Products*, 511 U.S.

244 (1994), to prohibit the retroactive imposition of punitive damages because neither the FSIA nor § 1605A's implementing legislation provide the necessary "clear statement" to indicate congressional intent for retroactivity. Pet. App. 127a.

1. In *Landgraf*, this Court held that a statute that "attaches new legal consequences to events completed before its enactment" is presumed not to apply retroactively unless Congress has otherwise "made clear its intent." 511 U.S. at 270. The Court emphasized that a statute should be read to avoid interpretations that alter the rules of liability or impose sanctions for past conduct, especially punitive damages, which "share key characteristics of criminal sanctions." *Id.* at 281. The Court then declined to give retroactive effect to a statute that contained a punitive damages provision strikingly similar to § 1605A(c). *Compare* 511 U.S. at 252 (analyzing The Civil Rights Act of 1991, § 102, which states, "the complaining party *may* recover . . . punitive damages"), *with* 28 U.S.C. § 1605A(c) ("damages *may* include . . . punitive damages").

Subsequently, a number of Courts of Appeals have found that punitive damages statutes are subject to analysis under the *Landgraf* framework, and indeed have found that those statutes lack the requisite clear statement to permit the imposition of punitive damages for pre-enactment conduct. *See, e.g.*, *Ditullio v. Boehm*, 662 F.3d 1091, 1100 (9th Cir. 2011) (applying *Landgraf* framework and holding that punitive damages under the Trafficking Victims Protection Act are unavailable to punish child sex trafficking that occurred before enactment); *Gross v.*

Weber, 186 F.3d 1089, 1091 (8th Cir. 1999) (applying *Landgraf* framework and holding same for Violence Against Women Act as applied to pre-enactment abuse); *accord Koch v. S.E.C.*, 793 F.3d 147, 158 (D.C. Cir. 2015) (applying *Landgraf* framework and refusing to apply provision of Dodd-Frank Act retroactively because it "enhanced the penalties for a violation of the securities laws").

2. In *Altmann*, this Court considered the *Landgraf* framework and held that the jurisdictional immunity provisions of the FSIA apply to conduct that occurred prior to the FSIA's enactment, notwithstanding the absence of a clear statement to that effect in the statute. *Altmann*, 541 U.S. at 692-96. The Court found retroactive application appropriate because, unlike statutes imposing new liability, "the FSIA merely open[ed] the United States courts to plaintiffs with pre-existing claims against foreign states; the Act neither increase[d] those states' liability for past conduct nor impose[d] new duties with respect to transactions already completed." 541 U.S. at 695, 700 (quoting *Landgraf*, 511 U.S. at 280).

Petitioners' reliance on *Altmann* ignores that *Altmann* did not address the retroactive application of substantive causes of action or penalties under the FSIA, because such provisions were not before the Court at that time. In 2004, when this Court decided *Altmann*, the FSIA did not contain a substantive cause of action like § 1605A(c), but rather was a purely jurisdictional and procedural statute. The Court specifically observed that the FSIA, as of 2004 when it was deciding the case, "does not create or modify any causes of action." *Id.* at 695 n.15.

The 2008 amendments to the FSIA materially altered the statute. In addition to adding the federal cause of action for certain terrorism claims, the 2008 amendments authorized for the first time "a quantum of liability — punitive damages — to which foreign sovereigns were previously immune" under 28 U.S.C. § 1606. Pet. App. 123a. As the D.C. Circuit soundly observed, "[u]nlike the grant of jurisdiction held retroactive in *Altmann*," these changes to the FSIA were "essentially substantive." *Id.*

Faced with analyzing a substantive punitive damages provision of the FSIA, which this Court in *Altmann* did not do, the D.C. Circuit properly applied the *Landgraf* framework, in accord with the decisions of other circuits confronted with assessing retroactivity of similar punitive damages provisions (*see Ditullio*, 662 F.3d at 1100; *Gross*, 186 F.3d at 1091) as well as this Court's precedent (*see Republic of Iraq v. Beaty*, 556 U.S. 848, 864-65 (2009) (recognizing that laws that "modify substantive rights" fall squarely within *Landgraf*'s presumption)). As the D.C. Circuit explained, that "jurisdiction under the FSIA applies retroactively . . . has no bearing upon the question whether the authorization of punitive damages does as well." Pet. App. 122a-123a.

3. Applying *Landgraf*, the D.C. Circuit properly concluded that the 2008 amendments contained no clear statement of retroactive effect for the punitive damages provision in § 1605A(c) or for punitive damages assessed against Sudan under state law. Pet. App.125a-129a. With respect to punitive damages under the federal cause of action, the D.C.

Circuit examined first the text of § 1605A(c), which states only that damages for a claim under that cause of action "*may* include . . . punitive damages" (emphasis added). *See* Pet. App. 125a. The D.C. Circuit then examined the relevant provisions of the enacting legislation that Petitioners rely on here (*see* Pet. 30-31 (citing the 2008 NDAA, § 1083)), and the court found that "no clear statement emerges from the union of § 1083(c) and § 1605A(c)." Pet. App. 127a. And with respect to the state-law punitive damages, looking again to the same provisions Petitioners point to here (§ 1605A and § 1606), the D.C. Circuit reasonably found: "If the express authorization of punitive damages under § 1605A(c) lacks a clear statement of retroactive effect, then the implicit, backdoor lifting of the prohibition against punitive damages in § 1606 for state law claims fares no better." Pet. App. 129a.

Petitioners' extensive reliance upon § 1605A's legislative history (Pet. 32-35) is simply irrelevant to the *Landgraf* inquiry. *See Landgraf*, 511 U.S. at 281 (holding that only an "explicit command" in the statute can authorize punitive damages for pre-enactment conduct); *see also Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result"). Thus, review of the D.C. Circuit's decision in order to examine this history is unwarranted. Moreover, in light of *Landgraf*'s "clear statement" requirement for retroactivity, a court should not presume, based merely on selective legislative history, that Congress intended retroactive application of the provision

without having made that intention express. *See Merck & Co. v. Reynolds*, 559 U.S. 633, 648 (2010) ("We normally assume that, when Congress enacts statutes, it is aware of relevant judicial precedent.").

B. The D.C. Circuit's Decision Neither Creates Nor Deepens Any Conflict Among The Circuits

Petitioners admit that there is no conflict among the Circuits regarding the retroactivity of punitive damages available under the FSIA. Pet. 29 n.10. Sudan agrees that in some instances the absence of a circuit conflict may have little bearing on the appropriateness of certiorari for an FSIA decision by the D.C. Circuit, given that the District of Columbia is the default venue for such actions. *See* 28 U.S.C. § 1391(f); *see also* Conditional Cross-Pet. 16. Like a grant of certiorari on a patent decision by the Federal Circuit, a grant of certiorari on an FSIA decision by the D.C. Circuit may well be warranted without a circuit split if the decision is sufficiently controversial and important. Here, however, additional guidance from this Court is unnecessary, given that the D.C. Circuit's decision is plainly consistent with this Court's decision in *Landgraf*, as well as with the approaches of other circuits confronted with similar questions of retroactivity for punitive damages provisions — each of which applied *Landgraf*. *See Ditullio*, 662 F.3d at 1100; *Gross*, 186 F.3d at 1091. Simply put, the D.C. Circuit's decision here is comfortably in line with prior precedents.

C. The D.C. Circuit's Decision Is Irrelevant To Future § 1605A Cases

Unlike the questions presented in Sudan's related Petition and Conditional Cross-Petition, the question of the retroactive applicability of punitive damages in § 1605A cases is relevant to only a very small subset of those cases, specifically cases against Sudan, Syria, Iran, and North Korea arising from attacks that occurred prior to January 2008. That is because the statute of limitations for § 1605A actions is 10 years. *See* 28 U.S.C. § 1605A(b). Thus, as of January 2018, no new actions may be brought that implicate the question of retroactive applicability of punitive damages arising from the 2008 amendments to the FSIA.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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