No. 17-1406

In the Supreme Court of the United States

REPUBLIC OF SUDAN, ET AL., PETITIONERS

v.

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

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

The Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1330, 1441(d), 1602 *et seq.*, provides that a foreign state and its agencies and instrumentalities are immune from the jurisdiction of federal and state courts in civil actions, subject to limited exceptions. The "[t]errorism exception" provides that a foreign state that has been designated a state sponsor of terrorism is not immune from jurisdiction in certain suits for damages arising out of personal injury or death "caused by an act of * * * extrajudicial killing * * * or the provision of material support or resources for such an act" by a foreign state official, employee, or agent acting within the scope of his office, employment, or agency. 28 U.S.C. 1605A(a)(1) (emphasis omitted). The questions presented are:

1. Whether the term "extrajudicial killing," 28 U.S.C. 1605A(a), is limited to summary executions by state actors.

2. Whether the terrorism exception, 28 U.S.C. 1605A(a)(2)(A)(ii), withdraws foreign sovereign immunity for emotional distress claims brought by family members of victims of the enumerated acts of terror.

3. Whether the cause of action in 28 U.S.C. 1605A(c) provides the exclusive remedy for actions under 28 U.S.C. 1605A(a), precluding foreign-national family members of victims from relying on state causes of action.

4. Whether the statute of limitations in 28 U.S.C. 1605A(b) is jurisdictional in nature and, if not, whether the court of appeals should have considered cross-petitioners' limitations defense.

5. Whether the court of appeals erred in upholding the district court's discretionary decision not to vacate the judgments under Federal Rule of Civil Procedure 60(b).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Treaties, statutes and rules: Page

Miscellaneous—Continued: Page

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the conditional cross-petition for a writ of certiorari should be denied.

STATEMENT

1. a. Under the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1330, 1441(d), 1602 *et seq.*, a foreign state and its agencies and instrumentalities are immune from the jurisdiction of federal and state courts in civil actions unless an exception to immunity applies. 28 U.S.C. 1604. This case concerns the "[t]errorism exception," which withdraws foreign sovereign immunity and establishes jurisdiction in U.S. courts for certain damages claims "for personal injury or death that was

caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act," if the "provision of material support or resources is engaged in by an official, employee, or agent" of the defendant foreign state "while acting within the scope of his or her office, employment, or agency." 28 U.S.C. 1605A(a)(1).

The FSIA defines each of the predicate acts for which the terrorism exception eliminates immunity. "[E]xtrajudicial killing" "ha[s] the meaning given * * * in section 3 of the Torture Victim Protection Act of 1991 [(TVPA), Pub. L. No. 102-256, 106 Stat. 73]," 28 U.S.C. 1605A(h)(7), which provides:

> [T]he term 'extrajudicial killing' means a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.

TVPA § 3, 106 Stat. 73 (28 U.S.C. 1350 note).

A court "shall hear a claim" under the terrorism exception only if certain criteria are met. 28 U.S.C. 1605A(a)(2). As relevant here, the Secretary of State must have designated the defendant foreign sovereign a "state sponsor of terrorism." 28 U.S.C. 1605A(a)(2)(A)(i). And "at the time the act [of terrorism] occurred," "the claimant or the victim" must have been a U.S. national, servicemember, employee, or contractor acting within the scope of his employment. 28 U.S.C. 1605A(a)(2)(A)(ii).

b. Congress originally enacted the terrorism exception in 1996, in response to attacks perpetrated by state

sponsors of terrorism or terrorist organizations affiliated with or materially supported by such foreign states. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221(a), 110 Stat. 1241-1243; see, *e.g.*, H.R. Rep. No. 383, 104th Cong., 1st Sess. 41 (1995) (House Report) (citing, among other "examples of terrorism[]," "the bombing of the U.S. Embassy in Beirut," "the hostage takings of Americans in the Middle East," and "the murder of American tourist Leon Klinghoffer" by the Palestine Liberation Front). In 2004, the Court of Appeals for the District of Columbia Circuit held that the terrorism exception—which was then codified at 28 U.S.C. 1605(a)(7) (2000)—did not provide a federal cause of action against a foreign state, but "merely waive[d] the [jurisdictional] immunity of a foreign state" in lawsuits seeking to recover damages under other sources of law for the enumerated acts of terrorism. *Cicippio-Puleo* v. *Islamic Republic of Iran*, 353 F.3d 1024, 1033 (2004).[1]

Congress responded in 2008, amending the FSIA to create a substantive federal cause of action for the same predicate acts as were included in the original terrorism exception to immunity. National Defense Authorization Act for Fiscal Year 2008 (NDAA), Pub. L. No. 110-181, Div. A, Tit. X, § 1083(a)(1), 122 Stat. 338; see 154 Cong. Rec. 500 (2008) (Sen. Lautenberg) (amendment "fixes

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[1] The court of appeals acknowledged that the Flatow Amendment, 28 U.S.C. 1605 note, "undoubtedly does provide a cause of action against '[a]n official, employee, or agent of a foreign state designated as a state sponsor of terrorism' 'for personal injury or death caused by acts of that official, employee, or agent, for which the courts of the United States may maintain jurisdiction under section 1605(a)(7).'" *Cicippio-Puleo*, 353 F.3d at 1032 (quoting 28 U.S.C. 1605 note) (brackets in original).

th[e] problem" of *Cicippio-Puleo* "by reaffirming the private right of action * * * against the foreign state sponsors of terrorism themselves" for "the horrific acts of terrorist murder and injury committed or supported by them"). The cause of action, 28 U.S.C. 1605A(c), imposes liability on a foreign state sponsor of terrorism for certain claims by U.S. nationals, servicemembers, employees, or contractors, as well as their "legal representative[s]."

When Congress enacted the cause of action in 2008, it provided that if certain criteria were met, existing claims under the prior law "shall * * * be given effect as if the action had originally been filed" under the new federal cause of action. NDAA § 1083(c)(2), 122 Stat. 342-343 (28 U.S.C. 1605A note). Congress further provided that in certain circumstances, plaintiffs could invoke Section 1605A to file new claims that were "[r]elated" to existing ones. § 1083(c)(3), 122 Stat. 343 (28 U.S.C. 1605A note).

As relevant here, the limitations period in Section 1605A(b) provides that "[a]n action may be brought or maintained under this section if the action is commenced, or a related action was commenced under section 1605(a)(7) * * * not later than * * * 10 years after the date on which the cause of action arose." 28 U.S.C. 1605A(b).

2. In 1993, the Secretary of State designated cross-petitioner Republic of Sudan a state sponsor of terrorism based on the Secretary's assessment that Sudan "has repeatedly provided support for acts of international terrorism." 58 Fed. Reg. 52,523 (Oct. 8, 1993). Sudan remains so designated today, along with Iran, North Korea, and Syria. U.S. Dep't of State, *State Sponsors of Terrorism*, https://www.state.gov/j/ct/list/c14151.htm.

On August 7, 1998, members of al Qaeda detonated truck bombs at the U.S. Embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania. Pet. App. 5a.[2] The attacks killed more than 200 people and injured more than 1000 others, including U.S. nationals and foreign-national U.S. government employees and contractors. *Ibid.*

3. a. In October 2001, a group of U.S.-national plaintiffs (the *Owens* plaintiffs, who are among the cross-respondents here) sued cross-petitioners under the prior terrorism exception, 28 U.S.C. 1605(a)(7) (2000). Cross-petitioners defaulted, but later appeared and moved to dismiss. Pet. App. 13a-14a. The district court vacated the default and denied the motion, *Owens* v. *Sudan*, 374 F. Supp. 2d 1, 4, 7-28 (D.D.C. 2005), and the court of appeals affirmed, Pet. App. 151a-178a.

b. While the case was pending in the court of appeals, Congress amended the FSIA, replacing the former terrorism exception to immunity in 28 U.S.C. 1605(a)(7) (2000) with the current exception in Section 1605A(a), and creating the substantive cause of action in Section 1605A(c). Following the court's decision, the *Owens* plaintiffs amended their complaint to assert jurisdiction under the new immunity exception, as well as substantive claims under the new federal cause of action. See NDAA § 1083(c)(2), 122 Stat. 342-343 (28 U.S.C. 1605A note). By this time, cross-petitioners' prior counsel had withdrawn and cross-petitioners had ceased participating in the litigation. See Pet. App. 16a.

c. Additional plaintiffs, who are also cross-respondents here, subsequently filed similar complaints

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[2] All references to the "Pet. App." are to the appendix to the petition for a writ of certiorari in *Republic of Sudan* v. *Owens*, No. 17-1236.

or moved to intervene in *Owens*. See Pet. App. 15a-16a. Those plaintiffs include foreign-national employees and contractors of the U.S. Government who were victims of the attacks, as well as their foreign-national family members.[3] The foreign-national family members are ineligible to invoke the federal cause of action, see 28 U.S.C. 1605A(c); they therefore asserted jurisdiction under Section 1605A(a) and alleged emotional-distress claims under state and foreign law. See Pet. App. 100a, 231a.

4. Following a consolidated evidentiary hearing in which cross-petitioners did not participate, the district court entered default judgments for cross-respondents. Pet. App. 179a-240a.

As relevant here, the district court held that "[t]argeted, large-scale bombings of U.S. embassies or official U.S. government buildings constitute acts of extrajudicial killing[]" under Section 1605A, Pet. App. 223a, and that cross-petitioners provided "material support" to al Qaeda that was "essential" to and legally "caused" the bombings, *id.* at 199a-214a, 226a. The court also held that while foreign-national family members of victims of the bombings could not invoke the cause of action in Section 1605A(c), they could proceed with state-law claims. *Id.* at 231a-232a. The court ultimately awarded approximately $10.2 billion in damages, including approximately $4.3 billion in punitive damages. *Id.* at 17a-18a; see *id.* at 245a-455a.

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[3] These classes of individuals could not have sued under the exception to immunity in Section 1605(a)(7), which provided that "the court shall decline to hear a claim * * * if * * * neither the claimant nor the victim was a national of the United States * * * when the act upon which the claim is based occurred." 28 U.S.C. 1605(a)(7) (2006).

5. Cross-petitioners reappeared, appealed, and sought an indicative ruling on motions for vacatur under Federal Rule of Civil Procedure 60(b). See Fed. R. Civ. P. 62.1. The court of appeals held the appeals in abeyance pending the district court's resolution of the motions to vacate. Pet. App. 460a.

The district court denied the motions, issuing five rulings that are relevant here. Pet. App. 456a-556a. First, the court determined that the embassy bombings were "extrajudicial killing[s]" within the meaning of the FSIA because they were "deliberated killing[s]," which cross-petitioners had not argued were authorized by a court judgment or permissible under international law. *Id.* at 484a-540a. Second, the court held that Section 1605A(a)'s exception to immunity applies to the state-law claims of victims' family members. *Id.* at 535a-540a. Third, the court determined that the FSIA does not otherwise prohibit foreign-national family-member plaintiffs from relying on the exception to sovereign immunity in Section 1605A(a)(1) to bring state-law claims. Pet. App. 543a-546a. Fourth, the court held that Section 1605A(b)'s limitations period is not jurisdictional, *id.* at 501a-504a, and that in any event, the *Khaliq*, *Aliganga*, and *Opati* actions were timely-filed "related actions." *Id.* at 504a-510a. Fifth, the court declined to vacate the judgments in their entirety because cross-petitioners had not demonstrated "excusable neglect" under Federal Rule of Civil Procedure 60(b)(1) (for cases in which cross-petitioners moved to vacate within one year of the default judgment), or "extraordinary circumstances" under Rule 60(b)(6) (for cases in which cross-petitioners missed that deadline). Pet. App. 473a-484a (citation omitted).

6. In a consolidated opinion addressing cross-petitioners' direct appeal and their appeal from the denial of the Rule 60(b) motions, the court of appeals affirmed the judgments in relevant respects. Pet. App. 1a-147a.

First, the court of appeals held that the term "extrajudicial killing" includes "the terrorist bombings" at issue here. Pet. App. 22a-23a. The court rejected cross-petitioners' argument that "extrajudicial killing" is a term of art under international law limited to "summary execution[s]" by state actors, reasoning that "the role of the state in an extrajudicial killing [under international law] appears" unclear. *Id.* at 27a. "More important," the court continued, even if cross-petitioners' interpretation of international law were correct, their "argument would fail because the TVPA does not appear to define an 'extrajudicial killing' coextensive with the meaning of a 'summary execution' (or any similar prohibition)" imposed by international law. *Ibid.* Instead, the TVPA's first sentence prohibits "deliberated killing[s] not authorized by a previous judgment." TVPA § 3, 106 Stat. 73 (28 U.S.C. 1350 note). While the second sentence exempts killings that, "under international law," are "lawfully carried out under the authority of a foreign nation," *ibid.*, the court explained that that reference "highlights" the "omission" of any similar reference in the first sentence's prohibition. Pet. App. 30a.

The court of appeals also noted that the FSIA's definition of "extrajudicial killing" does not cross-reference Section 2 of the TVPA, which limits liability to those who act "under actual or apparent authority, or color of law, of any foreign nation." Pet. App. 30a-32a (internal quotation marks omitted). Instead, the FSIA permits a foreign state to be held liable if its officials,

employees, or agents provide "material support" for predicate acts while acting in the scope of their offices, employment, or agency. Pet. App. 32a, 37a. The court further observed that Congress had apparently approved of decisions awarding compensation to victims of terrorist bombings by authorizing a compensation scheme for certain victims, and reenacting the same predicate acts in Section 1605A following such judgments. *Id.* at 39a-41a; see Victims of Trafficking and Violence Protection Act of 2000 (Violence Protection Act), Pub. L. No. 106-386, § 2002(a)-(b), 114 Stat. 1541-1543.

Second, the court of appeals held that family members of those injured or killed in the bombings could invoke the exception to immunity in Section 1605A(a)(1). The court rejected cross-petitioners' argument that the word "claimant" in Section 1605A(a) should be interpreted as limited to "legal representative," because the latter phrase appears in Section 1605A(c), but not in Section 1605A(a). Pet. App. 100a-103a.

Third, the court of appeals exercised its discretion to reach and reject cross-petitioners' non-jurisdictional argument that the FSIA precludes foreign-national family members from bringing claims under state law. Pet. App. 106a-111a. The court explained that Section 1606, entitled "[e]xtent of liability," merely limits liability "[a]s to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607," 28 U.S.C. 1606, and does not prohibit foreign-national family members from relying on the

exception to sovereign immunity in Section 1605A(a) to bring state-law claims, Pet. App. 109a-111a.[4]

Fourth, the court of appeals held that the limitations period in Section 1605A(b) is not jurisdictional, and that cross-petitioners had forfeited their challenge to the timeliness of the *Khaliq*, *Aliganga*, and *Opati* actions. Pet. App. 92a-100a.

Finally, the court of appeals held that the district court did not abuse its discretion in denying vacatur under Rule 60(b)(1) or (b)(6). Pet. App. 130a-147a. While the court acknowledged that the general policy favoring merits adjudication has particular force with respect to claims against foreign states, it noted that the FSIA expressly authorizes default judgments, see 28 U.S.C. 1608(e). Pet. App. 134a-135a. Considering cross-petitioners' knowledge of the pending actions, their default in *Owens*, their sophisticated legal counsel, and the undisputed potential prejudice to cross-respondents, the court concluded that cross-petitioners had not demonstrated "excusable neglect" or "extraordinary circumstances" warranting vacatur. *Id.* at 135a-147a.

DISCUSSION

None of the questions presented in the conditional cross-petition for a writ of certiorari warrants further review. As to each of the five questions, the court of

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[4] The court certified to the D.C. Court of Appeals the question whether "a claimant alleging emotional distress arising from a terrorist attack that killed or injured a family member [must] have been present at the scene of the attack in order to state a claim for intentional infliction of emotional distress." Pet. App. 117a. The D.C. Court of Appeals has answered that question in the negative, 2018 WL 4496414, and the D.C. Circuit has affirmed the default judgments with respect to the emotional distress claims in relevant part, see 5/21/19 Opinion.

appeals' judgment is correct, and it does not conflict with any decision of this Court or of another court of appeals. Review of the fourth question presented —whether the time bar in Section 1605A(b) is jurisdictional—is unwarranted for the additional reason that the district court exercised its discretion to review the timeliness of the relevant actions and concluded that they were timely. And the fifth question presented challenges only the court of appeals' fact-bound determination that the district court did not abuse its discretion in declining to vacate the judgments under Federal Rule of Civil Procedure 60(b).

I. THE COURT OF APPEALS' DETERMINATION THAT "EXTRAJUDICIAL KILLING" IS NOT LIMITED TO SUMMARY EXECUTIONS BY STATE ACTORS DOES NOT WARRANT REVIEW

A. The court of appeals correctly held that the embassy bombings at issue here constitute "extrajudicial killing[s]" within the plain meaning of the FSIA. Pet. App. 21a-41a.

1. The FSIA defines "extrajudicial killing" by reference to "section 3 of the [TVPA]." 28 U.S.C. 1605A(h)(7). That provision states:

> [T]he term "extrajudicial killing" means a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.

TVPA § 3, 106 Stat. 73 (28 U.S.C. 1350 note). As the court of appeals correctly observed, the embassy bombings were "deliberated killing[s]" in the ordinary sense of those words. *Ibid.*; see Pet. App. 23a. And they were "neither authorized by any court nor by the law of nations." Pet. App. 23a.

2. Cross-petitioners do not dispute that plain-text analysis. See Cross-Pet. 16-22. Instead, they contend (Cross-Pet. 16) that "the term [extrajudicial killing] has a distinct meaning under international law, which Congress intended to adopt, that encompasses [only] a summary execution or targeted assassination by state actors." As the court of appeals explained, however, even if cross-petitioners' interpretation of international law were correct, their "argument would fail." Pet. App. 27a. While the FSIA defines the predicate acts of "aircraft sabotage" and "hostage taking" by reference to international treaties, 28 U.S.C. 1605A(h)(1) and (2), it defines "extrajudicial killing" by reference to a domestic statute—Section 3 of the TVPA. 28 U.S.C. 1605A(h)(7); see Pet. App. 30a. And that provision, by its terms, does not adopt wholesale any international-law definition. Pet. App. 27a.

Cross-petitioners observe (Cross-Pet. 18) that the TVPA's definition of "extrajudicial killing" adopts some language (the "without previous judgment" clause) "verbatim" from Common Article 3 of the Geneva Conventions of 1949. But the particular provision of Common Article 3 on which petitioners rely refers to the "carrying out of executions." Geneva Conventions art. 3. By contrast, the TVPA refers to "deliberated killing[s]" that are "not authorized." § 3, 106 Stat. 73 (28 U.S.C. 1350 note). The latter language "signals th[at] Congress intended the TVPA to reach a broader range of

conduct than just 'summary executions'" by state actors. Pet. App. 28a.

Cross-petitioners cannot derive (Pet. 19-20) a state-action requirement from lower court decisions interpreting the TVPA. Those cases involved *both* Sections 2 and 3 of the TVPA, and did not hold that international law only prohibits "extrajudicial killing" committed by state actors. See *Yousuf* v. *Samantar*, 699 F.3d 763, 777 (4th Cir. 2012), cert. denied, 571 U.S. 1156 (2014); *Kadić* v. *Karadžić*, 70 F.3d 232, 243 (2d Cir. 1995), cert. denied, 518 U.S. 1005 (1996). While Section 2 of the TVPA limits liability to individuals who engage in extrajudicial killing or torture "under actual or apparent authority, or color of law, of any foreign nation," TVPA § 2, 106 Stat. 73 (28 U.S.C. 1350 note) the FSIA's definition of "extrajudicial killing" does not incorporate that provision, see 28 U.S.C. 1605A(h)(7) (cross-referencing TVPA "section 3"). Rather, the terrorism exception addresses state involvement in Section 1605A(a), which limits jurisdiction to cases in which predicate acts—including "material support"—are "engaged in by an official, employee, or agent of [a] foreign state while acting within the scope of his or her office, employment, or agency." 28 U.S.C. 1605A(a)(1). Reading the term "extrajudicial killing" to include an additional, atextual state-action requirement would drain "material support" of much of its practical effect as a predicate act. The terrorism exception "would extend jurisdiction over a sovereign that did not directly commit an extrajudicial killing only if an official of the defendant state materially supported a killing committed by a state actor from a different state," allowing states to "effectively contract out certain terrorist acts." Pet. App. 32a, 38a.

B. The legislative history confirms that "extrajudicial killing" is not limited to summary executions by state actors.

1. In describing the "need for the legislation" that included the original terrorism exception, a House Report cited attacks that were materially supported—but not directly committed—by state actors. See House Report 41 (citing, *inter alia*, "the bombing of the U.S. Embassy in Beirut"); cf. *Bank Markazi* v. *Peterson*, 136 S. Ct. 1310, 1319-1320 & n.6 (2016) (describing FSIA judgments against Iran for attack on Marine Barracks in Beirut).

Subsequent events underscore the point. Five months after Section 1605(a)(7) was enacted, Congress passed the Flatow Amendment, which provides a cause of action against foreign state officials, employees, and agents for the predicate acts identified in the terrorism exception to immunity. 28 U.S.C. 1605 note; see p. 3 n.1, *supra*. Congress enacted the Flatow Amendment in response to a suicide bombing in Israel carried out by a non-state terrorist group supported by Iran, see, *e.g.*, *Flatow* v. *Islamic Republic of Iran*, 999 F. Supp. 1, 6-12 (D.D.C. 1998)—strongly suggesting that Congress understood the term "extrajudicial killing" to cover that type of attack. See Pet. App. 38a-39a. And between the late 1990s and 2008, when the current terrorism exception was enacted, Congress directed payment of the compensatory damages awarded to victims of attacks committed by state-supported terrorists. See Pet. App. 39a; Violence Protection Act § 2002(a)-(b), 114 Stat. 1541-1543.

2. Cross-petitioners' reliance on the legislative history is not persuasive. Cross-petitioners cite (Cross-

Pet. 18-19) a Senate Report stating that the TVPA "incorporates into U.S. law the definition of extrajudicial killing found in customary international law" and that the statutory "definition conforms with" Common Article 3 of the Geneva Conventions. S. Rep. No. 249, 102d Cong., 1st Sess. 6 (1991). But that statement does not demonstrate that Congress intended to use the definition of extrajudicial killing to exclude all killing committed by non-state actors from the TVPA (or the FSIA). This Court has recognized that Common Article 3 applies to armed conflicts involving non-state actors like terrorist groups. See *Hamdan* v. *Rumsfeld*, 548 U.S. 557, 629-632 (2006); cf. *id.* at 687-688 (Thomas, J., dissenting) (stating that al Qaeda's actions, including in the embassy bombings, violate the laws of war).

Cross-petitioners point to statements (Cross-Pet. 20-21) of then-current and former State Department officials criticizing a bill that would have withdrawn immunity for "an act of international terrorism," defined to include certain criminal acts that are "violent or dangerous to human life." S. 825, 103d Cong., 1st Sess. § 1 (1993). Those witnesses objected to the breadth of the proposed (and subsequently rejected) definition; they did not advocate a narrow interpretation of "extrajudicial killing." *The Foreign Sovereign Immunities Act: Hearing before the Subcomm. on Courts and Administrative Practice of the Comm. on the Judiciary*, 103d Cong., 2d Sess. 14, 81-82, 85 (1994). And in any event, their statements cannot override the plain text that Congress adopted.

C. Cross-petitioners' reliance (Pet. Reply Br. 5) on *Jesner* v. *Arab Bank, PLC.*, 138 S. Ct. 1386 (2018), is misplaced. *Jesner* concerned the Alien Tort Statute (ATS), 28 U.S.C. 1350, not the TVPA. While this Court

briefly described the TVPA as "creat[ing] an express cause of action for victims of torture and extrajudicial killing in violation of international law," 138 S. Ct. at 1398, it did not address the notion that "extrajudicial killing" under the FSIA is limited to summary executions by state actors.

II. THE COURT OF APPEALS' DETERMINATION THAT THE FSIA WITHDRAWS FOREIGN SOVEREIGN IMMUNITY FOR CLAIMS BY VICTIMS' FAMILY MEMBERS DOES NOT WARRANT REVIEW

A. The FSIA provides that a court "shall hear a claim" under the terrorism exception if, as relevant here, "the claimant or victim" is a U.S. national, a U.S. servicemember, or a U.S. government employee or contractor acting within the scope of his employment when injured or killed. 28 U.S.C. 1605A(a)(2)(A)(ii). The court of appeals correctly rejected cross-petitioners' argument that the term "claimant" is limited to the "legal representative" of a qualifying victim, which cross-petitioners urged would eliminate jurisdiction for the claims of victims' family members suing on their own behalf. Pet. App. 100a-103a. As the court explained, the "plain meaning" of the word "claimant" is not so limited. *Id.* at 102a. And cross-petitioners' interpretation makes little sense in context: Congress used the term "legal representative" in Section 1605A(c)'s cause of action, but not in Section 1605A(a)'s exception to immunity. Moreover, the court's decision is consistent with the Seventh Circuit's decision in *Leibovitch* v. *Islamic Republic of Iran*, 697 F.3d 561, 570 (2012).

B. Cross-petitioners contend (Cross-Pet. 24) that Section 1605A(a) must "be read in harmony with § 1605A(c)." But the court of appeals correctly observed that the jurisdictional provision and federal

cause of action need not be coterminous. Pet. App. 102a-105a; cf. *FDIC* v. *Meyer*, 510 U.S. 471, 484 (1994) ("[W]hether there has been a waiver of sovereign immunity" and "whether the source of substantive law" permits relief are "two 'analytically distinct' inquiries.") (citation omitted). And while cross-petitioners cite (Cross-Pet. 23-24) two House Reports considering prior versions of the bill that ultimately included Section 1605(a)(7), those proposals did not include the "claimant or victim" language. H.R. No. 934, 103d Cong., 1st Sess. § 1 (1993); H.R. No. 1710, 104th Cong., 1st Sess. § 804(a)(C) (1995). Moreover, one of the Reports stated that "the victim's legal representative *or another person who is a proper claimant*" may sue. H.R. Rep. No. 702, 103d Cong., 2d Sess. 5 (1994) (emphasis added).

III. THE COURT OF APPEALS' HOLDING THAT FOREIGN-NATIONAL FAMILY-MEMBER PLAINTIFFS MAY INVOKE STATE-LAW CAUSES OF ACTION DOES NOT WARRANT REVIEW

A. The court of appeals correctly held that foreign-national family-members may bring state-law actions in reliance on Section 1605A(a)'s exception to immunity. Pet. App. 106a-111a. As just discussed, Section 1605A(a) withdraws foreign sovereign immunity for claims by a "claimant" or "victim" with the requisite relationship to the United States, while Section 1605A(c) permits qualifying victims or their "legal representative[s]" to invoke the federal cause of action. 28 U.S.C. 1605A(a) and (c). Nothing in the text of Section 1605A(c) suggests that its cause of action is exclusive. And had Congress intended Section 1605A(c) to "close[] the door" to foreign-national family members' state-law claims, Pet. 25, there would have been no reason to define the class of plaintiffs eligible to invoke the exception to immunity

more broadly than the class of plaintiffs eligible to invoke the cause of action. See Pet. App. 107a; pp. 16-17, *supra*.

B. Cross-petitioners' contrary argument (Cross-Pet. 25-28) rests on Section 1606, which states in relevant part that "[a]s to any claim" for 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." 28 U.S.C. 1606. Cross-petitioners contend (Cross-Pet. 25-28) that by codifying the current terrorism exception in Section 1605A, without amending Section 1606, Congress foreclosed foreign-national family members from bringing state-law claims pursuant to the immunity exception in Section 1605A(a).

Cross-petitioners' argument fails because Section 1606 speaks only to the "[e]xtent of liability" under Sections 1605 and 1607, 28 U.S.C. 1606, and is silent regarding Section 1605A. Thus, foreign-national family-member plaintiffs relying on the exception to immunity in Section 1605A(a) and state-law causes of action are neither enabled nor hindered by Section 1606. The exception to immunity in Section 1605A(a) is a sufficient basis for jurisdiction. Pet. App. 107a.

Citing *Leibovitz*, *supra*, cross-petitioners suggest (Cross-Pet. 28) that permitting state-law claims would be inconsistent with "Congress's intent to create a uniform system of recovery in terrorism cases under the FSIA." But *Leibovitch* held that permitting plaintiffs to bring state-law claims in reliance on the exception to immunity "survives Congress's creation of a private right of action." 697 F.3d at 570. As the Seventh

Circuit recognized, see *id.* at 569-571, Congress's general intent in creating the federal cause of action cannot overcome the clear statutory language.

Finally, cross-petitioners suggest (Cross-Pet. Reply Br. 6) that the decision below conflicts with *Jesner*, *supra*, by permitting state-law claims of foreign-national family members "who have no connection to the United States." But the terrorism exception ensures such a connection by providing jurisdiction only if the "claimant or victim" is a U.S. national, servicemember, or government employee or contractor injured or killed while acting within the scope of employment. 28 U.S.C. 1605A(a)(2)(A)(ii). Nothing in *Jesner* suggests that connection is inadequate for purposes of the FSIA. *Jesner* concerned the ATS, where the presumption against extraterritorial application of domestic statutes applies, *ibid.*; cross-petitioners have not invoked that presumption.

IV. THE COURT OF APPEALS' DECISION NOT TO ADDRESS CROSS-PETITIONERS' TIMELINESS ARGUMENT DOES NOT WARRANT REVIEW

A. The court of appeals correctly determined that the statute of limitations in Section 1605A(b) is not jurisdictional in nature. Pet. App. 89a-100a.

1. Section 1605A(b) provides that "[a]n action may be brought or maintained under this section if the action is commenced, or a related action was commenced under section 1605(a)(7) * * * not later than," as relevant here, "10 years after the date on which the cause of action arose." 28 U.S.C. 1605A(b). In *United States* v. *Wong*, 135 S. Ct. 1625 (2015), this Court explained that "Congress must do something special, beyond setting an exception-free deadline, to tag a statute of limita-

tions" as jurisdictional. *Id.* at 1632. The court of appeals reasonably concluded that Section 1605A(b) does not meet that standard. Pet. App. 92a-100a.

2. Cross-petitioners rely (Cross-Pet. 31) on the time bar's placement within Section 1605A—"immediately below the jurisdictional provisions of § 1605A(a) but above § 1605A(c)'s right of action." In this statutory context, however, placement of the time bar in a separate subsection than the jurisdictional provision, see 28 U.S.C. 1605A(a), supports the view that the former "is not jurisdictional." *Wong*, 135 S. Ct. at 1633. Nor does the statutory history suggest otherwise. Cross-petitioners point out (Cross-Pet. 31) that the prior terrorism exception was limited by a time bar in former Section 1605(f). But they cannot mean to suggest that *every* provision of the pre-2008 Section 1605—including those governing discovery and the calculation of damages—"was essentially * * * jurisdictional." *Ibid.*; see Pet. App. 98a-99a.

Cross-petitioners contend (Cross-Pet. 31-32) that the decision below contravenes *Rubin* v. *Islamic Republic of Iran*, 138 S. Ct. 816, 823 (2018), which held that a different provision of the FSIA, 28 U.S.C. 1610(g), "does not provide a freestanding basis for parties holding a judgment under § 1605A to attach and execute against the property of a foreign state." 138 S. Ct. at 827. *Rubin* relied on the fact that some provisions of Section 1610 include "express immunity-abrogating" language, while Section 1610(g) does not. *Id.* at 824. But nothing in *Rubin* suggests, as cross-petitioners contend (Cross-Pet. 32), that because Section 1605A's title refers to "jurisdictional immunity," 28 U.S.C. 1605A, *all* of its provisions are jurisdictional. See, *e.g.*, 28 U.S.C. 1605A(e) (providing for the appointment of special masters).

Cross-petitioners observe (Cross-Pet. 33-35) that the court of appeals' determination that the time bar is not jurisdictional has permitted district courts to decide, on a case-specific basis, whether to consider the limitations defenses of defaulting sovereigns. But if a court abuses its discretion in declining to reach a non-jurisdictional defense, that would provide a basis for appeal in that case, not certiorari here.

B. Cross-petitioners further contend (Cross-Pet. 29-30) that even if the statute of limitations is not jurisdictional, the court of appeals erred in declining to consider on direct appeal the timeliness of the *Opati*, *Aliganga*, and *Khaliq* actions. That discretionary determination does not warrant review.

Cross-petitioners do not dispute the general rule that reliance on non-jurisdictional limitations provisions, like other affirmative defenses, may be forfeited. Pet. App. 92a-93a; see, *e.g.*, *Day* v. *McDonough*, 547 U.S. 198, 202-205 (2006). While cross-petitioners note (Cross-Pet. 29-30) that other courts have permitted defaulting defendants to challenge the sufficiency of the complaint on direct appeal, none of those cases addressed whether a court may find a statute of limitations defense forfeited. And this case would be a poor vehicle to review the issue, because the district court considered and rejected cross-petitioners' timeliness challenges. Pet. App. 504a-510a.

V. THE COURT OF APPEALS' DETERMINATION THAT THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DECLINING TO VACATE THE JUDGMENTS DOES NOT WARRANT REVIEW

A. Finally, cross-petitioners seek review (Cross-Pet. 35-39) of the court of appeals' determination that the district court did not abuse its discretion in declining to

vacate the default judgments, on the ground that cross-petitioners failed to demonstrate excusable neglect under Rule 60(b)(1) or extraordinary circumstances under Rule 60(b)(6). See Pet. App. 133a-146a. The court's thorough and fact-bound analysis does not warrant review. In affirming the district court's decision, the court of appeals reasonably emphasized cross-petitioners' litigation-related conduct and the potential prejudice to cross-respondents from vacatur, which cross-petitioners did not contest. *Id.* at 133a-134a. The court further explained that the declaration of Sudan's Ambassador to the United States regarding the "difficult domestic circumstances" during the relevant period did not "show [cross-petitioners were] incapable of maintaining any communication with the district court," particularly given Sudan's prior participation in legal proceedings during its civil war. *Id.* at 141a.

B. Cross-petitioners contend (Cross-Pet. 35-37) that the court of appeals departed from the "strong policy * * * favoring adjudication on the merits in cases against foreign sovereigns." But the court acknowledged that "general policy," while explaining that it is "by itself" insufficient to require vacatur, because the FSIA expressly authorizes default judgments against foreign sovereigns. Pet. App. 135a; see 28 U.S.C. 1608(e). Moreover, the court reasonably explained that reviewing all non-jurisdictional issues would be inappropriate under the circumstances. See generally Pet. App. 130a-144a. And the court adequately addressed and reasonably rejected cross-petitioners' arguments (Cross-Pet. 38-39) regarding domestic conditions in Sudan during the litigation. Pet. App. 140a-141a.

Cross-petitioners incorrectly suggest (Cross-Pet. 36-37) that the decision below conflicts with decisions of

other courts of appeals and disregards the position of the United States regarding vacatur in prior cases. The cases and briefs cross-petitioners cite demonstrate only that courts have significant discretion to decide whether Rule 60(b) relief is warranted given the circumstances of a particular case. Cf. *Magness* v. *Russian Fed'n*, 247 F.3d 609, 619 (5th Cir.) (vacatur warranted where foreign sovereign had not been properly served and sought vacatur within a reasonable time), cert. denied, 534 U.S. 892 (2001); *Amernational Indus., Inc.* v. *Action-Tungsram, Inc.*, 925 F.2d 970, 976-978 (4th Cir.) (vacatur warranted where foreign instrumentality's failure to respond to discovery request did not evince reckless disregard for proceedings or prejudice plaintiffs), cert. denied, 501 U.S. 1233 (1991); *First Fidelity Bank, N.A.* v. *Government of Antigua & Barbuda-Permanent Mission*, 877 F.2d 189, 195-196 (2d Cir. 1989) (vacatur warranted in light of possibility that foreign sovereign was "the innocent victim" of fraud by its agents); *Gregorian* v. *Izvestia*, 871 F.2d 1515, 1525-1526 (9th Cir.) (vacatur warranted where foreign corporation had followed its government's instruction not to appear), cert. denied, 493 U.S. 891 (1989); *Jackson* v. *People's Republic of China*, 794 F.2d 1490, 1494-1497 (11th Cir. 1986) (vacatur warranted where district court properly "[b]alanc[ed] all interests"), cert. denied, 480 U.S. 917 (1987); see also Gov't Amicus Br. 1-2, *Magness*, 247 F.3d 609 (urging that default judgment "be set aside because of improper service of process"); Gov't Amicus Br. 24-29, *FG Hemisphere* v. *Democratic Republic of Congo*, 447 F.3d 835 (D.C. Cir. 2006) (emphasizing that foreign state "acted expeditiously to protect its interests once it was aware" of execution order, as well as lack of prejudice to plaintiff); Gov't Amicus Br. 13-15, *Practical Concepts, Inc.* v. *Republic of Bolivia*, 811 F.2d 1543 (D.C. Cir. 1987) (addressing various factors).

CONCLUSION

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

Respectfully submitted.

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