

No. 17-1406

IN THE
Supreme Court of the United States

REPUBLIC OF SUDAN, MINISTRY OF EXTERNAL
AFFAIRS AND MINISTRY OF THE INTERIOR
OF THE REPUBLIC OF SUDAN,
Cross-Petitioners,

v.

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

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

**SECOND SUPPLEMENTAL BRIEF IN SUPPORT
OF CONDITIONAL CROSS-PETITION
FOR A WRIT OF CERTIORARI**

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May 19, 2020

SECOND SUPPLEMENTAL BRIEF FOR CROSS-PETITIONERS

Yesterday's decision by this Court in *Opati v. Republic of Sudan*, Case No. 17-1268 (May 18, 2020) ("slip op."), underscores the critical importance of this Court deciding whether claims under state law are available in cases brought under the terrorism exception to sovereign immunity, 28 U.S.C. § 1605A(a). Questions 2 and 3 of the Questions Presented in Sudan's Conditional Cross-Petition address the availability of such state-law claims — claims that arise in virtually all terrorism-exception cases and that, in the cases subject to this Cross-Petition alone, implicate damages of over \$7.4 billion against a foreign sovereign.

In *Opati*, this Court vacated the D.C. Circuit's vacatur of punitive damages awarded retroactively under § 1605A(c), the federal cause of action for claims arising under § 1605A. Though the parties had addressed the availability of state-law claims and state-law punitive damages to some extent, the issues fell outside of the Question Presented in that case, and the Court declined to resolve those issues. *See* Brief for Respondents 52-60, *Opati v. Republic of Sudan*, Case No. 17-1268 (Nov. 22, 2019) (state-law claims); *id.* at 60-63 (state-law punitive damages); Reply Brief for Petitioners 17-20, 22-23, *Opati v. Republic of Sudan*, Case No. 17-1268 (Dec. 23, 2019); slip op. 11. The Court recognized, however, that its decision permitting retroactive federal-law punitive damages had an implication for the D.C. Circuit's reasoning as to retroactive state-law punitive damages, and the Court went on to state that the

D.C. Circuit “must also reconsider its decision” on that issue. Slip op. 12.

Whether the availability of retroactive state-law punitive damages is addressed by this Court or by the D.C. Circuit, the threshold question of the availability of *state-law claims at all* must first be resolved. This Court recognized Sudan’s contention that, if the Court were to “take up th[e] question” of retroactive state-law punitive damages in addition to the question of retroactive federal punitive damages, then the Court “should also resolve whether litigants may invoke state law at all, in light of the possibility that §1605A(c) now supplies the exclusive cause of action for claims involving state-sponsored acts of terror.” *Id.* Justice Sotomayor acknowledged the related point during oral argument, questioning whether, if the Court addressed the availability of retroactive state-law punitive damages, it could “avoid reaching” the question of “subject-matter jurisdiction, whether relatives of victims for their independent state tort actions fall within any of these statutes, because they all require a U.S. nexus.” Tr. Oral Arg. at 62, *Opati v. Republic of Sudan*, No. 17-1268 (Feb. 24, 2020).

This Court’s statement in *Opati* that the D.C. Circuit “must” revisit the issue of retroactive state-law punitive damages (slip op. 12) makes paramount the need for this Court to resolve the threshold question of the availability of state-law claims, including both (i) the jurisdictional issue of whether foreign-national family-member plaintiffs with state-law claims can satisfy the required U.S.

nexus under the § 1605A(a) exception to immunity (*see* Question Presented 2), and (ii) the issue of whether § 1605A(c) is an exclusive cause of action for claims under § 1605A (*see* Question Presented 3). The D.C. Circuit expressly decided that family members, including foreign-national family members, may bring state-law claims, and, thus, the issue is ripe for Supreme Court review. Pet. App. 99a-110a. The issue also is recurring: numerous such plaintiffs with no connection to the United States continue to invoke §1605A(a) and assert state- and foreign-law substantive claims in their own right (not as party representatives) against foreign sovereigns in U.S. courts. *E.g.*, *Przewozman v. Islamic Republic of Iran*, No. 19-cv-2601 (D.D.C. Aug. 28, 2019) (ECF No. 6); *Ratemo v. Islamic Republic of Iran*, No. 19-cv-2067 (D.D.C. July 11, 2019) (ECF No. 6); *Henkin v. Islamic Republic of Iran and Syrian Arab Republic*, No. 19-cv-1184 (D.D.C. Apr. 24, 2019) (ECF No. 1); *Jakubowicz v. Islamic Republic of Iran and Syrian Arab Republic*, No. 18-cv-1450 (D.D.C. Jun 19, 2018) (ECF No. 1). Many such cases involve default judgments that will never lead to an opportunity for an authoritative ruling by this Court. *E.g.*, *Fritz v. Islamic Republic of Iran*, No. 15-456 (RDM), 2020 U.S. Dist. LEXIS 64922, at *3 (D.D.C. May 15, 2020); *Barry v. Islamic Republic of Iran*, No. 16-1625 (RC), 2020 U.S. Dist. LEXIS 17674, at *51-53 (D.D.C. Feb. 4, 2020).

In declining to address issues outside of the Question Presented in *Opati*, this Court observed that issues such as the availability of state-law claims were afforded only “limited” treatment and argument in the parties’ briefs, thereby providing the

Court “little assistance” to resolve the issues. *Id.* This Cross-Petition provides this Court with the opportunity to obtain additional assistance from the parties (and amici) to allow the Court to resolve with finality critical and recurring issues under the FSIA — particularly Questions Presented 2 and 3, which are directly implicated by the *Opati* decision.

CONCLUSION

For the foregoing reasons, as well as those stated in Sudan’s Conditional Cross-Petition (Case No. 17-1406), and its Brief for Respondents (at 52-60) in *Opati v. Republic of Sudan*, Case No. 17-1268 (Nov. 22, 2019), this Court should grant the Conditional Cross-Petition.

Respectfully submitted,

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