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.,

Respondents.

On Conditional Cross-Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the D.C. Circuit correctly construed the term "extrajudicial killing," 28 U.S.C. § 1605A(a)(1), in the "terrorism exception" of the Foreign Sovereign Immunities Act ("FSIA") to include terrorist bombings materially supported by state sponsors of terror that result in mass deaths.

2. Whether the D.C. Circuit correctly construed the FSIA term "claimant," 28 U.S.C. § 1605A(a)(2)(A)(ii), to mean "one who brings a claim for relief."

3. Whether the D.C. Circuit correctly construed the 2008 amendments to the FSIA's terrorism exception, which removed the sovereign immunity of state sponsors of terror from suit in "courts of the United States or of the States," as not preempting state-law causes of action against terror states.

4. Whether the D.C. Circuit correctly held that the statute of limitations for the FSIA's terrorism exception, 28 U.S.C. § 1605A(b), is not jurisdictional because it does not "speak in jurisdictional terms." *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 515 (2006).

5. Whether the district court abused its discretion in declining to vacate all of Sudan's default judgments under Rule 60(b)(1) or (6).

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BRIEF IN OPPOSITION

Respondents, who are plaintiffs in the cases *Owens* v. *Republic of Sudan*, No. 01-cv-2244 (D.D.C.), *Mwila* v. *Islamic Republic of Iran*, No. 08-cv-1377 (D.D.C.), and *Khaliq* v. *Republic of Sudan*, No. 10-cv-356 (D.D.C.), respectfully submit that the conditional cross-petition for a writ of certiorari filed by the Republic of Sudan et al. should be denied.

OPINIONS BELOW

The opinion of the court of appeals is reported at 864 F.3d 751 (D.C. Cir. 2017). Pet. App. 1a–146a.[1] The opinion of the district court is reported at 174 F. Supp. 3d 242 (D.D.C. 2016). Pet. App. 147a–248a.

JURISDICTION

The judgment of the court of appeals was entered on July 28, 2017. A petition for rehearing *en banc* was denied on October 3, 2017. Pet. App. 342a–43a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

1. Sudan's conditional cross-petition, like the petitions filed in *Opati* v. *Republic of Sudan*, No. 17-1268 (U.S.) and *Republic of Sudan* v. *Owens*, No. 17-1236 (U.S.), arises from massive terrorist bombings on the U.S. Embassies in Nairobi, Kenya and Dar es Salaam, Tanzania that al Qaeda carried out in 1998. Pet. App. 2a. The explosions killed more than 200 people, including 12 Americans and dozens of other em-

[1] All references to "Pet. App." refer to the Petition Appendix filed in *Opati* v. *Republic of Sudan*, No. 17-1268 (U.S.).

ployees and contractors of the United States, and injured more than a thousand. *Ibid*. As the district court that heard extensive evidence in these consolidated cases found, and as the D.C. Circuit below affirmed, al Qaeda was able carry out those attacks only because the Sudanese government deliberately provided material support to the terror group's planning, recruitment, and training activities. *See id.* at 38a–86a, 212a–27a.

James Owens, a United States citizen injured in the Tanzania attack, sued Sudan in October 2001 under the "terrorism exception" to the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602–1611, for its material support of al Qaeda.[2] In its current form, the FSIA's "[t]errorism exception" abrogates foreign sovereign immunity for and grants jurisdiction over suits "against a foreign state for personal injury or death that was caused by" terrorist acts, including "extrajudicial killing[s]," or was caused by "the provision of material support or resources for such an act."

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[2] Owens was later joined by others injured or killed in the bombings and their immediate family members. Pet. App. 13a. These consolidated proceedings currently consist of seven cases involving eight plaintiff groups: *Owens* v. *Republic of Sudan*, No. 01-cv-2244 (D.D.C.); *Wamai* v. *Republic of Sudan*, No. 08-cv-1349 (D.D.C.); *Amduso* v. *Republic of Sudan*, No. 08-cv-1361 (D.D.C.); *Mwila* v. *Islamic Republic of Iran*, No. 08-cv-1377 (D.D.C.); *Onsongo* v. *Republic of Sudan*, No. 08-cv-1380 (D.D.C.); *Khaliq* v. *Republic of Sudan*, No. 10-cv-356 (D.D.C.); *Opati* v. *Republic of Sudan*, No. 12-cv-1224 (D.D.C.); and the Aliganga Plaintiffs, who intervened in the *Owens* case in 2012, *Owens*, No. 01-cv-2244, ECF No. 233. This Brief in Opposition is filed by the plaintiffs in the *Owens*, *Mwila*, and *Khaliq* cases. The plaintiffs in the *Opati*, *Wamai*, *Amduso*, and *Onsongo* cases also adopt the arguments set forth in this Brief.

28 U.S.C. § 1605A(a)(1). The FSIA gives the term "extrajudicial killing" the meaning that term has "in section 3 of the Torture Victim Protection Act of 1991 (28 U.S.C. 1350 note)," *id.* § 1605A(h)(7), which defines "extrajudicial killing" as "a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court," but states that the term "does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation," Pub. L. No. 102-256, § 3(a), 106 Stat. 73, 73 (codified at 28 U.S.C. § 1350 (note)).

The FSIA's terrorism exception requires that the "claimant or the victim" was, at the time of the terrorist attack, (1) a U.S. "national," (2) "a member of the armed forces," or (3) an "employee" of the U.S. government "or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment." 28 U.S.C. § 1605A(a)(2)(A)(ii).

Actions brought under the terrorism exception are subject to a statute of limitations that allows an action to be brought only if it was commenced—or if a "related action" was commenced under the terrorism exception's similarly worded predecessor, 28 U.S.C. § 1605(a)(7) (2006) (repealed)—by the latter of (1) "10 years after April 24, 1996," or (2) "10 years after the date on which the cause of action arose." *Id.* § 1605A(b). Additionally, a related action may be brought if an "action arising out of the same act or incident" had been "timely commenced," and the related action was commenced not later than 60 days after "the date of the entry of judgment in the original action." National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083(c)(3), 122 Stat. 3, 343 (codified at 28 U.S.C. § 1605A note).

Finally, the FSIA's terrorism exception provides a federal cause of action against state sponsors of terrorism for personal injury or death caused by such an act of terrorism. 28 U.S.C. § 1605A(c). This cause of action is available only to (1) U.S. nationals, (2) members of the armed forces, (3) employees of the U.S. government or of a U.S. contractor who are "acting within the scope of the employee's employment," or (4) "the legal representative of a person described in paragraph (1), (2), or (3)." *Ibid.*

2. After initially defaulting, Sudan appeared in 2004, hired U.S. counsel, and moved to vacate the default judgments and dismiss the case, arguing that it was immune under the FSIA because its support for al Qaeda did not cause plaintiffs' injuries. Pet. App. 11a. The district court vacated the default, but, after allowing Plaintiffs to amend their complaint, denied Sudan's motion to dismiss. *Id*. at 11a–12a. The D.C. Circuit affirmed, holding that Plaintiffs' pleadings demonstrated "a reasonable enough connection between Sudan's interactions with al Qaeda in the early and mid-1990s and the group's attack on the embassies in 1998 to maintain" the jurisdictional causation requirement. *Ibid*. Sudan did not seek this Court's review of that decision.

Instead, facing the prospect of discovery and a trial on the merits, Sudan abandoned the litigation. Pet. App. 13a. The FSIA, however, does not allow a court to enter a judgment against a defaulting foreign state unless a plaintiff first establishes her "right to relief by evidence satisfactory to the court." 28 U.S.C. § 1608(e). Accordingly, in 2010, the district court held a three-day evidentiary hearing to determine whether Sudan provided al Qaeda with material support that

caused respondents' injuries in the 1998 U.S. Embassy bombings. Pet. App. 13a–14a.

3. In 2011, the district court concluded that Sudan had provided al Qaeda with a safe harbor and financial, military, and intelligence assistance that caused the bombings. Pet. App. 14a. In 2012, the court's opinion was translated into Arabic and served on Sudan, *ibid.*, yet Sudan still did not move to reenter the proceedings to dispute or otherwise object to the district court's finding of liability. Seven special masters then spent years assessing the damages of each of the hundreds of individual plaintiffs. *Ibid*. After receiving the special masters' reports, the district court issued final judgments in the cases in 2014. *Id.* at 15a. The next year, Sudan appeared, appealed each of the judgments, and moved the district court to vacate the judgments under Rule 60(b). *Ibid*. The court of appeals held the appeals in abeyance pending the district court's disposition of the Rule 60 motions. *Ibid*.

The district court denied Sudan's motions to vacate the judgments in all respects. The court first held that Sudan's failure to participate in this litigation was not "excusable neglect." Pet. App. 165a–76a. Sudan was absent for nearly five years, and this "extraordinary amount of delay" was not justified given that "Sudan was well aware of these cases and yet did nothing." *Id.* at 167a. "The idea that the relevant Sudanese officials could not find the opportunity over a period of *years* to send so much as a single letter or email communicating Sudan's desire but inability to participate in these cases is, quite literally, incredible." *Id.* at 169a. The court thus was "by no means persuaded that Sudan has behaved in good faith," and concluded that it was "more likely that Sudan chose"

deliberately "to ignore these cases over the years, changing course only when the final judgments saddled it with massive liability." *Id.* at 171a–72a. Moreover, the court concluded, "vacatur would pose a real risk of prejudice to the plaintiffs." *Id.* at 172a.

Sudan next argued that the court lacked jurisdiction over the cases because the term "extrajudicial killings" in 28 U.S.C. § 1605A(a) covers only killings by state actors. Pet. App. 176a–92a. The district court rejected this argument, holding that there was no such limitation either in the statutory text of Section 1605A(a), *id*. at 178a–79a, or in Section 3(a) of the TVPA, *id.* at 180a, or under international law, *id.* at 181a–82a n.5.

Also unconvincing were Sudan's statute-of-limitations arguments. The district court first held that the limitations provision in Section 1605A(b) is not jurisdictional—and therefore not subject to vacatur under Rule 60(b)(4). Pet. App. 193a–96a. The court then concluded in the alternative that, even if the provision were jurisdictional, all of the claims were timely because even those that were filed well after the terrorism exception's enactment in 2008 still "ar[ose] out of the same act or incident" as the claims in the original *Owens* proceeding. *Id.* at 196a–201a.

The district court also rejected Sudan's argument that the judgments were void for lack of jurisdiction because respondents had not established the causation necessary for jurisdiction to attach under Section 1605A(a). After carefully reviewing the evidence for a second time, the court concluded that the evidence established that Sudan caused respondents' injuries. Pet. App. 202a–27a.

Sudan then argued that the immediate family members of those physically injured or killed in the bombings could not pursue claims. The FSIA terrorism exception grants jurisdiction when "the claimant or the victim" is a U.S. national, a member of the armed forces, or a U.S. government employee. 28 U.S.C. § 1605A(a)(2)(A)(ii). Sudan argued that the word "claimant" does not mean "any claimant," but rather means "the legal representative of the victim"; the district court dismissed this argument as well. Pet. App. 227a–32a. Among other reasons, the court noted that Congress used the term "legal representative" later in the same section, *see* 28 U.S.C. § 1605A(c)(4), demonstrating that Congress knew how to use the more restrictive term when it wanted to. Pet. App. 231a.

Finally, Sudan argued that Section 1606 of the FSIA—which defines the extent of foreign sovereigns' liability under the FSIA by, for example, forbidding punitive damages—is the exclusive gateway to state-law causes of action against foreign states. Sudan asserted that foreign states are immune from state-law claims unless Section 1606 authorizes the claims and that, because Section 1606 refers to Sections 1605 and 1607 but not 1605A, state-law claims are unavailable to victims of terrorism. The district court rejected this argument. Pet. App. 232a–40a. First, the court noted that this nonjurisdictional argument does not qualify as an extraordinary circumstance that would justify review under Rule 60(b)(6). *Id.* at 233a–34a. At any rate, the court concluded, nothing in Section 1606 grants access to substantive law; in fact, it does the opposite: it limits liability. *Id*. at 236a. Therefore, there is no need for plaintiffs to satisfy Section 1606's terms before pursuing a state-law cause of action.

4. Sudan then reactivated its appeals, consolidating its challenges to the district court's denial of Rule 60 relief with its appeals of the underlying judgments. The D.C. Circuit unanimously held that the district court's "findings established both jurisdiction over and substantive liability for claims against Sudan." Pet. App. 14a.

First, the D.C. Circuit affirmed the district court's conclusion that the grant of jurisdiction in the FSIA's terrorism exception over claims for death caused by an "extrajudicial killing" did not contain a "state actor" requirement. Pet. App. 19a–38a. The text of Section 3(a) of the TVPA, which defines "extrajudicial killing," does not import an international law definition, *id.* at 23a, and in any event the international-law definition of "extrajudicial killing" itself does not seem to contain a state-actor requirement, *id.* at 24a–28a.

The court of appeals then engaged in a lengthy examination of Sudan's attack on the sufficiency of the evidence. Pet. App. 38a–86a. The court of appeals affirmed the district court, concluding that "the plaintiffs have offered sufficient admissible evidence that establishes that Sudan's material support of al Qaeda proximately caused the 1998 embassy bombings." *Id.* at 86a.

The D.C. Circuit turned down Sudan's argument regarding statute of limitations, holding that there is no reason to think that the provision is jurisdictional, and that Sudan's limitations arguments were therefore waived. Pet. App. 87a–98a.

The court of appeals also affirmed the district court in denying Sudan's argument regarding who may bring a claim. Pet. App. 99a–105a. Section 1605A(a)(2)(A)(ii) grants courts jurisdiction only when

"the claimant or the victim" is a U.S. national, a member of the armed forces, or an employee or contractor of the United States acting within the scope of employment. The D.C. Circuit held that there was no reason to give the term "claimant" any meaning other than the "plain" one: "someone who brings a claim for relief." *Id.* at 101a. Therefore, immediate family members of victims who are themselves U.S. nationals, employees, or contractors may bring claims under the FSIA terrorism exception. *Ibid*.

Equally unavailing was Sudan's argument that no provision of the FSIA affirmatively allows plaintiffs to pursue state-law causes of action under the terrorism exception. Pet. App. 105a–10a. The court of appeals exercised its discretion to reach this nonjurisdictional issue in order to announce the rule for all cases brought in the D.C. Circuit: There is nothing preventing plaintiffs from pursuing state-law causes of action. *Id*. at 107a. Although Sudan pointed to Section 1606 of the FSIA, the court held that that provision "simply limits the liability of a foreign state"; it does not "create" that liability. *Id.* at 108a.

Finally, the D.C. Circuit held that the district court did not abuse its discretion in declining to vacate the default judgments under Rule 60(b)(1) and (6). Pet. App. 131a–45a. In particular, the district court's "unchallenged" finding that vacating the judgments "would pose a real risk of prejudice to the plaintiffs," the court of appeals concluded, "makes it difficult to imagine Sudan could prevail" even if its arguments were meritorious. *Id.* at 132a–33a. And they were not meritorious because Sudan was a "double-defaulting sovereign" (*id.* at 137a) that never even tried to communicate to the court its purported difficulties in participating in the litigation, *id.* at 142a.

Sudan's petition for en banc rehearing was denied without recorded dissent. Pet. App. 342a–43a. On March 2, 2018, Sudan petitioned this Court for a writ of certiorari, contesting the district court's and court of appeals' conclusions that plaintiffs had established by sufficient, admissible evidence that Sudan materially caused the U.S. Embassy bombings. *Republic of Sudan* v. *Owens*, No. 17-1236 (U.S.). On the same day, the *Opati*, *Wamai*, *Onsongo*, and *Amduso* plaintiff groups filed a petition for a writ of certiorari, challenging the D.C. Circuit's decision to vacate the punitive damages in the case. *Opati* v. *Republic of Sudan*, No. 17-1268 (U.S.). In response to that petition, Sudan filed a conditional cross-petition for a writ of certiorari. *Republic of Sudan* v. *Opati*, No. 17-1406 (U.S.).[3]

REASONS FOR DENYING THE PETITION

The five questions Sudan presents in its Conditional Cross-Petition are literally also-rans—questions that did not make the cut for Sudan's primary petition in docket number 17-1236 (U.S.). It is easy to see why: Sudan here alleges only that the D.C. Circuit erred in its interpretation of straightforward statutory terms or that the courts below exercised their discretion contrary to Sudan's wishes. Sudan cannot point to any division among the courts of appeals on any of the five questions. And contrary to Sudan's

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[3] Respondents represented in this Brief in Opposition are plaintiffs in the cases *Owens* v. *Republic of Sudan*, No. 01-cv-2244 (D.D.C.), *Mwila* v. *Islamic Republic of Iran*, No. 08-cv-1377 (D.D.C.), and *Khaliq* v. *Republic of Sudan*, No. 10-cv-356 (D.D.C.). None of them was awarded punitive damages. They therefore take no position with respect to the petition in *Opati* v. *Republic of Sudan*, No. 17-1268 (U.S.), which concerns the D.C. Circuit's vacatur of the district court's punitive damages awards.

suggestion (Cross-Pet. 15), this case does not present any "unique"—much less "the only"—"opportunity" to review issues arising in cases brought under the FSIA's terrorism exception. Suits against terror states are not confined to the D.C. Circuit. The provision granting the District Court of the District of Columbia venue over cases "brought against a foreign state" is not exclusive, *see* 28 U.S.C. § 1391(f)(4), and, as a result, suits brought under the FSIA's terror exception are reviewed by courts of appeals throughout the country, *see*, *e.g.*, *Vera* v. *Republic of Cuba*, 867 F.3d 310, 317 (2d Cir. 2017); *Leibovitch* v. *Islamic Republic of Iran*, 697 F.3d 561 (7th Cir. 2012); *Rux* v. *Republic of Sudan*, 461 F.3d 461 (4th Cir. 2006).

Sudan's questions presented thus are merely pleas for this Court to address purported errors in the D.C. Circuit's decision. Indeed, the Conditional Cross-Petition by its own terms asks this Court to "[c]orrect" the decision. Cross-Pet. 15, 22, 25, 29, 25. That would be a manifestly insufficient reason for this Court to grant certiorari review in any case, but especially so here, given that the D.C. Circuit's unanimous opinion was plainly correct on all five issues that Sudan here challenges. Sudan's conditional cross-petition should be denied.

I. THE TERM "EXTRAJUDICIAL KILLING" IN SECTION 1605A INCLUDES TERRORIST BOMBINGS THAT PRODUCE MASS KILLINGS.

The FSIA's "[t]errorism exception" confers jurisdiction over claims for "injury or death" that was "caused by an act of . . . extrajudicial killing" or by a foreign state's "provision of material support" for that act. 28 U.S.C. § 1605A(a)(1). Section 1605A(h)(7) gives the term "extrajudicial killing" the definition set

forth in Section 3(a) of the Torture Victim Protection Act of 1991 ("TVPA"):

> 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.

Pub. L. No. 102-256, § 3(a), 106 Stat. 73, 73 (codified at 28 U.S.C. § 1350 note).

Sudan argues that courts should read into the term "extrajudicial killing" an extratextual limitation: that such an act can be committed only by a state actor. In other words, Sudan believes that the "[t]errorism exception" should not apply to terrorist killings. The D.C. Circuit held that there was no textual, structural, or historical reason to limit the term "extrajudicial killing," as incorporated by the FSIA, to killings that were undertaken by a state actor. Pet. App. 19a–38a. And Sudan points to no other court that has addressed—much less adopted—its novel argument. This kind of infrequently raised, splitless question does not warrant this Court's review.

Moreover, the D.C. Circuit's decision is clearly correct. Contrary to Sudan's contention, (Cross-Pet. 16), international law does not limit "extrajudicial killings" to those committed by state actors. In fact, as the D.C. Circuit noted, Pet. App. 23a–24a, the international law materials suggest just the opposite. The U.N. Terminology Database includes "[k]illings committed by vigilante groups" as a form of "extrajudicial killing." *Ibid.* The Geneva Convention prohibits

"murder of all kinds." Geneva Convention, art. 3(1)(a), Aug. 12, 1949, 6 U.S.T. 3114. And the U.N. Special Rapporteur on Summary or Arbitrary Executions devotes a chapter of its Handbook on Extrajudicial Killings precisely to "killings by non-State actors." Project on Extrajudicial Executions, *U.N. Special Rapporteur on Extrajudicial Executions Handbook*, ¶ 45, http://www.extrajudicialexecutions.org/application/media/Handbook%20Chapter%203-Responsibility%20of%20states%20for%20non-state%20killings.pdf (last visited May 7, 2018).

In addition, the TVPA's definition of "extrajudicial killing" is not circumscribed by the international-law understanding of that phrase, as the D.C. Circuit recognized. *See* Pet. App. 24a–28a. The text of Section 3(a) certainly does not state that it is adopting an international-law definition. Indeed, if the term "extrajudicial killings" were limited to "summary executions" (as Sudan contends), the second sentence of Section 3(a) of the TVPA—making clear that the term does not include any "killing that, under international law, is lawfully carried out under the authority of a foreign nation"—would be superfluous because "a 'summary execution' always violates international law." *Id.* at 27a. And the use of the term "international law" in the second sentence of Section 3(a) "highlights its omission in the first sentence," which is the part of the statute that actually provides the definition of "extrajudicial killing." *Ibid*. Congress knows how to reference international law when it wants to. *See*, *e.g.*, 28 U.S.C. § 1605(a)(3) (creating jurisdiction when "rights in property [are] taken in violation of international law"); *see also Bolivarian Republic of Venezuela* v. *Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1319 (2017). Its failure to do so here is significant.

Sudan tries to manufacture a circuit split on the issue, Cross-Pet. 19, but the cases it cites do not involve the FSIA. Instead, the cases concern other statutes, such as a provision of the TVPA that the FSIA's terrorism exception did not adopt: Section 2(a), which establishes liability for those acting under the "authority" or "color of law" of a "foreign nation." For instance, Sudan points to dictum in a Second Circuit case. Cross-Pet. 19 (quoting *Kadić* v. *Karadžić*, 70 F.3d 232, 243 (2d Cir. 1995) ("[S]ummary execution[s] . . . are proscribed by international law only when committed by state officials or under color of law.")). But that case involved the Alien Tort Claims Act—an Act that explicitly incorporates "the law of nations"—and Section 2 of the TVPA itself, not the FSIA. *See Kadić*, 70 F.3d at 244 (citing Section 2 of the TVPA); *see also Yousuf* v. *Samantar*, 699 F.3d 763, 777 (4th Cir. 2012) (same). Neither of these cases has anything to say about the meaning of "extrajudicial killing" when it is isolated from Section 2 of the TVPA and imported into the FSIA. *See Kadić*, 70 F.3d at 245 (noting that Section 2(a) of the TVPA "provides a cause of action," while Section 3 "defines the term[ ] 'extrajudicial killing'"); *see also* Pet. App. 31a.

Moreover, "Congress is presumed to be aware of" settled "judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Forest Grove Sch. Dist.* v. *T.A.*, 557 U.S. 230, 239–40 (2009). Numerous cases brought under the predecessor to Section 1605A (28 U.S.C. § 1605(a)(7) (2006) (repealed)) were premised on terrorist bombings or other killings by non-state actors, and courts held that those claims were redressable under the FSIA. *See*, *e.g.*, *Flatow* v. *Islamic Republic of Iran*, 999 F. Supp. 1 (D.D.C. 1998). In response, Congress did not limit the statute, but reinforced it.

See Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 2002(a)(2)(A), 114 Stat. 1464, 1542 (allowing payments to claimants such as *Flatow*). Congress then reenacted the jurisdictional provision and expanded the relief available to terrorism victims by adding a federal cause of action. 28 U.S.C. § 1605A(a), (c). Sudan's strained interpretation of "extrajudicial killing" as precluding relief for these same sorts of terrorist acts is both atextual and ahistorical.

Finally, as the Court of Appeals recognized, Sudan's interpretation of "extrajudicial killing" would have absurd results. Under Sudan's theory, the only way that a foreign sovereign could provide "material support" for an extrajudicial killing (28 U.S.C. § 1605A(a)(1)) would be to materially support "a killing committed by a state actor from a *different state*," thus reducing the "material support" provision to practically nothing. *See* Pet. App. 29a (emphasis added). Congress did not enact the "material support" provision for naught.

Sudan's argument that the term "extrajudicial killing" includes only killings committed by state actors—as opposed to materially supported by state actors—is meritless and does not warrant this Court's review.

II. THE D.C. CIRCUIT CORRECTLY HELD THAT SECTION 1605A CREATES JURISDICTION FOR CLAIMS OF FAMILY MEMBERS OF U.S. NATIONALS, EMPLOYEES, AND CONTRACTORS.

The FSIA's terrorism exception gives courts jurisdiction and withdraws immunity "if . . . the claimant or the victim" was a national or employee of the United States. 28 U.S.C. § 1605A(a)(2)(A)(ii). Sudan

seeks to limit the word "claimant" to "the legal representative of" victims and thereby to exclude the victims' immediate family members from recovery. Cross-Pet. 23. But courts are united against Sudan's reading, and no wonder: Sudan's argument contradicts the statutory text. As the D.C. Circuit held, a "claimant" is "simply someone who brings a claim for relief." Pet. App. 101a. That holding does not warrant review.

Every court to consider Sudan's reading of Section 1605A—or its similarly worded predecessor, Section 1605(a)(7), which left immunity in place only if "neither the claimant nor the victim was a national of the United States"—has rejected it. "Denying jurisdiction over family members' claims for American victims would require" the court "to ignore the disjunctive structure of" Section 1605A's words "the claimant *or* the victim." *Leibovitch*, 697 F.3d at 569–70; *see Hurst* v. *Socialist People's Libyan Arab Jamahiriya*, 474 F. Supp. 2d 19, 26 n.10 (D.D.C. 2007) ("Section 1605(a)(7) only requires that the claimant or the victim be a U.S. citizen, not both."); *La Réunion Aérienne* v. *Socialist People's Libyan Arab Jamahiriya*, 477 F. Supp. 2d 131, 135 (D.D.C. 2007), *aff'd in part, appeal dismissed in part,* 533 F.3d 837 (D.C. Cir. 2008) ("[The] FSIA explicitly contemplates third-party claims for money damages for personal injury or death by allowing non-victim claimants to bring suit.") (ellipsis omitted).

Had Congress meant to limit the waiver only to a victim's "legal representative," it could have done so. As the D.C. Circuit noted, Pet. App. 100a–01a, Congress did specify elsewhere in a simultaneously enacted part of the same statute that only victims or their "legal representative[s]" would have a federal

cause of action. 28 U.S.C. § 1605A(c)(4). But Congress did not use this term in Section 1605A(a) where it set forth the conditions on *jurisdiction*. When Congress uses different language in neighboring statutory provisions, courts presume that the distinction is "intentiona[l] and purposeful[l]." *Russello* v. *United States*, 464 U.S. 16, 23 (1983).

Sudan argues that the jurisdictional provision in Section 1605A(a) and the cause of action in Section 1605A(c) must be read "in harmony." Cross-Pet. 24. But as this Court recognized in *Helmerich*, the FSIA frequently creates exceptions to jurisdictional immunity that "do[ ] not overlap" with the cause of action. 137 S. Ct. at 1324; *see* Pet. App. 102a–03a (giving other examples). And even in other statutory contexts, the question "whether there has been a waiver of sovereign immunity" and the question "whether the source of substantive law upon which the claimant relies provides an avenue for relief" are "two analytically distinct inquiries." *FDIC* v. *Meyer*, 510 U.S. 471, 484 (1994). Sudan's reading blurs that distinction and ignores Congress's chosen language.

Sudan's reliance on the legislative history (Cross-Pet. 23–24) is also misplaced. The 1994 House Report only undermines Sudan's position, as it states that a "victim's legal representative *or another person who is a proper claimant*" would be able to bring "an action for wrongful death." H.R. Rep. No. 103-702, at 5 (1994) (emphasis added). This statement assumes that someone besides the victim's "legal representative" may be "a proper claimant." Other legislative history is consistent with this position, too. *See*, *e.g.*, H.R. Rep. No. 105-48, at 2 (1997) ("The intent of the drafters was that a family should have the benefit of these provisions if either the victim of the act or the

survivor who brings the claim is an American national.").

When Congress enacted Section 1605A, it did so in the face of a decade of precedent allowing family-members of victims to bring claims under the predecessor provision, 28 U.S.C. § 1605(a)(7) (2006) (repealed). *See*, *e.g.*, *Cicippio-Puleo* v. *Islamic Republic of Iran*, 353 F.3d 1024, 1030 (D.C. Cir. 2004) (Section 1605(a)(7) "clear[ly]" conferred jurisdiction over claims brought by family members of terror victims). "If a word or phrase has been . . . given a uniform interpretation by inferior courts . . . , a later version of that act perpetuating the wording is presumed to carry forward that interpretation." *Tex. Dep't of Housing & Cmty. Affairs* v. *Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2520 (2015). That is just what happened here, and the D.C. Circuit was right to give the term "claimant" its plain meaning. Sudan's second question presented is unworthy of this Court's review.

III. THE D.C. CIRCUIT CORRECTLY HELD THAT STATE-LAW CAUSES OF ACTION ARE NOT PREEMPTED.

Sudan's third question presented is similarly splitless and mistaken. Sudan contends that Section 1605A eliminated the longstanding ability of claimants to bring state-law causes of action against terror states. As an initial matter, because this argument is not jurisdictional, Sudan "forfeited [it] by failing to appear in the district court." Pet. App. 107a. But the D.C. Circuit nonetheless decided to exercise its "discretion to reach the question" in order to inform the litigants of "terrorism exception [cases that] are filed in th[at] circuit" that Sudan's "convoluted argument" is wrong. *Id.* at 107a–09a.

Section 1606 of the FSIA limits the "[e]xtent of liability" for foreign sovereigns in cases brought under Sections 1605 or 1607. For instance, the provision forbids "punitive damages" for those suits. 28 U.S.C. § 1606. As Sudan concedes, Section 1606 conspicuously does not mention Section 1605A, and therefore does not restrict punitive damages under the terrorism exception, as the terrorism exception itself confirms. *See id.* § 1605A(c) (allowing "punitive damages"). Indeed, because Section 1605A(c) affirmatively allows punitive damages, it would have been absurd to expect claims brought pursuant to Section 1605A to be channeled through Section 1606.

Although Section 1606 is a liability *limiting* provision, Sudan tries to twist it into a liability *authorizing* provision. Sudan argues that Section 1606 is the sole "gateway" through which FSIA plaintiffs can access state-law causes of action. Cross-Pet. 26. There is no support for this position and it is contrary to the unanimous views of the courts of appeal that have heard terrorism litigation following the enactment of Section 1605A.

It is Section 1605A(a)'s exception to Sudan's foreign sovereign immunity—not Section 1606—that allows plaintiffs to bring suit. Once Sudan's immunity is lifted, nothing prevents plaintiffs from bringing any colorable claim, whether under federal or state law. Even before the FSIA was enacted and the supposed "gateway" was opened, courts had the power to hear state-law suits against foreign sovereigns. *See*, *e.g.*, *Nat'l City Bank of N.Y.* v. *Republic of China*, 348 U.S. 356 (1955) (allowing defendant to raise counterclaims arising under state law against a sovereign plaintiff); Pet. App. 105a–06a. Courts did not need Section 1606

before its enactment to hear state-law claims, and they do not need it today.

Courts have uniformly adopted this conclusion. Section 1605A "did not displace a claimant's ability to pursue claims under applicable state or foreign law upon the waiver of sovereign immunity," even though it also "created a new cause of action." *Leibovitch*, 697 F.3d at 572; *see Estate of Doe* v. *Islamic Republic of Iran*, 808 F. Supp. 2d 1, 20 (D.D.C. 2011) (same). "[T]hose plaintiffs who are foreign national family members of victims of . . . terrorist attacks . . . may continue to pursue claims under applicable state" law. *Leibovitch*, 697 F.3d at 572.

Sudan also suggests that the enactment of the federal cause of action in Section 1605A(c) blocks plaintiffs from pursuing any other cause of action. Cross-Pet. 27. Again, there is nothing to support Sudan's reading. No part of Section 1605A(c) suggests that it is an exclusive remedy or that it preempts state-law claims. Thus Sudan must resort to an implied preemption theory. But, in evaluating claims of implied preemption, this Court "presume[s] that Congress does not cavalierly pre-empt state-law causes of action," *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485 (1996), particularly in "a field which the States have traditionally occupied," *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). In such areas, this Court "start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Medtronic*, 518 U.S. at 485. There is nothing in the text, structure, or history of Section 1605A to overcome this presumption.

The D.C. Circuit correctly interpreted 1605A(a)'s exception from foreign sovereign immunity to permit

the plaintiffs to bring a claim under state law. Section 1606 has no bearing on courts' jurisdiction. The court of appeals did not err and its holding is consistent with that of the other courts to address the question. There is no cause for this Court to review this question.

IV. THE D.C. CIRCUIT CORRECTLY REJECTED SUDAN'S FORFEITED ARGUMENT THAT RESPONDENTS' CLAIMS ARE TIME-BARRED.

Sudan also asks this Court to reverse the D.C. Circuit's discretionary decision not to reach Sudan's forfeited statute-of-limitations argument. Contrary to Sudan's contention (Cross-Pet. 30–31), the D.C. Circuit correctly concluded that the FSIA's statute of limitations is not jurisdictional, and Sudan can point to no circuit split or other reason for this Court to review that decision. And in any event, resolution of that question on the merits would make no difference in the outcome here because the district court *did* reach the question on the merits and rejected it. *See* Pet. App. 196a–201a.

The statute of limitations for the FSIA's terrorism exception states:

> An 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) (before the date of the enactment of this section) . . . not later than the latter of—
>
> (1) 10 years after April 24, 1996; or
>
> (2) 10 years after the date on which the cause of action arose.

28 U.S.C. § 1605A(b). Sudan argues that the court of appeals erred in holding that this provision is not jurisdictional. Cross-Pet. 30. But the D.C. Circuit's holding is a straightforward application of this Court's precedent: "[M]ost time bars are nonjurisdictional," because "filing deadlines" are "quintessential claim-processing rules" that "do not deprive a court of authority to hear a case" unless "Congress has clearly stated as much." *United States* v. *Wong*, 135 S. Ct. 1625, 1632 (2015). Unless a statute "speak[s] in jurisdictional terms" by restricting "a court's power" to hear a claim, the limitation provision is not jurisdictional. *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 514–15 (2006). This is true "even when the time limit is important (most are) and even when it is framed in mandatory terms (again, most are)." *Wong*, 135 S. Ct. at 1632.

There is nothing in Section 1605A(b) to suggest that the limitations period is jurisdictional. As the court of appeals observed, Section 1605A(b) contains no reference to the "court's power to hear a case," and nothing in the statute "conditions its jurisdictional grant on compliance with [the] statute of limitations." Pet. App. 92a. Because Section 1605A(b) neither "expressly refer[s] to subject-matter jurisdiction" nor "speak[s] in jurisdictional terms," it is not jurisdictional. *Musacchio* v. *United States*, 136 S. Ct. 709, 717 (2016).

Sudan argues that because Section 1605A(b) follows the jurisdictional grant in Section 1605A(a), it too must be jurisdictional. Cross-Pet. 31. To the contrary, "Congress's separation of a filing deadline" in one subsection "from a jurisdictional grant" in another "indicates that the time bar is *not* jurisdictional." *Wong*, 135 S. Ct. at 1633 (emphasis added); *see* Pet.

App. 95a. In fact, the remainder of Section 1605A is also clearly nonjurisdictional. *See*, *e.g.*, 28 U.S.C. § 1605A(c) (private right of action); *id.* § 1605A(d) (additional damages), *id.* § 1605A(e) (special masters); *id.* § 1605A(g) (property disposition). Nor, contrary to Sudan's contention (Cross-Pet. 31), is there any jurisdictional significance to Section 1605A(b)'s use of the word "action" rather than "claim." This Court, for instance, has interpreted similar language barring any "civil action" not to be jurisdictional. *Reed Elsevier, Inc.* v. *Muchnick*, 559 U.S. 154, 166 (2010); *see* Pet. App. 94a–95a.

This Court's decision in *Rubin* v. *Islamic Republic of Iran*, 138 S. Ct. 816 (2018), *see* Cross-Pet. 31–32, is also of no help to Sudan. This Court in *Rubin* rejected the argument that 28 U.S.C. § 1610(g) sweeps away all immunity from any assets that belong to a state sponsor of terrorism. The opinion stated that when a provision "conspicuously lacks . . . textual markers" indicating that it concerns immunity, a court should not read into the provision the text that Congress omitted. *Id*. at 824. This Court observed that other provisions of 28 U.S.C. § 1610 clearly stated that they were stripping a foreign state of immunity by using the key term "shall not be immune," but that Section 1610(g) "conspicuously" did not. *Ibid*. The same is true here. The terrorism exception's jurisdictional provision, Section 1605A(a)(1), contains the key language: "shall not be immune"; the limitations provision in Section 1605A(b) does not.

Sudan suggests that the recent district court decision in *Sheikh* v. *Republic of Sudan* is inconsistent with this case. --- F. Supp. 3d ----, No. 14-cv-2090 (JDB), 2018 WL 1567578 (D.D.C. Mar. 30, 2018).

Even if Sudan were correct, a district court's divergence from controlling circuit authority does not warrant this Court's review. (Rather, it is a reason for review in the courts of appeals.) But Sudan's characterization of the district court opinion is not correct. The district court, acknowledging that it need not consider the claims, nevertheless "exercis[ed] [its] discretion" to reach the issue, given that the "untimeliness of the[ ] actions" was "patent." *Id.* at *4, *7. That discretionary decision in *Sheikh* is fully consistent with the court's holding below that Section 1605A(b) is not jurisdictional. Pet. App. 193a–96a. Indeed, as in *Sheikh*, the district court below exercised its discretion to consider Sudan's statute-of-limitations argument. But unlike *Sheikh*, the district court below found (correctly) that *all* of the claims were timely. *Id.* at 196a–201a.

Finally, Sudan tries to gin up a circuit split with a series of cases that "do[ ] not preclude a [defaulting] party from challenging the sufficiency of the complaint on direct appeal." Cross-Pet. 29. But Sudan's own cases confirm that defendants "forfeit[ ]" any "defenses they may have had by willfully abandoning their defense of the litigation." *City of N.Y.* v. *Mickalis Pawn Shop, LLC*, 645 F.3d 114, 119 (2d Cir. 2011); *see Day* v. *McDonough*, 547 U.S. 198, 202, 204 (2006) ("affirmative defenses" like "statute of limitations" may be "forfeited"); *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) ("a statute of limitations[ ] is subject to waiver.").

That is just what happened here: Sudan has forfeited its opportunity to challenge the timeliness of the actions. Neither the district court nor the court of appeals erred in declining to allow Sudan to remedy

its tactical default by reappearing to appeal. Ultimately, Sudan's fourth question presented challenges the appropriateness of the court of appeals "declin[ing] to exercise its discretion and consider the timeliness of [these] claims." Cross-Pet. 33. There is no reason for this Court to review that discretionary decision.

V. THERE WERE NO EXTRAORDINARY CIRCUMSTANCES JUSTIFYING VACATUR OF THE JUDGMENTS.

For its final question presented, Sudan bemoans the way that the district court, in its discretion, reviewed the facts it found and decided not to vacate the default judgments under Federal Rule of Civil Procedure 60(b)(1) or (6). Cross-Pet. 35. But "the district judge, who is in the best position to discern and assess all the facts, is vested with a large measure of discretion in deciding whether to grant a Rule 60(b) motion." Pet. App. 130a. Sovereigns, like every other litigant, "bear[ ] the burden of establishing" that "excusable neglect" (in the case of Rule 60(b)(1)) or "extraordinary circumstances" (for Rule 60(b)(6)) exist. *Id.* at 131a. Both the district court and the D.C. Circuit concluded that Sudan "has not met this burden." *Ibid*. That determination does not warrant further review.

Sudan relies heavily on "a three-page declaration" by one of its ambassadors that explains that "natural disasters and civil war" as well as "a fundamental lack of understanding" of "the litigation process in the United States" prevented it from appearing in any of the consolidated cases between 2009 and 2015. Pet. App. 132a; *see* Cross-Pet. 38–39. But the district court and the court of appeals saw through these thin excuses. Some of the "turmoil" that Sudan referenced "has been of the Sudanese government's own making."

Pet. App. 132a. And the ambassador's "conclusory" declaration "does not show [that Sudan] was incapable of maintaining any communication with the district court"; Sudan never provided "a single communication to the court" in *six years*, despite being well aware of the proceedings. *Id*. at 132a, 140a. And Sudan's claims of ignorance were not credible, given that its *first* default had been vacated on those very grounds, and it had hired sophisticated U.S. counsel since then. *Id*. at 132a. Finally, vacating the default judgments at this late date would be gravely prejudicial to all of the plaintiffs, who have waited years for justice. *Id.* at 132–33a.

Sudan contends that the courts should have followed a policy that encourages vacating sovereign defaults. Cross-Pet. 36–37. But, as the D.C. Circuit noted, "[i]f policy considerations alone made vacatur of judgments against foreign sovereigns under Rule 60(b) near-automatic, then the general policy favoring vacatur would render the specific authorization of default judgments in the FSIA a nullity." Pet. App. 134a–35a. And if Sudan should succeed in vacating its default judgments for a second time, what would prevent it from defaulting a third time? Sudan's favored policy would *reward* a strategy of multiple tactical defaults. As the D.C. Circuit put it, "if we were to vacate the default judgment in this case, then we could not expect any sovereign to participate in litigation rather than wait for a default judgment, move to vacate it under Rule 60(b), appeal if necessary, and then reenter the litigation to contest the merits, having long delayed its day of reckoning." *Id*. at 135a. In any event, this Court is not an appropriate forum for Sudan's policy arguments.

In a final protestation against the court of appeals' opinion, Sudan argues that it was a "double-defaulter" only for the *Owens* case, not for the other cases. Cross-Pet. 38. But the district court had "consolidated" the cases for the purposes of establishing liability, Pet. App. 13a, and "[e]ven when served with the district court's 2011 opinion on liability," which applied to all plaintiff groups, Sudan still "let three years pass before filing its motion to vacate," *id*. at 136a. As the court of appeals noted, for a "double-defaulting sovereign" like Sudan, it is particularly "difficult to show good faith." *Id.* at 137a. Sudan did not provide sufficient justification for the district court to vacate its defaults under Rule 60(b)(1) or (6), still less for the D.C. Circuit to reverse that discretionary decision, and provides none at all for this Court to exercise its discretion to grant review over the lower courts' discretionary determinations.

CONCLUSION

The conditional cross petition for a writ of certiorari should be denied.

Respectfully submitted.

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