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

REPLY BRIEF IN SUPPORT OF CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF FOR CROSS-PETITIONERS

Cross-Respondents do not seriously engage with the important foreign-relations implications of the D.C. Circuit's decision under 28 U.S.C. § 1605A. They focus instead on the perceived lack of a conflict among the circuits concerning the issues raised by Sudan's Conditional Cross-Petition. *Owens* Cross-Pet. Opp'n 10-11; 12. But as Sudan has argued, the *Opati* Petition itself does not raise any issue that conflicts with any decision of this Court or of any of the courts of appeals. Sudan's Opp'n 11-26. The *Opati* Petition also does not present any issue that would otherwise warrant this Court's review and accordingly should be denied. *See generally id.* at 11-27.

If the Court nonetheless grants the *Opati* Petition, however, the Court also should grant Sudan's Cross-Petition. Given that Sudan is the only foreign state to challenge over a decade's worth of decisions misinterpreting § 1605A in the default context, the lack of conflict at the circuit level is hardly surprising. Moreover, the issues raised in the Cross-Petition are unlikely to receive any future percolation in the circuits.

And though Cross-Respondents assert that courts have "uniformly adopted" the D.C. Circuit's conclusions, they cite primarily decisions from the D.C. District Court in the default-judgment context. *See, e.g.*, *Owens* Cross-Pet. Opp'n 16, 20. These decisions hardly demonstrate a reason to deny Sudan's Cross-Petition. To the contrary, they establish precisely why the Court should extend any writ granted in respect of the *Opati* Petition to

Sudan's Cross-Petition: the D.C. District Court serves as the principal venue for § 1605A cases, which are decided largely in the default context and frequently lack appellate review.

Although the D.C. District Court is not the *exclusive* venue for § 1605A actions (*Owens* Cross-Pet. Opp'n 11), in reality the D.C. District Court remains the principal venue and is looked upon by other courts as a persuasive authority in cases involving the FSIA terrorism exception. Brief of the United States as Amicus Curiae Supporting Reversal at 9, *Kumar v. Republic of Sudan*, 880 F.3d 144 (4th Cir. 2018) (No. 16-2267) (advising the Fourth Circuit that the "D.C. Circuit's interpretation is particularly instructive because most suits against foreign states (as opposed to suits against foreign state agencies or instrumentalities) are brought in that circuit"); *Leibovitch v. Islamic Republic of Iran*, 697 F.3d 561, 566 n.2 (7th Cir. 2012) (turning to D.C. District Court cases for "guidance" because it "has adjudicated the vast majority of suits under the FSIA's terrorism exception"); *see also Bettis v. Islamic Republic of Iran*, 315 F.3d 325, 332 (D.C. Cir. 2003) (describing the District of Columbia as "the dedicated venue for actions against foreign states"). Given the singular importance of the D.C. Circuit's conclusions under § 1605A, those conclusions merit this Court's review.

Despite Cross-Respondents' suggestion otherwise (*Owens* Cross-Pet. Opp'n 11), case-law statistics confirm that the D.C. District Court holds a preeminent place in the field of terrorism litigation. A review of the federal dockets shows that the D.C.

District Court is responsible for 116 of the 129 default judgments entered against state sponsors of terrorism under § 1605A, or its predecessor § 1605(a)(7), in the past twenty years. Based on that review, those 116 D.C. District Court cases comprise a staggering $47 billion in default judgment damages awards, representing over eighty-five percent of the total default damages awards entered in all 129 cases.

Today, forty-nine § 1605A actions are currently pending before U.S. district courts. Forty-four of those cases are pending before the D.C. District Court. No foreign states, except Sudan, have appeared or likely will appear in those cases. Indeed, the D.C. Circuit is the only court of appeals to have addressed each of the fundamental issues of statutory interpretation raised in Sudan's Petition and Cross-Petition. Sudan's Cross-Petition shows that the D.C. Circuit's unchecked decision will only entrench the D.C. District Court as the principal clearinghouse for actions against state sponsors of terrorism and perpetuate ill-founded decisions awarding multi-million-dollar (if not multi-billion-dollar) default judgments against these foreign states.

The Cross-Petition therefore presents, as Sudan has stated, a unique opportunity for this Court to provide much needed guidance on § 1605A. Such guidance is all the more important because cases against the foreign states named as defendants in § 1605A actions are the most likely to implicate the most sensitive of U.S. foreign-relations concerns.

All of the issues raised in Sudan's Cross-Petition are important. They are also placed squarely at issue by the *Opati* Petition — a fact the *Owens* Cross-Respondents overlook (*see, e.g.*, Cross-Pet. 25 (citing Pet. 19-21); *id.* at 29 (citing Pet. 30)). The D.C. Circuit failed to follow several of this Court's decisions on fundamental rules of statutory construction, particularly those applicable in the FSIA context. Thus, if the Court grants the *Opati* Petition on the issue of retroactive punitive damages, it should hear as well Sudan's challenge of the D.C. Circuit's deeply flawed interpretation of the foundational provisions of § 1605A.

Contrary to this Court's precedent, the D.C. Circuit improperly interpreted or ignored the text, context, purpose, and legislative history of § 1605A's various subsections. When properly considered, those sources confirm Sudan's interpretation of a narrow terrorism exception to foreign sovereign immunity. *See Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 825 (2018) (interpreting 28 U.S.C. § 1610(g) "consistent with the history and structure of the FSIA"); *Musacchio v. United States*, 136 S. Ct. 709, 717 (2016) (examining the "text, context, and relevant historical treatment of the provision at issue" (internal quotations marks and citation omitted)); *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006) (instructing that statutory terms must be read in light of "the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform that analysis").

1. Contrary to the D.C. Circuit's Opinion, "extrajudicial killing" is a unique term of art derived from international law. The text, context, and history of § 1605A make clear that an "extrajudicial killing," as defined in the TVPA and incorporated into § 1605A, means a summary execution by a state actor. *See, e.g.*, S. Rep. No. 102-249, at 6 (1991) ("The TVPA incorporates into U.S. law the definition of extrajudicial killing found in customary international law."); *The Foreign Sovereign Immunities Act: Hearing on S. 825 Before the Subcomm. on Courts and Admin. Practice of the S. Comm. on the Judiciary,* 103d Cong. 7 (1994) (statement of Rep. Mazzoli) ("[E]xtrajudicial killing is defined in accordance with the TVPA and the Geneva Conventions of 1949."); *see also Kadić v. Karadžić*, 70 F.3d 232, 243-44 (2d Cir. 1995) ("[T]orture and summary execution . . . are proscribed by international law only when committed by state officials or under color of law."). And Cross-Respondents' argument (*Owens* Cross-Pet. Opp'n 13-14) that the meaning of § 3 of the TVPA should *not* be informed by international law cannot be squared with this Court's recent statement: "The TVPA — which is codified as a note following the ATS — creates an express cause of action for victims of torture and extrajudicial killing *in violation of international law*." *Jesner v. Arab Bank, PLC*, 200 L. Ed. 2d 612, 626 (2018) (emphasis added).

2. The D.C. Circuit found that indirect victims of terrorism, i.e., family members, are proper "claimants" in their own right for emotional injury claims under § 1605A(a), even though the legislative

history makes clear that "claimant" specifically refers to the individual asserting the claims of an incapacitated victim or decedent. *See* Cross-Pet. 22-24. And while the D.C. Circuit did not consider the legislative history at all in reaching its conclusion (Pet. App. 101a), the portions of the legislative history referenced in Cross-Respondents' Opposition clearly support Sudan's position. *See Owens* Cross-Pet. Opp'n 17 (referring to the "victim's legal representative *or another person who is a proper claimant*" and "either the victim of the act *or survivor who brings the claim*" (emphasis added) (quoting legislative history)).

3. The D.C. Circuit concluded that foreign-national family members asserting emotional injury claims and who have no connection to the United States and no claim under § 1605A(c) can nonetheless establish jurisdiction under § 1605A(a) in U.S. courts and assert state-law (or foreign-law) claims against a foreign state based on the alleged material support of foreign terrorists in foreign countries. This conclusion is antithetical to this Court's decisions. *See, e.g.*, *Jesner*, 200 L. Ed. 2d at 635 (stating that serious questions existed as to whether the petitioners' allegations "touch and concern" the United States where the petitioners were "foreign nationals seeking hundreds of millions of dollars in damages against a major Jordanian financial institution in attacks by foreign terrorists in the Middle East"). The D.C. Circuit's interpretation of § 1606 as merely a *liability limiting provision* is also inconsistent with § 1606's text. Pet. App. 108a. Section 1606 provides the manner in which "the

foreign state *shall be liable*." *See* Cross-Pet. 26-28 (emphasis added) (quoting § 1606). Congress's failure to amend § 1606 to include § 1605A must be deemed purposeful, because U.S. courts have no free-wheeling license to create the manner in which foreign states are liable. *See* Cross-Pet. 27; *see also, e.g.*, *Jesner*, 200 L. Ed. 2d at 631 (stating that "separation-of-powers concerns that counsel against courts creating private rights of action apply with particular force in the context of the ATS" and stating that the "political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns").

4. According to the D.C. Circuit, the ten-year statute of limitations provision in § 1605A(b) — contained in a *jurisdictional exception* to immunity — is not really jurisdictional and the district court therefore is at liberty to entertain patently stale claims against a foreign state. Contrary to Cross-Respondents' suggestion (*Owens* Cross-Pet. Opp'n 22), *United States v. Wong* does not require "magic words" in order for a statute of limitations to be jurisdictional. 135 S. Ct. 1625, 1632 (2015). Section 1605A(b) by its terms applies to actions, not just claims — "no *action* may be brought" — and, thus, meets the standard set by this Court in *Wong*. Cross-Pet. 31. Moreover, Cross-Respondents have no excuse for their failure to bring a timely direct action under § 1605A in 2008 when they had the ability, rather than in 2010 and 2012, years after the limitations period expired. Yet Sudan is the litigant that was found inexcusably neglectful.

Lastly, despite Cross-Respondents' continued mischaracterization of the procedural history of the actions below (*Owens* Cross-Pet. Opp'n 26; *Opati* Cross-Pet. Opp'n 2-3), Cross-Respondents submitted no evidence to refute the sworn declaration of Sudan's Ambassador. The Ambassador's unrefuted declaration explained Sudan's failure to appear in the actions below — the bulk of which were filed in 2008, after the new terrorism exception was enacted and on the eve of the expiration of the limitations period, and in 2010 and 2012, after the limitations period had expired. At each turn, the district court and the D.C. Circuit adopted Cross-Respondents' disingenuous conflation of all the actions with the earlier, separately filed *Owens* case. *See, e.g.*, Pet. App. 132a, 137a, 166a, 169a, 172a.

But even in the *Owens* case, the record was clear that Sudan's exit was entirely consistent with Ambassador Khalid's unrefuted declaration describing the civil war and strife besieging Sudan at the time. Cross-Pet. 6-9, 38-39. Cross-Respondents' Opposition goes so far as to falsely state (*Owens* Cross-Pet. Opp'n 4) that in 2004 Sudan "moved to vacate the default judgments" and was therefore rightly denied a second vacatur in the actions below. Again, as of 2004, *only Owens* had been filed, and Sudan appeared in that case to vacate an *entry* of default — not "default judgments" as Cross-Respondents misleadingly suggest.

Cross-Respondents also blithely state (*Owens* Cross-Pet. Opp'n 27) that the district court had "consolidated" all cases for liability purposes and that

Sudan even ignored the cases when the 2011 liability opinion was served. But major actions (*Aliganga* and *Opati*), resulting in over $1.6 billion in damages (exclusive of punitive damages), were not even filed in 2010 or 2011 when the liability hearing took place and the opinion issued. Sudan appeared within less than thirty days of the entry of the final default judgment in each case and timely appealed from those judgments, and later moved to vacate. Cross-Respondents' purported prejudice in the event of vacatur, and statements about having "waited years for justice," ring hollow. *Owens* Cross-Pet. Opp'n 26. Plaintiffs — without any adversary on the other side — were the masters of their own timing. As for the untimely 2012 actions, those actions were clearly opportunistic, making assertions of prejudice for those actions even less credible. Those actions merely piggybacked on the 2011 liability decision, without the submission of any evidence of jurisdiction or liability specific to those actions. Pet. App. 270a; Cross-Pet. App. 91a-92a.

Moreover, none of the plaintiffs in any of the consolidated actions submitted any admissible or sufficient evidence to support jurisdiction over Sudan in these cases, as set forth in detail in Sudan's Petition in *Owens*. And, as undersigned counsel represented to the D.C. Circuit, Sudan was willing to consider steps to mitigate any perceived prejudice, including waiving the requirement that any victims would have to testify again should plaintiffs succeed on the merits.

Cross-Respondents' assertions of prejudice, and the D.C. Circuit's acceptance of those assertions, were therefore conclusory at best, and the denial of Sudan's request to defend on the merits stands as an affront to principles of international comity and an impediment to U.S. foreign relations.

Although the United States declined to express its views in the district court on Sudan's vacatur motion "at this time" — the key phrase conspicuously omitted from the *Opati* Opposition (at 4) — nothing precluded the D.C. Circuit from inviting the views of the United States at the appeal level, particularly if the D.C. Circuit intended to penalize Sudan (as it did) for the failure of the United States to appear *sua sponte*. Indeed, it is not unusual for the United States to appear to express a view upon invitation by this Court or the court of appeals without having appeared in the district court. *See, e.g.*, Brief for the United States as Amicus Curiae at 1, *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312 (May 24, 2016) (No. 15-423); Order Inviting the United States to Submit an Amicus Curiae Brief, *Bennett v. Islamic Republic of Iran*, 817 F.3d 1131 (9th Cir. 2016) (No. 13-15442). The D.C. Circuit could not have known how the United States might have responded had the D.C. Circuit invited the United States to express its views in 2017, when diplomatic relations between Sudan and the United States were warming, culminating in the revocation of sanctions.

The D.C. Circuit also penalized Sudan because Sudan is a designated state sponsor of terrorism. *See*

Cross-Pet. 37 (citing Pet. App. 134a). But while this designation is a necessary condition for maintaining a § 1605A action, it should not have served as a basis for denying Sudan the opportunity to defend the serious allegations against it on the merits.

CONCLUSION

For the foregoing reasons, if this Court grants the *Opati* Petition, it should grant the Conditional Cross-Petition and invite the views of the United States.

Respectfully submitted,

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