No. 19-____

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,

Petitioners,

v.

JAMES OWENS, *et al.*,

Respondents.

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

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PETITION FOR A WRIT OF CERTIORARI

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November 15, 2019

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

Whether the D.C. Circuit applied an unconstitutional rule of substantive liability created by the D.C. Court of Appeals — the highest local court of the District of Columbia — specially targeting foreign sovereigns that lack immunity under the terrorism exception to sovereign immunity, 28 U.S.C. § 1605A(a).

Whether the D.C. Circuit's decision retroactively applying the new special liability rule of the D.C. Court of Appeals conflicts with this Court's precedents in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), and *Landgraf v. USI Film Products*, 511 U.S. 244 (1994).

PARTIES TO THE PROCEEDING

The Republic of the Sudan, the Ministry of External Affairs of the Republic of the Sudan, and the Ministry of the Interior of the Republic of the Sudan, petitioners on review, were the defendants-appellants below.

The Islamic Republic of Iran and the Iranian Ministry of Information and Security were also defendants in the district court proceedings. Pursuant to Rule 12.6 of this Court, Petitioners state that they do not believe that these entities have an interest in the outcome of this Petition.

A number of cases were consolidated in the district court and circuit court proceedings.

In *Owens v. Republic of Sudan*, No. 01-cv-2244-JDB, the following individuals, respondents on review, were the plaintiffs-appellees below: James Owens; Victoria J. Spiers; Gary Robert Owens; Barbara Goff; Frank B. Pressley Jr.; Yasemin B. Pressley; David A. Pressley; Thomas C. Pressley; Michael F. Pressley; Berk F. Pressley; Jon B. Pressley; Marc Y. Pressley; Sundus Buyuk; Montine Bowen; Frank Pressley, Sr.; Bahar Buyuk; Serpil Buyuk; Tulay Buyuk; Ahmet Buyuk; Dorothy Willard; Ellen Marie Bomer; Donald Bomer; Michael James Cormier; Andrew John William Cormier; Alexandra Rain Cormier; Patricia Feore; Clyde M. Hirn; Alice M. Hirn; Patricia K. Fast; Inez P. Hirn; Joyce Reed; Worley Lee Reed; Cheryl L. Blood; Bret W. Reed; Ruth Ann Whiteside; Lorie Gulick; Pam Williams; Flossie Varney; Lydia Sparks; Howard

Sparks; Tabitha Carter; Michael Ray Sparks; Gary O. Spiers; Victoria Q. Spiers; Julita A. Qualicio.

The following individuals, respondents on review, were the Intervenor plaintiffs-appellees below: Linda Jane Whiteside Leslie; Jesse Nathanael Aliganga; Julian Leotis Bartley, Sr.; Jean Rose Dalizu; Molly Huckaby Hardy; Kenneth Ray Hobson, II; Arlene Bradley Kirk; Mary Louise Martin; Ann Michelle O'Connor; Sherry Lynn Olds; Prabhi Guptara Kavaler; Howard Charles Kavaler; Tara Lia Kavaler; Maya Pia Kavaler; Pearl Daniels Kavaler; Leon Kavaler; Richard Martin Kavaler; Clara Leah Aliganga; Leah Ann Colston; Gladis Baldwin Bartley; Egambi Fred Kibuhiru Dalizu; Temina Engesia Dalizu; Lawrence Anthony Hicks; Mangiaru Vidija Dalizu; Lori Elaine Dalizu; Rose Banks Freeman; June Beverly Freeman; James Herbert Freeman; Sheila Elaine Freeman; Gwendolyn Tauwana Garrett; Jewell Patricia Neal; Joyce Mccray; Jeannette Ella Marie Goines; Brandi Plants; Jane Huckaby; Deborah Hobson-Bird; Meghan Elizabeth Hobson; Bonnie Sue Hobson; Kenneth Ray Hobson, II; Robert Kirk, Jr.; Robert Michael Kirk; Maisha Kirk Humphrey; Neal Alan Bradley; Katherine Bradley Wright; Kenneth R. Bradley; Dennis Arthur Bradley; Patricia Anne Bradley Williams; James Robert Klaucke; Karen Marie Klaucke; Joseph Denegre Martin, Jr.; Martha Martin Ourso; Kathleen Martin Boellert; Gwendolyn Frederic Deney; Joseph Denegre Martin, III; Stephen Harding Martin; James Paul O'Connor; Micaela Ann O'Connor; Tara Colleen O'Connor; Delbert Raymond Olds; Jennifer Erin Perez; Marsey Gayle Cornett; Christa Gay Fox; May

Evelyn Freeman Olds; Kimberly Ann Zimmerman; Michael Hawkins Martin; Mary Linda Sue Bartley; Edith Lynn Bartley; Mary Katherine Bradley; Douglas Norman Klaucke; William Russel Klaucke; Susan Elizabeth Martin Bryson.

In *Amduso v. Republic of Sudan*, No. 08-cv-1361-JDB, the following individuals, respondents on review, were the plaintiffs-appellees below: Milly Mikali Amduso; Joyce Auma Ombese Abur; James Andayi Mukabi; Hamsa Safula Asdi; Gerald W. Bochart; Jomo Matiko Boke; Monicah Kebayi Matiko; Velma Akosa Bonyo; Benson Okuku Bwaku; Beatrice Mugemi Bwaku; Belinda Chaka; Murabu Chaka; Boniface G. Chege; Lucy Wairimu; Catherine Lucy Nyambura Mwangi; Anastasia Gianopulos; Grace Njeri Gicho; Lucy Muthoni Gitau; Catherine W. Gitumbu; Japeth Munjal Godia; Merab A. Godia; Jotham Odiango Godia; Grace Akanya; Omari Idi; Caroline Nguhi Kamau; Kimani Kamau; Hannah Ngenda Kamau; Jane Kamau; Josinda Katumba Kamau; Jane Kavindu Kathuka; Ikonye Michael Kiarie; Jane Mweru Kiarie; Humphrey Kibiru; Jennifer Wambui; Elizabeth Muli Kibue; Michael Kibue Kamau; David K. Kiburu; Judy Walthera; Faith Wambui Kihato; Harrison Kariuki Kimani; Grace Wanjiku Kimani; Grace Njeri Kimata; Alice Muzhomi Kiongo; Lucy Kamau Kiongo; Lucy Kamau Kiongo; Elizabeth Victoria Kitao; Raphael N. Kivindyo; Margaret Mwikali Nzomo; Luka Mwalie Litwaj; Mary Vutagwa Mwalie.

In *Wamai v. Republic of Sudan*, No. 08-cv-1349-JDB, the following individuals, respondents on

review, were the plaintiffs-appellees below: Winfred Wairimu Wamai; Diana Williams; Titus Wamai; Angela Wamai; Lloyd Wamai; John Muriuki Girandi; Sarah Anyiso Tikolo; Negeel Andika; Grace Njeri Kimata; Lucy Muthoni Gitau; Gitau Catherine Waithira; Ernest Gichiri Gitau; Felister Wanjiru Gitau; Grace Njeri Gicho; Diana Njoki Macharia; Lucy Kamau; Kiongo Wairimu; Teresia Wairimu; Jane Kamau; Alice Muhoni Kamau; Newton Kamau; Pauline Kamau; Peter Kamau; Marcy Kamau Wairimu; Ann Wambui Kamau; Daniel Kiomho Kamau; Nyangoro Wilfred Mayaka; Doreen Mayaka; Dick Obworo; Diana Nyangara; Deborah Kerubo; Jacob Awala; Warren Awala; Vincent Owour; Mordechai Thomas Onono; Priscilla Okatch; Dennis Okatch; Rosemary Anyango Okatch; Samson Okatch; Jenipher Okatch; Josinda Katumba Kamau; Caroline Wanjiru Kamau; Faith Wanza Kamau; Elizabeth Vutage Maloba; Kenneth Maloba; Margaret Maloba; Adhiambo Sharon; Okile Marlon; Lewis Mafwavo; Marlong Okile; Mary Mutheu Ndambuki.

In *Onsongo v. Republic of Sudan*, No. 08-cv-1380-JDB, the following individuals, respondents on review, were the plaintiffs-appellees below: Mary Onsongo; Enoch Onsongo; Peris Onsongo; Vanice Onsongo; Onsongo Mweberi; Salome Mweberi; Bernard Onsongo; Edwin Nyangau Onsongo; George Onsongo; Eunice Onsongo; Peninah Onsongo; Gladys Onsongo; Osborn Olwch Awalla; Warren Awala; Vincent Owuor; Martha Achieng Onyango; Juliana Atieno Onyango; Irena Kung'u.

In *Mwila v. Islamic Republic of Iran*, No. 08-cv-1377-JDB, the following individuals, respondents on review, were the plaintiffs-appellees below: Judith Abasi Mwila; Donte Akili Mwaipape; Donti Akili Mwaipape; Victoria Donti Mwaipape; Elisha Donti Mwaipape; Joseph Donti Mwaipape; Debora Donti Mwaipape; Nko Donti Mwaipape; Monica Akili; Akili Musupape; Valentine Mathew Katunda; Abella Valentine Katunda; Venant Valentine Mathew Katunda; Desidery Valentine Mathew Katunda; Veidiana Valentine Katunda; Diana Valentine Katunda; Edwine Valentine Mathew Katunda; Angelina Mathew Felix; Edward Mathew Rutaheshelwa; Elizabeth Mathew Rutaheshelwa; Angelina Mathew Rutaheshelwa; Happiness Mathew Rutaheshelwa; Eric Mathew Rutaheshelwa; Enoc Mathew Rutaheshelwa; Angelia Mathew-Ferix; Mathew Ferix; Samuel Thomas Marcus; Cecilia Samuel Marcus; Coronella Samuel Marcus; Hanuni Rmadhani Ndange; Alli Kindamba Ng'ombe; Paulina Mbwanilwa Ng'ombe; Mohamed Alli Ng'ombe; Kindamba Alli Ng'ombe; Shabani Saidi Mtulya; Adabeth Said Nang'oko; Kulwa Ramadhani.

In *Opati v. Republic of Sudan*, No. 12-cv-1224-JDB the following individuals, respondents on review, were the plaintiffs-appellees below: Monicah Okoba Opati; Selifah Ongecha Opati; Rael Angara Opati; Johnstone Mukabi; Salome Ratemo; Kevin Ratemo; Fredrick Ratemo; Louis Ratemo; Stacy Waithera; Michael Daniel Were; Judith Nandi Busera; Roselyne Karsorani; George Mwangi; Bernard Machari; Gad Gideon Achola; Mary Njoki Muiruri; Jonathan Karania Nduti; Gitionga Mwaniki;

Rose Nyette; Elizabeth Nzaku; Patrick Nyette; Cornel Kebungo; Phoebe Kebungo; Joan Adundo; Benard Adundo; Nancy Njoki Macharia; Sally Omondi; Jael Nyosieko Oyoo; Edwin Oyoo; Miriam Muthoni; Priscah Owino; Greg Owino; Michael Kamau Mwangi; Joshua O. Mayunzu; Zackaria Musalia Ating'a; Julius M. Nyamweno; Polychep Odhiambo; David Jairus Aura; Charles Oloka Opondo; Ann Kanyaha Salamba; Erastus Mijuka Ndeda; Techonia Oloo Owiti; Joseph Ingosi; William W. Maina; Peter Ngigi Mugo; Simon Mwanhi Nhure; Joseph K. Gathungu; Dixon Olubinzo Indiya; Peter Njenga Kungu; Charles Gt. Kabui; John Kiswilli.

In *Khaliq v. Republic of Sudan*, No. 10-cv-0356-JDB, the following individuals, respondents on review, were the plaintiffs-appellees below: Rizwan Khaliq; Jenny Christiana Lovblom; Imran Khaliq; Tehsin Khaliq; Kamran Khaliq; Imtiaz Bedum; Irfan Khaliq; Yasir Aziz; Naurin Khaliq. None of the *Khaliq* plaintiffs has a claim subject to the Petition here.

RELATED PROCEEDINGS

Pursuant to Supreme Court Rule 14.1, Petitioners state that the following proceedings are directly related to the action that is the subject of this Petition.

United States District Court for the District of Columbia:

Owens v. Republic of Sudan, No. 01-cv-2244-JDB (Mar. 28, 2014; Oct. 24, 2014)

Mwila v. Islamic Republic of Iran, No. 08-cv-1377-JDB (Mar. 28, 2014)

Khaliq v. Republic of Sudan, No. 10-cv-0356-JDB (Mar. 28, 2014)

Amduso v. Republic of Sudan, No. 08-cv-1361-JDB (July 25, 2014)

Onsongo v. Republic of Sudan, No. 08-cv-1380-JDB (July 25, 2014)

Wamai v. Republic of Sudan, No. 08-cv-1349-JDB (July 25, 2014)

Opati v. Republic of Sudan, No. 12-cv-1224-JDB (July 25, 2014)

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Wamai v. Republic of Sudan, Nos. 14-7125, 16-7048 (July 28, 2017)

Amduso v. Republic of Sudan, Nos. 14-7127, 16-7044 (July 28, 2017)

Onsongo v. Republic of Sudan, Nos. 14-7128, 16-7050 (July 28, 2017)

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PETITION

Petitioners the Republic of the Sudan, the Ministry of External Affairs of the Republic of the Sudan, and the Ministry of the Interior of the Republic of the Sudan (collectively, "Sudan"), each a foreign state within the meaning of 28 U.S.C. § 1603, respectfully petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

In 2017, the D.C. Circuit issued an opinion in this case, App. 32a-177a, which is reported at 864 F.3d 751 (D.C. Cir. 2017). In that opinion, the D.C. Circuit certified a question to the D.C. Court of Appeals. The response of the D.C. Court of Appeals, App. 15a-31a, is reported at 194 A.3d 38 (D.C. 2018). In 2019, the D.C. Circuit issued a subsequent opinion applying the rule pronounced in the response of the D.C. Court of Appeals. That opinion of the D.C. Circuit, App. 1a-11a, from which this Petition arises, is reported at 924 F.3d 1256 (D.C. Cir. 2019). The D.C. Circuit's denial of Sudan's petition for rehearing en banc with respect to the 2019 opinion is unreported but is reproduced at App. 183a-185a.

JURISDICTION

On May 21, 2019, the D.C. Circuit entered the judgment from which this Petition arises. App. 12a-14a. On June 18, 2019, Sudan's timely petition for rehearing en banc was denied. App. 183a-185a. On August 23, 2019, Sudan requested an extension of sixty days in which to file its petition for a writ of certiorari. On August 27, 2019, the Chief Justice

granted the requested extension, making the deadline for this petition November 15, 2019.

28 U.S.C. § 1254(1) provides this Court with jurisdiction to review the D.C. Circuit's judgment.

PROVISIONS INVOLVED

The relevant provisions of the United States Constitution and United States Code are set forth in Appendix J.

STATEMENT

This Petition presents important and recurring questions concerning the constitutionality of a judicially pronounced state-law rule of substantive liability that specially targets foreign sovereigns lacking immunity under the terrorism exception to immunity, § 1605A(a) of the Foreign Sovereign Immunities Act ("FSIA"). The Petition further asks whether U.S. courts may apply this state-law rule retroactively in view of the longstanding federal law requiring the non-discriminatory treatment of foreign states. The state-level court at issue here is the D.C. Court of Appeals, the highest local court of the District of Columbia and an Article I court. *See* 28 U.S.C. § 1257(b); D.C. Code § 11-101.

Subjecting a foreign state to jurisdiction and liability in U.S. courts is always a delicate matter. But the sensitivities are never more heightened than when the suit alleges that the foreign state materially supported an act of terrorism and the damages are in the billions of dollars. In the cases subject to review here alone, the D.C. Circuit's decision below increases Sudan's liability by over $3.8 billion (excluding billions more in punitive damages, which are currently on review by this Court in *Opati v. Republic of Sudan* (No. 17-1268)). Sudan is in the midst of a historic transition to a civilian-led democracy, and the vast increase in liability at issue here undermines Sudan's desperately needed economic recovery. The need for this Court's review of this decision thus is paramount.

* * *

In 2008, Congress enacted for the first time a federal cause of action under the FSIA, applicable against foreign states designated by the U.S. Department of State as state sponsors of terrorism under federal law (i.e., currently Iran, North Korea, Sudan, and Syria). *See* 28 U.S.C. § 1605A(c). Pursuant to this federal cause of action, foreign sovereigns that are subject to jurisdiction under § 1605A(a) may be subject to liability under § 1605A(c) for supporting terrorism if certain criteria enumerated in the statute are satisfied.

The D.C. Circuit's 2017 decision affirmed billions of dollars in default judgments against Sudan for state-law claims of intentional infliction of emotional distress ("IIED") brought by foreign-national family members of victims of the 1998 embassy bombings in Kenya and Tanzania. Because none of these foreign-national family members could satisfy the statutory predicates to bring a federal claim against Sudan under § 1605A(c), the D.C. District Court allowed them recourse to state law and then elected to apply the law of the District of Columbia.

Sudan appeared after the entry of these default judgments, timely appealed, and moved for vacatur in the district court. Among other arguments, Sudan argued (and still maintains) that Congress had intended § 1605A(c) to be the exclusive remedy against foreign sovereigns over which courts had jurisdiction under § 1605A(a), thereby excluding foreign-national family-member plaintiffs from both the federal and state-law rights of action. Sudan further argued that, in any event, these plaintiffs

could not state an IIED claim under D.C. law, because none of the plaintiffs was present at the scene of the attacks.

The D.C. Circuit held in its 2017 opinion that Congress did not intend to preclude resort to state law for plaintiffs who did not qualify for a remedy under § 1605A(c) and upheld the default judgments of over 500 foreign-national plaintiffs proceeding on state-law claims.

But the D.C. Circuit recognized an uncertainty in D.C. law and certified a question to the D.C. Court of Appeals to determine whether D.C.-IIED law requires a plaintiff to be present at the scene of a terrorist attack. The D.C. Court of Appeals responded in the negative and, in a flagrant assault on federalism, created its own special rule targeting foreign states over which the court has jurisdiction under § 1605A(a). *See* App. 24a. Under this rule, the traditional "presence requirement" applicable to private actors for IIED claims is inapplicable to foreign states lacking immunity under § 1605A(a). App. 24a-25a. The D.C. Court of Appeals coined its new rule "The FSIA Terrorism Exception to the Presence Requirement." App. 24a. Over Sudan's constitutional challenges to the new D.C.-law FSIA rule, the D.C. Circuit applied the new rule retroactively against Sudan.

As this Court's precedents demonstrate, the new D.C.-law "FSIA Terrorism Exception to the Presence Requirement" is unconstitutional, because it encroaches upon the federal foreign affairs powers and conflicts with longstanding federal law requiring

the non-discriminatory treatment of foreign states in U.S. courts. As such, the D.C. Circuit should not have applied the new D.C.-law rule in this case.

Further, the D.C. Circuit's retroactive application of the District of Columbia's new rule impermissibly and exponentially increases Sudan's liability for conduct found to have occurred long before the D.C. Court of Appeals pronounced the new D.C.-law "FSIA Terrorism Exception to the Presence Requirement." Such retroactive application conflicts with this Court's precedents in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) and *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), and the decisions of other Circuits.

Critically, the new D.C.-law rule, and the D.C. Circuit's retroactive application of that rule, implicate important interests of the United States. The D.C. Court of Appeals created a new rule of substantive liability targeting designated state sponsors of terrorism — foreign states with which the United States has historically engaged in, and currently engages in, some of the most delicate and difficult foreign relations. With respect to Sudan, the transitional government is at a particularly sensitive phase of its engagement with the United States and the broader international community as Sudan seeks to have its state-sponsor-of-terrorism designation lifted by the United States — a measure critical to the success of Sudan's economic recovery and new system of government.

This case presents the most appropriate vehicle for review of the questions presented. Most cases brought against designated state sponsors of terrorism result in default judgments, as the sovereign typically does not appear. Here, Sudan is fully engaged in the adversarial process. The issues have been fully briefed by the parties and squarely considered by the lower courts, including, as relevant here, the D.C. Court of Appeals. Indeed, this case presents a unique opportunity for this Court to clarify in an adversarial setting the extent of a foreign state's liability under § 1605A before the lower courts apply the new D.C.-law rule to enter further multi-billion dollar default judgments against foreign states lacking immunity under § 1605A(a).

I. Background and District Court Proceedings

A. The Default Judgments

The complaints in these consolidated cases, seeking to hold Sudan liable for the deaths and personal injuries resulting from the 1998 Embassy bombings in Kenya and Tanzania, invoke subject-matter jurisdiction under the FSIA, § 1605A(a)(1), which withdraws the sovereign immunity of foreign states designated by the United States as state sponsors of terrorism, in actions

> in which money damages are sought against a foreign state 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 such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting with the scope of his or her office, employment, or agency.

28 U.S.C. § 1605A(a)(1). In particular, the complaints allege that Sudan provided "material support" to al Qaeda and Osama Bin Laden in the early- and mid-1990s and thereby proximately caused the 1998 Embassy bombings, and that the bombings constituted "extrajudicial killings" within the meaning of § 1605A. All of the plaintiffs, including those whose claims are the subject of this Petition, asserted claims under the FSIA's private right of action, § 1605A(c), and also IIED claims under Kenyan law, Tanzanian law, and the common law of unspecified U.S. states.

Sudan — an impoverished nation riven by civil war and besieged by natural disasters at the time — did not appear to defend the actions. The district court conducted an ex parte evidentiary hearing, and thereafter entered default judgments finding subject-matter jurisdiction over all actions and liability against Sudan (and also Iran). In addressing the claims brought by family members of the victims, the district court held, and the D.C. Circuit later affirmed, that only U.S.-national family members satisfied the requirements of § 1605A(c)(1) through (4) in order to bring a federal claim. App. 231a-235a; App. 141a-142a. The district court further held, and the D.C. Circuit later affirmed, that the foreign-

national family members who did not have federal § 1605A(c) claims could still resort to common law. App. 235a; App. 141a-142a. Applying District of Columbia choice-of-law rules, the district court concluded that District of Columbia law was more appropriate than Kenyan or Tanzanian law on the grounds, among others, that no clear conflict existed between the IIED law of those jurisdictions and the District of Columbia. App. 238a.

The district court entered default judgments in 2014, and awarded more than $10.2 billion in compensatory damages, prejudgment interest, and punitive damages as to all plaintiffs. Of this amount, the district court awarded $7.3 billion to the foreign-national family-member plaintiffs under District of Columbia IIED law, despite these family members' absence from the scenes of the bombings. *See* App. 48a, 253a-254a.

B. Sudan's Appearance, Appeal, and Vacatur Motions

Sudan, emerging from years of tumult — and having ceded much of its territory and population to the new country of South Sudan — engaged U.S. counsel in 2014, appeared in these consolidated actions, and timely appealed the entry of default judgments to the D.C. Circuit. Sudan retained the undersigned counsel in April 2015, and shortly thereafter, filed motions to vacate the default judgments in each of the consolidated actions. The D.C. Circuit stayed Sudan's direct appeals to allow the district court to resolve the motions to vacate.

In its motions to vacate, Sudan argued, among other things, that the district court lacked jurisdiction to enter the default judgments, and the default judgments were, therefore, void under Rule 60(b)(4) of the Federal Rules of Civil Procedure. Sudan further argued that the judgments should be vacated under Rule 60(b)(6) because the foreign-national family-member plaintiffs had failed to state a claim. Sudan argued that state-law claims were not available in § 1605A actions, and even if they were, those plaintiffs had not satisfied the "presence" requirement for their IIED claims. The district court rejected Sudan's arguments and denied Sudan's motions to vacate. Sudan subsequently appealed the denial of the vacatur motions, and that appeal was consolidated with its direct appeal of the default judgments.

II. The D.C. Circuit's 2017 Opinion and Certified Question

The D.C. Circuit, in its 2017 decision on Sudan's consolidated appeal, affirmed the district court's decision in all respects, except that it vacated the punitive damages awards and certified a question of D.C. law to the District of Columbia Court of Appeals as to whether the foreign-national family-member plaintiffs may recover on their D.C.-law IIED claims. App. 51a, 147a-148a.

In particular, the D.C. Circuit exercised its discretion to hear Sudan's challenge to the district court's denial of vacatur, under Rule 60(b)(6) of the Federal Rules of Civil Procedure, on the grounds that the question was "purely one of law important to the

administration of federal justice" and the foreign-national family member "plaintiffs ha[d] secured billions in damages against a foreign sovereign." App. 140a. Sudan argued that those plaintiffs had failed to state a claim, because D.C. law requires that IIED claimants be physically present at the scene of the injury or attack. The D.C. Circuit acknowledged that, in *Pitt v. District of Columbia*, 491 F.3d 494, 507 (D.C. Cir. 2007), the D.C. Circuit "did apply the presence requirement" for an IIED claim, and that there were "convincing reasons" to apply the presence requirement even in international terrorism cases. App. 143a-144a. The D.C. Circuit observed that "the drafters of the Third Restatement of Torts have criticized several district court decisions for abandoning the presence requirement in FSIA terrorism cases," and further reflected that "we too have expressed skepticism that the sensational nature of a terrorist attack warrants an exception to the limitations of IIED in the Restatement." App. 145a-146a.

The D.C. Circuit determined, however, that the D.C. Court of Appeals had not yet rendered a decision specifically on whether, under D.C. law, the presence requirement applies in IIED claims involving international terrorism. The D.C. Circuit therefore certified the following question to the D.C. Court of Appeals:

> Must a claimant alleging emotional distress arising from a terrorist attack that killed or injured a family member have been present at the scene of the

> attack in order to state a claim for intentional infliction of emotional distress?

App. 148a.

III. The Response of the D.C. Court of Appeals to the D.C. Circuit's Certified Question

On September 20, 2018, the D.C. Court of Appeals answered the certified question in the negative, but first "formally adopt[ed]" § 46(2) of the Restatement (Second) of Torts — including the presence requirement for an IIED claim — holding that "generally" a family member must be "present at the time" of the attack in order to recover for IIED under D.C. law. App. 21a-22a. Citing to numerous cases in which the court had "embraced the Restatement Second's approach to IIED liability," the court explained that, in formally adopting the presence requirement, the court was "mak[ing] explicit what our earlier cases implied." App. 21a-22a.

Despite accepting that presence generally was required for a family member to bring an IIED claim, the court then adopted the "caveat" to § 46 of the Restatement, creating what the D.C. Court of Appeals termed a new "FSIA Terrorism Exception to the Presence Requirement." App. 23a, 24a. The "caveat," as explained at Comment *l*, was intended to "leave open the possibility of situations in which presence at the time may not be required." Restatement (Second) of Torts § 46 cmt. *l*.

The D.C. Court of Appeals emphasized that the new "*FSIA terrorism exception* [to the presence requirement] . . . is quite limited in scope," and "excuses the presence requirement only when plaintiffs demonstrate that" § 1605A(a)'s predicates, including that defendants "have been classified as state sponsors of terrorism," have been met. App. 27a (emphasis in original). The court explained that "[i]nvoking the caveat here will increase the IIED liability of foreign states if they sponsor terrorism," and that "[e]xcusing the presence element in such cases may further deter foreign states from sponsoring terrorism." App. 28a, 30a. The D.C. Court of Appeals repeatedly stated that it was adopting a new and specially limited exception to the IIED presence requirement that applied only to those foreign states designated under federal law as state sponsors of terrorism. *E.g.*, App. 25a, 27a, 30a.

Sudan filed a timely petition for rehearing en banc, arguing that the panel's opinion — by creating a new legal rule applicable only to certain foreign states — impermissibly encroached on federal foreign-affairs powers, conflicted with federal law requiring that foreign states be liable to the same extent as private individuals in like circumstances, and created an arbitrary and discriminatory exception to the presence requirement lacking in judicially manageable standards. On December 12, 2018, the D.C. Court of Appeals denied Sudan's petition for rehearing en banc. App. 181a-182a.

IV. The D.C. Circuit's 2019 Opinion

In supplemental briefing to the D.C. Circuit addressing the response of the D.C. Court of Appeals to the certified question, Sudan argued that the new D.C.-law "FSIA Terrorism Exception to the Presence Requirement" is unconstitutional and should not be applied. In particular, Sudan argued that the newly created "FSIA Terrorism Exception to the Presence Requirement" encroaches on federal authority because it serves as an explicit attempt to shape foreign policy by creating a new rule to "increase the IIED liability of foreign states" and address an issue of "national significance." App. 28a. Sudan urged the court to apply the general requirement of presence at the scene, a requirement that Sudan argued was the only constitutional aspect of the D.C. Court of Appeals' decision.

Sudan further argued that, under the Supremacy Clause, the new rule is preempted because, by singling out certain foreign states for enhanced liability, the D.C.-law rule conflicts with longstanding federal law requiring that foreign states lacking immunity be held liable in the same manner and to the same extent as a private individual under like circumstances. Finally, Sudan argued that, under the presumption against retroactivity set forth by this Court in *Landgraf*, 511 U.S. at 244, retroactive application of the newly created D.C.-law "FSIA Terrorism Exception to the Presence Requirement" to Sudan, based on Sudan's purported conduct from the

1990s, would impermissibly increase Sudan's liability for pre-decision conduct. Sudan further argued that the new judicially created D.C.-law rule could not be applied retroactively, in accordance with the factors identified by this Court in *Chevron Oil*, 404 U.S. at 106-07.

The D.C. Circuit brushed aside all of Sudan's arguments and affirmed the default judgments with respect to the foreign-national family members' IIED claims. App. 3a. The D.C. Circuit concluded that "each of Sudan's arguments proceeds from the premise that the D.C. Court of Appeals crafted a new rule of substantive law applicable only to foreign states lacking immunity under § 1605A," App. 7a, and it disagreed that the D.C. Court of Appeals had created such a rule when it crafted and coined the "FSIA Terrorism Exception to the Presence Requirement." App. 11a ("[W]e decline Sudan's invitation to construe the D.C. Court of Appeals' rule as singling out certain foreign sovereigns."). On this basis, the D.C. Circuit declined to address any of Sudan's arguments in substance.

Sudan timely filed a petition for rehearing en banc, arguing the unconstitutional and impermissibly retroactive nature of the Panel's decision. On June 18, 2019, the D.C. Circuit denied Sudan's petition for rehearing en banc. App. 183a-185a.

REASONS FOR GRANTING THE PETITION

I. The D.C. Circuit's Application of the District of Columbia's "FSIA Terrorism Exception to the Presence Requirement" Raises Important Constitutional Issues

A. The District of Columbia's "FSIA Terrorism Exception to the Presence Requirement" Encroaches upon the Federal Foreign-Affairs Powers, Contrary to this Court's Precedents

1. The Constitution and centuries of this Court's precedents establish that authority over foreign affairs is vested "exclusively" in the federal government and "not shared by the States." *United States v. Pink*, 315 U.S. 203, 233 (1942); *see also Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) ("The Federal Government . . . is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties."). The Constitution grants broad foreign-affairs authority to Congress and the President, while denying such authority to the states. *Compare* U.S. Const. art. I, § 8 (granting Congress powers to "provide for the common Defence," "regulate Commerce with foreign Nations," "establish [a] uniform Rule of Naturalization," "define and punish . . . Offences against the Law of Nations," and "declare War"), *and* U.S. Const. art. II, §§ 2-3 (designating the President as "Commander in Chief," with powers "to make Treaties" and to appoint and receive "Ambassadors" and "other public Ministers"), *with* U.S. Const. art. I, § 10 (prohibiting any state from "enter[ing] into any Treaty, Alliance, or

Confederation," "grant[ing] Letters of Marque and Reprisal," "enter[ing] into any Agreement . . . with a foreign Power" without Congressional consent, or "engag[ing] in War").

This Court consistently has recognized that the text of the Constitution reflects the framers' intent to reserve foreign-affairs authority exclusively for the federal government, so that the United States can "act through a single government with unified and adequate national power."' *Japan Line, Ltd. v. Cty. of L.A.*, 441 U.S. 434, 448 (1979) (quoting *Bd. of Trs. v. United States*, 289 U.S. 48, 59 (1933)); *see also Hines*, 312 U.S. at 62 ("[T]he supremacy of the national power in the general field of foreign affairs . . . is made clear by the Constitution . . . and has since been given continuous recognition by this Court."); *Holmes v. Jennison*, 39 U.S. 540, 575 (1840) ("Every part of that instrument shows that our whole foreign intercourse was intended to be committed to the hands of the general government . . . .").

The Constitution forbids states from "rewrit[ing]" U.S. foreign policy, whether by "constitutions, statutes, or judicial decrees." *Pink*, 315 U.S. at 233; *see also First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 622 n.11 (1983) ("[M]atters bearing on the Nation's foreign relations 'should not be left to divergent and perhaps parochial state interpretations."' (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964))), *superseded by statute on other grounds*, 28 U.S.C. § 1610(g). This Court also has recognized that claims against foreign states necessarily and

unavoidably implicate the foreign-affairs authority vested in the federal government. *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493 (1983) ("Actions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States, and the primacy of federal concerns is evident.").

Accordingly, this Court has consistently invalidated state laws, including those allowing specifically for claims against foreign states, that impermissibly intrude "into the field of foreign affairs which the Constitution entrusts to the President and the Congress." *Zschernig v. Miller*, 389 U.S. 429, 432, 441 (1968) (invalidating an Oregon law that "illustrate[d] the dangers which are involved if each State . . . is permitted to establish its own foreign policy"); *see also Pink*, 315 U.S. at 232 (holding unconstitutional a New York court's refusal to enforce rights under a presidential agreement with the Soviet Union, finding "serious consequences might ensue" if states "could defeat or alter" U.S. foreign policy). Lower courts following this Court's precedents have done the same. *E.g.*, *Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067, 1077 (9th Cir. 2012) (finding unconstitutional a California statute allowing for claims by Armenian genocide victims because the law had a "direct impact upon foreign relations" (quoting *Zschernig*, 389 U.S. at 441)); *Tayyari v. N.M. State Univ.*, 495 F. Supp. 1365, 1380 (D.N.M. 1980) (invalidating a state university's policy excluding Iranian students as imposing "an impermissible burden on the federal government's power" over foreign affairs); *Springfield Rare Coin*

Galleries, Inc. v. Johnson, 503 N.E.2d 300, 305-06 (Ill. 1986) (striking state tax provision targeting South Africa because it was not an "evenhanded burden" and encroached upon "the authority of the Federal government to conduct foreign affairs"); *N.Y. Times Co. v. N.Y. Comm'n on Human Rights*, 361 N.E.2d 963, 968-69 (N.Y. 1977) (finding a municipal order boycotting South Africa encroached on federal foreign-policy authority).

2. This Court also has "cast doubt on the authority of courts to extend or create private causes of action even in the realm of domestic law." *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1402 (2018). The Court has "recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004) (citing *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001); *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001)).

Further, the Court has cautioned that "the potential implications for the foreign relations of the United States of recognizing such causes should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs," *Sosa*, 542 U.S. at 727, as "[t]he political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns," *Jesner*, 138 S. Ct. at 1403 (citing *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 116-17 (2013)). These foreign-affairs and separation-of-powers concerns extend in force to judicial

rulemaking by a state-level court that has created a cause of action applicable only against foreign states subject to jurisdiction under § 1605A.

3. The new D.C.-law "FSIA Terrorism Exception to the Presence Requirement" encroaches in particular on the authority of the political branches to shape foreign policy. As the D.C. Court of Appeals plainly stated, the new D.C.-law rule was intended to "increase the IIED liability of foreign states" and address an issue of "national significance." App. 28a-29a. By fashioning a new rule of law expressly targeting a narrow subset of foreign states, the D.C. Court of Appeals vastly expanded the scope of liability for these foreign states, outside of the authority and control of the U.S. political branches and foreign-policy makers. In this case alone, over $3.8 billion in damages turns on the application of this new D.C.-law rule.

If the District of Columbia's new FSIA rule is allowed to stand, nothing would prevent the District of Columbia, or the states, from seeking to shape U.S. foreign policy by creating other D.C.-law, or state-law, causes of action that increase the liability of other foreign sovereigns, such as those sovereigns sued under 28 U.S.C. § 1605B, a broader terrorism-related exception to foreign sovereign immunity.

The D.C. Circuit side-stepped the question whether the D.C. Court of Appeals *could* create a foreign-policy rule increasing the liability of only those foreign states lacking immunity under § 1605A(a), because the D.C. Circuit concluded (erroneously) that the D.C. Court of Appeals had not,

in fact, created a rule targeting only certain foreign states. App. 10a-11a. But the D.C. Court of Appeals expressly stated that it was creating a basis for liability in a "special" and "limited context," and described this new rule as: the "FSIA Terrorism Exception to the Presence Requirement." App. 24a, 30a-31a; *see also* App. 29a (stating "we endorse an FSIA terrorism exception"). The court emphasized that the new "*FSIA terrorism exception* . . . is quite limited in scope," and "excuses the presence requirement only when plaintiffs demonstrate that" § 1605A(a)'s predicates, including that defendants "have been classified as state sponsors of terrorism," have been met. App. 27a; *see also* App. 27a ("Relaxing the presence requirement in cases where § 1605A applies . . . ."); App. 30a ("We see little need to enforce the presence requirement in IIED cases where the jurisdictional elements of § 1605A are satisfied.").

The D.C. Court of Appeals' explicit focus on the foreign-policy implications of its new rule further reinforces that the D.C. Court of Appeals' decision specifically targets those foreign sovereigns subject to jurisdiction under § 1605A. *See* App. 28a ("Invoking the caveat here will increase the IIED liability of foreign states if they sponsor terrorism."); App. 30a ("Excusing the presence element in such cases may further deter foreign states from sponsoring terrorism"); App. 26a ("Defendants in FSIA terrorism cases do not need this additional protection [of a presence requirement]."); App. 25a ("In FSIA terrorism cases . . . the very facts that justify stripping foreign sovereigns of their immunity allay

the concerns that the presence requirement was designed to address.").

The only reasonable interpretation of the D.C. Court of Appeals' decision is that the court was pronouncing a new rule applicable only against designated state sponsors of terrorism subject to jurisdiction in § 1605A actions. Such judicial rulemaking exceeds the powers of the D.C. Court of Appeals — a state-level court — to shape foreign policy, in conflict with the separation-of-powers doctrine and principles of federalism, as well as this Court's precedents.

B. The District of Columbia's "FSIA Terrorism Exception to the Presence Requirement" Conflicts with Longstanding Federal Law Requiring the Non-Discriminatory Treatment of Foreign States

The Supremacy Clause provides that federal law is "the supreme Law of the Land" and "the Judges in every State shall be bound thereby," notwithstanding any state law to the contrary. U.S. Const. art. VI, cl. 2. The D.C. Court of Appeals' new "FSIA Terrorism Exception to the Presence Requirement" conflicts with longstanding federal law requiring the non-discriminatory treatment of foreign states in U.S. courts.

1. In the years preceding the enactment of the FSIA in 1976, federal courts held that foreign sovereigns lacking immunity were subject "to the same rules of law that apply to private citizens."

Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 704 (1976) (decided five months prior to enactment of FSIA); *see also, e.g.*, *Victory Transp., Inc. v. Comisaria Gen. de Abastecimientos y Transportes*, 336 F.2d 354, 362, 364 (2d Cir. 1964) (finding no immunity and applying the U.S. Arbitration Act with no modifications for a foreign sovereign); *Petrol Shipping Corp. v. Kingdom of Greece*, 360 F.2d 103, 106, 110 (2d Cir. 1966) (same); *Premier S.S. Corp. v. Embassy of Algeria*, 336 F. Supp. 507, 510 (S.D.N.Y. 1971) (same). This Court has recognized that the non-discriminatory treatment of foreign states applies not only when foreign states face liability but also when foreign states are themselves claimants in U.S. courts. *See Pfizer, Inc. v. Gov't of India*, 434 U.S. 308, 318-19 (1978) ("This Court has long recognized the rule that a foreign nation is generally entitled to prosecute any civil claim in the courts of the United States upon the same basis as a domestic corporation or individual might do. . . . To allow a foreign sovereign to sue in our courts for treble damages to the same extent as any other person injured by an antitrust violation is thus no more than a specific application of a long-settled general rule.").

Upon enactment of the FSIA, this federal-law non-discrimination principle was embodied in § 1606, titled "Extent of Liability." Section 1606 provides that "[a]s to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like

circumstances." The D.C. Circuit has held that § 1606 "in effect instructs federal judges to find the relevant law, not to make it," and has observed that, in doing this, "federal judges have looked to the common law of the states to determine the meaning of 'intentional infliction of emotional distress.'" *Bettis v. Islamic Republic of Iran*, 315 F.3d 325, 333 (D.C. Cir. 2003). Plaintiffs relying on the FSIA's former terrorism exception to immunity, § 1605(a)(7), thus would raise state-law claims via § 1606 of the FSIA. *See, e.g.*, *Price v. Socialist People's Libyan Arab Jamahiriya*, 384 F. Supp. 2d 120, 132 (D.D.C. 2005) (explaining that "state law must then provide a cause of action against private individuals for the kind of acts that defendant allegedly committed" (citing 28 U.S.C. § 1606)). As the D.C. Circuit itself observed, however, this recourse to state-law claims resulted in the application of different "substantive law among the states," which accordingly "caused recoveries to vary among otherwise similarly situated claimants, denying some any recovery whatsoever." App. 42a (citing *Peterson v. Islamic Republic of Iran*, 515 F. Supp. 2d 25, 44-45 (D.D.C. 2007) (denying recovery for IIED to plaintiffs domiciled in Pennsylvania and Louisiana while permitting recovery for plaintiffs from other states)).

In 2008, Congress repealed § 1605(a)(7), replacing it with § 1605A, the new FSIA terrorism exception. As part of the 2008 amendments, Congress enacted § 1605A(c), providing for the first time a federal right of action for qualifying plaintiffs against foreign sovereigns designated as state sponsors of terrorism under federal law. As the D.C. Circuit held in its

2017 Opinion, "in creating a federal cause of action, the Congress sought to end the inconsistencies in the 'patchwork' pass-through approach." App. 160a (citing *Leibovitch v. Islamic Republic of Iran*, 697 F.3d 561, 567 (7th Cir. 2012)).

In enacting § 1605A, Congress declined to amend § 1606 to include a reference to § 1605A, even though Congress amended other FSIA provisions to account for § 1605A's enactment. *See, e.g.*, 28 U.S.C. §§ 1607, 1610. Thus, § 1606 did not apply to new cases filed under § 1605A. As Sudan argues in its pending Conditional Cross-Petition in *Republic of Sudan v. Opati*, Case No. 17-1406 (and in *Opati v. Republic of Sudan*, Case No. 17-1268), Congress' decision not to amend § 1606 is unsurprising, because the new federal cause of action against state sponsors of terrorism, § 1605A(c), forecloses recourse to the "patchwork" of state-law causes of action previously invoked through § 1606. Instead, Sudan maintains that § 1605A(c) provides the exclusive remedy in cases brought under § 1605A. The D.C. Circuit in its 2017 Opinion, however, disagreed and held that Congress intended to allow resort to state law if a plaintiff did not qualify for a remedy under § 1605A(c). *See* App. 141a-142a. But no evidence of such congressional intent exists.

Even assuming recourse to state-law claims remains viable under § 1605A and § 1606 does not apply to guide the "extent of liability" here, the principle of non-discriminatory treatment of foreign states still applies to Plaintiffs' IIED claims under longstanding federal law. *See Alfred Dunhill of*

London, 425 U.S. at 704. The new District of Columbia "FSIA Exception to the Presence Requirement" expressly targets and discriminates against foreign states lacking immunity under § 1605A, in conflict with this federal law.

2. A state law that conflicts with federal law cannot stand under this Court's precedent. *See, e.g.*, *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000) (striking down state law sanctioning Burma); *see also Ridgway v. Ridgway*, 454 U.S. 46, 54-55, 60 (1981) (finding a state-court decree preempted because it unconstitutionally conflicted with a federal statute). This Court has stated that under the Supremacy Clause, federal common law, like federal statutory law, preempts conflicting state law. *See Sabbatino*, 376 U.S. at 426 (holding that "there are enclaves of federal judge-made law which bind the states"); *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988) (explaining that certain areas involving "'uniquely federal interests' are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced" by "federal common law" (citations omitted)).

The D.C. Circuit decision applying the D.C. Court of Appeals' new rule did not address Sudan's arguments on non-discrimination. Instead, the D.C. Circuit concluded summarily that the D.C. Court of Appeals had not created a new rule singling out foreign sovereigns designated as state sponsors of terrorism under federal law. App. 10a. As discussed

above, that conclusion is unsupportable on the face of the D.C. Court of Appeals' decision.

This Court's review thus is essential to determine whether the D.C. Court of Appeals overstepped its Constitutional authority by creating a rule of substantive liability — applicable against only foreign states designated as state sponsors of terrorism under federal law — in conflict with longstanding federal law requiring U.S. courts to treat foreign sovereigns lacking immunity like private actors for purposes of liability.

II. The D.C. Circuit's Retroactive Application of the District of Columbia's "FSIA Terrorism Exception to the Presence Requirement" Conflicts with this Court's Precedents and the Decisions of Other Circuits

In answering the D.C. Circuit's certified question, the D.C. Court of Appeals held that it was making "explicit" what its case law from the 1980s had "implied" — that family members asserting IIED claims must have been present at the scene. App. 22a. But the D.C. Court of Appeals continued that it was also now recognizing a new exception to the presence requirement applicable in "FSIA terrorism cases." App. 24a-25a. The D.C. Court of Appeals stated that its "holding today" was consistent with Congress' "efforts to deter foreign states from sponsoring terrorism." App. 29a. By its own words, therefore, the "FSIA terrorism exception" to presence was a new rule of substantive liability that did not

exist during the times relevant to Sudan's alleged conduct.

Before determining whether to retroactively apply this new rule of substantive liability, the D.C. Circuit should have followed this Court's instruction in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). *Chevron Oil* instructs courts to consider whether (i) the decision "establish[es] a new principle of law," (ii) retroactive application of the new rule will "further or retard its operation," and (iii) retroactive application would "produce substantial inequitable results." *Id.* at 106-07 (internal quotation marks and citations omitted). Each *Chevron Oil* factor weighs decidedly against retroactive application of the new D.C.-law rule, as (i) the D.C. Court of Appeals was clear that it was creating a new rule under D.C. law, at variance with the presence requirement that generally applies, (ii) applying the new rule retroactively to this case would not advance the court's purported policy objective of "deterrence" (App. 28a), and (iii) the retroactive application of the new rule plainly resulted in "substantial inequitable results" — i.e., a default judgment of over $3.8 billion in compensatory damages and prejudgment interest.

The D.C. Circuit not only failed to apply *Chevron Oil*, it failed to consider Sudan's retroactivity argument at all.

This question of retroactivity is particularly certworthy given the substantial uncertainty concerning the continued applicability of *Chevron Oil* in light of subsequent decisions from this Court and several circuits. Indeed, this Court in *Ryder v.*

United States, 515 U.S. 177 (1995), questioned — but did not foreclose — *Chevron Oil*'s "continuing validity" in the context of retroactively applied judicial decisions, following this Court's rulings in *Harper v. Virginia Department of Taxation*, 509 U.S. 86, (1993), and *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749 (1995). *See Ryder*, 515 U.S. at 184-85.

Across the circuits, however, the federal courts of appeals have reached vastly disparate conclusions as to whether *Chevron Oil* remains applicable in this context. Some courts maintain that *Chevron Oil* still governs whether to apply a judicial decision retroactively in the first instance. *See Nunez-Reyes v. Holder*, 646 F.3d 684, 690-91 (9th Cir. 2011) (concluding that "the Supreme Court has not overruled the *Chevron Oil* test" in circumstances where the court "announce[s] a new rule of law not affecting [its] jurisdiction"); *Crowe v. Bolduc*, 365 F.3d 86, 93 (1st Cir. 2004) (acknowledging *Chevron Oil* as providing a "narrow equitable exception" in civil cases dealing with whether to apply judicial decisions retroactively); *Glazner v. Glazner*, 347 F.3d 1212, 1216-17 (11th Cir. 2003) ("Although prospectivity appears to have fallen into disfavor with the Supreme Court . . . the Court has clearly retained the possibility of pure prospectivity and, we believe, has also retained the *Chevron Oil* test" in the civil context.).

Other circuits opine that this Court has overruled *Chevron Oil*. *See, e.g.*, *Atl. Coast Demolition & Recycling v. Bd. of Chosen Freeholders*, 112 F.3d 652, 672 (3d Cir. 1997) ("[T]he Supreme Court's latest

retroactivity jurisprudence has overruled *Chevron Oil*'s equitable balancing test as the determinant of whether a new principle of law will be applied retroactively." (citing *Reynoldsville Casket Co.*, 514 U.S. 749; *Harper*, 509 U.S. 86)); *Toms v. Taft*, 338 F.3d 519, 529 (6th Cir. 2003) (finding *Chevron Oil* "has been overruled to the extent that it permits the selective prospective-only application of a new rule of law"). And some courts have wavered on the issue or declined to decide it altogether. *See Educ. Credit Mgmt. Corp. v. Mersmann*, 505 F.3d 1033, 1051 (10th Cir. 2007) (referring to the jurisprudence since *Chevron Oil* as a "confusing path for courts to navigate" and concluding that the "*Chevron* is only relevant, if it maintains any relevance at all, in determining whether a new federal rule should apply retroactively across the board" (internal quotations omitted)); *Fairfax Covenant Church v. Fairfax Cty. Sch. Bd.*, 17 F.3d 703, 710 (4th Cir. 1994) (noting that *Chevron Oil* may have "lost all vitality," despite "the notable absence in *Harper* of any statement that *Chevron* is overruled," but nonetheless applying the *Chevron Oil* analysis on retroactivity).

Notwithstanding the conflicting interpretations regarding *Chevron Oil*'s continued relevance, the D.C. Circuit's failure to even acknowledge *Chevron Oil*'s potential applicability conflicts with the decisions of the First, Ninth, and Eleventh Circuits holding that *Chevron Oil* is still pertinent to deciding the retroactive application of judicial decisions. *See Nunez-Reyes*, 646 F.3d at 690; *Crowe*, 365 F.3d at 93; *Glazner*, 347 F.3d at 1216-17. This Court's review is

therefore imperative to provide much-needed clarity to this debate.

2. The application of the new "FSIA terrorism exception" to presence also conflicts with this Court's decision in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994). Under *Landgraf*, a statute that "attaches new legal consequences to events completed before its enactment" presumptively does not apply retroactively unless Congress has otherwise "made clear its intent." *Id.* at 270. To overcome this presumption, *Landgraf* requires that the statutory text include a clear, "explicit command" allowing for such retroactive application. *Id.* at 281.

In its 2017 decision in this case, the D.C. Circuit held that punitive damages could not be imposed retroactively because of the presumption against retroactivity set forth in *Landgraf*. App. 156a (acknowledging that "[t]his principle applies equally to state sponsors of terrorism" and that "[e]ven when the conduct in question is morally reprehensible or illegal, a degree of unfairness is inherent whenever the law imposes additional burdens based on conduct that occurred in the past" (quoting *Landgraf*, 511 U.S. at 282 n.35) (internal quotation marks omitted)).

The statute at issue here is § 1606 of the FSIA. During the 1990s, the time of Sudan's alleged conduct giving rise to Plaintiffs' claims, § 1606 (and federal common law) required that foreign states be treated like private actors for purposes of liability. At that time, private individuals were liable for IIED under D.C. law only to family members who were present at the scene. *See* App. 22a (formally adopting presence

requirement by making explicit what cases from the 1980s had implied). Applying the new D.C.-law rule here, therefore, impermissibly and exponentially increases Sudan's liability for past conduct.

If § 1606's "same extent" limitation no longer applies by reason of § 1605A's enactment, that statutory and legal change in the governing law post-dates Sudan's alleged conduct here. But Congress gave no indication that a foreign state lacking immunity under § 1605A(a) should face greater liability under state law than private parties in like circumstances, much less a clear statement of intent that any such change in the law should operate retroactively. *See* App. 161a ("The authorization of § 1605A, read together with § 1606, lacks a clear statement of retroactive effect.").

Indeed, the D.C. Circuit's 2017 opinion on punitive damages already held this "backdoor lifting" of the applicability of § 1606 to state-sponsor-of-terrorism claims could not sustain a *Landgraf* analysis. App. 161a. (This Court's review of that question is pending. *See* Case No. 17-1268.) Hence, the *Landgraf* presumption against retroactivity controls and should have compelled the D.C. Circuit's application of the law in effect at the time of the relevant conduct — namely, the limitation on state-law liability under § 1606 and the D.C. IIED law then in effect.

Like the question on the retroactive application of punitive damages (currently on review in Case No. 17-1268), the retroactive application of the D.C. Court of Appeals' new FSIA rule implicates billions of

dollars in damages against a foreign sovereign and applies in any case against a designated state sponsor of terrorism for claims arising prior to 2008 (when § 1605A was enacted and the applicability of § 1606 came into question). The retroactivity question here thus equally warrants this Court's review.

III. The District of Columbia's "FSIA Terrorism Exception to the Presence Requirement" Compromises the Ability of the United States to Conduct Foreign Relations

Cases against foreign sovereigns are always fraught with the potential for diplomatic misunderstanding and friction. *See Verlinden*, 461 U.S. at 493 ("Actions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States, and the primacy of federal concerns is evident."). But the risk of diplomatic friction is never greater than when a foreign state is sued for allegedly supporting terrorism.

1. This Court's review is particularly urgent here, where the D.C. Circuit's application of the D.C.-law rule threatens to disrupt the delicate bilateral engagement between the United States and Sudan, as Sudan embarks on a historic transition to democratic civilian rule and seeks removal from the list of state sponsors of terrorism. *See* Press Release, Office of the Spokesperson, U.S. Department of State, Friends of Sudan Supports the Planned Reforms of Sudan's Economy (Oct. 22, 2019), *available at* https://www.state.gov/friends-of-sudan-supports-the-

planned-reforms-of-sudans-economy/ ("The United States noted that it has begun engagement with the Government of Sudan on the requirements for potential recession of Sudan's SST designation."); Cong. Research Serv., R45794, Sudan's Uncertain Transition (July 17, 2019).

This Court has recognized, in the case of Iraq, the unique and delicate foreign-relations issues that U.S. law and litigation can present for a transitional government of a designated state sponsor of terrorism seeking to restore its standing in the international community. *See Republic of Iraq v. Beaty*, 556 U.S. 848, 864 (2009) ("'[A] friendly successor government would, in its infancy, be vulnerable under [then-] Section 1605(a)(7) to crushing liability for the actions of its renounced predecessor.'" (quoting *Acree v. Republic of Iraq*, 370 F.3d 41, 61 (D.C. Cir. 2004) (concurring opinion of then-Circuit Judge Roberts))). Much like Iraq was in *Beaty*, Sudan's transitional government is now in the throes of rebuilding Sudan's economy under the crippling effects of the state-sponsor-of-terrorism designation and restoring Sudan's standing in the global community. The D.C. Circuit's retroactive application of the District of Columbia's unconstitutional rule increases Sudan's liability by over $3.8 billion, thereby undermining Sudan's economic recovery and, in turn, its civil and political stability.

Against this history, and at this particularly delicate time in the ongoing foreign relations between the United States and Sudan, this Court, at a minimum, should seek the views of the United States

on the D.C. Circuit's endorsement and retroactive application of the new D.C.-law rule that vastly increases Sudan's liability in these cases. *See, e.g.*, *Jesner*, 138 S. Ct. at 1399 (recognizing the urgent need for this Court's review in case causing significant diplomatic tensions).

2. Importantly, the Petition also presents this Court with an extremely rare opportunity to review and clarify the extent of a foreign state's liability to foreign-national family-member plaintiffs who cannot avail themselves of the federal cause of action in § 1605A(c). In most terrorism cases under § 1605A, the defendant foreign state does not appear, resulting in billions of dollars in default judgments. These default judgments often escape review entirely, precipitating and perpetuating bad law, and can mount up to become a serious impediment to the already-delicate foreign relations between the United States and the relevant foreign state.

The United States therefore has a strong interest "in encourag[ing] foreign states to appear before [U.S.] courts in cases brought under the FSIA," *Practical Concepts, Inc. v. Republic of Bolivia*, 811 F.2d 1543, 1551-52 (D.C. Cir. 1987), and "in assuring foreign nations' ability to rely on the U.S. courts" in those cases, *FG Hemisphere Assocs. v. Democratic Republic of Congo*, 447 F.3d 835, 839 (D.C. Cir. 2006). But, absent this Court's review, the D.C. Circuit's decision stands to openly discourage foreign states from appearing. A foreign sovereign has little incentive to appear before a court that seemingly has free rein to create or apply new substantive rules,

devoid of congressional input, that specially target foreign states and increase their liability exponentially (and retroactively).

The United States has a strong interest in stemming the growing tide of unchecked default judgments emanating from FSIA terrorism litigation brought in the D.C. District Court (the default jurisdiction in FSIA cases under 28 U.S.C. § 1391(f)). Because the D.C. Circuit allowed recourse to state law for foreign-national plaintiffs who cannot satisfy the requirements of § 1605A(c), the D.C. District Court continues to serve as a clearinghouse for billions of dollars in IIED claims in § 1605A cases brought by foreign-national plaintiffs proceeding under state law.

A review of the dockets shows that at least seventy-nine § 1605A cases are currently pending in the D.C. District Court, twenty-seven of which appear to rely on state-law causes of action. In all but a handful of these cases, the defendant foreign sovereign has not appeared. Since the beginning of 2019, twenty-four new such cases have been filed in the D.C. District Court, of which nine invoke state law. Thus the D.C. Circuit's decision will only embolden more foreign-national plaintiffs lacking any substantial connection to the United States to file suits seeking billions of dollars in the D.C. federal court against designated foreign sovereigns. These suits not only place an undue burden on the D.C. federal courts, but they deepen the risk that such free-wheeling litigation will complicate foreign relations for the United States.

Because the issues here have been fully adjudicated in an adversarial context, this Petition may be this Court's only opportunity to provide much-needed guidance on the extent of a foreign state's liability under § 1605A for claims brought by foreign-national plaintiffs having little or no connection to the United States.

CONCLUSION

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

Respectfully submitted,

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November 15, 2019