No. 17-1268

In the Supreme Court of the United States

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

v.

REPUBLIC OF SUDAN, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONERS

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
JOSEPH H. HUNT
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
ERICA L. ROSS
Assistant to the Solicitor General
SHARON SWINGLE
SONIA M. CARSON
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

MARIK A. STRING
Acting Legal Adviser
Department of State
Washington, D.C. 20520

QUESTION PRESENTED

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

In 2008, Congress amended the FSIA to authorize certain plaintiffs to pursue a federal cause of action "for personal injury or death caused by" extrajudicial killing and to recover "economic damages, solatium, pain and suffering, and punitive damages." 28 U.S.C. 1605A(c); see National Defense Authorization Act for Fiscal Year 2008 (NDAA), Pub. L. No. 110-181, Div. A, Tit. X, § 1083(a)(1), 122 Stat. 338. Congress also moved the terrorism exception to foreign sovereign immunity from 28 U.S.C. 1605(a)(7) (2006), where it was subject to the prohibition on recovery of punitive damages in 28 U.S.C. 1606, to Section 1605A(a), where it is not so limited. In addition, Congress provided that certain existing claims "shall * * * be given effect as if the action had originally been filed under section 1605A(c)," NDAA § 1083(c)(2), 122 Stat. 342-343 (28 U.S.C. 1605A note), and that new claims "arising out of the same act or incident" as existing claims "may be brought under section 1605A," § 1083(c)(3), 122 Stat. 343.

The question presented is whether 28 U.S.C. 1605A permits recovery of punitive damages from foreign state sponsors of terrorism for activities occurring prior to the enactment of Section 1605A.

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INTEREST OF THE UNITED STATES

This case concerns whether the portions of 28 U.S.C. 1605A that permit recovery of punitive damages from foreign state sponsors of terrorism apply to activities occurring prior to the enactment of that statute. Litigation against foreign states in United States courts can have significant foreign affairs implications for the United States. At the same time, the United States has a strong interest in opposing state-sponsored terrorism, and in supporting appropriate recoveries for victims. At the Court's invitation, the United States filed a brief as amicus curiae at the petition stage of this case.

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-31a.

STATEMENT

1. a. Under the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1330, 1441(d), 1602 *et seq.*, a foreign state and its agencies and instrumentalities are immune from the jurisdiction of federal and state courts in civil actions unless an exception to immunity applies. 28 U.S.C. 1604. This case concerns the "[t]errorism exception," which establishes jurisdiction in United States courts for certain civil actions for damages "for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act," if the "provision of material support or resources is engaged in by an official, employee, or agent" of the defendant foreign state "while acting within the scope of his or her office, employment, or agency." 28 U.S.C. 1605A(a)(1) (emphasis omitted). The FSIA permits civil actions under the terrorism exception only if, among other criteria, the Secretary of State has formally designated the defendant foreign state a "state sponsor of terrorism." 28 U.S.C. 1605A(a)(2)(A)(i).

b. Congress originally enacted the terrorism exception in 1996, in response to attacks perpetrated by foreign state sponsors of terrorism or terrorist organizations affiliated with or materially supported by such states. Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 221(a), 110 Stat. 1241-1243; see, *e.g.*, H.R. Rep. No. 383, 104th Cong., 1st Sess. 41 (1995) (citing, among other "examples of terrorism[]," "the bombing of the U.S. Embassy in Beirut," "the hostage takings of Americans in the Middle East," and "the murder of American tourist Leon Klinghoffer" by the Palestine Liberation Front).

In 2004, the Court of Appeals for the District of Columbia Circuit held that the terrorism exception—which was then codified at 28 U.S.C. 1605(a)(7) (2000)—did not provide a federal cause of action against a foreign state, but "merely waive[d] the [jurisdictional] immunity of a foreign state" in lawsuits seeking to recover damages under other sources of law for the enumerated acts of terrorism. *Cicippio-Puleo* v. *Islamic Republic of Iran*, 353 F.3d 1024, 1033.

Congress responded in 2008 by amending the FSIA to create a federal cause of action for the same predicate acts as were included in the original terrorism exception to immunity. National Defense Authorization Act for Fiscal Year 2008 (NDAA), Pub. L. No. 110-181, Div. A, Tit. X, § 1083(a)(1), 122 Stat. 338; see 154 Cong. Rec. 500 (2008) (Sen. Lautenberg) (explaining that the amendment "fixes th[e] problem" of *Cicippio-Puleo* "by reaffirming the private right of action * * * against the foreign state sponsors of terrorism themselves" for "the horrific acts of terrorist murder and injury committed or supported by them"). The federal cause of action, codified at 28 U.S.C. 1605A(c), imposes liability on a foreign state sponsor of terrorism for certain claims by U.S. nationals, service-members, employees, or contractors, as well as their "legal representative[s]."

c. The FSIA generally prohibits plaintiffs from recovering punitive damages from foreign states. Section 1606, which was not amended in 2008, provides:

> As 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; but a foreign state except for an agency or

> instrumentality thereof shall not be liable for punitive damages.

28 U.S.C. 1606.

The 2008 amendments altered the application of that general rule to foreign state sponsors of terrorism in two ways. First, the federal cause of action in Section 1605A(c) expressly authorizes plaintiffs to recover "economic damages, solatium, pain and suffering, and punitive damages." 28 U.S.C. 1605A(c). Second, while the 2008 amendments retained the former terrorism exception to sovereign immunity in substantially similar form, Congress moved that exception from Section 1605(a)(7), where it fell within Section 1606's prohibition on punitive-damages liability, to Section 1605A(a), where it does not.

d. The 2008 amendments also addressed two classes of actions seeking relief for events occurring prior to the amendments' enactment. First, in a provision entitled "Prior actions," Congress provided that "any action" that (1) had been "brought under section 1605(a)(7)"; (2) "ha[d] been adversely affected on the ground[] that" the prior law "fail[ed] to create a cause of action against" a foreign state sponsor of terrorism; and (3) remained pending "before the courts in any form, including on appeal or motion under rule 60(b) of the Federal Rules of Civil Procedure * * * shall * * * be given effect as if the action had originally been filed under section 1605A(c) of title 28." NDAA § 1083(c)(2), 122 Stat. 342-343 (28 U.S.C. 1605A note) (capitalization altered). Second, in a provision entitled "Related actions," Congress provided that any action "arising out of the same act or incident" as a timely filed existing action, "may be brought under section 1605A of title 28" within certain periods of time. § 1083(c)(3), 122 Stat.

343 (capitalization altered). In addition, in a provision entitled "In general," Congress provided that the 2008 amendments "shall apply to any claim arising under section 1605A of title 28." § 1083(c)(1), 122 Stat. 343 (capitalization altered).

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

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

3. a. In October 2001, a U.S.-national plaintiff sued respondents under the then-existing terrorism exception, 28 U.S.C. 1605(a)(7) (2000). Compl. ¶ 2, *Owens* v. *Republic of Sudan*, No. 01-cv-2244 (D.D.C. Oct. 26, 2001). The complaint was later amended to include additional U.S.-national plaintiffs (the *Owens* plaintiffs). See Third Am. Compl. ¶ 2, *Owens*, *supra* (No. 01-cv-2244). The *Owens* plaintiffs alleged that respondents caused the embassy bombings by providing material support to al Qaeda, including "shelter and protection from interference," while the group was "carrying out planning and training" for the attacks. *Id.* ¶ 8; see *id.*

¶¶ 8-11. The *Owens* plaintiffs relied on substantive causes of action arising under state law. *Id.* ¶¶ 12-68.

As relevant here, respondents moved to dismiss, the district court denied the motion, and the court of appeals affirmed. *Owens* v. *Republic of Sudan*, 412 F. Supp. 2d 99 (D.D.C. 2006), aff'd and remanded, 531 F.3d 884 (D.C. Cir. 2008); see Pet. App. 10a-13a.

b. Before the court of appeals issued its decision in *Owens*, Congress enacted the 2008 amendments to the FSIA, replacing the former terrorism exception to immunity in 28 U.S.C. 1605(a)(7) (2006) with the current exception in Section 1605A(a), and creating the federal cause of action in Section 1605A(c). Following the court of appeals' decision, the *Owens* plaintiffs amended their complaint to assert jurisdiction under the new immunity exception, as well as substantive claims under the new federal cause of action. See NDAA § 1083(c)(2), 122 Stat. 342-343. The *Owens* plaintiffs did not seek punitive damages. Pet. App. 289a n.9.

By this time, respondents' prior counsel had withdrawn and respondents had ceased participating in the litigation. See Pet. App. 13a.

c. Additional plaintiffs subsequently filed or amended similar complaints or moved to intervene in *Owens*. See Pet. App. 13a, 89a. Petitioners here—known in the district court as the *Opati*, *Wamai*, *Amduso*, and *Onsongo* plaintiffs—relied on the related-action provision, NDAA § 1083(c)(3), 122 Stat. 343, and sought relief including punitive damages. See Pet. App. 89a-90a, 261a, 287a, 309a, 336a. The vast majority of petitioners are foreign-national employees and contractors of the U.S. government who were victims of the Embassy attacks, as well as their foreign-national family members. *Id.* at 250a, 268a, 295a, 316a.

The foreign-national family members are ineligible to invoke the federal cause of action, see 28 U.S.C. 1605A(c); they therefore asserted jurisdiction under Section 1605A(a) and alleged emotional-distress claims under state and foreign law. See Pet. App. 99a, 250a; Second Am. Compl. ¶¶ 367-391, *Opati* v. *Republic of Sudan*, No. 12-cv-1224 (D.D.C. Oct. 22, 2013) (invoking state, Kenyan, and Tanzanian law); J.A. 128a-135a (district court decided, under choice-of-law principles, to apply District of Columbia law).

4. Following a consolidated evidentiary hearing in which respondents did not participate, the district court entered default judgments for all plaintiffs. J.A. 79a-136a; see Pet. App. 13a-15a. The court determined that the plaintiffs had put forth sufficient evidence that respondents provided material support to al Qaeda, and that the 1998 Embassy bombings were "caused by" that support. 28 U.S.C. 1605A(a)(1); J.A. 95a-123a. The court ultimately awarded a total of approximately $10.2 billion in damages, including approximately $4.3 billion in punitive damages. Pet. App. 15a.

Respondents thereafter reappeared, appealed, and sought an indicative ruling on motions for vacatur under Federal Rule of Civil Procedure 60(b). See Fed. R. Civ. P. 62.1. The court of appeals held the appeals in abeyance pending the district court's resolution of the motions to vacate. Pet. App. 151a.

The district court denied the motions. Pet. App. 147a-248a. As relevant here, the court declined to vacate the punitive damages awards as impermissibly retroactive. While the court expressed "significant doubt" about whether the 2008 NDAA authorized the award of punitive damages for pre-enactment conduct, the court observed that respondents had "provided no authority

suggesting that such error alone is a proper basis for vacating the judgments." *Id.* at 247a; see *id.* at 240a-248a.

5. The court of appeals affirmed the district court's judgment as to respondents' liability, but vacated the punitive damages awards on the ground that Section 1605A does not authorize punitive damages for pre-enactment conduct. Pet. App. 1a-146a.

a. The court of appeals first determined that "sound reasons" existed to "exercise [its] discretion" to reach the merits of the punitive-damages issue. Pet. App. 107a-108a. The court noted, *inter alia*, what it termed the "criminal" nature of punitive damages; the size of the awards; the fact that the "novel" issue presented a "pure question of law"; the "potential effect on U.S. diplomacy and foreign relations"; the strength of Sudan's arguments; and the likelihood that the question would recur within the circuit. *Id.* at 117a-120a & n.8.

b. On the merits, the court of appeals determined that plaintiffs suing foreign state sponsors of terrorism under Section 1605A may not recover punitive damages for activities predating that provision's enactment.

i. The court of appeals first determined that the "presumption against retroactive legislation" under *Landgraf* v. *USI Film Products*, 511 U.S. 244, 265 (1994), governed the applicability of the new federal cause of action to pre-enactment conduct. Pet. App. 122a-125a. The court explained that under *Landgraf*, a court must determine "whether Congress has expressly prescribed the statute's proper [temporal] reach." *Id.* at 121a (citation omitted). "If Congress has clearly spoken, then 'there is no need to resort to judicial default rules,' and the court must apply the statute as written." *Ibid.* (quoting *Landgraf*, 511 U.S. at 280). But if the

statute is not clear, the court must "evaluate whether the legislation 'operate[s] retroactively,' as it does if it 'would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.'" *Ibid.* (quoting *Landgraf*, 511 U.S. at 280) (brackets in original). "If the statute operates retroactively but lacks a clear statement of congressional intent to give it retroactive effect, then the *Landgraf* presumption controls and the court will not apply the statute to pre-enactment conduct." *Ibid.*

Taking *Landgraf*'s second step first, the court of appeals found it "obvious that the imposition of punitive damages under the new federal cause of action in § 1605A(c) operates retroactively because it increases Sudan's liability for past conduct." Pet. App. 122a. The court distinguished *Republic of Austria* v. *Altmann*, 541 U.S. 677 (2004), which held that certain provisions of the FSIA applied to pre-enactment conduct notwithstanding the absence of a clear statement in the statute. The court explained that *Altmann* addressed jurisdictional provisions, whereas here, "the authorization of punitive damages 'adheres to the cause of action' under § 1605A(c), making it 'essentially substantive.'" Pet. App. 122a-123a (quoting *Altmann*, 541 U.S. at 695 n.15).

The court of appeals next considered whether the federal cause of action contains "a clear statement authorizing punitive damages for past conduct." Pet. App. 125a. The court did not question that "[t]he 2008 NDAA plainly applies the new cause of action in § 1605A(c) to the pre-enactment conduct of a foreign sovereign." *Id.* at 122a. The court explained that "by allowing a plaintiff to convert an action brought under [the prior] § 1605(a)(7)" into one under Section 1605A(c), the

NDAA "clearly authorizes the federal cause of action to apply" to conduct predating its enactment. *Id.* at 126a. But the court determined that the statute lacks "a clear statement" authorizing plaintiffs invoking the federal cause of action to recover punitive damages for pre-enactment conduct. *Id.* at 125a-128a. The court stated that "nothing in the text of § 1605A(c) speaks to whether punitive damages are available under the federal cause of action for pre-enactment conduct." *Id.* at 126a. And the court determined that the prior- and related-action provisions did not constitute "a clear statement" that Congress intended punitive damages to be available against foreign state sponsors of terrorism for such conduct. *Id.* at 127a-128a.

ii. The court of appeals likewise held that the 2008 NDAA does not authorize plaintiffs relying on state causes of action to recover punitive damages for pre-enactment conduct. Pet. App. 128a. The court acknowledged that the NDAA codified the new exception to foreign sovereign immunity in Section 1605A(a), and that Section 1606's prohibition on punitive damages "has no bearing on state law claims brought under the jurisdictional grant in § 1605A." *Ibid.* But the court determined that Congress's placement of the new terrorism exception in Section 1605A did not constitute a clear statement of intent to allow state-law plaintiffs to recover punitive damages for pre-enactment conduct. *Id.* at 128a-129a. The court concluded that "[i]f the express authorization of punitive damages under § 1605A(c) lacks a clear statement of retroactive effect" sufficient to satisfy *Landgraf*, "then the implicit, back-door lifting of the prohibition against punitive damages in § 1606 for state law claims fares no better." *Id.* at 129a.

SUMMARY OF ARGUMENT

The court of appeals erred in concluding that the current version of the terrorism exception, 28 U.S.C. 1605A, does not permit recovery of punitive damages from foreign state sponsors of terrorism for conduct predating the provision's enactment.

A. The court of appeals correctly determined that this Court's analysis in *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994), applies to the question whether plaintiffs relying on the new federal cause of action in 28 U.S.C. 1605A(c) may recover punitive damages for conduct predating the 2008 NDAA. The creation of a new cause of action is the paradigmatic circumstance in which the *Landgraf* presumption against retroactive application applies.

The court of appeals erred, however, in determining that the *Landgraf* presumption precludes the award of punitive damages under the federal cause of action for pre-enactment conduct. *Landgraf* provides that even where a statute would have retroactive effect, it may apply to pre-enactment conduct if "Congress has expressly prescribed the statute's proper reach." 511 U.S. at 280. That is the case here. Congress expressly provided for certain claims based on pre-enactment conduct to "be given effect as if the action had originally been filed under section 1605A(c)," and for other such claims to be filed directly "under section 1605A." NDAA § 1083(c)(2)-(3), 122 Stat. 342-343. By making Section 1605A(c) as a whole applicable to those claims, the 2008 NDAA clearly authorized plaintiffs to recover "economic damages, solatium, pain and suffering, and punitive damages," 28 U.S.C. 1605A(c), for pre-enactment conduct.

The history of the 2008 amendments confirms that Congress and the Executive understood that Section 1605A would authorize punitive damages for pre-enactment conduct. In vetoing a prior bill with materially identical language—but no presidential waiver provision, which was later added to the final 2008 NDAA—President George W. Bush expressed concern that the bill would have authorized the award of punitive damages for actions taken by the prior Iraqi regime. Congress also was aware of district court decisions awarding punitive damages against foreign states for conduct that predated the enactment of the prior terrorism exception.

Neither the court of appeals nor respondents dispute that plaintiffs suing for pre-enactment conduct may, where eligible, rely on the federal cause of action in Section 1605A(c) and, "[i]n any such action," recover "economic damages, solatium, [and] pain and suffering * * * damages." 28 U.S.C. 1605A(c). But the same statutory provisions that make clear Congress's intent to permit "such" actions and recoveries for pre-enactment conduct, *ibid.*, also make clear that plaintiffs suing for such conduct may recover punitive damages. Those provisions do not distinguish between punitive damages and other forms of relief.

Neither this Court's cases, nor the fact that punitive damages were previously unavailable in United States courts for claims against foreign states, provides support for requiring Congress to provide an extra-clear statement for punitive damages to apply to pre-enactment conduct. This Court also should not credit respondents' argument (Supp. Br. 6) that the same Congress that was "focus[ed]" on creating a federal cause of action for plaintiffs with preexisting claims against designated

state sponsors of terrorism intended to limit the forms of relief available to them. Because Congress expressly provided for punitive damages and directed that certain claims based on pre-enactment conduct be filed, or treated as though filed, under Section 1605A(c), there is no doubt that Congress made available Section 1605A(c)'s full panoply of damages. NDAA § 1083(c)(2)-(3), 122 Stat. 342-343.

B. The court of appeals also erred in holding that plaintiffs who invoke the terrorism exception to foreign sovereign immunity in Section 1605A(a) to bring state or foreign causes of action cannot recover punitive damages for pre-enactment conduct. In the 2008 amendments, Congress moved the terrorism exception from Section 1605(a)(7), where it was subject to Section 1606's prohibition on the recovery of punitive damages, to Section 1605A(a), where it is not. Because that change does not create or modify any cause of action—but only affects the extent to which United States courts are open to preexisting state or foreign causes of action—the *Landgraf* presumption against retroactivity does not apply.

Instead, under this Court's decision in *Republic of Austria* v. *Altmann*, 541 U.S. 677 (2004), the question is whether "anything in" the 2008 amendments "or the circumstances surrounding [their] enactment suggests" that removal of the bar to punitive damages "should not apply" to claims based on pre-enactment conduct. *Id.* at 697. The answer is no. Again, by expressly permitting certain plaintiffs who suffered pre-enactment injuries to bring suit "under section 1605A," NDAA § 1083(c)(3), 122 Stat. 343, Congress made plain that such actions should be treated like all other actions filed under that provision. Plaintiffs suing based on pre-

enactment conduct therefore may invoke the exception to foreign sovereign immunity in Section 1605A(a) and recover whatever forms of damages their foreign- or state-law claims permit, including punitive damages.

ARGUMENT

PLAINTIFFS SUING FOREIGN STATE SPONSORS OF TERRORISM UNDER 28 U.S.C. 1605A MAY RECOVER PUNITIVE DAMAGES FOR PRE-ENACTMENT CONDUCT

A. Plaintiffs Invoking The Federal Cause Of Action In 28 U.S.C. 1605A(c) May Recover Punitive Damages For Pre-Enactment Conduct

The court of appeals correctly recognized that the two-step analysis set forth in *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994), governs the question whether petitioners may obtain punitive damages under the federal cause of action in 28 U.S.C. 1605A(c) for conduct that predated the current version of the statute. The court erred, however, in concluding that the 2008 amendments lack a clear statement of congressional intent to make punitive damages available for pre-enactment conduct.

1. a. In *Landgraf*, this Court explained that "[w]hen a case implicates a federal statute enacted after the events in suit," a two-step inquiry generally applies. 511 U.S. at 280. "[A] court's first task is to determine whether Congress has expressly prescribed the statute's proper [temporal] reach." *Ibid.* If the statute reflects "clear congressional intent" that the new law should apply to pre-enactment conduct, the court should honor Congress's determination that "the benefits of retroactivity outweigh the potential for disruption or unfairness," and "there is no need to resort to judicial default rules." *Id.* at 268, 280.

If, however, the statute "does not evince any clear expression of intent" about its temporal application, the court must proceed to *Landgraf*'s second step. 511 U.S. at 264. There, the court should consider whether "the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted [or] increase a party's liability for past conduct." *Id.* at 280. If the statute would operate retroactively, the court should apply the "traditional presumption * * * that it does not govern" pre-enactment events, *id.* at 272, 280, "owing to the 'absen[ce of] a clear indication from Congress that it intended such a result,'" *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30, 37-38 (2006) (quoting *INS* v. *St. Cyr*, 533 U.S. 289, 316 (2001)) (brackets in original). By contrast, if the rule would not have retroactive effect—for example, because it is a "new jurisdictional" or "procedural" rule that "'takes away no substantive right'" or "regulate[s] secondary rather than primary conduct"—then it generally will apply in suits based on pre-enactment conduct. *Landgraf*, 511 U.S. at 274-275 (citation omitted).

Applying that framework, *Landgraf* held that the Civil Rights Act of 1991, 42 U.S.C. 1981a(a), did not authorize courts to award compensatory and punitive damages to a plaintiff for sexual harassment that predated the Act, where "no relief" would have been available before the Act's enactment. 511 U.S. at 283; see *id.* at 280-285. The Court first determined that a provision directing that the Act "'shall take effect upon enactment,'" combined with "negative inferences drawn from two [different] provisions of quite limited effect," were insufficient to show that Congress intended the new law to apply to an employer's pre-enactment conduct. *Id.* at 257-259 (citation omitted). Next, the Court concluded

that awarding damages under the new law would "impose on employers found liable a new disability in respect to past events." *Id.* at 283 (citation and internal quotation marks omitted). The Court accordingly applied the presumption against retroactivity, holding that the new damages provision did not apply to pre-enactment conduct. *Id.* at 280-285.[1]

In *Republic of Austria* v. *Altmann*, 541 U.S. 677 (2004), this Court considered whether *Landgraf* applied to an action under the FSIA. *Altmann* was decided before Congress enacted the federal cause of action in Section 1605A(c); at the time, the FSIA did "not create or modify any causes of action." *Id.* at 695 n.15. Instead, the FSIA "'codifie[d], as a matter of federal law, the restrictive theory of sovereign immunity'" that the State Department had previously adopted in the "'Tate Letter,'" and "transfer[red] primary responsibility for immunity determinations from the Executive to the Judicial Branch." *Id.* at 690-691 (quoting *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 487-488 (1983)).

This Court held that *Landgraf*'s "default rule" did not "control" the question whether the FSIA applied to conduct that predated both the Tate Letter in 1952 and the FSIA's enactment in 1976. *Altmann*, 541 U.S. at 692. The Court explained that the FSIA "defie[d] * * * categorization" as either "affect[ing] substantive rights" or "address[ing] only matters of procedure." *Id.* at 694.

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[1] Although the plaintiff in *Langdraf* would not have been entitled to any relief prior to enactment of the Civil Rights Act of 1991, the Court acknowledged that "in some cases," prior law would have permitted the recovery of backpay. 511 U.S. at 283. As to those cases, the Court stated that the creation of new damages remedies also would have retroactive effect. *Ibid.*

While the statute "merely open[ed] United States courts to plaintiffs with pre-existing claims against foreign states," rather than creating its own cause of action, it also codified "'the standards governing foreign sovereign immunity as an aspect of *substantive* federal law.'" *Id.* at 695 (quoting *Verlinden*, 461 U.S. at 497). The Court further found that the nature of foreign sovereign immunity was not amenable to the *Landgraf* test. While the "aim" of the presumption against retroactivity "is to avoid unnecessary *post hoc* changes to legal rules on which parties relied in shaping their primary conduct," "the principal purpose of foreign sovereign immunity has never been to permit foreign states * * * to shape their conduct in reliance on the promise of future immunity from suit in United States courts." *Id.* at 696. Instead, foreign sovereign immunity is "'a gesture of comity'" that "reflects current political realities and relationships." *Ibid.* (citation omitted).

"In this *sui generis* context," the Court declined to apply *Landgraf*, instead asking whether "anything in the FSIA or the circumstances surrounding its enactment suggests" that it "should not apply" to a foreign sovereign's pre-enactment conduct. *Altmann*, 541 U.S. at 696-697. The Court answered that question in the negative. *Id.* at 697-699. The Court explained that the statute's statement that "[c]laims of foreign states to immunity should henceforth be decided" under the FSIA, 28 U.S.C. 1602, along with the statute's "structure" and "purposes," sufficed to demonstrate that Congress "intended courts to resolve *all* such claims" under the FSIA, "regardless of when the underlying conduct occurred." *Altmann*, 541 U.S. at 698.

b. The court of appeals correctly determined that *Landgraf*, rather than *Altmann*, applies to the federal

cause of action in Section 1605A(c). Pet. App. 123a-126a. As this Court has recognized, the creation of a new cause of action is the paradigmatic circumstance implicating the *Landgraf* framework. See, *e.g.*, *Landgraf*, 511 U.S. at 283 (observing that where a statute "can be seen as creating a new cause of action, * * * its impact on parties' rights is especially pronounced"); *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939, 948 (1997) (concluding that the *Landgraf* analysis applied to a provision that "change[d] the substance of the existing cause of action"). Indeed, *Altmann* itself explained that where a statute "create[s] or modif[ies] a[] cause[] of action," it is properly analyzed under *Landgraf*. 541 U.S. at 695 n.15. Because, at the time of *Altmann*, the FSIA did not create or modify any cause of action, it is not determinative that the Court there declined to address *Landgraf*'s applicability to the FSIA on a provision-by-provision basis. See Pet. Br. 36-37.

2. Although the court of appeals correctly held that *Landgraf* applies to the federal cause of action, it erred in concluding that Section 1605A(c) does not clearly authorize punitive damages for pre-enactment conduct. See Pet. App. 125a-128a.

a. As the court of appeals recognized, and respondents have not disputed, the 2008 amendments clearly permit plaintiffs to invoke the express federal cause of action and recover "economic damages, solatium, [and] pain and suffering * * * damages," 28 U.S.C. 1605A(c), for conduct predating the 2008 NDAA. Pet. App. 122a. That is because the amendments direct that certain then-pending "prior actions" under 28 U.S.C. 1605(a)(7) (2006) "shall * * * be given effect as if [they] had originally been filed under section 1605A(c)." NDAA

§ 1083(c)(2), 122 Stat. 342-343 (capitalization altered). And they allow plaintiffs to file new actions directly "under section 1605A" if those actions are "related" to actions that were "timely commenced" under 28 U.S.C. 1605(a)(7) (2006). NDAA § 1083(c)(3), 122 Stat. 343 (capitalization altered). As the court of appeals acknowledged, the actions permitted by the prior- and related-action provisions "necessarily are based upon the sovereign defendant's conduct before enactment of § 1605A." Pet. App. 122a.

Those same statutory provisions demonstrate that punitive damages are available under Section 1605A(c) for pre-enactment conduct. Neither Section 1605A(c), nor the prior- and related-action provisions, distinguish among different types of relief. Instead, the prior- and related-action provisions channel certain claims based on prior events through Section 1605A(c) as a whole. Section 1605A(c), in turn, states that "[i]n any such action"—*i.e.*, in any action governed by subsection (c)—"damages may include economic damages, solatium, pain and suffering, and punitive damages." 28 U.S.C. 1605A(c). If there were any doubt, the 2008 amendments further provide that, "in general," "[t]he amendments made by this section" as a whole "shall apply to any claim arising under section 1605A of title 28." NDAA § 1083(c)(1), 122 Stat. 342 (capitalization altered). Thus, once one accepts that the federal cause of action applies to pre-enactment conduct, and that it makes economic, solatium, and pain and suffering damages available for such conduct, there is no textual basis for reaching a different conclusion with respect to punitive damages.[2]

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[2] As petitioners have observed (Pet. 27-28), respondents do not now contend that any constitutional provision bears on the analysis.

Indeed, the FSIA's provisions governing prior- and related cases resemble a provision in an earlier civil rights bill that *Landgraf* reasoned would have "unambiguous[ly]" applied to pre-enactment conduct. 511 U.S. at 263. That provision stated that the new damages provision in the bill "shall apply to all proceedings pending on or commenced after" enactment, *id.* at 255 n.8 (quoting S. 2104, 101st Cong., 2d Sess. § 15(a)(4) (1990)), without singling out pending proceedings seeking punitive damages. Here, Congress similarly provided that "[t]he [2008] amendments * * * shall apply to any claim arising under section 1605A"; authorized plaintiffs with qualifying claims "before the courts in any form" to request that "that action, and any judgment in the action * * * , be given effect as if the action had originally been filed under section 1605A(c)"; and authorized plaintiffs to file "under section 1605A" new actions "[r]elated" to existing actions under the prior terrorism exception. NDAA § 1083(c)(1)-(3), 122 Stat. 342-343.[3]

Thus, because the text of the FSIA "makes clear" that the punitive damages remedy applies retroactively, any "arguable unfairness" of such application "is not a sufficient reason for a court to fail to give that law its intended scope." *Bank Markazi* v. *Peterson*, 136 S. Ct. 1310, 1325 (2016) (brackets, citation, and internal quotation marks omitted).

[3] Respondents contend (Supp. Br. 6-7) that the unenacted bill in *Landgraf*, 511 U.S. at 264, more clearly permitted punitive damages for pre-enactment conduct because its timing provision cross-referenced "a specific provision exclusively governing the availability of" damages. Resp. Supp. Br. 7. But the bill took that form because it amended an existing cause of action to add new damages remedies. See S. 2104 §§ 8, 15(a)(4). Here, the 2008 amendments created a new federal cause of action *and* prescribed new remedies in a single provision. See 28 U.S.C. 1605A(c). It was therefore sufficient for Congress, in the prior- and related-action provisions, to cross-reference Section 1605A and 1605A(c) more generally.

b. The history of the 2008 amendments confirms that Congress and the Executive understood that Section 1605A would authorize punitive damages for pre-enactment conduct. After the fall of Saddam Hussein's regime in Iraq, President George W. Bush vetoed an earlier version of the 2008 amendments that contained language materially identical to the text of Section 1605A. See H.R. 1585, 110th Cong., 1st Sess. § 1083(a) (2007). Iraq was designated as a state sponsor of terrorism until 2004, 69 Fed. Reg. 58,793 (Sept. 24, 2004), and the proposed legislation would have allowed plaintiffs to recover punitive damages from Iraq for conduct of the former regime. See H.R. 1585 § 1083(a)(1) (requiring courts to hear claims under proposed Section 1605A if the foreign state was designated as a state sponsor of terrorism when "the original action or the related action" was filed); 28 U.S.C. 1605A(a)(2)(A)(i)(II) (same). In vetoing the legislation, the President expressed concern that "creating a new Federal cause of action backed by the prospect of punitive damages to support claims that may previously have been foreclosed" would undermine U.S. foreign policy and burden efforts to rebuild Iraq. Memorandum to the House of Representatives Returning Without Approval the "National Defense Authorization Act for Fiscal Year 2008," 43 Weekly Comp. Pres. Doc. 1641 (Dec. 28, 2007).

As ultimately enacted, the 2008 NDAA authorized the President to waive the amendments' application to Iraq, NDAA § 1083(d)(1), 122 Stat. 343, and the President did so, 73 Fed. Reg. 6571 (Feb. 5, 2008); see *Republic of Iraq* v. *Beaty*, 556 U.S. 848, 853-854 (2009). The author of the terrorism-exception amendment believed that this compromise would address the President's concerns regarding Iraq while preserving other

plaintiffs' ability to recover for prior acts of terrorism. See 154 Cong. Rec. at 501 (Sen. Lautenberg) ("By insisting on being given the power to waive application of this new law to Iraq, the President seeks to prevent victims of past Iraqi terrorism—for acts committed by Saddam Hussein—from achieving the same justice as victims of other countries. Fortunately, the President will not have authority to waive the provision's application to terrorist acts committed by Iran and Libya, among others.").[4]

c. Historical context also indicates that Congress intended to make punitive damages available for conduct predating the 2008 NDAA. The prior Section 1605(a)(7) applied to conduct predating its enactment in April 1996, see AEDPA § 221(c), 110 Stat. 1243, and the broader statutory framework prior to the 2008 amendments makes clear that Congress was aware that courts had awarded punitive damages against foreign states for pre-enactment conduct under that provision. In 2000, Congress directed the Secretary of Treasury to

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[4] Respondents suggest (Supp. Br. 7) that this legislative history is irrelevant because *Landgraf* requires an "explicit command" in the statute's text. 511 U.S. at 281. As discussed, however, the statutory text contains such a command; the legislative history simply reinforces the point. See pp. 18-20, *supra*. Moreover, this Court has explained that at *Landgraf*'s first step, courts should "apply[] '[the] normal rules of construction'" to determine a statute's "temporal reach." *Gonzales*, 548 U.S. at 37 (quoting *Lindh* v. *Murphy*, 521 U.S. 320, 326 (1997)); cf. *St. Cyr*, 533 U.S. at 320 n.44 (considering legislative history "significant" where, "despite its comprehensive character, it contain[ed] no evidence that Congress specifically considered" the provision's applicability to pre-enactment convictions); *AT&T Corp.* v. *Hulteen*, 556 U.S. 701, 713 (2009) (relying on legislative history demonstrating Congress's "prospective intent").

pay to certain plaintiffs with judgments under the terrorism exception 110% of their compensatory damages awards, if they relinquished their rights to punitive damages (or 100% of their compensatory damages awards, if they agreed not to seek to attach certain foreign state assets). Aimee's Law, Pub. L. No. 106-386, Div. C, § 2002(a)(1)-(2), 114 Stat. 1541-1542. At least three of the covered judgments included punitive damages awards against foreign states as such for conduct committed before Section 1605(a)(7)'s enactment in 1996—apparently under the Flatow Amendment, see p. 23 n.5, *infra*—even though Section 1606 barred punitive damages against foreign states at the time. See *Jenco* v. *Islamic Republic of Iran*, 154 F. Supp. 2d 27, 40 (D.D.C. 2001); *Eisenfeld* v. *The Islamic Republic of Iran*, 172 F. Supp. 2d 1, 9 (D.D.C. 2000); *Flatow* v. *Islamic Republic of Iran*, 999 F. Supp. 1, 27 (D.D.C. 1998).[5]

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[5] In 1998, Congress amended the FSIA to authorize punitive damages against foreign states under 28 U.S.C. 1605(a)(7) (Supp. IV 1998), including for pre-enactment conduct. Treasury Department Appropriations Act, 1999, Pub. L. No. 105-277, Div. A, § 117(b)-(c), 112 Stat. 2681-491. That amendment allowed the President to "waive" its requirements "in the interest of national security," § 117(d), 112 Stat. 2681-492, which President Clinton did, Presidential Determination No. 99-1 (Oct. 21, 1998), *reprinted in* 34 Weekly Comp. Pres. Doc. 2088 (Oct. 26, 1998). Congress repealed the amendment in 2000. Aimee's Law, § 2002(f)(2), 115 Stat. 1543. To the extent the decisions cited above discussed the issue, they rested the punitive damages awards not on the 1998 amendment, but instead on the Flatow Amendment, Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997, Pub. L. No. 104-208, Tit. V, § 589, 110 Stat. 3009-172 (28 U.S.C. 1605 note)—which permits punitive damages against certain officials, employees, and agents of state sponsors of terrorism—and vicarious liability principles. See *Flatow*, 999 F. Supp. at 25-27.

3. The court of appeals' contrary decision, and respondents' defense of it, are unconvincing.

a. Respondents first contend (Br. in Opp. 24-25; Supp. Br. 4) that Section 1605A(c) does not authorize punitive damages for pre-enactment conduct because it uses "plainly equivocal language—'damages *may* include . . . punitive damages.'" Supp. Br. 4 (quoting 28 U.S.C. 1605A(c)). But the word "may" simply confirms that a court has discretion in determining damages awards. See, *e.g.*, *Fogerty* v. *Fantasy, Inc.*, 510 U.S. 517, 533 (1994). Indeed, Section 1605A(c) provides that "damages *may* include economic damages, solatium, pain and suffering, and punitive damages," 28 U.S.C. 1605A(c) (emphasis added)—but respondents do not contest that the first three forms of damages are available for pre-enactment conduct. Similarly, the unenacted bill that *Landgraf* stated "unambiguous[ly]" would have applied to pre-enactment conduct, 511 U.S. at 263, provided that compensatory and punitive damages "may be awarded," S. 2104 § 8.

b. Like the court of appeals, see Pet. App. 128a, respondents would require a clearer statement that punitive damages are available for pre-enactment conduct than for other forms of relief. But respondents offer no sound basis for adopting an extra-clear-statement rule.

i. *Landgraf* does not impose a higher bar for giving punitive damages retroactive effect. As discussed above, there, this Court considered whether a provision permitting plaintiffs to recover "compensatory and punitive damages" should apply to cases involving pre-enactment conduct. 511 U.S. at 249. Although the Court acknowledged particular concerns associated with punitive damages, *id.* at 281, it did not establish a higher standard for evaluating Congress's intent with

respect to their retroactive application. Instead, the Court considered whether the statute at issue "explicitly authorized punitive damages" for pre-enactment conduct, *ibid.*, just as it determined that the compensatory damages remedy would "not apply" to such conduct "in the absence of clear congressional intent," *id.* at 283. The Court concluded that it "found no clear evidence of congressional intent that [the section]" as a whole "should apply to cases arising before its enactment." *Id.* at 286.

The cases that respondents have cited (Br. in Opp. 22) to suggest that Section 1605A(c) lacks the requisite clear statement confirm that no heightened standard applies to punitive damages. In *Ditullio* v. *Boehm*, 662 F.3d 1091 (2011), the Ninth Circuit considered whether the cause of action in the Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, Div. A, 114 Stat. 1466 (22 U.S.C. 7101 *et seq.*); see 18 U.S.C. 1595 (2012 & Supp. V 2017), which the court held provided for both compensatory and punitive damages, applied to pre-enactment conduct. 662 F.3d at 1096-1098. In considering retroactivity, the court found no clear statement with respect to the cause of action as a whole; it did not separately assess the authorization of punitive damages, or hold it to a higher standard. *Id.* at 1098-1102. The same was true in *Gross* v. *Weber*, 186 F.3d 1089, 1091-1092 (8th Cir. 1999), where the court held that neither the Violence Against Women Act of 2000 (VAWA), Pub. L. No. 106-386, Div. B, 114 Stat. 1491, nor Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 373 (20 U.S.C. 1681), applied to pre-enactment conduct. While the court observed that "VAWA creates a federal cause of action * * * with a

broad range of available relief—including punitive damages," it did not address the retroactivity of those damages separately from the cause of action or compensatory damages. *Weber*, 186 F.3d at 1091.[6]

ii. Contrary to respondents' suggestion (Supp. Br. 5), the state of the law before 2008 also did not require Congress to specifically "discuss[] the damages available for § 1605A(c) claims" in the prior- and related-action provisions. As respondents observe (*ibid.*), before the 2008 NDAA, Section 1606 prohibited United States courts from awarding punitive damages against foreign states, though they could award other forms of damages under state and foreign causes of action. But Congress clearly intended to change that default rule when it created a federal cause of action for which "damages may include economic damages, solatium, pain and suffering, and punitive damages," 28 U.S.C. 1605A(c), as well as highly reticulated prior- and related-action provisions that permitted plaintiffs to rely on Section 1605A(c) with respect to certain pre-enactment conduct.

c. Finally, respondents contend (Supp. Br. 6) that the prior- and related-action provisions "focus[]" not on making punitive damages available for pre-enactment conduct, but instead on overturning the D.C. Circuit's holding in *Cicippio-Puleo* v. *Islamic Republic of Iran*, 353 F.3d 1024 (2004), that the FSIA included no federal cause of against foreign state sponsors of terrorism. But Congress's solicitude for plaintiffs disadvantaged by *Cicippio-Puleo* does not show that it intended to

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[6] The third case respondents cited, *Koch* v. *SEC*, 793 F.3d 147, 158 (D.C. Cir. 2015), cert. denied, 136 S. Ct. 1492 (2016), did not address punitive damages.

limit the remedies available to such plaintiffs. Had Congress intended only to reverse *Cicippio-Puleo*, it could have made a federal cause of action available against designated state sponsors of terrorism without providing for punitive damages. Instead, Congress created a federal cause of action that expressly authorizes the award of punitive damages; made Section 1606's prohibition on the award of such damages against foreign states inapplicable to both the cause of action and the terrorism exception to immunity more generally, see pp. 28-30, *infra*; directed courts to treat certain already-decided claims "as if [they] had originally been filed under section 1605A(c)"; permitted plaintiffs to file new, "[r]elated" claims "under section 1605A"; and stated that "[t]he amendments made by this section" as a whole "shall apply to any claim arising under section 1605A." NDAA § 1083(c)(1)-(3), 122 Stat. 342-343. The plain text of those provisions makes clear that Congress intended for punitive damages to be available to plaintiffs injured by pre-enactment conduct.

B. Plaintiffs Suing Under State Or Foreign Causes Of Action, In Reliance On The Exception To Foreign Sovereign Immunity In 28 U.S.C. 1605A(a), May Recover Punitive Damages For Pre-Enactment Conduct

The court of appeals assumed that *Landgraf* governs the question whether plaintiffs may rely on Section 1605A(a)'s exception to immunity and obtain punitive damages authorized under state or foreign causes of action. With respect to such claims, however, the 2008 amendments addressed sovereign immunity and incidentally altered the extent to which plaintiffs could recover on preexisting causes of action in United States courts. That change falls under *Altmann*, not *Landgraf*. And under *Altmann*, nothing in the statute "or

the circumstances surrounding its enactment suggests" that Congress intended to preclude plaintiffs with pre-enactment injuries from obtaining the full range of damages available under state or foreign law. 541 U.S. at 697.[7]

1. a. 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, * * * a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages." 28 U.S.C. 1606. Prior to 2008, the terrorism exception to sovereign immunity was located in 28 U.S.C. 1605(a)(7) (2006), and thus individuals suing foreign state sponsors of terrorism under that provision could not obtain punitive damages. Following the 2008 amendments, that is no longer the case. Congress

[7] At the petition stage, the United States suggested that this Court rephrase the question presented, which expressly references only the federal cause of action, 28 U.S.C. 1605A(c). Pet. i; see U.S. Amicus Br. 19 n.8. Although the Court did not alter the question presented, it is appropriate to consider whether the 2008 amendments permit plaintiffs relying on the exception to foreign sovereign immunity in Section 1605A(a), and state or foreign causes of action, to obtain punitive damages from foreign state sponsors of terrorism for pre-enactment conduct. The district court awarded punitive damages "under section 1605A(c)" without differentiating between plaintiffs with federal and state-law claims, see Pet. App. 261a-263a, 287a-290a, 309a-311a, 336a-338a, and the petition's list of parties includes as petitioners plaintiffs relying on state law, *id.* at 369a-375a. In addition, although respondents subsequently contended that the state-law claims are outside the question presented, see Supp. Br. 8, both the petition and the brief in opposition addressed whether punitive damages are available to plaintiffs with such claims for conduct predating the 2008 amendments. See Pet. 28-29; Br. in Opp. 24-25.

moved the terrorism exception to foreign sovereign immunity to Section 1605A(a)—and as the court of appeals acknowledged, "by its terms," "Section 1606 * * * has no bearing upon state [or foreign] law claims brought under" Section 1605A(a). Pet. App. 128a.

The court of appeals nonetheless held that plaintiffs bringing state- or foreign-law claims based on pre-enactment conduct may not recover punitive damages. Pet. App. 128a-129a. The court began by noting that, in light of its holding that the federal cause of action does not permit punitive damages for pre-enactment conduct, a contrary determination with respect to state claims would create a "puzzling outcome." *Id.* at 128a. The court avoided that result by applying the *Landgraf* presumption, although it did not specifically address whether *Landgraf* or *Altmann* should govern state (and foreign) causes of action. Compare Pet. App. 128a-129a (discussion of state-law claims), with *id.* at 121a-128a (discussion of federal cause of action). The court then determined that "the retroactive authorization of punitive damages under state law fails for the same reason it does under the federal cause of action: The authorization of § 1605A, read together with § 1606, lacks a clear statement of retroactive effect." *Id.* at 129a.

The court of appeals arrived at the wrong answer because it asked the wrong question. Unlike the federal cause of action in Section 1605A(c), the authorization of punitive damages under state and foreign causes of action is not subject to *Landgraf*. As previously explained, punitive damages are now available for such claims because Congress moved the terrorism exception to foreign sovereign immunity to Section 1605A(a), where it is not subject to Section 1606. Like the provisions at issue in *Altmann*, neither Section 1605A(a) nor

Section 1606 (nor the combination thereof) "create[s] or modif[ies] any causes of action." *Altmann*, 541 U.S. at 695 n.15. Instead, Section 1605A(a), by replacing Section 1605(a)(7), merely provides that United States courts continue to be open to "plaintiffs with pre-existing claims against foreign states," *id.* at 695, and Section 1606 does not apply to claims brought under Section 1605A(a). See *id.* at 703-704 (Scalia, J., concurring) (explaining that the FSIA was not subject to *Landgraf* because it "d[id] not by [its] own force create or modify substantive rights; respondent's substantive claims are based primarily on California law").

Section 1605A(a) thus serves as a gateway for plaintiffs to bring state- and foreign-law claims, and takes the remedies available under those causes of action as it finds them. Section 1605A(a) is not "attached to" the plaintiff's substantive cause of action, and it does not "prescribe[] a limitation" or create an authorization "that any court entertaining the cause of action [i]s bound to apply." *Altmann*, 541 U.S. at 695 n.15; see *Hughes Aircraft*, 520 U.S. at 948 (finding statutory amendment subject to *Landgraf* because it "change[d] the substance of the existing cause of action"). If, for example, a plaintiff relied on a state or foreign cause of action that did not make punitive damages available, then Section 1605A(a) would not authorize such damages. Conversely, neither Section 1605A(a)'s exception to foreign sovereign immunity, nor Section 1606's inapplicability to claims brought under that section, "purport[s] to limit foreign countries'" or states' decisions about the types of damages that will be available under their substantive law. *Altmann*, 541 U.S. at 695-696 n.15 (emphasis omitted).

b. Respondents contend that the 2008 amendments are subject to *Landgraf* because they authorize punitive damages against foreign sovereigns in United States courts "for the first time in U.S. history." Supp. Br. 9 (citation omitted). At least in the context of the FSIA, however, this Court has not found that type of reasoning decisive. In *Altmann*, the Court rejected the dissent's argument that the FSIA should not apply to pre-enactment conduct because it "'create[d] jurisdiction where there was none before.'" 541 U.S. at 696 n.15 (quoting *id.* at 723 (Kennedy, J., dissenting)). "Even if the dissent [was] right" on that point, the Court explained that that attribute of the statute was in "some tension with other, less substantive aspects of the Act," which "render[ed] the *Landgraf* approach inconclusive." *Ibid.*

The same analysis applies here. As noted above, with respect to state and foreign claims, the 2008 amendments—like the provisions at issue in *Altmann*—neither create nor modify any cause of action. After those amendments, foreign state sponsors of terrorism face the same substantive claims under state and foreign law as they did before the amendments' enactment; the only difference is the extent to which the relief authorized by those causes of action may be obtained in United States courts. "It is true enough that, as to a claim [for punitive damages] that no foreign court would entertain," the 2008 amendments "can have the accidental effect of rendering enforceable" an authorization of such relief that "was previously unenforceable," and thus affecting a foreign state sponsor of terrorism's liability. *Altmann*, 541 U.S. at 704 (Scalia, J., concurring). But "[s]tatutes like the FSIA do not '*spea[k]* . . . *to* the substantive rights of the parties'" in the sense relevant

for *Landgraf*, "even if they happen sometimes to affect them." *Ibid.* (quoting *Hughes Aircraft*, 520 U.S. at 951) (second set of brackets in original).

2. Because *Altmann* rather than *Landgraf* applies, the question is whether "anything in" Section 1605A(a) "or the circumstances surrounding its enactment suggests" that it "should not apply" to petitioners' claims. 541 U.S. at 697. The answer is no. Indeed, the court of appeals acknowledged that "[w]ithout the *Langraf* presumption, the enactment of § 1605A would have lifted the restriction on punitive damages in § 1606 from state law claims." Pet. App. 129a.

That is the best reading of the statutory text and context. In the 2008 amendments, Congress moved the exception to foreign sovereign immunity from Section 1605(a)(7), where it was subject to Section 1606's prohibition on punitive damages, to Section 1605A, where it is not. As respondents point out (Supp. Br. 10), in light of the "circumstances surrounding" the 2008 amendments—specifically, that Section 1606 previously prohibited the recovery of punitive damages against foreign states—that action alone might have raised questions about whether Congress intended for plaintiffs to recover punitive damages for pre-enactment conduct.

But Congress did not stop there. Having freed the terrorism exception from Section 1606's prohibition on punitive damages by moving it to Section 1605A(a), Congress permitted plaintiffs to file new claims "under Section 1605A" for "act[s] or incident[s]" that were *already* the subject of suits under Section 1605(a)(7), and that necessarily predated the 2008 amendments. NDAA § 1083(c)(3), 122 Stat. 343. Congress further provided that "in general," the 2008 amendments "shall apply to any claim arising under section 1605A of title

28." § 1083(c)(1), 122 Stat. 342 (capitalization altered). The 2008 amendments thus make clear that Congress intended for victims of past state-sponsored terrorist acts to be treated like all other plaintiffs who rely on Section 1605A(a) to invoke a state or foreign cause of action, and who may recover punitive damages to the extent the substantive law authorizes them. Cf. *Altmann*, 541 U.S. at 697 (Congress's statement that "'[c]laims of foreign states to immunity should henceforth'" be decided under the FSIA, "[t]hough perhaps not sufficient to satisfy *Landgraf*[]," provided "clear evidence" that statute applied to pre-enactment conduct) (quoting 28 U.S.C. 1602) (emphasis omitted).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
JOSEPH H. HUNT
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
ERICA L. ROSS
Assistant to the Solicitor General
SHARON SWINGLE
SONIA M. CARSON
Attorneys

MARIK A. STRING
Acting Legal Adviser
Department of State

SEPTEMBER 2019

APPENDIX

1. 28 U.S.C. 1602 provides:

Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

2. 28 U.S.C. 1603 provides:

Definitions

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332 (c) and (e) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

3. 28 U.S.C. 1605 (2012 & Supp. V 2017) provides:

General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States

and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: *Provided*, That—

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been

maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in section 31301 of title 46. Such action shall be brought, heard, and determined in accordance with the provisions of chapter 313 of title 46 and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

[(e), (f) Repealed. Pub. L. 110-181, div. A, title X, § 1083(b)(1)(B), Jan. 28, 2008, 122 Stat. 341.]

(g) LIMITATION ON DISCOVERY.—

(1) IN GENERAL.—(A) Subject to paragraph (2), if an action is filed that would otherwise be barred by section 1604, but for section 1605A or section 1605B, the court, upon request of the Attorney General, shall stay any request, demand, or order for discovery on the United States that the Attorney General certifies

would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action, until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere.

(B) A stay under this paragraph shall be in effect during the 12-month period beginning on the date on which the court issues the order to stay discovery. The court shall renew the order to stay discovery for additional 12-month periods upon motion by the United States if the Attorney General certifies that discovery would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action.

(2) SUNSET.—(A) Subject to subparagraph (B), no stay shall be granted or continued in effect under paragraph (1) after the date that is 10 years after the date on which the incident that gave rise to the cause of action occurred.

(B) After the period referred to in subparagraph (A), the court, upon request of the Attorney General, may stay any request, demand, or order for discovery on the United States that the court finds a substantial likelihood would—

(i) create a serious threat of death or serious bodily injury to any person;

(ii) adversely affect the ability of the United States to work in cooperation with foreign and international law enforcement agencies in investigating violations of United States law; or

(iii) obstruct the criminal case related to the incident that gave rise to the cause of action or undermine the potential for a conviction in such case.

(3) EVALUATION OF EVIDENCE.—The court's evaluation of any request for a stay under this subsection filed by the Attorney General shall be conducted ex parte and in camera.

(4) BAR ON MOTIONS TO DISMISS.—A stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

(5) CONSTRUCTION.—Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States.

(h) JURISDICTIONAL IMMUNITY FOR CERTAIN ART EXHIBITION ACTIVITIES.—

(1) IN GENERAL.—If—

(A) a work is imported into the United States from any foreign state pursuant to an agreement that provides for the temporary exhibition or display of such work entered into between a foreign state that is the owner or custodian of such work and the United States or one or more cultural or educational institutions within the United States;

(B) the President, or the President's designee, has determined, in accordance with subsection (a) of Public Law 89-259 (22 U.S.C. 2459(a)), that such work is of cultural significance and the temporary

exhibition or display of such work is in the national interest; and

(C) the notice thereof has been published in accordance with subsection (a) of Public Law 89-259 (22 U.S.C. 2459(a)),

any activity in the United States of such foreign state, or of any carrier, that is associated with the temporary exhibition or display of such work shall not be considered to be commercial activity by such foreign state for purposes of subsection (a)(3).

(2) EXCEPTIONS.—

(A) NAZI-ERA CLAIMS.—Paragraph (1) shall not apply in any case asserting jurisdiction under subsection (a)(3) in which rights in property taken in violation of international law are in issue within the meaning of that subsection and—

(i) the property at issue is the work described in paragraph (1);

(ii) the action is based upon a claim that such work was taken in connection with the acts of a covered government during the covered period;

(iii) the court determines that the activity associated with the exhibition or display is commercial activity, as that term is defined in section 1603(d); and

(iv) a determination under clause (iii) is necessary for the court to exercise jurisdiction over the foreign state under subsection (a)(3).

(B) OTHER CULTURALLY SIGNIFICANT WORKS.—In addition to cases exempted under subparagraph (A), paragraph (1) shall not apply in any case asserting jurisdiction under subsection (a)(3) in which rights in property taken in violation of international law are in issue within the meaning of that subsection and—

(i) the property at issue is the work described in paragraph (1);

(ii) the action is based upon a claim that such work was taken in connection with the acts of a foreign government as part of a systematic campaign of coercive confiscation or misappropriation of works from members of a targeted and vulnerable group;

(iii) the taking occurred after 1900;

(iv) the court determines that the activity associated with the exhibition or display is commercial activity, as that term is defined in section 1603(d); and

(v) a determination under clause (iv) is necessary for the court to exercise jurisdiction over the foreign state under subsection (a)(3).

(3) DEFINITIONS.—For purposes of this subsection—

(A) the term "work" means a work of art or other object of cultural significance;

(B) the term "covered government" means—

(i) the Government of Germany during the covered period;

(ii) any government in any area in Europe that was occupied by the military forces of the Government of Germany during the covered period;

(iii) any government in Europe that was established with the assistance or cooperation of the Government of Germany during the covered period; and

(iv) any government in Europe that was an ally of the Government of Germany during the covered period; and

(C) the term "covered period" means the period beginning on January 30, 1933, and ending on May 8, 1945.

4. Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997, Pub. L. No. 104-208, Tit. V, § 589, 110 Stat. 3009-172, provides in pertinent part:

CIVIL LIABILITY FOR ACTS OF
STATE SPONSORED TERRORISM

SEC. 589. (a) an official, employee, or agent of a foreign state designated as a state sponsor of terrorism designated under section 6(j) of the Export Administration Act of 1979 while acting within the scope of his or her office, employment, or agency shall be liable to a United States national or the national's legal representative for personal injury or death caused by acts of that official, employee, or agent for which the courts of the United States may maintain jurisdiction under section 1605(a)(7) of title 28, United States Code, for money

damages which may include economic damages, solatium, pain, and suffering, and punitive damages if the acts were among those described in section 1605(a)(7).

(b) Provisions related to statute of limitations and limitations on discovery that would apply to an action brought under 28 U.S.C. 1605(f) and (g) shall also apply to actions brought under this section. No action shall be maintained under this action if an official, employee, or agent of the United States, while acting within the scope of his or her office, employment, or agency would not be liable for such acts if carried out within the United States.

* * * * *

5. 28 U.S.C. 1605A provides:

Terrorism exception to the jurisdictional immunity of a foreign state

(a) IN GENERAL.—

(1) NO IMMUNITY.—A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter 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 within the scope of his or her office, employment, or agency.

(2) CLAIM HEARD.—The court shall hear a claim under this section if—

(A)(i)(I) the foreign state was designated as a state sponsor of terrorism at the time the act described in paragraph (1) occurred, or was so designated as a result of such act, and, subject to subclause (II), either remains so designated when the claim is filed under this section or was so designated within the 6-month period before the claim is filed under this section; or

(II) in the case of an action that is refiled under this section by reason of section 1083(c)(2)(A) of the National Defense Authorization Act for Fiscal Year 2008 or is filed under this section by reason of section 1083(c)(3) of that Act, the foreign state was designated as a state sponsor of terrorism when the original action or the related action under section 1605(a)(7) (as in effect before the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) was filed;

(ii) the claimant or the victim was, at the time the act described in paragraph (1) occurred—

(I) a national of the United States;

(II) a member of the armed forces; or

(III) otherwise an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment; and

(iii) in a case in which the act occurred in the foreign state against which the claim has been brought, the claimant has afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration; or

(B) the act described in paragraph (1) is related to Case Number 1:00CV03110 (EGS) in the United States District Court for the District of Columbia.

(b) LIMITATIONS.—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) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) 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.

(c) PRIVATE RIGHT OF ACTION.—A foreign state that is or was a state sponsor of terrorism as described in subsection (a)(2)(A)(i), and any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, shall be liable to—

(1) a national of the United States,

(2) a member of the armed forces,

(3) an employee of the Government of the United States, or of an individual performing a contract

awarded by the United States Government, acting within the scope of the employee's employment, or

(4) the legal representative of a person described in paragraph (1), (2), or (3),

for personal injury or death caused by acts described in subsection (a)(1) of that foreign state, or of an official, employee, or agent of that foreign state, for which the courts of the United States may maintain jurisdiction under this section for money damages. In any such action, damages may include economic damages, solatium, pain and suffering, and punitive damages. In any such action, a foreign state shall be vicariously liable for the acts of its officials, employees, or agents.

(d) ADDITIONAL DAMAGES.—After an action has been brought under subsection (c), actions may also be brought for reasonably foreseeable property loss, whether insured or uninsured, third party liability, and loss claims under life and property insurance policies, by reason of the same acts on which the action under subsection (c) is based.

(e) SPECIAL MASTERS.—

(1) IN GENERAL.—The courts of the United States may appoint special masters to hear damage claims brought under this section.

(2) TRANSFER OF FUNDS.—The Attorney General shall transfer, from funds available for the program under section 1404C of the Victims of Crime Act of 1984 (42 U.S.C. 10603c), to the Administrator of the United States district court in which any case is pending which has been brought or maintained under this section such funds as may be required to cover the costs of special masters appointed under

paragraph (1). Any amount paid in compensation to any such special master shall constitute an item of court costs.

(f) APPEAL.—In an action brought under this section, appeals from orders not conclusively ending the litigation may only be taken pursuant to section 1292(b) of this title.

(g) PROPERTY DISPOSITION.—

(1) IN GENERAL.—In every action filed in a United States district court in which jurisdiction is alleged under this section, the filing of a notice of pending action pursuant to this section, to which is attached a copy of the complaint filed in the action, shall have the effect of establishing a lien of lis pendens upon any real property or tangible personal property that is—

(A) subject to attachment in aid of execution, or execution, under section 1610;

(B) located within that judicial district; and

(C) titled in the name of any defendant, or titled in the name of any entity controlled by any defendant if such notice contains a statement listing such controlled entity.

(2) NOTICE.—A notice of pending action pursuant to this section shall be filed by the clerk of the district court in the same manner as any pending action and shall be indexed by listing as defendants all named defendants and all entities listed as controlled by any defendant.

(3) ENFORCEABILITY.—Liens established by reason of this subsection shall be enforceable as provided in chapter 111 of this title.

(h) DEFINITIONS.—For purposes of this section—

(1) the term "aircraft sabotage" has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation;

(2) the term "hostage taking" has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages;

(3) the term "material support or resources" has the meaning given that term in section 2339A of title 18;

(4) the term "armed forces" has the meaning given that term in section 101 of title 10;

(5) the term "national of the United States" has the meaning given that term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22));

(6) the term "state sponsor of terrorism" means a country the government of which the Secretary of State has determined, for purposes of section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)), section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371), section 40 of the Arms Export Control Act (22 U.S.C. 2780), or any other provision of law, is a government that has repeatedly provided support for acts of international terrorism; and

(7) the terms "torture" and "extrajudicial killing" have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991 (28 U.S.C. 1350 note).

6. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, Div. A, Tit. X, Subtit. F, § 1083, 122 Stat. 338 provides:

SEC. 1083. TERRORISM EXCEPTION TO IMMUNITY.

(a) TERRORISM EXCEPTION TO IMMUNITY.—

(1) IN GENERAL—Chapter 97 of title 28, United States Code, is amended by inserting after section 1605 the following:

"§ 1605A. Terrorism exception to the jurisdictional immunity of a foreign state

"(a) IN GENERAL.—

"(1) NO IMMUNITY.—A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter 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 within the scope of his or her office, employment, or agency.

"(2) CLAIM HEARD.—The court shall hear a claim under this section if—

"(A)(i)(I) the foreign state was designated as a state sponsor of terrorism at the time the act described in paragraph (1) occurred, or was so designated as a result of such act, and, subject to subclause (II), either remains so designated when the claim is filed under this section or was so designated within the 6-month period before the claim is filed under this section; or

"(II) in the case of an action that is refiled under this section by reason of section 1083(c)(2)(A) of the National Defense Authorization Act for Fiscal Year 2008 or is filed under this section by reason of section 1083(c)(3) of that Act, the foreign state was designated as a state sponsor of terrorism when the original action or the related action under section 1605(a)(7) (as in effect before the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) was filed;

"(ii) the claimant or the victim was, at the time the act described in paragraph (1) occurred—

"(I) a national of the United States;

"(II) a member of the armed forces; or

"(III) otherwise an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment; and

"(iii) in a case in which the act occurred in the foreign state against which the claim has been

brought, the claimant has afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration; or

"(B) the act described in paragraph (1) is related to Case Number 1:00CV03110 (EGS) in the United States District Court for the District of Columbia.

"(b) LIMITATIONS.—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) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) 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.

"(c) PRIVATE RIGHT OF ACTION.—A foreign state that is or was a state sponsor of terrorism as described in subsection (a)(2)(A)(i), and any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, shall be liable to—

"(1) a national of the United States,

"(2) a member of the armed forces,

"(3) an employee of the Government of the United States, or of an individual performing a con-

tract awarded by the United States Government, acting within the scope of the employee's employment, or

"(4) the legal representative of a person described in paragraph (1), (2), or (3),

for personal injury or death caused by acts described in subsection (a)(1) of that foreign state, or of an official, employee, or agent of that foreign state, for which the courts of the United States may maintain jurisdiction under this section for money damages. In any such action, damages may include economic damages, solatium, pain and suffering, and punitive damages. In any such action, a foreign state shall be vicariously liable for the acts of its officials, employees, or agents.

"(d) ADDITIONAL DAMAGES.—After an action has been brought under subsection (c), actions may also be brought for reasonably foreseeable property loss, whether insured or uninsured, third party liability, and loss claims under life and property insurance policies, by reason of the same acts on which the action under subsection (c) is based.

"(e) SPECIAL MASTERS.—

"(1) IN GENERAL.—The courts of the United States may appoint special masters to hear damage claims brought under this section.

"(2) TRANSFER OF FUNDS.—The Attorney General shall transfer, from funds available for the program under section 1404C of the Victims of Crime Act of 1984 (42 U.S.C. 10603c), to the Administrator of the United States district court in which any case is pending which has been brought or maintained under this section such funds as may be required to

cover the costs of special masters appointed under paragraph (1). Any amount paid in compensation to any such special master shall constitute an item of court costs.

"(f) APPEAL.—In an action brought under this section, appeals from orders not conclusively ending the litigation may only be taken pursuant to section 1292(b) of this title.

"(g) PROPERTY DISPOSITION.—

"(1) IN GENERAL.—In every action filed in a United States district court in which jurisdiction is alleged under this section, the filing of a notice of pending action pursuant to this section, to which is attached a copy of the complaint filed in the action, shall have the effect of establishing a lien of lis pendens upon any real property or tangible personal property that is—

"(A) subject to attachment in aid of execution, or execution, under section 1610;

"(B) located within that judicial district; and

"(C) titled in the name of any defendant, or titled in the name of any entity controlled by any defendant if such notice contains a statement listing such controlled entity.

"(2) NOTICE.—A notice of pending action pursuant to this section shall be filed by the clerk of the district court in the same manner as any pending action and shall be indexed by listing as defendants all named defendants and all entities listed as controlled by any defendant.

"(3) ENFORCEABILITY.—Liens established by reason of this subsection shall be enforceable as provided in chapter 111 of this title.

"(h) DEFINITIONS.—For purposes of this section—

"(1) the term 'aircraft sabotage' has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation;

"(2) the term 'hostage taking' has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages;

"(3) the term 'material support or resources' has the meaning given that term in section 2339A of title 18;

"(4) the term 'armed forces' has the meaning given that term in section 101 of title 10;

"(5) the term 'national of the United States' has the meaning given that term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22));

"(6) the term 'state sponsor of terrorism' means a country the government of which the Secretary of State has determined, for purposes of section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)), section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371), section 40 of the Arms Export Control Act (22 U.S.C. 2780), or any other provision of law, is a government that has repeatedly provided support for acts of international terrorism; and

"(7) the terms 'torture' and 'extrajudicial killing' have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991 (28 U.S.C. 1350 note).".

(2) AMENDMENT TO CHAPTER ANALYSIS.—The table of sections at the beginning of chapter 97 of title 28, United States Code, is amended by inserting after the item relating to section 1605 the following:

"1605A. Terrorism exception to the jurisdictional immunity of a foreign state.".

(b) CONFORMING AMENDMENTS.—

(1) GENERAL EXCEPTION.—Section 1605 of title 28, United States Code, is amended—

(A) in subsection (a)—

(i) in paragraph (5)(B), by inserting "or" after the semicolon;

(ii) in paragraph (6)(D), by striking "; or" and inserting a period; and

(iii) by striking paragraph (7);

(B) by repealing subsection (e) and (f); and

(C) in subsection (g)(1)(A), by striking "but for subsection (a)(7)" and inserting "but for section 1605A".

(2) COUNTERCLAIMS.—Section 1607(a) of title 28, United States Code, is amended by inserting "or 1605A" after "1605".

(3) PROPERTY.—Section 1610 of title 28, United States Code, is amended—

(A) in subsection (a)(7), by striking "1605(a)(7)" and inserting "1605A";

(B) in subsection (b)(2), by striking "(5), or (7), or 1605(b)" and inserting "or (5), 1605(b), or 1605A";

(C) in subsection (f), in paragraphs (1)(A) and (2)(A), by inserting "(as in effect before the enactment of section 1605A) or section 1605A" after "1605(a)(7)"; and

(D) by adding at the end the following:

(g) PROPERTY IN CERTAIN ACTIONS.—

"(1) IN GENERAL.—Subject to paragraph (3), the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of—

"(A) the level of economic control over the property by the government of the foreign state;

"(B) whether the profits of the property go to that government;

"(C) the degree to which officials of that government manage the property or otherwise control its daily affairs;

"(D) whether that government is the sole beneficiary in interest of the property; or

"(E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

"(2) UNITED STATES SOVEREIGN IMMUNITY INAPPLICABLE.—Any property of a foreign state, or agency or instrumentality of a foreign state, to which paragraph (1) applies shall not be immune from attachment in aid of execution, or execution, upon a judgment entered under section 1605A because the property is regulated by the United States Government by reason of action taken against that foreign state under the Trading With the Enemy Act or the International Emergency Economic Powers Act.

"(3) THIRD-PARTY JOINT PROPERTY HOLDERS. — Nothing in this subsection shall be construed to supersede the authority of a court to prevent appropriately the impairment of an interest held by a person who is not liable in the action giving rise to a judgment in property subject to attachment in aid of execution, or execution, upon such judgment.".

(4) VICTIMS OF CRIME ACT.—Section 1404C(a)(3) of the Victims of Crime Act of 1984 (42 U.S.C. 10603c(a)(3)) is amended by striking "December 21, 1988 with respect to which an investigation or" and inserting "October 23, 1983, with respect to which an investigation or civil or criminal".

(c) APPLICATION TO PENDING CASES.—

(1) IN GENERAL.—The amendments made by this section shall apply to any claim arising under section 1605A of title 28, United States Code.

(2) PRIOR ACTIONS.—

(A) IN GENERAL.—With respect to any action that—

(i) was brought under section 1605(a)(7) of title 28, United States Code, or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208), before the date of the enactment of this Act,

(ii) relied upon either such provision as creating a cause of action,

(iii) has been adversely affected on the grounds that either or both of these provisions fail to create a cause of action against the state, and

(iv) as of such date of enactment, is before the courts in any form, including on appeal or motion under rule 60(b) of the Federal Rules of Civil Procedure,

that action, and any judgment in the action shall, on motion made by plaintiffs to the United States district court where the action was initially brought, or judgment in the action was initially entered, be given effect as if the action had originally been filed under section 1605A(c) of title 28, United States Code.

(B) DEFENSES WAIVED.—The defenses of res judicata, collateral estoppel, and limitation period are waived—

(i) in any action with respect to which a motion is made under subparagraph (A), or

(ii) in any action that was originally brought, before the date of the enactment of this Act, under section 1605(a)(7) of title 28, United States Code, or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208), and is refiled under section 1605A(c) of title 28, United States Code,

to the extent such defenses are based on the claim in the action.

(C) TIME LIMITATIONS.—A motion may be made or an action may be refiled under subparagraph (A) only—

(i) if the original action was commenced not later than the latter of—

(I) 10 years after April 24, 1996; or

(II) 10 years after the cause of action arose; and

(ii) within the 60-day period beginning on the date of the enactment of this Act.

(3) RELATED ACTIONS.—If an action arising out of an act or incident has been timely commenced under section 1605(a)(7) of title 28, United States Code, or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208), any other action arising out of

the same act or incident may be brought under section 1605A of title 28, United States Code, if the action is commenced not later than the latter of 60 days after—

(A) the date of the entry of judgment in the original action; or

(B) the date of the enactment of this Act.

(4) PRESERVING THE JURISDICTION OF THE COURTS.—Nothing in section 1503 of the Emergency Wartime Supplemental Appropriations Act, 2003 (Public Law 108-11, 117 Stat. 579) has ever authorized, directly or indirectly, the making inapplicable of any provision of chapter 97 of title 28, United States Code, or the removal of the jurisdiction of any court of the United States.

(d) APPLICABILITY TO IRAQ.—

(1) APPLICABILITY.—The President may waive any provision of this section with respect to Iraq, insofar as that provision may, in the President's determination, affect Iraq or any agency or instrumentality thereof, if the President determines that—

(A) the waiver is in the national security interest of the United States;

(B) the waiver will promote the reconstruction of, the consolidation of democracy in, and the relations of the United States with, Iraq; and

(C) Iraq continues to be a reliable ally of the United States and partner in combating acts of international terrorism.

(2) TEMPORAL SCOPE.—The authority under paragraph (1) shall apply—

(A) with respect to any conduct or event occurring before or on the date of the enactment of this Act;

(B) with respect to any conduct or event occurring before or on the date of the exercise of that authority; and

(C) regardless of whether, or the extent to which, the exercise of that authority affects any action filed before, on, or after the date of the exercise of that authority or of the enactment of this Act.

(3) NOTIFICATION TO CONGRESS.—A waiver by the President under paragraph (1) shall cease to be effective 30 days after it is made unless the President has notified Congress in writing of the basis for the waiver as determined by the President under paragraph (1).

(4) SENSE OF CONGRESS.—It is the sense of the Congress that the President, acting through the Secretary of State, should work with the Government of Iraq on a state-to-state basis to ensure compensation for any meritorious claims based on terrorist acts committed by the Saddam Hussein regime against individuals who were United States nationals or members of the United States Armed Forces at the time of those terrorist acts and whose claims cannot be addressed in courts in the United States due to the exercise of the waiver authority under paragraph (1).

(e) SEVERABILITY.—If any provision of this section or the amendments made by this section, or the application of such provision to any person or circumstance, is held invalid, the remainder of this section and such amendments, and the application of such provision to other persons not similarly situated or to other circumstances, shall not be affected by such invalidation.

7. 28 U.S.C. 1606 provides:

Extent of liability

As 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; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.