SUPREME COURT OF THE UNITED STATES

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,)) No. 17-1268 v. REPUBLIC OF SUDAN, ET AL.,) Respondents.)

Pages: 1 through 64
Place: Washington, D.C.
Date: February 24, 2020

HERITAGE REPORTING CORPORATION

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     IN THE SUPREME COURT OF THE UNITED STATES
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     MONICAH OKOBA OPATI, IN HER OWN )
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     RIGHT, AND AS EXECUTRIX OF THE )
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     ESTATE OF CAROLINE SETLA OPATI,
                                   )
     DECEASED, ET AL.,
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                 Petitioners, )
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                              ) No. 17-1268
               v.
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     REPUBLIC OF SUDAN, ET AL.,
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                Respondents. )
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                  Washington, D.C.
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               Monday, February 24, 2020
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           The above-entitled matter came on for
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     oral argument before the Supreme Court of the
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    United States at 11:10 a.m.
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      APPEARANCES:
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1 PROCEEDINGS 2 (11:10 a.m.) CHIEF JUSTICE ROBERTS: 3 We'll hear 4 argument next in Case 17-1268, Opati versus the 5 Republic -- Republic of Sudan. Mr. McGill. 6 7 ORAL ARGUMENT OF MATTHEW D. McGILL ON BEHALF OF THE PETITIONERS 8 9 MR. McGILL: Mr. Chief Justice, and 10 may it please the Court: 11 Sudan provided Al Qaeda with a safe 12 haven and vital material support enabling it to 13 carry out the embassy bombings, killing 224 14 people and wounding thousands more. In 15 retaliation, President Clinton sent 13 cruise 16 missiles into Khartoum. But to impose punitive 17 damages, Sudan argues, somehow would violate 18 principles of fundamental fairness embodied in the Landgraf presumption. 19 20 If fairness is the issue here, then 21 Sudan surely should lose. The State Department 22 had designated Sudan as a state sponsor of terrorism in 1993, but Sudan continued to 23 24 shelter Osama Bin Laden even as he issued 25 fatwahs calling for attacks on U.S. interests.

In 1996 Congress enacted the Flatow amendment 1 2 which, which explicitly provided for punitive damages for acts of state-sponsored terrorism. 3 4 But still Sudan continued to harbor Al Oaeda. 5 Sudan had ample opportunity to conform its primary conduct to U.S. law. It just chose 6 7 not to. And that's not particularly surprising, because Sudan is a foreign government and 8 9 foreign governments generally are not guided in 10 their policymaking by changes to U.S. law. The 11 central rationale underpinning the Landgraf 12 presumption simply is not applicable where the 13 legislation is directed at foreign governments. 14 But, ultimately, this Court need not 15 decide here whether Landgraf or Altmann applies, 16 because the first step in the analysis is to 17 determine whether Congress has clearly defined 18 the statute's temporal reach. And here it is abundantly clear that 19 20 Congress intended punitive damages be available 21 in two carefully defined categories of cases involving past acts of terrorism. 22 23 In the subsection entitled, 24 "Application to Pending Cases," Congress set 25 forth two categories of cases, prior actions and

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related actions, each of which were unmistakably 1 2 directed at past acts of terrorism. 3 Then the amendments say, in Section 1083(c)(1), "The amendments made by this 4 5 section shall apply to any claim arising under 6 Section 1605A." Congress had said prior --7 prior actions and related actions could file under this new 1605A, and now Congress is saying 8 9 the amendments made by this section shall apply 10 to any of those claims. 11 And Sudan concedes, at page 43 of its brief, that that meant all of the amendments in 12 13 Section 1983 apply to a claim arising under 14 Section 1605A. 15 That language, "shall apply to" -- "to any claim," is virtually identical to the 16 17 language in footnote 8 of Landgraf, "shall apply 18 to all proceedings," that -- that Landgraf 19 described as an unambiguous directive and that 20 the Court later in Martin versus Hadix described 21 as unambiguously addressing the temporal reach of the statute. 22 23 JUSTICE ALITO: In a case involving 24 private -- a private defendant, rather than a 25 sovereign nation, are there constitutional

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limits on Congress's ability to make punitive
 damages retroactive?

3 MR. McGILL: Yes, I think under this 4 Court's decision at least in BMW versus Gore, 5 the Due Process Clause imports some idea of fair 6 notice that would be applicable to persons, but 7 foreign states are not persons within the 8 meaning of the Due Process Clause, just as 9 states of the union are not.

JUSTICE ALITO: So if we just apply the Landgraf test, what would be wrong with saying if Congress wants to make punitive damages retroactive, it has to say so expressly? There is a magic words requirement?

15 MR. McGILL: That would be inconsistent with the -- how the Court looked at 16 17 it in Landgraf. The language in footnote 8 of 18 Landgraf just roped together compensatory and punitive damages. It -- actually, it didn't 19 20 even reference either specifically. It just 21 said Section 8 shall apply to all proceedings pending on the date of enactment. And Section 8 22 23 provided for compensatory damages and punitive 24 damages.

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25 There was no magic words requirement
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1 applicable in Landgraf. And this Court 2 recognized -- but not -- not only in Landgraf, but later in Martin versus Hadix, that that was 3 4 sufficient to unambiguously address the temporal 5 reach of the statute. JUSTICE GINSBURG: Is Sudan --6 7 MR. McGILL: And --JUDGE GINSBURG: -- simply wrong when 8 9 it tells us, as it did in its brief, that the 10 Court has never permitted retroactive 11 application of a statutory authorization of 12 punitive damages in any context? 13 MR. McGILL: I'm not -- I'm not aware 14 that Sudan is wrong as to what it said, but the 15 Court was very clear in Landgraf that if the 16 1990 bill had been enacted, that would have been 17 sufficient. And that bill is no more or less 18 clear than Section 1980 -- Section 1083(c) as 19 enacted by Congress in 2008. 20 It says -- the language is almost 21 exactly the same, "shall apply to all 22 proceedings" versus "shall apply to any claim." And Sudan concedes, it's important to note, that 23 24 every single word of Section 1083 applies 25 retroactively, except the two words "punitive

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1 damages."

There's no -- there's no application of the Landgraf presumption that works in that way. That's -- there's no textual basis for extracting punitive damages from the rest of Section 1083.

7 JUSTICE KAGAN: Mr. McGill, is it really right that it does -- all the rest of it 8 9 does apply retroactively? And I mean that in 10 this sense, that under the old statutory scheme, 11 1605(a)(7), wouldn't a person have been able to 12 get compensatory damages and all the other 13 damages anyway? So that the only new thing that 14 was added by way of this creation of a cause of 15 action is the punitive damages. So I guess that 16 would be a reason to think of the punitives, 17 separate and apart from all the rest, as 18 retroactive.

19 MR. McGILL: No, it's not correct, 20 Justice Kagan, because as part of -- part of the 21 rationale for Congress enacting a federal cause 22 of action was that the Court in the Peterson 23 case involving the 1983 Marine Corps barracks 24 bombing, it held that persons -- family members 25 proceeding under Pennsylvania law and Louisiana

law had no -- had no remedy because the state --1 2 the state law didn't permit for intentional infliction of emotional distress for persons not 3 4 present at the scene of the bombing. 5 So -- so Congress enacted -- in the federal cause of action, it -- it created a 6 7 remedy that did not otherwise exist for 8 compensatory damages in that limited instance, 9 at least. 10 I would point to --11 JUSTICE KAGAN: Well, I guess -- I 12 mean, it definitely created -- maybe I'm not --13 not understanding the answer. It definitely 14 created a cause of action, but in what 15 circumstances is that cause of action different, 16 putting aside punitive damages, than the state 17 law claims that would have been brought? 18 MR. McGILL: A -- a family member who 19 was in Pennsylvania -- who lived in 20 Pennsylvania, for instance, had no claim for 21 compensatory damages under --2.2 JUSTICE KAGAN: Because? MR. McGILL: By dint of Pennsylvania 23 24 state law. That just -- that that --25 Pennsylvania state tort law did not allow that

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person to recover. Same for Louisiana. 1 2 And this was, you know, Judge Lamberth 3 in the Peterson case expressed some regret about 4 this. 5 JUSTICE KAGAN: Got it. 6 MR. McGILL: But -- but -- so that was 7 part of the rationale for the federal cause of action. 8 9 JUSTICE KAGAN: Got it. 10 MR. McGILL: There are two, at least two other points that I think demonstrate 11 12 Congress's clear intent that punitive damages 13 apply retroactively. 14 First is the prior actions provision, 15 which for qualifying cases provided not only 16 that an action could be restored under the new 17 Section 1605A but also that the judgment itself 18 shall be given effect as if it had been originally filed under 1605A(c). 19 20 And prior to 2004, many courts in D.C. 21 had awarded punitive damages in cases under the 22 Flatow Amendment. One of those cases was a case 23 called Acree versus Iraq that this Court 24 addressed in Iraq versus Beaty, it was a 959 25 million dollar judgment that included 300

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1 million dollars of punitive damages.

2 And then President Bush's veto 3 statement, which you can find at the blue brief 4 at 17(a) complains that this -- that the 5 legislation that Congress had enacted would 6 revive a 959 million dollar judgment against 7 Iraq for the misdeeds of Saddam Hussein. That is an unmistakable reference to the Acree 8 decision. 9

10 And what Congress did in response was 11 not change anything with respect to the retroactivity of the cause of action or 12 13 retroactivity generally or to punitive damages 14 specifically. It instead gave the President 15 waiver authority solely with respect to Iraq. 16 It demonstrates that the President 17 knew that this statute provided for punitive 18 damages to apply retroactively, and Congress's 19 reaction to that was to say yes, we want -- we 20 want punitive damages here to apply 21 retroactively. 2.2 An additional point I would make that's related is that under the Flatow 23 24 Amendment, ever since its enactment in 1996, it

25 had always been applied to allow for punitive

damages for past acts of terrorism, including in
 the case involving Lisa Flatow herself.

There is just no reason to think that 3 4 Congress in 2008 wanted to narrow the relief 5 that had been available under the Flatow Amendment. This was instead, if you look at the 6 7 history of how Congress has dealt with the 8 terrorism exception going back to 1996, it is consistently an effort to expand, not always 9 10 perfectly effective effort, but it's an effort 11 to expand the relief available to victims of terrorism. 12

There's no reason to think that after enacting the Flatow Amendment and providing punitive damages that looked backwards, that now Congress would provide a different punitive damages remedy that looked only forward.

18 It also, of course, would ignore the 19 acts of terrorism that were most in Congress's 20 mind at the time, which included, of course, 21 this bombing here.

22 One additional point I could make that 23 further demonstrates that this would apply 24 retroactively is the operation of the related 25 actions provision. And as the D.C. Circuit

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recognized in an opinion by then Judge Kavanaugh, the -- that related actions provision allows a person who already has a judgment for compensatory damages to file a new action under the new federal cause of action to seek punitive damages.

7 The only reason Congress would allow 8 somebody to bring a second cause of action 9 arising out of the same act of terrorism would 10 be to allow that person to provide -- to get the 11 punitive damages that Congress, once again, was 12 attempting to provide.

13 So you have the text of the statute, 14 the history of the statute, and the context in 15 which it arose, all here together, work -- work 16 together to persuasively demonstrate that 17 Congress wanted punitive damages to apply to 18 past acts of terrorism.

Sudan, again, concedes that the federal cause of action for money damages applies retroactively. They concede that the federal cause of action for solatium, for pain and suffering, and -- and economic damages all apply retroactively.

25 JUSTICE GINSBURG: This is an aside of

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the issue here, but I have not seen the term 1 2 "solatium" as a -- as an item of damages before. Where does that come from? 3 4 MR. McGILL: I don't know where it 5 comes from originally, but it -- I think it -it refers to the -- the emotional suffering of 6 7 an aggrieved family member who is not themselves 8 directly -- that -- that the injury that, for 9 instance, a spouse suffers from have -- from 10 viewing their -- their spouse or their -- their other family member suffering through an injury. 11 12 JUSTICE ALITO: What about the 13 retroactivity of punitive damages under state 14 law? 15 MR. McGILL: So I think there, if the Court agrees with me that -- that the federal 16 17 remedy -- that the punitive damages applies 18 retroactively under the federal cause of action, 19 then the state law cause -- then it applies --20 the D.C. Circuit's decision with respect to 21 state -- the state law cause of action really 22 collapses. The D.C. Circuit's primary rationale 23 24 was that it would be inconsistent to allow state 25 law punitive damages and not -- if you had

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already decided that the federal law doesn't, 1 2 you know, doesn't provide for punitive damages, and it was that -- what it said, inconsistent 3 4 outcomes at page 129 of the petition appendix 5 that really drove the decision. 6 Two additional points I would make is, 7 first, the D.C. Circuit recognized that without the Landgraf presumption, then the amendment 8 would have lifted the restriction as to state 9 10 law punitive damages. So if you agree with us 11 and the government that Altmann is the right

framework as to which to -- to look at the state 12 13 law issue, then under the D.C. Circuit's own 14 rationale, the state law punitive damages should 15 apply.

16 And I guess the third point I would 17 make is that once you acknowledge and concede 18 that these state law claims are brought under Section 1605A, and -- and it should be 19 20 emphasized that Petitioner's claims here have 21 only ever been claims under Section 1605A. 2.2 They all were filed after the enactment of this statute originally. So once 23

you concede that the actions are under 1605A, Section 1606 has no application to them.

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1606 bar on punitive damages, as the D.C. 1 2 Circuit says, at 128A of the petition appendix, it has 1606, therefore, has no bearing upon 3 4 state law claims brought under the 5 jurisdictional grant in Section 1605A. That is us. That is our claims. 6 7 And if they -- without Section 1606, there is no other textual basis to bar punitive 8 damages of a state law claim. There is no --9 10 there is no free-floating preemption of state 11 law punitive damages that could be invoked. So I think if you agree with us about 12 13 the federal law cause of action, then the state 14 law cause of action goes with it. 15 If there are no further questions. 16 CHIEF JUSTICE ROBERTS: Thank you, 17 counsel. 18 Ms. Ross. ORAL ARGUMENT OF ERICA L. ROSS FOR THE 19 20 UNITED STATES, AS AMICUS CURIAE, 21 SUPPORTING THE PETITIONERS 2.2 MS. ROSS: Mr. Chief Justice and may 23 it please the Court: 24 If I could start this morning with 25 Justice Alito's question about a magic words

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requirement, we of course agree with Petitioners 1 2 that -- or with Petitioners that Landgraf doesn't require that. And I think it's very 3 important on page 272 of Landgraf where the 4 5 Court explains exactly what it is doing. 6 It states that: "Requiring clear 7 intent assures that Congress itself has affirmatively considered the potential 8 unfairness of retroactive application and 9 10 determined that it is an acceptable price to pay 11 for the countervailing benefits." I think that that is exactly what 12 13 happened here for all of the reasons that Mr. 14 McGill has already explained. We have a statute 15 where Congress in the first instance says under 16 1605A(c) that punitive damages will be available 17 in a laundry list of damages that it 18 specifically identifies. 19 It then goes in Section 1083(c), and 20 this is on page 26A of our appendix, through the 21 actions that will be brought under 1605A, it explains that the amendments to Section 1605A 22 will apply in any action, and it provides for 23 24 prior actions that are related to 25 previously-filed actions, so actions that are

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1 necessarily dependent on pre-enactment conduct, 2 to be brought directly under Section 1605A. 3 CHIEF JUSTICE ROBERTS: If Landgraf --4 MS. ROSS: I don't --5 CHIEF JUSTICE ROBERTS: -- is -- if 6 Landgraf is a sort of substantive interpretive 7 canon that is based on constitutional concern, why would it apply at all in a case involving a 8 9 foreign sovereign? 10 And if it's not such a substantive 11 canon, it would have to be an interpretive canon 12 that Congress generally doesn't want to impose 13 liability retroactively on a foreign state. 14 Would there be any basis for that? MS. ROSS: So I think it is a canon of 15 16 congressional intent. I don't know that it's as 17 closely tied to or limited to constitutional 18 concerns, so much as simply a concern that when 19 -- generally when Congress acts in a substantive 20 manner, we think that it does so prospectively. 21 And I think if -- if you thought that 22 it simply had no application to foreign 23 sovereigns, I think Altmann would have been 24 written very differently. I think page 695 in 25 footnote 15 of Altmann make very clear that the

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1 Court, while considering Landgraf not 2 particularly appropriate in the context of 3 foreign sovereign immunity and related issues 4 that were then part of the FSIA, very clearly 5 and self-consciously carved out situations in 6 which you are imposing new liability for the 7 first time.

And this actually takes me to Justice 8 9 Kagan's question, which I also was hoping to 10 address. The -- it -- it is true, as Mr. McGill 11 points out, that the compensatory damages were not available for all victims under prior law. 12 13 I think it's also important to note that I don't 14 read Landgraf as asking necessarily whether any 15 other source of law would have provided for that same set of damages. I read it as asking 16 17 whether this federal cause of action in that 18 case and -- and here would provide for that type 19 of liability.

20 And I think that's important because 21 you can imagine in a case, particularly in a 22 case involving a foreign sovereign, where you 23 would then have to do that analysis across many, 24 many different types or bodies of law across 25 different countries, as well as in the state and

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the -- the federal context. 1 2 It's also not clear to me -- and this goes to Justice Ginsburg's question -- whether 3 4 types of damages that are specifically 5 enumerated in 1605A(c) like solatium necessarily would have been available under state law 6 7 previously. And so no one has sort of done that 8 analysis. And I don't think that's necessarily 9 the right way to think about the question here. 10 I think the -- the back-and-forth 11 between Congress and the President that Mr. McGill mentioned earlier is extremely 12 13 important here for two reasons. One, of course, 14 is that, as Mr. McGill noted, it's very, very 15 similar -- the language here is very similar to 16 the prior bill that Landgraf had discussed. And 17 so I think we can sort of take note of that. 18 Obviously, Landgraf also, by looking 19 at that prior bill and the veto of that prior 20 bill, sort of provides a guidepost that that is 21 the -- the correct type of history to look at in 22 this clear statement inquiry. 23 JUSTICE SOTOMAYOR: Ms. Ross, I'm --24 I'm trying to process everything you've just 25 said --

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1 MS. ROSS: Sorry. 2 JUSTICE SOTOMAYOR: -- but let me break it down in a more direct way. 3 4 MS. ROSS: Sure. 5 JUSTICE SOTOMAYOR: Your colleague 6 said that we don't have to get into the 7 Landgraf/Altmann issue, that we can just see the 8 plain language of the statute and say 9 whatever -- however we look at it through the 10 Landgraf lens or the Altmann lens, Congress was 11 clear: Punitive damages apply retroactively in 12 this case. 13 Do you agree with that proposition? 14 MS. ROSS: I do, Your Honor, with 15 respect to the federal aspect. 16 JUSTICE SOTOMAYOR: All right. Now we 17 go back to what Justice Alito asked you, and I 18 want to clarify what you think the answer is to this. 19 20 Assuming it was a little less clear, 21 are you saying Altmann -- Altmann would say that 22 there is no presumption in a case involving 23 foreign sovereigns, that Landgraf is only a 24 presumption that applies to private rights, not 25 to actions against foreign sovereigns?

1 MS. ROSS: No, Your Honor, we think 2 that Landgraf would apply. We just simply think 3 that it is satisfied here. 4 And, again, I apologize if I have --5 JUSTICE SOTOMAYOR: I'm sorry, I know 6 your adversary takes a different tact. So I 7 wasn't sure. Okay. 8 MS. ROSS: Correct. 9 JUSTICE SOTOMAYOR: Yes. 10 MS. ROSS: Petitioners think that you can apply Altmann across the board. We do think 11 12 that Landgraf is the right framework for the 13 federal cause of action, although we think 14 Altmann is the correct --15 JUSTICE SOTOMAYOR: You -- you don't 16 -- you don't believe that it's only to private 17 rights; you believe it's to any retroactivity 18 questions? MS. ROSS: Well, no. I mean, of 19 20 course we would -- we would carve out Altmann 21 itself, which was a retroactivity question. 22 JUSTICE SOTOMAYOR: But on immunity? 23 MS. ROSS: But on immunity. Exactly, 24 Your Honor. 25 JUSTICE SOTOMAYOR: All right.

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MS. ROSS: And we think that that's 1 2 why Altmann, in fact, applies to the state law 3 claims, because all Congress did with respect to 4 the state law claims was adjust the extent to 5 which United States courts are open to 6 plaintiffs with preexisting claims. That's the 7 language that Congress used, essentially, to describe the then current state of the FSIA in 8 2004, and we think it's still true with respect 9 10 to the state law claims today, because plaintiffs would be proceeding, obviously, under 11 12 state law and so section 1605A(a), which is the 13 -- the exception to foreign sovereign immunity, 14 and section 1606, which is the provision that 15 previously barred punitive damages, neither of 16 those create liability for punitive damages in 17 the first instance. 18 Again, they simply alter the extent to which plaintiffs who otherwise could obtain that 19 20 remedy in -- under state causes of action can do 21 so in federal and state courts following the 2.2 2008 amendments. 23 JUSTICE ALITO: If Congress thought 24 that a particular country was an incorrigible

sponsor of terrorism and it wanted to punish

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that country, would there be any constitutional barrier to Congress simply expropriating all assets of that country within the reach of the -- of the United States? MS. ROSS: Your Honor, the United States hasn't taken a position on the scope of a foreign state's constitutional rights in this case. Sudan hasn't raised that issue. Sudan has asked, like any other litigant, for application of the Landgraf presumption. It has not suggested that there would be some particular constitutional violation as to it. I think, particularly in this context, where we have a narrow provision focused on state sovereign -- or state sponsors of terrorism that have been designated as such based on a congressional -- several congressional statutes that permit that designation, and then an executive determination about their sponsorship of terrorism, there really aren't any constitutional issues in this case. JUSTICE ALITO: But you think that Landgraf applies in exactly the same way to a

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claim by -- when the -- when the defendant is a

1 foreign state as it does when the defendant is a
2 private party?

MS. ROSS: I think that, again, we -we haven't had a need to address that here because I think Landgraf requires that Congress be clear. I think for the textual and contextual reasons that have already been discussed this morning, Congress was exceptionally clear.

I also think that that is -- the -the notion that it would apply in the same way or at least that it does apply to this very narrow circumstance of the creation of a new cause of action against a foreign state is a pretty clear sort of lesson from Altmann itself.

And, again, Altmann having been very clear to carve out the situation in which a new cause of action is created, obviously there, it was thinking about foreign sovereigns more generally.

JUSTICE ALITO: I mean, is the idea that if a -- if a foreign state is going to sponsor terrorism, it might think, well, you know, if we're going to be liable for compensatory damages, it's worth our while, but

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if we're going to get hit with punitive damages, 1 2 well, that's going to stop us? Is that the -the thinking of the U.S. Government? 3 MS. ROSS: I don't think that that's 4 the thinking of the U.S. Government, Justice 5 Alito. I think what -- what is the thinking of 6 7 the U.S. Government is twofold. One is that Landgraf, I think, doesn't 8 9 just apply in situations -- and some of the 10 subsequent decisions actually make this clear --11 it doesn't just apply in situations where 12 someone is sort of consciously thinking should I 13 take this act or shouldn't I. It embodies a 14 more baseline fairness expectation, an 15 expectation simply about how we think Congress 16 thinks about these issues. 17 We generally think that when Congress 18 legislates, it does so prospectively. And so if 19 it's going to do so in a way that really affects 20 substantive liabilities, it should be clear, and 21 we think, again, here, it was quite clear, and we think that that's enough to resolve this case 2.2 on -- as I said, on the federal cause of action. 23 24 And then, on the state cause of 25 action, we think that clearly falls under

Altmann and, for the reasons provided, we -- we think satisfies that more lenient test. If the Court has no further questions, we would ask that you reverse. CHIEF JUSTICE ROBERTS: Thank you, counsel. Mr. Curran. ORAL ARGUMENT OF CHRISTOPHER M. CURRAN ON BEHALF OF THE RESPONDENTS MR. CURRAN: Mr. Chief Justice, and may it please the Court: First, a response to my friend Mr. McGill's opening histrionics, I note that the D.C. Circuit concluded that the -- that the evidence at the default hearing failed to show that Sudan either specifically intended or directly advanced the 1998 embassy bombings. The D.C. Circuit also acknowledged that Sudan expelled Bin Laden permanently in 1996, May of 1996, two years before the U.S. designated Bin Laden and Al Qaeda as terrorists. So I think that some of Mr. McGill's comments have some selective 20/20 hindsight

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25 JUSTICE GINSBURG: Now -- but is that

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1 before us? 2 MR. CURRAN: I'm just responding to the -- the argument that Sudan is the devil 3 incarnate here. I -- I think instead the record 4 5 shows that Sudan, at most, was negligent in 6 controlling people within its borders and that it's not -- and I want to make it clear that 7 Sudan did not and is not accused of being a 8 9 terrorist, but instead providing an environment 10 that allowed terrorism to foster, again, long 11 before Bin Laden was a notorious terrorist. 12 Now, before I turn to the 13 retroactivity issues that are before the Court, 14 Justice Ginsburg, one comment about the state 15 law claims that Justice Alito raised. 16 The state law claims are all brought 17 by foreign national family members, so those --18 that's citizens of Kenya and Tanzania. They're all for claims of emotional distress felt by 19 20 those plaintiffs. These are not representative 21 claims of any kind. 2.2 Now, those claimants acknowledge, they 23 concede that they are not eligible for the cause 24 of action under 1605A(c) because they don't have 25 the sufficient U.S. nexus; they're not U.S.

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nationals, they're not U.S. employees, they're 1 2 not U.S. contractors, and they're not representatives of those. 3 4 So --5 JUSTICE GINSBURG: But their decedents 6 were? MR. CURRAN: But their decedents were. 7 But these are not claims on behalf of the 8 decedents. These are claims for the emotional 9 10 injuries of these foreign family members 11 themselves. So if they're not eligible under 1605 12 13 capital -- 1605A(c), under the cause of action, 14 they are also not eligible under the exception 15 to immunity because that's got parallel, almost 16 identical, U.S. nexus requirements. 17 The bottom line is there's no subject 18 matter jurisdiction as to claims by foreign 19 national family members seeking redress for 20 their own emotional injuries. So if the Court were to expand the 21 question presented, as my friends suggest, the 22 -- the conclusion should be that those state law 23 24 claims cannot withstand scrutiny under subject 25 matter jurisdiction.

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Now, turning to the key retroactivity 1 2 point, here our position, of course, is Landgraf 3 controls this case. Altmann is not on point 4 because when Altmann was decided, the FSIA was 5 strictly a jurisdictional statute, essentially. 6 I do know it was complicated by the 7 Verlinden decision, which said it established some substantive aspects of federal common law. 8 9 But, in any event, Altmann was limited to the 10 FSIA as it existed at the time, and that was 11 pre-2008. Footnote 15 of Altmann and the text 12 13 accompanying that specifically say that we're 14 not dealing here in Altmann with a cause of 15 action, the creation of a cause of action or the 16 modification of a cause of action, because if we 17 were, we'd have to be concerned with Landgraf 18 and Landgraf's progeny, including the Hughes 19 case. 20 JUSTICE KAGAN: Well, Mr. Curran, 21 assuming Landgraf controls, why isn't it met here? I mean, you've conceded that every other 22 23 part of this statute applies retroactively. 24 So how is it that you can exempt 25 punitive damages from that retroactive coverage?

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1 MR. CURRAN: Okay. There's a lot to 2 that question. And I -- and I -- and I have an answer for all of it. First, with respect to 3 4 your earlier point, yeah, we do concede that the 5 compensatory damages and other -- certain other 6 aspects of relief, including solatium, those --7 those do apply retroactively but not because 8 there's a clear statement by Congress that those 9 should apply retroactively. 10 It's because there was no change, no substantial change. The -- the foreign states 11

13 solatium. And --

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JUSTICE KAGAN: Well, Mr. McGill said sometimes there was. And -- and it would be a matter of state law. You would have to go state by state and see what a particular state law had allowed and what it didn't. And that couldn't be what Congress had in mind, is, I think, Mr. McGill's and Ms. Ross's argument.

were already subject to compensatory damages and

21 MR. CURRAN: Right. So Mr. McGill 22 identified two states, Louisiana and 23 Pennsylvania, that don't provide for IIED 24 claims, emotional distress claims for 25 non-present family members, okay?

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So those are two outlier states. 1 I'm 2 not aware that we have got any plaintiffs in 3 this case from Pennsylvania or Louisiana. 4 And -- and, furthermore, that's secondary. 5 We -- our position is the family members don't have a claim at all before or 6 7 after the 2008 amendments. 8 JUSTICE GORSUCH: But, Mr. Curran, 9 just to try and pursue this question a little 10 bit further, I -- I thought you had conceded as 11 well that 1605A's cause of action applies 12 retroactively, the federal cause of action --13 MR. CURRAN: Yes, yes. 14 JUSTICE GORSUCH: -- does. 15 MR. CURRAN: Because --16 JUSTICE GORSUCH: Okay. And that's a 17 new cause of action, you'd agree, right? 18 MR. CURRAN: Well, it's new as a matter of federal law. 19 20 JUSTICE GORSUCH: Right. That's --21 that's how we usually define causes of action 22 is, you know --23 MR. CURRAN: Okay, but --24 JUSTICE GORSUCH: -- is there a source 25 of law that provides --

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1 MR. CURRAN: -- there is a point. 2 JUSTICE GORSUCH: May I finish, 3 please? 4 MR. CURRAN: I'm sorry. 5 JUSTICE GORSUCH: That's all right. 6 So, and -- and this is just the heart of the 7 matter. And -- so take your time with it. And -- there is no rush. 8 9 But I think this is the heart of the 10 matter for me, and it sounds like it may be for 11 some of my colleagues. If we agree that the 12 cause of action is a new one and applies 13 retroactively, and if we agree that compensatory 14 damages apply retroactively, on what account 15 does it make sense to speak of punitive damages not also applying retroactively, given that it's 16 17 authorized by the same statute? 18 MR. CURRAN: Yeah, the answer to that 19 lies in this Court's analysis of the Bradley 20 case, within Landgraf and within Altmann. 21 Okay, Bradley was a case where there 22 were -- there was an entitlement to attorneys' 23 fees under common law. 24 And then a statute was passed 25 authorizing attorneys' fees. And the question

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was: Well, should that new statute apply
 retroactively or not? No clear statement by
 Congress. But different regimes.
 And the Court concluded, this Court

5 concluded that we're going to apply the statute 6 retroactively because there's not really a -- a 7 retroactive effect for -- for the passage of 8 that statute because attorneys' fees were 9 already available under common law. So --10 JUSTICE GORSUCH: Right. Let's say I 11 don't buy that argument, and if mere fact that there were state causes of action doesn't move 12

13 me very much.

And I'm still here, though, on -- on a record in which everyone agrees that the federal cause of action does apply retroactively. Then what do I do? MR. CURRAN: Well -- well, I might

10 FRC CORRANT WEIL WEIL, I might 19 change my concession as to the federal cause of 20 action, if -- if the state -- if the prior state 21 cause of action was --22 JUSTICE GORSUCH: Can we do that --23 MR. CURRAN: -- irrelevant.

24 JUSTICE GORSUCH: -- at this stage, 25 Mr. Curran?

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MR. CURRAN: Well -- well, I don't 1 2 But under -- and I don't know if this is know. directly responsive to your question, but 3 4 there's no clear statement here as to 5 retroactive effect of any of this stuff in 2008. 6 So my friends point to 1083(c) and its 7 provisions on pending cases. Well, this is an 8 important point to make. None of the cases 9 we're talking about here today were pending at 10 the time two -- the 2008 statute was enacted. 11 As we say on page 13 of our brief, 12 three of the cases were filed in 2008, after the 13 2008 enactment. And the fourth case, the Opati 14 case, which we referred to on page 14 of our 15 brief, was filed in 2012. So none of the cases at issue in this 16 17 case were pending cases. So I submit --18 JUSTICE GINSBURG: I thought you were 19 really -- I thought it was a given that you were 20 contesting the retroactivity only of punitive 21 damages, not the basic cause of action, not the 22 compensatory damages, not pain and suffering, 23 not solatium, I -- and now you seem to be 24 waffling or reneging on that concession. 25 MR. CURRAN: No. So -- so here

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-- here's my analysis, right? Landgraf first 1 2 asks did Congress specify clearly whether there's retroactive effect or not? 3 4 If Congress has said so, we apply 5 that. But if Congress hasn't said so, then the 6 next step in the Landgraf analysis is: Well, we 7 have to take a look and see whether this new provision has a retroactive operation. 8 9 Does it upset settled expectations? 10 Does it impose new damages? Does it impose a 11 disability to use Justice Story's terminology? And -- and in -- in the -- with 12 13 respect to compensatory damages and with respect 14 to the cause of action, with all due respect to 15 Justice Gorsuch's disagreement on this point, those -- those things existed before the 2008 16 17 enactment. 18 JUSTICE GORSUCH: Well, we often say there's a state tort cause of action, that 19 20 doesn't necessarily mean there's a federal civil 21 rights cause of action, right? 2.2 MR. CURRAN: True, but here there's no 23 space between --24 JUSTICE GORSUCH: So, hey, federal law 25 can provide the exact same remedy that state law

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1 That doesn't mean they're the same cause can. 2 of action, does it? MR. CURRAN: Well, I think under 3 4 Landgraf and under Bradley, what we look for is 5 the practical consequences. Is there 6 fundamental unfairness in implying -- in 7 applying retroactively the new provision? 8 And here there's not, as to 9 compensatory damages and the cause of action. 10 JUSTICE ALITO: I don't know where your argument based on these state claims is 11 12 going. Suppose that there was no federal cause 13 of action for something, but there was a state 14 cause of action for exactly the same thing. 15 And so now Congress passes a statute 16 that creates the federal cause of action, which 17 is exactly parallel to the preexisting state 18 cause of action, but says nothing whatsoever about retroactivity. 19 20 Would you say that there is no 21 retroactive effect in the case of the federal statute because you -- you were already liable 22 23 under the state law? 24 MR. CURRAN: That's exactly what I'm 25 saying, yes. There's -- there's no --

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1 JUSTICE ALITO: I think you're arguing 2 in exactly the opposite direction. So you would say there is no retroactive effect under the 3 4 state -- under the federal -- we would presume 5 that there would be no retroactive application -- that there would be --6 7 MR. CURRAN: No. JUSTICE ALITO: -- no problem with 8 9 retroactive application of the federal claim 10 because you were already liable under the state 11 law. 12 MR. CURRAN: Right, that's the proper 13 application of Landgraf. In -- under Landgraf 14 the presumption against retroactivity doesn't 15 kick in, unless the new statute has a 16 retroactive effect. That has to operate 17 retroactively. 18 There has to be prejudice to the 19 subject of the statute before the presumption 20 kicks in. 21 JUSTICE KAGAN: Well, what --22 JUSTICE BREYER: Suppose you're right. 23 JUSTICE KAGAN: -- does that mean we 24 have --25 JUSTICE BREYER: Suppose you're right

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that -- I mean, we take all this, you say, look, 1 2 go read 160- whatever it is, whatever it is --3 (c)(2), and it says, with respect to any action 4 that was brought under 1605(a)(7), on motion, 5 the judge -- it's -- shall -- it's treated, it shall be given effect, as if the action had 6 7 originally been filed under 1605A(c). Now, when you look at the effect, as 8 9 if it had been brought under 1605A(c), we get 10 all these things like economic damages, 11 dah-dah-dah-dah, and punitive damages, all 12 right? 13 So I'll make every assumption you 14 The assumption is that all those things want. 15 except for the word "punitive damages" were 16 already part of what the defendants were facing. 17 The only new one is punitive damages. 18 So we're talking about a retroactive effect of the two words in this statute which --19 20 called punitive damages, which didn't face the 21 plaintiffs -- the defendant before. All right? 2.2 Fine. Now, if that's so, why isn't it still 23 24 clear? 25 MR. CURRAN: Well, there's no

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1 reference to punitive -- you -- you -- you --2 you summarized accurately 1083(c)(2). There's 3 no reference there to punitive damages. There's 4 no reference to the retroactivity --5 JUSTICE BREYER: No, all there is, is the word "as if." 6 MR. CURRAN: Right. 7 JUSTICE BREYER: And it says "as if 8 9 the action had originally been filed under 10 1605A(c)," okay? So if it had been originally 11 filed under 1605A(c), you would have -- when 12 you're looking to the damage, what damages shall 13 I give, said the judge? Well, read the words, 14 economics, solatium, pain, suffering, and 15 punitive damages. 16 MR. CURRAN: This Court's decisions, 17 Landgraf and the progeny, they all say that 18 there has to be a clear statement of 19 retroactivity. 20 JUSTICE BREYER: Well, isn't this 21 clear? 22 MR. CURRAN: That's not clear. 23 JUSTICE BREYER: It's clear because it 24 says "as if." It's like if Socrates is a man, 25 you know, what is that -- all men are mortal; if

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Socrates is a man, Socrates is mortal. 1 2 It says all actions brought under 3 1605A, it shall be treated as if --4 MR. CURRAN: Right. So -- so --5 JUSTICE BREYER: -- it is 1605, and to б treat it under 1605A(c), you give punitive 7 damages. MR. CURRAN: Right. So, again --8 9 JUSTICE BREYER: Maybe Socrates wasn't 10 mortal, but I thought he was. 11 (Laughter.) 12 MR. CURRAN: Well, 1083(c)(2) --13 JUSTICE BREYER: Yeah. 14 MR. CURRAN: -- applies only to 15 pending cases, and it provides that by motion, a 16 -- a party in a pending case, a plaintiff in a 17 pending case --18 JUSTICE BREYER: Yeah. 19 MR. CURRAN: -- can make -- can, 20 therefore, basically transition its action from 21 the prior version, which is 15 -- 16 --22 1605(a)(7), to the new federal cause of action. 23 So it's a transition. It says nothing 24 about punitive damages being -- being applied. 25 It says nothing about retroactivity. And this

1 says --2 JUSTICE BREYER: Yeah. It just says 3 as if -- I mean, I don't want to repeat myself. MR. CURRAN: So it's -- so it's 4 5 putting -- so it's putting that transitioned 6 plaintiff on the same footing as a 7 fresh-filing --8 JUSTICE BREYER: Yep. 9 MR. CURRAN: -- 1605A person. 10 JUSTICE BREYER: Yep. 11 MR. CURRAN: That -- that says nothing 12 about whether punitive damages should apply to 13 pre-enactment conduct. And --14 JUSTICE GINSBURG: There's something 15 strange about the -- the whole discussion of 16 retroactivity because the doctrine is supposed 17 to be based on people having an opportunity to know what the law is and conform their conduct 18 to it. 19 20 Are you maintaining that Sudan might 21 have withheld their aid to Al Qaeda just to prevent exposure to punitive damages? 22 MR. CURRAN: This Court's cases are 23 24 pretty clear saying that even as to conduct that 25 was illegal or immoral, the -- the bad man

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1 under -- to use Justice Holmes's terminology, is 2 still entitled to notice of what the law is. Maybe a -- a -- a country in the position of a 3 4 Sudan knowing about the extra liability of --5 maybe they would have supervised their 6 residents, their 40 million residents, a little 7 more closely. But -- but the -- but the law does 8 9 presume that -- particularly in the case of 10 punitive damages, that it's only fair to apply 11 them if the party was on notice of its exposure to that at the time of the relevant conduct. Is 12 13 there --14 JUSTICE BREYER: It's like a due 15 process argument, and I guess if corporations are persons, maybe foreign countries are too. I 16 17 don't know the answer to that. 18 JUSTICE GINSBURG: That's another --MR. CURRAN: Well, this Court's said 19 20 _ _ 21 JUSTICE BREYER: But that isn't in front of us, is it? 22 23 And as far as the words "pending 24 cases" are concerned, you fall within -- are you 25 a pending case?

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1 MR. CURRAN: Pardon me? 2 JUSTICE BREYER: Were you -- are your 3 -- are these pending cases in your view? MR. CURRAN: No, none of them are. 4 5 JUSTICE BREYER: They're not pending 6 cases? 7 MR. CURRAN: Right. None are. 8 JUSTICE BREYER: It says, "with 9 respect to any action that was brought under 10 1605(a)(7), " yours was brought under --11 MR. CURRAN: No. 12 JUSTICE BREYER: It wasn't? What was 13 it brought under? 14 MR. CURRAN: They were all brought 15 after the enactment in 2008. So they were all 16 brought under 1605A. Page 13 of our brief. 17 Every one of these actions was filed after the 18 enactment in 2008. None were pending at the time of the enactment. 19 20 This Section 1083(c) that we're all 21 talking about is irrelevant to these cases. 22 JUSTICE BREYER: Oh, I see. So your 23 argument --24 MR. CURRAN: You're looking in the 25 wrong place.

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1 JUSTICE BREYER: Let me see I have if 2 right. Your argument is that 1605 -- this --3 that this section is really about 1605(a)(7) --4 MR. CURRAN: Yes. 5 JUSTICE BREYER: -- and your cases are 6 biq A. 7 MR. CURRAN: Yes. And there's 8 nothing -- you can look throughout all the 2008 9 enactment, you will not see a whisper of a 10 suggestion about the temporal application of 11 claims under 1605A. They don't exist. That's 12 why my friends are resorting to the pending 13 action transition provisions, which are 14 irrelevant to what we're talking about. 15 JUSTICE BREYER: But that -- wouldn't 16 that be a little weird? In other words, you 17 brought it under 1605A before what's called the 18 Flatow Amendment, is this -- I don't know what 19 you're --20 MR. CURRAN: No. It's all after 21 Flatow. 2.2 JUSTICE BREYER: All right, wait --23 you're saying it's under big A, and this latter 24 thing, application of pending cases, is only 25 small a.

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1 MR. CURRAN: Right. 2 JUSTICE BREYER: So if, in fact, you filed the -- a case in 1899 and it's still 3 4 pending, it's true in some courts --5 (Laughter.) 6 JUSTICE BREYER: -- the -- the -- and 7 you -- you -- then you wouldn't -- you would have punitive damages applied to that? 8 9 MR. CURRAN: No. I would --10 JUSTICE BREYER: But if you filed it 11 _ _ MR. CURRAN: No. It still doesn't 12 13 mention punitive damages. It still doesn't talk 14 about retroactivity. Landgraf sets a bar, and it's not just 15 16 Landgraf; it's all the cases after it. It's It's St. Cyr. All of these cases say if 17 Lindh. 18 you're going to imply -- to -- to apply 19 punishment or significant increased damages 20 retroactively, Congress, you got to say it 21 pretty clearly. You got to say, as to the new punitive damages, those apply retroactively to 22 pre-enactment conduct. It's not that hard to 23 24 say. Congress can say it. 25 JUSTICE ALITO: Nothing short of -- of

referring explicitly to punitive damages would 1 2 be sufficient? MR. CURRAN: I -- I think that's 3 right. I think that's what "explicit" means and 4 5 that's what "express" means in the Landgraf 6 decision. Words like "express" and "explicit" 7 are all over Landgraf. 8 Now, I do acknowledge that that -- in 9 that footnote 8, where just Stevens was -- for 10 the Court, was writing about the 1990 Civil 11 Rights Act, which wasn't passed, he identified 12 that as a better and maybe sufficient way to 13 show retroactive effect, but there, there was a 14 cross-reference specifically to the damages 15 provision. And it said that provision shall 16 apply for cases on or before such and such a 17 date. 18 With -- with all due respect to Mr. --

18 With -- With all due respect to Mr. --19 my friend Mr. McGill, there's no close analogy 20 between that provision in footnote 8 of Landgraf 21 and what we're dealing with here. Here we have 22 literally nothing talking about the retroactive 23 effect of 1605A. Nothing.

JUSTICE KAGAN: Mr. Curran, if I couldunderstand your position, are you saying that

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punitive damages are the only thing that was 1 2 new, or are you saying -- are you conceding that there are some states where other sorts of 3 damages and maybe some other liability rules 4 5 were new, but that those get kind of swept into 6 the mix and there is retroactive application of 7 those? MR. CURRAN: I'm not aware of any new 8 9 exposure that 1605A imposed, other than punitive 10 damages. 11 JUSTICE KAGAN: Suppose Mr. McGill can tell us we found three states where there's new 12 13 exposure. What happens to those? MR. CURRAN: If there was no exposure 14 15 in those states, and then now there is under the 16 new federal cause of action, I think a foreign 17 sovereign defendant has an argument that that is 18 new, that is a new disability, that is a new punishment, and it shouldn't be applied 19 20 retroactively without a clear statement by 21 Congress. I think that's under Landgraf. 2.2 JUSTICE BREYER: I want to be sure I understand this, but you're saying, I think, 23 24 look at 1605A. 25 MR. CURRAN: Yes.

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1 JUSTICE BREYER: When you look at 2 1605A, it does provide for punitive damages, but 3 it doesn't say whether those punitive damages 4 are retroactive. 5 MR. CURRAN: Correct. 6 JUSTICE BREYER: Now you look at 16-7 -- then you look at 1605A, application to 8 pending cases. And you're saying as to that, it 9 has nothing to do with this case, because this 10 was not a case that was brought under 11 1605(a)(7), which it has to do with? Is that 12 right? 13 MR. CURRAN: I -- I'm not sure if I 14 heard you right. All -- all of these --15 JUSTICE BREYER: Is it --16 MR. CURRAN: All --17 JUSTICE BREYER: It says in --18 MR. CURRAN: -- all of these --19 JUSTICE BREYER: -- with respect to 20 any action that was brought under section 21 1605(a)(7)? Yeah. And that isn't yours? 22 MR. CURRAN: That -- that isn't ours. 23 JUSTICE BREYER: So that whole section 24 doesn't apply --25 MR. CURRAN: No. Right.

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JUSTICE BREYER: -- and when we look 1 2 at the section that does apply --3 MR. CURRAN: Right. 4 JUSTICE BREYER: -- we see that it 5 doesn't say anything about retroactivity. 6 MR. CURRAN: I'll -- I'll say it 7 again. JUSTICE BREYER: Is that it? Is that 8 9 it? 10 MR. CURRAN: Yes. All four of these 11 cases that we're dealing with in this case were filed after the enactment of the statute. None 12 13 of them were pending. The only --14 JUSTICE ALITO: Is that a new 15 argument? I thought -- are you saying that the federal cause of action does not apply 16 17 retroactively at all? 18 MR. CURRAN: No, I'm --JUSTICE ALITO: Under the new federal 19 20 cause of action all you can sue for are things 21 that happened after the enactment of that 22 provision? MR. CURRAN: No, I'm saying that the 23 24 new federal cause of action applies 25 retroactively because under Landgraf's second

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1 step, it has no retro -- no practical 2 retroactive operation. JUSTICE GORSUCH: And if we disagree 3 with that premise, you lose, right, because if 4 -- if we think that a federal cause of action 5 6 adds in any way a material new potential 7 liability, different statutes of limitations, 8 for example, different elements of the cause of action, whatever, if -- if we disagree with you 9 10 and we think that a federal cause of action is separate and distinct from a state cause of 11 12 action, you lose? 13 MR. CURRAN: No. 14 JUSTICE GORSUCH: Why not? How -- how 15 do you prevail then? MR. CURRAN: Because -- because if --16 17 if the federal cause of action is really a new 18 disability, is really a new --JUSTICE GORSUCH: Yeah. 19 20 MR. CURRAN: -- a new prejudice, then 21 it requires an express statement by Congress --2.2 JUSTICE GORSUCH: And you've --23 MR. CURRAN: -- of retroactivity. 24 JUSTICE GORSUCH: And my 25 understanding, though, is you've agreed that the

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retroactivity here is permissible, but you are 1 2 saying that that -- that's -- that that -- maybe 3 -- maybe I'm missing this. Maybe the missing 4 argument is that -- that your concession is no 5 longer valid at that stage. 6 MR. CURRAN: No, no, no. Oh, at that 7 stage? Right. If you change the premises of my 8 concession, yes, my concession changes. But --9 but -- but my concession is premised on the very 10 strong reality that the federal cause of action 11 didn't add much to preexisting state causes of action. 12 13 JUSTICE SOTOMAYOR: Excuse me. Could 14 I just clarify one step further? 15 MR. CURRAN: Please. 16 JUSTICE SOTOMAYOR: Let's assume that 17 this had been filed earlier than the amendment, 18 that it was -- that it goes back to or it was 19 timely filed before. 20 Would you concede that 1605A(c) would 21 make punitive damages retroactive as to that class of cases? 22 23 MR. CURRAN: I would not and I'll tell 24 you why. 25 JUSTICE SOTOMAYOR: All right. That's

1 where now I'm getting lost. I followed you up 2 to saying for new causes of action --3 MR. CURRAN: Okay. If --4 JUSTICE SOTOMAYOR: -- it's not clear. 5 MR. CURRAN: If 1083(c) was relevant 6 because there was a pending case under 7 1605(a)7 --8 JUSTICE SOTOMAYOR: Exactly. 9 MR. CURRAN: -- then I still would say 10 where is the express or explicit command of retroactivity for punitive damages and I don't 11 find that in 1083(c). 12 13 JUSTICE BREYER: You have a stronger 14 argument. I mean, you would say, look, if we 15 had filed this three years later, the punitive 16 damages part wouldn't apply because this 17 retroactive -- the "as if" thing doesn't apply. 18 And so it can't be clear. It can't be 19 clear to a preceding one when, although they 20 refer to "as if," it doesn't make sense to apply 21 retroactivity to the older cases and not to the 2.2 newer cases. 23 And that itself creates an ambiguity. 24 MR. CURRAN: Right. Saying "as if" 25 isn't enough. Saying --

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1 JUSTICE BREYER: Well, that's a pretty 2 -- I mean, you have to say something like that. 3 And, boy, we're in outer space, I think, by the -- we're --4 5 MR. CURRAN: Landgraf tells us the --6 the -- the notion of retroactive imposition of 7 _ _ 8 JUSTICE BREYER: Yeah. 9 MR. CURRAN: -- punitive damages is 10 such a draconian step, it -- it is against --11 JUSTICE BREYER: See, I've got that. 12 MR. CURRAN: -- the basic principles 13 going back centuries about fairness. 14 So before we attribute that intention 15 to Congress, we're going to ask Congress to say 16 it pretty damn clearly. 17 JUSTICE KAGAN: So, Mr. Curran --18 MR. CURRAN: That's all it says. 19 JUSTICE KAGAN: -- in your state of 20 the world and if I understand it, it's not just 21 punitive action, punitive damages now, it's 22 really any new liability, any new damages. 23 So you're conceiving of a state of the 24 world where a defendant foreign state gets to 25 walk in and say, well, there's this new thing

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and that wouldn't have been true before, there's 1 2 this new thing and that wouldn't have been true before, and -- and that's what it will all come 3 4 down to, right? 5 And -- and, boy, that seems -- that 6 seems awfully complicated and probably not what 7 Congress had in mind, that somebody would say 8 under Pennsylvania law it works like this. Under Wisconsin law it works like this. And 9 10 then different people would be treated in 11 different ways, depending on which state they 12 were in. 13 Could that make any sense? 14 MR. CURRAN: Well, the -- first of 15 all, these principles aren't just for foreign sovereigns. Right? These are for -- this is 16 17 for litigation writ large. 18 JUSTICE KAGAN: Yeah. 19 MR. CURRAN: Right? And -- and we're 20 not taking a position that, oh, oh, the federal 21 cause of action shouldn't apply retroactivity

because of people in Pennsylvania. Look, we're not -- we're taking a more practical approach to this, that, in general, the -- the federal cause of action adds nothing new. So it has no

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retroactive operation under Landgraf, therefore,
 it applies retroactively.

This is what Landgraf says. So I -we're not asking for any change of the law. We're asking for equal-handed treatment of Sudan, as -- on the same footing that other litigants would enjoy the presumptions and other -- other statements in Landgraf, but we're not asking for anything new or radical here.

10 This case presents a straightforward application of the Landgraf steps. Is there --11 12 is there a clear statement by Congress? If not, 13 then we look and see whether there's a retroactive operation. If there is a 14 15 retroactive operation, such as with punitive damages, then the presumption kicks in and --16 17 and the -- and the -- and the new provision 18 cannot apply retroactively. That's it. We're 19 not asking for anything radical here.

There are other arguments we make in -- in our briefs, including on subject matter jurisdiction. We invite the Court to consider those, including the one -- that that argues that the Helmerich decision of a couple of years ago has not been applied correctly here because

the Court here found that -- applied a wrong 1 2 standard for jurisdictional causation. We also take issue with the idea that 3 4 -- that this case involves an extrajudicial 5 killing, because that's a specific term of art under international law. And we raise a series 6 7 of other jurisdictional arguments that probably would require a remand or further briefing. 8 JUSTICE GINSBURG: Are they -- I know 9 10 one is a limitation, statute of limitation question, which is an affirmative defense, not a 11 jurisdictional issue. 12 13 MR. CURRAN: Well, that -- that's the 14 issue, Justice Ginsburg. The issue is whether 15 the limitations defense is jurisdictional and, 16 therefore, cannot be waived by a defaulting 17 foreign sovereign or whether it is an 18 affirmative defense that can be waived. 19 And our position is, given the 20 placement and text of 1605A(b), that it should 21 be interpreted to be jurisdictional so the court of appeals should have addressed it on the 22 23 merits. 24 JUSTICE ALITO: Mr. -- Mr. McGill says 25 that if your interpretation of extrajudicial

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killing is correct, then the terrorism exception 1 2 doesn't apply to terrorism. 3 MR. CURRAN: Yeah, that -- that's --4 that's semantics. 5 JUSTICE ALITO: Well -- well --6 MR. CURRAN: If there's no question 7 that the four predicate acts each constitute types of terrorism, okay, so -- so it's still 8 9 the terrorism exception. 10 My question for -- my question to Mr. 11 McGill, I guess, is how come Congress rejected the -- the act of terrorism as it was proposed 12 13 in the early versions of the -- of the terrorism 14 exception? JUSTICE ALITO: Well, which terrorists 15 16 would be covered under your -- under your 17 understanding? Only those who are -- are 18 officially on the payroll of the state? 19 MR. CURRAN: No, no, agents and others engaging in the acts. Well, it depends -- it 20 21 may depend on the predicate act, right, there 22 are four predicate acts. Two of them, extrajudicial killing and torture, are acts 23 24 under international law that can only be 25 committed by state actors.

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The other ones, aircraft sabotage and 1 2 hostage taking, under those conventions, anyone, 3 you don't have to be a state actor, but you can 4 be guilty of the violation under international 5 law. So it depends on -- on the predicate act. 6 And -- and the ATA, right, we've got 7 the antiterrorist act, which does criminalize and provide civil remedies for acts of 8 9 international terrorism, that excepts foreign 10 states. 11 So when one considers the broad 12 terrorism statutory scheme, one sees that acts 13 of terrorism generally are prohibited and 14 criminalized and provide for civil remedies, but 15 not against a foreign state, but under the four predicate acts that are embedded in the 16 17 terrorism exception, those are acts that 18 Congress carefully considered with the advice of the State Department and concluded that those 19 20 acts are all condemned universally by 21 international law. 2.2 Thank you. 23 CHIEF JUSTICE ROBERTS: Thank you, 24 counsel. Three minutes, Mr. McGill. 25

1 REBUTTAL ARGUMENT OF MATTHEW D. McGILL 2 ON BEHALF OF THE PETITIONERS 3 MR. McGILL: Thank you, Mr. Chief 4 Justice. 5 Justice Breyer, let's start with what 6 this case is. If you turn to 28(a) of the 7 government's brief, you will see the provision for related actions. That's what these cases 8 9 are. 10 A related action is -- is one which is -- where there is a -- a case that has been 11 12 timely commenced under the old terrorism 13 exception, 1605(a)(7), and that's the Owens 14 case, filed in 2001, then any other action --15 turn the page -- arising out of the same act or 16 incident may be brought under 1605A. That is 17 us. 18 We -- because we are related to Owens, we arise out of the same act or incident as 19 20 Owens, we file under 1605A. What happens then? 21 Under 1605A1 -- I'm -- I'm sorry, under 22 1083(c)1, the amendments made by this section 23 shall apply to any claim arising under Section 24 1605A. 25 The amendments of 1083, therefore,

1 apply to our claims. And at page 43, Sudan 2 concedes that -- and I'm reading now --3 "Section 1083(C)(1) simply provides that all the 4 amendments under Section 1083 apply to a claim 5 arising under Section 1605A." 6 All the amendments. That includes 7 punitive damages. 8 JUSTICE BREYER: But he's saying -- I 9 think he's saying, look at the -- look at the 10 first -- look at 2(b)(a) in the application to 11 pending cases. And he's saying with respect to 12 any action brought under 1605(a)(7) -- small 13 a -- that's where this retroactivity, that's 14 where the thing applies, and he says his was --15 yours isn't. 16 MR. McGILL: We're not -- we're --17 JUSTICE BREYER: But you come to --18 MR. McGILL: We're not --19 JUSTICE BREYER: -- the related part. 20 MR. McGILL: -- a prior action. We're 21 a related action. 2.2 JUSTICE BREYER: Arising out --MR. McGILL: But 1605A -23 24 JUSTICE BREYER: -- of the same --25 MR. McGILL: -- applies to both.

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Prior actions is the Acree case. Prior actions 1 2 are cases that already had punitive damages judgments that Congress said could be revived. 3 4 Any judgment in the action "shall be given 5 effect as if it had been filed under 1605A(c)." And it was for that reason that the 6 7 President first vetoed it, and it was in 8 response to the President's veto that Congress 9 gives waiver authority with respect to Iraq. 10 JUSTICE SOTOMAYOR: Mr. McGill, the 11 one argument that they make that I -- can we avoid reaching, is a subject matter 12 13 jurisdiction, whether relatives of victims for 14 their independent state tort actions fall within 15 any of these statutes, because they all require 16 a U.S. nexus. 17 MR. McGILL: Yes. So the -- the 18 argument is that claimant in 1085 -- 1605A(a) 19 means legal representative. That's their 20 argument. That argument is wrong for several 21 reasons: 2.2 First, it's contrary to the plain meaning of claimant. Second, claimant or victim 23 24 was language added in a technical amendment in 25 1997, and it was consistent -- may I --

CHIEF JUSTICE ROBERTS: You can get to third, and then --MR. McGILL: Consistently --consistently applied by lower courts for some 12 years. And Congress legislated against that б background, ratified that, and I'd cite the Inclusive Communities Project for that. CHIEF JUSTICE ROBERTS: Thank you, counsel. The case is submitted. (Whereupon, at 12:11 p.m., the case was submitted.)

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