

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

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11 - - - - -

12 Washington, D.C.
13 Monday, February 24, 2020

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16 The above-entitled matter came on for
17 oral argument before the Supreme Court of the
18 United States at 11:10 a.m.

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1 APPEARANCES:

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3 on behalf of the Petitioners.

4 ERICA L. ROSS, Assistant to the Solicitor General,

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7 supporting the Petitioners.

8 CHRISTOPHER M. CURRAN, Washington, D.C.;

9 on behalf of the Respondents.

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P R O C E E D I N G S

(11:10 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 17-1268, Opati versus the Republic -- Republic of Sudan.

Mr. McGill.

ORAL ARGUMENT OF MATTHEW D. MCGILL

ON BEHALF OF THE PETITIONERS

MR. MCGILL: Mr. Chief Justice, and may it please the Court:

Sudan provided Al Qaeda with a safe haven and vital material support enabling it to carry out the embassy bombings, killing 224 people and wounding thousands more. In retaliation, President Clinton sent 13 cruise missiles into Khartoum. But to impose punitive damages, Sudan argues, somehow would violate principles of fundamental fairness embodied in the Landgraf presumption.

If fairness is the issue here, then Sudan surely should lose. The State Department had designated Sudan as a state sponsor of terrorism in 1993, but Sudan continued to shelter Osama Bin Laden even as he issued fatwahs calling for attacks on U.S. interests.

1 In 1996 Congress enacted the Flatow amendment
2 which, which explicitly provided for punitive
3 damages for acts of state-sponsored terrorism.
4 But still Sudan continued to harbor Al Qaeda.

5 Sudan had ample opportunity to conform
6 its primary conduct to U.S. law. It just chose
7 not to. And that's not particularly surprising,
8 because Sudan is a foreign government and
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.

19 And here it is abundantly clear that
20 Congress intended punitive damages be available
21 in two carefully defined categories of cases
22 involving past acts of terrorism.

23 In the subsection entitled,
24 "Application to Pending Cases," Congress set
25 forth two categories of cases, prior actions and

1 related actions, each of which were unmistakably
2 directed at past acts of terrorism.

3 Then the amendments say, in
4 Section 1083(c)(1), "The amendments made by this
5 section shall apply to any claim arising under
6 Section 1605A." Congress had said prior --
7 prior actions and related actions could file
8 under this new 1605A, and now Congress is saying
9 the amendments made by this section shall apply
10 to any of those claims.

11 And Sudan concedes, at page 43 of its
12 brief, that that meant all of the amendments in
13 Section 1983 apply to a claim arising under
14 Section 1605A.

15 That language, "shall apply to" -- "to
16 any claim," is virtually identical to the
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
22 of the statute.

23 JUSTICE ALITO: In a case involving
24 private -- a private defendant, rather than a
25 sovereign nation, are there constitutional

1 limits on Congress's ability to make punitive
2 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.

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

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

25 There was no magic words requirement

1 applicable in Landgraf. And this Court
2 recognized -- but not -- not only in Landgraf,
3 but later in Martin versus Hadix, that that was
4 sufficient to unambiguously address the temporal
5 reach of the statute.

6 JUSTICE GINSBURG: Is Sudan --

7 MR. MCGILL: And --

8 JUDGE GINSBURG: -- simply wrong when
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."
23 And Sudan concedes, it's important to note, that
24 every single word of Section 1083 applies
25 retroactively, except the two words "punitive

1 damages."

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

7 JUSTICE KAGAN: Mr. McGill, is it
8 really right that it does -- all the rest of it
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

1 law had no -- had no remedy because the state --
2 the state law didn't permit for intentional
3 infliction of emotional distress for persons not
4 present at the scene of the bombing.

5 So -- so Congress enacted -- in the
6 federal cause of action, it -- it created a
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 --

22 JUSTICE KAGAN: Because?

23 MR. MCGILL: By dint of Pennsylvania
24 state law. That just -- that that --
25 Pennsylvania state tort law did not allow that

1 person to recover. Same for Louisiana.

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
8 action.

9 JUSTICE KAGAN: Got it.

10 MR. MCGILL: There are two, at least
11 two other points that I think demonstrate
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
19 originally filed under 1605A(c).

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

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
8 is an unmistakable reference to the Acree
9 decision.

10 And what Congress did in response was
11 not change anything with respect to the
12 retroactivity of the cause of action or
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.

22 An additional point I would make
23 that's related is that under the Flatow
24 Amendment, ever since its enactment in 1996, it
25 had always been applied to allow for punitive

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

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

13 There's no reason to think that after
14 enacting the Flatow Amendment and providing
15 punitive damages that looked backwards, that now
16 Congress would provide a different punitive
17 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

1 recognized in an opinion by then Judge
2 Kavanaugh, the -- that related actions provision
3 allows a person who already has a judgment for
4 compensatory damages to file a new action under
5 the new federal cause of action to seek punitive
6 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.

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

25 JUSTICE GINSBURG: This is an aside of

1 the issue here, but I have not seen the term
2 "solatium" as a -- as an item of damages before.
3 Where does that come from?

4 MR. MCGILL: I don't know where it
5 comes from originally, but it -- I think it --
6 it refers to the -- the emotional suffering of
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
11 other family member suffering through an injury.

12 JUSTICE ALITO: What about the
13 retroactivity of punitive damages under state
14 law?

15 MR. MCGILL: So I think there, if the
16 Court agrees with me that -- that the federal
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.

23 The D.C. Circuit's primary rationale
24 was that it would be inconsistent to allow state
25 law punitive damages and not -- if you had

1 already decided that the federal law doesn't,
2 you know, doesn't provide for punitive damages,
3 and it was that -- what it said, inconsistent
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
8 the Landgraf presumption, then the amendment
9 would have lifted the restriction as to state
10 law punitive damages. So if you agree with us
11 and the government that Altmann is the right
12 framework as to which to -- to look at the state
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
19 Section 1605A, and -- and it should be
20 emphasized that Petitioner's claims here have
21 only ever been claims under Section 1605A.

22 They all were filed after the
23 enactment of this statute originally. So once
24 you concede that the actions are under 1605A,
25 Section 1606 has no application to them. The

1 1606 bar on punitive damages, as the D.C.
2 Circuit says, at 128A of the petition appendix,
3 it has 1606, therefore, has no bearing upon
4 state law claims brought under the
5 jurisdictional grant in Section 1605A. That is
6 us. That is our claims.

7 And if they -- without Section 1606,
8 there is no other textual basis to bar punitive
9 damages of a state law claim. There is no --
10 there is no free-floating preemption of state
11 law punitive damages that could be invoked.

12 So I think if you agree with us about
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.

19 ORAL ARGUMENT OF ERICA L. ROSS FOR THE
20 UNITED STATES, AS AMICUS CURIAE,
21 SUPPORTING THE PETITIONERS

22 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

1 requirement, we of course agree with Petitioners
2 that -- or with Petitioners that Landgraf
3 doesn't require that. And I think it's very
4 important on page 272 of Landgraf where the
5 Court explains exactly what it is doing.

6 It states that: "Requiring clear
7 intent assures that Congress itself has
8 affirmatively considered the potential
9 unfairness of retroactive application and
10 determined that it is an acceptable price to pay
11 for the countervailing benefits."

12 I think that that is exactly what
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
22 explains that the amendments to Section 1605A
23 will apply in any action, and it provides for
24 prior actions that are related to
25 previously-filed actions, so actions that are

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,
8 why would it apply at all in a case involving a
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?

15 MS. ROSS: So I think it is a canon of
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

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.

8 And this actually takes me to Justice
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
12 not available for all victims under prior law.
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
16 same set of damages. I read it as asking
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

1 the -- the federal context.

2 It's also not clear to me -- and this
3 goes to Justice Ginsburg's question -- whether
4 types of damages that are specifically
5 enumerated in 1605A(c) like solatium necessarily
6 would have been available under state law
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
12 Mr. McGill mentioned earlier is extremely
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 --

1 MS. ROSS: Sorry.

2 JUSTICE SOTOMAYOR: -- but let me
3 break it down in a more direct way.

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
19 this.

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
11 can apply Altmann across the board. We do think
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?

19 MS. ROSS: Well, no. I mean, of
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.

1 MS. ROSS: And we think that that's
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
8 describe the then current state of the FSIA in
9 2004, and we think it's still true with respect
10 to the state law claims today, because
11 plaintiffs would be proceeding, obviously, under
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
19 which plaintiffs who otherwise could obtain that
20 remedy in -- under state causes of action can do
21 so in federal and state courts following the
22 2008 amendments.

23 JUSTICE ALITO: If Congress thought
24 that a particular country was an incorrigible
25 sponsor of terrorism and it wanted to punish

1 that country, would there be any constitutional
2 barrier to Congress simply expropriating all
3 assets of that country within the reach of the
4 -- of the United States?

5 MS. ROSS: Your Honor, the United
6 States hasn't taken a position on the scope of a
7 foreign state's constitutional rights in this
8 case. Sudan hasn't raised that issue. Sudan
9 has asked, like any other litigant, for
10 application of the Landgraf presumption. It has
11 not suggested that there would be some
12 particular constitutional violation as to it.

13 I think, particularly in this context,
14 where we have a narrow provision focused on
15 state sovereign -- or state sponsors of
16 terrorism that have been designated as such
17 based on a congressional -- several
18 congressional statutes that permit that
19 designation, and then an executive determination
20 about their sponsorship of terrorism, there
21 really aren't any constitutional issues in this
22 case.

23 JUSTICE ALITO: But you think that
24 Landgraf applies in exactly the same way to a
25 claim by -- when the -- when the defendant is a

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

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

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

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

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

1 if we're going to get hit with punitive damages,
2 well, that's going to stop us? Is that the --
3 the thinking of the U.S. Government?

4 MS. ROSS: I don't think that that's
5 the thinking of the U.S. Government, Justice
6 Alito. I think what -- what is the thinking of
7 the U.S. Government is twofold.

8 One is that Landgraf, I think, doesn't
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
22 we think that that's enough to resolve this case
23 on -- as I said, on the federal cause of action.

24 And then, on the state cause of
25 action, we think that clearly falls under

1 Altmann and, for the reasons provided, we -- we
2 think satisfies that more lenient test.

3 If the Court has no further questions,
4 we would ask that you reverse.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Mr. Curran.

8 ORAL ARGUMENT OF CHRISTOPHER M. CURRAN

9 ON BEHALF OF THE RESPONDENTS

10 MR. CURRAN: Mr. Chief Justice, and
11 may it please the Court:

12 First, a response to my friend
13 Mr. McGill's opening histrionics, I note that
14 the D.C. Circuit concluded that the -- that the
15 evidence at the default hearing failed to show
16 that Sudan either specifically intended or
17 directly advanced the 1998 embassy bombings.

18 The D.C. Circuit also acknowledged
19 that Sudan expelled Bin Laden permanently in
20 1996, May of 1996, two years before the U.S.
21 designated Bin Laden and Al Qaeda as terrorists.

22 So I think that some of Mr. McGill's
23 comments have some selective 20/20 hindsight
24 aspect to them.

25 JUSTICE GINSBURG: Now -- but is that

1 before us?

2 MR. CURRAN: I'm just responding to
3 the -- the argument that Sudan is the devil
4 incarnate here. I -- I think instead the record
5 shows that Sudan, at most, was negligent in
6 controlling people within its borders and that
7 it's not -- and I want to make it clear that
8 Sudan did not and is not accused of being a
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
19 all for claims of emotional distress felt by
20 those plaintiffs. These are not representative
21 claims of any kind.

22 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.

1 nationals, they're not U.S. employees, they're
2 not U.S. contractors, and they're not
3 representatives of those.

4 So --

5 JUSTICE GINSBURG: But their decedents
6 were?

7 MR. CURRAN: But their decedents were.
8 But these are not claims on behalf of the
9 decedents. These are claims for the emotional
10 injuries of these foreign family members
11 themselves.

12 So if they're not eligible under 1605
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.

21 So if the Court were to expand the
22 question presented, as my friends suggest, the
23 -- the conclusion should be that those state law
24 claims cannot withstand scrutiny under subject
25 matter jurisdiction.

1 Now, turning to the key retroactivity
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
8 some substantive aspects of federal common law.
9 But, in any event, Altmann was limited to the
10 FSIA as it existed at the time, and that was
11 pre-2008.

12 Footnote 15 of Altmann and the text
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
22 here? I mean, you've conceded that every other
23 part of this statute applies retroactively.

24 So how is it that you can exempt
25 punitive damages from that retroactive coverage?

1 MR. CURRAN: Okay. There's a lot to
2 that question. And I -- and I -- and I have an
3 answer for all of it. First, with respect to
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
11 substantial change. The -- the foreign states
12 were already subject to compensatory damages and
13 solatium. And --

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

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?

1 So those are two outlier states. 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
6 members don't have a claim at all before or
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
19 matter of federal law.

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 --

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
8 -- there is no rush.

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
16 not also applying retroactively, given that it's
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

1 was: Well, should that new statute apply
2 retroactively or not? No clear statement by
3 Congress. But different regimes.

4 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
12 there were state causes of action doesn't move
13 me very much.

14 And I'm still here, though, on -- on a
15 record in which everyone agrees that the federal
16 cause of action does apply retroactively. Then
17 what do I do?

18 MR. CURRAN: Well -- well, 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?

1 MR. CURRAN: Well -- well, I don't
2 know. But under -- and I don't know if this is
3 directly responsive to your question, but
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.

16 So none of the cases at issue in this
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 -- so here

1 -- here's my analysis, right? Landgraf first
2 asks did Congress specify clearly whether
3 there's retroactive effect or not?

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
8 provision has a retroactive operation.

9 Does it upset settled expectations?
10 Does it impose new damages? Does it impose a
11 disability to use Justice Story's terminology?

12 And -- and in -- in the -- with
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,
16 those -- those things existed before the 2008
17 enactment.

18 JUSTICE GORSUCH: Well, we often say
19 there's a state tort cause of action, that
20 doesn't necessarily mean there's a federal civil
21 rights cause of action, right?

22 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

1 can. That doesn't mean they're the same cause
2 of action, does it?

3 MR. CURRAN: Well, I think under
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
11 your argument based on these state claims is
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
19 about retroactivity.

20 Would you say that there is no
21 retroactive effect in the case of the federal
22 statute because you -- you were already liable
23 under the state law?

24 MR. CURRAN: That's exactly what I'm
25 saying, yes. There's -- there's no --

1 JUSTICE ALITO: I think you're arguing
2 in exactly the opposite direction. So you would
3 say there is no retroactive effect under the
4 state -- under the federal -- we would presume
5 that there would be no retroactive application
6 -- that there would be --

7 MR. CURRAN: No.

8 JUSTICE ALITO: -- no problem with
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

1 that -- I mean, we take all this, you say, look,
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
6 shall be given effect, as if the action had
7 originally been filed under 1605A(c).

8 Now, when you look at the effect, as
9 if it had been brought under 1605A(c), we get
10 all these things like economic damages,
11 dah-dah-dah-dah-dah, and punitive damages, all
12 right?

13 So I'll make every assumption you
14 want. The assumption is that all those things
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
19 effect of the two words in this statute which --
20 called punitive damages, which didn't face the
21 plaintiffs -- the defendant before. All right?
22 Fine.

23 Now, if that's so, why isn't it still
24 clear?

25 MR. CURRAN: Well, there's no

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
6 the word "as if."

7 MR. CURRAN: Right.

8 JUSTICE BREYER: And it says "as if
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

1 Socrates is a man, Socrates is mortal.

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
6 treat it under 1605A(c), you give punitive
7 damages.

8 MR. CURRAN: Right. So, again --

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.

4 MR. CURRAN: So it's -- so it's
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
18 know what the law is and conform their conduct
19 to it.

20 Are you maintaining that Sudan might
21 have withheld their aid to Al Qaeda just to
22 prevent exposure to punitive damages?

23 MR. CURRAN: This Court's cases are
24 pretty clear saying that even as to conduct that
25 was illegal or immoral, the -- the bad man

1 under -- to use Justice Holmes's terminology, is
2 still entitled to notice of what the law is.
3 Maybe a -- a -- a country in the position of a
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.

8 But -- but the -- but the law does
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
12 to that at the time of the relevant conduct. Is
13 there --

14 JUSTICE BREYER: It's like a due
15 process argument, and I guess if corporations
16 are persons, maybe foreign countries are too. I
17 don't know the answer to that.

18 JUSTICE GINSBURG: That's another --

19 MR. CURRAN: Well, this Court's said
20 --

21 JUSTICE BREYER: But that isn't in
22 front of us, is it?

23 And as far as the words "pending
24 cases" are concerned, you fall within -- are you
25 a pending case?

1 MR. CURRAN: Pardon me?

2 JUSTICE BREYER: Were you -- are your
3 -- are these pending cases in your view?

4 MR. CURRAN: No, none of them are.

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
19 time of the enactment.

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.

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 big 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.

22 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.

1 MR. CURRAN: Right.

2 JUSTICE BREYER: So if, in fact, you
3 filed the -- a case in 1899 and it's still
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
8 have punitive damages applied to that?

9 MR. CURRAN: No. I would --

10 JUSTICE BREYER: But if you filed it
11 --

12 MR. CURRAN: No. It still doesn't
13 mention punitive damages. It still doesn't talk
14 about retroactivity.

15 Landgraf sets a bar, and it's not just
16 Landgraf; it's all the cases after it. It's
17 Lindh. It's St. Cyr. All of these cases say if
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
22 punitive damages, those apply retroactively to
23 pre-enactment conduct. It's not that hard to
24 say. Congress can say it.

25 JUSTICE ALITO: Nothing short of -- of

1 referring explicitly to punitive damages would
2 be sufficient?

3 MR. CURRAN: I -- I think that's
4 right. I think that's what "explicit" means and
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. --
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.

24 JUSTICE KAGAN: Mr. Curran, if I could
25 understand your position, are you saying that

1 punitive damages are the only thing that was
2 new, or are you saying -- are you conceding that
3 there are some states where other sorts of
4 damages and maybe some other liability rules
5 were new, but that those get kind of swept into
6 the mix and there is retroactive application of
7 those?

8 MR. CURRAN: I'm not aware of any new
9 exposure that 1605A imposed, other than punitive
10 damages.

11 JUSTICE KAGAN: Suppose Mr. McGill can
12 tell us we found three states where there's new
13 exposure. What happens to those?

14 MR. CURRAN: If there was no exposure
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
19 punishment, and it shouldn't be applied
20 retroactively without a clear statement by
21 Congress. I think that's under Landgraf.

22 JUSTICE BREYER: I want to be sure I
23 understand this, but you're saying, I think,
24 look at 1605A.

25 MR. CURRAN: Yes.

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.

1 JUSTICE BREYER: -- and when we look
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.

8 JUSTICE BREYER: Is that it? Is that
9 it?

10 MR. CURRAN: Yes. All four of these
11 cases that we're dealing with in this case were
12 filed after the enactment of the statute. None
13 of them were pending. The only --

14 JUSTICE ALITO: Is that a new
15 argument? I thought -- are you saying that the
16 federal cause of action does not apply
17 retroactively at all?

18 MR. CURRAN: No, I'm --

19 JUSTICE ALITO: Under the new federal
20 cause of action all you can sue for are things
21 that happened after the enactment of that
22 provision?

23 MR. CURRAN: No, I'm saying that the
24 new federal cause of action applies
25 retroactively because under Landgraf's second

1 step, it has no retro -- no practical
2 retroactive operation.

3 JUSTICE GORSUCH: And if we disagree
4 with that premise, you lose, right, because if
5 -- if we think that a federal cause of action
6 adds in any way a material new potential
7 liability, different statutes of limitations,
8 for example, different elements of the cause of
9 action, whatever, if -- if we disagree with you
10 and we think that a federal cause of action is
11 separate and distinct from a state cause of
12 action, you lose?

13 MR. CURRAN: No.

14 JUSTICE GORSUCH: Why not? How -- how
15 do you prevail then?

16 MR. CURRAN: Because -- because if --
17 if the federal cause of action is really a new
18 disability, is really a new --

19 JUSTICE GORSUCH: Yeah.

20 MR. CURRAN: -- a new prejudice, then
21 it requires an express statement by Congress --

22 JUSTICE GORSUCH: And you've --

23 MR. CURRAN: -- of retroactivity.

24 JUSTICE GORSUCH: And my
25 understanding, though, is you've agreed that the

1 retroactivity here is permissible, but you are
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
12 action.

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
22 class of cases?

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
11 retroactivity for punitive damages and I don't
12 find that in 1083(c).

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
22 newer cases.

23 And that itself creates an ambiguity.

24 MR. CURRAN: Right. Saying "as if"
25 isn't enough. Saying --

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
4 -- we're --

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

1 and that wouldn't have been true before, there's
2 this new thing and that wouldn't have been true
3 before, and -- and that's what it will all come
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.
9 Under Wisconsin law it works like this. And
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
16 sovereigns. Right? These are for -- this is
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
22 because of people in Pennsylvania. Look, we're
23 not -- we're taking a more practical approach to
24 this, that, in general, the -- the federal cause
25 of action adds nothing new. So it has no

1 retroactive operation under Landgraf, therefore,
2 it applies retroactively.

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

10 This case presents a straightforward
11 application of the Landgraf steps. Is there --
12 is there a clear statement by Congress? If not,
13 then we look and see whether there's a
14 retroactive operation. If there is a
15 retroactive operation, such as with punitive
16 damages, then the presumption kicks in and --
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.

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

1 the Court here found that -- applied a wrong
2 standard for jurisdictional causation.

3 We also take issue with the idea that
4 -- that this case involves an extrajudicial
5 killing, because that's a specific term of art
6 under international law. And we raise a series
7 of other jurisdictional arguments that probably
8 would require a remand or further briefing.

9 JUSTICE GINSBURG: Are they -- I know
10 one is a limitation, statute of limitation
11 question, which is an affirmative defense, not a
12 jurisdictional issue.

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
22 of appeals should have addressed it on the
23 merits.

24 JUSTICE ALITO: Mr. -- Mr. McGill says
25 that if your interpretation of extrajudicial

1 killing is correct, then the terrorism exception
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
8 types of terrorism, okay, so -- so it's still
9 the terrorism exception.

10 My question for -- my question to Mr.
11 McGill, I guess, is how come Congress rejected
12 the -- the act of terrorism as it was proposed
13 in the early versions of the -- of the terrorism
14 exception?

15 JUSTICE ALITO: Well, which terrorists
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
20 engaging in the acts. Well, it depends -- it
21 may depend on the predicate act, right, there
22 are four predicate acts. Two of them,
23 extrajudicial killing and torture, are acts
24 under international law that can only be
25 committed by state actors.

1 The other ones, aircraft sabotage and
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
8 and provide civil remedies for acts of
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
16 predicate acts that are embedded in the
17 terrorism exception, those are acts that
18 Congress carefully considered with the advice of
19 the State Department and concluded that those
20 acts are all condemned universally by
21 international law.

22 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
8 for related actions. That's what these cases
9 are.

10 A related action is -- is one which is
11 -- where there is a -- a case that has been
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,
19 we arise out of the same act or incident as
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.

22 JUSTICE BREYER: Arising out --

23 MR. MCGILL: But 1605A -

24 JUSTICE BREYER: -- of the same --

25 MR. MCGILL: -- applies to both.

1 Prior actions is the Acree case. Prior actions
2 are cases that already had punitive damages
3 judgments that Congress said could be revived.
4 Any judgment in the action "shall be given
5 effect as if it had been filed under 1605A(c)."

6 And it was for that reason that the
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
12 avoid reaching, is a subject matter
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:

22 First, it's contrary to the plain
23 meaning of claimant. Second, claimant or victim
24 was language added in a technical amendment in
25 1997, and it was consistent -- may I --

1 CHIEF JUSTICE ROBERTS: You can get to
2 third, and then --

3 MR. MCGILL: Consistently --
4 consistently applied by lower courts for some 12
5 years. And Congress legislated against that
6 background, ratified that, and I'd cite the
7 Inclusive Communities Project for that.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel. The case is submitted.

10 (Whereupon, at 12:11 p.m., the case
11 was submitted.)

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| <p>40:19 59:22 twofold [1] 27:7 type [2] 20:18 21:21 types [3] 20:24 21:4 59:8</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>U.S [13] 4:25 5:6,10 27:3,5,7 28:20 29:25,25 30:1,2,16 63:16 ultimately [1] 5:14 unambiguous [1] 6:19 unambiguously [2] 6:21 8:4 under [85] 6:5,8,13 7:3 9:10,25 10: 21 11:16,19,21 12:23 13:5 14:4 15:13,18 16:13,18,21,24 17:4 18: 15,21 19:2 20:12 21:6 24:11,20 27:25 29:24 30:12,13,14,24 34:23 35:9 36:2 38:3,4,23 39:3,4,10,13 40:4,7,9 41:9,11 42:2,6 44:1 45:9, 10,13,16 46:11,17,23 49:15,21 50: 10,20 51:19,25 54:6 56:8,9 57:1 58:6 59:16,16,24 60:2,4,15 61:12, 16,20,21,21,23 62:4,5,12 63:5 underpinning [1] 5:11 understand [3] 48:25 49:23 55:20 understanding [3] 10:13 52:25 59:17 unfairness [2] 18:9 38:6 union [1] 7:9 UNITED [8] 1:1,18 2:6 3:7 17:20 24:5 25:4,5 universally [1] 60:20 unless [1] 39:15 unmistakable [1] 12:8 unmistakably [1] 6:1 up [1] 54:1 upset [1] 37:9</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>valid [1] 53:5 Verlinden [1] 31:7 version [1] 42:21 versions [1] 59:13 versus [7] 4:4 6:20 7:4 8:3,22 11: 23,24 veto [3] 12:2 21:19 63:8 vetoed [1] 63:7 victim [1] 63:23 victims [3] 13:11 20:12 63:13 view [1] 45:3 viewing [1] 15:10 violate [1] 4:17 violation [2] 25:12 60:4 virtually [1] 6:16 vital [1] 4:12</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>waffling [1] 36:24 wait [1] 46:22 waived [2] 58:16,18 waiver [2] 12:15 63:9 walk [1] 55:25 wanted [3] 13:4 14:17 24:25 wants [1] 7:12 Washington [4] 1:12 2:2,5,8 way [9] 9:4,14 21:9 22:3 25:24 26:</p> | <p>11 27:19 48:12 52:6 ways [1] 56:11 weird [1] 46:16 whatever [4] 22:9 40:2,2 52:9 whatsoever [1] 38:18 Whereupon [1] 64:10 whether [13] 5:15,17 20:14,17 21: 3 37:2,7 43:12 50:3 57:13 58:14, 17 63:13 whisper [1] 46:9 whole [2] 43:15 50:23 will [6] 18:16,21,23 46:9 56:3 61:7 Wisconsin [1] 56:9 withheld [1] 43:21 within [7] 7:7 25:3 29:6 34:20,20 44:24 63:14 without [3] 16:7 17:7 49:20 withstand [1] 30:24 word [3] 8:24 40:15 41:6 words [9] 7:14,25 8:25 17:25 40: 19 41:13 44:23 46:16 48:6 work [2] 14:15,15 works [3] 9:3 56:8,9 world [2] 55:20,24 worth [1] 26:25 wounding [1] 4:14 writ [1] 56:17 writing [1] 48:10 written [1] 19:24</p> <hr/> <p style="text-align: center;">Y</p> <hr/> <p>years [4] 28:20 54:15 57:24 64:5 Yep [2] 43:8,10</p> |
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