No. 17-1236

IN THE

Supreme Court of the United States

REPUBLIC OF SUDAN, MINISTRY OF EXTERNAL AFFAIRS AND MINISTRY OF THE INTERIOR OF THE REPUBLIC OF SUDAN,

Petitioners,

v.

JAMES OWENS, *et al.*,

Respondents.

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

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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While the United States maintains that a writ of certiorari is not warranted, that position is predicated upon a misreading of this Court's precedents, the D.C. Circuit's decision below, and Sudan's arguments. When these misreadings are clarified, it becomes apparent that certiorari is indeed warranted, because the D.C. Circuit adopted legal standards in conflict with this Court's decision in *Helmerich* and thereby permitted a default judgment to stand in the absence of a legally sufficient showing of jurisdictional facts. Nearly half a century after the enactment of the FSIA, lower courts are still in serious disarray on the important and recurring question of the proper legal standard for establishing jurisdictional facts necessary to subject foreign sovereigns to subject-matter jurisdiction in U.S. courts.

I. The United States Fails To Appreciate That The D.C. Circuit's "Lighter Burden" Conflicts With *Helmerich*

The United States is simply incorrect in arguing that the D.C. Circuit's decision here "does not conflict" with this Court's decision in *Helmerich*. U.S. Br. 11. The D.C. Circuit expressly held that "[e]stablishing material support and causation for jurisdictional purposes is a lighter burden than proving a winning case on the merits." App. 42a. That "lighter burden" for jurisdictional purposes squarely conflicts with *Helmerich*'s holding that jurisdictional facts must be conclusively established before a U.S. court may assert subject-matter jurisdiction over a foreign sovereign. *See* 137 S. Ct.

at 1319. The United States seems to think that the D.C. Circuit's decision cannot conflict with *Helmerich*, given that the D.C. Circuit acknowledged *Helmerich* (U.S. Br. 11-12); fact is, the D.C. Circuit acknowledged *Helmerich* and then promptly adopted and applied a legal standard squarely at odds with it.

Once Sudan appeared and challenged the jurisdictional facts underlying the $10.3 billion default judgment against it, the district court was required to conclusively resolve the factual disputes to determine whether subject-matter jurisdiction existed. If that determination overlapped with the merits, "so be it." *Helmerich*, 137 S. Ct. at 1319. Instead, the district court merely considered whether the plaintiffs had produced "*some*" evidence, even if "meager." App. 522a. The D.C. Circuit affirmed, endorsing the "lighter burden" for jurisdictional facts. App. 42a, 146a-47a. That decision defied *Helmerich* and also *Insurance Corp. of Ireland*, 456 U.S. 694 (1982), which permits any defaulting party to appear subsequently and obtain de novo consideration of subject-matter jurisdiction, even after a default judgment is entered. Pet. 17-19.

The United States asserts that the D.C. Circuit was using the term "lighter burden" to refer not to the "non-frivolous" standard condemned in *Helmerich*, but to a burden-shifting approach under which a plaintiff bears a modest burden of production. U.S. Br. 12. That interpretation of the D.C. Circuit's decision, while possible, is questionable, because the D.C. Circuit appeared to use the "lighter burden" to refer to *Chabad*'s discussion of "the *Bell v. Hood* standard" of non-

frivolousness rather than to *Chabad*'s discussion of burden shifting. App. 42a. Ultimately, however, this debate does not matter; one way or another, the D.C. Circuit expressly endorsed a "lighter burden" for establishing jurisdictional facts, thereby running headlong into *Helmerich*.

Adding insult to injury, the D.C. Circuit endorsed a ridiculously "light[]" burden for establishing the jurisdictional facts. The district court required plaintiffs to produce only "*some*" evidence, even if "meager." App. 522a (emphasis in original). In affirming, the D.C. Circuit stated that "the only question before this court is whether the plaintiffs have met their rather modest burden of production to establish the court's jurisdiction." App. 55a. The D.C. Circuit contrasted this "rather modest" burden with the heavier burden of proving a case on the merits. *Id.* This bifurcated approach cannot be squared with *Helmerich*.

As the United States emphasizes (U.S. Br. 11-12), the D.C. Circuit acknowledged *Helmerich* and its requirement that plaintiffs "prove the facts supporting the court's jurisdiction under the FSIA." App. 42a. But the D.C. Circuit's acknowledgement of *Helmerich* is immediately preceded by its endorsement of a "lighter burden" for jurisdictional facts (App. 42a) and is immediately followed by an endorsement of the district court's finding that plaintiffs' evidence satisfied "the jurisdictional standard" (App. 43a). *See also* App. 55a ("the only question before this court is whether the plaintiffs have met their rather modest burden of production to establish the court's jurisdiction"); App. 88a ("The

district court, therefore, correctly held the plaintiffs met their burden of production . . . ."). The D.C. Circuit's discussion of *Helmerich* makes it inescapable that the D.C. Circuit failed to appreciate that *Helmerich* forecloses *any* lower standard for jurisdictional facts. Quite simply, there is no separate "jurisdictional standard"; facts necessary to establish jurisdiction over a foreign state must be established to the same extent as facts necessary to the merits of a claim.

The D.C. Circuit's misapprehension of *Helmerich* might be explained by the timing of that decision, which was decided more than six months after the oral argument before the D.C. Circuit in this case. While the parties notified the D.C. Circuit of *Helmerich*, the D.C. Circuit did not have the benefit of briefing on the case. The D.C. Circuit's treatment of *Helmerich* suggests that the case was an afterthought. In any event, the D.C. Circuit's decision stands as controlling authority in a circuit that is always a proper venue for FSIA cases and that is in fact the venue for the overwhelming majority of FSIA cases. That controlling authority — catnip for forumshoppers — cannot stand.

The D.C. Circuit applied an incorrect legal standard in affirming jurisdiction. Contrary to the suggestion of the United States (U.S. Br. 10), there is nothing "fact-bound" about Sudan's argument. A challenge to a legal standard is a quintessential issue of law. And the United States' cynical reformulation of Sudan's Questions Presented should not obscure that Sudan is raising purely issues of law. Sudan addresses facts solely to show that the D.C. Circuit's

erroneous legal standards were outcome determinative. Sudan seeks reversal and a remand for the application of the correct legal standard for jurisdiction under the FSIA.

The United States faults Sudan's identification of a circuit split on burden-shifting under the FSIA. U.S. Br. 12-13. First, the United States criticizes Sudan for identifying the circuit split in its reply brief (*id.* at 12), but that criticism is unfair; it was only in Respondents' opposition to Sudan's Petition that Respondents first interpreted the D.C. Circuit's citation to *Chabad* as referencing burden-shifting rather than invoking the *Bell v. Hood* non-frivolous standard. Opp'n 19-20. It was entirely appropriate of Sudan to show that this case is certworthy even under Respondents' questionable alternative interpretation of the D.C. Circuit's opinion. Second, the United States disputes the existence of a circuit split, but can do so only by mischaracterizing Sudan's position. The circuit split Sudan identified is over the height of a plaintiff's burden of production ("meager" versus preponderance of the evidence) (Reply 6-7), not over "whether a plaintiff or a foreign sovereign defendant bears the initial evidentiary burden," as the United States mischaracterizes (U.S. Br. 13).

In another inexcusable mischaracterization of Sudan's position, the United States asserts that Sudan's Petition argued that the D.C. Circuit should have applied de novo review as to jurisdictional facts. U.S. Br. 14 (citing Pet. 16-19). In reality, Sudan's Petition faults the D.C. Circuit for not requiring *the district court* to fully consider de novo Sudan's challenge to the jurisdictional findings underlying the

default judgment. As the Petition makes clear, *Insurance Corp. of Ireland* and its progeny establish that any defaulting defendant may subsequently appear and obtain de novo consideration of subject-matter jurisdiction. Pet. 17-19. Because both the United States and Respondents respond only to their mischaracterized version of Sudan's argument, there is no rebuttal to Sudan's actual argument as to how the D.C. Circuit's decision conflicts with *Insurance Corp. of Ireland* and its progeny.

The upshot of the D.C. Circuit's defiance of *Helmerich* and *Insurance Corp. of Ireland* is that Sudan is saddled with a $10.3 billion default judgment based on "*some*" "meager" evidence supporting subject-matter jurisdiction. Even after Sudan appeared in the district court to challenge the default judgment, its jurisdictional arguments never received plenary consideration.

II. The United States Admits That The D.C. Circuit Allowed Jurisdictional Facts To Be Established "Based Solely Upon" Expert Opinion

Unlike Respondents (Opp'n 23-26), the United States at least admits that the district court and the D.C. Circuit permitted the facts necessary for subject-matter jurisdiction to be based solely upon the opinion testimony of three expert witnesses. U.S. Br. 8-9, 15. The United States nonetheless defends the lower court's reliance solely upon expert opinion, accepting the D.C. Circuit's holding that the FSIA does not require any "particular type of admissible evidence." U.S. Br. 15 (citing App. 64a). Indeed, the

United States even accepts the D.C. Circuit's holding that looser evidentiary standards should apply under the FSIA's terrorism exception (U.S. Br. 15) — an atextual holding that turns presumptive immunity on its head.

According to the United States, the D.C. Circuit did not accept expert opinion testimony as a substitute for factual findings, but instead "concluded that the district court did not clearly err in making factual findings based on admissible expert opinions." U.S. Br. 17. The United States apparently thinks this metaphysical distinction avoids a conflict with *Marvel Characters* and other authorities condemning the use of expert witnesses as a means to satisfy burdens requiring factual evidence. Pet. 27-30. In any event, the United States does not dispute that the district court and the D.C. Circuit, applying their "lighter burden," permitted jurisdictional facts to be found based solely on expert opinion, without any actual factual evidence.

III. The United States Obscures The Pertinent Statutory Language And Misreads This Court's Precedents On Causation

The United States also defends the D.C. Circuit's holding on causation, even though that holding ignored the specific-intent and directness requirements of §1605A(a)(1). U.S. Br. 18-22. Unhelpfully, the United States obscures Sudan's argument by italicizing the wrong "for" when block-quoting the statutory language. *Id.* at 18. Sudan's consistent position is, and has been, that §1605A(a)(1) requires specific intention through the language "or the provision of material support or

resources *for* such an act" (emphasis added). Sudan raised this argument in its opening brief in the D.C. Circuit (at pages 27-28), where Sudan quoted the appropriate "for" and cited to *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 502 (1982), with the parenthetical statement "holding that the statutory use of the term 'for' requires a showing of intent." And Sudan has also consistently maintained that traditional proximate causation includes an element of directness. Sudan raised this argument in its opening brief in the D.C. Circuit at page 27, where *Paroline* and *Rothstein* are cited for their descriptions of the concept of proximate causation, as including the element of directness. *See also* Reply 10.

The United States tries to limit *Paroline* (and *Anza* and *Holmes*) to their specific statutory contexts, as though proximate cause includes directness in some contexts but not in others. U.S. Br. 20-21. But those cases were unmistakably discussing the traditional common-law concept of proximate cause under hornbook law. Indeed, the United States admitted as much in another CVSG brief it filed with this Court one day before it submitted its CVSG brief here: there it stated that "common-law proximate-causation principles . . . require consideration of the directness of the link between the defendant's conduct and the plaintiff's injury." Brief of the United States as Amicus Curiae at 17, *Toshiba Corp. v. Auto. Indus. Pension Trust Fund*, No. 18-486 (U.S. May 20, 2019) (citing *Holmes*, 503 U.S. at 268).

And the United States is off base suggesting that the FSIA's use of "direct" in another exception (i.e.

"direct effect" in the commercial activity exception to sovereign immunity, 28 U.S.C. §1605(a)(2)) means directness is not part of proximate causation under the FSIA's terrorism exception. U.S. Br. 19-20. If anything, that contrast merely suggests that Congress used the term "direct" when intending to exclude other elements of proximate causation such as substantiality and foreseeability. *See Republic of Arg. v. Weltover*, 504 U.S. 607, 618 (1992) (holding that "direct effect" under the commercial-activity exception includes directness but not substantiality or foreseeability).

Only by reading out intent and directness from §1605A(a)(1)'s causation requirement was the D.C. Circuit able to reach this extraordinary conclusion: "In sum, that the evidence failed to show Sudan either specifically intended or directly advanced the 1998 embassy bombings is irrelevant to proximate cause and jurisdictional causation." App. 88a.

All told, the D.C. Circuit's "lighter burden" for jurisdictional facts allowed the court to affirm a $10.3 billion default judgment against a foreign sovereign, based on "*some*" "meager" evidence, based solely upon opinion testimony of expert witnesses, even though that evidence failed to show that Sudan specifically intended or directly advanced the horrific bombings. Sudan regrets defaulting in the district court, but once it appeared to challenge the jurisdictional basis for the default judgment, *Helmerich* and *Insurance Corp. of Ireland* entitled Sudan to a de novo determination of jurisdictional facts.

IV. The United States Has Previously Acknowledged That The Issues Here Raise Important Foreign Relations Concerns

The United States asserts without explanation that a writ of certiorari is not warranted by foreign-relations concerns (U.S. Br. 10), but in *Helmerich* the United States told this Court repeatedly — at both the petition and merits stages — that imposing a lighter burden for jurisdictional facts raised very serious foreign-relations concerns. *See, e.g.*, Brief for the United States as Amicus Curiae at 16, *Helmerich*, 137 S. Ct. 1312 (May 24, 2016) (No. 15-423) (urging certiorari because a "permissive" standard for establishing jurisdiction "may result in adverse foreign-relations consequences and reciprocal adverse treatment of the United States in foreign courts"); Brief for the United States as Amicus Curiae Supporting Petitioners at 20, *Helmerich*, 137 S. Ct. 1312 (August 26, 2016) (No. 15-423) ("Subjecting a foreign sovereign to the jurisdiction of a U.S. court without first making the substantive legal determination that the FSIA's immunity exceptions dictate may well be understood as an affront to that sovereign's dignity." (internal quotations and brackets omitted)); Transcript of Oral Argument at 25, *Helmerich*, 137 S. Ct. 1312 (2017) (No. 15-423) (attorney from Office of the Solicitor General: "asserting jurisdiction over a foreign state based on a nonfrivolous allegation . . . is something that doesn't respect foreign state's dignity"). These representations of the United States in *Helmerich* apply with equal force here, and the United States offers no rationale to the contrary.

CONCLUSION

For the foregoing reasons and those stated in Sudan's Petition and Reply, this Court should grant Sudan's Petition for a Writ of Certiorari.

Respectfully submitted,

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