No. 17-____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Petition presents three important and recurring questions concerning the circumstances under which U.S. courts have subject-matter jurisdiction over actions against foreign states under the Foreign Sovereign Immunities Act ("FSIA"):

1. Whether plaintiffs suing a foreign state bear a "lighter burden" in establishing the facts necessary for jurisdiction than in proving a case on the merits, when this Court held to the contrary — at the urging of the Solicitor General and the Department of State — in *Bolivarian Republic of Venezuela v. Helmerich & Payne International Drilling Co.*, 137 S. Ct. 1312 (2017).

2. Whether plaintiffs suing a foreign state can establish facts necessary for jurisdiction "based solely upon" the opinion testimony of so-called "terrorism experts," when the record lacks admissible factual evidence sufficient to establish jurisdiction.

3. Whether plaintiffs' failure to prove a foreign state "either specifically intended or directly advanced" a terrorist attack is "irrelevant to proximate cause and jurisdictional causation," when (i) the FSIA's "terrorism exception" establishes jurisdiction over a foreign state only where the foreign state provided material support "for" a specified act of terrorism, and (ii) proximate causation requires a "direct relationship" between the defendant's conduct and the resultant injury.

PARTIES TO THE PROCEEDING

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

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

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

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

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

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

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

In *Wamai v. Republic of Sudan*, No. 08-cv-1349-JDB, the following individuals, respondents on review, were the plaintiffs-appellees below: Winfred Wairimu Wamai; Diana Williams; Angela Wamai; Lloyd Wamai; John Muriuki Girandi; Sarah Anyiso Tikolo; Negeel Andika; Grace Njeri Kimata; Lucy Muthoni Gitau; Gitau Catherine Waithira; Ernest Gichiri Gitau; Felister Wanjiru Gitau; Grace Njeri Gicho; Diana Njoki Macharia; Lucy Kamau; Kiongo Wairimu; Teresia Wairimu; Jane Kamau; Alice Muthoni Kamau; Newton Kama; Pauline Kamau; Peter Kamau; Marcy Kamau Wairimu; Ann Wambui Kamau; Daniel Kiomho Kamau; Nyangoro Wilfred Mayaka; Doreen Mayaka; Dick Obworo; Diana Nyangara; Deborah Kerubo; Jacob Awala; Warren Awala; Vincent Owour; Mordechai Thomas Onono; Priscilla Okatch; Dennis Okatch; Rosemary Anyango Okatch; Samson Okatch; Jenipher Okatch; Josinda Katumba Kamau; Caroline Nguhi Kamau; Faith Wanza Kamau; Elizabeth Vutage Malob; Kenneth Maloba; Margaret Maloba; Adhiambo Sharon; Okile Marlon; Lewis Mafwavo; Marlong Okile; Mary Mutheu Ndambuki.

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

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

In *Khaliq v. Republic of Sudan*, No. 10-cv-0356-JDB, the following individuals, respondents on review, were the plaintiffs-appellees below: Rizwan Khaliq; Jenny Christiana Lovblom; Imran Khaliq; Tehsin Khaliq; Kamran Khaliq; Imtiaz Bedum; Irfan Khaliq; Yasir Aziz; Naurin Khaliq.

In *Opati v. Republic of Sudan*, No. 12-cv-1224-JDB the following individuals, respondents on review, were the plaintiffs-appellees below: Monicah Okoba Opati; Selifah Ongecha Opati; Rael Angara

Opati; Johnstone Mukabi; Salome Ratemo; Kevin Ratemo; Fredrick Ratemo; Louis Ratemo; Stacy Waithera; Michael Daniel Were; Judith Nandi Busera; Roselyne Karsorani; George Mwangi; Bernard Machari; Gad Gideon Achola; Mary Njoki Muiruri; Jonathan Karania Nduti; Gitionga Mwaniki; Rose Nyette; Elizabeth Nzaku; Patrick Nyette; Cornel Kebungo; Phoebe Kebungo; Joan Adundo; Benard Adundo; Nancy Njoki Macharia; Sally Omondi; Jael Nyosieko Oyoo; Edwin Oyoo; Miriam Muthoni; Priscah Owino; Greg Owino; Michael Kamau Mwangi; Joshua O. Mayunzu; Zackaria Musalia Ating'a; Julius M. Nyamweno; Polychep Odhiambo; David Jairus Aura; Charles Oloka Opondo; Ann Kanyaha Salamba; Erastus Mijuka Ndeda; Techonia Oloo Owiti; Joseph Ingosi; William W. Maina; Peter Ngigi Mugo; Simon Mwanhi Nhure; Joseph K. Gathungu; Dixon Olubinzo Indiya; Peter Njenga Kungu; Charles Gt. Kabui; John Kiswilli.

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Additional citations to the district court record are indicated by citation to the parties' Joint Appendix before the D.C. Circuit ("C.A. App.____").

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

OPINIONS BELOW

The opinion of the D.C. Circuit, App. 1a-147a, is reported at 864 F.3d 751 (D.C. Cir. 2017). The D.C. Circuit's denial of rehearing en banc is unreported but reproduced at App. 573a-574a.

JURISDICTION

On July 28, 2017, the D.C. Circuit entered judgment. On October 3, 2017, Sudan's timely petition for rehearing en banc was denied. On December 20, 2017, Sudan requested an extension of sixty days in which to file its petition for a writ of certiorari. On December 22, 2017, the Chief Justice granted the requested extension, making the deadline for this petition March 2, 2018.

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

PROVISIONS INVOLVED

The relevant provisions of the United States Code are set forth in Appendix I.

STATEMENT

On August 7, 1998, truck bombs exploded almost simultaneously outside two U.S. Embassies on the African continent, one in Dar es Salaam, Tanzania, and the other in Nairobi, Kenya. Hundreds of innocent people were killed and thousands more were injured as a result of the explosions. The al Qaeda organization and its leader Osama Bin Laden claimed credit for the bombings, reportedly the first terrorist attack they had planned, directed and executed.

Sudan is a sovereign nation in northeastern Africa. The complaints in these consolidated cases, filed in the United States District Court for the District of Columbia, seek to hold Sudan liable for the deaths and personal injuries resulting from the 1998 Embassy bombings. The complaints invoke subject-matter jurisdiction under the FSIA's § 1605A(a)(1), which withdraws sovereign immunity in cases

> in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting with the scope of his or her office, employment, or agency.

28 U.S.C. § 1605A(a)(1). In particular, the complaints allege that Sudan provided "material support" to al Qaeda and Bin Laden in the early- and mid-1990s and thereby proximately caused the 1998 Embassy bombings.

Sudan — an impoverished nation riven by civil war and besieged by natural disasters — defaulted in the district court. The district court thereafter conducted an ex parte evidentiary hearing, found subject-matter jurisdiction under § 1605A(a)(1), and held Sudan liable in the amount of $10.2 billion in compensatory damages, prejudgment interest, and punitive damages.

Emerging from its years of tumult — and having ceded much of its territory and population to the new country of South Sudan — Sudan appeared in these consolidated actions in 2015, both by moving in the district court to vacate the default judgments and by timely appealing the default judgments to the United States Court of Appeals for the District of Columbia Circuit (which stayed the appeal to allow the district court to resolve the motions to vacate). In both courts, Sudan acknowledged that Bin Laden had lived in Sudan in the early- to mid-1990s as a private citizen, before he became a notorious terrorist and before he issued any public "fatwas" against the United States. But Sudan categorically denied providing any "material support" for the 1998 Embassy bombings or proximately causing them. Sudan observed that it had permanently expelled Bin Laden from the country in 1996, more than two years before the bombings and the resultant U.S.

designation of Bin Laden and al Qaeda as terrorists in 1998 and 1999, respectively.

As the centerpiece of its argument for relief from the default judgment, Sudan challenged the admissibility, reliability and sufficiency of the evidence of "material support" and proximate causation. Sudan observed that the district court's factual findings were based not on testimony of percipient witnesses or on other competent evidence, but on factual assertions by expert witnesses lacking any personal knowledge. Sudan acknowledged that Plaintiffs' experts could properly provide opinion testimony, and could properly rely upon hearsay in reaching their opinions. But Sudan disputed that Plaintiffs' experts could properly provide the factual evidentiary basis for jurisdiction; Sudan contended that the district court erroneously allowed the experts to serve as conduits for the introduction of hearsay. *See* Fed. R. Evid. 703; Fed. R. Evid. 703 advisory committee's notes to 2000 Amendments ("[T]he underlying information is not admissible simply because the opinion or inference is admitted."); *see, e.g.*, *Marvel Characters, Inc. v. Kirby*, 726 F.3d 119, 136 (2d Cir. 2013) ("Although the Rules permit experts some leeway with respect to hearsay evidence, Fed. R. Evid. 703, a party cannot call an expert simply as a conduit for introducing hearsay under the guise that the testifying expert used the hearsay as the basis of his testimony." (internal quotation marks omitted)).

For example, when the district court purportedly found that Sudan supposedly was an "eager host" in

"court[ing]" Bin Laden and al Qaeda in the early 1990s and "even sent a letter of invitation to Bin Laden," App. 198a, 199a, the district court was finding these supposed facts based on the testimony of Plaintiffs' expert witnesses, not from any sound evidentiary foundation.

Furthermore, the testimony of Plaintiffs' experts was demonstrably inaccurate. When the district court asked Plaintiffs' expert (Evan Kohlmann) how he knew about the purported "letter of invitation" ("How do we know?," C.A. App. 277), the expert testified that his source was the testimony of Jamal al-Fadl at a 2001 criminal trial against al Qaeda members, *id.* (Two other Plaintiffs' experts testified similarly. C.A. App. 368, 833.) The transcript from that 2001 criminal trial, however, establishes that al-Fadl did *not* testify as to the contents of the letter in question — he was prohibited from doing so under the "best evidence" rule, Fed. R. Evid. 1002 (Requirement of the Original) — and said nothing about the letter being a "letter of invitation" to Bin Laden. C.A. App. 762-65. In fact, al-Fadl testified that the letter was addressed not to Bin Laden or al Qaeda but to the Wadi al Aqiq Company, C.A. App. 769-70, apparently an import-export company, C.A. App. 835. While this supposed "letter of invitation" — and its supposed use by al Qaeda — served as a linchpin of the testimony of Plaintiffs' experts and the purported findings of fact by the district court, admissible evidence did not support the existence of the letter in the form described by Plaintiffs' experts and found by the district court. The letter itself was

not introduced as evidence either at the 2001 criminal trial or at the 2010 hearing in this case.

In this manner, the district court in its 2011 opinion uncritically accepted, as fact, the assertions, embellishments, and fabrications of Plaintiffs' experts as the evidentiary foundation for finding that Sudan provided "material support" and proximately caused the 1998 Embassy bombings. *See, e.g.*, App. 211a-213a (relying on Kohlmann's factual assertions in support of finding that Sudanese government entered into joint venture with al Qaeda to obtain weapons); *id.* at 213a (relying on Kohlmann's factual assertions in support of finding that Sudan provided weapons and explosives to al Qaeda); *id.* at 201a-202a (relying on factual assertions by Kohlmann and other Plaintiff experts, Lorenzo Vidino and Steven Simon, in support of findings on Sudan's apparent motivations for "inviting" al Qaeda to Sudan and providing support to al Qaeda); *id.* at 208a-209a (relying on factual assertions by Kohlmann and Vidino in support of finding that al Qaeda's investment in a Sudanese bank "known for financing terrorist operations" allowed al Qaeda to "serve[] al Qaeda's ultimate goal of organizing jihad against the United States and the West"); *id.* at 211a (relying on Simon's factual assertions in support of finding that Sudan "strongly resisted foreign pressure to turn [Bin Laden] over to the United States or grant access to the al Qaeda training camps"); *id.* at 212a (relying on factual assertions by experts in support of finding that Sudanese intelligence "escort[ed]" al Qaeda members through customs and "facilitated the

transport of al Qaeda operatives and funds from Sudan to the Nairobi cell").

Despite Sudan's challenge to the admissibility and sufficiency of the evidence, the district court denied Sudan's motions to vacate the default judgments. First, the district court concluded that, as to those Plaintiffs asserting a federal claim under § 1605A(c), Sudan's challenge to the sufficiency of the evidence was wholly off-base. Relying upon the D.C. Circuit's decision in *Agudas Chasidei Chabad of U.S. v. Russian Federation*, 528 F.3d 934 (D.C. Cir. 2008) ("*Chabad*"), the district court concluded that those plaintiffs merely needed to show that their claims were "non-frivolous" to establish subject-matter jurisdiction. App. 518a-519a. *Chabad* set that low threshold where a plaintiff's claim on the merits mirrors the jurisdictional standard, as § 1605A(c) mirrors § 1605A(a)(1). *Id.*

As to other Plaintiffs, namely those asserting claims under District of Columbia law, the district court found that the jurisdictional standard did not mirror the merits standard, so *Chabad*'s "non-frivolous" standard did not apply. App. 520a. The district court acknowledged that Sudan had "plausible arguments" challenging factual findings underlying the default judgments but stated "the fact that particular statements in that [2011] opinion may not be adequately supported is irrelevant if there is nonetheless sufficient evidence in the record of the necessary jurisdictional facts." App. 521a. And the district court concluded that the opinion testimony of Plaintiffs' experts was, standing alone, sufficient

evidence to establish the facts necessary for jurisdiction. App. 523a ("the opinions of the plaintiff's [sic] three expert witnesses are enough to satisfy that burden"); App. 530a ("the admissibility of statements along the way is irrelevant if — as the Court concludes — the ultimate opinions themselves are sufficient"); App. 531a-532a ("In sum, the consistent and admissible opinions of these three experts were sufficient to satisfy the plaintiffs' burden of producing evidence that Sudan provided 'material support' that 'caused' the embassy bombings."). The district court thus abandoned reliance upon the factual matters set forth in its 2011 default ruling, and instead rested solely upon the "ultimate opinions" of Plaintiffs' experts as the factual basis for finding "material support" and proximate causation. App. 530a-532a.

On a consolidated appeal from the default judgment and the district court's denial of Sudan's motions to vacate, the D.C. Circuit characterized Sudan's challenge to the admissibility and sufficiency of the evidence as "Sudan's weightiest challenge to jurisdiction." App. 41a. Nonetheless, the D.C. Circuit rejected Sudan's challenge.

At the outset of its discussion of the evidence, the D.C. Circuit declared: "Establishing material support and causation for jurisdictional purposes is a lighter burden than proving a winning case on the merits. *See Agudas Chasidei Chabad of U.S. v. Russian Federation*, 528 F.3d 934, 940 (D.C. Cir. 2008)." App. 42a. The D.C. Circuit's reliance upon its prior decision in *Chabad* was most peculiar because

Chabad had just been overturned three months earlier — on the precise point the D.C. Circuit was invoking — in this Court's decision in *Helmerich & Payne Int'l Drilling Co. v. Bolivarian Republic of Venezuela*, 137 S. Ct. 1312 (2017). *Chabad*, at its page 940, was the express basis for the D.C. Circuit's *Helmerich* decision that this Court reversed. *Helmerich & Payne Int'l Drilling Co. v. Bolivarian Republic of Venezuela*, 784 F.3d 804, 811-12 (D.C. Cir. 2015). And, while this Court's decision in *Helmerich* came after the briefing and argument of the appeal in this case, both Sudan and Plaintiffs had alerted the D.C. Circuit of this Court's decision in *Helmerich* through a supplemental letter under Rule 28(j) of the Federal Rules of Appellate Procedure. The D.C. Circuit inexplicably relied upon overruled law in holding that Plaintiffs enjoyed a "lighter burden" in proving material support and causation for purposes of jurisdiction. App. 42a.

Odder still, the D.C. Circuit went on to acknowledge this Court's decision in *Helmerich* and its abrogation of *Chabad*'s "non-frivolous" jurisdictional standard. App. 42a. But, despite *Helmerich*, the D.C. Circuit persisted in its application of a "lighter burden" for proving the jurisdictional facts to establish "material support" and proximate causation.

The D.C. Circuit proceeded to describe the sources of the evidence presented at the district court's evidentiary hearing, correctly noting that the sources "of critical importance" were Plaintiffs' expert witnesses and transcripts of testimony by al Qaeda

operatives at a U.S. criminal trial not involving Sudan. App. 44a-46a. The D.C. Circuit described former al Qaeda witness Jamal al-Fadl as "plaintiffs' star witness" who "cast a long shadow over the proceedings." App. 46a. Later in the opinion, the D.C. Circuit acknowledged the weight of Sudan's argument that al-Fadl's testimony was inadmissible under Rule 804(b)(1) of the Federal Rules of Evidence, and the D.C. Circuit declined to consider the testimony. App. 75a n.5. The same argument applies to the prior testimony of the other two al Qaeda witnesses, leaving Plaintiffs' experts as the only remaining evidence "of critical importance."

The D.C. Circuit then went on to summarize the district court's findings of fact as presented in the district court's opinion supporting its default judgment. App. 47a-55a. The findings came largely from the testimony of Plaintiffs' experts, with all of their assertions, embellishments, and fabrications.

Beyond its application of *Chabad*'s "lighter burden" for jurisdictional facts, the D.C. Circuit understood Sudan's initial default in the district court, and absence from the evidentiary hearing, as license to foreclose Sudan from challenging the admissibility rulings or the factual findings by the district court. First, the D.C. Circuit stated that Plaintiffs bore only a "rather modest burden of production" to establish the court's jurisdiction. App. 55a. Second, the D.C. Circuit applied a "narrowly circumscribed" appellate review of the district court's findings of fact and evidentiary rulings. App. 55a-56a. And, in what amounts to an outright

abandonment of appellate scrutiny, the D.C. Circuit stated that it would not deem a factual finding clearly erroneous as long as there was an adequate basis for inferring that the district court was satisfied with the evidence. App. 56a. The D.C. Circuit attempted to justify its "lenient standard" on the grounds that "firsthand evidence and eyewitness testimony" is "difficult or impossible" to obtain in FSIA terrorism cases, App. 57a-58a, but the court did not consider whether that justification was valid here, where numerous percipient witnesses (including former al Qaeda operatives) are available and the terrorist attack took place outside the defendant's territory.

The D.C. Circuit also went to great lengths to emphasize its determination to accord "an unusual degree of discretion over evidentiary rulings in an FSIA case against a defaulting state sponsor of terrorism." App. 57a. The D.C. Circuit stated that it would find an abuse of discretion only where the evidence relied upon is "both clearly inadmissible and essential to the outcome." App. 58a. And it added that it would overturn a jurisdictional finding only upon a finding that the record was "'wholly lacking' an 'adequate basis.'" App. 59a (citation omitted).

The D.C. Circuit held that the factual predicate for jurisdiction under § 1605A(a)(1) may be established exclusively through opinion testimony by an expert witness: "Indeed, cases in this Circuit and in others have repeatedly sustained jurisdiction or liability or both under the terrorism exception to the FSIA and in other terrorism cases based solely upon expert testimony. Therefore the plaintiffs' 'failure' to

present eyewitness testimony or other direct evidence is of no moment as to whether they have satisfied their burden of production." App. 64a-65a (citations omitted).

The D.C. Circuit acknowledged that the district court, in ruling on Sudan's motions to vacate, appreciated Sudan's "plausible arguments" on admissibility and receded to a reliance upon only the experts' opinions. App. 67a. The D.C. Circuit agreed with the district court that opinion testimony alone, without any accompanying factual predicate, was sufficient to find jurisdiction. App. 67a-68a.

The D.C. Circuit brushed aside Sudan's challenge to the reliability of the experts' conclusions, ruling that Sudan forewent any such challenge by not appearing at the district court's evidentiary hearing. App. 71a-72a.

On proximate causation, the D.C. Circuit continued to embrace the inadmissible factual content provided by Plaintiffs' experts. App. 76a-88a. Even considering this inadmissible evidence, the D.C. Circuit was compelled to acknowledge that "the evidence failed to show Sudan either specifically intended or directly advanced the 1998 embassy bombings." App. 88a. Nonetheless, the D.C. Circuit held that the absence of such intent or direct support was "irrelevant to proximate cause and jurisdictional causation." App. 88a.

REASONS FOR GRANTING THE PETITION

This Petition presents important and recurring questions addressing the circumstances under which a foreign state is subject to jurisdiction in U.S. courts. While subjecting a foreign state to jurisdiction is always a sensitive matter, the sensitivities are never more heightened than when the suit alleges that the foreign state has been complicit in an act of terrorism. Under § 1605A, such suits can only be brought against foreign states designated by the U.S. Department of State as state sponsors of terrorism (i.e., currently Iran, North Korea, Sudan and Syria), so the potential for mistrust and friction is high. And the need for fair and evenhanded administration of justice is paramount.

I. The D.C. Circuit's Opinion Conflicts With This Court's Decision In *Helmerich*

The D.C. Circuit's ruling that "[e]stablishing material support and causation for jurisdictional purposes is a lighter burden than proving a winning case on the merits," App. 42a, directly conflicts with this Court's decision in *Helmerich*. Given that almost all § 1605A actions are filed in the United States District Court for the District of Columbia under the default venue provision (28 U.S.C. § 1391(f)(4)), clarity on this issue is of significant concern.

The D.C. Circuit in *Helmerich & Payne International Drilling Co. v. Bolivarian Republic of Venezuela*, 784 F.3d 804 (D.C. Cir. 2015), held that, in order for plaintiffs to withstand a jurisdictional challenge under the FSIA, they need only satisfy an

"exceptionally low bar" and raise jurisdictional claims that are not "wholly insubstantial or frivolous." *Id.* at 812-13 (considering the expropriation exception to foreign sovereign immunity in 28 U.S.C. § 1605(a)(3)). In reaching that conclusion, the D.C. Circuit relied extensively and expressly on its prior decision in *Chabad*, stating: "What plaintiffs must allege to survive a jurisdictional challenge, then, 'is obviously far less demanding than what would be required for the plaintiff's case to survive a summary judgment motion' or a trial on the merits." *Helmerich*, 784 F.3d at 811-12 (quoting *Chabad*, 528 F.3d at 940).

This Court in *Helmerich* rejected the lighter burden articulated by the D.C. Circuit in *Chabad* and *Helmerich*, holding that plaintiffs must establish the jurisdictional elements of their claim under the FSIA as a factual matter, not as a matter of mere possibility or as a "good argument to that effect," even where the jurisdictional facts and merits are intertwined, as they are under § 1605A. 137 S. Ct. at 1316, 1319. Courts must "still answer the jurisdictional question" even where that means resolving "some, or all, of the merits issues." *Id.* at 1319.

In response to this Court's call for the views of the United States, the Solicitor General and the State Department argued that the D.C. Circuit's lenient standard in *Chabad* and *Helmerich* was inappropriate and "effectively nullifies" the jurisdictional requirements. Brief for the United States as Amicus Curiae at 32, *Helmerich*, 137 S. Ct.

1312 (Aug. 26, 2016) (No. 15-423) ("*Helmerich* U.S. Brief"); *see also* 137 S. Ct. at 1320 (adopting views of the United States and acknowledging those views, particularly on issues of sovereign immunity, are due "special attention"). Indeed, the United States pointed out in *Helmerich* that the district court in this case appeared to have applied the non-frivolous standard. *Helmerich* U.S. Brief at 26 n.6. (Remarkably, here, the D.C. Circuit did not request the views of the United States on the unique sovereign immunity issues before it, and yet drew a negative inference against Sudan for the failure of the United States to voluntarily express a view. App. 135a.)

Notwithstanding this Court's decision in *Helmerich*, the D.C. Circuit here erroneously relied on *Chabad* for the very proposition that this Court overruled in *Helmerich*, namely that, under the FSIA, proving jurisdiction "is a lighter burden than proving a winning case on the merits." App. 42a (citing *Chabad*, 528 F.3d at 940); *see also* App. 55a (referring to Plaintiffs' "rather modest burden of production"). Specifically, the D.C. Circuit cited to the same page of *Chabad* (page 940) upon which it relied in *Helmerich* to support the very proposition that this Court overruled. *See Helmerich*, 137 S. Ct. at 1318 (overruling lighter standard set by court of appeals) (citing *Helmerich*, 784 F.3d at 812 (quoting *Chabad*, 528 at 940)).

The D.C. Circuit's reliance on *Chabad* is all the more perplexing because in the very next paragraph, the D.C. Circuit acknowledges (without citation to

Chabad) that "the Supreme Court has overruled the precedent upon which the district court relied, requiring a plaintiff to prove the facts supporting the court's jurisdiction under the FSIA, rather than simply to make a 'non-frivolous' claim to that effect." App. 42a. The D.C. Circuit acknowledged that, under *Helmerich*, Plaintiffs were required actually to prove the facts supporting jurisdiction. App. 42a-43a. But rather than apply that standard, the D.C. Circuit endorsed the "lighter burden" to affirm the district court's extraordinary conclusion that plaintiffs may obtain a multi-billion-dollar default judgment against a foreign sovereign by relying on *only* expert testimony to supply the jurisdictional facts of the case. App. 67a-68a (agreeing with district court's conclusion that "the experts' opinions 'nonetheless' provided 'sufficient evidence in the record of the necessary jurisdictional facts" (citation omitted)). The D.C. Circuit endorsed this "lighter burden" notwithstanding the D.C. Circuit's finding that Sudan neither "specifically intended" nor "directly advanced" the Embassy bombings. App. 88a.

Moreover, the D.C. Circuit applied a "narrowly circumscribed" and "lenient" appellate review standard to affirm "the district court's satisfaction with the evidence presented" under § 1608(e). App. 56a-57a. The D.C. Circuit concluded that it would not set aside a default judgment even where that default judgment was based on insufficient evidence of subject-matter jurisdiction. App. 57a ("Provided 'the claimant's district court brief and reference to the record appear[] relevant, fair and reasonably comprehensive,' we will not set aside a default

judgment for insufficient evidence." (alteration in original) (quoting *Alameda v. Sec'y of Health, Educ. & Welfare*, 622 F.2d 1044, 1049 (1st Cir. 1980))).

Thus the D.C. Circuit improperly declined to review the jurisdictional factual findings against the purported supporting evidence, concluding erroneously that the district court was not required to fully consider de novo Sudan's challenge to the jurisdictional facts because Sudan was absent from the case:

> Sudan gave up its opportunity to challenge the fit between the experts' opinions and the underlying facts. . . . Had Sudan participated in the hearing, it could have challenged the experts to substantiate each and every factual proposition they asserted . . . . That would have allowed this court to determine whether the experts' opinions reliably reflected the more developed factual record. By deferring its attack until this appeal, Sudan has deprived the experts of an opportunity to respond, and instead asks this court to rule on an incomplete record. We decline the invitation.

App. 71a-72a. This Court has, however, clearly established that "[a] defendant is always free to ignore the judicial proceedings, risk a default judgment, and then challenge that judgment on jurisdictional grounds in a collateral proceeding." *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites*

de Guinee, 456 U.S. 694, 706 (1982). Indeed, "subject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived." *United States v. Cotton*, 535 U.S. 625, 630 (2002); *see also Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506 (2006) ("The objection that a federal court lacks subject-matter jurisdiction may be raised by a party, or by a court on its own initiative, at any stage in the litigation even after trial and the entry of judgment.") (internal citations and quotation marks omitted)); *Ins. Corp. of Ireland*, 456 U.S. at 702 ("[N]o action of the parties can confer subject-matter jurisdiction upon a federal court. Thus, the consent of the parties is irrelevant . . . principles of estoppel do not apply . . . and a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings.") (internal citations and quotation marks omitted); Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

Based on this line of authority, the D.C. Circuit previously held that a defaulting foreign sovereign is entitled to "full consideration" and de novo review of its jurisdictional challenge, in the district court, on a motion to vacate under Rule 60(b)(4) of the Federal Rules of Civil Procedure. *See Practical Concepts, Inc. v. Republic of Bolivia*, 811 F.2d 1543, 1545, 1547 (D.C. Cir. 1987) (Ginsburg, J.) (citing *Ins. Corp. of Ireland, Ltd.*, 456 U.S. at 706); *see also id.* at 1547 (holding that a defendant has "a right to ignore [a] proceeding at his own risk but to suffer *no detriment* if his assessment proves correct") (emphasis added) (quoting Restatement (Second) of Judgments § 65

cmt. *b* (1982) (stating defendant "may refrain from appearing," and later, "may assert his jurisdictional objection," and that, if the jurisdictional objection prevails, "the default judgment will be vacated"); *Bell Helicopter Textron, Inc. v. Islamic Republic of Iran*, 734 F.3d 1175, 1181 (D.C. Cir. 2013) (holding that a defaulting foreign state's jurisdictional objection is entitled to "full consideration" and "de novo review," and rejecting "arguable basis standard" and narrow construction of the term "void" (quoting *Practical Concepts*, 811 F.2d at 1545)).

This Court's precedent, and even the D.C. Circuit's own precedent, required that Plaintiffs actually prove the jurisdictional facts and that the D.C. Circuit reverse the default judgments if the evidence was insufficient to establish subject-matter jurisdiction as a factual matter. But in the end, the lighter burden affirmed by the D.C. Circuit denied Sudan full consideration of the jurisdictional facts and supporting evidence in the district court and on appeal.

II. The D.C. Circuit Erroneously Affirmed Jurisdiction "Based Solely Upon" Expert Opinion Testimony, When The Record Lacked Admissible Evidence Of Jurisdictional Facts

1. The D.C. Circuit's application of a more lenient standard for proving jurisdictional facts allowed the D.C. Circuit simply to rubber stamp the district court's findings — supported solely by inadmissible evidence — that Sudan's "material support" "caused" the Embassy bombings. Those findings were supplied by the testimony of three expert witnesses,

Evan Kohlmann (principally), Lorenzo Vidino, and Steven Simon. Each expert testified as though they had personal knowledge of the supposed factual statements they made. In actuality, these experts were simply repeating inadmissible hearsay evidence, often inaccurately.

The D.C. Circuit held that the "experts' opinions 'nonetheless' provided 'sufficient evidence in the record of the necessary jurisdictional facts.'" App. 67a. Indeed, the D.C. Circuit concluded that jurisdiction (and liability) under the FSIA's terrorism exception can be established on the basis of an expert's opinion alone: "[C]ases in this Circuit and in others have repeatedly sustained jurisdiction or liability or both under the terrorism exception to the FSIA and in other terrorism cases *based solely upon expert testimony*." App. 64a (emphasis added) (citing *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 705 (7th Cir. 2008)).

The D.C. Circuit recognized that the experts' testimony may not be reliable, but credited that testimony anyway in light of Sudan's failure to appear: "[W]e cannot know with certainty whether the experts' opinions were consistent or in conflict with the underlying facts upon which they relied." App. 71a-72a (stating that had Sudan appeared, the court could have "determin[ed] whether the experts' opinions reliably reflected" the record).

This Court's and the D.C. Circuit's own precedent under *Insurance Corporation of Ireland*, *Practical Concepts* and *Bell Helicopter* should have precluded this effort to punish Sudan for its failure to appear.

Sudan meticulously analyzed the alleged facts funneled by the experts and exposed those alleged facts not only on the basis that they were derived from inadmissible hearsay, but on the basis that they were insufficient, misleading and, in several instances, outright false. *See infra*. The erroneous lenient standard, however, allowed the D.C. Circuit to avoid the proper review that ought to have set those facts aside.

The D.C. Circuit, like the district court, relied heavily on the testimony of Kohlmann, who repeatedly misrepresented the prior testimony of Jamal al-Fadl, a government informant, from an earlier criminal trial. The D.C. Circuit observed that, "[a]lthough al Fadl did not testify at the evidentiary hearing, his prior testimony provided much of the factual basis for the expert witnesses' opinions." App. 46a. And though calling al-Fadl Plaintiffs' "star witness" whose testimony "cast a long shadow over the proceedings," App. 46a, the D.C. Circuit conceded that al-Fadl's prior testimony was *inadmissible hearsay* under Rule 804(b)(1) and declined to consider that prior testimony further, App. 75a n.5. Yet, inexplicably, the D.C. Circuit accepted Kohlmann's loose account of the inadmissible al-Fadl criminal trial testimony to stand as the key jurisdictional facts in the proceedings.

A particularly egregious example concerned Sudan's purported "letter of invitation" to Bin Laden. During the 2010 evidentiary hearing, Kohlmann testified about the purported letter and, when asked by the District Court for the source of his knowledge

("How do we know?" C.A. App. 277), Kohlmann responded that the source was al-Fadl in the 2001 criminal trial, *id.* Simon and Vidino testified similarly. C.A. App. 368, 833. At that 2001 criminal trial, however, al-Fadl did *not* testify as to the contents of the letter in question — he was prohibited from doing so under the "best evidence" rule, Fed. R. Evid. 1002 (Requirement of the Original) — and said nothing about the letter being a "letter of invitation" to Bin Laden. C.A. App. 762-65. In fact, al-Fadl testified that the letter was not addressed to Bin Laden or al Qaeda but to the Wadi al Aqiq Company, C.A. App. 769-70, apparently an import-export company, C.A. App. 835. This supposed "letter of invitation" — and its purported use by al Qaeda — serves as a centerpiece of Plaintiffs' experts' testimony and the district court's "Findings of Fact," but the record does not support the existence of the letter in the form described by Plaintiffs' experts, found by the district court, and relied upon by the D.C. Circuit. The letter itself was never introduced as evidence either at the 2001 criminal trial or at the 2010 hearing here.

Kohlmann also embellished the (inadmissible) testimony of L'Houssaine Kherchtou. While Kohlmann testified that Kherchtou had testified about obtaining help of the Sudanese intelligence service in smuggling $10,000 out of Sudan, C.A. App. 328-29, Kherchtou's actual testimony was that "one of the Sudanese securities," perhaps an airport security employee, "don't check your bag and stuff," C.A. App. 800-01. There was also no finding that this airport employee acted within the scope of his employment.

Sudan made all of these points in its briefing before the D.C. Circuit, yet the D.C. Circuit inexplicably ignored them.

Kohlmann's repeated embellishment of hearsay evidence and failure to function as anything more than an unreliable conduit for inadmissible hearsay has caused many highly credentialed individuals to criticize Kohlmann's lack of methodology, lack of peer-reviewed theories, and distorted and biased gloss on the facts. *See* Expert Report of Dr. Jeff Goodwin at 3, *Yaghi v. United States*, No. 5:09-cr-00216 (E.D.N.C. Jan. 19, 2016), ECF No. 2217-30 (criticizing Kohlmann's "home-grown terrorism" theory as "appalling" and "speculative"); Expert Report of David Miller at 2, *Yaghi v. United States*, No. 5:09-cr-00216 (E.D.N.C. Jan. 19, 2016), ECF No. 2217-31 (stating Kohlmann "has been severely criticised by leading figures in his purported field of expertise and moreover has been criticised by the High Court in England and Wales for distorting evidence through selective quotations"); Expert Report of Arun Kundnani ¶¶ 14-15, *Yaghi v. United States*, No. 5:09-cr-00216 (E.D.N.C. Jan. 19, 2016), ECF No 2217-28 (identifying a "major factual error in Mr. Kohlmann's trial testimony," specifically, Kohlmann's error concerned a "pivotal moment in Islamic history" that "calls into question his entire credibility as an expert witness"); Expert Report of James L. Feldkamp ¶ 11, *Yaghi v. United States*, No. 5:09-cr-00216 (E.D.N.C. Jan. 19, 2016), ECF No. 2217-27; Wesley Yang, *The Terrorist Search Engine*, N.Y. Mag., Dec. 13, 2010 ("It takes about 30 seconds to spot that Kohlmann produces junk science in

court.") (quoting Magnus Ranstorp); *see also* Transcript of Motion at 26-28, *United States v. Abu Ali*, No. 1:05-cr-53-GBL-1 (E.D. Va. Oct. 28, 2005) (ruling that "Mr. Evan Kohlmann has never met anyone from al-Qaeda, has not infiltrated al-Qaeda, has not done any research where he's had contact with someone who was in al-Qaeda to know just what they do or did not do. He's read about it on the Internet and in scholarly books. . . . He has not qualified because the methods that he's gathered his information, reading the Internet and reading books"). Both the Fifth and the Eleventh Circuits have held that opinions based on erroneous or distorted facts should be excluded. *See United States v. City of Miami*, 115 F.3d 870, 873 (11th Cir. 1997) ("Opinions derived from erroneous data are appropriately excluded."); *Guillory v. Domtar Indus.*, 95 F.3d 1320, 1331 (5th Cir. 1996) ("Expert evidence based on a fictitious set of facts is just as unreliable as evidence based upon no research at all. Both analyses result in pure speculation. We find the testimony properly excluded on this ground.").

The D.C. Circuit erroneously tried to justify its acceptance of Plaintiffs' hearsay and otherwise defective evidence on the grounds that primary evidence of Sudan's purported material support would be unavailable through discovery or from third-party witnesses. App. 61a. But Plaintiffs had direct access to at least one of the perpetrators of the Embassy bombings in federal prison in Denver (they deposed him, but did not use his testimony at the hearing) and could have sought to obtain (but did not) the testimony of al-Fadl who was in the United

States in 2011 at the time of the default judgment proceedings. *See, e.g.*, Benjamin Weiser, *Ex-Aide to Bin Laden, Vital Witness for U.S., Seeks Sentence*, N.Y. Times (Dec. 4, 2012), http://www.nytimes.com/2012/12/05/nyregion/ex-bin-laden-aide-vital-witness-for-us-seeks-sentence.html.

Finally, though conceding that al-Fadl's testimony "provided much of the factual basis for the expert witnesses' opinions," App. 46a, the D.C. Circuit refused to acknowledge that the experts' testimony parroting al-Fadl formed the district court's *actual factual findings*. Instead, the D.C. Circuit recast the district court's 2011 opinion stating that the district court did not err "in reciting potentially inadmissible facts" ostensibly because the "experts needed to disclose the factual basis for their opinions," otherwise the "district court would have been at a loss to determine whether the opinions were admissible as reliable expert testimony." App. 67a-68a. But even a cursory review of the 2011 opinion demonstrates that the district court did *not* have any such purpose in "reciting potentially inadmissible facts." App. 67a. The inadmissible facts parroted by the experts were identified in the 2011 opinion *as the factual findings* themselves, and were not included, as the D.C. Circuit erroneously suggests, to aid the district court understand the basis of the expert's opinion. *See* App. 197a-215a.

Furthermore, in denying vacatur, the district court agreed that Sudan "may have [a] plausible" argument that some factual findings were unsubstantiated by "record evidence." App. 521a.

But the only evidence the district court deemed admissible was the prior testimony of al-Fadl and two other out-of-court declarants. App. 532a-535a. As mentioned, however, the D.C. Circuit agreed that al-Fadl's testimony was *inadmissible* under Rule 804(b)(1), and the logic of that concession shows that the testimony of the other two witnesses was also inadmissible. In the end, the D.C. Circuit's affirmance rested on the position that expert opinions alone, unsupported by any admissible facts, were sufficient to establish jurisdiction for purposes of a default judgment against a foreign sovereign.

Perhaps recognizing the inherent infirmity in such a conclusion, for good measure the D.C. Circuit found that State Department reports on state sponsors of terrorism were admissible, App. 72a-75a. But Plaintiffs never proffered those reports as admissible hearsay exceptions under Rule 803(8), and the district court never admitted them as such in its Memorandum Opinion on jurisdiction and liability in 2011 or later in its denial of Sudan's motions to vacate. In fact, Plaintiffs' only mention of the basis for admissibility was in a single sentence in a footnote in their Response Brief on appeal. Final Brief of Plaintiffs-Appellees at 44 n.9, *Owens v. Republic of Sudan*, No. 14-5105, 864 F.3d 751 (D.C. Cir. 2017), ECF No. 1631278. *See, e.g.*, *Tolbert v. Queens College*, 242 F.3d 58, 75 (2d Cir. 2001) ("A contention is not sufficiently presented for appeal if it is conclusorily asserted only in a footnote.").

Such intelligence reports are inadmissible under Rule 803(8) because of the hearsay they contain. *See,*

e.g., *Gilmore v. Palestinian Auth.*, 843 F.3d 958, 970 (D.C. Cir. 2016) (affirming exclusion of pages from Israeli government website); *Estate of Parsons v. Palestinian Auth.*, 651 F.3d 118, 133 (D.C. Cir. 2011) (Tatel, J., concurring) (finding no abuse of discretion where district court concluded that "'[i]ntelligence reports that contain multiple levels of hearsay are not admissible evidence'" (quoting *Estate of Parsons v. Palestinian Auth.*, 715 F. Supp. 2d 27, 34 (D.D.C. 2010))); *see also Monegasque de Reassurances S.A.M. v. Nak Naftogaz of Ukr.*, 311 F.3d 488, 499 (2d Cir. 2002) (rejecting State Department Country Reports as "meager and conclusory submissions"). Despite the inherent unreliability of these reports as "evidence," the D.C. Circuit found that they established a connection between Sudan and al Qaeda and Bin Laden. App. 48a, 50a-51a, 72a-73a. But neither Bin Laden nor al Qaeda is mentioned once in any State Department report issued before 1997, much less in connection with Sudan. This makes sense because, as stated, they were not known or designated as terrorists until 1998 and 1999.

2. In contrast to the D.C. Circuit, the Second Circuit does not accept expert opinion testimony as a substitute for factual findings. In *Vera v. Republic of Cuba*, the Second Circuit was critical in its examination of the jurisdictional basis for the default judgment that rested on plaintiff's assertion that Cuba was designated as a state sponsor of terrorism as a result of the extrajudicial killing of his father. 867 F.3d 310, 317-18 (2d Cir. 2017). Vera's father was killed in 1976 and Cuba was not designated until 1982. The only evidence offered was a single expert

affidavit that asserted Cuba was designated at least in part as a result of the killing of Vera's father in 1976. The Second Circuit rejected the affidavit, finding that the expert cited no evidence to support this conclusion or to specifically link Cuba's designation to the killing. *Id.* at 318.

Similarly, in *United States v. Mejia*, 545 F.3d 179 (2d Cir. 2008), the defendants successfully challenged their convictions on the basis of testimony of the Government's expert witness. The expert, a New York state police investigator, testified on the MS-13 gang's structure, history, methods, and jargon. *Id.* at 186. In vacating the convictions, the Second Circuit warned of the officer expert being used as a fact witness:

> If the officer expert strays beyond the bounds of appropriately "expert" matters, that officer becomes . . . a chronicler of the recent past whose pronouncements on elements of the charged offense serve as shortcuts to proving guilt. As the officer's purported expertise narrows from . . . the meaning of "capo" to the criminality of the defendant, the officer's testimony becomes more central to the case, more corroborative of the fact witnesses, and thus more like a summary of the facts than an aide in understanding them. *The officer expert transforms into the hub of the case, displacing the jury by connecting and combining all other*

> *testimony and physical evidence into a coherent, discernible, internally consistent picture of the defendant's guilt*.

Id. at 190-91 (emphasis added).

The Second Circuit further observed that it was not "acceptable to substitute expert testimony for factual evidence" in the first instance. *Id.* at 195. Although the Second Circuit acknowledged that under Rule 703 an expert can testify to opinions based on inadmissible evidence, the court nonetheless stated:

> The expert may not, however, simply transmit hearsay to the jury. . . . Instead, the expert must form his own opinions by applying his extensive experience and a reliable methodology to the inadmissible materials. Otherwise, the expert is simply repeating hearsay evidence without applying any expertise whatsoever . . . .

Id. at 197 (internal quotations and citations omitted).

In *Marvel Characters, Inc. v. Kirby*, 726 F.3d 119 (2d Cir. 2013), the Second Circuit reviewed the testimony of two experts who purported to offer historical perspective concerning the relationship between Marvel Comics and comic book artist Jack Kirby. *Id.* at 135. The Second Circuit upheld the district court's ruling that the expert reports and testimony were inadmissible because the experts

"speculate[d] as to the motivations and intentions of certain parties . . . or opine[d] on the credibility of other witness' accounts," based on reports that were "by and large undergirded by hearsay statements, made by freelance artists in both formal and informal settings, concerning Marvel's general practices towards its artists during the relevant time period." *Id.* at 136. According to the Second Circuit, although Rule 703 of the Federal Rules of Evidence "permit[s] experts some leeway with respect to hearsay evidence . . . a party cannot call an expert simply as a conduit for introducing hearsay under the guise that the testifying expert used the hearsay as the basis for his testimony." *Id.* (internal quote and citation omitted).

Contrary to the Second Circuit's approach, the D.C. Circuit abdicated its responsibility to correct the district court's failure to give full consideration to the purported jurisdictional facts and look behind the factual statements made by Plaintiffs' experts, and instead allowed the district court simply to accept those unchecked statements as actual facts for purposes of establishing jurisdiction (and liability) in the case.

III. The D.C. Circuit Applied The Wrong Standard Of Causation

The D.C. Circuit erred in concluding that the district court's factual findings were sufficient to establish that Sudan provided material support "for" the bombings as 1605A requires or that any such "material support" in fact "caused" the Embassy bombings. In particular, these purported findings failed to bridge the temporal gap between Sudan's

expulsion of Bin Laden in 1996 and the 1998 Embassy bombings. If anything, the findings largely placed Sudan's alleged conduct or the events supposedly relevant to Sudan in the "early 1990s" or did not place them in time at all.

The D.C. Circuit rejected Sudan's plain-language argument that § 1605A(a)(1)'s requirement that the material support must be "for" the terrorist act "requires something more than proximate causation." App. 86a-87a (analyzing Sudan's argument). The D.C. Circuit held that it had already rejected this argument in *Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1128-30 (D.C. Cir. 2004), by concluding that a state's material support need not "go directly for the specific act" and "[b]ecause material support 'is difficult to trace,' requiring more than proximate cause 'could absolve' a state from liability when its actions significantly and foreseeably contributed to the predicate act." App. 87a (quoting *Kilburn*, 376, F.3d at 1128, 1130).

This erroneous conclusion was outcome determinative — as demonstrated by the D.C. Circuit's concession that "the evidence failed to show Sudan either specifically intended or directly advanced the 1998 embassy bombings," App. 88a — and dispensed with the "direct relationship" long-since required under this Court's proximate causation standard. *See Paroline v. United States*, 134 S. Ct. 1710, 1719 (2014) (stating that proximate cause generally refers to the basic requirement that "there must be some *direct* relation between the injury asserted and the injurious conduct alleged")

(emphasis added) (internal quotation and citation omitted); *Anza v. Ideal Steel Co.*, 547 U.S. 451, 457, 461 (2006) (stating that when analyzing proximate causation under RICO "the central question [a court] must ask is whether the alleged violation led *directly* to the plaintiff's injuries") (emphasis added); *Holmes v. Secs. Inv'r Prot. Co.*, 503 U.S. 258, 268-69 (1992) (recognizing that the common-law concept of proximate cause includes "a demand for some direct relation between the injury asserted and the injurious conduct alleged" and applying that standard to Clayton Act claim). And since the D.C. Circuit's decision, the Ninth Circuit, relying on this Court's precedents, issued a decision in conflict with the D.C. Circuit's interpretation of proximate causation. *See Fields v. Twitter*, 881 F.3d 739, 748 (9th Cir. 2018) (requiring a "direct relationship" between the alleged acts of material support and injury to establish causation under the Anti-Terrorism Act).

Section 1605A's requirement that the material support be "for" the relevant predicate act only reinforces that a direct relationship is required. As Sudan established, the conduct accepted by the D.C. Circuit as "material support" was far too attenuated and remote in time from the 1998 Embassy bombings, and any causal chain was indisputedly broken by Sudan's expulsion of Bin Laden in 1996. App. 83a (acknowledging that Sudan's "expulsion of bin Laden may have marked a temporary setback for Al Qaeda"). The district court attempted to bridge this gap by reference to an inadmissible declassified CIA cable from 1998 that referenced a "Bin Laden

associate in Sudan." App. 205a (citing C.A. App. 730). But that document, in any event, provides no information that establishes a direct relationship between that associate and either the Sudanese government or the Embassy bombings. In short, "the evidence failed to show Sudan either specifically intended or directly advanced the 1998 embassy bombings." App. 88a. The D.C. Circuit's conclusion that the absence of such evidence was "irrelevant to proximate cause and jurisdictional causation" is entirely inconsistent with this Court's and Ninth Circuit precedent.

IV. The D.C. Circuit's Opinion Compromises U.S. Interests In Foreign Relations

Foreign states are sued in U.S. courts with great regularity. Such suits are always fraught with the potential for diplomatic misunderstanding and friction. Never is that potential greater than when a foreign state is sued for alleged complicity in terrorism.

Under § 1605A, only foreign states designated by the U.S. Department of State as state sponsors of terrorism (i.e., currently Iran, North Korea, Sudan and Syria) may be sued for terrorism. Nonetheless, a review of the dockets shows that thirty-nine cases are currently pending in the United States District Court of the District of Columbia; since the beginning of 2017, seventeen new cases have been filed in that court alone. The foreign-state defendants in these cases commonly do not appear; default judgments, often in the billions of dollars, result. And these default judgments frequently become an impediment

to warmer diplomatic relations.

The frequency of run-away default-judgment awards likely serves as a further deterrent to an appearance by a foreign-state defendant, which may reasonably conclude that the action against it is a political tool devoid of the fair administration of justice. Here, for example, the district court entered $10.2 billion default judgments against Sudan, on the sole basis of opinion testimony by Plaintiffs' experts, at a time when all the world was aware that Sudan was fully pre-occupied by the existential threat of civil war and repeated natural and humanitarian crises. And, when Sudan appeared in good faith to vacate the default judgment and dispute the allegations on their merits, it was turned away. Moreover, on appeal, the D.C. Circuit appeared to depart inexplicably from established law of this Court requiring that jurisdiction be firmly decided as a factual matter, even in a default setting. These decisions stand in stark contrast to the longstanding U.S. policy favoring adjudication on the merits, particularly in cases involving foreign sovereigns. *Practical Concepts, Inc. v. Republic of Bolivia*, 811 F.2d 1543, 1551 n.19 (D.C. Cir. 1987) (condemning "intolerant adherence to default judgments against foreign states"); *see also FG Hemisphere Assocs. v. Democratic Republic of Congo*, 447 F.3d 835, 838 (D.C. Cir. 2006) (stressing "a foreign sovereign's interest — and our interest in protecting that interest — in being able to assert defenses based on its sovereign status"); Brief for the United States as Amicus Curiae at 3-4, *Practical Concepts, Inc. v. Republic of Bolivia*, 811 F.2d 1543 (D.C. Cir. Jan. 7,

1987) (No. 85-6001) ("When a foreign state has appeared and asserts legal defenses, albeit after a default judgment has been entered, it is important that those defenses be considered carefully and, if possible, that the dispute be resolved on the basis of all relevant legal arguments.").

Such outcomes are not likely to imbue foreign states with confidence in the fairness of U.S. litigation against them, or to induce them to appear in the future. *Id.* at 3 ("It is, however, in the interest of United States' foreign policy to encourage foreign states to appear before our courts in cases brought under the FSIA.").

The D.C Circuit's opinion also exposes the United States to reciprocal treatment in foreign courts and, thus, implicates serious issues of national and international importance. *See Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493 (1983) ("Actions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States, and the primacy of federal concerns is evident."); *see also Nat'l City Bank v. Republic of China*, 348 U.S. 356, 362 (1995) (stating principles of foreign sovereign immunity derive from "standards of public morality, fair dealing, reciprocal self-interest, and respect for the 'power and dignity' of the foreign sovereign").

This Court in *Helmerich* adopted the views of the U.S. Government that one of the consequences of a lenient standard on proving jurisdictional facts in FSIA cases would be to "affront other nations, producing friction in our relations with those nations

and leading some to reciprocate by granting their courts permission to embroil the United States in 'expensive and difficult litigation' based on legally insufficient assertions that sovereign immunity would be vitiated." 137 S. Ct. at 1322 (citations and internal quotation marks omitted).

Such reciprocal lawsuits exist: Cuban nationals have obtained default judgments against the United States in Cuban courts for terrorism-related claims based on the Bay of Pigs invasion and the economic sanctions imposed on Cuba by the United States. *See* Complaint, *The People of Cuba v. The Government of the United States*, (Jan. 3, 2000) (No. 1) (Civil and Administrative Court of Law, Havana Province), *available at* http://repository.un.org/bitstream/handle/11176/153391/A_55_316-ES.pdf (Cuban plaintiffs seeking multi-billion dollars in damages as a result of the U.S. economic blockade and sanctions on Cuba since the early 1960s).

Finally, the recent improvement in relations between the United States and Sudan supports review in this case. Over the last several years, Sudan has worked diligently and cooperatively with the United States to address regional conflicts and combat the threat of terrorism. As a result of this cooperation, as well as other positive actions of Sudan, the United States announced on January 13, 2017, that it was lifting certain country-wide sanctions that had been imposed against Sudan for nearly twenty years. Exec. Order No. 13761, 82 Fed. Reg. 5331 (Jan. 13, 2017). Based on Sudan's continued positive actions, the United States

terminated those sanctions in full on October 12, 2017.

The D.C. Circuit's endorsement of a more lenient jurisdictional standard for suits against a foreign state, particularly in a default setting, runs counter to the U.S. interest in improving relations with foreign states such as Sudan, which has repeatedly expressed its good-faith commitment to defending the merits of this case in a full, adversarial trial, if necessary.

CONCLUSION

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

Respectfully submitted,

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