No. 17-1269

IN THE

Supreme Court of the United States

AVINESH KUMAR, ET AL.,

Petitioners,

v.

REPUBLIC OF SUDAN,

Respondent.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Fourth Circuit

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDINGS

Respondent is the Republic of the Sudan, a sovereign nation that qualifies as a "foreign state" under the U.S. Foreign Sovereign Immunities Act, Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended at 28 U.S.C. §§ 1330, 1391(f), 1441(d), 1602-1611). Petitioners are listed at page II of the Petition.

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I. THE QUESTION PRESENTED IS THE SUBJECT OF AN UNEQUIVOCAL CIRCUIT SPLIT

All relevant parties in both this *Kumar* case (No. 17-1269) and the parallel *Harrison* case (No. 16-1094) now agree upon the existence of a conflict in the circuits as to whether, under the applicable service-of-process provisions of the Foreign Sovereign Immunities Act ("FSIA") (28 U.S.C. § 1608(a)(3)), a plaintiff may validly serve a foreign state through a mailing to the foreign state's embassy in the United States. And all relevant parties now agree that this

issue is an important and recurring one worthy of this Court's review.

Sudan first identified the circuit conflict in its pending petition for a writ of certiorari in *Harrison*. In that petition, Sudan observed that the Second Circuit in *Harrison* had departed from decisions by other circuits in permitting service through the foreign state's embassy in the United States. Sudan also maintained that the Second Circuit's holding was contrary to the natural reading of § 1608(a)(3), violated the obligations of the United States under the Vienna Convention on Diplomatic Relations, and threatened to expose the United States to reciprocal treatment in foreign courts. Sudan noted that the United States, in amicus briefs, has consistently condemned service on or through an embassy as inconsistent with the FSIA and the Vienna Convention. *See* Petition for a Writ of Certiorari at 2-3, 5, *Harrison v. Republic of Sudan*, No. 16-1094 (Mar. 9, 2017).

The *Harrison* Plaintiffs (represented by the same counsel as the *Kumar* Plaintiffs) initially opposed certiorari, arguing that Sudan's claim of a circuit conflict was "a strawman," "a sham," and "an attempt to manufacture a circuit split." Brief for the Respondents in Opposition to Petition for a Writ of Certiorari at 5, *Harrison v. Republic of Sudan*, No. 16-1094 (June 26, 2017).

This Court has invited the Solicitor General to file a brief in *Harrison* expressing the views of the United States. 138 S. Ct. 293 (2017).

On January 19, 2018, the Fourth Circuit held in *Kumar* that § 1608(a)(3) does *not* permit service on a foreign state through its embassy in the United States. The Fourth Circuit expressly recognized that its holding "aligns with the greater weight of [other circuits'] holdings," but that it "conflicts with" the holding by the Second Circuit in *Harrison*. Pet. App. 32a-33a. The Fourth Circuit found the Second Circuit's reasoning "weak and unconvincing." Pet. App. 34a. In particular, the Fourth Circuit criticized as "artificial" the Second Circuit's distinction between service "on" an embassy and service "via" an embassy, and the Fourth Circuit found that its holding, rather than the Second Circuit's holding, accorded appropriate deference to the views of the United States on its treaty obligations and reciprocal interests. Pet. App. 34a n.11.

After the Fourth Circuit's decision in *Kumar*, the *Harrison* Plaintiffs and the *Kumar* Plaintiffs have now acknowledged the conflict in the circuits, with the *Harrison* Plaintiffs doing so in a supplemental brief in *Harrison* and the *Kumar* Plaintiffs doing so in their Petition here. While both sets of Plaintiffs assert that the Fourth Circuit's decision "creates" the conflict (Pet. 11; Supplemental Brief for the Respondents at 1-2, *Harrison v. Republic of Sudan*, No. 16-1094 (Mar. 9, 2018)), Sudan's Petition in *Harrison* and the Fourth Circuit opinion (Pet. App. 32a-33a) demonstrate that *Kumar* simply made the conflict express and undeniable.

In any event, all parties in *Kumar* and *Harrison* now accept that there is a conflict in the circuits and

that the conflict is sufficiently important to warrant resolution by this Court. Indeed, as the *Kumar* Plaintiffs note in their Petition, the conflicting decisions of the Second Circuit in *Harrison* and the Fourth Circuit in *Kumar* result in the intolerable circumstance of diametrically opposite outcomes in materially identical cases in two different circuits. Pet. 5.

II. BOTH THE *KUMAR* AND *HARRISON* PETITIONS ARE APPROPRIATE VEHICLES FOR CERTIORARI REVIEW

While the *Kumar* Plaintiffs argue in their Petition that *Kumar* is a better vehicle than *Harrison* for resolving the conflict in the circuits, their reasoning is questionable. In fact, for various reasons, *Harrison* may be the preferred vehicle. In any event, Sudan is indifferent as to whether certiorari is granted in one case or the other (or both), as long as this Court's resolution of the conflict can be applied to correct the Second Circuit's holding in *Harrison*.

In advocating for *Kumar* as the superior vehicle, the *Kumar* Plaintiffs first point out that *Harrison* arises from an appeal of an enforcement action, rather than an appeal from an underlying judgment (*see* Pet. 16), but that feature is not particularly unusual or complicated; indeed, challenges to service of process frequently occur at the enforcement stage, particularly when a default judgment is being enforced.

The *Kumar* Plaintiffs then refer to Sudan's motion to vacate the underlying *Harrison* default judgment

in the United States District Court for the District of Columbia. *Id.* at 16-17. But, as Sudan explained in its reply in support of certiorari in *Harrison*, basic principles of collateral estoppel preclude the district court from deviating from the Second Circuit holding in *Harrison*. Reply Brief for Petitioner at 2-3, *Harrison v. Republic of Sudan*, No. 16-1094 (July 13, 2017). The *Kumar* Plaintiffs offer no rejoinder on this point, but only their unsupported assertion that the district court could grant Sudan's motion to vacate "at any time." Pet. 16-17.

The *Kumar* Plaintiffs portray their Petition as "a straightforward appeal of underlying judgments" (*id.* at 16), but their case is hardly free from procedural complications. As their Petition explains (*id.* at 7-8), the *Kumar* Plaintiffs already have obtained and recovered upon a default judgment against Sudan in the *Rux* case; their *Kumar* case is a second bite of the apple, this time under a newly enacted federal right of action (28 U.S.C. § 1605A(c)). While the Fourth Circuit has permitted that second bite (Pet. App. 17 n.2 (citing *Clodfelter v. Republic of Sudan*, 720 F.3d 199, 212 (4th Cir. 2013))), that ruling could be reviewed by this Court, potentially mooting the service issue.

Moreover, after the Fourth Circuit issued its decision, the district court ordered the *Kumar* Plaintiffs to effect service on Sudan by May 16, 2018. Order, No. 2:10-cv-00171 (E.D. Va. Feb. 15, 2018). Should they do so, Sudan will move to dismiss Plaintiffs' claims based on Sudan's other jurisdictional objections that the Fourth Circuit did

not reach in its decision. Thus, like the *Harrison* Plaintiffs' claims, the *Kumar* Plaintiffs' claims potentially may become moot on grounds other than service of process.

The *Kumar* Plaintiffs also point to a supposed "factual complication" in *Harrison*, because in that case Sudan questions the actual delivery of the service packet at the Sudanese Embassy in Washington. Pet. 17. But the exact same factual issue exists in *Kumar*. *See, e.g.*, Brief for Defendant-Appellant Sudan at 18, *Kumar v. Republic of Sudan*, 880 F.3d 144 (4th Cir. 2018) (No. 16-2267) ("Moreover, the signature on the return receipt is illegible, such that there is no evidence the package made it to the Embassy, much less the Ministry of Foreign Affairs in Khartoum." (citation omitted)); Defendant-Appellant's Reply Brief and Response Brief on Cross-Appeal at 9, *Kumar v. Republic of Sudan*, 880 F.3d 144 (4th Cir. 2018) (No. 16-2267) ("Here, the signature on the return receipt is illegible and there is no evidence that the service package reached either the Embassy or the Ministry of Foreign Affairs in Khartoum, both points that Plaintiffs have conspicuously failed to address."). Thus, the *Kumar* Plaintiffs are mistaken in their Petition when they assert that their case lacks any alleged delivery "anomaly." Pet. 17.

The *Harrison* Petition addresses the outlier decision of the Second Circuit, which has alarmed a number of foreign states with its cavalier disregard for the Vienna Convention, prompting some of those foreign states to express their concerns in amicus

briefs to this Court. And, more broadly, there are sound reasons why this Court may prefer to address — and correct — an offending outlier decision (such as the Second Circuit's decision) rather than address a well-reasoned decision aligned with the greater weight of circuit decisions (such as the Fourth Circuit's decision).

As noted, in any event, Sudan is indifferent as to which case serves as the vehicle to resolve the circuit conflict. Perhaps granting certiorari in both cases is best, particularly because the parties' respective counsel are the same in both cases. From Sudan's perspective, the paramount interest obviously is resolving the circuit conflict in a manner that permits a correction of the Second Circuit decision in *Harrison*.

CONCLUSION

For the foregoing reasons, the Court should (i) grant Sudan's Petition in *Harrison v. Republic of Sudan* ((No. 16-1094), (ii) grant the *Kumar* Plaintiffs' Petition here and hold Sudan's Petition in *Harrison* pending resolution of this case, or (iii) grant the Petitions in both cases.

Respectfully submitted,

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