No. 17-1406

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,

Cross-Petitioners,

v.

MONICAH OKOBA OPATI, IN HER OWN RIGHT, AS EXECUTRIX OF THE ESTATE OF CAROLINE SETLA OPATI, DECEASED, *et al.*,

Cross-Respondents.

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Cross-Respondents are 155 U.S. Government employees or contractors killed or injured as a result of the August 7, 1998 bombings of the United States Embassies in Nairobi, Kenya and Dar-es-Salaam, Tanzania and their immediate family members. Cross-Respondents, who were plaintiffs in *Opati* v. *Republic of Sudan*, No. 12-1224 (D.D.C.), *Wamai* v. *Republic of Sudan*, No. 08-cv-1349 (D.D.C.), *Amduso* v. *Republic of Sudan*, No. 08-cv-1361 (D.D.C.), and *Onsongo* v. *Republic of Sudan*, No. 08-cv-1380 (D.D.C.), respectfully submit that the conditional cross-petition for a writ of certiorari filed by the Republic of Sudan *et al.* should be denied, while Cross-Respondents' petition for certiorari in Case No. 17-1268 should be granted.

Cross-Respondents join in the opposition brief to the conditional cross-petition for a writ of certiorari filed by the plaintiffs in the *Owens* v. *Republic of Sudan*, No. 01-cv-2244 (D.D.C.), *Mwila* v. *Republic of Sudan*, No. 08-cv-1377 (D.D.C.), and *Khaliq* v. *Republic of Sudan*, No. 08-cv-1356 (D.D.C.).

REASONS FOR DENYING THE PETITION

Sudan previously filed a petition for writ of certiorari on March 2, 2018 in Case No. 17-1236. Now, faced with the Cross-Respondents' petition—which poses significant questions—Sudan seeks to hitch its wagon to the Cross-Respondents' petition in hopes of gaining a second bite at the apple.

In its conditional cross-petition, Sudan requests that the Court review *five* new questions. But if such questions had been worthy of review, Sudan would have asserted them in its initial petition. This conditional cross-petition is simply another instance in a long line of gamesmanship by Sudan, and likely is little more than a ploy to delay and distract from this Court's consideration of the Cross-Respondents' petition. The conditional cross-petition should be rejected.

I. SUDAN'S HISTORY OF GAMESMANSHIP

Before the district court, Sudan, a state sponsor of terrorism so-designated by the U.S. Department of State since 1993,[1] repeatedly and willfully made tactical litigation decisions designed to delay and obstruct recovery by the victims of the East African embassy bombings and their families. For more than a decade, and with the assistance of multiple highly experienced counsel belonging to sophisticated international law firms, Sudan made determinations:

(i) to enter the litigation;

(ii) to contest jurisdictional and other claims before the district court and on appeal to the D.C. Circuit;

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1. In August 1993, the United States publicly designated the Government of Sudan as a state sponsor of international terrorism, 58 Fed. Reg. 52523-01, 1993 WL 398167 (October 8, 1993), following public reports of Sudan's participation in a conspiracy to bomb the United Nations Headquarters and other landmarks in New York City and to kidnap and murder U.S. Government officials.

(iii) to exit the litigation after losing those arguments and claims before the D.C. Circuit;

(iv) to ignore judicial proceedings, despite repeated service and notice, conducted by the district court over the course of six years to assess liability and damages, including a three-day bench trial, two years of individualized assessments of damages by seven Special Masters appointed by the district court, and final assessment of compensatory and punitive damages which were limited by district court to a one-to-one ratio; and

(v) to monitor the litigation closely enough to stage its reentry post-judgment in 2014 in a series of reappearances over the course of the year designed to further delay these cases rather than simply filing notices of reappearance in the several cases at a single time when it had determined to reappear for a second time in the consolidated litigation.

Despite Sudan's calculated and willful decisions to twice default on the merits and therefore to forfeit nonjurisdictional challenges to the district court's carefully considered written assessments of the legal and factual bases of the plaintiffs' claims, the court of appeals entertained several of Sudan's nonjurisdictional challenges and vacated nearly half of the damages awarded by the district court in failing to follow the rule of *Republic of Austria v. Altmann*, 541 U.S. 677, 696 (2004). Not content with that ruling, Sudan now attempts to escape liability entirely, despite its failure to engage in good faith in the lower court proceedings. Rewarding Sudan's conduct and gamesmanship would insulate any state sponsor of terrorism from meaningful proceedings and render the FSIA a meaningless nullity.

II. SUDAN'S GAMESMANSHIP AND MISSTATEMENTS IN ITS CONDITIONAL CROSS-PETITION

Sudan's conditional cross-petition is simply another act in its long line of gamesmanship. Not only does Sudan request review of five questions that it failed to raise in its initial petition, its conditional cross-petition is riddled with misleading statements and inconsistencies.

1. For example, Sudan faults the court of appeals for purportedly drawing a negative inference "from the failure of the United States to *sua sponte* intervene on Sudan's behalf," noting that "the D.C. Circuit did not request the views of the United States." (Cross-Pet. 37). But Sudan fails to note that the district court affirmatively invited the involvement of, or a Statement of Interest from, the United States in the consolidated cases. The United States expressly declined to intervene. *See* Case No. 1:01-cv-02244 (D.D.C.) at ECF Nos. 393 & 396; Pet. App. 163a–64a.[2] Thus, there was no reason for the court of appeals again to seek the involvement of the United States.

The United States' express decision to refrain from involving itself in this matter distinguishes this matter from the cases Sudan cites in which the United States did intervene or otherwise engage in the substance of the case. Cross-Pet. 36–37. As this Court explained in *Republic of Austria v. Altmann*, "should the State Department choose to express its opinion on the implications of exercising

2. All references to "Pet. App." refer to the Petition Appendix filed in Case No. 17-1268 (U.S.).

jurisdiction over *particular* petitioners in connection with *their* alleged conduct, that opinion might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy." 541 U.S. 677, 702 (2004) (emphasis in original).

2. Furthermore, in its opposition to Cross-Respondents' petition, Sudan did not contest Cross-Respondents' reliance upon the rule of *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250 (2014), which bars courts from applying special procedural rules to foreign states outside those established by Congress. Br. in Opp'n 20–21 in Case No. 17-1268. Sudan now argues in its cross-petition that "the D.C. Circuit failed to uphold the liberal policy favoring vacatur followed by its sister circuits and urged repeatedly by the United States in respect of foreign sovereigns." Cross-Pet. 5. Sudan cannot have it both ways: it cannot tacitly acknowledge that foreign states—including those designated as sponsors of international terrorism—are subject to the same standards of procedure and review as private litigants and also contend that such foreign states should benefit from a purported "liberal policy favoring vacatur." In any event, as explained in the Owens Respondents' concurrently-filed opposition brief, Sudan's advocacy of a "liberal policy" favoring vacatur makes little sense, as it would reward a foreign state for strategically and repeatedly defaulting and lead to an immense waste of judicial resources.

3. Finally, Sudan's cross-petition also inappropriately challenges the district court's factual finding that Sudan acted tactically and not in good faith when it twice defaulted and remained absent from the lower court proceedings until after substantial judgments were

entered against it. Cross-Pet. 35–39. As an initial matter, such a fact-specific issue is not an appropriate ground on which to seek Supreme Court review. *See Vasquez v. United States*, 454 U.S. 975, 977 (1981).

Furthermore, the district court, which was in the best position to evaluate such contentions, and the court of appeals have already firmly rejected Sudan's argument that its absence from the lower court proceedings was the result of civil war, natural disasters, or the partitioning of the country. As the district court explained:

> "Viewing the entire history of the litigation, it seems more likely that Sudan chose (for whatever reason) to ignore these cases over the years, changing course only when the final judgment saddled it with massive liability . . . . Given how long-lasting and complete that inaction was, and how weak Sudan's proffered explanations are, the Court cannot conclude that Sudan acted in good faith."

Pet. App. 172a. The court of appeals echoed this factual finding, explaining:

> "But the one conclusory paragraph in the three-page declaration of its Ambassador to the United States that Sudan cites as evidence for this proposition does not show it was incapable of maintaining any communication with the district court. Indeed, Sudan participated in the litigation during its civil war and while negotiating a peace treaty bringing that war to a close. . . . This shows Sudan could participate

> in legal proceedings despite difficult domestic circumstances."

Pet. App. 140a.

Despite these factual findings based upon "the entire history of the litigation" and the fact that Sudan only submitted "one conclusory paragraph in the three-page declaration" to support its position, Sudan now assigns error to the court of appeals and boldly contends that: "Had there been doubts about the factual underpinnings for excusable neglect or extraordinary circumstances, the D.C. Circuit should have remanded for further fact findings by the district court." Cross-Pet. 39. There were no doubts—much less any doubts raised by Sudan's one conclusory paragraph of purported evidence. Thus, there is no need to remand the question for further review.

The district court made its factual determination after a decade of meticulous supervision of this litigation and multiple determinations of its jurisdiction and the merits of the case both during Sudan's two defaults and in the context of Sudan's Rule 60 motion. Pet App. 10a-17a. The court of appeals likewise made its determinations based upon a thorough review of the record. There is no need for this Court to make a third determination that Sudan did not act in good faith in twice defaulting and in delaying and impeding these judicial proceedings.

CONCLUSION

The Court should deny Sudan's conditional cross petition for a writ of certiorari and grant Cross-Respondents' petition. Whereas Cross-Respondents' petition for certiorari requests review of questions of national importance, Sudan's cross-petition seeks review of questions which did not even warrant inclusion in its initial petition and which seek little more than a review of the factual findings by the district court and the court of appeals.

Respectfully submitted,

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