No. 17-1236

In the Supreme Court of the United States

REPUBLIC OF SUDAN, ET AL., PETITIONERS

v.

JAMES OWENS, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1330, 1441(d), 1602 *et seq.*, provides that a foreign state and its agencies and instrumentalities are immune from the jurisdiction of federal and state courts in civil actions, subject to limited exceptions. The "[t]errorism exception" provides that a foreign state that has been designated a state sponsor of terrorism is not immune from jurisdiction in certain suits for damages arising out of personal injury or death "caused by an act of * * * extrajudicial killing * * * or the provision of material support or resources for such an act" by a foreign state official, employee, or agent acting within the scope of his office, employment, or agency. 28 U.S.C. 1605A(a)(1) (emphasis omitted). The questions presented are:

1. Whether the court of appeals erred in holding that respondents' evidence that petitioners provided material support to al Qaeda sufficed to establish jurisdiction under the terrorism exception.

2. Whether the court of appeals erred in holding that respondents had established facts necessary to support jurisdiction under the terrorism exception based on the testimony of expert witnesses.

3. Whether the court of appeals erred in holding that a plaintiff's injuries are "caused by" a defendant's acts, within the meaning of the terrorism exception, when the defendant's conduct is a proximate cause of the plaintiff's harm.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. a. Under the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1330, 1441(d), 1602 *et seq.*, a foreign state and its agencies and instrumentalities are immune from the jurisdiction of federal and state courts in civil actions unless an exception to immunity applies. 28 U.S.C. 1604. This case concerns the "[t]errorism exception," which withdraws foreign sovereign immunity and establishes jurisdiction in U.S. courts for certain damages claims "for personal injury or death that was caused by an act of * * * extrajudicial killing * * * or the provision of material support or resources for such

an act," if the "provision of material support or resources is engaged in by an official, employee, or agent" of the defendant foreign state "while acting within the scope of his or her office, employment, or agency." 28 U.S.C. 1605A(a)(1) (emphasis omitted). The FSIA permits claims under the terrorism exception only if, among other criteria, the Secretary of State has formally designated the defendant foreign state a "state sponsor of terrorism." 28 U.S.C. 1605A(a)(2)(i).

b. Congress originally enacted the terrorism exception in 1996, in response to attacks perpetrated by state sponsors of terrorism or terrorist organizations affiliated with or materially supported by such foreign states. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221(a), 110 Stat. 1241-1243; see, *e.g.*, H.R. Rep. No. 383, 104th Cong., 1st Sess. 41 (1995) (citing, among other "examples of terrorism[]," "the bombing of the U.S. Embassy in Beirut," "the hostage takings of Americans in the Middle East," and "the murder of American tourist Leon Klinghoffer" by the Palestine Liberation Front). In 2004, the Court of Appeals for the District of Columbia Circuit held that the terrorism exception—which was then codified at 28 U.S.C. 1605(a)(7) (2000)—did not provide a federal cause of action against a foreign state, but "merely waive[d] the [jurisdictional] immunity of a foreign state" in lawsuits seeking to recover damages under other sources of law for the enumerated acts of terrorism. *Cicippio-Puleo* v. *Islamic Republic of Iran*, 353 F.3d 1024, 1033 (2004).[1]

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[1] The court of appeals acknowledged that the Flatow Amendment, 28 U.S.C. 1605 note, "undoubtedly does provide a cause of action against '[a]n official, employee, or agent of a foreign state designated as a state sponsor of terrorism' 'for personal injury or death

Congress responded in 2008, amending the FSIA to create a substantive federal cause of action for the same predicate acts as were included in the original terrorism exception to immunity. National Defense Authorization Act for Fiscal Year 2008 (NDAA), Pub. L. No. 110-181, Div. A, Tit. X, § 1083(a)(1), 122 Stat. 338; see 154 Cong. Rec. 500 (2008) (Sen. Lautenberg) (amendment "fixes th[e] problem" of *Cicippio-Puleo* "by reaffirming the private right of action * * * against the foreign state sponsors of terrorism themselves" for "the horrific acts of terrorist murder and injury committed or supported by them"). The substantive cause of action, codified at 28 U.S.C. 1605A(c), imposes liability on a foreign state sponsor of terrorism for certain claims by U.S. nationals, servicemembers, employees, or contractors, as well as their "legal representative[s]." *Ibid.* The new version of the immunity exception, codified at 28 U.S.C. 1605A(a), is substantially similar to the prior text. See 28 U.S.C. 1605A(a)(1).

c. Since its enactment in 1976, the FSIA has expressly permitted courts to enter default judgments against foreign sovereigns. § 4(a), 90 Stat. 2895; see 28 U.S.C. 1608(e). The FSIA provides, however, that a court may not enter a default judgment "unless the claimant establishes his claim or right to relief by evidence satisfactory to the court." 28 U.S.C. 1608(e).

2. In 1993, the Secretary of State designated petitioner Republic of Sudan a state sponsor of terrorism based on the Secretary's assessment that Sudan "has

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caused by acts of that official, employee, or agent for which the courts of the United States may maintain jurisdiction under section 1605(a)(7).'" *Cicippio-Puleo*, 353 F.3d at 1032 (quoting 28 U.S.C. 1605 note) (brackets in original). The FSIA's cause of action against foreign state employees, officials, and agents is not at issue here.

repeatedly provided support for acts of international terrorism." 58 Fed. Reg. 52,523, 52,523 (Oct. 8, 1993). Sudan remains so designated today, along with Iran, North Korea, and Syria. U.S. Dep't of State, *State Sponsors of Terrorism*, https://www.state.gov/j/ct/list/c14151.htm.

On August 7, 1998, members of al Qaeda detonated truck bombs at the U.S. Embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania. Pet. App. 5a. The attacks killed more than 200 people and injured more than 1000 others, including U.S. nationals and foreign-national U.S. government employees and contractors. *Ibid.*

3. a. In October 2001, a group of U.S.-national plaintiffs who are among the respondents here (the *Owens* plaintiffs) sued petitioners under the then-existing terrorism exception, 28 U.S.C. 1605(a)(7) (2000). The complaint alleged that petitioners caused the embassy bombings by providing material support to al Qaeda, including "shelter and protection from interference," while the group was "carrying out planning and training" for the attacks. Third Am. Compl. ¶ 8, *Owens* v. *Republic of Sudan*, 412 F. Supp. 2d 99 (D.D.C. 2006), aff'd and remanded, 531 F.3d 884 (D.C. Cir. 2008); see generally *id.* ¶¶ 8-11 (alleging, *inter alia*, that Sudanese intelligence officers "helped provide security for Al Qaeda and facilitated the movement of weapons in and out of the country"). The *Owens* plaintiffs relied on substantive causes of action arising under state law. *Id.* ¶¶ 12-68.

Petitioners defaulted, but later appeared and moved to dismiss. The district court vacated the default and denied the motion, and the court of appeals affirmed. Pet. App. 151a-178a; see *id.* at 13a-21a (describing the history of this litigation).

b. While the case was pending in the court of appeals, Congress amended the FSIA, replacing the former terrorism exception to immunity in 28 U.S.C. 1605(a)(7) (2000) with the current exception in Section 1605A(a), and creating the substantive cause of action in Section 1605A(c). Following the court of appeals' decision, the *Owens* plaintiffs amended their complaint to assert jurisdiction under the new immunity exception, as well as substantive claims under the new federal cause of action. See NDAA § 1083(c)(2), 122 Stat. 342-343 (28 U.S.C. 1605A note) (permitting plaintiffs to convert existing claims under former Section 1605(a)(7) to claims under new Section 1605A(c)). By this time, petitioners' prior counsel had withdrawn and petitioners had ceased participating in the litigation. See Pet. App. 14a-16a.

c. Additional plaintiffs, who are also respondents here, subsequently filed similar complaints or moved to intervene in *Owens*. See Pet. App. 15a-16a. Those plaintiffs include foreign-national U.S. government employees and contractors who were victims of the attacks, as well as foreign-national family members of those victims. The foreign-national family members are ineligible to invoke the federal cause of action, see 28 U.S.C. 1605A(c); they therefore asserted jurisdiction under Section 1605A(a) and alleged emotional-distress claims under state and foreign law. See Pet. App. 100a, 231a.

4. Following a consolidated evidentiary hearing in which petitioners did not participate, the district court entered default judgments for respondents. Pet. App. 179a-240a.

As relevant here, the district court determined that respondents had put forth sufficient evidence that petitioners provided material support to al Qaeda. Pet.

App. 197a-215a, 218a-227a. The court concluded that testimony from expert witnesses showed that petitioners offered al Qaeda safe harbor, as well as financial, military, diplomatic, and intelligence assistance that enabled the group to strengthen its network, infiltrate nearby countries, avoid foreign intelligence services, and acquire and transport weapons. *Id.* at 199a-215a, 224a-225a; see 28 U.S.C. 1605A(h)(3) (defining "material support or resources" by reference to 18 U.S.C. 2339A); 18 U.S.C. 2339A(b)(1) (defining "material support or resources" to include providing "any * * * service").

The district court also determined that the 1998 embassy bombings were "caused by" petitioners' material support. 28 U.S.C. 1605A(a)(1); Pet. App. 225a-227a. The court concluded that the FSIA requires a proximate causal connection, which the court defined as "some reasonable connection" between a defendant's conduct and the plaintiff's injury. Pet. App. 226a (citation omitted). The court determined that respondents satisfied this standard by demonstrating that petitioners "provided the safe harbor necessary to allow al Qaeda to train and organize its members for acts of large-scale terrorism," and "facilitated [the] safe harbor through constant vigilance by [Sudanese] security services and the provision of documentation required to shelter al Qaeda from foreign intelligence services and competing terrorist groups." *Ibid.* The court determined that, without the "several kinds of material support" that petitioners provided "to al Qaeda," the organization "could not have carried out the 1998 bombings." *Id.* at 224a.

The district court ultimately awarded respondents approximately $10.2 billion in damages, including approximately $4.3 billion in punitive damages. Pet. App. 17a-18a; see *id.* at 245a-455a.

5. Petitioners reappeared, appealed, and sought an indicative ruling on motions for vacatur under Federal Rule of Civil Procedure 60(b). See Fed. R. Civ. P. 62.1. The court of appeals held the appeals in abeyance pending the district court's resolution of the motions to vacate. Pet. App. 460a.

The district court denied the motions. Pet. App. 456a-556a. The court rejected petitioners' argument that the default judgment was void, see Fed. R. Civ. P. 60(b)(4), because the record lacked sufficient evidence to support jurisdiction. Pet. App. 510a-535a. Applying a standard subsequently rejected by this Court in *Bolivarian Republic of Venezuela* v. *Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312 (2017), the court concluded that the plaintiffs proceeding under the federal cause of action in Section 1605A(c) had established subject-matter jurisdiction by providing "nonfrivolous" allegations that their claims satisfied that provision. Pet. App. 518a-520a. By contrast, the court determined that because the District of Columbia tort-law claims of the foreign-national family-member plaintiffs did not "'mirror[]'" the jurisdictional standard in Section 1605A(a)(1), those plaintiffs had to provide "evidence substantiating" jurisdiction. *Id.* at 520a (citation omitted).

Applying a burden-shifting framework, the district court concluded that the testimony of respondents' expert witnesses established jurisdiction. Pet. App. 521a-532a. In particular, the court stated that "[t]he FSIA begins with a presumption of immunity, which the

plaintiff bears the initial burden to overcome by producing evidence that an exception applies." *Id.* at 521a (citation omitted). The court determined that respondents had met that burden through "consistent and admissible opinions" of three expert witnesses demonstrating that petitioners "provided 'material support' that 'caused' the embassy bombings." *Id.* at 531a-532a. Because petitioners had defaulted, they had failed to fulfill their "burden of persuasion to establish the absence of the factual basis by a preponderance of the evidence." *Id.* at 532a (citation omitted).

6. In a consolidated opinion addressing petitioners' direct appeal and their appeal from the denial of the Rule 60(b) motions, the court of appeals affirmed in relevant respects the district court's judgments. Pet. App. 1a-147a.

The court of appeals recognized that *Helmerich*, *supra*, required respondents "to prove the facts supporting the court's jurisdiction * * * , rather than simply to make a 'non-frivolous' claim to that effect." Pet. App. 42a (citation omitted). The court accordingly applied to all respondents the same burden-shifting framework that the district court had applied only to plaintiffs proceeding under District of Columbia law. *Id.* at 43a; see *ibid.* (noting that the district court's determination that petitioners provided material support for the 1998 embassy bombings "plainly applies to all claimants and all claims").

The court of appeals then concluded that all respondents had established jurisdiction. Pet. App. 62a-75a. It rejected petitioners' argument that the district court had erred in relying exclusively on inadmissible expert testimony. The court of appeals reasoned that "[n]ei-

ther § 1608(e) nor any other provision of the FSIA requires a court to base its decision upon a particular type of admissible evidence." *Id.* at 64a. The court further explained that the district court had "properly distinguished the experts' clearly admissible opinions from the potentially inadmissible facts underlying their testimony." *Id.* at 67a.

The court of appeals also held that respondents had offered sufficient evidence that their injuries were "caused by" petitioners' material support for al Qaeda. 28 U.S.C. 1605A(a)(1); see Pet. App. 41a-88a. The court explained that "the standard for jurisdictional causation" is "proximate cause." Pet. App. 76a. And it noted that, "[a]s Sudan points out, the inquiry into proximate cause contains two similar but distinct elements": (1) "[T]he defendant's actions must be a 'substantial factor' in the sequence of events that led to the plaintiff's injury," and (2) "the plaintiff's injury must have been 'reasonably foreseeable or anticipated as a natural consequence' of the defendant's conduct." *Id.* at 76a-77a (citation omitted). The court found both prongs satisfied because petitioners had, for example, "undoubtedly bec[o]me aware" of al Qaeda's intent to attack U.S. interests when Osama bin Laden began calling for attacks against the United States in 1991, but continued "to assist the group" in ways that made the embassy bombings possible, including through financial support and by shielding al Qaeda training operations from local police. *Id.* at 85a; see *id.* at 77a-86a.

The court of appeals rejected petitioners' assertion that for jurisdiction to exist under Section 1605A(a)(1), a foreign state must specifically intend its material support to cause a particular attack. Pet. App. 86a-88a. The court observed that "nothing in the FSIA * * * requires a

greater showing of intent than proximate cause." *Id.* at 87a. The court also rejected petitioners' argument that Sudan had broken the chain of causation by expelling bin Laden from the country in 1996. *Id.* at 80a-82a. The court explained that expert testimony suggested that petitioners "continued to harbor al Qaeda terrorists until and after the bombings," and that the passage of two years between the expulsion of bin Laden and the embassy bombings did "not preclude a finding" of proximate causation given the particular facts of this case. *Id.* at 82a; see *id.* at 82a-84a.

DISCUSSION

Petitioners contend (Pet. 13-33) that the court of appeals erroneously assessed respondents' jurisdictional allegations, relied on inadmissible and insufficient evidence, and incorrectly determined that petitioners' actions "caused" respondents' injuries within the meaning of the terrorism exception, 28 U.S.C. 1605A(a)(1). The court of appeals' decision on those points does not conflict with any decision of this Court or of another court of appeals. Moreover, the court of appeals' analysis of the arguments petitioners raised before that court—several of which are fact-bound—does not warrant review based on foreign-relations concerns, as petitioners contend (Pet. 33-37). The petition for a writ of certiorari should be denied.

I. THE COURT OF APPEALS' DETERMINATION THAT JURISDICTION EXISTED UNDER THE TERRORISM EXCEPTION DOES NOT WARRANT REVIEW

A. The court of appeals held (Pet. App. 41a-88a) that respondents established the district court's jurisdiction over their claims by offering sufficient evidence that petitioners' material support for al Qaeda caused respondents' injuries. See 28 U.S.C. 1605A(a)(1). Contrary to

petitioners' suggestion (Pet. 13-16), the court of appeals' analysis does not conflict with this Court's decision in *Bolivarian Republic of Venezuela* v. *Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312 (2017).

In *Helmerich*, this Court considered whether plaintiffs may establish jurisdiction under the FSIA's expropriation exception based on "facts and claims" that are "not 'wholly insubstantial or frivolous.'" 137 S. Ct. at 1318 (citation and emphasis omitted). The Court rejected that "exceptionally low bar" for demonstrating jurisdiction under the FSIA. *Ibid.* (citation omitted). The Court explained that the "non-frivolous" standard was inconsistent with the text of the expropriation exception, which provides jurisdiction where "rights in property taken in violation of international law are in issue," 28 U.S.C. 1605(a)(3); see 137 S. Ct. at 1318; contravened the FSIA's "basic objectives" in codifying the restrictive theory of sovereign immunity, 137 S. Ct. at 1319-1322; and risked "affront[ing]" other nations, *id.* at 1322 (citation omitted). The Court thus held that plaintiffs seeking to establish jurisdiction must present "factual allegations" that "make out a legally valid claim that a certain kind of right is at issue (*property* rights) and that the relevant property was taken in a certain way (in violation of international law)." *Id.* at 1316.

Petitioners principally contend (Pet. 13-16) that the court of appeals' decision in this case "directly conflicts" with *Helmerich*. That is incorrect. The court expressly recognized that *Helmerich* had invalidated the "non-frivolous" standard on which the district court had relied in evaluating the jurisdictional allegations of the plaintiffs proceeding under the federal cause of action in Section 1605A(c). Pet. App. 42a (citation omitted). And the court of appeals further stated that *Helmerich*

required all plaintiffs to "prove the facts supporting the court's jurisdiction under the FSIA." *Ibid.* After reviewing the evidence in detail, the court concluded that all respondents had satisfied their burden to establish jurisdiction. *Id.* at 44a-88a.

As petitioners observe (Pet. 15), the court of appeals also cited its prior decision in *Agudas Chasidei Chabad* v. *Russian Federation*, 528 F.3d 934 (D.C. Cir. 2008), which had adopted the "non-frivolous" standard. See Pet. App. 42a. But the court relied on that decision for the distinct proposition that "[e]stablishing material support and causation for jurisdictional purposes is a lighter burden than proving a winning case on the merits," *ibid.*, because plaintiffs bear only the burden of production to "present adequate supporting evidence" that an exception to immunity applies, *Agudas Chasidei Chabad*, 528 F.3d at 940; see Pet. App. 55a. Contrary to petitioners' suggestion (Pet. 15), the court of appeals did not rely on *Agudas Chasidei Chabad* for the non-frivolous standard that it expressly noted *Helmerich* had rejected.

B. In their reply in support of the petition for a writ of certiorari (Reply Br. 3-6, 11-13), petitioners assert that the court of appeals' application of the burden-shifting framework contravened *Helmerich* and the decisions of other courts of appeals. That argument, which petitioners did not raise in the certiorari petition or in the court of appeals, does not warrant this Court's review.

Helmerich does not directly address application of a burden-shifting framework. After noting that the facts in *Helmerich* were not in dispute, this Court explained that "where jurisdictional questions turn upon further factual development," a court should "take evidence and

resolve relevant factual disputes" as early as possible in the litigation. 137 S. Ct. at 1316. But the Court did not address the precise manner in which the analysis should proceed. See *id.* at 1316-1317.

Nor are petitioners correct (Pet. Reply Br. 6-7) that the decision below implicates a division in the courts of appeals on the question whether a plaintiff or a foreign sovereign defendant bears the initial evidentiary burden in a suit under the FSIA. Like the decision below, each of the decisions petitioners cite recognizes that in a suit against a foreign sovereign, the plaintiff bears the burden to show that an exception to immunity applies. See Pet. App. 55a; *MMA Consultants 1, Inc.* v. *Republic of Peru*, 719 Fed. Appx. 47, 51 (2d Cir. 2017), cert. denied, 139 S. Ct. 85 (2018); *GDG Acquisitions LLC* v. *Government of Belize*, 849 F.3d 1299, 1305-1306 (11th Cir. 2017); *Global Tech., Inc.* v. *Yubei (XinXiang) Power Steering Sys. Co.*, 807 F.3d 806, 811 (6th Cir. 2015); *Universal Trading & Inv. Co.* v. *Bureau for Representing Ukrainian Interests in Int'l & Foreign Courts*, 727 F.3d 10, 17 (1st Cir. 2013); *Swarna* v. *Al-Awadi*, 622 F.3d 123, 143 (2d Cir. 2010).

Moreover, even if review were otherwise warranted, this case would present a poor vehicle for addressing the propriety of the burden-shifting framework. As noted above, petitioners did not contest that framework's applicability until their reply brief in support of the petition for a writ of certiorari. And even if the Court were to reject the burden-shifting framework, that holding would not affect the outcome of this case, because the district court concluded that respondents proved their claims on the merits. See Pet. App. 197a-215a, 239a-240a.

C. Petitioners further contend (Pet. 16-19) that the court of appeals should have reviewed de novo petitioners' challenges to jurisdictional facts. That argument also does not warrant review.

To begin, petitioners did not argue for de novo review of factual findings in the court of appeals. Instead, petitioners contended that the district court found "the [terrorism] exception applicable" based on "factual findings that were clearly erroneous." Pet. C.A. Br. 14.

Contrary to petitioners' suggestion (Pet. 17-18), this Court's decisions do not entitle a defaulting defendant to de novo review of factual findings underlying a district court's jurisdiction. Petitioners cite cases reaffirming that following default, defendants remain free to challenge jurisdictional rulings in collateral proceedings. See *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500, 506 (2006); *United States* v. *Cotton*, 535 U.S. 625, 630 (2002); *Insurance Corp.* v. *Compagnie des Bauxities de Gunee*, 456 U.S. 694, 702, 706 (1982). But none of those cases specifically addressed the standard of review for factual findings. The decisions below are thus consistent with the cases petitioners cite, because both the district court and the court of appeals entertained petitioners' jurisdictional arguments, notwithstanding their default.

Finally, petitioners contend (Pet. 18-19) that the decision below conflicts with the court of appeals' prior decisions. But the facts in *Bell Helicopter Textron, Inc.*, v. *Islamic Republic of Iran*, 734 F.3d 1175 (D.C. Cir. 2013), were "undisputed," *id.* at 1179, and *Practical Concepts, Inc.* v. *Republic of Bolivia*, 811 F.2d 1543 (D.C. Cir. 1987), did not expressly discuss the standard of review for factual findings underlying jurisdiction, see *id.* at 1548-1551. In any event, any intra-circuit tension between those decisions and the decision below

would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

II. THE COURT OF APPEALS' RELIANCE ON EXPERT TESTIMONY DOES NOT WARRANT REVIEW

A. The FSIA provides that a court may not enter a default judgment "unless the claimant establishes his claim or right to relief by evidence satisfactory to the court." 28 U.S.C. 1608(e). In this case, both the district court and the court of appeals concluded that respondents had satisfied their burden to produce sufficient evidence to establish jurisdiction through the testimony of three expert witnesses. See Pet. App. 61a-72a; *id.* at 523a.

Petitioners contend (Pet. 20) that the lower courts erred in relying solely on expert testimony. As the court of appeals correctly explained, however, the FSIA does not require a court "to base its decision upon a particular type of admissible evidence." Pet. App. 64a. Indeed, imposing an atextual direct-evidence requirement would be particularly inappropriate in this context, given that Congress enacted the terrorism exception "because state sponsors of terrorism had become better at hiding their material support and misdeeds." *Id.* at 63a (brackets, citation, and internal quotation marks omitted). Moreover, such a requirement would permit foreign sovereigns to frustrate jurisdictional fact-finding by failing to appear and participate in the litigation. *Ibid.*

Nor are petitioners correct (Pet. 24-25) that the court of appeals should have required *these* respondents to present direct evidence of petitioners' material support of al Qaeda, even if the FSIA would not otherwise

mandate such evidence. Petitioners note (*ibid.*) that respondents deposed a perpetrator of the embassy bombings and could have sought to obtain the testimony of a convicted former al Qaeda member. But petitioners cite no authority for their highly fact-specific argument, and we are aware of none. Nothing suggests that Congress silently intended the FSIA to impose different standards on different plaintiffs based on idiosyncratic circumstances, or to deprive some plaintiffs of the benefit of expert testimony that is otherwise admissible under the Federal Rules of Evidence—particularly in the face of a defendant's default.

B. Petitioners further challenge (Pet. 21-26) the admissibility and reliability of testimony by expert witness Evan Kohlmann. That narrow, fact-bound issue does not warrant certiorari.

Even if petitioners could demonstrate that admission of Kohlmann's testimony was error, the district court and court of appeals *also* relied on the testimony of two additional experts. Those experts concluded, *inter alia*, that petitioners "supplied al Qaeda with important resources and support during the 1990s knowing that al Qaeda intended to attack the citizens, or interests of the United States," and that it would be "difficult to see how * * * the [embassy bombings] could have been carried out with equal success" without that support. Pet. App. 528a-529a (quoting testimony of Steven Simon); see *id.* at 528a ("The material support that the Sudanese government provided was indispensable, as al Qaeda could not have achieved its attacks on the US Embassies in 1998" without it.) (quoting testimony of Dr. Lorenzo Vidino); *id.* at 44a-54a (summarizing evidence and district court's findings of fact).

With respect to those other experts, petitioners specifically assert (Pet. 22) only that they mischaracterized statements about whether Sudan "invit[ed]" bin Laden to reside in the country. But again, even if petitioners were correct in that regard, the experts described many other forms of material support that petitioners provided to al Qaeda. See Pet. App. 44a-54a; *id.* at 526a-529a.

C. There also is no merit to petitioners' contention (Pet. 27) that the court of appeals "accept[ed] expert opinion testimony as a substitute for factual findings," in conflict with decisions of the Second Circuit. See Pet. 27-30. Petitioners' argument mischaracterizes the court of appeals' decision, which concluded that the district court did not clearly err in making factual findings based on admissible expert opinions. See Pet. App. 66a-72a. Nor is there a circuit split. Petitioners cite (Pet. 27-28) *Vera* v. *Republic of Cuba*, 867 F.3d 310 (2d Cir. 2017), but that case did not address admissibility; the court concluded that the plaintiff had not made a sufficient factual showing of jurisdiction based on a single expert affidavit that "cited no [relevant] evidence." *Id.* at 318. And the court of appeals here agreed with the Second Circuit's statement in *Marvel Characters, Inc.* v. *Kirby*, 726 F.3d 119, 136 (2013), cert. denied, 135 S. Ct. 42 (2014), that "a party cannot call an expert simply as a conduit for introducing hearsay." Pet. App. 66a-67a (citation omitted); accord *United States* v. *Mejia*, 545 F.3d 179, 197 (2d Cir. 2008); see Pet. 28-30. The court of appeals concluded that the district court had "properly distinguished the experts' clearly admissible opinions from the potentially inadmissible facts underlying their testimony." Pet. App. 67a.

III. THE COURT OF APPEALS' CAUSATION ANALYSIS DOES NOT WARRANT REVIEW

A. The FSIA's terrorism exception withdraws immunity for "any case * * * in which money damages are sought * * * *for* personal injury or death that was *caused by* an act of * * * extrajudicial killing * * * or the provision of material support or resources for such an act" by a foreign state official, employee, or agent acting within the scope of his office, employment, or agency. 28 U.S.C. 1605A(a)(1) (emphasis added). The court of appeals held that for a claim to satisfy the italicized language, a plaintiff must establish that the defendant's actions were a proximate cause of the plaintiff's injury. Pet. App. 76a. In this context, the court explained, proximate cause requires the plaintiff to demonstrate both that the defendant's actions were a "'substantial factor'" in the plaintiff's injury, and that the injury was "'reasonably foreseeable or anticipated as a natural consequence' of the defendant's conduct." *Id.* at 76a-77a (citation omitted).

Petitioners principally contend (Pet. 30-33) that the terrorism exception's language "'requires something more than proximate causation,'" *i.e.*, a "direct relationship" between petitioners' material support and the embassy bombings. Pet. 31 (citation omitted). But petitioners did not make that argument in the court of appeals. Instead, petitioners argued that the evidence failed to satisfy a proximate causation standard. See Pet. C.A. Br. 24-42 (disputing whether petitioners' actions were the "proximate cause" of respondents' injuries); Pet. App. 76a (court's statement that "[a]s Sudan points out, the inquiry into proximate cause contains two similar but distinct elements.").

The court of appeals' decision to adopt and apply a proximate-causation standard that both requires a plaintiff to demonstrate that a defendant's actions were a "'substantial factor'" in the plaintiff's injury, and that the injury was "'reasonably foreseeable or anticipated,'" Pet. App. 76a-77a, does not warrant review at this time. The court's two-pronged proximate-causation standard correctly required plaintiffs to show more than the provision of generalized support to an organization that later carries out a terrorist attack. The court's decision also is consistent with this Court's cases interpreting statutory language requiring that an injury be "caused by" a particular source to require a showing of proximate causation. See *Jerome B. Grubart, Inc.* v. *Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 536-538 (1995) (interpreting the jurisdictional provision of the Admiralty Jurisdiction Act (Extension), 46 U.S.C. App. 740 (1994)); Pet. App. 76a (citing *Jerome B. Grubart, Inc.*, *supra*).

Petitioners have failed to provide a sufficient basis for reading a "direct relationship" standard into the FSIA's terrorism exception. In another of the FSIA's exceptions to sovereign immunity, Congress specifically required plaintiffs to show that the foreign state's conduct had a "direct effect" in the United States. See 28 U.S.C. 1605(a)(2) (withdrawing foreign sovereign immunity for any action "based * * * upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States"); *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607, 617-619 (1992) (applying the "direct effect" requirement in Section 1605(a)(2)). Congress's failure to include sim-

ilar language in Section 1605A(a)(1)—or in its materially identical predecessor, 28 U.S.C. 1605(a)(7) (2006)—suggests that it did not intend to require a plaintiff to demonstrate a "direct relationship," Pet. 31, between the defendant's conduct and the plaintiff's injury. See, *e.g.*, *Russello* v. *United States*, 464 U.S. 16, 23 (1983).[2]

B. Petitioners also suggest (Pet. 31-32) that the proximate-causation standard itself required respondents to show that petitioners' actions had a "direct relationship" to the 1998 embassy bombings. But the cases on which petitioners rely did not require respondents to make such a showing to establish that respondents' injuries were "caused by" petitioners' material support within the meaning of 28 U.S.C. 1605A(a)(1). *Paroline* v. *United States*, 572 U.S. 434 (2014), addressed a very different statute concerning restitution. *Id.* at 439. And the Court explained that "[t]he idea of proximate cause * * * defies easy summary"; it is "'a flexible concept,'" that requires "a sufficient connection to the result" and "is often explicated in terms of foreseeability or the scope of the risk created by the predicate conduct." *Id.* at 444-445 (quoting *Bridge* v. *Phoenix Bond & Indem. Co.*, 553 U.S. 639, 654 (2008)). The decision below is consistent with

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[2] To the extent petitioners advocated below for "something more than proximate cause," Pet. 31 (quoting Pet. App. 86a), they briefly suggested that the language of Section 1605A(a)(1) and the "foreseeability aspect of proximate causation" "require[] a showing of intent" with respect to the particular terrorist act. Pet. C.A. Br. 27-28; see Pet. App. 86a-87a. Although petitioners at times appear to renew that argument in this Court, see Pet. 31, 33, the court of appeals correctly explained that the FSIA does not graft a specific-intent requirement onto the proximate-causation standard, see Pet. App. 86a-88a, and petitioners point to no decision of any court adopting such a standard in the context of the FSIA's terrorism exception.

Paroline: It states that "[t]he defendant's actions must be a 'substantial factor' in the sequence of events that led to the plaintiff's injury," and "the plaintiff's injury must have been 'reasonably foreseeable or anticipated as a natural consequence' of the defendant's conduct." Pet. App. 76a-77a (citation omitted).

Petitioners also cite (Pet. 32) *Anza* v. *Ideal Steel Supply Corp.*, 547 U.S. 451 (2006), and *Holmes* v. *Securities Investor Prot. Co.*, 503 U.S. 258 (1992). But those cases arose in the distinct context of civil liability under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, where the Court has applied a more stringent causation standard. See *Hemi Grp., LLC* v. *City of New York*, 559 U.S. 1, 12 (2010) (noting that "[t]he concepts of direct relationship and foreseeability are of course two of the 'many shapes [proximate cause] took at common law,'" and explaining that "[o]ur precedents make clear that in the RICO context, the focus is on the directness of the relationship between the conduct and the harm") (citation omitted; second set of brackets in original).

Nor does the decision below conflict with the Ninth Circuit's recent decision in *Fields* v. *Twitter, Inc.*, 881 F.3d 739 (2018). See Pet. 32. *Fields* rejected the argument that proximate causation under the Anti-Terrorism Act, 18 U.S.C. 2333(a), requires "*only* foreseeability." 881 F.3d at 748 (emphasis added). And even if tension exists between *Fields* and the decision in this case, such a nascent disagreement would not warrant certiorari, particularly given petitioners' failure to present to the court of appeals their "direct relationship" argument. See p. 18, *supra*.

C. Finally, petitioners fault (Pet. 30-31) the court of appeals for failing to hold that "the temporal gap between [Sudan's] expulsion of Bin Laden in 1996 and the 1998 Embassy bombings" broke any causal connection between its material support and the subsequent attacks. But the court appropriately addressed that gap in light of the totality of the circumstances in this case and left open the possibility that different facts could yield a different result. Pet. App. 80a-84a; accord *Boim* v. *Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 699-700 (7th Cir. 2008) (en banc), cert. denied, 558 U.S. 981 (2009). Moreover, the court explained that respondents provided evidence showing that petitioners continued supporting al Qaeda after 1996. Pet. App. 81a-82a. Petitioners' fact-bound evidentiary objections to that conclusion (Pet. 32-33) do not warrant this Court's review.

CONCLUSION

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

Respectfully submitted.

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