No. 17-1236

In the Supreme Court of the United States

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

Petitioners,

v.

JAMES OWENS, *et al.*,

Respondents.

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

BRIEF OF TERRORISM AND EVIDENCE EXPERTS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici are, together, terrorism and evidence experts with extensive experience in the areas of evidence, sociology, and social science research. Collectively, they have published more than 50 articles and books on these subjects. *Amici* have served as expert witnesses in terrorism-related trials and have consulted for the U.S. State Department and the National Security Council. A list of individual *amici* is set forth in the Appendix.

This case presents the Court with an opportunity to provide guidance, in the Foreign Sovereign Immunities Act (FSIA) context, on the proper admissibility requirements for expert testimony on terrorism.

SUMMARY OF THE ARGUMENT

Expert testimony on terrorism, no less than other areas of study, must meet the baseline requirements of reliability set out by the Federal Rules of Evidence. In this case, the Court of Appeals relied exclusively on the testimony of three expert witnesses to determine that a foreign sovereign's immunity from suit in U.S. court should be stripped under the terrorism exception to the FSIA—while avowedly spurning as a matter of law any searching analysis of the admissibility of the experts' testimony. *See Owens* v. *Republic of Sudan*, 864 F.3d 751, 785-89 (D.C. Cir. 2017). Rather, the Court of Appeals adopted a "lenient standard" for FSIA default-judgment cases, granting the district court "an unusual degree of discretion over evidentiary rulings." *Id.* at 785. The district court, in turn,

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[1] All parties have consented to the filing of this *amicus* brief after receiving notice at least 10 days prior to its filing. No counsel for a party authored this brief in whole or in part, and no person other than *amici*'s counsel made a monetary contribution to fund the preparation or submission of this brief.

invoked an unspecified "authority . . . to adjust evidentiary requirements to differing situations." *Owens* v. *Republic of Sudan*, 174 F. Supp. 3d 242, 277 (D.D.C. 2016) (internal quotation marks and citation omitted).

This "hands off" review is incompatible with the courts' *Daubert* gatekeeping function and threatens to undermine the reliability of judgments in important terrorism cases, which often—as the Court of Appeals explained—rely largely, if not exclusively, on expert testimony.

Federal courts' charge to ensure the reliability of expert testimony is doubly important in terrorism cases. Because terrorism is one of the most politically fraught, complex, and debated social phenomena of our time, its study requires particular care, and testifying experts must therefore utilize careful, thorough, and methodologically sound analysis.

The Court's intervention is needed to provide guidance to the lower courts in assessing expert reliability in the unique context of terrorism cases, where firsthand evidence is often lacking. As three circuit judges explained in one case after detailing the unreliable foundation of a terrorism expert's testimony, "[i]n any other sort of case, this sort of sloppiness would not be tolerated." *Boim* v. *Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 718 (7th Cir. 2008) (en banc) (Rovner, J., concurring in part and dissenting in part) (footnote omitted).

This case highlights the problems that can arise when courts fail to screen the admissibility of expert testimony. At least one of Respondents' experts, Evan Kohlmann, lacks substantial academic and government background and has been criticized for offering unreliable "expert" testimony in other terrorism cases.

And the experts relied on no discernable methodology, let alone a reliable one.

This Court should grant the petition for certiorari and reverse the judgment below to reaffirm the rigorous evidentiary requirements for expert testimony in terrorism cases.

ARGUMENT

I. The Lower Courts' Relaxed Review Of Terrorism Expert Testimony Threatens To Undermine The Reliability Of Judgments In Terrorism Cases.

A. The Lower Courts' Standard Undermines The Gatekeeping Function In Terrorism Cases.

1. As the Court of Appeals recognized, courts assessing the evidence in a proceeding under 28 U.S.C. § 1608(e) to enter a default judgment against a foreign sovereign can rely only on expert testimony that is admissible under the Federal Rules of Evidence. *Owens*, 864 F.3d at 786 (citation omitted).

Federal Rule of Evidence 702, of course, "imposes a special obligation" upon federal courts to exercise a "basic gatekeeping obligation"—to ensure that "all expert testimony" is "not only relevant, but reliable." *Kumho Tire Co.* v. *Carmichael*, 526 U.S. 137, 147 (1999) (internal quotation marks and citation omitted). "Since *Daubert*," all "parties relying on expert evidence have had notice of the exacting standards of reliability such evidence must meet." *Weisgram* v. *Marley Co.*, 528 U.S. 440, 455 (2000) (citation omitted). The bedrock admissibility requirements for expert testimony help ensure the judicial process is not based on "subjective belief or unsupported speculation."

Daubert v. *Merrell Dow Pharms., Inc.*, 509 U.S. 579, 590 (1993).

Despite recognizing the foundational requirement that expert testimony be admissible, however, the Court of Appeals announced a "lenient standard" toward appraising evidence and expert testimony in FSIA cases such as this, noting ambiguously that it "ha[s] allowed plaintiffs to prove their claims using evidence that might not be admissible in a trial." *Owens*, 864 F.3d at 785 (citation omitted).

Under its newly minted standard of review, the Court of Appeals accorded "an unusual degree of discretion" to the district court's evaluation of "the admission of expert testimony." *Id.* The Court of Appeals emphasized its authority "to adjust evidentiary requirements," explaining that, under its abuse-of-discretion-plus review, it will "accord *even more* deference to the district court's . . . evidentiary rulings" in a FSIA default-judgment case. *Id.* at 785-86 (internal quotation marks omitted and emphasis added). The district court engaged in a similarly lax review of the expert testimony's admissibility. *Owens*, 174 F. Supp. 3d at 277-79. As did the Court of Appeals, the district court noted its "authority—indeed . . . [its] obligation—to adjust evidentiary requirements to differing situations." *Id.* at 277 (internal quotation marks and citation omitted).

2. Neither the Court of Appeals' double-deference standard of review nor the district court's "adjust[ed] evidentiary requirements" can be reconciled with the Federal Rules of Evidence.[2]

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[2] The Court of Appeals provided no direct support from this Court for its recasting (and lowering) of the evidentiary burden

The courts' gatekeeping responsibilities are rooted in the Federal Rules and do not change, as the courts below held, simply because the opposing party is a foreign sovereign, the case involves allegations of material support for terrorism, and the evidence is evaluated under § 1608(e).

Other courts of appeals routinely engage in *de novo* review to ensure that district courts apply the "proper standard" in evaluating the admissibility of expert testimony. *E.g.*, *Hall* v. *Flannery*, 840 F.3d 922, 926 (7th Cir. 2016) ("We review de novo whether a district judge has properly followed Rule 702 and *Daubert*." (citation omitted)); *In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1260 (10th Cir. 2014) ("We review de novo whether the district court applied the proper standard in determining whether to admit or exclude expert testimony.").

And courts in FSIA cases routinely apply the regular admissibility requirements to proffered evidence. *E.g.*, *Hansen* v. *PT Bank Negara Indonesia (Persero)*, 706 F.3d 1244, 1248-51 (10th Cir. 2013); *In re Terrorist Attacks on Sept. 11, 2001*, 2012 WL 3090979, at *1 (S.D.N.Y. July 30, 2012), *report and recommendation adopted*, 2012 WL 4711407 (S.D.N.Y. Oct. 3, 2012); *Peterson* v. *Islamic Republic of Iran*, 2008 WL 5046327, at *2 & n.2 (N.D. Cal. Nov. 24, 2008).[3]

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in FSIA cases—even in the context of a terrorism case or a default judgment. *See Han Kim* v. *Democratic People's Republic of Korea*, 774 F.3d 1044, 1048 (D.C. Cir. 2014) (citing *Bundy* v. *Jackson*, 641 F.2d 934, 951 (D.C. Cir.1981)); *Bundy*, 641 F.2d at 951 (citing Supreme Court precedent discussing adjustments to burdens of proof in Title VII cases).

[3] Indeed, in a case decided only a few years ago, the Court of Appeals recognized that Rule 702 applies to expert testimony in cases proceeding under 28 U.S.C. § 1608(e). *Han Kim*, 774 F.3d at 1049.

B. The "Lenient" Approach Toward Expert Testimony Adopted By The Courts Below Is Particularly Inappropriate For Terrorism Experts.

1. The importance of the gatekeeping function is at an apex in terrorism cases, as "[t]he testimony of expert witnesses is of crucial importance . . . because firsthand evidence of terrorist activities is difficult, if not impossible, to obtain." *Owens*, 864 F.3d at 787 (citations omitted); *see also Owens*, 174 F. Supp. 3d at 276-77. Indeed, as in this case, the Court of Appeals has "repeatedly sustained jurisdiction or liability or both under the terrorism exception to the FSIA and in other terrorism cases based *solely* upon expert testimony." *Owens*, 864 F.3d at 788 (citations omitted and emphasis added); *see, e.g.*, *Kilburn* v. *Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1132 (D.C. Cir. 2004).

Oddly, the Court of Appeals seized on the centrality of expert testimony in FSIA terrorism cases as *support* for its holding that a "lenient standard" toward the evidence "is particularly appropriate" in such cases. *Owens*, 864 F.3d at 785. That reasoning has no purchase in law or logic. Rather, the often-dispositive weight of expert testimony in terrorism cases is further reason for courts to undertake the kind of serious inquiry into its validity and admissibility that is mandated by the Federal Rules of Evidence.

2. Indeed, the study of terrorism presents unique complexities that require, if anything, *greater* solicitude by the courts for the reliability of a terrorism expert's methodology. *E.g.*, *Han Kim*, 774 F.3d at 1049-50 (expert opinions were based on fieldwork); *see also* Fed. R. Evid. 702, 2000 advisory comm. note ("The more subjective and controversial the expert's inquiry,

the more likely the testimony should be excluded as unreliable.").

a. *Ideological Bias*. The study of terrorism, of course, implicates some of the most politically fraught and momentous issues of the contemporary era. There is much debate, for instance, over how to categorize different types of terrorism. *See, e.g.*, Jeff Goodwin, *A Theory of Categorical Terrorism*, 84 Social Forces 2027, 2032-42 (2006) (reviewing "extant theoretical approaches" and proposing two analytic categories of terrorism); *see generally* Lisa Stampnitzky, Disciplining Terror 7 (2013) (noting disagreement about definitional issues).

Terrorism experts must therefore be screened to ensure that their methodology is free—to the greatest extent possible—from systemic ideological bias that would render it unreliable. *Cf.* Fed. Judicial Ctr., Reference Manual on Scientific Evidence xiv (3d ed. 2011) ("Conflicts of interest may take many forms and can be based on religious, social, political, or other personal convictions. The biases that these convictions can induce may range from serious to extreme . . . .").

Moreover, as discussed below, terrorism experts (as Respondents' experts did in this case) often seek to rely on secondary sources such as Internet sources and news reports, which can be "biased, since they emphasize the sensational" and can omit relevant (and countervailing) information. RAND Nat'l Defense Research Inst., Social Science for Counterterrorism: Putting the Pieces Together 156 (Paul K. Davis & Kim Cragin, eds. 2009). It is all the more important, therefore, that experts testifying on terrorism develop objective and reliable principles and methods to sort through complex and controversial material.

There is ample literature that explains how to conduct methodologically rigorous analysis of social-science phenomena. *See, e.g.*, Alexander L. George & Andrew Bennett, Case Studies And Theory Development In The Social Sciences 4 (2004) (identifying three methodological approaches—"case study methods, statistics, and formal modeling"—for social-science studies); *see id.* at 5 (highlighting the "comparative advantages of case study methods").

It is particularly important that the proponent of an explanatory theory test its predictions. *See* Stephen Van Evera, Guide To Methods For Students Of Political Science, 17-20 (2015). For example, in his work, Professor Goodwin proposed an analytic category of terrorism—"categorical" terrorism—and noted what was required to validate his theory: "[I]t is necessary but not sufficient to explain why some revolutionary movements have practiced categorical terrorism; an adequate theory must also explain why other revolutionary movements have *not* carried out categorical terrorism." Goodwin, *supra*, at 2031. Even where the expert seeks only to "explain discrete events," the literature offers criteria to evaluate whether the explanation accords with accepted standards of causation. Van Evera, *supra*, at 32-35.

b. *Area Expertise*. To the extent that Islamist terrorism is the focus of a case, moreover, it is vital that testifying experts have an in-depth knowledge of Arabic and Islamic culture, facility in relevant languages, and competence in weighing and evaluating primary-source materials. "Terrorist organizations differ enormously, even 'affiliates' of al-Qaeda differ, and many key issues are local." RAND, *supra*, at 454.

Without such knowledge, experts cannot reliably help courts and juries understand such frequently

case-dispositive issues as the complexities of the structure, organization, and methods of terrorist groups, the meaning of Islamic religious terminology used by such groups, and the web of relationships between a terrorist group and other groups, foreign states, and individuals that have varying degrees of sympathy for the terrorist group's goals. Fed. Judicial Ctr., *supra*, at 22 ("An expert needs more than proper credentials . . . . A proposed expert must also have 'knowledge.'").

c. *Selection and Interpretation of Material*. Terrorism experts must not only develop objective criteria and methods for evaluating evidence but also for selecting the relevant materials to evaluate in any given case or study. To do so, an expert must be able to grasp and explain why certain source materials are relevant and not others—and understand the nuances contained in the underlying material, as well as possess the competence to know when underlying materials are not accurate. *See Boim*, 549 F.3d at 716 (Rovner, J., concurring in part and dissenting in part) ("No expert worth his salt would base his opinion on internet and documentary sources without assuring himself that they are reliable . . . ."); *id.* at 726 (Wood, J., concurring in part and dissenting in part) ("[T]here must . . . be a solid foundation for the expert's opinion.").

Indeed, that competence takes on even greater importance where terrorism experts are permitted to rely on inadmissible evidence for their opinions. "The problem of testing the reliability of expert testimony . . . becomes even more pronounced when an expert relies heavily on sources that are difficult to authenticate, such as Internet sources." Maxine D. Goodman, *A Hedgehog on the Witness Stand—What's the Big Idea?: The Challenges of Using* Daubert *to Assess Social Science and Nonscientific Testimony*, 59 Am. U.

L. Rev. 635, 642 (2010). In such cases, "allowing [the expert] to recount what those sources say without establishing their authenticity and trustworthiness would contradict the basic requirement that expert opinion have 'a reliable foundation.'" *Boim*, 549 F.3d at 715 (Rovner, J., concurring in part and dissenting in part) (quoting *Daubert*, 509 U.S. at 597).

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Courts, therefore, must be able "to independently evaluate the context and meaning of what [a terrorism expert] is relying on." *Id.* at 718. And they must beware of experts lacking serious training in objective methods of research. *See generally* Andrew Silke, *The Devil You Know: Continuing Problems with Research on Terrorism*, *in* Research on Terrorism: Trends, Achievements, and Failures 58 (Andrew Silke, ed. 2004) (observing that terrorism research often fails to "produc[e] meaningful explanatory results (while tolerating very high levels of conceptual confusion and disagreement)").

II. The Court Of Appeals Blessed Inadmissible Expert Testimony As The Basis For Jurisdiction And Liability Under The FSIA's Terrorism Exception.

This case highlights some of the consequences of the adoption of a lax standard of review of the admissibility of expert testimony. With the imprimatur of the Court of Appeals, the district court failed to scrutinize (1) Respondents' experts' qualifications and (2) whether the experts used any methodology, let alone its reliability.

1. The courts below relied on the testimony of three experts: Steven Simon, Dr. Lorenzo Vidino, and

Evan F. Kohlmann. Of crucial importance to the judgment below was Mr. Kohlmann, who "has earned a reputation among many scholars as a 'hand for hire,'" and has been criticized for "making basic analytical errors on the stand." *See* Wesley Yang, *The Terrorist Search Engine*, N.Y. Mag. (Dec. 5, 2010), https://goo.gl/MbvqMe.

The Court of Appeals approved the district court's wholesale acceptance of testimony from Mr. Kohlmann—although the district court asked no questions at all of him (or the other experts) during the evidentiary hearing before admitting him as an expert. Evidentiary Hearing Tr. 213-24, *Owens* v. *Republic of Sudan*, No. 01-cv-02244-JDB (D.D.C. Oct. 28, 2010).

And yet "[Mr.] Kohlmann does not speak Arabic; has never been to Iraq or Afghanistan; does not hold a postgraduate degree in any related field; has no experience in military, law-enforcement, or intelligence work; and continues to submit . . . his undergraduate thesis on Arab mujaheddin in Afghanistan as evidence of his expertise." Yang, *supra*. He has not done any fieldwork in Sudan. And he has worked with organizations that have been criticized as disseminators of propaganda. *See* Ctr. for Am. Progress, Fear, Inc.: The Roots of the Islamophobia Network in America, Aug. 26, 2011, https://goo.gl/9ZoQkZ (analyzing the Investigative Project, an entity that employed Mr. Kohlmann).[4]

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[4] Similarly, Dr. Vidino does not speak Arabic. He was also affiliated with the Investigative Project, like Mr. Kohlmann. Bench Trial Tr. 63:5-11, *Rux* v. *Republic of Sudan*, No. 04-cv-0428 (E.D. Va. Mar. 13, 2007). And Dr. Vidino has published only a single essay on Sudan, which he admitted was written in response to being approached by lawyers about a suit. *Id.* at 66:14-68:7; *see also* Joint Appendix at 829, *Owens* v. *Republic of*

Indeed, as one judge explained in barring Mr. Kohlmann from testifying as an expert in a terrorism case, Mr. Kohlmann "is not qualified" because he has no firsthand experience with terrorists, the Middle East, or relevant languages: "All he has done is to read about it. My jury could do an Internet search on Google and read about al-Qaeda." Tr. of Proceedings at 28, *United States* v. *Abu Ali*, No. 1:05-cr-53-GBL-1 (E.D. Va. Oct. 28, 2005).

2. Even more troubling than Mr. Kohlmann's lack of qualifying credentials, however, is the absence of a social-science methodology that can be subjected to peer review or some form of objective evaluation. *See Kumho*, 526 U.S. at 152 (federal courts must "make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field").

Mr. Kohlmann failed to offer meaningful testimony as to how he selected, weighed, and evaluated his source material and checked its accuracy. All he said was that he "stud[ied] the issue of the Sudanese government's links" to the 1998 embassy bombings "based upon" his review of certain materials. Evidentiary Hearing Tr. 214, 222, *Owens* v. *Republic of Sudan*, No. 01-cv-02244-JDB (D.D.C. Oct. 28, 2010).[5]

Sudan, 864 F.3d 751 (D.C. Cir. 2017) (No. 14-5105), Dkt. 1630691 (expert report of Dr. Vidino).

[5] Dr. Vidino, similarly, explained that his expert "report is based on [his] research and analysis of the relevant open source materials," and offered no discernable methodology by which he selected the materials—which included websites, books, and

Courts in various other cases have discredited Mr. Kohlmann's testimony for lack of methodological rigor and reliability. *See* Order at 8, *United States* v. *Osmakac*, No. 12-cr-45-T-35AEP (M.D. Fla. May 19, 2014), Dkt. 270 (excluding Mr. Kohlmann's testimony on "homegrown terrorists" because his methodology "has not been subjected to peer review, it does not have a known error rate, it has not been tested and it does not appear . . . capable of being accurately tested"); Minute Order at 4, *United States* v. *Kabir*, No. 12-cr-00092-VAP (C.D. Cal. July 7, 2014), Dkt. 433 (excluding in part Mr. Kohlmann's testimony because "he is unfamiliar with basic terms and theories of social science research (such as 'variable,' 'attribute,' 'operational definition,' and 'grounded theory')," his analysis has not been subjected to peer review "despite his claim that it presents a reliable theory," and "he does not employ recognized social scientific tools (such as random sampling and blind tests) to control for bias or error)"); Tr. of Proceedings at 27, *United States* v. *Abu Ali*, No. 1:05-cr-53-GBL-1 (E.D. Va. Oct. 28, 2005) ("there's no way to test the reliability" of the "Internet . . . postings" that Mr. Kohlmann used).

Mr. Kohlmann has also been the subject of successful evidentiary challenges for laundering inadmissible hearsay evidence. *See, e.g.*, *Weiss* v. *Nat'l Westminster Bank PLC*, 278 F. Supp. 3d 636, 646 (E.D.N.Y. 2017) ("[T]he parts of Kohlmann's testimony that are nothing more than a recitation of inadmissible secondary evidence [are] inadmissible."); *Strauss* v. *Credit Lyonnais, S.A.*, 925 F. Supp. 2d 414, 446 (E.D.N.Y.

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press reports—or analyzed them. Joint Appendix at 829, *Owens* v. *Republic of Sudan*, 864 F.3d 751 (D.C. Cir. 2017) (No. 14-5105), Dkt. 1630691.

2013), *on reconsideration in part*, 2017 WL 4480755 (E.D.N.Y. Sept. 30, 2017) (rejecting Mr. Kohlmann's testimony that was "nothing more than a recitation of secondary evidence, not all of which is admissible").

Here, however, all the relevant "facts" found by the district court were those contained in sources relied upon by the experts—with no independent scrutiny by the trial court and Court of Appeals. *See Owens*, 864 F.3d at 781-84 (summarizing the district court's findings of facts, which were "according to Kohlmann" and the other experts).

CONCLUSION

Respondents' proffer of expert testimony should have, at the very least, been seriously analyzed. Instead, the Court of Appeals adopted an "unusual" standard that risks blessing the use of fatally flawed expert testimony. To vindicate the reliability of expert testimony in important terrorism cases, the Court should grant the petition for certiorari and reverse the judgment of the Court of Appeals.

Respectfully submitted,

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APPENDIX

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3. Arun Kundnani, Visiting Assistant Professor of Media, Culture, and Communication, New York University
4. Professor David Miller, Professor of Sociology, University of Bath, UK
5. Dr. Lisa Stampnitzky, Lecturer in Politics, University of Sheffield