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 Circuit

MOTION FOR LEAVE TO FILE A BRIEF OF *AMICI CURIAE* AND BRIEF OF FORMER U.S. AMBASSADORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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MOTION OF TIMOTHY M. CARNEY FOR LEAVE TO FILE A BRIEF OF *AMICI CURIAE*

Amicus curiae Timothy M. Carney moves under Supreme Court Rule 37 for leave to join in the attached *amici curiae* brief of Cameron R. Hume and David L. Mack. All parties have consented to the submission of an *amici curiae* brief by Mr. Hume and Mr. Mack. However, counsel for the Respondents have not consented for Mr. Carney to join in that brief.

Mr. Carney is a retired Foreign Service Officer with over 30 years of State Department experience and has served in various senior diplomatic roles, including as former U.S. ambassador to Sudan (1995-

1997) and Haiti (1998-1999). As a former senior State Department official, Mr. Carney is concerned about the potential foreign policy implications of the lower courts' decisions in this case. And as the former U.S. ambassador to the sovereign Petitioner in this matter, Mr. Carney brings a unique perspective to the issues in the Petition and thus his views are "relevant matter" that might not otherwise be brought fully to the Court's attention pursuant to Rule 37.

Accordingly, *amicus curiae* Timothy M. Carney respectfully requests that this Court grant him leave to join in the attached *amici* brief of Mr. Hume and Mr. Mack.

Alternatively, should this Court deny Mr. Carney leave to join in the attached *amici* brief, Messrs. Hume and Mack file the attached brief on their own behalf as *amici curiae* with full consent of the Parties and without the involvement of Mr. Carney.

Respectfully submitted,

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INTEREST OF *AMICI CURIAE*

The *amici curiae* are former U.S. ambassadors and career diplomats, both of whom served for decades in various senior capacities at the United States Department of State.[1] During and after their public service careers, the *amici* have become recognized as experts in the field of U.S. international relations generally and in issues concerning the Middle East and North Africa ("MENA") region specifically. The *amici* are Cameron R. Hume and David L. Mack.

Cameron R. Hume is the former U.S. ambassador to Algeria (1997-2000), South Africa (2001-2004) and Indonesia (2007-2010), having also served as Chief of Mission to the Republic of Sudan (2005-2007). Mr. Hume is the author of several books and numerous articles on foreign policy, with a focus on Middle Eastern and North African affairs.

David L. Mack is the former Deputy Assistant Secretary of State for Near East Affairs (1990-1993) and former U.S. ambassador to the United Arab Emirates (1986-1989). Throughout his State Department career, Mr. Mack has served in numerous diplomatic posts throughout the MENA region, including Iraq, Jordan, Jerusalem, Lebanon, Libya, Tunisia, and Saudi Arabia.

As former senior State Department officials and current experts on U.S. policy in the MENA region,

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[1] No counsel for a party in this case authored this brief in whole or in part. No person or entity—other than the *amici* or their counsel—made a monetary contribution to fund the preparation or submission of this brief.

the *amici* are concerned about the foreign policy implications of the United States Court of Appeals for the District of Columbia Circuit's (the "Court of Appeals") expansive reading of the jurisdictional provisions of the Foreign Sovereign Immunities Act ("FSIA"). Accordingly, the *amici* urge the Court to reject the decision of the Court of Appeals and rule in favor of the Petitioners on the jurisdictional question.

SUMMARY OF ARGUMENT

The Court of Appeals' holding here—permitting an international litigant to establish jurisdiction over a sovereign defendant based solely on an expert's characterization of inadmissible evidence found in the "public record"—creates significant risks for U.S. foreign policy. *First,* the ruling could encourage other nations to assume jurisdiction over claims against the United States on the same basis. Not only would this lead to an escalation of litigation by "ordinary" plaintiffs, but also actions brought by hostile nations, entities, and individuals, claiming jurisdiction on the basis of biased interpretations of information mined from the Internet and other public sources.

Second, the ruling in this case fails to accord due respect to foreign sovereigns by relaxing burdens and U.S. evidentiary rules where the sovereign does not appear. Such relaxed standards risk painting the United States not as neutral arbiter but as a partial one, expanding and contracting the principles of comity to serve its own interests or those of its domestic plaintiffs. Such a result could have harmful consequences on U.S. foreign policy.

ARGUMENT

The *amici* take no position with respect to the underlying causes of action against the Petitioners. However, as career diplomats who have devoted their professional lives to protecting and furthering U.S. interests on the international stage, the *amici* are concerned by the lower courts' ruling that expert testimony is sufficient to establish jurisdiction and liability over a sovereign defendant in the absence of any supporting admissible evidence. That decision risks undermining U.S. foreign policy objectives, and entangling the United States in foreign litigation, on the basis of testimony by purported experts. It also undermines the United States' efforts to be a fair and neutral arbiter in the international diplomatic arena.

1. The Decision Below Exposes the United States to Reciprocal Treatment.

The District Court in this case concluded that it had jurisdiction to enter default judgments in excess of $10 billion against the Republic of Sudan. That court based its jurisdictional ruling entirely on the testimony of experts, who summarized and interpreted inadmissible hearsay information.[2] *See Petition* at 21-23. Had that testimony been only one

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[2] *Amici* take no position concerning the qualifications of the Plaintiffs' experts, but it is worth noting that counter-terrorism experts in other cases have emphasized that Evan Kohlmann, Plaintiffs' primary expert, has had no direct contact with members of the terrorism networks on which he claims to be an authority, and his purported expertise is based on "reading the Internet and reading books." *See Petition* at 24, *citing* Transcript of Motion at 26-28, *United States v. Abu Ali*, No. 1:05-cr-53-GBL-1 (E.D. Va. Oct. 28, 2005).

factor in the jurisdictional analysis, its flaws might have been mitigated and counterweighed by other evidence. Yet, here, the Court of Appeals found that such testimony could form the sole basis for establishing jurisdiction. [3] By upholding the District Court's conclusion, the Court of Appeals has set a negative precedent with respect to how the United States may expect itself to be treated in its capacity as a sovereign defendant in future foreign litigations.

By permitting supposed experts to establish U.S. jurisdiction over a foreign sovereign—particularly in the politically charged context of international terrorism—the decision below causes the United States to lose its ability to object to such treatment of itself by foreign courts. *See, e.g.,* Petition at 36, *citing Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1322 (2017) (a more lenient standard for jurisdictional facts in FSIA litigation would amount to an "affront to other nations[,]" "producing frictions in our relations" 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…") (internal citations and quotation marks omitted). In light of the lower courts' rulings here, hostile regimes across the globe may now point to U.S. case law as precedent for and acceptance of the theory of "jurisdiction by expert testimony." It would be naïve to suppose that there are not countless foreign "experts"—independent or

[3] Notably, the Second Circuit Court of Appeals has rejected similar attempts to substitute expert "summary" testimony for admissible evidence. *See* Petition at 27-30.

sponsored by the United States' geopolitical rivals—eager to testify in foreign courts on the alleged misdeeds of the United States.

For example, in May of 2017, United Russia—the political party headed by Vladimir Putin—released a so-called "report" on alleged efforts by U.S. media outlets to influence Russian regional elections in 2016 as part of "a large U.S. system to influence Russia's internal politics."[4] The following year, a Russian government council published an "expert report" claiming that the United States "committed more than 100 clear acts of deliberate and gross interference in the affairs of more than 60 countries."[5] Tellingly, while the Russian council referred to their report as an "objective analysis based on reliable data," independent reviewers of the council's report referred to it as an 83-page "digressive look at America's history," noting that the bulk of the report appeared to be a mischaracterization of a 2016 U.S. academic journal article and/or lifted without attribution from Wikipedia and works by a Stalinist "pseudo-

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[4] Emily Tamkin, "United Russia Completes Report on How U.S. Media Influenced Russian Elections," *Foreign Policy* (May 19, 2017) (http://foreignpolicy.com/2017/05/19/united-russia-completes-report-on-how-u-s-media-influenced-russian-elections/).

[5] Alexander Borzenko, "Russia's Senate released a report accusing the U.S. of meddling in foreign countries…" *Meduza* (Mar. 5, 2018) (https://meduza.io/en/feature/2018/03/06/russia-s-senate-released-a-report-accusing-the-u-s-of-meddling-in-foreign-countries-its-sources-are-a-stalinist-pseudo-historian-wikipedia-and-an-american-postgraduate).

historian."[6] Citing the ruling here, an international litigant against the United States could establish jurisdiction in a foreign court by retaining the author of that report, or others like it, to provide the "expert" opinion that the United States has engaged in electoral interference.

In our increasingly globalized, digitalized world, it is a trivial matter for a foreign litigant to find some expert, somewhere, willing to "summarize" the enormous volume of information in the litigant's favor—accurate or not—found on the Internet or elsewhere in the public record. The Respondents in this case have found one; no doubt the Petitioners could supply others. That is the nature of expert witnesses and that is exactly why expert testimony should not serve as the sole or even principal basis for a judgment against a foreign sovereign. The risk of "hired gun" experts, serving as mere conduits for inadmissible information in the public record, is simply too great otherwise. And, that risk is magnified in the context of international litigation involving sovereigns, where the stakes of litigation are not just monetary damages but sensitive matters of foreign relations and international prestige.

Simply put, what is done to the Republic of Sudan today may be done to the United States tomorrow. And if this Court permits the Court of Appeals' decision to stand, the United States will have lost a potent argument against such treatment.

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[6] *Id.*

2. The Decision Below Undermines Perceptions of the United States as a Fair and Neutral Arbiter in the International Diplomatic Arena.

Beyond the potential negative outcomes for the United States in its capacity as a sovereign defendant in foreign courts, permitting the establishment of "jurisdiction by expert" as an international legal principle would undercut U.S. efforts to establish itself as a fair and neutral diplomatic arbiter, including its role to strive to resolve disputes in the MENA region.

The lower courts' decision on the jurisdictional question here is not a ruling on the merits, or one based on documentary evidence or testimony derived from personal knowledge. It is, rather, a decision in which inadmissible hearsay was first rehabilitated by its bundling into "expert" testimony, and then transformed into the court's factual findings, applying an idiosyncratic "lighter burden" standard for establishing jurisdiction, justified by the purported difficulty of obtaining "firsthand evidence." *See* Petition at 11, 20-25. From a foreign policy perspective, the appearance of substantive justice is an overriding concern. That is especially so in the MENA region, in which the United States does not always enjoy widespread political or popular support and in which it is too often perceived as a partial or self-interested intervenor in matters of national sovereignty.

The *amici* submit that allowing the Court of Appeals' decision to stand could be perceived by diplomatic partners in the MENA region as, at best, a legal technicality and, at worst, a form of "might makes right." International comity requires that the

U.S. treat foreign sovereigns with the same deference it expects for itself. The FSIA was written to codify that principle into U.S. law. *See, e.g.*, *Helmerich*, 137 S. Ct. at 1319 (stating that "one of the FSIA's basic objectives, as shown by its history" is to "embod[y] basic principles of international law long followed both in the United States and elsewhere" that "grant[ing] those sovereign entities an immunity from suit in our courts both recognizes the 'absolute independence of every sovereign authority' and helps to 'induc[e]' each nation state, as a matter of 'international comity,' to 'respect the independence and dignity of every other,' including our own.") (quoting *Berizzi Brothers Co. v. S.S. Pesaro*, 46 S. Ct. 611 (1926)). Over the last several decades, the United States has devoted tremendous effort to improving public perception of its fairness and impartiality in the MENA region. This decision can only threaten those efforts.

In a matter of such great political sensitivity—particularly one involving a developing MENA nation recently emerged from civil war, with an often-fraught diplomatic history with the United States—the lower courts should have applied the most searching review and most stringent standard before infringing upon a foreign nation's sovereignty, particularly where that sovereign is not present to defend itself. *See, e.g.,* Petition at 35, *citing Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493 (1983) ("[a]ctions 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").

In sum, forcing foreign sovereigns—typically, developing nations with far less geopolitical power

and influence than the United States—to shoulder the burden of default judgments of great magnitude solely on the basis of questionable evidence undermines the United States' efforts to be perceived as a fair and impartial arbiter of disputes among nations.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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