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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602–1611, a foreign state is immune from suit unless a statutory exception applies. A court cannot rest jurisdiction upon a "nonfrivolous argument" that an exception applies; instead the "factual allegations must make out a legally valid claim," and where "jurisdictional questions turn upon further factual development, the trial judge may take evidence and resolve relevant factual disputes." *Bolivarian Republic of Venezuela* v. *Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1316 (2017).

Here, jurisdiction over Sudan is based on the FSIA's terrorism exception, which permits jurisdiction for personal injury "caused by" an act of terrorism or "the provision of material support or resources for such an act." 28 U.S.C. § 1605A(a)(1). After initially appearing, Sudan defaulted. The district court conducted an evidentiary hearing and determined that the evidence supported jurisdiction and liability. Sudan now seeks this Court's review on three questions:

1. Whether the court of appeals correctly held that the district court's extensive factual findings that Sudan's material support for al Qaeda had caused the 1998 U.S. Embassy bombings adequately supported jurisdiction under the FSIA's terrorism exception.

2. Whether the court of appeals correctly rejected Sudan's forfeited challenges to the admissibility of respondents' evidence.

3. Whether the court of appeals correctly concluded that a finding of proximate causation satisfies the terrorism exception's requirement that the plaintiff's injury be "caused by" the defendant's conduct when Sudan did not argue otherwise.

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BRIEF IN OPPOSITION

Respondents James Owens et al. respectfully submit that the petition for a writ of certiorari filed by the Republic of Sudan et al. should be denied.

OPINIONS BELOW

The opinion of the court of appeals is reported at 864 F.3d 751 (D.C. Cir. 2017). Pet. App. 1a–147a. The opinions of the district court are reported at 826 F. Supp. 2d 128 (D.D.C. 2011), Pet. App. 179a–240a, and 174 F. Supp. 3d 242 (D.D.C. 2016), Pet. App. 456a–556a.

JURISDICTION

The judgment of the court of appeals was entered on July 28, 2017. A petition for rehearing *en banc* was denied on October 3, 2017. Pet. App. 573a–74a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

1. At half-past ten in the morning of August 7, 1998, al Qaeda suicide bombers drove trucks filled with explosives into the U.S. Embassies in Nairobi, Kenya and Dar es Salaam, Tanzania. The massive, near-simultaneous explosions killed more than 200 people, including 12 Americans and dozens of other employees and contractors of the United States, and injured more than a thousand. As the district court that heard extensive evidence in these consolidated cases found, al Qaeda was able to carry out those at-

tacks only because, throughout the 1990s, the Sudanese government deliberately provided material support to the terror group's planning, recruitment, and training activities.

James Owens, a United States citizen injured in the Tanzania attack, sued Sudan in October 2001 under the "terrorism exception" to the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602–1611, for its material support of al Qaeda.[1]

The FSIA's "[t]errorism exception" abrogates foreign sovereign immunity for suits "against a foreign state for personal injury or death that was caused by" terrorist acts, including "extrajudicial killing[s]"—such as lethal bombings—or was caused by "the provision of material support or resources for such an act." 28 U.S.C. § 1605A(a)(1). Plaintiffs here proceeded under this provision (and its pre-2008 predecessor, 28 U.S.C. § 1605(a)(7) (2006) (repealed)). The FSIA also provides a federal cause of action against state sponsors of terrorism for personal injury or death caused by such an act of terrorism. *Id.* § 1605A(c). This cause of action is available to plaintiffs who are U.S. nationals, members of the armed

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[1] Owens was later joined by others injured or killed in the bombings and their immediate family members. Pet. App. 13a. These consolidated proceedings currently consist of seven cases involving eight plaintiff groups: *Owens* v. *Republic of Sudan*, No. 01-cv-2244 (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.); *Mwila* v. *Islamic Republic of Iran*, No. 08-cv-1377 (D.D.C.); *Onsongo* v. *Republic of Sudan*, No. 08-cv-1380 (D.D.C.); *Khaliq* v. *Republic of Sudan*, No. 10-cv-356 (D.D.C.); *Opati* v. *Republic of Sudan*, No. 12-cv-1224 (D.D.C.); and the Aliganga Plaintiffs, who intervened in the *Owens* case in 2012, *Owens*, No. 01-cv-2244, ECF No. 233.

forces, and employees and contractors of the U.S. government, *ibid.*; all other plaintiffs must proceed under state-law causes of action. Pet. App. 111a.

2. After initially defaulting, Sudan appeared in 2004 and moved to vacate the default and dismiss the case, arguing that it was immune under the FSIA because its support for al Qaeda did not cause plaintiffs' injuries. Pet. App. 13a–14a. The district court vacated the default, but, after allowing plaintiffs to amend their complaint, denied Sudan's motion to dismiss. *Id*. at 14a. The D.C. Circuit affirmed, holding that Plaintiffs' pleadings demonstrated "a reasonable enough connection between Sudan's interactions with al Qaeda in the early and mid-1990s and the group's attack on the embassies in 1998 to meet" the "jurisdictional causation requirement." *Id.* at 175a. Sudan did not seek this Court's review of that decision.

Instead, facing the prospect of discovery and a trial on the merits, Sudan abandoned the litigation. Pet. App. 15a. Sudan's second default, however, did not leave it without protection from entry of judgment. The FSIA does not allow a court to enter a judgment even against a defaulting foreign state like Sudan unless a plaintiff first demonstrates the existence of jurisdiction and establishes her "right to relief by evidence satisfactory to the court." 28 U.S.C. § 1608(e). Accordingly, in 2010, the district court held a three-day evidentiary hearing to determine whether Sudan provided al Qaeda with material support that caused respondents' injuries in the 1998 U.S. Embassy bombings. Pet. App. 16a.

The plaintiffs presented the recorded, sworn testimony of three former al Qaeda operatives: Jamal al Fadl, a "former senior al Qaeda operative turned FBI

informant" who was "in the witness protection program," and Essam al Ridi and L'Houssaine Kherchtou, "members of al Qaeda when the terrorist group was based in Sudan" who "testified, based upon firsthand knowledge, about the Sudanese government and military facilitating al Qaeda's movement through East Africa and protecting al Qaeda's leadership." *Id*. at 46a. The court further considered al Qaeda-produced videos about its activities in Sudan and other documentary evidence. *Id.* at 47a. Plaintiffs also presented the testimony of three well-qualified expert witnesses whose "opinions regarding Sudan's support for al Qaeda" were based both on public materials "and firsthand interviews . . . with al Qaeda affiliates." *Id*. at 44a–46a. Finally, the court examined reports from the State Department and the CIA "describing Sudan's relationship with al Qaeda in the 1990s." *Id*. at 47a.

3. In 2011, the district court issued an exhaustive opinion, concluding that Sudan had provided al Qaeda with a safe harbor and financial, military, and intelligence assistance that "enabled al Qaeda to build its terrorist cells in Kenya, Somalia and Tanzania." Pet. App. 213a–14a.

As the court found, in 1990, pressure in Afghanistan and Pakistan forced al Qaeda's founder, Osama bin Laden, to seek a new base of operations. Pet. App. 198a. General Omar al Bashir, who overthrew the Sudanese government in a military coup the year before, provided the solution. *Id.* at 198a–99a. After installing himself as President of Sudan, al Bashir began courting terror organizations. *Id.* at 199a. Sudan invited "militant Islamic revolutionary groups," including "the Palestinian HAMAS movement," "Hezbollah," "al-Qaeda," and many others "to take a base

in Khartoum," with the goal of launching a worldwide Jihad. *Id*. at 202a.

For the next five years, al Qaeda thrived in Sudan, "gr[owing] into a sophisticated organization." Pet. App. 209a. Al Qaeda operated in Sudan with "full support by the Sudanese government," which provided "[c]omplacent banks, customs exemptions, [and] tax privileges." *Ibid*. Sudan also provided al Qaeda's operatives with Sudanese citizenship and passports that ensured travel unencumbered by "normal immigration and customs controls," including to their terror cell in Nairobi, Kenya, which planned and organized the 1998 U.S. Embassy bombings. *Id*. at 210a. Sudanese military and intelligence forces staved off "any problems with the local police or authorities," enabling al Qaeda to conduct explosives training and other operations free from interference. *Id*. The Sudanese military further aided al Qaeda in transporting weapons. *Id.* at 211a. Members of the Sudanese military even acted as bin Laden's personal guards. *Ibid*. "[T]he Sudanese intelligence service viewed al Qaeda as a proxy, much the way that Iran views Hezbollah as a proxy." *Id*. at 213a.

In 1993, the State Department placed Sudan on the list of state sponsors of terrorism because it was "harbor[ing] international terrorist groups." Pet. App. 72a, 205a; *see* 58 Fed. Reg. 52,523 (Oct. 8, 1993). Contrary to Sudan's assertion that the 1998 U.S. Embassy bombings were al Qaeda's "first terrorist attack," Pet. 2, in the early 1990s "al Qaeda members claimed responsibility for the killing of U.S. soldiers in Mogadishu, Somalia." Pet. App. 49a. And Sudan maintained its close relationship with bin Laden and al Qaeda even "after bin Laden publicized his intent to attack American interests in a series of *fatwas*." *Ibid.*

In 1996, acceding to international demands, Sudan made a show of expelling bin Laden, but refused to turn him over to the United States or grant international bodies access to al Qaeda's training camps. *Id.* at 211a. Even after bin Laden left Sudan, however, al Qaeda members remained behind, operating with Sudan's continued support. *Id*. at 205a.

The court found that "Sudanese government support was critical," "[e]ssential," and "absolutely integral" "to the success of the 1998 embassy bombings." Pet. App. 213a. "[K]nowing that al Qaeda intended to attack the citizens, or interests of the United States," Sudan provided al Qaeda the material support—including "[t]he support of Sudanese intelligence" and "the safe haven provided by the Sudanese government to house al Qaeda's leadership and train its operatives"—that "enabled al Qaeda to build its terrorist cells in Kenya" and "Tanzania." *Id*. at 213a–14a. Sudanese intelligence provided al Qaeda with weapons and explosives, and smuggled operatives and funds from Sudan to al Qaeda's Nairobi cell, the same cell that ultimately carried out its plan to devastate the U.S. Embassies. *Id.* at 212a–13a. In sum, Sudan's material support "proximate[ly] cause[d]" respondents' injuries through its provision of safe harbor, training, and other support to al Qaeda. *Id.* at 225a–27a. As the district court put it, "the consequences of [Sudan's] conduct were reasonably certain to—and indeed intended to—cause injury to plaintiffs." *Id.* at 249a; *see id.* at 403a–04a.

In 2012, the court's opinion was translated into Arabic and served on Sudan, Pet. App. 17a, yet Sudan still did not move to re-enter the proceedings to dispute or otherwise object to the district court's finding of liability. Seven court-appointed special masters

then spent years assessing the damages of each of the hundreds of individual plaintiffs. *Ibid*. After receiving the special masters' reports, the district court issued final judgments in the cases, the first in March 2014 in the *Owens*, *Khaliq*, and *Mwila* cases. After final judgment was entered in those cases, Sudan reappeared in those cases and filed notices of appeal. Pet. App. 471a. Sudan did not, however, appear in the other cases, choosing instead to await the entry of final judgments in those cases before entering appearances and noticing appeals. *Ibid*. The next year, on the eve of the one-year time bar for certain Rule 60 motions, *see* Fed. R. Civ. P. 60(c), Sudan moved the district court to vacate the judgments under Rule 60(b). Pet. App. 18a. Sudan then moved the court of appeals to hold its appeals in abeyance pending the district court's disposition of the Rule 60 motions, which the court of appeals did. *Id.* at 154a.

After extensive briefing and oral argument, the district court denied Sudan's motions to vacate the judgments in all respects. The court first held that Sudan's failure to participate in this litigation was not "excusable neglect." Pet. App. 473a–84a. After an initial period of years in which it was represented by multiple sophisticated international law firms, Sudan was absent for nearly five years, and this "extraordinary amount of delay" was not justified given that "Sudan was well aware of these cases and yet did nothing." *Id.* at 475a. "The idea that the relevant Sudanese officials could not find the opportunity over a period of *years* to send so much as a single letter or email communicating Sudan's desire but inability to participate in these cases is, quite literally, incredible." *Id.* at 477a. The court thus was "by no means persuaded that Sudan has behaved in good faith," and concluded that it was "more likely that Sudan chose"

deliberately "to ignore these cases over the years, changing course only when the final judgments saddled it with massive liability." *Id.* at 480a.

The district court also rejected Sudan's argument that the judgments were void for lack of jurisdiction because respondents had not established the causation necessary for jurisdiction to attach under Section 1605A(a). After carefully reviewing the evidence for a second time, the court concluded that the evidence established Sudan's causation of respondents' injuries. Pet. App. 520a–35a. The evidence showed that al Qaeda could not have carried out the bombings had Sudan not "actively assisted and participated in al Qaeda terrorist activities," and that "Sudan 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." *Id*. at 528a.

4. Sudan then reactivated its appeals, consolidating its challenge to the district court's denial of Rule 60 relief with its appeals of the underlying judgments. The D.C. Circuit unanimously held that the district court's "findings established both jurisdiction over and substantive liability for claims against Sudan." Pet. App. 16a–17a.

The D.C. Circuit acknowledged that, "even though [Sudan] forfeited its right to contest the merits of the plaintiffs' claims," it nevertheless could challenge the district court's "factual findings" that Sudan's provision of material support to al Qaeda had caused the U.S. Embassy bombings because "material support and causation are jurisdictional." *Id*. at 41a; *see also* 28 U.S.C. § 1605A(a)(1). But, as the court of appeals explained, Sudan's default made this an "uphill battle" because under the FSIA, "[t]he plaintiff bears an

initial burden of production to show an exception to immunity, such as § 1605A, applies," but "[t]hen, the sovereign bears the ultimate burden of persuasion to show the exception does not apply." Pet. App. 55a. "Therefore, if a plaintiff satisfies his burden of production and the defendant fails to present any evidence in rebuttal, then jurisdiction attaches." *Ibid*. And the plaintiffs' burden of production is "rather modest," and "lighter" than that necessary to "winning [a] case on the merits." *Id.* at 42a, 55a.

The D.C. Circuit also recognized, however, that under this Court's decision in *Bolivarian Republic of Venezuela* v. *Helmerich & Payne International Drilling Co*., 137 S. Ct. 1312, 1316 (2017), a plaintiff's burden of production no longer could be satisfied with merely a "non-frivolous" claim of jurisdiction, as D.C. Circuit precedent had allowed. Pet. App. 42a. The court viewed *Helmerich* as "requiring a plaintiff to prove the facts supporting the court's jurisdiction under the FSIA." *Ibid*. Although the district court's decision pre-dated *Helmerich*, the D.C. Circuit held that the district court had satisfied its jurisdictional standard by demanding the plaintiffs with causes of action arising under District of Columbia law to "offer evidence *proving* the[ ] jurisdictional elements," including causation. *Id*. at 42a–43a (emphasis added).[2]

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[2] Under pre-*Helmerich* D.C. Circuit law, non-frivolous claims could establish jurisdiction so long as the jurisdictional provision perfectly mirrored the cause of action, such as the jurisdictional provision in 28 U.S.C. § 1605A(a) and the companion cause of action in Section 1605A(c). Pet. App. 518a (citing *Simon* v. *Republic of Hungary*, 812 F.3d 127, 140 (D.C. Cir. 2016)). Because the D.C.-law causes of action did not mirror the jurisdictional provision in Section 1605A(a), however, the district court concluded that it "must therefore examine whether the evidence was sufficient to support its jurisdiction." *Id.* at 520a.

"First in its 2011 opinion on liability and again in its 2016 opinion denying vacatur, the district court weighed the plaintiffs' evidence of material support and causation and concluded it satisfied the jurisdictional standard." Pet. App. 43a. That finding "plainly applie[d] to all claimants and all claims." *Ibid.* Thus, Sudan could prevail in its challenge to the district court's jurisdiction "only if the district court erred in its factual findings." *Ibid*. The court of appeals "conclude[d] it did not." *Ibid.*

The D.C. Circuit rejected Sudan's challenges to the admissibility of the plaintiffs' expert testimony. The court "presume[d]" that a defaulting sovereign may "challenge for the first time on appeal the admissibility of evidence supporting a jurisdictional fact." Pet. App. 60a. But because "a defendant sovereign that defers its challenge until appealing a default judgment . . . handicaps the nondefaulting plaintiff in filling out the evidentiary record," the D.C. Circuit explained that such a challenge could not be accepted "unless the contested evidence is clearly inadmissible and we seriously doubt the plaintiff could have provided alternative evidence that would have been admissible." *Ibid.* The court held that Sudan's belated objections to respondents' expert evidence did not meet this standard. *Ibid.* The experts' opinions were "undoubtedly admissible" and the district court did not abuse its discretion "in qualifying the experts, summarizing their testimony, or crediting their conclusions." Pet. App. 68a, 70a. Moreover, the court of appeals observed, "the district court did not rely solely upon expert testimony to establish jurisdiction and liability," but also relied on State Department reports that "speak directly to Sudan's support for terrorist groups, including al Qaeda." *Id.* at 72a. The D.C. Circuit agreed with "[t]he plaintiffs" that these "reports

fit squarely within the public records exception." *Id.* at 73a (citing Fed. R. Evid. 803(8)). And the district court also heard recorded trial testimony from three former al Qaeda operatives, including Jamal al Fadl who "was particularly well-suited to address the relationship between al Qaeda and the government of Sudan in the 1990s because he served then as a principal liaison between the terrorist group and Sudanese intelligence." *Id*. at 46a. Finally, the court of appeals noted that the evidentiary record also included al Qaeda-produced videos "describing its move to Sudan and its terrorist activities thereafter." *Id*. at 47a.

The D.C. Circuit next turned to Sudan's arguments regarding proximate causation. The court rejected Sudan's challenge to the district court's finding that Sudan's material support of al Qaeda was a "substantial factor" leading to plaintiffs' injuries, holding that the district court's finding "was far from clearly erroneous." Pet. App. 84a. The court likewise rejected Sudan's contention that the U.S. Embassy bombings were not a reasonably foreseeable result of Sudan's support. Given al Qaeda's activity throughout the 1990s, including its issuance of *fatwas* against the United States beginning in 1991 and the terrorist group's attack on American troops in Somalia in 1993, "Sudan could not help but foresee that al Qaeda would attack American interests wherever it could find them." *Id.* at 86a. And the court of appeals also rejected Sudan's argument that the terrorism exception requires a showing that it specifically intended its support to cause the U.S. Embassy bombings in particular. That rule, the court recognized, would allow a sponsor of terrorism to "avoid liability for supporting known terrorist groups by professing ignorance of their specific plans for attacks." *Id.* at 88a. But "[n]othing in the FSIA," the court said, "requires a

greater showing of intent than proximate cause." *Id.* at 87a. And here "the plaintiffs have offered sufficient admissible evidence that establishes that Sudan's material support of al Qaeda proximately caused the 1998 embassy bombings." *Id.* at 88a.

Sudan's petition for panel and en banc rehearing was denied without recorded dissent. Pet. App. 571a–72a, 573a–74a.

REASONS FOR DENYING THE PETITION

Sudan's three-question petition should be denied. The meticulously reasoned and unanimous decision of the court of appeals below does not conflict with any decision of this Court, or any other court of appeals on any of the three questions raised by Sudan. Nor does Sudan's petition otherwise present any important question of law.

Rather than raising compelling questions of national importance, Sudan essentially asks this Court to second-guess well-reasoned factual determinations made by the district court based upon six years of proceedings, including a three-day bench trial on liability, two years of individualized assessments of damages by seven Special Masters appointed by the district court, a meticulous review and assessment of damages by the district court, and a final reexamination of the entire record after Sudan reappeared. As Sudan acknowledges in its petition, the "centerpiece" of its argument is, and always has been, "the admissibility, reliability and sufficiency of the evidence of material support and proximate causation" presented over the course of those proceedings. Pet. 4. But such factual arguments do not merit Supreme Court review. And they are particularly inappropriate where, as here, the petitioner intentionally defaulted twice

and entirely failed to raise the arguments to the district court when the evidence was introduced. Sudan's long effort to defer its day of reckoning for its material support of al Qaeda should be brought to an end.

There is no conflict with this Court's recent decision in *Bolivarian Republic of Venezuela* v. *Helmerich & Payne International Drilling Company*, 137 S. Ct. 1312 (2017). The D.C. Circuit expressly applied the teachings of that case and held that the district court properly determined that it possessed jurisdiction here based on the evidentiary record and its resulting factual findings that Sudan's material support for al Qaeda had caused respondents' injuries. *Helmerich* certainly does not require more. The court of appeals' statement that a plaintiff's burden to establish jurisdiction is "lighter" than the burden to prove liability on the merits reflects only the well-established proposition—undisputed here or below by Sudan—that a plaintiff seeking to establish jurisdiction under the FSIA bears only an initial burden of production that an exception to immunity applies, while the burden of persuasion rests with the foreign state asserting immunity. *Helmerich* did not address, much less disturb, that framework, which has been adopted by every circuit to address the issue. Here, Sudan elected to default, and thus neither challenged nor controverted plaintiffs' evidence supporting jurisdiction and liability.

Sudan's other challenges to the decision of the court of appeals are similarly insubstantial. Sudan questions whether jurisdictional facts can be established "based solely upon" expert witness testimony, Pet. i, but that issue certainly is not presented here because, as the court of appeals noted, the district court's factual findings were not "based solely upon"

expert testimony. And Sudan's other objections to the admissibility of respondents' evidence do not remotely warrant this Court's review.

Sudan's final objection—that a finding of proximate cause under the terrorism exception requires a "'direct relationship' between the defendant's conduct and the resultant injury," Pet. i—was not raised below. In any event, the district court found that Sudan, by and through its material support of al Qaeda, intended to cause—and did cause—the U.S. Embassy bombings. That fully satisfies the "direct relationship" test Sudan now urges.

What Sudan's petition really is seeking is not review of any question of law but rather this Court's searching review of the district court's amply supported factual findings—made after more than a decade of first-hand experience with this case and affirmed in full by the court of appeals—that Sudan provided material support to al Qaeda that was intended to, and did, aid al Qaeda's efforts to kill Americans. But this is not a "court for correction of errors in fact finding." *Exxon Co., U.S.A.* v. *Sofec, Inc.*, 517 U.S. 830, 841 (1996). Sudan's petition should be denied.

I. THE D.C. CIRCUIT DECISION DOES NOT CONFLICT WITH *HELMERICH*.

Sudan argues that the decision below "directly conflicts with this Court's decision in *Helmerich*," Pet. 13, but that fanciful suggestion of conflict is based on a misreading of both *Helmerich* and the D.C. Circuit's decision. In *Helmerich*, the parties "stipulated" to the "facts," 137 S. Ct. at 1318, and the resulting jurisdictional dispute turned on the purely legal question whether a sovereign's expropriation of property from

its own citizens violates international law. *Ibid*. The issues here were quite different.

Here, the court of appeals acknowledged *Helmerich*'s requirement that, to establish jurisdiction, "the relevant factual allegations must make out a legally valid claim" to an exception from sovereign immunity, 137 S. Ct. at 1316, and ensured that it was satisfied. Going beyond *Helmerich*, the court of appeals addressed not merely whether the "factual allegations" supported jurisdiction based on the FSIA's terrorism exception, but whether the detailed *factual findings* based on voluminous evidence presented over the course of a three-day evidentiary hearing actually *established* both liability and jurisdiction—an issue not addressed in *Helmerich*. Moreover, it addressed that issue in the context of Sudan's decision to default—and thus not cooperate in discovery (which might help plaintiffs prove their claims), raise evidentiary objections, or present contrary evidence.

a. *Helmerich* was a case brought under the so-called "expropriation exception" to immunity under the FSIA, which applies when property is "taken in violation of international law." 28 U.S.C. § 1605(a)(3). Though the parties had provided "stipulations as to all relevant facts," 137 S. Ct. at 1318, the parties disputed the legal proposition whether the plaintiffs' property had been "taken in violation of international law." Specifically, Venezuela argued that "international law does not cover expropriations of property belonging to a country's own nationals." *Id.* at 1317.

Applying circuit precedent, a D.C. Circuit panel held that jurisdiction would attach so long as the plaintiffs' legal theory was not "wholly insubstantial or frivolous." *Helmerich*, 137 S. Ct. at 1318 (emphasis omitted). Because there were legitimate arguments

on each side of the question whether international law would permit the expropriation in question, the court of appeals held that the plaintiffs "had satisfied [the D.C.] Circuit's forgiving standard for surviving a motion to dismiss." *Ibid*. This Court granted certiorari to consider whether a non-frivolous argument alone in support of a claim that property has been taken in violation of international law is sufficient to overcome a foreign state's claim of immunity from suit under the FSIA and allow the district court to proceed to consider the merits. *Ibid.*

This Court held that "the expropriation exception grants jurisdiction only when there is a valid claim that 'property' has been 'taken in violation of international law'" and that "[a] nonfrivolous argument to that effect is insufficient." *Helmerich*, 137 S. Ct. at 1318–19. The Court reached this conclusion as a matter of "statutory construction." *Id.* at 1318. Examining "the [expropriation] provision's language," the Court observed that it "would normally foresee a judicial decision about the jurisdictional matter." *Id.* at 1319. And the Court further noted that "to find jurisdiction where a taking does *not* violate international law (*e.g.*, where there is a nonfrivolous but ultimately *incorrect* argument that the taking violates international law)" would subject to jurisdiction "the kind of foreign sovereign's public act . . . that the restrictive theory of sovereign immunity ordinarily leaves immune from suit." *Id.* at 1321.

The Court concluded that when "the facts are not in dispute, those facts bring the case within the scope of the expropriation exception only if they do show (and not just arguably show) a taking of property in violation of international law." *Helmerich*, 137 S. Ct. at 1324. And "[i]f a decision about the matter requires

resolution of factual disputes, the court will have to resolve those disputes." *Ibid*.

The Court in *Helmerich* did not in any respect address the procedures, or the showing that must be made to establish jurisdiction when the foreign sovereign defendant defaults. *See* 28 U.S.C. § 1608(e) ("No judgment by default shall be entered . . . unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.").

b. The D.C. Circuit's decision does not conflict with this Court's decision in *Helmerich*.

1. At the threshold, *Helmerich* itself resolves only the standard for surviving a motion to dismiss when jurisdiction is asserted under the FSIA's expropriation exception. 28 U.S.C. § 1605(a)(3). This is evident from the Court's analysis, which is specific to the expropriation exception. The Court's analysis starts with a parsing of "the provision's language," and then draws from the exception's incorporation of "international law" a particular need to uphold immunity in situations when international law would permit a taking by the sovereign. 137 S. Ct. at 1319. *Helmerich* does not mention the FSIA's terrorism exception, 28 U.S.C. § 1605A(a)(1), and its expropriation-exception-specific reasoning has no obvious application to the terrorism exception. Thus, even if the D.C. Circuit had applied in this terrorism case the non-frivolous-argument standard that *Helmerich* rejected—and, as shown below it did not—there would be no conflict with either the holding or the reasoning of *Helmerich*.

2. The D.C. Circuit, however, expressly stated that it was *not* applying the non-frivolous argument standard that *Helmerich* rejected in the expropriation context. The D.C. Circuit was not presented with a

challenge to the legal theory on which plaintiffs had proceeded. Rather, Sudan's challenge focused on the factual support for that legal theory. And the D.C. Circuit certainly did not depart from *Helmerich* when it read that case as "requiring a plaintiff to prove the facts supporting the court's jurisdiction under the FSIA." Pet. App. 42a. The court of appeals found that standard satisfied by "the district court's second basis for concluding the plaintiffs had sufficiently shown material support and causation in this case." *Ibid.*

As the court of appeals explained, the district court had permitted only those respondents advancing the cause of action created by federal law to rest on the "nonfrivolous argument" standard. With respect to those plaintiffs proceeding under *D.C.-law* causes of action, the district court had held that they "could not establish jurisdiction simply by making a nonfrivolous claim of material support and causation," and instead "required those plaintiffs to offer evidence proving these jurisdictional elements." Pet. App. 43a. The court of appeals recounted that the district court "[f]irst in its 2011 opinion on liability and again in its 2016 opinion denying vacatur" had "weighed the plaintiffs' evidence of material support and causation and concluded it satisfied the jurisdictional standard." *Ibid*. And "[b]ecause the court's finding of Sudan's material support for the 1998 embassy bombings plainly applies to all claimants and all claims," the court of appeals concluded that *Helmerich* did not disturb the district court's conclusion that jurisdiction under the terrorism exception had been established. *Ibid.* Sudan could escape jurisdiction only if it demonstrated that "the district court erred in its factual findings," and the court of appeals held that "it did not." *Ibid.*

That ruling does not depart from *Helmerich*. *Helmerich* stated that when jurisdiction turns on "further factual development," the district court "may take evidence and resolve relevant factual disputes." 137 S. Ct. at 1316. Here, even though there were, because of Sudan's second default, no "factual disputes" in the ordinary sense, the district court, consistent with Section 1608(e), received evidence, evaluated it, and made factual findings necessary to establish jurisdiction. *Helmerich* does not require anything more—particularly when the sovereign defendant has abandoned the litigation *after* the motion to dismiss phase. The district court's findings "do show (and not just arguably show)," *id*. at 1324, causation linking Sudan's material support of al Qaeda to respondents' injuries necessary to establish the "terrorism exception" to Sudan's immunity from suit.

3. Sudan nevertheless claims that the court of appeals contravened *Helmerich* when it observed that "[e]stablishing material support and causation for jurisdictional purposes is a lighter burden than proving a winning case on the merits." Pet. App. 42a. And because the court of appeals cited for this proposition the case that also established the "non-frivolous argument" standard, *Agudas Chasidei Chabad of U.S.* v. *Russian Federation*, 528 F.3d 934 (D.C. Cir. 2008), Sudan suggests that the "lighter burden" must be the same as the "non-frivolous argument" standard that *Helmerich* rejected. This argument is both wrong and irrelevant.

Sudan's argument is wrong because the court of appeals there was not citing *Chabad* for the proposition that jurisdiction can be established with a non-frivolous argument, but instead for the uncontroversial point that *Chabad* made on the same page: that

the sovereign bears the ultimate burden of persuasion of establishing its immunity under the FSIA, and that a plaintiff need bear "only a burden of production" that an exception to immunity applies. 528 F.3d at 940. *Helmerich* does not even mention, much less cast doubt on, this burden-shifting framework, which has been adopted by *every court* to address the question.[3] Indeed, it is so well accepted that Sudan did not object to it in the district court, or the court of appeals. That the plaintiffs' burden of production under this framework is the "lighter burden" the court of appeals was referring to is confirmed by the fact that the court, in the very next paragraph, recognized that *Helmerich* "overruled" the "non-frivolous argument" standard. Pet. App. 42a.

The argument is irrelevant in any event because the plaintiffs here did "prove a winning case on the merits" (Pet. App. 42a) that Sudan had provided material support to al Qaeda that caused the U.S. Embassy bombings, and thus did not need to rely on a lighter burden of production to establish those same facts as a jurisdictional matter. The district court in

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[3] *See*, *e.g.*, *Cabiri* v. *Gov't of Republic of Ghana*, 165 F.3d 193, 196 (2d Cir. 1999); *Fed. Ins. Co.* v. *Richard I. Rubin & Co.*, 12 F.3d 1270, 1285 (3d Cir. 1993); *Velasco* v. *Gov't Of Indonesia*, 370 F.3d 392, 397 (4th Cir. 2004); *Janvey* v. *Libyan Inv. Auth.*, 840 F.3d 248, 257–58 (5th Cir. 2016); *DRFP L.L.C.* v. *Republica Bolivariana de Venezuela*, 622 F.3d 513, 515–16 (6th Cir. 2010); *Int'l Ins. Co.* v. *Caja Nacional De Ahorro y Seguro*, 293 F.3d 392, 397 (7th Cir. 2002); *Embassy of the Arab Republic of Egypt* v. *Lasheen*, 603 F.3d 1166, 1169–70 (9th Cir. 2010); *Orient Mineral Co.* v. *Bank of China*, 506 F.3d 980, 991–92 (10th Cir. 2007); *S & Davis Int'l, Inc.* v. *Republic of Yemen*, 218 F.3d 1292, 1300 (11th Cir. 2000); Pet. App. 55a; *see also Universal Trading & Inv. Co.* v. *Bureau for Representing Ukrainian Interests in Int'l & Foreign Courts*, 727 F.3d 10, 17 (1st Cir. 2013).

2011 made extensive and detailed factual findings with respect to material support and causation that fully support Sudan's substantive *liability*. Pet. App. 197a–215a. Those same factual findings are no less sufficient to establish the same facts as a jurisdictional matter.

4. To the extent that Sudan's petition argues that this Court's decision in *Helmerich* entitles it to "de novo review" (Pet. 18) of the district court's factual findings concerning jurisdiction, that contention would not warrant this Court's review.

At the threshold, the contention is waived. Before the D.C. Circuit, Sudan agreed that the district court's factual findings are reviewed for clear error. *See* Sudan C.A. Br. 14; Sudan C.A. Reply 2.

And there is no conflict with *Helmerich* on the standard of appellate review in any event. In *Helmerich* the parties had "stipulated" to the "facts," 137 S. Ct. at 1318. The jurisdictional dispute there turned on the purely legal question whether a sovereign's expropriation of property from its own citizens violates international law. *Ibid.* This Court thus had no occasion in *Helmerich* to address what standard of appellate review would apply to *any* findings of facts relevant to jurisdiction, never mind findings resulting from a proceeding in which the sovereign defaults and that accordingly is governed by 28 U.S.C. § 1608(e). Thus the court of appeals' review of the district court's factual findings for clear error (Pet. App. 56a) could not conflict with *Helmerich*.

Sudan's points to a "line of authority" supposedly establishing that a "defaulting foreign sovereign" is entitled to "de novo review of its jurisdictional challenge" regardless of the circumstances of its default

and the nature of its jurisdictional challenge. Pet. 18. That would be an exceedingly strange rule because the FSIA does not "relieve[ ] the sovereign from the duty to defend cases." *Commercial Bank of Kuwait* v. *Rafidain Bank*, 15 F.3d 238, 242 (2d Cir. 1994). Indeed, Sudan's rule would accord to a sovereign that engages in a strategy of tactical default *more* searching appellate review of a district court's factual findings on jurisdiction than it would have received had it participated in the evidentiary hearing.

In fact, in the cases comprising Sudan's "line of authority," jurisdiction turned, just as in *Helmerich*, on questions of law and thus did not address the standard of appellate review of factual findings relevant to jurisdiction. *See Bell Helicopter Textron, Inc.* v. *Islamic Republic of Iran*, 734 F.3d 1175, 1179 (D.C. Cir. 2013) ("the subsidiary facts are undisputed"); *Practical Concepts, Inc.* v. *Republic of Bolivia*, 613 F. Supp. 863, 872 n.10 (D.D.C. 1985) ("the issues here are predominantly legal, not factual"), *vacated on other grounds*, 811 F.2d 1543 (D.C. Cir. 1987); *see also Ins. Corp. of Ireland* v. *Compagnie des Bauxites*, 456 U.S. 694, 709 (1982) (affirming under "abuse of discretion" standard the district court's decision to sanction petitioner's disregard of court orders by "t[a]k[ing] as established the facts" that demonstrated personal jurisdiction). Sudan's contention that it is entitled to de novo review of the district court's findings is supported by no case. Instead, "[i]t is widely—indeed, universally—accepted" that courts of appeals in contested cases "exercise de novo review over legal conclusions" regarding jurisdiction, but "examine jurisdictional findings of fact by the trial courts only for clear error on the part of the district court." 5B Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1350, at 255–64 (3d ed. 2004).

The D.C. Circuit's application of the clear-error standard to the district court's factfinding does not warrant this Court's review.

II. THE D.C. CIRCUIT CORRECTLY HELD THAT THE DISTRICT COURT DID NOT COMMIT CLEAR ERROR IN FINDING JURISDICTIONAL FACTS BASED ON VARIOUS TYPES OF EVIDENCE.

As its second question, Sudan asks whether "jurisdiction (and liability) under the FSIA's terrorism exception can be established on the basis of an expert's opinion alone." Pet. 20. That question does not warrant review.

As the D.C. Circuit recognized, "the district court did *not* rely solely upon expert testimony to establish jurisdiction." Pet. App. 72a (emphasis added). Plaintiffs submitted voluminous evidence, including recorded trial testimony from three former al Qaeda operatives, *id*. at 46a, al Qaeda-produced videos, *id.* at 47a, and numerous reports from the State Department and the CIA, *id.* at 72a–75a (holding that the reports "together with the plaintiffs' admissible opinion evidence satisfy the burden of production on material support and jurisdictional causation"). And the district court based its conclusions on the "evidence as a whole." *Id*. at 44a; *see id*. at 523a ("the record contains much else" besides "the opinions of plaintiff[s'] three expert witnesses"). Thus, the question Sudan seeks to present is not raised in this case. That is reason enough to deny review: Where a question "is not fairly presented by the record," *Rogers* v. *United States*, 522 U.S. 252, 253 (1998), certiorari is inappropriate.

Sudan's petition makes plain that its real gripe is with the lower courts' admissibility determinations

and the district court's weighing of the evidence. *See* Pet. 19–27. Those case-specific complaints were carefully weighed and unanimously rejected by the D.C. Circuit. That decision is correct and does not merit further review in this Court.

As the district court and the D.C. Circuit held, the expert reports and testimony, witness testimony, trial transcripts, State Department reports, and CIA reports presented by respondents were admissible. Pet. App. 520a–35a, 62a–75a. And, despite Sudan's attempts to undermine expert Evan Kohlmann, Pet. 23–24, numerous courts have upheld his qualifications as a terrorism expert. *See*, *e.g.*, *United States* v. *Farhane*, 634 F.3d 127, 158–59 (2d Cir. 2011); *United States* v. *Benkahla*, 530 F.3d 300, 309 (4th Cir. 2008). Thus, even if this Court were inclined to review the court of appeals' rejection of Sudan's forfeited objections to the district court's admission of certain pieces of evidence, there is no evidentiary error for this Court to correct.

Sudan asserts a conflict with decisions of the Second Circuit, but there is none. Sudan first points to *Vera* v. *Republic of Cuba*, 867 F.3d 310, 317 (2d Cir. 2017), but that case does not address the admissibility of expert testimony at all. In *Vera* the key question was whether the plaintiff had established jurisdiction over Cuba under the terrorism exception by showing that his father's 1976 murder was one of the acts that caused Cuba's designation by the U.S. State Department as a state sponsor of terrorism. *Id.* at 317–18. As part of its analysis, the Second Circuit observed that a state court's previous finding of jurisdiction in a Section 1608(e) default proceeding was supported only by a single expert affidavit that "cited no evidence" on the dispositive point. *Id.* at 318. But the Second Circuit did not say (or even suggest) that the

plaintiff's expert opinion was inadmissible. Instead, weighing the evidence in front of it, which included evidence suggesting that Cuba was designated as a state sponsor of terrorism for reasons entirely unrelated to the murder of the plaintiff's father, the Second Circuit concluded that the plaintiff had failed to make the necessary showing to establish jurisdiction. *Id.* at 318–20. That ruling does not conflict in any way with the D.C. Circuit's holding here that the district court's factual findings were fully supported by admissible evidence, including the opinions of three experts, each of whom cited ample evidence for their opinions that Sudan provided material support to al Qaeda that was a substantial factor leading to the U.S. Embassy bombings.

Sudan also suggests (at 28–30) that the D.C. Circuit's decision here diverges from rulings of the Second Circuit stating that "a party cannot call an expert simply as a conduit for introducing hearsay." *Marvel Characters, Inc.* v. *Kirby*, 726 F.3d 119, 136 (2d Cir. 2013); *see also United States* v. *Mejia*, 545 F.3d 179, 197 (2d Cir. 2008). But the D.C. Circuit *agreed* with that proposition; indeed, it quoted the Second Circuit's decision in *Marvel* for that very proposition. Pet. App. 66a–67a. And "[a]pplying th[at] standard[ ] to the case at hand," the court of appeals held that "the district court properly distinguished the experts' clearly admissible opinions from the potentially inadmissible facts underlying their testimony." *Id.* at 67a. Sudan thus is urging review of a supposed error in application of established law. That type of question does not warrant this Court's review. And such review would be particularly misplaced in a case where, unlike *Marvel Characters* and *Mejia*, the petitioner defaulted in the lower court and the district court's ev-

identiary determinations in the Section 1608(e) proceeding accordingly could be reviewed only for "clear[ ] inadmissib[ility]." *Id*. at 60a.

III. THE D.C. CIRCUIT CORRECTLY HELD THAT THE DISTRICT COURT DID NOT COMMIT CLEAR ERROR IN CONCLUDING THAT SUDAN PROXIMATELY CAUSED THE 1998 U.S. EMBASSY BOMBINGS.

Sudan's final contention is equally unworthy of this Court's review. In defining the standard for proximate causation, the D.C. Circuit held that "the defendant's actions must be a substantial factor in the sequence of events that led to the plaintiff's injury," and "plaintiff's injury must have been reasonably foreseeable or anticipated as a natural consequence of the defendant's conduct." Pet. App. 76a–77a. But, the court of appeals held, proximate cause does *not* require that the defendant "specifically intended" the injury, and thus it is "irrelevant" whether "Sudan either specifically intended or directly advanced the 1998 embassy bombings." *Id.* at 87a–88a.

Though Sudan's petition is not entirely clear on this point, it seems to grasp at the court of appeals' passing reference to "directly advanced" in an effort to forge a new argument that it never raised below and that the D.C. Circuit did not squarely address: That proximate causation requires a "direct relationship" between the defendant's act and the plaintiff's injury. Pet. 31. Once again, this question is not posed here and amounts to little more than an invitation for this Court to reexamine the factual conclusions of the district court and court of appeals.

a. Before the D.C. Circuit, Sudan argued that the FSIA's "proximate causation" standard requires that

the defendant's actions "be a 'substantial factor' in the sequence of events that led to the plaintiff's injury," and that "plaintiff's injury must have been 'reasonably foreseeable or anticipated as a natural consequence.'" Pet. App. 76a–77a; *see* Sudan C.A. Br. 27–28, 42.

The D.C. Circuit agreed. Pet. App. 76a–77a. The court examined the evidence offered at trial and affirmed the district court's conclusions as to both prongs. The court dismissed "Sudan's claims of ignorance regarding al Qaeda's aims" as "def[ying] both reason and the record," and catalogued, as had the district court, the many ways in which Sudan supported al Qaeda, including intelligence support, financial subsidies, and security services. *Id.* at 77a–80a.

The D.C. Circuit then rejected Sudan's argument that the district court's factual findings failed to bridge a temporal gap between Sudan's expulsion of bin Laden in 1996 and the 1998 U.S. Embassy bombings. To the contrary, the factual findings showed that Sudan "continued to harbor al Qaeda terrorists until and after the bombings." Pet. App. 82a. And, in any event, "severing ties with al Qaeda would not preclude a finding that its material support remained a substantial factor in the embassy bombings." *Ibid*. The district court's conclusion that the evidence demonstrated that Sudan's support was a "substantial factor" in the chain of causation leading to the U.S. Embassy bombings "was far from clearly erroneous." Pet. App. 83a–84a. The D.C. Circuit also held that the facts demonstrated that the bombings were "reasonably foreseeable or anticipated as a natural consequence" of Sudan's material support, and that "Sudan cannot bury its head in the sand and contend otherwise." *Id*. at 85a–86a.

b. Additionally, Sudan briefly hinted in its opening brief below that the proximate-cause standard might also require "intent." Sudan C.A. Br. 28. The D.C. Circuit disagreed, holding that "proximate causation" in this context does not require "specific intent." Pet. App. 87a. Instead, the court agreed with the other courts of appeals to consider the question and concluded that the FSIA "require[s] neither specific intent nor direct traceability to establish the liability of material supporters of terrorism." *Id.* at 88a (citing *Boim* v. *Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 698 (7th Cir. 2008) (en banc)); *see also Rux* v. *Republic of Sudan*, 461 F.3d 461, 473 (4th Cir. 2006) (holding that 28 U.S.C. § 1605(a)(7) (2006) (repealed), the predecessor to Section 1605A, required a showing of proximate cause and rejecting "Sudan's call for a more stringent standard"). In concert with these other courts, the D.C. Circuit held that whether the evidence "show[ed] Sudan either specifically intended or directly advanced the 1998 embassy bombings is irrelevant to proximate cause and jurisdictional causation." Pet. App. 88a.

Instead of confronting the D.C. Circuit's actual holding, Sudan wrests the words "directly advanced" from this sentence, insisting that the court erred in its application of the proximate-cause standard. Sudan seems to ask this Court to review a question that was never raised and that the courts below never confronted: whether proximate causation requires a "direct" relationship. There is no reason for this Court to decide this issue in the first instance. This is "a court of review, not of first view." *BNSF Ry. Co.* v. *Tyrrell*, 137 S. Ct. 1549, 1559 (2017).

Sudan also fails in its attempt to gin up a split between the D.C. and the Ninth Circuits. The case Sudan highlights, *Fields* v. *Twitter, Inc.*, 881 F.3d 739 (9th Cir. 2018), involved a completely separate statute, the Anti-Terrorism Act ("ATA"), which establishes a cause of action for anyone injured "by reason of" an international terrorist act. 18 U.S.C. § 2333(a). The Ninth Circuit's conclusion that "a direct relationship, rather than foreseeability" was required to demonstrate causation under the ATA was specific to the "purposes of the ATA," the ATA's unique statutory "phrase 'by reason of,'" and the ATA's "statutory history." *Fields*, 881 F.3d at 748. The Ninth Circuit even acknowledged that "in other contexts," the "foreseeability analysis [has] more weight" in the proximate-cause inquiry. *Ibid.* Thus, the Ninth Circuit's definition of "proximate cause" was expressly limited to the ATA context, and therefore could not be in conflict with the D.C. Circuit's decision here.

Ultimately, Sudan never makes it clear which part of the D.C. Circuit's analysis it thinks was incorrect. *See*, *e.g.*, Pet. 31 (possibly arguing that the district court should not have applied proximate causation at all). The incoherence of this argument demonstrates that it, too, is a thinly disguised factual dispute. All Sudan is asking this Court to decide is whether "[t]he D.C. Circuit erred in concluding that the district court's factual findings were sufficient." *Ibid*. That question is not close to meriting this Court's scrutiny.

IV. THIS CASE DOES NOT PRESENT ANY FOREIGN RELATIONS CONCERNS.

The terrorism exception to the FSIA reflects Congress' judgment that when foreign states designated

by the State Department as state sponsors of terrorism commit or support acts of terrorism, they should bear civil liability for their actions. Section 1605A was passed by Congress and signed into law by the President as part of the United States' efforts to discourage terrorist attacks and punish the rogue nations that sponsor such acts.

While Sudan characterizes its liability as an impediment to improved relations, Pet. 13, Sudan is subject to suit only because the executive branch officials responsible for carrying out foreign relations have determined that Sudan is a state sponsor of terror. When the terrorism exception was enacted in 1996, *see* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221, 110 Stat. 1214, 1241–43 (codified at 28 U.S.C. § 1605(a)(7) (2006) (repealed)), Sudan was already listed as a state sponsor of terrorism, 58 Fed. Reg. 52,523 (Oct. 8, 1993), and both Congress and the President knew that passage of the FSIA would subject Sudan to liability for its actions.

Thus, far from hindering the United States' foreign affairs conduct, the FSIA and its exceptions are an important instrument of our national foreign policy. Congress and the President have worked together to tailor the FSIA's reach in light of its impact on foreign affairs. If the President determines that it is unjust to impose liability on Sudan for the prior actions of its regime, that outcome can be achieved through cooperation with Congress. Although the United States has reduced its sanctions against Sudan in recent years, neither Congress nor the President has sought to relieve Sudan from liability for its past transgressions or to remove Sudan from its list of state sponsors of terrorism. *See* Exec. Order

No. 13,761, 82 Fed. Reg. 5331 (Jan. 13, 2017) (waiving certain sanctions against Sudan pending review of its actions); Exec. Order No. 32,611, 82 Fed. Reg. 32,611 (July 11, 2017) (extending period for such review). Sudan cannot seek such relief from this Court.

Sudan also critiques the court of appeals for failing to seek the views of the United States, Pet. 15, but omits the fact that the United States has long been aware of this litigation and has twice expressly declined to participate after invitation by the district court—first in 2004, and then again in 2016, when it declined to weigh in on the jurisdictional issues that Sudan raised. *Owens* v. *Republic of Sudan*, No. 01-cv-2244, ECF No. 50 (D.D.C. Mar. 10, 2004) (notice of the United States declining participation in litigation); ECF No. 396 (D.D.C. Jan. 11, 2016) (notice of United States declining court's invitation to file a statement of interest).

Sudan's liability for acts of terror that it supported is not, as Sudan alleges, a threat to American foreign policy. Rather, it is the result of the deliberate decisions of the political branches over more than twenty years that liability for acts of terror advances the interests of justice and furthers the aims of American foreign policy. Sudan cannot erase the FSIA's terrorism exception.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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