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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF OF PETITIONERS

In applying a "lighter burden" for establishing facts necessary for jurisdiction, the D.C. Circuit defied this Court's decision in *Helmerich*; overrode the presumptive immunity enacted in the FSIA; permitted the affirmance of a jurisdictionally unsound multi-billion-dollar default judgment against a foreign state; and exposed the United States to friction in foreign relations and reciprocal treatment in foreign courts. The D.C. Circuit's application of an incorrect jurisdictional standard was a quintessential error of law that pervaded the court's analysis of the jurisdictional requirements of "material support" and causation.

In opposing a writ of certiorari, Respondents *admit* that the D.C. Circuit applied a "lighter burden" for establishing jurisdictional facts, but Respondents try to explain away the "lighter burden" as part of a supposedly "well-established" FSIA burden-shifting framework. Opp'n 8-10, 13, 19-21. That burden-shifting framework, however, conflicts with *Helmerich* and also conflicts with the burden-shifting framework applied in other circuits.

A writ of certiorari is necessary to clarify the proper legal standard for establishing subject-matter jurisdiction under the FSIA.

I. *Helmerich* Forecloses The D.C. Circuit's "Lighter Burden"

In *Helmerich*, this Court rejected the notion that FSIA jurisdiction could ever be established on the basis of an arguable or "non-frivolous" showing of the legal and factual grounds for jurisdiction; instead, a

plaintiff is required to "prove" and "show (and not just arguably show)" the actual existence of jurisdiction, and a court is required to resolve factual disputes and reach a decision finding that jurisdiction exists. *Helmerich*, 137 S. Ct. at 1316, 1318-19, 1324.

This Court reasoned that the FSIA requires such an approach, given the FSIA's baseline presumption of immunity from jurisdiction. *Id.* at 1320 (observing that FSIA "starts from a premise of immunity and then creates exceptions to the general principle") (citing H.R. Rep. No. 94-1487, at 17); 28 U.S.C. § 1604 ("a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided" by the FSIA's exceptions). *See also Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993) ("[A] foreign state is presumptively immune from the jurisdiction of United States courts; unless a specified [FSIA] exception applies, a federal court lacks subject-matter jurisdiction over a claim against a foreign state.").

Here, the D.C. Circuit's own words — expressly acknowledging it was applying a "lighter burden" as to "material support and causation for jurisdictional purposes" (App. 42a (citing *Chabad*, 528 F.3d at 940)) — demonstrate the conflict with *Helmerich*. But the D.C. Circuit, in its decision, also expressly acknowledged *Helmerich* and the overruling of *Chabad*'s "non-frivolous" standard. App. 42a. The D.C. Circuit even stated *Helmerich*'s core holding, accurately, as "requiring a plaintiff to prove the facts supporting the court's jurisdiction under the FSIA." App. 42a. Thus, the D.C. Circuit presented a seeming internal inconsistency, both contradicting and acknowledging *Helmerich*.

Respondents maintain, not unreasonably, that the D.C. Circuit's reference to a "lighter burden," with the accompanying citation to *Chabad*, must relate not to the "non-frivolous" standard discussed in *Chabad*, 528 F.3d at 940, but to an earlier discussion on that same page about a burden-shifting framework under which a plaintiff bears a burden of production and a foreign-state defendant bears the burden of persuasion. Opp'n 13, 19-20. If Respondents' reading of the D.C. Circuit decision is correct, it only *confirms* the conflict with *Helmerich*.

While Respondents suggest that the district court did in fact conclusively establish the jurisdictional facts as *Helmerich* requires (Opp'n 13, 18), that suggestion is false (even with respect to those plaintiffs asserting claims under D.C. law). Instead, the district court employed a burden-shifting framework that excused plaintiffs from establishing the jurisdictional facts, and the D.C. Circuit affirmed on that basis.

The district court, at the page cited by the D.C. Circuit (App. 43a (citing to 174 F. Supp. 3d at 276, which is found at App. 521a-523a)), expressly explained the burden it was imposing on plaintiffs to establish the jurisdictional elements of "material support" and causation. That burden was merely to satisfy a "burden of production," which the district court described as a modest requirement:

> The point is: the bar is relatively low. Yes, the existence of the burden of production means that the plaintiff must provide *some* evidence that could convince a factfinder of the

> jurisdictional fact in question. But because the ultimate burden of persuasion lies with the defendant, in cases where the defendant offers little or no evidence of its own, even a meager showing by the plaintiff will suffice.

App. 522a (emphasis in original). Thus, far from requiring the plaintiffs to satisfy or establish the exception to immunity, the district court set a "relatively low" bar, merely requiring the plaintiffs to present "*some*" evidence, even if it constituted a "meager showing." The district court's relaxed burden is reminiscent of the "non-frivolous" and "arguabl[e]" standard — an "exceptionally low bar" — condemned in *Helmerich*, 137 S. Ct. at 1318.

In describing "the burden of proof applicable to a FSIA case," the D.C. Circuit echoed the district court's view that a plaintiff bears only an "initial burden of production" while the foreign-state defendant bears "the ultimate burden of persuasion to show the exception does not apply" (and "by a preponderance of the evidence"). App. 55a (echoing district court decision (521a-522a)). The D.C. Circuit plainly understood the significance of this burden-shifting framework: "if a plaintiff satisfies his burden of production and the defendant fails to present any evidence in rebuttal, then jurisdiction attaches." App. 55a (echoing district court decision (522a)).

In this context, as Respondents recognize (Opp'n 9), the D.C. Circuit seems to clarify what it meant by a "lighter burden" for jurisdictional purposes:

> Although a court gains jurisdiction over a claim against a defaulting

> defendant when a plaintiff meets his burden of production, the plaintiff must still prove his case on the merits. This later step, however, does not affect the court's jurisdiction over the case, and a defaulting defendant normally forfeits its right to raise nonjurisdictional objections. *See Practical Concepts*, 811 F.2d at 1547. Thus, the only question before this court is whether the plaintiffs have met their rather modest burden of production to establish the court's jurisdiction.

App. 55a. Thus, the D.C. Circuit contemplates that a plaintiff bears the "lighter burden" of a burden of production — which is a "relatively low" bar that can be satisfied by a "meager" or "rather modest" showing of "*some*" evidence — even though the plaintiff bears a higher burden of proving its claim on the merits.

To circumvent a conflict with *Helmerich*, Respondents argue that *Helmerich*'s holding should be limited to cases under the FSIA's expropriation exception, but that argument is meritless. The reasoning of *Helmerich* applies equally to cases under any of the FSIA's exceptions, because the presumption of immunity applies equally to all such cases, a point clear from *Helmerich* itself and from the amicus briefs submitted by the Solicitor General and State Department. Brief for the United States as Amicus Curiae at 7-8, *Helmerich*, No. 15-423 (May 24, 2016); Brief for the United States as Amicus Curiae Supporting Petitioners at 9-11, *Helmerich*, No. 15-423 (Aug. 26, 2016). And the D.C. Circuit certainly understood *Helmerich* to apply to this case,

for it tried (unsuccessfully) to comply with it. Indeed, Respondents themselves acknowledged that *Helmerich* applies in this case, stating as much in their letter to the D.C. Circuit under Rule 28(j) of the Federal Rules of Appellate Procedure after *Helmerich* was decided. *See* Letter, *Owens v. Republic of Sudan*, No. 14-5105 (D.C. Cir. May 2, 2017), ECF No. 1673547.

Nor can Respondents distinguish *Helmerich* on the basis that the facts were stipulated there and are contested here. Opp'n 14, 21. In *Helmerich*, this Court stated repeatedly, and as an express part of its holding, that where jurisdictional facts are in dispute the court has to resolve those disputes. *Helmerich*, 137 S. Ct. at 1316-17, 1324.

Respondents also attempt to portray the burden-shifting framework employed by the lower courts here as "well-established" and, indeed, "adopted by every circuit to address the issue" (Opp'n 13, 20), but those statements are demonstrably false. The FSIA has long been understood to create presumptive immunity, *see, e.g.*, *Nelson*, 507 U.S. at 355, such that some "meager" showing by a plaintiff would be insufficient to overcome the presumption. Thus, the Second Circuit has held, both before and after *Helmerich*, that to overcome a foreign state's presumptive immunity a plaintiff must establish by "a preponderance of the evidence" that an exception applies. *See, e.g., MMA Consultants 1, Inc. v. Republic of Peru*, 719 F. App'x 47, 51 (2d Cir. 2017); *Swarna v. Al-Awadi*, 622 F.3d 123, 143 (2d Cir. 2010).

Other circuits are aligned with the Second Circuit's approach. *See, e.g., Glob. Tech., Inc. v.*

Yubei (Xinxiang) Power Steering Sys. Co., 807 F.3d 806, 811 (6th Cir. 2015) ("AVIC is therefore presumed to be immune from suit, and the burden of production shifts to the plaintiff to rebut this presumption by showing that an enumerated exception applies."); *Universal Trading & Inv. Co. v. Bureau for Representing Ukrainian Interests in Int'l & Foreign Courts*, 727 F.3d 10, 17 (1st Cir. 2013) ("[H]aving accepted that defendants fit within the definition of 'foreign sovereign,' the burden of production is on UTICo to offer evidence showing that, under one of the listed exceptions, immunity should not be granted to the Ukrainian defendants."). *But see GDG Acquisitions LLC v. Gov't of Belize*, 849 F.3d 1299, 1306 (11th Cir. 2017) ("If the plaintiff 'has asserted facts suggesting that an exception to foreign sovereign immunity exists, the party arguing for immunity . . . bears the burden of proving by a preponderance of the evidence that the exception does not apply.'").

Thus, the D.C. Circuit's "lighter burden" is not only in conflict with *Helmerich* but is part of a deep and mature split that exists among the circuits as to the appropriate standard for establishing FSIA jurisdiction, and specifically as to the showing a plaintiff must make to overcome a foreign state's presumptive immunity. This circuit split invites forum shopping, because under the FSIA the D.C. Circuit is always a venue available to a plaintiff (28 U.S.C. § 1391(f)(4)), and that circuit imposes an exceedingly relaxed burden on plaintiffs. A writ of certiorari is warranted to clarify that the D.C. Circuit's "lighter burden" for jurisdiction cannot survive *Helmerich*.

II. Only By Applying The Legally Incorrect "Lighter Burden" Could The Lower Courts Conclude That Plaintiffs Established "Material Support" And Causation

In addressing whether plaintiffs had satisfied their "lighter burden" of establishing jurisdiction, the district court elected not to attempt to resolve Sudan's challenge to the admissibility of all of the evidence presented. App. 521a ("The question is not whether every factual proposition in the Court's 2011 opinion can be substantiated by record evidence admissible under the Federal Rules of Evidence. Sudan may have plausible arguments that some cannot."). Instead, while asserting that "the record contains much else as well," the district court relied *solely* upon the opinions of plaintiffs' expert witnesses. App. 523a. And the district court emphasized that it was not relying upon any of the factual content in the experts' testimony, but solely upon their "ultimate conclusions." App. 529a. Indeed, the district court ridiculed Sudan for "spill[ing] a great deal of ink attacking as inadmissible hearsay particular statements the experts made in the course of explaining the bases for their opinions." App. 529a-530a (adding: "the admissibility of statements along the way is irrelevant if — as the Court concludes —the ultimate opinions themselves are sufficient"). The district court concluded: "In sum, the consistent and admissible opinions of these three experts were sufficient to satisfy the plaintiffs' burden of producing evidence that Sudan provided 'material support' that 'caused' the embassy bombings. . . . The Court therefore had subject-matter jurisdiction to decide the plaintiffs' claims." App. 531a-532a.

The D.C. Circuit agreed. App. 67a. In doing so, it too expressly relied upon the D.C. Circuit's forgiving standard: "In short, the plaintiffs have offered sufficient admissible evidence that establishes that Sudan's material support of al Qaeda proximately caused the 1998 embassy bombings. The district court, therefore, correctly held the plaintiffs met their burden of production under the FSIA terrorism exception." App. 88a.

Respondents emphasize that the district court and the D.C. Circuit, in their opinions, referred to other proffered evidence, beyond the "ultimate conclusions" of plaintiffs' experts. But those references are irrelevant, as such other evidence was not relied upon by the district court in its 2016 conclusion that plaintiffs had satisfied their burden of production. Furthermore, the only other evidence referred to by the district court in its 2016 decision — transcripts of testimony by al-Fadl and two others in proceedings in which Sudan was not a party — were found by the D.C. Circuit not to be admissible under Rule 804(b)(1) of the Federal Rules of Evidence. App. 75a n.5. And, when stating that "the district court did not rely solely upon expert testimony to establish jurisdiction and liability," the D.C. Circuit was plainly referring to the district court's initial 2011 decision, not the 2016 decision in which the district court explained its basis for finding that plaintiffs had satisfied their burden of production. App. 72a. When addressing the district court's 2016 decision, the D.C. Circuit agreed with the district court that the experts' "ultimate conclusions" were sufficient for plaintiffs to satisfy their "lighter burden" of establishing "the necessary jurisdictional facts." App. 67a.

That same "lighter burden" also allowed the D.C. Circuit to find jurisdictional causation even while acknowledging that "the evidence failed to show Sudan either specifically intended or directly advanced the 1998 embassy bombings." App. 88a. Such a departure from ordinary principles of proximate causation can only be explained by a standard satisfied by "some" evidence, even if "meager" or "modest." And Respondents' suggestion of a waiver by Sudan (Opp'n 26) is unfounded, as Sudan expressly argued the traditional elements of proximate cause, citing among other authorities the leading case of *Paroline v. United States*, 134 S. Ct. 1710 (2014), at the specific page identifying directness among the elements. Defendants-Appellants' Opening Brief at 27, *Owens*, No. 14-5105 (D.C. Cir. Aug. 19, 2016), ECF No. 1631291 (citing 134 S. Ct. at 1719). Sudan even block-quoted from *Rothstein v. UBS AG* part of a discussion on the directness requirement of proximate cause. *See* 708 F.3d 82, 91-92 (2d Cir. 2013) (quoting as part of that discussion *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 461 (2006) ("with respect to 'proximate causation, the central question . . . is whether the alleged violation led directly to the plaintiff's injuries'")).

While Respondents attempt to portray Sudan's petition as seeking this Court's review of "factual determinations" (Opp'n 12), that is not the case. Sudan seeks review of the legal standard that the D.C. Circuit applied in assessing jurisdiction. And, in doing so, Sudan maintains that the D.C. Circuit's legally erroneous standard led the court to accept a meager showing as establishing the jurisdictional facts of "material support" and causation.

III. The D.C. Circuit's "Lighter Burden" Harms Foreign Relations

The D.C. Circuit's jurisdictional standard makes it exceedingly easy for a plaintiff to overcome a foreign state's presumptive immunity. All a plaintiff must do is to present "*some*" evidence that an exception to immunity applies, even if that evidence constitutes a "meager" or "modest" showing. Such a low burden makes the presumptive immunity an empty promise.

The D.C. Circuit's standard applies whether or not a foreign sovereign appears in court, as *Chabad* and this case show. Where a foreign sovereign does appear, the plaintiff's low burden means that the burden of persuasion shifts easily to the foreign sovereign; imposing a burden upon a foreign sovereign so readily is itself a form of asserting jurisdiction over the sovereign and carries a substantial risk of offense. Where a foreign sovereign does not appear, the low burden means that the court is asserting jurisdiction essentially regardless of the legitimacy of doing so, because even in most meritless cases a plaintiff will be able to muster "*some*" evidence. And once jurisdiction is found, relief from it cannot be ensured, even if the jurisdiction is unfounded; as this case shows, doctrines of waiver can combine with limited appellate review to insulate a jurisdictional finding from meaningful review.

Foreign sovereigns reasonably may find offensive the notion that they can be so readily subjected to the burdens and exposures of litigation in the U.S. courts. They may understandably consider principles of comity as well as customary international-law

standards to require greater protection of their immunities.

As this Court has recognized repeatedly, including in *Helmerich*, the United States is constantly subjected to litigation in foreign courts around the world. *Helmerich*, 137 S. Ct. at 1322. Weak respect for the immunity of foreign sovereigns in the U.S. courts should be expected to be reciprocated by foreign plaintiffs and foreign courts in cases against the United States. *Id.*

In asserting that "[t]his case does not present any foreign relations concerns" (Opp'n 29), Respondents ignore that foreign-relations concerns arise whenever a court of one sovereign asserts jurisdiction over another sovereign, even when the court applies conventional legal rules rather than a "lighter burden." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493 (1983) ("Actions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States."). Respondents also ignore the case-specific foreign relations concerns that are implicated when U.S. courts, applying a "lighter burden" in a default proceeding, find a foreign sovereign to be subject to jurisdiction and liable for billions of dollars in damages for providing "material support" that supposedly caused deadly terrorist attacks upon U.S. embassies abroad.

Given the stakes, the D.C. Circuit cannot be excused from its failure to invite the views of the United States. That the United States declined to express its views "at this time" in the district court (Opp'n 31 (citing U.S. filings)) in no way suggested

that the United States would have declined to express its views on appeal.

Respectfully submitted,

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