No. 21-_____

In The
Supreme Court of the United States

BILAL ABDUL KAREEM,

Petitioner,

v.

WILLIAM J. BURNS,
Director, Central Intelligence Agency, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

WHETHER THE D.C. CIRCUIT'S DECISION TO DISMISS THE CASE BASED ON DISPUTED FACTS NOTICED SUA SPONTE AND WITHOUT DUE PROCESS WAS IMPROPER.

WHETHER THE LACK OF GUIDANCE FROM THIS COURT HAS RESULTED IN CONFUSION ABOUT APPROPRIATE SCOPE OF JUDICIAL NOTICE AS TO THE TRUTH OF FACTS CONTAINED IN ONLINE MEDIA PUBLISHED BY THE GOVERNMENT.

PARTIES

The Petitioner (Plaintiff-Appellant below) is Bilal Abdul Kareem, a United States citizen and journalist.

The Respondents (Defendants-Appellees below) are William J. Burns, the Director of the Central Intelligence Agency; Llyod J. Austin III, the Secretary of Defense; Alejandro Mayorkas, the Secretary of the Department of Homeland Security; Merrick Garland, the Attorney General of the United States; Avril Haines, the Director of National Intelligence; Jake Sullivan, the National Security Adviser; the Departments of Defense, Justice, Homeland Security; and the Central Intelligence Agency and the United States of America.

RELATED PROCEEDINGS

Zaidan v. *Trump*, No. 17-cv-581, U.S. District Court for the District of Columbia. Judgment entered on June 13, 2018.

Kareem v. Haspel, No. 17-cv-581, U.S. District Court for the District of Columbia. Judgment entered on September 24, 2019.

Kareem v. Haspel, No. 19-5328, United States Court of Appeals for the D.C. Circuit. Judgment entered on January 15, 2021.

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The Petitioner, Bilal Abdul Kareem, prays that a writ of certiorari be issued to review the judgment of the Circuit Court for the District of Columbia.

OPINIONS BELOW

The judgment of the Circuit Court for the District of Columbia, denying Kareem's appeal and remanding the case to the District Court for the District of

Columbia with instructions to dismiss the case on the ground that Kareem lacks Article III standing was entered January 15, 2021 and is attached at Appendix ("App.") 22. The accompanying memorandum opinion is attached at App.1. The denial of Petitioner's petitions for rehearing and rehearing *en banc*, are attached at App.83 and App.85, respectively.

JURISDICTION

The judgment of the Circuit Court for the District of Columbia was entered on January 15, 2021. A timely application for rehearing *en banc* was denied on April 20, 2021. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional and statutory provisions.

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

App.87.

Federal Rule of Evidence 201 states:

Rule 201. Judicial Notice of Adjudicative Facts

(a) Scope. This rule governs judicial notice of an adjudicative fact only, not a legislative fact.

(b) Kinds of Facts That May Be Judicially Noticed. The court may judicially notice a fact that is not subject to reasonable dispute because it:

> (1) is generally known within the trial court's territorial jurisdiction; or
>
> (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

(c) Taking Notice. The court:

> (1) may take judicial notice on its own; or
>
> (2) must take judicial notice if a party requests it and the court is supplied with the necessary information.

(d) Timing. The court may take judicial notice at any stage of the proceeding.

(e) Opportunity to Be Heard. On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.

(f) Instructing the Jury. In a civil case, the court must instruct the jury to accept the

> noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive.

App.94-95.

Federal Rule of Civil Procedure Rule 8 states, in relevant part:

> (a) Claim for Relief. A pleading that states a claim for relief must contain:
>
> (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;
>
> (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and
>
> (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

App.91-94.

STATEMENT OF THE CASE

Petitioner is a U.S. citizen and journalist living and working in Syria. In the course of his reporting, while using signal-emitting devices—including cell phones, satellite phones, and handheld transceivers—he has interviewed multiple parties to the conflict, including anti-Assad rebels. Appellant's Brief at 7-8. In June 2016, he narrowly missed being killed by four

targeted airstrikes on his office, vehicles, and person, at least one of which was from a drone-launched Hellfire missile, a weapon commonly used by the U.S. military. App.3-5, 16. In August 2016, he survived a fifth strike. App.4. Two of these strikes occurred in the Idlib governate in northwestern Syria, and two were carried out on the outskirts of the Aleppo governate. One was carried out on the outskirts of Aleppo city. App.3-4.

In March 2017, Petitioner filed an action in the district court under the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (App.87-90), alleging he had been designated for lethal action by the U.S. government in an unconstitutional, unlawful, and arbitrary and capricious manner. Complaint, *Zaidan v. Trump*, 17-cv-00581, ECF. No. 1 (Mar. 20, 2017) (D.D.C.). He referenced not only the multiple, specific strikes and their remarkable precision, but public disclosures about the U.S. government's use of signal intelligence from cell phones and other devices to identify suspected terrorists—sometimes without verifying their identities—to target individuals for lethal action.

The district court carefully canvassed the allegations and expressly found that Mr. Kareem had alleged facts creating a plausible inference that he had been targeted for extrajudicial killing by the United States and therefore had standing:

> Mr. Kareem alleges that he is on the Kill List because he was the victim of five near-miss attacks within a three-month period in 2016. Two of the attacks involved his place of work, one involved his own vehicle, one involved a

> work vehicle in which he had been traveling immediately before, and one hit a location from which he had just walked away.
>
> . . . Accepting all well-pled allegations as true, Mr. Kareem has plausibly alleged that he was in 2016 a target on the Kill List with evidence that makes it "more than a sheer possibility."

App.39-40. The court rejected the government's contention that the mere possibility that another state actor could have been responsible for the strikes did not "make it implausible that the attacks were a result of U.S. action." App.40. The court then held that Kareem's invocation of the Fifth Amendment was his "birthright" and his constitutional claims could proceed.

Thereafter, the government invoked the state secrets privilege, claiming that who was on the Kill List was a state secret, and even disclosing who was *not* on the Kill List would be a state secret, even with respect to U.S. citizen journalists. The court found the privilege to apply and dismissed the action. App.82.

Petitioner appealed the dismissal and argued that the state secrets privilege could not foreclose his right to due process under the Fifth Amendment before his government could kill him. In response, the government argued that the state secrets privilege was absolute and also that Kareem lacked standing, resurrecting its assertion that Kareem's claim was implausible and falls "short of the line between possibility and plausibility." Br. for Appellees at 10. The

government also cited two reports that were not part of the evidentiary record below:

- Carla A. Humud et al., Cong. Rsch. Serv., RL33487, Armed Conflict in Syria: Overview and U.S. Response (2017) ("CRS Report"); and
- U.S. Dep't of State, Syria 2016 Human Rights Report (2017) ("State Department Report").

The government referred to the CRS Report "generally" for the broad proposition that multiple organizations and militaries were involved in the Syrian conflict. Br. for Appellees at 18. It did not move for judicial notice. Petitioner's Reply objected to the introduction of purported facts outside the record in an appellate brief. Appellant's Reply at 11-12.

During oral argument, two of the panel judges made general assertions about the civil war in Syria. One judge stated "I frankly think we could take judicial notice that in 2016, strikes were being conducted all over Syria, and certainly including where Mr. Kareem was." App.100. Counsel disputed that contention, pointing out that in respect of June 2016 "there are no other facts on the record that suggest that there were a flurry of drone strikes occurring that month." App.101. Another judge suggested that "Aleppo and Idlib . . . were subject to routine and severe bombings" in the summer of 2016. App.101-102. When counsel responded that the court had "no basis to confirm that fact," the judge stated "I remember the news." App.102.

In the court's opinion, it took notice—sua sponte—of "facts regarding the Syrian conflict that Kareem's complaint does not dispute because they are generally known and can be readily determined from reliable sources, such as the Congressional Research Service and State Department reports." App.14. It did not identify any report by a URL, but rather cited two different versions of a Congressional Research Service report, neither of which was cited by the government: "Cong. Rsch. Serv., RL33487, Armed Conflict in Syria: Overview and U.S. Response (June 20, 2017)," and "Cong. Rsch. Serv., RL33487, Armed Conflict in Syria: Overview and US. Response (Sept. 28, 2016)." App.14, 15. It also cited the "U.S. Dep't of State, Syria 2016 Human Rights Report 2 (2017)." App.20.

Kareem did not have an opportunity to dispute the sources because notice was taken sua sponte. Nor did he know what inferences the court intended to draw from them. The assertions made by the court in reliance on those reports are vigorously disputed and demonstrably unwarranted:

- The Panel's opinion relied on a single statement in the CRS Report that "in *September* 2016, 'Syrian and Russian forces began an intense aerial bombardment of opposition-held areas of eastern Aleppo.'" App.15. (emphasis added). The Panel relied on this quotation to reject as implausible Kareem's allegation that he was targeted by the United States in *June* and *August* 2016, *before* the

beginning of the bombardment according to the very report cited. App.15-16.

- The court relied on the very same quotation for the proposition that other forces were using "powerful missiles" to undermine Kareem's specific allegation that it was a Hellfire missile which attacked him "in an area called Khantounam, near an area called Talkheis" Corrected Pet. for Reh'g and Reh'g *En Banc* at 12; App.17. This is well *southwest* of Aleppo, nowhere near the "opposition-held areas of eastern Aleppo" referenced in the report. App.18.

- The opinion also relies on a statement that Russia, at some unspecified time, used "bunker-buster bombs and incendiary munitions against civilians in Aleppo." App.18. The court further quoted that a bunker-buster bomb "[is] designed to penetrate hardened targets or targets buried deep underground." Nothing in the complaint lends any credence to the court's supposition that it was not a Hellfire missile, but a bunker buster bomb, an entirely different weapon. The strike on Kareem did *not* take place in Aleppo City (nor did any of the other four strikes) and it occurred while Kareem and his film crew were parked under a tree. There is no reference to a building, much less a bunker or underground stronghold. Thus, any link between the type and place of the attacks alleged and the inference

drawn by the court from the facts cited is without basis.

- The court also speculated that Syrian forces may have been responsible for the strikes. It said "[i]n its Syria 2016 Human Rights Report, the United States Department of State noted that the Syrian government has used 'indiscriminate and deadly force against civilians,' including through 'air and ground-based military assaults.'" App.20. But Kareem alleges five targeted attacks on his person while reporting, at his office, and with his crew in vehicles; there was nothing "indiscriminate" about them.

- The court also quoted a statement in the State Department Report, which represented that the United Nations "has reported that the Syrian government 'routinely targeted and killed both local and foreign journalists.'" App.20. The court noted that the State Department Report separately cited a report by Reporters Without Borders; that report apparently estimated 56 journalists were killed in Syria from 2011–2016. How this was determined is not known, but none of the noticed facts suggest that there was a Syrian practice of targeting journalists with precision airstrikes, let alone by a drone-launched missile.

Had the "facts" judicially noticed been subjected to meaningful evaluation, Kareem would have shown

that they were neither reliable nor relevant to the claims and that the limited research done by the court on its own initiative did not link Russians or Syrians or anyone else to the specific time, place, or manner of the attacks alleged. While there was war in Syria, it is a large country with defined operations in specific places at specific times by specific actors. Nevertheless, relying on these "facts" as true, and drawing erroneous inferences from them, the D.C. Circuit concluded that no plausible conclusion of United States involvement in these five attacks could be drawn and ordered the dismissal of Petitioner's complaint for lack of standing. Petitioner was not given an opportunity to be heard on the propriety of noticing those facts or the related inferences in violation of Federal Rule of Evidence 201(e).

Seeking redress for this error, Kareem filed a Petition for Rehearing or Rehearing *En Banc* on March 1, 2021, complaining that the court had gone far beyond the limits imposed by Rule 201 and that he was denied the right to a hearing on the facts noticed during which he could have put forth his own evidence; the Panel and Circuit Court issued denials on April 20, 2021. App.83-85.

This Court's March 19, 2020 Order No. 589 extended the deadline to file a petition for a writ of certiorari to 150 days from the denial of a petition for rehearing.

REASONS FOR GRANTING THE WRIT

The D.C. Circuit employed a wholly improper use of judicial notice to reverse the district court's finding that Kareem had satisfied the pleading requirements for standing. Based on a recall of "the news" and "reality" during oral argument, the Court pulled blanket, inapposite assertions from reports authored by the government. From these limited sources—which are silent on the undisputed fact that the United States conducted airstrikes in Idlib and elsewhere in Syria in June and August 2016—the court made improper factual assumptions to undermine Kareem's allegations. And it did so without giving Kareem an opportunity for adversarial testing of those facts. This is a right to which he is entitled by the Federal Rules of Evidence. The invocation and application of judicial notice in this case—noticing irrelevant facts, making facially erroneous inferences, and denying Kareem the right to challenge the evidence as guaranteed by Rule 201(e)—is an egregious departure from the accepted and usual course of judicial proceedings, one that has life or death implications, and warrants intervention by this Court. U.S. Sup. Ct. R. 10.

The need for corrective action is acute both because this Court has not given such guidance in the 46 years since Rule 201 was adopted and because the lower courts have become increasingly confused and inconsistent in the application of the rule. Technological advances mean information, often of indeterminate reliability, is now available at the stroke of a computer keyboard. In response, courts have increasingly begun

employing judicial notice in a standardless manner beyond its stated limited purpose of allowing consideration of certain well-known and indisputable facts. Without clear standards, judges may import disputed facts and inferences misdrawn from those facts to undermine the plausibility of well-pleaded claims, exactly as happened below. This is a serious issue that goes to what Federal Rule of Civil Procedure Rule 8 requires and whether judges may take it upon themselves to litigate the merits of factual allegations, alone in their chambers.

Petitioner respectfully submits that, as is evident in this case, judicial notice has become a form of prevalent and troubling judicial activism aimed at achieving a particular result. The district court below recognized that particularly where the Government is the secretive guardian of much of the operative proof, Kareem was not required to plead "the *most* plausible set of facts, but merely *a* plausible set of facts." *Zaidan v. Trump*, 317 F. Supp. 3d 8, 20 (D.D.C. 2018). The Circuit Court altered the factual landscape, while denying the due process guarantees of Rule 201.

Petitioner requests the Court to give clear guidance with respect to the appropriate subjects, use, and limits of judicial notice, and to affirm the right of litigants to be heard on facts noticed sua sponte after the case has been submitted.

A. The lower courts are in conflict on approaches to Rule 201, and this case, which implicates due process and applies the doctrine in a case dispositive way, provides the ideal vehicle for this Court to reconcile these differences.

The doctrine of judicial notice is intended to be applied in a simple and straightforward matter. The legislative history of Rule 201 shows that judicial notice should be used as an exception, not the rule:

> The usual method of establishing adjudicative facts is through the introduction of evidence, ordinarily consisting of the testimony of witnesses. If particular facts are outside of reasonable controversy, this process is dispensed with as unnecessary. A high degree of indisputability is the essential prerequisite.

Notes of Advisory Committee on Proposed Rules, Rule 201. However, as time has elapsed, some courts have overstepped, and used judicial notice as an all-purpose short-cut to bypass litigation of facts that were highly complex and contentious and at times case dispositive.

The D.C. Circuit asserted little relevant authority for taking judicial notice below. It first stated a broad and standardless right to consider extra-record materials: "It is well-settled that we may consider materials outside the pleadings to determine our jurisdiction." App.14. n.2, citing *Haase v. Sessions*, 835 F.2d 902, 908 (D.C. Cir. 1987) (court may "undertake an independent investigation to assure itself of its own subject matter jurisdiction" in considering standing under

Rule 12(b)(1)). As to the sources noticed, the only legal authority cited was a case that states that courts may take judicial notice of documents upon which complaints rely on a motion to dismiss. The complaint in that case happened to rely upon a GAO Report. *See Williams v. Lew*, 819 F.3d 466, 473 (D.C. Cir. 2016). The court also cited *Youkhana v. Gonzales*, 460 F.3d 927, 932 (7th Cir. 2006), in which an appellate court noticed a State Department country report consistent with the rules of evidence particular to Board of Immigration Appeals.

The decision below is at odds with how judicial notice operates in the view of this Court and the other Courts of Appeals, and although there is variance among them on when a document may be noticed for the truth of the matters asserted therein, there can be no question that the D.C. Circuit's use of judicial notice violated Rule 201. A court has an obligation to satisfy itself with respect to its jurisdiction, but to the extent that it requires more facts of record to assure itself of that jurisdiction, it does not have a blank check to notice information like the specific actions of various combatants at specific times in a war zone, sua sponte, and without affording the party against whom the evidence shall be used a chance to challenge the notice. Indeed, the fact that the D.C. Circuit noticed information in an incomplete and broad-brush manner and drew unwarranted inferences, highlights the need for guidance from this Court about the limits of judicial notice where the facts are anything but indisputable. If the facts it needs do not fall within the ambit of Rule

201, the district court must address those facts through the adversary process. Here, and all too often in other cases, that does not happen as cases are disposed of with a bureaucratic process for which it was never intended.

Some of the Courts of Appeals have addressed the dangers of judicial notice and have issued powerful decisions confirming that it may not be used as a substitute for adversarial litigation. In *Victaulic Co. v. Tieman*, the Third Circuit stated:

> Taking a bare 'fact' that is reflected not in the pleadings, but on a corporate website, and then drawing inferences *against* the non-moving party so as to dismiss its well-pleaded claims on the basis of an affirmative defense, takes us, as a matter of process, far too far afield from the adversarial context of litigation.

499 F.3d 227, 237 (3d Cir. 2007). In *Khoja v. Orexigen Therapeutics, Inc.*, the Ninth Circuit instructed lower courts that there are limits on using notice as a tool at the pleading stage.

> The overuse and improper application of judicial notice and the incorporation-by-reference doctrine, however, can lead to unintended and harmful results. Defendants face an alluring temptation to pile on numerous documents to their motions to dismiss to undermine the complaint, and hopefully dismiss the case at an early stage. Yet the unscrupulous use of extrinsic documents to resolve competing

> theories against the complaint risks premature dismissals of plausible claims that may turn out to be valid after discovery. . . . Such undermining of the usual pleading burdens is not the purpose of judicial notice or the incorporation-by-reference doctrine.

899 F.3d 988, 998-99 (9th Cir. 2018). For judicial notice to be proper, the fact must be accurate and the court must be clear about which fact it is taking notice of; "[j]ust because the document itself is susceptible to judicial notice does not mean that every assertion of fact within that document is judicially noticeable for its truth." *Id.* at 999.

Courts of Appeals are generally concerned with whether a fact is subject to reasonable dispute or not, erring on the side of not taking notice and having an evidentiary hearing instead. As should be obvious, where the parties actually dispute the facts to be noticed and have a non-frivolous basis for doing so, the facts *cannot* be noticed. Below, the parties disputed the liability of the United States for the drone strikes on Kareem, and the court noticed "facts" to suggest that there could have been other culpable actors. This is deciding a question of law, not fact, and is wholly inappropriate. In *Doe v. Mckesson*, 945 F.3d 818, 833 (5th Cir. 2019), *cert. granted, judgment vacated*, 141 S. Ct. 48 (2020), the court found that "the district court was incorrect to take judicial notice of a mixed question of fact and law when it concluded that Black Lives Matter is a 's*ocial movement*, rather than an organization or entity of any sort.'" That "fact" was disputed by the

parties and would have been dispositive on a question of law, and thus it precluded judicial notice.

The Second Circuit concurs on the limits of Rule 201 with respect to disputed facts. Where, as below, secondary sources are subject to dispute, "it is error to accept the data (however authentic) as evidence . . . at least without affording an opposing party the opportunity to present information which might challenge the fact or the propriety of noticing it." *Oneida Indian Nation of New York v. State of N.Y.*, 691 F.2d 1070, 1086 (2d Cir. 1982). This is especially true on considering a motion to dismiss:

> Judicial notice of a disputed fact should not ordinarily be taken as the basis for dismissal of a complaint on its face. [ ] The better course is to conduct an evidentiary hearing at which the plaintiff may have its "day in court," and, through time-honored methods, test the accuracy of defendants' submissions and introduce evidence of its own.

Id. And whenever notice is taken, courts should be careful to distinguish between a fact and a proposition. In *United States v. Mitchell*, 365 F.3d 215, 252 n.30 (3d Cir. 2004), the Third Circuit illustrated the difference: "Rule 201(b)'s use of 'fact' can be made clearer by the use of more polarized examples: Matters like 'February 7, 1977 was a Monday' (a fact) are suitable for judicial notice, while propositions like 'daily exercise reduces the likelihood of heart disease' (a scientific conclusion) are not."

At bottom, other Courts of Appeals have decided that judicial notice is the exception, not the rule, and if notice is to be taken, it should be taken conservatively in cases where the assertion noticed is truly beyond dispute and relevant to the case at hand. In this case, the D.C. Circuit's assumption that Russia, Syria or some force other than the United States could have been responsible for the attacks on him in Syria is an unsubstantiated proposition drawn from reports that, quite simply, do not support that claim and certainly do not undermine the plausibility of Kareem's claims. This use of judicial notice goes well beyond any reasonable example of properly noticed facts that are not subject to reasonable dispute. This Court should reverse to correct the D.C. Circuit's dramatic departure from the accepted and usual course of taking judicial notice of facts. This Court should also clarify that Federal Rule 201 is a limited time-saver, not a broad rule for deciding cases.

B. This case presents the opportunity to resolve a broad conflict in the lower courts concerning the limits of judicial notice taken of government reports, particularly in cases where the government is a party.

This case brings to the fore a critical issue of when the government's own publications should be treated as true. In this case, the government is the defendant, and the court relies on reports essentially generated by the government, which omit reference to the conduct giving rise to the government's own liability while

relying on third party sources for the actions of other forces. Nowhere do the reports address the United States' extensive use of weaponized drones—an undisputed issue central to Kareem's complaint. The D.C. Circuit's reliance of these reports contravenes what should be an obvious principle of due process: that a party should not be the source or creator of the information to be noticed. *Scanlan v. Texas A&M Univ.*, 343 F.3d 533, 537 (5th Cir. 2003); *Stewart v. Stoller*, No. 2:07-CV-552-DB-EJF, 2014 WL 1248072, at *2 (D. Utah Mar. 25, 2014).

While this is an intuitive principle, it has not been applied consistently in the lower courts. Some courts have been hesitant to take notice of documents that are simply what one party says about itself and generally decline to notice information or documents appearing on websites that are created and maintained by a party to the litigation. *See Gerritsen v. Warner Bros. Ent. Inc.*, 112 F. Supp. 3d 1011, 1030 (C.D. Cal. 2015); *Koenig v. USA Hockey Inc.*, No. 2:09-CV-1097, 2010 WL 4783042 *2 (S.D. Ohio June 14, 2010) (refusing to take notice of document from the Wikipedia page of one of the litigants). Other courts have found it an abuse of discretion *not* to take notice of information generated by a party where the party did not dispute the reliability of that information, which would be based in equitable notions of estoppel. In *O'Toole v. Northrop Grumman Corp.*, 499 F.3d 1218, 1225 (10th Cir. 2007), for example, the Court of Appeals ruled that Northrop's quarterly reports posted online should have

been noticed because it "fail[ed] to dispute its own information."

While government records are presumed to be reliable, courts are split on whether they should notice the factual assertions contained within them for their truth. Generally, courts draw a distinction between "judicial notice of a simple bookkeeping entry in a generally available government record or of the mere existence of a formal government report," which is permissible, and reports containing "a wide range of factual statements, some of which undoubtedly are reasonably contestable and all of which ordinarily would be subject to more rigorous evidentiary requirements and verification" and therefore do not qualify for admission to the record through judicial notice. *Murakami v. United States*, 46 Fed. Cl. 731, 739 (2000). Thus, the Eleventh Circuit has held that government reports may be appropriately noticed as evidence of *knowledge* of an averred fact. In *Hope v. Pelzer*, the Eleventh Circuit took notice of a DOJ report on the danger of cuffing prisoners to hitching posts to show that the Department of Corrections was aware of this danger. 240 F.3d 975, 979 (11th Cir. 2001), *rev'd*, 536 U.S. 730 (2002). In *K.T. v. Royal Caribbean Cruises, Ltd.*, 931 F.3d 1041, 1047-48 (11th Cir. 2019), the Eleventh Circuit permitted judicial notice of publicly available, government-produced Cruise Line Incident Reports to show that that Royal Caribbean knew or should have known about the danger of sexual assault aboard its cruise ships. This exercise of judicial notice again went

to knowledge of risk, not the truth relating to underlying facts.

Some courts have found that statistics produced by a government department based on a database can be reliable and noticed for their truth, but news articles and websites repeating those statistics cannot be. *Christa McAuliffe Intermediate Sch. PTO, Inc. v. de Blasio*, 364 F. Supp. 3d 253, 262 (S.D.N.Y.), *aff'd*, 788 F. App'x 85 (2d Cir. 2019) (noticing DOE statistics derived from a DOE-run program; declining notice of contents of news articles and websites). There does not appear to be disagreement that basic facts, like the purpose of a government agency, can and should be noticed; the Seventh Circuit has held that it is an abuse of discretion not to judicially notice that information when requested. *Denius v. Dunlap*, 330 F.3d 919, 926 (7th Cir. 2003). In other instances, government reports have been easy sources of statistics with respect to their own operations and courts have accepted them with little or no analysis. *Williams v. Swack*, No. 12-CV-1552, 2013 WL 5423791, at *6 (E.D.N.Y. Sept. 26, 2013) (taking judicial notice of "New York Department of Corrections and Community Supervision Inmate Population Information"). In other instances, uncontroversial statistics have been established by government reports. *Placide-Eugene v. Visiting Nurse Serv. of New York*, No. 12-CV-2785, 2013 WL 2383310, at *12 (E.D.N.Y. May 30, 2013) (noting that "the [c]ourt can take judicial notice of government statistics" and noticing that the "CIA World Factbook" for the racial composition of Haiti).

But courts do not, as a general matter, notice facts well outside their territorial jurisdiction. Where taking notice of information outside a court's jurisdiction is allowed, it is done pursuant to a statutory exception. The D.C. Circuit cited the asylum case, *Youkhana v. Gonzales*, 460 F.3d 927, 932 (7th Cir. 2006), for the proposition that it may notice a State Department country report, but that case is inapposite. App.14. Individuals seeking asylum may move to reopen their petition based on "changed country conditions" in the country of feared persecution and the Board of Immigration Appeals' rules of evidence expressly permit it to take administrative notice of "the contents of official documents" that are not reasonably subject to dispute. 8 C.F.R. § 208.13; 8 C.F.R. § 1003.1. While Courts of Appeals have found they may take judicial notice of the same type of information—post-briefing—for the purpose of deciding to remand to the Board, others have held that review is limited to the administrative record. *E.g.*, *Hussain v. Whitaker*, 742 F. App'x 339 (9th Cir. 2018); *Patel v. United States Att'y Gen.*, 971 F.3d 1258, 1275 (11th Cir. 2020), *cert. granted sub nom. Patel v. Garland*, No. 20-979, 2021 WL 2637834 (U.S. June 28, 2021). Either way, notice in this context is not governed by Rule 201 and courts have no real guidance as to what the limits may be on noticing the contents of government reports except not to do so if the facts are disputed.

When it comes to ordinary civil cases, government records have a presumption of reliability, but that is a rebuttable presumption. Public records, "like any other

documents, may contain erroneous information" and thus are subject to reasonable dispute. *Tobey v. Chibucos*, 890 F.3d 634, 648 (7th Cir. 2018). Government documents may be reliable as accurate records of an agency's own actions. *See S.E.C. v. Goldstone*, 952 F. Supp. 2d 1060, 1221 (D.N.M. 2013) (noticing the standards of the Financial Accounting Standards Board). But on issues not within their exclusive purview, factual assertions and inferences drawn from them are not appropriate subjects of judicial notice. For instance, in *Carley v. Wheeled Coach*, 991 F.2d 1117, 1126 (3d Cir. 1993), the court refused to notice a government report on rollover problems in vehicles with a high center of gravity: "The government may perform various tests on vehicles, but the quantity and nature of those tests are not matters of common knowledge, nor are they readily provable through a source whose accuracy cannot reasonably be questioned." For similar reasons, reports reflecting analysis, like that of an Inspector General, are not proper subject of notice because the court "knows nothing about the investigative process which led to the report's conclusions, and it cannot access the report's validity." *Cty. of San Miguel v. Kempthorne*, 587 F. Supp. 2d 64, 78 (D.D.C. 2008); *Cactus Corner, LLC v. U.S. Dep't of Agric.*, 346 F. Supp. 2d 1075, 1100 (E.D. Cal. 2004), aff'd, 450 F.3d 428 (9th Cir. 2006) (taking notice of the fact of existence of a Department of Agriculture report but denying notice as to the "accuracy and validity of the contents").

The Congressional Research Service and the State Department reports noticed below are not ordinary government records. They are not based on data collected by the government. They rely heavily on certain selective media reports, including hearsay allegations made by others. For example, the D.C. Circuit found in this case that "according to the State Department, Reporters Without Borders has estimated that 56 journalists were killed in Syria between 2011 and September 2016, including seven during 2016." App.20. The panel was wildly out of step with other Courts of Appeals in admitting as true the hearsay contained in the reports. Other Courts of Appeals have reliably held that it is proper only "to take judicial notice of the fact that press coverage, prior lawsuits, or regulatory filings contained certain information, without regard to the truth of their contents." *Staehr v. Hartford Fin. Servs. Grp., Inc.*, 547 F.3d 406, 425 (2d Cir. 2008).

There is good reason for the limitation which the D.C. Circuit failed to follow here: the contents of news articles are hearsay and are not properly considered as indisputable facts. *Perkins v. Milwaukee Cty.*, 781 F. App'x 538, 542-43 (7th Cir. 2019) ("Media reports offered for the truth of the matter asserted—that Perkins engaged in protected speech—are inadmissible hearsay."); *United States v. Isaacs*, 359 F. App'x 875, 877 (9th Cir. 2009) (same). "When courts have taken judicial notice of contents of news articles, they have done so for proof that something is publicly known, not for the truth of the article's other assertions." *The Est.*

of Lockett by & through Lockett v. Fallin, 841 F.3d 1098, 1111 (10th Cir. 2016) (declining to take judicial notice of news articles reflecting alternate methods of inserting an IV); *Platt v. Bd. of Commissioners on Grievances & Discipline of Ohio Supreme Ct.*, 894 F.3d 235, 245 (6th Cir. 2018) (declining to take notice of news articles for disposition of a complaint against an Ohio Supreme Court Justice); *United States v. Hedaithy*, 392 F.3d 580, 607 n.24 (3d Cir. 2004) (refusing to take judicial notice of newspaper articles though sources included Washington Post, Far Eastern Economic Review, Denver Post, ESPN The Magazine, Yale Herald, and Newsday).

C. Parties have the absolute right to contest judicial notice and the D.C. Circuit manifestly ignored this right when it used judicial notice to dismiss a case that has life or death consequences.

Rule 201 entitles parties to an opportunity to be heard and to introduce their own evidence when judicial notice is to be taken. The D.C. Circuit applied judicial notice in the appellate decision on its own initiative and without giving the parties an opportunity to object or counter the evidence noticed. In addition to contesting the reliability—or indisputability—of the material, Kareem could and would have suggested other evidentiary material that could have been noticed that would have supported his position.

The D.C. Circuit's denial of due process differs markedly from the practice of other circuits, all of which stress that some opportunity to be heard must be given (although what form that should take is unclear). In *Lussier v. Runyon*, 50 F.3d 1103, 1114 (1st Cir. 1995), the First Circuit examined a decision premised upon taking judicial notice of interim disability payments after the record was closed, with "no real opportunity to address or counter the gleaned evidence." Rejecting notice as improper, the First Circuit commented:

> Ours is a system that seeks the discovery of truth by means of a managed adversarial relationship between the parties. If we were to allow judges to bypass this system, even in the interest of furthering efficiency or promoting judicial economy, we would subvert this ultimate purpose. As Rule 201(b) teaches, judges may not defenestrate established evidentiary processes, thereby rendering inoperative the standard mechanisms of proof and scrutiny, if the evidence in question is at all vulnerable to reasonable dispute.

Id. Similarly, the Sixth Circuit stressed the importance of ensuring that judicial notice is taken in a fair and balanced way; it remanded a case where the court had taken judicial notice of evidence in favor of one party without giving the other party a chance to introduce relevant facts supporting of its own position. In *Cotton v. City of Cincinnati*, 495 F. App'x 707, 710 (6th Cir. 2012), the court remanded in part because the noticed fact—that a mailing was sent—was potentially

outcome dispositive. Failing to consider evidence that those mailings were returned, albeit after the hearing had ended, would have been completely unfair and create a "half-truth" based on an arbitrary respect for "one form of judicial notice but not the other." *Id.*

Even in circuits where particular online sources have been noticed for their truth, due process is imperative. The Seventh Circuit has held that the parties must be given an opportunity to contest judicial notice prior to the court using the power: "[G]iven that the Internet contains an unlimited supply of information with varying degrees of reliability, permanence, and accessibility, it is especially important for parties to have the opportunity to be heard prior to the taking of judicial notice of websites." *Pickett v. Sheridan Health Care Ctr.*, 664 F.3d 632, 648 (7th Cir. 2011). And Rule 201(e)'s promise that a party is "entitled to be heard" applies with equal force in the appellate courts, which, although not factfinders themselves, must allow parties to "object or furnish helpful documents." *Browning-Ferris Indus. of S. Jersey, Inc. v. Muszynski*, 899 F.2d 151, 161 (2d Cir. 1990), *abrogated by Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998). The D.C. Circuit did none of that here, improperly using judicial notice to avoid dealing with a complex and difficult case raising important issues of due process and national security.

D. The D.C. Circuit has made a grievous error in the application of judicial notice to dismiss important, well-pleaded claims.

This case presents an excellent vehicle for this Court's consideration because the appellate decision is a singularly egregious example of a court abusing judicial notice, presenting a range of particular issues. Judicial notice is a pragmatic device for a court to venture outside the record on a highly circumscribed basis. Taking judicial notice of facts that have not been tested in the cauldron of the adversarial process to reach a substantive outcome in a case not only distorts a rule wholly beyond its language and intended meaning; it threatens the ability of litigants to have cases tried through party-driven, evidentiary based adversary process.

The decision below is premised on a finding that it was not plausible that the United States was targeting Petitioner on five separate occasions at specific times in specific places where the United States was operating. The district court found the plausibility threshold easily met that Petitioner, a U.S. citizen, was targeted for extrajudicial killing; the D.C. Circuit did its own unilateral and incomplete research and selectively pulled from it in order to dismiss the complaint.

As discussed above, the "facts" noticed are very much "subject to reasonable dispute." They were not "generally known within the trial court's territorial jurisdiction" (they were all in Syria). Neither could they

be "accurately and readily determined from sources whose accuracy cannot reasonably be questioned." On their face, the reports reflect that the factual assertions made therein are based on media, eyewitnesses, NGOs, social media reports, and press briefings. Both reports contain multiple layers of hearsay and the facts noticed simply do not map onto the attacks alleged in the complaint—not in time, manner, or location—and none make implausible that the United States targeted Kareem. Further, the court made unfounded, indeed inaccurate extrapolations from the noticed "facts," inferring competing ideas about who was conducting strikes in the places and times Kareem was struck and with what other possible weapons. None of this information is contained in the facts actually noticed.

The D.C. Circuit plainly violated Rule 201(e) and compounded it by denying the due process guaranteed therein. The reports noticed were tantamount to taking testimony from defendants but not plaintiff, drawing all inferences from that unilateral testimony on motion to dismiss against plaintiff, and then dismissing the case. Dismissing a case based solely on a sporadic and incomplete account of the party whose conduct is being challenged is facially unfair.

E. Certiorari should be granted because this Court has not issued a ruling on the limits of judicial notice and technological advances in the accessibility of information means that clear guidance is urgently needed.

Since the adoption of Rule 201 in 1975, this Court has not issued any ruling on the proper scope or application of judicial notice. In the intervening time, technological advances have made information about almost anything, including complex conflicts thousands of miles away, readily available at the stroke of a key. The result is that courts now increasingly using judicial notice in ways and means which are not only in conflict with each other, but also with Rule 201 itself. Without guidance from this Court, the confusion will only get worse.

The fullest statements on judicial notice from this Court appear well before Rule 201 was adopted. For instance, 131 years ago, where a patent claim turned on the newness of a design, this Court would *not* take judicial notice of previous designs, because that was "a question which may and should be raised by answer and settled by proper proofs." *New York Belting & Packing Co. v. New Jersey Car-Spring & Rubber Co*., 137 U.S. 445, 450 (1890). Such proofs, according to this Court, are not settled in appellate proceedings. Decisions on appeal should not turn on facts "which are the proper subjects of evidence and of determinations of fact by the trial court." *Borden's Farm Prod. Co. v. Baldwin*, 293 U.S. 194, 209 (1934) (declining to notice widely varying data on trade conditions in New York).

Nor should judicial notice be taken of any fact which cannot be supported with concrete evidence or without giving the party against whom the evidence is to be used a chance to challenge it. This Court rejected in 1937 the improper noticing of secondhand, undisclosed information about electricity pricing because the probative value could not be ascertained or fairly challenged. To rule otherwise would "presume acquiescence in the loss of fundamental rights." *Ohio Bell Tel. Co. v. Pub. Utilities Comm'n of Ohio*, 301 U.S. 292, 306-07 (1937). Courts must inform parties of the facts to be noticed and the inferences to be drawn. This is a fundamental perquisite to employing judicial notice, for without it, "he is deprived of any opportunity to challenge the deductions drawn from such notice or to dispute the notoriety or truth of the facts allegedly relied upon." *Garner v. State of La.*, 368 U.S. 157, 173 (1961).

Since 1975, however, judicial notice has not arisen in cases before this Court in any meaningful way. During this time, the explosion of the internet has meant that there is more readily accessible information than ever before. This is best exemplified by the panel judges' own remarks in the oral arguments in this case when they noted that they "remember the news" and "reality" as support for the argument that anyone could have carried out the attacks on Kareem.

Absent direction from this court on the boundaries of judicial notice in an information age, courts are left with only a handful of appellate court decisions on how and when to take judicial notice, and as a result, courts

have struggled to define for themselves the scope of permissible notice under Rule 201.

* * *

This Court should grant certiorari, reverse the case and remand with instructions to allow Kareem to contest the facts and inferences noticed with his own evidence. Further, this Court should articulate clear guidance on the proper scope of judicial notice to prevent further abuses of Rule 201.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant the writ of certiorari.

Respectfully submitted,

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