No. 16-1094

In The

Supreme Court of the United States

REPUBLIC OF SUDAN,

Petitioner,

v.

RICK HARRISON, *et al.*,

Respondents.

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

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Second Circuit correctly held that Petitioners complied with the service requirements for service upon a foreign state, under 28 U.S.C. § 1608(a)(3), by mailing the service packet required thereunder with a return receipt requested to the head of Respondent Sudan's Ministry of Foreign Affairs via the Embassy of Sudan in Washington D.C., when the service packet was accepted, signed for, and never refused or returned.

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Respondents Rick Harrison, John Buckley III, Margaret Lopez, Andy Lopez, Keith Lorensen, Lisa Lorensen, Edward Love, Robert McTureous, David Morales, Gina Morris, Martin Songer Jr., Tracey Smith as personal representative of the Estate of Rubin Smith, Shelly Songer, Jeremy Stewart, Kesha Stidham, Aaron Toney, Eric Williams, and Carl Wingate, respectfully submit this Opposition to the Petition for a Writ of Certiorari (the "Petition") filed herein by Petitioner Republic of Sudan ("Sudan").

Introduction

Sudan's assertions that the Panel's Opinion is momentous and creates a circuit split are utterly contrived. None of the decisions relied upon by Sudan address the issue presented in the Petition, nor conflict with the Panel's opinion. As described below, in the only other instances in which federal courts have been presented with the question of whether service, under 28 U.S.C. § 1608(a)(3), on a foreign minister can be perfected by mailing a service package through the foreign state's embassy, the courts have held in accord with the Panel's Opinion. Further, Sudan, in a motion to vacate the Respondent's judgment, is currently seeking relief in the D.C. District Court that is duplicative of the relief it seeks in the Petition. Thus, the Petition presents no compelling issue for the Court and is a waste of the Court's time and resources.

REASONS FOR DENYING THE PETITION

I. Sudan Has Filed a Motion to Vacate the Respondents' Judgment in the United States District Court for the District of Columbia that Remains Pending, on the Same Grounds as Argued in the Current Petition

Sudan's Petition in this matter is a needless waste of the Court's time and resources. It has filed a motion to vacate the Respondents' judgment that is fully briefed and currently pending in the U.S. District Court for the District of Columbia, in *Harrison, et al. v. Republic of Sudan*, Case No. 1:10-cv-01689 ("Motion to Vacate"). *See* Case No. 1:10-cv-01689, Dkt. No. 56. In its Motion to Vacate, Sudan advances the same arguments regarding purported improper service, under 28 U.S.C. § 1608(a)(3), that it presents in this Petition. *Id.* at 29-31. Because Sudan continues to pursue this issue in the District Court, this Petition is neither necessary or appropriate and should be denied.

As it was the court that initially heard the case and rendered judgment, it is appropriate for the D.C. District Court to determine whether it had subject matter jurisdiction over the action at its inception. This is particularly true given that Sudan continues to present purported evidentiary issues regarding service that were never raised in the District Court below. *See* Petition at p. 9-10; *see also Harrison v. Republic of Sudan*, 838 F.3d 86, 96 (2d Cir. 2016) ("The factual challenge should have been raised

during the five years that the case was pending in the district courts.").

Specifically, Sudan asserts that the service packet was not delivered to the Sudanese Embassy and that the minister of foreign affairs was not the person named by the Respondents in the service packet at the time of delivery of the service documents. *See* Petition at p. 9-10. These evidentiary issues were not raised in the Southern District of New York and, in fact, were not raised in any of Sudan's briefs on appeal, at oral argument, or in its petition for rehearing, with the arguments appearing for the first time in its reply brief in support of its petition for rehearing. *See Harrison*, 838 F.3d at 96. The Respondent's strongly dispute these evidentiary issues, which contradict prior statements made by Sudan in its briefs and at oral argument.[1] *See* Respondent's Motion for Leave to File Sur-Reply, Appeal No. 14-121, Dkt. No. 119.

Notwithstanding that these issues are disputed, Sudan's arguments were inappropriately raised for the first time on appeal. 838 F.3d at 96 ("'[F]actfinding is the basic responsibility of district courts, rather than appellate courts, and ... the Court of Appeals should not ... resolve[] in the first instance [a] factual dispute which ha[s] not been considered by the District Court.'") (quoting *DeMarco v. United States*, 415 U.S. 449, 450 n.* (1974)). Just as the

[1] At oral argument, Sudan argued that the Respondent's service packet had been intentionally withheld from the Ministry of Foreign Affairs by a South Sudanese contingent of the then coalition government, the Sudanese People's Liberation Movement, that was in control of Sudanese Embassy at the time service was made. *See Harrison v. Republic of Sudan*, 802 F.3d 399, 403 n.5 (2d Cir. 2015).

Second Circuit refused to consider these issues for the first time on appeal, so should the Court decline to address the arguments raised in the Petition. *See Pullman-Standard v. Swint*, 456 U.S. 273, 293 (1982) (reversing decision of the Fifth Circuit Court of Appeals for making factual determinations for the first time on appeal).

Further, Sudan argues in the Petition that the decisions of the D.C. Circuit, in *Barot v. Embassy of the Republic of Zambia*, 785 F.3d 26 (D.C. Cir. 2015) and *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148 (D.C. Cir. 1994), favor its position and conflict with the Panel's Opinion. *See* Petition at p. 14-15. While the Respondents dispute that the D.C. Circuit's decisions cited by Sudan favor it in any way, these arguments remain pending in Sudan's Motion to Vacate before the D.C. District Court.

Sudan has engaged in forum shopping since its first appearance in this case and has continued to press its arguments in whatever court appears most advantageous to it at the time.[2] The Court should not countenance Sudan's attempt to continue to litigate the same issues it is presenting in the Petition in the D.C. District Court and deny Sudan's Petition accordingly.

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[2] Sudan appeared and filed its Motion to Vacate in the D.C. District Court, more than a year after it filed its notice of appeal to the Second Circuit and only after oral argument had taken place in the appeal. *Compare* Case No. 1:10-cv-01689, Dkt. No. 56; *with* Appeal No. 14-121, Dkt. Nos. 1 and 67.

II. There Is No Conflict Between the Second Circuits' Decision and the Decisions of Any Other Circuit

Faced with the fact that no court has ever held that mailing a service package to the minister of foreign affairs through the foreign state's embassy fails to comply with the requirements of 28 U.S.C. § 1608(a)(3), Sudan instead employs a strawman argument by asserting that mailing the service package to foreign minister via the embassy is the equivalent of directly serving the embassy or a consular official. This argument is a sham and is being used solely in an attempt to manufacture a circuit split where no actual cases exist that are in conflict with the Panel's Opinion.

The Respondents did not serve the service package on the Embassy of Sudan or a Sudanese consular official. The service package was addressed specifically by name to Sudan's Minister of Foreign Affairs with direct notation of his title as the Minister of Foreign Affairs and had a return address of the clerk of the District Court. *Harrison*, 838 F.3d at 92 ("Here, the summons and complaint were addressed to the Sudanese Minister of Foreign Affairs, by name and title, at the Sudanese Embassy."). As they had done in the past, an official at Sudan's Embassy accepted and executed a return receipt for the service package, which stated in bold type that the addressee was the Minister of Foreign Affairs. *Id*. ("The embassy accepted the papers, signing for them and sending back a return receipt to the Clerk of Court."). The Sudanese Embassy official did not reject the

mailing as being improperly addressed, as it easily could have done.

The Court should not countenance this strawman argument, which has no bearing on the actual issue presented in the Petition. As described below, in the rare instances where the issue has been presented, the only court's to considerate it have found Sudan's argument untenable.

A. Service Via Mail, under 28 U.S.C. § 1608(a)(3), Is Distinguishable from Service Directly Upon an Embassy or Consular Official Because the Attempted Service Fails If the Service Packet Is Rejected or Returned

As the Second Circuit correctly noted, mailing a service package addressed to the foreign state's minister of foreign affairs through the state's embassy is not equivalent to directly serving the embassy or a consular official. *Harrison*, 838 F.3d at 92 ("There is a significant difference between *serving process* on an embassy, and mailing papers to a country's foreign ministry *via* the embassy."). If service were permitted directly on an embassy or consular official, which it is not, service would be perfected merely on delivery of the service documents to the embassy or official. As described below, under 28 U.S.C. § 1608(a)(3), service is not perfected on delivery of the service package alone. The service package must be accepted and not refused or returned. Sudan is well aware of this distinction and has availed itself of the ability to refuse service packages in the past. *See Opati v.*

Republic of Sudan, 978 F. Supp. 2d 65, 67 (D.D.C. 2013).

In a long line of cases, district courts have consistently held that where a service package served via mail, pursuant to 28 U.S.C. § 1608(a)(3), is refused or returned service is not perfected and the plaintiff must resort to service via diplomatic channels, under 28 U.S.C. § 1608(a)(4). *See Flanagan v. Islamic Republic of Iran*, 190 F. Supp. 3d 138, 151-53 (D.D.C. 2016) (holding service was not perfected as to Syria, under 28 U.S.C. § 1608(a)(3), because the service packet was refused, noting "[t]here exist at least half a dozen cases in which courts note that service under section 1608(a)(3) was ineffective precisely because service was refused"); *Opati*, 978 F. Supp. 2d at 67 (holding service on Sudan and Iran via mail, under 18 U.S.C. § 1608(a)(3), was defective when acceptance of the respective service packages were refused); *Murphy v. Islamic Republic of Iran*, 740 F. Supp. 2d 51, 67 (D.D.C. 2010) (holding service on Iran via mail, under 28 U.S.C. § 1608(a)(3), was defective because the service package was refused); *Valore v. Islamic Republic of Iran*, 700 F. Supp. 2d 52, 70 (D.D.C. 2010) (same); *Ben-Rafael v. Islamic Republic of Iran*, 540 F. Supp. 2d 39, 52 (D.D.C. 2008) (same); *Nikbin v. Islamic Republic of Iran*, 471 F. Supp. 2d 53, 60 (D.D.C. 2007) (same); *see also de Sousa v. Embassy of Republic of Angola*, CV 16-367 (BAH), 2017 WL 90330, at *5 (D.D.C. Jan. 9, 2017) (holding that while "refusal by an embassy to accept a package may defeat service under § 1608(a)(3)," service was perfected because the service package was accepted and signed for); *Karcher v. Islamic Republic of Iran*, CV 16-232 (CKK), 2017 WL 1401264, at *2 (D.D.C. Apr. 19, 2017)

(same); *Doe v. Holy See*, CIV.A. 13-128, 2014 WL 3909136, at *1 (E.D. La. Aug. 11, 2014) (noting where the plaintiff's service package mailed to the Holy See's Secretary of Relations with States, under 28 U.S.C. § 1608(a)(3), was returned to the clerk of court marked "refused," service by the clerk via diplomatic channels, under 28 U.S.C. § 1608(a)(4), was then attempted).

Recently, in *Flanagan*, Sudan argued that a co-defendant, Syria, had been effectively served via mail, under 28 U.S.C. § 1608(a)(3), even though the service package was returned with the notation that delivery was refused. 190 F.Supp.3d at 151. Upon reviewing the legislative history and numerous prior decisions on the issue, the D.C. District Court rejected Sudan's argument, holding that service defective, under 28 U.S.C. § 1608(a)(3), if the service package is returned as refused. *Id.* at 153 ("[T]he Court believes it unlikely that Congress envisioned service would be accomplished under section 1608(a)(3), and personal jurisdiction would attach over a foreign state, when service is returned as refused.").

Further, as noted in *Flanagan*, in *Opati v. Republic of Sudan*, Sudan had itself avoided service, under 28 U.S.C. § 1608(a)(3), by refusing to accept a mailed service package. *See Flanagan*, 190 F.Supp.3d at 152; *Opati*, at 67 ("Each mailing was refused by [Sudan and Iran], and the summonses returned unexecuted. [] Hence, Plaintiffs were unsuccessful in effecting service under section 1608(a)(3).").

Similarly, in *Kumar v. Republic of Sudan*, Case No. 2:10-cv-171 (E.D. Va.), Sudan, also, avoided service, under 28 U.S.C. § 1608(a)(3), by refusing to accept documents served by mail addressed to the

Minister of Foreign Affairs at the Embassy of Sudan. *See Harrison*, Appeal No. 14-121, Dkt. No. 104 at p. 11. Upon delivery of the *Kumar* plaintiffs' mailing, the Embassy official refused to accept the documents and directed them to be returned to sender, for which FedEx stated the reason as being "Address is correct/Recipient no longer at this address." *Id.*

Just as the D.C. District Court, in *Flanagan*, refused to accept Sudan's argument that service is perfected under 28 U.S.C. § 1608(a)(3), even when the service package is refused, so should the Court reject Sudan's conflation of service directly on an embassy or consular official with service mailed to the ministry of foreign affairs through an embassy. *See Flanagan*, 190 F.Supp.3d at 152-53. As the Second Circuit held, there is a clear distinction between such methods of service that renders Sudan's reliance on cases involving service directly on an embassy or consular official untenable. *Harrison*, 838 F.3d at 92 ("[T]he papers were not served on the embassy as a proxy or agent for Sudan, but they were instead mailed to the Minister of Foreign Affairs, in the most natural way possible—addressed to him, by name, via Sudan's embassy.").

B. The Purportedly Conflicting Decisions Cited by Sudan Address Service Made Directly Upon an Embassy or Consular Official, Not Service Via Mail, under 28 U.S.C. § 1608(a)(3), to the Minister of Foreign Affairs

Ignoring the actual issues decided by the Panel in the appeal below, Sudan cites to seven cases, *Barot v.*

Embassy of the Republic of Zambia, 785 F.3d 26 (D.C. Cir. 2015); *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148 (D.C. Cir. 1994), cert. denied 513 U.S. 1150 (1995); *Magness v. Russian Federation*, 247 F.3d 609 (5th Cir. 2001); *Alberti v. Empresa Nicaraguense De La Carne*, 705 F.2d 250 (7th Cir. 1983); *Autotech Technologies LP v. Integral Research & Dev. Corp.*, 499 F.3d 737 (7th Cir. 2007); *Ellenbogen v. The Canadian Embassy*, 2005 WL 3211428 (D.D.C Nov. 9, 2005); and *Lucchino v. Foreign Countries of Brazil, South Korea, Spain, Mexico, & Argentina*, 631 F. Supp. 821 (E.D. Pa. 1986), which it purports are in direct conflict with the Panel's Opinion. In reality, the foregoing cases stand for nothing more than the basic principle that service on a foreign state or its instrumentalities cannot be accomplished, under 28 U.S.C. § 1608(a)(3), by directly serving the foreign state's embassy or a consular official. As described below, none of the foregoing cases deal with the issue of whether mailing a service package to the minister of foreign affairs through the foreign state's embassy complies with the requirements of 28 U.S.C. § 1608(a)(3), nor do they conflict with the Panel's Opinion.

In *Barot*, the case principally relied upon by Sudan, the clerk of the district court, acting on behalf of a plaintiff proceeding *in forma pauperis*, attempted to serve a Title VII employment action against the Embassy of Zambia by mailing the service package to the Embassy of Zambia at the address of the Zambian Ministry of Foreign Affairs. 785 F.3d 26 at 27-28. The district court dismissed the plaintiff's complaint, holding that service was improper, under 28 U.S.C. § 1608(a)(3), because the package was not addressed to

the Zambian foreign minister. *Id.* at 28-29. On appeal, the D.C. Circuit reversed the district court's decision holding that it abused its discretion in dismissing the complaint, given the unusual procedural posture and its own involvement in the service errors. *Id.* at 29. It further held that the plaintiff should be given another opportunity to serve Zambia, but should ensure the mailing was addressed to the foreign minister, pursuant to § 1608(a)(3). *Id.* at 29-30. Nowhere in its opinion did the D.C. Circuit discuss the issue of whether a mailing addressed to the Zambian foreign minister through the Embassy of Zambia would have been proper method of service of the plaintiff's service package, under 28 U.S.C. § 1608(a)(3). The facts presented in *Barot* did not present that issue, nor even an analogous issue. *Barot*, like the other cases cited by Sudan, is nothing more than an example of an ill advised litigant making obvious errors in perfecting service on a foreign state.

In *Transero*, the D.C. Circuit held that the plaintiff's service of a complaint for breach of contract directly on the Bolivian Air Force, under 28 U.S.C. § 1608(b), was improper because the Bolivian Air Force was not an agency or instrumentality of Bolivia, but rather a "foreign state or political subdivision" that must be served in strict compliance with § 1608(a). 30 F.3d at 88. In light of this determination, the D.C. Circuit, in a divided panel, reversed the district court's decision that service had been perfected under the actual notice standard of § 1608(b). *Id.* at 91-92. It explicitly noted that the plaintiff "never attempted the methods of service prescribed in sections 1608(a)(3) and (a)(4)…." *Id.* at 91. Just as in *Barot*,

the D.C. Circuit did not address a service of process issue that is remotely like the one presented herein, even in passing or in dicta. Sudan's assertions that the *Transero* opinion conflicts with the Panel's Opinion are contrived and unsupportable.

In *Magness*, the Fifth Circuit held that the plaintiffs' mailing of service papers to the Texas Secretary of State for dispatch to Boris Yeltsin and directly to the Russian Deputy Minister of Culture did not comply with the service requirements of 28 U.S.C. § 1608(a)(3), for service on the Russian Federation. 247 F.3d at 613. The facts and issues discussed in the Fifth Circuit's opinion, which do not involve service on an embassy or consular official at all, are so disparate from those presented here and have so little bearing that it exemplifies Sudan's attempt to manufacture a circuit split. Again, there is no basis whatsoever for Sudan to argue that a conflict exists based on the opinion.

The plaintiff, in *Autotech*, attempted to serve a contempt order on the defendant, a company wholly owned by the state of Belarus, by directly serving the order on the ambassador of Belarus. 499 F.3d at 739, 748. The Seventh Circuit held that the plaintiff's service was defective because it did not comply with the requirements of 28 U.S.C. § 1608(b) for service on a foreign agency or instrumentality. *Id.* at 749. As such, the Seventh Circuit's holding stands for nothing more than the undisputed principle that a plaintiff cannot serve a foreign agency or instrumentality be directly serving the ambassador or embassy itself. *Id.* at 748-49. Sudan's repeated quotation of the words "service through an embassy" from the opinion is misleading at best, as the plaintiff did not attempt to

serve the Belarusian entity by transmitting the documents through the embassy or ambassador. *Id.* at 748 ("The only hint of service in the record is a copy indicating that there was service on the ambassador from Belarus."). The portion of the opinion quoted by Sudan only discusses service directly on a consular officer of legal documents that pertain to an agency or instrumentality of a foreign state. *Id.* at 748-749. It does not conflict with the Panel's Opinion and Sudan's assertions otherwise are not only incorrect, but also inappropriate.

In *Alberti*, the plaintiffs attempted to directly serve the ambassador of Nicaragua with a complaint seeking a declaratory judgment against an entity that had been nationalized by the government of Nicaragua, by mailing the complaint to the ambassador at the Nicaraguan Embassy. 705 F.2d at 252. On an refuted motion by the Republic of Nicaragua and the defendant entity, the district court dismissed the complaint on the grounds of failure to perfect service of process. *Id.* On appeal, the Seventh Circuit affirmed the dismissal, holding that the nationalized entity was a "foreign state" within the meaning of 28 U.S.C. § 1608 and that service was not perfected as required, under 28 U.S.C. § 1608(a)(3), because the complaint was served directly on the Nicaraguan ambassador. *Id.* at 253. Sudan's assertions that the Seventh Circuit's opinion is of great significance or conflicts with the Panel's Opinion, again, fails for the reason that the Seventh Circuit did not go beyond simply stating service directly on an ambassador is improper under § 1608(a)(3).

Similarly, in *Ellenbogen*, the plaintiff, who was attempting to sue the Canadian Embassy for age discrimination, served the embassy directly by personally mailing a copy of the summons and complaint to the Embassy. 2005 WL 3211428, at *1. The district court looked to whether the plaintiff had satisfied service under 28 U.S.C. § 1608(a)(3) because it was, in its judgment, the only provision that bore any resemblance to what the plaintiff had actually done. *Id.* Noting numerous procedural errors, including improperly directly serving the Embassy, the district court dismissed the case for failure to perfect service on the defendant. *Id.*

Like the plaintiff in *Ellenbogen*, the plaintiffs in *Lucchino*, attempted to directly serve Mexico's embassy and consulate with a complaint. 631 F.Supp. at 826-27. Just as in *Ellenbogen*, the district court noted other procedural errors, including failure to include a notice of suit, and held that service directly on an embassy does not comply with the requirements of 28 U.S.C. § 1608(a). The district court went no further than this holding and, as such, the decision does not conflict with the Panel's Opinion.

As described above, none of the cases cited by Sudan relate to the service issue presented in the Petition or conflict with the Panel's Opinion. *See Harrison*, 838 F.3d at 93 ("None of the cases relied on by Sudan or the United States undermines our reading of § 1608(a)(3)."). As such, Sudan's claim of a circuit split is undeniably false. Moreover, in the rare instances where the service issue raised in the Petition has actually been disputed, the courts faced with the issue have found Sudan's argument to be totally unavailing. *See Rux v. Republic of Sudan*,

Case No. 2:04CV428, 2005 WL 2086202 (E.D. Va. Aug. 26, 2005), *aff'd in part, appeal dismissed in part*, 461 F.3d 461 (4th Cir. 2006); *Wye Oak Technology v. Republic of Iraq*, 2010 WL 2613323 (E.D. Va. June 29, 2010).

In *Rux v. Republic of Sudan*, Sudan also argued that the plaintiffs therein failed to perfect service, under 28 U.S.C. § 1608(a)(3), because § 1608(a)(3) "requires that process be delivered directly to the Minister of Foreign Affairs in Sudan, as opposed to delivering it to him via that country's embassy." *See* 2005 WL 2086202, at *16. The district court squarely rejected Sudan's arguments, stating:

> Surely the legislature did not intend to designate the United States Postal Service or a commercial carrier as the preferred method of delivery to the Minister of Foreign Affairs. ***The text of 1608(a)(3) does not prohibit service on the Minister of Foreign Affairs at an embassy address. Indeed, the statute does not prescribe the place of service, only the person to whom process must be served.*** Sudan does not cite a single case in support of its position.

Id. (emphasis added). On appeal, the Fourth Circuit affirmed the district court, declining to review the issue of service under pendent appellate jurisdiction. *See Rux v. Republic of Sudan*, 461 F.3d 461, 474-75 (4th Cir. 2006).

Subsequently, in *Wye Oak*, the Republic of Iraq made a similar argument contesting that the plaintiff's service under 28 U.S.C. § 1608(a)(4) was improper because it claimed service had never been

properly attempted or made pursuant to § 1608(a)(3). 2010 WL 2613323, at *5-6. Specifically, Iraq argued in a motion to dismiss that service made under subsection (4) was premature because the plaintiff had not complied with subsection (3) because it caused the service package to be mailed to the Iraqi Embassy in Washington, D.C, rather than directly to the Ministry of Foreign Affairs in Iraq. The *Wye Oak* Court, rejected the argument that service to the Iraqi Minister of Foreign Affairs through the Embassy did not comply with subsection (3), stating:

> The Court concludes that the attempted service through the Embassy does not render service ineffective in this case. … ***Section (a)(3) does not impose a requirement that an otherwise proper service package must be delivered to a particular destination.*** No doubt, the address to which the service package is directed must bear some objectively reasonable relationship to the head of the Ministry of Foreign Affairs and the chosen method of delivery must have some reasonable expectation of success. However, there is nothing on the face of Section (a)(3) that prohibits Wye Oak's chosen method of delivery to the head of the Ministry of Foreign Affairs and, for that reason, there was no requirement in Section (a)(3) with which Wye Oak failed to "strictly" comply.

Id. at *5 (emphasis added).

In light of the foregoing, it is clear that there is no circuit split and that the few courts that have considered the issue presented by the Petition have

issued decisions that accord with the opinion and reasoning of the Panel.

III. The Vienna Convention Prohibits Service on an Embassy or Consular Official, Not Service Via Mail Forwarded by an Embassy

Contrary to Sudan's arguments the Panel's Opinion and the *Rux* and *Wye Oak* Court's holdings do not violate the sanctity of the embassy embodied in the Vienna Convention on Diplomatic Relations by causing foreign embassies to become proxies of the minister of foreign affairs for the purpose of service of process. As stated above, if a foreign state objects to accepting a mailing to their foreign minister through their embassy, they can simply refuse the mailing, just as Sudan did in the *Opati* and *Kumar* cases. Moreover, neither the legislative history, nor the plain language of the 28 U.S.C. § 1608 indicate that Congress has determined service of process to a minister of foreign affairs through an embassy to be improper. Sudan's argument to the contrary is baseless and has been rejected by every court that has considered it.

As held by the Panel, in the legislative history of the FSIA cited by Sudan, Congress was concerned with service of process directly on an embassy or consular official, not whether documents could be mailed to a foreign official through an embassy. *See* 838 F.3d at 92 ("The legislative history does not address, any more than does the statutory text, whether Congress intended to permit the mailing of service to a foreign minister via an embassy.").

If Congress had wanted the service package to only be mailed directly to the ministry at its location in a foreign state, it would have stated such as much in the text of the statute. *See Harrison*, 802 F.3d at 404. The Panel correctly observed that in the immediately following clause, § 1608(a)(4), Congress specified that the service package was to be mailed "to the Secretary of State, in Washington, District of Columbia." *Harrison*, 802 F.3d at 404 ("If Congress had wanted to require that the mailing be sent to the head of the ministry of foreign affairs in the foreign county, it could have said so. In § 1608(a)(4), for example, Congress specified that the papers be mailed 'to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services,' for transmittal to the foreign state 'through diplomatic channels.'") (emphasis in original).

For Sudan's argument to succeed, the Court would be required to rewrite the statute by inserting new requirements and then retroactively penalize the Respondents for failing to meet those new requirements. The Court cannot add new requirements to an existing statute, particularly where the plain language is clear. *See Burrage v. U.S.*, 134 S. Ct. 881, 892 (2014) ("The role of this Court is to apply the statute as it is written - even if we think some other approach might 'accor[d] with good policy.'") (quoting *Commissioner v. Lundy*, 516 U.S. 235, 252, (1996)); *see also Jacobs v. New York Foundling Hosp.*, 577 F.3d 93, 99 (2d Cir. 2009) ("It is not our place as jurists to supply that which is omitted by the legislature.") (quoting *Spielman v. Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 332 F.3d 116,

127 (2d Cir. 2003)); *see also Matter of Greenway*, 71 F.3d 1177, 1180 (5th Cir. 1996) ("It is not the job of the courts to legislate, and the Supreme Court has counseled that where the statutory language is plain, 'the sole function of the court is to enforce it according to its terms.'") (quoting *U.S. v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989)).

Notwithstanding the clear language of the statute, subsequent to the *Rux* decision, 2005 WL 2086202, at *16, Congress revised the FSIA, in the National Defense Authorization Act for Fiscal Year 2008, Pub.L. No. 110–181, to address problems related to suits filed pursuant to the former terrorism exception to sovereign immunity, 28 U.S.C. § 1605(a)(7). *See Owens v. Sudan*, 826 F. Supp. 2d 128, 147 (D.D.C. 2011). Where Congress "adopts a new law incorporating sections of a prior law …, Congress normally can be presumed to have had knowledge of the [judicial] interpretation given to the incorporated law…" *Lorillard v. Pons*, 434 U.S. 575, 581 (U.S. 1978). As such, Congress was presumptively aware of the decision in *Rux*, but did not amend § 1608(a)(3) to require service to be made only on the ministry in the foreign state.

Just as in its argument that there is a circuit split, Sudan's argument that the Panel's Opinion violates the Vienna Convention is based entirely on authority that states nothing more than that service cannot be perfected by directly serving an embassy or consular official. Neither the legislative history of 1608(a), nor its plain language supports Sudan's argument that service mailed via an embassy violates that prohibition. Congress could have specified the mailing of the service package must be directed to the

ministry's address in the foreign state, but it did not do so. In light of the language of § 1608(a)(4) and the history of decisions approving of the Respondent's method of service, it is clear that Congress deemed such service proper and in accord with the Vienna Convention.

Conclusion

Contrary to Sudan's assertions, the Panel's Opinion affirming the district court's turnover orders is neither momentous or in conflict with the decisions of any other Circuit. Further, Sudan continues to simultaneously pursue relief in the D.C. District Court that is duplicative of the relief it seeks in the Petition. Thus, the Petition presents no compelling issue for the Court and is a waste of the Court's time and resources. For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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