No. 16-1094

In the Supreme Court of the United States

REPUBLIC OF SUDAN, PETITIONER

v.

RICK HARRISON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1330, 1441(d), 1602 *et seq.*, provides four exclusive, hierarchical means for a litigant to serve a foreign state in the courts of the United States. 28 U.S.C. 1608(a)(1)-(4). The third means, in Section 1608(a)(3), provides for "a copy of the summons and complaint and a notice of suit * * * to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned." 28 U.S.C. 1608(a)(3).

The question presented is whether service under Section 1608(a)(3) may be accomplished by requesting the clerk to mail the service package, if the papers are directed to the minister of foreign affairs, to the embassy of the foreign state in the United States, or whether Section 1608(a)(3) requires that process be mailed to the ministry of foreign affairs in the country concerned.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be held pending the Court's disposition of the petition for a writ of certiorari in *Kumar* v. *Republic of Sudan*, No. 17-1269 (filed Mar. 9, 2018), and then be disposed of as appropriate. In the alternative, if the Court grants the petition in *Kumar*, the Court may wish to grant certiorari in this case and consolidate it with *Kumar* for consideration of the merits.

STATEMENT

1. The Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1330, 1441(d), 1602 *et seq.*, provides the sole basis for civil suits against foreign states and their agencies or instrumentalities in United States

courts. See, *e.g.*, *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-435 & n.3 (1989). The FSIA establishes that "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 Act. 28 U.S.C. 1604. If a suit comes within a statutory exception to foreign sovereign immunity, the FSIA provides for subject-matter jurisdiction in district courts, 28 U.S.C. 1330(a), as well as for personal jurisdiction over the foreign state "where service has been made under section 1608." 28 U.S.C. 1330(b).

Section 1608(a) provides the exclusive means for serving "a foreign state or political subdivision of a foreign state" in civil litigation. 28 U.S.C. 1608(a); see Fed. R. Civ. P. 4(j)(1). The provision specifies four exclusive methods of service, in hierarchical order. See, *e.g.*, Pet. App. 8a; *Magness* v. *Russian Fed'n*, 247 F.3d 609, 613 (5th Cir.), cert. denied, 534 U.S. 892 (2001). First, service must be effected on a foreign state "in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision." 28 U.S.C. 1608(a)(1). Second, if no such special arrangement exists, service must be provided "in accordance with an applicable international convention on service of judicial documents." 28 U.S.C. 1608(a)(2). Third, if no such international convention applies, service shall be made

> by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned.

28 U.S.C. 1608(a)(3). Fourth, if service cannot be made within thirty days under Section 1608(a)(3), the litigant must deliver process to the State Department for service "through diplomatic channels to the foreign state." 28 U.S.C. 1608(a)(4).

2. On October 12, 2000, terrorists bombed the USS *Cole* in the Port of Aden, Yemen. Pet. App. 24a. Seventeen U.S. service members were killed and forty-two others were injured. *Ibid.* In 2010, the individual respondents, who are sailors and spouses of sailors injured in the bombing, sued petitioner, the Republic of Sudan, in the District Court for the District of Columbia. Pet. 8. Relying on the cause of action set forth in 28 U.S.C. 1605A, which is available in actions against designated state sponsors of terrorism such as the Republic of Sudan, respondents alleged that petitioner provided material support to the al Qaeda operatives who carried out the bombing. Pet. 8; Pet. App. 3a.

Because service under 28 U.S.C. 1608(a)(1)-(2) was not possible, respondents attempted to serve petitioner under Section 1608(a)(3). Pet. App. 4a, 9a. They requested that the Clerk of Court mail a copy of the summons and complaint via registered mail, return receipt requested, to:

> Republic of Sudan
> Deng Alor Koul
> Minister of Foreign Affairs
> Embassy of the Republic of Sudan
> 2210 Massachusetts Avenue NW
> Washington, DC 20008

Id. at 132a.

Petitioner did not respond within sixty days, see 28 U.S.C. 1608(d), and following a hearing, the district court entered a default judgment against petitioner.

Pet. App. 22a-23a. The court determined that service on petitioner was proper, *id.* at 27a-28a, and that it had jurisdiction under 28 U.S.C. 1605A(a). Pet. App. 29a-64a. The court then concluded that respondents had established petitioner's liability under 28 U.S.C. 1605A and 1606, and awarded respondents $314.7 million in damages. Pet. App. 22a-23a, 64a-75a. Respondents attempted to serve the default judgment on petitioner by the same delivery method—through the clerk's mailing of the papers to the Embassy of the Republic of Sudan in Washington, D.C. *Id.* at 5a; see 28 U.S.C. 1608(e) (requiring service of any default judgment).

3. Respondents registered the default judgment in the District Court for the Southern District of New York. Pet. App. 5a. Both that court and the District Court for the District of Columbia determined that respondents had effected service of the default judgment and that respondents could seek attachment and execution of the judgment. *Id.* at 6a; see 28 U.S.C. 1610(c).

Respondents filed three petitions in the Southern District of New York seeking turnover of assets of petitioner's agencies and instrumentalities held by respondent banks Mashreqbank PSC, BNP Paribas, and Credit Agricole Corporate and Investment Bank—assets which had been frozen pursuant to the Sudanese Sanctions Regulations, 31 C.F.R. Part 538. Pet. App. 6a; see Fed. R. Civ. P. 69(a). Respondents again attempted to serve the relevant papers on Sudan by mailing them to the Embassy of the Republic of Sudan in Washington, D.C., in a package directed to the Minister of Foreign Affairs. Pet. App. 6a. The district court granted respondents' petitions and issued three turnover orders against the banks in partial satisfaction of the default judgment. *Id.* at 76a-91a.

Petitioner then entered an appearance in the Southern District of New York and timely appealed the issuance of the turnover orders. Pet. App. 6a-7a.*

4. The court of appeals affirmed. Pet. App. 1a-21a. It concluded that respondents had properly effected service under Section 1608(a)(3) in the original action. *Id.* at 8a-15a. The court held that service under Section 1608(a)(3), which requires that process be "addressed and dispatched * * * to the head of the ministry of foreign affairs of the foreign state concerned," 28 U.S.C. 1608(a)(3), could be accomplished by providing for delivery to the "minister of foreign affairs via an embassy address." Pet. App. 11a. According to the court, Section 1608(a)(3) did not require that service be made on the Minister of Foreign Affairs of Sudan at the Ministry of Foreign Affairs in Khartoum, Sudan, because the statute does not expressly state that process must "be mailed to a location in the foreign state," and respondents' method of service "could reasonably be expected to result in delivery to the intended person." *Ibid.*

The court of appeals recognized that the FSIA's legislative history "seemed to contemplate—and reject—service on an embassy," in order to "prevent any inconsistency with the Vienna Convention on Diplomatic Relations," which provides that "'[t]he premises of the [diplomatic] mission shall be inviolable.'" Pet. App. 13a-14a (citation omitted; brackets in original). But the court distinguished "'service *on* an embassy'" from "service on a minister of foreign affairs *via* or *care of* an

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* While that appeal was pending, petitioner entered an appearance in the litigation in the District Court for the District of Columbia and moved to vacate the default judgment under Federal Rule of Civil Procedure 60(b). The district court has not ruled on that motion. Pet. App. 96a n.1.

embassy," which the court held was permissible and did not implicate "principles of mission inviolability and diplomatic immunity." *Ibid.* (brackets and citation omitted). Having concluded that respondents' initial service was proper, the court determined that service of the default judgment and all post-judgment motions was proper as well. *Id.* at 15a.

5. Following additional briefing and argument in which the United States participated, see Pet. App. 135a-147a, the court of appeals denied petitioner's motion for panel rehearing. *Id.* at 97a. Although "acknowledg[ing]" that the issue "presents a close call," *ibid.*, the court adhered to its prior conclusion that Section 1608(a)(3) permitted respondents to serve petitioner by a "mailing addressed to the minister of foreign affairs via Sudan's embassy in Washington, D.C.," *id.* at 98a, because the statute "does not specify that the mailing be sent to the head of the ministry of foreign affairs *in* the foreign country," *id.* at 99a. The court reiterated its view that respondents' method of service "could reasonably be expected to result in delivery to the intended person." *Id.* at 98a. And it again stated that although Section 1608(a)(3) does not permit service "'*on*'" an embassy, "[t]he legislative history does not address * * * whether Congress intended to permit the mailing of service to a foreign minister via an embassy." *Id.* at 102a (citation omitted). For that reason, the court rejected, "with some reluctance," the United States' argument that the court's interpretation of Section 1608(a)(3) contravenes the Vienna Convention on Diplomatic Relations (VCDR), *done* Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95. Pet. App. 109a; see *id.* at 105a-109a. In the court's view, "service on an embassy or consular official would be improper" under the VCDR,

but service with papers "addressed to the Minister of Foreign Affairs via the embassy" conforms to the Convention's requirements. *Id.* at 106a. And while the United States had noted that it "consistently rejects attempted service via direct delivery to a U.S. embassy abroad" because it believes such service to be inconsistent with international law, the court stated that its rule would "not preclude the United States (or any other country) from enforcing a policy of refusing to accept service via its embassies." *Ibid.* (citation omitted). Finally, the court opined that "the Sudanese Embassy's acceptance of the service package surely constituted 'consent'" for purposes of the VCDR. *Id.* at 107.

The court of appeals denied rehearing en banc. Pet. App. 114a-115a.

DISCUSSION

The United States deeply sympathizes with the extraordinary injuries suffered by respondents, and it condemns in the strongest possible terms the terrorist acts that caused those injuries. The United States also has a strong interest in opposing and deterring state sponsored terrorism and supporting appropriate recoveries for U.S. victims.

Nevertheless, as the United States has long maintained, the court of appeals erred by holding that the FSIA, 28 U.S.C. 1608(a)(3), permits service on a foreign state "via" or in "care of" the foreign state's diplomatic mission in the United States. Pet. App. 13a. That decision contravenes the most natural reading of the statutory text, treaty obligations, and the FSIA's legislative history, and it threatens harm to the United States' foreign relations and its treatment in courts abroad. The decision below also squarely conflicts with a recent de-

cision of the Fourth Circuit, *Kumar* v. *Republic of Sudan*, 880 F.3d 144, 158 (2018), petition for cert. pending, No. 17-1269 (filed Mar. 9, 2018), and is in significant tension with decisions of the Seventh and D.C. Circuits. As the parties in both this case and *Kumar* now recognize, the question presented warrants this Court's review. See Resps. Supp. Br. 1-2; Resp. to Pet. at 1-2, *Kumar*, *supra* (No. 17-1269).

This case, however, has potential vehicle problems that could complicate the Court's consideration. Because *Kumar* appears to present a more suitable vehicle for addressing the question presented, the petition for a writ of certiorari in this case should be held pending the Court's consideration of the petition in *Kumar*, and then disposed of as appropriate. In the alternative, this Court may wish to grant certiorari in both cases and consolidate them for review.

A. The Foreign Sovereign Immunities Act Does Not Permit A Litigant To Serve A Foreign State By Requesting That Process Directed To The Foreign Minister Be Mailed To The State's Embassy In The United States

The FSIA's text, the United States' treaty obligations, and the statute's legislative history all demonstrate that Section 1608(a)(3) does not permit a litigant to serve a foreign state by requesting that process directed to the state's minister of foreign affairs be mailed to the state's embassy in the United States.

1. a. Section 1608(a) provides four exclusive, hierarchical means for serving "a foreign state or political subdivision of a foreign state" in civil litigation. 28 U.S.C. 1608(a). The provision at issue here, Section 1608(a)(3), permits a litigant to serve a foreign state "by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the

head of the ministry of foreign affairs of the foreign state concerned." 28 U.S.C. 1608(a)(3).

Although Section 1608(a)(3) does not expressly identify the location of service, the most natural understanding of the text is that it requires delivery to the ministry of foreign affairs at the foreign state's seat of government. The statute mandates that service be "addressed and dispatched * * * to the head of the ministry of foreign affairs." 28 U.S.C. 1608(a)(3). It is logical to conclude that delivery should be made to that official's principal place of business, *i.e.*, the ministry of foreign affairs in the foreign state's seat of government. See *Kumar*, 880 F.3d at 155 (Section 1608(a)(3) "reinforce[s] that the location must be related to the intended recipient."). A state's foreign minister does not work in the state's embassies throughout the world, and nothing in the statute suggests that Congress expected foreign ministers to be served at locations removed from their principal place of performance of their official duties. See *ibid.*

If Congress had intended to permit service "via" a foreign embassy in the United States, *e.g.*, Pet. App. 101a, it would have provided that service be addressed to the foreign state's ambassador, or to an agent, rather than "addressed and dispatched * * * to the head of the ministry of foreign affairs." 28 U.S.C. 1608(a)(3). Indeed, the neighboring provision, Section 1608(b), which governs service on a foreign state agency or instrumentality, expressly provides for service by "delivery * * * to an officer, a managing or general agent, or to any other [authorized] agent." 28 U.S.C. 1608(b)(2). Congress's failure to include similar language in Section 1608(a) underscores that it did not envision that service

would be sent to a foreign state's embassy, with embassy personnel effectively functioning as agents for forwarding service to the head of the ministry of foreign affairs. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (brackets and citation omitted).

b. The court of appeals drew different inferences from the statutory text. It noted that in contrast to Section 1608(a)(3), Section 1608(a)(4) specifies that papers may be mailed "to the Secretary of State *in Washington, District of Columbia*." Pet. App. 99a. As the Fourth Circuit explained, however, reliance on Section 1608(a)(4) is unpersuasive: Unlike Section 1608(a)(3), Section 1608(a)(4) "directs attention to one known location for one country—the United States—and so can be easily identified." *Kumar*, 880 F.3d at 159.

The court of appeals also was of the view that "[a] mailing addressed to the minister of foreign affairs via Sudan's embassy in Washington, D.C. * * * could reasonably be expected to result in delivery to the intended person." Pet. App. 98a. But Section 1608(a)'s exclusive methods of service require "strict compliance." *Kumar*, 880 F.3d at 154; *Magness* v. *Russian Fed'n*, 247 F.3d 609, 615 (5th Cir.), cert. denied, 534 U.S. 892 (2001); *Transaero, Inc.* v. *La Fuerza Aerea Boliviana*, 30 F.3d 148, 154 (D.C. Cir. 1994), cert. denied, 513 U.S. 1150 (1995). But see *Peterson* v. *Islamic Republic Of Iran*, 627 F.3d 1117, 1129 (9th Cir. 2010) (upholding defective service based on substantial compliance with Section 1608(a)). By contrast, where Congress envisioned an actual-notice standard, it said so expressly: Section

1608(b) contains a "catchall * * * expressly allowing service by any method 'reasonably calculated to give actual notice.'" *Kumar*, 880 F.3d at 154 (quoting 28 U.S.C. 1608(b)(3)); see also, *e.g.*, *Transaero*, 30 F.3d at 154.

2. The United States' treaty obligations further demonstrate that Section 1608(a)(3) does not permit a litigant to serve a foreign state by having process mailed to the foreign state's embassy in the United States.

a. The VCDR, which the United States signed in 1961 and ratified in 1972, and which "codified longstanding principles of customary international law with respect to diplomatic relations," *767 Third Ave. Assocs.* v. *Permanent Mission of The Republic of Zaire to the United Nations*, 988 F.2d 295, 300 (2d Cir.), cert. denied, 510 U.S. 819 (1993), establishes certain obligations of the United States with respect to foreign diplomats and diplomatic premises in this country. See *Boos* v. *Barry*, 485 U.S. 312, 322 (1988). Article 22, Section 1 of the VCDR provides that "[t]he premises of" a foreign state's "mission shall be inviolable," and "[t]he agents of the receiving State may not enter them, except with the consent of the head of the mission." VCDR, art. 22, sec. 1, 23 U.S.T. 3237, 500 U.N.T.S. 106. Mission inviolability means, among other things, that "the receiving State * * * is under a duty to abstain from exercising any sovereign rights, in particular law enforcement rights, in respect of inviolable premises." Eileen Denza, *Diplomatic Law* 110 (4th ed. 2016) (Denza).

Section 1608(a)(3) should be interpreted in a manner that is consistent with the United States' treaty obligations. See, *e.g.*, *Cook* v. *United States*, 288 U.S. 102, 120 (1933); 1 Restatement (Third) of the Foreign Relations Law of the United States § 114 (1987) ("Where fairly

possible, a United States statute is to be construed so as not to conflict * * * with an international agreement of the United States."). Construing Section 1608(a)(3) to require that process be mailed to the ministry of foreign affairs in the foreign state ensures that the inviolability of foreign embassies within the United States is maintained.

By contrast, the court of appeals' determination that a litigant may serve a foreign state by directing process to be mailed to the foreign state's embassy in the United States is inconsistent with the inviolability of mission premises recognized by the VCDR. The Executive Branch has long interpreted Article 22 and the customary international law it codifies to preclude a litigant from serving a foreign state with process by mail or personal delivery to the state's embassy. See *Hellenic Lines, Ltd.* v. *Moore*, 345 F.2d 978, 982 (D.C. Cir. 1965) (Washington, J., concurring) ("The establishment by one country of a diplomatic mission in the territory of another does not * * * empower that mission to act as agent of the sending state for the purpose of accepting service of process.") (quoting Letter from Leonard C. Meeker, Acting Legal Adviser, U.S. Dep't of State, to John W. Douglas, Assistant Att'y Gen., U.S. Dep't of Justice (Aug. 10, 1964)). This interpretation of the VCDR "is entitled to great weight," *Abbott* v. *Abbott*, 560 U.S. 1, 15 (2010) (citation omitted), in light of "the Constitution's grant to the Executive Branch * * * of broad oversight over foreign affairs," *Kumar*, 880 F.3d at 157. See *id.* at 158 (the Executive Branch's "longstanding policy and interpretation" of Article 22 is "authoritative, reasoned, and entitled to great weight").

The Executive Branch's interpretation also reflects the prevailing understanding of Article 22. As a leading

treatise explains, it is "generally accepted" that "service by post on mission premises is prohibited." Denza 124. Other treatises are in accord. See James Crawford, *Brownlie's Principles of Public International Law* 403 (8th ed. 2012) ("It follows from Article 22 that writs cannot be served, even by post, within the premises of a mission but only through the Ministry for Foreign Affairs."); Ludwik Dembinski, *The Modern Law of Diplomacy* 193 (1988) (Article 22 "protects the mission from receiving by messenger or by mail any notification from the judicial or other authorities of the receiving State."). Other countries also share this understanding. See, *e.g.*, Pet. Supp. Br. App. 2a (Note Verbale from the Republic of Austria to the State Department); Kingdom of Saudi Arabia Amicus Br. 12-14. And domestically, the Fourth and Seventh Circuits have recognized that attempting to serve a party in a foreign country "through an embassy [in the United States] is expressly banned * * * by [the VCDR]." *Autotech Techs. LP* v. *Integral Research & Dev. Corp.*, 499 F.3d 737, 748 (7th Cir. 2007), cert. denied, 552 U.S. 1231 (2008); see *Kumar*, 880 F.3d at 157.

The Convention's drafting history is to the same effect. See *Water Splash, Inc.* v. *Menon*, 137 S. Ct. 1504, 1511 (2017) (considering treaty drafting history); *Medellin* v. *Texas*, 552 U.S. 491, 507-508 (2008) (same). In a report accompanying a preliminary draft of the VCDR, the United Nations International Law Commission explained:

> [N]o writ shall be served within the premises of the mission, nor shall any summons to appear before a court be served in the premises by a process server. Even if process servers do not enter the premises but carry out their duty at the door, such an act

> would constitute an infringement of the respect due to the mission. All judicial notices of this nature must be delivered through the Ministry for Foreign Affairs of the receiving State.

U.N. Int'l L. Comm'n, *Report of the Commission to the General Assembly, Doc. A/3623*, 2 Y.B. Int'l L. Comm'n 131, 137 (1957).

b. In light of this prevailing understanding, this Office is informed that the United States routinely refuses to recognize the propriety of service through mail or personal delivery by a private party or foreign court to a United States embassy. When a foreign litigant or court officer purports to serve the United States through an embassy, the embassy sends a diplomatic note to the foreign ministry in the forum state, explaining that the United States does not consider itself to have been served consistent with international law and thus will not appear in the litigation or honor any judgment that may be entered against it. See 2 U.S. Dep't of State, *Foreign Affairs Manual* § 284.3(c) (2013). The United States has a strong interest in ensuring that its courts afford foreign states the same treatment to which the United States believes it is entitled under customary international law and the VCDR. See, *e.g.*, *Kumar*, 880 F.3d at 158 (recognizing importance of reciprocity interest); *Persinger* v. *Islamic Republic of Iran*, 729 F.2d 835, 841 (D.C. Cir.), cert. denied, 469 U.S. 881 (1984) (United States' interest in reciprocal treatment "throw[s] light on congressional intent").

c. Although the court of appeals acknowledged that the Executive Branch's treaty interpretation "is to be afforded 'great weight,' it summarily rejected [the government's] position." *Kumar*, 880 F.3d at 159 n.11 (ci-

tation omitted); see Pet. App. 109a. The court acknowledged that "service on an embassy or consular official would be improper" under the VCDR, Pet. App. 106a, but it believed "[t]here is a significant difference between *serving process* on an embassy, and mailing papers to a country's foreign ministry *via* the embassy," *id.* at 101a; see *id.* at 14a. But as the Fourth Circuit stated, that is an "artificial" and "non-textual" distinction. *Kumar*, 880 F.3d at 159 n.11; see *id.* at 157 (distinction arises from "meaningless semantic[s]"). In either case, the suit is against the foreign state. See 28 U.S.C. 1603(a); *El-Hadad* v. *United Arab Emirates*, 216 F.3d 29, 31-32 (D.C. Cir. 2000) (treating suit against foreign embassy as suit against the state); *Gray* v. *Permanent Mission of the People's Republic of the Congo to the United Nations*, 443 F. Supp. 816, 820 (S.D.N.Y.) (holding that permanent mission of foreign country to the United Nations is a "foreign state" under the FSIA), aff'd, 580 F.3d 1044 (2d Cir. 1978). And in either case, mailing service to the embassy treats it as the state's "de facto agent for service of process," in violation of the VCDR's principle of mission inviolability. *Kumar*, 880 F.3d at 159 n.11.

The court below also suggested that service "via" petitioner's embassy complied with the VCDR because the embassy consented to service by "accept[ing]" the papers. Pet. App. 107a. But the VCDR provides that "agents of [a] receiving State may not enter [a mission], *except with the consent of the head of the mission*." Art. 22, sec. 1, 23 U.S.T. 3237, 500 U.N.T.S. 106 (emphasis added). "Simple acceptance of the certified mailing from the clerk of court [by an embassy employee] does not demonstrate a waiver [of the VCDR]." *Kumar*, 880 F.3d at 157 n.9. And no record evidence suggests that

petitioner's Ambassador to the United States—the head of the mission—was aware of, much less consented to receive, respondents' service of process.

3. The FSIA's legislative history confirms that Congress intended the statute to bar service by mail to a foreign state's embassy.

a. An early draft of the FSIA permitted service on a foreign state by "registered or certified mail * * * to the ambassador or chief of mission of the foreign state" in the United States. S. 566, Sec. 1(1) [§ 1608], 93d Cong., 1st Sess. (1973). The State Department recommended removing that method based on its view that it would violate Article 22 of the VCDR. See H.R. Rep. No. 1487, 94th Cong., 2d Sess. 26 (1976) (House Report); *Service of Legal Process by Mail on Foreign Governments in the U.S.*, 71 Dep't St. Bull., No. 1840, at 458, 458-459 (Sept. 30, 1974). A subsequent version of the bill eliminated that method of service. H.R. 11315, Sec. 4(a) [§ 1608], 94th Cong., 1st Sess. (1975).

In addition, the House Report accompanying the bill that became the FSIA explained that some litigants had previously attempted to serve foreign states by "mailing of a copy of the summons and complaint to a diplomatic mission of the foreign state." House Report 26. The Report described this practice as having "questionable validity" and stated that "Section 1608 precludes this method so as to avoid questions of inconsistency with section 1 of article 22 of the [VCDR]." *Ibid.* Thus, "[s]ervice on an embassy by mail would be precluded under th[e] bill." *Ibid.*; see *Kumar*, 880 F.3d at 156 (relying on this legislative history); *Alberti* v. *Empresa Nicaraguense De La Carne*, 705 F.2d 250, 253 (7th Cir. 1983) (same).

b. The court of appeals disregarded this legislative history because the House Report "fail[ed] to" distinguish "between '[s]ervice on an embassy by mail,' and service on a minister [of] foreign affairs via or care of an embassy." Pet. App. 102a (citation and emphases omitted). But as discussed above, see p. 15, *supra*, that distinction is merely "semantic." *Kumar*, 880 F.3d at 157.

In any event, the court of appeals misread the legislative history. The House Report disapproved of "attempting to commence litigation against a foreign state" by "mailing * * * a copy of the summons and complaint *to* a diplomatic mission of the foreign state." House Report 26 (emphasis added). Congress thus sought to prevent parties from completing service by mailing process papers to an embassy, regardless of whether the papers are directed to the ambassador—which the court of appeals agreed would violate the statute and the VCDR, see Pet. App. 106a—or to the foreign minister, as occurred here.

B. Certiorari Is Warranted, But *Kumar* Presents A Better Vehicle For The Court's Review

1. As all parties now recognize, the question presented warrants this Court's review.

a. The decision below squarely conflicts with the Fourth Circuit's decision in *Kumar*, *supra*. In both cases, a group of victims of the USS *Cole* bombing allege that petitioner provided material support for the attack. And in both cases, the victims attempted to effect service by requesting that the clerk send documents, directed to the Minister of Foreign Affairs, to the Embassy of the Republic of Sudan in Washington, D.C. The Second Circuit upheld that method of service, while the Fourth Circuit determined that it fails to satisfy

28 U.S.C. 1608(a)(3). See *Kumar*, 880 F.3d at 159 (acknowledging split). Such disparate results on similar facts warrant this Court's review. See Resp. to Pet. at 4, *Kumar*, *supra* (No. 17-1269).

Moreover, the court of appeals' decision is in significant tension with decisions of the Seventh and D.C. Circuits. Although those courts have not directly addressed the method of service respondents attempted here, they have considered closely related questions.

In *Barot* v. *Embassy of The Republic of Zambia*, 785 F.3d 26 (2015), the D.C. Circuit recounted that the plaintiff's first effort to serve her former employer, the Zambian Embassy, had failed to comply with the FSIA because service was "attempted * * * at the Embassy in Washington, D.C., rather than at the Ministry of Foreign Affairs in Lusaka, Zambia, as the Act required." *Id.* at 28. After describing the plaintiff's further failed attempts at service, the court determined that she should be "afford[ed] * * * the opportunity to effect service pursuant to 28 U.S.C. 1608(a)(3)," which "requires serving a summons, complaint, and notice of suit, * * * that are 'dispatched by the clerk of the court,' and sent to the 'head of the ministry of foreign affairs' in Lusaka, Zambia, whether identified by name or title, and not to any other official or agency." 785 F.3d at 29-30 (citation omitted); see *Gates* v. *Syrian Arab Republic*, 646 F.3d 1, 4 (D.C. Cir.) (litigant complied with Section 1608(a)(3) by addressing service to the Syrian Ministry of Foreign Affairs), cert. denied, 565 U.S. 945 (2011); *Transaero*, 30 F.3d at 154 (Section 1608(a)(3) "mandates service of the Ministry of Foreign Affairs.").

The Seventh Circuit has similarly rejected the idea that service through an embassy comports with the

FSIA. In considering attempted service of a motion on a foreign instrumentality, the court explained that "service through an embassy is expressly banned both by an international treaty to which the United States is a party and by U.S. statutory law." *Autotech*, 499 F.3d at 748; see *Alberti*, 705 F.2d at 253 (service on the ambassador is "simply inadequate" under Section 1608(a)(3)).

b. The decision below also threatens harm to the United States' foreign relations. The United States has substantial interests in ensuring that foreign states are served properly before they are required to appear in U.S. courts, and in preserving the inviolability of diplomatic missions under the VCDR. Moreover, the United States routinely objects to attempts by foreign courts and litigants to serve the United States by delivery to U.S. embassies, and thus has a significant reciprocity interest in the treatment of U.S. missions abroad. At the same time, if this Court grants certiorari and holds that respondents' method of service was improper, respondents may be able to correct the deficient service by requesting that the clerk of court send "a copy of the summons and complaint and a notice of suit * * * to the head of the ministry of foreign affairs" of the Republic of Sudan in Khartoum, Sudan. 28 U.S.C. 1608(a)(3); cf. *Kumar*, 880 F.3d at 160 (remanding to the district court "with instructions to allow Kumar to perfect service of process in a manner consistent with this opinion").

2. Although the question presented warrants this Court's review, this case could prove to be a problematic vehicle for resolving it.

Petitioner first challenged respondents' method of service on appeal from the entry of turnover orders filed in the District Court for the Southern District of New York to execute on the default judgment issued by the

District Court for the District of Columbia. Petitioner has filed a motion to vacate the underlying default judgment, which remains pending. See 10-cv-1689 D. Ct. Doc. 55 (June 14, 2015); Pet. 11; Pet. App. 96a n.1; Fed. R. Civ. P. 60(b). Petitioner has not asked the district court to hold its proceedings in abeyance pending this Court's review of the petition for a writ of certiorari. Thus, the district court could vacate or amend its judgment at any time, calling into question the continued validity of the turnover orders at issue here and perhaps mooting this case. See *Walker* v. *Turner*, 22 U.S. (9 Wheat.) 541, 549 (1824).

For example, petitioner's motion to vacate argues, *inter alia*, that the award of punitive damages—which comprise 75% of the judgment, see Pet. App. 22a—is impermissibly retroactive. See 10-cv-1689 D. Ct. Doc. 55-1, at 33-34. The bombing of the USS *Cole* occurred in October 2000, but the statutory provision authorizing punitive damages, 28 U.S.C. 1605A, was enacted in 2008, see National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, Div. A, Tit. X, § 1083(a)(1), 122 Stat. 338. Petitioner's motion to vacate therefore contends that the award of punitive damages was improper because Congress did not clearly indicate its intent for the punitive-damages provision to apply retroactively. 10-cv-1689 D. Ct. Doc. 55-1, at 31-34; see generally *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 266 (1994).

In *Owens* v. *Republic of Sudan*, 864 F.3d 751 (2017), petitions for cert. pending, No. 17-1236 and No. 17-1268 (filed Mar. 2, 2018), the D.C. Circuit accepted petitioner's argument (which in that case supported petitioner's challenge to damages arising from another incident, see *id.* at 762). The court held that Section

1605A operates retroactively, but that Congress did not make "a clear statement authorizing punitive damages for past conduct," and it therefore vacated the punitive damages award under the FSIA. *Id.* at 816; see *id.* at 815-817. In light of the change in controlling circuit precedent, the district court may amend the underlying judgment in this case, which could in turn raise questions about the turnover orders' continued validity.

3. The petition for a writ of certiorari in *Kumar* presents the same question as does this case. See Pet. at i, *Kumar* v. *Republic of Sudan*, No. 17-1269 (filed Mar. 9, 2018). *Kumar*, which arises on direct review of a motion to vacate a default judgment, appears to present a better vehicle for this Court's consideration. *Id.* at 16-17.

The Republic of Sudan, petitioner here and respondent in *Kumar*, states that it is "indifferent" as to which petition this Court grants, but it suggests that *Kumar* presents its own vehicle problems. Resp. to Pet. at 4, 7, *Kumar*, *supra* (No. 17-1269); see generally *id.* at 4-7. Those issues do not appear to present significant vehicle problems. For example, respondent in *Kumar* notes, *id.* at 5, that petitioners there have been granted time to effect proper service on remand from the Fourth Circuit's decision, and that respondent in *Kumar* will then move to dismiss the complaint on other bases. But no such motion has been filed. And even if litigation of such a motion proceeds in the district court, that would not foreclose this Court from deciding the question presented, which would determine whether the default judgment in that case should have been set aside and thus whether the proceedings on remand should have occurred in the first place.

Because the question presented warrants review, and because *Kumar* provides a better vehicle for this

Court's consideration, this Court should grant the petition for a writ of certiorari in *Kumar*, and hold this petition pending its disposition of that case. In the alternative, to ensure that the Court may decide the question presented, the Court may wish to grant certiorari in both cases and consolidate them for review.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's consideration of the petition for a writ of certiorari in *Kumar* v. *Republic of Sudan*, No. 17-1269 (filed Mar. 9, 2018), and then be disposed of as appropriate. In the alternative, if the Court grants the petition in *Kumar*, the Court may wish to grant certiorari in this case and consolidate it with *Kumar* for consideration of the merits.

Respectfully submitted.

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MAY 2018