No. 17-1011

IN THE

Supreme Court of the United States

BUDHA ISMAIL JAM, ET AL.,

Petitioners,

v.

INTERNATIONAL FINANCE CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit

BRIEF IN OPPOSITION

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March 30, 2018

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

In 1945, Congress enacted the International Organizations Immunities Act ("IOIA"), 22 U.S.C. § 288a(b), to protect international organizations composed of numerous member states from suit in domestic courts. The IOIA provides that international organizations designated by the President enjoy "the same immunity from suit and every form of judicial process as is enjoyed by foreign governments." 22 U.S.C. § 288a(b). At the time, foreign states were entitled to virtually absolute immunity. The IOIA further provides that the President may in his discretion revoke, condition, or limit the immunity of any designated international organization. *Id.* at § 288. The question presented is:

Whether the Court of Appeals correctly held that the IOIA does not incorporate subsequent developments in the law of foreign-state immunity, including those enacted in the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1603 *et seq.*

RULE 29.6 STATEMENT

International Finance Corporation was established in 1956 by its founding multilateral treaty, the IFC Articles of Agreement. As a public international organization, IFC is owned by the governments of 184 nations.

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INTRODUCTION

This case involves potential lender liability arising from the alleged environmental impact of a power plant in Gujarat, India. Petitioners are Indian nationals who allege that they were harmed by those impacts. The power plant is owned and operated by an Indian company (not Respondent). All of the alleged injuries occurred in India.

Respondent International Finance Corporation ("IFC") is a public international organization owned by 184 member countries, including the United States. It is headquartered in Washington, D.C. In 1956, President Eisenhower designated IFC an international organization under the International Organizations Immunities Act ("IOIA") and the IFC statute, 22 U.S.C. § 282 *et seq.*; such designation entitles IFC to enjoy the privileges and immunities conferred by the IOIA, subject only to waiver and to revision or revocation by the President.

This Court should deny the Petition because the D.C. Circuit correctly interpreted and straightforwardly applied the IOIA to bar Petitioners' suit. The immunity from suit conferred by the IOIA is virtually absolute, and Congress expressly provided a means for adjusting that immunity over time: the President may withdraw or limit an organization's immunity. The immunity conferred in the IOIA was not altered, decades later, by the passage of the Foreign Sovereign Immunities Act ("FSIA")—a different statute, covering different entities, with different motivating principles. If the passage of the FSIA had fundamentally altered IOIA immunity, it would subject some organizations, i.e.,

those created for the primary purpose of development through financing, to the possibility of suit in the United States in respect of many, if not all, of their activities.

The IOIA's text, legislative history, and purpose support the D.C. Circuit's view of IOIA immunity as de-linked from foreign-sovereign immunity. Foundational concepts under foreign-sovereign immunity, like reciprocity and foreign-official immunity, do not track under the IOIA. Moreover, the principles animating international-organization immunity and those animating foreign-sovereign immunity differ substantially: The main principle of international-organization immunity is to prevent any single member country from possessing outsized influence through its national courts over the actions of the organization; by contrast, the main principles of foreign-sovereign immunity are to foster comity among co-equal sovereigns based and to gain favorable reciprocal treatment in foreign relations. Thus, the IOIA expressly rejects reciprocity as a consideration relevant to organization immunity and grants officers of international organizations an immunity that is less comprehensive than that enjoyed by officials of foreign states. Far from "anomalous," it is predictable that Congress considered international organizations differently than their individual member-country owners.

Under Petitioners' view, the passage of the FSIA altered not only the eponymous foreign sovereigns but also any and all immunities *related to* foreign sovereigns. But this is not so. In *Samantar v. Yousuf*, 560 U.S. 305 (2010), this Court rejected

precisely this view, holding that the FSIA did not govern other forms of immunity—in that case, foreign-official immunity. In doing so, this Court rejected the same "anomalous result" arguments Petitioners offer here.

What *is* anomalous is the Third Circuit's decision in *OSS Nokalva v. European Space Agency*, 617 F.3d 756 (3d Cir. 2010). However, that lone panel decision does not create a conflict warranting this Court's review. Not only are suits against international organizations uncommon, but also they frequently do not even involve the application of the IOIA. Further, in nearly all of them, the international organization would enjoy immunity from suit even under the restrictive theory adopted by the Third Circuit. Thus, Petitioners' questions presented are unlikely to recur.

Likewise, this Court should decline Petitioners' request to correct the D.C. Circuit's "error" in its reading of IFC's charter, the IFC Articles of Agreement. Both the District Court and the Court of Appeals interpreted Article VI, § 3 of the IFC Articles of Agreement consistently with the entire charter, including the provision explaining that the charter's waiver language is intended to enable IFC "to fulfill the functions with which it is entrusted." If Petitioners' interpretation prevailed, almost every financing IFC made anywhere in the world could be the subject of a lawsuit in Washington, D.C., by any number of plaintiffs who may have some asserted interest in the development project at issue. U.S. courts would routinely be asked to scrutinize IFC's internal decision-making.

Finally, even if Petitioners were correct that the FSIA applies to international organizations, IFC would still be immune from Petitioners' claims because they do not fit within the FSIA's commercial-activity exception. The gravamen of Petitioners' suit is the alleged tortious operation of a power plant in Gujurat, India. Because the gravamen of their claims is neither commercial activity in the United States nor an act in the United States related to commercial activity elsewhere, the FSIA's commercial-activity exception to immunity from suit would not apply.

STATEMENT OF THE CASE

I. Statutory Framework

Foreign sovereigns have historically been entitled to immunity from suit in U.S. courts. *See The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 137 (1812). For much of the Nation's history, until 1952, the Executive Branch—to which courts deferred—applied a theory of absolute immunity, under which foreign states generally could not be subject to suit without their consent. *See Samantar v. Yousuf*, 560 U.S. 305, 311-12 (2010). In 1952, the Department of State adopted the "restrictive" theory of foreign-sovereign immunity. *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 711 (1976). Under that theory, foreign states were granted immunity for their sovereign acts but not their commercial acts. *Permanent Mission of India to the U.N. v. City of N.Y.*, 551 U.S. 193, 199 (2007). In 1976, Congress enacted the FSIA, which essentially codified the restrictive theory of sovereign immunity, and which now provides the sole basis for obtaining jurisdiction over a foreign state, or its agencies and

instrumentalities, in a civil case. 28 U.S.C. § 1603 *et seq.*; *id.* § 1605(a)(2) (codifying commercial-activities exception).

Separately, in the aftermath of World War II, the United States and the international community created numerous public international organizations (i.e., organizations whose membership is composed of the United States and foreign governments). As those organizations began to conduct activities in the United States, Congress recognized the need to confer on them immunity from suit in U.S. courts. H.R. Rep. No. 79-1203, at 1-2 (1945). That immunity would ensure that courts of the United States—a single member state—would not increase the burdens, financial and otherwise, of organizations whose activities represent the collective efforts of multiple foreign sovereigns.

In 1945, Congress enacted the IOIA to provide international organizations designated by executive order with immunity from suit. Specifically, the IOIA provides international organizations with "the same immunity from suit and every form of judicial process as is enjoyed by foreign governments." 22 U.S.C. § 288a(b). An international organization "may expressly waive [its] immunity for the purpose of any proceedings or by the terms of any contract." *Id.* Additionally, the President may revoke, condition, or limit the immunity of any designated international organization "if, in his judgment such action should be justified by reason of the abuse by an international organization or its officers and employees of the privileges, exemptions, and immunities provided . . . or for any other reason, at any time." *Id.* § 288.

Since 1945, U.S. Presidents have designated at least 82 entities as "international organizations" under the IOIA. U.S. Dep't of State, 9 Foreign Affairs Manual 402.3-7(M) (2017). The United States is a member of some of these organizations, such as the World Bank and IFC. However, Presidents have also designated certain entities as "international organizations" entitled to IOIA immunity even though the United States is not a member and is not bound via treaty, such as the European Space Agency. *See, e.g.*, 22 U.S.C. § 288f–1 (ESA and Organizations of Eastern Caribbean States); *id.* § 288f–2 (African Union).

II. International Finance Corporation

IFC was founded in 1956 by its constitutional treaty, the IFC Articles of Agreement, Dec. 5, 1955, 7 U.S.T. 2197, T.I.A.S. No. 3620 [hereinafter "IFC Articles"]. IFC was designed to foster development in the private sector, in part through strategic lending. *See* H.R. Rep. No. 84-1299, at 1-2, 4 (1955). IFC's investments complement work by the other Bretton Woods institutions: the International Monetary Fund, which acts to stabilize world currencies, and the World Bank, which focuses on public-sector projects. *Id.*; *Bill to Provide for Participation of the United States in IFC: Hearing on S. 1894 Before the S. Subcomm. on Banking & Currency*, 84th Cong. 22-23 (1955) [hereinafter "S. 1894 Hearing"] (IFC to fill "an important gap in the existing international machinery for financing economic development").

The collective effort of these organizations was instrumental in repairing the global economy after World War II. IFC now counts 184 nations as

members, including the United States. Pet. App. 3a, 24a. It provided financing for development projects of more than $19 billion in fiscal year 2017 alone. *See* IFC, *A Record Year*, News & Views, Nov. 2017, at 1, http://www.ifc.org/wps/wcm/connect/20277329-63ef-4af1-8d5a-7778d5f4806a/IFC+Treasury+Funding+Newsletter+for+Investors+Nov+2017.pdf?MOD=AJPERES.

The United States actively negotiated both the IFC Articles and the nearly identical World Bank Articles of Agreement. *See* S. 1894 Hearing at 22 (noting "that the United States [would] take initiative in creating" IFC). IFC's chartered purpose "is to further economic development by encouraging the growth of productive private enterprise in member countries, particularly in the less developed areas." IFC Articles art. I. IFC accomplishes this purpose by "assist[ing] in financing the establishment, improvement, and expansion of productive private enterprises" through lending "in association with private investors" and through advisory services to stimulate private-sector investment in member countries where capital is scarce. *Id.* art. I(i)-(iii). At the urging of the United States, the Articles prohibit IFC from "assum[ing] responsibility for managing any enterprise in which it has invested." *Id.* art. III § 3(iv); *see* S. 1894 Hearing at 28 (Statement of Treas. Sec. Humphrey) ("We in the Treasury do not think it would be desirable or feasible for [IFC] . . . to take the management responsibility which stock ownership entails.").

"To enable the Corporation to fulfill the functions with which it is entrusted," the IFC Articles protect

IFC with jurisdictional "privileges and immunities" that "shall be accorded in the territories of each member." IFC Articles art. VI § 1; *see also id.* art. VI § 10 (committing "each member . . . to mak[e] effective in terms of its own law the principles set forth in this Article").

In 1955, Congress passed the International Finance Corporation Act, which authorized the President to accept membership in IFC on behalf of the United States and declared that IFC's immunities under the Articles "shall have full force and effect in the United States . . . upon acceptance of membership by the United States in, and the establishment of, the Corporation." 22 U.S.C. § 282g. President Eisenhower signed the IFC Articles on behalf of the United States on December 5, 1955. *See* 7 U.S.T. 2197.

In 1956, the President designated IFC an "international organization entitled to enjoy the privileges, exemptions, and immunities conferred by the . . . International Organizations Immunities Act." Exec. Order No. 10,680, 3 C.F.R. 86-87 (Supp. 1956). The President has not revoked, limited, or modified IFC's jurisdictional immunities under the IOIA.

III. Background And Proceedings Below

A. IFC Finances A Portion Of The Tata Mundra Power Project

In 2005, the Government of India began exploring major power projects that would serve some of its 400 million people lacking access to the electricity grid. The Tata Mundra Ultra Mega Power Project was

planned to "supply much-needed power for India's continued economic growth" in five Indian states. Pet. App. 23a. Coastal Gujarat Power Limited ("CGPL"), an Indian power company, developed and now operates the plant. *Id.* at 24a. Pursuant to a loan agreement and other documentation, IFC loaned $450 million to CGPL's Tata Mundra project—approximately 11% of the project's total $4.14 billion estimated cost. *Id.*

To address the potential environment and social impact of CGPL's planned project, IFC and CGPL jointly developed an Environmental and Social Action Plan ("Social Action Plan"). *Id.* at 25a. The IFC-CGPL lending agreement makes clear, however, that "managing environmental and social risks and impacts in a manner consistent with the Performance Standards" and Social Action Plan "becomes the responsibility of the client," CGPL. *Id.* (quoting Social Action Plan ¶ 7).

B. Petitioners File CAO Complaint

Because international organizations are typically immune from suit to prevent interference in their internal operations, many have developed internal "conflict resolution systems." Joshua M. Javits, *Internal Conflict Resolution at International Organizations*, 28 A.B.A. J. Lab. & Emp. L. 223, 223-224 (2013). The Compliance Advisor Ombudsman ("CAO") is IFC's internal conflict-resolution mechanism. Pet. App. 26a. "[T]he CAO's compliance function is focused on *IFC's* environmental and social performance, not on the performance of IFC's clients." *Id.* (emphasis added). The CAO "is not a court, has no authority with respect to judicial processes, and

creates no legal enforcement mechanism." *Id.* at 27a (internal quotation marks omitted).

Petitioners filed a complaint with the CAO alleging that IFC failed to prevent CGPL's plant from causing social and environmental harms because IFC did not "follow its own policies and enforce the conditions of the loan agreement" by, *inter alia*, cancelling its loan to CGPL. Pet. App. 26a (alterations in original omitted). The CAO recommended remedial measures. Pet. App. 27a-28a. CGPL then adopted a ten-point action plan to bring the plant back into compliance with IFC policy. *Id.* at 27a. At no point did the CAO recommend that IFC cancel its loan to CGPL. *Id.* at 27a-28a (citing ECF No. 10-21). The CAO continues to monitor compliance with IFC policy and makes recommendations as appropriate. *Id.* at 28a.

C. The District Court Dismisses Petitioners' Suit

Unsatisfied with the CAO process, Petitioners retained an organization engaged in environmental advocacy litigation to sue IFC in the U.S. District Court for the District of Columbia. Pet. App. 28a. Though IFC was a minority lender and lacked any management control, Petitioners allege that IFC "is primarily responsible for their injuries" caused by CGPL's plant. *Id.* at 23a. Petitioners' "complaint characterizes the suit as one that arises out of IFC's irresponsible and negligent conduct . . . in appraising, financing, advising, supervising and monitoring its significant loan to CGPL." *Id.* at 33a (internal quotation marks omitted). Their "claims are almost entirely based on tort: negligence, negligent nuisance, and trespass." *Id.* at 3a. Petitioners' complaint

alleges that, "[i]n *loaning money* for the Tata Mundra Project, the IFC engaged in substantial commercial activity in the United States, in Washington, D.C., and engaged in conduct in the United States in connection with commercial activity outside the United States." 1 D.C. Cir. JA0058 (Compl. ¶ 195) (emphasis added).

IFC moved to dismiss Petitioners' complaint on the grounds that IFC was immune from this lawsuit under the IOIA, arguing that the IOIA conferred absolute immunity on IFC.[1] IFC further argued that it had not waived its immunity in Article VI of the IFC Articles. 1 D.C. Cir. JA0107-08 (Mot. to Dismiss at 7-8). Petitioners responded that the IOIA's grant of immunity is limited by the exceptions to foreign-state immunity codified in the FSIA, and in particular, the FSIA's "commercial activity" exception. Pet. App. 37a. Alternatively, Petitioners argued that IFC had waived its immunity in Article VI of the IFC Articles. *Id.* at 32a-33a.

The District Court concluded that IFC was immune from this suit under the IOIA. Pet. App. 28a. The District Court also found that Article VI of the IFC Articles did not permit Petitioners' suit for two reasons. First, "none of [Petitioners] have a

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[1] IFC also moved to dismiss pursuant to the doctrine of *forum non conveniens* because each of the key features of this suit—Petitioners' residence, CGPL's plant, IFC's monitoring activities, most relevant witnesses, and all of the alleged injuries—centers in India. *Id.* at 28a. IFC submitted that the private- and public-interest factors point to India, which is the preferred forum for resolving Petitioners' claims. *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947).

commercial relationship with IFC." *Id.* at 33a. Second, Petitioners' suit, which is "aimed squarely at IFC's discretion to select and administer its own projects," would "open IFC to disruptive interference with its lending policies." *Id.* at 34a, 36a (internal alteration and quotation marks omitted). Finding a sufficient reason to dismiss Petitioners' claims, the District Court granted IFC's motion but left its *forum non conveniens* ground for dismissal unaddressed. *Id.* at 28a.

D. The D.C. Circuit Affirms And Denies Rehearing En Banc

The D.C. Circuit affirmed the District Court's "well-reasoned" opinion. Pet. App. 2a. The court reaffirmed long-standing D.C. Circuit precedent holding that "foreign organizations receive[d] the immunity that foreign governments enjoyed at the time the IOIA was passed, which was 'virtually absolute immunity.'" *Id.* at 4a (quoting *Atkinson v. Inter-Am. Dev. Bank*, 156 F.3d 1335, 1340 (D.C. Cir. 1998)). The court rejected Petitioners' argument that the IOIA incorporates the FSIA's subsequently enacted "commercial activity" exception. The court explained that "when considering the [IOIA] legislation, Congress rejected a commercial activities exception." *Id.* at 5a (citing *Atkinson*, 156 F.3d at 1341). Instead, Congress "explicitly delegated the responsibility to the President" to effect changes in IOIA immunity. *Id.*

The court further concluded that IFC did not waive its immunity from this suit under Article VI of the IFC Articles. *Id.* at 10a-11a. The court found that IFC is immune from "claims arising out of core

operations," which "threaten the policy discretion of the organization," but is subject to suits arising from its "ancillary business transactions." *Id.* at 10a; *see also id.* at 9a ("The *Mendaro* test instead focused on identifying those transactions where the other party would not enter into negotiations or contract with the organization absent waiver.") (citing *Mendaro v. World Bank*, 717 F.2d 610, 617 (D.C. Cir. 1983)). Because Petitioners' suit is of the former category, IFC retains immunity. *Id.* at 11a.

Judge Pillard concurred. Pet. App. 12a-22a. She agreed that Petitioners' complaint was properly dismissed pursuant to *Atkinson* and *Mendaro*, but stated that the Court of Appeals "should revisit both *Atkinson* and *Mendaro* in an appropriate case." *Id.* at 21a.

Petitioners requested rehearing en banc but no member of the D.C. Circuit called for a poll. *See id.* at 39a (denying rehearing en banc in "the absence of a request by any member of the court for a vote").

REASONS FOR DENYING THE PETITION

I. The Court Of Appeals' Construction Of The IOIA Is Correct, And It Does Not Warrant This Court's Review

The Court of Appeals correctly held that the IOIA confers presumptively absolute immunity on international organizations, and that the scope of the immunity conferred does not change with subsequent developments in the immunity of foreign states. Rather, Congress accounted for the possibility of subsequent developments in the law and practice of foreign immunities by conferring on the President authority to limit or withdraw an international organization's immunity in appropriate circumstances.

Contrary to Petitioners' contention (Pet. 18), there is nothing remarkable about the fact that organizations' immunity is presumptively broader in scope than that of foreign states. Fundamentally different considerations animate the immunities of international organizations and foreign states. Moreover, this Court has previously recognized that the FSIA does not govern all types of foreign immunity: foreign-official immunity, which is much more closely related to foreign-sovereign immunity than is international-organization immunity, is not governed by the FSIA and can be broader than foreign-state immunity. *Samantar v. Yousuf*, 560 U.S. 305, 321-22 (2010).

This Court's review is not warranted. Although the Third Circuit has disagreed with the D.C. Circuit's construction, Petitioners' questions

presented are unlikely to recur with any frequency. International organizations often need not rely on the IOIA, as their charters also confer broad immunity that is independent of the IOIA. Further, the suits brought against such organizations often would not fall within any of the FSIA's exceptions to immunity, even if the FSIA applied. The petition for a writ of certiorari should be denied.

A. The Court Of Appeals' Construction Of The IOIA Is Correct

1. a. Enacted in 1945, the IOIA provides that international organizations "shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments." 22 U.S.C. § 288a(b). The phrase "same immunity from suit . . . as is enjoyed by foreign governments" had a clear, substantive meaning at the time of the IOIA's enactment: the United States "generally granted foreign sovereigns complete immunity from suit in the courts of this country." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983); *see also Atkinson*, 156 F.3d at 1340; *Nat'l City Bank v. Republic of China*, 348 U.S. 356, 362 (1955). The authority to determine foreign-state immunity rested with the President, pursuant to his foreign-affairs power. In 1945, the Executive Branch followed a theory of absolute immunity, under which (with narrow exceptions) "a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign."[2] *Alfred Dunhill of London, Inc. v.*

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[2] Although Petitioners attempt to argue (Pet. 22-24) that foreign-state immunity was not in fact "absolute" in 1945, the Executive Branch, and courts applying principles set forth by

Republic of Cuba, 425 U.S. 682, 711 (1976) (quoting Tate Letter, which set forth the Executive Branch's historical understanding of immunity).

Congress's invocation of foreign-state immunity in the IOIA thus had two substantive effects. First, it created a default rule of absolute immunity to be applied as the rule of decision in suits involving international organizations. Second, it expressed Congress's recognition that international organizations that are composed of multiple member states, including the United States, were entitled to "privileges of a governmental character," consistent with their "official" nature. S. Rep. No. 79-861, at 2 (1945).

Congress also expressly provided a mechanism by which the scope of immunity accorded to

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the Executive Branch, have not held that foreign states were subject to suit based on their commercial activities. Instead, foreign states' immunity was subject only to narrow exceptions concerning real property and merchant vessels that are not relevant here. *Alfred Dunhill*, 425 U.S. at 711-12. The decisions upon which Petitioners rely (Pet. 24) are not to the contrary. *United States v. Deutsches Kalisyndikat Gesellschaft*, 31 F.2d 199 (S.D.N.Y. 1929), did not "deny" (Pet. 24) immunity to a foreign sovereign based on its commercial activity. The court "only" held that immunity did not apply because a suit against a state-owned corporation is "not a suit against the Republic of France or any representative of that republic." 31 F.2d at 203; *see also id.* at 200-02 (noting State Department's pre-FSIA view that a state-owned corporation has no "diplomatic status in this country" and concluding that such a corporation does not enjoy immunity merely "because its stock is owned solely by the government"). *The Pesaro*, 277 F. 473 (S.D.N.Y. 1921), involved a foreign merchant vessel that was not entitled to immunity even under the absolute theory.

international organizations could be modified over time. Section 288 delegates to the President the authority to "withhold or withdraw" immunity in "light of the functions performed by any such international organization," or to "condition or limit" the immunity in any way. 22 U.S.C. § 288; *see also Atkinson*, 156 F.3d at 1341 ("It seems, therefore, that Congress was content to delegate to the President the responsibility for updating the immunities of international organizations in the face of changing circumstances.").

Despite the foregoing, Petitioners contend that Congress's use of the phrase "same immunity from suit . . . as is enjoyed by foreign governments" reflects Congress's intent to incorporate subsequent developments in foreign-state immunity, such that international organizations' immunity would evolve along with foreign-state immunity. Pet. 3-4. In support of their contention, Petitioners rely on the "reference canon," which Petitioners view as establishing that Congress's reference to the immunity of foreign states presumptively should be construed to incorporate subsequent changes in the law of foreign-state immunity. Pet. 15. But that canon—which merely provides a guide to interpretation in the absence of other evidence of congressional intent—has no application here. Congress expressly provided a means of modifying international-organization immunity in light of changing circumstances, including subsequent legal developments. 22 U.S.C. § 288. That provision demonstrates that Congress intended in Section 288a to establish a substantive rule of absolute immunity, subject to subsequent modification by the President.

If the President deemed it appropriate, he could use his authority under Section 288 to establish that international organizations' immunity should be coextensive with the current scope of foreign-state immunity. In the absence of such action, however, Section 288a's rule of absolute immunity continues to control.[3]

Indeed, under Petitioners' construction, Section 288's delegation to the President would be superfluous. Under the law of foreign-state immunity existing in 1945, the Executive Branch had primary responsibility for determining the scope and application of foreign-state immunity, an authority that included the ability to alter the scope of immunity over time. *Verlinden*, 461 U.S. at 486-87; *Alfred Dunhill*, 425 U.S. at 711-12 (announcing Executive's adoption of the more limited "restrictive" theory of foreign-state immunity). Had Congress assumed that international organizations' immunity would automatically follow that of foreign states, it also would have assumed that the scope of international organizations' immunity would effectively be determined by the President's exercise of his authority to alter foreign-state immunity over time. There would have been no need expressly to

[3] Petitioners also invoke *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003), for the proposition that jurisdictional provisions phrased in the present tense require applying the law as of the time of suit. Pet. 16. But *Dole* held only that sovereign immunity must be determined based on the *facts* as they exist at the time of suit, rather than at an earlier time. 538 U.S. at 478. That well-established rule sheds no light on whether Congress intended to incorporate subsequent changes in the law of foreign-sovereign immunity in the IOIA.

provide the President with authority to "withhold or withdraw" the immunity otherwise granted by Section 288a. 22 U.S.C. § 288.

b. Various other "textual clues . . . cut against" Petitioners' argument that Congress intended to forever link organizational and sovereign immunities. *Samantar*, 560 U.S. at 306; Pet. 15. Several of the IOIA's provisions distinguish between international organizations and foreign states. For instance, Section 288f provides that international organizations are entitled to the immunity granted by Section 288a even in situations in which the Executive would condition its suggestion of a foreign state's immunity on reciprocity by that foreign state. 22 U.S.C. § 288f; *see Garb v. Republic of Poland*, 440 F.3d 579, 585 (2d Cir. 2006) (discussing importance of reciprocity concerns in traditional application of foreign-state immunity). In addition, Section 288d provides immunities for "representatives of foreign governments in or to international organizations" that are more limited than the diplomatic immunity to which foreign-state representatives are ordinarily entitled. 22 U.S.C. § 288d(b). These provisions indicate that Congress did not expect the immunities afforded by the IOIA to evolve with the common law of foreign-state immunity or otherwise. Instead, Congress created substantive rules of immunity tailored to international organizations, and granted the President discretion to modify or withdraw those immunities. *Atkinson*, 156 F.3d at 1341; 22 U.S.C. § 288.

2. The drafting history and purpose of the IOIA also counsel against Petitioners' construction.

Congress considered and rejected precisely the commercial-activity exception that Petitioners seek to graft onto the IOIA. Pet. App. 5a. Instead, Congress anticipated that the President could decide whether immunity would remain appropriate if an international organization "should engage, for example, in activities of a commercial nature." *Atkinson*, 156 F.3d at 1341 (quoting S. Rep. No. 79-861, at 2); 91 Cong. Rec. 12,530-31 (1945) (rejecting argument for express commercial-activities exception because such concern was "fully taken care of" by § 288); 91 Cong. Rec. 12,432 (1945) (remarks of Sen. Taft on "same immunity" amendment: Section 288 allows the President "to cancel any individual privilege" if organizations "go beyond the purpose of the act"). Congress thus anticipated the possibility that absolute immunity might be inappropriate in certain circumstances—and it assumed that the discretion conferred by Section 288 would enable the President to address those situations.

Petitioners contend that the drafting history indicates that Congress declined to confer absolute immunity in Section 288a. Pet. 16-17. That is incorrect. As Petitioners observe, the Senate rejected an earlier House version of the IOIA that would have conferred on international organizations "immunity from suit and every form of judicial process." Pet. 16 (quoting H. R. 4489, 79th Cong. § 2(b) (1945)). But in describing the Senate's amendments, the bill's House sponsor did not include the amendment on which Petitioners rely as one of the "substantive" amendments meriting discussion on the House floor. 91 Cong. Rec. 12,532 (1945). To the extent that the

drafting history provides any evidence of congressional intent, therefore, it indicates that Congress did not view the earlier conferral of absolute "immunity from suit" as materially different from the ultimately enacted language.[4]

3. a. Petitioners' construction of Section 288a—under which the FSIA now governs international organizations' immunity—would give rise to anomalous results.

Under Petitioners' view, the enactment of the FSIA in 1976 had the effect of shoehorning the immunity of a wide range of international organizations with vastly different functions into the FSIA's one-size-fits-all framework.[5] In particular, all organizations would be subject to suit for claims "based on" certain commercial activities. 28 U.S.C. § 1605(a)(2). For some organizations that engage in a

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[4] Petitioners state that Congress has subsequently "read the IOIA to provide only restrictive immunity." Pet. 18 (citing H.R. Rep. No. 105-802, at 13 (1998)). But that congressional report, which noted "a lack of case law on this issue," predated *Atkinson*. H.R. Rep. No. 105-802, at 13 (1998). And in any event, other subsequent congressional statements point in the opposite direction. *See* 101 Cong. Rec. 13,409 (1990) (statement of Sen. Roth concerning S. 2715) ("Even though the immunity enjoyed by foreign governments has changed, the 1945 law has not been changed and the listed international organizations retain absolute immunity.").

[5] The FSIA itself suggests no congressional intent to include international organizations within its scope. Congress did not include international organizations "in the elaborate definition of 'state' in § 1603." *Broadbent v. Org. Am. States*, 628 F.2d 27, 31 (D.C. Cir. 1980); *see Samantar*, 560 U.S. at 317 (holding that foreign officials are not included within the definition of foreign "state").

range of commercial and non-commercial activities, that would mean that a subset of their activities would potentially be subject to suit. But for other organizations, especially those that focus on financial transactions, nearly all of their activities potentially could be characterized as commercial in nature. If the commercial-activity exception's other requirements were met, those activities could be the subject of lawsuits in U.S. courts.

In effect, under Petitioners' view, the FSIA's enactment would have sub silentio abrogated immunity for a range of international organizations. That result would be entirely inconsistent with Congress's evident intent, in the IOIA, to ensure that all designated international organizations (regardless of their primary functions) would be presumptively entitled to immunity—subject only to the President's authority to make tailored immunity determinations based on the organization and the situation at issue. 22 U.S.C. § 288.

Applying the restrictive view of sovereign immunity embodied in the FSIA to all international organizations would also be inconsistent with the principles animating international-organization immunity. That immunity rests on the recognition that because such organizations are composed of numerous sovereign states, "a Member State ought not to be able to exercise power, through its national courts, over the execution of the Organization's functions or the disposition of its funds, which have, in the first instance, been determined and contributed collectively." Alice Ehrenfeld, *United Nations Immunity Distinguished From Sovereign*

Immunity, 52 Am. Soc'y Int'l L. Proc. 88, 90 (1958) (cited in Privileges and Immunities, 13 Whiteman Digest, ch. 38 § 5, at 51-55); Secretary of State, *Report to the President on the Results of the San Francisco Conference*, 158-60 (1945) [hereinafter "San Francisco Report"] (immunity designed to protect organizations from "interference by any state," especially from litigation in "the country in which [the organization] has its seat"). To hold that international organizations are categorically subject to suit for commercial activities—and the other activities made subject to suit in the FSIA—would violate this principle.

b. For much the same reasons, Petitioners are incorrect in contending (Pet. 18) that it is "anomalous" to accord international organizations presumptively absolute immunity when foreign states' immunity is narrower.

The principles animating foreign-state immunity differ in fundamental respects from those animating international-organization immunity. "[F]oreign sovereign immunity is a matter of grace and comity" that is extended from one co-equal sovereign to another based on considerations of reciprocity and foreign relations. *Verlinden*, 461 U.S. at 486; *Nat'l City Bank*, 348 U.S. at 362. The United States accordingly adopted the restrictive theory of sovereign immunity with respect to foreign states because other sovereign nations had increasingly distinguished between a state's "sovereign" and "private" acts. *Alfred Dunhill*, 425 U.S. at 712-714 (quoting Tate Letter); *Broadbent*, 628 F.2d at 30-31 (noting that the distinction between sovereign and

commercial activities is "central" to the restrictive theory). When a sovereign acted in the capacity of a private actor, suits based on those actions were understood not to raise the same comity and sovereignty concerns as suits based on sovereign acts. By contrast, any suit against an international organization implicates the fundamental concern animating its immunity: the need to avoid empowering a single member state, through its national courts, to control or burden the actions of the organization as a whole. For that reason, it is hardly anomalous to accord international organizations presumptively absolute immunity, tempered by the Executive's ability to limit immunity in appropriate situations.

More broadly, this Court has already recognized that the FSIA does not and never was intended to govern every type of immunity related to foreign-sovereign immunity. In *Samantar*, this Court held that the FSIA does not govern the immunity of foreign officials—even though foreign official immunity is grounded in the recognition that asserting jurisdiction against a foreign official for acts taken in an official capacity effectively asserts jurisdiction against the state itself. 560 U.S. at 321. The Court explained that under the common law applied by the Executive Branch, foreign officials were sometimes entitled to immunity in situations in which the state itself would not be. *Id.* at 322 (citing *Greenspan v. Crosbie*, No. 74-4734, 1976 WL 841 (S.D.N.Y. Nov. 23, 1976)). Thus, even in the context of foreign-official immunity—which is far more closely related to foreign-state immunity than is international-organization immunity—this Court did

not see anything "anomalous" in according foreign officials broader immunity than foreign states.

4. Finally, Petitioners rely heavily (Pet. 13) on a nearly forty-year-old brief filed by the United States as amicus curiae in *Broadbent*, in which the United States took the position that under the IOIA, international organizations were subject to suit based on commercial activities. *See* 3 D.C. Cir. JA1067-69. But that dated expression lacks persuasive force in light of intervening developments.[6] Although *Broadbent* itself did not decide the issue, the D.C. Circuit eventually rejected the government's view in *Atkinson*. 156 F.3d at 1341. In the 20 years since, the United States has not attempted to persuade the D.C. Circuit to reconsider its view. *Cf.* Reply in Support of Statement of Interest of the United States at 7, *Lempert v. Rice*, 956 F. Supp. 2d 17 (D.D.C. 2013) (No-12-1518), ECF No. 24 (acknowledging, in a case in which the IOIA was not dispositive, that the D.C. Circuit has held "that the immunity provided by the IOIA is 'absolute' and subject only to limitation by Executive Order").

Atkinson has long been the law; if the Executive Branch continues to disagree with *Atkinson* and believes that international organizations should be subject to suit for their "commercial activities," it would not need to go to court, but could accomplish that result by exercising its authority under Section 288 to modify or retract the immunity of specific

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[6] The United States did not support its conclusion with any analysis of the IOIA's text, its drafting history and purpose, or the immunity considerations specific to international organizations. *See* 3 D.C. Cir. JA1067-69.

international organizations. Instead, the President has continued to designate other entities as international organizations under the IOIA, providing them unqualified, absolute immunity without exceptions for commercial activities or any other activity that would be subject to suit under the FSIA. *See, e.g.*, Exec. Order No. 13,759, 82 Fed. Reg. 5323 (Jan. 12, 2017) (designating the World Organisation for Animal Health as an international organization).

B. Any Conflict Between The D.C. Circuit And The Third Circuit Concerning The Interpretation Of The IOIA Does Not Warrant Review

As Petitioners observe (Pet. 11), the Third Circuit has construed the IOIA to incorporate subsequent developments in foreign-state immunity, including the FSIA. *OSS Nokalva, Inc. v. Eur. Space Agency*, 617 F.3d 756, 766 (3d Cir. 2010) ("[T]he reasoning underlying the FSIA's exception for suits arising out of a government's commercial transactions from the broad immunity it otherwise accords such a government is equally applicable to international organizations and is incorporated into the IOIA."). That shallow circuit split does not warrant this Court's review. Indeed, this Court confirmed as much when it denied a petition to review the disagreement between the Third and D.C. Circuits in *Nyambal v. International Monetary Fund*. *See* 135 S. Ct. 2857 (2015) (denying petition for writ of certiorari to D.C. Circuit in 772 F.3d 277 (D.C. Cir. 2014)).

As an initial matter, suits against international organizations are uncommon. Over the past decade,

there have been only approximately 15 reported decisions concerning suits against international organizations in which IOIA-related issues have arisen.[7]

Rarer still are IOIA cases on which the questions presented would have any practical impact. Suits concerning the most frequently sued organizations—the U.N. and the IMF—do not implicate the questions presented, because those organizations (as Petitioners acknowledge) also enjoy immunity from suit under their founding treaties and thus need not

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[7] *See Laventure v. U.N.*, No. 14-1611, 2017 WL 3671175, at *5 (E.D.N.Y. Aug. 23, 2017) (dismissing suit); *Zuza v. Off. of High Representative*, 107 F. Supp. 3d 90, 91 (D.D.C. 2015) (dismissing suit), *aff'd*, 857 F.3d 935 (D.C. Cir. 2017); *Olegovna v. Putin*, No. 16-586, 2016 WL 3093893, at *1 (E.D.N.Y. June 1, 2016) (dismissing suit against IMF); *Smith v. World Bank Grp.*, 99 F. Supp. 3d 166, 167 (D.D.C. 2015) (dismissing suit), *aff'd*, 694 F. App'x 1 (D.C. Cir. 2017); *Lempert v. Rice*, 956 F. Supp. 2d 17, 21 (D.D.C. 2013) (dismissing suit against U.N.); *Hudes v. Aetna Life Ins. Co.*, 806 F. Supp. 2d 180, 196 (D.D.C. 2011) (dismissing suit), *aff'd*, 493 F. App'x 107 (D.C. Cir. 2012); *Sampaio v. Inter-Am. Dev. Bank*, 806 F. Supp. 2d 238, 238 (D.D.C. 2011) (dismissing suit), *aff'd*, 468 F. App'x 10 (D.C. Cir. 2012); *Sadikoğlu v. UNDP*, No. 11-0294, 2011 WL 4953994, at *1 (S.D.N.Y. Oct. 14, 2011) (dismissing suit); *In re Kaiser Grp. Int'l, Inc.*, 730 F. Supp. 2d 247, 253 (D.D.C. 2010) (quashing subpoena); *Nicol v. U.N. Missions*, No. 09-1800, 2009 WL 2370179, at *1 (E.D. Pa. July 30, 2009) (dismissing suit); *Nyambal v. IMF*, 772 F.3d 277, 278 (D.C. Cir. 2014) (dismissing suit); *Brzak v. U.N.*, 551 F. Supp. 2d 313, 314 (S.D.N.Y. 2008) (dismissing suit), *aff'd*, 597 F.3d 107 (2d Cir. 2010); *do Rosario Veiga v. WMO*, 568 F. Supp. 2d 367, 376 (S.D.N.Y. 2008) (dismissing suit), *aff'd*, 368 F. App'x 189 (2d Cir. 2010); *Vila v. Inter-Am. Inv. Corp.*, 536 F. Supp. 2d 41, 46-51 (D.D.C. 2008) (dismissing in part suit against IIC); *Price v. Unisea, Inc.*, 289 P.3d 914, 916 (Alaska 2012) (affirming dismissal).

rely on the immunity conferred by the IOIA. Pet. 2-3; *see, e.g.*, Pet. 19 (citing *Polak v. IMF*, 657 F. Supp. 2d 116 (D.D.C. 2009)). Like the U.N. and the IMF, IFC also enjoys such immunities under the IFC Articles. By contrast, because the United States was not a member of the international organization at issue in *OSS Nokalva*, the European Space Agency, there was no treaty at issue in that case. *See* H.R. Rep. No. 89-1099, at 2 (1965) (stating that 22 U.S.C. § 288f–1 was necessary "because the United States is not a member" of the ESA's predecessor); European Space Agency, *New Member States*, https://www.esa.int/About_Us/Welcome_to_ESA/New_Member_States (last visited Mar. 17, 2018) (listing ESA's 22 member states).

In fact, in many suits against international organizations—including those cited by Petitioners—the international organization would have been immune even if the FSIA applied, as the suit did not fall within any of the FSIA's exceptions to immunity. These include the suits cited by Petitioners involving internal employment disputes (*Smith, Sampaio, Aguado, Fazzari*, *Hudes*), defamation (*Dujardin*), or fraud and tortious interference (*Ashford*).[8] *See Broadbent*, 628 F.2d at 34 ("employment of civil

[8] *See* Pet. 14 (citing, *inter alia*, *Ashford Int'l, Inc. v. World Bank Grp.*, No. 04-3822, 2006 WL 783357 (N.D. Ga. Mar. 24, 2006)); *id.* at 18-20 (citing, *inter alia*, *Smith v. World Bank Grp.*, 694 F. App'x 1 (D.C. Cir. 2017); *Sampaio v. Inter-Am. Dev. Bank*, 468 F. App'x 10 (D.C. Cir. 2012); *Aguado v. Inter-Am. Dev. Bank*, 85 F. App'x 776 (D.C. Cir. 2004); *Dujardin v. Int'l Bank for Reconstruction & Dev.*, 9 F. App'x 19 (D.C. Cir. 2001); *Fazzari v. Inter-Am. Dev. Bank*, 254 F.3d 315 (D.C. Cir. 2000); *Hudes v. Aetna Life Ins. Co.*, 806 F. Supp. 2d 180, 187-89 (D.D.C. 2011)).

servants [i]s noncommercial for purposes of restrictive immunity"); 28 U.S.C. § 1605(a)(5)(B) (excluding "libel" and "slander" from noncommercial-tort exception).

It is therefore unsurprising that, in the nearly 70 years since the Executive Branch adopted the restrictive theory of foreign-state immunity, only one circuit court other than the D.C. Circuit has squarely addressed whether the IOIA incorporates post-enactment developments in foreign-state immunity. The questions presented are unlikely to recur, and any conflict created by the Third Circuit's decision is unlikely to deepen. Therefore, this Court should deny certiorari.

II. The Court Of Appeals' Construction Of The IFC's Articles Of Agreement Does Not Warrant This Court's Review

Petitioners also argue that the Court of Appeals erred in construing the IFC Articles of Agreement not to waive immunity in this suit. Pet. 24-25. That contention does not warrant this Court's review.

A. Article VI, § 3 of the IFC's Articles of Agreement states that "[a]ctions may be brought against the Corporation only in a court of competent jurisdiction in the territories of a member in which the Corporation has an office." Pet. App. 7a n.2. Although that language could be "read literally" to waive immunity, *id.* at 7a, the Court of Appeals correctly explained that it had long construed the materially identical provisions of other organizations' charters not to waive immunity with respect to actions that—like this one—would impair the

organization's ability to fulfill its core functions by second-guessing internal decision-making processes. Pet. App. 10a; *accord Osseiran v. IFC*, 552 F.3d 836, 840 (D.C. Cir. 2009); *Vila v. Inter-Am. Inv. Corp.*, 570 F.3d 274, 281 (D.C. Cir. 2009); *Mendaro v. World Bank*, 717 F.2d 610, 615, 620 (D.C. Cir. 1983); *Banco de Seguros del Estado v. IFC*, No. 06-2427, 2007 WL 2746808, at *5 n.8 (S.D.N.Y. Sept. 20, 2007); *In re Dinastia, L.P.*, 381 B.R. 512, 522 (S.D. Tex. 2007); *Ashford Int'l, Inc. v. World Bank Grp.*, No. 04-3822, 2006 WL 783357, at *3 (N.D. Ga. Mar. 24, 2006).

That construction gives effect to the preamble to Article VI, which states that the IFC Article's immunity and waiver provisions are intended to enable IFC "to fulfill the functions with which it is entrusted." IFC Articles, art. VI § 1; *Mendaro*, 717 F.2d at 617. As the Court of Appeals correctly recognized, construing IFC's charter to permit suit in the circumstances presented here would vitiate its ability to perform its functions. If IFC were routinely subject to suit by individuals who are not parties to any contract with IFC, but who are allegedly affected by projects funded by IFC, "every loan the IFC makes to fund projects in developing countries could be the subject of the suit in Washington." Pet. App. 11a. Indeed, Petitioners' claims urge the court to decide issues such as when IFC should press on environmental covenants in lending agreements, what remedial action IFC should require from borrowers, and when IFC should cancel a lending agreement altogether. As the District Court held and the Court of Appeals affirmed, Petitioners' suit "focus[es] on IFC's internal decision-making processes," thereby "demand[ing] . . . judicial scrutiny

of the IFC's discretion to select and administer its programs." Pet. App. 33a (internal quotation marks and brackets omitted); *id.* at 10a (Petitioners' suit seeks to challenge IFC's core "policy discretion," by second-guessing the manner in which IFC conducted its relationships with the parties with whom it contracted).

The Court of Appeals' construction is also consistent with the Executive Branch's interpretation of the identical language contained in the World Bank's charter. Because IFC's charter was modeled on the World Bank's charter, the Executive's understanding of the Bank's Articles of Agreement is highly relevant here. *See* Executive Directors of the International Bank for Reconstruction and Development, *Explanatory Memorandum on the Proposed Articles of Agreement of the International Finance Corporation* at 3 (1955), http://bit.ly/2BJlkUR. The Executive Branch has explained that although "[t]he language of the Article does not specify the exact scope of actions which may properly be brought against the Bank[,] . . . at the time the Articles of Agreement were negotiated, Article VII(3) was intended as a limited waiver of immunity specifically to permit suits by private lenders against the Bank in connection with the Bank's issuance of securities." Letter from Roberts B. Owen, Legal Adviser, Dep't of State, to Leroy D. Clark, Gen. Counsel, EEOC (June 24, 1980), in Marian L. Nash, Contemporary Practice of the United States Relating to International Law, 74 Am. J. Int'l L. 917, 918 (1980). The waiver "was not designed (and should not now be construed) to subject the Bank to the full range of our domestic jurisdiction

or to expose the Bank's internal personnel and administrative actions to review by our courts." *Id.*

B. Petitioners do not contend that the Court of Appeals' construction of IFC's Articles of Agreement conflicts with that of any other court of appeals. Instead, Petitioners simply argue that the court erred. But the narrow question whether the court correctly construed IFC's charter does not warrant this Court's review.

In fact, this case would be a poor vehicle to adjudicate Petitioners' arguments about IFC's Articles. Petitioners challenge (Pet. 26) the Court of Appeals' statement that, as a general matter, IFC's Articles of Agreement should be construed to allow suits against IFC in commercial suits arising out of "business relations with outside companies" where the counterparty would not engage in the transaction if it expected IFC to be immune. *See* Pet. App. 9a; *Mendaro*, 717 F.2d at 618. But that general statement was not dispositive in this case for the reasons stated above: the Court of Appeals held that Petitioners' suit improperly challenged IFC's "internal review process" and its "core" policy decisions with respect to its "stated mission." Pet. App. 11a. Subjecting IFC to such scrutiny by U.S. courts risks "varied effects being given in different countries" to the work of international organizations, which "would interfere seriously with the[ir] necessary independence." Privileges and Immunities, 13 Whiteman Digest, ch. 38, § 5, at 47 (quoting Yuen-Li Liang, *The Legal Status of the United Nations in the United States*, 2 Int'l L. Q. 577, 584 (1948)).

III. This Court's Review Is Unwarranted For The Additional Reason That Petitioners Would Not Benefit From A Ruling In Their Favor

A. *Commercial Activity.* Even if the FSIA's commercial-activity exception applied here, IFC would still be entitled to immunity, as Petitioners' claims do not fall within the exception. *But cf.* Pet. 20.

Petitioners contend (Pet. 20) that their suit falls within the commercial-activity exception because it is "based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere." 28 U.S.C. § 1605(a)(2). To take advantage of either prong of the commercial-activity exception, Petitioners must establish that the "gravamen" of their claims—that is, the core alleged wrongful acts that caused their injury—is either a commercial activity of IFC in the United States, or an act in the United States in connection with commercial activity elsewhere. *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 395 (2015) (even if a defendant's actions "led to the conduct that eventually injured" the plaintiffs, the immunity exception would not be satisfied if the actions "were not the *particular* conduct upon which their suit was based") (emphasis added) (internal quotation marks omitted).

Here, the "gravamen" of Petitioners' complaint is clearly the construction and operation of CGPL's plant in India. That is the conduct that allegedly injured them. The only conduct that Petitioners allege IFC "performed in the United States" (28

U.S.C. § 1605(a)(2)) was its decision to disburse funds before CGPL was allegedly out of compliance, and IFC's participation in the CAO proceedings *after* Petitioners were already harmed. *See* 1 D.C. Cir. JA0058 (Compl. ¶¶ 197-99) (citing "IFC's responses to allegations of harm caused"). Even if IFC's disbursement of funds, as alleged, supposedly "led to the conduct that eventually injured" Petitioners (*OBB*, 136 S. Ct. at 395), there was nothing wrongful about the disbursement itself, absent the subsequent construction and operation of the plant in India. Thus, whether IOIA immunity is absolute or subject to the FSIA's exceptions is ultimately irrelevant because either theory is "sufficient to shield the organization from lawsuit on the basis of acts involved here." *Broadbent*, 628 F.2d at 32-33; *see also* Brief for the United States as Amicus Curiae at 9 n.2, *Georges v. U.N.*, 834 F.3d 88 (2d Cir. 2016) (No. 15-455), ECF No. 199 (arguing same).

B. *Forum Non Conveniens.* Even if IFC lacked immunity here, Petitioners' suit would be subject to dismissal on *forum-non-conveniens* grounds. *Sinochem Int'l Co. v. Malay Int'l Shipping Corp.*, 549 U.S. 422, 425 (2007). IFC moved to dismiss on that ground, but the District Court did not address the issue. Pet. App. 28a. Petitioners did not rebut IFC's assertion that the private- and public-interest factors favor dismissal because most of the proof and parties are located in India, which has the greater interest in applying its law to this case. Nor did they establish that India's National Green Tribunal is not an adequate forum in which to bring cases seeking enforcement of legal rights related to the environment in India. Thus, even if this Court were

to rule in Petitioners' favor with respect to immunity, the District Court would dismiss the case on *forum-non-conveniens* grounds on remand.

CONCLUSION

The Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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