No. 18-652

IN THE

Supreme Court of the United States

OUSSAMA EL OMARI,

Petitioner,

v.

RAS AL KHAIMAH FREE TRADE ZONE AUTHORITY, *et al.*,

Respondents.

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

BRIEF IN OPPOSITION FOR RESPONDENTS RAS AL KHAIMAH FREE TRADE ZONE AUTHORITY AND SHEIKH SAUD BIN SAQR AL QASIMI

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QUESTIONS PRESENTED

I. The Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602 *et seq.*, creates an exception to foreign sovereign immunity for certain claims based upon "commercial activity." Is a foreign government agency engaged in "commercial activity" when it promotes and regulates commerce in free trade zones located within the foreign country's borders?

II. The common law doctrine of foreign official immunity bars suits against foreign officials for acts performed in their official capacity unless the acts constitute *jus cogens*, *i.e.*, violations of certain norms of international law. Is a foreign official subject to suit in the United States for a claim alleging that the official directed the issuance of an international arrest warrant in furtherance of the foreign government's enforcement of its criminal laws?

III. Did Fed. R. Civ. P. 15(a)(2) require the District Court to exercise its discretion to give Petitioner leave to amend his complaint for the third time notwithstanding the District Court's holding that further amendment would be futile?

PARTIES TO THE PROCEEDING

Petitioner Oussama El Omari was plaintiff in the District Court and appellant before the Second Circuit. Respondents Ras Al Khaimah Free Trade Zone Authority ("RAKFTZA"), Sheikh Saud Bin Saqr Al Qasimi ("Sheikh Saud"), Kreab (USA) Inc. ("Kreab"), and The Arkin Group, LLC ("The Arkin Group") were all defendants in the District Court and appellees before the Second Circuit.

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The unpublished summary order of the Court of Appeals for the Second Circuit (App. 1–6) is available at 735 Fed. App'x. 30. The District Court's memorandum opinion granting Respondents' motions to dismiss (App. 7–42) is available at 2017 WL 3896399 (S.D.N.Y. Aug. 18, 2017).

STATUTORY PROVISIONS INVOLVED

The relevant sections of the FSIA are reproduced in the Statutory Appendix.

STATEMENT OF THE CASE

A. Introduction

This is a dispute over payments allegedly due to a foreign government official who was fired by RAKFTZA, the foreign government agency that he had run for over a decade. He alleges that the termination resulted from a change in the ruling regime, but he has since been convicted of abusing his public office to enrich himself. The official, who resided in the foreign country, was responsible for promoting and regulating commerce in free trade zones located within its borders. Petitioner seeks review of the Second Circuit's unanimous, non-precedential summary order affirming the District Court's "thorough and well-reasoned" opinion dismissing all of his claims. App. 3. That 35-page

opinion meticulously applied settled law to the facts alleged in this case to hold (among other things) that Petitioner's job did not entail "commercial activity" as defined by the FSIA because RAKFTZA "acted as a creator and regulator of markets rather than as a 'private player within' them," and that the FSIA therefore bars his breach of contract claim. App. 29 (quoting *Republic of Argentina v. Weltover*, 504 U.S. 607, 614 (1992)).

Petitioner's case-specific complaints about the decision below do not warrant this Court's review. There is no circuit split on whether the promotion and regulation of commerce within a foreign country's borders is "commercial activity," a conclusion that the Second Circuit first reached 14 years ago in *Kato v. Ishihara*, 360 F.3d 106, 112 (2d Cir. 2004). To the contrary, circuit courts across the country have cited and applied legal principles from *Kato* to determine whether employment disputes with foreign governments or their agencies and instrumentalities fall within the FSIA's commercial activity exception. Even Petitioner acknowledges that his primary "illustration of circuit division," *El-Hadad v. United Arab Emirates*, 496 F.3d 658 (D.C. Cir. 2007), "relied on" *Kato*, but simply "reached an opposite result" (*i.e.*, no immunity) on the specific facts of that case. Pet. 7. This Court has already denied two previous petitions arguing for the same illusory split between *Kato* and *El-Hadad*. It should do the same here.

Nor does this case present a circuit split on the meaning of "direct effect" as used in the FSIA's commercial activity exception. That exception requires that, where a claim is based "upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere[,]" the act must have a "direct effect in the United States." 28 U.S.C. § 1605(a)(2). But because it held that no "commercial activity" was at issue, the District Court expressly declined to address whether "the alleged commercial activity lacks an adequate nexus to the United States." App. 30 n.7. And the Second Circuit's summary order affirmed that judgment. Thus, neither the District Court nor the Second Circuit addressed whether Petitioner had alleged an act with a "direct effect in the United States," and neither decision can possibly implicate a split on that question.

Petitioner uses the rest of his Petition as a soapbox to malign the government of Ras Al Khaimah (also called "RAK"), for which he once served as a high-ranking official, and its Ruler, Respondent Sheikh Saud. These baseless attacks only underscore why this sham suit has no place in this Court, and why the FSIA's commercial activity exception should not open this Nation's courts to disputes over a foreign agency's dismissal of a corrupt government official.

B. The Foreign Sovereign Immunities Act

Over forty years ago, Congress enacted the FSIA to provide for "the determination by United States courts of the claims of foreign states to immunity." 28 U.S.C. § 1602. The FSIA immunizes foreign states and subdivisions, and their agencies and instrumentalities, from suit unless the case falls within a statutory exception. *See* 28 U.S.C. § 1604. The so-called "commercial activity exception" invoked by Petitioner is codified at 28 U.S.C. § 1605(a)(2). That section allows plaintiffs to sue a foreign sovereign for, among other things, "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere" if that act "causes a direct effect in the United States." And Section 1603(d) of the Act defines "commercial activity" to include a "regular course of commercial conduct or a particular commercial transaction or act."

Recognizing that the statute would be invoked in myriad factual scenarios, Congress chose not to offer a more granular definition of "commercial activity." Rather, when enacting the FSIA, Congress noted that "[i]t has seemed unwise to attempt an excessively precise definition" of "commercial activity" and acknowledged that it was investing the courts with "a great deal of latitude in determining what is a 'commercial activity' for the purposes of th[e] [FSIA]." H.R. Rep. No. 94-1487, at *16 (1976). This Court last considered the meaning of "commercial

activity" in *Weltover*, where it held that the "issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in 'trade and traffic or commerce,'" 504 U.S. at 614 (citation omitted; emphasis in original), and *Saudi Arabia v. Nelson*, 507 U.S. 349, 361–62 (1993), where it held that a foreign state's exercise of its police power is a sovereign activity, not a commercial one. Nothing in the Second Circuit's decision suggests that the lower courts have had any difficulty applying this Court's FSIA precedents on "commercial activity" to employment disputes.

C. Factual Background

Ras Al Khaimah, one of the Emirates comprising the United Arab Emirates ("UAE"), created RAKFTZA through the RAK Free Trade Zone Law. App. 28, 118–19. It is undisputed that RAKFTZA is an agency or instrumentality of a foreign state under 28 U.S.C. § 1603(b). App. 28, 118. Article 6 of the RAK Free Trade Zone Law states that RAKFTZA was created for "the setting up, promotion, development, management, administration, regulation, operation and construction of the appropriate facilities in" the RAK Free Trade Zone, which is located in Ras Al Khaimah. App. 29, 118–19; *see also* App. 5. And that same law empowered RAKFTZA to create rules and regulations to "manage and organize the [RAK] Free

Trade Zone as well as the companies and individuals operating in it." App. 29; *see also* App. 5.

In 1998, Petitioner entered into an employment contract with RAKFTZA "to help create, operate, and promote the" RAK Free Trade Zone. App. 116. The contract was written in Arabic and English, was governed by UAE labor law, and called for payment in UAE currency. App. 117, 127, 139. In 2000, a governmental decree issued by Ras Al Khaimah's Ruler at that time, Sheikh Saud's father, appointed Petitioner to RAKFTZA's five-member Board of Directors. App. 30, 118–19. Petitioner also became CEO and Director General of RAKFTZA. App. 117.

In May 2012, Petitioner was dismissed from those positions. App. 116–17. As a result, Petitioner also lost his UAE residency. App. 140. Petitioner has pled that he was fired because of "a Royal family conflict and power play" between the new Ruler of Ras Al Khaimah, Sheikh Saud, and one of his brothers. App. 117; *see also* App. 134 (alleging a "Royal family succession conflict"). But RAKFTZA presented the District Court with criminal judgments finding Petitioner guilty of three different schemes of fraud and corruption during his tenure.

D. Procedural History

More than four years after his dismissal, Petitioner filed his original Complaint against RAKFTZA and Respondent Kreab. App. 45. The sole

cause of action against RAKFTZA was for breach of contract based on an "end of service gratuity" that Petitioner believed was owed to him under his employment contract and UAE labor law. App. 72. Later, Petitioner amended his pleading two times: first, to add fraud and intentional infliction of emotional distress ("IIED") claims against Sheikh Saud, App. 77; and then again to add a fraud claim against Respondent The Arkin Group, App. 115.

All Respondents moved for dismissal of all claims against them. RAKFTZA moved for dismissal under the FSIA, among other grounds, and Petitioner responded by citing the commercial activity exception as the basis for jurisdiction. App. 25–26. In opposing the motion, Petitioner said he wanted to replead his complaint, but did "not even attempt to explain how he would remedy [its] defects." App. 34. After Respondents' motions were fully briefed, but before they were decided, Petitioner asked for leave to file a Third Amended Complaint adding new claims and new defendants. App. 34; *see* App. 158. The District Court granted the motions to dismiss in their entirety and denied Petitioner's request for leave to replead.

Specifically, the District Court held that *Kato v. Ishihara* required dismissal of Petitioner's breach of contract claim against RAKFTZA. App. 25–30. In *Kato*, the Second Circuit held that "the fact that a government instrumentality . . . is engaged in the *promotion of commerce* does not mean that the instrumentality is thereby engaged in *commerce*."

Kato, 360 F.3d at 112 (emphasis in original). Under *Kato*, employment claims made by a person working for a foreign agency or instrumentality do not fall within the "commercial activity" exception of the FSIA where the agency or instrumentality promotes, rather than engages in, commerce and the employee's job furthers that function, even where—unlike here—the employee works in the United States. *Id.*

The District Court also dismissed Petitioner's fraud claims. Petitioner had brought those claims against Sheikh Saud, Kreab and The Arkin Group, based upon alleged misrepresentations in (and omissions from) a white paper allegedly commissioned by Sheikh Saud to analyze RAKFTZA's internal operations. App. 23. The District Court held that Petitioner could not allege fraud under New York law because his own pleadings acknowledged that he knew about the alleged misrepresentations and omissions, thereby rendering "his suggestion that he reasonably relied on" them an "absurdity." *Id.*

Petitioner's IIED claim against Sheikh Saud was dismissed by the District Court under the foreign official immunity doctrine, which applies to "acts undertaken in an official capacity on behalf of a government . . . ." App. 31. Petitioner had been convicted of fraud and corruption charges in Ras Al Khaimah. *See* App. 141 (acknowledging "criminal cases filed against" Petitioner in Ras Al Khaimah). The District Court held that Sheikh Saud enjoyed immunity on the IIED claim because the act on which

that claim is based—the issuance of an Interpol Red Notice for Petitioner's arrest—was undertaken "through RAK official channels and on behalf of the RAK, presumptively in furtherance of its enforcement of its laws." App. 32.[1] Applying *Samantar v. Yousuf*, 560 U.S. 305, 322–23 (2010), the District Court held that there was no exception to foreign official immunity because Petitioner did not state a plausible *jus cogens* violation. App. 32–33.

The District Court also denied Petitioner's motion for leave to file a Third Amended Complaint. The District Court concluded that amendment would be futile because: (1) Petitioner already amended his complaint after being warned of the pleading deficiencies in multiple pre-motion letters, App. 33; (2) Petitioner's Second Amended Complaint still did not "even come close to stating a claim" and Petitioner did not "even attempt to explain how he would remedy these defects," App. 34; and (3) Petitioner's proposed new claims for computer hacking and fraud were not actionable and did not remedy the deficiencies in the pleaded claims, App. 35.

The Second Circuit summarily affirmed the District Court's rulings in an unpublished, non-precedential decision. First, the Second Circuit considered, and rejected, the principal purported error

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[1] The Petition falsely contends that Sheikh Saud sought and was denied a suggestion of immunity from the State Department. Pet. 10. That bogus contention has no support in the record and cannot be the basis for review by this Court.

urged by Petitioner on his appeal—that the District Court should have recused itself because of "a brief ex parte conversation between a law clerk and counsel regarding the proper procedure for how to request a document be sealed." App. 4. Next, noting that its decision in *Kato* "controls here," the Second Circuit concluded that RAKFTZA was not engaged in commercial activity and hence was immune from suit under the FSIA. App. 5. Finally, the court concluded that the other grounds on which Petitioner appealed were all "without merit." App. 6.

REASONS FOR DENYING THE PETITION

The Second Circuit's non-precedential summary order does not present a circuit split and does not warrant this Court's review. The decisions below comport with established precedents applying the FSIA's commercial activity exception to employment disputes against foreign governments and their agencies or instrumentalities. The different outcomes in the cases identified by Petitioner result from applying one legal standard across different factual scenarios, but those fact-bound distinctions do not require this Court's attention. Nor does the Second Circuit's non-precedential decision raise any issues of substantial or broad importance. Rather, it addresses a fact-based question: whether Petitioner's job overseeing a foreign government agency's promotion and regulation of commerce within the foreign government's sovereign territory is a "commercial

activity." For each of these reasons, the Court should deny certiorari.

I. The Courts of Appeals Are Not Divided on the Application of the Commercial Activity Exception in the Context of Employment Disputes.

The Second Circuit's summary order is entirely consistent with decades of precedent on the commercial activity exception. The decision adhered to the Second Circuit's decision in *Kato*, which was decided 14 years ago. Petitioner has not and cannot identify any Court of Appeals decision in the last 14 years that disagreed with *Kato's* holding that a foreign government agency's promotion of commerce within the sovereign's own territory is not a commercial activity. To the contrary, the Fifth Circuit, the Sixth Circuit and the D.C. Circuit—on which Petitioner relies for his purported split, Pet. 15–16—all cite *Kato* approvingly. *See UNC Lear Servs., Inc. v. Kingdom of Saudi Arabia*, 581 F.3d 210, 216 (5th Cir. 2009) (citing *Kato* in finding that the employment of individuals integrated in a foreign air force is not commercial); *Glob. Tech., Inc. v. Yubei (XinXiang) Power Steering Sys. Co.*, 807 F.3d 806, 815 (6th Cir. 2015) (citing *Kato* for proposition that promoting business abroad is not a commercial activity); *El-Hadad,* 496 F.3d at 664 (D.C. Circuit applies the same legal principles as its sister circuits, including the Second Circuit in *Kato*). Indeed, Petitioner readily admits, as he must, that his

primary authority, *El-Hadad*, "relied on" *Kato* and reached an "opposite result" based on the facts. Pet. 7.

A simple comparison of the two cases demonstrates that they *agree* on the applicable legal principles. Both *Kato* and *El-Hadad* expressly consider the same factors in determining whether the commercial activity exception applies: whether the employee is a civil servant, whether the employee's activities have a private sector analog, and whether the defendant's activities were typical of a private party engaged in commerce. *Compare Kato*, 360 F.3d at 111, *with El-Hadad*, 496 F.3d at 668. The different outcomes in the two cases flow directly from their specific facts. In *Kato*, a "concededly" civil servant promoting domestic commerce abroad was exercising powers "peculiar to sovereigns," and thus the agency retained its immunity in that employment dispute. *Kato*, 360 F.3d at 111. The court in *El-Hadad*, on the other hand, noted that the employee there was an accountant working in the United States who exercised no discretionary authority on behalf of the foreign sovereign, and was comparable to any auditor working in commercial enterprise. *El-Hadad*, 496 F.3d at 668. In stark contrast to the accountant working in a Washington, D.C. embassy in *El-Hadad*, Petitioner was a senior government official working in the UAE who was charged with running a foreign government agency that promotes commerce in the RAK Free Trade Zone. App. 25–30.

Indeed, in every case comprising Petitioner's imagined split, the court faithfully applied this Court's precedents. Each decision dutifully cited this Court's decision in *Weltover,* considered the *nature* of the employee's job function and any private sector analogs, and arrived at a consistent test that has produced logical outcomes based on each case's unique facts. *See Weltover*, 504 U.S. at 614–15; *Kato*, 360 F.3d at 111–12; *El-Hadad,* 496 F.3d 667–68. The District Court's decision likewise applied *Weltover* to the specific facts of this case and concluded that immunity applied. App. 25–30.

This Court has denied similar attempts to gin up the same false split. Twice before, other petitioners have sought review based on a supposed split between *El-Hadad* and *Kato*, and both times the Court denied certiorari. *See* Pet. for a Writ of Certiorari at 33–34, *UNC Lear Services, Inc. v. Kingdom of Saudi Arabia*, 559 U.S. 971 (2009) (No. 09-687), *certiorari denied in UNC Lear Services*, 559 U.S. 971; Pet. for a Writ of Certiorari at 28, *United Arab Emirates v. El-Hadad*, 552 U.S. 1310 (2007) (No. 07-853), *certiorari denied in El-Hadad*, 552 U.S. 1310. The Court should do the same here.

II. The Second Circuit Decision Does Not Implicate Any Conflict Regarding the Commercial Activity Exception's "Direct Effect" Requirement.

Petitioner's second purported split fares no better. Petitioner contends that the circuits are divided on whether an act connected to a commercial activity needs to be "legally significant" to have a "direct effect" in the United States. Pet. 15–16. But review is not warranted on this question for a very simple reason: neither the District Court nor the Second Circuit addressed it. Both courts held that there was no commercial activity, which made the existence of a "direct effect" irrelevant. *See* 28 U.S.C. § 1605(a)(2). Thus, any purported conflict between the decisions below and *Filetech S.A. v. France Telecom S.A.*, 157 F.3d 922 (2d Cir. 1998)—a case not cited by the District Court when it dismissed Petitioner's claim nor by the Second Circuit when it affirmed the dismissal—is not implicated by this case.

Petitioner tries to obscure this defect by arguing that the "lack of the lower court's recognition of [Petitioner's] pleading of fraudulent acts *implies* the courts applied the additional legally significant acts requirement." Pet. 16 (emphasis added). But this "implied conflict" theory is nonsense at every level. The District Court *did* consider the fraud claims that Petitioner alleged against Sheikh Saud, Kreab and The Arkin Group, and held that they not only failed to state a claim under New York law, App. 20–25, but

that they did not "even come close to stating a claim," App. 34. The District Court also considered the fraud claim against RAKFTZA that Petitioner sought to add to his Proposed Third Amended Complaint and held that it too was "frivolous."[2] App. 35. The Second Circuit held that Petitioner's appeal from these rulings were "without merit." App. 6. And even if Petitioner plausibly alleged some fraud by RAKFTZA—which he has not—he has not begun to explain how that fraud could be the "direct effect" of RAKFTZA's alleged breach of his employment contract, as would be required to establish the third prong of the commercial activity exception.

Even if the lower courts had addressed whether Petitioner had alleged a "direct effect," the purported split has been repeatedly rejected by this Court. At least four other petitioners have invoked the supposed circuit split on the "direct effect" requirement in cases that—unlike here—squarely raised the issue. *See* Pet. for a Writ of Certiorari at 19 & n.3, *Odhiambo v. Republic of Kenya*, 136 S. Ct. 2504 (2016) (No. 14-1206); Pet. for a Writ of Certiorari at 12–18, *Guevara v. Republic of Peru*, 562 U.S. 1082 (2010) (No. 10-389); Pet. for a Writ of Certiorari at 16–18, *Am. Telecom Co.,*

[2] This claim alleged that RAKFTZA had falsified its own internal records showing that it had paid Petitioner his end-of-service gratuity. App. 198. Petitioner does not allege that he saw these documents before bringing his lawsuit and "offers not a single allegation (not even a conclusory one) of his reliance on these documents, demonstrating the frivolous nature of this claim." App. 35.

LLC v. Republic of Lebanon, 552 U.S. 1242 (2008) (No. 07-721); Pet. for a Writ of Certiorari at 18–20, *Islamic Republic of Iran v. McKesson HBOC, Inc.*, 537 U.S. 941 (2002) (No. 01-1521). Each time, this Court denied certiorari. *See Odhiambo,* 136 S. Ct. 2504; *Guevara*, 562 U.S. 1082; *Am. Telecom Co. LLC*, 552 U.S. 1242; *McKesson HBOC, Inc.,* 537 U.S. 941. It should do the same here.

III. The Other Questions Raised in the Petition Are Not Worthy of This Court's Attention.

Petitioner poses two other questions—on the application of the foreign official immunity and leave to amend standards, Pet. i—but does not explain why certiorari should be granted on either ground, as the Court's Rules require. *See* Sup. Ct. R. 10, 14.1(h), 14.4. Even if Petitioner had not waived review of these issues, neither question is worthy of certiorari.

The District Court's fact-bound holding that Respondent was entitled to official immunity on Petitioner's IIED claim does not warrant this Court's review. Petitioner does not and cannot contend that any decision from this Court or any other circuit conflicts with the District Court's statement of the law—*i.e.*, that foreign officials enjoy immunity "for acts undertaken in an official capacity on behalf of a government" and that this immunity "may be held not to apply when the official's conduct violates peremptory norms of international law, known as *jus cogens,*" App. 31. The issuance of an arrest warrant

based upon a criminal conviction in the courts of Ras Al Khaimah was clearly an official act that did not violate any international norms.

Nor can Petitioner muster any reason why this Court should review the District Court's decision to deny his request to amend his complaint for a third time to add new claims that the court deemed to be "frivolous," "speculative" and "implausible" on their face. App. 35. Because such decisions are discretionary, requests that this Court review denials of such motions are routinely rejected.[3] The same should be done here.

IV. This Case is an Improper Vehicle for Evaluating the Immunity of Sovereign Wealth Funds.

In the absence of any traditional factors warranting certiorari, Petitioner claims that this case should be a vehicle for addressing the FSIA's application to sovereign wealth funds. But nothing in the record suggests that RAKFTZA is a sovereign wealth fund, or even is affiliated with a sovereign wealth fund. As Petitioner readily concedes, "this case is an employment discharge case and not an

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[3] *See, e.g.,* Pet. for a Writ of Certiorari at ii, *Mann v. Structured Asset Mortg. Inv. II Tr. 2007-AR3*, 138 S. Ct. 473 (2017) (No. 17-381); Pet. for a Writ of Certiorari at i, *Mulvania v. Rock Island Cnty. Sheriff*, 138 S. Ct. 361 (2017) (No. 17-245); Pet. for a Writ of Certiorari at i, *Tumminello v. Father Ryan High Sch., Inc.*, 138 S. Ct. 121 (2017) (No. 16-1431). Certiorari was denied in each case. *Mann*, 138 S. Ct. 473; *Mulvania*, 138 S. Ct. 361; *Tumminello*, 138 S. Ct. 121.

investment matter." Pet. 14. Thus, whatever public concerns might arise from the status of sovereign wealth funds in U.S. courts, they have no bearing here.

This case is about nothing more than an "end of service gratuity" allegedly owed to a senior government official when he was fired, ostensibly as the result of a "royal family powerplay." Pet. 3. If anything, the nature of this claim counsels *against* review by this Court, for U.S. courts are rightly reluctant to interfere in the internal political affairs of foreign countries. *See, e.g., Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1319 (2017) (FSIA's "basic objectives" include recognition of the "'absolute independence of every sovereign authority'"); *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897) (alleged wrongs inflicted on U.S. citizen due to foreign government's transition of power are not addressable because "the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory.").

CONCLUSION

For the reasons stated above, Respondents RAKFTZA and Sheikh Saud respectfully request that the Court deny the Petition.

Respectfully submitted,

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December 20, 2018

STATUTORY APPENDIX

Section 1603 of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602-11, provides in pertinent part:

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity–

> (1) which is a separate person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States as defined in section 1332 (c) and (e) of this title, nor created under the laws of any third country.

Section 1603(d) of the FSIA defines "commercial activity" as follows: A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of

conduct or particular transaction or act, rather than by reference to its purpose

Section 1604 of the FSIA, 28 U.S.C. § 1604, provides in pertinent part:

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

Section 1605(a)(2) of the FSIA, provides:

(a) A foreign state shall not be immune from jurisdiction of courts of the United States or of the States in any case . . . (2) in which the action 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; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.