No. 19-

In the Supreme Court of the United States

CANADA,

Petitioner

v.

CYNTHIA L. MERLINI,

Respondent

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent Merlini was injured while working as Assistant to the Consul General at petitioner Canada's Consulate. She sued Canada under a strict liability cause of action premised on the employer's failure to comply with state regulatory requirements for workers' compensation insurance. Canada did not comply with those requirements because its own legislation creates a comprehensive workers' compensation scheme applicable to all Canadian Government employees worldwide. The court of appeals rejected Canada's claim of sovereign immunity based on the commercial activity exception to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(2). The questions presented are:

1. Whether the court of appeals erred in treating Canada's legislative decision to compensate its consular employees for workplace injuries exclusively under Canadian law as a mere omission to comply with state law, and thus as "commercial activity" within 28 U.S.C. § 1605(a)(2).

2. Whether the court of appeals erred in deeming Canada's setting of conditions of full-time employment within the Canadian Consulate "commercial activity" within 28 U.S.C. § 1605(a)(2), based on the employee's U.S. citizenship and allegedly "clerical" job duties.

PARTIES TO THE PROCEEDING

Petitioner Canada and respondent Cynthia L. Merlini were the sole parties to the proceeding in the court below. At the invitation of the court below, the United States filed a brief as *amicus curiae*.

RELATED PROCEEDINGS

The proceedings directly on review in this case are:

Cynthia L. Merlini v. Canada, No. 17-2211, 926 F.3d 21 (App. 1a-54a) (1st Cir. June 10, 2019), *rehearing en banc denied*, 940 F.3d 801 (App. 55a-60a) (1st Cir. October 23, 2019)

Cynthia L. Merlini v. Canada, Civ. No. 17-10519, 280 F. Supp. 3d 254 (App. 61a-69a) (D. Mass. Dec. 7, 2017).

Respondent Merlini previously filed an administrative claim against the Massachusetts' Workers' Compensation Trust Fund concerning the same workplace injuries that are involved in this case, which resulted in the following state appellate proceeding:

In re Merlini, No. 15-P-847, 89 Mass. App. Ct. 1130, 54 N.E.3d 606 (table) (Mass. App. Ct. June 29, 2016).

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

Federal Statutes

Legislative History

State Statutes

Treaties

Canadian Statutes and Regulations

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner Canada respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in appeal No. 17-2211.

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals is reported at 926 F.3d 21 and reprinted in the Appendix (App.) *infra,* at 1a-53a. The order of the court of appeals denying en banc review and opinions in respect of that order are reported at 940 F.3d 801 and reprinted at App. 54a-58a. The opinion of the district court is reported at 280 F. Supp. 3d 254 and reprinted at App. 59a-67a.

JURISDICTION

The judgment of the court of appeals was entered on June 10, 2019. Canada's petition for rehearing *en banc* was denied on October 23, 2019. By order dated January 10, 2020, Justice Breyer extended the time for petition for a writ of certiorari to March 6, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND TREATIES INVOLVED

Pertinent provisions of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602 *et seq.*, the Massachusetts Workers' Compensation Act, Mass. Gen. L. ch. 152, the 1963 Vienna Convention on Consular Relations, 21 U.S.T. 77, Canada's Government Employees Compensation Act, R.S.C. 1985, c. G-5, and Canada's Locally-Engaged Staff Employment Regulations, SOR/95-152, are reproduced at App. 79a-103a.

INTRODUCTION AND SUMMARY

Canada has embassies or consulates in 12 U.S. jurisdictions. It is one of almost 200 sovereign foreign states that operate over 400 embassies and consulates throughout the 50 states, the District of Columbia, and various U.S. territories. Those missions employ thousands of U.S. and foreign citizens. Thousands more are employed by international organizations that are generally subject to the same rules under the Foreign Sovereign Immunities Act ("FSIA") as foreign states. *See Jam v. Int'l Fin. Corp.,* 139 S. Ct. 759 (2019).

This case concerns the right of those sovereigns to set the rules governing employment within their governmental missions. Canada employed Merlini at its Boston Consulate on terms that included the application of a Canadian statute that provides a comprehensive and exclusive workers' compensation scheme for, *inter alia*, consular employees. Merlini sued Canada under a Massachusetts statute that premises liability on an employer's failure to either purchase workers' compensation insurance or obtain a license from Massachusetts regulators to self-insure. The court of appeals held that both (i) Canada's employment of Merlini as a full-time Assistant to the Consul General, and (ii) Canada's conduct with respect to workers' compensation, constituted "commercial activity" within 28 U.S.C. § 1605(a)(2), so Canada was not immune under the FSIA.

This Court's decisions in *Republic of Argentina v. Weltover, Inc.,* 504 U.S. 607 (1992) ("*Weltover*"), *Saudi Arabia v. Nelson,* 507 U.S. 349 (1993) ("*Nelson*"), and *OBB Personenverkehr AG v. Sachs,* 136 S. Ct. 390 (2015) ("*Sachs*"), instruct that to apply

the commercial activity exception, a court must identify the "gravamen" of a complaint in terms of the "particular actions that the foreign state performs," *Weltover*, 504 U.S. at 614. The 2-1 majority decision of the court of appeals misinterpreted the FSIA and those decisions in two respects, each of which entails conflicts with decisions of other courts of appeals, and each of which independently warrants review and reversal.

First, the court mischaracterized Canada's conduct with respect to workers' compensation insurance as a mere omission — a "choice to forgo obtaining the requisite insurance," App. 17a — of which a private employer could equally be guilty. That may accurately reflect the minimum requirements for liability under Massachusetts law. But it neglects the sovereign nature of the "particular actions" Canada performed — legislating and implementing a comprehensive legal scheme for compensating employees of its federal government worldwide. In doing so, the decision below conflicts both with this Court's cases and with decisions of the D.C. and Second Circuits holding that a foreign sovereign's administration of a national medical or compensation program is a sovereign activity.

Second, the court held that Canada was engaged in "commercial activity" in employing respondent Merlini because she is a U.S. citizen and performed what the court understood to be "clerical" duties. The court thereby effectively made Massachusetts law sovereign over the terms on which Canada may employ an Assistant to the Consul General working full-time in its Consulate. The court's focus on the employee's nationality and specific job duties, rather than the sovereign employer's activities and the

mission she was employed to serve, lacks any support in the FSIA's text and exacerbates a pre-existing circuit split. Moreover, the ruling conflicts with basic principles of international law under the 1963 Vienna Convention on Consular Relations as recognized by the D.C. Circuit.

Three of the six judges on the First Circuit dissented from denial of rehearing *en banc*. Judge Torruella stated that this case "raises 'a question of exceptional importance.'" (App. 54a (citation omitted). Judge Lynch, joined by Chief Judge Howard, urged this Court to grant review, opining that the panel opinion significantly misreads the FSIA and this Court's cases, creates multiple circuit conflicts, "and is in derogation of principles of comity and international law." App. 55a. She further explained, consistent with an *amicus* brief filed by the United States, that the decision below will harm U.S. interests via reciprocity, since the Federal Employees' Compensation Act essentially mirrors Canada's GECA by creating a comprehensive and exclusive workers' compensation system under U.S. law for U.S. embassies and consulates abroad. The dissenting judges are right: this case merits this Court's review.

STATEMENT

1. The FSIA makes foreign states immune from suit in U.S. courts, 28 U.S.C. § 1604, subject to limited exceptions, 28 U.S.C. § 1605. Those exceptions constitute the exclusive circumstances in which federal courts may exercise jurisdiction over suits against foreign states or their instrumentalities. *See* 28 U.S.C. § 1330(a); *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488 (1983). A plaintiff bears

the burden of demonstrating that an exception applies. *See ibid.*

The most important FSIA exception is the commercial activity exception, which (insofar as relevant here) denies immunity from suit in any case "in which the action is based upon a commercial activity carried on in the United States by the foreign state . . . ." 28 U.S.C. § 1605(a)(2). The exception codifies the "restrictive theory" of sovereign immunity, *see Nelson,* 507 U.S. at 363, under which "immunity is confined to suits involving the foreign sovereign's public acts, and does not extend to cases arising out of a foreign state's strictly commercial acts." *Samantar v. Yousuf*, 560 U.S. 305, 312 (2010) (quoting *Verlinden,* 461 U.S. at 487). Applying the exception involves determining "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.'" *Weltover*, 504 U.S. at 614 (citation omitted).

The phrase "based upon" in § 1605(a)(2) requires courts to identify the "particular conduct" of the sovereign that supplies "those elements . . . that, if proven, would entitle a plaintiff to relief," and 'the 'gravamen of the complaint.'" *Sachs,* 136 S. Ct. at 395 (quoting *Nelson,* 507 U.S. at 357). It is not sufficient that a single element of the plaintiff's cause of action involves commercial activity; the court must "zero[] in on the core" of the suit to determine whether sovereign activities, which are properly immune, are involved. *Id*. at 396.

2. The "particular actions" at issue in this case are actions of the Canadian Consulate in Boston and, in issuing legal directions binding the Consulate, the

Canadian Government in Ottawa. Beginning in 2003, petitioner Canada employed respondent Merlini, a U.S. citizen, in the Consulate as a full-time Assistant to the Consul General.

Merlini's employment was subject to several Canadian laws. For example, Canada's Locally-Engaged Staff ("LES") Employment Regulations require all consular employees, including U.S. citizens, to swear an oath or affirmation that "I will faithfully and honestly fulfil the duties that devolve upon me by reason of my employment in the Public Service and that I will not, without due authority in that behalf, disclose or make known any matter that comes to my knowledge by reason of such employment." SOR/95-152, art. 9(2) & scheds. III & IV.

Of particular significance to this case, Merlini's employment was subject to Canada's Government Employees Compensation Act, R.S.C. 1985, c. G-5 ("GECA"). GECA provides a comprehensive scheme for compensating employees of Canada's federal government for personal injuries suffered in the course of their employment, whether inside or outside of Canada, and without regard to the employee's citizenship. *See* GECA §§ 2, 3(2), 4. For LES employees, such as Merlini, compensation for workplace injuries is generally awarded by Canada's Minister of Labour, *see id.* § 7(2), and provided from Canada's Consolidated Revenue Fund, *see id.* § 4(6). The GECA compensation scheme is exclusive: it expressly bars any non-GECA "claim" against Canada or its officers for injuries compensable under GECA. *Id.* § 12.

3. In 2009, Merlini was injured in a slip-and-fall accident at work within the Consulate. As she had

been instructed to do, consistent with the Canadian law governing her consular employment, she filed a claim under GECA. *See* App. 72a (Compl. ¶¶ 21, 23). Canada paid her compensation representing approximately nine months' salary pursuant to GECA § 7(2). When Canada determined Merlini was able to work and ceased providing her with compensation, Merlini did not exercise her right to appeal under Canadian law.

4. Instead, in 2011, Merlini filed an administrative claim against the Massachusetts Workers' Compensation Trust Fund under the Massachusetts Workers' Compensation Act, Mass. Gen. L. ch. 152 ("MWCA"). The MWCA generally authorizes claims against the Fund for workplace injuries suffered by employees or employers who are "uninsured" within the meaning of the MWCA. MWCA § 65(2)(e). Merlini's administrative claim was ultimately rejected on appeal because the MWCA bars claims against the Fund by employees who are entitled to workers' compensation benefits in another jurisdiction. *In re Merlini,* 89 Mass. App. Ct. 1130, 54 N.E.3d 606 (table) (2016); *see* MWCA § 65(2)(e)(i).

5. The present case began in March 2017, when Merlini filed a one-count complaint against Canada in the U.S. District Court for the District of Massachusetts under MWCA § 66. The MWCA has the same basic structure as most workers' compensation statutes throughout the United States. It bars all employee common law claims against employers for workplace personal injuries, *see* MWCA §§ 24, 26; *Foley v. Polaroid Corp.,* 381 Mass. 545, 548-49, 413 N.E.2d 711, 713-14 (1980), replacing them with an obligation to secure insurance or state regulatory approval of self-insurance for workplace

injuries in manners specified by state regulations, MWCA § 25A, and a procedure for employees to seek compensation from that insurance, MWCA § 7, plus an administrative claims procedure for claims that are denied, MWCA §§ 10 *et seq*. If an employer fails to comply with MWCA § 25A, enforcement may take several forms, including stop work orders, penalties and fines. MWCA § 25C. In addition, MWCA § 66 creates a statutory strict liability cause of action for personal injuries, *see Thorson v. Mandell,* 402 Mass. 744, 746, 525 N.E.2d 375, 377 (1988), with a 20-year statute of limitations, which applies only to employers who fail to comply with MWCA § 25A, *see* MWCA §§ 24, 67.

Under MWCA § 66, there are three elements to Merlini's statutory claim: (i) she suffered a workplace injury, (ii) while employed by Canada, (iii) which violated an obligation to comply with MWCA § 25A. It is undisputed that Merlini's claim satisfies the first two elements. Canada has also not purchased insurance to cover workers' compensation under Massachusetts law, or sought from Massachusetts regulators a "license as a self-insurer," as provided in MWCA § 25A. As a sovereign nation, Canada considers itself entitled to employ its consular staff, and to compensate them from its Consolidated Revenue Fund, without asking permission from state regulators.

6. Canada moved to dismiss Merlini's complaint under the FSIA. Merlini argued that either the commercial activity exception, 28 U.S.C. § 1605(a)(2), or the noncommercial tort exception, 28 U.S.C. § 1605(a)(5), to sovereign immunity applied. The district court granted Canada's motion to dismiss. App. 59a-67a. The court ruled that the commercial

activity exception was inapplicable because "[a] sovereign defendant's decision to offer and structure its own form of benefits is not comparable to exercising a power that could be leveraged by private citizens." App. 64a. The court further concluded that Merlini's "claim is based on [Canada's] decision to provide its own system of benefits and to remain uninsured in Massachusetts," and thus rejected application of the noncommercial tort exception. App. 65a.

7. The First Circuit reversed. In a 2-1 decision, the court held that Canada was subject to suit under the commercial activity exception.[1] Judge Barron, joined by Judge Kayatta, first concluded that insofar as Merlini's claim was "based upon" her employment, the commercial activity exception should apply, because she is a U.S. citizen and her job duties "were purely clerical." App. 12a-13a. Judge Barron indicated that if Merlini either were a Canadian citizen, or had "governmental" or "security" duties, immunity would apply. App. 17a-18a, 25a-26a n.7.

The majority then rejected the argument, made by Canada and by the United States as *amicus curiae*, that the gravamen of Merlini's claim under MWCA § 66 was Canada's sovereign legislative decision to structure its consular operations on the basis that its own GECA scheme comprehensively and exclusively

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[1] Because liability under MWCA § 66 requires no tortious conduct, the court unanimously upheld the district court's ruling that the noncommercial tort exception did not apply, notwithstanding the United States' suggestion (in an *amicus* brief) of a remand on that issue. *See* App. 13a-17a (majority opinion); App. 36a-38a nn.9, 11 (Lynch, J., dissenting). The noncommercial tort exception is addressed at *infra*, pp. 34-35.

governs workers' compensation for its consular employees. Judge Barron acknowledged that Canada was "motivated by what it characterizes as its sovereign obligation to provide its employees protection through its own national workers' compensation system." App. 23a. But he deemed that "motivat[ion]" immaterial in light of this Court's decision in *Weltover,* and concluded that in other respects, "Canada's employment of Merlini without obtaining the requisite insurance," App. 21a, was equivalent to a private employer electing to "take the risk of going bare," App. 22a.

Judge Lynch dissented, opining that "[t]his case is about Canada's sovereign choice of a comprehensive workers' compensation scheme (a scheme which did compensate Merlini)." App. 44a. Judge Lynch concluded that the majority misread this Court's decisions in *Nelson, Sachs,* and *Weltover*, and created conflicts with decisions of other courts of appeals in *Anglo-Iberia Underwriting Management Co. v. P.T. Jamsostek,* 600 F.3d 171 (2d Cir. 2010), *Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan*, 115 F.3d 1020 (D.C. Cir. 1997), *Gregorian v. Izvestia*, 871 F.2d 1515 (9th Cir. 1989), and *MacArthur Area Citizens Ass'n v. Republic of Peru,* 809 F.2d 918 (D.C. Cir. 1987). App. 38a-48a. Judge Lynch joined the United States in highlighting the "foreign policy repercussions of the majority's view," including the reciprocity concerns for U.S. missions abroad given that the Federal Employees' Compensation Act, 5 U.S.C. § 8101 *et seq*., mirrors Canada's GECA. App. 50a. Judge Lynch also criticized the majority's distinction between U.S. citizen "clerical" and other consular employees as lacking any basis in the text of the FSIA or this Court's cases. App. 51a-52a.

8. Canada petitioned for rehearing *en banc*, which the First Circuit denied by a 3-3 vote. Judge Torruella dissented "because this appeal raises 'a question of exceptional importance.'" App. 54a (citation omitted). Judge Lynch, joined by Chief Judge Howard, renewed her criticisms of the majority opinion, *see* App. 55a-58a, and they expressly "urge[d] the Supreme Court to grant review in this important case." App. 55a.

REASONS FOR GRANTING THE PETITION

As the court below unanimously recognized, there are two connected elements to the "particular activity" of Canada that constitute the gravamen of Merlini's suit under MWCA § 66: her employment, and Canada's conduct with respect to workers' compensation. The critical issue under the FSIA is how to characterize those two elements. The First Circuit majority characterized Merlini's employment as "clerical" (and thus commercial) rather than consular (and thus sovereign). It characterized Canada's conduct with respect to workers' compensation as an "omission" to comply with Massachusetts workers' compensation regulations (and thus commercial) rather than a comprehensive legislative scheme to govern compensation for Canada's federal government employees worldwide (and thus sovereign). Canada submits that in both respects it erred and created or exacerbated conflicts among the courts of appeals.

This Court has previously stressed both the difficulty and the unavoidability of such characterization issues, which are central to the administration of the FSIA. *See Nelson*, 507 U.S. at 361; *Weltover*, 504 U.S. at 617. On the one hand, viewing a sovereign's activity too broadly in terms of

the sovereign's purpose could eviscerate the commercial activity exception. Sovereigns can almost always cite a higher governmental purpose for even the most clearly commercial activities, such as repudiating a debt, as in *Weltover*. On the other hand, viewing a sovereign's activity too narrowly in terms only of the aspects of that activity that are legally required for the plaintiff's cause of action could eviscerate immunity so long as a law does not specifically target sovereigns. An ambassador's recall could be mischaracterized as a "commercial" employment termination matter; the exercise of police powers could be mischaracterized as tortious violence or even as "commercial misconduct," *see Nelson,* 507 U.S. at 361-62.

Such issues arise most frequently in the employment context, where they have engendered confusion and conflict in the courts of appeals. This case presents an opportunity for this Court to provide needed guidance.

I. This Court should review the First Circuit's ruling that a foreign sovereign can be sued based upon its legislative decision to compensate its consular employees for workplace injuries exclusively under its own law

As the First Circuit recognized, an essential element of Merlini's claim under MWCA § 66 is Canada's non-compliance with the workers' compensation insurance requirements in MWCA § 25A. MWCA § 25B generally exempts state and local government employers from those requirements, but there is no express exemption for foreign

governments, and the premise of Merlini's claim is that Canada is not exempt.[2]

MWCA § 25A requires an employer to either (1) purchase Massachusetts workers' compensation insurance or join a state-sanctioned self-insurance group, or (2) annually obtain a license to self-insure, which involves providing to Massachusetts regulators a sworn statement of assets and liabilities, a detailed description of the employer's business, and a bond. Once an employer complies with MWCA § 25A, its employees' claims for workers' compensation become payable by its insurance or self-insurance subject to the MWCA's detailed administrative rules and procedures.

The MWCA scheme is incompatible with Canada's GECA. Under GECA, workers' compensation for Canada's consular employees such as Merlini is funded not by Massachusetts-regulated insurance, but by Canada's Consolidated Revenue Fund, *see* GECA § 4(6), and awards are made not through the MWCA process but generally by (or under authority delegated within the Canadian Government by) the

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[2] If required to defend this case on the merits, Canada will argue that it is impliedly exempt under Massachusetts law. However, Canada is entitled to have the FSIA immunity issue resolved before litigating the merits. Immunity shields defendants "not only from the consequences of litigation's results but also from the burden of defending themselves." *Dombrowski v. Eastland,* 387 U.S. 82, 85 (1967). Accordingly, FSIA immunity issues should be determined "[a]t the threshold of every action in a District Court against a foreign state." *Verlinden,* 461 U.S. at 493-94; *see also Bolivarian Rep. of Venezuela v. Helmerich & Payne Int'l Drilling Co.,* 137 S. Ct. 1312, 1317 (2017) ("*Helmerich*") (courts should "reach a decision about immunity as near to the outset of the case as is reasonably possible").

Canadian Minister of Labour in Ottawa, as part of a detailed administrative process, *see id.* § 7(2). Further, GECA § 12 expressly bars covered employees from bringing workplace injury "claims" against Canada other than under GECA. The Canadian Consulate in Boston did not have the option of compensating Merlini under the MWCA. Her rights to compensation were determined in Ottawa, by the Canadian Parliament when it enacted GECA and by the Canadian Ministry of Labour when it implemented GECA.

The First Circuit majority nonetheless concluded that since the MWCA is indifferent to whether non-compliance arises from a commercial decision to "take the risk of going bare," App. 22a, or from a foreign sovereign's decision to legislate and implement its own global workers' compensation for government employees, Merlini's claim was based upon commercial activity. *See* App. 20a-30a. As Judge Lynch explained in dissent, that focus on the abstract elements of the cause of action versus the actual activity of the sovereign conflicts with decisions of both this Court and multiple courts of appeals. *See* App. 38a-48a.

A. The ruling conflicts with this Court's decisions in *Weltover*, *Nelson* and *Sachs*

The First Circuit majority concluded that Canada's conduct should be characterized as a mere omission with respect to workers' compensation — as employing Merlini "without obtaining the requisite insurance," App. 21a — based mainly on 28 U.S.C. § 1603(d) and *Weltover*. *See* App. 22a n.5, App. 23a-25a. Section 1603(d) provides that "[t]he 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." In *Weltover*, this Court held that Argentina's default on negotiable bonds that were traded on international markets and payable in the United States — a breach of contract involving a "garden-variety debt" — was commercial activity regardless of any underlying governmental "purpose." 504 U.S. at 615. The majority read too much into both the statute and *Weltover*, and erred in two respects.

First, this Court's cases reject the notion that section 1603(d) requires stripping a sovereign's conduct to its simplest legal form and divorcing it from all context. In *Weltover*, this Court reviewed the "full context" of Argentina's actions before determining that they were "analogous to a private commercial transaction" in every respect except perhaps their ultimate purpose. 504 U.S. at 615-16; *see also* App. 41a (Lynch, J., dissenting). This Court noted the inherent difficulty of applying the "nature" versus "purpose" test in section 1603(d), equating "nature" with "the outward form of the conduct that the foreign state performs or agrees to perform." 504 U.S. at 617.

This Court made the same point in *Nelson*, 507 U.S. at 361, adding an acknowledgment that the definition in section 1603(d) is "diffiden[t]" and almost circular, *id.* at 359. The Court then elaborated on the meaning of the "nature" or "outward form of the conduct" that determines its characterization. It acknowledged that the Saudi Government was accused of acts that, stripped to their simplest legal form, could be undertaken by private parties: retaliation against a whistleblower, false imprisonment, assault and torture. But it

emphasized that when a sovereign exercises "'powers peculiar to sovereigns,'" *id.* at 360 (quoting *Weltover*, 504 U.S. at 614), such as police powers, even if it violates human rights and breaks laws that a private actor could break, its activities are sovereign and immune, *see id.* at 361-62.

Second, this Court's cases instruct that the gravamen of the plaintiff's suit must be defined in terms of "particular actions that the foreign state performs," *Weltover*, 504 U.S. at 614, in order to determine whether the suit is "based upon a commercial activity carried on in the United States by the foreign state," 28 U.S.C. § 1605(a)(2). The statutory term is "activity" — not relationship or omission. Further, focusing on activities rather than omissions is necessary to implement the jurisdictional nexus aspect of the statutory test: activities occur in particular locations, whereas omissions occur anywhere and nowhere. *See Nelson,* 507 U.S. at 357-58. Accordingly, this Court has held that the commercial activity exception does not apply merely because (i) there is a commercial relationship between the plaintiff and the sovereign defendant, as there was in both *Nelson* (hospital employment) and *Sachs* (a train ticket) and (ii) the plaintiff frames a cause of action in terms of an omission that occurred in the context of that relationship (in both cases, a failure to warn). *See Sachs,* 136 S. Ct. at 396-97; *Nelson,* 507 U.S. at 363.

The First Circuit's decision is inconsistent with *Weltover, Nelson* and *Sachs*. By characterizing Canada's conduct as a mere omission to insure in compliance with Massachusetts law, the court below ignored the "outward nature" of Canada's activities. A private employer might violate MWCA § 25A by

simply "going bare." App. 22a. But that is not what Canada did. Canada created a scheme to compensate consular employees such as Merlini, and indeed, did compensate Merlini. It did so by a quintessentially sovereign means — legislating an integrated legal scheme, administered by a high government officer (the Minister of Labour) in quasi-judicial fashion, and applicable throughout the full extent of Canada's sovereign jurisdiction.[3] The "particular actions" undertaken by Canada that provide the basis for Merlini's suit involve the enactment and implementation of GECA. Merlini's suit is not based on any actions undertaken by the Canadian Consulate that were independent of GECA. GECA provided a Canadian remedy for Merlini (pursuant to which she received compensation) and, as a corollary thereto, barred her from making any "claim" for a duplicative remedy under Massachusetts law, *see* GECA § 12. It would have been absurd for the Consulate to insure, or to petition Massachusetts regulators for a license to self-insure, against Massachusetts law claims barred by GECA. As Judge Lynch stated: "These 'acts' — of enforcing the Canadian uniform compensation scheme and of foregoing Massachusetts workers' compensation insurance — are the same. It is mere semantics to disaggregate the two." App. 40a. Further, having told Merlini that GECA would govern any workers' compensation claims, *see* App. 72a (Compl. ¶ 21),

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[3] *See, e.g., Nelson,* 507 U.S. at 362 ("'[S]uch acts as legislation . . . can be performed only by the state acting as such'") (quoting H. Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 Brit. Y.B. Int'l L. 220, 225 (1952)); *id.* at 361 (immunity extends "to a foreign state's 'internal administrative acts'")) (citation omitted).

Canada never gave her any commercial expectation of receiving compensation for workplace injuries under Massachusetts law.

B. The ruling conflicts with decisions of the D.C. and Second Circuits holding that a foreign sovereign's administration of a national medical or compensation program is sovereign activity

In contrast to the decision below, the D.C. Circuit and the Second Circuit have recognized that although government medical or compensation programs may employ commercial means, actions taken by government actors at the level of setting or administering the rules for those programs are sovereign activity.

Like Merlini's case, the D.C. Circuit's decision in *Jungquist* involved an individual plaintiff's claim against a foreign sovereign for compensation for personal injuries. The plaintiff was injured in a boating accident in Abu Dhabi and, acknowledging some individual responsibility for her injuries, Sheikh Sultan caused her to be enrolled in, and compensated by, an official national medical treatment and reimbursement program of the Abu Dhabi government. After her benefits under the program were terminated, the D.C. Circuit held that she could sue Sheikh Sultan based on an alleged contract made in his private capacity to ensure her continuing compensation. 115 F.3d at 1028. However, it held that the government agency and employees who administered the program and effectuated the termination of benefits retained sovereign immunity. To be sure, they had employed commercial means, such as paying travel and hospital bills, in support of the plaintiff's treatment,

see id. at 1029,[4] and the plaintiff's complaint was (like Merlini's) that they were omitting to make further financial provision, in the same manner that a private actor could make, for her compensation. However, the government agency and its employees had not made and breached a commercial contract with the plaintiff, *see id.* at 1030, and their actual activities "fell within their official duties" of "overseeing the administration of the Abu Dhabi foreign medical treatment program," *see id.* at 1028-29. Accordingly, they were immune.

The Second Circuit endorsed and applied the reasoning of *Jungquist* in a somewhat different context in *Anglo-Iberia*, 600 F.3d 171. The plaintiffs alleged that they were victims of a commercial reinsurance fraud scheme perpetrated by employees of Indonesia's social security and national health insurance administration, and that the Indonesian government agency had negligently failed to supervise their employees to prevent the fraud. As in *Merlini* and *Jungquist*, the plaintiffs claimed they had suffered a financial loss because of something government administrators had omitted to do that could equally be done by a private actor — in *Anglo-Iberia*, better supervise their employees. As in *Jungquist*, but contrary to *Merlini,* the Second Circuit held that that arguably commercial *omission*

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[4] The court acknowledged that a contract to pay a provider for medical services is normally commercial, and a breach of such a contract can be a basis for suit under the commercial activity exception, as it was in *Rush-Presbyterian-St. Luke's Med. Ctr. v. Hellenic Republic,* 877 F.2d 574 (7th Cir. 1989), a case on which the court below relied. *See Jungquist,* 115 F.3d at 1030; *see also Nelson,* 507 U.S. at 358 (referring to an employment contract with a government hospital as "arguably commercial activities").

was not a basis for liability under the FSIA, since the only *activity* alleged was administering a national government benefits program. *See id.* at 177-78.[5]

II. This Court should review the First Circuit's ruling that a foreign sovereign's setting of employment terms for its full-time consular employees is non-immune "commercial activity" if they are U.S. citizens performing "clerical" job duties

The decision below conflicts with Canada's sovereign right to set the terms governing employment in its consulate. As applied to U.S. citizen employees in Canada's Boston Consulate, the decision effectively nullifies section 12 of GECA by subjecting Canada to suit under the MWCA. GECA was enacted long before, and was the basis on which, Merlini was employed. *See* App. 72a (Compl. ¶ 21). Canada's implementation of GECA is the kind of systemic "internal administrative act[]" of a sovereign, setting the rules for a government body, that merits immunity. *See Nelson,* 507 U.S. at 361. It is not an individual employment action that might or might not be "commercial" depending on the

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[5] Other courts of appeals decisions reflect the same general insight that administration of a government program does not become commercial activity merely because it involves commercial transactions unless the suit is brought to enforce voluntarily agreed terms of those commercial transactions (as it was in *Weltover* and *Rush-Presbyterian*). For example, in *Gregorian*, 871 F.2d 1515, the Ninth Circuit held that the fact that the Soviet state propaganda organ Izvestia sold newspapers in commerce in the United States did not make its governmental decisions about what to publish commercial activity such that it could be sued for libel.

specifics of the employment relationship and the action.

The First Circuit majority, however, ruled that Merlini's employment relationship with Canada was "commercial" based on her individual citizenship and job duties, *see* App. 12a-13a, 17a-18a, and expressly made that characterization decisive in denying immunity, *see* App. 17a-18a, 25a-26a n.7. In doing so, it exacerbated a pre-existing conflict among the courts of appeals on how to classify employment relationships for purposes of 28 U.S.C. § 1605(a)(2). In addition, it created a conflict with international law principles concerning consular sovereignty and independence, as recognized in the 1963 Vienna Convention on Consular Relations and a D.C. Circuit decision.

A. The decision below exacerbated a pre-existing circuit split over whether a government employee's individual citizenship and job duties, or the government mission she serves, controls the classification of her employment as sovereign or commercial

The text of the FSIA says nothing about an individual *employee* plaintiff's citizenship, or about her seniority or duties. Instead of asking about who the plaintiff is or what she does at work, the FSIA asks whether her sovereign *employer* is engaged in "commercial activity." However, *Merlini* is one of several court of appeals cases that rely on two sentences in the FSIA's legislative history:

> Also public or governmental and not commercial in nature, would be the employment of diplomatic, civil service, or military personnel, but not the employment of

> American citizens or third country nationals by the foreign state in the United States. . . .
>
> Activities such as a foreign government's . . . employment or engagement of laborers, clerical staff or public relations or marketing agents, or its investment in a security of an American corporation, would be among those included within ["commercial activity"].

H.R. Rep. 94-1487, at 16, 1976 U.S.C.C.A.N. 6604, 6615; *see* App. 18a, 43a; *see also, e.g., El-Hadad v. United Arab Emirates,* 496 F.3d 658, 667-68 (D.C. Cir. 2008); *Holden v. Canadian Consulate,* 92 F.3d 918, 921 (9th Cir. 1996); *Segni v. Commercial Office of Spain,* 835 F.2d 160, 165 (7th Cir. 1987). Based on that legislative history, the court below deemed Merlini's U.S. citizenship and allegedly "clerical" job duties decisive.[6]

That ruling exacerbates pre-existing confusion and conflict among the courts of appeals in FSIA employment-related cases as to whether the application of the commercial activity exception depends on the employer's acts and the mission the employee is hired to serve, or on the individual

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[6] In the present posture, this Court may assume that Merlini's duties were "clerical" in the sense of not imbuing her with policy-making discretion. However, contrary to Judge Barron's suggestion (App. 12a-13a & n.3), Canada did not concede the accuracy of that characterization. Indeed, Canada moved, unsuccessfully, to supplement the record on appeal with Merlini's contract of employment and job description — an effort that Canada will renew if this case returns to the district court. In any event, regardless of whether she had decision-making authority, Merlini handled confidential consular communications. *See* App. 70a (Compl. ¶ 9).

employee's citizenship, seniority and specific job duties. Having initially adopted a per se rule that U.S. citizen employees of foreign governments are not "civil servants" whose employment is a sovereign function, *see Broadbent v. Organization of American States,* 628 F.2d 27, 34 (D.C. Cir. 1980), the D.C. Circuit currently employs a multi-factor test. *See El-Hadad*, 496 F.3d at 665. While that test is more complex than the criteria employed in the decision below, it emphasizes similar factors: in *El-Hadad*, an Egyptian accountant employed by a U.A.E. mission in the United States was deemed a "commercial" employee in large part because he was not a U.A.E. citizen and because he "had no role in the creation of governmental policy," *id.* at 668.

As the court in *El-Hadad* recognized, *id.* at 664 n.2, the Second Circuit has taken a contrary (and, Canada submits, the correct) approach. In *Kato v. Ishihara*, 360 F.3d 106 (2d Cir. 2004), it opined that "the central inquiry" should concern the activities of the employer, not the categorization of the employee's duties and status. *Id.* at 111. Kato was employed in New York by a Japanese government agency to serve the "promotion abroad of the commerce of domestic firms," which the court identified as a "basic — even quintessential — governmental function." *Id.* at 112. In contrast to the decision below, the Second Circuit declined to read the legislative history phrase "laborers, clerical staff or public relations or marketing agents" as if it were statutory text, and held that notwithstanding that Kato was engaged in marketing, the Japanese government functions she was employed to serve involved sovereign activity. The Second Circuit emphasized the impropriety of determining immunity based on parochial and ill-defined distinctions between "civil service" and

"clerical" jobs in the context of foreign governmental offices that may structure their work force in a manner not anticipated by the drafters of the 1976 legislative history. *Id.* at 113.

The *Merlini/El-Hadad* approach is also in tension with cases upholding immunity against suits involving employees and contractors who do not work in offices. For example, in *Butters v. Vance International, Inc.,* 225 F.3d 462 (4th Cir. 2000), the Fourth Circuit held that the Saudi government was immune from suit for sex discrimination when it refused to employ a female security guard. As in *Kato*, the court focused on the government function at issue, ignoring the fact that the plaintiff was a U.S. citizen who would have no civil service status or policy-making responsibilities: "The relevant act here—a foreign sovereign's decision as to how best to secure the safety of its leaders—is quintessentially an act 'peculiar to sovereigns.'" *Id.* at 465 (quoting *Nelson,* 507 U.S. at 361). *See also UNC Lear Servs., Inc. v. Kingdom of Saudi Arabia,* 581 F.3d 210, 216-17 (5th Cir. 2009) (military technical support services contract); *Crum v. Kingdom of Saudi Arabia,* 2005 WL 3752271, at *3 (E.D. Va. July 13, 2005) (chauffeur's employment).

As Judge Lynch explained, the majority's approach places it on the wrong side of the circuit split in light of the principles of statutory interpretation laid down by this Court. "[L]egislative history may not be used to alter text." App. 56a (citing *Food Mktg. Inst. v. Argus Leader Media,* 139 S. Ct. 2356, 2364 (2019), *Chamber of Commerce v. Whiting,* 563 U.S. 582, 599 (2011), and *Shannon v. United States,* 512 U.S. 573, 584 (1994)). Moreover, nothing in the legislative history states that U.S.

citizenship or "clerical" status is decisive in a case like this one, concerning which jurisdiction's laws set the rules for consular employment, as opposed to, say, a garden-variety breach of employment contract case against a state-owned commercial enterprise.

B. The decision below conflicts with international law principles of consular sovereignty and independence, as recognized in the Vienna Convention and by the D.C. Circuit

By focusing on Merlini's individual citizenship and job duties, the majority below ignored her job function and the mission she served: she was an Assistant to the Consul General, so her function was to assist the consular mission.

Consulates perform a range of tasks, some of which involve commerce. Not every transaction involving a consulate is sovereign. Consulates buy paper for their printers in the same commercial marketplace, and on the same terms, as law firms. Close cases may arise with respect to particular consular employees whose jobs focus on commerce rather than core consular functions, such as the plaintiffs in *Holden*, *Segni* and *Kato*. But the core functions of a consulate are quintessentially sovereign. They include protecting the interests of the sending state, furthering diplomatic and other relations between the sending state and the host state, making reports to the sending state, issuing official governmental documents such as passports and visas, implementing the sending state's laws, and protecting nationals of the sending state. *See generally* 1963 Vienna Convention on Consular Relations, 21 U.S.T. 77, art. 5 ("VCCR"). Those core sovereign functions constitute the job of the Consul

General, and Merlini was hired as his Assistant to serve them. In such a job, consular employees are likely to handle official state documents and sensitive diplomatic communications. *See* VCCR art. 35; App. 70a (Compl. ¶ 9). Hence Canada's legal requirement that consular employees, regardless of citizenship and seniority, swear an oath or affirmation of office and secrecy. SOR/95-152, art. 9(2) & scheds. III & IV.

Because a consulate serves diplomatic and other sensitive sovereign functions, international and U.S. law recognizes that it must be insulated from interference by the host jurisdiction — especially interference by courts and states that thereby also impinge upon the Federal Government's authority over international relations, *see, e.g., Am. Ins. Ass'n v. Garamendi,* 539 U.S. 396, 413-15 (2003). Thus, the Vienna Convention makes consular premises, documents, communications and fees immune from local jurisdiction and taxation, *see* VCCR arts. 31-33, 35, 39.[7] The Convention acknowledges that consular employees sometimes engage in non-sovereign activities, particularly when they leave the premises of the consulate, so it requires consulates to carry insurance under local law for vehicular accidents. *See* VCCR art. 56. But it imposes no insurance

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[7] Under Article 33, consular documents are "inviolable," and under Article 44(3), "[m]embers of a consular post are under no obligation to give evidence concerning matters connected with the exercise of their functions or to produce official correspondence and documents relating thereto." Permitting suits against consulates concerning employment within the consulate risks compelling them to surrender this important protection under international law in order to produce evidence to defend themselves.

requirements for intra-consular matters such as workers' compensation for consular employees.

Most importantly for present purposes, the VCCR provides immunity for consular officers for all "acts performed in the exercise of consular functions." VCCR art. 43. The Consul General's acts in administering Canada's standard terms of employment for the Consulate, and in employing and supervising his Assistant, Merlini, fall within Article 43. Since the FSIA was intended to codify international law principles, *see, e.g., Helmerich,* 137 S. Ct. at 1319-21, it should be interpreted, consistent with the VCCR, to provide immunity with respect to Merlini's consular employment.

The decision of the D.C. Circuit in *MacArthur Area Citizens Association,* 809 F.2d 918, adheres to these principles and, in doing so, conflicts with the decision below. The D.C. Circuit held that because "operation of a chancery is, by its nature, *cf.* 28 U.S.C. § 1603(d), governmental, not commercial," *id.* at 920, a suit to enforce nuisance and/or local zoning laws against its construction did not fall within the commercial activity exception. In doing so, the D.C. Circuit rejected the plaintiff's argument that the construction should be deemed commercial because a private business could have created the same nuisance by contracting with the same construction company to build the same building. The building was not just an office; it was a chancery. Applying the same logic to Merlini's suit compels the conclusion that she was not just a commercial office worker; she was a consular employee, whose employment was an exercise of Canada's sovereign powers.

III. The questions presented are exceptionally important

This case most immediately concerns whether courts will enforce a Massachusetts statute, the MWCA, against Canada's Boston Consulate, notwithstanding the conflicting Canadian statute, GECA. But its implications are much broader in four respects.

A. The decision below has significant adverse implications for U.S. diplomatic interests

The decision below adversely impacts the interests of the United States in two significant ways. First, insofar as it imposes significant costs, burdens and legal uncertainties on U.S. missions of foreign states and international organizations, it may hamper diplomatic cooperation and discourage employment of U.S. citizen locally employed staff.

Second, as Judge Lynch stressed, the United States "protects other countries' sovereign immunity so that 'similar protections will be accorded to [the U.S. abroad].'" App. 57a (quoting *Boos v. Barry*, 485 U.S. 312, 323 (1988)). The "concept of reciprocity" is important throughout international law, particularly with respect to overseas diplomatic missions. *See, e.g., Boos,* 485 U.S. at 323; *Helmerich,* 137 S. Ct. at 1322; *Nat'l City Bank of N.Y. v. China*, 348 U.S. 356, 362 (1955). The United States has its own equivalent to GECA: the Federal Employees' Compensation Act, 5 U.S.C. § 8101 *et seq*. ("FECA"). For over a century, at posts around the globe, the United States has provided workers' compensation benefits to federal workers under FECA, which, in parallel to GECA, is funded by the U.S. Treasury and administered, according to U.S. standards, by the Secretary of

Labor. FECA applies to "an employee who is neither a citizen nor resident of the United States." 5 U.S.C. § 8137(a). With respect to such employees, the Secretary has discretion to reflect "substantive features" of workers' compensation laws in the host jurisdiction, *id.* § 8137(a)(1). But the United States asserts sovereign authority to make that decision for itself, and in many jurisdictions it administers FECA to the exclusion of host jurisdiction law. *See* 3 U.S. State Dep't, Foreign Affairs Manual § 3631.2.

B. The decision below has nationwide implications

Many foreign sovereigns have consular offices in multiple U.S. jurisdictions. Canada, for example, maintains consulates in 11 states in addition to its Embassy in the District of Columbia. *See* https://www.international.gc.ca/country-pays/us-eu/index.aspx?lang=eng#offices. The issues that arise in this case under Massachusetts law could readily arise under many other jurisdictions' laws, presenting Canada and other foreign sovereigns with a complex patchwork of state laws and the threat of punitive strict liability suits if they continue to employ U.S. citizens.

State workers' compensation laws are far from uniform, but the general structure of Massachusetts' law, including the aspects that present the issues in this case, is quite typical. Like Massachusetts, most U.S. jurisdictions have workers' compensation laws that (i) generally replace common law tort liability with a regulatory compensation regime, (ii) punish employers who do not comply with state regulatory requirements by subjecting them to suit on the basis of strict liability (or at least without typical tort law defenses), and (iii) do not expressly exempt foreign

sovereign employers. *See, e.g.,* Alaska Stat. §§ 23.30.055, 23.30.075; Ariz. Rev. Stat. §§ 23-907, 23-961, 23-1022; Ark. Code §§ 11-9-105, 11-9-404; Cal. Lab. Code §§ 3602, 3700, 3706, 3708; Del. Code tit. 19, §§ 2371, 2372, 2374; D.C. Code §§ 32-1504, 32-1534; Fla. Stat. §§ 440.11, 440.38; 820 Ill. Comp. Stat. 305/4, 305/5; Iowa Code §§ 85.20, 87.1, 87.21; Ky. Rev. Stat. §§ 342.340, 342.690; Me. Rev. Stat. tit. 39-A, §§ 103, 104, 401; Md. Code Lab. & Empl. §§ 9-402, 9-509; Mich. Comp. Laws §§ 418.131, 418.141, 418.611, 418.641; Minn. Stat. §§ 176.031, 176.181; Miss. Code. §§ 71-3-9, 71-3-75; Mo. Stat. §§ 287.120, 287.280; Mont. Code §§ 39-71-401, 39-71-411, 39-71-508, 39-71-509; Nev. Rev. Stat. §§ 616A.020, 616B.612, 616B.636; N.Y. Workers' Comp. Law §§ 11, 50; Ohio Rev. Code §§ 4123.35, 4123.74, 4123.77; Or. Rev. Stat. §§ 656.017, 656.018, 656.020; 77 Pa. Stat. §§ 41, 481, 501; 28 R.I. Gen. Laws §§ 28-29-3, 28-29-20, 28-36-1, 28-36-10; S.D. Codified Laws §§ 62-3-1, 62-3-11, 62-5-1; 24 V.I.C. §§ 261, 272, 284; W. Va. Code § 23-2-1, 23-2-6, 23-2-8.[8]

Those jurisdictions include the two that host the most foreign sovereign consular offices and international organizations, the District of Columbia and New York. D.C. and New York law each impose requirements for workers' compensation insurance, or alternatively state-authorized self-insurance, that parallel MWCA § 25A. *See* D.C. Code § 32-1534; N.Y. Workers' Comp. Law § 50. They also each

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[8] At least four additional states follow the same model, but do not have statutory provisions expressly imposing strict liability or eliminating common law tort differences. *See* N.H. Rev. Stat. §§ 281-A:5, 281-A:7, 281-A:8; N.J. Stat. §§ 34:15-8, 34:15-71, 34:15-120.9; S.C. Code §§ 42-1-540, 42-5-10, 42-5-40; Wyo. Stat. §§ 27-14-104, 27-14-203.

subject employers who do not comply to suit under essentially the same strict liability terms as MWCA § 66. *See* D.C. Code § 32-1504; N.Y. Workers' Comp. Law § 11.

C. The decision below may have implications for as many as 200 foreign sovereigns and international organizations

The ruling below is not specific to GECA; it would apply to any foreign sovereign that implements its own workers' compensation scheme in its governmental missions rather than joining in a host state's program by seeking the host's approval of its insurance or self-insurance arrangements. Nor does it appear to be limited to consulates. If the precise nature of the employing office mattered, given the status of consulates under the Vienna Convention, consulates should be no less immune than embassies. Further, under this Court's decision in *Jam*, 139 S. Ct. 759, international organizations are generally subject to the same rules under the commercial activity exception as foreign states.

At least 26 foreign states maintain consulates within the Boston metropolitan area alone. *See* https://en.wikipedia.org/wiki/List_of_diplomatic_missions_in_Boston. [9] Almost 200 foreign sovereigns maintain embassies or consulates in the District of Columbia and/or New York. *See* https://en.wikipedia.org/wiki/List_of_diplomatic_missions_in_the_United_States. Across the United

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[9] An authoritative State Department listing of foreign consular offices within the United States as of 2016 is available at https://2009-2017.state.gov/documents/organization/256839.pdf.

States, there are more than 400 foreign consular offices. *See id.*

Judge Barron noted that "some foreign consulates . . . apparently have obtained the insurance required by chapter 152." App. 31a.[10] Subject to conflicts with their own laws, such as GECA and FECA, foreign states may choose to comply with the MWCA or other state laws. Further, under the First Circuit's ruling, a foreign sovereign could maintain immunity from suit by staffing its consulates solely with its own citizens. To require either course of action on pain of litigation is, however, a significant intrusion on the independence of a foreign consulate.

Moreover, there are likely many foreign states and international organizations with laws and policies similar to GECA and FECA. According to an Australian Government handbook for locally engaged staff in the United States, workers' compensation for employees of Australia's Embassy and Consulates in the District of Columbia, New York and Chicago is provided under Australia's Comcare law. *See* Australian Government, Dep't of Foreign Affairs & Trade, *Locally Engaged Staff Terms & Conditions of Employment, United States of America* § 4.9 (2019), https://usa.embassy.gov.au/sites/default/files/usa_les_tc_2019.pdf, at 16. As a further example, one of the largest employers subject to the FSIA, the World Bank Group, takes the position that "[t]he World Bank and the IFC (the Organizations) are not subject to the employment legislation of any of their member countries." World Bank Group, *Principles of Staff*

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[10] He also noted that the same is true of the Quebec Government Office in Boston. *Id.* As a provincial, not federal, employer, that office is not covered by GECA.

Employment — Preamble, Forward & Principles 1-11, § 1.01 (Aug. 1, 1983), https://policies.worldbank.org/sites/ppf3/PPFDocuments/Forms/DispPage.aspx?docid=2666&ver=current. Accordingly, the World Bank administers its own integrated system, analogous to GECA, to determine and provide workers' compensation for all its employees. *See* World Bank Group Directive*, Staff Rule 6.11,* §§ 3.01, 5.01, 12.01, 13 (Apr. 9, 2018), https://policies.worldbank.org/sites/ppf3/PPFDocuments/76ca03935c904e98b1269153552ede86.pdf.

D. The decision below has implications beyond workers' compensation cases

This case also has potential implications for employment-related issues extending beyond workers' compensation. It involves judgments central to the restrictive theory of sovereign immunity — how to identify the "gravamen" of the action, and how to distinguish between the "purpose" of a sovereign's activity, which is not decisive, and its "outward form," which is. As section II, *supra*, reflects, those issues arise frequently and contentiously in the context of various employment-related causes of action. This case presents an opportunity for this Court to provide needed guidance on the application of the commercial activity exception in employment-related cases.

* * * * *

For the foregoing reasons, Judges Torruella and Lynch and Chief Judge Howard were right to conclude that this is a case of "exceptional importance," App. 54a, meriting this Court's review. At a minimum, given the important foreign policy interests at stake and the United States' involvement

as *amicus curiae* in the Court below, this Court should call for the views of the Solicitor General.

IV. Merlini's alternative argument under the noncommercial tort exception does not present a "vehicle problem"

Finally, Merlini's alternative argument — and the United States' suggestion in its First Circuit *amicus* brief — that the noncommercial tort exception might apply neither warrants certiorari in its own right nor provides any reason not to address the questions presented under the commercial activity exception. Every judge who addressed the issue below correctly concluded that the noncommercial tort exception did not apply. *See* App. 13a-17a (majority opinion); App. 36a-38a nn. 9, 11 (Lynch, J., dissenting); App. 65a-66a (district court). The essential conduct upon which liability under Merlini's sole cause of action, MWCA § 66, is premised, is employment without compliance with MWCA § 25A. *See* App. 69a (Compl. ¶ 1) ("In sum, the Consulate was acting as a self-insurer without obtaining a license."). Canada's conduct with respect to that element is either sovereign, as argued above, or commercial, as the First Circuit held; it is not a noncommercial tort.

Indeed, MWCA § 66 requires no negligence or other tortious act or omission on the part of an employer. Like many states, Massachusetts has effectively abolished common law tort actions for workplace injuries. *See* MWCA §§ 24, 26; *Foley,* 381 Mass. at 548-49, 413 N.E.2d at 713-14; L. Locke, Workmen's Compensation, 29 Mass. Practice § 651 (1968) (under the MWCA, "an employer who becomes an insured person under the act obtains an immunity from actions at law by his employees"). Instead, § 66 imposes strict liability for workplace injuries,

however caused — essentially an indemnification obligation —for the "purpose" of "induc[ing]" and "pressur[ing]" employers to comply with MWCA § 25A. *Price v. Ry. Exp. Agency, Inc.,* 322 Mass. 476, 478-79, 78 N.E.2d 13, 16 (1948).

To be sure, Merlini's complaint contains a conclusory allegation that an unidentified individual "negligently" omitted to secure a phone cord. App. 71a (Compl. ¶ 15). However, that allegation is not reiterated in her sole count, App. 73a (Compl. ¶¶ 26-32), since it is irrelevant to her cause of action under Massachusetts law. Merlini's assertion of negligence is merely artful pleading, designed to create jurisdiction under 28 U.S.C. § 1605(a)(5). This Court rejected an analogous effort in *Sachs*, where the plaintiff artfully pled a (legally cognizable) "failure to warn" claim in order to identify conduct within the United States. *See Sachs*, 136 S. Ct. at 396. *A fortiori*, the courts below were right to reject Merlini's artful pleading suggesting a negligence claim that does not exist under Massachusetts law.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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