No. 19-1101

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

BRIEF IN OPPOSITION

Theodore Joel Folkman
Counsel of Record
Folkman LLC
PO Box 116
Boston, Mass. 02131
(617) 219-9664
ted@folkman.law

Of counsel:

Alan S. Pierce
Pierce, Pierce & Napolitano
27 Congress St.
Salem, Mass. 01970

Counsel for Respondent

April 21, 2020

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

1. Canada, which operates a consulate in Boston, did not obtain workers' compensation insurance or a license to self-insure, as Massachusetts law requires. Merlini, an American clerical employee, was injured on the job. Merlini brought a common-law action for damages, as Massachusetts law permits in cases where the employer is uninsured. She alleged that she was not a citizen of Canada; that her duties were entirely clerical; that she was not a consular officer and performed no governmental, consular, diplomatic, or other official tasks; and that she took no competitive examination before hire, was not entitled to tenure, and did not receive the same benefits as a foreign service officer. Is Canada immune from suit notwithstanding the commercial activity exception to foreign sovereign immunity?

2. Merlini's injury was caused by the negligence of a fellow worker, who failed to secure a telephone cord to the floor. If the commercial activity exception does not apply, is Canada immune from suit notwithstanding the noncommercial tort exception to foreign sovereign immunity?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

INTRODUCTION. 1

COUNTERSTATEMENT 1

A. The Accident and Canada's Response 1

B. The Claim for Benefits from the Workers' Compensation Trust Fund 3

C. The Common-Law Claim for Damages. 4

D. The First Circuit's Decision 7

REASONS TO DENY THE PETITION 11

A. There Is No Square Conflict 11

B. The First Circuit's Decision Is Correct. 16

1. A Foreign Sovereign Cannot Claim Immunity By Relying On The Sovereign Purposes Behind Its Actions 18

2. Facts And Circumstances That A Plaintiff Does Not Need To Plead Or Prove Cannot Possibly Be Part Of The Gravamen Of Her Case 21

C. This Case Is A Poor Vehicle. 23

D. The First Circuit Decision Poses No Real Risk to Foreign Sovereigns Doing Business Here or to the US Government When Doing Business Abroad 24

CONCLUSION. 26

TABLE OF AUTHORITIES

CASES

Am. Constr. Co. v. Jacksonville, Tampa & Key W. Ry. Co., 148 U.S. 372 (1893). 23

Anglo-Iberia Underwriting Management v. P.T. Jamsostek, 600 F.3d 171 (2d Cir. 2010). . . . 12, 13

Atl. Marine Constr. Co. v. U.S. Dist. Court for the W. Dist. of Tex., 571 U.S. 49 (2013) 25

Barrett v. Transformer Serv., Inc., 374 N.E.2d 1325 (Mass. 1978) 6, 23

Butters v. Vance Int'l, Inc., 225 F.3d 462 (4th Cir. 2000). 18

El-Hadad v. United Arab Emirates, 496 F.3d 658 (D.C. Cir. 2007). 11, 12, 17

Food Marketing Inst. v. Argus Leader Media, 139 S. Ct. 2356 (2019). 16

Gregorian v. Izvestia, 871 F.2d 1515 (9th Cir. 1989). 14

Hanover Ins. Co. v. Ramsey, 539 N.E.2d 537 (Mass. 1989) 6

Holden v. Canadian Consulate, 92 F.3d 918 (9th Cir. 1996). 11, 12, 17

Howard v. Lightner, 214 A.2d 474 (D.C. 1965) 5

In re Opinion of the Justices, 34 N.E.2d 527 (Mass. 1941) 6

Jungquist v. Sheikh Sultan bin Khalifa al Nahyan,
115 F.3d 1020 (D.C. Cir. 1997) 12, 13

Kato v. Ishihara,
360 F.3d 106 (2d Cir. 2004) 15, 16, 18

Lim v. Offshore Specialty Fabricators, Inc.,
404 F.3d 898 (5th Cir. 2005) 25

MacArthur Area Citizens Ass'n v. Republic of Peru,
809 F.2d 918 (D.C. Cir. 1987) 14, 15

Morgan v. Robacker,
151 N.Y.S.2d 836 (App. Div. 1956) 5

Nat'l City Bank of N.Y. v. Republic of China,
348 U.S. 356 (1955) 25

O'Dea v. J.A.L., Inc.,
569 N.E.2d 841 (Mass. App. Ct. 1991) 6

OBB Personenverkehr AG v. Sachs,
136 S. Ct. 390 (2015) 21, 22, 25, 26

Olsen v. Government of Mex.,
729 F.2d 641 (9th Cir. 1984) 9

Republic of Argentina v. Weltover, Inc.,
504 U.S. 607 (1992) 10, 19, 20, 21, 22

Rodríguez v. Municipality of San Juan,
659 F.3d 168 (1st Cir. 2011) 16

Rush-Presbyterian-St. Luke's Med. Ctr. v. Hellenic Republic,
877 F.2d 574 (7th Cir. 1989) 14

Saudi Arabia v. Nelson,
507 U.S. 349 (1993) 7, 21, 22

Segni v. Commercial Office of Spain,
835 F.2d 160 (7th Cir. 1987) 11, 12, 17

Truong v. Wong,
775 N.E.2d 405 (Mass. App. Ct. 2002) 6

USAA Cas. Ins. Co. v. Permanent Mission of the Republic of Namib.,
681 F.3d 103 (2d Cir. 2012) 9

Va. Military Inst. v. United States,
580 U.S. 946 (1993) 23

Verlinden B.V. v. Central Bank of Nigeria,
461 U.S. 480 (1983) 4

STATUTES

28 U.S.C. § 1603(d) 18, 20

28 U.S.C. § 1605(a)(2) 6, 7

28 U.S.C. § 1605(a)(5) 6, 7, 8, 9

Cal. Lab. Code § 3708 . . . . 5, 6

D.C. Code § 32-1504(b) 5

Mass. Gen. Laws ch. 152, § 1(7) 2

Mass. Gen. Laws ch. 152, § 25A 2

Mass. Gen. Laws ch. 152, § 65(2) 3, 4

Mass. Gen. Laws ch. 152, § 66 . . . . 5, 7

Mass. Gen. Laws ch. 152, § 67 5

N.Y. Workers' Comp. Law § 11 . . . . 4, 5

Government Employees Compensation Act, R.S.C. 1985, c. G-5 (Can.). *passim*

TREATIES

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Jun. 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 24

Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 11

OTHER AUTHORITIES

H.R. Rep. No. 94-1487, 1976 U.S.C.C.A.N. 6604 . . . . 16, 17

9 Lex K. Larson, *Larson's Workers' Compensation Law* 5, 6

INTRODUCTION

Canada failed to do what the law requires nearly every employer in Massachusetts to do: it failed to purchase workers' compensation insurance or to obtain a license to self-insure. Merlini, a worker injured on the job, sued Canada under Massachusetts's unique statute providing for strict liability in common-law tort suits against uninsured employers.

This case meets none of the Court's usual criteria for granting review. There is no circuit split for this Court to resolve. The First Circuit's decision was correct on the merits and amply supported by this Court's precedents and by sound policy. A decision by this Court may not finally resolve the question of jurisdiction considering Canada's announced intention to bring a new motion to dismiss for lack of subject-matter jurisdiction after the case is remanded. And there is no risk to US foreign policy or to international comity that justifies review of a case that is unique and highly unlikely to recur. The Court should deny the petition.

COUNTERSTATEMENT

A. The Accident and Canada's Response.

Cynthia Merlini worked for the government of Canada as an assistant to its consul general at its consulate in Boston. She was an American living in Massachusetts. Her duties at the consulate were clerical and comparable to the duties of a secretary at any private business: she answered the telephone, maintained files, typed letters, and performed other secretarial tasks. She was not a consular officer. She

performed no governmental, consular, diplomatic, or other official duties. She took no competitive examination before her hire, she was not entitled to tenure, and she did not receive the same benefits as a Canadian foreign service officer. App. 70a.

In January 2009, Merlini was setting out coffee and tea for a meeting to be held at the consulate. She tripped over a speakerphone cord, hitting a credenza. A fellow worker caused the accident by negligently failing to secure the cord to the floor. Merlini suffered a serious injury. App. 71a. An administrative judge in the Massachusetts Department of Industrial Accidents ("the DIA") found, years later, that the injury had left her "totally and permanently incapacitated from all work of a remunerative nature." *Merlini v. Consulate General of Canada,* Bd. No. 35748-09, slip. op. at 8 (Mass. Dept. of Indus. Acc. Sept. 17, 2013).

Massachusetts law requires nearly every employer to provide compensation for injured employees by "insurance with an insurer" or by "obtaining from the [DIA] annually a license as a self-insurer."[1] Mass. Gen. Laws ch. 152, § 25A. Canada acknowledges that it did neither. Instead, Canada paid benefits to Merlini under a Canadian law—the Government Employees Compensation Act, R.S.C. 1985, c. G-5 (Can.)

---

[1] An "insurer," under the statute, is not just a company in the insurance business or one that provides benefits measured by some other jurisdiction's law, but one that has "contracted with an employer to pay *the compensation provided for by this chapter."* Mass. Gen. Laws ch. 152, § 1(7) (emphasis supplied). A self-insurer is treated as an insurer for purposes of the statute, *see id.*, and must therefore pay the benefits provided by Massachusetts law, not by some alternative benefits scheme that it creates.

("GECA")—for a few months until October 2009, when it decided—wrongly, as a Massachusetts administrative judge later found— that she was able to return to work.

B. The Claim for Benefits from the Workers' Compensation Trust Fund.

Merlini then sought benefits from the Massachusetts Workers' Compensation Trust Fund, a fund established by the Commonwealth to provide compensation to workers whose employers had not obtained insurance or a license to self-insure as required by law. To succeed on a claim against the Trust Fund, the worker must show, among other things, that she is not entitled to workers' compensation benefits in another jurisdiction. Mass. Gen. Laws ch. 152, § 65(2). An administrative judge awarded Merlini benefits, but in August 2012, the DIA Reviewing Board remanded for further consideration of the requirements of § 65(2).

On remand, the administrative judge again found that Merlini was unable to work and entitled to benefits from the Trust Fund. The Trust Fund appealed, and the DIA Reviewing Board reversed, holding that that Merlini was not entitled to benefits from the Trust Fund because she was entitled to the benefits she had received under GECA. *Merlini v. Consulate General of Canada,* 29 Mass. Workers' Comp. Rep. 41 (Dept. Indus. Acc. Rev. Bd. 2015).[2]

[2] There were two other bases for the DIA Reviewing Board's decision. First, the Board held that Canada was not "subject to the personal jurisdiction of the commonwealth," as § 65(2) requires; it

Merlini appealed to the Massachusetts Appeals Court, arguing that the benefits she had received under GECA were discretionary and that she had not been *entitled* to receive them. In an unpublished decision, the court affirmed, holding that under Canadian law, Merlini was entitled to benefits under GECA. *Merlini's Case,* No. 15-P-847, 2016 WL 3549598 (Mass. App. Ct. Jun. 29, 2016).

C. The Common-Law Claim for Damages.

Many jurisdictions allow injured employees of uninsured employers to elect between claiming statutory workers' compensation benefits from the employer or bringing a common-law claim for tort against the employer. *See, e.g.,* N.Y. Workers' Comp.

---

reasoned that the administrative judge "lack[ed] authority to make such a determination because the FSIA vests that authority in the *federal* courts." *Id.* at 45 (emphasis supplied). This conclusion was plainly incorrect, because under the FSIA the state and federal courts have concurrent jurisdiction of actions against foreign states. *See Verlinden B.V. v. Central Bank of Nigeria,* 461 U.S. 480, 489 (1983). Second, the Board held that Canada was not "uninsured in violation of" the Massachusetts Workers' Compensation law, as § 65(2) also requires; the Board rested its conclusion on immunity under the FSIA, apparently concluding that because the DIA "lack[ed] jurisdiction to determine whether an exception to … immunity applies," the mere invocation of immunity by a foreign state requires dismissal for lack of jurisdiction. *Merlini v. Consulate General of Canada,* 29 Mass. Workers' Comp. Rep. at 47. Canada argued below that these two holdings should have issue-preclusive effect. But because Merlini appealed from them and the Massachusetts Appeals Court affirmed on other grounds, the First Circuit rightly rejected the preclusion argument. (App. 33a-34a). Canada has never defended the Board's reasoning on the merits, nor has it sought review in this Court of the First Circuit's decision on issue preclusion.

Law § 11; D.C. Code § 32-1504(b). Massachusetts does not give the worker an election of remedies against the uninsured employer. The worker's only remedies are to seek benefits from the Trust Fund—a path that was closed to Merlini—or to bring a common-law tort action against the uninsured employer under Mass. Gen. Laws ch. 152, §§ 66 and 67.[3] Section 66 provides that "[a]ctions brought against employers to recover damages for personal injuries … sustained … by an employee in the course of his employment" must be brought within twenty years, and that contributory or comparative negligence, the negligence of a fellow employee, assumption of risk, and the employer's lack of negligence "shall not be defense[s]" to such a claim. Section 67 provides that § 66 "shall not apply to actions to recover damages for personal injuries received by employees of an insured person or a self-insurer." In effect, the statutes modify the common law by making an uninsured employer strictly liable for injuries occurring in the course of employment.[4] The worker can

[3] Canada is wrong to lump in §§ 66 and 67 with laws in other states that "replace common law tort liability with a regulatory compensation scheme" (Pet. at 29). Section 66 merely modifies the preexisting common-law tort action, and it does not limit damages to the benefits prescribed by the "regulatory compensation scheme."

[4] Massachusetts law is apparently unique in allowing an injured worker to recover tort damages from an uninsured employer in a common-law action without proof of negligence. *See* 9 Lex K. Larson, *Larson's Workers' Compensation Law* § 102.01[2] at n.9. In many jurisdictions the injured worker has the burden to prove the employer's negligence. *See, e.g., Howard v. Lightner,* 214 A.2d 474, 476 (D.C. 1965); *Morgan v. Robacker,* 151 N.Y.S.2d 836, 837 (App. Div. 1956). In others, there is a rebuttable presumption of negligence, which the employer can overcome. *See, e.g.,* Cal. Lab.

recover all tort damages and is not limited to the statutory benefits she would have received if the employer had been insured. *See Truong v. Wong,* 775 N.E.2d 405, 407 (Mass. App. Ct. 2002). Entitlement to benefits under another jurisdiction's law is not a defense to a common-law claim against the uninsured employer, as it is to an administrative claim against the Trust Fund. *See Barrett v. Transformer Serv., Inc.,* 374 N.E.2d 1325, 1328 (Mass. 1978). All that the injured worker need prove in order to show liability is that "she suffered a workplace injury in the course of her employment and that the defendant … was her employer." (App. 15a). *See Hanover Ins. Co. v. Ramsey,* 539 N.E.2d 537, 538 n.3 (Mass. 1989). She does not need to prove that "any action by any person," including the uninsured employer, "caused the underlying injury." (App. 14a-15a).

Merlini brought a common-law claim against Canada in the District Court. She asserted that the court had subject-matter jurisdiction under the commercial activity exception to foreign sovereign immunity, 28 U.S.C. § 1605(a)(2), or in the alternative, under the noncommercial tort exception, 28 U.S.C.

Code § 3708. Thus in most jurisdictions, the uninsured employer's negligence is relevant, one way or another, to the injured employee's common-law claim against the employer. *See* 9 Larson, *supra* § 102.02[6]. Massachusetts, on the other hand, makes the uninsured employer strictly liable at common law regardless of negligence. *See O'Dea v. J.A.L., Inc.,* 569 N.E.2d 841, 842 (Mass. App. Ct. 1991). Its law creates "a cause of action in an employee sustaining an injury 'in the course of his employment' that is a 'direct result' of such employment, though not a 'direct result of any negligence on the part of the employer.'" *See In re Opinion of the Justices,* 34 N.E.2d 527, 544 (Mass. 1941).

§ 1605(a)(5). Both exceptions turn on identifying the conduct that the claim is "based upon." To pass muster under § 1605(a)(2), the claim must be based upon Canada's commercial activity. To survive under § 1605(a)(5), it must *not* be based upon the exercise or performance of, or failure to exercise or perform, a discretionary function.

Canada moved to dismiss for lack of subject-matter jurisdiction, arguing that neither exception applied on the allegations of the complaint (Canada mounted a facial attack on the complaint and did not offer any evidence). The District Court dismissed for lack of jurisdiction. App. 67a. Merlini appealed.

D. The First Circuit's Decision.

There were two main questions on appeal. *First,* what was Merlini's claim based upon? To determine the basis, the court had to look to "those elements of [the] claim that, if proven, would entitle [Merlini] to relief under [her] theory of the case." *Saudi Arabia v. Nelson,* 507 U.S. 349, 357 (1993). The parties and the United States as *amicus curiae* identified three possibilities: Merlini's employment; the negligence of Merlini's fellow worker; or Canada's failure to purchase insurance.[5] Merlini argued that the action was based

---

[5] Canada's petition misstates the United States' position. According to the petition (Pet. at 9-10), the United States joined Canada in arguing "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 governs workers' compensation for its consular employees." In fact, the United States *rejected* the "district court['s] conclu[sion] that plaintiff's

on the employment or on Canada's failure to obtain insurance and that she prevailed on either theory under the commercial activity exception; she argued in the alternative that the action was based on her fellow worker's negligence.[6] The United States argued that the action was based on the accident caused by the fellow worker's negligence and suggested a remand to determine whether the noncommercial tort exception applied. Canada argued that the action was based not just on the lack of workers' compensation insurance, but on its deliberate decision not to purchase insurance or to self-insure as required by the Massachusetts statute.

Second, once the court identified the particular conduct on which Merlini's claim was based, was that conduct commercial activity for purposes of the commercial activity exception to foreign sovereign immunity?[7]

---

action is based upon Canada's choice of workers' compensation systems," arguing that that view "cannot be reconciled with the Supreme Court's approach to the gravamen inquiry," and asserting instead that "[t]he trip-and-fall accident … forms the gravamen of plaintiff's action." (Brief of the United States as *Amicus Curiae* at 1; *see also id.* at 8-12). The United States did, however, agree with Canada's argument that the commercial activity exception would not apply if, as Canada argued, the gravamen of the action was "Canada's choice of workers' compensation systems." (*Id.* at 15).

[6] If the case is within the commercial activity exception, it cannot be within the noncommercial tort exception, and vice versa: the noncommercial tort exception applies only in cases "not otherwise encompassed in" the commercial activity exception. *See* 28 U.S.C. § 1605(a)(5).

[7] The court did not reach the question whether the fellow worker's failure to secure the cord to the floor was "the exercise or

The First Circuit reversed and remanded. App. 53a. The majority (Kayatta and Barron, JJ.) and the dissenter (Lynch, J.) agreed that Merlini's claim was not based upon the negligence of her fellow worker, as the United States urged, because the employer's negligence is not relevant to Merlini's case under Massachusetts law. App. 14a-15a (panel decision); App. 36a n.9 (Lynch, J., dissenting).

The court did not decide between the two remaining possibilities, because it held that Merlini prevailed under the commercial activity exception whichever theory was correct. Merlini prevailed if her claim was based upon her employment, because Canada conceded that her employment was commercial. App. 13a ("[I]f Merlini's complaint is 'based on' Canada's employment of her as a clerical worker doing routine clerical work at the consulate in Boston, then the 'commercial

---

performance or the failure to exercise or perform a discretionary function," 28 U.S.C. § 1605(a)(5)(A), because it held that the action was not based on the fellow worker's negligence. Had it reached the question, it surely would have concluded that the negligent failure to secure the cord was not the exercise or failure to exercise of a discretionary function, but precisely the kind of ordinary tortious conduct the noncommercial tort exception was meant to reach. *See, e.g., USAA Cas. Ins. Co. v. Permanent Mission of the Republic of Namib.,* 681 F.3d 103, 113 (2d Cir. 2012) (foreign mission failed to shore up a party wall; failure was not a discretionary function even though it had made a policy decision to locate its chancery in the building at issue); *Olsen v. Government of Mex.,* 729 F.2d 641, 646-47 (9th Cir. 1984) (prisoners being transferred by air to the US under a prisoner exchange treaty were killed in airplane accident due to pilot's negligence; acts or omissions were not discretionary, even though the prisoner transport was pursuant to Mexico's decision to enter into the treaty).

activity' exception would appear to apply. In fact, Canada does not appear to argue otherwise") (citation omitted). If, on the other hand, the claim was based upon Canada's failure to purchase insurance or to obtain a license to self-insure, Merlini prevailed, because Canada's failure was "the type of conduct by which a private party engages in trade and traffic or commerce." App. 22a (citation and internal quotation marks omitted). Canada may have been "motivated by what it characterizes as its sovereign obligation to provide its employees protection through its own national workers' compensation system," App. 23a, but the court held that in light of *Republic of Argentina v. Weltover, Inc.,* 504 U.S. 607 (1992), "the 'motive behind' Canada's conduct … is not germane to the question of whether the activity of doing just that is 'commercial' for purposes of the FSIA's 'commercial activity' exception." App. 23a.

Canada petitioned for rehearing *en banc*. It asked the First Circuit to supplement the record and to consider documents it had failed to put before the District Court or the panel: a written employment contract, various job descriptions, Canada's Locally-Engaged Staff Terms and Conditions, and its Boston LES ("locally-engaged staff") Handbook. And for the first time, Canada argued that Merlini's allegation that her employment was purely clerical was untrue.[8] It

---

[8] Canada asserts that it "did not concede the accuracy" of Merlini's allegations about the nature of her work, though it allows that "[i]n the present posture, this Court may assume that Merlini's duties were 'clerical' in the sense of not imbuing her with policy-making discretion." (Pet. at 22 n.6). But in the District Court and before the First Circuit panel, Canada did not seek to argue that Merlini's

argued that supplementing the record would serve judicial efficiency, because if the First Circuit, after rehearing, affirmed, then on remand, Canada would bring another motion to dismiss for lack of subject-matter jurisdiction, and it would offer the documents to support its motion. Canada also raised new arguments under the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261, which it had not raised in the District Court or before the panel (Pet. for Rehearing at 14-15). The First Circuit denied the petition for rehearing *en banc.* App. 54a. It also denied Canada's motion to supplement the record.

REASONS TO DENY THE PETITION

A. There Is No Square Conflict.

The closest appellate decisions to Merlini's case on the facts are *Segni v. Commercial Office of Spain,* 835 F.2d 160 (7th Cir. 1987), *Holden v. Canadian Consulate,* 92 F.3d 918 (9th Cir. 1996), and *El-Hadad v. United Arab Emirates,* 496 F.3d 658 (D.C. Cir. 2007). The plaintiff in each case was employed by a foreign government in an embassy (*El-Hadad*), consulate (*Holden*), or trade office (*Segni*) in the United States. Each brought an employment-related claim against the

allegations were untrue or to offer any evidence on that or any other issue. Canada instead attacked the sufficiency of the complaint on its face. As Canada notes (Pet. at 22 n.6), it did move, unsuccessfully, for leave to supplement the record to offer evidence it had not offered before concerning Merlini's job duties. But that motion came at the time Canada unsuccessfully petitioned for rehearing *en banc,* after the First Circuit had decided the case. So there was no dispute about Merlini's job duties below.

foreign state.[9] In each case, the court held or assumed that the action was based on the employment or the foreign state's adverse employment action. (In *Holden,* the court reached its holding about the basis of the action after rejecting Canada's argument—similar to its argument here—that the action was based on its sovereign decision to close the consulate where Holden had been employed, *see Holden,* 92 F.3d at 920-21). And in each, the court held that because the plaintiff's employment (or the act relevant to the employment, such as the hiring) was commercial rather than governmental, the foreign state had no immunity. *Holden,* 92 F.3d at 921-22 (employment was commercial); *El-Hadad,* 496 F.3d at 663-68 (employment was commercial); *Segni,* 835 F.2d 164-66 (hiring was commercial).

Judge Lynch, who dissented from the First Circuit's decision and from its denial of the petition for rehearing *en banc,* did not cite any cases brought by employees of foreign governments against their employers as evidence of a circuit split. *Anglo-Iberia Underwriting Management v. P.T. Jamsostek,* 600 F.3d 171 (2d Cir. 2010), and *Jungquist v. Sheikh Sultan bin Khalifa al Nahyan,* 115 F.3d 1020 (D.C. Cir. 1997), both involved claims that foreign officials were liable for the way they administered foreign governmental programs. In *Anglo-Iberia,* the claim was that

[9] In *Segni,* the claim was for breach of contract, alleging a wrongful termination. In *Holden,* the claim was for age and sex discrimination following a termination. In *El-Hadad,* the claim was for breach of contract, alleging a wrongful termination, and for defamation related to the embassy's response to inquiries from prospective employers.

Indonesia and a state-owned insurer had negligently failed to supervise employees of the insurer who had been part of a reinsurance fraud scheme that had injured Anglo-Iberia. In *Jungquist,* the plaintiff was injured in a boating accident in Abu Dhabi, and Sheikh Sultan, a government official, had promised that he and the government would provide for her medical care, allegedly in return for Jungquist's silence about his involvement in the boating accident. Jungquist sued the UAE Medical Attaché who oversaw the government health program that was to have provided the care, and the Director of Patient Relations for the program. The claim was that in "overseeing the administration" of the program and arranging for "logistical matters" connected with the program, *id.* at 1029, the defendant acted as the Sheikh's "agents or co-conspirators" in his alleged fraud, breaches of contract, and infliction of emotional distress. *Id.* at 1028.

In both cases, the courts found that the defendants were immune from suit. But in both cases, the claim revolved around actions the defendants took in the administration of foreign government programs. Merlini, though, does not claim that Canada is liable to her because of the way it administered GECA in her case. As the First Circuit held in distinguishing the two cases:

> The reason that neither *Jungquist* nor *Anglo-Iberia* aids Canada's cause is simple. In each of those cases, the claims at issue were based on the defendants' *administration* of the government programs at issue independent of any conduct by the foreign state as the employer

> of the plaintiffs, such that it was the manner of the administration of those programs—and not the manner of the foreign state's employment of the plaintiffs—that was alleged to be wrongful.

(App. 28a-29a).

Nor is the First Circuit's decision at odds with the two other decisions Judge Lynch cited, *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). *Gregorian* was a libel claim against the Soviet state-owned newspaper, *Izvestia.* The key fact in *Gregorian*—the fact that made it clear that the Soviet government was engaged in governmental rather than commercial activity—was that *Izvestia* was "the voice of an official Soviet agency." *Gregorian,* 871 F.2d at 1522. *Izvestia,* in other words, was more like the Federal Register than like the *Boston Globe,* and the Soviet government's publication of its views was not like the private commercial publication of news. The Seventh Circuit focused on this point in *Rush-Presbyterian-St. Luke's Med. Ctr. v. Hellenic Republic,* 877 F.2d 574 (7th Cir. 1989), distinguishing *Gregorian* on its way to holding that the Greek government was not immune from suit on a claim that it breached a contract with US doctors and a US hospital by contracting with them to provide healthcare to its citizens and then failing to pay them, notwithstanding Greece's claim that it was simply administering its laws for providing health care to its citizens. *See Rush-Presbyterian,* 877 F.2d at 579.

In *MacArthur,* a neighborhood group sought damages from Peru when it operated a chancery out of

a building zoned for residential use. As the D.C. Circuit held, "operation of a chancery is, by its *nature,* governmental, not commercial." *MacArthur,* 809 F.2d at 920 (citation omitted). The challenged act in *MacArthur* was the operation of the chancery itself, not particular activities of the government connected to the chancery. Such activities may or may not be commercial, while operation of a chancery is something only governments can do. But Merlini is not challenging Canada's operation of a consulate. Rather, she is challenging its conduct as her employer.

Canada cites *Kato v. Ishihara,* 360 F.3d 106 (2d Cir. 2004), a case it failed to cite to the First Circuit panel, as a possible source of a circuit split. The panel distinguished *Kato* on the grounds that there, the Second Circuit had characterized the nature of the employment as governmental. App. 18a. In fact, the worker in *Kato* was a Japanese civil servant who took a competitive examination to get her job, had lifetime tenure, and had "a prescribed rotation of employment placements." *Kato,* 360 F.3d at 109. Judge Lynch did not point to *Kato* in her dissent from the panel decision or in her dissent from the denial of rehearing *en banc.* Canada now seeks to read *Kato* to focus not on the nature of the *employee's* duties but on the nature of the *employer's* business. But both parties below and the panel understood that if the gravamen of the case involved Merlini's employment, then the key question was the nature of the job Canada hired Merlini to do rather than the sovereign purpose for which Canada hired her to do it. The panel distinguished *Kato* and explained why the job duties of the worker there were different from Merlini's job duties. To the extent

Canada wants to read *Kato* to support a broad rule of immunity in embassy or consular employment cases because of the governmental nature of embassies or consulates rather than the commercial or non-commercial nature of a worker's job, this is not the right case to make the argument, as it was not developed below and the First Circuit never opined on it.

B. The First Circuit's Decision Is Correct.

The First Circuit's decision was plainly correct on the merits. If the gravamen of the case was Merlini's "employment … as a clerical worker doing routine clerical work at [the] consulate in Boston," then the decision was plainly correct because Canada did not argue, either to the District Court or to the First Circuit, that Merlini's employment was not commercial. (App. 13a). *Rodríguez v. Municipality of San Juan,* 659 F.3d 168, 175 (1st Cir. 2011) (arguments not made are waived).[10]

[10] Because the commercial nature of Merlini's employment was not disputed, Canada's effort to create a controversy about the use of a House Judiciary Committee report on the FSIA, H.R. Rep. No. 94-1487, 1976 U.S.C.C.A.N. 6604, that courts have used to help illuminate the distinction between commercial and non-commercial employment, is tangential at best. The suggestion is that the First Circuit's citation to the report conflicts with this Court's rule that legislative history should not be used "to muddy the meaning of clear statutory language," *Food Marketing Inst. v. Argus Leader Media,* 139 S. Ct. 2356, 2364 (2019) (citation and internal quotation marks omitted). The report explains that "the employment of diplomatic, civil service, or military personnel" was, in the Committee's view, "public or governmental" in nature, while the "employment or engagement of laborers, clerical staff or public relations or marketing agents" was, again in the Committee's view,

Waiver aside, there was no argument for Canada to make. Merlini was a clerical worker. She had no governmental, consular, diplomatic, or other official duties. She was a citizen of the United States but not of Canada. She took no competitive examination before hire, had no tenure protection, and was not a civil servant. Wherever one draws the line between commercial employment and non-commercial or governmental employment—and there may be close cases—Merlini was on the commercial side of the line. *See Holden,* 92 F.3d at 920 (in employment discrimination case, employee was a "commercial officer" responsible for "responding to inquiries from Canadian companies;" employment was commercial); *Segni,* 835 F.2d 160 at 162 (in breach of contract case, employee was responsible for "developing the marketing of Spanish wines" in America; employment was commercial); *El-Hadad,* 496 F.3d at 666-67 (in

"commercial activity." *Id.* at 16, 1976 U.S.C.C.A.N. at 6615. Nothing about the Committee's view is at odds with the text of the FSIA. Canada argues that the FSIA's focus is on whether the *foreign sovereign* is engaged in commercial activity, not whether the *employee* is engaged in commercial activity. That claim is unimpeachable but unenlightening, because the question before the First Circuit was precisely whether a foreign sovereign engages in commercial activity when it employs, for example, a laborer to fix a wall, or a janitor to sweep the floor, or a secretary to answer the phones—or when it fails to purchase workers' compensation insurance for such workers. Moreover, neither Merlini nor the panel made any claim about the binding or even the persuasive force of the Committee report. If the report did not exist, it would still be necessary to draw a line between cases in which a foreign sovereign employer is treated as a *commercial* employer and cases in which it is treated as a *governmental* employer. On the record below, Merlini's employment plainly fell on the commercial side of the line.

breach of contract and defamation case, employee was accountant with supervisory authority over other accountants at the embassy and was "part of the … government, in a way that an administrative assistant, for example, would not be;" employment was commercial) (citation omitted). *Contrast Butters v. Vance Int'l, Inc.,* 225 F.3d 462 (4th Cir. 2000) (employee provided personal protection to member of foreign country's royal family); *Kato, supra* (employee was a foreign civil servant who took a competitive examination, had lifetime tenure, and was required to rotate through posts in the United States and elsewhere).

If the gravamen of the case was Canada's failure to purchase insurance or obtain a license as a self-insurer, the decision was also plainly correct. Canada's view is that the gravamen of the case was not the *fact* of its failure to purchase insurance, but its *policy decision* not to purchase insurance, which it characterizes as sovereign. That view must fail for two reasons.

1. A Foreign Sovereign Cannot Claim Immunity By Relying On The Sovereign Purposes Behind Its Actions.

The FSIA 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." 28 U.S.C. § 1603(d). Canada's attempt to focus not on what it did (it failed to purchase Massachusetts workers' compensation insurance) but why it did it (it had made a "sovereign legislative decision to structure its consular operations on the

basis that its own GECA scheme comprehensively and exclusively governs workers' compensation for its consular employees") (Pet. at 9-10) fails to honor the statute's plain meaning.

The case is like *Republic of Argentina v. Weltover,* 504 U.S. 607 (1992), in the relevant respects. In *Weltover,* Argentina's creditors sued when the country defaulted on its sovereign bonds. Argentina claimed immunity from suit, arguing, that the transactions in which the bonds were issued "did not have the ordinary commercial consequence of raising capital or financing transactions," and that they "differ[ed] from ordinary debt instruments in that they were created by the Argentine Government to fulfill its obligations under a foreign exchange program designed to address a domestic credit crisis, and as a component of a program designed to control that nation's critical shortage of foreign exchange." *Id.* at 616. The Court held that Argentina's "line of argument," which asserted that "the line between 'nature' and 'purpose' rests upon a 'formalistic distinction [that] simply is neither useful nor warranted'," *id.* at 617 (citation omitted), was "squarely foreclosed by the language of the FSIA." *Id.* "[I]t is irrelevant *why* Argentina participated in the bond market in the manner of a private actor; it matters only that it did so." *Id.*

In *Weltover* and here, the foreign sovereign pointed to a national policy it regarded as important—relieving a shortage of foreign exchange for Argentina, applying a uniform rule to workers' compensation for consular employees around the world for Canada. In both cases, what the foreign sovereign did was precisely the same

as what a private business might have done in the same circumstances. Argentina issued bonds to secure debt. Canada failed to purchase insurance for its Massachusetts workers. When Canada argues that it did not simply fail to buy insurance but instead "created a scheme to compensate consular employees … by a quintessentially sovereign means" (Pet. at 16-17), it makes the same move that Argentina made in *Weltover,* and the move fails for the same reason.

Canada's failure to insure in Massachusetts is not reducible to its policy decision. If Canada had made a different policy decision and had decided to purchase Massachusetts insurance, but a bureaucrat had, say through inadvertence, failed to send a check to the insurer, Canada would still have been an uninsured employer and Merlini would still have had a common-law tort claim. Canada would not have been able, in that case, to argue that the gravamen of the case was its sovereign decision about how to insure against workplace injuries, because it would have made no sovereign decision not to insure under Massachusetts law. And if a bureaucrat had, through inadvertence or mistake, purchased Massachusetts workers' compensation insurance despite the country's policy decision, then Merlini would have had no claim. Canada's position implies that a foreign sovereign is immune from jurisdiction when it violates US law *purposefully,* but not when it does so *inadvertently.* But that goes to purpose—precisely what 28 U.S.C. § 1603(d) forbids courts to consider when deciding whether an activity is commercial.

2. Facts And Circumstances That A Plaintiff Does Not Need To Plead Or Prove Cannot Possibly Be Part Of The Gravamen Of Her Case.

Identifying the basis of a case requires identifying "the particular conduct on which the [plaintiff's] action is 'based.'" *Nelson,* 507 U.S. at 356. It is not sufficient to conclude that a single element of the claim would fall within an exception to FSIA immunity; nor is it necessary to undertake an "exhaustive claim-by-claim, element-by-element analysis" of the claims in the complaint. *OBB Personenverkehr AG v. Sachs,* 136 S. Ct. 390, 396 (2015). Instead, the court must look to the "gravamen of the complaint," and "those elements … that, if proven, would entitle a plaintiff to relief." *Id.* at 395.

In Merlini's case, Canada's decision about whether to use its own workers' compensation system or comply with Massachusetts law cannot be the basis of Merlini's complaint, because Merlini did not have to plead or prove anything about the decision in order to make out her claim. If the lack of insurance forms part of the basis of the claim, it is the lack itself, and not the *reason* for the lack, that matters. The complaint could have been entirely silent about GECA and the reasons for Canada's failure to purchase insurance in Massachusetts, and Merlini's claim would have been unchanged.

In *Weltover,* the issuance of the bonds was the basis of the action, which the Court found to be a commercial act. Issuance of a bond must be crucial to an action on the bond, in the same way that a negligent act must be

crucial to an action for negligence. *Weltover* contrasts strongly with *Nelson* and *Sachs*. In those cases, the key facts relevant to the case took place abroad and the supposed commercial conduct in the United States that underlay the plaintiffs' jurisdictional claims were merely incidental. In *Nelson,* an American worker claimed he had been hired in the United States to work at a Saudi hospital and that he had been falsely imprisoned and tortured by the Saudi government while in Saudi Arabia. *Nelson,* 507 U.S. at 352-353. In *Sachs,* an American traveler who had bought a European train ticket in the United States claimed that she was injured in a railway accident in Austria. *Sachs,* 136 S. Ct. at 393-95. Both *Nelson* and *Sachs* featured plaintiffs who pleaded their cases creatively in order to try to manufacture jurisdiction. But that was not true in *Weltover,* and it is not true here, as the First Circuit understood:

> Merlini's chapter 152 claim was not part of some shrewd litigation strategy aimed at navigating around Canada's sovereign immunity. It was, instead, the only claim that Merlini could bring against her employer for the workplace injury that she suffered under the statutory framework established by the Massachusetts legislature for permitting employees to seek redress for such injuries from their employers.

(App. 17a). Indeed, it is Canada that seeks to avoid jurisdiction by use of a shrewd litigation strategy. Canada argues that Merlini's claim is based on facts and circumstances—the *decision* not to have insurance rather than the mere failure not to have

circumstance—that have nothing to do with her claim and that she does not need to plead, prove, or even mention in order to prevail. Nor is entitlement to benefits under GECA or even receipt of benefits a defense to a common-law claim against Canada, *see Barrett,* 374 N.E.2d at 1326 (noting compensation "was in fact being paid" under another state's law). The only role Canada's policymaking has in the case is to support an argument against jurisdiction. It has nothing to do with the merits of the claim and therefore cannot be the basis of the claim.

C. This Case Is A Poor Vehicle.

The First Circuit held that assuming the truth of the allegations in the complaint, the District Court erred by dismissing the action for lack of subject-matter jurisdiction. But Canada has promised that it will renew its jurisdictional argument if there is a remand, this time by offering evidence rather than simply attacking the sufficiency of the pleadings. Thus there are strong prudential reasons to deny the petition. Ordinarily the Court will not grant review of a non-final decision "unless it is necessary to prevent extraordinary inconvenience and embarrassment in the context of the cause." *Am. Constr. Co. v. Jacksonville, Tampa & Key W. Ry. Co.,* 148 U.S. 372, 384 (1893). *See also Va. Military Inst. v. United States,* 580 U.S. 946 (1993) (opinion of Scalia, J., respecting the denial of petition for certiorari).

This prudential rule is especially apt here, because if this Court takes the case, it could decide it in a way that does little to suggest how the new jurisdictional arguments Canada means to make should come out. If,

for example, this Court decides that on the facts of the complaint, the case is based upon Merlini's employment, and if on remand the District Court must decide whether the employment was or was not commercial, the Court's decision about the sufficiency of the allegations of the complaint will not control the outcome of the case—if, as Canada claims, the true facts are at odds with the allegations of the complaint. Nor will this Court's decision have any bearing on the outcome of the additional legal arguments Canada failed to raise below but may raise on remand, for example, the Vienna Convention argument.

D. The First Circuit Decision Poses No Real Risk to Foreign Sovereigns Doing Business Here or to the US Government When Doing Business Abroad.

The dissenters from denial of rehearing argued that the majority's decision was "in derogation of principles of comity" and would "precipitate a reciprocal effect on this country's foreign affairs at its numerous embassies and legations abroad." App. 55a. There is no real reason for concern. First, a foreign sovereign that does not want to litigate disputes with its employees in US courts can include a choice of court agreement or an agreement to arbitrate in its written contracts of employment. An agreement between Merlini and Canada to arbitrate employment disputes in Canada, for example, would have fallen under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Jun. 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, and would therefore have been enforceable in the United States, because her employment was

commercial. *See, e.g., Lim v. Offshore Specialty Fabricators, Inc.,* 404 F.3d 898, 903 (5th Cir. 2005). And while no treaty would similarly obligate the United States to honor a choice of court agreement requiring disputes between Merlini and Canada to be heard in a Canadian court, written choice of court agreements are presumptively enforceable. *See Atl. Marine Constr. Co. v. U.S. Dist. Court for the W. Dist. of Tex.,* 571 U.S. 49, 63-64 (2013).

Second, the United States itself takes the position in this case that Canada should *not* be immune from suit on the facts pleaded, though on different grounds than the grounds on which the First Circuit based its decision. The courts should not stretch to construe the FSIA to give foreign states immunity in cases where the United States itself suggests that the foreign state has no immunity (and where the United States presumably would not claim immunity if the same case were brought against it abroad), because "reciprocal self-interest" is one of the bases of the United States' consent to exempt foreign sovereigns like Canada from our courts' jurisdiction in most cases. *See Nat'l City Bank of N.Y. v. Republic of China,* 348 U.S. 356, 362 (1955).

Third, Massachusetts's statute is unique. Apparently no other American jurisdiction gives an injured worker a common-law claim against an uninsured employer without proof of negligence. In any other jurisdiction, the courts would likely reach a different outcome, holding that the basis of the action was not the failure to have insurance, but rather the negligence that caused the injury. *See Sachs,* 136 S. Ct.

at 396 (quoting a letter from Justice Holmes to then-Professor Frankfurter: "the 'essentials' of a personal injury narrative will be found at the 'point of contact'—'the place where the boy got his fingers pinched'"). A decision from a single state, with many fewer embassies or consulates than jurisdictions such as New York or the District of Columbia, is unlikely to be repeated elsewhere and is unlikely to disrupt the nation's foreign relations.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Theodore Joel Folkman
Counsel of Record
Folkman LLC
PO Box 116
Boston, Mass. 02131
(617) 219-9664
ted@folkman.law

Of counsel:

Alan S. Pierce
Pierce, Pierce & Napolitano
27 Congress St.
Salem, Mass. 01970

Counsel for Respondent