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

REPLY BRIEF FOR THE PETITIONER

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INTRODUCTION

The Foreign Sovereign Immunities Act ("FSIA") immunizes foreign sovereigns from suit in respect of their sovereign acts and decisions. Merlini's complaint is based upon two related acts and decisions: (i) Canada's staffing of its consulate (by hiring Merlini as a full-time Assistant to the Consul General, *see* App. 70a, ¶ 7), and (ii) its decision to compensate its government employees worldwide (including Merlini) for workplace injuries under its own statutory scheme, *see* App. 72a-73a, ¶¶ 21, 23, 25, rather than implementing insurance schemes under local regulations designed for commercial employers. If either or both are sovereign, Canada is entitled to immunity. *See OBB Personenverkehr AG v. Sachs,* 136 S. Ct. 390, 395-96 (2015) (inclusion of a single commercial element does not defeat immunity). The First Circuit panel majority erred, and created conflicts with decisions of this Court and several courts of appeals, in deeming both commercial.

Merlini's brief largely repeats the errors and unfounded claims of distinction made by the panel majority and highlighted by the petition. *Compare* Opp. 1, 12-14, 18-23 (characterizing the case as involving a mere omission to comply with Massachusetts insurance requirements) *with* Pet. 11-20 (arguing that Canada's actual conduct, including its enactment and administration of its own compensation laws, must be reviewed to determine whether it is sovereign); *compare* Opp. 11-12, 14-18 (characterizing Canada's employment of Merlini as

"commercial" because her job duties were allegedly "clerical") *with* Pet. 20-27 (arguing that Canada's setting of terms for staffing its consulate is sovereign conduct).

Merlini also makes unfounded "waiver" and "poor vehicle" arguments that solely concern the second question Canada presented (whether Canada's employment of Merlini was sovereign). Opp. 9-11 & n.8, 16-17 & n.10, 23-24. Every judge below ruled on the merits, and the consular, sovereign context of Merlini's employment has been a focus of Canada's arguments from the outset.

Finally, Merlini offers two reasons to doubt this case's importance. First, she suggests that sovereign immunity is unnecessary in employment cases because *any* foreign employer can avoid U.S. courts by inserting a foreign arbitration or choice of court clause in *any* agreement. Opp. 24-25. If that premise is valid, it is difficult to imagine any principled objection to the much narrower claim, advanced by Canada, that a foreign *sovereign* employer may employ *consular* employees on the basis that their compensation will be determined by the sovereign's administrative tribunals rather than U.S. courts.

Second, Merlini suggests that if Canada is correct that the court below erred in applying the commercial activity exception to sovereign immunity, the noncommercial tort exception might apply. Opp. 25-26. Every judge below rightly rejected that argument. *See* Pet. 34-35.

The First Circuit's decision raises serious concerns for FSIA doctrine, for the hundreds of foreign sovereign such missions nationwide, and for the United States abroad, given the reciprocity concerns inherent in sovereign immunity. *See* Pet. 28-33. Judge Lynch and Chief Judge Howard were right to urge this Court to review this case. At a minimum, the Court should call for the views of the Solicitor General.

I. The First Circuit's denial of sovereign immunity to Canada's legislative decision to compensate its government employees under Canadian law warrants review.

When a foreign sovereign enacts or administers a government program, such as a compensation or insurance program, it is engaged in sovereign activity and entitled to immunity under the FSIA, regardless of how that activity affects or is characterized by a plaintiff. Legislation is quintessentially sovereign. *See, e.g., Saudi Arabia v. Nelson,* 507 U.S. 349, 362 (1993). The exercise of police power is sovereign, even if it is illegitimate and harms a U.S. citizen plaintiff in the same way as a common assault by a private thug. *Id.* at 361-62. A foreign government official's implementation of a compensation program by, for example, fraudulently cutting off benefits for an American citizen in the United States is sovereign, even if a private health insurer could have done the same thing. *Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan,* 115 F.3d 1020, 1028-29 (D.C. Cir. 1997). And if a government administrator is performing a

sovereign function, such as running a government insurance scheme, the fact that a plaintiff's claim focuses on the administrator's actions as employer—for example, failing to supervise a fraudulent employee—does not deprive the sovereign of immunity. *Anglo-Iberia Underwriting Mgmt. v. P.T. Jamsostek,* 600 F.3d 171, 177-78 (2d Cir. 2010).

Merlini joins the First Circuit majority in attempting to distinguish these cases on the basis that her case involves employment, not administration. Opp. 13-14 (quoting App. 28a-29a). That is a distinction without a difference. Governments can administer very little without employing people. *Nelson* was a case brought by an employee of a foreign government alleging that it retaliated against him for whistleblowing; in *Anglo-Iberia*, the foreign government's sole connection to the alleged fraud was as employer of the alleged fraudster.

Nor does Canada's claim of immunity rest on the *purposes* of its acts, as Merlini suggests (Pet. 18-20). If Canada hired Merlini to perform a commercial function—say, sell excess maple syrup to Americans—and promised her a commission, a claim that it was concerned to protect Canadian taxpayers would not entitle it to immunity if it reneged on the promised payment. *See, e.g., Republic of Argentina v. Weltover, Inc.,* 504 U.S. 607 (1992); *Rush-Presbyterian-St. Luke's Med. Ctr. v. Hellenic Republic,* 877 F.2d 574 (7th Cir. 1989). But Canada did not renege on any commercial promise to Merlini. Canada did what it said it would do: it compensated Merlini under a Canadian statute,

the Government Employees Compensation Act ("GECA"). *See* App. 72a-73a, ¶¶ 21, 23, 25. And the *form* taken by the conduct of Canada of which Merlini complains was uniquely sovereign: Canada legislated that no non-GECA claim was allowed. *See* GECA § 12 (App. 99a). *Nelson* instructs that conduct that takes a sovereign form, such as legislation, is immune. 507 U.S. at 361-62.

Merlini's final argument on the first question presented lays bare the dramatic departure from FSIA precedent and principle entailed by the First Circuit's decision:

> Merlini did not have to plead or prove anything about [GECA] 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.

Opp. 21. If, as Merlini contends, sovereign immunity could be evaded by such barebones pleading, many FSIA cases would be decided differently. Nelson could have alleged that the Saudi government hospital that employed him hired thugs to beat him in retaliation for whistleblowing, without mentioning that those thugs were the police. *See Nelson,* 507 U.S. at 366 (White, J., concurring in judgment). The plaintiffs in *Anglo-Iberia* could have alleged that an insurer failed to supervise its fraudulent employee, without

acknowledging that that employee administered a *government* insurance program. The plaintiffs in *Gregorian v. Izvestia,* 871 F.2d 1515 (9th Cir. 1989), could have claimed that they were defamed by a newspaper sold in the United States, without mentioning that it was "the voice of an official Soviet agency," *id.* at 1522. The plaintiffs in *MacArthur Area Citizens Ass'n v. Republic of Peru,* 809 F.2d 918 (D.C. Cir. 1987), could have claimed that a residentially zoned building was being used for non-residential purposes, without specifying that it was a chancery. The plaintiffs in *Kato v. Ishihara,* 360 F.3d 106 (2d Cir. 2004), *Butters v. Vance International, Inc.,* 225 F.3d 462 (4th Cir. 2000), and *Crum v. Kingdom of Saudi Arabia,* 2005 WL 3752271 (E.D. Va. July 13, 2005), could have claimed that their employers mistreated them in their respective capacities as marketer, security guard, and chauffeur, without specifying what or whom they marketed, protected, or drove. The plaintiffs in *UNC Lear Services, Inc. v. Kingdom of Saudi Arabia,* 581 F.3d 210 (5th Cir. 2009), could have omitted to mention that the technical support services contract they sought to enforce involved military hardware. And courts could dispense with the well-established practice of jurisdictional fact-finding beyond the face of the complaint in FSIA cases. *See, e.g., Mortimer Off Shore Servs., Ltd. v. Federal Republic of Germany,* 615 F.3d 97, 105 (2d Cir. 2010); *Robinson v. Government of Malaysia,* 269 F.3d 133, 140-42 (2d Cir. 2001).[1]

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[1] Relatedly, Merlini purports not to "claim that Canada is liable to her because of the way it administered GECA in her case."

II. The First Circuit's categorization of Merlini's consular employment as commercial independently warrants review.

Merlini's complaint is expressly "based on" Canada's "employment of Merlini at the Consulate," App. 69a, ¶ 3. If Canada's conduct in employing her on the terms it did was sovereign, immunity must apply.

A. The question is squarely presented.

Merlini urges this Court to deny review based on "waiver" and "poor vehicle" arguments addressed to the second question presented. Opp. 9-11 & n.8, 16-17 & n.10, 23-24. There are no such obstacles.

Merlini claims that until it petitioned for rehearing in the First Circuit, Canada "did not argue . . . that Merlini's employment was not commercial." Opp. 16. Canada argued, and the district court held, App. 64a, that Merlini's complaint is barred because it is based upon Canada's enactment and implementation of GECA. However, Canada also emphasized the sovereign interests implicated in Merlini's consular employment. Canada's brief at the panel stage presented the issue whether the district court correctly held that "the Government of Canada's

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Opp. 13. However, it is essential to her claim that Canada "ceased paying benefits" under GECA, App. 72a, ¶ 23, because its GECA administrative adjudication determined that she could return to work, *see* App. 42a, whereas she claims that she was permanently disabled, App. 72a, ¶ 24. Merlini's claim is necessarily premised on a collateral challenge to the GECA adjudication—an official action of the Canadian Government in Ottawa—as having under-compensated her.

decision to provide workers' compensation benefits to local workers *in its Consulate* under its own sovereign system of laws is not a 'commercial activity' . . ." Canada App. Br. at 1 (emphasis added). Canada emphasized "[t]he Consulate's mission" to "represent Canadian sovereign interests on issues such as borders, security and trade," citing the Vienna Convention on Consular Relations ("VCCR"). *Id.* at 3 & n.1; *see also id*. at 4 (consular staff are employed "to assist the Consulate in carrying out its diplomatic functions.").[2] And Canada protested the intrusion on its sovereign right to operate its consulate: "requiring Canada to obtain a license as a self-insurer would lead to the absurd result of forcing one sovereign to seek the permission of another sovereign before it could hire employees for its Consulate." *Id.* at 14; *see also* App. 31a.

That is not waiver, especially in the context of sovereign immunity. *See, e.g., Creighton Ltd. v. Government of Qatar,* 181 F.3d 118, 122-23 (D.C. Cir. 1999) (implied waiver of FSIA immunity must be intentional, and is narrowly construed); *cf. Lane v. Pena,* 518 U.S. 187, 192 (1996) (waiver of the federal government's immunity must be express, and is narrowly construed). Nor did the First Circuit view it as such. The panel addressed on the merits the sovereign or commercial nature of Merlini's

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[2] Merlini errs in claiming that Canada made "new arguments under" the VCCR on rehearing and in this Court. Opp. 11; *see also id.* at 24. Canada's arguments remain "under" the FSIA. The VCCR remains relevant in assessing the sovereign interests at issue in the setting of terms of consular employment.

employment, App. 12a-13a, 17a-18a, 38a-39a & n.13, 42a, 50a-52a, the relevant legislative history, App. 13a, 18a, 30a, 43a,[3] and the main cases Canada cites as evidencing a conflict on the second question presented, App. 15a (citing *El-Hadad v. United Arab Emirates,* 496 F.3d 658 (D.C. Cir. 2007)), 18a (citing *Kato,* 360 F.3d 106, and *Butters,* 225 F.3d 462), 48a (citing *MacArthur,* 809 F.2d 918).[4]

Merlini ultimately appears to concede that Canada can pursue all its FSIA arguments, albeit on remand. Opp. 24. Canada might prevail on remand by establishing jurisdictional facts contrary to the complaint's allegations that Merlini's job duties were "clerical." *See* Pet. 22 n.6. However, that is not a "vehicle problem." If, as Canada, Judge Lynch, Chief Judge Howard, the district judge and (according to its First Circuit brief) the United States all believe, "clerical" is not the decisive criterion under the FSIA, Canada should not be subjected to unnecessary litigation burdens to prove a legally immaterial point.

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[3] Merlini criticizes "Canada's effort to create a controversy" about legislative history. Opp. 16 n.10. As Judge Lynch observed, the majority cited that same legislative history "thrice." App. 43a. The majority's improper reliance on it to re-write the statutory criterion of "commercial" as "clerical" is, appropriately, a focus of her dissents. *See* App. 43a-44a, 51a, 56a-57a.

[4] Judge Barron appeared to infer from Canada's decision to move for dismissal on the basis of the complaint's characterization of Merlini's employment as "clerical" that Canada did not contest that her employment was "commercial." App. 12a-13a. Canada never made such a concession, and it clearly took the opposite position in its petition for rehearing.

B. The First Circuit's decision conflicts with other court of appeals decisions and is wrong.

Both the Second Circuit in *Kato*, 360 F.3d at 112-13, and the D.C. Circuit in *El-Hadad,* 496 F.3d at 664 n.2, have expressly noted a split between the Second Circuit, which properly focuses on the activities and mission of the sovereign, and other courts of appeals, now including the First Circuit, which apply a formalistic "clerical" versus "civil service" test to determine whether an employment-related case falls within the commercial activities exception. The dissenters below explained why the latter approach is wrong: it privileges out-of-context legislative history over the FSIA's statutory text, structure and purpose. *See* App. 55a-57a.

Merlini joins the majority below in distinguishing *Kato* on its facts, while ignoring its reasoning. Opp. 15. Neither she nor the majority persuasively explain why sovereignty is at stake in the employment of a marketer (*Kato*), a security guard (*Butters*), a chauffeur (*Crum*), or technical support personnel (*UNC Lear*), but not in the employment of an assistant to the Consul General who works directly with that high government official handling diplomatic communications, subject to VCCR protections, on the sovereign premises of the consulate (*see MacArthur*, 809 F.2d at 920).

III. Merlini's efforts to downplay the importance of this case are unavailing.

Judge Lynch's dissents and the petition explain what is at stake. Even viewed narrowly as a consular employment case, this case could impact the operations of hundreds of foreign missions nationwide. *See* Pet. 29-33. Those impacts may not be reflected immediately in appellate litigation, since foreign sovereigns may adjust their policies and diplomatic operations (for example, by avoiding hiring U.S. citizens) to avoid litigation that may intrude on diplomatic and consular immunities, but that is all the more reason to grant review. The case raises serious reciprocity concerns for U.S. missions abroad, as the United States' brief below and Judge Lynch's dissents emphasized. *See* App. 50a-51a, 57a-58a; Pet. 28-29. And more broadly, it raises doctrinal concerns regarding the proper interpretation of the FSIA and the proper use of legislative history in statutory interpretation. *See* App. 55a-57a; Pet. 11-12, 33.

Merlini's efforts to downplay this case's significance fail. First, she suggests that consulates could side-step the problems the decision creates by including in employment agreements terms mandating arbitration or litigation outside the United States. Opp. 24-25. That is a richly ironic suggestion. Merlini's complaint acknowledges that she was employed on the basis that the proper forum for any workplace injury claims she might have was Canada's administrative tribunals under GECA. *See* App. 72a-73a, ¶¶ 21, 23, 25*; see also* GECA (App. 93a-99a).

Canada argues that the FSIA should be interpreted to honor that arrangement it made in its sovereign capacity as national legislator and consular administrator. Merlini declines to do so, but proposes a far more radical alternative. She suggests that any foreign employer, sovereign or private, could insist that U.S. citizen employees working in the United States forgo U.S. courts. If that were good law it would eviscerate the commercial activities exception. The extreme and legally dubious means Merlini suggests to side-step the decision below only reinforce its significance.

Second, Merlini argues that the commercial activity exception issues in this case do not merit review because the noncommercial tort exception might apply instead. Opp. 25-26. As applied to this case, that argument is doomed. The district judge and all three members of the panel rejected the application of the noncommercial tort exception because, as Merlini acknowledges, the Massachusetts statute under which she sued requires no proof of any tortious "'action by any person.'" Opp. 6 (quoting App. 15a); *see* App. 13a-17a, 36a-38a n. 9, 11, 65a-66a; Pet. 34-35. Labeling the Massachusetts statutory claim a "common-law tort claim" (Opp. 5) does not make it so.

Merlini speculates that other states' workers' compensation laws might prove more fertile ground for the noncommercial tort exception insofar as they may retain more vestiges of tort law. Opp. 25-26. That may be true for some states, although most state workers' compensation laws imposing liability on

"uninsured" employers eliminate traditional tort defenses, *see* Pet. 29-31, and Merlini acknowledges that, for example, California law does not require a plaintiff to prove negligence to establish a prima facie case, Opp. 5-6 n.4. But the possibility that a different exception to immunity might apply in some other states provides no reason to deny review. By reviewing and reversing the decision below, this Court can restore the immunity of the 26 foreign sovereign missions in Massachusetts and of many other sovereign missions in states with similar laws, assuage reciprocity concerns for U.S. missions abroad, and clarify the law under the FSIA's most important provision, the commercial activity exception.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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