No. _____

In the
Supreme Court of the United States

VIPULA D. VALAMBHIA, ET AL.,
Petitioners,
v.

UNITED REPUBLIC OF TANZANIA, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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January 25, 2021

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QUESTIONS PRESENTED

1. Whether clause 3 of the commercial activities exception to the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1605(a)(2), provides for jurisdiction in a suit to recognize foreign commercial judgments causing direct effects in the United States including payments to U.S. citizens in U.S. dollars using a U.S. bank account.

2. Whether clause 2 of the commercial activities exception to the FSIA provides for jurisdiction in a suit to recognize foreign judgments based upon the foreign state's payments in the United States in connection with its commercial activities elsewhere.

PARTIES TO THE PROCEEDINGS

1. The following petitioners on review were also plaintiffs-appellants below:

a. Priscilla D. Valambhia
b. Bhavna D. Valambhia
c. Punita D. Valambhia
d. Krishnakant D. Valambhia

2. The following respondents were also defendants-appellees below:

a. Bank of Tanzania
b. Ministry of Defence and National Service

STATEMENT OF RELATED PROCEEDINGS

There are no proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully seek a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINION BELOW

The opinion of the Court of Appeals (App.1) is reported at 964 F.3d 1135. The opinion of the district court granting respondents' motion to dismiss (App.22) is unreported.

STATEMENT OF JURISDICTION

The Court of Appeals entered judgment on July 10, 2020, App.20, and denied rehearing and rehearing en banc on August 28, 2020, App.34, 36. On March 19, 2020, by general order, the Court extended the time to file this petition to January 25, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 28 United States Code, Section 1605(a)(2) provides in relevant part:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
> . . . .
>
> (2) [1] in which the action is based upon a commercial activity carried on in the United States by the foreign state; or [2] upon an act performed in the United States in connection

> with a commercial activity of the foreign state elsewhere; or [3] upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

INTRODUCTION

This case provides the Court with an ideal opportunity to finally get courts out of the business of imposing judicially created limitations on jurisdiction under the FSIA. Despite this Court's clear holding in *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 617-18 (1992), that the commercial activities exception contains no unexpressed requirements, the lower courts have continued to impose a raft of extra-statutory limitations on jurisdiction found nowhere in the FSIA. Deepening this troubling trend, the D.C. Circuit resurrected a more onerous version of its prior "foreseeability" rule, rejected by the Court in *Weltover*, by holding that an effect under clause 3 of the commercial activities exception cannot be "direct" unless the foreign sovereign agrees, contemplates, or arranges for the effect to occur in the United States. The plain language of clause 3 contains no such requirement.

Nevertheless, the Court of Appeals held that this suit to recognize foreign commercial judgments awarding payment to U.S. citizens could not satisfy clause 3 unless the foreign sovereign specifically anticipated and arranged in advance for the judgments to be paid in the United States.

The D.C. Circuit's decision, coupled with similar holdings in other circuits, suggests a collective judicial reluctance to exercise the jurisdiction granted by Congress in the FSIA. That is not the courts' decision to make, however. It smacks of "the bedlam . . . [of] . . . factor-intensive, loosely common-law-based immunity regime" that Congress abated in 1975 when it enacted the FSIA's comprehensive framework. *Republic of Argentina v. NML Capital*, Ltd., 573 U.S. 134, 141 (2014).

The Court should grant review to reverse this trend and hold that jurisdiction under the FSIA should not be artificially constrained by judicial rulemaking, but should be based solely on the plain language of the statute.

STATEMENT OF THE CASE

This is an action brought by U.S. citizens to recognize two foreign money judgments in Tanzania.

The High Court of Tanzania issued the two judgments against the United Republic of Tanzania, the Bank of Tanzania, and Tanzania's Ministry of Defence and National Service (collectively "Tanzania"), consisting of a 1991 decree and a 2001 Garnishee Order (the "Judgments"). The Judgments directed Tanzania to pay Devram Valambhia ("Valambhia") and his family (collectively, the "Valambhias") their interest in the proceeds of a commercial contract to supply Tanzania with military equipment. The amounts due under the Judgments, over $55 million plus interest, are payable in U.S. dollars.

For several years, Tanzania made partial payments in U.S. dollars by using Tanzania's Federal Reserve Bank of New York bank account. The last payment was made in 2001, a decade after the original 1991 judgment and the same year the Garnishee Order was entered. The limited record on Tanzania's motion to dismiss does not indicate whether the final 2001 payment was likewise made from Tanzania's New York account, but the complaint alleged Tanzania's past practice was to use its New York account.

Valambhia passed away in Tanzania in 2005 after Tanzania jailed him on false charges, confiscated his passport, and prevented him from leaving the country.

After Valambhia's death, the Valambhias repeatedly appeared in Tanzanian court to demand payment in the United States and requested assistance through U.S. diplomatic channels. None of these efforts proved successful, however, and the Valambhias filed suit in the district court to recognize the Judgments under the District of Columbia's Uniform Foreign Money Judgments Recognition Act of 2011, D.C. CODE §§ 15-361–371.

On Tanzania's motion, the district court dismissed the Valambhias' complaint for lack of jurisdiction under the FSIA, holding that it is categorically impossible to recognize a foreign court judgment under the commercial activities exception to the FSIA because the elements of a recognition action do not include

commercial conduct. App.29-30.[1] The district court recognized that its reasoning "effectively makes a dead letter of an action to recognize a foreign court judgment brought against a foreign sovereign under the commercial activities exception to the FSIA." App.30.

The Court of Appeals declined to endorse the district court's reasoning, but nevertheless affirmed, holding that the district court had no jurisdiction under clauses 2 and 3 of the FSIA's commercial activities exception. App.18-19.

Embracing prior Circuit precedent rejected by this Court in *Weltover,* 504 U.S. 607, the Court of Appeals held that "direct effects" under clause 3 of the FSIA cannot exist unless the parties expressly "agree," "contemplate," or otherwise "arrange" that payment will occur in the United States. App.11-13.

The Court of Appeals also construed the allegations in the complaint in favor of Tanzania by assuming that its final 2001 payment was paid from a Tanzanian bank account, contrary to the allegations that Tanzania's consistent past practice was to make payments in U.S. dollars using its New York bank account. App.10-11. Thus, the court held that Tanzania's use of a New York bank account was not a "direct effect" of the Judgments or Tanzania's subsequent failure to pay. App.11.

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[1] This Court has disapproved of "undertak[ing] such an exhaustive claim-by-claim, element-by-element analysis." *See OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 34 (2015).

The court also held that clause 2 of the commercial activities exception did not apply, reasoning that the Valambhias' suit to recognize the Judgments was not "based upon" Tanzania's payments through its New York bank account and its subsequent withholding of amounts due—rejecting the Valambhias' argument that Tanzania's cessation of those payments was the basis for filing suit to recognize and enforce the Judgments. App.17-18.

BASIS FOR FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

The district court had subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1330(a).

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD DECIDE WHETHER CLAUSE 3 PROVIDES FOR JURISDICTION OVER A SUIT TO RECOGNIZE FOREIGN COMMERCIAL JUDGMENTS CAUSING DIRECT EFFECTS IN THE UNITED STATES INCLUDING PAYMENTS USING A U.S. BANK ACCOUNT.

The Court should grant review to reject the growing trend in the circuits of imposing extra-statutory limitations on jurisdiction under the commercial activities exception to the FSIA. Contrary to this Court's holding in *Weltover* that the plain language of clause 3 contains no unexpressed requirements, 504 U.S. at 617-18, the D.C. Circuit held that "direct effects" cannot exist under clause 3 of the commercial activities exception unless the parties expressly "agree," "contemplate," or otherwise "arrange" for, the effects to occur in the United States. App.11-13.

Disregarding this Court's clear guidance, the Court of Appeals effectively imposed a more onerous version of its prior "foreseeability" rule rejected by the Court in *Weltover*: now, a foreign sovereign does not just have to foresee the direct effect in the United States, it must agree to it, contemplate it, or arrange for it to happen.

The Circuit's decision, along with similar decisions in other circuits, suggests a collective judicial reluctance to exercise the jurisdiction granted by Congress under the FSIA, contrary to "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). "Federal courts, it was early and famously said, have 'no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.'" *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013) (quoting *Cohens v. Virginia*, 6 Wheat. 264, 404 (1821)).

The Circuit's misreading of clause 3 is particularly concerning in light of the District of Columbia's exclusive venue over suits against foreign states when no substantial part of the events or omissions giving rise to the claim occurred in, and the property claimed is not situated in, the United States. 28 U.S.C. §§ 1391(f)(4), 1603(a). As a result, other circuits frequently look to the D.C. Circuit for guidance.

A. This case presents an important question on which the circuits are divided.

In *Weltover*, this Court rejected the reasoning of several circuits, including the D.C. Circuit, which had

construed the FSIA's legislative history to hold that an effect is not "direct" under clause 3 unless it is both "substantial" and "foreseeable." 504 U.S. at 617-18 (disapproving of, *inter alia*, *Mar. Int'l Nominees Establishment v. Republic of Guinea*, 693 F.2d 1094, 1110-11 (D.C. Cir. 1982)). While recognizing that the "principle *de minimis non curat lex* ensures that jurisdiction may not be predicated on purely trivial effects in the United States," the Court "reject[ed] the suggestion that § 1605(a)(2) contains any unexpressed requirement of 'substantiality' or 'foreseeability.'" *Id.* at 618. The Court held that "an effect is 'direct' if it follows 'as an immediate consequence of the defendant's . . . activity.'" *Id.*

Applying this straightforward standard, the Court held that "Argentina's unilateral rescheduling of the maturity dates on . . . [bonds] had a 'direct effect' in the United States" where "Respondents had designated their accounts in New York as the place of payment, and Argentina made some interest payments into those accounts before announcing that it was rescheduling the payments." *Id.* at 618-19. The Court explained that "the rescheduling of those obligations necessarily had a 'direct effect' in the United States: Money that was supposed to have been delivered to a New York bank for deposit was not forthcoming." *Id.* at 619.

The same situation exists here: Tanzania made payments to the Valambhias in U.S. dollars using its New York bank account before unilaterally stopping these payments in 2001—ten years after the first

judgment was entered.[2] As an immediate consequence, funds that were to be paid to the Valambhias—who are United States citizens and have repeatedly demanded payment here—were not forthcoming. *Weltover*, 504 U.S. at 619.

Echoing its prior foreseeability requirement, however, the Court of Appeals held that Tanzania's use of its New York bank account to make payments did not constitute a direct effect when "nothing about the High Court judgments, nor the underlying agreements, contemplated or suggested that Tanzania would use that account." App.10. Similarly, the Court of Appeals concluded there were no direct effects in the United States because "Tanzania and the Valambhias had no arrangement that called for Tanzania's use of a New York bank account or invited the Valambhias to

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[2] The Court of Appeals improperly construed the facts alleged in the complaint against the Valambhias and in Tanzania's favor by assuming that all of Tanzania's New York payments were made prior to the original 1991 judgment. *See* App.10-11; *Saudi Arabia v. Nelson*, 507 U.S. 349, 351 (1993) ("Because this case comes to us on a motion to dismiss the complaint, we assume that we have truthful factual allegations before us, though many of those allegations are subject to dispute." (internal citation omitted)); *Schubarth v. Fed. Republic of Germany*, 891 F.3d 392, 398, 400-01 (D.C. Cir. 2018) (stating that the facts alleged "must be presumed true and construed liberally"). In fact, the complaint alleged that Tanzania's past practice was to make payments from its New York account, and the attachments incorporated into the complaint made clear that its payments continued until 2001, a decade after the original judgment. "Rule 12(b)(6) does not countenance . . . dismissals based on a judge's disbelief of a complaint's factual allegations." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (citation omitted).

demand payment within the United States . . . ." App.13.[3] In other words, absent an express agreement, arrangement, or provision requiring or contemplating that Tanzania use its New York account to pay the Judgments, there could be no direct effect.

Holding that parties must agree to, contemplate, or otherwise arrange for the effects to occur in the United States, at a minimum, requires that the parties must foresee that effects will occur in the United States—the very test previously applied by the D.C. Circuit and rejected by the Court in *Weltover*. *See Mar. Int'l Nominees*, 693 F.2d at 1110-11 (requiring conduct to be "reasonably contemplated" to satisfy substantial and foreseeable rule); *Weltover*, 504 U.S. at 617-18. But requiring parties to actually agree to, contemplate, or arrange for the effects to occur in the United States beforehand goes far beyond the D.C. Circuit's prior "substantial" and "foreseeable" rule. Clause 3 contains no such requirement. 28 U.S.C. § 1605(a)(2); *Weltover*, 504 U.S. at 617-18. As the Circuit previously correctly recognized, "[t]he FSIA . . . requires only that effect be 'direct,' not that the foreign sovereign agree that the effect would occur." *Cruise Connections Charter Mgmt. 1, LP v. Att'y Gen. of Canada*, 600 F.3d 661, 665 (D.C. Cir. 2010) (rejecting a sovereign defendant's argument that it never agreed to any aspect of the transaction taking place in the United States).

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[3] The Court of Appeals apparently did not believe that Tanzania's past practice of making payments in U.S. dollars from its New York bank account qualified as a sufficient "arrangement" to satisfy its new rule.

B. This case expands a troubling trend among the circuits of engrafting extra-statutory requirements onto clause 3.

The decision by the Court of Appeals expands a troubling trend in the circuits of engrafting a variety of extra-statutory requirements onto clause 3, contrary to Congress's grant of jurisdiction in the FSIA and this Court's holding in *Weltover*.

For example, the D.C. and Second Circuits have applied an express or implied place-of-performance rule in order to establish direct effects in breach of contract cases under clause 3. *See Odhiambo v. Republic of Kenya*, 764 F.3d 31, 38-40 (D.C. Cir. 2014) ("For purposes of clause three of the FSIA commercial activity exception, breaching a contract that establishes or necessarily contemplates the United States as a place of performance causes a direct effect in the United States, while breaching a contract that does not establish or necessarily contemplate the United States as a place of performance does not cause a direct effect in the United States."); *Rogers v. Petroleo Brasileiro, S.A.*, 673 F.3d 131, 139-40 (2d Cir. 2012) ("In cases involving the default by a foreign state or its instrumentality on its commercial obligations, an act has a direct effect in the United States if the defaulting party is contractually obligated to pay in this country.").

While the Court of Appeals stated that it was not "import[ing] *Odhiambo*'s rule here," App.14, its reasoning nevertheless requires parties to somehow—either expressly or impliedly—specify that the effects will occur in the United States in order for

them to be direct. A rule requiring an express or implied place-of-performance clause specifying the United States "is in conflict with *Weltover* and [the Court's] own decisions, [and] cannot have binding effect." *Odhiambo*, 764 F.3d at 44-45 (Pillard, J., concurring in part and dissenting in part) (emphasis added).

Even after *Weltover* disapproved of the substantial and foreseeable test, some circuits have continued to apply a "legally significant acts" test, which "requires that the conduct having a direct effect in the United States be legally significant conduct in order for the commercial activity exception to apply." *See Virtual Countries, Inc. v. Republic of S. Africa*, 300 F.3d 230, 240 (2d Cir. 2002) (maintaining the test remains good law after *Weltover*); *Adler v. Fed. Republic of Nigeria*, 107 F.3d 720, 727 (9th Cir. 1997); *United World Trade, Inc. v. Mangyshlakneft Oil Prod. Ass'n*, 33 F.3d 1232, 1239 (10th Cir. 1994); *Gen. Elec. Capital Corp. v. Grossman*, 991 F.2d 1376, 1385 (8th Cir. 1993); *Rush-Presbyterian-St. Luke's Med. Ctr. v. Hellenic Republic*, 877 F.2d 574, 581-82 (7th Cir. 1989); *Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511, 1515 (D.C. Cir. 1988).

These constructions of the commercial activities exception serve to narrow the courts' jurisdiction over FSIA cases, contrary to this Court's admonition that, absent a "textual indication that [statutory] exemptions should be construed narrowly, there is no reason to give [them] anything other than a fair (rather than a narrow) interpretation." *Encino Motorcars, LLC v. Navarro*, 138 S.Ct. 1134, 1142 (2018) (citation and internal quotations omitted); *see also* ANTONIN SCALIA

& BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 101, 363 (2012) (explaining canon of construction that general terms "are not to be arbitrarily limited").

Still other circuits have declined to adopt such a test, holding that when this Court rejected "the suggestion that § 1605(a)(2) contains any unexpressed requirement of 'substantiality' or 'foreseeability,'" *Weltover*, 504 U.S. at 618, "this holding was an admonishment to courts not to add any unexpressed requirements to the language of the statute." *Keller v. Cent. Bank of Nigeria*, 277 F.3d 811, 818 (6th Cir. 2002), *abrogated on other grounds by Samantar v. Yousuf*, 560 U.S. 305, 310 n.4 (2010); *see also Voest-Alpine Trading USA Corp. v. Bank of China*, 142 F.3d 887, 894, 896 (5th Cir. 1998) (holding Chinese bank's refusal to send payment to Texas bank account in accordance with customary practice caused a direct effect).

Allowing a proliferation of judicially created limits on jurisdiction under the FSIA smacks of "the bedlam . . . [of] executive-driven, factor-intensive, loosely common-law-based immunity regime" that Congress abated in 1975 with the FSIA's "comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state." *Republic of Argentina v. NML Capital*, Ltd., 573 U.S. 134, 141 (2014). This time, however, judges, rather than the Executive Branch, are cobbling together the factors, which differ from circuit to circuit. This runs counter to the FSIA's purpose of "forc[ing] [the courts']

retirement from the immunity-by-factor-balancing business." *Id.* at 146.

> As the Act itself instructs, "[c]laims of foreign states to immunity should henceforth be decided by courts . . . in conformity with the principles *set forth in this [Act]*." 28 U.S.C. § 1602 (emphasis added). Thus, any sort of immunity defense made by a foreign sovereign in an American court must stand on the Act's text. Or it must fall.

Id. at 141-42 (citations omitted).

The Court should grant the petition to ensure that jurisdiction under the commercial activities exception is governed by the Act, rather than an ever-evolving, judicially created common law that limits that jurisdiction.

II. THE COURT SHOULD GRANT THE PETITION TO DECIDE WHETHER CLAUSE 2 PROVIDES FOR JURISDICTION IN A SUIT BASED UPON PAYMENTS IN THE UNITED STATES IN CONNECTION WITH A FOREIGN STATE'S COMMERCIAL ACTIVITIES ELSEWHERE.

The Court should also grant the petition to hold that a suit based upon payments in the United States in connection with a commercial activity of the foreign sovereign elsewhere satisfies clause 2 of the commercial activities exception. This case presents an ideal opportunity for the Court to construe clause 2 for the first time.

Clause 2 provides that a foreign sovereign is not immune from suit in the United States "based . . . upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere." 28 U.S.C. § 1605(a)(2). Unlike clause 3 of the exception, clause 2 does not require that the act performed in the United States cause a direct effect in the United States. *See id.*

As with clause 3, the courts of appeals have imposed a variety of extra-statutory limitations on jurisdiction in clause 2 cases. Some courts of appeals have held that clause 2 is "generally understood to apply to *non-commercial* acts in the United States that relate to commercial acts abroad." *Byrd v. Corporacion Forestal y Indus. de Olancho S.A.*, 182 F.3d 380, 390 (5th Cir. 1999), *abrogated on other grounds by Samantar v. Yousuf*, 560 U.S. at 310 n.4; *Voest-Alpine*, 142 F.3d at 892 n.5. *But see Strata Heights Int'l Corp. v. Petroleo Brasileiro, S.A.*, 67 F. App'x 247, 247 n.7 (5th Cir. 2003) (observing that "the *Voest-Alpine* court . . . may have read a distinction into the statute that neither Congress nor the Supreme Court intended").

Other courts of appeals hold that under clause 2, a "material connection must exist between the act performed in the United States and plaintiff's cause of action." *See Pere v. Nuovo Pignone, Inc.*, 150 F.3d 477, 482 (5th Cir. 1998); *see also Orient Mineral Co. v. Bank of China*, 506 F.3d 980, 996 (10th Cir. 2007); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 709 (9th Cir. 1992).

In reliance on legislative history, the D.C. Circuit and the Eighth Circuit have held that "the acts (or

omissions) encompassed [by clause 2] are limited to those which in and of themselves are sufficient to form the basis of a cause of action." *Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511, 1514 (D.C. Cir. 1988) (quoting H.R. Rep. No. 1487, 94th Cong., 2d Sess. 19 (1976), U.S. Code Cong. & Admin. News 1976, p. 6618); *Gen. Elec. Capital Corp. v. Grossman*, 991 F.2d 1376, 1384 (8th Cir. 1993); *see also Odhiambo v. Republic of Kenya*, 764 F.3d 31, 37-38 (D.C. Cir. 2014). *But see Samantar*, 560 U.S. at 326-29 (Alito, Thomas, Scalia, J.J., concurring separately to object to reliance on the FSIA's legislative history).

Without citing its prior case law on clause 2, the Court of Appeals implicitly reached the same result by concluding that Tanzania's payments through its New York account and its subsequent withholding of amounts due under the Judgments "have little to do with the recognition action that forms the basis of this suit." App.18. Thus, the court held that the Valambhias' suit was not "based upon" these payments. *Id.* (citing *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 35 (2015) (holding that "an action is 'based upon' the 'particular conduct' that constitutes the 'gravamen' of the suit")).

To the contrary, as with most recognition actions, the Valambhias filed this action to recognize and enforce the Judgments only after Tanzania stopped making payments on the Judgments. Nonpayment is generally the impetus for any recognition or enforcement action. *See NML Capital, Ltd.*, 573 U.S. at 136-37 (Argentina's nonpayment of judgments prompted execution actions and discovery). The

Valambhias' suit is therefore based upon Tanzania's New York payments and the cessation of those payments—"particular conduct" on which their suit is based. 577 U.S. at 35.

The Court of Appeals' restrictive interpretation of clause 2, like that of other circuits, is contrary to the plain language of the statute, which simply requires that the suit be "based . . . upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere." 28 U.S.C. § 1605(a)(2).

Imposing judicial limitations on jurisdiction under clause 2 is no different than imposing a "substantial" and "foreseeable" rule for direct effects under clause 3. *Weltover*, 504 U.S. at 617-18. Doing so ignores that Congress "forced [the courts'] retirement from the immunity-by-factor-balancing business nearly 40 years ago." *See NML Capital, Ltd.*, 573 U.S. at 146.

The Court should grant the petition to construe clause 2 and hold that it is satisfied in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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