No. 20-1054

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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The Foreign Sovereign Immunities Act exists to provide access to the courts for those aggrieved by the commercial acts of a foreign sovereign.[1] In accordance with the restrictive view of sovereign immunity reflected in the FSIA, the defendant bears the burden of proving that the plaintiff's allegations do not bring the case within a statutory exception to immunity.[2] In ruling on a motion to dismiss, as here, the district court should take the plaintiff's factual allegations as true and determine whether they bring the case within any of the exceptions to immunity invoked by the plaintiff.[3]

This should be beyond peradventure 45 years since the passage of the FSIA, but explanations are apparently still necessary. Although the Valambhias' allegations, taken as true, support jurisdiction under clauses 2 and 3 of the commercial activities exception, the D.C. Circuit created additional hurdles to jurisdiction found nowhere in the statute. It held that for direct effects to exist under clause 3, Tanzania first had to have agreed to, contemplated, or arranged for those effects to occur here. The plain language of clause

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[1] *See Transamerican S.S. Corp. v. Somali Democratic Republic*, 767 F.2d 998, 1001 (D.C. Cir. 1985); 28 U.S.C. § 1602.

[2] *Phoenix Consulting, Inc. v. Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000).

[3] *Id.*; *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 citations omitted)).

3 requires only that the suit be based "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." 28 U.S.C. § 1605(a)(2).

The Valambhias are judgment creditors with the legal right under the Judgments to be paid over $55 million plus interest; they are U.S. citizens residing in the United States since long before the Judgments were entered; and they have continually demanded payment here ever since. Tanzania's consistent practice before the Judgments was to pay the amounts owed under the underlying contracts in U.S. dollars through its Federal Reserve Bank of New York account. It made at least one more postjudgment payment in 2001, although the account it used for that payment is unknown at this early stage of the litigation on a motion to dismiss. Regardless, if the facts alleged and construed in the light most favorable to the Valambhias do not constitute direct effects in the United States, it is difficult to imagine anything that would, barring an express contractual right to receive payment in the United States.

Clause 2 requires even less: "an act performed in the United States in connection with a commercial activity of the foreign state elsewhere." *Id.* Tanzania's payments through a New York account satisfy this clause.

Tanzania ignores the Valambhias' argument that this case is emblematic of a collective judicial reluctance, in the D.C. Circuit and other circuits, 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); Pet.3, 7, 11-14. Federal courts "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*, 19 U.S. (6 Wheat.) 264, 404 (1821)). Indeed, it is integral to our system of government being "a government of laws, and not of men," and "[i]t will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 163 (1803).

The Court should grant the petition to resolve these important issues.

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.

Contrary to the plain language of the FSIA and the protests of Tanzania, the Circuit has made it more difficult to bring a case under clause 3 of the commercial activities exception by requiring that the foreign sovereign agree to, contemplate, or arrange for direct effects to occur here. App.11-13. These requirements, unexpressed in the statute, are logically indistinguishable from the prior foreseeability rule rejected by the Court in *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 617-18 (1992). Tanzania

says "[i]t did not," but fails to support that *ipse dixit*. Opp.7.

Tanzania attempts to explain away these new requirements as "dicta," Opp.16, but the Circuit's opinion is more properly read as offering alternative holdings to support its conclusion that clause 3 of the commercial activities exception does not apply: because (1) improperly construing the complaint against the Valambhias, Tanzania's payments through a New York bank account were made solely before the Judgments,[4] or (2) the High Court judgments or the underlying agreements did not agree to, contemplate, or arrange for payment in the United States. App.10-13. "This alternative holding is no less binding than if it were the exclusive basis for the Court's decision." *Hamdan v. Rumsfeld*, 548 U.S. 557, 716 (2006) (Thomas, J., dissenting, joined by Scalia and Alito, JJ.) (citing *Massachusetts v. United States*, 333 U.S. 611, 623 (1948)). "[W]here there are two grounds, upon either of

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[4] The D.C. Circuit—*sua sponte* and without any discussion in the briefs or at oral argument—seized upon a stray reference to Tanzania's Exchequer Account contained in an attachment to the complaint to assume that the final 2001 payment was made from that account, rather than by converting Tanzanian shillings into U.S. dollars through Tanzania's New York account, as Tanzania consistently had done in the past. App.11; Pet. Reh'g 11-15. The Valambhias pointed out the court's error in their petition for rehearing and rehearing *en banc*, which was denied. App.34-37. Of course, the Court is free to disagree with the Circuit's reading of the complaint. *See Brown v. W. Ry. of Ala.*, 338 U.S. 294, 296, (1949) (concluding it is the Court's "duty to construe the allegations of this complaint ourselves"); *see, e.g., Papasan v. Allain*, 478 U.S. 265, 286-87 (1986) (disagreeing with court of appeals' understanding of the complaint).

which the judgment of the trial court can be rested, and the appellate court sustains both, the ruling on neither is *obiter*, but each is the judgment of the court, and of equal validity with the other." *Union Pac. R.R. Co. v. Mason City & Fort Dodge R.R. Co.*, 199 U.S. 160, 166 (1905). "Whenever a question fairly arises in the course of a trial, and there is a distinct decision of that question, the ruling of the court in respect thereto can, in no just sense, be called mere *dictum*." *Id.*; *see also Ala. Legis. Black Caucus v. Ala.*, 575 U.S. 254, 275 (2015) (rejecting lower court's alternative holding); *Simon v. Kroger Co.*, 471 U.S. 1075, 1077 n.1 (1985) (White, J., dissenting from denial of certiorari) ("[T]he presence of an alternative holding does not reduce the precedential effect of the . . . holding or make it any less the authoritative judgment of the Court of Appeals.").

A. The Circuits Are Divided on This Important Issue.

Contrary to Tanzania's denials, the circuits are divided as to how to construe clause 3 after *Weltover*, as detailed in the Petition.[5] *See* Opp.6, 13-15; Pet. Part I.B. Although the facts of each case differ, there is a discernable trend in creating extra-statutory hurdles to satisfying jurisdiction under clause 3, whether it is the

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[5] Tanzania's brief in opposition also contains unsupported claims of misrepresentations of the record and "theatrics" by Petitioners. *See, e.g.,* Opp.1 ("rhetorical hand-waving and misrepresentations of the record below"), 6 ("Petitioners turn instead to misrepresenting that decision"), 15 ("Petitioners' theatrics notwithstanding"), 19 ("Petitioners again misconstrue the record"). Petitioners will not respond in kind. *See* SUP. CT. R. 5.4.

express or implied place of performance rule,[6] the "legally significant acts" test,[7] or the D.C. Circuit's newest addition here, the agree, contemplate, or arrange rule. Other circuits correctly reject such unexpressed requirements in favor of the plain language of the FSIA.[8]

Nor can Tanzania deny the Circuit's unique role in deciding FSIA cases 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). This too supports granting the petition.

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[6] *See Rogers v. Petroleo Brasileiro, S.A.*, 673 F.3d 131, 139-40 (2d Cir. 2012); *Odhiambo v. Republic of Kenya*, 764 F.3d 31, 38-40 (D.C. Cir. 2014).

[7] *See Virtual Countries, Inc. v. Republic of South Africa*, 300 F.3d 230, 240-41 (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); *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).

[8] *See Orient Min. Co. v. Bank of China*, 506 F.3d 980, 998-99 (10th Cir. 2007) (rejecting "additional, judicially-created criteria to satisfy 28 U.S.C. § 1605(a)(2)'s third clause" and applying clause "as it is written, without judicial adornment"); *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); *Voest-Alpine Trading USA Corp. v. Bank of China*, 142 F.3d 887, 893-96 (5th Cir. 1998).

B. The Valambhias Alleged Multiple Direct Effects Here.

The Valambhias assert multiple direct effects in the United States including (1) Tanzania's failure to pay Judgments owed to U.S. citizens, (2) its past practice of making payments through a U.S. bank, (3) the Valambhias' continued demands for payment here, and (4) that the Judgments are payable in U.S. dollars.[9] Together, these facts amply support a finding of direct effects.

Indeed, the outcome of this case likely would have been different if the Valambhias had been able to sue in another circuit. *See Devengoechea v. Bolivarian Republic of Venezuela*, 889 F.3d 1213, 1225-26 (11th Cir. 2018) (finding direct effects where payment or return of property "was necessarily to occur in the United States," where "Venezuela knew he was living," and "[n]othing in the record alleges, or even suggests, that Devengoechea maintains a bank account outside of the United States, so on a motion to dismiss, we reasonably understand the allegations in the light most favorable to Devengoechea to mean that payment was to occur in the United States"). Other circuits likewise have found direct effects based on (1) the failure to pay or return property to persons known to live in the United States,[10] (2) the past practice of making

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[9] *See* COA Br. 28-36; COA Reply 13-17.

[10] *Keller*, 277 F.3d at 817-18; *Voest-Alpine*, 142 F.3d at 896; *L'Europeenne de Banque v. La Republica de Venezuela*, 700 F.Supp. 114, 121-22 (S.D.N.Y. 1988); *see also de Csepel v. Republic of Hungary*, 714 F.3d 591, 600-01 (D.C. Cir. 2013) (holding that,

payments through a U.S. bank,[11] and (3) the requirement that payment be made in U.S. dollars.[12]

This is not like the cases Tanzania cites in which the financial effect in the United States is only a distant ripple, or a "pay wherever you are" scenario. Opp.9-10. The Judgments are expressly payable to the "Valambhia family," making them judgment creditors with "a legal right to enforce execution of a judgment for a specific sum of money." BLACK'S LAW DICTIONARY 1010 (11th ed. 2019). Thus, the Judgments caused direct effects on United States residents and citizens as soon as they were signed.[13]

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while the alleged bailment did not specify a place of performance, "this is fairly inferred from the complaint's allegations that the bailment contract required specific performance—i.e., return of the property itself—and that this return was to be directed to members of the Herzog family Hungary knew to be residing in the United States").

[11] *Orient Min. Co.*, 506 F.3d at 999; *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1111-12 (5th Cir. 1985); *SerVaas Inc. v. Republic of Iraq*, 653 F. App'x 22, 24 (2d Cir. 2011); *see also Transamerican*, 767 F.2d at 1004.

[12] *Weltover*, 504 U.S. at 609 (noting that Argentine bond required payment in U.S. dollars); *L'Europeenne*, 700 F.Supp. at 122 (stating that agreement specified payment in U.S. dollars); *see also Odhiambo*, 764 F.3d at 41 (contrasting *Weltover* and stating that contract's place of performance, if any, would be Kenya because it "expressly provided that rewards would be paid in Kenyan shillings").

[13] COA App. 79-80 (Decree), 82-83 (Garnishee Order). Tanzania maintains that the latter judgment required payment outside of the United States, Opp.4, but fails to mention that it was an order

Having a judgment in one's name should create an even greater direct effect than the contractual place-of-performance clauses favored by the Circuit[14] because, unlike a mere breach of contract claim, the claims underlying the judgment have already been tested in the courts. Here, they were tested over decades of trial and appellate proceedings in Tanzania, which held that the Valambhias are indeed owed the money due under the Judgments. As an immediate consequence of Tanzania's failure to pay the Judgments, money that should have been paid in the United States "was not forthcoming." *Weltover*, 504 U.S. at 619.

Tanzania contends the Circuit's approach is consistent with *Weltover*, but acknowledges that it rests upon the Circuit's assumption that Tanzania's use of its New York bank account only preceded the Judgments. Opp.7-8; *see supra* note 4. Presuming the facts alleged as true and construing them liberally on a motion to dismiss, *see supra* note 3, however, Tanzania's consistent practice was to pay the Valambhias with its New York account, including for the postjudgment payment in 2001.[15] Any doubt should

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of attachment executing on the original 1991 judgment owed to the Valambhias, the judgment creditors, given Tanzania's failure to pay it. COA App. 79-80, 82, 90.

[14] *See, e.g., Odhiambo*, 764 F.3d at 38-39; *Peterson v. Royal Kingdom of Saudi Arabia*, 416 F.3d 83, 90-91 (D.C. Cir. 2005).

[15] Tanzania admits it made one postjudgment payment in 2001, but contends—without support and contrary to the allegations in the complaint—that it was made under the underlying contract and from the Exchequer Account. Opp.3 n.1; *see supra* note 4. It

have been construed against Tanzania as the party with the burden to prove the inapplicability of the FSIA's exceptions.[16]

The Court should grant the petition to resolve this important issue.

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.

Tanzania fails to address the division among the circuits as how to construe clause 2 of the commercial activities exception. Opp.18-20. As detailed in the petition, some Circuits limit it to non-commercial acts, while others require a material connection between the act and plaintiff's cause of action. Pet.15-16. The D.C. Circuit, in reliance on the FSIA's legislative history, limits the clause to acts or omissions "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.

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contends it never paid the Judgments, Opp.4, 11-12 (citing App.5), but the complaint and its attachments make clear that Tanzania made at least one postjudgment payment, but never fully paid the Judgments or the underlying contracts. COA App.6, 8, 9, 15, 115.

[16] *Phoenix Consulting*, 216 F.3d at 40. Regardless, this is not the only direct effect alleged, and it alone is not dispositive.

& Admin. News 1976, p. 6618); *see also Odhiambo v. Republic of Kenya*, 764 F.3d 31, 37-38 (D.C. Cir. 2014).

While the Circuit's holding on clause 2 relies upon its misconstruction of the complaint in Tanzania's favor regarding the timing of Tanzania's New York payments, properly construed,[17] this suit is based upon those payments, which continued after the Judgments were entered. The cessation of those payments prompted this recognition action. Tanzania attempts to twist the allegations in the complaint to argue that it never paid any amounts owed under the Judgments, Opp.20, but the complaint and its incorporated attachments make clear that Tanzania made payments on the underlying contracts and the Judgments up until 2001, but never fully paid the amounts owed.

Although the Circuit dismissed the Valambhias' clause 2 arguments based upon its misreading of the complaint, given the confusion among the circuits as to how to construe the clause, and this Court's silence on the issue, the Court should grant the petition to clarify its proper interpretation.

The Circuit missed the point of the FSIA: to provide a forum for cases that satisfy its exceptions. Instead, the Circuit made it more difficult for cases to be heard against foreign sovereigns who engage in commercial activities impacting the United States. The Court should grant the petition to hold that the plain meaning of the statute is all that is required for jurisdiction.

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[17] *See supra* note 4.

CONCLUSION

For the foregoing reasons, and those presented in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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