

20-117

No. _____

IN THE
Supreme Court of the United States

JAIRO SEQUEIRA,
Petitioner,

v.

The Republic of Nicaragua, a Foreign State, The City
of Chinandega, a political subdivision of the Republic of
Nicaragua, The City of El Viejo, a political subdivision of
the Republic of Nicaragua

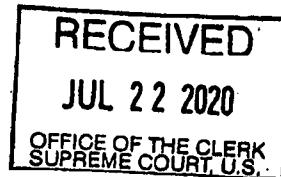
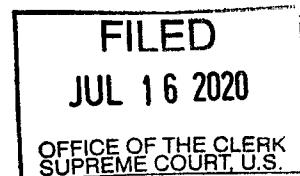
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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July 2, 2020



QUESTIONS PRESENTED

Section 1605(a)(1) of the Foreign Sovereign Immunities Act (“FSIA”) provides that a foreign state shall not be immune from the jurisdiction of United States Courts when the foreign state has waived its immunity explicitly. There is a split in the circuit courts in determining jurisdiction when faced with a contract containing an explicit waiver. Most courts have ruled that explicit waivers and jurisdiction is ascertained simply by reading the contract in which an explicit waiver is made. In the case below however, the Ninth Circuit Court of Appeals affirmed the district court’s approach of making a decision on the validity of the contract based on foreign contract law before determining jurisdiction by explicit waiver.

The questions presented are:

1. Whether 1605(a)(1) of the FSIA waiver exception requires courts to determine jurisdiction based on whether or not a contract contains an explicit waiver prior to determining the validity of the contract by interpreting foreign law, and, if not, would the ruling on validity first prevent a party from finding jurisdiction elsewhere.
2. Whether a foreign state’s taking of a U.S. construction company and the property it is on, for the purpose of building houses to sell and rent, which leads to the non-payment of dividends in the U.S., meets the direct effect doctrine of the FSIA 1605(a)(2) clause 3..
3. Is a written contractual promise by a foreign state to make payments in the U.S. in exchange for property in the foreign state considered property rights present in the U.S. in accordance with §1605(a)(3) clause one of the FSIA illegal taking exception?

PARTIES TO THE PROCEEDING BELOW

Petitioner Jairo Sequeira was the Plaintiff-appellant below.

Respondent, the Republic of Nicaragua, is a Foreign State and was a defendant and appellee below.

Respondent, the City of Chinandega, is a political subdivision of the Republic of Nicaragua and was a defendant and appellee below.

Respondent, the City of El Viejo, is a political subdivision of the Republic of Nicaragua and was a defendant and appellee below.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED.....	i
PARTIES TO THE PROCEEDINGS BELOW.....	ii
TABLE OF CONTENTS.....	iii
TABLE OF APPENDICES.....	iv
TABLE OF AUTHORITIES.....	v
OPINIONS AND ORDERS BELOW.....	1
JURISDICTION.....	1
STATUTORY PROVISIONS INVOLVED.....	1
STATEMENT OF THE CASE.....	2
REASONS FOR GRANTING THE PETITION	6
I. There is a split in the circuit courts in determining jurisdiction when faced with a contract containing an explicit waiver.....	6
II. The decision below creates a circuit split, and departs from this Court's precedent on questions involving the direct effect doctrine under 1605(a)(2) of the FSIA.....	9
III. The Circuit's decision creates uncertainty as to the scope of the FSIA expropriation exception.....	11
CONCLUSION.....	12

TABLE OF APPENDICES**APPENDIX A:**

Mandate of the Ninth Circuit No. 18-56269 (April 27, 2020).....	1a
--	----

APPENDIX B:

Order of the Ninth Circuit regarding rehearing en banc, No. 18-56269 (April 17, 2020).....	2a
---	----

APPENDIX C:

Order of the Ninth Circuit (Jan 28, 2020).....	4a
--	----

APPENDIX D:

Order of the Central District Court of California (August 24, 2018) Docket No. 195.....	8a
--	----

APPENDIX E:

Judgment of the Central District Court of California (August 24, 2018) Docket No. 196.....	37a
---	-----

APPENDIX F:

Order of the Ninth Circuit No. 15-55417 (May 30, 2017).....	38a
--	-----

APPENDIX G:

Settlement Agreement.....	40a
---------------------------	-----

APPENDIX H:

United States Congress Bills.....	52a
-----------------------------------	-----

APPENDIX I:

Nicaraguan Statutory Provisions Involved.....	67a
---	-----

TABLE OF AUTHORITIES

CASES:

<i>Anderman v. Fed. Republic of Austria</i> , 256 F. Supp. 2d 1098, 1105-06 (C.D. Cal. 2003).....	6, 14
<i>Argentine Republic v. Amerada Hess Shipping Corp.</i> , 488 U.S. 428, 439, 109 S.Ct. 683, 690, 102 L.Ed.2d 818 (1989).....	3, 6, 12
<i>Gregorian v. Izvestia</i> , 871 F.2d 1515, 1527 (9th Cir.1989).....	9, 28
<i>Joseph v. Office of Consulate General of Nigeria</i> , 830 F.2d at 1024.....	11, 14
<i>L'Europeenne de Banque v. La Republica de Venezuela</i> , 700 F.Supp. 114, 121 (S.D.N.Y.1988).....	9
<i>Meadows v. Dominican Republic</i> , 817 F.2d 517 (9th Cir.1987).....	9, 10
<i>Mansfield, C. L.M.R. Co. v. Swan</i> , 111 U.S. 379, 382 (1884).....	8
<i>Omnia Commercial Co., Inc. v. United States</i> , 261 U.S. 502, 508 (1923).....	12
<i>Republic of Argentina v. Weltover, Inc.</i> , 504 U.S. 607, 618-19 (1992).....	9, 28
<i>Siderman de Blake v. Republic of Argentina</i> , 965 F.2d 699, 706 (9th Cir. 1992).....	7, 9, 10, 11
<i>Sosa v. Alvarez-Machain</i> , 542 U.S. 692 at 111 (2004).....	8
<i>Steele Company v. Citizens for a Better Environment</i> , 523 U.S. 83, at 88-89, 118 S.Ct. 1003 (1998).....	8

Verlinden B. V. v. Central Bank of Nigeria
461 U.S. 480 at 493-94, 103 S.Ct. at 1971(1983).....6

Restatement (Third) of Foreign Relations Law of the
United States §391 (1987).....3

STATUTES

28 U.S.C. § 1605(a)(1).....i, 3, 7

28 U.S.C. § 1605(a)(2).....i, 3, 9

28 U.S.C. § 1605(a)(3).....i, 3, 10

Article 2372 of Nicaraguan Civil Code.....3

OPINIONS BELOW

The Order of the Ninth Circuit court of appeals are unreported and are reproduced at App.4a-8a, App. 38a-39a. The order denying petitioners' petition for rehearing and rehearing en banc is unreported and is reproduced at App.2a-3a. The District Court's order is unreported and is reproduced at App.8a-36a. The District Court's Judgment is unreported and is reproduced at App.37a-93.

JURISDICTION

The Ninth Circuit court of appeals entered judgment on January 28, 2020. It denied rehearing en banc on April 17, 2020. Jurisdiction is proper under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Foreign Sovereign Immunities Act ("FSIA") of 1976, 28 U.S.C. § 1605 (a)(1), provides:

A foreign state shall not be immune from the jurisdiction of courts of the United States in any case in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver

28 U.S.C. § 1605 (a)(2), provides that:

A foreign state is not immune from jurisdiction where the action is based

....

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

28 U.S.C. § 1605 (a)(3), provides:

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

...
(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.

STATEMENT OF THE CASE

This case presents three exceptionally important questions concerning the scope of federal jurisdiction over foreign states under the Foreign Sovereign Immunities Act (FSIA). These three questions have divided the lower courts: First, whether a court should first determine the validity of a contract by applying its interpretation of foreign law concerning its notarization before it applies the FSIA to a contract containing a waiver exception clause; and if so, does that determination go into the merits of the case thus preventing a party from finding jurisdiction elsewhere. Second, whether a foreign state seizing a U.S. construction Company in its territory for the purpose of building houses for sale and rent amounts to a commercial act under direct effect doctrine of the FSIA 1605(a)(2) clause 3. Finally, is a contractual promise by a foreign state to make payments in the U.S. in exchange for property in the foreign state considered to be property rights present in the U.S. in accordance with §1605(a)(3) clause one of the FSIA illegal taking exception?

These issues are vitally important. To allow

foreign states to maintain their immunity in the courts for ordinary commercial transactions is granting them an unfair advantage in competition with private commercial enterprise. It also arguably denies private parties in other nations normal recourse to courts to settle disputes. See, Restatement (Third) of Foreign Relations Law of the United States §391 (1987).

The FSIA “provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country.” *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989). Foreign sovereigns are “presumptively immune from the jurisdiction of United States courts” under the statute, and may be sued only if “one of the Act’s express exceptions to sovereign immunity applies.” Sachs, 136 S. Ct. at 394 (quoting Nelson, 507 U.S. at 355).

The first of the exceptions, here, recognizes that a foreign sovereign may waive its immunity from suit, either “explicitly or by implication.” 28 U.S.C. § 1605(a)(1).

The second exception abrogates immunity from suits based on certain types of “commercial activity” by the foreign sovereign. 28 U.S.C. § 1605(a)(2). The remaining exceptions abrogate immunity from select actions related to property rights. 28 U.S.C. § 1605(a)(3).

This appeal has its origins in a Settlement Agreement between the petitioner, Jairo Sequeira (Sequeira), a U.S. citizen, and respondent the City of El Viejo (El Viejo), a political subdivision of the Republic of Nicaragua, (Nicaragua), a foreign state, acting on behalf and for the benefit of Nicaragua. Pet. App. 40a-52a. On May 29, 2007, the parties agreed to settle their dispute over the undeveloped eastern half of a piece of property in El Viejo where Sequeira’s construction company, Smith Inc., is located. Nicaragua took this portion of land from Sequeira for the purpose of building a Stadium and houses to sell and rent. El Viejo agreed to deposit \$2.5 million dollars into Sequeira’s U.S. bank account in exchange for the land. Clause three of the settlement agreement includes a jurisdictional waiver clause and a

choice of law clause wherein El Viejo explicitly waives its jurisdiction to a California Court in the event of a breach or dispute over the settlement agreement. Nicaragua proceeded to build on Sequeira's property a Stadium and houses to sell and rent through its housing agency INVUR. Neither El Viejo nor Nicaragua deposited the \$2.5 million dollars as promised. Instead, in November 2012, Nicaragua took the remainder of Sequeira's property, the western half, which was developed with several warehouses, a Multi-Processing plant and Sequeira's construction company. Respondents began operating and managing the Multi-Processing Plant for personal gain in 2012.

In 2013, Sequeira sued Nicaragua, Chinandega and El Viejo, et al., for breach of contract, expropriation, intentional interference with prospective economic advantage and business relationship claims, *inter alia* claims.

On August 1, 2014, the district court dismissed Sequeira's first amended complaint against Nicaragua, Chinandega, and El Viejo with prejudice. It ruled that Sequeira did not produce evidence that an exception under the FSIA applied. Sequeira timely appealed the district court's ruling. Pet.

On May 24, 2017, the Ninth Circuit ruled that, "Sequeira was not required to produce evidence in response to a facial attack on subject matter jurisdiction." The Ninth Circuit reversed the dismissal of Sequeira's claims against the sovereign defendants and remanded the case for further proceedings.

On January 31, 2018, Sequeira filed his third amended complaint against Nicaragua, Chinandega, and El Viejo.

On August 24, 2018, the district court ruled that it lacks jurisdiction because, based on its interpretation of foreign law, it found the contract to be void *ab initio* and invalid even though it contained a waiver exception clause and choice of law clause and cited case law to the effect that "Ultimately, "the essential inquiry in written agreement

cases is whether a sovereign contemplated the involvement of the United States courts in the affair in issue".

Because the court ruled the contract is invalid it is likely other courts will rely on this court's ruling that the contract is invalid and Sequeira will be prevented from exercising his rights in other jurisdictions. The district court relied on the interpretation of foreign law to determine the validity of the contract without determining jurisdiction first. If the district court had determined jurisdiction based on the reading of the contract, which contains an explicit waiver, the parties would have then proceeded to engage in discovery to show whether the contract was properly notarized under Nicaraguan law, which it was. However, the district court put more weight on defendants' affidavits than Sequeira's.

The district court stated that it found "direct effect". Pet. App. 29a. Under FSIA, direct effect, in and of itself, grants jurisdiction. However, at this point the court linked the stand alone element of direct effect with the separate provision of illegal taking and determined that it lacks jurisdiction.

Further, the district court found that although the record shows that the foreign state took Sequeira's property in violation of international law, it found no commercial activity in the U.S. The district court did not consider the settlement contract that was to be paid in the U.S. as property rights present in the U.S. under §1605(a)(3) of the FSIA.

Sequeira timely appealed. The Ninth Circuit affirmed the lower court's decision. Sequeira requested a rehearing and rehearing en banc, which was denied.

REASONS FOR GRANTING THE PETITION

I. THERE IS A SPLIT IN THE CIRCUIT COURTS IN DETERMINING JURISDICTION WHEN FACED WITH A CONTRACT CONTAINING AN EXPLICIT WAIVER.

The Ninth Circuit court's decision below, applying foreign law to a contract containing a waiver exception to determine whether it is valid before determining whether the FSIA applies, is contrary to the decisions of the Supreme Court of the United States, other Circuits precedents and its own. Consideration by this Court is necessary to secure and maintain uniformity of decisions in the courts.

This Court has ruled, and other Circuits have applied its precedent, that "[a]t the threshold of every action in a district court against a foreign state...the court must satisfy itself that one of the [FSIA] exceptions applies." *Verlinden B. V. v. Central Bank of Nigeria* 461 U.S. 480 at 493-94, 103 S.Ct. at 1971 (1983). A federal court lacks subject matter jurisdiction over a claim against a foreign state unless the claim falls within an exception to immunity under the FSIA. See 28 U.S.C. 1330(a); *Verlinden*, *id* at 1969; see also *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439, 109 S.Ct. 683, 690, 102 L.Ed.2d 818 (1989) (FSIA is the "sole basis for obtaining jurisdiction over a foreign state in federal court").

Under the FSIA, a foreign sovereign may elect to waive its immunity from suit "either explicitly or by implication." 28 U.S.C. § 1605(a)(1).

"Explicit waivers may be ascertained simply by reading the document in which an explicit waiver is purportedly made." *Anderman v. Fed. Republic of Austria*, 256 F. Supp. 2d 1098, 1105-06 (C.D. Cal. 2003).

Ultimately, "the essential inquiry in written agreement

cases is whether a sovereign contemplated the involvement of United States courts in the affair in issue.” *Siderman*, 965 F.2d at 721.

Although, the district court cited these cases in its ruling, and although it read the contract, it departed from these precedents. Rather than inquiring whether the sovereign contemplated the involvement of U.S. courts to determine whether it had jurisdiction or ascertaining whether an explicit waiver existed simply by reading the document in which an explicit waiver is purportedly made, it looked into the elements of formation of contracts, erroneously applying foreign law, namely, Nicaraguan Civil Code 2372.

The Ninth Circuit departed from its own precedent established in the *Siderman* case thereby creating a circuit split. In *Siderman*, the district court erroneously dismissed the plaintiffs’ claims by evaluating the validity of the sovereign acts taken by the foreign state under the act of the state doctrine prior to being vested with jurisdiction. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 706 (9th Cir. 1992). Here, the court dismissed petitioner’s breach of contract claim based on its interpretation of the notarization act prior to being vested with jurisdiction. In *Siderman* it was established that “As a threshold matter, a court adjudicating a claim against a foreign state must determine whether the Foreign Sovereign Immunities Act provides subject matter jurisdiction over the claim, and it is in error to consider act of state issue without first considering the threshold issue of subject matter jurisdiction”. Here, the lower court adjudicated Sequeira’s claim of breach of contract by ruling the contract is invalid without first considering the threshold issue of subject matter jurisdiction.

The requirement that jurisdiction be established as a threshold matter "spring[s] from the nature and limits of the judicial power of the United States" and is "inflexible and without exception." *Mansfield, C. L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884).

This Court has held that jurisdiction "would normally be considered a threshold question that must be resolved...before proceeding to the merits. *Steele Company v. Citizens for a Better Environment*, 523 U.S. 83, at 88-89, 118 S.Ct. 1003 (1998). The Ninth Circuit's threshold question was whether the contract was valid or not under the Nicaraguan Notarization Act and then it resolved that it was invalid based on its erroneous interpretation of Nicaragua Notarization Act thereby proceeding to the merits of the case.

This Ninth Circuit's decision is in conflict with *Sosa v. Alvarez-Machain*, 542 U.S. 692 at 111, another U.S. Supreme Court case specifying the order of deciding cases, which is first jurisdiction then merits. Here the Ninth Circuit did the opposite. It ruled that the petitioner's contract is invalid based on its erroneous interpretation of foreign law and then based on that ruling decided that it lacked jurisdiction. By not following the order established in the *Sosa* case, the lower court entered a summary judgment on the petitioner's breach of contract claim. Consequently, it deprived petitioner of his Constitutional rights to litigate his case and prove that his contract is valid in other jurisdictions.

If courts follow the Ninth Circuit's order of deciding cases, first merits then jurisdiction, it will deprive litigants of their Constitutional rights to litigate their cases.

II. THE DECISION BELOW CREATES A CIRCUIT SPLIT, AND DEPARTS FROM THIS COURT'S PRECEDENT ON QUESTIONS INVOLVING THE DIRECT EFFECT DOCTRINE UNDER 1605(A)(2) OF THE FSIA.

The Ninth Circuit decision conflicts with this Court's precedent in *Weltover*, in which the Supreme Court held that Argentina's breach of a contract to pay bondholders in New York had a direct effect in the United States. *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618-19 (1992) In the present case, the Ninth Circuit found that the settlement contract showing that respondents agreeing to deposit \$2.5 million in Sequeira's U.S. bank account does not amount to commercial activity.

Further, the Ninth Circuit conflicts with its own precedents and other circuits. In *Siderman*, the Ninth Circuit held that: "in cases where a plaintiff's claim is for breach of a contract providing that payment or performance must be made in the United States, the "direct effect" requirement has been deemed satisfied." *Siderman* at 710.

In *Meadows v. Dominican Republic*, the Ninth Circuit: "considered an action brought by two U.S. residents to recover a loan commission they earned by obtaining a loan on behalf of a foreign government. Under the loan agreement, the commission was to be paid in the U.S. through the plaintiffs' bank and the Court found this to be a sufficiently direct effect to permit jurisdiction under clause three." *Meadows v. Dominican Republic*, 817 F.2d 517 (9th Cir.1987). *Siderman*, at 711 (citing *Meadows* at 817 F.2d at 523. See also *Gregorian v. Izvestia*, 871 F.2d 1515, 1527 (9th Cir.1989) (discussing similar cases); *L'Europeenne de Banque v. La Republica de Venezuela*, 700 F.Supp. 114, 121 (S.D.N.Y.1988) (extending rule to encompass foreign plaintiff).

The Ninth Circuit decision conflicts with its own precedent and creates a circuit split by affirming the district court's decision that FSIA immunity under

28 U.S.C. § 1605 (a)(2) does not apply despite the fact that the district court found direct effect due to the foreign state's act of taking Sequeira's property and ruling that "The taking had the "direct effect" of crippling Smith, Inc. such that it could not longer pay its taxes, leading to its suspension in 2009" but finding that there was no commercial activity. App. 29a. The Ninth Circuit and the district court disregarded the fact that the same taking the district court was referring to also led to the nonpayment of dividends in the U.S. to Smith Inc.'s shareholders, Sequeira being one of them. In *Siderman* the Ninth Circuit held that "The dispositive element in clause three for purposes of this case, therefore, is the requirement that the acts cause a direct effect in the United States." This same court held in *Siderman* that "As an owner and shareholder of INOSA, each of the Sidermans is entitled to a share of the profits earned by the corporation. If INOSA's articles of incorporation or by-laws (or the equivalent corporate documents under Argentine law) require INOSA to pay those dividends at the shareholder's place of residence, the United States, we believe in light of *Meadows* that the direct effect requirement would be satisfied." Similarly to the *Siderman* case, Sequeira, as an owner and shareholder of the businesses the Appellees took over, is entitled to a share of the profits earned by the corporations. Furthermore, Smith Company's by-laws and articles of incorporation require Smith Company to pay those dividends at the shareholder's place of residence, the United States.

The Ninth Circuit Court is in contravention with the Supreme Court's precedent in *Nelson*, which held: "Congress manifestly understood there to be difference between a suit "based upon" commercial activity and one "based upon acts" performed "in connection with" such activity. The Ninth Circuit held that Sequeira did not prove commercial activity even though it found that the

foreign state seized Sequeira's Multi-Processing Plant where his construction company was located and respondents submitted evidence and acknowledged that its agency, INVUR was selling, renting, managing and operating the houses they built on Sequeira's property.

In *Siderman*, the Ninth Circuit held "The Sidermans base their claims on Argentina's seizure and continuing operation of INOSA, both of which constitute acts that Argentina has performed outside United States territory. It is equally clear that they have been performed in connection with the commercial activities of operating the Hotel Gran Corona and managing INOSA's real estate investments in Argentina. These activities are, as noted above, "of a kind in which a private party might engage." *Joseph*, 830 F.2d at 1024.

III. THE CIRCUIT'S DECISION CREATES UNCERTAINTY AS TO THE SCOPE OF THE FSIA EXPROPRIATION EXCEPTION.

Under the expropriation exception, a foreign state is not immune from suit if "rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States." 1605(a)(3)

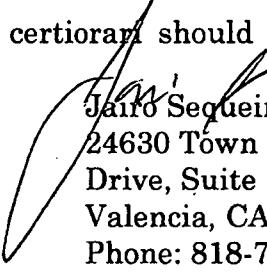
The district court found that that the foreign state took Sequeira's property in violation of international law but found no commercial activity in the U.S. However, the expropriation exception is met when "property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state."

Sequeira received from the foreign state a written contractual agreement in exchange for part of his property located in Nicaragua. That contractual

agreement is enforceable in the United States and is currently present in the United States. The Supreme Court has established that contractual obligations are property rights. *Omnia Commercial Co., Inc. v. United States*, 261 U.S. 502, 508 (1923) (“The contract in question was property within the meaning of the Fifth Amendment . . . and if taken for public use the Government would be liable.” (citations omitted)). Consequently, the Ninth Circuit decision conflicts with the Supreme Court’s precedent.

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully, submitted.


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July 16, 2020