No.

In the Supreme Court of the United States

THE WELSH GOVERNMENT, PETITIONER

v.

PABLO STAR LTD. and PABLO STAR MEDIA LTD., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a political subdivision of a foreign state immune from copyright infringement claims under the Foreign Sovereign Immunities Act's commercial activity exception, 28 U.S.C. § 1602(a)(2), based on its activities promoting the culture and tourism of Wales and the alleged activities did not have substantial contact with the United States?

CORPORATE DISCLOSURE STATEMENT

The Welsh Government is a political subdivision of the United Kingdom. It has no parent corporation, and no publicly held company owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

The Welsh Government respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals is unreported (App. 1A-27A). The opinion of the U.S. District Court is reported at 378 F.Supp.3d 300 (2019) (App. App. 28A-47A).

JURISDICTION

The Court of Appeals entered judgment on June 8, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1603 of Title 28 of the United States Code provides in relevant part:

> (d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.
>
> (e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

Section 1605(a)(2) provides in relevant part:

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

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

This case involves allegations by the Respondents, plaintiffs Pablo Star Ltd. ("Pablo Star") and Pablo Star Media Ltd. ("Pablo Media") (collectively "Pablo"), claiming that the Petitioner, defendant Welsh Government (sometimes referred to as "the Government"), and media defendants used two photographs of the poet Dylan

Thomas to promote tourism to Wales and thereby infringed copyrights. Based on the commercial activities exception to the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1605(a)(2), the District Court denied the Welsh Government's motion to dismiss the Second Amended Complaint. The Second Circuit affirmed.

On February 18, 2015, Pablo Star filed an initial Complaint seeking to recover on copyright infringement claims against the Welsh Government and several publishing companies.[1] *See* Second Circuit Joint Appendix ("A") 18-29. On May 11, 2015, Pablo Star and a new plaintiff, Pablo Media filed a First Amended Complaint. A30-51. The Court dismissed Pablo's claims against the Welsh Government and all but one of the publishing defendants, Tribune Content Agency, LLC ("Tribune"), for insufficient service of process on the Welsh Government, lack of personal jurisdiction, and improper venue; it also denied Pablo's motion for a preliminary injunction. *Pablo Star Ltd. v. Welsh Gov't*, 170 F.Supp.3d 597 (S.D.N.Y. 2016) (A52-71). The District Court did not decide the Welsh Government's argument that the Court lacked subject matter jurisdiction based on immunity from suit under the FSIA, 28 U.S.C. § 1604. Pablo then unsuccessfully moved to reconsider the order dismissing the claims against the Welsh Government. *Pablo Star Ltd. v. Welsh Gov't*, 2016 WL 2745849 (S.D.N.Y. May 11, 2016) (A108-12,).

The Court subsequently stayed the case against the sole remaining defendant, Tribune, pending the outcome of an appeal in the United Kingdom pertaining to Pablo Star's corporate status. A113-16. On January 31, 2018, the Court lifted the stay.

[1] The media defendants have been dismissed or are no longer parties to this case.

A117. In order to get a third bite at the apple, Pablo sought leave to file a Second Amended Complaint ("SAC"), which the Court granted. Dkt. Nos. 95, 96; A118-24. The SAC was filed as of May 8, 2018. A125-260.

Supported by a declaration and exhibits, the Welsh Government filed a motion to dismiss the SAC pursuant to Fed. R. Civ. P. 12(b)(1), again asserting its immunity from suit under the FSIA. Dkt. Nos. 105-109; A278-436. Pablo opposed the motion but did not file any evidence rebutting the Government's evidence. Dkt. No. 119. The Welsh Government filed a reply. Dkt. No. 121; A433-36.

On March 29, 2019, the District Court issued an Order denying the motion to dismiss and ordered Government to file an answer to the SAC. App. 28A-47A. The Government timely filed a notice of interlocutory appeal of the Order on April 29, 2019. A437-38. The Second Circuit affirmed on June 8, 2020. App. 1A-27A.

II. BACKGROUND

Pablo Star and Pablo Media, are alleged to be related companies organized and registered under the laws of the United Kingdom. A125; SAC ¶ 1; A354-430. In fact, Pablo Media was dissolved on May 6, 2018, and the ownership of its assets and rights were transferred to the Crown under United Kingdom law.[2] Both Pablo entities are owned by Haydn Price and neither he nor his companies are citizens or residents of the United States. A63, A431 ¶ 3.

[2] A433-35; Companies Act 2006 §§ 1000, 1012(1) (available at http://www.legislation.gov.uk/ukpga/2006/46/pdfs/ukpga_20060046_en.pdf. In deciding the dismissal motion, the District Court declined to address whether Pablo Media had standing to sue but noted that the Government would be free to raise the issue at a later stage of the case.

Dylan Thomas was a Welsh poet and writer who died in 1953. Vernon Watkins took the two photographs at issue here of Thomas and his wife, Caitlin, referred to as "Just Married" and "Penard." A126 ¶¶ 3-6. The former pictured the couple after their wedding in 1937 and the latter showed them playing croquet.

When Mr. Watkins died in 1967 the copyright in the photographs passed to his widow, Gwen Watkins. The SAC alleges that as of August 25, 2011, the elderly Watkins assigned the copyrights to Pablo Star. A126 ¶ 7. On May 21, 2014, Pablo Star allegedly transferred certain "aspects" of its copyrights to Pablo Media, but it purportedly retained its rights to pursue claims against defendants. SAC ¶ 9.

The Welsh Government is a political subdivision of the United Kingdom. *See, e.g.*, Gov't of Wales Act 2006 § A1 (Welsh Government is "a permanent part of the United Kingdom's constitutional arrangements")[3]; A279-308; A312 ¶ 2; A350. Parliament granted certain powers to the National Assembly for Wales and to an executive body, the Welsh Government. It is located in Wales and also has international offices, including at the U.K.'s Embassy and Consulates in the United States. A309; A312 ¶ 3; A432 ¶ 5.

The devolved Welsh Government has authority to promote the well-being of Wales, including culture, economic development and tourism promotion. *See, e.g.*, Gov't of Wales Act 2006 § 60, 61. Section 60 of that Act, entitled " Promotion etc. of well-being", provides in part:

> (1) The Welsh Ministers may do anything which they consider appropriate to achieve any one or more of the following objects –

[3] Available at http://www.legislation.gov.uk/ukpga/2006/32/contents.

(a) the promotion or improvement of the economic well-being of Wales,
(b) the promotion or improvement of the social well-being of Wales, and
(c) the promotion or improvement of the environmental well-being of Wales.

(2) The power under subsection (1) may be exercised in relation to or for the benefit of –
(a) the whole or any part of Wales, or
(b) all or any persons resident or present in Wales.

(3) The power under subsection (1) includes power to do anything in relation to or for the benefit of any area outside Wales, or all or any persons resident or present anywhere outside Wales, if the Welsh Ministers consider that it is likely to achieve one or more of the objects in that subsection.

Section 61, entitled "Support of culture etc.", provides that:

> The Welsh Ministers may do anything which they consider appropriate to support –
>
> (a) archaeological remains in Wales,
> (b) ancient monuments in Wales,
> (c) buildings and places of historical or architectural interest in Wales,
> (d) historic wrecks in Wales,
> (e) arts and crafts relating to Wales,
> (f) museums and galleries in Wales,
> (g) libraries in Wales,
> (h) archives and historical records relating to Wales,
> (i) cultural activities and projects relating to Wales,
> (j) sport and recreational activities relating to Wales, and
> (k) the Welsh language.

Using its statutory authority, the Welsh Government promotes tourism from visitors in the United Kingdom, the United States and other countries. That function is tasked to the Department of Economy, Skills and Natural Resources, which is overseen by a Government Minister. A216-17; A312-33 ¶¶ 2, 5-6. The SAC sometimes

refers to "Visit Wales" but that is merely an administrative division of the Department. *See, e.g.*, A127 ¶ 15; A312-13 ¶ 5.

After its 2006 formation, the Welsh Government used Dylan Thomas' legacy, likeness and international appeal and used the two photographs to promote Wales. A127 ¶ 14; A132 ¶ 43; A137 ¶ 75. For example, SAC Ex.1 (A146-52), entitled "Dylan Thomas Walking Tour of Greenwich Village, New York", was co-authored by Dylan Thomas' daughter. The document used a small version of the Just Married photograph and displayed a copyright notice underneath: "Copyright Jeff Towns/Dylan's Bookstore." A146. Notably, the document states that two of the locations on the map, Chumley's and Carpo's Café, were closed for renovations or no longer open "*as we went to press 6/23/08*." A147-48 (italics in original). That use of the Just Married photograph occurred years before Watkins allegedly assigned the copyrights to Pablo Star.

Ex. 2 to the SAC (A154-55) is a printout of an online document on the Welsh Government's website, visitwales.com, entitled "Discovering the Welsh in America." It states that: "The Welsh Government has researched and produced an exhibition and a booklet outlining the history of the Welsh in America up to the present day and outlining the important contributions that the Welsh have made to life in America." Embedded in the electronic document was a link to a pdf document titled "Welsh in America 2010." It included the Just Married photograph, along with the notation "Copyright Jeff Towns." The piece also included a link to a private company in New York that would conduct walking tours on Sundays, beginning March 6, 2011. A155.

There is no evidence that the Welsh Government itself charged or received any revenue from that private company (or otherwise) based on this publication.

In 2013, the Welsh Government developed a tourism strategy, titled "The Welsh Government Strategy for Tourism 2013-2020: Partnership for Growth". A130 ¶¶ 32-33, A209-39. It also published a Framework Action Plan Years 1-3. A130 ¶¶ 35-36, A240-60. The strategy and action plan focused on domestic tourism. While international visitors have been of lower importance the Welsh Government would still seek to encourage tourism from Germany, Ireland, the United States and Canada. The action plan concentrated on using digital content and websites to promote Wales as an appealing tourist destination. Rob Holt, the Government's Deputy Director of Tourism Development and Major Events swore under oath that the strategy and action plan were developed in Wales and the computer servers for the Welsh Government's work are created and maintained in the United Kingdom. A312-13 ¶¶ 2-7.

Pablo alleges, on information and belief, that after the strategy and plans were developed, the Welsh Government provided copies of the Just Married photograph to defendant Tribune and other United States media companies for use in articles on Dylan Thomas that promoted tourism to Wales. A133 ¶¶ 47-48; A162-95. These exhibits are printouts of on-line content. In 2016, the District Court dismissed the First Amended Complaint for lack of venue. According to the Court, Pablo did not allege that substantial conduct occurred in New York:

> The only concrete infringing materials that Plaintiffs can identify are materials that were available online. But the fact that an infringing

> material is accessible via the internet in a jurisdiction is hardly sufficient to conclude that this infringement occurred in this district for the purposes of venue. Indeed, all of the Welsh Government's relevant conduct – including the creation and maintenance of the websites at issue – appears to have occurred abroad. On this basis, the Court cannot conclude that a substantial part of the events giving rise to this claim occurred in New York.

A67 (footnote omitted). As discussed below, this aspect of the 2016 decision conflicts with the Court's 2019 decision.

Pablo's SAC tries to get around that ruling by alleging that the Welsh Government created infringing "promotional materials" that included the alleged copyrighted photographs, such as advertisements, brochures, pamphlets, a New York City walking tour map, and display panels for an exhibition called "Welsh in America" that included copies of the photographs. Pablo alleges, on information and belief, that the Welsh Government distributed and loaned out copies of the materials from its offices in New York and loaned out and publicly displayed the Welsh in America exhibition in New York. The SAC alleged that, again upon information and belief, the Welsh Government contracted with unknown businesses in New York (named as "John Doe" defendants) to publish, print, display, and distribute the walking tour maps and display panels. A128-30 ¶¶ 22-31.

Count I of the SAC alleges copyright infringement against defendants Welsh Government. A140-42 ¶¶ 93-106. Count II alleges a claim for contributory and vicarious copyright infringement against the Welsh Government based on the distribution of the Just Married photograph to media companies. A142-43 ¶¶ 107-15.

Among other relief, Pablo seeks an injunction, damages and a declaration that the Welsh Government does not have a license to the photographs.

The Welsh Government moved to dismiss for lack of subject matter jurisdiction under the FSIA with supporting evidence. Dkt. Nos. 105-06, 121; A278-436, A433-36. In opposition, Pablo argued that the commercial activity, expropriation, and tort exceptions in 28 U.S.C. § 1605(a)(2), (3), and (5) applied. Pablo did not file any rebuttal evidence. Dkt. No. 119. The District Court considered only the commercial activity exception and did not address the other two exceptions. The District Court denied the motion, on the grounds that allegations of copyright infringement to promote tourism necessarily constitutes commercial activity and the Welsh Government acts occurred in the United States. The Second Circuit affirmed. App. 1A-47A.

REASONS FOR GRANTING THE PETITION

The Second Circuit erred in ruling, for the first time, that a political subdivision of a foreign sovereign is not immune under the commercial activities exception for alleged copyright infringement in promoting tourism. The decision is erroneous and contrary to law. Copyright infringement is a tort and is not commercial activity under the FSIA. Further, the Welsh Government's actions are very different from the commercial activities of a private travel company. A private company may prepare sales brochures or advertising material to sell tours. The Welsh Government did not do that. It never sold anything. Instead, as alleged in the SAC, it prepared materials and cooperated with certain media outlets, to promote the culture of and

tourism to Wales. It was exercising its statutory function under the law of the United Kingdom. These statutory functions relate to the promotion of Wales's profile with a view to this ultimately facilitating improvements to its cultural and economic wellbeing. This is not "commercial" in nature. Commercial activity envisages, for example, participants buying and selling goods and services with the nature of activity reflecting some form of direct reward in return for provision of a direct service to a customer. *See, e.g.*, H. Rep. No. 1487 at 16 (94th Cong. 1976). This is consistent with the "ordinary activities of any private travel company." However, to suggest that this is "indistinguishable" from the actions of the Welsh Government in this case is patently incorrect. The Government was not acting as a travel agent or marketing agency (including a "not for profit" variety of the same). The activity was governmental in nature and consistent with general strategic public or governmental activities that are undertaken by embassy or consular civil servants around the world to promote and raise the profile of their respective countries pursuant to general public policy considerations. There is no commercial market for altruistically promoting Wales around the world and this is not something that a "private travel company" would do. The lower courts' failure to recognize the difference should not be the law.

In addition, the District Court gave no weight to an Irish judgment that dismissed a claim for copyright infringement on the grounds that the Welsh Government's use of the photographs to promote tourism was not commercial activity and the exception did not apply. The parties and the issues in the Irish and New York

cases were the same or substantially similar. The foreign judgment should have been given *res judicata* effect.

Finally, even assuming that the Welsh Government had *some* contact with the United States, there is nothing showing there was *substantial* contact.

I. THE WELSH GOVERNMENT IS ENTITLED TO FISA IMMUNITY AS A POLITICAL SUBDIVISION OF A FOREIGN STATE.

As a political subdivision of a foreign state, the Welsh Government is immune from suit under the FSIA unless a specified exception applies. The FSIA provides "the sole basis for obtaining jurisdiction over a foreign state in federal court[.]" *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989); *see also Obb Personenverkehr AG v. Sachs*, 136 S.Ct. 390 (2015); *Kato v. Ishihara*, 360 F.3d 106, 110 (2d Cir. 2004). Under the FISA, a "foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter." 28 U.S.C. § 1604. A "foreign state" is defined to include a "political subdivision" of that state. 28 U.S.C. § 1603(a). If none of the exceptions to immunity apply, the court lacks both subject matter jurisdiction and personal jurisdiction. *See, e.g.*, *Cargill Int'l S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1016 (2d Cir. 1993) (citing *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 485 n.5 (1983)). Unlike other statutes that make immunity a defense to liability, the absence of immunity is a jurisdictional requirement under the FSIA. *See, e.g.*, *Mol, Inc. v. People's Republic of Bangladesh*, 736 F.2d 1326, 1328 (9th Cir. 1984).

On a motion to dismiss for lack of subject matter jurisdiction under FSIA, "the defendant must present a 'prima facie case that it is a foreign sovereign,' after which

the plaintiff 'has the burden of going forward with evidence showing that, under exceptions to the FSIA, immunity should not be granted.'" *Virtual Countries, Inc. v. Republic of S. Africa*, 300 F.3d 230, 241 (2d Cir. 2002) (quoting *Cargill Int'l S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1016 (2d Cir. 1993)). "Where the plaintiff satisfies her burden that an FSIA exception applies, the foreign sovereign then bears the ultimate burden of persuasion that the FSIA exception does not apply." *Swarna v. Al–Awadi*, 622 F.3d 123, 143 (2d Cir. 2010).

The Court may resolve disputed jurisdictional facts by reference to evidence extrinsic to the pleadings, including declarations. *See, e.g.*, *Filetech S.A. v. France Telecom S.A.*, 157 F.3d 922, 932 (2d Cir. 1998); *Freund v. Republic of France*, 592 F.Supp.2d 540, 553 (S.D.N.Y. 2008). The Court may not draw reasonable inferences based on facts alleged in the complaint in the plaintiff's favor on subject matter jurisdiction. *See, e.g.*, *J.S. ex rel. N.S. v. Attica Cent. Sch.*, 386 F.3d 107, 110 (2d Cir. 2004). And because the FSIA's objective is to free a foreign sovereign from suit, not just liability, courts should resolve any factual disputes and reach a decision about immunity as near to the outset of the case as is reasonably possible. *See, e.g.*, *Bolivarian Republic of Venez. v. Helmerich & Payne Int'l Drilling Co.*, 137 S.Ct. 1312, 1317 (2017).

Here, there is no dispute that the Welsh Government is a political subdivision of the United Kingdom. *See* Gov't of Wales Act 2006 § A1; A312 ¶ 2, A350 ¶ 12. Pablo did not provide any evidence rebutting FSIA's applicability to this case.

II. THE FSIA'S COMMERCIAL EXCEPTION DOES NOT APPLY TO THE ACTIVITIES OF THE WELSH GOVERNMENT.

A foreign state is not be immune from the jurisdiction of the courts of the United States where "the action is based [1] *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." 28 U.S.C. § 1605(a)(2) (alterations and emphasis added). The District Court considered only the first prong of the exception and is thus the only one at issue on appeal. App. 41A n.4. The Welsh Government was not engaged in commercial activity and it is immune from Pablo's claims.

The FSIA defines a "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity is to be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d). Courts must consider whether the activity at issue is the type of action by which a private party engages in trade and traffic or commerce. *See, e.g.*, *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 611, 614 (1992); *Anglo–Iberia Underwriting Mgmt. v. P.T. Jamsostek*, 600 F.3d 171, 176 (2d Cir. 2010); *Kato*, 360 F.3d at 110. The phrase "'commercial activity carried on in the United States by a foreign state' means commercial activity carried on by such state and having substantial contact with the United States." *Id.* § 1603(e). To exercise subject matter

jurisdiction under FISA, a court must find that the foreign state engaged in a "regular course of commercial conduct" or a "particular commercial transaction or act", the commercial activity has "substantial contact" with the United States, and the cause of action is "based upon" the commercial activity. *See, e.g.*, *Verlinden B.V. v. Central Bank of Nigeria*, 488 F.Supp. 1284, 1294-97 (S.D.N.Y. 1980), *aff'd*, 647 F.2d 320 (2d Cir. 1981), *rev'd on other grounds*, 461 U.S. 480 (1983).

A. COPYRIGHT INFRINGEMENT IS A TORT, NOT COMMERCIAL ACTIVITY.

Tortious conduct does not qualify as "commercial activity" within the meaning of the FSIA. *See, e.g.*, *Saudi Arabia v. Nelson*, 507 U.S. 349, 358 (1993). Copyright infringement has long been considered a tort in this Circuit. *See, e.g.*, *Screen Gems–Columbia Music, Inc. v. Metlis & Lebow Corp.,* 453 F.2d 552, 554 (2d Cir. 1972); *Ted Browne Music Co. v. Fowler*, 290 F. 751, 754 (2d Cir. 1923). Tortious or unlawful conduct does not qualify as "commercial activity" within the meaning of the FSIA. *See, e.g.*, *Nelson*, 507 U.S. 349, 358 (1993); *Democratic National Committee v. Russian Federation*, 392 F.Supp.3d 410, 429 (2d. Cir. 2019). The courts below stripped the Welsh Government of its immunity despite this authority. The Supreme Court has never decided whether copyright infringement is a tort for which the commercial activities exception to FSIA would apply. It is important to grant the petition to elucidate the scope of foreign sovereign's immunity under the commercial exception.

B. The District Court Erred In Ignoring Applicable Law That Tourism Promotion By A Foreign Sovereign Is Not Commercial Activity.

Under the Second Circuit's ruling, foreign sovereigns would see their immunity stripped in United States courts based on activity that promotes the other country's businesses, tourism, or culture. That is not the law. The commercial activity exception does not divest the Welsh Government's immunity for using photographs to promote the culture and tourism of Wales.

The law of the United Kingdom granted the Welsh Government the statutory authority to promote the well-being of Wales, including through promoting economic development, tourism, and culture. Gov't of Wales Act 2006 § 60, 61. Since passage of the Act, those functions have been executed by a government department. Indeed, at least three years before Pablo had arguably acquired any interest in the copyrights, the Welsh Government used one of the photographs in promotional material. A146-52.

In 2013, the Welsh Government published plans to promote tourism. A130 ¶¶ 32, 35; A209-60; A312-13 ¶¶ 5, 6. The Government then continued or undertook a variety of non-commercial activities to implement its strategy. It continued to use the photograph of Dylan and Caitlan Thomas that it had used for years to promote Wales. A145-52. The SAC alleges that the Government published, displayed, distributed, and otherwise used the two photographs in advertisements, publications, and other materials to promote tourism. A127 ¶ 14; A132 ¶ 43; A137 ¶ 75. A review of the exhibits to the SAC that the District Court pointed to in support of its opinion shows that they written to promote Wales, not to engage in commercial activity. App. 10A-

11A; A145-55; A162-95. The Government's motion to dismiss should have been granted.

In addition, there is no allegation or evidence that the Welsh Government sold the photographs, charged a royalty for their use, or sold trips to Wales. The Government did not sell the photographs as part of a commercial transaction. A313 ¶¶ 8-9; A343; A351-52 ¶¶ 15, 17. It did not charge anyone to use the photographs to promote Wales and its culture, including any of the media companies named in the SAC. A351-52 ¶ 17. The use was solely to encourage tourism in Wales. *See, e.g.*, A209-60; A312-13 ¶¶ 4-9; A315-42; A351-52 ¶¶ 16-17. Indeed, a third-party may *not* use material authorized for "promotion of non-tourism related, non-inward investment related or [for] commercial products." A313 ¶ 9; A343. The Government disclaimed any activity that was commercial.

The Second Circuit further erred by not applying cases finding that a government's promotion of its citizens' products, providing general business development assistance, and participation in trade shows did not constitute commercial activity within the meaning of the FSIA. For example, in *Kato*, 360 F.3d 106, the plaintiff was employed in the United States by the Tokyo Metropolitan Government ("TMG"), a Japanese governmental office that provided "product promotion for Japanese companies, general business development assistance, participation in trade shows on behalf of the [various] companies to promote those companies' products for sale, and leasing [of] office space to those companies for their business development." *Id.* at 111. TMG "performed actions that were only

superficially similar to actions typically undertaken by private parties…." *Id.* TMG's activities were governmental rather than commercial, explaining that even if "a private Japanese business might engage in these activities on its own behalf ... such a business would not typically undertake the promotion of other Japanese businesses, or the promotion of Japanese business interests in general…." *Id.* at 112. Thus, the mere "fact that a government instrumentality like TMG is engaged *in the promotion of commerce* does not mean that the instrumentality is thereby engaged in *commerce*." *Id.* at 112 (emphasis in original). Kato went on to explain that:

> The promotion abroad of the commerce of domestic firms is a basic – even quintessential – governmental function. For example, the United States Department of Commerce is charged by statute with the "duty ... to foster, promote, and develop the foreign and domestic commerce, the mining, manufacturing, and fishery industries of the United States." 15 U.S.C. § 1512. Indeed, many agencies of the United States have some role in the direct or indirect promotion of American commerce overseas…. Agencies of foreign governments do not undertake "commercial activit[ies]" merely by engaging in these basic and routine trade promotional activities.

Id. (other examples omitted). The Court concluded that "an agency of a foreign government is not involved in 'commercial activity' under the FSIA when it provides general business development assistance, including product promotion, to business enterprises of that country seeking to engage in commerce in the United States." *Id.* at 114. The Second Circuit's own authority belied the result that it reached here. Other cases are to the same effect. *See, e.g.*, *Omari v. Ras Al Khaimah Free Trade Zone Auth.*, 2017 WL 3896399, *9 (S.D.N.Y. Aug. 18, 2017), *aff'd*, 735 F. App'x 30, 2018 WL 4037294 (2d Cir. Aug. 23, 2018); *Kim v. Korea Trade Promotion-Investment Agency*, 51 F.Supp.3d 279 (S.D.N.Y. 2014); *Rukoro v. Federal Republic of Germany*,

363 F.Supp.3d 436 (S.D.N.Y. 2019); *LaLoup v. United States*, 29 F.Supp.3d 530, 551-52 (E.D. Pa. 2014).

There is no allegation or evidence that the Welsh Government published and sold the two photographs or received any royalty payments from any third party. Accordingly, the Welsh Government engaged in non-commercial activities and the SAC should have been dismissed.

The Court of Appeal's ruling is erroneous for another reason. The Vienna Convention on Consular Relations, to which the United States and the United Kingdom are signatories, expressly provides that "consular functions" include "furthering the development of commercial, economic, cultural and scientific relations between the sending State and the receiving State and otherwise promoting friendly relations between them in accordance with the provisions of the present Convention…." Vienna Convention on Consular Relations, Art. 4-5, 21 U.S.T. 77, 596 U.N.T.S. 261 (Apr. 24, 1963) Art. 5(b), Art. 43 of the Vienna Convention provides that consulates and employees are not amenable to the courts of the receiving state when engaged in consular functions. One Court applied the Convention and ruled that:

> The plaintiffs identify three activities that they allege constitute commercial activity Greece engages in the United States: (1) establishing and maintaining consulates, (2) "promot[ing] its business interests through Economic and Commercial Offices", and (3) "sponsor[ing] tourism" through tourist offices. These are not the type of actions a private party engages in, but are instead the activities of a sovereign, as the Vienna Convention on Consular Relations makes clear. The Vienna Convention on Consular Relations governs the establishment of consular posts and the scope of consular functions. *See* Vienna Convention on Consular Relations (1963), Art. 4-5. Under Article 5, consular functions include "furthering the development of commercial, economic, cultural and scientific relations between the

> sending State and the receiving State and otherwise promoting friendly relations between them...." *Id.*

LaLoup, 29 F.Supp.3d at 551-52 (cited with approval in *Rukoro*, 363 F.Supp.3d at 451-52); *see also Ezeiruaku v. Bull*, 2014 WL 5587404, *5 (D.N.J. Nov. 3, 2014) (quoting *LaLoup* with approval). To the extent that the SAC relies on alleged activity taking place at the United Kingdom's office space in an embassy or consulate that does not provide a basis to find commercial activities in the United States.

Finally, the commercial activity issue has already been decided adverse to Pablo in a foreign court. In July 2015, Pablo Media sued the Welsh Government in Ireland for using the photographs at issue to promote tourism. The Government argued that it was immune from suit and was not engaged in commercial activity in promoting tourism. In December 2016, the Irish court granted the motion to dismiss. A313-14 ¶ 10, A344-53. The Welsh Government argued that the decision should be considered on comity principles because the Irish court had jurisdiction and that the laws and public policy of the forum state and the rights of its residents would not be violated. *See, e.g.*, *Cunard S.S. Co. v. Salen Reefer Servs. AB*, 773 F.2d 452, 457 (2d Cir. 1985); Dkt. No. 106 at 14. The Second Circuit did not even address this argument.

C. The District Court Erred In Holding That The Welsh Government's Conduct Was Carried On In The United States.

Assuming for argument's sake that the Welsh Government did engage in commercial activity, this Court should still grant this petition to consider the legal standard for conduct that was actually "carried on in the United States" and that the activity here was "substantial". 28 U.S.C. §§ 1602(a)(2), 1603(e); *Verlinden B.V.*, 488 F.Supp. at 1294-97. The activity carried out by the Welsh Government was not

actually carried on in the United States and any activity that could be deemed to occur here did not rise to the level of "substantial" activity.

The District Court and Second Circuit decided that the Welsh Government's activities were carried on in the United States. But they erroneously relied on allegations in Pablo's SAC that were controverted by evidence and it misreads the exhibits that what it terms are the "[m]ost relevant" to immunity. *See, e.g.*, App. 41A.

The relevant activity took place in Wales. *See, e.g.*, *Marathon Int'l Petroleum Supply Co. v. I.T.I. Shipping, S.A.*, 728 F.Supp. 1027, 1030 (S.D.N.Y. 1990). For example, the Government's strategic and action plans to promote tourism were formulated in Wales, not in this country. *See, e.g.*, A209-60; A313 ¶ 6). The Government did not sell the photographs at issue in the United States. *Id.* A313 ¶ 8). The alleged distribution of the photographs by the Welsh Government to media companies alleged in the SAC occurred in the United Kingdom. The act of use by electronic storage and distribution occurred from computers and servers in the United Kingdom. A62-95; A313 ¶ 7. That activity did not occur in the United States. *See, e.g.*, *Verlinden B.V.* 488 F.Supp. at 1294-97; *Capitol Records, LLC v. VideoEgg, Inc.*, 611 F.Supp.2d 349, 362-63 (S.D.N.Y. 2009) (alleged copyright infringement was committed in California where the website was created and maintained); *Rogers v. Ecolor Studio*, 2013 WL 752256, *2 (E.D.N.Y. Feb. 7, 2013) (alleged infringement based on reproduction on a website, was committed in India, where the website was created and maintained); *Cable News Network, L.P. v. GoSMS. com, Inc.*, 2000 WL 1678039, *3 (S.D.N.Y. Nov. 2, 2000) ("defendants' servers are located in California

and Israel, therefore defendants committed the tortious act in either California, Israel or in both locations, but not in New York.").

The alleged walking tour map of Greenwich Village is not evidence of commercial conduct by the Government in New York. App. 43A, discussing SAC Ex. 1 (A145-52). Again, that document itself reflects that prepared and use as least as early as 2008, years before Pablo obtained any interest to the copyrights. The Court draws an unreasonable inference from the SAC, which it cannot do. A map prepared by a foreign sovereign but accessible to a New York consumer does not mean that the activity had substantial contact with the United States.

The District Court also relied on SAC Ex. 2, the "Discovering the Welsh in America" on-line material, which indicated that it was "developed by the Welsh Government in New York" and was available to order "for distribution free-of-charge . . . from the Welsh Government in New York." App. 42A, quoting A153-55. Again, on-line material is stored by the Government on its servers in the United Kingdom. A313 ¶ 7. For the same reasons set forth above, this exhibit is not evidence of substantial contact with the United States.

In arguing that there was activity in the United States, Pablo pointed to the fact that the Welsh Government had an office in New York. App. 42A. Missing from the discussion, however, was any mention of the unrebutted evidence proving that all of Government's offices in the United States were located in the United Kingdom's Embassies and Consulates in this country. A309; A312 ¶ 3; A432 ¶ 5. Having an office at a foreign embassy or consulate does not provide a proper basis to invoke the

commercial activities exception. It would be contrary to the Vienna Convention and *LaLoup* case discussed above. It is also contrary to the decision in *S&S Mach. Co. v Masinexportimport*, 802 F.Supp. 1109, 1112 (S.D.N.Y. 1992), which ruled that:

> In the first place, the legislative history of the FSIA states that "embassies and related buildings could not be deemed to be property used for a `commercial' activity as required by section 1610(a)." 1976 U.S. CODE CONG. & ADMIN. NEWS 6604, 6628. It does not strike us as misguided to consider the Consulate building "related" to an embassy. Moreover, even assuming for present purposes that the building might have housed an economic or commercial office, it is abundantly clear to us that the Consulate is primarily used for consular and other protected purposes. Such activities, it need hardly be said, are not those "in which a private person could engage," nor consular acts "so-called private acts subject to suit"; rather, it is axiomatic that only a sovereign can operate a Consulate and undertake the activities for which such a building is used. Applying a "restrictive theory of sovereign immunity," we conclude that the Consulate building is not "used for a commercial activity" and therefore does not fall within the immunity exception of § 1610(a).

Id. at 1112 (footnote omitted). A display panel used at an embassy or consulate does not reflect contact as required for the FSIA exception to apply. Based on the undisputed facts and the law, Pablo cannot rely on embassy and consulate offices to find that the Government conducted commercial activities in the United States.

Accordingly, Pablo failed to show that the alleged activities of the Welsh Government is not substantial contact with the United States. As such, the commercial activity exception is not triggered. Having a clear standard for what constitutes "substantial" activity carried out in the United States is important and a reason to grant the petition. Foreign sovereigns should have certainty and predictability in how they undertake activities that could expose them to liability.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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