No. 21-___

IN THE

Supreme Court of the United States

BUDHA JAM, *et al.*,
Petitioners,
v.

INTERNATIONAL FINANCE CORPORATION,
Respondent.

AND

MANJALIYA IKBAL, *et al.*,
Petitioners,
v.

INTERNATIONAL FINANCE CORPORATION,
Respondent.

On Petition for a 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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QUESTIONS PRESENTED

The Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-11, governs whether foreign sovereigns and international organizations are subject to suit in U.S. court. As relevant here, a covered entity is subject to suit under the Act for any claim "based upon" commercial activity the entity carried on in the United States or where the entity waives immunity. *Id.* § 1605. The questions presented are:

1. Whether the commercial activity exception to immunity allows suit where the alleged acts of the defendant that give rise to its liability constitute commercial activity carried on in the United States, regardless of whether another party's conduct more directly caused the injury.

2. Whether a treaty provision stating that "[a]ctions may be brought against the [international organization]" waives the organization's immunity.

PARTIES TO THE PROCEEDING

Petitioners, all of whom were plaintiffs below, are Budha Ismail Jam, Sidik Kasam Jam, Ranubha Jadeja, Navinal Panchayat, Machimar Adhikar Sangharash Sangathan, Manjaliya Ikbal, Manjaliya Hajraben, Parit Abedabanu, Jabedabanu Sadam Manek and Manjaliya Harun.

Respondent, the defendant in this case, is the International Finance Corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Budha Jam, *et. al.*, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the D.C. Circuit in Nos. 20-7092 and 20-7097.

OPINIONS BELOW

The most recent opinion of the United States Court of Appeals for the D.C. Circuit (Pet. App. 1a-13a) is published at 3 F.4th 405 (D.C. Cir. 2021). The opinions of the district court addressing the first question presented (Pet. App. 14a-36a, 37a-66a) are published at 442 F. Supp. 3d 162 (D.D.C. 2020) and 481 F. Supp. 3d 1 (D.D.C. 2020), respectively. The earlier opinion of the D.C. Circuit, addressing the second question presented (Pet. App. 67a-88a), is published at 860 F.3d 703 (D.C. Cir. 2017).

JURISDICTION

The opinion of the court of appeals was issued on July 6, 2021. Pet. App. 1a. The court of appeals denied rehearing en banc on August 13, 2021. *Id.* 89a. On November 3, 2021, the Chief Justice extended the time in which to file a petition for certiorari to and including December 27, 2021. *See* No. 21A124. On December 21, 2021, the Chief Justice extended the deadline to January 10, 2022. *See id.* This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605, and the International Organizations Immunities Act, 22 U.S.C. § 288a, are reproduced at Pet. App. 90a-104a.

INTRODUCTION

Foreign sovereigns, international organizations and state-owned businesses engage in all manner of ordinary commercial activity, with ever-increasing frequency. When they do, their immunity from suit in the United States is governed by the Foreign Sovereign Immunities Act (FSIA). The FSIA codified the "restrictive theory" of immunity. As relevant here, that theory provides that foreign sovereigns (and other covered entities) are subject to claims "based on" their acts in the United States "in the course of their purely commercial operations." *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 706 (1976); *see also Republic of Arg. v. Weltover, Inc.*, 504 U.S. 607, 612, 614 (1992).

Until this case, federal courts of appeals applying the commercial activity exception to immunity had always found that immunity turns on the nature and location of the *covered defendant*'s own acts. If the defendant's conduct that allegedly makes it liable was commercial activity carried on in the United States, the defendant is not immune from suit (though, of course, it may prevail on the merits).

Here, however, the D.C. Circuit held that even if the covered defendant's relevant conduct was U.S. commercial activity, the commercial activity exception cannot be met where the conduct that most directly injured the plaintiff was committed by a third party. It thus granted immunity to a sovereign that was sued for its U.S. commercial activity, by looking to a non-sovereign third-party's acts.

This new split of authority requires this Court's intervention. The D.C. Circuit's decision is at odds with the text and purpose of the commercial activity

provision; dramatically alters the law applicable to all foreign sovereigns, state-owned enterprises, and international organizations; and will have harmful and absurd consequences, especially for American citizens and businesses.

In particular, sovereign entities sometimes participate with others, through commercial conduct, in various sorts of harmful acts, including fraud, price-fixing, human trafficking, terrorism, breach of contract, torts, and property expropriation. On the merits, such sovereigns would be liable under ordinary joint-liability theories. If, however, the FSIA immunizes sovereigns who do not most directly cause the harm, then states and state-owned companies could facilitate wrongdoing from U.S. territory and leave American citizens and businesses without recourse. Indeed, requiring that sovereigns must commit the most directly harmful act would immunize them even where both the sovereign and the third party's conduct was commercial, and all of the conduct occurred in the United States.

A second holding of the D.C. Circuit, declining to enforce the express waiver of immunity in respondent's founding treaty on the ground that it would not "benefit" respondent, also warrants review. This holding conflicts with the plain text of the International Organizations Immunities Act (IOIA), which provides without qualification that waivers should be enforced. The D.C. Circuit's judicially invented waiver-curbing doctrine also is "amorphous" and "awkward to apply." Pet. App. 83a, 88a (Pillard, J., concurring). The doctrine should not be allowed to persist—at least not without this Court's consideration.

STATEMENT OF THE CASE

1. The FSIA governs the immunity of foreign sovereigns, state-owned businesses, and (by incorporation through the IOIA) international organizations. *See* 28 U.S.C. § 1605; 22 U.S.C. § 288a(b); *Jam v. Int'l Fin. Corp.*, 139 S. Ct. 759, 768-72 (2019). Under the FSIA, a sovereign is subject to suit in any "action . . . based upon," among other things, "a commercial activity carried on in the United States by the [sovereign]; or upon an act performed in the United States in connection with a commercial activity of the [sovereign] elsewhere." 28 U.S.C. § 1605(a)(2). This provision codifies the principle that sovereigns and other covered entities engaged in commercial activity are treated like, and afforded no greater protection than, private parties. *Weltover*, 504 U.S. at 612, 614. Thus, once commercial activity is shown, Section 1605(a)(2) operates "in effect, [as] a Federal long-arm statute" that simply requires "minimum jurisdictional contacts." H.R. Rep. No. 94-1487, at 13 (1976).

2. This case arises out of a commercial project financed by respondent, International Finance Corporation (IFC). Headquartered in Washington, D.C., IFC is an international organization that provides loans in the developing world to private corporations, at profit-generating interest rates, for projects that otherwise would not attract "sufficient private capital." Pet. App. 38a. IFC comprises 185 member countries, including the United States. *Id.* 2a.

In 2008, IFC made a $450 million investment in the coal-fired Tata Mundra Power Plant, located in

Gujarat, India. Pet. App. 40a.[1] In accordance with IFC's policy to prevent social and environmental damage, the loan agreement afforded IFC substantial supervisory authority over the project. *Id.* 40a-41a. Loan disbursement was "contingent on IFC's approval of the project's construction plan." *Id.* 41a. The agreement required the borrower, Coastal Gujarat Power Ltd., to meet "IFC's environmental and social requirements." *Id.* Should Coastal Gujarat fail to abide by these conditions, IFC "could revoke [its] financial support." *Id.* 69a.

According to IFC's ombudsman, however, "the plant's construction and operation did not comply" with the loan conditions meant to protect the surrounding communities. Pet. App. 69a. And despite knowing the harms it had predicted had materialized, IFC continued to disburse funds. IFC failed to enforce the contract provisions requiring Coastal Gujarat to remediate harm and prevent further injury and has never taken any steps to address the situation.

The result is a "dismal picture." Pet. App. 68a n.1. The power plant has "devastated" the local environment and way of life. *Id.* 68a. Neighboring villagers and farmers can no longer procure fresh water because the plant's construction caused sea water to contaminate the aquifer. *Id.* 68a n.1. The "cooling system discharges thermal pollution into the sea, killing off marine life on which fishermen rely for their income." *Id.* And "coal dust and ash" pollute the air. *Id.* 69a n.18.

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[1] Because this appeal arises from a motion to dismiss, all allegations in the complaint must be taken as true. *See, e.g.*, *Walden v. Fiore*, 571 U.S. 277, 281 n.2 (2014).

Neither the power plant's construction nor its attendant harms could have occurred without IFC's financing and approval of the plant's design. All of IFC's decisions that contributed to these harms were made at IFC headquarters in Washington, D.C. This includes its decision to finance the project, despite knowing that it posed substantial risks and would inevitably cause irreversible harm, and its decisions to disburse each tranche of the loan, knowing the project did not comply with the environmental and social conditions. IFC also supervised and approved the plant's negligent design and environmental and social management from D.C. Pet. App. 3a, 33a-34a.

3. Petitioners are farmers and fishermen who live near the plant, a trade union of fishworkers, and a local government. Pet. App. 41a. In 2015, they sued IFC in the United States District Court for the District of Columbia, where IFC is domiciled. *Id.* 14a. Focusing on actions IFC took in the United States, petitioners brought claims for negligence, negligent supervision, public and private nuisance, trespass, and breach of contract. *Id.* 43a. They sought injunctive relief or damages. *Id.*

Petitioners argued, for two independent reasons, that IFC was not immune from this suit. First, petitioners maintained that their claims are based upon IFC's commercial activity in the United States. Second, petitioners noted that international organizations "may expressly waive their immunity," 22 U.S.C. § 288a(b), and that IFC's founding treaty contains an express immunity waiver: "Actions may be brought against the Corporation . . . in a court of competent jurisdiction in the territories of a member in which the Corporation has an office." IFC Articles

of Agreement art. VI § 3, Dec. 5, 1955, 7 U.S.T. 2197, 2214.[2] There is only one exception (suits by *member states* are expressly prohibited), *id.*, and that exception is inapplicable here.

The district court rejected both arguments and dismissed petitioners' suit on the ground that IFC was immune under the IOIA. *Jam v. Int'l Fin. Corp.*, 172 F. Supp. 3d 104, 108 (D.D.C. 2016).

4. The D.C. Circuit affirmed. Applying then-binding circuit precedent, the court of appeals held that IFC enjoyed "virtually absolute immunity" from suit under the IOIA, even if petitioners' claims satisfied the FSIA's commercial activity exception. Pet. App. 70a (citing *Atkinson v. Inter-Am. Dev. Bank*, 156 F.3d 1335 (D.C. Cir. 1998)).

Turning to waiver, the court of appeals acknowledged that IFC's Articles, "read literally, would seem to include a categorical waiver" of immunity from suit. Pet. App. 73a. But it held that its precedent "obliged" it to ask whether the claim "benefits" the organization, and since, in its view, the benefits of this type of suit would be outweighed by the burdens, it found IFC had not waived immunity. *Id.* 74a.

Judge Pillard wrote separately to argue that both strands of D.C. Circuit precedent the panel applied were "wrongly decided." Pet. App. 78a (Pillard, J., concurring). Directing that courts "pare back an international organization's apparent waiver of immunity," according to the "amorphous" question whether a particular lawsuit would "benefit" an

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[2] IFC's Articles of Agreement, as amended through April 2020, are available at https://bit.ly/3EUPhyc.

organization, creates a "doctrinal tangle." *Id.* 88a. It would be far better, Judge Pillard proposed, to determine waiver according to organizations' own charters and the "time-tested body of law under the FSIA" that allows lawsuits based on commercial activity. *Id.* 87a.

4. This Court granted certiorari, reversed and remanded. The Court clarified that the IOIA grants organizations like IFC only the restrictive immunity codified in the FSIA, and thus IFC may be sued for its commercial acts that fall within 28 U.S.C. § 1605(a)(2). *Jam*, 139 S. Ct. at 768-72. The Court did not address waiver.

5. On remand in the district court, IFC again claimed immunity, asserting that the FSIA's commercial activity exception is not satisfied here. Pet. App. 45a-46a. IFC argued that claims implicating the FSIA are "based upon" the last act in the causal chain that harmed plaintiffs, even if not committed by the defendant, and that petitioners' claims are therefore based on Coastal Gujarat's acts. *Id.* 49a.

At first, the district court rejected IFC's arguments that petitioners' claims against IFC are actually "based upon" third party acts. Pet. App. 49a-52a. The court nonetheless dismissed, reasoning that petitioners did not specifically allege that IFC committed *its* tortious acts in the United States or "that approving the funding—by itself—was a negligent act." *Id.* 58a-64a.

Petitioners moved to amend their complaint to address the district court's concerns, or for reconsideration based on record facts that the court overlooked. Pet. App. 15a. Petitioners' amendments

alleged, and the unconsidered facts showed, that approving the loan *was* negligent: IFC knew that the project, which could not have proceeded absent IFC funding, presented serious risks, and that at least some of those harms could not be prevented. DE 63-1 ¶¶ 216-25. Petitioners also alleged that IFC committed the acts and omissions that the district court found to be the gravamen of the case in Washington, D.C., including IFC's approval of the project's design, supervision of project planning and implementation, response to complaints, and decisions to continue disbursing funds without enforcing the protective loan provisions. *Id.* ¶¶ 197-215, 226-51, 256-60, 266-68.

The district court then abandoned its original holding that petitioners' claims against IFC are based upon IFC's conduct. In a second opinion, the court now reasoned that a claim is typically based on the conduct that "actually injured" a plaintiff, even if committed by a third party. Pet. App. 18a-19a. Applying that test, the court held that petitioners' claims are based upon Coastal Gujarat's "construction and operation" of the plant. *Id.* 24a. The court then rejected Plaintiffs' amendments as futile, stating that the amendments "relate[d] only to IFC's conduct," and adhering to its view that "IFC's conduct is not what the suit is based upon." *Id.* 34a-35a.

6. The court of appeals affirmed. Like the district court, the D.C. Circuit reasoned that where a non-sovereign third party's conduct more directly caused the plaintiff's injury, a claim against an entity covered by the FSIA is not based upon that defendant's conduct. Pet. App. 7a-11a. The court of

appeals also adhered to its earlier holding that IFC did not waive its immunity. *Id.* 11a.

7. Petitioners sought rehearing en banc, but the court of appeals denied the petition without comment. Pet. App. 89a.

REASONS FOR GRANTING THE WRIT

I. This Court should resolve whether the FSIA immunizes covered entities from suits challenging their U.S.-based commercial activity where the injury was more directly caused by a third party's conduct.

A. The D.C. Circuit's decision creates a split over this issue.

1. The FSIA lifts immunity where a suit is "based upon a commercial activity carried on in the United States by the foreign [sovereign]." 28 U.S.C. § 1605(a)(2). The D.C. Circuit concluded that the sovereign's acts must be the most direct cause of the harm; otherwise, in its view, the claims are not "based upon" the acts of the foreign sovereign and are instead "based upon" "the conduct of a non-sovereign third party." Pet. App. 8a-9a. On this understanding of the FSIA, it does not matter whether the sovereign's acts occur in the U.S. or whether they are commercial; nor does it matter whether the third party's acts occur in the U.S. or whether they, too, are commercial. If the foreign sovereign is not the most direct cause of the plaintiff's injury, the claim is not "based upon" its conduct, and the plaintiff's claim cannot meet the commercial activity exception.

2. Every other court of appeals to have considered cases involving multiple responsible parties disagrees with this approach. Rather than making a

threshold determination of whether the claims are "based upon" the defendant's conduct or someone else's, the Second, Fifth, Sixth, and Tenth Circuits all determine a sovereign's immunity by simply examining the acts of *the sovereign* upon which the claim is grounded. If *the sovereign*'s relevant conduct is commercial activity in the United States, it is not immune. Period.

In *Anglo-Iberia Underwriting Mgmt. v. P.T. Jamsostek*, 600 F.3d 171, 174 (2d Cir. 2010), for example, the plaintiff alleged that a foreign sovereign negligently supervised someone who committed fraud. Even though the fraudster obviously more directly injured the plaintiff, the Second Circuit looked to "the act of the foreign sovereign that serves as the basis for the plaintiff's claim" in assessing whether the sovereign was immune. *Id.* at 177.[3]

In *Callejo v. Bancomer, S.A.*, 764 F.2d 1101 (5th Cir. 1985), the Fifth Circuit held that "immunity depends on the nature of those acts of the *defendant* that form the basis of the suit"—not the acts of others. *Id.* at 1109 (emphasis added). There, Mexico's regulations devalued American investors' bank deposits. Plaintiffs sued a Mexican state-owned bank

[3] The Second Circuit has similarly held that *two* sovereign entities could be sued, which was only possible because the court did *not* ask which defendant was more directly responsible, let alone hold that the other defendant was immune. *See Petersen Energía Inversora S.A.U. v. Argentine Republic*, 895 F.3d 194, 205-10 (2nd Cir. 2018). Instead, applying this Court's teaching that courts must look to "'the core of [the plaintiffs'] suit,' *i.e.*, 'the . . . acts that actually injured them,'" *id.* at 204 (quoting *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 35 (2015)), the court assessed the gravamen of the claim against each defendant by reference to each defendant's *own* conduct.

for breach of contract. *Id.* at 1104. The district court held that the suit was "based upon" Mexico's regulation, not the bank's acts. *Id.* at 1107. But the Fifth Circuit rejected that holding, focusing on the defendant's acts; the defendant bank's breach was "the act complained of." *Id.* at 1108-09; *accord De Sanchez v. Banco Cent. de Nicaragua*, 770 F.2d 1385, 1391 (5th Cir. 1985).

In *Global Technology, Inc. v. Yubei (XinXiang) Power Steering System Co.*, 807 F.3d 806, 814 (6th Cir. 2015), the question was whether a sovereign corporation was immune from a suit involving its subsidiary's acts. The Sixth Circuit held that the proper analysis required first determining which acts were attributable to the sovereign, then "whether those acts satisfy the commercial activity exception." *Id.* The court did *not* ask whose conduct more directly caused the injury. In the court's framing, only conduct attributable to the sovereign could be the gravamen. *Accord Riedel v. Bancam, S.A.*, 792 F.2d 587, 591-92 (6th Cir. 1986) (following *Callejo* on similar facts).

Finally, the Tenth Circuit held in *Southway Constr. Co. v. Cent. Bank of Nigeria*, 198 F.3d 1210 (10th Cir. 1999), that two Nigerian sovereign entities were not immune for allegedly conspiring with others to defraud U.S. investors. *Id.* at 1218. Although those with a direct contractual relationship with the plaintiff more directly caused its injuries, the court held that the sovereign entities were not immune from suit. *Id.*

3. This conflict will not resolve itself without this Court's intervention. The D.C. Circuit insisted here that cases from other circuits were "distinguishable

on their facts" (though it provided no explanation for that assertion) or were off-point because they predated this Court's decision in *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 35-36 (2015). Pet. App. 9a. It then denied rehearing en banc without comment. *Id.* 89a. But there is no real prospect that any other court of appeals—much less all of them—will reconsider its precedent. The Second Circuit, for example, considered *Sachs* in *Petersen Energía Inversora S.A.U. v. Argentine Republic*, 895 F.3d 194, 206 (2nd Cir. 2018). And in *Sachs* itself, this Court relied on the Fifth Circuit's decision cited above, making it especially unlikely that the court would feel any need to reconsider the issue. *See Sachs*, 577 U.S. at 33-34 (citing *Callejo*, 764 F.2d at 1109); *see also Saudi Arabia v. Nelson*, 507 U.S. 349, 357 (1993) (same).

B. The D.C. Circuit's decision conflicts with how the Government has urged the FSIA be interpreted.

The Government's longstanding position has been that sovereign immunity should be determined by looking to the acts of the sovereign defendant, not third parties. For example, the Government argued to this Court in 2018 that "it is natural to understand a U.S. court's jurisdiction over a foreign defendant to depend on that entity's contacts with the United States—and not the contacts of some other, separate entity." Br. of the United States as Amicus Curiae 11, *De Csepel v. Republic of Hungary*, 139 S. Ct. 784, 2018 WL 6382956 (2019). Therefore, the Government explained, an entity's immunity "depends on the connection between the expropriated property and *that entity's own* U.S. commercial activities." *Id.*; *see*

also Br. for the United States as Amicus Curiae 16, *Federal Ins. Co. v. Kingdom of Saudi Arabia*, 557 U.S. 935, 2009 WL 1539068 (2009) (arguing in concerted action case that focus should be on "the foreign state's act or omission—not that of any third party").

The Government has also recognized that the gravamen of claims against different defendants must be assessed according to each defendant's conduct. In *Petersen Energía Inversora*, the plaintiff alleged that Argentina had harmed it by taking over YPF, in which Petersen had invested. 895 F.3d at 207-10. The United States recognized that the gravamen of a claim against a particular defendant was that defendant's wrongful conduct, so "[t]he 'gravamen' of Petersen's claims against Argentina is that Argentina violated its promise to Petersen," while "the 'gravamen' of Petersen's claims against YPF is that YPF violated its promise to Petersen." Br. for the United States as Amicus Curiae 10, *Petersen Energía Inversora S.A.U. v. Argentine Republic*, 139 S. Ct. 2741, 2019 WL 2209263 (2019). Under the decision below, however, the gravamen of both claims would have been Argentina's takeover because that was the conduct that most directly injured Petersen; YPF, a state-owned entity, would have been immune because the claims would not be "based upon" its conduct.

To be sure, the Department of Justice urged in the district court that IFC should be immune from this suit. But the State Department did not join these statements, and the Government did not participate at all in the court of appeals. So the earlier filing should not be taken as agreement with the D.C. Circuit's ultimate decision.

C. This question is extremely important.

Under the D.C. Circuit's holding below, the FSIA immunizes a covered entity from suit in *every* case where that entity was not the most direct cause of the harm. Thus, as the district court foretold, the D.C. Circuit's rule entitles covered entities to immunity from a "large swath" of ordinary claims—including in "any suit in which there is an intervening cause that occurred abroad, even if all of the defendant's relevant conduct occurred in the United States." Pet. App. 51a. Indeed, the D.C. Circuit's rule necessarily applies even where *all* of the conduct—*both* the third-party's and the covered entity's—is commercial activity in the United States. This is because the suit must be "based upon" conduct "by the [*sovereign*]." 28 U.S.C. § 1605(a)(2). If a court deems the gravamen of claims against the covered entity to be a third-party's acts, the entity is necessarily immune—full stop—because that conduct was not carried on by the entity. A suit based entirely on commercial activity in the U.S. would fail the commercial activity exception.[4]

Whether the FSIA's commercial activity exception turns on the sovereign's own conduct when another actor may have more directly caused the plaintiff's injuries has significant implications for individuals, businesses, international organizations,

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[4] To be sure, the D.C. Circuit stated that the commercial activity exception did not apply here because "the gravamen of appellants' complaint is injurious activity *that occurred in India*." Pet. App. 2a (emphasis added). But if the D.C. Circuit were correct that the gravamen is "the operation of the Plant," *id.* 7a, the *location* of that conduct is irrelevant. The sovereign defendant, IFC, did not operate the Plant, and therefore no suit could be "based upon" IFC's conduct regardless of where that operation occurred—even if the Plant were in the United States.

foreign governments and state-owned enterprises. Whenever multiple entities act together to commit a wrong, only one (at most) could be sued. The result would be that a wide range of ordinary joint-liability claims against FSIA-covered entities would suddenly be barred. Pet. App. 51a.

For example:

• *Human trafficking/forced labor*. In *Rodriguez v. Pan American Health Organization*, 502 F. Supp. 3d 200 (D.D.C. 2020), plaintiffs sued an international organization for facilitating forced labor by transferring payments for the labor to Cuba, just like a bank. *Id.* at 214-15. The organization argued the gravamen was Cuba's conduct, since the forced labor "actually injured" the plaintiffs. *Id.* at 215-16. But the court held that the claim against the organization was based on the *organization*'s conduct that facilitated Cuba's forced labor. *Id.* at 214, 216-17. Under the D.C. Circuit's new test, only the actor that actually committed forced labor could be liable.

• *Expropriation/property seizure*. Sovereign entities sometimes aid illegal property seizures or traffic in such property. Under the D.C. Circuit test, none of these sovereigns would be liable for their actions—leaving Americans without redress when their property is stolen, even if a sovereign benefits from that theft.

For instance, in *Exxon Mobil Corp. v. Corporación CIMEX S.A.*, No. 19-cv-01277, ___ F. Supp. 3d ___, 2021 U.S. Dist. LEXIS 75679 (D.D.C. Apr. 20, 2021), Exxon sued a Cuban sovereign enterprise, CIMEX, for trafficking and profiting from American property that Cuba expropriated. *Id.* at *2-10. The district court held that because the

expropriation "alone would not 'entitle a plaintiff to relief'" against CIMEX, the gravamen of the claim against CIMEX was CIMEX's trafficking—the conduct for which CIMEX was sued. *Id.* at *26 (quoting *Sachs*, 577 U.S. at 33). But under the D.C. Circuit test, only the initial theft would form the gravamen of these claims; the sovereign defendants would be immune for the subsequent trafficking because it was not what "actually injured" Exxon.

Similarly, in *African Growth Corporation v. Republic of Angola*, No. 17-2469, 2019 U.S. Dist. LEXIS 120571 (D.D.C. July 19, 2019), the plaintiff sued individuals for seizing its properties and Angola for permitting the seizures and denying it due process. The district court held that the gravamen of the claims against Angola was *Angola*'s activities. *Id.* at *10-12.

• *Fraud*. Sovereign entities sometimes aid others' fraud. Indeed, examples abound. *E.g. Dale v. Colagiovanni*, 443 F.3d 425, 428-29 (5th Cir. 2006) (alleging Vatican's agent conspired in massive scheme to defraud American insurers); *Rosner v. Bank of China*, 528 F. Supp. 2d 419, 424-25 (S.D.N.Y. 2007) (sovereign bank allegedly facilitating removal of stolen funds from the U.S.). Americans are regularly injured by such schemes. Yet under the D.C. Circuit's rule, the sovereign would get off scot-free.

Take *Southway Construction Company*, where two Nigerian sovereign defendants allegedly schemed, along with other, more direct perpetrators, to defraud Colorado investors. 198 F.3d at 1212-13; *see supra* at 12. The foreign sovereigns never directly contacted the defrauded plaintiffs. *Southway v. Cent.*

Bank of Nig., 994 F. Supp. 1299, 1303-04 (D. Colo. 1998). Accordingly, the activity that most directly harmed the plaintiffs was committed by a third party. Yet the Tenth Circuit concluded that the action was based upon the sovereigns' acts and the sovereigns were not immune. 198 F.3d at 1217-18. These claims would not survive the D.C. Circuit's test.

- *Price Fixing*. State-owned enterprises sometimes conspire to fix prices. For example, in *In re Cathode Ray Tube (CRT) Antitrust Litig.*, MDL No. 1917, 2018 U.S. Dist. LEXIS 16926 (N.D. Cal. Feb. 1, 2018), a Chinese sovereign enterprise conspired with non-sovereign entities to fix television parts prices. *Id.* at *56-61. The conspiracy "allegedly resulted in overcharges of billions of U.S. dollars to [U.S.] companies." *In re Cathode Ray Tube CRT Antitrust Litig.,* 07-cv-05944-JST, 2020 U.S. Dist. LEXIS 67163, *1 (N. D. Cal. March 11, 2020). The court looked to "the anticompetitive behavior *of the [sovereign] Defendants*, as part of the broader conspiracy," 2018 U.S. Dist. LEXIS 16926, at *73 (emphasis added), and *that* behavior was commercial activity with an effect on the United States. *Id.* at *69-75. And in *Sea Breeze Salt, Inc. v. Mitsubishi Corp.*, No. CV 16-2345-DMG, 2016 U.S. Dist. LEXIS 139342 (C.D. Cal. Aug. 18, 2016), a Mexican state-owned business conspired to fix salt prices and the court looked to the "[*sovereign*'s] alleged price-fixing." *Id.* at *8-9 (emphasis added).

Neither court followed the D.C. Circuit's rule and considered whether a co-conspirator more directly injured the plaintiff. Indeed, that would be a near impossible task in a conspiracy, which, by definition, requires collective action, but typically involves

different conduct by each participant. In the price-fixing context, for example, would courts focus on the conspiracy's mastermind? The actor that sold the goods to the plaintiff? Or perhaps the actor with the biggest market share, that had the greatest effect on the price? Looking at the *defendant*'s actions is a much clearer rule, and led to both of these sovereigns facing liability for their participation in the conspiracy.

- *Contracts*. Sovereign entities frequently contract with American businesses. Where, for instance, non-contracting parties induce a breach, multiple parties could be liable under ordinary contract principles. Courts have allowed businesses to seek redress, and have not tried to identify a single wrongful commercial act as the only one claims could be based upon. *See, e.g.*, *Callejo*, 764 F.2d at 1109.

Thus, in *Petersen Energía Inversora*, Argentina expropriated investors' shares in a petroleum company, YPF, which thereby became a state entity. 895 F.3d at 207-10. Investors brought breach-of-contract claims against Argentina and YPF. While defendants argued that the breach was caused by Argentina's expropriation, which was what directly injured the plaintiffs, the court analyzed each party's acts separately, and found both entities could be sued. *Id.* at 207-11. Under the decision below, the court would have had to determine which party most directly injured the investors; only claims against that party could proceed.

- *Aircraft Accidents*. In *Sachs*, Chief Justice Roberts asked: if there was negligence in aircraft maintenance in the United States that caused a rough landing and injuries abroad, would there then

be two gravamina? Tr. of Oral Arg at 14:5-17:4, *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27 (2015).

Similar cases involving multiple actors are *not* hypothetical. Plaintiffs in air crash cases have sued both the manufacturer for defects in the plane and the airline, where the airline was state-owned, *Saunier v. Boeing Co.*, No. 13 C 8507, 2014 U.S. Dist. LEXIS 56616, *2 (N.D. Ill. April 23, 2014); *In re Air Crash near Nantucket Island, Mass., on Oct. 31, 1999*, 392 F. Supp. 2d 461, 466 (E.D.N.Y. 2005), and conversely, where the manufacturer was state-owned, *In re Air Crash Disaster Near Roselawn*, 96 F.3d 932, 935 (7th Cir. 1996). And in *Filus v. Lot Polish Airlines*, 907 F.2d 1328, 1329 (2d Cir. 1990), plaintiffs sued an airline, airline maintenance companies, and the manufacturer—each for its own negligence—where all of the companies were sovereign entities of two different countries.

Under the decision below, courts would have to determine which conduct the claim was *really* based on—the manufacture or the airline's acts? But such cases necessarily involve different gravamina for different defendants. Courts have focused on the plaintiffs' actual theory of liability, and *that defendant*'s allegedly wrongful act. *Filus*, 907 F.2d at 1333 (looking at USSR activities to assess immunity, not other entities').

- *Products Liability*. State-owned enterprises also manufacture and sell commercial goods. This is commercial activity, so when these goods injure Americans, sovereign sellers *and* manufacturers should be liable to the same extent as private parties. These cases typically involve multiple sovereign *and* private defendants, including the manufacturer and

the seller. *E.g. Vermeulen v. Renault, U.S.A., Inc.*, 985 F.2d 1534, 1543-44 (11th Cir. 1993) (denying immunity for French sovereign manufacturer). Thus, in *Rote v. Zel Custom Mfg. LLC*, No. 2:13-cv-1189, 2015 U.S. Dist. LEXIS 16700, *4-5 (S.D. Ohio Feb. 11, 2015), a plaintiff injured by an exploding rifle round sued, among others, the gun manufacturer, the gun seller, the ammunition manufacturer and the ammunition seller. The sovereign ammunition manufacturer was not immune. *Rote v. Zel Custom Mfg. LLC*, 816 F.3d 383, 387 (6th Cir. 2016).

No court has ever zeroed in on one actor in the supply chain as the "actual cause" of the harm, leaving other defendants immune. As the district court acknowledged, parsing whether the manufacturer or the seller actually injured the victim would be "difficult"; both "might bear similar levels of responsibility." Pet. App. 29a.

• *Terrorism*. State-owned entities have been accused of abetting terrorism. For instance, in *Wultz v. Islamic Republic of Iran*, 755 F. Supp. 2d 1, 18 (D.D.C. 2010), the Bank of China's U.S. branches transferred millions of dollars for members of Palestinian Islamic Jihad, which allegedly facilitated terrorist attacks in Israel, including the restaurant bombing that killed plaintiffs' decedent. Under the decision below, a state-owned entity would be immune from claims for aiding terrorism through U.S. commercial activity, because the terrorists' acts "actually injured" plaintiffs.

• *Criminal Cases.* The decision below could even hamstring the Government's prosecutions of covered entities engaged in criminal conspiracies or other joint-criminal activity. Courts have not settled

whether the FSIA applies to criminal prosecutions, but some circuits have decided cases on the assumption that it does. *United States v. Turkiye Halk Bankasi A.S.*, 16 F.4th 336, 347-48 (2d Cir. 2021); *United States v. Pangang Grp. Co., Ltd.*, 6 F.4th 946, 954 (9th Cir. 2021); *In re Grand Jury Subpoena*, 912 F.3d 623, 625, 627 (D.C. Cir. 2019). If that assumption is correct, the decision below would immunize crimes that harm our national security.

For instance, in *Turkiye Halk Bankasi*, a state-owned bank allegedly conspired with others to evade U.S. sanctions by helping Iran launder billions of dollars. 16 F.4th at 341. The decision below would have courts determine which co-conspirator most directly caused the sanctions evasion. Instead, the Second Circuit found Halkbank was not immune based on its own contributions to the conspiracy. *Id.* at 347-50; *see also, e.g.*, *Pangang Grp. Co.*, 6 F.4th at 950-51 (addressing under FSIA prosecution of Chinese state-owned companies for conspiracy to commit economic espionage by stealing U.S. company's trade secrets).

D. This case is an excellent vehicle for resolving this issue.

The FSIA question presented here is outcome-determinative of whether IFC is immune from this suit. Petitioners sued IFC for negligently funding a private project and approving the plant's dangerous design. Those allegations meet both of Section 1605(a)(2)'s requirements: IFC's conduct is commercial, and it occurred here.

1. Acts are "commercial" if they are "the type of actions by which a private party engages in . . . commerce." *Weltover*, 504 U.S. at 614 (internal

quotations and emphasis omitted). Loaning money through a commercial contract, at market-based interest rates, to a private entity is commercial activity. *See Rodriguez*, 502 F. Supp. 3d at 214 (finding acting like a bank was commercial). So is approving a business partner's design. Indeed, IFC told this Court that it "employ[s] traditional financial tools" and "cannot take sovereign acts." Br. for Respondent at 58, *Jam v. Int'l Fin. Corp.*, 139 S. Ct. 759 (2019).

2. IFC's commercial activity also had "substantial contact with the United States." 28 U.S.C. § 1603(e). IFC has never disputed that it committed the conduct petitioners challenge at its D.C. headquarters. *Supra* at 6.

E. The D.C. Circuit's interpretation of the FSIA is incorrect.

The decision below conflicts with the FSIA's plain text and obvious purpose. The FSIA does not ask courts to compare multiple tortfeasors' relative responsibility nor require that the defendant be the most direct cause of the harm. Instead, immunity turns simply on the nature and location of the "actions that the foreign state performs" (or performed). *Weltover*, 504 U.S. at 614.

1. *Text.*

a. The commercial activity exception denies immunity where "the *action* is based upon a commercial activity carried on in the United States by the foreign state." 28 U.S.C. § 1605(a)(2) (emphasis added). An "action" is short for a "cause of action"—that is, "[a] legal theory of a lawsuit." *Cause of Action*, Black's Law Dictionary (11th ed. 2019). The FSIA's

focus on the "action," as the plaintiff frames it, thus dictates that covered defendants are subject to suit when their acts *upon which their liability is alleged* constitute U.S. commercial activity.

The FSIA does not impose any additional requirement that the covered defendant must be the actor that most directly caused the plaintiff's injury. Indeed, in the words of a neighboring section of the FSIA, covered entities "are not immune from the jurisdiction of foreign courts insofar as *their* commercial activities are concerned." 28 U.S.C. § 1602 (emphasis added). And courts cannot add "unexpressed requirement[s]" to this test. *Weltover*, 504 U.S. at 618.

The D.C. Circuit never engaged with the import of the word "action." And it treated Section 1602 as just an aside about international law. Pet. App. 9a-10a. But the commercial activity exception *codifies* international law, *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 199 (2007). Indeed, Section 1602 states the FSIA's "focus." *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 825 (2018). Section 1602 confirms what is apparent in Section 1605: Immunity turns on the sovereign's own acts, not on whether another actor more directly harmed the plaintiff.

b. The D.C Circuit's rule also flouts Section 1606. That provision states that sovereigns "shall be liable in the same manner and to the same extent as a private individual under like circumstances." But the decision below shields sovereigns from whole categories of ordinary joint-liability claims commonly brought against private parties. *See supra* at 15-22.

The court of appeals thought that because Section 1606 applies to claims for which a sovereign "is not entitled to immunity," it is irrelevant. Pet. App. 10a. But Section 1606 shows that the FSIA "was not intended to affect the substantive law" governing sovereigns, *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 620 (1983), and the court's approach impermissibly does exactly that. If Congress intended the FSIA to radically limit the liability rules that apply to sovereigns, it would not have expressly stated that ordinary liability rules apply.

c. Contrary to the D.C. Circuit's assertion (Pet. App. 9a), focusing on defendant's conduct does not read "based upon" out of Section 1605. That language ensures that there is a connection between the sovereign's commercial activity in the U.S. and the activity for which the sovereign was sued: "Proof that defendants were involved on another occasion in the United States in commercial activity that has no connection with, or relationship to, the conduct which gave rise to plaintiff's cause of action will not suffice." *Gould, Inc. v. Mitsui Mining & Smelting Co.*, 947 F.2d 218, 221 (6th Cir. 1991). In other words, the "based upon" provision answers the question of *which* of the sovereign defendant's acts must be commercial conduct with a U.S. nexus: the acts upon which the action is based. It weeds out cases where the sovereign engaged in some U.S. commercial conduct, but the core of the sovereign's actionable conduct is non-commercial, *see Nelson*, 507 U.S. 349, or has no

nexus to the United States, *see Sachs*, 577 U.S. 27.[5] Neither of those scenarios is present here.

2. *Purpose.* The D.C. Circuit's holding also thwarts the FSIA's purpose. Congress enacted the FSIA to codify the "restrictive" view of sovereign immunity that the State Department had adopted. *Permanent Mission of India*, 551 U.S. at 199. The State Department's position was that foreign states' commercial activities "'do not give rise to sovereign immunity.'" *Alfred Dunhill of London, Inc.*, 425 U.S. at 698 (quoting Letter of Monroe Leigh, November 26, 1975); *accord Samantar v. Yousuf*, 560 U.S. 305, 312-13 (2010). There was no exception for commercial acts committed with others.

The D.C. Circuit's rule similarly frustrates the FSIA's operation as a proxy for personal jurisdiction. Personal jurisdiction over a covered entity is present whenever subject-matter jurisdiction is satisfied. 28 U.S.C. § 1330(b). The commercial activity exception accordingly functions as a "basic long-arm provision for obtaining personal jurisdiction." *Velidor v. L/P/G Benghazi*, 653 F.2d 812, 817 (3d Cir. 1981); *accord* H.R. Rep. No. 94-1487, at 13 (1976) (noting that the immunity exceptions of Sections 1605-07 "prescribe the necessary contacts which must exist before our courts can exercise personal jurisdiction"). Indeed, the FSIA's requirement that a claim be "based upon" the sovereign's commercial activity that has

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[5] *Sachs* and *Nelson* addressed not *whose* acts were the basis of the suit, but *which* of the *sovereign*'s acts were. *See Sachs*, 577 U.S. at 35-36 (finding gravamen of personal injury suit was *defendant*'s management of a railway, not its ticket sale); *Nelson*, 507 U.S. at 358, 361-63 (finding claim based on sovereign's torture, not its hiring).

"substantial contact" with the United States, 28 U.S.C. §§ 1603(e); 1605(a)(2); *Nelson*, 507 U.S. at 356 (quoting 28 U.S.C. § 1605(a)(2)), mirrors the test for specific jurisdiction. *See McGee v. Int'l Life Insur. Co.*, 355 U.S. 220, 223 (1957) (noting due process met for suit "based on" contract with "substantial connection" to the forum); H.R. Rep. No. 94-1487, at 13 (1976) (citing, *inter alia*, *McGee*, 355 U.S. at 223).

Yet, contrary to the D.C. Circuit's rule, personal jurisdiction inquiries ask simply whether a "defendant's suit-related conduct" has a "substantial connection" to the forum. *Walden v. Fiore*, 571 U.S. 277, 284 (2014). A "third person['s]" acts are "not an appropriate consideration." *Id.* (quotation marks omitted).

The appeals court noted that *Sachs* did not apply a personal jurisdiction-like approach. Pet. App. 10a. But *Sachs* decided *which* of *defendant*'s acts counted. That is consistent with personal jurisdiction's focus on the *defendant*'s conduct. *Sachs* did not address whether the "based upon" provision's personal jurisdiction foundation forecloses predicating immunity on third-party acts.

3. *Precedent*. The D.C. Circuit's holding that the gravamen is a third-party's conduct conflicts with this Court's precedent—specifically, its elements-based approach to the commercial activity exception—and the ordinary joint-liability principles that approach embodies. The court of appeals thought courts determine what conduct the claim is based on in some metaphysical sense, without reference to the defendant or the claim against it. Pet. App. 7a-9a. But courts must to look to "those elements of [the] claim that, if proven, would entitle [the] plaintiff to relief

under his theory of the case." *Nelson*, 507 U.S. at 357; *accord Sachs*, 577 U.S. at 33-34. A claim's elements are keyed to—and thus the claim is "based" on—the *defendant*'s conduct that allegedly makes the defendant liable, not any third-parties' acts.

Indeed, under traditional joint-liability "theor[ies] of the case," joint-tortfeasors are liable for their *own* conduct. *See, e.g.*, Restatement (Second) of Torts (hereinafter "Restatement") §§ 302, 302A, 302B & cmt. H, 876 (1965). Conspiracy and aiding and abetting claims, for example, hold defendants liable for *their* concerted action with the direct perpetrator. Restatement § 876; *Overseas Priv. Inv. Corp. v. Industria de Pesca, N.A., Inc.*, 920 F. Supp. 207, 210 (D.D.C. 1996) (gravamen of aiding and abetting is *defendant*'s assistance to another's breach). Likewise, defendants are liable for their *own* negligence that "allowed [someone else's] foreseeable [tort]." *Sheridan v. United States*, 487 U.S. 392, 401 (1988). Such cases involve "two tortious acts": the directly harmful conduct, and the acts of others who allowed it to occur. *Id.* at 398, 403; *accord* Restatement §§ 447-49 (explaining that negligent or tortious acts of third party do not absolve another negligent party of liability). Thus, each defendant's conduct is the basis of the claim against *that defendant*.

Of course, a sovereign's conduct can be too attenuated from the harm for liability. But such cases should fail on the *merits*. *Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1129 (D.C. Cir. 2004). That is, if a plaintiff seeks recovery based on conduct that is too remote from its injuries, then a court can dismiss the case for lack of causation or the

like. But the FSIA provides no basis for dismissing such claims on the ground of immunity.

4. *Administrability*. This Court has admonished that "jurisdictional rules should be clear." *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 621 (2002). Courts "place primary weight upon the need for judicial administration . . . to remain as simple as possible." *Hertz Corp. v. Friend*, 559 U.S. 77, 80 (2010). Indeed, the FSIA was passed in part because the immunity rules were unclear. *Opati v. Republic of Sudan*, 140 S. Ct. 1601, 1605 (2020). The State Department likewise supports "clear, reasonable, and workable [immunity] rule[s]" rather than "uncertain ad hoc inquir[ies]." Br. for the United States as Amicus Curiae Supporting Respondents 11, *Weltover*, 504 U.S. 607, 1992 WL 12012096 (1992).

The D.C. Circuit's approach is anything but clear or simple. Conducting some undefined comparative analysis of two or more responsible parties' conduct to determine whether the claim is *really* "based upon" a third party's conduct rather than the defendant's would be complex and indefinite. In fact, the district court acknowledged that where multiple parties "bear similar levels of responsibility," "it would be difficult to discern" whose conduct is the gravamen. Pet. App. 29a. This is no way to conduct a threshold jurisdictional inquiry. Better to stick with the FSIA's plain directive to focus exclusively on the named defendant's alleged conduct, and to let substantive law, joint-liability, and other doctrines sort out the rest on the merits.

II. This Court should make clear that express waivers of international organizations' immunity should be enforced according to their plain text.

This Court's intervention is separately warranted because the D.C. Circuit's judicially-created test for determining whether an organization has waived its immunity conflicts with the plain text of the IOIA. This issue affects a number of organizations, including IFC, with express waivers in their founding treaties. And it overwhelmingly arises in the D.C. Circuit, where many international organizations are based. The issue is too important to be left to D.C. Circuit precedent that even that court concedes "is a bit strange," Pet. App. 74a, and that "lacks a sound legal foundation and is awkward to apply," *id.* 83a (Pillard, J., concurring).

1. All international organizations have founding agreements that reflect their member states' judgment as to the immunities the organization needs. Like several other international organizations, IFC's Articles state that "[a]ctions may be brought against the Corporation." IFC Articles of Agreement art. VI § 3.[6] This provision prohibits suits by member states, but the "broad language" otherwise "contain[s]

[6] *See also, e.g.*, Agreement Establishing the European Bank for Reconstruction and Development art. 46, May 29, 1990, 29 I.L.M. 1077; Agreement Establishing the Inter-American Investment Corporation art. VII, Nov. 19, 1984, T.I.A.S. No. 12087; Agreement Establishing the Inter-American Development Bank art. XI § 2, Apr. 8, 1959, 10 U.S.T. 3029; Articles of Agreement of the International Bank for Reconstruction and Development art. VII § 3, Dec. 27, 1945, 60 Stat. 1440.

no exceptions." *Osseiran v. Int'l Fin. Corp.*, 552 F.3d 836, 839-40 (D.C. Cir. 2009).

Where, as here, a treaty plainly waives immunity, that express waiver must be honored. The IOIA provides in no uncertain terms that international organizations "may expressly waive their immunity." 22 U.S.C. § 288a(b). Consequently, when the D.C. Circuit first addressed a treaty waiver like the one at issue here, it held that the plain text waived immunity "in broad terms," allowing suit by anyone except member states. *Lutcher S.A. Celulose e Papel v. Inter-Am. Dev. Bank*, 382 F.2d 454, 457 (D.C. Cir. 1967). And the D.C. Circuit acknowledged in *this* case that "read literally," the provision "would seem to include a categorical waiver." Pet. App. 73a. That is consistent with how the State Department read identical language when it was originally drafted, noting the World Bank "will be subject to a suit." U.S. Dep't of State, Constitutionality of the Bretton Woods Agreement Act 90 (1945).

But instead of continuing after *Lutcher* to enforce treaty waivers according to their terms, the D.C. Circuit subsequently gave itself the power, where it deemed it advisable, to "read a qualifier into" treaty language, *Osseiran*, 552 F.3d at 839. In *Mendaro v. World Bank*, 717 F.2d 610 (D.C. Cir. 1983), the D.C. Circuit held that it would not enforce waivers unless the organization would receive a "corresponding benefit" from being subject to suit. *Id.* at 617. And the court of appeals applied that limitation here, refusing to enforce IFC's waiver because it did not believe this is "the type of suit by the type of plaintiff that would benefit the organization over the long term." Pet.

App. 73a (quotation marks and emphasis omitted); *see also, e.g.*, *Atkinson*, 156 F.3d at 1338-39 (same).

The IOIA's approval of "express[] waive[rs]," 22 U.S.C. § 288a(b), precludes such judicial policymaking. The statute contains no exception allowing U.S. judges to second-guess treaties' drafters and decline to apply an express waiver where they believe that the suit will not "benefit" the organization. Instead, the ordinary rules of treaty construction apply. And under those rules, a treaty's plain text controls. *See, e.g.*, *GE Energy Power Conversion Fr. SAS, Corp. v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637, 1645 (2020).

In short, the D.C. Circuit's "corresponding benefit" test is a relic from an age when courts felt more free to depart from text. The court of appeals breezed past the waiver's plain text to what it believed to be immunity's "underlying purposes," *Mendaro*, 717 F.2d at 615, and assumed the drafters were careless, suggesting the plain text would result in "inadvertent[]" waiver. *Id.* at 617. We now know this methodology is untenable. The drafters' purpose is generally "expressed by the ordinary meaning of the words used." *Jam*, 139 S. Ct. at 769 (quotation marks omitted). What's more, organizations' assessments of costs and benefits "are more reliably reflected in their charters and policies—here, in the broad waiver included in IFC's Articles of Agreement—than in their litigation positions defending against pending claims." Pet. App. 85a (Pillard, J., concurring).

2. Review is especially warranted because the D.C. Circuit's waiver test makes no sense after this Court's decision in *Jam.* The D.C. Circuit crafted its

test under the erroneous assumption that the IOIA confers absolute immunity. Against that backdrop, the court of appeals reasoned that the key goal of waiver was to permit claims regarding "commercial transactions." Pet. App. 74a; *Mendaro*, 717 F.2d at 618. If counterparties could not enforce the organizations' contracts, the reasoning went, they would be less likely to contract at all; immunity would "hobble its ability to perform the ordinary activities of a financial institution operating in the commercial marketplace." *Mendaro*, 717 F.2d at 618.

But this Court's holding that IOIA immunity is *not* absolute, but instead mirrors sovereign immunity, *Jam*, 139 S. Ct. at 768-72, makes tailoring waiver to such commercial interests unnecessary. *See* Pet. App. 87a (Pillard, J., concurring). The FSIA contains a commercial activities exception, which addresses any concerns about organizations' ability to contract. Nevertheless, the D.C. Circuit has steadfastly clung to its "corresponding benefit" test, even after this Court rejected its absolute immunity rule. *Id.* 11a. Now that this Court has knocked the pins out from under the "corresponding benefit" test, this Court should assess whether the D.C. Circuit's test is warranted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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