No. 22-886

In the Supreme Court of the United States

BLENHEIM CAPITAL HOLDINGS LTD., ET AL., PETITIONERS

v.

LOCKHEED MARTIN CORPORATION, ET AL.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. 1330, 1602 *et seq.*, a foreign sovereign is immune from civil suit in United States courts, with only limited exceptions. One exception, the commercial-activity exception, applies when the plaintiff's claim is "based upon" the "commercial activity" of the foreign sovereign. 28 U.S.C. 1605(a)(2).

In this case, petitioners sued respondents in federal court for claims related to the Republic of Korea's (South Korea's) purchase of F-35 fighter jets and a military satellite. South Korea could buy the fighter jets only through the Foreign Military Sales (FMS) program, a special U.S. government program that requires that the transaction be between two sovereigns (rather than between the foreign sovereign and a manufacturer) and that the President find the transaction to be in the interests of national security.

The question presented is whether South Korea's procurement of the F-35 fighter jets and military satellite through an FMS transaction is "commercial activity" that could provide an exception to sovereign immunity under the FSIA, 28 U.S.C. 1605(a)(2).

CORPORATE DISCLOSURE STATEMENT

Lockheed Martin Corporation does not have a parent corporation. State Street Corporation is the only publicly held company that owns 10% or more of Lockheed Martin Corporation's stock.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-26) is reported at 53 F.4th 286. The order of the district court (Pet. App. 27-46) is not published in the *Federal Supplement* but is available at 2021 WL 4708767.

JURISDICTION

The judgment of the court of appeals was entered on November 15, 2022. A petition for a rehearing was denied on December 13, 2022 (Pet. App. 47). The petition for a writ of certiorari was filed on March 13, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners sued respondents in federal district court, bringing state tort claims related to the Republic of Korea's procurement of F-35 fighter jets and a military satellite. Petitioners alleged that the district

court had subject-matter jurisdiction over those claims under the commercial-activity exception to the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. 1605(a)(2). The district court held that the commercial-activity exception does not apply, Pet. App. 41-42, and the court of appeals affirmed, *id.* at 21.

A. Legal Background

1. The FSIA "provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country." *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 355 (1993) (internal quotation marks omitted). Under the FSIA, a foreign state is "presumptively immune" from civil suit, unless the claim against it comes within one of the limited exceptions to immunity set out in the statute. *Ibid.*; see 28 U.S.C. 1605-1607.

Petitioners invoke the FSIA's "commercial activity" exception. Under that exception, a foreign government is not immune from suit when the suit is "based upon" that government's "commercial activity" and that activity has a sufficient connection to the United States. 28 U.S.C. 1605(a)(2). The theory behind the exception is that foreign sovereigns have immunity for their "sovereign or public acts," but not for acts "that are private or commercial in character." *Nelson*, 507 U.S. at 359-360. In determining whether an act comes within the commercial-activity exception, a court asks whether the foreign sovereign "exercise[d] only those powers that can also be exercised by private citizens, as distinct from those powers peculiar to sovereigns." *Id.* at 360 (internal quotation marks omitted).

2. This case involves the sale of highly regulated military equipment by the United States to the government of the Republic of Korea (South Korea)

through the Foreign Military Sales (FMS) program. Pet. App. 13.

Under the Arms Export Control Act, 22 U.S.C. 2751 *et seq.*, foreign governments can purchase military equipment from the United States under one of two programs. *Secretary of State for Def.* v. *Trimble Navigation Ltd.*, 484 F.3d 700, 703 (4th Cir. 2007). Under the Direct Commercial Sales (DCS) program, the foreign government purchases the equipment directly from the manufacturer. *Ibid.* Under the FMS program, the foreign government purchases the equipment from the U.S. government. *Ibid.* Only the FMS program is at issue in this case.

The FMS program only allows sovereign-to-sovereign sales. U.S. Dep't of Def., Def. Sec. Coop. Agency, *Security Assistance Management Manual* § C4.1 (2012) (*SAMM*); see U.S. Dep't of Def., Def. Sec. Coop. Agency, *Security Cooperation Management* 15-1 (2022) (*Green Book*). No private party can buy equipment through the FMS program. *Green Book* 5-1.

Some particularly sensitive military equipment can only be sold through the FMS program. *SAMM* §§ C4.3.4-.5. That includes the fighter jets at issue in this case. Pet. App. 15-16. The President makes the decision about what equipment can only be sold through the FMS program. *SAMM* § C4.3.5.

The U.S. government exercises complete control over sales through the FMS program. The U.S. government is the seller of the equipment, and the foreign government negotiates only with the U.S. government about the price and terms of the sale. *SAMM* § C5.4.1. The U.S. government provides the equipment either from its own inventory or by purchasing the equipment from the manufacturer. *Green Book* 1-2. The U.S. government separately negotiates the price and

terms of its agreement with the manufacturer. *Id.* at 15-8. The manufacturer thus "has no direct contractual relationship" with the foreign government. *Id.* at 9-3. If the foreign government is dissatisfied with the equipment, it cannot sue the manufacturer but instead must engage in bilateral consultations with the U.S. government. *SAMM* fig. C5.F4 § 7.2.

A sale under the FMS program reflects "the President's and Congress's judgment on national security concerns." Pet. App. 17; see *SAMM* §§ C4.1-3. The President authorizes each individual sale, and he can do so only after finding that the sale "will strengthen the security of the United States and promote world peace"; that the foreign government will "maintain the security" of the equipment; that the foreign government will use the equipment only for legitimate purposes; and that the foreign government will not transfer the equipment to any other country without prior consent from the United States. 22 U.S.C. 2753(a), 2754. The President must notify Congress when a sale is over a certain dollar amount, and Congress can block the sale. 22 U.S.C. 2753(d). A foreign government may not participate in the FMS program if it provides support to terrorists, fails to take adequate steps to prevent the production or transportation of illicit drugs, proliferates nuclear weapons technology, or fails to combat human trafficking. *E.g.*, 22 U.S.C. 2152d, 2371, 2291j, 2799aa.

An FMS sale can include an offset, which is a benefit provided to the foreign sovereign in addition to the principal equipment it purchases. *Green Book* 9-19. Although the foreign sovereign negotiates the offset directly with the manufacturer, the offset becomes part of the overall FMS transaction. *Id.* at 9-20 to -21; see *SAMM* § C6.3.9. The U.S. government must authorize the inclusion of any offset in an FMS sale, and

the costs of any offset are built directly into the FMS contract between the U.S. government and the foreign sovereign. *Green Book* 9-21 to -22.

B. Factual Background

1. The F-35 is a state-of-the-art stealth fighter jet that includes many highly sensitive and classified technologies. Pet. App. 5. It is available to foreign allies only through the FMS program. *Id.* at 6.

South Korea entered into an FMS contract with the U.S. government to acquire 40 F-35 jets that would be manufactured by respondent Lockheed Martin. Pet. App. 3. South Korea and Lockheed Martin agreed that Lockheed Martin would provide South Korea with a military satellite as an offset. *Ibid.* South Korea needed the military satellite to be able to engage with the F-35 fighter jets. *Id.* at 16.

The U.S. government approved the sale of the F-35 jets and the satellite. Pet. App. 8. South Korea paid the U.S. government approximately $7 billion for the fighter jets and the satellite, and the U.S. government then separately disbursed the funds to Lockheed Martin. *Id.* at 3, 16.

2. Lockheed Martin would provide the jets itself, but decided to procure the satellite elsewhere. It originally worked with petitioners Blenheim Capital Holdings Ltd. and Blenheim Capital Partners Ltd. (collectively Blenheim) to do so. Pet. App. 6. Blenheim's business is to broker offset transactions for international defense contracts. *Id.* at 5.

Blenheim and Lockheed Martin entered into an agreement to obtain the satellite from Airbus Defense and Space SAS (Airbus). Pet. App. 5. Under that agreement, Blenheim would obtain three satellites from Airbus – the military satellite for South Korea and two commercial satellites that Blenheim would

keep for itself. *Id.* at 5-6. Lockheed Martin would pay Blenheim $150 million in installments, and Blenheim would secure financing to pay the rest of the cost of the satellites. *Ibid.* Blenheim would then use the money it expected to make operating the two commercial satellites to recover those costs. *Ibid.*

Blenheim defaulted on its obligations under its agreement with Lockheed Martin. C.A. App. 258. Lockheed Martin made its initial installment payment of $45 million, *id.* at 90, but Blenheim was unable to raise any of the financing needed to pay for the satellites, *id.* at 258. Because of that default, Lockheed Martin terminated the parties' agreement, *id.* at 254, and instead contracted directly with Airbus to procure the military satellite for South Korea, Pet. App. 8. That ultimately cost Lockheed Martin much more than the $150 million it would have paid under its agreement with Blenheim. C.A. App. 257.

C. Procedural History

1. Blenheim sued Lockheed Martin, Airbus, and the government of South Korea and its Defense Acquisition Program Administration (collectively South Korea) in federal district court, bringing federal antitrust and state tort claims. Pet. App. 4, 28. It alleged that Lockheed Martin, Airbus, and South Korea conspired to "cut Blenheim out" of the transaction to buy the satellite. *Id.* at 7 (quoting Compl. ¶ 11). It invoked federal-question jurisdiction for the federal antitrust claim, Compl. ¶ 21; see 28 U.S.C. 1331; the FSIA's commercial-activity exception for its state tort claims against South Korea, Compl. ¶ 22; see 28 U.S.C. 1330, 1605(a); and supplemental jurisdiction for its state tort claims against Lockheed Martin and Airbus, Compl. ¶ 31; see 28 U.S.C. 1367(a).

South Korea has never participated in these proceedings because Blenheim did not serve it in a timely manner. Pet. App. 28; see Pet. ii. Lockheed Martin and Airbus moved to dismiss the complaint for lack of subject-matter jurisdiction (for the state tort claims) and for failure to state a claim (for the federal antitrust claim). Pet. App. 4.

2. The district court granted the motions to dismiss. See Pet. App. 27-46. It held that the FSIA's commercial-activity exception did not apply here for two reasons. *Id.* at 41-46.

First, the district court held that South Korea's conduct was not "commercial activity." Pet. App. 45-46. It explained that the commercial-activity exception "is limited to those cases in which a state exercises only those powers that can be exercised by private citizens." *Id.* at 45 (citing *Nelson*, 507 U.S. 349). The court explained that because the transaction here was "sovereign-to-sovereign" and "South Korea could not purchase the F-35 fighter jets through a direct commercial sale," South Korea had not engaged in commercial activity. *Ibid.*

Second, the district court held that Blenheim's claims are not "based upon" South Korea's alleged commercial activity (its procurement of the fighter jets and satellite). Pet. App. 46. The court explained that the "the gravamen of Blenheim's suit" is Airbus's, Lockheed Martin's, and South Korea's supposed "tortious interference" with Blenheim's contracts with Lockheed Martin and with Airbus, not South Korea's activities in procuring the fighter jets and satellite. *Id.* at 46.[1]

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[1] The court also rejected Blenheim's antitrust claim as time-barred, Pet. App. 32-33, and as impermissibly extraterritorial,

3. The court of appeals affirmed. Pet. App. 1-26. It agreed that South Korea's purchase of F-35 fighter jets and the related military satellite is not "commercial activity" under the FSIA, and so Blenheim's claims cannot proceed in federal court. *Id.* at 14-21.

The court of appeals explained that whether a foreign sovereign's activity is "commercial activity" depends on whether the sovereign is "engag[ing] in a transaction particular to sovereigns" or a transaction in which private parties can engage. Pet. App. 15 (citing *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607, 614 (1992)). The court noted that only a sovereign could purchase the F-35 fighter jets, and it could only do so in a sovereign-to-sovereign sale through the FMS program. *Id.* at 15-17. The jets "involved highly advanced technology" that could be sold only "with the approval and supervision of the U.S. government." *Ibid.* The sale was "not activity directed or influenced by the market," but instead "by the President's and Congress's judgment on national security concerns." *Id.* at 17. No private party could "engage in such a procurement, whether as a buyer or seller." *Ibid.* The court accordingly concluded that a sale under the FMS program cannot be considered "commercial activity." *Ibid.*

The court of appeals rejected Blenheim's argument that any buying or selling of goods by a foreign sovereign is commercial activity. Pet. App. 14. It explained that "Blenheim's definition of commercial activity is made at too general a level" and would "essentially encompass every purchase or sale of goods involving a

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id. at 36-39. The court of appeals affirmed those holdings, *id.* at 21-26, and Blenheim does not challenge them in its certiorari petition, see Pet. i.

foreign sovereign." *Ibid.* The court also rejected Blenheim's argument that it should look only at the procurement of the military satellite, and not the procurement of the fighter jets, explaining that Blenheim itself recognized that the satellite offset was a "necessary and integral part of the procurement by South Korea of the F-35s" through the FMS transaction. *Id.* at 18-19.

Because it concluded that South Korea did not engage in "commercial activity," the court of appeals did not review the district court's additional holding that Blenheim's claims are not "based upon" South Korea's alleged commercial activity. See Pet. App. 21.

4. Blenheim filed a petition for rehearing en banc, which the court of appeals denied, with no judge requesting a poll on the petition. Pet. App. 47.[2]

Blenheim since has settled its claims with Airbus. See Ltr. from Hamish Hume, Counsel for Petitioners, to Scott S. Harris, Clerk of the Court (May 23, 2023).

ARGUMENT

Blenheim renews its contention (Pet. 25-28) that South Korea's procurement of F-35 military jets through the FMS program and of a related military satellite as an offset is "commercial activity" under the FSIA. The court of appeals' decision is correct and does not conflict with any decision from another circuit. Indeed, the only other court of appeals that has considered an FMS transaction like this one agreed that the transaction was not commercial activity but

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[2] Blenheim then brought materially identical claims against Lockheed Martin and Airbus in state court. See Compl., *Blenheim Cap. Holdings Ltd.* v. *Lockheed Martin Corp.*, No. CL22-4769 (Cir. Ct. for Arlington Cnty., Va. filed Dec. 22, 2022). That case is stayed pending the disposition of this petition.

instead was quintessentially sovereign conduct. Further, the question presented does not arise with great frequency, and this case would be a poor vehicle for addressing it in any event. Further review is therefore unwarranted.

I. THE COURT OF APPEALS' DECISION IS CORRECT

A. The Transaction At Issue Was Not Commercial Activity

1. The FSIA provides foreign sovereigns with immunity from suit in federal court. See 28 U.S.C. 1330, 1604. It contains a few limited exceptions, including the "commercial activity" exception at issue here. That exception applies when the suit is based on "a commercial activity carried on in the United States by the foreign state," "an act performed in the United States in connection with a commercial activity of the foreign state elsewhere," or "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. 1605(a)(2).

The FSIA defines "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act." 28 U.S.C. 1603(d). The statute instructs that "[t]he 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." *Ibid.*

This Court has explained how to determine when a foreign state engages in "commercial activity." A foreign state "engages in commercial activity * * * where it exercises 'only those powers that can also be exercised by private citizens, as distinct from those

powers peculiar to sovereigns.'" *Nelson*, 507 U.S. at 360 (quoting *Weltover*, 504 U.S. at 614). Or, in other words, "a foreign state engages in commercial activity * * * only where it acts 'in the manner of a private player within the market.'" *Ibid.* (quoting *Weltover*, 504 U.S. at 614). The Court emphasized that question is one "of behavior, not motivation": "[T]he issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in trade and traffic or commerce." *Id.* at 360-361 (quoting *Weltover*, 504 U.S. at 614).

2. The court of appeals correctly articulated and applied that definition of "commercial activity" in this case. Pet. App. 15-18. It recognized that when South Korea purchased the F-35 fighter jets and military satellite through the FMS transaction, it was not acting like a private player in the market but instead was engaging in a transaction unique to sovereigns. *Id.* at 18.

To begin with, only foreign governments can participate in the FMS program; private parties do not participate in any capacity. Pet. App. 15; see 22 U.S.C. 2753(a). Because the F-35 fighter jets at issue here are available only through the FMS program, Pet. App. 15-16, only foreign governments can procure them. Similarly, the military satellite at issue has "next-generation capabilities," including the ability to "engag[e] with the F-35s," so its purchase also was limited to foreign governments. *Ibid.* The ability to buy F-35 fighter jets and the military satellite thus are "powers peculiar to sovereigns." *Nelson*, 507 U.S. at 360; see Pet. App. 15-16.

Further, FMS transactions have a "special contract structure" that is entirely unlike that of private transactions. Pet. App. 17. FMS sales are exclusively

between the foreign government and the U.S. government. *Id.* at 16; see *Green Book* 1-2, 15-6 fig.15-1. The U.S. government determines the price and conditions of the sale. *BAE Sys. Tech. Sol'n & Servs., Inc.* v. *Republic of Korea's Def. Acquisition Program Admin.*, 884 F.3d 463, 468 (4th Cir. 2018). If the foreign government is dissatisfied with the equipment, its only recourse is to engage in bilateral consultations with the U.S. government. *Ibid.* Thus, the foreign government in an FMS contract engages solely in government-to-government conduct, which is "*not* akin to that of participants in a marketplace." *Cicippio* v. *Islamic Republic of Iran*, 30 F.3d 164, 168 (D.C. Cir. 1994). This is unlike in a DCS transaction, where the foreign government contracts directly with the private manufacturer. *Trimble*, 484 F.3d at 703.

Each sale through the FMS program "reflects the national security interests of the United States," *Trimble*, 484 F.3d at 707, rather than market forces, Pet. App. 17. The President must authorize each sale, and Congress may veto larger sales (including the one at issue here). 22 U.S.C. 2753(c). The President can only authorize the sale if he determines that the sale is in the interests of national security and furthers the foreign policy objectives of the United States. 22 U.S.C. 2751, 2753(a).

Under all of these circumstances, the court of appeals correctly concluded that "the offset transaction in this case was not the type of activity in which a private party could have participated" and "South Korea did not act in the manner of a private party in its procurement of the F-35s and the military satellite." Pet. App. 21; *see id.* at 17-18. Notably, the only other court of appeals that has considered whether engaging in an FMS transaction constitutes commercial activity reached the same conclusion. See *Heroth* v. *Kingdom*

of Saudi Arabia, 331 F. App'x 1, 3 (D.C. Cir. 2009) (per curiam) (unpublished).

B. Blenheim's Arguments Lack Merit

1. Blenheim's primary argument (Pet. 25, 33-34) is that the satellite offset portion of the FMS transaction should be considered "commercial activity" that is separate from the purchase of the fighter jets. In its view, "the satellite transaction is commercial because a private person or corporation could purchase satellites from Airbus." Pet. App. 18.

The court of appeals correctly rejected that argument. Pet. App. 18-19. As it explained, Blenheim's own allegations make clear that the satellite offset was a "necessary and integral" part of the FMS transaction – the F-35 fighter jets and the military satellite were a package deal. *Ibid.*; see Compl. ¶ 45 (alleging that satellite offset "ar[o]se from the FMS" transaction). The complaint also acknowledged that South Korea acquired the satellite "through the FMS process"; that the acquisition was "facilitated by" the U.S. Department of Defense; and that it required the U.S. government's "approval." Compl. ¶¶ 27-28, 34-35, 46, 176.

The U.S. government completely controlled the agreement between South Korea and Lockheed Martin to procure the military satellite, even though it was not a party to that agreement. Pet. App. 19. The procurement of the satellite occurred as part of the FMS transaction. *Id.* at 5-6. The satellite itself involved military technologies that are not available on commercial satellites. *Id.* at 16. The U.S. government had to approve the inclusion of the satellite into the offset transaction. *Ibid.* The U.S. government specifically included the cost of the satellite in its contract

with South Korea. *Ibid.* And the payment for the satellite passed through the U.S. government. *Ibid.* As Blenheim itself acknowledged in the complaint, "all monetary transactions flow[ed] through the Pentagon." *Id.* at 19 (quoting Compl. ¶ 40) (emphasis omitted).

Blenheim cites (Pet. 33-34) Department of Defense guidance stating that an offset transaction is "an international business arrangement" that "is strictly between the Purchaser and the U.S. defense contractor." *Green Book* 8-7, 9-1. The point of that language is just that the U.S. government is not responsible for performance under the offset agreement: "The [U.S. Government] assumes no obligation to administer or satisfy any offset requirements or bear any of the associated costs." *Id.* at 9-22. The guidance does not say that the offset agreement exists independently of the FMS transaction. To the contrary, it recognizes that the offset is an integral part of the FMS transaction, and the costs for the offset are included in the FMS contract between the foreign sovereign and the U.S. government. See *id.* at 9-20 to -22.

2. Blenheim makes three other arguments in support of its view of commercial activity. Each is mistaken.

a. Blenheim argues (Pet. 15-16, 28-29) that this Court's decision in *Weltover* supports its view. But *Weltover* is nothing like this case: *Weltover* involved bonds that Argentina had issued on the open markets – the same type of "garden-variety debt instruments" that private companies issue on the same markets – and so this Court held that Argentina had engaged in commercial activity. 504 U.S. at 609-610, 614-617. Here, no private party could use the FMS program or purchase the F-35 fighter jets or the military satellite at issue. Pet. App. 17.

Blenheim quotes (Pet. 16) one sentence from *Weltover*, but it reads too much into the language. To illustrate the distinction between uniquely sovereign powers and powers that private citizens also can exercise, the *Weltover* Court gave a number of examples, including that "a contract to buy army boots or even bullets is a 'commercial' activity, because private companies can similarly use sales contracts to acquire goods." 504 U.S. at 614-615.

Blenheim interprets this language to hold that *any* contract to acquire military goods is commercial activity. But the Court did not say that. It was making the general point that selling goods that anyone can buy is commercial activity. The Court was not assessing any particular sales contract, and especially not the one here, which can only be done by sovereigns, must be approved by the President, and reflects the national security and foreign policy objectives of the U.S. government. Pet. App. 17.

Further, the *Weltover* Court carefully compared the characteristics of Argentina's bonds with bonds offered by private companies before concluding that Argentina had engaged in commercial activity. 504 U.S. at 614. That analysis would not have been necessary under Blenheim's view of commercial activity, because under that view, all that would have mattered was that Argentina was raising debt. See Pet. 16. So *Weltover* does not help Blenheim.

b. Second, Blenheim relies (Pet. 17) on the FSIA's legislative history. It quotes (*ibid.*) a House Report stating:

> As the definition [of "commercial" in 28 U.S.C. 1603(d)] indicates, the fact that goods or services to be procured through a contract are to be used for a public purpose is irrelevant; it is

> the essentially commercial nature of an activity or transaction that is critical. Thus, a contract by a foreign government to buy provisions or equipment for its armed forces or to construct a government building constitutes a commercial activity.

H. Rep. No. 1487, 94th Cong,. 2d Sess. 16 (1976) (House Report).

Blenheim contends (Pet. 17) that the last sentence in that passage establishes that every contract for military equipment is commercial activity. But as the context makes clear, that sentence is making a different point – that the foreign government's purpose in entering the transaction is irrelevant. The House Report does not say that every contract to purchase goods is commercial activity, much less a sovereign-to-sovereign sale like the one here. Indeed, it elsewhere states that a sales contract is commercial if it is "of the same character as a contract which might be made by a private person," House Report 16 – the same standard the court of appeals applied here, Pet. App. 14-15.

c. Blenheim also cites (Pet. 17, 29-32) the European Convention on State Immunity – a treaty to which the United States is not a signatory. That convention provides that a foreign state is not immune from suit when it engages in commercial activity "in the same manner as a private person." European Convention on State Immunity art. 7(1), May 16, 1972, E.T.S. No. 74. Blenheim relies (Pet. 31-32) on an explanatory note to the convention, which states that in considering whether a government is acting in the same manner as a private person, a court should not consider whether a private party would have been

prohibited from engaging in the same activity as the sovereign. Explanatory Report to the European Convention on State Immunity art. 7 ¶ 37, May 16, 1972, E.T.S. No. 74.

The European Convention is a treaty that the United States has not signed and that is not at issue here. Further, the text of the convention supports Lockheed Martin's position: It states a test that is similar to the one used by this Court, see *Nelson*, 507 U.S. at 359, and applied by the court below, see Pet. App. 15-18.

Blenheim is not relying on the text of the convention, but merely on an explanatory note. Even if it were appropriate for Blenheim to rely on that note, that would not get Blenheim anywhere. The only effect would be to say that the courts below should not have given weight to the facts that private parties cannot purchase F-35 fighter jets or the military satellite or participate in the FMS program. See Pet. App. 15. Even without those undisputed facts, many other facts establish that South Korea was engaging in uniquely sovereign activity. For example, private buyers and sellers do not set up transactions where the U.S. government first takes title to the goods and that require the express authorization of the President. *Id.* at 17.

3. At bottom, Blenheim takes an extreme view of the commercial-activity exception. It contends (Pet. 27) that any transaction that involves the purchase of goods pursuant to a contract is "commercial activity" because private parties also enter into contracts to purchase goods. In its view, the sovereign nature of an FMS transaction and related offset is irrelevant – all that matters is that South Korea ultimately was purchasing goods. *Id.* at 26-27.

The court of appeals correctly rejected that extreme view. As the court explained, "Blenheim's definition of commercial activity is made at too general a level" and would cause the exception to swallow the rule. Pet. App. 14. Cast at the level of abstraction Blenheim proposes, all government conduct (other than enacting legislation) would be commercial activity, because all government conduct can be reduced to employing personnel, buying goods, and contracting for services – actions that private parties also perform. Courts consistently have refused to apply the commercial-activity exception in those broad terms. E.g., *Butters* v. *Vance Int'l, Inc.*, 225 F.3d 462, 466 (4th Cir. 2000) (holding that the employment of security guards for a foreign head of state is not commercial activity).

Blenheim argues (Pet. 33-34) that its rule is more administrable than the court of appeals' approach. That is true only in the sense that Blenheim's rule is extreme and absolute – under its view, any transaction that could be characterized as involving the sale of goods is commercial activity. Besides, Blenheim's rule cannot be reconciled with the statute Congress enacted – which directs courts to look at the particular "nature of the course of conduct," 28 U.S.C. 1603(d) – or this Court's interpretation of the statute – which distinguishes between "those powers that can also be exercised by private citizens" and "those powers peculiar to sovereigns," *Nelson*, 507 U.S. at 360.

II. NO CIRCUIT CONFLICT EXISTS

A. No Disagreement Exists In The Courts Of Appeals

1. Blenheim argues (Pet. 18-25) that the decision below conflicts with decisions from the Fifth, Eighth, Ninth, and Eleventh Circuits, which each held that a

foreign government's purchase of some type of military goods was commercial activity. None of the cited decisions addressed whether a sale through the FMS program between the U.S. government and a foreign sovereign of equipment that only sovereign governments could purchase was commercial activity, and each is distinguishable.

McDonnell Douglas Corp. v. *Islamic Republic of Iran*, 758 F.2d 341 (8th Cir.), cert. denied, 474 U.S. 948 (1985), involved a contract between a private company, McDonnell Douglas, and the pre-revolutionary Iranian government for spare parts for military jets. *Id.* at 343. The Iranian government had procured the jets through an FMS contract, but the only contract at issue was the separate, direct contract between McDonnell Douglas and Iran to allow Iran to buy spare parts. *Id.* at 343 n.2. The Eighth Circuit held that Iran's buying spare parts under that contract was "commercial activity" because it was a regular contract for the sale of goods directly between a manufacturer and a purchaser, one that any private party could sign. *Id.* at 348-349. The Eighth Circuit did not hold that *any* contract to procure military equipment, no matter the type or circumstances, constitutes commercial activity. And the court did not address whether claims related to the separate FMS contract would fall into the commercial-activity exception.

UNC Lear Services, Inc. v. *Kingdom of Saudi Arabia*, 581 F.3d 210 (5th Cir. 2009), cert. denied, 559 U.S. 971 (2010), involved a transaction that was materially the same as in *McDonnell Douglas*. The Saudi Arabian government bought fighter jets from the United States under the FMS program, and then contracted directly with private service providers, including the plaintiff, to maintain and support the jets. *Id.*

at 212. The claims at issue related solely to the separate maintenance contract between Saudi Arabia and the plaintiff. *Ibid*. Citing *McDonnell Douglas*, the Fifth Circuit held that the separate maintenance contract constituted commercial activity, because the contract was a regular commercial contract between the plaintiff and Saudi Arabia. *Id.* at 216-218. The court did not consider claims arising out of an FMS transaction.

Further, the Fifth Circuit separately held that a different contract between the plaintiff and Saudi Arabia, under which the plaintiff sent personnel to Saudi Arabia to provide training and support to the Royal Saudi Air Force, was *not* commercial activity, because it concerned services "vital to the operation of a national air defense system" that a private party could not undertake. 581 F.3d at 213, 216-217. That contract is much closer to the one at issue here.

Ministry of Defense & Support for Armed Forces of Islamic Republic of Iran v. *Cubic Defense System, Inc.*, 385 F.3d 1206 (9th Cir. 2004), rev'd on other grounds sub nom. *Ministry of Defense & Support for the Armed Forces of the Islamic Republic of Iran* v. *Elahi*, 556 U.S. 366 (2009), involved a contract that the pre-revolutionary Iranian government entered into with a private company to obtain training equipment for military aircraft. *Id.* at 1211. The Ninth Circuit held that the contract was commercial activity. *Id.* at 1219-1220. Again, the contract at issue was a direct contract between the supplier and its customer, not an FMS contract between sovereigns that was controlled by the U.S. government. *Id.* at 1220.

Finally, *Samco Global Arms, Inc.* v. *Arita*, 395 F.3d 1212 (11th Cir. 2005), involved a contract between the government of Honduras and a private company for the import of weapons, munitions, and explosives to

Honduras tax-free. *Id.* at 1214-1215. The Honduran armed forces would store the weapons and had the right of first refusal to purchase the weapons from the company, otherwise they could be sold to other buyers, including private parties. *Id.* at 1215. The Eleventh Circuit held that the contract was commercial activity, because the contract was "essentially for the bailment of goods with a purchase option"; "was predominantly commercial in nature"; and "obviously could have been executed by individuals in the private marketplace." *Id.* at 1216. The court did not consider claims arising out of an FMS transaction or hold that any purchase of goods is commercial activity.

Tellingly, Blenheim ignores the D.C. Circuit's decision in *Heroth* v. *Kingdom of Saudi Arabia*, *supra*, which is the only other court of appeals decision to consider a claim arising out of an FMS transaction. The plaintiff in that case sued the Saudi Arabian government after his son died following a terrorist attack in Saudi Arabia, where the son was working to help modernize the Saudi Arabian national guard pursuant to an FMS contract. 331 F. App'x at 2. The D.C. Circuit held that the Saudi Arabian government had not been engaged in commercial activity. *Id.* at 3. The court explained that because of the sovereign-to-sovereign nature of an FMS transaction, the transaction was not the "type of action by which a private party engages in trade and traffic or commerce," *ibid.* (brackets and internal quotation marks omitted), but rather was "quintessentially sovereign activity," *ibid.* (citing *Cicippio*, 30 F.3d at 168).

Blenheim has not shown that any court of appeals would come to a different conclusion on the facts of this case. The different outcomes in these cases reflect their different facts, rather than any disagreement about the applicable legal rules. There accordingly is

no disagreement in the circuits warranting this Court's review.

B. The Cited District Court Decisions Do Not Justify Further Review

Blenheim also cites (Pet. 22-25) two district court decisions. Those decisions cannot create a circuit conflict warranting this Court's review. See Sup. Ct. R. 10(a). And, as the court of appeals recognized, the decisions are inapposite and should not be given any weight. See Pet. App. 19-21.

The first decision, *Virtual Defense & Development International, Inc.* v. *Republic of Moldova*, 133 F. Supp. 2d. 1 (D.D.C. 1999), involved a brokerage contract between the plaintiff and the government of Moldova. *Id.* at 2-3. Following the dissolution of the Soviet Union, the Moldovan government was trying to sell Russian-made MiG-29 fighter planes "to bolster its weakening economy." *Id.* at 2. After Moldova began advertising those planes on the open market, the United States became alarmed, and so Moldova contracted with a private company to help broker the sale of the planes. *Id.* at 2-3. The district court held that the commercial-activity exception applied, because "Moldova acted as a private participant in the market" in entering the brokerage contract with the plaintiff, and "the mere fact that the goods sold by Moldova were MiG-29 planes does not change the nature of Moldova's actions." *Id.* at 4. As the court of appeals explained, "the transaction was an open market trans-

action in which any private entity could have participated and was therefore 'commercial' for purposes of the FSIA." Pet. App. 19-20.[3]

The second decision, *Simon* v. *Republic of Hungary*, 443 F. Supp. 3d 88 (D.D.C. 2020), involved expropriation claims by victims of the Holocaust. *Id.* at 91-92. The district court had two holdings. The first holding – that the FSIA's expropriation exception to immunity applies when the plaintiffs are citizens of the country whose government they are suing – has been abrogated by this Court. See *Federal Republic of Germany* v. *Philipp*, 141 S. Ct. 703, 715 (2021). The second holding – that Hungary's purchases of airplanes, munitions, and other military equipment through the FMS program constitute commercial activity – is currently on appeal and likely to be overturned.

The district court reasoned that the FMS contracts at issue involved commercial activity because they were "like a contract to buy army boots." *Simon*, 443 F. Supp. 3d at 110. That reasoning "gave scant attention to the manner in which Foreign Military Sales transactions are structured and regulated," Pet. App. 19, and did not account at all for the D.C. Circuit's decision in *Heroth*, see 443 F. Supp. 3d at 110. The Hungarian government has appealed *Simon*'s commercial-activity holding to the D.C. Circuit. See Opening Br. at 50-52, *Simon*, No. 22-7010 (D.C. Cir.

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[3] Blenheim contends (Pet. 23) that, like in this case, the planes at issue in *Virtual Defense* were military jets not available to private parties. That is incorrect; Moldova was attempting to sell the jets on the open market, including to private parties. 133 F. Supp. 2d at 2-3; see Pet. App. 19. In fact, the Moldovan government specifically authorized the plaintiff to try to broker a sale to "private business entities." 133 F. Supp. 2d at 3 (internal quotation marks omitted).

Nov. 21, 2022). In the meantime, the district court's decision in that case should not be given any significant weight.

III. THIS WOULD BE AN ESPECIALLY BAD CASE FOR FURTHER REVIEW

The question presented does not arise with any frequency. The issue here is limited to an FMS transaction, a sovereign-to-sovereign transaction that is tightly controlled by the U.S. government. Only two federal appellate decisions have addressed whether an FMS transaction constitutes commercial activity under the FSIA – the decision below and *Heroth*. Pet. App. 15-21; *Heroth*, 331 F. App'x at 3.

Further, if the issue truly were important enough to warrant this Court's review, the Court should grant review in a case where the foreign sovereign is present. The party whose interests are most directly affected by the question presented – the government of South Korea – is not a party in this Court. Pet. ii. That is because Blenheim failed to serve the complaint on South Korea before the district court resolved Lockheed Martin's and Airbus's motions to dismiss. Pet. App. 28. In light of the uniquely sovereign interests at stake, the Court should not address the merits of the question presented in a case without at least one sovereign government participating.

Finally, resolving the question presented will not change the outcome of the case, because even if South Korea's procurement of the fighter jets and military satellite could be considered "commercial activity," Blenheim's claims are not "based upon" it. As the district court explained, the FSIA's commercial-activity exception requires not only that the sovereign's activity be "commercial activity," but also that the cause of action be "based upon" that activity. Pet. App. 40; see

28 U.S.C. 1605(a)(2). "Based upon" means "those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." *Nelson*, 507 U.S. at 357. A claim is based upon a foreign sovereign's commercial activity if that "particular conduct * * * constitutes the gravamen of the suit." *OBB Personenverkehr AG* v. *Sachs*, 577 U.S. 27, 35 (2015) (internal quotation marks omitted).

As the district court explained, Blenheim's claims are not based upon South Korea's procurement of the F-35 fighter jets or the military satellite, because the gravamen of the claims was Airbus's, Lockheed Martin's, and South Korea's supposed tortious interference with Blenheim's private contracts with Lockheed Martin and with Airbus. Pet. App. 46. The facts of South Korea's purchase of the jets or the satellite, if proven, would not entitle Blenheim to anything under that theory of the case. Thus, even if the Court granted certiorari and agreed with Blenheim on the question presented, subject-matter jurisdiction would be lacking.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 2023