No. 18-575 & No. 18-581

IN THE
Supreme Court of the United States

ARGENTINE REPUBLIC,
Petitioner,
v.
PETERSEN ENERGÍA INVERSORA S.A.U. AND PETERSEN ENERGÍA, S.A.U.,
Respondents.

YPF S.A.,
Petitioner,
v.
PETERSEN ENERGÍA INVERSORA S.A.U. AND PETERSEN ENERGÍA, S.A.U.,
Respondents.

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

BRIEF OF THE REPUBLIC OF CHILE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the "commercial activity" exception to sovereign immunity in the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(2), is applicable to suits challenging conduct inextricably intertwined with a sovereign act of expropriation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....iv

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION.....2

ARGUMENT 4

I. Congress Intended the FSIA to Codify International Law on Sovereign Immunity 4

II. The Court Should Ensure Consistency with International Law 8

A. The FSIA Should Not Be Interpreted in a Manner at Variance with International Law 9

B. Departure from International Standards on Sovereign Immunity Risks Subjecting the United States to Reciprocal Treatment in the Courts of Other States 10

C. Departure from International Standards by United States Courts Can Constitute State Practice for the Determination of Customary International Law 12

III. The Uncertainty in the Law May Result in Foreign Sovereigns Receiving Disparate Treatment in United States Courts 13

IV. Clarifying the Law Will Reduce the Temptation to Engage in Forum Shopping..... 15

CONCLUSION 16

TABLE OF AUTHORITIES

Cases

Alfred Dunhill of London, Inc. v. Republic of Cuba,
425 U.S. 682 (1976).....3, 5, 7

Aquamar S.A. v. Del Monte Fresh Produce N.A.,
179 F.3d 1279 (11th Cir. 1999).....11

Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. Rep. 3 (Feb. 14).....12

Banco Nacional de Cuba v. Sabbatino,
376 U.S. 398 (1964).....7

Berizzi Brothers Co. v. S.S. Pesaro,
271 U.S. 562 (1926).....4

Bettis v. Islamic Republic of Iran,
315 F.3d 325 (D.C. Cir. 2003).....15

Bolivarian Republic of Venez. v. Helmerich & Payne Int'l Drilling Co.,
137 S. Ct. 1312 (2017).....4, 6

Cabrera-Alvarez v. Gonzalez,
423 F.3d 1006 (9th Cir. 2005) 9

F. Hoffmann-LaRoche Ltd v. Empagran S.A.,
542 U.S. 155 (2004).....9, 10

First Nat'l Bank v. Kaufman,
593 F. Supp. 1189 (N.D. Ala. 1984).....14

Goar v. Compania Peruana de Vapores,
688 F.2d 417 (5th Cir. 1982) 14

Guan v. Bi,
2014 U.S. Dist. LEXIS 29961 (N.D. Cal. Mar. 6, 2014).....14

Houston v. Murmansk Shipping Co.,
667 F.2d 1151 (4th Cir. 1982) 14

Jurisdictional Immunities of the State (Ger. v. It.; Greece Intervening), Judgment, 2012 I.C.J. Rep. 99 (Feb. 3) 5, 12

Ledgerwood v. State of Iran,
617 F. Supp. 311 (D.D.C. 1985).....11

MacLeod v. United States,
229 U.S. 416 (1913).....9

Martinez v. Republic of Cuba,
708 F. Supp. 2d 1298 (S.D. Fla. 2010) 14

McKeel v. Islamic Republic of Iran,
722 F.2d 582 (9th Cir. 1983) 6

Morgan Guaranty Trust Co. v. Republic of Palau,
639 F. Supp. 706 (S.D.N.Y. 1986) 14

Murray v. Schooner Charming Betsy,
6 U.S. 64 (1804).....9

Nat'l City Bank v. Republic of China,
348 U.S. 356 (1955).....11

Permanent Mission of India to the UN v. City of New York, 551 U.S. 193 (2007).....6

Persinger v. Islamic Republic of Iran,
729 F.2d 835 (D.C. Cir. 1984).....10

Philippines v. Pimentel,
553 U.S. 851 (2008).....4

Radeljak v. DaimlerChrysler Corp.,
475 Mich. 598 (2006) 15

Republic of Arg. v. Weltover, Inc.,
504 U.S. 607.....6

Republic of Aus. v. Altmann,
541 U.S. 677 (2004).....6

Rong v. Liaoning Province Government,
452 F.3d 883 (D.C. Cir. 2006).....2

Saudi Arabia v. Nelson,
507 U.S. 349 (1993).....2, 6

Schooner Exchange v. McFaddon,
11 U.S. 116 (1812).....4

Scottsdale Ins. Co. v. Tolliver,
636 F.3d 1273 (10th Cir. 2011).....15

Siderman de Blake v. Republic of Argentina,
965 F.2d 699 (9th Cir. 1992) 3

Verlinden B.V. v. Cent. Bank of Nigeria,
461 U.S. 480 (1983).....13, 14

Williams v. Nat'l Gallery of Art,
2017 U.S. Dist. LEXIS 154445
(S.D.N.Y. Sept. 21, 2017).....9

Williams v. Shipping Corp. of India,
489 F. Supp. 526 (E.D. Va. 1980).....11

Statutes

Foreign Sovereign Immunities Act, 28 U.S.C. §§
1391(f), 1602 *et seq*.....passim
28 U.S.C. § 1391(f)(1)-(3) 15
28 U.S.C. § 1391(f)(4).....15
28 U.S.C. § 1602.....6
28 U.S.C. § 1604.....7
28 U.S.C. § 1605(a)(2).....7

Legislative Materials

H.R. REP. NO. 94-1487 (1976) 13, 14

Other Authorities

Brief for United States as *Amicus Curiae*, *Bolivarian Republic of Venez. v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312 (2017) (No. 15-423), 2016 U.S. S. Ct. Briefs LEXIS 3114.....11

LAWS LIFTING SOVEREIGN IMMUNITY IN SELECTED COUNTRIES (May 2016), https://www.loc.gov/law/help/sovereign-immunity/lifting-sovereign-immunity.pdf.....10

RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1987).....4, 12

S. Ct. R. 37.6.....1

INTEREST OF *AMICUS CURIAE*

The Republic of Chile ("Chile") is a sovereign State.[1] Chile is one of Latin America's most politically, economically, and socially stable countries, and it ranks at the top of Latin American nations in the leading indicators in all of those areas, including commitment to the rule of law, democracy, education, environmental protection, standard of living, absence of corruption, and human rights. Chile is also a key foreign relations and economic partner of the United States. Our two countries routinely cooperate on such issues as multilateral security and diplomacy, military exercises and exchanges, international commerce, and scientific and other academic research. Since 2004, Chile and the United States have mutually benefited from a bilateral Free Trade Agreement, under which consumer and industrial goods flow between our two countries duty-free.

Chile is concerned that the Second Circuit's decision fails to honor the internationally-recognized distinction between sovereign acts and commercial acts. It is indisputable that, under international law, a State exercises powers unique to a sovereign when it expropriates property and that such conduct is

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[1] Counsel of record for all parties received timely notice of *amicus curiae* Chile's intention to file this brief, and all parties have consented to this filing. Pursuant to Supreme Court Rule 37.6, *amicus curiae* Chile affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus curiae* and its counsel made a monetary contribution to its preparation or submission.

never commercial in character. Under international law and widespread State practice, a State will be immune from the jurisdiction of another State's courts for expropriatory and other sovereign conduct. The intertwining of commercial acts with the fundamental act of expropriation does not change that calculus. Nor do the commercial consequences of an expropriation. As a sovereign State dedicated to the equality of States and adherence to international law, which includes the international legal standards governing sovereign immunity, Chile has an immediate and direct interest in this matter.

INTRODUCTION

This Court has not addressed whether the commercial activity exception of the Foreign Sovereign Immunities Act ("FSIA") applies to a claim against a foreign sovereign that "consists of both commercial and sovereign elements." *Saudi Arabia v. Nelson*, 507 U.S. 349, 358 n.4 (1993). Such claims are being filed, however, and the lower courts are divided on whether jurisdiction over a foreign sovereign State may be predicated on the commercial activity exception when the State has exercised its sovereign right to expropriate property.

The D.C. Circuit has held that the commercial activity exception does not apply to a claim based on seemingly commercial acts that "flow" from an expropriation. *See Rong v. Liaoning Province Government*, 452 F.3d 883, 889 (D.C. Cir. 2006). On the other hand, the Ninth Circuit has held that a claim based on commercial use of previously expropriated property may be asserted under the

commercial activity exception. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 708-9 (9th Cir. 1992).

The Second Circuit has now compounded the confusion. It has allowed the respondents to proceed under the commercial activity exception with claims that challenge allegedly commercial conduct that is the byproduct of a sovereign expropriation. The Second Circuit's artful parsing of these claims cannot obscure that they arise from conduct that is inextricably linked to the quintessentially sovereign act of expropriation.

The varying approaches that the circuits have taken underscores the need for clarification from this Court. This is especially so because the "line between commercial and political acts of a foreign state often will be difficult to delineate." *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 715 (1976) (Powell, J., concurring). It is reasonable to expect that further cases will be presented involving allegedly commercial conduct that is bound up with or the inevitable result of a sovereign act. Clear rules are needed to guide the lower courts in circumstances where a State undertakes a sovereign act that may have a commercial component and/or commercial implications.

ARGUMENT

I. Congress Intended the FSIA to Codify International Law on Sovereign Immunity

Sovereign immunity is a central feature of international law that "since early in the history of [the United States]" this Court has "recognized" as being "premised upon the 'perfect equality and absolute independence of sovereigns.'" *Philippines v. Pimentel,* 553 U.S. 851, 865 (2008) (quoting *Schooner Exchange v. McFaddon*, 11 U.S. 116, 137 (1812)). Consistent with that understanding, "[t]he immunity of a state from the jurisdiction of the courts of another state" is universally accepted to be "an undisputed principle of customary international law." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, part 4, ch. 5, subch. A, intro. note, 390 (1987).[2]

The International Court of Justice – the principal judicial organ of the United Nations – has explained that "the rule of State immunity occupies an

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[2] "Our courts have understood, as international law itself understands, foreign nation states to be 'independent sovereign' entities. To grant those sovereign entities immunity from suit in our courts both recognizes the 'absolute independence of every sovereign authority' and helps to 'induc[e] each nation state as a matter of 'international comity' to 'respect the independence and dignity of every other,' including our own." *Bolivarian Republic of Venez. v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1319 (2017) (quoting *Berizzi Brothers Co. v. S.S. Pesaro*, 271 U.S. 562, 575 (1926)).

important place in international law and international relations." *Jurisdictional Immunities of the State (Ger. v. It.; Greece Intervening),* Judgment, 2012 I.C.J. Rep. 99, ¶ 57 (Feb. 3). It "derives from the principle of sovereign equality of States, which, as Article 2, paragraph 1, of the Charter of the United Nations makes clear, is one of the fundamental principles of the international legal order." *Id.* States therefore "generally proceed on the basis that there is a right to immunity under international law, together with a corresponding obligation on the part of other States to respect and give effect to that immunity." *Id.* ¶ 56. Accordingly, "[e]xceptions to the immunity of the State represent a departure from the principle of sovereign equality." *Id.* ¶ 57.

The distinction between sovereign and commercial acts is at the core of the modern approach to sovereign immunity. This is reflected in the FSIA, which codifies the restrictive theory of immunity that the United States formally adopted in 1952, when the Department of State concluded that customary international law had come to permit adjudication of disputes arising from a State's commercial activities while preserving immunity for sovereign acts: "the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*)." *Alfred Dunhill*, 425 U.S. at 711-15, Appendix 2 (Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State, to Philip B. Perlman, Acting Att'y Gen. (May 19, 1952), *reprinted in* 26 DEP'T ST BULL. 984-85 (1952)).

This Court has explained that "[i]n enacting the FSIA, Congress intended to codify the restrictive

theory's limitation of immunity to sovereign acts." *Permanent Mission of India to the UN v. City of New York*, 551 U.S. 193, 199 (2007). *See also Republic of Aus. v. Altmann*, 541 U.S. 677, 691 (2004); *Saudi Arabia v. Nelson*, 507 U.S. 349, 359 (1993) (quoting *Republic of Arg. v. Weltover, Inc.*, 504 U.S. 607, 612) (FSIA "largely codifies the so-called 'restrictive' theory of foreign sovereign immunity first endorsed by the State Department in 1952").

The motivation for doing so was, in significant measure, to make the United States' approach to immunity consistent with international practice. *Helmerich & Payne*, 137 S. Ct. at 1319 ("The Act for the most part embodies basic principles of international law long followed both in the United States and elsewhere"); *Permanent Mission of India*, 551 U.S. at 199 (the purpose of the FSIA is "codification of international law at the time of the FSIA's enactment"); *McKeel v. Islamic Republic of Iran*, 722 F.2d 582, 587 (9th Cir. 1983) ("Congress intended that the FSIA would make United States law on sovereign immunity consistent with international law").

Section 1602 of the FSIA reflects Congress' intention that the laws of the United States should comport with international legal standards with respect to commercial activities: "Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned…" 28 U.S.C. § 1602. As *Alfred Dunhill* explains, "[T]he United States has adopted and adhered to the policy declining to extend sovereign immunity to the commercial dealings of foreign

governments. It has based that policy in part on the fact that this approach has been accepted by a large and increasing number of foreign states in the international community." 425 U.S. at 701-2.

This intention finds concrete expression in the relationship between the overarching presumption of immunity codified in § 1604 of the FSIA and the limited abrogation of that immunity provided for with respect to certain commercial activities found in § 1605(a)(2). Congress determined in this respect that "subjecting foreign governments to the rule of law in their commercial dealings presents a much smaller risk of affronting their sovereignty than would an attempt to pass on the legality of their governmental acts." *Alfred Dunhill*, 425 U.S. at 703-4.

An affront to a foreign sovereign, however, remains a significant possibility when sovereign and commercial acts are intertwined in a case. Exercising jurisdiction in those circumstances would necessarily bring governmental acts within the court's purview. Those acts could and, in the present case, did include acts that are of particular sensitivity, such as expropriation. *Id.* at 704 n.16 ("some aspects of international law touch much more sharply on national nerves than do others") (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964)). That commercial concerns may also be raised in such cases does make the need to render judgment on governmental actions or their consequences any less a reality.

Indeed, the possible intertwining of sovereign and commercial acts is not limited to actions that

implicate an expropriation. It can also arise in other cases where unwarranted judicial review of a foreign sovereign's governmental acts would be equally sensitive and otherwise beyond the jurisdictional reach of the courts of the United States. For example, enactment of environmental laws may constrain the exercise of contractual rights set out in a concession agreement entered into between the State and a private entity for the operation of a mine. A determination by public health regulators that a pharmaceutical may not be sold due to adverse side-effects could affect the performance of a sales contract between the manufacturer and a state-owned hospital. The regulation of chemicals might prevent the fulfillment of a commercial contract for their sale or use. Each of these scenarios involves a classic exercise of sovereign authority that may be inextricably connected to commercial conduct or have commercial consequences.

II. The Court Should Ensure Consistency with International Law

It is vital that the courts of the United States apply the exceptions to sovereign immunity correctly and in conformance with Congress's expressed intention that they comport with international law. Certiorari is warranted where lower court decisions place United States jurisprudence at variance with such international standards, as the decision of the Second Circuit now risks doing.

A. The FSIA Should Not Be Interpreted in a Manner at Variance with International Law

It is presumed that "Congress intend[ed] to legislate in a manner consistent with international law." *Cabrera-Alvarez v. Gonzalez*, 423 F.3d 1006, 1009 (9th Cir. 2005). Accordingly, acts of Congress ought not to be interpreted in a manner violative of international law if any other construction is possible. *Murray v. Schooner Charming Betsy,* 6 U.S. 64, 118 (1804). The Court should thus grant certiorari to ensure that the FSIA is "construed in the light of the purpose of the Government to act within the limitation of the principles of international law, the observance of which is so essential to the peace and harmony of nations." *MacLeod v. United States,* 229 U.S. 416, 434 (1913).

Courts consistently decline to interpret the FSIA in a manner that would "deviate from the exceptions to sovereign immunity generally recognized by international law that Congress sought to codify in FSIA." *Williams v. Nat'l Gallery of Art*, 2017 U.S. Dist. LEXIS 154445, at *12 (S.D.N.Y. Sept. 21, 2017). Indeed, this is mandated by the overarching principle that a court "ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations." *F. Hoffmann-LaRoche Ltd v. Empagran S.A.*, 542 U.S. 155, 164 (2004). As this Court has explained, "[t]his rule of statutory construction cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws. It thereby helps the potentially conflicting laws

of different nations work together in harmony – a harmony particularly needed in today's highly interdependent commercial world." *Id.* at 164-65.

B. Departure from International Standards on Sovereign Immunity Risks Subjecting the United States to Reciprocal Treatment in the Courts of Other States

Beyond being inconsistent with Congress' intention to place the United States in conformity with international law and practice, deviation from those standards by the United States carries significant risk. "[S]ome foreign states base their sovereign immunity decisions on reciprocity." *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 841 (D.C. Cir. 1984) (declining to construe the FSIA in a manner that bears "potential for international discord and for foreign government retaliation").

For example, in the Russian Federation, reciprocity "is declared as a main principle under which Russian courts will consider the limits to jurisdictional immunity of a foreign state in relation to the degree of immunity the Russian Federation enjoys in that foreign state. The immunity of a foreign state can be limited in Russia if the foreign state limits Russian jurisdictional immunity." LAWS LIFTING SOVEREIGN IMMUNITY IN SELECTED COUNTRIES 12 (May 2016).

The Court has thus long recognized that the United States' adherence to international norms regarding sovereign immunity rests in part on

understandable considerations of reciprocal self-interest. *Nat'l City Bank v. Republic of China*, 348 U.S. 356, 362 (1955). Insofar as United States courts may permit the exercise of jurisdiction against a foreign sovereign where, as in the present case, a sovereign act is inextricably linked to commercial activity, courts in other States might reciprocally allow jurisdiction to be exercised against the United States.

In light of that concern, the Court's FSIA jurisprudence has paid due regard to the warning of the Solicitor General and the Department of State that applying the FSIA's exceptions to immunity in an overly-expansive manner risks leading other countries "to reciprocate by granting their courts permission to embroil the United States in 'expensive and difficult litigation, based on legally insufficient assertions that sovereign immunity should be vitiated.'" *Helmerich & Payne,* 137 S. Ct. at 1322 (quoting Brief for United States as *Amicus Curiae* at 21-22, *Bolivarian Republic of Venez. v. Helmerich & Payne Int'l Drilling Co.,* 137 S. Ct. 1312 (2017) (No. 15-423), 2016 U.S. S. Ct. Briefs LEXIS 3114, at *38). *See also Aquamar S.A. v. Del Monte Fresh Produce N.A.*, 179 F.3d 1279, 1295 (11th Cir. 1999) (the FSIA's purposes include according foreign sovereigns treatment similar to treatment the United States prefers to receive in foreign courts); *Ledgerwood v. State of Iran*, 617 F. Supp. 311, 314 (D.D.C. 1985) (removing sovereign immunity risks "foreign government retaliation"); *Williams v. Shipping Corp. of India*, 489 F. Supp. 526, 528 (E.D. Va. 1980) ("In effect, a foreign nation is being accorded… the type of

reciprocal immunity we would like to be accorded in a foreign court.").

C. Departure from International Standards by United States Courts Can Constitute State Practice for the Determination of Customary International Law

Obtaining this Court's guidance on the requirements of the FSIA in the context of this hybrid case is also important because of the potential implications of the Second Circuit decision for customary international law. That body of law is formed where state practice is combined with *opinio juris* (*i.e.*, a sense of legal obligation). *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987) ("Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.").

With respect to sovereign immunity, determining whether there is sufficient state practice relies principally on judicial decisions that interpret immunity laws. For example, the International Court of Justice observed that "State practice of particular significance is to be found in the judgments of national courts faced with the question of whether a foreign State is immune…" *Ger. v. It.*, 2012 I.C.J. at ¶ 55. That Court thus scrutinized the jurisprudence of numerous national courts, including the case law of United States courts applying the FSIA. *See id.* ¶¶ 72-77. *See also Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.)*, Judgment, 2002 I.C.J. Rep. 3

(Feb. 14), ¶ 58 (examining case law of national courts in determining customary international law concerning immunity from criminal jurisdiction).

By exercising jurisdiction over an action where sovereign and commercial acts are linked, the Second Circuit decision may be construed as reflective of the state practice of the United States. This risks contributing to the creation of a new norm of customary international law in respect of sovereign immunity. That should only be done with the imprimatur of this Court.

III. The Uncertainty in the Law May Result in Foreign Sovereigns Receiving Disparate Treatment in United States Courts

Resolving the uncertainty in the existing case law is also necessary to give effect to Congress' desire to prevent "disparate treatment of cases involving foreign governments." H.R. REP. NO. 94-1487, at 13 (1976) (report accompanying FSIA). Given that "[a]ctions against foreign sovereigns… raise sensitive issues concerning the foreign relations of the United States," *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493 (1983), providing foreign sovereigns different treatment in actions before United States courts can have "adverse foreign relations consequences." H.R. REP. NO. 94-1487, at 13. This is particularly so where the different treatment concerns outcome-determinative rules governing jurisdiction.

To prevent that from occurring, "Congress exercised its Art. I powers by enacting a statute comprehensively regulating the amenability of foreign nations to suit in the United States." *Verlinden*, 461 U.S. at 493. The statute sought "to clarify" the circumstances in which jurisdiction could be exercised over foreign sovereigns by enacting a "comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities." *Id.* at 488. The House Report is unambiguous that this was done so the FSIA could achieve "uniformity in decision." H.R. REP. NO. 94-1487, at 13.

That congressional desire is widely recognized in the case law. *See, e.g.*, *Houston v. Murmansk Shipping Co.*, 667 F.2d 1151, 1154 (4th Cir. 1982) (Congress intended "to foster a uniformity of decisions in cases under the FSIA"); *Goar v. Compania Peruana de Vapores*, 688 F.2d 417, 428 (5th Cir. 1982) ("Congress has expressed a strong policy favoring uniformity of decision in cases involving foreign sovereigns…"); *Guan v. Bi*, 2014 U.S. Dist. LEXIS 29961, at *19 (N.D. Cal. Mar. 6, 2014) (FSIA enacted "to create a uniform set of standards for making foreign immunity determinations") (citing *Martinez v. Republic of Cuba*, 708 F. Supp. 2d 1298, 1301 (S.D. Fla. 2010)); *Morgan Guaranty Trust Co. v. Republic of Palau*, 639 F. Supp. 706, 716 (S.D.N.Y. 1986) (FSIA intended to ensure uniformity of decisions in interest of foreign relations); *First Nat'l Bank v. Kaufman*, 593 F. Supp. 1189, 1192 (N.D. Ala. 1984) (referring to FSIA's "overriding goal of uniform treatment of foreign states in federal court litigation").

The varying approaches taken by the circuit courts undermine the objective of achieving uniformity of decision. That the uncertainty involves a critical and oft-litigated provision of the FSIA makes its resolution all the more urgent.

IV. Clarifying the Law Will Reduce the Temptation to Engage in Forum Shopping

In addition to providing this Court with an opportunity to offer much needed guidance on an important and recurring issue, granting the petitions and clarifying the law would have the salutary effect of removing incentives to forum shop, tolerance for which conflicts with "basic notions of comity and respect for foreign sovereignty." *Radeljak v. DaimlerChrysler Corp.,* 475 Mich. 598, 625 (2006) (Markman, J., concurring). *See also Scottsdale Ins. Co. v. Tolliver*, 636 F.3d 1273, 1277 (10th Cir. 2011) (preferring rules that "discourage[] forum shopping").

Under 28 U.S.C. § 1391(f)(4), the District Court for the District of Columbia is the "dedicated venue for actions against foreign states." *Bettis v. Islamic Republic of Iran*, 315 F.3d 325, 332 (D.C. Cir. 2003). But plaintiffs may seek to establish venue in other districts under § 1391(f)(1)-(3) in actions invoking the commercial activity exception. As things now stand, in cases involving some combination of sovereign and commercial conduct, plaintiffs wishing to sue foreign states under the commercial activity exception may to try to avoid the District Court for the District of Columbia and establish venue instead in a District Court within the Second Circuit. Bringing

uniformity to the law would level the playing field and deter procedural ploys.

CONCLUSION

The Court should grant certiorari to resolve the conflict that has arisen in the interpretation of the commercial activity exception to sovereign immunity.

Respectfully submitted,

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