No. 21-995

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 Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF *AMICI CURIAE* INTERNATIONAL LAW SCHOLARS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

Amici curiae respectfully submit this brief in support of Petitioners.[1] *Amici* (listed in Appendix) are scholars of international law with expertise in sovereign and international organization immunity, including under the Foreign Sovereign Immunities Act ("FSIA"), which also governs international organizations. *See* 28 U.S.C. §§ 1602–1611 (1976); *Jam v. Int'l Fin. Corp.*, 139 S. Ct. 759, 768 (2019). *Amici*, who include scholars with expertise in foreign jurisdictions, have a strong interest in the accurate and uniform application of the restrictive theory of sovereign immunity and the commercial activity doctrine under the FSIA. *Amici* are concerned that among countries that have adopted restrictive immunity, the United States would stand alone in allowing sovereigns to use the commercial activity exception as a shield to escape liability if another actor is the more proximate tortfeasor. *Amici* respectfully urge this Court to reconsider the decision below and bring U.S. immunity jurisprudence back in line with the FSIA's text and purpose of eliminating preferential treatment for sovereigns involved in commercial activity.

[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici curiae* or their counsel contributed money to the preparation or submission of this brief. The parties received timely notice and have consented to this filing.

SUMMARY OF ARGUMENT

The animating purpose of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602-1611 (1976), is to remove immunity and preferential treatment for sovereign entities when they engage in private conduct such as commercial activity. In other words, sovereigns acting as private actors should be treated as private actors. The decision below undermines this *raison d'être* of the FSIA while raising an important and unsettled question: whether a sovereign can claim immunity for their commercial activity when a third party's conduct may be the more direct cause of a plaintiff's injuries.

The D.C. Circuit's decision creates a new rule that conflates a key immunity question (whether the gravamen of the claim against a sovereign is commercial activity) with ordinary liability questions (such as to what extent the sovereign's conduct caused the harm). The effect of the new rule is to give preferential treatment to sovereigns for their commercial activity, which contravenes the FSIA's text and explicit purpose, as well as decades of guidance from Congress, the Executive, and this Court.

Specifically, the lower court impermissibly exempts sovereigns from ordinary liability regimes in contravention of § 1606's directive that the FSIA should not be read to change the principles of liability that would normally apply to private parties in similar circumstances. The decision also contravenes a second express purpose of the statute, codified in § 1602, of

aligning U.S. immunity law with the restrictive theory of immunity under international law. No other country known to *amici* has interpreted the restrictive theory to afford immunity to a sovereign for commercial acts because the sovereign is not the principal wrongdoer. Thus, the lower court's conflation of the immunity inquiry with ordinary liability concepts is out of step with international law as well as the text of the statute.

The case also raises a separate important question: whether courts can disregard express waivers. The lower court ignored the plain text of an international organization's waiver of immunity. In doing so, the D.C. Circuit's rule makes it harder for international organizations to effectuate their intent to waive than for their constituent states, whose clear, plain-text waivers are given full effect under the FSIA. Such a result is discordant with this Court's holding in *Jam v. International Finance Corporation*, 139 S. Ct. 759 (2019), that the International Organizations Immunities Act ("IOIA"), 22 U.S.C. § 288a (1945), should be read "to ensure ongoing parity" with foreign sovereign immunity rules. *Jam*, 139 S. Ct. at 768.

Amici respectfully urge this Court to grant certiorari to address these two important questions.

ARGUMENT

I. By Substituting its View for That of Congress, the D.C. Circuit Created a New Rule That Conflates the Immunity Inquiry with Liability Questions, Leading to Preferential Treatment for Sovereign Commercial Activity in Contravention of the FSIA's Text, Purpose, and History.

The D.C. Circuit's determination that sovereigns enjoy immunity for their U.S.-based commercial conduct whenever a third party is more proximate to the harm creates a new rule that conflates an immunity inquiry (regarding gravamen) with separate liability concepts (such as whether and to what extent responsibility falls on a sovereign compared to other wrongdoers). Concepts of immunity and liability are not synonymous, however. The new rule also runs contrary to the fundamental purpose of the FSIA: to treat sovereigns the same as private actors when they engage in private conduct (as specified in § 1602, § 1605, and § 1606) and to align U.S. law with the restrictive theory of sovereign immunity under international law (as specified in § 1602). Indeed, the D.C. Circuit's conflation of immunity and liability has resurrected impermissible preferential treatment for sovereigns in explicit contravention of the FSIA's text, purpose, and history, as well as the directive to align with international law.

Under § 1605(a)(2), a court evaluating a claim of immunity is to inspect the sovereign's conduct to determine whether the gravamen of the plaintiff's claim against the sovereign is its commercial activity. *See*

Saudi Arabia v. Nelson, 507 U.S. 349, 356–58 (1993) (holding commercial activity exception does not apply when core of plaintiffs' claim against sovereign was its non-commercial conduct); *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 35–36 (2015) (holding suit was not "based upon" sovereign's commercial activity when gravamen of suit against sovereign was its unlawful non-commercial conduct abroad). By requiring that an "action" against a sovereign be "based upon" its commercial conduct, § 1605(a)(2) ensures that immunity persists where the alleged commercial conduct is merely peripheral and the gravamen of the suit against the sovereign is in fact its public acts. *Id.*[2]

What the "based upon" language does not do, however, is authorize the court to look outside of the plaintiff's claim against the sovereign to determine whether some other party might be a more suitable defendant. *See Nelson*, 507 U.S. at 357.[3] No precedent instructs courts to transform the gravamen analysis into an inquiry about a third party's actions. The D.C. Circuit made precisely this error below. Rather than assess whether it was the commercial conduct of the

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[2] Moreover, judicial interpretation of § 1605(a)(2) must be informed by the FSIA's other provisions and its broader purpose. *See* Antonin Scalia & Bryan A. Garner, *Reading Law* § 4 (2012) (Presumption Against Ineffectiveness); *id.* § 24 (Whole Text Canon); *id.* § 27 (Harmonious Reading Canon); *see also infra* Sections I.A–C.

[3] This Court in *Nelson* noted that "the phrase is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief *under his theory of the case*." *Id.* (emphasis added).

International Finance Corporation ("IFC") that formed the basis of the action against it, as instructed by this Court's decisions in *Sachs* and *Nelson*, the D.C. Circuit looked beyond the plaintiffs' claims against the IFC to hold that the suit was not "based upon" the IFC's acts at all, but rather a third party's. *Jam v. Int'l Fin. Corp.*, 3 F.4th 405, 408–11 (D.C. Cir. 2021). Where a sovereign defendant's actions are not proximate enough to the harm to create liability, this issue should instead be addressed under Fed. R. Civ. P. 12(b)(6), just like it would for any other private actor. Indeed, every other domestic and foreign court known to *amici* that applies restrictive immunity treats the immunity and liability inquiries separately.

A. In Immunizing Sovereign Defendants in Cases Where Similarly Situated Private Parties Could Be Held Liable Along with Other Tortfeasors, the D.C. Circuit's Decision Runs Contrary to Ordinary Principles of Liability and Grants Preferential Treatment to Sovereigns, Ignoring the Explicit Textual Mandate of § 1606 of the FSIA.

In creating a new rule that immunizes sovereigns whenever a third party is more proximate to the harm, the D.C. Circuit disregarded the plain text of § 1606. Congress made clear that the FSIA was enacted to eliminate differential treatment for sovereigns while also maintaining ordinary principles of liability. The text of § 1606 unequivocally states that a "foreign state

shall be liable in the same manner and to the same extent as a private individual under like circumstances" with regards to its non-immune conduct. 28 U.S.C. § 1606; *see also* H.R. Rep. No. 94-1487 at 12 (1976) ("The bill is not intended to affect the substantive law of liability."). This Court has affirmed this reading of the text in no uncertain terms. *See First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 620 (1983) ("The language and history of the FSIA clearly establish that the Act was not intended to affect the substantive law determining the liability of a foreign state. . . .").

Of particular importance here is that Congress intended to maintain existing liability regimes for multiple tortfeasors when it adopted the FSIA's immunity exceptions. Congress specifically contemplated jurisdiction in a circumstance in which a sovereign may only be partially liable. H.R. Rep. No. 94-1487 at 12 ("Nor is it intended to affect . . . the attribution of responsibility between or among entities of a foreign state; for example, . . . whether an entity sued is liable in whole or in part for the claimed wrong."); *cf. Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1129 (D.C. Cir. 2004) (finding argument that § 1605(a)(7) requires defendant to be the sole cause "runs afoul of the FSIA's injunction that a non-immune 'foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances.'").

The D.C. Circuit's holding that the participation of a third party can shield a sovereign defendant from

jurisdiction runs contrary to ordinary principles of liability in contravention of the clear mandate of § 1606. It is well-established that "[a] person who joins in committing a tort cannot escape liability by showing that another person is also liable." 74 Am. Jur. 2d *Torts* § 64 (2022) (citing *S.E.C. v. Hughes Capital Corp.*, 124 F.3d 449 (3d Cir. 1997); *Genetti v. Caterpillar, Inc.*, 621 N.W.2d 529 (2001)).[4] Yet, that is exactly what the D.C. Circuit's holding allows sovereign defendants to do. The decision renders the ordinary liability regimes designed for multiple wrongdoers, *see*, *e.g.*, Restatement (Second) of Torts §§ 875–79 (Am. L. Inst. 1979), inapplicable to sovereign defendants even when the sovereign's wrong is commercial activity in the United States. Rather than abiding by the clear intent of Congress to make a sovereign defendant open to suit in such cases, the D.C. Circuit's ruling effectively immunizes sovereign defendants from liability in any case where there is a more proximate tortfeasor. This alters the liability regime for sovereigns so that they are

[4] Similarly, it is an established principle of international law that sovereigns cannot escape liability by showing that another sovereign is also liable for the alleged wrong. *See* Int'l Law Comm'n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, U.N. Doc. A/56/10, art. 16 (2001) (recognizing responsibility of sovereign in connection with act of third-party sovereign); *Corfu Channel* (U.K. v. Alb.), Judgment, 1948 I.C.J. 15 (Mar. 25) (holding Albania responsible for mine explosion in its territorial waters, even though it was likely that another party laid the mines); *Certain Phosphate Lands in Nauru* (Nauru v. Austl.), Preliminary Objections, 1992 I.C.J. 240 (June 26) (holding that Australia could not rely on actions by other sovereigns, who jointly administered the Nauru area with Australia, to preclude adjudication of claims against it).

treated differently from a private party for the same private acts,[5] which disregards § 1606's express instruction to treat them the "same." Thus, by conflating the gravamen and liability inquiries, the D.C. Circuit abandons the very principles that the FSIA was expressly designed to maintain.

Ultimately, the D.C. Circuit's new rule invites courts at the immunity phase to prematurely determine whether the defendant may or may not be liable.

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[5] For example, in similar lender liability cases, courts have developed a nuanced regime to determine liability for negligently funding and supervising a construction project. While the specific law to be applied in this case has not yet been determined, courts across the United States have held that a construction lender may be liable if the lender took on a role beyond that of the usual money lender for the benefit of a third party. *See*, *e.g.*, *Connor v. Great W. Sav. & Loan Ass'n*, 447 P.2d 609, 618 (Cal. 1968) (finding lender liable to third party for construction defects, noting that lender "not only financed the development . . . but controlled the course it would take"); *Fikes v. First Fed. Sav. & Loan Ass'n of Anchorage*, 533 P.2d 251, 261 (Alaska 1975) (holding that lender, "having knowledge of a prior equitable interest of a third party, had a duty to administer the interim construction loan in a conventional manner, with due care"); *Rudolph v. First S. Fed. Sav. & Loan Ass'n*, 414 So. 2d 64, 71 (Ala. 1982) (holding trial court erred in granting summary judgment because lender had assured plaintiff that lender's inspections would be sufficient protection to plaintiffs to replace architect's approval safeguards); *Davis v. Nev. Nat'l Bank*, 737 P.2d 503, 506 (Nev. 1987) (finding bank liable for failing to investigate plaintiff's claims of substantial deficiencies in construction and continuing to distribute loan proceeds to contractor). The D.C. Circuit's rule effectively eliminates such liability regimes entirely for sovereigns by exempting them from lender liability altogether—even when the lending is commercial activity in the United States—creating clear preferential treatment for sovereign lenders.

As the D.C. Circuit has itself previously recognized in the context of sovereign immunity, "[a]ny concerns about reaching too far to charge foreign states with the attenuated impact of their financial activities are better addressed as questions of substantive law." *Kilburn*, 376 F.3d at 1129. Allowing such litigation to proceed to a merits assessment does not mean that sovereigns will have to go to trial or even face discovery; defendants can use a 12(b)(6) motion to challenge claims that are too attenuated from their own conduct. Thus, there are other mechanisms to weed out non-meritorious cases that protect against a flood of litigation targeting sovereigns and international organizations. This Court should restore the separation of the gravamen and liability inquiries and ensure that the express directive in § 1606 is followed.

B. In Ignoring § 1606, the D.C. Circuit Has Undermined the FSIA's Explicit and Fundamental Purpose to Enforce the Restrictive Theory of Sovereign Immunity.

The D.C. Circuit's new rule contravenes seventy years of history and jurisprudence, which have established that sovereigns should receive no special treatment for their commercial activity. The decision undermines the uncontroverted purpose of the FSIA as stated in § 1602 and the explicit guidance and precedent of all three branches of government.

Before 1952, the United States largely gave foreign states absolute immunity. However, the middle of

the twentieth century saw "the widespread and increasing practice . . . of governments of engaging in commercial activities." 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. 985 (1952) [hereinafter Tate Letter]. Recognizing the "unfair advantage" that immunity gave to sovereign entities "in their dealings with the private sector," Marc B. Feldman, *The United States Foreign Sovereign Immunities Act of 1976 in Perspective: A Founder's View*, 35 Int'l & Comp. L.Q. 302, 303 (1986), a new approach to immunity—allowing private individuals who do business with sovereigns to vindicate their rights in court—became necessary. Accordingly, in the Tate Letter of 1952, the U.S. executive branch adopted the restrictive theory of immunity whereby sovereigns would be immune only for sovereign acts (*de jure imperii*), and not private ones (*de jure gestionis*).

Still, over the next two decades, courts deferred to executive branch determinations of immunity, which occasionally granted immunity for public policy reasons where restrictive theory would not allow, resulting in confusing and inconsistent application of the theory. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 487–88 (1983). To resolve this confusion and ensure that sovereigns would no longer receive preferential treatment when they act like private parties, Congress enacted the FSIA in 1976.

Congress explicitly articulated that the Act's purpose is to conform sovereign immunity determinations

with the restrictive theory, under which sovereigns "are not immune . . . insofar as their commercial activities are concerned." 28 U.S.C. § 1602. This Court has repeatedly affirmed this purpose, as well as the importance of aligning interpretation of the immunity exceptions with this purpose. *See*, *e.g.*, *Federal Republic of Germany v. Philipp*, 141 S. Ct. 703, 713 (2021) (adopting interpretation "more consistent with the FSIA's express goal of codifying the restrictive theory," and noting that "[m]ost of the FSIA's exceptions, such as the exception for 'commercial activity carried on in the United States,' comport with the overarching framework of the restrictive theory"); *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 199 (2007) (noting Court's reading of FSIA's text aligned with its purpose of codifying restrictive theory).

By adopting a test that directly conflicts with an uncontested understanding of the core tenet of restrictive theory—to eliminate preferential treatment for sovereigns involved in commercial activity—the D.C. Circuit has substituted its view for the explicit directive of the statute. Allowing the D.C. Circuit decision to stand would thus subvert the unmistakable congressional mandate and this Court's subsequent cases interpreting the FSIA.[6]

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[6] Furthermore, the D.C. Circuit's rule would be difficult to administer, including in cases involving joint sovereign liability or conspiracies. The ruling thus invites inconsistency that could well revert the immunity inquiry to a series of ad hoc decisions—

C. The D.C. Circuit's Ruling Similarly Undermines the FSIA's Explicit Directive to Align U.S. Immunity Law with International Law, Which Contradicts the Circuit's Position and its Preferential Treatment of Sovereigns.

The D.C. Circuit's rule also runs afoul of the directive in § 1602 to conform immunity decisions with the restrictive theory under international law. 28 U.S.C. § 1602; *see also Philipp*, 141 S. Ct. at 712–13 (referring to international law governing property rights to interpret FSIA's expropriation exception); *Aquamar S.A. v. Del Monte Fresh Produce N.A.*, 179 F.3d 1279, 1294 (11th Cir. 1999) ("Congress intended international law to inform the courts in their reading of the statute's provisions."). International law on the restrictive theory is clear on the question here: the actions of third parties are irrelevant to the determination of sovereign immunity.

To determine whether a sovereign is immune, international law asks which of the sovereign's activities are the basis of the claim. James Crawford, *International Law and Foreign Sovereigns: Distinguishing Immune Transactions*, 54 Brt. Y.B. Int'l L. 75, 94–95 (1983); *see also The United Nations Convention on Jurisdictional Immunities and Their Property* 67 (Roger O'Keefe & Christian J. Tams eds., 2013) (observing

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the situation Congress specifically enacted the FSIA to avoid. *See Verlinden B.V.*, 461 U.S. at 488.

that, when claim involves sovereign's commercial *and* non-commercial activity, courts inquire as to which sovereign activity is at the core of the claim). Whether a third party more directly caused the alleged harm is a liability question and is distinct from immunity determinations under international law. *See Jurisdictional Immunities of the State* (Ger. v. It.), Judgment, 2012 I.C.J. 99, ¶ 100 (Feb. 3) ("[W]hether a State is entitled to immunity before the courts of another State is a question entirely separate from whether the international responsibility of that State is engaged and whether it has an obligation to make reparation.").

State practice confirms this approach: No jurisdiction known to *amici* considers the acts of a third party in determining the immunity of a sovereign. Instead, foreign jurisdictions applying international law or interpreting domestic statutes that incorporate international law uniformly ask whether the sovereign's acts are commercial without regard to whether a third party is more responsible.

A recent case decided by the Court of Justice of the European Union ("CJEU") is illustrative. In *LG and Others v. Rina SpA*, EUR-Lex (May 7, 2020), the relatives of over 1,000 people killed in a shipwreck sought compensation from a company acting on behalf of the state of Panama for wrongfully certifying that the ferry was safe. *See id.*, ¶¶ 14–15. The court, applying international law, held that the company did not enjoy sovereign immunity because the classification and certification activities it performed were commercial in nature and not an exercise of a public

function. *Id.*, ¶ 49. The court's reasoning was in no way affected by the fact that the passengers' deaths were more directly caused by the private shipowner's failure to provide a timely rescue for the passengers—wrongdoing for which the shipowner was found criminally liable by a separate court.

National courts in countries with well-developed jurisprudence on restrictive immunity[7] uniformly take the approach of the CJEU in *Rina*. The following cases are particularly instructive:

- **Italy:** Cass. civ., 10 dicembre 2020, n. 28180 (applying CJEU decision in *Rina* to find no immunity for commercial activity without regard to third-party shipowner's conduct that more directly caused passengers' deaths);
- **France:** Cour de cassation [Cass.] [Supreme Court for Judicial Matters] crim., Nov. 23, 2004, No. 04-84.265 (focusing immunity analysis in shipwreck case on whether defendant sovereign's alleged faulty certificates of seaworthiness were commercial without regard to third party who was held criminally liable for failure to service ship);
- **Australia:** *T. Garuda Indon., Ltd. v. Australian Competition & Consumer Comm'n* (2012) 247 CLR 240 (focusing on whether

[7] For a list of countries involved historically in developing jurisprudence on the restrictive theory, see Hazel Fox & Philippa Webb, *The Law of State Immunity* 133–66 (3d ed. 2015); Int'l Law Comm'n, Draft Articles on Jurisdictional Immunities of States and Their Property, with Commentaries, [1991] 2 Y.B. Int'l L. Comm'n (Part Two) 36; Tate Letter.

defendant sovereign's actions were commercial instead of actions of other parties to monopoly and noting that "the definition of 'commercial transaction' fixes upon . . . engagement *by the foreign State*") (emphasis added);

- **Belgium:** Cass. [Court of Cassation] (1st ch.), Oct. 23, 2015, C.14.0322.F/1 (focusing, in case involving multiple sovereign defendants, on whether a sovereign's acts as third-party accomplice to private actors were commercial, and separately assessing whether the acts of each sovereign defendant satisfied the commercial activity exception, without regard to which sovereign was more responsible for the harm);

- **Canada:** *Steen Estate v. Iran*, 2011 ONSC 6464, 2011 CarswellOnt 12470 (holding that because plaintiff's claim was "directed at the Islamic Republic of Iran . . . not Hezbollah" immunity analysis considers only Iran's funding of terrorism,[8] despite Hezbollah being more directly responsible for plaintiff's harms); *see also Walker v. Bank of New York, Inc.*, 1993 CarswellOnt 458 (performing separate sovereign immunity analyses for multiple sovereign defendants (the United States and Bank of New York), without regard to which sovereign was more directly responsible for the harm);

[8] Because this decision predates Canada's enactment of a terrorism exception to immunity, it reflects Canadian state practice on the commercial activities exception.

- **United Kingdom:** *Estate of Michael Heiser v. Islamic Republic of Iran* [2019] EWHC (QB) 2074 (assessing whether Iran's sponsorship of terrorism[9] was commercial without regard to acts of Hezbollah, which directly carried out terrorist attacks).

Foreign courts applying restrictive theory under international law thus uniformly assess whether the conduct for which the sovereign is being sued is commercial to determine whether it enjoys immunity from that suit, without regard to whether another actor played a larger role in the alleged harm. By granting sovereign immunity because it deemed a third party a more proximate tortfeasor, the D.C. Circuit created a new rule that conflicts with international law in contravention of § 1602 and the purpose of the FSIA.

This Court should grant certiorari to align the interpretation of the commercial activity exception with the rest of the FSIA's text and with the fundamental and express purpose of the statute: to treat sovereign entities like private parties when they act like private parties.

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[9] The case was decided under the United Kingdom's commercial activity exception as the United Kingdom does not have a separate terrorism exception to sovereign immunity.

II. By Refusing to Honor International Organizations' Express Waivers, the D.C. Circuit Has Disregarded Plain Text in Favor of an Unworkable Test That Creates Incongruence in the Law Governing International Organizations and Foreign States.

The D.C. Circuit failed to recognize the IFC's express waiver, disregarding the text and drafting history of the IFC's Articles of Agreement, Dec. 5, 1955, 7 U.S.T. 2197, which clearly convey the IFC's intent to waive immunity. In nullifying the IFC's express waiver, the court persists in applying an unworkable "corresponding benefit" test. Moreover, it makes it harder for international organizations to waive immunity compared to foreign states, a result that creates dissonance with the spirit of this Court's holding in *Jam* that the IOIA "link[s] the law of international organization immunity to the law of foreign sovereign immunity, so that the one develops in tandem with the other." 139 S. Ct. at 771. This Court should grant certiorari to correct the D.C. Circuit's "efforts to chart a separate course under the IOIA [that] were misguided from the start." *Jam v. Int'l Fin. Corp.*, 860 F.3d 703, 713 (D.C. Cir. 2017) (Pillard, J., concurring).

A. The IFC Unequivocally Waived its Immunity for Suits Brought in the United States by Non-Members.

Both the text and drafting history of the IFC's Articles of Agreement plainly convey the organization's express waiver of immunity for suits such as this one.

The Articles of Agreement provide that "[a]ctions may be brought against the Corporation only in a court of competent jurisdiction in the territories of a member in which the Corporation has an office, has appointed an agent for the purpose of accepting service of process, or has issued or guaranteed securities. No actions shall, however, be brought by members. . . ." IFC Articles of Agreement, art. VI § 3. This provision's plain text demonstrates that the IFC contemplated suits by non-members and consented to the possibility of such litigation in the United States, where it is headquartered.

The drafting history of the IFC's Articles affirms the organization's intent to waive.[10] As part of the World Bank Group, the IFC has Articles that are identical to those of the World Bank, which in turn were adapted directly from the Articles of the International Monetary Fund ("IMF"). Proceedings and Documents of the United Nations Monetary and Financial Conference (1948), vol. I, at vii. When adapting the IMF's charter to the Bank (and IFC), however, the drafters made a deliberate choice to replace the IMF's absolute immunity provision with one expressly permitting suit in specific fora. *Compare* International Monetary

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[10] In interpreting international treaties such as the IFC's Articles of Agreement, this Court "traditionally consider[s] as aids to its interpretation negotiating and drafting history (*travaux preparatoires*)." *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226 (1996); *see also* Vienna Convention on the Law of Treaties, art. 32, May 23, 1969, 1155 U.N.T.S. 331 (encouraging recourse to drafting history to "confirm the meaning resulting from" consideration of text and context).

Fund Articles of Agreement, art. IX § 3, Dec. 27, 1945, 60 Stat. 1401 ("The Fund . . . shall enjoy immunity from every form of judicial process except to the extent that it expressly waives its immunity.") *with* International Bank for Reconstruction and Development Articles of Agreement, art. VII § 3, Dec. 27, 1945, 60 Stat. 1440 ("Actions may be brought. . . .") *and* IFC Articles of Agreement, art. VI § 3 (same).

The drafters included a broad immunity waiver because they deemed it to be strategic for the organization to permit suits by non-members. One of the chief drafters of the Bank's Articles explained that its immunity "provision differs from that customarily incorporated into the charters of international public organizations, which usually confer complete immunity," because, as a securities marketer, the Bank "believed that it would improve their quality if holders thereof could establish their rights in the courts in the case of a dispute with the Bank." Edward Chukwuemeke Okeke, "Immunities and Privileges, XIV Annexes of the Specialized Agencies Convention, Annex VI—International Bank for Reconstruction and Development (IBRD)," *in The Conventions on the Privileges and Immunities of the United Nations and its Specialized Agencies: A Commentary* 755, 761 (August Reinisch ed., 2016).

This intent to broadly waive immunity is also evident in the advice that the World Bank gave to other development banks that were drafting their own charters. For example, the Bank suggested that the African Development Bank may want to narrow the scope of

its provision "by expressing the cause of action for which jurisdiction is accepted." U.N. Econ. & Soc. Council, Economic Commission for Africa, Comments and Proposals Received by the International Bank for Reconstruction and Development Concerning the Draft Agreement Establishing an African Development Bank, ¶ 19, U.N. Doc. E/CN.14/FMAB/4/Add.5 (July 16, 1963). The newer development banks took this advice, providing for "immunity from every form of legal process except in" relation to certain enumerated causes of action. *See* African Development Bank Articles of Agreement, art. 52, Aug. 4, 1963, 510 U.N.T.S. 46; Asian Development Bank Articles of Agreement, art. 50, Aug. 22, 1966, 571 U.N.T.S. 123. The IFC, however, has taken no steps to amend the waiver provision in its Articles, despite the fact that the Articles have undergone thorough amendment four times since their original drafting. *See Articles of Agreement*, World Bank Group (May 19, 2021), https://www.worldbank.org/en/about/articles-of-agreement. Given the wide range of language at the drafters' disposal, the ultimate adoption of the language "[a]ctions may be brought against the Corporation" clearly signals a "deliberate choice" by the drafters, who "must have been aware that they were waiving immunity in broad terms." *Lutcher v. Inter-American Development Bank*, 382 F.2d 454, 457 (D.C. Cir. 1967) (analyzing nearly identical waiver language).

B. In Ignoring Express Waivers, the D.C. Circuit's Approach Creates Different Standards for Enforcing Waivers by International Organizations and Foreign States.

Despite recognizing that the IFC's Articles of Agreement "read literally, would seem to suggest a categorical waiver," the D.C. Circuit nonetheless ignored the plain text because it deemed that waiving immunity would not confer a benefit on the IFC in this case. *Jam*, 860 F.3d at 706. While this Court's decision in *Jam* harmonizes immunity rules for international organizations and foreign states, 139 S. Ct. at 772, the effect of the D.C. Circuit's approach is the opposite, creating two divergent standards for making waiver determinations.

Applying the test established in *Mendaro v. World Bank*, 717 F.2d 610 (D.C. Cir. 1983), the D.C. Circuit declined to enforce the IFC's waiver because allowing the claim to proceed would not "benefit the organization over the long term." *Jam*, 860 F.3d at 708 (quoting *Osseiran v. Int'l Fin. Corp.*, 552 F.3d 836, 840 (D.C. Cir. 2009)). The *Mendaro* test asks courts to reach far beyond the waiver's plain text to determine whether—in the court's independent assessment—waiving immunity in a particular case would serve the organization's interest. Described as "perplexing," "amorphous," "lack[ing] a sound legal foundation," and "awkward to apply," this approach asks judges to "second-guess international organizations' own waiver decisions." *Jam*, 860 F.3d at 711 (Pillard, J., concurring); *see also id.* at 707

(majority opinion) (admitting that it is "a bit strange that it is the judiciary that determines when a claim 'benefits' the international organization"). The D.C. Circuit's approach is more than "a bit strange": In substituting the court's judgment for that of the drafters, the court completely divorces the waiver's effect from the drafters' intent.

In addition, the rule makes it harder for international organizations to waive immunity than for foreign states. The D.C. Circuit thus created a discrepancy in the immunity rules notwithstanding this Court's guidance in *Jam* that the two sets of immunity rules should be interpreted to be "continuously equivalent." *Jam*, 139 S. Ct. at 768. In contrast to the *Mendaro* benefit test, courts give full effect to foreign states' plain text waivers so long as they have "clearly and unambiguously" manifested their intent to waive. *See World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1162 (D.C. Cir. 2002). The "touchstone of the waiver exception" is "that the foreign state ha[s] *intended* to waive its sovereign immunity." *Ivanenko v. Yanunkovich*, 995 F.3d 232, 240 (D.C. Cir. 2021) (internal citation omitted). Uniformly adopted by courts across the country,[11] this approach asks of judges an

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[11] *See*, *e.g.*, *Libra Bank, Ltd. v. Banco Nacional de Costa Rica*, 676 F.2d 47, 59–60 (2d Cir. 1982); *BAE Sys. Tech. Sol. & Servs. v. Republic of Korea's Def. Acquisition Program Admin.*, 884 F.3d 463, 473 (4th Cir. 2018); *Can-Am v. Republic of Trinidad & Tobago*, 169 Fed. Appx. 396, 402 (5th Cir. 2006); *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 670 (7th Cir. 2012); *Corzo v. Banco Cent. de Reserva del Peru*, 243 F.3d 519, 523 (9th Cir. 2001); *Aquamar*, 179 F.3d at 1292.

ordinary task: to engage with the drafters' intent as evidenced by plain text, without having to make far-reaching assumptions about what claims might benefit the waiving party.

Given this Court's guidance in *Jam* to align the immunity rules of international organizations and foreign states, as well as this Court's preference for clear jurisdictional rules that "remain as simple as possible," *Hertz Corp. v. Friend*, 559 U.S. 77, 80 (2010), this Court should grant certiorari to correct the D.C. Circuit's errant approach of disregarding international organizations' express waivers.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to grant petitioners' writ of certiorari to correct the decision of the court below.

Respectfully submitted,

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