Nos. 20-7092, 20-7097

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Budha Jam *et. al.*,
Plaintiff-Appellants
v.
International Finance Corporation,
Defendant-Appellee

and

Manjaliya Ikbal *et al.*,
Plaintiff-Appellants
v.
International Finance Corporation,
Defendant-Appellee
(consolidated case)

On Appeal from the United States District Court
for the District of Columbia, No. 15-cv-00612
The Honorable John D. Bates

PLAINTIFFS-APPELLANTS' PETITION FOR PANEL REHEARING OR REHEARING EN BANC

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[1] Authorities upon which Plaintiffs-Appellants chiefly rely are marked with an asterisk.

Statutes

Other

GLOSSARY

FSIA	Foreign Sovereign Immunities Act
IFC	International Finance Corporation
IOIA	International Organizations Immunities Act

INTRODUCTION AND RULE 35(b) STATEMENT

This case marks the first time any Circuit has immunized a sovereign engaged in U.S. commercial activity by looking to a third party's conduct. This Circuit (and every other to address the issue) has always determined immunity based on the *sovereign defendant*'s own acts. *Transamerican S.S. Corp. v. Somali Democratic Republic*, 767 F.2d 998 (D.C. Cir. 1985); *Gilson v. Republic of Ireland*, 682 F.2d 1022 (D.C. Cir. 1982). A sovereign's immunity does not turn on the conduct of a non-sovereign third party.

The Foreign Sovereign Immunities Act (FSIA) lifts immunity for a sovereign's commercial activities in the United States. But the Panel Opinion would allow foreign sovereigns and their instrumentalities to use U.S. business transactions to finance or otherwise abet wrongful conduct, even where all of the conduct at issue is commercial, and all of it occurred in the United States.

The FSIA's commercial activity exception allows claims that are "based upon" the sovereign defendant's commercial activity in the United States. 28 U.S.C. § 1605(a)(2). The Supreme Court instructed courts to determine the complaint's "gravamen" – the activity it is based

upon – by reference to the elements of plaintiff's liability theory. *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 33-34 (2015); *Saudi Arabia v. Nelson*, 507 U.S. 349, 357 (1993). That forecloses the notion that the *suit* against the defendant and defendant's *liability* can be based upon different conduct, and places the focus on the conduct that makes the *defendant* liable.

But the panel held that a claim against a sovereign is based not on the conduct that makes the defendant liable, but on the conduct that most directly injured the plaintiff, even if committed by a third party. So if a third party more directly injured the plaintiff, the sovereign will always be immune.

That not only conflicts with the elements test, it immunizes sovereigns' U.S. commercial conduct from ordinary joint-liability rules, contrary to this Court's holding that 28 U.S.C. § 1606 treats sovereigns' commercial activity like private parties'. *Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1129 (D.C. Cir. 2004). And it flouts Congress' intent that "based upon" merely ensures the *sovereign*'s activity has the same sort of U.S. nexus as supports specific personal jurisdiction, which this Court recognized in *Price v. Socialist People's*

Libyan Arab Jamahiriya, 294 F.3d 82, 89-90 (D.C. Cir. 2002).

The immunity inquiry asks only whether the defendant must defend itself, not about the strength of the claim. *Kilburn*, 376 F.3d at 1129. If a defendant's conduct is too remote from the injury, the case should be dismissed on the *merits*. *Id.* But the immunity test cannot be stricter than the tort standard governing the merits. *Id.*

The Opinion's harmful consequences emphasize the need for review. It allows states and state-owned companies to facilitate wrongdoing from U.S. territory. It leaves American citizens and businesses without recourse in joint-liability cases that courts have always heard. It absurdly immunizes sovereigns where both the sovereign and the third party engaged in *U.S.* commercial activity: if the claim is deemed "based upon" a third party's conduct, the defendant is immune regardless of where that conduct occurred. And it will sow confusion because it provides no guideposts.

Making matters worse, the International Finance Corporation's (IFC) Articles of Agreement waive immunity, and this Court has interpreted this waiver in fundamentally inconsistent ways. This Court first held that the waiver's plain text waives immunity "in broad

terms." *Lutcher S.A. Celulose e Papel v. Inter-Am. Dev. Bank*, 382 F.2d 454, 457 (D.C. Cir. 1967). But another panel later read the same language "narrowly," allowing waiver only when the type of suit "benefit[s]" the organization. *Mendaro v. World Bank*, 717 F.2d 610, 611, 617 (D.C. Cir. 1983).

Members of this Court have acknowledged that *Mendaro* and *Lutcher* conflict; most recently, Judge Pillard noted that *Mendaro* "lacks a sound legal foundation," and should be revisited *en banc*. *Jam v. Int'l Fin. Corp.* ("*Jam I*"), 860 F.3d 703, 710, 713 (D.C. Cir. 2017) (Pillard, J., concurring); *see also Vila v. Inter-American Inv. Corp.*, 583 F.3d 869, 869-70 (D.C. Cir. 2009) (statements of Williams, J. and Rogers, J.).

The Opinion thus raises two issues of exceptional importance, both of which involve intra-Circuit splits and readily warrant *en banc* consideration.

BACKGROUND

From its Washington, D.C. headquarters, Defendant-Appellee IFC provided indispensable funding for, approved the design of, and supervised the construction of the Tata Mundra power plant ("the Plant"), despite knowing it would harm Plaintiffs, local farmers and

fishermen. Like a private entity, IFC financed the Plant, a private project, at market interest rates. The Plant has, as IFC foresaw, threatened Plaintiffs' health and destroyed their livelihoods by devastating fisheries and ruining freshwater sources, leaving farmers unable to grow crops on their land.[2]

IFC claimed absolute immunity from Plaintiffs' suit, but the Supreme Court held that it only enjoys the "restrictive" immunity foreign states receive under the FSIA. *Jam v. Int'l Fin. Corp.*, 139 S. Ct. 759, 772 (2019) ("*Jam II*"). On remand, IFC claimed it was immune for its U.S. commercial activity – approving the loan, authorizing designs, supervising implementation, and disbursing funds – because the "gravamen" of Plaintiffs' suit was actually the Plant's construction in India by IFC's joint tortfeasor. Plaintiffs argued that claims against IFC are based on IFC's acts and that IFC's Articles of Agreement waive immunity.

The district court issued two opinions. The first correctly looked to *IFC*'s conduct, rejecting IFC's assertion that these claims are "based

[2] Plaintiffs-Appellants' Opening Brief at 5-11 more fully describes the facts.

upon" third party acts. JA1496. The second reversed course, holding that "a suit can be based primarily upon the conduct of a third party," and "focus[ed] on" what it believed "actually injured plaintiffs" – the last harmful act in the causal chain. JA1744. Plaintiffs appealed.

The panel held that the gravamen need not be "the sovereign defendant's conduct," ruling that the claim against the defendant is based not upon defendant's conduct but upon the third party conduct that more directly caused the injury. Op.6-7. The Court dismissed Plaintiffs' argument that IFC waived immunity as foreclosed by *Jam I*. Op.10 (citing 860 F.3d at 706-08).

REASONS FOR GRANTING REHEARING

The Opinion contravenes settled law of the Supreme Court and this and other circuits, conflicts with the text and purpose of the commercial activity provision and IFC's waiver, and will have harmful and absurd consequences. This Court should grant rehearing.

I. The panel's holding that the FSIA immunizes a sovereign's U.S.-based commercial conduct is worthy of review.

A. The Opinion conflicts with this Court's, other Circuits', and the Supreme Court's prior precedent.

This Circuit and others have always found the gravamen of a

claim against a foreign sovereign to be the defendant's conduct, even where multiple parties harmed the plaintiff. Review is warranted because the Opinion created intra- and inter-Circuit splits and conflicts with Supreme Court caselaw.

1. The Supreme Court has made clear that the immunity inquiry turns on the "actions that the foreign state performs." *Republic of Argentina v. Weltover*, 504 U.S. 607, 614 (1992).

2. This Court has determined immunity by looking to the sovereign's conduct. For example, in *Transamerican*, one sovereign defendant seized plaintiff's ship, and another, the embassy, accepted payment to free it. 767 F.2d at 1002-04. This Court analyzed each entity's immunity based on its *own* acts. *Id.* The embassy could be sued even though the seizure by the other sovereign actually injured plaintiff, *id.*, contrary to the panel's analysis here.

Similarly, in *Gilson*, sovereign defendants enticed the plaintiff to contract with one of them, who breached and gave plaintiff's property to another defendant. 682 F.2d at 1024, 1027. This Court held that courts must assess the nexus between *each defendant's* activity and the wrong, and rejected the argument that the claim was "based upon" only the

theft that actually injured plaintiff. *Id.* at 1027 n.22.

3. The Second, Fifth, Sixth, and Tenth Circuits also look to the sovereign's acts in multi-party cases. *E.g.*, *Barnet v. Ministry of Culture & Sports of the Hellenic Republic*, 961 F.3d 193, 200 (2d Cir. 2020) (identifying the "'core' action taken by [the sovereign] . . . for which relief is sought") (quoting *Sachs*, 577 U.S. at 35); *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1108-09 (5th Cir. 1985) (holding analysis focuses on the *defendant*'s acts, not another's); *Glob. Tech., Inc. v. Yubei (XinXiang) Power Steering Sys. Co.*, 807 F.3d 806, 814 (6th Cir. 2015) (first determining which acts were attributable to the sovereign, then "whether *those* acts satisfy the commercial activity exception") (emphasis added); *Southway Constr. Co. v. Cent. Bank of Nigeria*, 198 F.3d 1210, 1217-18 (10th Cir. 1999) (finding sovereigns not immune for conspiring to defraud investors).

Callejo is particularly noteworthy, since *Nelson* and *Sachs* relied on it in establishing the elements test. 507 U.S. at 357; 577 U.S. at 34.

4. Without analysis, the Opinion discounted many of these cases as "distinguishable on their facts" or pre-*Sachs*. Op.8. But these cases are consistent with *Sachs* and *Nelson*; the Opinion is not.

Courts determine the complaint's gravamen by looking to the "elements of [the] claim . . . under [plaintiff's] theory of the case." *Nelson*, 507 U.S. at 357; *accord Sachs*, 577 U.S. at 33-34. Yet the Opinion held that the Plant's operation "actually injured" Plaintiffs and was the suit's basis, without reference to the elements of the claims against the defendant. Op.5-7.

Where plaintiffs sue a joint tortfeasor, the elements of the claim – tortious conduct, duty, and *mens rea* – focus on the defendant's acts, even if another's conduct was a more immediate cause. *See* Restatement (Second) of Torts ("Restatement") §§ 302, 302B & cmt. H (Am. L. Inst. 1965). For example, the gravamen of aiding and abetting is *defendant*'s assistance. *Overseas Priv. Inv. Corp. v. Industria de Pesca, N.A., Inc.*, 920 F. Supp. 207, 210 (D.D.C. 1996). Similarly, defendants are liable for their *own* negligence that allows a third person to commit a harmful act. Restatement §§ 447-49; *e.g.*, *Sheridan v. United States*, 487 U.S. 392, 395, 398, 401, 403 (1988) (holding case involved two torts: a shooting, and negligently allowing it to occur).

The Opinion's statement that, absent the third party act, there would be nothing wrongful about IFC's conduct, Op.6, ignores this basic

principle that joint tortfeasors' acts are wrongful. *See Rodriguez, v. Pan Am. Health Org.*, No. 20-928, 2020 U.S. Dist. LEXIS 208904, at *25-26 (D.D.C. Nov. 9, 2020) (rejecting same argument and finding organization's acts as financial middleman "separately wrongful" from Cuba's forced labor and thus the claim's gravamen).[3] The Supreme Court does not require *every* element to be a sovereign's commercial activity. *Nelson*, 507 U.S. at 358 n.4. The fact that third party conduct is an injury's most immediate cause does not make that conduct the gravamen of the suit against the defendant.

Neither *Sachs* nor *Nelson* ever suggested otherwise. Both involved only state conduct; the question was not *whose* acts were the basis of the suit, but *which* of the *sovereign*'s acts were. *Nelson* found the claim was based on the *sovereign*'s torture, not its hiring. *Id.* at 358, 361-63. *Sachs* found that the gravamen of a personal injury suit was *defendant*'s management of the railway, not *defendant*'s ticket sale. 577 U.S. at 35-36. *Sachs* merely noted that Nelson's suit was "based upon the *Saudi sovereign acts* that actually injured [plaintiff]," not the sovereign's other acts. *Id.* at 34-35 (emphasis added). That hardly

[3] Defendant has appealed. No. 20-7114.

licenses courts to grant immunity based on a non-sovereign third party's conduct.[4]

The holdings of *Sachs* and *Nelson* are "limited." *Id.* at 36 n.2 (citing *Nelson*, 507 U.S. at 358 n.4). Neither provides the "flat contradiction" necessary to permit the panel to overturn *Transamerican* and *Gilson*'s focus on the sovereign's acts. *Razzoli v. Fed. Bureau of Prisons*, 230 F.3d 371, 375 (D.C. Cir. 2000). Indeed, the *Sachs/Nelson* elements test requires that focus.

B. The Opinion will lead to absurd results, foreclosing whole categories of cases.

Immunizing sovereigns based upon third party acts would lead to

[4] Judge Randolph suggested that *Nestle USA, Inc., v. Doe*, 141 S. Ct. 1931 (2021), supports the Opinion, but the panel did not adopt this view, and it is incorrect. *Nestle* applied the presumption against extraterritoriality to the *claim*, not the jurisdictional statute. *Id.* at 1936. The presumption cannot apply to the FSIA; it "does not apply to provisions granting subject-matter jurisdiction," Restatement (Fourth) of the Foreign Relations Law of the United States § 404 cmt. a (Am. L. Inst. 2018), and the FSIA specifies each provision's geographic scope. 28 U.S.C. § 1605(a). Claims clearly may involve expropriation or terrorism in a foreign state, among other things. Regardless, *Nestle* looked to *defendants'* acts. 141 S. Ct. at 1936-37. The defendant committed acts of abetting abroad, and only "general corporate activity" here; by contrast, IFC committed the specific acts for which it is liable in the United States.

absurd results Congress could not have intended. *Cf. Mohamad v. Palestinian Auth.*, 566 U.S. 449, 455 (2012).

1. As the district court originally noted, granting immunity wherever the defendant is not the most direct cause would preclude "a large swath" of joint-liability claims that are available against private parties. JA1499. That would make the U.S. a safe haven for tortious commercial conduct and harm its victims, including U.S. citizens and companies.

The Opinion would bar all sorts of claims for facilitating wrongdoing, including cases where sovereigns conspire to fix prices, *In re Cathode Ray Tube (CRT) Antitrust Litig.*, MDL No. 1917, 2018 U.S. Dist. LEXIS 16926, at *56-61 (N.D. Cal. Feb. 1, 2018), aid or enable fraud, *Anglo-Iberia Underwriting Mgmt. v. P.T. Jamsostek*, 600 F.3d 171, 174 (2d Cir. 2010); *Dale v. Colagiovanni*, 443 F.3d 425, 428-29 (5th Cir. 2006); *Frank v. Commonwealth of Ant. & Barb.*, 842 F.3d 362, 365-66 (5th Cir. 2016), manufacture and sell harmful products, *Rote v. Zel Custom Mfg. LLC*, 816 F.3d 383, 387 (6th Cir. 2016), or cause third parties to breach a contract, *Petersen Energía Inversora S.A.U. v. Argentine Republic*, 895 F.3d 194, 207-10 (2d Cir. 2018); *Universal*

Trading & Inv. Co. v. Bureau for Representing Ukr. Int. in Int'l & Foreign Cts., 727 F.3d 10, 12 (1st Cir. 2013). In all of these situations, the Opinion would require that only the actor the court concludes "actually" caused the harm could be liable.

Indeed, the Opinion would immunize sovereigns who finance or abet serious crimes from the United States, because the crime would be the gravamen. This would provide impunity to sovereign entities supporting terrorism, *Burnett v. Al Baraka Inv. & Dev. Corp.*, 292 F. Supp. 2d 9, 17-18 (D.D.C. 2003), aiding sanctions evasion, *United States v. Halkbank*, No. 15 Cr. 867, 2020 U.S. Dist. LEXIS 182312, at *15-16 (S.D.N.Y. Oct. 1, 2020), and facilitating forced labor, *Rodriguez*, 2020 U.S. Dist. LEXIS 208904, at *11-14.

The panel's rule would also harm U.S. corporations. In *Exxon Mobil Corp. v. Corporación CIMEX S.A.*, No. 19-cv-01277, 2021 U.S. Dist. LEXIS 75679 (D.D.C. Apr. 20, 2021), Cuba expropriated Exxon's property, which CIMEX, a state-owned company, subsequently trafficked. The expropriation, not the subsequent trafficking, is what "actually injured" Exxon. But because the expropriation "alone would not 'entitle a plaintiff to relief'" against CIMEX, the gravamen of the

claim against CIMEX was CIMEX's trafficking – the conduct for which *CIMEX* was sued. *Id.* at *26 (quoting *Sachs*, 577 U.S. at 33).

All of these cases found the gravamen to be the *sovereign defendant*'s acts, not another actor's. The Opinion would foreclose these types of suits, significantly affecting individuals and businesses that interact with sovereigns.

2. The Opinion would allow immunity where *both* a third party and the sovereign committed commercial acts in the United States – an absurd result. This is because the gravamen must be conduct "by the [*sovereign*]." 28 U.S.C. § 1605(a)(2). If the gravamen of this case were the "operation of the Plant," Op.6, IFC would be immune even if the Plant were in the U.S., because that conduct was not carried on by the sovereign. Thus, even where all the tortious conduct is commercial activity in the U.S., the panel would find immunity in cases it deems are based primarily upon third party conduct.

3. Jurisdictional rules must be "clear," *Lapides v. Bd. of Regents of the Univ. Sys. of Ga.*, 535 U.S. 613, 621 (2002), but the Opinion denied it created a "last harmful act" rule, and did not set forth any test. Op.10. By contrast, looking to *defendant*'s wrongful act, as the elements

test requires, is a clear rule.

C. The FSIA's text and binding precedent interpreting it dictate that sovereign immunity turns on the sovereign's conduct.

1. The FSIA provides that "states are not immune from the jurisdiction of foreign courts insofar as *their* commercial activities are concerned." 28 U.S.C. § 1602 (emphasis added). The statute's focus is thus squarely on the sovereign defendant's acts.

The Opinion thought Section 1602 is just about international law. Op.9. But since the commercial activity exception *codifies* international law, *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 199 (2007), Section 1602 is about the exception too.

2. By immunizing whole categories of ordinary tort claims, the Opinion conflicts with the FSIA's instruction that sovereigns "shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606. The panel found this language irrelevant because Section 1606 applies to claims for which a sovereign is not immune, Op.9, but this Court has looked to Section 1606 to interpret the scope of immunity.

In *Kilburn*, this Court found that a jurisdictional standard "more

restrictive" than the tort standard governing the claim "runs afoul of [Section 1606's] injunction that a non-immune 'foreign state shall be liable in the same manner . . as a private individual.'" 376 F.3d at 1129. The Opinion does what *Kilburn* forbids, interpreting "based upon" in a manner that would restrict the scope of liability.

3. Focusing on defendant's conduct does not read "based upon" out of the statute. Op.8. That language requires courts to determine which of the defendant's conduct is relevant, exactly as *Sachs* and *Nelson* applied it.

4. Section 1605(a)(2) merely requires a connection between the "defendant['s conduct] and [U.S.] *territory*," "'prescrib[ing] the necessary contacts'" for personal jurisdiction. *Price*, 294 F.3d at 89-90 (quoting H.R. Rep. No. 94-1487 at 13 and noting Congress created a "federal long-arm statute").

Since personal jurisdiction turns on *defendant's* forum connections, *Walden v. Fiore*, 571 U.S. 277, 284 (2014), it does *not* ask whether third-parties more directly caused the harm. The Opinion, however, concluded that the "based upon" inquiry has nothing to do

with personal jurisdiction. Op.9.[5] The Opinion conflicts with *Price*.

II. Inconsistent panel decisions on the test for waiver of immunity warrant *en banc* review.

A. The *Mendaro* and *Jam I* waiver tests conflict with *Lutcher*.

Courts must give effect to a defendant's immunity waiver. 22 U.S.C. § 288a(b). IFC's Articles state that "[a]ctions may be brought against the Corporation." JA701 Art. VI § 3. The provision prohibits suits by member states, but the "broad language" otherwise "contain[s] no exceptions." *Osseiran v. Int'l Fin. Corp.*, 552 F.3d 836, 839-40 (D.C. Cir. 2009).

Thus, this Court in *Lutcher* found that an identical provision waives immunity "in broad terms" and expressly rejected a "restrictive" reading; the drafters "purposeful[ly]" waived immunity for anyone except member states. 382 F.2d at 457. Nonetheless, *Mendaro* "read a qualifier into" the waiver language, *Osseiran*, 552 F.3d at 839,

[5] The panel noted that *Sachs* did not apply a personal jurisdiction-like approach, Op.9-10 (citing 577 U.S. at 31), but *Sachs* decided *which* of *defendant*'s acts count. *Sachs* is consistent with, and did not reject, the FSIA's focus on the *type* of contacts that establish personal jurisdiction, and does not overturn *Price*. Basing immunity on third party conduct, by contrast, would abandon the FSIA's personal jurisdiction approach.

"decid[ing] . . . to honor an international organization's 'facially broad waiver of immunity' only insofar as doing so provided a 'corresponding benefit' to the organization." *Jam I*, 860 F.3d at 711 (Pillard, J., concurring) (quoting *Mendaro*, 717 F.2d at 613, 617). And *Jam I* narrowed *Mendaro*, departing even further from text, holding that even where, as it found was true here, a claim "can be thought of as a 'benefit,'" it fails unless it relates to "ancillary business transactions" rather than "core operations." *Id.* at 708.

The *Mendaro* panel could not overrule *Lutcher*. *Sierra Club v. Jackson*, 648 F.3d 848, 854 (D.C. Cir. 2011). *Mendaro* is "impossible to reconcile," *Vila*, 583 F.3d at 870 (statement of Williams, J.), with *Lutcher*'s "different interpretation." *Id.* (statement of Rogers, J.). While *Jam I* suggested that "the *Mendaro* test emerged in part from *Lutcher*," 860 F.3d at 706 n.3 (citing 382 F.2d at 456), it mistakenly quoted the summary of *the Bank's argument* that *Lutcher* expressly rejected. 382 F.2d at 456-57.

Only *en banc* review can resolve the conflict. As Judge Pillard argued, "the full court should revisit . . . *Mendaro*." 860 F.3d at 713 (Pillard, J., concurring).

B. *Jam II* supports *Lutcher's* plain text approach.

Courts apply a text's plain meaning. That is how the Supreme Court analyzed the International Organizations Immunities Act (IOIA), *Jam II*, 139 S. Ct. at 768-70; the same approach governs treaties. *United States v. Ali*, 718 F.3d 929, 938 (D.C. Cir. 2013). *Lutcher* faithfully reads the IOIA and the Articles; *Mendaro* does not.

Under the IOIA, organizations may "expressly waive their immunity." 22 U.S.C. § 288a(b). This requires courts to honor express waivers and bars judicially created "qualifiers," like *Mendaro*'s organizational "benefit" and *Jam I*'s "ancillary business" requirements. This Court cannot "decide[]. . . to honor" the waiver only to a limited extent. *Jam I*, 860 F.3d at 711 (Pillard, J., concurring).

Courts cannot substitute their view of the purpose of immunity for waivers' plain text. *See id.* (*Mendaro* "second-guess[es]" the Articles' "waiver decisions"). Purpose is generally "expressed by the ordinary meaning of the words used." *Jam II*, 139 S. Ct. at 769 (quotation marks omitted). But *Mendaro* looked past the "facially broad waiver" to what it thought was immunity's "underlying purposes," assuming that careless drafters used language that did not reflect their intent. 717 F.2d at 611,

615, 617. *Lutcher* correctly recognized the drafters' "deliberate choice" to "waiv[e] immunity in broad terms." 382 F.2d at 457.

Mendaro, addressing provisions identical to IFC's, held that generic preambulatory language to the waiver provision limits the waiver. 717 F.2d at 617. But that language states the purpose of the "immunities" provisions, JA700 § 1 – not the *waiver* provision, as *Mendaro* wrongly held. And the waiver has been incorporated into U.S. law, 22 U.S.C. § 282g, and into international law by IFC, *see* Convention on the Privileges and Immunities of the Specialized Agencies Annex XIII §1, Nov. 21, 1947, 33 U.N.T.S. 261, *without* the preamble. The waiver means what it says.

CONCLUSION

The Opinion's holding that if the sovereign did not most directly harm the plaintiff, it is immune for its U.S. commercial conduct, conflicts with prior D.C. Circuit precedent, splits with every other circuit to address the question, diverges from the FSIA's text, and would lead to anomalous results. This Court should restore its original focus on the sovereign's conduct and remand to the district court to apply that standard.

Moreover, as judges of this Court have recognized, the conflict between *Lutcher* and *Mendaro* – exacerbated in *Jam I* – is untenable.

Rehearing is warranted on both issues.

August 5, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 35(b)(2)(A), I certify the following:

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 35(b)(2)(A) because this brief contains 3900 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Circuit Rule 32(e)(1).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

August 5, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of August, 2021, I filed the foregoing Petition of the Plaintiffs-Appellants in *Jam et al. v. International Finance Corporation*, Nos. 20-7092, 20-7097, with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

August 5, 2021

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