No. 17-1011

IN THE

Supreme Court of the United States

BUDHA ISMAIL JAM, et al.,

Petitioners,

v.

INTERNATIONAL FINANCE CORPORATION,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the D.C. Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Faced with a statutory provision that gives international organizations the "same immunity" as foreign governments, 22 U.S.C. § 288a(b), the IFC urges this Court to deny certiorari on the ground that "[f]undamentally different" principles should govern "the immunities of international organizations and foreign states," BIO 14; *see also id.* 2, 22-24. To say the text of the International Organizations Immunities Act (IOIA) directly refutes the IFC's argument is putting it mildly. The IFC's other arguments in defense of the D.C. Circuit's absolute-immunity rule likewise crumble on inspection.

But the case for certiorari here goes well beyond the fact that the D.C. Circuit's construction of the IOIA is wrong. The Third Circuit has squarely rejected the D.C. Circuit's absolute-immunity rule. And the IFC cannot seriously deny that the Executive Branch—whose views are particularly important with respect to international law issues—disagrees with it as well. Under these circumstances, it is critical to resolve whether international organizations should truly be allowed to operate beyond the law's reach. As part of that review, this Court should also consider the D.C. Circuit's judicially created limit on organizations' waivers of immunity—an additional, related matter that has tied the court of appeals up in knots and hampered the proper administration of the IOIA.

I. This Court should resolve whether the immunity the IOIA affords to international organizations tracks the FSIA.

1. The IFC cannot dispute that the Third and D.C. Circuits (and Supreme Court of Alaska) disagree over

whether the IOIA cloaks international organizations with absolute immunity. Contrary to the IFC's contentions (BIO 3, 26-29), this disagreement warrants this Court's attention.

a. For starters, the D.C. Circuit's stance on the question presented is particularly significant—and particularly troublesome. Cases involving the IOIA disproportionately arise within that circuit because most international organizations are located there. Yet the D.C. Circuit's absolute-immunity rule is at loggerheads not only with the Third Circuit's position on the issue, but also with the long-established position of the U.S. State Department. *See OSS Nokalva, Inc. v. Eur. Space Agency*, 617 F.3d 756 (3d Cir. 2010); Pet. 12-13, 22-24.

The IFC suggests that the Government's position is not due the usual weight because the Government has not reiterated it since filing an amicus curiae brief in 1980. BIO 25. In fact, the State Department reaffirmed the Government's position in 1992. Pet. 12-13 n.4. And the IFC offers no basis for believing the Government's position has changed since then.

b. The IFC next posits that suits against international organizations are "uncommon." BIO 26-27. But simply tallying reported decisions "[o]ver the past decade," *id.* 26, as the IFC does, is hardly an adequate proxy for the significance of whether international organizations are absolutely immune from suit. The D.C. Circuit established its absolute-immunity rule over a decade ago in *Atkinson v. Inter-American Development Bank*, 156 F.3d 1335 (D.C. Cir. 1998), deterring parties since then from bringing claims in Washington, D.C. Even so, cases implicating the immunity issue here continue to be

brought in that jurisdiction. *See* Pet. 19 (citing cases). Lawsuits against international organizations likewise have been brought in recent years in several other places. *See id.* 14 (citing cases).

Bean counting aside, the immunity issue presented here is exceptionally important regardless of how often it arises in court cases. International organizations affect matters ranging from international business to natural resource management to human health and safety. *See* Pet. 2. Lower courts should not be able to place the commercial activities of such organizations beyond the reach of the law—regardless of how egregious or harmful the organizations' acts may be—without this Court's considering the question.

c. Nor is the IFC correct in suggesting that construing the IOIA's "same immunity" provision to track the FSIA would rarely "have any practical impact" on the outcome of immunity analyses. BIO 27. To support this claim, the IFC points to two organizations—the United Nations and the International Monetary Fund (IMF)—that enjoy broad immunity under their founding treaties. *Id.* 27-28. But those organizations are exceptional. The charters of most international organizations, including the IFC, do not establish immunity beyond what the disputed IOIA provision confers.[1]

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[1] The IFC asserts at one point that its charter gives it immunities comparable to the United Nations and IMF. BIO 28. This is incorrect. The Articles of Agreement for the latter organizations protect them from every form of legal process. Pet. 2-3. By contrast, with the one exception of suits by member states, the IFC's Articles do not purport to confer any immunity. *Id.* 7-8; Pet. App. 2a, 23a.

The IFC's claim (BIO 28) that applying the FSIA in this context would still preclude most suits against international organizations is similarly inaccurate. As the IFC itself acknowledges, many international organizations engage almost exclusively in commercial activity. *Id.* 22. That being so, the IFC is wrong to suggest (*id.* 28-29) that employment suits against such organizations would never satisfy the FSIA's commercial activity exception. *See El-Hadad v. United Arab Emirates*, 496 F.3d 658, 663-68 (D.C. Cir. 2007) (explaining circumstances under which employment claims can satisfy exception); *Kato v. Ishihara*, 360 F.3d 106, 111-14 (2d Cir. 2004) (same). And that is to say nothing of suits like this—or suits involving other plainly commercial matters such as contracts, corporate bankruptcy, or securities fraud. *See* Pet. 19.

2. The significance of the immunity issue here and the intractable split over the meaning of the IOIA call for this Court's intervention, even without more. But the IFC's arguments on the merits confirm the need for review.

a. The plain text of the IOIA compels the conclusion that the statute incorporates the law of foreign sovereign immunity as it exists today. Indeed, the IFC does not dispute the general rule that when the text of a federal statute explicitly refers to another body of law, the statute incorporates that law on an evolving basis. Pet. 12; *see also El Encanto, Inc. v. Hatch Chile Co.*, 825 F.3d 1161, 1164 (10th Cir. 2016) (Gorsuch, J.) (the "plain language" of a statute referencing the Federal Rules of Civil Procedure incorporates the Rules as they exist at the time of suit, not at the time of the statute's enactment);

Devlin v. United States, 352 F.3d 525, 530, 532 (2d Cir. 2003) (Federal Tort Claims Act provision rendering United States liable "in accordance with the law of the place where the act or omission occurred" ties the Government's liability to the "evolving tort law of the several states").

The IFC nevertheless maintains that the reference canon is overcome here by "other evidence of congressional intent." BIO 17. Both of its arguments in this respect are unconvincing.

First, the IOIA's presidential authority provision—which allows the President to "withhold or withdraw from any [international] organization" its privileges and immunities, 22 U.S.C. § 288—does not shed any light on whether the statute's "same immunity" provision freezes sovereign immunity law as of 1945. The presidential authority to "withdraw" an immunity simply permits discrete, organization-specific exemptions to the IOIA's various default immunity rules. As the text of Section 288 makes clear, the provision has nothing to do with setting the default rules for *all* organizations. *See* Pet. 16.

Indeed, no President has ever used the authority in Section 288, as the IFC proposes, to alter "the scope of immunity accorded international organizations" across the board, BIO 16-17. Rather, the President has used Section 288 only to adjust specific privileges and immunities for named organizations.[2]

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[2] *See, e.g.*, Exec. Order No. 13,524, 74 Fed. Reg. 67,803 (Dec. 16, 2009) (expanding Interpol's privileges and immunities); Exec. Order No. 11,059, 27 Fed. Reg. 10,405 (Oct. 23, 1962) (designating and withholding certain immunities

Second, the IFC observes that "[s]everal of the IOIA's provisions distinguish between international organizations and foreign states." BIO 19 (citing 22 U.S.C. §§ 288d, 288f). But these other provisions refute rather than support the IFC's position. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983). That being so, the provisions that the IFC cites show that Congress knew in the IOIA how to distinguish between international organizations and foreign states, and it chose not to do so in the provision setting default rules for immunity from suit.

b. The IFC's policy arguments likewise run smack into the text of the IOIA. Extrapolating from a couple of secondary sources and spinning a theory even the D.C. Circuit did not voice below or in *Atkinson*, the IFC argues that "[f]undamentally different" principles should animate foreign sovereign immunity and international organization immunity. BIO 14, 22-24. In crafting the IOIA, however, Congress reached the opposite conclusion with respect to immunity from suit—namely, that the "same" immunity rules should govern both types of entities. 22 U.S.C. § 288a(b). And that conclusion makes sense. International organizations are simply collections of sovereign states. So they should not be

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from the Inter-American Tropical Tuna Commission, the Great Lakes Fishery Commission, and the International Pacific Halibut Commission).

immune when states themselves would not be entitled to immunity.

The IFC also notes that the FSIA "never was intended to govern . . . the immunity of foreign officials." BIO 24 (citing *Samantar v. Yousuf*, 560 U.S. 305 (2010)). This is irrelevant. The IOIA directs that international organizations shall enjoy the same immunity as "foreign governments." 22 U.S.C. § 288a(b). The immunity rules governing foreign *officials* are beside the point.

The IFC lastly maintains that incorporating the FSIA's approach to immunity into the IOIA would produce "anomalous results," in that subjecting international organizations to suit for their commercial activities would affect some international organizations more than others. BIO 21-22. But that is not odd at all. Under the FSIA, agencies of foreign states that engage in predominately commercial activity are more commonly subject to suit than those that are not. The IOIA simply aligns international organization immunity with this existing regime.

The real anomaly would be granting immunity for the commercial activities of international organizations and not others similarly situated. Development banks such as the IFC, for instance, often make loans in tandem with state-owned and private banks, which are amenable to suit for their commercial wrongs, *see Atlantica Holdings, Inc. v. Sovereign Wealth Fund Samruk-Kazyna JSC*, 813 F.3d 98, 102, 117 (2d Cir. 2016) (sovereign wealth fund not immune under FSIA from securities fraud claim). Against this backdrop, insulating international organizations' commercial misdeeds

from suit would be inconsistent with how their peers and business partners are treated for the same acts.

3. The IFC contends that "petitioners would not benefit from a ruling in their favor" because it could ultimately prevail in this litigation for reasons unrelated to the IOIA. BIO 33 (capitalization altered). The district court and the court of appeals, however, addressed "only IFC's threshold immunity argument," without reaching any of its other arguments for dismissal. Pet. 8; Pet. App. 23a-24a, 28a. And this Court is "a court of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). Accordingly, any other defenses that the IFC might wish to press in the future should not dissuade this Court from resolving the IOIA issue presented here.[3]

Regardless, the IFC's alternative defenses lack merit. For the first time in this litigation, the IFC asserts that petitioners' claims do not fit within the FSIA's commercial activity exception. BIO 33. But the IFC's analogy to *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 395 (2015), fails. The commercial activity exception was inapplicable in *Sachs* because the tortious conduct occurred entirely overseas. *Id.* at 396. Here, by contrast, petitioners' claims are based upon acts the IFC undertook at its Washington, D.C., headquarters: the IFC's decision to fund a dangerous project without proper

[3] The procedural posture here thus stands in stark contrast to *Nyambal v. International Monetary Fund*, 772 F.3d 277 (D.C. Cir. 2014), *cert. denied*, 135 S. Ct. 2857 (2015), where the D.C. Circuit ruled for the defendant for reasons independent of the IOIA, and the petitioner did not challenge that alternative holding in its petition to this Court. *See* Pet. 15 n.5.

safeguards, its "inadequate supervision" of that project, and its continued disbursement of funds despite knowledge that serious harms were materializing. Pet. 6.

The doctrine of *forum non conveniens* could not require dismissal of petitioners' suit either. *Contra* BIO 34. That doctrine does not apply when the alternative forum the defendant proposes provides "no remedy at all." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 (1981). Here, no remedy is available in the IFC's proposed alternative forum because the Indian government has recently given the IFC special immunity. *See* Ministry of External Affairs, Notification, 2016, Gazette of India, pt. II sec. 3(ii) (July 18, 2016).

II. Even apart from the question whether the IOIA tracks the FSIA's immunity rules, this Court's review is warranted.

If the D.C. Circuit proved somehow to be correct that the IOIA's "same immunity" provision locks in the law that governed foreign states in 1945, this Court's further guidance would be needed. The D.C. Circuit has adopted two important IOIA-specific rules that have created fits for litigants and courts alike.

1. As the IFC's BIO reveals, the D.C. Circuit has made a hash of the immunity rules that governed in 1945. This Court has repeatedly held that the law at that time required courts to defer to the Executive Branch's stance as to whether a foreign state was entitled to immunity. *See Republic of Austria v. Altmann*, 541 U.S. 677, 689 (2004); Pet. 21-22. The IFC also implicitly acknowledges, and pre-1945 case

law confirms, that the Executive Branch made those determinations on a case-by-case basis. BIO 15-16 n.2; *see also Republic of Iraq v. Beaty*, 556 U.S. 848, 857 (2009); Pet. 23-24. In its efforts to harmonize *Altmann* with the D.C. Circuit's holding, however, the IFC argues that the IOIA's "same immunity" provision requires courts to defer to the Executive's views as of "the time of the IOIA's enactment," instead of at the time a lawsuit is filed. BIO 15.

The IFC's argument fails fully to account for how *Altmann* explained immunity law worked in 1945. Immunity then, as now, reflected "current political realities," requiring courts to defer to "the most recent [political branch] decision." *Altmann*, 541 U.S. at 696; *see also* Pet. 23-24 (citing pre-1945 case law). So a court today applying the law of 1945 would have to look to the political branches' *modern* position on immunity. That would be a readily administrable and sensible inquiry that accounts for the purposes for deferring to the Executive in the first place. And it would dictate, per the Government's expressions in the FSIA and the Tate Letter, that foreign states (and thus international organizations) are not immune from suit based on commercial activities. *See* Pet. 22.

By contrast, the IFC's backward-looking approach to the IOIA's "same immunity" provision would require courts today to imagine whether President Truman's administration would have wanted the particular defendant to enjoy immunity. *See* Pet. App. 6a. This leaves lower courts with an inherently speculative task, *Altmann*, 541 U.S. at 713 (Breyer, J., concurring)—and one that seems increasingly foolish as time goes by. This Court should not countenance such a misguided regime,

especially insofar as it grants organizations immunity under circumstances that U.S. law has denied to foreign states for over sixty-five years.

2. The D.C. Circuit's approach to waivers under the IOIA also merits this Court's review.

a. The IOIA provides in unqualified terms that organizations "may expressly waive their immunity." 22 U.S.C. § 288a(b). Consequently, the D.C. Circuit's recognition that "read literally," the IFC's charter includes a "categorical waiver" of immunity from suit, Pet. App. 7a, should have been the end of the matter. But the D.C. Circuit nevertheless declined to enforce the waiver because of its rule requiring not only a written waiver of immunity but also a showing that the type of suit at issue "would benefit the organization over the long term." *Id.* (citation omitted); *see also Mendaro v. World Bank*, 717 F.2d 610, 617 (D.C. Cir. 1983) (first enunciating this test).

As the D.C. Circuit itself recognized here, its "corresponding benefit" test has devolved into a "doctrinal tangle." Pet. App. 21a (Pillard, J., concurring); *see also id.* 8a-11a (majority opinion recognizing that the test is "a bit strange" and "something of a misnomer" because a claim such as petitioners' "in some sense can be thought of as a 'benefit'"). The IFC tries to defend the test—and the outcome it produced here—on the ground that a waiver of immunity should not be enforced where it "would vitiate [an organization's] ability to perform its functions." BIO 30. But the fact that the IFC even offers this defense only reinforces how freewheeling and "amorphous" the D.C. Circuit's waiver jurisprudence has become. Pet. App. 21a (Pillard, J., concurring).

At any rate, the IFC's contention that lawsuits like this would stymie its operations is transparently untrue. All other lending institutions—whether privately or publicly owned—are subject to suit for commercial malfeasance. Yet they remain able to perform their core functions.

b. The IFC contends that this case is an unsuitable vehicle to address the IOIA's waiver provision because the D.C. Circuit characterized petitioners' claims as "challeng[ing the] IFC's 'internal review process' and its 'core' policy decisions." BIO 32 (quoting Pet. App. 10a-11a). But this is circular. The D.C. Circuit offered those characterizations in service of applying the very "corresponding benefit" test that petitioners maintain is wrong. *See Mendaro*, 717 F.2d at 617-18. This Court should grant certiorari to resolve whether petitioners are correct that courts must enforce waivers without applying that judicially created standard.

CONCLUSION

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

Respectfully submitted,

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