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' MOTION TO RECALL THE MANDATE AND PETITION FOR REHEARING OR REHEARING *EN BANC*

Richard L. Herz
Marco B. Simons (D.C. Bar No. 492713)
Michelle C. Harrison (D.C. Bar No. 1026592)
Lindsay A. Bailey (D.C. Bar No. 1723447)
EARTHRIGHTS INTERNATIONAL
1612 K St. NW, Suite 800, Washington, D.C. 20006
Tel: (202) 466-5188

May 3, 2022 *Counsel for Plaintiffs-Appellants*

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TABLE OF AUTHORITIES[1]

[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

INTRODUCTION AND RULE 35(b) STATEMENT

Two of this Court's decisions, issued within the past year, irreconcilably conflict. One of them, the decision here, also conflicts with a Supreme Court decision issued just days ago. Given this Court's and the Supreme Court's intervening authority, Plaintiffs-Appellants respectfully move this Court to recall the mandate and reconsider its decision, either by the panel or *en banc*, to "maintain uniformity of the court's decisions" and consistency with Supreme Court precedent. Fed. R. App. P. 35(b)(1).

The Foreign Sovereign Immunities Act (FSIA) lifts immunity for any claim "based upon a commercial activity carried on in the United States by the foreign [sovereign]." 28 U.S.C. § 1605(a)(2). The Opinion in this case held that a claim against a sovereign is based not on the defendant's conduct that makes it liable, but on the conduct that most directly injured the plaintiff, even if committed by a third party. *See Jam v. Int'l Fin. Corp.*, 3 F.4th 405, 409-411 (D.C. Cir. 2021). That is, if the sovereign defendant is not the most direct cause of the harm, the claims are not "based upon" the sovereign's acts and are instead "based upon" "the conduct of a non-sovereign third party." *Id.* In such

circumstances, the sovereign will always be immune, even if its wrongful conduct was commercial activity in the United States.

But this Court, in another case that was pending at the same time, later rejected that approach. *See Rodriguez v. Pan Am. Health Org.*, 29 F.4th 706, 2022 U.S. App. LEXIS 8172 (D.C. Cir. 2022). In both cases, the defendant aided a third party that more directly injured the plaintiffs, and without whose conduct the plaintiffs would not have suffered harm. But while *Jam* held that the claim's gravamen was the third party's acts because those acts "actually injured" plaintiffs, 3 F.4th at 409, *Rodriguez* held the gravamen was the defendant's conduct, and that defendant's conduct need *not* be what "actually injured" plaintiffs. 2022 U.S. App. LEXIS 8172, at *18. The claims here would not have been dismissed under *Rodriguez*. These conflicting rules require further review.

There is more. The Supreme Court just confirmed that courts must hold sovereigns engaged in U.S. commercial acts to the same liability standards as private parties. *Cassirer v. Thyssen-Bornemisza Collection Found.*, No. 20-1566, __ U.S. __, 2022 U.S. LEXIS 2097 (U.S.

April 21, 2022). But *Jam*'s most direct cause rule bars ordinary joint tortfeasor liability, precisely *because* the claim involves joint liability.

Whether a sovereign engaged in U.S. commercial activity is nonetheless immune based upon a third party's conduct is an exceptionally important issue. *Jam* conflicts not only with *Rodriguez* and *Cassirer*, but also with the Supreme Court's "elements test," *see OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 33-34 (2015), and the precedent of every other court of appeals to consider the question. And *Jam* creates new immunity for ordinary joint liability in a host of contexts, from fraud, to terrorism, to expropriation, to criminal law. The Court should recall the mandate and harmonize its decision with both its own, more recent decision and with intervening Supreme Court authority.

BACKGROUND

From its headquarters in Washington, Defendant-Appellee International Finance Corporation (IFC) provided indispensable funding for, and approved the design and construction of the Tata Mundra power plant. As IFC foresaw at the time, the Plant has threatened local people's health, destroyed their livelihoods, devastated

fisheries, and ruined freshwater sources, leaving farmers unable to grow crops on their land.

When Plaintiffs sued IFC for these injuries, IFC claimed absolute immunity, 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). On remand, IFC claimed it was immune because the "gravamen" of Plaintiffs' suit was the Plant's construction by IFC's joint tortfeasor, not IFC's own wrongful conduct. Plaintiffs disagreed, arguing that a claim is based upon the defendant's conduct that makes it liable – here, IFC's wrongful acts in the United States.

The district court issued two opinions. The first correctly looked to IFC's conduct, rejecting IFC's assertion that these claims are "based upon" third party acts. *Jam v. Int'l Fin. Corp.*, 442 F. Supp. 3d 162, 172-73 (D.D.C. 2020). The second reversed course, stating that it was "focus[ing] on" what conduct it believed "actually injured plaintiffs" – which it found was "the conduct of a third party." *Jam v. Int'l Fin. Corp.*, 481 F. Supp. 3d 1, 9 (D.D.C. 2020).

This Court affirmed, concluding that the claims were based not upon IFC's conduct in the United States, but upon the third party conduct in India that more directly caused the injury. *Jam*, 3 F.4th at 409. The Court declined to hear the case *en banc* on August 13, 2021. On April 25, 2022, the Supreme Court denied Plaintiffs' petition for *certiorari*.

On December 9, 2020, while this case was pending before this Court, the Pan American Health Organization – an international organization like IFC – appealed a district court decision denying it immunity. Notice of Appeal, *Rodriguez*, 29 F.4th 706 (D.C. Cir. filed Dec. 9, 2020). There, Cuban physicians sued the Organization for, *inter alia*, providing financial services to Brazil and Cuba that facilitated forced labor in violation of human trafficking laws. 2022 U.S. App. LEXIS 8172, at *2. While Plaintiffs' petition for *certiorari* in this case was pending, this Court affirmed that the Pan American Health Organization was *not* entitled to immunity. *Id.* at *20. Unlike in *Jam*, the Court specifically rejected the argument that the gravamen analysis focuses on the acts that "actually injured" the plaintiffs, instead focusing on the defendant's conduct for which it was sued. *Id.* at *18.

On April 21, 2022, the U.S. Supreme Court decided *Cassirer*. 2022 U.S. LEXIS 2097.

REASONS FOR RECALLING THE MANDATE AND GRANTING REHEARING

The *Jam* Opinion conflicts with both a more recent decision of this Court and a holding the Supreme Court reached just days ago. If the Opinion nonetheless is still good law in this Circuit, it creates Circuit splits with every other court of appeals to consider the question. This Court should grant panel or *en banc* rehearing.

I. The Court should recall the mandate to reconsider the Opinion in light of more recent precedent.

This Court may recall its mandate to avoid divergent results in two cases pending at the same time, *Greater Boston Television Corp. v. FCC*, 463 F.2d 268, 278-79 (D.C. Cir. 1971), or where "a supervening change in governing law [] calls into serious question the correctness of the court's judgment." *Sargent v. Columbia Forest Prods.*, 75 F.3d 86, 90 (2d Cir. 1996). Both circumstances exist here. *Jam* and *Rodriguez* were pending before this Court at the same time, and both *Rodriguez* and the Supreme Court's decision in *Cassirer* issued after the decision here.

Supra at 5. As detailed below, both *Rodriguez* and *Cassirer* are at odds with the Opinion here.

Courts of appeals may "reopen a case at any time." *Sargent*, 75 F.3d at 89 (noting, following a denial of *certiorari*, that its "power to recall a mandate is unquestioned"). Granting a recall motion filed within two weeks of the denial of *certiorari* is not considered reopening a stale claim. *Id.* at 90.

The Court should recall the mandate to reconcile this case with *Rodriguez* and reconsider it in light of the new Supreme Court authority.

II. *Jam* is fundamentally inconsistent with *Rodriguez*.

Both the reasoning and the outcome in *Jam* conflict with *Rodriguez*. *Jam* held that because IFC merely "facilitated" a third party's acts, the gravamen is third-party conduct; its analysis focused on what conduct "actually injured" the Plaintiff, rather than the *defendant*'s tortious conduct. *See* 3 F.4th at 409.

Rodriguez involved analogous circumstances, but assessed the gravamen differently and reached the opposite result. 2022 U.S. App. LEXIS 8172, at *16-21. Like IFC, the Pan American Health

Organization facilitated the third-party conduct (Cuba and Brazil's forced labor) that "actually injured" the plaintiffs. And like IFC, it argued the gravamen was the third-parties' conduct. *Id.* at *18. But unlike *Jam*, the *Rodriguez* panel *rejected* that argument, holding that "*Sachs* does not require defining the 'gravamen' by looking to the acts that 'actually injured' [Plaintiffs]." *Id.* (citing 577 U.S. at 36 n.2).

Rodriguez held that "with regard to alleged financial activity, we consider the 'gravamen' of *that* alleged wrongful conduct rather than the harm that may result elsewhere." *Id.* at *19 (emphasis original). The panel noted that under Supreme Court precedent, the gravamen of a suit consists of "'those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case.'" *Id.* at *19-20 (quoting *Saudi Arabia v. Nelson*, 507 U.S. 349, 357 (1993)); *accord Sachs,* 577 U.S. at 34. Applying that test, the panel held that "[i]f the conduct is itself wrongful – as opposed to wrongful based only on other conduct – it constitutes the 'core' of the claim." *Id.* at *19-20 (quoting *Sachs,* 577 U.S. at 35). Because it found that the "financial benefit" that violates Section 1589(b) was "itself 'wrongful conduct' and occurred in

the United States," the panel concluded that the commercial activity exception was satisfied. *Id.* at *20.

The claims in *Jam* equally satisfy *Rodriguez*, yet this Court held that IFC was immune. Plaintiffs allege negligent conduct by IFC (in the U.S.), and a defendant's negligence is itself wrongful conduct, separate from that of any other actor or joint tortfeasor.[1] Defendants are liable for their own negligence that "allowed [someone else's] foreseeable [tort]"; such cases involve "two tortious acts": the directly harmful conduct, and the acts allowing it to occur. *See Sheridan v. United States*, 487 U.S. 392, 398, 401, 403 (1988). While Plaintiffs here may not have a claim against IFC without additional wrongful conduct by third parties, the same is true in *Rodriguez* – receiving a financial benefit is only wrongful if it comes from a third party's wrongful use of forced labor. 18 U.S.C. § 1589(b).

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[1] *See, e.g.*, Restatement (Second) of Torts §§ 302, 302A, 302B & cmt. H, 876 (1965) (noting joint-tortfeasors are liable for their own conduct); *id.* §§ 447-49 (explaining that negligent or tortious acts of third party do not absolve another negligent party of liability); Restatement (Third) of Torts: Liability for Physical and Emotional Harm, § 19, comment c (2012) (noting defendant is liable where "third party's misconduct is among the risks making the defendant's conduct negligent.")

Rodriguez found the Pan American Health Organization's conduct to be the gravamen, rather than "the acts that 'actually injured' the [plaintiffs]," precisely because *Rodriguez* applied the Supreme Court's test and looked to the elements of the claim. 2022 U.S. App. LEXIS 8172, at *18-20. A claim's elements are keyed to the *defendant*'s conduct that makes that defendant liable. Thus, a suit is "based upon" the defendant's conduct, not a third party's.

Jam, by contrast, looked instead to what most directly caused Plaintiff's injury. *See* 3 F.4th at 409. But that is *not* an element of the claim; joint-tortfeasors are liable for their *own* conduct, even if someone else more directly caused the injury. *Jam* cannot be reconciled with *Rodriguez*'s correct application of the Supreme Court's test. Had *Jam* focused on the conduct that makes the *defendant* liable – IFC's U.S. conduct – as *Rodriguez* did, the results in *Rodriguez* and *Jam* would have been the same.

To be sure, *Rodriguez* tried to distinguish *Jam*, but its description of *Jam* is incorrect. According to *Rodriguez*, "the 'gravamen' [in *Jam*] occurred in India because *all the allegedly wrongful conduct occurred there*." 2022 U.S. App. LEXIS 8172, at *18 (citing *Jam*, 3 F.4th at 409)

(emphasis added). But *Jam* states that "all of appellants' claims *turn on* allegedly wrongful conduct in India," 3 F.4th at 409 (emphasis added), *not* that all of the allegedly wrongful conduct occurred abroad. Again, the same is true of *Rodriguez*: the claims there "turn on" the alleged forced labor abroad. And here, as in *Rodriguez*, the *defendant*'s wrongful conduct occurred in the United States.

Rodriguez noted that *Jam* concerned "tortious activity" while "here, however, the financial activity itself gives rise to a cause of action." 2022 U.S. App. LEXIS 8172, at *19 (citing 18 U.S.C. § 1589(b)). But IFC's negligence equally gives rise to the claims against IFC in *Jam*. The *Rodriguez* claims are statutory, but *Rodriguez* did *not* hold that *Jam*'s actual injury test applies to common law claims, but not to statutory claims. Nor is there any basis for such a rule; indeed, it conflicts with *Sachs*'s elements test.

III. *Jam* is fundamentally inconsistent with the Supreme Court's recent decision in *Cassirer*.

Jam conflicts with *Cassirer* because it creates a different liability regime for foreign sovereigns than for private parties.

The Supreme Court unanimously held, less than two weeks ago, that the liability rules governing sovereigns must be the same as those

governing everyone else. *Cassirer*, 2022 U.S. LEXIS 2097, at *16. Sovereigns that are not immune under the FSIA are liable "'to the same extent as a private individual under like circumstances.'" *Id.* at *11 (quoting 28 U.S.C. § 1606). Courts therefore must "ensure – as Section 1606 demands – that [a foreign sovereign] will be liable in the same way as a private party." *Id.* at *13.

Jam, however, imposes a substantive limit on sovereigns' liability that bars many ordinary claims that are available against private parties. Traditional joint-liability rules hold *private* joint-tortfeasors liable for their own conduct, even if another party more directly caused the injury. *Supra* Section II; *Sheridan*, 487 U.S. at 401. But *Jam* precludes such claims against *sovereign* joint-tortfeasors. Indeed, *Jam* bars such suits against sovereigns *because* they involve joint liability.

Jam's approach thus immunizes sovereigns from a "large swath" of ordinary claims. 442 F. Supp. 3d at 173. But a private party engaged

in the same U.S. commercial conduct as IFC could be sued under joint liability principles. That conflicts with *Cassirer*.[2]

Of course, a sovereign's conduct, like a private party's, can be too attenuated from the harm for liability, but that is a merits question, not an immunity question. *Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1129 (D.C. Cir. 2004) (holding that a jurisdictional standard "more restrictive" than the applicable tort standard "runs afoul of" Section 1606).

Jam found that because Section 1606 applies to claims for which a sovereign "is not entitled to immunity," it is irrelevant to the immunity inquiry. 3 F.4th at 410. But *Cassirer* held that "the FSIA was never intended to *affect* the substantive law determining the liability of a

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[2] *Jam* stated that the commercial activity exception did not apply because "the gravamen of appellants' complaint is injurious activity that occurred in India." 3 F.4th at 407. But the panel's holding necessarily applies even where all of the conduct – both the third party's and the covered entity's – is commercial activity in the United States. The suit must be "based upon" conduct "by the [sovereign]." 28 U.S.C. § 1605(a)(2). If the gravamen were a third-party's acts, the sovereign is necessarily immune – full stop – because that conduct was not carried on by the sovereign. Under *Jam,* a suit based entirely on commercial activity in the U.S. would fail the commercial activity exception.

foreign state or instrumentality deemed amenable to suit." 2022 U.S. LEXIS 2097, at *11 (quotation marks omitted) (emphasis added). Granting immunity whenever a joint-tortfeasor's conduct more directly caused the injury clearly "affects" the substantive law that applies to sovereigns by inherently precluding ordinary liability theories. *Jam* thus creates the very "mismatch between [a sovereign's] liability and a private defendant's" that *Cassirer* foreclosed. *Id.* at *13-14.

Moreover, instead of looking to the claim's elements, *Jam* requires courts to compare two or more responsible parties' conduct and to determine whose is more important, without reference to established common law or statutory liability principles. Thus, *Jam* necessarily forces courts to invent new federal common law rules. *Cassirer* specifically sought to avoid this kind of "federal common lawmaking." *Id.* at *15.

Rodriguez and Plaintiffs' approach, by contrast, leave substantive law untouched and does not require courts to invent any new rules. Claims may proceed where the *defendant*'s wrongful conduct is commercial and occurred in the United States. That treats sovereigns engaged in commercial conduct like private parties, by applying the

same liability rules and requiring a similar nexus to the forum. It thus preserves *Cassirer*'s equal treatment principle.

The Court should consider the conflicts between *Jam* and *Cassirer*.

IV. The issue in this case is extremely important.

Under *Jam*, whenever multiple entities act together to commit a wrong, only one (at most) could be sued; under *Rodriguez*, each entity could be sued for its own conduct. Whether immunity turns on the sovereign's own conduct when another actor may have more directly caused plaintiff's injuries is a question of exceptional importance, for two reasons.

First, if *Jam* survives *Rodriguez,* this Circuit's law is at odds with that of every other court of appeals to have considered FSIA cases involving multiple responsible parties. Rather than making a threshold determination of whether the claims are "based upon" the defendant's conduct or someone else's, the Second, Fifth, Sixth, and Tenth Circuits all determine a sovereign's immunity by examining the acts of *the*

sovereign upon which the claim is grounded.[3] All of these courts hold the gravamen to be defendant's own wrongful conduct, not a third party's. If *the sovereign*'s relevant conduct is commercial activity in the United States, it is not immune. Period.

Second, this issue arises whenever sovereign entities aid or act with third parties, and thus has significant implications for individuals, businesses, international organizations, foreign governments and state-owned enterprises. Such cases abound, in a variety of contexts:

- Aiding fraud. *E.g. Southway Construction Company*, 198 F.3d at 1212-13, 1217-18; *Dale v. Colagiovanni*, 443 F.3d 425, 428-29 (5th Cir. 2006); *Rosner v. Bank of China*, 528 F. Supp. 2d 419, 424-25 (S.D.N.Y. 2007).

- Conspiring to fix prices. *E.g. In re Cathode Ray Tube (CRT) Antitrust Litig.*, MDL No. 1917, 2018 U.S. Dist. LEXIS 16926, *56-61,

[3] *Petersen Energía Inversora S.A.U. v. Argentine Republic*, 895 F.3d 194, 204-10 (2d Cir. 2018); *Anglo-Iberia Underwriting Mgmt. v. P.T. Jamsostek*, 600 F.3d 171, 174 (2d Cir. 2010); *United States v. Turkiye Halk Bankasi A.S.*, 16 F.4th 336, 348 (2d Cir. 2021); *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1107, 1109 (5th Cir. 1985); *Frank v. Commonwealth of Antigua & Barbuda*, 842 F.3d 362, 370 (5th Cir. 2016); *Global Technology, Inc. v. Yubei (XinXiang) Power Steering System Co.*, 807 F.3d 806, 814 (6th Cir. 2015); *Southway Constr. Co. v. Cent. Bank of Nigeria*, 198 F.3d 1210, 1218 (10th Cir. 1999).

73 (N.D. Cal. Feb. 1, 2018); *Sea Breeze Salt, Inc. v. Mitsubishi Corp.*, No. CV 16-2345-DMG, 2016 U.S. Dist. LEXIS 139342 *8-9 (C.D. Cal. Aug. 18, 2016).

• Multiple responsible parties in aircraft accidents or products liability. *E.g. In re Air Crash Disaster Near Roselawn*, 96 F.3d 932, 935 (7th Cir. 1996); *Filus v. Lot Polish Airlines*, 907 F.2d 1328, 1329 (2d Cir. 1990); *Vermeulen v. Renault, U.S.A., Inc.*, 985 F.2d 1534, 1543-44 (11th Cir. 1993); *Rote v. Zel Custom Mfg. LLC*, 816 F.3d 383, 387 (6th Cir. 2016).

• Aiding and abetting terrorism. *See Wultz v. Islamic Republic of Iran*, 755 F. Supp. 2d 1, 18 (D.D.C. 2010).

• Criminal conspiracies. *E.g. Turkiye Halk Bankasi*, 16 F.4th at 341, 347-48; *United States v. Pangang Grp. Co., Ltd.*, 6 F.4th 946, 950-51 (9th Cir. 2021).

As it stands, district courts and future panels cannot know whether all of these kinds of claims should be barred under *Jam* or allowed under *Rodriguez*. Indeed, another case raising the issue is currently before this Court. In *Exxon Mobil Corp. v. Corporacion 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 district court concluded that the gravamen of Exxon's claim against CIMEX was CIMEX's trafficking – the conduct for which CIMEX was sued. *Id.* at *26. CIMEX appealed. *Exxon Mobil Corp. v. Corporacion Cimex S.A. (Cuba)*, No. 21-7127 (D.C. Cir., filed Nov. 3, 2021). Under *Rodriguez,* that decision would be affirmed; the gravamen would be the conduct for which defendant was sued – the defendant's trafficking – and it would not be immune. But, under the earlier decision in *Jam,* only Cuba's expropriation would be the gravamen since it "actually injured" Exxon, and the defendant would be immune for the trafficking.

This important issue has arisen three times in the last year in this Circuit alone. Failure to reconsider *Jam* and ensure consistency with *Rodriguez* risks further confusion and divergent outcomes.[4] The Court should resolve this important question here and now.

[4] Even if the Court declines to reconsider *Jam* at this point, it should at least recall the mandate and hold it until *Exxon* is decided, to ensure the decision is consistent with *Exxon*.

CONCLUSION

The decision in this case conflicts with more recent D.C. Circuit and Supreme Court precedent. The Court should reconsider its decision.

May 3, 2022

Respectfully submitted,

/s/ Richard L. Herz
Richard L. Herz*
Marco B. Simons (D.C. Bar No. 492713)
Michelle Harrison (D.C. Bar No. 1026592)
Lindsay A. Bailey (D.C. Bar No. 1723447)
EARTHRIGHTS INTERNATIONAL
1612 K St. NW, Suite 800
Washington, D.C. 20006
Tel: (202) 466-5188
Fax: (202) 466-5189
rick@earthrights.org

Counsel for Plaintiffs-Appellants

* Based in CT; admitted in NY; does not practice in DC's courts.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7), 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 3,487 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.

May 3, 2022

/s/ Richard L. Herz
Richard L. Herz
EARTHRIGHTS INTERNATIONAL
1612 K St. NW, Suite 800
Washington, D.C. 20006
Tel: (202) 466-5188
Fax: (202) 466-5189
rick@earthrights.org

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of May, 2022, I filed the foregoing Motion and 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.

May 3, 2022

/s/ Richard L. Herz
Richard L. Herz
EARTHRIGHTS INTERNATIONAL
1612 K St. NW, Suite 800
Washington, D.C. 20006
Tel: (202) 466-5188
Fax: (202) 466-5189
rick@earthrights.org