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 a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Before the decision below, an unbroken line of cases from several circuits held that immunity under the Foreign Sovereign Immunities Act (FSIA) turns exclusively on the covered defendant's own acts. If the defendant's allegedly wrongful conduct constituted commercial activity in the United States, then the commercial activity exception was satisfied. Such claims might founder on the merits, but the defendant was not immune.

IFC claims that *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27 (2015), upended all of that. But many decisions that conflict with the D.C. Circuit's decision below post-date *Sachs*. Furthermore, *Sachs* involved a single potential defendant and thus did not raise the question here—namely, whether a plaintiff's claim ceases to be based upon a covered defendant's conduct where another actor allegedly harmed the plaintiff more directly. If anything, therefore, IFC's attempt to place so much weight on *Sachs* only highlights the need for review. If a decision from this Court is to have such far-reaching effects, it should come in a case that actually addresses the issue.

With respect to waiver of its immunity, IFC ignores the plain text of the International Organizations Immunities Act (IOIA) and its founding agreement. It instead argues that the IOIA gives courts the power to assess the "functions" and "purposes" of waiving immunity and to enforce waivers only when judges perceive a "corresponding benefit" to doing so. BIO 23. This Court's earlier decision in this case makes clear that this approach is illegitimate. As with other federal statutes, the

IOIA's language governs, and that language allows waivers and contains no exceptions. This Court should no longer tolerate the D.C. Circuit's judicially invented "corresponding benefit" test.

I. This Court should resolve how the commercial activity exception applies in cases involving multiple parties that harmed the plaintiffs.

A. The courts of appeals are divided.

1. At least four circuits addressing cases involving multiple potentially responsible parties have held—contrary to the decision below—that the gravamen of a plaintiff's claim against a covered defendant turns solely on that defendant's conduct. IFC suggests that petitioners' cases "consider[ed] more than the sovereign's conduct." BIO 17-18. But while some courts may have considered third-party conduct in determining which of the *covered defendant*'s acts constitute the gravamen, they all determined that the gravamen was the defendant's own allegedly wrongful conduct.

For instance, the Second Circuit in *Petersen Energía Inversora S.A.U. v. Argentine Republic*, 895 F.3d 194 (2d Cir. 2018), held that the commercial activity exception requires courts to "identify the act of the *foreign sovereign State* that serves as the basis for plaintiffs' claims." *Id.* at 204 (emphasis added, quotation marks omitted). Claims against one sovereign defendant, YPF, were based on its failure to prevent wrongful acts by Argentina, without which there would have been no injury. *See id.* at 199-203. IFC's only response is that *Petersen* did not involve "third-party conduct." BIO 17. But there is no logical distinction between co-defendants and third-parties;

a co-defendant is a third-party with respect to claims against that defendant. Subsequently, the Second Circuit confirmed in a case involving numerous conspiring parties that the gravamen turned solely on defendant's "activities." *United States v. Turkiye Halk Bankasi A.S.*, 16 F.4th 336, 348 (2d Cir. 2021).

IFC next notes that *Global Technology, Inc. v. Yubei (XinXiang) Power Steering System Co.*, 807 F.3d 806 (6th Cir. 2015), performed an "agency law analysis." BIO 19. But that is irrelevant. After explaining agency law, the Sixth Circuit directed the district court to determine which of the acts *attributable to the sovereign* formed the gravamen; the gravamen was necessarily sovereign acts. 807 F.3d at 814; Pet. 12.

The Fifth Circuit cases, *de Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385 (5th Cir. 1985), and *Callejo v. Bancomer, S.A.*, 764 F.2d 1101 (5th Cir. 1985), can likewise be understood only as focusing on the sovereign defendant's conduct. IFC claims the Fifth Circuit considered "the conduct that actually injured the plaintiff" because both cases involved allegations that banks had followed superior instructions in refusing to cash certificates of deposit. BIO 18-19. But the Fifth Circuit described "the act complained of" as either *following* those instructions (in *Callejo*, 764 F.2d at 1109), or *giving* those instructions (in *de Sanchez*, 770 F.2d at 1388), depending on the role of the sovereign defendant at issue.

The Fifth Circuit reaffirmed this defendant-centered approach in *Frank v. Commonwealth of Antigua & Barbuda*, 842 F.3d 362 (5th Cir. 2016), and *Janvey v. Libyan Investment Authority*, 840 F.3d 248

(5th Cir. 2016). In both cases, the actual injury was directly caused by Allen Stanford's Ponzi scheme. But in applying the commercial activity exception, the court looked to the sovereign defendant's acts. *See Frank*, 842 F.3d at 370 (considering "Antigua's actions"); *Janvey*, 840 F.3d at 262 (considering "LFICO's acts").

IFC argues that the remaining cases did not determine what the gravamen was, but simply assessed whether the sovereign conduct was commercial. BIO 18-19. That is plainly wrong. These courts all first determined the gravamen and only then asked whether that act was commercial, or in connection with commercial activity. *See Anglo-Iberia Underwriting Mgmt. v. P.T. Jamsostek*, 600 F.3d 171, 177 (2d Cir. 2010) (determining that "the basis of Anglo-Iberia's claim is . . . negligent supervision" before analyzing connection to commercial activity); *Southway v. Central Bank of Nigeria*, 198 F.3d 1210, 1217 (10th Cir. 1999) (holding claims were "based on" a "scam" before determining its commercial nature); *Riedel v. Bancam, S.A.*, 792 F.2d 587, 592 (6th Cir. 1986) (concluding claim "arises from" defendant's sale of certificate of deposits before analyzing commercial activity).[1] Had any of these courts followed the D.C. Circuit in holding that the gravamen was the third-party act that most directly harmed the plaintiffs, their analysis would have been different.

2. That leaves IFC's argument that pre-*Sachs* cases cannot establish a conflict. BIO 17-18. IFC is incorrect. *Sachs* applied the framework in *Saudi*

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[1] IFC claims *Riedel* "does not involve third-party conduct," BIO 19, but it addresses actions by the Government of Mexico and multiple banks. 792 F.2d at 588-90.

Arabia v. Nelson, 507 U.S. 349 (1993), to determine *which* of a single defendant's acts was the gravamen, not whether a third-party's acts could be. Pet. 26 n.5. Nothing in *Sachs* changed the law as relevant here, much less suggests that a third party's acts can be the gravamen of a claim against a sovereign. To the contrary, *Sachs* expressly cautioned that its reach was "limited." 577 U.S. at 36 n.2.

At any rate, as described above, there is post-*Sach*s caselaw from the Second, Fifth, and Sixth Circuits looking solely to the sovereign defendant's acts even when a third-party was also involved. And none of the courts whose decisions conflict with the decision below has suggested that *Sachs* diminished the precedential value of that case law. To the contrary, many courts have continued to rely on their pre-*Sachs* decisions. *See, e.g.*, *France.com, Inc. v. French Republic*, 992 F.3d 248, 253 (4th Cir. 2021) (citing *Garb v. Republic of Poland*, 440 F.3d 579, 586 (2d Cir. 2006)); *Merlini v. Canada*, 926 F.3d 21, 36 (1st Cir. 2019) (citing *Anglo-Iberia*, 600 F.3d at 174-75); *Rote v. Zel Custom Mfg. LLC*, 816 F.3d 383, 389 (6th Cir. 2016) (citing *O'Bryan v. Holy See*, 556 F.3d 361, 379-80 (6th Cir. 2009).

B. The D.C. Circuit's holding is wrong.

1. The touchstone in interpreting any statute is its text. But IFC offers no response to petitioners' showing that Sections 1602, 1605(a)(2) and 1606 focus the "based upon" inquiry on a defendant's own commercial conduct. Pet. 23-26. If plaintiffs plead a legitimate theory of recovery against the sovereign, and the conduct on which that theory is based involves commercial conduct in the United States, the

claim may proceed. The conduct of other actors is immaterial.

2. IFC nonetheless argues that the D.C. Circuit's new rule flows from *Nelson* and *Sachs*. BIO 10-12. As noted above, neither *Nelson* nor *Sachs* addressed whether the gravamen of a claim can be third-party conduct. Insofar as these decisions are instructive, they demonstrate the D.C. Circuit was wrong.

Sachs and *Nelson* applied an elements test, tying the gravamen to the "elements of a claim that . . . would entitle a plaintiff to relief under his theory of the case." 577 U.S. at 34 (quotation marks omitted). This test forecloses the D.C. Circuit's rule that third-party acts can be the gravamen. Under the elements test, the suit is "based upon" the same conduct that makes the defendant liable.

IFC responds that *Sachs* requires courts to analyze the conduct that "actually injured" plaintiff. BIO 12. But IFC takes these words out of context. *Sachs* merely observed that Nelson's claim was based upon "the Saudi sovereign acts that actually injured [plaintiff]," not the sovereign's other acts. 577 U.S. at 34. That hardly allows sovereign immunity to depend on third party conduct.[2]

Nor does petitioners' argument depend on tolerating "artful pleading." BIO 14. While plaintiffs cannot avoid the FSIA's requirements by "recast[ing]"

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[2] Focusing on the covered defendant's own acts does not "render the FSIA meaningless" by reducing it to nothing more than "personal jurisdiction" protections that already safeguard sovereign defendants. BIO 12. The Fifth Amendment does not protect foreign states, so no personal jurisdiction analysis would otherwise be required. *Williams v. Romarm, S.A.*, 756 F.3d 777, 782 (D.C. Cir. 2014); *see also* Pet. 26-27.

their claims against *the defendant*, *Sachs*, 577 U.S. at 36 (quotation marks omitted), it is not "recasting" a claim to sue one potentially liable party instead of another. Petitioners pled "the only cause of action that [they have] against [IFC]." *Merlini*, 926 F.3d at 30 (citing and distinguishing *Nelson*, 507 U.S. at 363).

3. IFC's final gambit is to deny that the D.C. Circuit adopted a "most direct cause" test. BIO 11. But it clearly did. The court of appeals held that third-party conduct is the gravamen here because IFC merely "facilitated" a third party's acts that "actually injured [petitioners]." Pet. App. 7a.

To be sure, the D.C. Circuit stated that it did not "impose" an across-the-board "last harmful act" requirement. Pet. App. 11a. But that simply meant that sometimes another act will more directly cause the plaintiffs' harm. The D.C. Circuit never suggested that the gravamen test could be satisfied where the sovereign's acts were not the most direct cause of the plaintiffs' injuries.

Thus, IFC cannot avoid the fact that—at least in the D.C. Circuit, where a disproportionate number of FSIA cases are brought—the decision below will create a new, unwarranted immunity in such diverse contexts as terrorism, fraud, expropriation, human trafficking, and violating U.S. sanctions. Pet. 16-22. Take, for instance, a sovereign bank that knowingly provides financial services from the United States for a terrorist group, thus enabling it to murder civilians. Like petitioners here, victims would have potential claims against both the terrorists *and* the bank. Under the D.C. Circuit's test, the bank could obtain immunity by pointing out that the terrorist group's acts more directly harmed the plaintiff. This result is

unacceptable, and yet IFC provides no real response to outcomes such as this.

C. The Government has not taken a clear position on the question presented.

IFC notes that the Government filed Statements of Interest in the district court supporting dismissal. BIO 13-14. But the Government has been inconsistent, at other times taking positions that accord with petitioners' argument and conflict with the decision below.

Most relevant is the brief in *Petersen*, supporting the Second Circuit's decision discussed above. IFC claims that the Government in that case simply argued there were two injuries. BIO 15. There was, however, only one: Argentina harmed the plaintiff when it "refused to make a tender offer in accordance with YPF's bylaws," and YPF "fail[ed] to enforce" its bylaws to prevent Argentina's actions. Br. for the United States as Amicus Curiae 5-6, 10, *YPF S.A. v. Petersen Energía Inversora S.A.U.*, 139 S. Ct. 2741, (2019), *available at* 2019 WL 2209263. That is analogous to the roles of CGPL and IFC here.

Nor does the Government's statement at the 2019 oral argument in this Court necessarily reflect its views on the question presented here. IFC's quotation omits the caveat that the assessment was "from what we know." Tr. of Oral Arg. 25:22-26:6, *Jam v. Int'l Fin. Corp.*, 139 S. Ct. 759 (2019). The Government may have assumed that IFC's tortious conduct occurred in India. It did not have the benefit of petitioners' Amended Complaint, which clarified that their claims arise from IFC's actions in the United States.

D. This case is an excellent vehicle.

IFC suggests this case is an unsuitable vehicle for resolving the question presented because the lower courts *could* have dismissed on the alternative ground that IFC's conduct was sovereign, not commercial, in nature. BIO 20. But no lower court has addressed this argument, and an unconsidered alternative argument does not undermine the case as a vehicle. In such circumstances, the Court can and does address the question presented and remand for consideration of alternative arguments. *See, e.g.*, *Manuel v. City of Joliet*, 137 S. Ct. 911, 922 (2017).

Furthermore, the lower courts had good reason to ignore IFC's argument: IFC previously admitted that it "cannot take sovereign acts." Br. for Respondent 58, *Jam*, 139 S. Ct. 759; *see also* Pet. App. 74a-75a (IFC's "operations are solely 'commercial'"). IFC lent money to a private party, at market-based interest rates, to build a privately-owned project. That is commercial activity. Pet. 22-23.

IFC also points to its Environmental and Social Sustainability standards. But its argument misses the mark. First, petitioners' claim is based on IFC's funding an inherently harmful project, and negligently approving the plant's dangerous design. That was tortious regardless of whether IFC included sustainability standards in the loan contract. Second, IFC's standards are not "like national regulations," BIO 20. IFC has no authority to regulate; in incorporating *contractual* requirements, it acts as "a private player" within a market, not a "regulator"; its "actions are 'commercial.'" *Republic of Arg. v. Weltover, Inc.*, 504 U.S. 607, 614 (1992). Indeed,

numerous private banks voluntarily incorporate similar sustainability standards into *their* contracts.[3]

IFC finally suggests the commercial activity exception should not apply to its actions because of its "fundamental nature" as a "multilateral development bank." BIO 12-13. But FSIA immunity depends on the "nature" of a covered entity's *conduct*, not of the entity itself. 28 U.S.C. § 1603(d); *see also id.* § 1606. It also "is irrelevant *why*" a bank, or any other entity decides to lend private parties money at market rates. *See Weltover*, 504 U.S. at 614, 617. Such actions are commercial, and that is the end of the immunity inquiry.

II. This Court should address whether express waivers of immunity should be enforced according to their plain terms.

IFC does not deny that its Articles, if read according to their plain terms, expressly waive immunity from suit. IFC nevertheless argues that the D.C. Circuit properly declined to enforce IFC's waiver here. According to IFC, the IOIA empowers courts to decline to enforce waivers when judicial assessments of the "*functions* of [an international organization] and the *purposes* of its immunities" counsel in a

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[3] For example, the Equator Principles, a "financial industry benchmark" that draws on IFC's standards among other sources, Equator Principles EP4 (2020), https://equator-principles.com/app/uploads/The-Equator-Principles_EP4_July2020.pdf, have been adopted by over 120 financial institutions in 38 countries, including Citigroup and JPMorgan Chase. Equator Principles, Members and Reporting, https://equator-principles.com/members-reporting/ (last visited Mar. 28, 2022).

particular case against a waiver. BIO 23 (emphasis added).

This approach, coined decades ago by the D.C. Circuit, is from the "bygone era of statutory construction" where courts believed they could ignore or rewrite statutory text based on their own conceptions of underlying legislative intent or good policy. *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019) (quotation marks omitted). The IOIA provides that organizations "may expressly waive their immunity" from suit. 22 U.S.C. § 288a(b). Full stop. The Court should require the D.C. Circuit to follow this unqualified direction that express waivers are valid and enforceable. *See* 22 U.S.C. § 288a(b).

Even if the underlying purposes of IFC's waiver mattered, they would not aid IFC. The drafters' purpose is generally "expressed by the ordinary meaning of the words used." *Jam*, 139 S. Ct. at 769 (quotation marks omitted). And the State Department memo and the Luxford letter confirm that IFC's provision here categorically waives immunity from suit. *See* Pet. 31; BIO 22-23.

IFC attempts to limit its waiver under "'functional necessity' principles." BIO 22. But even under a purposive inquiry, IFC's argument falters. Functional necessity principles create a presumption *against* immunity unless the organization needs it. *See* Michael Singer, *Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns*, 36 Va. J. Int'l L. 53, 65-68 (1995). That is because accountability, not immunity, is typically necessary to make multilateral institutions effective. Amicus Br. of Former United

States Diplomats and International Development Practitioners 10-13. In *Mendaro v. World Bank*, 717 F.2d 610 (D.C. Cir. 1983), the D.C. Circuit "appl[ied] the [functional necessity] rationale in reverse," presuming immunity despite text that provided none, and making its own judgments about whether the institution would prefer to have immunity. *Id.* at 617. There is no sound basis in law for this approach.

IFC lastly notes that the Court previously denied review on this second question presented. BIO 22. But the D.C. Circuit's *Mendaro* test makes no sense after this Court's decision in *Jam*. *Jam* held that speculation about purpose over text "gets the inquiry backward." 139 S. Ct. at 769; Pet. 32-33. And *Jam* makes *Mendaro*'s tailoring of waiver to commercial interests unnecessary. Pet. 32-33. Because the D.C. Circuit on remand refused to correct its error, it falls on this Court to do so.

CONCLUSION

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

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