In the

Supreme Court of the United States

JOSE GUEVARA,

Petitioner,

v.

REPUBLICA DEL PERU, AND
MINISTERIO DEL INTERIOR DEL PERU,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The commercial activity exception to the Foreign Sovereign Immunities Act ("FSIA") identifies three grounds for which a sovereign's commercial activity will subject it to jurisdiction in U.S. courts. The third ground permits a party to overcome the statute's presumption of immunity based upon a sovereign's act performed in connection with commercial activity elsewhere which causes a "direct effect" in the United States. In *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992), this Court determined that an effect is "direct" if it follows "as an immediate consequence of the defendant's . . . activity." *Id.* at 618 (quoting *Weltover, Inc. v. Republic of Argentina*, 941 F.2d 145, 152 (2d Cir. 1991)) (ellipses in original). In so holding, this Court expressly rejected the notion that the commercial activity exception "contains any unexpressed requirement of 'substantiality' or 'foreseeability.'" *Id.*

Nevertheless, the circuits remain evenly split on what constitutes a "direct effect." While some circuits persist in requiring evidence that a "legally significant act" occurred in the United States, others reject that requirement as precluded by this Court's decision in *Weltover*. This conflict is deep, ongoing, and ripe for resolution. The question presented is especially important because the unique facts of this case highlight the important role that the FSIA and its commercial activity exception will play in transactions which impact our national security. Accordingly, the question presented is:

Whether the commercial activity exception's "direct effect" clause requires evidence that a "legally

significant act" occurred within the United States in order to vest American courts with jurisdiction over a foreign sovereign.

RULE 14.1(b) STATEMENT – PARTIES

The following were parties to the proceedings in the United States Court of Appeals for the Eleventh Circuit:

1. Jose Guevara – Plaintiff/Counter-Defendant/ Appellee/Cross-Appellee, Petitioner on Review.

2. Republica del Peru – Defendant/Counter-Claimant/Cross-Appellant, Respondent on Review.

3. Ministerio del Interior del Peru – Defendant/ Counter-Claimant/Cross-Appellant, Respondent on Review.

4. Antonio Ketin Vidal – Defendant/Counter-Claimant/Cross-Appellant.

5. Fernando Rospigliosi – Defendant/Counter-Claimant/Cross-Appellant.

6. Luis Alfredo Percovich – Proposed Intervenor/ Appellant.

7. United States of America – *Amicus Curiae* in support of Defendant/Counter-Claimant/Cross-Appellant, Republica del Peru.

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The United States Court of Appeals for the Eleventh Circuit has twice considered whether Respondents were immune from suit under the FSIA. The Eleventh Circuit's first decision, finding that the district court erred in dismissing the complaint because Respondents' offer of a monetary reward in exchange for information leading to the capture of an international fugitive fell within the FSIA's "commercial activity" exception, is reported at 468 F.3d 1289 (*Guevara I*). The district court's subsequent order granting summary judgment in favor of Petitioner is published at 2008 WL 4194839. The Eleventh Circuit's decision reversing summary judgment, on the ground that Respondents' offer of a monetary reward in exchange for information did *not* fall within the commercial activity exception, is reported at 608 F.3d 1297 (*Guevara II*).

JURISDICTION

The court of appeals entered its judgment on June 18, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The commercial activity exception to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(2), provides that:

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case –

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

STATEMENT OF THE CASE

The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602, *et seq.*, provides the "'sole basis' for obtaining jurisdiction over a foreign state in the United States." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 611 (1992) (quoting *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989)). This case arises from the application of the commercial activity exception – the "most significant of the FSIA's exceptions." *Id.* The question presented recurs frequently and is often dispositive of a plaintiff's claims against a foreign sovereign. Moreover, this case presents an important gloss on the interplay between the commercial activity exception, the FSIA, and our national security in the context of a post-9/11 world, where reward offers are regularly made in exchange for sensitive information on the location of dangerous fugitives. Indeed, the extent to which the U.S. courts should play a role in enforcing reward offers made by

foreign states has exposed a rift between the Federal Bureau of Investigation and the U.S. Department of State. While the FBI supported Petitioner's claim below, the State Department urged the Eleventh Circuit to reverse for fear that relations between the two countries would be strained if the judgment was affirmed. All of these factors compel this Court's intervention.

1. "This case's facts read like the latest spy thriller." App. at 3a. Throughout the 1990s, Vladimiro Lenin Montesinos Torres advised former Peruvian President, Alberto Fujimori, and led Peru's National Intelligence System. *Id.* Montesinos abused the power of his office, committing various criminal acts, from arms trafficking, drug dealing, and money laundering, to extortion and murder. *Id.* His conduct earned him comparisons to Rasputin, Darth Vader, Torquemada, and Cardinal Richelieu. *Id.* at 48a. On the evening of September 14, 2000, a video aired on Peruvian national television showing Montesinos bribing a congressman-elect. *Id.* at 49a. Two days later, President Fujimori dissolved the national intelligence agency and announced that he would resign from office following new elections. *Id.* As the government collapsed, Montesinos boarded a yacht bound for the Galapagos Islands. *Id.* at 50a. In November, 2000, a special prosecutor in Peru issued warrants for Montesinos' arrest. *Id.* Peru's fugitive spy chief, however, had vanished. *Id.* To generate new leads, Interim President Valentin Paniagua Corazao issued Emergency Decree 049-2001, which established a five million dollar reward for accurate information directly leading to Montesinos' location and capture. *Id.* at 50a-51a.

Montesinos eventually resurfaced in Caracas, Venezuela, where he underwent facial reconstruction surgery to change his identity. *Id.* at 9a. In December, 2000, Petitioner Jose Guevara, a former Venezuelan intelligence officer, was introduced to a bandaged man in need of a safe house and security. *Id.* For the next seven months, Petitioner served Montesinos as both protector and emissary. *Id.* at 9a-10a. In late June, 2001, Petitioner traveled to Miami, Florida, to meet with a banker on Montesinos' behalf. *Id.* at 10a. Alerted to Petitioner's ties to Montesinos, the FBI tracked Petitioner to a hotel in downtown Miami and arrested him. *Id.* Once in custody, the FBI – at Respondents' direction – conveyed Respondents' $5 million reward offer for information leading to Montesinos' capture. *Id.* at 11a. Petitioner accepted.

The FBI alerted Peruvian and Venezuelan authorities who were working jointly to develop a plan to capture Montesinos based on Petitioner's information. *Id.* at 11a-12a. From Miami, Petitioner contacted Montesinos, as well as his associates, on multiple occasions. *Id.* These controlled calls were carefully orchestrated to facilitate Montesinos' capture. Petitioner initially contacted Montesinos to update the fugitive spy chief on his meeting with the Miami banker. *Id.* at 11a. On the following day, June 23, 2001, Petitioner made additional telephone calls from Miami to his associates in Venezuela to coordinate Montesinos' handover. *Id.* at 12a. Antonio Ketin Vidal Herrera, then Peru's Minister of the Interior, reiterated to the FBI that Petitioner would be paid the $5 million reward if he disclosed Montesinos' location in Caracas. *Id.* at 12a-13a. Within hours, Petitioner successfully coordinated Montesinos' handover. *Id.* at 13a. The next day, the FBI informed

Petitioner that Montesinos had been captured. *Id.* On June 25, 2001, the FBI released Petitioner from custody, and all charges against him were dismissed. *Id.*

2. From the time of Petitioner's arrest until the district court granted summary judgment, the FBI directly urged Respondents to pay Petitioner the promised reward. On October 29, 2001, Special Agent Kevin Currier wrote to the new Minister of the Interior, Fernando Rospigliosi, requesting that Respondents pay the reward they offered Petitioner. *Id.* at 80a-81a. In his communications with Respondents, Agent Currier confirmed that Petitioner satisfied the conditions of the reward: "Mr. Guevara provided the key information that led to the location and capture of fugitive Vladimiro Montesinos." *Id.* at 81a. On October 30, 2002, Agent Currier again wrote to Peru's Minister of the Interior, by then, Gino Costa, requesting that Respondents honor their promise to pay Petitioner the reward. *Id.* at 82a-83a. In his letter, Agent Currier noted that his request that Petitioner be paid constituted "the FBI's official response relating to the reward." *Id.* at 82a. Agent Currier concluded by reaffirming Petitioner's "key contributions which led to the location and capture of Montesinos." *Id.* at 83a.

3. Despite Petitioner's principal role in Montesinos' location and capture, Respondents refused to pay the reward. Unable to reach a resolution, Petitioner sued Respondents in a Florida State court.[1] *Id.* at 52a.

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[1] The original lawsuit also named, as individual defendants, Peru's former Ministers of the Interior, Antonio Ketin Vidal and Fernando Rospigliosi. The district court granted summary

Respondents removed the action to federal court pursuant to the FSIA, and the district court dismissed the action on sovereign immunity grounds. *Id.* at 52a-53a. On appeal, the Eleventh Circuit reversed, concluding that a foreign state's offer of a reward in return for information enabling it to locate and capture a fugitive falls within the FSIA's commercial activity exception: "When it issued the offer contained in the Emergency Decree, Peru entered the marketplace of information. It did so not as a regulator but as a purchaser in the manner available to any private individual, and that makes its actions commercial." *Id.* at 72a. In addition to being legally correct, the Eleventh Circuit concluded that its decision was also consistent with sound public policy:

> Accepting Peru's position, dressed though it is in the clothing of sovereignty, would frustrate rather than further the ability of countries to carry out their sovereign functions. Anything that makes it easier for countries to welch on their promises to pay for information decreases the real value of any reward they offer and makes it less likely that an offer will be accepted. As Guevara has learned up to this point in the litigation, the promise of a multimillion dollar reward means little or nothing to an informant if the country offering the reward cannot be made to pay it. The holding Peru asks us to reach would jeopardize not only its vital interests but those of every

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judgment in their favor, and they are not part of this case. *See* App. at 8a n.9.

> country that offers rewards for information, including this country.

Id. at 72a-73a.

4. On remand, the district court entered summary judgment in Petitioner's favor. In its ruling, the district court noted that "[t]he parties agree that Peru's offer of a reward in exchange for information was an offer to enter into a unilateral contract. . . . The only consideration necessary in a unilateral contract," the district court explained, "is the offeree's performance." *Id.* at 39a. Thus, concluded the court, "[o]nce the offeree performs, the offeree has accepted the offer, thereby creating a contract that binds the offeror." *Id.* Noting that "Peru's Emergency Decree No. 049-2001 offered a reward of $5,000,000.00 for information enabling the location and capture of Montesinos," the district court reasoned that "[a]ll that remained for completion of the contract was for someone to perform the terms of the offer by providing such information." *Id.* The district court ultimately concluded that Petitioner "provided the information and assistance that led to Montesinos's capture and arrest by Venezuelan authorities the evening of June 23, 2001." *Id.* at 41a. Respondents appealed.

5. A divided Eleventh Circuit reversed. Writing for the majority, Judge Tjoflat began with the proposition that the prior panel decision had not fully disposed of the immunity question. *Id.* at 15a. The majority explained that its prior decision only addressed "whether Peru's offer of a reward was a commercial activity . . . ." *Id.* at 17a. According to the majority, this partial resolution left open, "albeit implicitly," the question of subject matter jurisdiction. *Id.* Judge

Tjoflat explained that the district court failed to analyze whether Respondents' activity fell under any of the independent bases for jurisdiction under the commercial activity exception. *Id.* at 19a. Having found the district court's analysis incomplete, the appellate court took up the question.

The majority initially determined that Respondents' commercial offer did not satisfy the first two prongs of the commercial activity exception. *Id.* at 20a-23a. With respect to the third basis for jurisdiction – the subject of the circuit split at issue here – Judge Tjoflat framed the question presented as "was the effect sufficiently direct and sufficiently in the United States that Congress would have wanted an American court to hear the case?" (internal quotation marks omitted). *Id.* at 23a-24a. The majority rejected Petitioner's claim that by accepting the reward offer in Miami, Respondents' commercial activity caused a direct effect in the United States. In the majority's view, Petitioner's "acceptance-related activity" consisted of a "one-off telephone communication" between Peru's then Minister of the Interior and the FBI. *Id.* at 25a. Noting that in the context of personal jurisdiction, a single call would not be sufficient to establish minimum contacts, Judge Tjoflat determined that the call did not result in a direct effect in the United States. *Id.* The majority likewise rejected Petitioner's claim that the failure to make payment within the United States constituted a direct effect. *Id.* Finally, Judge Tjoflat discounted the FBI's arrest of Petitioner as constituting a direct effect. The arrest resulted, concluded the court, not from Respondents' commercial activity, but from Petitioner's criminal acts in the United States. *Id.* at 25a-26a.

Judge Cox dissented, finding that the question of whether Respondents were entitled to immunity was no longer at issue. According to Judge Cox, the majority's view to the contrary rested on a "faulty premise." *Id.* at 27a. "In deciding that the [commercial activity] exception applies to Peru's actions," Judge Cox explained that the prior panel's decision "necessarily decided that a nexus existed between that commercial activity and the United States." *Id.* at 28a. He added that the *Guevara I* panel "implicitly held that the commercial activity was carried on in the United States, that an act was performed in the United States in connection with commercial activity elsewhere, or that a direct effect of the commercial act was caused in the United States." *Id.*

6. The commercial activity exception lists three grounds under which immunity may be overcome. 28 U.S.C. § 1605(a)(2). Under the third ground, a sovereign will not be entitled to immunity where a lawsuit is based "upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." *Id.* In *Weltover,* this Court granted review to consider the meaning of the phrase "direct effect," as used in the commercial activity exception. Finding that "an effect is direct if it follows as an immediate consequence of the defendant's . . . activity," the Court expressly rejected the notion that the commercial activity exception "contains any unexpressed requirement of 'substantiality' or 'foreseeability.'" *Weltover,* 504 U.S. at 618 (internal quotation omitted, ellipsis in original).

In light of its decision in *Weltover*, this Court vacated and remanded for further consideration the

Second Circuit's decision in *Antares Aircraft, L.P. v. Fed. Republic of Nigeria,* 505 U.S. 1215 (1992). On remand, Judge Winter, writing for a divided panel, reanimated the "substantiality" requirement that this Court rejected in *Weltover.* Although this Court "did not expressly adopt [the Second Circuit's] 'legally significant acts' test," Judge Winter explained, it "used a similar analysis." *Antares Aircraft, L.P. v. Fed. Republic of Nigeria,* 999 F.2d 33, 36 (2d Cir. 1993). On this basis, the Second Circuit has continued to apply the "legally significant act" requirement. From *Antares* surged the conflict that continues to divide the circuits.

REASONS FOR GRANTING THE WRIT

The Foreign Sovereign Immunities Act is the sole basis for obtaining jurisdiction over a foreign state in a court in the United States. This case implicates the commercial activity exception – the most significant of the FSIA's exceptions. Because sovereign states are presumptively immune, the determination of whether the commercial activity exception applies will be case dispositive. Although this Court previously considered the meaning of the commercial activity exception, its decision did not bring uniformity to the circuits. To the contrary, this Court's decision resulted in a deep and pervasive conflict among the federal courts. That division, as the Eleventh Circuit's decision here demonstrates, continues to deepen. Even within the camp that has strayed from this Court's original ruling, divisions are forming. A conflict among the circuits regarding the sole vehicle for obtaining jurisdiction over a foreign sovereign is untenable.

This case presents an ideal opportunity for resolving this conflict. First, the question presented

was raised below and directly addressed by the Eleventh Circuit, twice. Second, the question presented is likely to recur frequently.[2] Finally, this case raises an important question of public policy. As the Eleventh Circuit here acknowledged, Respondents' refusal to pay the reward monies "jeopardize[s] not only its vital interests but those of every country that offers rewards for information, including this country." App. at 72a-73a. The need to resolve the conflict here is even more important in light of the division between the FBI and the Department of State that this case has exposed. While the FBI directly urged Respondents to pay the reward, the State Department took the opposite approach. The policy divide between these two important entities, brought to light by the unique facts here, confirms this case's significance.

I. This Court Should Grant Review To Definitively Settle The Split Among The Circuits Regarding The Meaning Of The FSIA'S Commercial Activity Exception.

In *Weltover*, this Court rejected the notion that the commercial activity exception "contains any unexpressed requirement of substantiality or foreseeability." 504 U.S. at 618 (internal quotation marks omitted). As a consequence, this Court ruled that "an effect is direct if it follows as an immediate consequence of the defendant's . . . activity." *Id.*

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[2] *See, e.g., Leviathan Inc.*, ECONOMIST, Aug. 7, 2010, at 9-10 (reporting that sovereign governments are increasingly becoming involved in private business enterprises in an effort to jump-start local economies, highlighting that "[n]ine of the world's 30 largest listed firms are emerging-market companies that count the state as their dominant shareholder.").

(internal quotation omitted, ellipsis in original). This Court's decision in *Weltover,* however, did not settle the question. *See* Joseph F. Morrissey, *Simplifying the Foreign Sovereign Immunities Act: If a Sovereign Acts Like a Private Party, Treat it Like One*, 5 CHI. J. INT'L L. 675, 687 (2005) ("The *Weltover* decision ignited confusion and controversy over whether the direct effect clause mandates a finding of a legally significant act in the United States.").

Shortly after this Court ruled, the Tenth Circuit acknowledged its continuing "struggle[] to identify objective standards that would aid in determining what does and does not qualify as a 'direct effect in the United States.'" *United World Trade, Inc. v. Mangyshlakneft Oil Prod. Ass'n,* 33 F.3d 1232, 1237 (10th Cir. 1994). The court explained that "[t]he phrase itself seems hopelessly ambiguous when applied to any particular transaction." *Id.* Lamenting what it saw as the lack of any guidance, the Tenth Circuit concluded that "[t]he guideposts previously adopted by many courts – the requirement that a direct effect be both 'substantial' and 'foreseeable' – was expressly rejected by the Supreme Court in *Weltover.*" *Id.*

The twin guideposts of "substantiality" and "foreseeability," however, have failed to bring uniformity to the circuits' view of what constitutes a "direct effect." The Second, Ninth, and Eleventh Circuits have returned to the "legally significant act" requirement that this Court expressly rejected in *Weltover.* Yet, the re-introduction of this test has only caused more division. The "legally significant act" requirement is susceptible to various interpretations. The courts part ways, for example, in their analyses of

the act's location. Some contend that a "legally significant act" must occur within the United States, while others will deem the act "significant" if it occurs abroad. The Eleventh Circuit, in this case, has added another dimension to the conflict, analogizing the "legally significant act" requirement to the minimum contacts test applied in determining whether personal jurisdiction exists. App. at 24a-25a. In sharp contrast, the Fifth, Sixth, and Tenth Circuits have rejected the "legally significant act" requirement, noting that its imposition not only conflicts with this Court's ruling in *Weltover,* but with the commercial activity exception's plain meaning. Therefore, the conflict among the circuits is deep, pervasive, and, given the Eleventh Circuit's ruling here, likely to expand, especially within those circuits applying the "legally significant act" requirement.

1. Following *Weltover,* this Court vacated and remanded for further consideration the Second Circuit's decision in *Antares Aircraft, L.P. v. Fed. Republic of Nigeria,* 505 U.S. 1215 (1992). On remand, the Second Circuit noted that although this Court "did not expressly adopt [the Second Circuit's] 'legally significant acts' test, it used a similar analysis." *Antares Aircraft, L.P.*, 999 F.2d at 35. Because this Court's analysis of the "direct effect" clause did not foreclose the result reached by the Second Circuit through its application of the "legally significant acts" requirement, the Second Circuit determined that the test remained "viable." *Hanil Bank v. PT. Bank Negara Indonesia, (PERSERO),* 148 F.3d 127, 133 (2d Cir. 1998); *see also Filetech S.A. v. France Telecom S.A.,* 157 F.3d 922, 931 (2d Cir. 1998) (recognizing the "legally significant acts" test and explaining that it "requires that the conduct having a direct effect in the

United States be legally significant conduct in order for the commercial activity exception to apply").[3] Applying the same reasoning, the Ninth and Eleventh Circuits have likewise adopted the "legally significant acts" requirement. *See Adler v. Fed. Republic of Argentina,* 107 F.3d 720, 726-27 (9th Cir. 1997) (recognizing application of the Second Circuit's "legally significant acts" test); *see also Harris Corp. v. Nat'l Iranian Radio and Television,* 691 F.2d 1344, 1351 (11th Cir. 1982).

What constitutes a legally significant act, however, remains unsettled. The test, as the Tenth Circuit has observed, "is defined in different ways." *Orient Mineral Co. v. Bank of China,* 506 F.3d 980, 998 (10th Cir. 2007). Some courts have ruled that the location of the legally significant act is dispositive. The Second Circuit and the Eleventh Circuit here have held that a legally significant act would satisfy the "direct effects" test if it occurred inside the United States. *See* App. at 23a-24a ("As we have framed it, the question presented is, was the effect sufficiently 'direct' and sufficiently 'in the United States' that Congress would have wanted an American court to hear the case?") (internal quotation omitted); *Virtual Countries, Inc. v. Republic of S. Africa,* 300 F.3d 230, 240-41 (2d Cir. 2002) (holding that for the "direct effect" clause to apply, a sovereign must commit a legally significant act in the United States). The Ninth Circuit, in turn, has determined that an act taking place outside the

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[3] Although the Second Circuit made no mention of the "legally significant act" requirement in deciding *Commercial Bank of Kuwait v. Rafidain Bank,* 15 F.3d 238 (2d Cir. 1994), it specifically referenced and applied the requirement in its subsequent decisions.

United States can result in a "direct effect" in the United States. *See Adler v. Fed. Republic of Nigeria,* 219 F.3d 869, 876 (9th Cir. 2000) (finding that reliance by U.S.-based plaintiff on fraudulent statements made outside the United States is sufficient to satisfy the "direct effect" clause).

The location of the act itself, however, may not be dispositive. In this case, the Eleventh Circuit has equated the legally significant act requirement with the minimum contacts test applied in the personal jurisdiction context. App. at 25a (concluding that the same reasoning used in a minimum contacts analysis applied equally to jurisdictional questions under the "direct effect" clause). Thus, while a single act, committed in the United States, may be sufficient in some circuits that impose the "legally significant acts" requirement, it may fall short in the Eleventh Circuit. Even before the Eleventh Circuit here added further to the division on the meaning of the "legally significant acts" requirement, the Tenth Circuit questioned its application: "the phrase . . . is vague and ambiguous, adding nothing to the analysis." *Orient Mineral Co.,* 506 F.3d at 999.

2. In sharp contrast, the Fifth, Sixth, and Tenth Circuits have rejected the "legally significant act" requirement as inconsistent with this Court's decision in *Weltover. See Orient Mineral Co. v. Bank of China,* 506 F.3d 980, 998 (10th Cir. 2007); *Am. Telecom Co., L.L.C.. v. Republic of Lebanon,* 501 F.3d 534, 540 (6th Cir. 2007); *Voest-Alpine Trading USA Corp. v. Bank of China,* 142 F.3d 887, 895 (5th Cir. 1998). These circuits view the proper interpretation of the "direct effect" clause as grounded in the plain meaning of the commercial activity exception. In these circuits, the

imposition of the "legally significant act" requirement fails because it conflicts with the plain language of the statute, and renders portions of the commercial activity exception superfluous. The Fifth Circuit's decision in *Voest-Alpine* analyzed the problems inherent in the "legally significant act" requirement at length.

Writing for a unanimous panel of the Fifth Circuit, Judge Jolly explained that "nothing in the text of the third clause supports" the "legally significant act" requirement. *Voest-Alpine,* 142 F.3d at 894. The commercial activity exception's third clause, explained the court, "simply requires (1) an act outside the United States (2) in connection with commercial activity outside the United States (3) that causes a direct effect in the United States." *Id.* (citing 28 U.S.C. § 1605(a)(2)). Because this Court in *Weltover* "expressly admonished the circuit courts not to add 'any unexpressed requirement[s]' to the third clause and specifically rejected the argument that direct effects must be substantial or foreseeable," the court determined that the "legally significant act requirement" has been "renounced." *Id.* (alteration in original).

Directly addressing the sole argument raised by the competing circuits, the Fifth Circuit noted that "*Weltover's* reliance on a legally significant act in the United States does not justify, much less compel, the conclusion that it is or should be some kind of threshold requirement under the third clause." *Id.* To the contrary, the court explained, "[a] legally significant act in the United States will certainly cause a direct effect in the United States, but that does not mean that a direct effect in the United States can be

caused *only* by a legally significant act in the United States." *Id.* (emphasis in original).

Second, Judge Jolly explained that the imposition of a "legally significant act" requirement would render certain portions of the commercial activity exception superfluous. "[R]equiring the effect to have a causal nexus with some legally significant act in the United States merges the third clause into the second clause of the commercial activity exception." *Id.* at 895. The court noted that "[t]he second clause requires that the cause of action be based upon (1) an act in the United States (2) in connection with commercial activity outside the United States." *Id.* (citing 28 U.S.C. § 1605(a)(2)). Analyzing the second clause, the court reasoned that "the act *in the United States* must give rise to the cause of action or, in other words, be a 'legally significant act' as the term is used by courts adopting such a requirement." *Id.* (emphasis in original). By reading the statute this way, Judge Jolly explained, the second clause becomes "indistinguishable" from the third clause. *Id.* If anything, "the third clause would also require proof of an act outside the United States upon which the action is also based and which caused a direct effect in the United States." *Id.* Judge Jolly reasoned that this interpretation "leaves [the third clause] with no perceivable purpose, as plaintiffs would always opt to seek jurisdiction under the 'lesser included' second clause." *Id.*

3. This case presents an ideal vehicle for resolving the conflict among the circuits. The core facts are undisputed. Respondents offered a monetary reward in exchange for information leading to the capture of a fugitive. The offer itself constituted commercial

activity. App. at 17a. Moreover, under Florida law, Respondents' offer became a binding contract when Petitioner accepted the offer by performing, i.e., he provided information and coordinated efforts from the United States which led to the location and capture of the fugitive Montesinos. *Id.* at 39a. The sole question before the Eleventh Circuit was whether Respondents' offer, and their activities in connection with that offer, were sufficient to waive immunity. *Id.* at 19a. The issue was squarely addressed by the appellate court, and is dispositive of this case.

II. By Allowing Respondents To Welch On Their Promise To Pay The Reward, The Decision Below Undermines Both Domestic and International Efforts To Capture Criminals And Terror Suspects.

This case is about more than the proper reading of the commercial activity exception. Because of the unique facts here – the exchange of money for information regarding the location of an international fugitive – the Eleventh Circuit's decision reversing summary judgment will have far-reaching consequences. Writing for a unanimous panel in *Guevara I*, Judge Carnes made clear that "[e]nforceable commitments are important to reward programs, which are in turn important to the sovereign interests of this and other countries." App. at 74a-75a. The Eleventh Circuit's decision reversing summary judgment undermines not only the value of reward programs, but the interests of those sovereigns offering payment for vital information.

In the United States, there are a number of statutes that authorize the executive branch to offer

financial rewards in exchange for information useful in combating terrorism, espionage, narcotics trafficking, violations of human rights laws, and other criminal acts. *Id.* at 73a (collecting statutes). These programs benefit not only the United States, but our allies abroad. Indeed, even Respondents, who have thus far refused to honor their own reward offers, are directly benefiting from similar U.S. reward programs.

Notably, the United States is currently offering rewards for the arrest and/or conviction of two Peruvian fugitives – Florindo Eleuterio Flores-Hala[4] and Victor Quispe Palomino.[5] The U.S. Department of State describes both men as members of the Sendero Luminoso (the "Shining Path"),[6] "a notoriously violent terrorist group that controlled large areas of Peru and struck the capital Lima with repeated violent attacks."[7] The award amount – up to $5 million per person[8] – is the very same amount Respondents offered Petitioner for the location and capture of Montesinos. These reward programs are effective

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[4] UNITED STATES DEP'T OF STATE, Narcotics Rewards Program: Florindo Eleuterio Flores-Hala, http://www.state.gov/p/inl/narc/rewards/144800.htm (last visited Sept. 14, 2010).

[5] UNITED STATES DEP'T OF STATE, Narcotics Rewards Program: Victor Quispe Palomino, http://www.state.gov/p/inl/narc/rewards/144801.htm (last visited Sept. 14, 2010).

[6] UNITED STATES DEP'T OF STATE, Bureau of Consular Affairs, Peru: Country Specific Information, http://travel.state.gov/travel/cis_pa_tw/cis/cis_998.html (last visited Sept. 14, 2010).

[7] *See supra*, notes 4-5.

[8] *Id.*

precisely because the United States has a track record of payment.

Since September 11, 2001, the United States has paid at least $47 million in reward monies. App. at 73a. The success of these programs turns on this country's willingness to honor its promises to pay:

> Had the KGB agent who accepted the reward offer in the [Bob] Hanssen case had reason to doubt whether the United States would pay as promised, he would not have risked his life to provide the information that he did, information that was vital to this country's national security interests. The same is true of those who provided the information that enabled the United States to corner Uday and Quasay Hussein and to capture Ramzy Yousef.

Id. at 74a. Although none of the statutes authorizing the United States government to pay reward monies "contains a waiver of sovereign immunity," Judge Carnes aptly noted that "reward offers are only as effective as they are enforceable." *Id.* With good reason then, Judge Carnes concluded that "[a]bsent a clear requirement in the FSIA, we will not create impediments to the enforcement of reward contracts entered by this or any other country." *Id.* at 75a. And yet, there can be no greater impediment to the effectiveness of such reward programs than the Eleventh Circuit's decision in *Guevara II*.

In reversing the district court's summary judgment, the Eleventh Circuit treated this case like any other piece of commercial litigation. In so doing, the panel that decided *Guevara II* ignored the significant public

policy considerations Judge Carnes had identified in his prior decision reversing the dismissal of Petitioner's complaint. This is not a typical fact pattern; this case does not involve the type of commercial activity regularly considered by the courts in determining whether an exception to the FSIA's presumed immunity applies. *See, e.g., Weltover*, 504 U.S. at 609-10 (default on bond obligations by failure to make payment); *Am. Telecom*, 501 F.3d at 536-37 (breach of contract and associated tort claims premised on a bidding contract to manage cellular telephone networks); *Hanil Bank*, 148 F.3d at 129-30 (failure to remit payment due under a letter of credit).[9] As such, this case requires closer scrutiny. In the current security environment, U.S. courts ought not to be seen as hostile to claims such as those raised by Petitioner.

Indeed, what is particularly astonishing about the result here is the division it has exposed between the FBI, the nation's premier law enforcement agency, and the Department of State. Throughout the life of this litigation, the FBI has steadfastly supported Petitioner's claim to the reward. Directly appealing to the highest levels of Peru's government, the FBI confirmed Petitioner's decisive role in the location and capture of Montesinos and urged that Respondents pay the reward. App. at 80a-83a. The FBI's concern, of course, is obvious.

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[9] The atypical nature of the facts here, however, does not render this an improper vehicle for resolving the question presented. To the contrary, the facts here highlight the need to resolve the conflict among the circuits. The question presented not only includes the standard commercial activity considered by the courts, but the unique facts of this case which reflect the current security environment.

As a law enforcement agency, the FBI is well-acquainted with the vital role that informants play in the capture and prosecution of fugitives and, in the wake of 9/11, the fight against terrorism. *See United States v. Ihnatenko*, 482 F.3d 1097, 1100 (9th Cir. 2007) (noting that "[p]aid informants play a vital role in the government's infiltration and prosecution of major organized crime and drug syndicates," and that "[w]ithout informants, law enforcement authorities would be unable to penetrate and destroy organized crime syndicates, drug trafficking cartels, bank frauds, telephone solicitation scams, public corruption, terrorist gangs, money launderers, espionage rings, and the likes"); *see also* Kent Roach, *Review and Oversight of National Security Activities and Some Reflections on Canada's Arar Inquiry*, 29 CARDOZO L. REV. 53, 77, 83 (2007) (arguing that "[p]articular care should be taken with respect to the proper treatment of informants and witnesses who play a vital role in successful terrorism prosecutions" and that judicial review of complaints from informants is critical to ensure that the legal rights of informants are protected).

In sharp contrast, the State Department urged the appellate court to reverse. Ignoring the requirements of modern law enforcement, the diplomats claimed that principles of "international comity" should control the outcome here. This yawning conceptual gap further highlights the urgent need for this Court's intervention.

CONCLUSION

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

Respectfully submitted,

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SEPTEMBER 2010

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