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No. 10-389

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.**

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

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QUESTION PRESENTED

The petition does not raise an issue of law, but rather a dispute about the insufficiency of Plaintiff Jose Guevara's evidence. The Eleventh Circuit correctly found that Guevara's evidence failed to prove any "direct effect" in the United States from Peru's reward offer for accurate information directly enabling the capture of an infamous fugitive. Without a "direct effect" in the United States—*i.e.*, without any nexus between the conduct and the United States—the Eleventh Circuit dismissed the case for want of subject matter and personal jurisdiction under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1605(a)(2). The Eleventh Circuit did not hold that the "direct effect" had to be a "legally significant act" or satisfy a requirement of "substantiality" or "foreseeability," as the petition suggests. These arguments were not made below and thus, not addressed by the Eleventh Circuit. Accordingly, they were not properly preserved for this Court.

Guevara's evidence of "direct effect" fails to raise any novel or highly disputed issues. He argues that his arrest in Miami was "in connection with" commercial activity of Peru; the Eleventh Circuit correctly held his arrest was in connection with his criminal activity. The Eleventh Circuit also correctly held that Peru's refusal to pay Guevara in the United States was not required by the reward offer, thus distinguishing this case from *Republic of Argentina v. Weltover*, 504 U.S. 607 (1992). See *Guirlando v. T.C. Ziraat Bankasi A.S.*, 602 F.3d 69, 75 (2d Cir. 2010) (no direct effect where payment in United States not contractually required).

The circuit split interpreting the FSIA's nexus requirement, that Guevara asserts, is illusory and immaterial to the outcome of this case. The three judges of the Eleventh Circuit, including the dissent, agreed that this case was not appropriate for a United States court to decide, as argued by the United States in its amicus brief to the Eleventh Circuit. And there are numerous additional bases to support the result.

The petition, thus, should be denied.

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OPINIONS BELOW

This case has been before the United States Court of Appeals for the Eleventh Circuit twice. The Eleventh Circuit's first decision in this case held that "a foreign state's offer of a reward in return for information enabling it to locate and capture a fugitive" fell within the FSLA's commercial activity exception. 28 U.S.C. § 1605(a)(2). The decision, which reversed the district court's dismissal of Guevara's lawsuit, is reported at 468 F.3d 1289 (11th Cir. 2006) ("*Guevara I*").

On remand, the district court granted partial summary judgment in favor of Guevara and denied Peru's cross motion for summary judgment, finding Guevara had earned the reward and thus "effectively preempting the . . . evaluation decision" of the Peruvian governmental body (Special High Level Committee or "SHLC") that determined that Guevara had not earned the reward. 608 F.3d 1297, 1305. In response to Peru's argument that its conduct had insufficient nexus to the United States for jurisdiction under the FSIA, the district court held that the Eleventh Circuit already had decided the jurisdictional issues in *Guevara I*. The district court conducted no further analysis. This decision is published at 2008 WL 4194839.

The Eleventh Circuit's second decision reversed the district court, holding that: (1) it had not decided the nexus issue in *Guevara I*, and (2) the district court lacked subject matter jurisdiction because Peru's reward offer did not cause a direct effect in the United States under FSIA's commercial activity exception. That decision is reported at 608 F.3d 1297 (*Guevara II*).

STATEMENT OF THE CASE

A. Factual Record

Plaintiff Jose Guevara, a former Venezuelan intelligence officer, provided security and a safe house in Venezuela for Vladimiro Montesinos, the fugitive head of Peru's National Intelligence Agency, who had purportedly committed a string of crimes, including arms and drug trafficking, money laundering, extortion, bribery, and multiple murders. 3a-5a of Guevara Appendix A (hereinafter cited as "Guevara App. A, ___"). The first media leaks of Montesinos'

videotapes exposing some of his crimes led to the resignation of Peruvian President Alberto Fujimori, and created a political and constitutional crisis that had repercussions in Peru for many years. Guevara App. A, 3a. Montesinos quickly fled the country and disappeared.¹ Guevara App. A, 3a.

When the trail for Montesinos went cold, Peru's interim President Valentin Paniagua Corazao issued an Emergency Decree providing for a \$5 million reward for "accurate information that will directly enable the locating and capturing" of Montesinos. Guevara App. A, 4a; Emergency Decree, Peru Appendix A (hereinafter referred to as "Peru App. A, ___"). If more than one person supplied information, the reward would be split among them. The reward offer expressly required that information had to be provided to the SHLC, and that the SHLC would decide any reward claims. Guevara App. A, 4a. The decree authorized the government to take a loan from, and open an account in, a Peruvian state-owned bank to pay the reward. Guevara App. A, 4a. The decree gave the reward recipients no right to determine the place of payment.

While harboring Montesinos, Guevara and others extracted at least \$55 million from him as protection money. DE 296-3, pp. 41589-92; DE 295-3, pp. 4544-45; DE 295-2; p. 45,757; DE 296-6, pp. 68890, 68900.² When Montesinos was running out of money,

¹ The Eleventh Circuit recounted the facts in the light most favorable to Guevara. We include a more complete recitation of the record before the district court.

² DE refers to the docket entry number on the docket in the U.S. District Court for the Southern District of Florida, Case No. 1:04-cv-23223-MGC.

Guevara made trips on Montesinos' behalf to Lima, Bogotá, Miami and Nassau, Bahamas seeking additional funds. DE 201-2, pp. 35, 36, 94. On June 22, 2000, Guevara was arrested in Miami by the FBI after attempting to extort a banker to release a total of \$3.7 million from one of Montesinos' bank accounts. Guevara App. A, 10a. Guevara was charged with extortion and fraud against the United States. 18 U.S.C. §§ 875(b), 371. DE 201-2, p. 108; DE 201-6.

While in FBI custody, Guevara was told that he would be released and the charges dropped if he cooperated in Montesinos' capture. He also was informed of Peru's reward offer, which the FBI was aware of from published reports. Guevara App. A, 5a-6a. Supervisory Special Agent Kevin Currier testified that Guevara had agreed to cooperate with the FBI before he was informed of Peru's reward. DE 319-3, pp. 39-42. Currier, who was stationed in Lima, consulted with Minister of the Interior Antonio Ketín Vidal and worked out a plan for Montesinos' capture. DE 201-3, p. 125. In a single telephone conversation from Lima, Vidal and Currier told FBI Agent Waldo Longa in Miami to instruct Guevara to have his accomplices in Caracas deliver Montesinos to the Peruvian ambassador's residence. Guevara App. A, 12a-13a. Vidal also explained the terms of the reward to Longa who passed the information to Guevara. Guevara App. A, 13. Guevara then called his accomplice in Venezuela and supposedly gave the instructions. Guevara App. A, 13a.

Montesinos never arrived at the Peruvian ambassador's residence; he was captured that same night by the Venezuelan authorities. Guevara App. A, 13a. The next day Venezuelan President Hugo Chavez

announced that Venezuela had found and arrested Montesinos. DE 201-3, pp. 55, 68; DE 201-4, p. 58. In a diplomatic flap with both Peru and the United States, Venezuela said it alone had located Montesinos.³ The head of the FBI's Miami field office stated publicly he did not know how Montesinos was arrested, and Guevara told the media that the Venezuelan government had known all along where Montesinos was hiding. DE 285-14, DE 265-1, DE 201-2, pp. 69-73.

Guevara then submitted a claim for the reward to the SHLC, which conducted an extensive investigation, including meetings and correspondence with FBI Agent Currier and Guevara's lawyer. DE 326-5, ¶ 5. Despite repeated requests over a two-year period, Currier could not connect Montesinos' arrest to Guevara's purported cooperation. DE 326-5, ¶¶ 6, 7, 14. Guevara, who was in the best position to provide evidence regarding the circumstances of the arrest, relied only on the coincidence of timing between his call to Caracas and Montesinos' subsequent arrest. The SHLC, therefore, concluded that the Venezuelan Government's intervention was an independent event that resulted in Montesinos' arrest, and denied Guevara's claim. DE 326-5, ¶¶ 16, 19; DE 201-4, pp. 20-21.

B. Proceedings Below

Guevara filed suit against Peru and two ministers seeking the reward in Florida state court. Guevara App. A, 6a. After removing the case to federal court, Peru moved to dismiss on the grounds of sovereign

³ Venezuela's tension with Peru and the United States is reported in a June 29, 2001 Associated Press Worldstream article. DE 285-14.

immunity. Guevara App. A, 6a-7a. Peru argued that a reward offer did not constitute “commercial activity” that had sufficient “nexus” to the United States under the FSIA. DE 17, ¶¶ 10, 11. The district court dismissed, ruling that a reward offer was not commercial activity. Guevara App. A, 17a. The court did not address Peru’s nexus argument. DE 31.

The Eleventh Circuit reversed in *Guevara I*, holding that the reward offer was commercial activity. Guevara App. C. Because it was not a basis for the district court ruling, the nexus issue was not presented to the Eleventh Circuit, and the court’s opinion did not address the issue. Guevara App. A, 17a.

On remand, Peru preserved the nexus issue in its answer. In the midst of discovery, Guevara moved for partial summary judgment, and Peru responded, in part, by again arguing the nexus issue. DE 200, pp. 17-18. The district court granted Guevara partial summary judgment on his breach of contract claim, finding that Guevara had earned the reward. The court relied principally on its interpretation of a preliminary SHLC resolution that purportedly acknowledged Guevara’s role in Montesinos’ arrest. Guevara App. A, 14a. This interpretation was contested by an affidavit from the SHLC Chairman, and on reconsideration, by three additional affidavits, including by the draftsman of the resolution. DE 201-8, ¶ 3; 285-15, ¶¶ 12-13; 285-20, ¶¶ 4-5; and 285-21, ¶¶ 3-5. The district court also relied upon a conclusory, hearsay affidavit by FBI Agent Currier stating that Guevara’s cooperation “indirectly” resulted in Montesinos’ arrest, which fails on its face to satisfy the causation requirement in the reward decree (“directly enabling”). Guevara App. B, 40a-

41a; DE 119-3, ¶ 16. Currier acknowledged in his deposition that he had no personal knowledge regarding the circumstances of Montesinos' capture.

In opposing Guevara's motion to compel Agents Longa and Currier to testify at trial, the FBI disavowed Currier's affidavit, saying it was unauthorized and did not reflect the position of the FBI. Peru App. B, p. 16a, n.2.

On reconsideration, Peru submitted two sworn affidavits from the Venezuelan Congressional record by Guevara's accomplice, stating that Guevara had secretly signaled him on the telephone call from FBI custody to murder Montesinos. DE 297-6, p. 43, DE 326-3, pp. 4546-47, 4549-50. Guevara did not dispute these statements, in an affidavit or otherwise, and they stand uncontested on this record. DE 319-1, pp. 16, 17. Guevara's assertion that he had cooperated with the FBI to bring about Montesinos' capture thus evaporated, along with any possible dispute regarding his ineligibility for the reward.

On the nexus issue, the district court found that the issue had already been decided by the Eleventh Circuit in *Guevara I*, and said no more. Guevara App. A, 13a. After the district court denied reconsideration, Peru appealed. DE 284, 344, 349.

Guevara did not address the nexus issue in his briefing before the Eleventh Circuit, aside from asserting that the Eleventh Circuit already had determined the issue in the previous appeal. At oral argument, the Eleventh Circuit offered Guevara the opportunity to identify a nexus between Peru's commercial activity and the United States.

After oral argument, the United States submitted an amicus brief urging reversal of the district court,

which the Eleventh Circuit accepted. Brief for the United States as Amicus Curiae in Support of Republica Del Peru, Peru App. C. The United States said:

To protect the prerogatives of the Executive Branch in its conduct of foreign affairs, both the act of state doctrine and principles of international comity generally preclude U.S. courts from reviewing and overriding the sovereign decisions of foreign states and foreign tribunals. Particularly because this judgment against Peru presents two serious foreign-relations dilemmas for the United States, the doctrines are fully applicable here.

Peru App. A, pp. 35a-36a.

In reversing the district court, the Eleventh Circuit found that it had not previously decided the nexus issue, which had been properly preserved by Peru. Guevara App. A, 15a. On this issue, Judge Cox dissented but suggested, nonetheless, the case might not be appropriate for resolution by a United States Court under the doctrine of international comity. Guevara App. A, 32a.

On the merits of the nexus issue, the Eleventh Circuit responded to Guevara's nexus argument by finding that Guevara's arrest in Miami was in connection with his own criminal—not Peru's commercial—activity. Guevara App. A, 25a-26a. Peru's alleged refusal to make payment in the United States fails as a direct effect because Guevara had no right to payment in the United States; the Emergency Decree established a loan and bank account in Peru for payment. Guevara Appendix A, 4a. The Eleventh Circuit also found that Peru's refusal to pay the

reward to Guevara was a “negative activity” that alone did not satisfy the commercial activity exception. Guevara App. A, 25a.

The Eleventh Circuit held that the “one-off” telephone conversation among the two FBI agents and the Peruvian Minister did not constitute an act in connection with commercial activity. Guevara App. A, 25a. (During oral argument Guevara appeared to abandon, as evidence of direct effect, that single telephone call. *Id.*) The Eleventh Circuit found this call to be an insufficient basis to exercise personal and subject matter jurisdiction over a foreign state by analogy to the minimum contacts test for Due Process. Guevara App. A, 25a.

SUMMARY OF ARGUMENT

Guevara’s petition founders on two misconceptions: (1) he misstates the Eleventh Circuit’s holding in order to argue that a purported circuit split on the “direct effects” rule under the FSIA is relevant and case dispositive; and (2) he also misstates the record in arguing that the FBI and State Department differ on the handling of this case.

Peru’s reward offer had no effect—legally significant or otherwise—in the United States; the Emergency Decree required all material events to occur in Peru, and Guevara’s claims of a direct effect are factually inaccurate and legally deficient by any precedent. Guevara’s case was properly dismissed for lack of subject matter jurisdiction, and even if subject matter jurisdiction were present, his case would be dismissed on principles of international comity (as even the dissent in the Eleventh Circuit suggested) and act of state, as well as numerous other grounds

including the merits (Guevara did not earn the reward).

Public policy also supported dismissal. As set forth in the United States' amicus curiae brief, assuming jurisdiction over a foreign reward program would violate principles of international comity, create serious diplomatic tensions, and necessarily result in United States law enforcement and diplomatic decisions regarding our own reward programs being subjected to review by foreign courts. The United States stated:

[T]he federal government has a profound interest in preventing the district court's judgment from undermining our nation's relationship with a stable democratic partner in South America. Moreover, the United States operates its own highly successful international reward programs, and the judgment here raises the troubling specter of foreign courts overriding decisions made by U.S. law enforcement and diplomatic officials.

Peru App. C, 28a. The United States has at least 15 statutory reward programs, and frequently denies reward claims. 67 Am. Jur. 2d Rewards § 5. As the United States recognized, any interference by the United States in Peru's sovereign decisions regarding a notorious former government official would stress an otherwise friendly relationship. The United States, therefore, urged the Eleventh Circuit to dismiss Guevara's case on the alternative grounds of international comity and act of state.

The question presented, as framed by Guevara, did not and could not have determined the result of this case. The single phone call, and Peru's "negative

activity” in failing to pay the reward, had no direct effect in the United States, regardless of whether those actions or non-actions are characterized as “legally significant acts.” The Eleventh Circuit’s ruling was correct, and numerous other grounds support dismissal. The petition should be denied.

ARGUMENT

Even if properly preserved for this Court—which it was not—Guevara’s arguments do not raise the issue of whether a “legally significant act” must occur in the United States, as the petition argues.⁴ Guevara did not raise the issue below, the Eleventh Circuit did not address the issue, and none of Guevara’s arguments for direct effect turn on the outcome of this issue. Under any existing interpretation of the direct effect clause, Peru’s conduct did not waive sovereign immunity under the FSIA.

The Eleventh Circuit held that the evidence did not establish that Peru’s activities fell within any of the three clauses of FSIA’s commercial activity exception, including the direct effect clause. Guevara App. A, 20a-26a. In his petition, Guevara concedes the first two clauses do not apply and challenges only the

⁴ Guevara incorrectly asserts that this issue was raised below and addressed by the Eleventh Circuit two times. Petition for Writ of Certiorari, (hereinafter cited as “Pet. _”), pp. 10-11. Neither opinion addressed whether a “legally significant act” must occur within the United States under the commercial activity exception. The Eleventh Circuit’s first opinion addressed whether the offer of a reward was commercial activity. *Id.* at 48a. The second opinion addressed whether Peru’s acts fell within any of § 1605(a)(2)’s three clauses. *Id.* at 20a-26a. Guevara did not raise below and the courts did not address whether a “legally significant act” must occur in the United States.

Eleventh Circuit's determination that the third clause—or "direct effect" clause—does not establish an exception to immunity for Peru. The clause provides an exception to immunity when:

. . . the action is based . . . [3] 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.

§ 1605(a)(2). Guevara argues that the Court should grant his Petition so that the Court can resolve a purported circuit split on "whether the commercial activity exception's 'direct effect' clause requires evidence that a 'legally significant act' occurred within the United States in the order to vest American courts with jurisdiction over a foreign sovereign." Pet., i-ii, Question Presented.

This case is not appropriate for resolving those issues. Guevara did not raise in the courts below the issue of whether Peru's purported actions involving the United States were or were not "legally significant," or whether any circuit split on that question existed. Rather, he merely asserted that the Eleventh Circuit already had decided the issue of the court's subject matter jurisdiction in its 2006 *Guevara I* opinion. The Eleventh Circuit did not require Guevara to plead or prove the existence of a "legally significant act." Indeed, the Eleventh Circuit did not address the "legally significant act" issue in *Guevara II* at all—understandably so, because Guevara did not raise it. As this issue has not been preserved, the Court should deny Guevara's petition on this ground alone.

As support for his argument that the Eleventh Circuit applied the “legally significant act” test, Guevara states that the question the court defined was whether “the effect was sufficiently ‘direct’ and sufficiently ‘in the United States’ that Congress would have wanted an American court to hear the case.” Pet. 14 (citing Guevara App. A, 23a-24a). This language clearly shows that the Eleventh Circuit was concerned about whether the *effect* was sufficiently in the United States, not whether the *conduct or act* was sufficiently in the United States. In determining whether Peru fell within the “direct effect” clause of the commercial activity exception, the Eleventh Circuit correctly held that “[n]either of Guevara’s arguments for a direct effect in the United States reflects [*Republic of Argentina v. Weltover* [504 U.S. 607 (1992)]’s requirement of immediate consequences or *Harris Corp. [v. Nat’l Iranian Radio & Television*, 691 F.2d 1344 (11th Cir. 1982)]’s focus on significant financial consequences in the United States. Therefore, we cannot conclude that a direct effect occurred in the United States as a result of Peru’s promise to pay the reward money.” Guevara App. A, 26a.

The Eleventh Circuit thus was not called on to assess the nature or quality of Peru’s alleged acts—“legally significant” or not—because no act was alleged or proven that could possibly have had a direct effect in the United States. Equally to the point, the Eleventh Circuit did not require that Guevara prove a “legally significant act,” either in the United States or outside it. Because Guevara did not have to meet any such legal standard, that test had no significance to the outcome of this case.

Guevara’s petition consists mostly of an academic discussion of the “legally significant act” test in the

courts; the petition barely attempts to identify Peru's acts that supposedly waived its sovereign immunity under the FSIA. Guevara argues that the reward "offer itself constituted commercial activity." Pet. 17-18. Guevara maintains that he accepted Peru's offer by performing in the United States, "*i.e.*, he provided information and coordinated efforts from the United States which led to the location and capture of the fugitive Montesinos[,]" which presumably provided the "direct effect" on the United States under the third branch of § 1605(a)(2). Pet. 18. The record does not support his argument, and Peru's reward offer defined acceptance as the delivery of information to the SHLC *in Peru*.

Guevara's arrest was not commercial activity carried on by Peru, in the United States or in Peru. As the Eleventh Circuit properly held, Guevara's arrest and subsequent cooperation was in connection with Guevara's criminal activity, not the reward. Guevara App. A, 25a-26a ("Guevara's arrest was 'an immediate consequence' of his criminal activity, not of Peru's offer of a reward for Montesinos's capture" (quoting *Weltover*, 504 U.S. at 618)). Law enforcement activities do not fall within the commercial activity exception. *Saudi Arabia v. Nelson*, 507 U.S. 349, 362 (1993) ("Exercise of the powers of police and penal officers is not the sort of action by which private parties can engage in commerce."). Guevara's call to Caracas was not a condition of the reward; it was law enforcement activity which cannot provide the basis for jurisdiction under the commercial activity exception.

The factual record also defeats Guevara's argument. Guevara was required to make the call to Venezuela for the much more immediate purpose of

obtaining his “get out of jail free card” from the FBI. DE 319-3, pp. 39-42. Guevara submitted no evidence suggesting he was motivated to make the Venezuela call to earn the reward; according to FBI Agent Currier, Guevara had agreed to cooperate with the FBI before he knew about Peru’s reward offer. DE 319-3, pp. 39-42; DE 119-3, ¶ 8. Even assuming that his purported cooperation would satisfy the reward offer, the uncontested evidence is that Guevara was only feigning cooperation while ordering Montesinos’s murder from FBI custody. DE 297-6, p. 43, DE 319-1, pp. 16, 17, DE 326-3, pp. 4546-47, 4549-50. In addition, Guevara presented no evidence that his telephone call to Caracas was related to Montesinos’s capture, except as a *post hoc, ergo propter hoc* coincidence of time. He even admitted that the Venezuelan government did not need his information; they knew where Montesinos was from the outset. DE 285-14; DE 201-2, pp. 69-73.

Nor could the reward offer itself have a direct effect in the United States. Reciting the facts in the light most favorable to Guevara, the Eleventh Circuit confronted a record in which the Emergency Decree defined the operative performance as the receipt of information by the SHLC *in Peru* (which never occurred); Guevara made a claim to the SHLC *in Peru*; his counsel met with members of the SHLC *in Peru*; the alleged breach of contract occurred when the SHLC, after an extensive and good faith review, denied Guevara’s claim *in Peru*; and Peru declined to make payment from a bank account authorized by the Emergency Decree to be opened *in Peru*. Guevara App. A, 20a; Peru App. A, pp. 1a-6a. Guevara argued that even though every event in connection with the offer took place in Peru, a direct effect sprang from what the Eleventh Circuit de-

scribed as “Peru’s failure to make the reward payment within the United States—a sort of ‘negative activity[.]’” Guevara App. A, 25a. The Eleventh Circuit observed that no federal court had ever relied on such “negative activity” to confer subject matter jurisdiction under § 1605(a)(2), and correctly rejected Guevara’s argument. *See also Guirlando v. T.C. Ziraat Bankasi A.S.*, 602 F.3d 69, 76 (2nd Cir. 2010) (under FSIA, “although the failure to act may have a legally significant effect in the place where the act was to have been performed, the failure to act is not itself an act.”).

Guevara’s argument that he was entitled to payment in Miami fails because it is factually inaccurate, as the Eleventh Circuit found. Guevara App. A, 23a. The Emergency Decree authorized a loan and bank account in Peru for payment of the reward. *Id.* The decree requires the loan to be taken from Banco de la Nación, a state-owned bank, and describes it as an internal indebtedness operation. Nothing in the decree requires payment in the United States, or gives Guevara the power to choose the place of payment. Thus, Guevara’s case is distinguished from *Weltover*, 504 U.S. at 619 (direct effect because payment due in the United States) and *Hanil Bank v. PT. Bank Negara Indonesia*, 148 F.3d 127, 132 (2d Cir. 1998) (direct effect when plaintiff entitled under a letter of credit to designate place of payment and it designated its New York bank account), and similar to the Second Circuit’s recent decision in *Guirlando*.

Guevara argued (but abandoned) the proposition that a direct effect in the United States occurred by virtue of the single Lima-Miami telephone call in which Minister Vidal conveyed the terms of the offer to FBI Agent Longa. The Eleventh Circuit held that

Guevara's acceptance-related activity involved only this "one-off" telephone communication that was too *de minimis* to support subject matter jurisdiction, using the minimum contacts personal jurisdiction test as an analogy, as this Court did in *Weltover*, 504 U.S. at 619. Guevara App. A, 25a. The Vidal call also was in connection with law enforcement—not commercial—activities. *Id.* The participants were discussing how to bring about Montesinos' arrest, and Minister Vidal did nothing more than repeat the terms of the reward offer.

In short, the Eleventh Circuit correctly determined that no act performed by any character in this drama brought about a "direct effect" in the United States within the meaning of § 1605(a)(2) of the FSIA. This conclusion did not turn on whether any act was "legally significant," because no act, regardless of how it could be characterized, produced the requisite direct effect in the United States. No party, including Guevara, raised this issue, and the Eleventh Circuit had no occasion to consider it.

Even though the "legally significant act" test is irrelevant to the outcome of this case, Guevara evidently believes that a circuit conflict is a potential ticket to review by this Court. He therefore raises this issue for the first time in his petition, and devotes the lion's share of the petition to explication of a purported circuit conflict on this irrelevant issue.

Guevara argues that some circuits require a "legally significant act" in the United States under the direct effect clause, while others do not. He asserts that the Eleventh Circuit requires a legally significant act to occur within the United States.

Contrary to Guevara's assertions, the Eleventh Circuit does not require a legally significant act, neither within nor without the United States. In this case, the Eleventh Circuit explicitly followed this Court's articulation of the nexus rule in *Weltover*, 504 U.S. at 618, where the Court held that "an effect is 'direct' if it follows 'as an immediate consequence of the defendant's . . . activity.'" (ellipses in original). Guevara App. A, 23a. The Eleventh Circuit did not mention the legally significant act test at all, let alone the location of any such act, nor did it include or make reference to a "substantiality" or "foreseeability" requirement, which *Weltover* expressly rejected.

Here, the Eleventh Circuit adopted the sensible approach recently exemplified by the Sixth Circuit in *American Telecom Co., LLC v. Republic of Lebanon*, 501 F.3d 534 (6th Cir. 2007). Noting that some circuits adopt the legally significant act formulation, others reject it, and still others find it "helpful but not required," the Sixth Circuit said: "But, while the circuits have framed the inquiry differently, these differences have no impact here. The present case is easily resolved without resort to any legally significant act" *Id.* at 540. Like the Eleventh Circuit here, the Sixth Circuit found that the conduct alleged simply could not have had a direct effect in the United States, and dismissed the case for want of subject matter jurisdiction under the FSIA.

Notably, although the Sixth Circuit in *American Telecom* catalogued the circuits with regard to their positions on the "legally significant act" issue, it did not identify the Eleventh Circuit as yet having taken any position on the question. That agnosticism remains unchanged after the Eleventh Circuit's deci-

sion here. Even if there is a circuit conflict on this issue, the Eleventh Circuit's non-position is not in conflict with any other circuit, making this case a particularly unsuitable vehicle for resolving whatever conflict may exist.

Guevara also relies on public policy arguments, none of which are valid.

First, Guevara maintains that because the United States—like Peru—offers rewards as adjuncts to law enforcement, United States courts should compel Peru to pay him the award he contends that he has earned. Pet. 18-19. To the contrary, the SHLC, a duly constituted organ of the Peruvian government, following in good faith the procedures set out in the reward offer, and with the participation of the FBI and Guevara's attorney in the process, determined that Guevara had not earned the reward. As the United States explained in its amicus brief to the Eleventh Circuit, and as Judge Cox noted in his dissent, the courts of the United States would violate basic principles of comity if they sat in judgment on the acts of other sovereign nations in determining entitlement to reward offers. Indeed, public policy dictates precisely the opposite conclusion from that urged by Guevara. As the United States also explained in its amicus brief, if a United States court can “effectively preempt[] the . . . evaluation decision” of the Peruvian government (*Guevara II*, 608 F.3d at 1305), courts of other nations would be encouraged to “preempt the . . . evaluation decision[s]” of the United States, and order payment of rewards to claimants that the United States had determined to be unjustified.

In fact, when Guevara accepted the reward offer, he also accepted the stipulation that his entitlement

to the reward would be decided by the SHLC in Peru. Guevara is no different from a party who signs a garden-variety contract that contains a forum selection clause dictating how and where disputes under the contract will be resolved. Guevara, having accepted and participated in that process, cannot now ask a U.S. court to supplant the Peruvian tribunal whose decision Guevara agreed to respect.

Second, Guevara reverses course and argues that a reward offer is not “typical” commercial activity, and should be evaluated under some unspecified new FSIA standard “requir[ing] closer scrutiny.” Pet. 21. (“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.”). Guevara cannot have it both ways: having persuaded the Eleventh Circuit in *Guevara I* that a reward offer is commercial activity potentially subject to FSIA jurisdiction, Guevara cannot in good conscience maintain in this Court that a reward offer is in some way less commercial than the activities that ordinarily fall within the exception. Indeed, if Guevara had made this concession to the Eleventh Circuit in *Guevara I*—that a reward offer is not “typical” commercial activity—this case would have been over in 2006.

Third and finally, Guevara argues that FBI Agent Currier’s urging to the Peruvian government to pay the reward to Guevara exposes a “yawning conceptual gap” between the FBI and the position taken by the United States in its *amicus* brief to the Eleventh Circuit. Pet. 22. That “gap” is illusory. The FBI later disavowed Currier’s statements as unauthorized. Even if the FBI had not disavowed

them, Agent Currier's letters do not contradict the considered position taken by the United States in this litigation with regard to the application of the doctrine of international comity. Agent Currier did not and could not take a legal position on this issue on behalf of the FBI.

CONCLUSION

There is no law, no equity and no public policy that would justify the district court assuming jurisdiction over Guevara's reward claim and entering judgment for Guevara. Guevara invites this Court to second-guess the decision of an organ of the Peruvian government, which is an inappropriate undertaking for a United States court. His petition should be denied.

Respectfully submitted,

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