No. 19-

In the Supreme Court of the United States

CANADA,

Petitioner

v.

CYNTHIA L. MERLINI,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent Merlini was injured while working as Assistant to the Consul General at petitioner Canada's Consulate. She sued Canada under a strict liability cause of action premised on the employer's failure to comply with state regulatory requirements for workers' compensation insurance. Canada did not comply with those requirements because its own legislation creates a comprehensive workers' compensation scheme applicable to all Canadian Government employees worldwide. The court of appeals rejected Canada's claim of sovereign immunity based on the commercial activity exception to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(2). The questions presented are:

1. Whether the court of appeals erred in treating Canada's legislative decision to compensate its consular employees for workplace injuries exclusively under Canadian law as a mere omission to comply with state law, and thus as "commercial activity" within 28 U.S.C. § 1605(a)(2).

2. Whether the court of appeals erred in deeming Canada's setting of conditions of full-time employment within the Canadian Consulate "commercial activity" within 28 U.S.C. § 1605(a)(2), based on the employee's U.S. citizenship and allegedly "clerical" job duties.

PARTIES TO THE PROCEEDING

Petitioner Canada and respondent Cynthia L. Merlini were the sole parties to the proceeding in the court below. At the invitation of the court below, the United States filed a brief as *amicus curiae*.

RELATED PROCEEDINGS

The proceedings directly on review in this case are:

Cynthia L. Merlini v. Canada, No. 17-2211, 926 F.3d 21 (App. 1a-54a) (1st Cir. June 10, 2019), *rehearing en banc denied*, 940 F.3d 801 (App. 55a-60a) (1st Cir. October 23, 2019)

Cynthia L. Merlini v. Canada, Civ. No. 17-10519, 280 F. Supp. 3d 254 (App. 61a-69a) (D. Mass. Dec. 7, 2017).

Respondent Merlini previously filed an administrative claim against the Massachusetts' Workers' Compensation Trust Fund concerning the same workplace injuries that are involved in this case, which resulted in the following state appellate proceeding:

In re Merlini, No. 15-P-847, 89 Mass. App. Ct. 1130, 54 N.E.3d 606 (table) (Mass. App. Ct. June 29, 2016).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Canada respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in appeal No. 17-2211.

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals is reported at 926 F.3d 21 and reprinted in the Appendix (App.) *infra,* at 1a-53a. The order of the court of appeals denying en banc review and opinions in respect of that order are reported at 940 F.3d 801 and reprinted at App. 54a-58a. The opinion of the district court is reported at 280 F. Supp. 3d 254 and reprinted at App. 59a-67a.

JURISDICTION

The judgment of the court of appeals was entered on June 10, 2019. Canada's petition for rehearing *en banc* was denied on October 23, 2019. By order dated January 10, 2020, Justice Breyer extended the time for petition for a writ of certiorari to March 6, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND TREATIES INVOLVED

Pertinent provisions of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602 *et seq.*, the Massachusetts Workers' Compensation Act, Mass. Gen. L. ch. 152, the 1963 Vienna Convention on Consular Relations, 21 U.S.T. 77, Canada's Government Employees Compensation Act, R.S.C. 1985, c. G-5, and Canada's Locally-Engaged Staff Employment Regulations, SOR/95-152, are reproduced at App. 79a-103a.

INTRODUCTION AND SUMMARY

Canada has embassies or consulates in 12 U.S. jurisdictions. It is one of almost 200 sovereign foreign states that operate over 400 embassies and consulates throughout the 50 states, the District of Columbia, and various U.S. territories. Those missions employ thousands of U.S. and foreign citizens. Thousands more are employed by international organizations that are generally subject to the same rules under the Foreign Sovereign Immunities Act ("FSIA") as foreign states. *See Jam v. Int'l Fin. Corp.,* 139 S. Ct. 759 (2019).

This case concerns the right of those sovereigns to set the rules governing employment within their governmental missions. Canada employed Merlini at its Boston Consulate on terms that included the application of a Canadian statute that provides a comprehensive and exclusive workers' compensation scheme for, *inter alia*, consular employees. Merlini sued Canada under a Massachusetts statute that premises liability on an employer's failure to either purchase workers' compensation insurance or obtain a license from Massachusetts regulators to self-insure. The court of appeals held that both (i) Canada's employment of Merlini as a full-time Assistant to the Consul General, and (ii) Canada's conduct with respect to workers' compensation, constituted "commercial activity" within 28 U.S.C. § 1605(a)(2), so Canada was not immune under the FSIA.

This Court's decisions in *Republic of Argentina v. Weltover, Inc.,* 504 U.S. 607 (1992) ("*Weltover*"), *Saudi Arabia v. Nelson,* 507 U.S. 349 (1993) ("*Nelson*"), and *OBB Personenverkehr AG v. Sachs,* 136 S. Ct. 390 (2015) ("*Sachs*"), instruct that to apply

the commercial activity exception, a court must identify the "gravamen" of a complaint in terms of the "particular actions that the foreign state performs," *Weltover*, 504 U.S. at 614. The 2-1 majority decision of the court of appeals misinterpreted the FSIA and those decisions in two respects, each of which entails conflicts with decisions of other courts of appeals, and each of which independently warrants review and reversal.

First, the court mischaracterized Canada's conduct with respect to workers' compensation insurance as a mere omission — a "choice to forgo obtaining the requisite insurance," App. 17a — of which a private employer could equally be guilty. That may accurately reflect the minimum requirements for liability under Massachusetts law. But it neglects the sovereign nature of the "particular actions" Canada performed — legislating and implementing a comprehensive legal scheme for compensating employees of its federal government worldwide. In doing so, the decision below conflicts both with this Court's cases and with decisions of the D.C. and Second Circuits holding that a foreign sovereign's administration of a national medical or compensation program is a sovereign activity.

Second, the court held that Canada was engaged in "commercial activity" in employing respondent Merlini because she is a U.S. citizen and performed what the court understood to be "clerical" duties. The court thereby effectively made Massachusetts law sovereign over the terms on which Canada may employ an Assistant to the Consul General working full-time in its Consulate. The court's focus on the employee's nationality and specific job duties, rather than the sovereign employer's activities and the

mission she was employed to serve, lacks any support in the FSIA's text and exacerbates a pre-existing circuit split. Moreover, the ruling conflicts with basic principles of international law under the 1963 Vienna Convention on Consular Relations as recognized by the D.C. Circuit.

Three of the six judges on the First Circuit dissented from denial of rehearing *en banc*. Judge Torruella stated that this case "raises 'a question of exceptional importance.'" (App. 54a (citation omitted). Judge Lynch, joined by Chief Judge Howard, urged this Court to grant review, opining that the panel opinion significantly misreads the FSIA and this Court's cases, creates multiple circuit conflicts, "and is in derogation of principles of comity and international law." App. 55a. She further explained, consistent with an *amicus* brief filed by the United States, that the decision below will harm U.S. interests via reciprocity, since the Federal Employees' Compensation Act essentially mirrors Canada's GECA by creating a comprehensive and exclusive workers' compensation system under U.S. law for U.S. embassies and consulates abroad. The dissenting judges are right: this case merits this Court's review.

STATEMENT

1. The FSIA makes foreign states immune from suit in U.S. courts, 28 U.S.C. § 1604, subject to limited exceptions, 28 U.S.C. § 1605. Those exceptions constitute the exclusive circumstances in which federal courts may exercise jurisdiction over suits against foreign states or their instrumentalities. *See* 28 U.S.C. § 1330(a); *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488 (1983). A plaintiff bears

the burden of demonstrating that an exception applies. *See ibid.*

The most important FSIA exception is the commercial activity exception, which (insofar as relevant here) denies immunity from suit in any case "in which the action is based upon a commercial activity carried on in the United States by the foreign state . . . ." 28 U.S.C. § 1605(a)(2). The exception codifies the "restrictive theory" of sovereign immunity, *see Nelson,* 507 U.S. at 363, under which "immunity is confined to suits involving the foreign sovereign's public acts, and does not extend to cases arising out of a foreign state's strictly commercial acts." *Samantar v. Yousuf*, 560 U.S. 305, 312 (2010) (quoting *Verlinden,* 461 U.S. at 487). Applying the exception involves determining "whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in 'trade and traffic or commerce.'" *Weltover*, 504 U.S. at 614 (citation omitted).

The phrase "based upon" in § 1605(a)(2) requires courts to identify the "particular conduct" of the sovereign that supplies "those elements . . . that, if proven, would entitle a plaintiff to relief," and 'the 'gravamen of the complaint.'" *Sachs,* 136 S. Ct. at 395 (quoting *Nelson,* 507 U.S. at 357). It is not sufficient that a single element of the plaintiff's cause of action involves commercial activity; the court must "zero[] in on the core" of the suit to determine whether sovereign activities, which are properly immune, are involved. *Id*. at 396.

2. The "particular actions" at issue in this case are actions of the Canadian Consulate in Boston and, in issuing legal directions binding the Consulate, the

Canadian Government in Ottawa. Beginning in 2003, petitioner Canada employed respondent Merlini, a U.S. citizen, in the Consulate as a full-time Assistant to the Consul General.

Merlini's employment was subject to several Canadian laws. For example, Canada's Locally-Engaged Staff ("LES") Employment Regulations require all consular employees, including U.S. citizens, to swear an oath or affirmation that "I will faithfully and honestly fulfil the duties that devolve upon me by reason of my employment in the Public Service and that I will not, without due authority in that behalf, disclose or make known any matter that comes to my knowledge by reason of such employment." SOR/95-152, art. 9(2) & scheds. III & IV.

Of particular significance to this case, Merlini's employment was subject to Canada's Government Employees Compensation Act, R.S.C. 1985, c. G-5 ("GECA"). GECA provides a comprehensive scheme for compensating employees of Canada's federal government for personal injuries suffered in the course of their employment, whether inside or outside of Canada, and without regard to the employee's citizenship. *See* GECA §§ 2, 3(2), 4. For LES employees, such as Merlini, compensation for workplace injuries is generally awarded by Canada's Minister of Labour, *see id.* § 7(2), and provided from Canada's Consolidated Revenue Fund, *see id.* § 4(6). The GECA compensation scheme is exclusive: it expressly bars any non-GECA "claim" against Canada or its officers for injuries compensable under GECA. *Id.* § 12.

3. In 2009, Merlini was injured in a slip-and-fall accident at work within the Consulate. As she had

been instructed to do, consistent with the Canadian law governing her consular employment, she filed a claim under GECA. *See* App. 72a (Compl. ¶¶ 21, 23). Canada paid her compensation representing approximately nine months' salary pursuant to GECA § 7(2). When Canada determined Merlini was able to work and ceased providing her with compensation, Merlini did not exercise her right to appeal under Canadian law.

4. Instead, in 2011, Merlini filed an administrative claim against the Massachusetts Workers' Compensation Trust Fund under the Massachusetts Workers' Compensation Act, Mass. Gen. L. ch. 152 ("MWCA"). The MWCA generally authorizes claims against the Fund for workplace injuries suffered by employees or employers who are "uninsured" within the meaning of the MWCA. MWCA § 65(2)(e). Merlini's administrative claim was ultimately rejected on appeal because the MWCA bars claims against the Fund by employees who are entitled to workers' compensation benefits in another jurisdiction. *In re Merlini,* 89 Mass. App. Ct. 1130, 54 N.E.3d 606 (table) (2016); *see* MWCA § 65(2)(e)(i).

5. The present case began in March 2017, when Merlini filed a one-count complaint against Canada in the U.S. District Court for the District of Massachusetts under MWCA § 66. The MWCA has the same basic structure as most workers' compensation statutes throughout the United States. It bars all employee common law claims against employers for workplace personal injuries, *see* MWCA §§ 24, 26; *Foley v. Polaroid Corp.,* 381 Mass. 545, 548-49, 413 N.E.2d 711, 713-14 (1980), replacing them with an obligation to secure insurance or state regulatory approval of self-insurance for workplace

injuries in manners specified by state regulations, MWCA § 25A, and a procedure for employees to seek compensation from that insurance, MWCA § 7, plus an administrative claims procedure for claims that are denied, MWCA §§ 10 *et seq*. If an employer fails to comply with MWCA § 25A, enforcement may take several forms, including stop work orders, penalties and fines. MWCA § 25C. In addition, MWCA § 66 creates a statutory strict liability cause of action for personal injuries, *see Thorson v. Mandell,* 402 Mass. 744, 746, 525 N.E.2d 375, 377 (1988), with a 20-year statute of limitations, which applies only to employers who fail to comply with MWCA § 25A, *see* MWCA §§ 24, 67.

Under MWCA § 66, there are three elements to Merlini's statutory claim: (i) she suffered a workplace injury, (ii) while employed by Canada, (iii) which violated an obligation to comply with MWCA § 25A. It is undisputed that Merlini's claim satisfies the first two elements. Canada has also not purchased insurance to cover workers' compensation under Massachusetts law, or sought from Massachusetts regulators a "license as a self-insurer," as provided in MWCA § 25A. As a sovereign nation, Canada considers itself entitled to employ its consular staff, and to compensate them from its Consolidated Revenue Fund, without asking permission from state regulators.

6. Canada moved to dismiss Merlini's complaint under the FSIA. Merlini argued that either the commercial activity exception, 28 U.S.C. § 1605(a)(2), or the noncommercial tort exception, 28 U.S.C. § 1605(a)(5), to sovereign immunity applied. The district court granted Canada's motion to dismiss. App. 59a-67a. The court ruled that the commercial

activity exception was inapplicable because "[a] sovereign defendant's decision to offer and structure its own form of benefits is not comparable to exercising a power that could be leveraged by private citizens." App. 64a. The court further concluded that Merlini's "claim is based on [Canada's] decision to provide its own system of benefits and to remain uninsured in Massachusetts," and thus rejected application of the noncommercial tort exception. App. 65a.

7. The First Circuit reversed. In a 2-1 decision, the court held that Canada was subject to suit under the commercial activity exception.[1] Judge Barron, joined by Judge Kayatta, first concluded that insofar as Merlini's claim was "based upon" her employment, the commercial activity exception should apply, because she is a U.S. citizen and her job duties "were purely clerical." App. 12a-13a. Judge Barron indicated that if Merlini either were a Canadian citizen, or had "governmental" or "security" duties, immunity would apply. App. 17a-18a, 25a-26a n.7.

The majority then rejected the argument, made by Canada and by the United States as *amicus curiae*, that the gravamen of Merlini's claim under MWCA § 66 was Canada's sovereign legislative decision to structure its consular operations on the basis that its own GECA scheme comprehensively and exclusively

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[1] Because liability under MWCA § 66 requires no tortious conduct, the court unanimously upheld the district court's ruling that the noncommercial tort exception did not apply, notwithstanding the United States' suggestion (in an *amicus* brief) of a remand on that issue. *See* App. 13a-17a (majority opinion); App. 36a-38a nn.9, 11 (Lynch, J., dissenting). The noncommercial tort exception is addressed at *infra*, pp. 34-35.

governs workers' compensation for its consular employees. Judge Barron acknowledged that Canada was "motivated by what it characterizes as its sovereign obligation to provide its employees protection through its own national workers' compensation system." App. 23a. But he deemed that "motivat[ion]" immaterial in light of this Court's decision in *Weltover,* and concluded that in other respects, "Canada's employment of Merlini without obtaining the requisite insurance," App. 21a, was equivalent to a private employer electing to "take the risk of going bare," App. 22a.

Judge Lynch dissented, opining that "[t]his case is about Canada's sovereign choice of a comprehensive workers' compensation scheme (a scheme which did compensate Merlini)." App. 44a. Judge Lynch concluded that the majority misread this Court's decisions in *Nelson, Sachs,* and *Weltover*, and created conflicts with decisions of other courts of appeals in *Anglo-Iberia Underwriting Management Co. v. P.T. Jamsostek,* 600 F.3d 171 (2d Cir. 2010), *Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan*, 115 F.3d 1020 (D.C. Cir. 1997), *Gregorian v. Izvestia*, 871 F.2d 1515 (9th Cir. 1989), and *MacArthur Area Citizens Ass'n v. Republic of Peru,* 809 F.2d 918 (D.C. Cir. 1987). App. 38a-48a. Judge Lynch joined the United States in highlighting the "foreign policy repercussions of the majority's view," including the reciprocity concerns for U.S. missions abroad given that the Federal Employees' Compensation Act, 5 U.S.C. § 8101 *et seq*., mirrors Canada's GECA. App. 50a. Judge Lynch also criticized the majority's distinction between U.S. citizen "clerical" and other consular employees as lacking any basis in the text of the FSIA or this Court's cases. App. 51a-52a.

8. Canada petitioned for rehearing *en banc*, which the First Circuit denied by a 3-3 vote. Judge Torruella dissented "because this appeal raises 'a question of exceptional importance.'" App. 54a (citation omitted). Judge Lynch, joined by Chief Judge Howard, renewed her criticisms of the majority opinion, *see* App. 55a-58a, and they expressly "urge[d] the Supreme Court to grant review in this important case." App. 55a.

REASONS FOR GRANTING THE PETITION

As the court below unanimously recognized, there are two connected elements to the "particular activity" of Canada that constitute the gravamen of Merlini's suit under MWCA § 66: her employment, and Canada's conduct with respect to workers' compensation. The critical issue under the FSIA is how to characterize those two elements. The First Circuit majority characterized Merlini's employment as "clerical" (and thus commercial) rather than consular (and thus sovereign). It characterized Canada's conduct with respect to workers' compensation as an "omission" to comply with Massachusetts workers' compensation regulations (and thus commercial) rather than a comprehensive legislative scheme to govern compensation for Canada's federal government employees worldwide (and thus sovereign). Canada submits that in both respects it erred and created or exacerbated conflicts among the courts of appeals.

This Court has previously stressed both the difficulty and the unavoidability of such characterization issues, which are central to the administration of the FSIA. *See Nelson*, 507 U.S. at 361; *Weltover*, 504 U.S. at 617. On the one hand, viewing a sovereign's activity too broadly in terms of

the sovereign's purpose could eviscerate the commercial activity exception. Sovereigns can almost always cite a higher governmental purpose for even the most clearly commercial activities, such as repudiating a debt, as in *Weltover*. On the other hand, viewing a sovereign's activity too narrowly in terms only of the aspects of that activity that are legally required for the plaintiff's cause of action could eviscerate immunity so long as a law does not specifically target sovereigns. An ambassador's recall could be mischaracterized as a "commercial" employment termination matter; the exercise of police powers could be mischaracterized as tortious violence or even as "commercial misconduct," *see Nelson,* 507 U.S. at 361-62.

Such issues arise most frequently in the employment context, where they have engendered confusion and conflict in the courts of appeals. This case presents an opportunity for this Court to provide needed guidance.

I. This Court should review the First Circuit's ruling that a foreign sovereign can be sued based upon its legislative decision to compensate its consular employees for workplace injuries exclusively under its own law

As the First Circuit recognized, an essential element of Merlini's claim under MWCA § 66 is Canada's non-compliance with the workers' compensation insurance requirements in MWCA § 25A. MWCA § 25B generally exempts state and local government employers from those requirements, but there is no express exemption for foreign

governments, and the premise of Merlini's claim is that Canada is not exempt.[2]

MWCA § 25A requires an employer to either (1) purchase Massachusetts workers' compensation insurance or join a state-sanctioned self-insurance group, or (2) annually obtain a license to self-insure, which involves providing to Massachusetts regulators a sworn statement of assets and liabilities, a detailed description of the employer's business, and a bond. Once an employer complies with MWCA § 25A, its employees' claims for workers' compensation become payable by its insurance or self-insurance subject to the MWCA's detailed administrative rules and procedures.

The MWCA scheme is incompatible with Canada's GECA. Under GECA, workers' compensation for Canada's consular employees such as Merlini is funded not by Massachusetts-regulated insurance, but by Canada's Consolidated Revenue Fund, *see* GECA § 4(6), and awards are made not through the MWCA process but generally by (or under authority delegated within the Canadian Government by) the

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[2] If required to defend this case on the merits, Canada will argue that it is impliedly exempt under Massachusetts law. However, Canada is entitled to have the FSIA immunity issue resolved before litigating the merits. Immunity shields defendants "not only from the consequences of litigation's results but also from the burden of defending themselves." *Dombrowski v. Eastland,* 387 U.S. 82, 85 (1967). Accordingly, FSIA immunity issues should be determined "[a]t the threshold of every action in a District Court against a foreign state." *Verlinden,* 461 U.S. at 493-94; *see also Bolivarian Rep. of Venezuela v. Helmerich & Payne Int'l Drilling Co.,* 137 S. Ct. 1312, 1317 (2017) ("*Helmerich*") (courts should "reach a decision about immunity as near to the outset of the case as is reasonably possible").

Canadian Minister of Labour in Ottawa, as part of a detailed administrative process, *see id.* § 7(2). Further, GECA § 12 expressly bars covered employees from bringing workplace injury "claims" against Canada other than under GECA. The Canadian Consulate in Boston did not have the option of compensating Merlini under the MWCA. Her rights to compensation were determined in Ottawa, by the Canadian Parliament when it enacted GECA and by the Canadian Ministry of Labour when it implemented GECA.

The First Circuit majority nonetheless concluded that since the MWCA is indifferent to whether non-compliance arises from a commercial decision to "take the risk of going bare," App. 22a, or from a foreign sovereign's decision to legislate and implement its own global workers' compensation for government employees, Merlini's claim was based upon commercial activity. *See* App. 20a-30a. As Judge Lynch explained in dissent, that focus on the abstract elements of the cause of action versus the actual activity of the sovereign conflicts with decisions of both this Court and multiple courts of appeals. *See* App. 38a-48a.

A. The ruling conflicts with this Court's decisions in *Weltover*, *Nelson* and *Sachs*

The First Circuit majority concluded that Canada's conduct should be characterized as a mere omission with respect to workers' compensation — as employing Merlini "without obtaining the requisite insurance," App. 21a — based mainly on 28 U.S.C. § 1603(d) and *Weltover*. *See* App. 22a n.5, App. 23a-25a. Section 1603(d) provides that "[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or

particular transaction or act, rather than by reference to its purpose." In *Weltover*, this Court held that Argentina's default on negotiable bonds that were traded on international markets and payable in the United States — a breach of contract involving a "garden-variety debt" — was commercial activity regardless of any underlying governmental "purpose." 504 U.S. at 615. The majority read too much into both the statute and *Weltover*, and erred in two respects.

First, this Court's cases reject the notion that section 1603(d) requires stripping a sovereign's conduct to its simplest legal form and divorcing it from all context. In *Weltover*, this Court reviewed the "full context" of Argentina's actions before determining that they were "analogous to a private commercial transaction" in every respect except perhaps their ultimate purpose. 504 U.S. at 615-16; *see also* App. 41a (Lynch, J., dissenting). This Court noted the inherent difficulty of applying the "nature" versus "purpose" test in section 1603(d), equating "nature" with "the outward form of the conduct that the foreign state performs or agrees to perform." 504 U.S. at 617.

This Court made the same point in *Nelson*, 507 U.S. at 361, adding an acknowledgment that the definition in section 1603(d) is "diffiden[t]" and almost circular, *id.* at 359. The Court then elaborated on the meaning of the "nature" or "outward form of the conduct" that determines its characterization. It acknowledged that the Saudi Government was accused of acts that, stripped to their simplest legal form, could be undertaken by private parties: retaliation against a whistleblower, false imprisonment, assault and torture. But it

emphasized that when a sovereign exercises "'powers peculiar to sovereigns,'" *id.* at 360 (quoting *Weltover*, 504 U.S. at 614), such as police powers, even if it violates human rights and breaks laws that a private actor could break, its activities are sovereign and immune, *see id.* at 361-62.

Second, this Court's cases instruct that the gravamen of the plaintiff's suit must be defined in terms of "particular actions that the foreign state performs," *Weltover*, 504 U.S. at 614, in order to determine whether the suit is "based upon a commercial activity carried on in the United States by the foreign state," 28 U.S.C. § 1605(a)(2). The statutory term is "activity" — not relationship or omission. Further, focusing on activities rather than omissions is necessary to implement the jurisdictional nexus aspect of the statutory test: activities occur in particular locations, whereas omissions occur anywhere and nowhere. *See Nelson,* 507 U.S. at 357-58. Accordingly, this Court has held that the commercial activity exception does not apply merely because (i) there is a commercial relationship between the plaintiff and the sovereign defendant, as there was in both *Nelson* (hospital employment) and *Sachs* (a train ticket) and (ii) the plaintiff frames a cause of action in terms of an omission that occurred in the context of that relationship (in both cases, a failure to warn). *See Sachs,* 136 S. Ct. at 396-97; *Nelson,* 507 U.S. at 363.

The First Circuit's decision is inconsistent with *Weltover, Nelson* and *Sachs*. By characterizing Canada's conduct as a mere omission to insure in compliance with Massachusetts law, the court below ignored the "outward nature" of Canada's activities. A private employer might violate MWCA § 25A by

simply "going bare." App. 22a. But that is not what Canada did. Canada created a scheme to compensate consular employees such as Merlini, and indeed, did compensate Merlini. It did so by a quintessentially sovereign means — legislating an integrated legal scheme, administered by a high government officer (the Minister of Labour) in quasi-judicial fashion, and applicable throughout the full extent of Canada's sovereign jurisdiction.[3] The "particular actions" undertaken by Canada that provide the basis for Merlini's suit involve the enactment and implementation of GECA. Merlini's suit is not based on any actions undertaken by the Canadian Consulate that were independent of GECA. GECA provided a Canadian remedy for Merlini (pursuant to which she received compensation) and, as a corollary thereto, barred her from making any "claim" for a duplicative remedy under Massachusetts law, *see* GECA § 12. It would have been absurd for the Consulate to insure, or to petition Massachusetts regulators for a license to self-insure, against Massachusetts law claims barred by GECA. As Judge Lynch stated: "These 'acts' — of enforcing the Canadian uniform compensation scheme and of foregoing Massachusetts workers' compensation insurance — are the same. It is mere semantics to disaggregate the two." App. 40a. Further, having told Merlini that GECA would govern any workers' compensation claims, *see* App. 72a (Compl. ¶ 21),

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[3] *See, e.g., Nelson,* 507 U.S. at 362 ("'[S]uch acts as legislation . . . can be performed only by the state acting as such'") (quoting H. Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 Brit. Y.B. Int'l L. 220, 225 (1952)); *id.* at 361 (immunity extends "to a foreign state's 'internal administrative acts'")) (citation omitted).

Canada never gave her any commercial expectation of receiving compensation for workplace injuries under Massachusetts law.

B. The ruling conflicts with decisions of the D.C. and Second Circuits holding that a foreign sovereign's administration of a national medical or compensation program is sovereign activity

In contrast to the decision below, the D.C. Circuit and the Second Circuit have recognized that although government medical or compensation programs may employ commercial means, actions taken by government actors at the level of setting or administering the rules for those programs are sovereign activity.

Like Merlini's case, the D.C. Circuit's decision in *Jungquist* involved an individual plaintiff's claim against a foreign sovereign for compensation for personal injuries. The plaintiff was injured in a boating accident in Abu Dhabi and, acknowledging some individual responsibility for her injuries, Sheikh Sultan caused her to be enrolled in, and compensated by, an official national medical treatment and reimbursement program of the Abu Dhabi government. After her benefits under the program were terminated, the D.C. Circuit held that she could sue Sheikh Sultan based on an alleged contract made in his private capacity to ensure her continuing compensation. 115 F.3d at 1028. However, it held that the government agency and employees who administered the program and effectuated the termination of benefits retained sovereign immunity. To be sure, they had employed commercial means, such as paying travel and hospital bills, in support of the plaintiff's treatment,

see id. at 1029,[4] and the plaintiff's complaint was (like Merlini's) that they were omitting to make further financial provision, in the same manner that a private actor could make, for her compensation. However, the government agency and its employees had not made and breached a commercial contract with the plaintiff, *see id.* at 1030, and their actual activities "fell within their official duties" of "overseeing the administration of the Abu Dhabi foreign medical treatment program," *see id.* at 1028-29. Accordingly, they were immune.

The Second Circuit endorsed and applied the reasoning of *Jungquist* in a somewhat different context in *Anglo-Iberia*, 600 F.3d 171. The plaintiffs alleged that they were victims of a commercial reinsurance fraud scheme perpetrated by employees of Indonesia's social security and national health insurance administration, and that the Indonesian government agency had negligently failed to supervise their employees to prevent the fraud. As in *Merlini* and *Jungquist*, the plaintiffs claimed they had suffered a financial loss because of something government administrators had omitted to do that could equally be done by a private actor — in *Anglo-Iberia*, better supervise their employees. As in *Jungquist*, but contrary to *Merlini,* the Second Circuit held that that arguably commercial *omission*

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[4] The court acknowledged that a contract to pay a provider for medical services is normally commercial, and a breach of such a contract can be a basis for suit under the commercial activity exception, as it was in *Rush-Presbyterian-St. Luke's Med. Ctr. v. Hellenic Republic,* 877 F.2d 574 (7th Cir. 1989), a case on which the court below relied. *See Jungquist,* 115 F.3d at 1030; *see also Nelson,* 507 U.S. at 358 (referring to an employment contract with a government hospital as "arguably commercial activities").

was not a basis for liability under the FSIA, since the only *activity* alleged was administering a national government benefits program. *See id.* at 177-78.[5]

II. This Court should review the First Circuit's ruling that a foreign sovereign's setting of employment terms for its full-time consular employees is non-immune "commercial activity" if they are U.S. citizens performing "clerical" job duties

The decision below conflicts with Canada's sovereign right to set the terms governing employment in its consulate. As applied to U.S. citizen employees in Canada's Boston Consulate, the decision effectively nullifies section 12 of GECA by subjecting Canada to suit under the MWCA. GECA was enacted long before, and was the basis on which, Merlini was employed. *See* App. 72a (Compl. ¶ 21). Canada's implementation of GECA is the kind of systemic "internal administrative act[]" of a sovereign, setting the rules for a government body, that merits immunity. *See Nelson,* 507 U.S. at 361. It is not an individual employment action that might or might not be "commercial" depending on the

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[5] Other courts of appeals decisions reflect the same general insight that administration of a government program does not become commercial activity merely because it involves commercial transactions unless the suit is brought to enforce voluntarily agreed terms of those commercial transactions (as it was in *Weltover* and *Rush-Presbyterian*). For example, in *Gregorian*, 871 F.2d 1515, the Ninth Circuit held that the fact that the Soviet state propaganda organ Izvestia sold newspapers in commerce in the United States did not make its governmental decisions about what to publish commercial activity such that it could be sued for libel.

specifics of the employment relationship and the action.

The First Circuit majority, however, ruled that Merlini's employment relationship with Canada was "commercial" based on her individual citizenship and job duties, *see* App. 12a-13a, 17a-18a, and expressly made that characterization decisive in denying immunity, *see* App. 17a-18a, 25a-26a n.7. In doing so, it exacerbated a pre-existing conflict among the courts of appeals on how to classify employment relationships for purposes of 28 U.S.C. § 1605(a)(2). In addition, it created a conflict with international law principles concerning consular sovereignty and independence, as recognized in the 1963 Vienna Convention on Consular Relations and a D.C. Circuit decision.

A. The decision below exacerbated a pre-existing circuit split over whether a government employee's individual citizenship and job duties, or the government mission she serves, controls the classification of her employment as sovereign or commercial

The text of the FSIA says nothing about an individual *employee* plaintiff's citizenship, or about her seniority or duties. Instead of asking about who the plaintiff is or what she does at work, the FSIA asks whether her sovereign *employer* is engaged in "commercial activity." However, *Merlini* is one of several court of appeals cases that rely on two sentences in the FSIA's legislative history:

> Also public or governmental and not commercial in nature, would be the employment of diplomatic, civil service, or military personnel, but not the employment of

> American citizens or third country nationals by the foreign state in the United States. . . .
>
> Activities such as a foreign government's . . . employment or engagement of laborers, clerical staff or public relations or marketing agents, or its investment in a security of an American corporation, would be among those included within ["commercial activity"].

H.R. Rep. 94-1487, at 16, 1976 U.S.C.C.A.N. 6604, 6615; *see* App. 18a, 43a; *see also, e.g., El-Hadad v. United Arab Emirates,* 496 F.3d 658, 667-68 (D.C. Cir. 2008); *Holden v. Canadian Consulate,* 92 F.3d 918, 921 (9th Cir. 1996); *Segni v. Commercial Office of Spain,* 835 F.2d 160, 165 (7th Cir. 1987). Based on that legislative history, the court below deemed Merlini's U.S. citizenship and allegedly "clerical" job duties decisive.[6]

That ruling exacerbates pre-existing confusion and conflict among the courts of appeals in FSIA employment-related cases as to whether the application of the commercial activity exception depends on the employer's acts and the mission the employee is hired to serve, or on the individual

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[6] In the present posture, this Court may assume that Merlini's duties were "clerical" in the sense of not imbuing her with policy-making discretion. However, contrary to Judge Barron's suggestion (App. 12a-13a & n.3), Canada did not concede the accuracy of that characterization. Indeed, Canada moved, unsuccessfully, to supplement the record on appeal with Merlini's contract of employment and job description — an effort that Canada will renew if this case returns to the district court. In any event, regardless of whether she had decision-making authority, Merlini handled confidential consular communications. *See* App. 70a (Compl. ¶ 9).

employee's citizenship, seniority and specific job duties. Having initially adopted a per se rule that U.S. citizen employees of foreign governments are not "civil servants" whose employment is a sovereign function, *see Broadbent v. Organization of American States,* 628 F.2d 27, 34 (D.C. Cir. 1980), the D.C. Circuit currently employs a multi-factor test. *See El-Hadad*, 496 F.3d at 665. While that test is more complex than the criteria employed in the decision below, it emphasizes similar factors: in *El-Hadad*, an Egyptian accountant employed by a U.A.E. mission in the United States was deemed a "commercial" employee in large part because he was not a U.A.E. citizen and because he "had no role in the creation of governmental policy," *id.* at 668.

As the court in *El-Hadad* recognized, *id.* at 664 n.2, the Second Circuit has taken a contrary (and, Canada submits, the correct) approach. In *Kato v. Ishihara*, 360 F.3d 106 (2d Cir. 2004), it opined that "the central inquiry" should concern the activities of the employer, not the categorization of the employee's duties and status. *Id.* at 111. Kato was employed in New York by a Japanese government agency to serve the "promotion abroad of the commerce of domestic firms," which the court identified as a "basic — even quintessential — governmental function." *Id.* at 112. In contrast to the decision below, the Second Circuit declined to read the legislative history phrase "laborers, clerical staff or public relations or marketing agents" as if it were statutory text, and held that notwithstanding that Kato was engaged in marketing, the Japanese government functions she was employed to serve involved sovereign activity. The Second Circuit emphasized the impropriety of determining immunity based on parochial and ill-defined distinctions between "civil service" and

"clerical" jobs in the context of foreign governmental offices that may structure their work force in a manner not anticipated by the drafters of the 1976 legislative history. *Id.* at 113.

The *Merlini/El-Hadad* approach is also in tension with cases upholding immunity against suits involving employees and contractors who do not work in offices. For example, in *Butters v. Vance International, Inc.,* 225 F.3d 462 (4th Cir. 2000), the Fourth Circuit held that the Saudi government was immune from suit for sex discrimination when it refused to employ a female security guard. As in *Kato*, the court focused on the government function at issue, ignoring the fact that the plaintiff was a U.S. citizen who would have no civil service status or policy-making responsibilities: "The relevant act here—a foreign sovereign's decision as to how best to secure the safety of its leaders—is quintessentially an act 'peculiar to sovereigns.'" *Id.* at 465 (quoting *Nelson,* 507 U.S. at 361). *See also UNC Lear Servs., Inc. v. Kingdom of Saudi Arabia,* 581 F.3d 210, 216-17 (5th Cir. 2009) (military technical support services contract); *Crum v. Kingdom of Saudi Arabia,* 2005 WL 3752271, at *3 (E.D. Va. July 13, 2005) (chauffeur's employment).

As Judge Lynch explained, the majority's approach places it on the wrong side of the circuit split in light of the principles of statutory interpretation laid down by this Court. "[L]egislative history may not be used to alter text." App. 56a (citing *Food Mktg. Inst. v. Argus Leader Media,* 139 S. Ct. 2356, 2364 (2019), *Chamber of Commerce v. Whiting,* 563 U.S. 582, 599 (2011), and *Shannon v. United States,* 512 U.S. 573, 584 (1994)). Moreover, nothing in the legislative history states that U.S.

citizenship or "clerical" status is decisive in a case like this one, concerning which jurisdiction's laws set the rules for consular employment, as opposed to, say, a garden-variety breach of employment contract case against a state-owned commercial enterprise.

B. The decision below conflicts with international law principles of consular sovereignty and independence, as recognized in the Vienna Convention and by the D.C. Circuit

By focusing on Merlini's individual citizenship and job duties, the majority below ignored her job function and the mission she served: she was an Assistant to the Consul General, so her function was to assist the consular mission.

Consulates perform a range of tasks, some of which involve commerce. Not every transaction involving a consulate is sovereign. Consulates buy paper for their printers in the same commercial marketplace, and on the same terms, as law firms. Close cases may arise with respect to particular consular employees whose jobs focus on commerce rather than core consular functions, such as the plaintiffs in *Holden*, *Segni* and *Kato*. But the core functions of a consulate are quintessentially sovereign. They include protecting the interests of the sending state, furthering diplomatic and other relations between the sending state and the host state, making reports to the sending state, issuing official governmental documents such as passports and visas, implementing the sending state's laws, and protecting nationals of the sending state. *See generally* 1963 Vienna Convention on Consular Relations, 21 U.S.T. 77, art. 5 ("VCCR"). Those core sovereign functions constitute the job of the Consul

General, and Merlini was hired as his Assistant to serve them. In such a job, consular employees are likely to handle official state documents and sensitive diplomatic communications. *See* VCCR art. 35; App. 70a (Compl. ¶ 9). Hence Canada's legal requirement that consular employees, regardless of citizenship and seniority, swear an oath or affirmation of office and secrecy. SOR/95-152, art. 9(2) & scheds. III & IV.

Because a consulate serves diplomatic and other sensitive sovereign functions, international and U.S. law recognizes that it must be insulated from interference by the host jurisdiction — especially interference by courts and states that thereby also impinge upon the Federal Government's authority over international relations, *see, e.g., Am. Ins. Ass'n v. Garamendi,* 539 U.S. 396, 413-15 (2003). Thus, the Vienna Convention makes consular premises, documents, communications and fees immune from local jurisdiction and taxation, *see* VCCR arts. 31-33, 35, 39.[7] The Convention acknowledges that consular employees sometimes engage in non-sovereign activities, particularly when they leave the premises of the consulate, so it requires consulates to carry insurance under local law for vehicular accidents. *See* VCCR art. 56. But it imposes no insurance

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[7] Under Article 33, consular documents are "inviolable," and under Article 44(3), "[m]embers of a consular post are under no obligation to give evidence concerning matters connected with the exercise of their functions or to produce official correspondence and documents relating thereto." Permitting suits against consulates concerning employment within the consulate risks compelling them to surrender this important protection under international law in order to produce evidence to defend themselves.

requirements for intra-consular matters such as workers' compensation for consular employees.

Most importantly for present purposes, the VCCR provides immunity for consular officers for all "acts performed in the exercise of consular functions." VCCR art. 43. The Consul General's acts in administering Canada's standard terms of employment for the Consulate, and in employing and supervising his Assistant, Merlini, fall within Article 43. Since the FSIA was intended to codify international law principles, *see, e.g., Helmerich,* 137 S. Ct. at 1319-21, it should be interpreted, consistent with the VCCR, to provide immunity with respect to Merlini's consular employment.

The decision of the D.C. Circuit in *MacArthur Area Citizens Association,* 809 F.2d 918, adheres to these principles and, in doing so, conflicts with the decision below. The D.C. Circuit held that because "operation of a chancery is, by its nature, *cf.* 28 U.S.C. § 1603(d), governmental, not commercial," *id.* at 920, a suit to enforce nuisance and/or local zoning laws against its construction did not fall within the commercial activity exception. In doing so, the D.C. Circuit rejected the plaintiff's argument that the construction should be deemed commercial because a private business could have created the same nuisance by contracting with the same construction company to build the same building. The building was not just an office; it was a chancery. Applying the same logic to Merlini's suit compels the conclusion that she was not just a commercial office worker; she was a consular employee, whose employment was an exercise of Canada's sovereign powers.

III. The questions presented are exceptionally important

This case most immediately concerns whether courts will enforce a Massachusetts statute, the MWCA, against Canada's Boston Consulate, notwithstanding the conflicting Canadian statute, GECA. But its implications are much broader in four respects.

A. The decision below has significant adverse implications for U.S. diplomatic interests

The decision below adversely impacts the interests of the United States in two significant ways. First, insofar as it imposes significant costs, burdens and legal uncertainties on U.S. missions of foreign states and international organizations, it may hamper diplomatic cooperation and discourage employment of U.S. citizen locally employed staff.

Second, as Judge Lynch stressed, the United States "protects other countries' sovereign immunity so that 'similar protections will be accorded to [the U.S. abroad].'" App. 57a (quoting *Boos v. Barry*, 485 U.S. 312, 323 (1988)). The "concept of reciprocity" is important throughout international law, particularly with respect to overseas diplomatic missions. *See, e.g., Boos,* 485 U.S. at 323; *Helmerich,* 137 S. Ct. at 1322; *Nat'l City Bank of N.Y. v. China*, 348 U.S. 356, 362 (1955). The United States has its own equivalent to GECA: the Federal Employees' Compensation Act, 5 U.S.C. § 8101 *et seq.* ("FECA"). For over a century, at posts around the globe, the United States has provided workers' compensation benefits to federal workers under FECA, which, in parallel to GECA, is funded by the U.S. Treasury and administered, according to U.S. standards, by the Secretary of

Labor. FECA applies to "an employee who is neither a citizen nor resident of the United States." 5 U.S.C. § 8137(a). With respect to such employees, the Secretary has discretion to reflect "substantive features" of workers' compensation laws in the host jurisdiction, *id.* § 8137(a)(1). But the United States asserts sovereign authority to make that decision for itself, and in many jurisdictions it administers FECA to the exclusion of host jurisdiction law. *See* 3 U.S. State Dep't, Foreign Affairs Manual § 3631.2.

B. The decision below has nationwide implications

Many foreign sovereigns have consular offices in multiple U.S. jurisdictions. Canada, for example, maintains consulates in 11 states in addition to its Embassy in the District of Columbia. *See* https://www.international.gc.ca/country-pays/us-eu/index.aspx?lang=eng#offices. The issues that arise in this case under Massachusetts law could readily arise under many other jurisdictions' laws, presenting Canada and other foreign sovereigns with a complex patchwork of state laws and the threat of punitive strict liability suits if they continue to employ U.S. citizens.

State workers' compensation laws are far from uniform, but the general structure of Massachusetts' law, including the aspects that present the issues in this case, is quite typical. Like Massachusetts, most U.S. jurisdictions have workers' compensation laws that (i) generally replace common law tort liability with a regulatory compensation regime, (ii) punish employers who do not comply with state regulatory requirements by subjecting them to suit on the basis of strict liability (or at least without typical tort law defenses), and (iii) do not expressly exempt foreign

sovereign employers. *See, e.g.,* Alaska Stat. §§ 23.30.055, 23.30.075; Ariz. Rev. Stat. §§ 23-907, 23-961, 23-1022; Ark. Code §§ 11-9-105, 11-9-404; Cal. Lab. Code §§ 3602, 3700, 3706, 3708; Del. Code tit. 19, §§ 2371, 2372, 2374; D.C. Code §§ 32-1504, 32-1534; Fla. Stat. §§ 440.11, 440.38; 820 Ill. Comp. Stat. 305/4, 305/5; Iowa Code §§ 85.20, 87.1, 87.21; Ky. Rev. Stat. §§ 342.340, 342.690; Me. Rev. Stat. tit. 39-A, §§ 103, 104, 401; Md. Code Lab. & Empl. §§ 9-402, 9-509; Mich. Comp. Laws §§ 418.131, 418.141, 418.611, 418.641; Minn. Stat. §§ 176.031, 176.181; Miss. Code. §§ 71-3-9, 71-3-75; Mo. Stat. §§ 287.120, 287.280; Mont. Code §§ 39-71-401, 39-71-411, 39-71-508, 39-71-509; Nev. Rev. Stat. §§ 616A.020, 616B.612, 616B.636; N.Y. Workers' Comp. Law §§ 11, 50; Ohio Rev. Code §§ 4123.35, 4123.74, 4123.77; Or. Rev. Stat. §§ 656.017, 656.018, 656.020; 77 Pa. Stat. §§ 41, 481, 501; 28 R.I. Gen. Laws §§ 28-29-3, 28-29-20, 28-36-1, 28-36-10; S.D. Codified Laws §§ 62-3-1, 62-3-11, 62-5-1; 24 V.I.C. §§ 261, 272, 284; W. Va. Code § 23-2-1, 23-2-6, 23-2-8.[8]

Those jurisdictions include the two that host the most foreign sovereign consular offices and international organizations, the District of Columbia and New York. D.C. and New York law each impose requirements for workers' compensation insurance, or alternatively state-authorized self-insurance, that parallel MWCA § 25A. *See* D.C. Code § 32-1534; N.Y. Workers' Comp. Law § 50. They also each

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[8] At least four additional states follow the same model, but do not have statutory provisions expressly imposing strict liability or eliminating common law tort differences. *See* N.H. Rev. Stat. §§ 281-A:5, 281-A:7, 281-A:8; N.J. Stat. §§ 34:15-8, 34:15-71, 34:15-120.9; S.C. Code §§ 42-1-540, 42-5-10, 42-5-40; Wyo. Stat. §§ 27-14-104, 27-14-203.

subject employers who do not comply to suit under essentially the same strict liability terms as MWCA § 66. *See* D.C. Code § 32-1504; N.Y. Workers' Comp. Law § 11.

C. The decision below may have implications for as many as 200 foreign sovereigns and international organizations

The ruling below is not specific to GECA; it would apply to any foreign sovereign that implements its own workers' compensation scheme in its governmental missions rather than joining in a host state's program by seeking the host's approval of its insurance or self-insurance arrangements. Nor does it appear to be limited to consulates. If the precise nature of the employing office mattered, given the status of consulates under the Vienna Convention, consulates should be no less immune than embassies. Further, under this Court's decision in *Jam*, 139 S. Ct. 759, international organizations are generally subject to the same rules under the commercial activity exception as foreign states.

At least 26 foreign states maintain consulates within the Boston metropolitan area alone. *See* https://en.wikipedia.org/wiki/List_of_diplomatic_missions_in_Boston. [9] Almost 200 foreign sovereigns maintain embassies or consulates in the District of Columbia and/or New York. *See* https://en.wikipedia.org/wiki/List_of_diplomatic_missions_in_the_United_States. Across the United

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[9] An authoritative State Department listing of foreign consular offices within the United States as of 2016 is available at https://2009-2017.state.gov/documents/organization/256839.pdf.

States, there are more than 400 foreign consular offices. *See id.*

Judge Barron noted that "some foreign consulates . . . apparently have obtained the insurance required by chapter 152." App. 31a.[10] Subject to conflicts with their own laws, such as GECA and FECA, foreign states may choose to comply with the MWCA or other state laws. Further, under the First Circuit's ruling, a foreign sovereign could maintain immunity from suit by staffing its consulates solely with its own citizens. To require either course of action on pain of litigation is, however, a significant intrusion on the independence of a foreign consulate.

Moreover, there are likely many foreign states and international organizations with laws and policies similar to GECA and FECA. According to an Australian Government handbook for locally engaged staff in the United States, workers' compensation for employees of Australia's Embassy and Consulates in the District of Columbia, New York and Chicago is provided under Australia's Comcare law. *See* Australian Government, Dep't of Foreign Affairs & Trade, *Locally Engaged Staff Terms & Conditions of Employment, United States of America* § 4.9 (2019), https://usa.embassy.gov.au/sites/default/files/usa_les_tc_2019.pdf, at 16. As a further example, one of the largest employers subject to the FSIA, the World Bank Group, takes the position that "[t]he World Bank and the IFC (the Organizations) are not subject to the employment legislation of any of their member countries." World Bank Group, *Principles of Staff*

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[10] He also noted that the same is true of the Quebec Government Office in Boston. *Id.* As a provincial, not federal, employer, that office is not covered by GECA.

Employment — Preamble, Forward & Principles 1-11, § 1.01 (Aug. 1, 1983), https://policies.worldbank.org/sites/ppf3/PPFDocuments/Forms/DispPage.aspx?docid=2666&ver=current. Accordingly, the World Bank administers its own integrated system, analogous to GECA, to determine and provide workers' compensation for all its employees. *See* World Bank Group Directive*, Staff Rule 6.11,* §§ 3.01, 5.01, 12.01, 13 (Apr. 9, 2018), https://policies.worldbank.org/sites/ppf3/PPFDocuments/76ca03935c904e98b1269153552ede86.pdf.

D. The decision below has implications beyond workers' compensation cases

This case also has potential implications for employment-related issues extending beyond workers' compensation. It involves judgments central to the restrictive theory of sovereign immunity — how to identify the "gravamen" of the action, and how to distinguish between the "purpose" of a sovereign's activity, which is not decisive, and its "outward form," which is. As section II, *supra*, reflects, those issues arise frequently and contentiously in the context of various employment-related causes of action. This case presents an opportunity for this Court to provide needed guidance on the application of the commercial activity exception in employment-related cases.

* * * * *

For the foregoing reasons, Judges Torruella and Lynch and Chief Judge Howard were right to conclude that this is a case of "exceptional importance," App. 54a, meriting this Court's review. At a minimum, given the important foreign policy interests at stake and the United States' involvement

as *amicus curiae* in the Court below, this Court should call for the views of the Solicitor General.

IV. Merlini's alternative argument under the noncommercial tort exception does not present a "vehicle problem"

Finally, Merlini's alternative argument — and the United States' suggestion in its First Circuit *amicus* brief — that the noncommercial tort exception might apply neither warrants certiorari in its own right nor provides any reason not to address the questions presented under the commercial activity exception. Every judge who addressed the issue below correctly concluded that the noncommercial tort exception did not apply. *See* App. 13a-17a (majority opinion); App. 36a-38a nn. 9, 11 (Lynch, J., dissenting); App. 65a-66a (district court). The essential conduct upon which liability under Merlini's sole cause of action, MWCA § 66, is premised, is employment without compliance with MWCA § 25A. *See* App. 69a (Compl. ¶ 1) ("In sum, the Consulate was acting as a self-insurer without obtaining a license."). Canada's conduct with respect to that element is either sovereign, as argued above, or commercial, as the First Circuit held; it is not a noncommercial tort.

Indeed, MWCA § 66 requires no negligence or other tortious act or omission on the part of an employer. Like many states, Massachusetts has effectively abolished common law tort actions for workplace injuries. *See* MWCA §§ 24, 26; *Foley,* 381 Mass. at 548-49, 413 N.E.2d at 713-14; L. Locke, Workmen's Compensation, 29 Mass. Practice § 651 (1968) (under the MWCA, "an employer who becomes an insured person under the act obtains an immunity from actions at law by his employees"). Instead, § 66 imposes strict liability for workplace injuries,

however caused — essentially an indemnification obligation —for the "purpose" of "induc[ing]" and "pressur[ing]" employers to comply with MWCA § 25A. *Price v. Ry. Exp. Agency, Inc.,* 322 Mass. 476, 478-79, 78 N.E.2d 13, 16 (1948).

To be sure, Merlini's complaint contains a conclusory allegation that an unidentified individual "negligently" omitted to secure a phone cord. App. 71a (Compl. ¶ 15). However, that allegation is not reiterated in her sole count, App. 73a (Compl. ¶¶ 26-32), since it is irrelevant to her cause of action under Massachusetts law. Merlini's assertion of negligence is merely artful pleading, designed to create jurisdiction under 28 U.S.C. § 1605(a)(5). This Court rejected an analogous effort in *Sachs*, where the plaintiff artfully pled a (legally cognizable) "failure to warn" claim in order to identify conduct within the United States. *See Sachs*, 136 S. Ct. at 396. *A fortiori*, the courts below were right to reject Merlini's artful pleading suggesting a negligence claim that does not exist under Massachusetts law.

CONCLUSION

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

Respectfully submitted,

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March 6, 2020

* Not admitted in the District of Columbia.

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 17-2211

CYNTHIA L. MERLINI,

Plaintiff, Appellant,

v.

CANADA,

Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Nathaniel M. Gorton, U.S. District Judge]

Before Lynch, Kayatta, and Barron,
Circuit Judges.

Theodore J. Folkman, with whom Murphy & King, P.C. was on brief, for appellant.

John F. Cooney, with whom Benjamin E. Horowitz, Venable LLP, D.E. Wilson, Jr., Andrew E. Bigart, and Liz C. Rinehart were on brief, for appellee.

June 10, 2019

BARRON, *Circuit Judge*. Cynthia Merlini ("Merlini") is a United States citizen who was injured in the course of her employment as an administrative assistant at the Canadian consulate in Boston, Massachusetts. The injury occurred in 2009 when she tripped over a cord in the consulate that had not been secured to the floor. In 2017, as a result of that injury, Merlini sued Canada for damages in the United States District Court for the District of Massachusetts pursuant to the Massachusetts Workers' Compensation Act (the "MWCA"), which is codified at Massachusetts General Laws chapter 152.

The District Court dismissed Merlini's complaint for lack of jurisdiction after concluding that Canada was immune from the suit under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 *et. seq.* We now reverse.

I.

In 2003, the government of Canada hired Merlini – who is a resident of Massachusetts, a citizen of the United States, and not a citizen of Canada – to be an administrative assistant to the Consul General of Canada in Boston. Merlini asserts, and Canada does not contest, that her "duties" in this position "were purely clerical, and comparable to the duties of an assistant or secretary to an executive in any private firm," as "[s]he answered the phones, maintained files, typed letters, and did other secretarial work" in the Canadian consulate in Boston. She further asserts, again without dispute, that "[s]he was not a consular officer," "[s]he had no governmental, consular, diplomatic, or official duties," "[s]he took no competitive examination before hiring," and "she was not entitled to tenure protections, or to the employment benefits Canadian foreign service officers received."

Merlini alleges that, while setting up coffee and tea service on January 22, 2009 for a meeting at the consulate, she tripped over an unsecured speakerphone cord, fell, struck a credenza, and thereby sustained "a serious injury" that left her unable to work. Canada does not challenge that allegation for the purpose of the present appeal. Additionally, it is undisputed that, per Canada's own national workers' compensation system, Canada paid Merlini what amounted to her full salary from shortly after the accident until October 2009.

Sometime thereafter, however, Canada determined that Merlini was able to return to work and ceased paying her pursuant to its national workers' compensation system. That determination appears to have set matters on the course that has resulted in the suit that is now before us on appeal.

The initial step on that course was Merlini's request that Canada reconsider its determination to stop paying her under Canada's workers' compensation system. Following Canada's denial of that request for reconsideration, Merlini shifted course and sought relief under Massachusetts law.

Merlini did so first, in 2011, by bringing an administrative claim against the Massachusetts Workers' Compensation Trust Fund ("WCTF"). That fund provides, among other things, for the payment of benefits to employees who are unable to work in consequence of workplace injuries that they have suffered while working for an employer who is subject to personal jurisdiction within the Commonwealth and who is "uninsured" for purposes of the MWCA. *See* Mass. Gen. Laws ch. 152 § 65(2)(e). Chapter 152 provides that, to qualify as "insured," an employer must (1) have insurance with an insurer, (2) hold membership in a

workers' compensation self-insurance group certified by the state, or (3) be licensed as self-insured annually by the state, which requires the employer, among other things, to complete a detailed application, provide certain financial information, post a surety bond to or deposit negotiable securities with the state to cover any losses that may occur, and purchase catastrophe reinsurance of at least $500,000. *See Id.* at §§ 1(6), 25A; 452 Mass. Code Regs. 5.00; *see also LaClair* v. *Silberline Mfg. Co.*, 393 N.E.2d 867, 871 (Mass. 1979).

In 2013, the Massachusetts Department of Industrial Accidents ("DIA") held an evidentiary hearing, in which Canada participated as amicus curiae for the WCTF, on Merlini's claim against the fund. An administrative judge found that Merlini was entitled to ongoing incapacity benefits from the fund under chapter 152 § 34 (temporary total incapacity benefits) and chapter 152 § 34A (permanent total incapacity benefits).

The WCTF then appealed this ruling to the DIA's Reviewing Board ("DIA Board"). In 2015, the DIA Board reversed the administrative judge's ruling and denied Merlini the benefits from the fund. The DIA Board determined that (1) Canada was not "subject to the personal jurisdiction of the Commonwealth"; (2) Canada was not "uninsured" for purposes of the statute because it had sovereign immunity; and (3) the WCTF was not liable if an employee was entitled to workers' compensation benefits in any other jurisdiction, Mass. Gen. Laws ch. 152 § 65(2) (e) (i), and Merlini was in fact entitled under Canadian law to such benefits under Canada's national workers' compensation system.

In 2016, Merlini sought review of the DIA Board's ruling from the Massachusetts Appeals Court ("MAC"). The MAC upheld the Board's ruling. The MAC did so,

however, only on the ground that, in consequence of the injury that Merlini suffered at the consulate, she had been entitled to benefits in another jurisdiction – namely, Canada. Thus, the MAC did not "address whether the Canadian government is subject to the jurisdiction of the Commonwealth or whether the Consulate was an 'uninsured employer' in violation of chapter 152."

Merlini did not appeal the MAC's ruling. Instead, in 2017, Merlini sued Canada for damages in federal district court in the District of Massachusetts pursuant to chapter 152. It is that suit that is the subject of this appeal.

Canada moved to dismiss Merlini's suit on jurisdictional grounds under Federal Rule of Civil Procedure 12(b) (1). Canada contended in its motion that it was entitled to foreign sovereign immunity under the FSIA and thus that the District Court lacked jurisdiction. Canada also separately moved to dismiss Merlini's suit under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. Canada did so on the ground that the DIA Board's ruling that Canada was not "uninsured" was preclusive of Merlini's claim because the DIA Board had ruled on that basis that Canada "was not required to obtain local workers' compensation insurance or register with the state as a self-insurer and therefore could not be considered an uninsured employer" under the MWCA.

In opposing Canada's motion to dismiss, Merlini first asserted that two exceptions to the FSIA's presumption of foreign sovereign immunity applied: the "commercial activity" exception, 28 U.S.C. § 1605(a)(2),[1]

[1] This provision states that:

and the "noncommercial tort" exception, *Id.* at § 1605(a)(5).[2] Merlini thus contended that the District Court had jurisdiction over Canada. Merlini also argued that she had stated a claim against Canada because the DIA Board ruling did not preclude her claim.

In December 2017, the District Court dismissed Merlini's complaint for lack of jurisdiction on the grounds that, pursuant to the FSIA, Canada is "'presumptively immune' from liability in federal courts of the United States" and that Merlini had failed to demonstrate

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> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case 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.

[2] This provision states that:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise encompassed in paragraph (2) [the "commercial activity" exception] above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to – (A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or (B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

that either of the two FSIA exceptions on which she relied in contesting Canada's sovereign immunity applied. *Merlini* v. *Canada*, 280 F. Supp. 3d 254, 256, 258 (D. Mass. 2017) (quoting *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 355 (1993)). The District Court "decline[d] to address" Canada's separate contention that Merlini had failed to state a claim for which relief could be granted. *Id.* at 259. Merlini now appeals the District Court's dismissal of her claim for lack of jurisdiction and also contends that the dismissal of her claim may not be affirmed on issue preclusion grounds.

II.

We start by describing certain aspects of the Massachusetts workers' compensation scheme, as codified by chapter 152 of the MWCA. Those provisions figure prominently in the parties' dispute over whether Canada is entitled to foreign sovereign immunity in this case.

As a general matter, the MWCA bars an employee from suing her employer for a work-related injury – including one resulting from a fellow employee's conduct – when the employer is "insured" within the meaning of the MWCA. *See* Mass. Gen. Laws ch. 152 § 24. The MWCA imposes this bar by providing that an employee waives the "right of an action at common law . . . [with] respect to an injury that is compensable under [the MWCA]" if the employer was insured within the meaning of the MWCA at the time of the employee's hiring or became insured prior to the employee's injury, unless the employee preserves such a right by providing proper notice of the employee's intent to preserve it. *Id.*

Chapter 152, however, sets forth a corollary to this bar. It provides that, if an employer is not insured within the meaning of the MWCA, then an employee,

generally, may bring a suit against the employer to recover for a workplace injury – even if the conduct is caused by a fellow employee. *See Hanover Ins. Co.* v. *Ramsey*, 539 N.E.2d 537, 538 n.3 (Mass. 1989) ("An employer who has failed to obtain workers' compensation insurance can be held liable essentially in all cases in which the employee can prove that he was injured in the course of his work.").

Moreover, chapter 152 makes clear that, in such a suit by the employee, the employer is deprived of asserting a host of important defenses that would ordinarily be available at common law, which effectively renders the employee's claim against the employer a "strict liability" claim. *See Doe* v. *Access Indus., Inc.*, 137 F. Supp. 3d 14, 16 (D. Mass. 2015); *Coppola* v. *City of Beverly*, 576 N.E.2d 686, 687 (Mass. App. Ct. 1991). Section 66 of chapter 152 specifies the limitations on the defenses that are available as follows:

> Actions brought against employers to recover damages for personal injuries or consequential damages sustained within or without the commonwealth by an employee in the course of his employment . . . shall be commenced within twenty years from the date the employee first became aware of the causal relationship between the disability and his employment. In such actions brought by said employees . . . it shall not be a defense: 1. That the employee was negligent; 2. That the injury was caused by the negligence of a fellow employee; 3. That the employee had assumed voluntarily or contractually the risk of the injury; 4. That the employee's injury did not result from negligence or other fault of the employer, if such

> injury arose out of and in the course of employment.

Merlini contends that, because Canada is not insured (even as a self-insurer) within the meaning of chapter 152, she is entitled under chapter 152 to bring her suit against Canada for the workplace injury that she suffered. And, she further contends, for that same reason, Canada is subject in her suit to the limitations on the defenses that are set forth in § 66. Canada argues in response that, precisely because Merlini relies on § 66, it is entitled to immunity under the FSIA, even assuming that Canada does not qualify as being "insured" within the meaning of chapter 152. Thus, Canada contends, Merlini's claim must be dismissed for lack of jurisdiction.

We must now decide whether Canada is right. To do so, we must address Merlini's contention that Canada lacks foreign sovereign immunity in consequence of either of two exceptions to such immunity that the FSIA recognizes.

III.

The FSIA "provides the sole basis for obtaining jurisdiction over a foreign state in federal court." *Universal Trading & Inv. Co.* v. *Bureau for Representing Ukrainian Interest in Int'l & Foreign Courts*, 727 F.3d 10, 16 (1st Cir. 2013) (quoting *Argentine Republic* v. *Amerada Hess Shipping Co.*, 488 U.S. 428, 439 (1989)). The FSIA establishes "a presumption of foreign sovereign immunity from the jurisdiction of the courts of the United States" that typically controls the jurisdictional question. *Id.* (citing 28 U.S.C. § 1330; *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 485 n.5 (1983)). Thus, as a general matter, "courts in the

Unites States lack both subject matter and personal jurisdiction over a suit against a foreign sovereign." *Id.*

The FSIA does, however, set forth a list of express exceptions to the foreign sovereign immunity that it generally recognizes, such that foreign states are not immune from suit in federal court if one of those "enumerated exceptions to immunity applies." *Id.* (citing 28 U.S.C. §§ 1604, 1605, 1605A; *Verlinden*, 461 U.S. at 488). Merlini invokes two of those exceptions – the "commercial activity" exception and the "noncommercial tort" exception – in contending that Canada is not entitled to sovereign immunity from her suit.

We focus here on one of them, the "commercial activity" exception, 28 U.S.C. § 1605(a) (2), as we conclude that, contrary to the District Court's ruling, this exception does apply. This conclusion, moreover, precludes the "noncommercial tort" exception from applying. *See* 28 U.S.C. § 1605(a) (5) (providing that "[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise encompassed in paragraph (2) [the "commercial activity" exception]"). Our review of the District Court's ruling on this score is de novo. *Universal Trading*, 727 F.3d at 15.

A.

The "commercial activity" exception provides in relevant part that "a foreign state is subject to jurisdiction in any case 'in which the action is *based upon a commercial activity* carried on in the United States by the foreign state.'" *Fagot Rodriguez* v. *Republic of Costa Rica*, 297 F.3d 1, 5 (1st Cir. 2002) (emphasis added) (quoting 28 U.S.C. § 1605(a) (2)). The inquiry into whether the exception applies – at least in a case like this, in which the parties agree that the foreign

state "carried on" the relevant action "in the United States" – involves two steps.

The first step "requires a court to 'identify[] the particular conduct on which the [plaintiff's] action is based.'" *OBB Personenverkehr AG* v. *Sachs*, 136 S. Ct. 390, 395 (2015) (alteration in original) (quoting *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 356 (1993)). In performing that threshold inquiry, "a court should identify that 'particular conduct' by looking to the 'basis' or 'foundation' for a claim," which the court has variously described as "'those elements . . . that, if proven, would entitle a plaintiff to relief'" and as "the gravamen of the complaint." *Id.* (omission in original) (internal citations omitted) (quoting *Nelson*, 507 U.S. at 357).

This inquiry requires more than a myopic focus on whether "one element" of the claim is based upon a "commercial activity" of the foreign state. *See Id.* at 394-96. The right approach looks beyond the fact that a single element of the claim might be "based on" such conduct and instead "zeroe[s] in on the core of" the plaintiff's claim. *Id.* at 396.

After a court identifies the particular conduct by the foreign state on which the plaintiff's claim is "based," the next step in the inquiry requires a court to determine whether that conduct qualifies as "commercial activity." *Fagot Rodriguez*, 297 F.3d at 5. If the conduct does so qualify, then the "commercial activity" exception to foreign state sovereign immunity applies, at least when, as in this case, the parties do not dispute that the conduct was "carried on" by the foreign state "in the United States."

"The term 'commercial activity' encompasses both 'a regular course of commercial conduct' and 'a particular commercial transaction or act.'" *Id.* (quoting 28 U.S.C.

§ 1603(d)). As we have explained, however, "the question is not whether the foreign government [was] acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives," but "[r]ather, the issue is whether the particular actions that the foreign state perform[ed] (whatever the motive behind them) [were] the *type* of actions by which a private party engages in 'trade and traffic or commerce.'" *Id.* at 6 (alterations in original) (quoting *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607, 614 (1992)). Thus, "[i]n assessing whether a certain transaction or course of conduct is commercial in character, courts must look to the 'nature' of the activity rather than its 'purpose.'" *Id.* at 5-6; *see also* 28 U.S.C. § 1603(d) ("The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.").

Against this legal background, the key questions concerning the "commercial activity" exception that we must address in this appeal are the following: what conduct is Merlini's claim against Canada "based on," and is that conduct "commercial activity"? We turn, then, to those two questions, starting with the first.

B.

In taking up the first question, we begin by observing that Canada does not dispute that it employed Merlini at its consulate in Boston, that she is an American citizen and not a Canadian citizen, that her employment involved only duties that "were purely clerical," and that her employment lacked indicia of diplomatic or civil service.[3] Nor does Canada contest,

[3] As already mentioned, Canada does not contend that Merlini had governmental, consular, diplomatic, or official duties; took a

for purposes of this appeal, that Merlini was injured while performing her ordinary clerical duties as Canada's employee in the consulate in Boston.

Thus, if Merlini's complaint is "based on" Canada's employment of her as a clerical worker doing routine clerical work at the consulate in Boston, then the "commercial activity" exception would appear to apply. *See* H. Rep. No. 94-1487, at 16 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6615 (describing "[a]ctivities such as a government's . . . employment or engagement of laborers, *clerical staff* or public relations or marketing agents . . . [as] those included within the definition [of commercial activity]" (emphasis added)). In fact, Canada does not appear to argue otherwise.

The State Department, in its amicus brief, however, contends that Merlini's complaint is solely "based on" the negligent conduct by her fellow employee that caused the injury that she suffered during the course of her employment – namely, what she alleges in her complaint to have been the negligent laying of the cord by that employee. The Department then contends that this conduct does not qualify as "commercial activity" and thus that the "commercial activity" exception does not apply. Rather, the Department contends, the "noncommercial tort" exception is the only exception that might apply in Merlini's case, insofar as her action under § 66 can be characterized – notwithstanding the fact that it strips the employer of asserting an absence of negligence as a defense – as one that seeks recovery "against a foreign state for personal injury . . . caused by [a] *tortious* act or omission." 28 U.S.C. § 1605(a)(5)

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competitive examination before hiring; or was entitled to tenure protections or the employment benefits Canadian foreign service officers receive.

(emphasis added). The Department thus argues that we should vacate and remand to permit Merlini to develop her claim of negligence under the "noncommercial tort" exception.

To establish the premise on which this contention rests – namely, that the suit is based solely on the conduct of Merlini's fellow employee with respect to the speakerphone cord – the Department invokes the Supreme Court's opinion in *Saudi Arabia* v. *Nelson*. There, the plaintiff argued that his claims of torture and false imprisonment at the hands of the Saudi Arabian government were "commercial" in nature because it was his employment with the Saudi Arabian government that "led to" those injuries. *Nelson*, 507 U.S. at 358. The Supreme Court, however, disagreed. In so deciding, the Court held that it was wrong to characterize the plaintiff's claims as being "based on" "commercial activity" simply because "commercial activity" "preceded" the conduct from which those claims arose. *Id.* Instead, the Court stressed that while the plaintiff's employment may have "led to" his injuries at the hands of the Saudi Arabian government in a temporal sense, the actions that effectuated those injuries were in no way tied to that employment and were, therefore, not "commercial" in nature. *Id.* The Department argues that the same conclusion is required here.

We disagree. The MWCA requires that Merlini prove only that she was injured in the workplace in the course of her employment with Canada. Consequently, Merlini is not required to prove – as the plaintiff in *Nelson* was required to prove as to his claims for battery, unlawful detainment, wrongful arrest and imprisonment, false imprisonment, inhuman torture, disruption of normal family life, and infliction of

mental anguish – any action by any person that caused the underlying injury. She has to prove, instead, that she suffered a workplace injury in the course of her employment and that the defendant, Canada, was her employer. Given that courts have held that an employer's maintenance of a hostile or discriminatory work environment constitutes "commercial activity" for the purposes of a Title VII suit against an employer, 42 U.S.C. § 2000e-2(a), – *see*, *e.g.*, *Holden* v. *Canadian Consulate*, 92 F.3d 918, 922 (9th Cir. 1996); *Ashraf-Hassan* v. *Embassy of France in United States*, 40 F. Supp. 3d 94, 102-03 (D.D.C. 2014) – we fail to see why that same logic does not apply to Merlini's § 66 claim against her employer for workplace injuries suffered by employees during the course of their employment. Hers is no more an ordinary slip and fall case than those cases are ordinary harassment cases. Each rests on a claim that makes the employer directly liable for what happens in the workplace to the employee who brings the suit.

To be sure, the Supreme Court has stressed that to find the gravamen of any personal injury suit, one must look to "the point of contact – the place where the boy got his fingers pinched." *Sachs*, 136 S. Ct. at 397 (internal quotations omitted). However, nothing in that precedent requires that we assess that conduct independent of the plaintiff's actual claim, which, in this case, is a claim against the employer – not a fellow employee – and requires no proof that any fellow employee engaged in any particular conduct.

We find the D.C. Circuit's analysis in *El-Hadad* v. *United Arab Emirates* instructive in this regard. 496 F.3d 658 (D.C. Cir. 2007). There, the Court held that that the gravamen of the plaintiff's complaint, which alleged breach of contract for wrongful termination,

involved "commercial activity," in part, because it occurred in the "employment context." *Id.* at 663. In choosing to focus on the "employment relationship . . . as a whole," the Court noted that a "narrow[er]" framing of the gravamen of the complaint – focusing myopically on the plaintiff's defamation or breach of contract claims divorced from the employment context – would "defy analysis" under the "commercial activity" inquiry. *Id.* at 663 n.1 (highlighting the difficulty of characterizing a "breach of contract," without more, as "commercial" or "non-commercial").

Simply put, Merlini's employment did not simply "le[ad] to" the injury that she received; it provides the legal basis for the only cause of action that she has against her employer for the injury for which she seeks to recover. *See In re Opinion of the Justices*, 34 N.E.2d 527, 544 (Mass. 1941) (establishing that chapter 152 §66 "must be interpreted as creating a cause of action in an employee sustaining an injury 'in the course of his employment' that is a 'direct result' of such employment though not a 'direct result of any negligence on the part of the employer'").

We recognize that, as the Department notes, the Supreme Court did not reject all of Nelson's claims on the ground that his allegations of "commercial activity" (his employment) preceded the actual conduct causing his injuries. Instead, in both *Nelson* and the Court's subsequent decision in *Sachs*, the Supreme Court noted that, with respect to the plaintiffs' *failure to warn* claims, the exception triggering activities (Nelson's employment and Sachs's ticket purchase) were necessary elements of those claims. Nonetheless, the Court concluded in both cases that the failure to warn claims were impermissible because they were "merely . . . semantic ploy[s]," *Nelson*, 507 U.S. 9 at

363, "artful[ly] pled[]," *Sachs*, 136 S. Ct. at 396, to avoid the foreign states' sovereign immunity.

Insofar as the Department means to argue that Merlini's claims are, in some way, a similar "semantic ploy" to avoid Canada's sovereign immunity, no such concerns exist here. Merlini's chapter 152 claim was not part of some shrewd litigation strategy aimed at navigating around Canada's sovereign immunity. It was, instead, the only claim that Merlini could bring against her employer for the workplace injury that she suffered under the statutory framework established by the Massachusetts legislature for permitting employees to seek redress for such injuries from their employers. That framework has, as one of its express aims, the goal of incentivizing *employers* to comply with the law's worker's compensation requirement so that employees are ensured adequate coverage in situations where they are injured *during the course of their employment. See In re Opinion of the Justices*, 34 N.E.2d at 543-44 (describing the "manifest[] . . . purpose" of chapter 152 as "leav[ing] non-subscribing employers in such a disadvantageous position that hardly any employer could afford not to accept the insurance provisions of the act").

Thus, even if we were to accept that the gravamen of Merlini's complaint does not encompass Canada's choice to forgo obtaining the requisite insurance, we still would find that the "commercial activity" exception applies. And that is because the conduct on which her claim is based cannot be divorced from her "employment relationship" with Canada.

In so deciding, though, we emphasize that we reach this conclusion because Merlini is a United States citizen – and not a citizen of Canada – whom Canada employed to work for it as clerical staff in the United

States. Accordingly, Merlini is just the type of employee whose employment by a foreign state Congress identified as an example of "commercial activity" by a foreign state. *See* H. Rep. No. 94-1487, at 16 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6615. Nor does Canada argue that there is anything about Merlini's duties that supports a different conclusion. We thus do not mean to suggest that the outcome would be the same if Merlini's position were not purely "clerical." *See Kato* v. *Ishihara*, 360 F.3d 106, 110-14 (2nd Cir. 2004) (characterizing "product promotion for Japanese companies" as "governmental" and, therefore, noncommercial); *Butters* v. *Vance Intern., Inc.*, 225 F.3d 462, 465 (4th Cir. 2004) (characterizing "[p]roviding security for the royal family" of Saudi Arabia as "sovereign" and, therefore, noncommercial).

C.

We turn, then, to Canada's contention, which it also made to the District Court, that "[t]he circumstances of [Merlini's] employment, and whether Canada could or should have prevented the alleged accident," are "incidental and immaterial under [Merlini's] theory of the claim." Canada points to the fact that Merlini is relying in bringing her claim on chapter 152 § 66, which provides that "[a]n employer is liable in tort to an employee without proof of negligence if the employer is required to maintain workers' compensation insurance and fails to do so (or fails to become a licensed self-insurer) . . . ." *Thorson* v. *Mandell*, 525 N.E.2d 375, 377 (Mass. 1988).

Canada argues that Merlini's reliance on § 66 is of critical importance in determining the gravamen of her complaint. Canada contends that, due to her reliance on that provision of chapter 152, Merlini is necessarily bringing a claim that is "based on" *"how*

Canada provides workers' compensation benefits," given that her claim necessarily depends on the fact that Canada chose to compensate her through a means that does not qualify an employer as "insured" under chapter 152.[4] (Emphasis added).

The District Court appeared, at least at points, to agree with Canada that the conduct that we must assess to determine whether it is "commercial" in nature is Canada's "decision to provide benefits directly under its own [national workers' compensation insurance] system." In particular, the District Court, after describing "[t]he determinative question" at the first step of the inquiry as being "whether [Canada's] decision not to purchase workers' compensation insurance is commercial in nature," ultimately concluded that Canada's "decision to provide its own benefits does not fall under the commercial activit[y] exception *because the decision to create and organize a workers' compensation program is sovereign in nature." Merlini*, 280 F. Supp. 3d at 257 (emphasis added).

The State Department, in its amicus brief, also endorsed this position as an alternative to its argument that the gravamen of Merlini's claim is more appropriately characterized as a "noncommercial tort." The Department contends that "Canada opted out of the Massachusetts workers' compensation system in a manner available exclusively to sovereigns – by enacting a statute creating an alternate and uniform compensation regime for all Canadian employees, wherever in the world they might be."

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[4] Notably, Canada does not dispute the fact that this activity was conducted by the Canadian government, nor does it dispute that it was performed in the United States.

But, while Canada and the District Court are right that Merlini's claim does rely on § 66, nothing in § 66, or, for that matter, the whole of chapter 152, makes *how* an "uninsured" employer chooses to compensate an injured employee of any relevance to a chapter 152 claim for damages against that employer. Chapter 152 requires, in relevant part, only that an employee must show "that [the employer] had to carry worker's [sic] compensation insurance" for an employee and "that [the employer] did not carry it." *Beath* v. *Nee*, 74 Mass. App. Ct. 1119, 1119 (2009) (unpublished). The statute does not require any showing regarding what alternative means, if any, the employer may have used to compensate the employee once the employee has shown that the employer was not insured within the meaning of chapter 152. Thus, while we must "zero[] in on the core" of her claim, *Sachs*, 136 S. Ct. at 396, and while we may not unduly seize upon merely one element of her claim, *see Id.* at 394-96, Merlini's claim is in no sense "based on" Canada's decision to compensate her through its own national workers' compensation system. *See Sachs*, 136 S. Ct. at 395 (explaining that "a court should identify . . . those elements . . . that, if proven, would entitle a plaintiff to relief, . . . and the gravamen of the complaint" (internal citations omitted)).

That is not to say, though, that we reject Canada's contention that its decision to forgo insurance forms part of what may be understood to be the gravamen of Merlini's claim. We may assume that it does. *Cf. Nelson*, 507 U.S. at 358 n.4. But, even if we do, we cannot ignore that Canada failed to obtain what Massachusetts courts describe as "workers' compensation insurance," *see LaClair* v. *Silberline Mfg. Co., Inc.*, 393 N.E.2d 867, 869 (Mass. 1979), and that Merlini's claim is based on the fact that she is an employee who was

injured during the course of her employment while her employer failed to possess that type of insurance. *See El-Hadad*, 496 F.3d at 663 (declining to divorce the conduct on which a breach of contract claim was based – the breach – from the "employment context" in which it occurred). Thus, even accepting that the gravamen of Merlini's claim relates to Canada's failure to obtain the requisite insurance, our inquiry into whether it is based on "commercial activity" would require us to examine whether that failure – given the employment context in which it occurred – constitutes "commercial activity."

In so doing, we must keep in mind that the characterization of conduct as "commercial activity" turns on its "nature" rather than its "purpose." 28 U.S.C. § 1603(d). Thus, a sovereign's conduct constitutes "commercial activity" if "the particular actions that the foreign state perform[ed] (whatever the motive behind them) [were] the *type* of actions by which a private party engages in 'trade and traffic or commerce,'" *Fagot Rodriguez*, 297 F.3d at 6 (alterations in original) (quoting *Weltover*, 504 U.S. at 614). Applying that test, we conclude that Canada's employment of Merlini without obtaining the requisite insurance is properly deemed to be "commercial activity," at least given that Merlini is a United States citizen whom Canada employed in Boston as clerical staff and that she seeks recovery for the injury she suffered while performing her clerical duties.[5]

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[5] Although we recognize that courts are instructed to give "special attention" to the State Department's views on matters of foreign immunity, *see Jam* v. *Int'l Finance Corp.*, 139 S. Ct. 759, 770-71 (2019) (quoting *Bolivarian Republic of Venezuela* v. *Helmerich & Payne Int'l. Drilling Co.*, 137 S. Ct. 1312, 1320 (2017)), we are aware of no authority that would instruct us to adopt the

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We start by considering whether, in general, an employer's failure, in employing its workers, to be insured within the meaning of chapter 152 is the type of conduct "by which a private party engages in 'trade and traffic or commerce.'" *Fagot Rodriguez*, 297 F.3d at 6 (quoting *Weltover*, 504 U.S. at 614). We have little doubt that it is.

Private employers in Massachusetts must regularly decide whether, in employing their workers, they should obtain the kind of insurance that chapter 152 contemplates or whether they instead should take the risk of going bare. *See*, *e.g.*, *Brown* v. *Leighton*, 434 N.E.2d 176 (Mass. 1982) (uninsured taxicab driver employer); *Barrett* v. *Transformer Serv., Inc.*, 374 N.E.2d 1325 (Mass 1978) (uninsured transformer service company employer); *Truong* v. *Wong*, 775 N.E.2d 405 (Mass. App. Ct. 2002) (uninsured tofu manufacturing plant employer). That decision by employers about their approach to insuring themselves against their employees' workplace injuries impacts the overall financial wellbeing of the employers' businesses and generally concerns parties (namely, their businesses' employees) who have commercial expectations about the recourse that they will have against their employers in the event that they suffer a workplace injury. *See*, *e.g.*, *Truong*, 775 N.E.2d at 408 (establishing that the corporation president did not purchase workers' compensation insurance because it was "too expensive"); *see also Rush-Presbyterian-St. Luke's Med. Ctr.* v. *Hellenic*

Department's views if we conclude – as we do here – that they would have us run afoul of the statutory instruction that we not permit the purposes behind foreign state actions to serve as proxies for the nature of those actions. 28 U.S.C. § 1603(d); *Weltover*, 504 U.S. at 614.

Republic, 877 F.2d 574, 580-81 (7th Cir. 1989) (describing the commercial obligations that arise out of traditionally private, third-party transactions).[6]

In recognizing the commercial nature of this choice by a business to go bare in employing someone, we do not mean to question whether Canada was in so "choosing" – while nonetheless employing Merlini, a United States citizen, as a clerical worker in its consulate in Boston – motivated by what it characterizes as its sovereign obligation to provide its employees protection through its own national workers' compensation system. In fact, Canada asserts that it has no legal authority – given the limitations that it contends that Canadian law imposes – to act otherwise. But, in light of the Supreme Court's decision in *Weltover*, it is clear that the "motive behind" Canada's conduct in employing Merlini without obtaining the requisite insurance is not germane to the question of whether the activity of doing just that is "commercial" for purposes of the FSIA's "commercial activity" exception. *Fagot Rodriguez*, 297 F.3d at 6 (quoting *Weltover*, 504 U.S. at 614); *see also* 28 U.S.C. § 1603(d).

In *Weltover*, the plaintiffs brought a breach of contract claim against Argentina after it defaulted on

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[6] Of course, it may be that, in some instances, a private business's failure to become insured within the meaning of chapter 152 is less the product of a commercial choice than a commercial oversight, *see*, *e.g.*, *O'Dea* v. *J.A.L., Inc.*, 569 N.E.2d 841 (Mass. App. Ct. 1991) (employer alleged to be uninsured due to a policy lapse), especially given how disadvantageous such a decision would appear to be for the employer. But, such an oversight still takes place in the course of the business's employment of its workers and in parallel with its business judgments about how to protect against the commercial losses that might be incurred in consequence of those workers suffering a workplace injury.

its bonds. *Weltover*, 504 U.S. at 610. Argentina argued in response that foreign sovereign immunity protected it from the suit, pointing to the fact that the bonds were not issued for the ordinary commercial purpose of "raising capital or financing acquisitions" but instead as instruments for refinancing sovereign debt. *Id.* at 616. According to Argentina, these refinancing measures were required as part of the government's program for addressing its domestic debt crisis. *Id.* Argentina thus argued that its decision not to repay the bonds was part of a governmental policy undertaken for sovereign rather than commercial reasons and therefore that the claim was based on activity that could not qualify as commercial for FSIA purposes. *Id.* at 616-17.

The Supreme Court rejected Argentina's contention. *Id.* at 617. According to the Court, Argentina had defaulted on what it termed "garden-variety debt." *Id.* at 615. Argentina's bonds, like private bonds, were negotiable, were traded on international markets, and came with the promise of future repayment. *Id.* Thus, for purposes of determining whether Argentina's default on those bonds was "commercial activity," the Court explained that Argentina's participation in the bond market was of a type that was commercial in nature and thus that it was "irrelevant *why* Argentina participated in the bond market." *Id.* (emphasis in original).

Canada, of course, did not issue bonds. But, it did employ a United States citizen as clerical staff in its Boston consulate, thereby engaging in conduct that it does not dispute qualifies as being "commercial" in nature. Nor does Canada dispute that private businesses, when employing such clerical workers, are subject to the very same obligation to obtain insurance in compliance with chapter 152 – insofar as they wish to avoid being subjected to personal injury suits such

as Merlini brings – or that their employment of such workers without having such insurance, as applied to those businesses, constitutes an activity that is commercial in nature.

We thus do not see how Canada's maintenance of a "garden-variety" employment relationship with Merlini while not maintaining such insurance is an activity that is any less "commercial" in nature than was Argentina's default on "garden-variety" debt in *Weltover*. In each case, the foreign state can point to a sovereign "purpose" in acting as it did. But in neither case does that reason speak to the "nature" of the foreign sovereign's conduct.[7] As a result, Canada provides no more

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[7] The dissent argues that, in attempting to identify the "nature" of Merlini's claim, we ignore the "outward form of [Canada's] conduct," which the dissent characterizes as "informing Merlini that she was subject to the GECA . . . , compensating her pursuant to the GECA's benefits scheme after she made a claim of injury, and not continuing her benefits when Canada's Workplace Safety and Insurance Board (WSIB) determined after a full process that Merlini was ready to return to work." However, none of these actions constitutes the "outward conduct" that forms the basis of Merlini's claim against the Canadian government. The only "outward conduct" on Canada's part that Merlini needs to prove to succeed in her claim is defined by the elements of the claim that § 66 permits her to bring. Those elements make clear that she must prove that Canada was her employer in Massachusetts when she suffered the workplace injury for which she seeks recompense and that Canada did not comply with the state's workers' compensation requirements while having her in its employ. In fact, had Canada registered as a self-insurer in compliance with chapter 152, it could have performed each of the "outward" actions that the dissent outlines and Merlini would not have had a claim that she could bring under Massachusetts law. This point shows that the "outward conduct" described by the dissent is simply immaterial to the claim that Merlini brings here, such that her claim can in no sense be understood to be "based on" it. She has a cause of action under Massachusetts law

reason for us to conclude that its conduct is "sovereign" rather than "commercial" than Argentina provided for the Court in *Weltover*.

Moreover, we note that, in deciding *Weltover*, the Supreme Court relied in part on the Seventh Circuit's reasoning in *Rush-Presbyterian*. *Weltover*, 504 U.S. at 614. There, Greece had entered into contracts with American doctors but then only partially paid them for their services. *Rush-Presbyterian*, 877 F.2d at 575-76. The Greek government pointed out that it had assumed these obligations as part of its comprehensive scheme to provide healthcare to all of its citizens. *Id.* at 580. According to Greece, the fact that its healthcare system was not profit-seeking, was funded by taxpayers, and operated through its own set of administrative proceedings, placed Greece's activity in retaining the doctors' services – and thus its alleged failure to pay them fully for those services – squarely in the realm of sovereign rather than "commercial activity." *Id.* at 580-81.

The Seventh Circuit disagreed. The court made clear that "private parties in the United States enter such agreements routinely" and that "the 'basic exchange' of money for health care services is the same" whether the payer is a government or a private employer. *Id.* at 581. The court thus ruled that Greece's reasons for characterizing its conduct as noncommercial related

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against Canada for the workplace injury that she suffered only because Canada employed her and, as her employer, did not comply with the state's workers' compensation requirements. Because that kind of conduct is the kind of conduct that private employers engage in regularly it is conduct that is properly characterized as "commercial activity," at least given Merlini's particular attributes as a United States citizen working in the Boston consulate as clerical staff.

only to the *purpose* underlying Greece's decision to enter into the contracts with the doctors and then not to pay them fully, rather than to the *nature* of the decision to enter into those contracts or to breach them. *Id.* at 580. And, for that reason, the Seventh Circuit rejected Greece's contention that the "commercial activity" exception did not apply.

Here, Canada, like Greece, entered into a contract for commercial services – in this case, in the form of its employment contract with Merlini, given that Canada does not dispute the "commercial" nature of Canada's employment of her as clerical staff at the consulate. And, then, after having done so, Canada, like Greece, failed to do what state law required of employers engaged in such typical commercial employment relationships – namely, in this case, to be "insured" within the meaning of chapter 152 in employing Merlini.

To be sure, the existence of Canada's own national workers' compensation system may explain Canada's motive for making a type of decision regularly made by private commercial actors. But, the existence of the foreign sovereign's system of social insurance in *Rush-Presbyterian* helped to explain the purpose behind that sovereign's failure to undertake a duty commonly required of employers engaged in commercial employment relationships. Yet, *Rush-Presbyterian* makes clear that such a fact does not thereby alter the commercial nature of that failure.

2.

Notwithstanding *Weltover* and *Rush-Presbyterian*, Canada contends that this case is actually more closely analogous to both *Jungquist* v. *Sheikh Sultan Bin Khalifa Al Nahyan*, 115 F.3d 1020 (D.C. Cir. 1997) and *Anglo-Iberia Underwriting Mgmt.* v. *P.T. Jamsostek*,

600 F.3d 171 (2d Cir. 2010), in which the "commercial activity" exception was held not to apply. *See Jungquist*, 115 F.3d at 1024; *Anglo-Iberia*, 600 F.3d at 176. Neither case, however, supports Canada's position.

In *Jungquist*, the D.C. Circuit held that the "commercial activity" exception was inapplicable to claims brought against officials of the government of the United Arab Emirates for actions that those officials took in *administering* the Abu Dhabi medical program in compliance with the Crown Prince Court's orders. 115 F.3d at 1020. Specifically, the court determined that the officials engaged in no "commercial activity" with the plaintiffs, but instead "fulfilled [the government's] obligations to the [plaintiffs] by performing their official tasks as administrators." *Id.* at 1030.

In *Anglo-Iberia*, the Second Circuit held that the "commercial activity" exception did not apply to claims against the Indonesian government for a fraud perpetrated by its employees in their capacities as *administrators* of the state-owned social security insurer, Jamsostek. 600 F.3d at 174. The court noted that providing insurance is an activity that both the government and private markets perform. But, the court explained, Jamsostek did not operate like a private insurer and therefore its wrongful administration of that government-run insurance program did not qualify as "commercial activity." *Id.* at 176.

The reason that neither *Jungquist* nor *Anglo-Iberia* aids Canada's cause is simple. In each of those cases, the claims at issue were based on the defendants' *administration* of the government programs at issue independent of any conduct by the foreign state as the employer of the plaintiffs, such that it was the manner of the administration of those programs – and not

the manner of the foreign state's employment of the plaintiffs – that was alleged to be wrongful.

Merlini's claim is quite distinct. Even on Canada's account, insofar as Merlini's claim is based on more than Canada's employment of her at the consulate or the conduct that caused the injury that she suffered there, her claim is still based on the Canadian government's decision to employ her for clerical work at the Boston consulate while not having the insurance contemplated by chapter 152. Thus, her claim is not based – as the claims at issue in *Jungquist* and *Anglo-Iberia* were – on any allegation that foreign state officials acted wrongfully in administering a governmental program independent of the foreign state's employment of the plaintiff in circumstances in which such employment concededly constitutes "commercial activity."

In that respect, Merlini's claim is no different from the claims that other employees have brought against private business employers that, like Canada, have not insured themselves in the manner chapter 152 specifies for the injuries that their workers may suffer in the workplace. The existence of Canada's own nationally administered program for compensating workers like Merlini, in other words, only provides the *justification* for the conduct by Canada on which Merlini's claim is based. But that justification speaks to Canada's "purpose" in engaging in that conduct and not to the "nature" of the conduct itself.

In fact, if Canada and the dissent's views prevailed, we struggle to understand what recovery for workplace harm – whether concerning wages, benefits, or discriminatory treatment – an employee of a foreign government, who, like Merlini, is a United States citizen employed as a clerical worker, could seek from

the employer under the "commercial activity" exception recognized in the FSIA. Yet, it is quite clear that Congress, in enacting the "commercial activity" exception to foreign state immunity in the FSIA, contemplated that some employees of foreign governments would be entitled to recover for workplace harm against their foreign state employer – namely, those employees that, like Merlini, are United States citizens employed in clerical positions. *See* H. Rep. No. 94-1487, at 16 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6615 (describing "[a]ctivities such as a government's . . . employment or engagement of laborers, clerical staff or public relations or marketing agents . . . [as] those included within the definition [of commercial activity]"). Nor are we aware of any precedent supporting the notion that employees like Merlini lose their right to recover against their foreign state employer whenever that foreign employer establishes rules different from ours for protecting them.[8]

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[8] The dissent relatedly argues that the "commercial activity" exception should not apply to Canada in this context because, due to Canada's own workers' compensation law, the government was not allowed to comply with Massachusetts' insurance requirements under chapter 152. We fail to see how Canada's legislative prohibition against obtaining the type of insurance that would qualify Canada as being "insured" for purposes of chapter 152 renders the act of not acquiring compliant insurance any less "commercial" in nature. As we have already argued, while Canada's sovereign workers' compensation regime clearly provides the *motivation* for its decision not to acquire compliant insurance under chapter 152, that motivation does not strip Canada's decision not to provide the requisite insurance of its "commercial" *character*, any more than the presidential decree directing Argentina to default on its bonds stripped that act of its "commercial" character in *Weltover* by way of constituting executive action. *See Weltover*, 504 U.S. at 610.

3.

Finally, Canada contends that a ruling that it must comply with the MWCA's insurance requirements or be stripped of many common law defenses in any suit claiming damages for a workplace injury brought by an employee against the employer would "produce an absurd result." Such a conclusion, Canada contends, would essentially force Canada to subject itself to having Massachusetts assess its solvency through semi-annual audits and various deposit requirements. According to Canada, that kind of intrusion into its finances "would violate basic principles of comity" that foreign sovereign immunity exists to protect. Thus, for this reason, too, Canada contends, the "commercial activity" exception cannot be construed to apply here.

We may, for present purposes, set aside the fact, which Canada does not contest, that some foreign consulates as well as the Quebec Government Office in Boston, which is a political subdivision of Canada for the purposes of FSIA applicability, apparently have obtained the insurance required by chapter 152. The more fundamental point is that Canada's concerns about "comity" do not provide a basis for concluding that it is immune from suit in this case.

As Canada rightly points out, the "FSIA's objective is to give protection from the inconvenience of suit as a gesture of comity." *Bolivarian Republic of Venezuela* v. *Helmerich & Payne Intl Drilling Co.*, 137 S. Ct. 1312, 1322 (2017) (internal quotations omitted) (noting that the FSIA was drafted with comity concerns in mind). But, by including the "commercial activity" exception in the FSIA, Congress made clear that those concerns do not provide a reason to extend that protection to foreign states with respect to a suit that the "commercial activity" exception encompasses. Thus,

an appeal to comity cannot in and of itself explain why a foreign state's conduct that is encompassed by that exception should be treated as if it is not.

Perhaps there is a case to be made that such comity concerns are relevant to a merits determination – as a matter of Massachusetts or federal law – that chapter 152's "insurance" requirement does not apply to a foreign sovereign in the same way that it applies to private employers. But, FSIA immunity applies only if, under the analysis that we must apply, *see Weltover*, 504 U.S. at 614; *Fagot*, 297 F.3d at 5-6, the conduct on which Merlini's claim is based is not "commercial" in nature. And, for the reasons that we have explained, the conduct here is commercial in nature, even though it may have been undertaken for sovereign reasons. Canada's appeal to comity, therefore, adds nothing to its argument, which we otherwise reject, that the "commercial activity" exception does not apply here. And thus, Canada's comity concerns provide no basis for concluding that Canada enjoys an immunity from this suit pursuant to the FSIA such that no federal court even has jurisdiction to make a merits judgment.

In its amicus brief, the State Department advances many similar "comity" concerns to those presented by Canada. But, although we give "special attention" to the State Department's views on matters of foreign policy, *see Jam*, 139 S. Ct. at 770-71, we decline to place much weight on those views here. The Department itself does not view recovery by an employee like Merlini under § 66 against a foreign state employer to be necessarily adverse to United States foreign policy interests, given that it argues to us that Canada might lack immunity from Merlini's claim under the FSIA's "noncommercial tort" exception, 28 U.S.C. § 1605(a)(5). And, as we have explained, the Department sets forth

no basis in the legislative history or text of the FSIA – or in any precedent construing it – for finding that Canada is immune from a suit under § 66 that is brought by a clerical worker like Merlini.

IV.

Having determined that the FSIA does not prohibit Merlini's suit, Canada argues that we should nevertheless affirm the District Court's dismissal on a ground not reached by the District Court. Specifically, Canada argues that Merlini has failed to state a claim upon which relief can be granted, *see* Fed. R. Civ. P. 12(b)(6), because the DIA Board's ruling operates to preclude Merlini's suit.

The parties agree that we apply Massachusetts issue preclusion law. *In re Baylis*, 217 F.3d 66, 70-71 (1st Cir. 2000). Canada contends that the DIA Board's conclusion that "Canada is not uninsured in violation of [the MWCA]" should be entitled to preclusive effect and thus bars Merlini's "relitigation" of that issue in federal court.

In order for an issue to have preclusive effect in a later proceeding under Massachusetts law, the following elements must be present: (1) there was a final judgment on the merits in the prior adjudication; (2) the party against whom preclusion is asserted was a party to the prior adjudication; and (3) the issue in the prior adjudication was identical to the issue in the current adjudication and essential to the earlier judgment. *See Kobrin* v. *Bd. of Registration in Med.*, 832 N.E.2d 628, 634 (Mass. 2005); *see also In re Baylis*, 217 F.3d at 71. An order from a state agency is considered to be a final judgment for issue preclusion purposes, however, only if it is *unappealed. See*, e.g., *Almeida* v. *Travelers Ins. Co.*, 418 N.E.2d 602, 605 (Mass. 1981) (noting that the

determination of an agency is not binding for preclusion purposes after it has been appealed). And here, Merlini appealed the DIA Board's ruling to the MAC. Thus, it is to the MAC's ruling that we must look.

The MAC's ruling, however, is of no help to Canada's contention that Merlini's claim must be dismissed on issue preclusion grounds. In affirming the DIA Board's order, the MAC did so only on one ground – namely, that Merlini was not entitled to recover from the WCTF because she was eligible for benefits in another jurisdiction. The MAC expressly stated that it was not ruling on whether Canada was subject to the jurisdiction of Massachusetts or whether the consulate was an "uninsured" employer in violation of chapter 152. For that reason, the MAC's "judgment is conclusive [only] as to the first determination." *In re Baylis*, 217 F.3d at 71. And, given that Canada makes no argument, just as it made none to the District Court, that the judgment as to the issue that the MAC did decide is preclusive of Merlini's claim, Canada's argument for dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) on the grounds of issue preclusion fails. *See P.R.* Tel. *Co., Inc.* v. *San Juan Cable LLC*, 874 F.3d 767, 770 (1st Cir. 2017), *cert. denied*, 138 S. Ct. 1597 (2018) (holding that any argument not raised in the party's brief is deemed waived).

V.

For the foregoing reasons we *reverse* the District Court's grant of Canada's motion to dismiss and *remand* the case for further proceedings. The parties shall bear their own costs.

-Dissenting Opinion Follows-

LYNCH, *Circuit Judge*, dissenting. In this important case affecting this country's foreign relations, I respectfully disagree with my colleagues. The majority holds that Canada is stripped of its sovereign immunity under the commercial activity exception to the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 *et seq.* I disagree.

This suit is based on Merlini's disagreement with the decision of her employer, the Canadian consulate in Boston, not to provide her with extended workers' compensation benefits, having provided her with basic benefits. That decision by Canada is required by a Canadian legislative act, under which Canada has chosen to provide its own workers' compensation system to all consulate employees, regardless of nationality. I believe Canada's actions are protected from suit by the FSIA. Even if the suit could be viewed as based not on a legislative act, but only on an administrative act by Canada in its decision not to give Merlini an extension on her benefits, Canada is still protected by sovereign immunity.

Further, I think the policy implications of the majority's view are grave. What is sauce for the Canadian goose under the majority's holding will prove to be a bitter sauce for the American gander. The majority view will, I believe, operate to the detriment of the United States. Compelling Canada to abide by Massachusetts state law, at the expense of maintaining its own workers' compensation scheme, will redound to the harm of the U.S. government's functions abroad, as I discuss later.

Because a sovereign state is "presumptively immune from the jurisdiction of United States courts" under the FSIA, *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 355 (1993), the burden falls upon Merlini to demonstrate that an exception applies, *see Universal Trading &*

Inv. Co. v. *Bureau for Representing Ukrainian Interest in Int'l & Foreign Courts*, 727 F.3d 10, 17 (1st Cir. 2013) (citing *Virtual Countries, Inc.* v. *Republic of S. Afr.*, 300 F.3d 230, 241 (2d Cir. 2002)). I agree with the district court that this burden has not been met. *See Merlini* v. *Canada*, 280 F. Supp. 3d 254, 258 (D. Mass. 2017). I set out my reasons below.[9]

I.

I first consider the text and meaning of the FSIA. The FSIA, enacted in 1976, "provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country." *Sullivan* v. *Republic of Cuba*, 891 F.3d 6, 9 (1st Cir. 2018) (quoting *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989)). According to the Supreme Court, "the [FSIA's] manifest purpose [is] to codify the restrictive theory of foreign sovereign immunity." *Nelson*, 507 U.S. at 363.[10] In a case cited approvingly by the *Nelson* Court, the Second Circuit carefully laid out the scope of the restrictive theory, which safeguards immunity for "traditionally . . . quite sensitive" actions including "internal administrative acts" and "legislative acts."

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[9] I do agree with, and join, the majority in rejecting the State Department's arguments in its amicus brief that (1) Merlini's complaint is based only on the negligent conduct of her fellow employee in laying the phone cord that Merlini tripped over and so (2) we should vacate and remand for Merlini to make a negligence claim under the noncommercial tort exception. But, as discussed later, I agree with aspects of the State Department's brief, particularly concerning this country's activities abroad.

[10] Indeed, just months before the passage of the FSIA, the Supreme Court noted that "it is fair to say that the 'restrictive theory' of sovereign immunity appears to be generally accepted as the prevailing law in this country." *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 703 (1976).

Victory Transp. Inc. v. *Comisaria Gen. de Abastecimientos y Transportes*, 336 F.2d 354, 360 (2d Cir. 1964). And the *Nelson* Court quoted from a much-cited law review article by a leading commentator, stating, "[S]uch acts as legislation . . . cannot be performed by an individual acting in his own name. They can be performed only by the state acting as such." *Nelson*, 507 U.S. at 362 (quoting Hersch Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 Brit. Y.B. of Int'l L. 220, 225 (1952)).

Under the FSIA's commercial activity exception, a foreign state is not immune from suit in a case

> 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.

28 U.S.C. § 1605(a)(2).[11]

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[11] The majority states correctly that its holding on the commercial activity exception, *see* 28 U.S.C. § 1605(a) (2), "precludes the noncommercial tort exception from applying." *See Id.* § 1605(a)(5).

I consider the noncommercial tort exception briefly on the merits here. As the district court pointed out, the noncommercial tort exception expressly does not apply to "any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused." 28 U.S.C. § 1605(a) (5) (A); *see Fagot Rodriguez* v. *Republic of Costa Rica*, 297 F.3d 1, 8 (1st Cir. 2002); *Merlini*, 280 F. Supp. 3d at 258. Canada's decision to enact a particular workers' compensation scheme clearly is a discretionary legisla-

As the first step in considering this exception, we must "identify[] the particular conduct on which [Merlini's] action is 'based' for purposes of the [FSIA]." *Nelson*, 507 U.S. at 356. This requires "zero[ing] in on the core of the[] suit," *OBB Personenverkehr AG* v. *Sachs*, 136 S. Ct. 390, 396 (2015), without focusing merely on "a single element of a claim," *Id.* at 395.[12] That is, a court must identify the "gravamen of the complaint." *Id.*

Here, when we properly "zero[] in on the core of [Merlini's] suit," *Id.* at 396, we see that it was the sovereign decision by Canada to enact and administer its own compensation scheme, including for all workers at consulates,[13] that is the basis for plaintiff's

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tive decision and is a decision "based on considerations of public policy." *Berkovitz* v. *United States*, 486 U.S. 531, 537 (1988). Following the Supreme Court, we must avoid "judicial 'second guessing' of legislative and administrative decisions grounded in social, economic and political policy through the medium of an action in tort." *United States* v. S.A. *Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984). Thus, Merlini's argument that Canada's conduct falls within the exception for noncommercial torts is unavailing.

[12] In *Sachs*, the Court unanimously held that the commercial exception did not apply to a claim concerning a grievous injury from a rail accident in Austria, and did not permit jurisdiction over the foreign state-owned railway. 136 S. Ct. at 393. The Court rejected the Ninth Circuit's reading of *Nelson* – that the commercial activity exception was properly met so long as a single element of the claim met the exception – and said again that courts must focus on the acts of the sovereign alleged to have injured the plaintiff. "[T]he mere fact that the sale of the Eurail pass would establish a single element of a claim is insufficient to demonstrate that the claim is 'based upon' that sale for purposes of § 1605(a)(2)." *Id.* at 395.

[13] Consulates, like embassies, by their operation are not usual places. They embody actions by a sovereign exercising its sover-

claim of injury. Merlini seeks more in the way of workers' compensation than Canada has provided. I disagree with the majority's characterization of Canada's conduct as being "an employer's failure . . . to be insured" under state law, as though Canada were a private employer making a discretionary, market-based choice.[14] The majority concludes that this is an ordinary commercial omission made by an employer who "take[s] the risk of going bare." Thus, the majority asserts that Merlini's claim is "in no sense 'based on' Canada's decision to compensate her through its own national workers' compensation scheme." In my view, the premise is wrong, and the conclusion is wrong.

To see why, one need only look to Canada's Government Compensation Act ("GECA"), R.S.C. 1985, c. G-5. That Canadian statute not only establishes the exclusive framework for how local consulate staff, like Merlini, receive benefits, but it also sets forth the sole mechanism for appealing the denial of such benefits. Accordingly, the GECA sets forth what the govern-

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eign powers; the consulate here is an extension of Canada. As Canada says, the "[c]onsulate's mission is to monitor and interpret political and economic issues in the New England area; represent Canadian sovereign interests on issues such as borders, security, and trade; and provide consular services to Canadian citizens in New England, among other functions." I certainly do not say that the FSIA question is resolved by the fact that the accident happened in a consulate and to a person employed by a consulate. But I think the majority gives insufficient attention to these facts.

[14] Canada argues that it does provide workers' compensation and that the chapter 152 definition of "uninsured" or "self-insured" employer is irrelevant to its immunity, contrary to what the majority suggests. And Merlini's complaint argues not that the consulate was uninsured as a factual matter, but that it "was acting as a self-insurer without obtaining a [Massachusetts] license."

ment of Canada has determined, in its sovereign discretion, to be the appropriate comprehensive workers' compensation scheme for all of its federal employees, at home and abroad. It does not matter, as the majority posits, that Merlini held only an administrative position: The GECA clearly applies to *all* "locally engaged" employees. *See Id.* § 7(1).

Important here, the GECA authorizes the government of Canada to compensate workplace injuries *only* through the Canadian Consolidated Revenue Fund (if a local fund exists in the jurisdiction where the injury occurred), *see Id.*, or directly through the government of Canada, *see Id.* § 7(2). The Act does not authorize any other means of compensation. As such, Canada, as Merlini's employer, was prohibited by law from purchasing local Massachusetts insurance. Nothing under the FSIA required the Canadian consulate to flout its own Canadian laws. Contrary to the majority, this issue is not, then, one of "motivation," but of a sovereign choice by Canada's legislature untethered from commercial activity (unlike, for example, the issuance and repayment of bonds).

To enforce Canada's uniform compensation scheme, the consulate had to forgo Massachusetts workers' compensation insurance. These "acts" – of enforcing the Canadian uniform compensation scheme and of foregoing Massachusetts workers' compensation insurance – are the same. It is mere semantics to disaggregate the two. Following the Supreme Court's interpretations in *Nelson*[15] and *Sachs*, then, Merlini's suit is

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[15] In *Nelson*, discussed further in the following section, the Supreme Court held that the suit was "based upon a sovereign activity immune from the subject-matter jurisdiction of United States courts under the [FSIA]." 507 U.S. at 363.

"based upon" Canada's enforcement and administration of a uniform compensation scheme, and not merely one *aspect* of Canada's conduct in enforcing and administering this scheme.

II.

The second step of the commercial activity inquiry requires determining whether the conduct that the complaint is "based upon" is commercial rather than sovereign. The FSIA defines commercial activity as "either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d). Thus, courts must assess "whether the particular actions that the foreign state performs . . . are the *type* of actions by which a private party engages in 'trade and traffic or commerce.'" *Republic of Argentina* v. *Weltover Inc.*, 504 U.S. 607, 614 (1992) (quoting Black's Law Dictionary (6th ed. 1990)). *Weltover* requires that the "full context" be considered. *Id.* at 615.

The majority asserts that Canada's conduct cannot be framed as a Canadian legislative directive to have and enforce its own workers' compensation scheme because that goes to the "purpose" of Canada's conduct, and not its "nature." *See* 28 U.S.C. § 1603(d). I disagree. Although it can be "difficult . . . in some cases to separate 'purpose' (i.e., the reason why the foreign state engages in the activity) from 'nature' (i.e., the outward form of the conduct that the foreign state performs or agrees to perform)," *Weltover*, 504 U.S. at 617 (emphasis omitted), that distinction here supports my view.

The "outward form of [Canada's] conduct" includes, among other things, informing Merlini that she was subject to the GECA (this was done before her accident and injury),[16] compensating her pursuant to the GECA's benefits scheme after she made a claim of injury, and not continuing her benefits when Canada's Workplace Safety and Insurance Board (WSIB) determined after a full process that Merlini was ready to return to work. Each of these actions was authorized, and, indeed, compelled by the GECA. I cannot see how a country enacting its own law as to its employees and then administering its own national compensation scheme under that law as to those employed at its embassies and consulates is not, by its "nature," a sovereign act. Put another way, the full administration of this scheme is not the *"justification* for the conduct by Canada on which Merlini's claim is based," it is the relevant conduct by Canada. The majority asserts that this conduct is "simply immaterial," and we should treat Canada, a sovereign state, simply as an "employer" who just "did not comply with the state's workers' compensation requirements." I disagree, and view this conduct as clearly material to Merlini's claim.[17] The majority, then, narrowly focuses on Merlini's

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[16] Merlini's complaint acknowledges that "the Consulate instructed all its American employees, including Merlini, to apply to the Government of Canada for benefits in the event of a workplace accident."

[17] The majority also says that, "had Canada registered as a self-insurer in compliance with chapter 152, it could have performed each of the 'outward' actions" that I list and "Merlini would not have had a claim that she could bring under Massachusetts law." That counterfactual is not relevant to the majority's assertion that "none of these actions constitutes the 'outward conduct' that forms the basis of Merlini's claim against the Canadian government." The existence of an alternative form of compliance with a Massachusetts statute (or, put another way, a method for

employment and Canada's failure to have workers' compensation insurance under Massachusetts state law, which I do not see as the relevant "course of conduct": Canada's sovereign, full administration of its workers' compensation scheme.

The majority thrice cites to a single sentence in the House Report about "employment or engagement" of clerical staff, as though it provides support for its conclusion. *See* H. Rep. No. 94-1487, at 16 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6615. It does not.

The full text of that paragraph of the report states:

> The courts would have a great deal of latitude in determining what is a '[commercial] activity' for purposes of this bill. It has seemed unwise to attempt an excessively precise definition of this term, even if that were practicable. Activities such as a foreign government's sale of a service or a product, its leasing of property, its borrowing of money, its employment or engagement of laborers, clerical staff or public relations or marketing agents, or its investment in a security of an American corporation, would be among those included within the definition.

Id. This history does not support the majority's use of it. This case is not about whether Canada complied with local law when it hired Merlini. No such dispute is before us. Merlini was hired; this dispute is about workers' compensation and Canada's choice of the workers' compensation it provides for its employees.

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a sovereign state to stave off lawsuits) does not change the character of Canada's acts from sovereign to commercial, nor does it mean that these acts are not the relevant conduct by Canada underlying Merlini's claim.

Nothing in the legislative history says that any dispute about post-employment compensation for workplace injuries is within the exception for commercial activity. This case is about Canada's sovereign choice of a comprehensive workers' compensation scheme (a scheme which did compensate Merlini). Canada chose to cover all people employed at its consulates, whether U.S. citizens or nationals of other countries, under its own scheme.

Further, Canada's action is not the "*type* of action[] . . . which a private party [would] engage[] in," *Id.* at 614. That is so because no private party can administer such a national statutory scheme.

My understanding comports with the Supreme Court's holding and reasoning in a series of cases. In *Weltover*, the Court held that Argentina's issuance of bonds known as "Bonods" was a commercial act, even though its purpose was to restructure the country's debt, 504 U.S. at 609-10, because the government was acting "not as regulator of [the] market, but in the manner of a private player within it." *Id.* at 614. The Court looked at the "full context," *Id.* at 615, and pointed to the fact that private parties regularly held and traded such "garden-variety debt instruments." *Id.*

In this case, the very opposite is true: The Canadian consulate's decision to comply with and enforce the workers' compensation scheme established by the GECA is precisely "the type of action[]" that a "regulator," not a private employer, engages in. *Id.* at 614. To be sure, a private employer can forgo purchasing workers' compensation insurance, but unlike Canada, it does not and cannot do so as part and parcel of enforcing a broader statutory scheme.

Next, in *Nelson*, the Court firmly rejected the argument that the recruitment and employment by Saudi Arabia of foreign nationals – which was arguably a commercial activity, and may have led to the commission of intentional torts which injured the plaintiffs – satisfied the commercial activity exception. 507 U.S. at 351. That is, the Court explicitly rejected the argument that no more was required than "a mere connection with, or relation to, commercial activity." *Id.* at 358.

The *Nelson* court emphasized that "a foreign state engages in commercial activity for purposes of the restrictive theory only where it acts 'in the manner of a private player within' the market." *Id.* at 360 (quoting *Weltover*, 504 U.S. at 614). The Court cited several federal cases, some pre-FSIA, for the proposition that immunity extends "to a foreign state's 'internal administrative acts.'" *Id.* at 361 (quoting *Victory Transport*, 336 F.2d at 360); *see Herbage* v. *Meese*, 747 F. Supp. 60, 67 (D.D.C. 1990), *aff'd*, 946 F.2d 1564 (D.C. Cir. 1991); *see also Heaney* v. *Gov't of Spain*, 445 F.2d 501, 503 (2d Cir. 1971) (reiterating immunity for legislative acts and administrative acts); *Isbrandtsen Tankers, Inc.* v. *President of India*, 446 F.2d 1198, 1200 (2d Cir. 1971) (same). Whether viewed as primarily legislative or administrative, Canada's conduct here remains sovereign.

The majority opinion, in my view, is also inconsistent with the Court's prior precedent and other circuit precedent. This circuit and others have rejected the majority's implicit premise that the nature of an action can be determined by an abstract consideration of whether some *aspects* of the broader governmental conduct are like those "which a private party engages in [during] 'trade and traffic or commerce.'" *Weltover*,

504 U.S. at 614. In my view, private parties cannot create governmental workers' compensation schemes and so Canada's actions are not like those of private employers. But even if there were some likenesses to a private employer's decision to self-insure, that would not be enough to strip Canada of its immunity under fairly settled FSIA law.

Several circuits have correctly found that even where government conduct is determined to be like that in which private parties can and do engage, the government conduct remains sovereign when performed as part of a broader governmental program.

I think the majority's view is in conflict with the Second Circuit decision in *Anglo-Iberia Underwriting Mgmt.* v. *P.T. Jamsostek*, 600 F.3d 171 (2d Cir. 2010). There, the Second Circuit held that an Indonesian state-owned insurer was entitled to sovereign immunity against a negligent supervision claim because neither Indonesia nor its state-owned insurer was engaged in a commercial activity. *Id.* at 176. Even if the insurer were arguably involved in a commercial activity overall, the challenged activity (negligent supervision) was not sufficiently connected to commerce. *Id.* at 179. That is, the state-owned insurer's "hiring, supervision, and employment of" individuals as part of a comprehensive national health insurance program was not a commercial act. *Id.* at 178.

The Second Circuit's first holding was that the sovereign there, Indonesia, "does not sell insurance to workers or to employers in any traditional sense and does not otherwise compete in the marketplace like a private insurer." *Id.* at 177 (internal quotation marks omitted). Thus, it held that Indonesia's insurance scheme does not equate to that of an independent actor in the private marketplace of potential health insurers.

Instead, it determined that "the administration of Indonesia's national health insurance program" was "sovereign in nature." *Id.* at 178. Here, Canada also does not compete in the marketplace as either seller or buyer, nor does it offer its workers' compensation program to private employees.

The Second Circuit's second holding was that "even if . . . administration of Indonesia's national health insurance program and [the state-owned insurer's] employment . . . were commercial in nature," the FSIA would not allow "abrogat[ing] a foreign sovereign's immunity solely on the basis of an employment relationship." *Id.* at 179. The majority attempts to distinguish *Anglo-Iberia* on this second holding, saying "the claims [there] were based on the defendants' *administration* of the government programs at issue," as it was "the manner of the administration . . . that was alleged to be wrongful." It is, at minimum, the administration by Canada of its own workers' compensation scheme that is at issue here, too.

And my view is that *Jungquist* v. *Sheikh Sultan Bin Khalifa Al Nahyan* further supports my point: The fact that actions can be done by private actors does not mean the actions fall within the commercial activity exception where such actions were nevertheless "uniquely sovereign in nature." 115 F.3d 1020, 1030 (D.C. Cir. 1997). There, the two officials who saw to the provision of the plaintiff's healthcare were "performing their official tasks as administrators of a government [health and welfare] program." *Id.* As here, then, the sovereign actions involved the "administrat[ion] of a government program [for health and welfare]." *Id.*

I also view the majority's conclusion as being at odds with rulings by the Ninth Circuit and D.C. Circuit. In *Gregorian* v. *Izvestia*, the Ninth Circuit held that

the Soviet Union was entitled to sovereign immunity against a libel claim regarding a state-controlled newspaper. 871 F.2d 1515, 1522 (9th Cir. 1989). That the newspaper was sold and distributed in the United States did not render commercial the nature of its publication and distribution, as the "writing and publishing of articles reporting or commenting on events" remained governmental because the paper was state-owned and operated. *Id.* The D.C. Circuit held similarly that Peru was entitled to sovereign immunity for remodeling and operating a building as a chancery allegedly in violation of local District of Columbia zoning laws, because the operation of a chancery was "by its *nature* governmental." *MacArthur Area Citizens Ass'n* v. *Republic of Peru*, 809 F.2d 918, 920 (D.C. Cir. 1987) (citation omitted).

In my view, it is incorrect to say that Merlini's claim is "no different from the claims that other employees have brought against private businesses that . . . have not insured themselves" under Massachusetts law. It is analytically incorrect, partly because the broader context must matter as to statutory interpretation and application of the FSIA. If that broader context did not matter, almost any governmental act could be disaggregated and framed as commercial conduct that a private party can perform.

Since what Canada has done here is a governmental act by its very nature, the majority cannot rely on *Rush-PresbyterianSt. Luke's Med. Ctr.* v. *Hellenic Republic*, 877 F.2d 574 (7th Cir. 1989), even if the case (whether rightly or wrongly decided) bears some initial resemblance. There, the Greek government was alleged to be in breach of a contract to reimburse physicians and an organ bank in Chicago for performing kidney transplants on Greek nationals. *Id.* at 575.

The Seventh Circuit held that Greece's execution of the contract constituted "commercial activity," even though it was done to fulfill the government's constitutional goal of caring for the health of Greek citizens, because "nothing about the provision of and payment for health services . . . is uniquely governmental." *Id.* at 581.

Not so here. Canada's conduct, its enactment of a comprehensive workers' compensation scheme and decision not to award extended benefits, is the conduct at issue, and it is "uniquely governmental." *Id.* It is one thing for a government to engage in a private, commercial act (such as executing a contract) in order to fulfill a general governmental purpose (such as providing healthcare to its citizens).[18] It is quite another for a government to act in a manner strictly and precisely compelled by its own law to maintain the

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[18] The Seventh Circuit in *Rush-Presbyterian* stated that "[u]nder the Greek constitution, the government has a broad obligation to provide health care services to Greek citizens." 877 F.2d at 575. The Greek constitution does establish that "the State shall care for the health of citizens and shall adopt special measures for the protection of youth, old age, disability and for the relief of the needy." 2001 Syntagma [Syn.][Constitution] 21 (Greece) (trans). This language seems closer to stating a general sovereign purpose – caring for health of citizens – than a direct and precise mandate such as at issue in the GECA.

In furthering this general constitutional goal, the Greek government maintains a wide range of possible options. And indeed, the Greek government has changed the precise cost and provision of healthcare numerous times since *Rush-Presbyterian* was decided, including, for example, eliminating health insurance for those who had been unemployed for more than two years as part of austerity measures. *See* Lucy Rodgers & Nassos Stylianou, *How bad are things for the people of Greece*, BBC News (July 16, 2015), http://www.bbc.com/news/world-europe-33507802.

uniformity of its own federal workers' compensation program. This distinction is important.

I return to my sense of the foreign policy repercussions of the majority's view. The U.S. has undertaken the same sovereign exercise abroad as to providing workers' compensation for U.S. embassy and consulate employees as has Canada. For over a century, the U.S. has had a workers' compensation scheme for federal workers under the Federal Employees' Compensation Act ("FECA"), 5 U.S.C. § 8101 *et seq.* FECA expressly covers "noncitizens and nonresidents" who are employees of the United States, such as employees at U.S. embassies and consulates abroad. *See Id.* § 8137. The State Department tells us that "many foreign nationals employed by U.S. embassies and consulates – including Canadian citizens employed by the United States in Canada – are currently entitled to workers' compensation benefits in virtue of United States law, not local law." Like the GECA, U.S. law mandates that noncitizen, nonresident federal workers employed abroad are subject to federal U.S. workers' compensation law and procedures. *See Id.* In addition to this statutory command, State Department regulations establish a "special schedule" for the compensation of such embassy and consulate workers, except in narrow circumstances. 20 C.F.R. § 25.2(b).

To say, then, that Canada is acting in a "commercial" manner when it imposes its own workers' compensation scheme would lead to the conclusion that our government's like actions as to employees of embassies and consulates abroad are similarly commercial, not sovereign. That, in my view, cannot be right. A decision that Canada's actions are merely commercial risks providing cover for other countries to ignore sovereign actions taken by the U.S. and allow

liability against the U.S. government concerning workers' compensation under local laws. Indeed, the State Department's filing expresses concern with the U.S. "fac[ing] increased exposure in similar claims abroad." I think it highly unlikely that Congress intended such a result in drafting the FSIA. The effect of the majority's holding is to abrogate Canada's immunity from suit and force it to face a claim that Massachusetts can require Canada to get local insurance when Canada has made a sovereign decision to provide insurance itself through a comprehensive scheme.

Further, Merlini cannot escape from the fact that she is challenging Canada's imposition of its own compensation scheme in lieu of purchasing Massachusetts workers' compensation insurance. The majority finds little significance in the fact that Canada provided Merlini with compensation through Canada's own workers' compensation system. Pursuant to the GECA, Merlini received compensation, in the form of full payment of her salary, from March until October 2009. At that point, the WSIB determined that Merlini was able to return to work and terminated her benefits. Merlini chose not to appeal, which was open to her, and instead began a decade-long legal battle in the U.S. to obtain additional benefits from Massachusetts and from Canada.

Finally, the majority also "emphasize[s]" throughout that Merlini is an American citizen, and states that it reaches its conclusion because of that fact. But that cannot limit the reach of its opinion in any way. The Massachusetts insurance statute, by its terms, applies to workers of all nationalities employed locally, not just U.S. citizens. So, by that logic, even the consulate's Canadian employees are subject to the state statute. The majority's attempt to cabin its opinion by

stressing that Merlini is an American citizen does not work for yet another reason. The majority's attempted distinction based on citizenship of Canada's consular employees creates incentives to discourage Canada from employing Americans in its consulate, and imposes on Canada the costs and paperwork of administering different workers' compensation systems. In turn, the majority's attempted distinction would discourage American embassies abroad from employing local foreign citizens due to post-employment application of local workers' compensation law. But the choice to employ such citizens and the mix of the nationalities of employees at such consulates and embassies are sovereign choices.

If the majority thinks, as it says it does, that its result here, a denial of sovereign immunity, can be limited to low-level, "purely clerical" workers, I think that is mistaken. The logic of its analysis leaves no room for that. Further, there is no support in the text of the statute or the Supreme Court caselaw for such a distinction. The same is true for any attempted limitation based on Merlini's American citizenship.

The purpose of sovereign immunity is to leave sovereign issues to the sovereigns, not to the courts. I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 17-2211

CYNTHIA L. MERLINI,

Plaintiff, Appellant,

v.

CANADA,

Defendant, Appellee.

JUDGMENT

Entered: June 10, 2019

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The District Court's grant of Canada's motion to dismiss is reversed, and the matter is remanded for further proceedings consistent with the opinion issued this day. The parties shall bear their own costs.

By the Court:

Maria R. Hamilton, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 17-2211

CYNTHIA L. MERLINI,

Plaintiff, Appellant,

v.

CANADA,

Defendant, Appellee.

Before Howard, *Chief Judge*,
Torruella, Lynch, Thompson, Kayatta, and Barron,
Circuit Judges.

ORDER OF COURT

Entered: October 23, 2019

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be *denied.*

TORRUELLA, *Circuit Judge.* I voted in favor of granting en banc review because this appeal raises "a question of exceptional importance." *See* Fed. R. App. P. 35(a)(2).

LYNCH, *Circuit Judge, with whom HOWARD, Chief Judge, joins, dissenting from the denial of rehearing en banc.* We regret that this court has denied en banc review. We urge the Supreme Court to grant review in this important case about the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1602 *et. seq*. The opinion rests on what we view as significant misreadings of FSIA and of Supreme Court FSIA precedent. Further, the opinion ignores the clear text of the FSIA statute and impermissibly relies on supposed legislative history – not text – to create distinctions not in the statute. In our view, the decision is inconsistent with the views of other circuits, creating a circuit conflict, and is in derogation of principles of comity and international law.

Predictably, the majority opinion will precipitate a reciprocal effect on this country's foreign affairs at its numerous embassies and legations abroad, and, as the State Department has plainly stated, these effects will be adverse to our national interest. The consequences are far reaching: in this circuit alone, this opinion subjects over forty foreign consulates to the many variations in local and state laws that are contrary to matters that were determined by such countries' legislatures.

The core legal issue is what conduct Merlini's claim against Canada is "based upon." *See Saudi Arabia* v. *Nelson*, 507 U.S. 349, 356 (1993); *OBB Personenverkehr AG* v. Sachs, 136 S. Ct. 390, 396 (2015). Here, the correct answer should have been that the claim is based upon Canada's sovereign choice, by legislation, to have its own workers' compensation scheme for all of its government employees, including those at its Boston consulate. In focusing on a downstream consequence of Canada's sovereign decision instead of the decision itself, the majority opinion misreads the text

of FSIA and misconstrues *Nelson, Sachs*, and *Republic of Argentina* v. *Weltover* Inc., 504 U.S. 607 (1992). The opinion also conflicts with cases from the D.C., Second, and Ninth Circuits. See *Anglo-Iberia Underwriting Mgmt.* v. *P.T. Jamsostek*, 600 F.3d 171 (2d Cir. 2010); *Jungquist* v. *Sheikh Sultan Bin Khalifa Al Nahyan*, 115 F.3d 1020 (D.C. Cir. 1997); *Gregorian* v. *Izvestia*, 871 F.2d 1515 (9th Cir. 1989); *MacArthur Area Citizens Ass'n* v. *Republic of Peru*, 809 F.2d 918 (D.C. Cir. 1987).

Beyond that, the opinion's assertion that its rationale will lead to the loss of Canada's sovereign immunity only as to low-level workers (for which it cites a House Committee Report),[1] itself violates rules of statutory interpretation. Nothing in the *text* of FSIA carves out differential treatment based on the perceived level or relative importance of a worker's responsibilities. *See* 28 U.S.C. § 1605 (laying out "[g]eneral exceptions to the jurisdictional immunity of a foreign state").[2] The opinion thus violates the tenet that legislative history may not be used to alter text. *See Food Mktg. Inst.* v. *Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019)

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[1] The House Report itself may not be relied on, even if use of legislative history were appropriate. *See Am. Broad. Cos., Inc.* v. *Aereo, Inc.*, 573 U.S. 431, 457-58 (2014) (Scalia, J., dissenting) (cautioning against using "a few isolated snippets of legislative history" from a committee report "as authoritative evidence of congressional intent even though they come from a single report issued by a committee whose members make up a small fraction of one of the two Houses of Congress"); *NLRB* v. *Health Care & Ret. Corp. of Am.*, 511 U.S. 571, 582 (1994) Mgt is the function of the courts and not the Legislature, much less a Committee of one House of the Legislature, to say what an enacted statute means." (quoting *Pierce* v. *Underwood*, 487 U.S. 552, 566 (1988))).

[2] Indeed, Canada's legislation rejected that distinction. *See* Government Employees Compensation Act, R.S.C. 1985, c. G-5 § 7(1) (Can.) (applying to *all* "locally engaged" employees).

("Even those of us who sometimes consult legislative history will never allow it to be used to 'muddy' the meaning of 'clear statutory language.'" (quoting *Milner* v. *Dep't of Navy*, 562 U.S. 562, 572 (1999))); *Chamber of Commerce of U.S.* v. *Whiting*, 563 U.S. 582, 599 (2011) ("[Congress's] authoritative statement is the statutory text, not the legislative history." (quoting *Exxon Mobil Corp.* v. *Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005))); *Shannon* v. *United States*, 512 U.S. 573, 584 (1994) ("[C]ourts have no authority to enforce a principle gleaned solely from legislative history that has no statutory reference point." (alterations omitted) (quoting Int'l *Bhd. of Elec. Workers, Local Union No. 474* v. *NLRB*, 814 F.2d 697, 712 (D.C. Cir. 1987))).

As said in *Boos* v. *Barry*, 485 U.S. 312, 323-24 (1988), this country protects other countries' sovereign immunity so that "similar protections will be accorded to [the U.S. abroad]." *See also Bolivarian Republic of Venezuela* v. *Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1322 (2017); *Nat'l City Bank of N.Y.* v. *China*, 348 U.S. 356, 362 (1955). The State Department has told us that "many foreign nationals employed by U.S. embassies and consulates – including Canadian citizens employed by the United States in Canada – are currently entitled to workers' compensation benefits in virtue of United States law, not local law." *See* Federal Employees' Compensation Act, 5 U.S.C. § 8101, *et. seq.*[3] The majority's conclusion that Canada's admin-

[3] The Federal Employees' Compensation Act (FECA), first enacted in 1916, is the "exclusive measure of compensation" for federal employees with work-related injuries or illnesses, including non-citizen, non-resident employees working outside of the United States. 20 C.F.R. § 25.2(d); *see Johansen* v. *United States*, 343 U.S. 427, 440 (1952) (describing FECA as a "system[] of simple, certain, and uniform compensation for injuries or death"

istration of its own statutory workers' compensation scheme here is not protected by its sovereign immunity leads to the conclusion that our government's similar actions as to employees, foreign or American, of its consulates and embassies will not be granted immunity.[4] By denying Canada's choice to implement a federal workers' compensation scheme the respect and deference it is entitled to, the consequences of the opinion will likely be that FECA – Congress's choice of comprehensive workers' compensation – will not be given that deference. We do not believe Congress intended such an outcome.

For these reasons, we dissent.

By the Court:

Maria R. Hamilton, Clerk

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designed "to make a workable, consistent, and equitable whole" (citation omitted)).

[4] The United States embassies, consulates, and legations abroad would have to conform not only to a foreign country's contrary national laws, but also a range of sub-national and regional laws (say, from a particular canton, state, or province). Here, a sub-national law, from Massachusetts, creates the perceived conflict. In a country where the United States is operating multiple diplomatic posts (which is true in numerous countries; for example, there are about nineteen posts in Mexico), the opinion would have the United States operate different schemes and systems for foreign nationals employed in the *same* country, doing essentially the *same* job.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 17-10519-NMG

CYNTHIA L. MERLINI,

Plaintiff,

v.

CANADA,

Defendant.

MEMORANDUM & ORDER

GORTON, J.

Cynthia Merlini ("Merlini" or "plaintiff") filed this action against the sovereign nation of Canada ("defendant") in March, 2017. She claims that during her employment by the Consulate General of Canada in Boston, an arm of the Government of Canada ("the Consulate"), she suffered an injury that left her disabled.

Pending before this Court is defendant's motion to dismiss for lack of jurisdiction. For the reasons that follow, defendant's motion to dismiss will be allowed.

I. Background

A. Alleged Injury

Merlini states that she is a United States citizen living in Massachusetts and that she is not a Canadian citizen or national. She worked for defendant at the Consulate in a clerical position from 2003 to 2009. Her

duties were secretarial and included answering the telephone, maintaining files and typing letters.

Merlini claims that on January 22, 2009, while preparing coffee and tea for a meeting at the Consulate's office, she tripped over an unsecured speakerphone cord and fell, striking a credenza. She alleges that as a result of that accident, she suffered a serious bodily injury that rendered her unable to work. In this action, Merlini seeks damages for physical and mental pain and suffering, medical expenses, past and future lost wages, physical dysfunction and loss of earning capacity.

B. Procedural History

Merlini maintains she received benefits from the Government of Canada pursuant to Canadian law from March, 2009, until October, 2009, at which point the Government of Canada stopped paying her benefits. She did not appeal the discontinuation of benefits in Canada.

Merlini brought a claim against defendant in the Massachusetts Department of Industrial Accidents ("DIA"). She alleged that defendant neither purchased workers' compensation insurance nor obtained a license as a self-insurer, in violation of Massachusetts workers compensation law. M.G.L. c. 152. An administrative law judge ("ALJ") at DIA found Merlini was entitled to permanent and total incapacity benefits and other benefits from the Massachusetts Workers' Compensation Trust Fund.

The DIA reviewing board reversed the ALJ's decision, finding that 1) Canada was not within the Commonwealth's personal jurisdiction, 2) Canada was not improperly uninsured because it had immunity under the Foreign Sovereign Immunities Act ("FSIA") and 3) Merlini had no claim because she was entitled to

benefits under Canadian law. Merlini appealed the reviewing board's decision to the Massachusetts Appeals Court. *In re Merlini*, 154 N.E.3d 606 (Mass. App. Ct. 2016) (unpublished table opinion). The Massachusetts Appeals Court held that the DIA reviewing board correctly reversed the ALJ, concluding the reviewing board properly found Canadian law applied and that Merlini's remedy, if any, was against the Canadian government. *Id.* at *2. The Court did not address the issue of whether the Canadian government is subject to jurisdiction in the Commonwealth, *id.*, and Merlini did not petition the Massachusetts Supreme Judicial Court for further appellate review.

On March 23, 2017, Merlini filed a complaint in this Court, alleging defendant violated M.G.L. c. 152, § 66. She claims defendant is strictly liable for her injuries because defendant was unlawfully uninsured under the Massachusetts workers' compensation statute.

Defendant filed a motion to dismiss in June, 2017, contending that 1) this Court lacks subject-matter jurisdiction to hear Merlini's claim, 2) the DIA Reviewing Board's decision precludes Merlini from bringing this case and 3) Merlini has failed to state a claim upon which relief can be granted. Because this Court agrees with defendant that it lacks subject-matter jurisdiction to hear plaintiff's case, it will address only that issue.

II. Defendant's Motions to Dismiss for Lack of Subject-Matter Jurisdiction

A. The Foreign Sovereign Immunities Act

Pursuant to Fed. R. Civ. P. 12(h)(3), if this Court "determines at any time that it lacks subject-matter jurisdiction the court must dismiss the action." A

defendant may present a defense of lack of subject-matter jurisdiction by motion. Fed. R. Civ. P. 12(b).

Pursuant to FSIA, 28 U.S.C. § 1602 *et seq.*,

> [s]ubject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States[.]

28 U.S.C. § 1604. In other words, a foreign sovereign defendant is "presumptively immune" from liability in the federal courts of the United States. *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 355 (1993).

FSIA provides limited exceptions to a foreign sovereign's immunity, however, and these exceptions constitute "the sole basis for obtaining jurisdiction over a foreign state in the courts of this country." *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989). Relevant here are the commercial activity and tortious activity exceptions.

Under the commercial activity exception, a foreign state is not immune from jurisdiction of the United States courts when a foreign state's action is:

> [1)] based upon a commercial activity carried on in the United States; [2)] performed in the United States in connection with a commercial activity of the foreign state elsewhere [or 3)] outside the territory of the United States [and] in connection with a commercial activity . . . [that] causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2).

Under the tortious activity exception, a foreign state is not immune from jurisdiction of the United States

courts when "money damages are sought against a foreign state for personal injury or death . . . occurring in the United States" that are caused by a tortious act or omission of that foreign state or its employee while acting withinin the scope of his/her employment. *Id.* § 1605(a)(5). The tortious activity exception, however, does not apply to a claim

> based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused.

Id. § 1605(a)(5)(A).

B. The Commercial Activity Exception

Plaintiff avers that her claim falls within FSIA's commercial activity exception to foreign sovereign immunity. The parties do not dispute that defendant qualifies as a "foreign state" for purposes of the Act under 28 U.S.C. § 1605(3)(a). Plaintiff relies on the first clause of the commercial activities exception, claiming that defendant is liable for its commercial activities in Massachusetts.

An action is "based upon" commercial activity when that conduct forms the "basis" or "foundation" for a claim, and that "element[] of the claim, if proven, would entitle a plaintiff to relief under his theory of the case." *Nelson*, 507 U.S. at 357. In assessing whether a certain activity is commercial, "courts must look to the nature of the activity rather than its purpose." *Fagot Rodriguez* v. *Republic of Costa Rica*, 297 F.3d 1, 5-6 (2002) (internal citations omitted).

The court must address whether the foreign state's actions, regardless of the motive behind them, "are the *type* of actions by which a private party engages in

trade and traffic or commerce." *Republic of Arg.* v. *Weltover, Inc.*, 504 U.S. 607, 614 (1992) (internal citations omitted) (emphasis in original). A sovereign state engages in commercial activity with respect to FSIA when "it exercises only those powers that can also be exercised by private citizens" rather than "powers peculiar to sovereigns". *Nelson*, 507 U.S. at 360 (internal quotation marks and citations omitted).

Plaintiff asserts that defendant violated M.G.L. c. 152, § 65(2)(e) by choosing not to purchase workers' compensation insurance and defendant is therefore strictly liable for her injuries. *Id.* Plaintiff contends that her claim is "based upon" defendant's decision to provide its own system of benefits to its employees. *Nelson*, 507 U.S. at 357. The determinative question is, therefore, whether defendant's decision not to purchase workers' compensation insurance is commercial in nature. *Weltover, Inc.*, 504 U.S. at 614.

Defendant's decision to provide its own benefits does not fall under the commercial activities exception because the decision to create and organize a workers' compensation program is sovereign in nature. *See Nelson*, 507 U.S. at 361 (concluding abuse of power by police is sovereign in nature and does not fall within exception); *cf. Weltover Inc.*, 504 U.S. at 614 (holding refinancing bonds is not sovereign in nature and does fall within exception). A sovereign defendant's decision to offer and structure its own form of benefits is not comparable to exercising a power that could also be leveraged by private citizens. *Weltover Inc.*, 504 U.S. at 614. Thus, the actions on which the claim is founded are not commercial in nature and the commercial activities exception to FSIA does not apply here. § 1605(a)(2); *Fagot Rodriguez*, 297 F.3d at 5-6.

C. The Tortious Activity Exception

Plaintiff also avers that her claim falls within FSIA's tortious activity exception to foreign sovereign immunity. 28 U.S.C. § 1605(a)(5). She contends that defendant's failure to acquire insurance pursuant to M.G.L. c. 152, § 66 comprises the requisite tortious conduct.

The tortious activity exception does not apply, however, to claims that involve the exercise of discretion. *See Fagot Rodriguez*, 297 F.3d at 8. A challenged government action is protected as discretionary if the conduct in question is a matter of choice or involves an element of judgment and if that judgment is of the kind that the discretionary function exception was designed to shield. *Fagot Rodriguez*, 297 F.3d at 9. The provision serves to prevent "judicial second guessing" of public policy decisions. *Id.*

Defendant does not dispute that its decision to maintain its own system of workers' compensation insurance involves an element of choice. *Id.* The issue is whether defendant's choice is a legislative or administrative decision grounded in social, economic or political policy. *Id.* In other words, the essential question here is whether the challenged action is based on "some plausible policy justification". *Id.* at 11.

The decision to provide benefits to workers injured in their employment is inherently grounded in a social, economic and political policy and is based on a plausible policy justification. *Id.* at 9, 11. Because plaintiff's claim is based on defendant's decision to provide its own system of benefits and to remain uninsured in Massachusetts, the claim applies to discretionary conduct. 23 U.S.C. § 1605(a)(5)(i). Accordingly, the tortious

activity exception to FSIA does not apply to plaintiff's claim. *Id.*

D. Conclusion

Because plaintiff has failed to demonstrate that one of the exceptions to FSIA applies here, defendant is presumptively immune from liability. 28 U.S.C. § 1604. Accordingly, this Court lacks subject matter jurisdiction to hear plaintiff's case and declines to address the other arguments raised by defendant. *Id.*

ORDER

In accordance with the foregoing, defendant's motion to dismiss for lack of subject matter jurisdiction (Docket No. 12) is ALLOWED.

So ordered.

/s/ Nathaniel M. Gorton
Nathaniel M. Gorton
United States District Judge

Dated: December 7, 2017

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 1: 17-cv-10519-NMG

CYNTHIA L MERLINI,

Plaintiff,

v.

CANADA,

Defendant.

ORDER OF DISMISSAL

Gorton D.J.

In accordance with the Court's Memorandum & Order dated 12/7/2017 granting the Defendant's motion to dismiss (dkt. no. 12), it is hereby ORDERED that the above-entitled action be and hereby is DISMISSED.

12/7/2017
Date

By the Court,

/s/Stephanie Caruso
Deputy Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

———

Civ. A. No.

———

CYNTHIA L. MERLINI,

Plaintiff,

vs.

CANADA,

Defendant.

———

COMPLAINT

PRELIMINARY STATEMENT

1. Cynthia L. Merlini ("Merlini"), an American living in Massachusetts, worked for the Consulate General of Canada in Boston, an arm of the Government of Canada ("the Consulate") in a clerical position. In 2009, she was injured on the job and suffered a serious bodily injury that left her unable to work. The Consulate had not complied with the Massachusetts workers' compensation statute by purchasing workers' compensation insurance or by obtaining a license as a self-insurer. Nor had it ever complied with the provisions of the workers' compensation statute requiring it to notify Merlini of her rights under Massachusetts law. Instead, in disregard of the law, which obligates foreign consulates to comply with the workers' compensation statutes just as all other employers must, the Consulate instructed all its American employees, including Merlini,

to apply to the Canadian government for benefits in the event of a workplace accident. In sum, the Consulate was acting as a self-insurer without obtaining a license. It ignored Massachusetts law outright, apparently because it believed, wrongly, that its status as a foreign consulate provided it with immunity from the otherwise routine application of Massachusetts law. In this action, Merlini seeks damages to compensate her for her workplace injury.

JURISDICTION

2. Canada is a foreign state. On information and belief, the Consulate is an arm of the Canadian government but is not a legal entity separate from the Government of Canada itself with the capacity to sue or be sued.

3. This action is based on Canada's commercial activities in the United States, namely, its employment of Merlini at the Consulate, as is more fully alleged below. The commercial activity exception to foreign sovereign immunity, 28 U.S.C. § 1605(a)(2), applies.

4. In the alternative, this is an action against a foreign state for personal injury occurring in the United States and caused by the tortious acts or omissions of Canada or its employees or officials while acting within the scope of office or employment, as is more fully alleged below. The non-commercial tort exception to foreign sovereign immunity, 28 U.S.C. § 1605(a)(5), applies.

5. The Court has jurisdiction of this action under 28 U.S.C. § 1330(a).

FACTS

A. The Consulate.

6. The Consulate is Canada's consular post for New England (excluding Connecticut). Its office is in Boston. The mandate of the Consulate is to promote Canada's interests in the region, including advancing political, economic, academic, and cultural ties, promoting trade and investment, and providing consular assistance to Canadians.

B. Merlin's Job at the Consulate.

7. Merlini was hired by the Consulate in 2003. She was assistant to the Consul General. She was hired in Massachusetts, and her place of work was in Massachusetts.

8. Merlini is an American citizen and a resident of Massachusetts. She is not a Canadian citizen or national.

9. Her duties were clerical, and comparable to the duties of the secretary or assistant to an executive at any private business. For example, she answered the telephone, maintained files, typed letters, and performed other secretarial tasks.

10. Indeed, at the time of the accident, she was setting up a coffee and tea service for a meeting the Consul General was to attend.

11. Merlini was not a consular officer, nor did she perform any governmental, consular, diplomatic, or other official tasks.

12. She took no competitive examination before being hired, was not entitled to tenure, and was not entitled to the same benefits as a foreign service officer.

C. The Accident.

13. On January 22, 2009, at the Consulate's office, Merlini was setting up a coffee and tea service for a meeting that was to be held at the Consulate.

14. In the room, a speakerphone was on a table. The cord of the speakerphone ran across the floor of the room.

15. An employee of the Consulate negligently failed to secure the speakerphone cord to the floor. The decision—if it was a conscious decision—not to secure the cord in a safe manner was not the exercise of any discretionary function.

16. Merlini tripped over the unsecured cord, got tangled in the cord, and fell, striking a credenza.

17. As a result of the accident, she suffered a serious bodily injury that has rendered her unable to work.

18. Merlini's damages, which she seeks in this action, include physical and mental pain and suffering, medical and related expenses, past and future lost wages and benefits, physical dysfunction, and loss of earning capacity.

D. The Consulate's Failure to Comply with the Workers' Compensation Statute.

19. Under Massachusetts's workers compensation statute, all employers, with limited exceptions not applicable here, are required either to purchase workers' compensation insurance or to obtain a license as a self-insurer.

20. The Consulate did neither. At the time of the accident—and, on information and belief, at all other times—the Consulate has been uninsured under the Massachusetts statute.

21. The statute also requires employers to notify employees of their rights under the statute. For example, the statute requires employers to notify new employees that the employer has provided for payment of workers' compensation either through an insurer or through self-insurance in accordance with the statute. It also requires employers to provide a notice to the employee as well as to the Massachusetts government within seven days of receipt of notice of a workplace injury. The Consulate did neither of these things. The only notices relating to workers' compensation that the Consulate ever provided to Merlini related to benefits provided under a Canadian statute.

22. Merlini was unaware of her rights under Massachusetts law at the time of her injury.

E. Prior Litigation

23. Merlini initially received benefits from the Government of Canada under Canadian law from shortly after the accident until October 2009, when the Government of Canada ceased paying benefits.

24. Because the Consulate was uninsured under Massachusetts law, Merlini brought a claim against the Workers' Compensation Trust Fund seeking total incapacity benefits. Canada participated in the proceedings. An administrative judge in the Department of Industrial Accidents found that Merlini was entitled to permanent and total incapacity benefits and other benefits under the Massachusetts workers' compensation law. After lengthy proceedings, including two decisions by the DIA Reviewing Board and an appeal to the Appeals Court, the Appeals Court held, in an unpublished decision, that Merlini was not entitled to benefits from the Trust Fund because the Trust Fund's statute, G.L. c. 152, § 65(2)(e)(i), provides that the

Trust Fund is not liable if the claimant was "entitled to workers' compensation benefits in any other jurisdiction." Merlini's Case, 89 Mass. App. Ct. 1130 (2016) (mem.). The court did not reach the Trust Fund's claim that Canada had foreign sovereign immunity or its claim that the Consulate was not an "uninsured employer" under the worker's compensation law.

25. Merlini's entitlement to benefits under Canadian law, as found by the Appeals Court, is not a defense to Merlini's claim for personal injury against the Consulate, as it was to her claim for benefits against the Trust Fund.

Count One
G.L. c. 152, § 66

26. Merlini incorporates the allegations of paragraphs 1 to 25.

27. The Consulate, and thus Canada, is an employer for purposes of G.L. c. 152, § 66.

28. The Consulate, and thus Canada, was uninsured under the worker's compensation law of Massachusetts.

29. Merlini was the Consulate's, and thus Canada's, employee.

30. Merlini suffered a personal injury in the course of her employment.

31. Merlini has suffered damages as a proximate result of the personal injury in the course of her employment.

32. The Consulate, and thus Canada, is strictly liable for Merlini's damages, without regard to fault.

DEMAND FOR RELIEF

Therefore, the plaintiff demands judgment against the defendant for damages in an amount to be determined at trial, plus interest, costs, and all other relief to which she may be entitled at law or in equity.

Respectfully submitted,

CYNTHIA L. MERLINI

By her attorney:

/s/ Theodore J. Folkman
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Dated: March 27, 2017
724242

APPENDIX E

28 U.S.C. § 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

28 U.S.C. § 1603. Definitions

For purposes of this chapter–

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity–

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

28 U.S.C. § 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. § 1605. General exceptions to the jurisdictional immunity of a foreign state

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

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign

state may purport to effect except in accordance with the terms of the waiver;

(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;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to–

(A) any claim based upon the exercise or performance or the failure to exercise or perform a

discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

* * *

APPENDIX F

Mass. Gen. L. ch. 152 § 24. Waiver of right of action for injuries

An employee shall be held to have waived his right of action at common law or under the law of any other jurisdiction in respect to an injury that is compensable under this chapter, to recover damages for personal injuries, if he shall not have given his employer, at the time of his contract of hire, written notice that he claimed such right, or, if the contract of hire was made before the employer became an insured person or self-insurer, if the employee shall not have given the said notice within thirty days of the time said employer became an insured person or self-insurer. An employee who has given notice to his employer that he claimed his right of action as aforesaid may waive such claim by a written notice, which shall take effect five days after it is delivered to the employer or his agent. The notices required by this section shall be given in such manner as the department may approve. If an employee has not given notice to his employer that he preserves his right of action at common law as provided by this section, the employee's spouse, children, parents and any other member of the employee's family or next of kin who is wholly or partly dependent upon the earnings of such employee at the time of injury or death, shall also be held to have waived any right created by statute, at common law, or under the law of any other jurisdiction against such employer, including, but not limited to claims for damages due to emotional distress, loss of consortium, parental guidance, companionship or the like, when such loss is a result of any injury to the employee that is compensable under this chapter.

Mass. Gen. L. ch. 152 § 25A. Purchase of insurance; self-insurance; reinsurance; deductibles

In order to promote the health, safety and welfare of employees, every employer shall provide for the payment to his employees of the compensation provided for by this chapter in the following manner:

(1) By insurance with an insurer or by membership in a workers' compensation self-insurance group, established pursuant to the provisions of sections twenty-five E to twenty-five U, inclusive, or

(2) Subject to the rules of the department, by obtaining from the department annually a license as a self-insurer by conforming to the provisions of one of the two following subparagraphs and also to the provisions of subparagraph (c) if required. Every employer desiring to be licensed as a self-insurer shall make application for such license on a form provided by the department. The application shall contain: (1) a sworn itemized statement of the assets and liabilities of the applicant; (2) a payroll report for the preceding fiscal year of the applicant; (3) a detailed description of the nature and kind of business carried on.

(a) By keeping on deposit with the state treasurer in trust for the benefit and security of employees such amount of securities, not less in market value than twenty thousand dollars, as may be required by the department, said securities to be in the form of cash, bonds, stocks or other evidences of indebtedness as the department may require, and to be used, liquidated and disbursed only upon order of the department for the purposes of paying the benefits provided for by this chapter. The department shall, at least semiannu-

ally, determine the liabilities of a self-insurer both incurred or to be incurred because of personal injuries to employees under this chapter. The department shall require an additional deposit or further security when the sum of the self-insurer's liability both incurred or to be incurred exceeds the deposit or any required reinsurance, or permit a decrease of said deposit provided the value of said deposit in no case shall be less than twenty thousand dollars. The department may permit a substitution of securities in place of those deposited. Interest, dividends and other income from said deposit or deposits shall be payable to the employer who deposited them, unless and until the department shall direct otherwise. The deposit or deposits may be returned to the employer if the employer shall insure with an insurer under paragraph (1) of this section, or qualify as a self-insurer under subparagraph (b) of this section, or if he shall cease to transact business in the commonwealth; provided, that in any case he satisfies the department that he is not under any obligation to pay compensation under this chapter, or, if the department so requires, he furnishes the department with a single premium non-cancellable policy, insuring him against any liability that may have arisen under this chapter or with a bond executed as surety by some company authorized to transact the business of workers' compensation insurance in this commonwealth, in an amount and form approved by the department, guaranteeing the payment of any liability on his part that may have arisen under this chapter. No deposit so deposited shall be assignable or subject to attachment or be liable in any way for the debt of the self-insurer. If an employer engaged in

interstate or foreign commerce certifies that the laws of the United States provide for liability for injury to or death of its employees, the deposit shall be returned to the employer less such amount as determined by the department as necessary to satisfy against liability that may already have arisen under this chapter; and provided that such determination by the department shall be reviewable by the superior court for the county in which the employer resides, or, in the case of a corporation, where said corporation has a usual place of business.

(b) By furnishing annually a bond running to the commonwealth, with some surety company authorized to transact business in the commonwealth as surety, in such form as may be approved by the department and in such amount not less than twenty thousand dollars as may be required by the department, said bond, however, to be upon the condition that if the license of the principal shall be revoked or if the principal shall cease to transact business in the commonwealth or if the department shall refuse to renew the license or if the principal shall insure with an insurer, the principal shall upon demand deposit with the state treasurer an amount of securities equal to the penal sum of the bond or a single premium non-cancellable policy issued by some insurance company authorized to transact the business of workers' compensation insurance in this commonwealth, insuring him against any liability that may have arisen under this chapter or a bond executed as surety by some company authorized to transact the business aforesaid in this commonwealth, in an amount and form approved by the department, guaranteeing the payment of any

liability on his part that may have arisen under this chapter. The department shall, at least semiannually, determine the liabilities of a self-insurer both incurred or to be incurred because of personal injuries to employees under this chapter. The department may at any time require an additional bond, similarly conditioned, or further security or permit a decrease in the amount of said bond provided the amount of the bond or the bonds in no case shall be less than twenty thousand dollars. The liability of the surety shall not exceed in the aggregate the penal sum or sums stated in any such annual bond or bonds or in any endorsements giving effect to any such increase or reduction. The department may permit a substitution of a new bond or bonds for the bond or bonds which have been furnished and shall return the old bond or bonds to the self-insurer as soon as a new annual bond has been obtained.

(c) As a further guarantee of a self-insurer's ability to pay the benefits provided for by this chapter to injured employees, every self-insurer shall make arrangements satisfactory to the department, by reinsurance, to protect it from extraordinary losses or losses caused by one disaster.

Such reinsurance shall be in such amounts and form as the department may approve and shall be effected with a company as provided in section twenty of chapter one hundred and seventy-five, provided, the minimum amount shall be not less than five hundred thousand dollars. Such reinsurance shall provide that the use or disposition of any money received by a self-insurer or former self-insurer under any such reinsurance shall be subject to the approval of the department, and no such money

shall be assignable or subject to attachment or be liable in any way for the debt of the self-insurer unless incurred under this chapter. The provisions of this paragraph shall not apply to common carriers by railroad which are subject to the provisions of the Federal Employers Liability Act.

(3) The department may make rules governing self-insurers, and may revoke or refuse to renew the license of a self-insurer because of the failure of such self-insurer promptly to make payments of compensation provided for by this chapter, or for any other reasonable cause. Any person aggrieved by the action of the department in refusing to grant a license or in revoking, or refusing to renew, a license of a self-insurer under this section or by the action of the department in requiring an additional deposit or further security under subparagraph (a) of this section, or in requiring a further bond or security for an additional sum under subparagraph (b) of this section may demand a hearing before the department, and if, after said hearing, the department denies his petition, he may within ten days after receipt of a notice stating reasons for such denial, file a petition in the superior court for Suffolk county for a review thereof; but the filing of such a petition shall not suspend the action of the department unless a stay thereof shall be allowed by the justice pending a final determination by the court. The court shall summarily hear the petition and may make any appropriate order or decree.

(4)(a) The commissioner of insurance shall require each insurer issuing a policy under this chapter to offer, as a part of the policy or as an optional endorsement to the policy, deductibles, including reasonable small deductibles optional to the policyholder for

benefits payable under this chapter. Deductible amounts offered shall be fully disclosed to the prospective policyholders in writing in amounts determined by the commissioner. The policyholder exercising the deductible option shall choose only one deductible amount.

(b) If the policyholder exercises the option and chooses a deductible, the insured employer shall be liable for the amount of the deductible for benefits paid for each compensable claim of work injury suffered by an employee or, at the option of the policyholder, an aggregate deductible as determined by the commissioner. The insurer shall pay all or part of the deductible amount, whichever is applicable, to a compensable claim, to the person or medical provider entitled to the benefits conferred by this chapter and then seek reimbursement from the insured employer for the applicable deductible amount. The payment or nonpayment of deductible amounts by the insured employer to the insurer shall be treated under the policy insuring the liability for workers' compensation in the same manner as payment or nonpayment of premiums.

(c) Optional deductibles shall be offered in each policy insuring liability for workers' compensation that is issued, delivered, issued for delivery, or renewed under this chapter on or after a date to be determined by the commissioner, unless an insured employer and insurer agree to renegotiate a workers' compensation policy in effect, so as to include a provision allowing for a deductible.

(d) Premium reductions for deductibles shall be determined by the commissioner of insurance.

(e) This subsection shall not apply to employers who are approved to self-insure against liability for workers' compensation or group self-insurance funds for workers' compensation established pursuant to the provisions of this chapter.

(f) The commissioner of insurance may promulgate regulations to enforce the provisions of this section.

Mass. Gen. L. ch. 152 § 25B. Applicability of statute relating to insurance and self-insurers; employer bringing employees within statute

Section twenty-five A shall not apply to the commonwealth, the Massachusetts Turnpike Authority, the Massachusetts Bay Transportation Authority, the Massachusetts Port Authority or the various counties, cities, towns and districts provided for in sections sixty-nine to seventy-five, inclusive. Any employer may bring an employee or employees for whom he is not required by this chapter to provide for the payment of compensation within the coverage of this chapter by providing for the payment of compensation to such employee or employees as provided by this chapter.

Mass. Gen. L. ch. 152 § 26. Injuries arising out of and in course of employment

If an employee who has not given notice of his claim of common law rights of action under section twenty-four, or who has given such notice and has waived the same, receives a personal injury arising out of and in the course of his employment, or arising out of an ordinary risk of the street while actually engaged, with his employer's authorization, in the business affairs or undertakings of his employer, and whether within or without the commonwealth, he shall be paid compensation by the insurer or self-insurer, as hereinafter

provided; provided, that as to an injury occurring without the commonwealth he has not given notice of his claim of rights of action under the laws of the jurisdiction wherein such injury occurs or has given such notice and has waived it. For the purposes of this section any person, while operating or using a motor or other vehicle, whether or not belonging to his employer, with his employer's general authorization or approval, in the performance of work in connection with the business affairs or undertakings of his employer, and whether within or without the commonwealth, and any person who, while engaged in the usual course of his trade, business, profession or occupation, is ordered by an employer, or by a person exercising superintendence on behalf of such employer, to perform work which is not in the usual course of such work, trade, business, profession or occupation, and while so performing such work, receives a personal injury, shall be conclusively presumed to be an employee, and if an employee while acting in the course of his employment receives injury resulting from frost bite, heat exhaustion or sunstroke, without having voluntarily assumed increased peril not contemplated by his contract of employment, or is injured by reason of the physical activities of fellow employees in which he does not participate, whether or not such activities are associated with the employment, such injury shall be conclusively presumed to have arisen out of the employment.

If an employee is injured by reason of such physical activities of fellow employees and the department finds that such activities are traceable solely and directly to a physical or mental condition resulting from the service of any of such fellow employees in the armed forces of the United States, the entire amount of compensation that may be found due shall be paid

by the insurer, self-insurer or self-insurance group; provided, however, that upon an order or pursuant to an approved agreement of the department, the insurer, self-insurer or self-insurance group shall be reimbursed by the state treasurer from the trust fund established by section sixty-five for all amounts of compensation paid under this section.

Mass. Gen. L. ch. 152 § 66. Actions for injuries sustained by employees; limitations; defenses

Actions brought against employers to recover damages for personal injuries or consequential damages sustained within or without the commonwealth by an employee in the course of his employment or for death resulting from personal injury so sustained shall be commenced within twenty years from the date the employee first became aware of the causal relationship between the disability and his employment. In such actions brought by said employees or by the Workers' Compensation Trust Fund pursuant to the provisions of subsection (8) of section sixty-five, it shall not be a defense:

1. That the employee was negligent;

2. That the injury was caused by the negligence of a fellow employee;

3. That the employee had assumed voluntarily or contractually the risk of the injury;

4. That the employee's injury did not result from negligence or other fault of the employer, if such injury arose out of and in the course of employment.

Mass. Gen. L. ch. 152 § 67. Application to insureds and employers having right of election, of statutes relating to defenses to actions

Section sixty-six shall not apply to actions to recover damages for personal injuries received by employees of an insured person or a self-insurer.

Paragraph 4 of said section sixty-six shall not apply to actions to recover damages for personal injuries sustained by any person, whose employer has a right of election as provided in paragraph 4 of section one.

APPENDIX G

1963 Vienna Convention on Consular Relations, 21 U.S.T. 77

Article 5
Consular functions

Consular functions consist in:

(a) protecting in the receiving State the interests of the sending State and of its nationals, both individuals and bodies corporate, within the limits permitted by international law;

(b) furthering the development of commercial, economic, cultural and scientific relations between the sending State and the receiving State and otherwise promoting friendly relations between them in accordance with the provisions of the present Convention;

(c) ascertaining by all lawful means conditions and developments in the commercial, economic, cultural and scientific life of the receiving State, reporting thereon to the Government of the sending State and giving information to persons interested;

(d) issuing passports and travel documents to nationals of the sending State, and visas or appropriate documents to persons wishing to travel to the sending state;

(e) helping and assisting nationals, both individuals and bodies corporate, of the sending State;

(f) acting as notary and civil registrar and in capacities of a similar kind, and performing certain functions of an administrative nature, provided that there is nothing contrary thereto in the laws and regulations of the receiving State;

(g) safeguarding the interests of nationals, both individuals and bodies corporate, of the sending State in

cases of succession *mortis causa* in the territory of the receiving State, in accordance with the laws and regulations of the receiving State;

(h) safeguarding, within the limits imposed by the laws and regulations of the receiving State, the interests of minors and other persons lacking full capacity who are nationals of the sending State, particularly where any guardianship or trusteeship is required with respect to such persons;

(i) subject to the practices and procedures obtaining in the receiving State, representing or arranging appropriate representation for nationals of the sending State before the tribunals and other authorities of the receiving State, for the purpose of obtaining, in accordance with the laws and regulations of the receiving State, provisional measures for the preservation of the rights and interests of these nationals, where, because of absence or any other reason, such nationals are unable at the proper time to assume the defence of their rights and interests;

(j) transmitting judicial and extra—judicial documents or executing letters rogatory or commissions to take evidence for the courts of the sending State in accordance with international agreements in force or, in the absence of such international agreements, in any other manner compatible with the laws and regulations of the receiving State;

(k) exercising rights of supervision and inspection provided for in the laws and regulations of the sending State in respect of vessels having the nationality of the sending State, and of aircraft registered in that State, and in respect of their crews;

(l) extending assistance to vessels and aircraft mentioned in sub—paragraph (k) of this Article and to

their crews, taking statements regarding the voyage of a vessel, examining and stamping the ship's papers, and, without prejudice to the powers of the authorities of the receiving State, conducting investigations into any incidents which occurred during the voyage, and settling disputes of any kind between the master, the officers and the seamen in so far as this may be authorized by the laws and regulations of the sending State;

(m) performing any other functions entrusted to a consular post by the sending State which are not prohibited by the laws and regulations of the receiving State or to which no objection is taken by the receiving State or which are referred to in the international agreements in force between the sending State and the receiving State.

* * *

Article 43
Immunity from Jurisdiction

1. Consular officers and consular employees shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of consular functions.

2. The provisions of paragraph 1 of this Article shall not, however, apply in respect of a civil action either:

(a) arising out of a contract concluded by a consular officer or a consular employee in which he did not contract expressly or impliedly as an agent of the sending State; or

(b) by a third party for damage arising from an accident in the receiving State caused by a vehicle, vessel or aircraft.

APPENDIX H

Government Employees Compensation Act, R.S.C. 1985, c. G-5

Section 1. Short title

This Act may be cited as the *Government Employees Compensation Act*.

Section 2. Definitions

In this Act,

"accident" includes a wilful and an intentional act, not being the act of the employee, and a fortuitous event occasioned by a physical or natural cause; *("accident")*

"common-law partner", in relation to an employee, means a person who was, immediately before the employee's death, cohabiting with the employee in a conjugal relationship, having so cohabited for a period of at least one year; *("conjoint de fait")*

"compensation" includes medical and hospital expenses and any other benefits, expenses or allowances that are authorized by the law of the province where the employee is usually employed respecting compensation for workmen and the dependants of deceased workmen; *("indemnité")*

"dependant", in relation to an employee, includes

(a) a common-law partner of the employee, and

(b) a person who was cohabiting with the employee immediately before the employee's death and is a parent of the employee's child;

("personne à charge")

"employee" means

(a) any person in the service of Her Majesty who is paid a direct wage or salary by or on behalf of Her Majesty,

(b) any member, officer or employee of any department, corporation or other body that is established to perform a function or duty on the Government of Canada's behalf who is declared by the Minister with the approval of the Governor in Council to be an employee for the purposes of this Act,

(c) any person who, for the purpose of obtaining employment in any department, corporation or other body that is established to perform a function or duty on the Government of Canada's behalf, is taking a training course that is approved by the Minister for that person,

(d) any person who is employed by any department, corporation or other body that is established to perform a function or duty on the Government of Canada's behalf, who is on leave of absence without pay and, for the purpose of increasing the skills used in the performance of their duties, is taking a training course that is approved by the Minister for that purpose, and

(e) any officer or employee of the Senate, House of Commons, Library of Parliament, office of the Senate Ethics Officer, office of the Conflict of Interest and Ethics Commissioner, Parliamentary Protective Service or office of the Parliamentary Budget Officer;

("agents de l'État")

"Her Majesty" means Her Majesty in right of Canada; *("Sa Majesté")*

"industrial disease" means any disease in respect of which compensation is payable under the law of the province where the employee is usually employed respecting compensation for workmen and the dependants of deceased workmen; *("maladie professionnelle")*

"Minister" means the Minister of Labour. *("ministre")*

Section 3. Persons excluded

3(1)Persons excluded

This Act does not apply to any person who is a member of the regular force of the Canadian Forces or of the Royal Canadian Mounted Police.

3(2)Application

This Act applies in respect of an accident occurring or a disease contracted within or outside Canada.

Section 4. Persons eligible for compensation

4(1) Persons eligible for compensation

Subject to this Act, compensation shall be paid to

(a) an employee who

(i) is caused personal injury by an accident arising out of and in the course of his employment, or

(ii) is disabled by reason of an industrial disease due to the nature of the employment; and

(b) the dependants of an employee whose death results from such an accident or industrial disease.

4(2) Rate of compensation and conditions

The employee or the dependants referred to in subsection (1) are, notwithstanding the nature or class of the employment, entitled to receive compensation at the same rate and under the same conditions as are

provided under the law of the province where the employee is usually employed respecting compensation for workmen and the dependants of deceased workmen, employed by persons other than Her Majesty, who

(a) are caused personal injuries in that province by accidents arising out of and in the course of their employment; or

(b) are disabled in that province by reason of industrial diseases due to the nature of their employment.

4(3) Determination of compensation

Compensation under subsection (1) shall be determined by

(a) the same board, officers or authority as is or are established by the law of the province for determining compensation for workmen and dependants of deceased workmen employed by persons other than Her Majesty; or

(b) such other board, officers or authority, or such court, as the Governor in Council may direct.

4(5) Payable to persons determined by awarding authority

Any compensation awarded to an employee or the dependants of a deceased employee by a board, officer, authority or court, under the authority of this Act, shall be paid to the employee or dependants or to such person as the board, officer, authority or court may direct, and the board, officer, authority or court has the same jurisdiction to award costs as is conferred in cases between private parties by the law of the province where the employee is usually employed.

4(6)Compensation, etc., payable out of C.R.F.

There may be paid out of the Consolidated Revenue Fund,

(a) any compensation or costs awarded under this Act;

(b) to the board, officers, authority or court authorized by the law of any province or under this Act to determine compensation cases, such amount as an accountable advance in respect of compensation or costs that may be awarded under this Act as, in the opinion of the Treasury Board, is expedient;

(c) in any province where the general expenses of maintaining the board, officers, authority or court are paid by the province or by contributions from employers, or by both, such portion of the contributions as, in the opinion of the Treasury Board, is fair and reasonable;

(d) in any province where the board, officers or authority may make expenditures to aid in getting injured workmen back to work or removing any handicap resulting from their injuries, such portion of those expenditures as, in the opinion of the Treasury Board, is fair and reasonable; and

(e) to the board, officers, authority or court, such amount as an accountable advance in respect of any expenses or expenditures that may be paid under paragraph (c) or (d) as, in the opinion of the Treasury Board, is expedient.

Section 7. Contributions to workmen's compensation fund in certain cases

7(1) Contributions to workmen's compensation fund in certain cases

Where an employee locally engaged outside Canada is usually employed in a place where under the law respecting compensation to workmen and the dependants of deceased workmen payments are made to a fund out of which compensation is paid to workmen and the dependants of deceased workmen, there may, with the approval of the Treasury Board, be paid to that fund, out of the Consolidated Revenue Fund, such payments in respect of that employee as may be deemed necessary by the Minister.

7(2) Compensation to employee or dependants in special cases

The Minister may, with the approval of the Treasury Board, award compensation in such amount and in such manner as he deems fit to

(a) an employee locally engaged outside Canada who

(i) is caused personal injury by an accident arising out of and in the course of his employment, or

(ii) is disabled by reason of any disease that is due to the nature of the employment and peculiar to or characteristic of the particular process, trade or occupation in which the employee was employed at the time the disease was contracted, and

(b) the dependants of such an employee whose death results from such an accident or disease,

and who are not otherwise entitled to compensation under any law respecting compensation to workmen and the dependants of deceased workmen.

Section 12. No claim against Her Majesty

Where an accident happens to an employee in the course of his employment under such circumstances as entitle him or his dependants to compensation under this Act, neither the employee nor any dependant of the employee has any claim against Her Majesty, or any officer, servant or agent of Her Majesty, other than for compensation under this Act.

APPENDIX I

Locally-Engaged Staff Employment Regulations, SOR 95/152

Article 2. Interpretation

2 In these Regulations,

civilian employee means a person who is employed locally under these Regulations and who

(a) is hired in support of the Canadian Forces outside of Canada under the North Atlantic Treaty Organization Status of Forces Agreement or any other bipartite or multipartite agreement,

(b) is not in receipt of allowances under the *Foreign Service Directives* or the *Military Foreign Service Regulations*, and

(c) is not a contributor under Part I of the *Public Service Superannuation Act*; (*employé civil*)

deputy head has the same meaning as in subsection 2(1) of the *Public Service Employment Act*; (*administrateur général*)

Deputy Minister means the Deputy Minister of Foreign Affairs; (*sous-ministre*)

employee means a person, other than a civilian employee, who is employed locally under these Regulations and who is not in receipt of allowances under the Foreign Service Directives; (*employé*)

employing department means a department that provides the funds for the position in which a person is employed under these Regulations; (*ministère employeur*)

Head of Mission means the senior officer in charge of a Mission or, in his absence, such person as is authorized to act in his place; (*chef de mission*)

integrated employee means an employee in a position for which the funds are provided by the Department of Foreign Affairs and International Trade; (*employé intégré*)

mission means an office of the Government of Canada outside Canada, including an office of the Canadian Forces; (*mission*)

non-integrated employee means an employee in a position for which the funds are provided by a department other than the Department of Foreign Affairs and International Trade; (*employé non intégré*)

transfer means the appointment without competition, that does not result in a change of tenure, of an employee from one position at a Mission to another position at a Mission where

(a) the other position has a maximum rate of pay no higher than the first position,

(b) if the positions are at different Missions that use the same classification plan, the classification levels of the two positions are the same, or

(c) if the positions are at different Missions that use different classification plans, the two Heads of Missions, after examining the statement of duties of the positions, indicate in writing that the duties of the positions are equivalent. (*mutation*)

* * *

Article 5. Appointments

5(1) Subject to subsection (2), the Deputy Minister may employ persons locally at a Mission as employees for a specified period or an indeterminate period in accordance with these Regulations.

(2) A vacant position at a Mission shall be filled by competition, subject to priority appointment given to laid off employees under subsection 11(3) of these Regulations.

(3) Where more than one person is eligible for priority under subsection 11(3), the Deputy Minister shall appoint the most meritorious person.

(4) Where no candidate is found qualified to perform at the full level of a position, an appointment to the position may be made at a lower level.

(5) An employee who is appointed for a specified period ceases to be an employee at the expiration of that period.

(6) Despite subsection (2), the Deputy Minister may authorize the transfer of an employee to another position in a Mission if the employee meets the requirements of the position to be filled using the selection criteria stated in section 7.

* * *

Article 9. Oaths and Affirmations of Allegiance and Office

9(1) Every person who is a Canadian citizen shall, prior to being employed under these Regulations, take and subscribe an Oath of Allegiance or Affirmation of Allegiance and an Oath of Office and Secrecy or an Affirmation of Office and Secrecy in the forms set out in Schedules I to IV, whichever are appropriate.

(2) Subject to subsection (3), every person who is not a Canadian citizen shall, prior to being employed under these Regulations, take and subscribe an Oath of Office and Secrecy or an Affirmation of Office and Secrecy in the forms set out in Schedule III or IV, whichever is appropriate.

(3) Where, at any time, the Deputy Minister is satisfied that it is not in the best interests of the Government of Canada that subsection (2) apply to non-Canadian citizens at a Mission, the Deputy Minister may exclude such non-Canadian citizens from the operation of that subsection.

* * *

SCHEDULE III. Oath of Office and Secrecy

I, _____ solemnly and sincerely swear that I will faithfully and honestly fulfil the duties that devolve upon me by reason of my employment in the Public Service and that I will not, without due authority in that behalf, disclose or make known any matter that comes to my knowledge by reason of such employment. So help me God.

_____

Signature of Employee

at _____

this day of _____

Sworn and subscribed before me

_____

Signature of Person Administering Oath

SCHEDULE IV. Affirmation of Office and Secrecy

I, _____ solemnly and sincerely affirm that I will faithfully and honestly fulfil the duties that devolve upon me by reason of my employment in the Public Service and that I will not, without due authority in that behalf, disclose or make known any matter that comes to my knowledge by reason of such employment.

_____

Signature of Employee

at _____

this day of _____

Affirmed and subscribed before me

_____

Signature of Person Administering Affirmation