No.

IN THE

Supreme Court of the United States

ALAN GROSS AND JUDITH GROSS,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. With only specifically-enumerated and narrow exceptions, the Federal Tort Claims Act ("FTCA") waives sovereign immunity and imposes liability on the United States "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. One such exception, the "foreign country exception," bars "[a]ny claim arising in a foreign country." 28 U.S.C. § 2680(k). In *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), this Court held that the applicability of the foreign country exception turns solely on the location of a plaintiff's injury. The Court thus held that the exception barred a claim for injuries that occurred exclusively in Mexico, even though some of the injury-causing conduct occurred in the United States. The question presented is one that was not addressed in *Sosa* and one on which lower courts are divided: whether the foreign country exception bars an FTCA claim where the plaintiffs have alleged injuries in both the United States and a foreign country.

II. This Court has recognized that the purpose of the foreign country exception is to prevent application of foreign tort law to claims against the United States. Here, even though neither party argued for the application of foreign tort law and even though the plaintiffs alleged injuries both in the United States and in a foreign country, the courts below held that the foreign country exception barred their claims. The courts below thus construed the foreign country exception to create two

classes of plaintiffs: (1) those injured solely in the United States; and (2) those injured solely or partly abroad—and held that the latter have no claim under the FTCA. The question presented is whether the foreign country exception, as applied here, lacks a rational basis and therefore violates the Equal Protection Clause.

PARTIES TO THE PROCEEDING

The Petitioners (plaintiffs-appellants below) are Alan and Judith Gross. The respondent (defendant-appellee below) is the United States of America (the "Government").

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The opinion of the United States District Court for the District of Columbia granting the Government's motion to dismiss is reported at 946 F. Supp. 2d 120. Pet. App. A16–A32. The opinion of the United States Court of Appeals for the District of Columbia Circuit affirming the District Court is reported at 771 F.3d 10. Pet. App. A1–A15.

JURISDICTION

Petitioners seek review of a final judgment of the D.C. Circuit, which was entered on November 14, 2014. Pet. App. A14–A15. This Petition is timely filed by the deadline of February 12, 2015. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the FTCA and the Constitution are set forth in the Appendix to the Petition. Pet. App. A33–A37.

STATEMENT OF FACTS

I. THE DISTRICT COURT PROCEEDING

Petitioner Alan Gross formerly worked as a subcontractor to Development Alternatives, Inc. ("DAI"), which was a prime contractor of the United States Agency for International Development ("USAID"), on a project aimed at improving internet access for Cuba's Jewish community. Pet. App. A57–

A63. Mr. Gross traveled to Cuba for this project five times in 2009. Pet. App. A63–A71.

On December 3, 2009, during his last visit to Cuba, Mr. Gross was arrested and imprisoned in Cuba by the Cuban government, under conditions that the District Court aptly described as "harrowing." Pet. App. A19, A70. On March 11, 2011, the Cuban government convicted Mr. Gross of "Acts against the Independence or Territorial Integrity of the State" and sentenced him to fifteen years in Cuban prison. Pet. App. A70. The Cuban government kept Mr. Gross imprisoned in Cuba until December 17, 2014, when he was released as part of an agreement between the United States and Cuba to expand relations between the two nations.

A. The Complaint

On November 16, 2012, Alan Gross and his wife, Petitioner Judith Gross, sued the Government and DAI for their responsibility in sending Mr. Gross to Cuba without proper training or supervision.[1] Pet. App. A38–A89. (The Grosses and DAI settled shortly thereafter.)

Mr. and Mrs. Gross alleged injuries in two separate locations: (1) Mr. Gross's physical and emotional harm while imprisoned in Cuba, *see* Pet. App. A76–A77; and (2) Mr. and Mrs. Gross's

[1] Because the District Court granted the Government's motion to dismiss, the allegations of the Grosses' Complaint are undisputed for purposes of the Petition. The District Court had jurisdiction over the Grosses' claims under 28 U.S.C. §§ 1346(b), 2671-2680.

economic harm and Mrs. Gross's non-economic harm, which occurred solely in the United States, *see* Pet. App. A77. Specifically, Mr. and Mrs. Gross alleged that they suffered economic injuries solely in the United States, including the destruction of Mr. Gross's business, damage to his professional reputation, lost income, legal fees, and medical expenses incurred by Mrs. Gross. Pet. App. A77. Mrs. Gross further alleged that she suffered non-economic damages exclusively in the United States, such as emotional distress and a loss of Mr. Gross's society, affection, assistance, and fellowship. Pet. App. A77.

B. The Government's Motion to Dismiss

1. The Statutory Claim

The Government moved to dismiss the Grosses' claims in their entirety—including the claims based on domestic injury—under the FTCA's foreign country exception. The Government argued that because none of the Grosses' domestic injuries would have occurred "but for" Mr. Gross's incarceration in Cuba—i.e., the Cuban government's conduct in detaining Mr. Gross—the foreign country exception barred all of the claims. To support its argument that all injury was derivative of foreign injury, the Government cited *Harbury v. Hayden*, 522 F.3d 413 (D.C. Cir. 2008), a loss of consortium claim brought by the wife of an individual whose injuries occurred entirely in a foreign country.

In response, the Grosses asserted that the foreign country exception could not apply because, in addition to Mrs. Gross's domestic injuries, many of Mr. Gross's own injuries occurred in the United States.

2. The Equal Protection Claim

The Grosses further argued that, even if the foreign country exception encompassed their claims, the exception was unconstitutional as applied. The foreign country exception distinguishes between two classes of U.S. citizens injured by governmental negligence: those whose injuries occur abroad, and those whose injuries occur in the United States. Although the Grosses acknowledged that this distinction was rational in general, they argued that it was unconstitutional as applied to them because it was uncontested below that Cuban law will not apply here and thus the exception's purpose of avoiding foreign tort law was not implicated in this case. Specifically, *both* DAI and the Grosses asserted below that foreign law would not apply, and the Government never disputed this point.

C. The District Court's Decision

The District Court nonetheless granted the Government's motion. Pet. App. A32. The court ruled that the foreign country exception precluded all of the Grosses' claims and therefore dismissed the complaint. Pet. App. A16–A32.

1. The Statutory Claim

In rejecting the Grosses' claims as a matter of statutory construction, the District Court did not address the allegations that Mr. Gross suffered distinct economic injuries exclusively in the United States and that Mrs. Gross suffered distinct economic and non-economic injuries entirely in the United States. Pet. App. A21–A26. Instead, the District Court focused solely on Mr. Gross's arrest and detention in Cuba, characterized this as his "injury," and then found that the foreign country exception bars recovery for this injury as a matter of law. With respect to Mrs. Gross, the District Court relied on *Harbury* to reject her injuries as purely derivative of Mr. Gross's "injury" in Cuba. Pet. App. A21–A26.

2. The Equal Protection Claim

In rejecting the Grosses' equal protection claim, the District Court concluded that the foreign country exception's different treatment of U.S. citizens depending on where their injuries occurred is facially rational because it "protect[s] the United States' coffers from the whims of foreign law." Pet. App. A28. Yet, while the District Court correctly stated the purpose for the exception, it did not then analyze whether foreign/Cuban law would apply, and thus whether invoking the exception to dismiss the Grosses' claims actually serves the exception's purpose. Pet. App. A26–A30.

II. THE COURT OF APPEALS' DECISION

A. The Statutory Claim

On appeal, the D.C. Circuit accepted that Mr. and Mrs. Gross had sustained substantial injuries in the United States.[2] Indeed, during oral argument, Judge Rogers suggested that *Harbury* arguably does not apply where the domestic injuries are substantial and separate from the foreign ones:

> Go back to *Harbury*. Just hypothetically, if the head of General Motors is asked to go to Cuba on behalf of the United States Government, and basically the same thing happens to him as happened to Mr. Gross . . . . trying to distinguish that from what the head of General Motors might say about the fact that he is being detained outside of the country has adversely [a]ffected the corporation, and the value of the corporation has decreased and he's seeking some recovery for that financial loss, very separate it seems the situation from the *Harbury* situation . . . .

Pet. App. A101.

The D.C. Circuit nonetheless concluded that the Grosses' substantial domestic injuries were legally irrelevant because they derived from

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[2] The D.C. Circuit had jurisdiction under 28 U.S.C. § 1291.

Mr. Gross's status of incarceration in Cuba, which the D.C. Circuit considered to be his injury. Pet. App. A4–A7. The D.C. Circuit was unpersuaded by the case of *S.H. ex rel. Holt v. United States*, 32 F. Supp. 3d 1111 (E.D. Cal. 2014), which held that, where a plaintiff alleges both foreign and domestic injuries, the foreign country exception bars recovery for only the former, even where, as here, the domestic injury would not have occurred "but for" events abroad. Pet. App. A6. The *S.H.* court noted that its decision gave effect both to *Sosa*, which held that the foreign country exception applies to injuries occurring abroad, and to the broad remedial purpose of the FTCA by allowing damages for domestic injuries but not for foreign ones. *S.H.*, 32 F. Supp. at 1116-17.

B. The Equal Protection Claim

On the Grosses' equal protection claim, the D.C. Circuit accepted that Cuban law would not apply to the Grosses' claims, but the D.C. Circuit concluded that this also was irrelevant. Specifically, the D.C. Circuit noted that the language of the foreign country exception is broad enough to encompass situations where foreign law would not apply. Pet. App. A8–A9 (citing *Sosa*, 542 U.S. at 711). But the D.C. Circuit did not address the *constitutional* question that its observation begs: whether it is constitutional to apply the language of the foreign country exception where it is undisputed that foreign law does not apply and thus applying the exception does not serve its purpose. The D.C. Circuit concluded that, even in as-applied constitutional challenges, at least those involving

rational basis review under the Equal Protection Clause, there is no need for a factual analysis of whether a statute's facially-valid purpose is served. Pet. App. A9–A13.

REASONS FOR GRANTING THE WRIT

As discussed more fully below, this Court should grant the writ for two reasons. First, this Court should resolve the question not addressed in *Sosa*—whether the foreign country exception bars claims that involve injuries that occur in the United States when the plaintiffs also suffer separate injuries abroad. This question is an important one, and the lower courts are divided on the answer, with the courts below holding that the foreign country exception does bar such claims and a district court in the Ninth Circuit holding that it does not. Second, this Court should grant the writ to resolve whether the Equal Protection Clause permits the distinction drawn by the courts below between claims that involve solely domestic injuries and those that involve a combination of domestic and foreign injuries, given that no party here advocated for foreign tort law and thus this distinction, as applied here, bears no rational relationship to the purpose of the foreign country exception, which is to prevent the application of foreign tort law to claims against the United States.

I. THE APPLICABILITY OF THE FOREIGN COUNTRY EXCEPTION TO CASES WHERE THE PLAINTIFF'S INJURY OCCURRED AT LEAST PARTLY IN THE UNITED STATES IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE RESOLVED BY THIS COURT.

In determining whether to grant a petition for a writ of certiorari, this Court considers, among other things, whether "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). Application of Rule 10(c) to the facts of the present case demonstrates that there are "compelling reasons" for this Court to grant the writ. R. 10.

Here, the D.C. Circuit "has decided an important question of federal law," namely, the applicability of the foreign country exception to an FTCA case that involves injuries both inside and outside the United States. R. 10(c). The importance generally of the scope of the foreign country exception is demonstrated by the numerous cases this Court has decided regarding the exception. *See Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); *Smith v. United States*, 507 U.S. 197 (1993); *United States v. Spelar*, 338 U.S. 217 (1949). And the specific question decided by the D.C. Circuit is important because of Congress' concern that the United States ought not to be subject to "liabilities depending on the laws of a foreign power." *Spelar*, 338 U.S. at 221. Finally, the question is important because it

involves critical legal and public policy determinations affecting when U.S. citizens can and should have access to the courts to seek redress for Government-caused injuries. The decisions of the lower courts will have profound negative consequences for all U.S. residents who travel abroad, no matter how briefly, including those who travel for work. The decisions would mean that a U.S. resident who travels abroad for one day and suffers some injury during that limited time would have no redress for any subsequent harm occurring solely in the United States, even if that domestic injury dwarfs the foreign injuries. The D.C. Circuit acknowledged this possibility during oral argument by asking the Government whether the foreign country exception would bar a claim by the CEO of General Motors for financial loss to the corporation if he or she were detained in a foreign country for some period of time. Pet. App. A101.

This important federal question "has not been, but should be, settled by this Court." R. 10(c). Despite the many decisions of this Court interpreting the foreign country exception, none has addressed the precise question presented here.

The decision that comes closest is *Sosa*, which was decided over a half-century after Congress passed the FTCA. There, the Court clarified the scope of the foreign country exception, holding that the applicability of the exception turns solely on the location of a plaintiff's injury and not the location of the events that caused that injury. *See Sosa*, 542 U.S. at 711-12.

At issue in *Sosa* was whether the foreign country exception barred the claim of Humberto Alvarez-Machain, a Mexican physician who sued the Government for false arrest after he was captured by Mexican nationals and later tried in the United States for his role in the torture and murder of a U.S. Drug Enforcement Administration ("DEA") agent in Mexico. *Id.* at 697, 700. The district court dismissed Mr. Alvarez-Machain's claim, holding that it was barred by the foreign country exception because Mr. Alvarez-Machain's arrest—the only injury for which he was suing—occurred in Mexico. *Id.* at 699. The Ninth Circuit (both the original panel and en banc) reversed, finding potential liability based on the "headquarters doctrine," under which the United States can be held liable for injuries occurring entirely abroad if the negligent or wrongful acts by the Government occurred in the United States (in *Sosa*, the acts of DEA agents in California in planning Mr. Alvarez-Machain's capture). *See Alvarez-Machain v. United States*, 331 F.3d 604, 638-39 (9th Cir. 2003).

This Court reversed, holding that the proper inquiry is not where the injury-causing conduct—domestic or foreign—occurred, but rather where the injuries occurred. *Sosa,* 542 U.S. at 711. Because *all* of Mr. Alvarez-Machain's injury occurred in Mexico, this Court held that the foreign country exception barred his claim. *Id.* The Court thus ruled that both the conduct of the United States in arranging Mr. Alvarez-Machain's arrest and the conduct of Mexican nationals in detaining him (both of which were proximate causes of Mr. Alvarez-Machain's injury) were irrelevant in determining

whether the foreign country exception applied. *Id.* at 704-06.

Sosa, however, did not address the question presented here: how far does the foreign country exception extend in the context of claims involving multiple injuries in multiple locations, namely, injuries both in the United States and abroad. Specifically, does the exception bar such claims in their entirety, precluding any recovery even for the domestic injuries; or, consistent with the principle that governmental immunity is not an all-or-nothing proposition, does the exception preclude recovery only of damages for the foreign injuries, while allowing recovery of damages for the domestic injuries?

Over a decade has passed since the Court decided *Sosa*, and in that time, only two cases to our knowledge have addressed the question posed here, and they reached diametrically opposite conclusions. Specifically, as discussed, in the instant case the courts below concluded that the foreign country exception completely bars claims involving both domestic and foreign injuries. Pet. App. A1–A32. By contrast, a district court in the Ninth Circuit has ruled that the foreign country exception does not completely bar a claim when some of a plaintiff's injuries occurred solely in the United States but other injuries occurred in a foreign country. *S.H. ex rel. Holt v. United States*, 32 F. Supp. 3d 1111 (E.D. Cal. 2014).

The plaintiffs in *S.H.* sued the Government for negligence that allegedly caused their daughter's

cerebral palsy. *Id.* at 1115. It was undisputed that one injury was the daughter's premature birth in Spain but that other injuries, including the diagnosis of cerebral palsy, occurred in the United States. *Id.* at 1117-18. And while the plaintiffs sought damages for injuries occurring in both countries, the court determined that "there is no basis for this court to conclude that even if plaintiffs are seeking more damages than they are entitled to, that they are therefore entitled to no damages whatever." *Id.* at 1119. Accordingly, the court allowed the plaintiffs to recover damages for injuries occurring in the United States but not for injuries occurring in Spain. *Id.* at 1142-43.

The Government argued there, as it has here, that the domestic injuries were irrelevant because they would not have occurred "but for" the injury in Spain. *See id.* at 1122-28. The court rejected this argument, noting that the Government has the burden to prove that the foreign country exception unambiguously applies. *Id.* at 1117 (citing *S.H. ex rel Holt*, No. CIV. S–11–1963 LKK DAD, 2013 WL 6086775, at *6 (E.D. Cal. Nov. 19, 2013) (in turn citing *Prescott v. United States*, 973 F.2d 696, 701-02 (9th Cir. 1992), *Bolt v. United States*, 509 F.3d 1028, 1032 (9th Cir. 2007), and *Stewart v. United States*, 199 F.2d 571, 520 (7th Cir. 1952)). Yet, this "but for" argument is exactly what the courts below adopted here.

S.H. is consistent with this Court's precedent in *Sosa,* which, in barring recovery for foreign injuries, focuses on the place of injury, rather than the place where the causative events occurred. *S.H.*

is also consistent with this Court's direction that, in interpreting the FTCA, lower courts should construe the statute's waivers of immunity broadly and exceptions to those waivers narrowly. "[U]nduly generous interpretations of the exceptions run the risk of defeating the central purpose of the statute, which waives the Government's immunity from suit in sweeping language." *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 491-92 (2006) (citations omitted). Although ambiguities regarding governmental immunity typically are construed in the Government's favor, this Court has directed that this principle is "unhelpful in the FTCA context." *See id.*; *see also United States v. Nordic Village, Inc.*, 503 U.S. 30, 34 (1992) (although exceptions to waivers of immunity often are construed broadly in favor of the Government, "[w]e have on occasion narrowly construed exceptions to waivers of sovereign immunity where that was consistent with Congress' clear intent, as in the context of the sweeping language of the Federal Tort Claims Act") (citations and quotations omitted).

S.H. is also consistent with the D.C. Circuit's own ruling in *Moore v. Valder*, which held that sovereign immunity is not an all-or-nothing proposition. 65 F.3d 189 (D.C. Cir. 1995). In *Moore*, the court interpreted the FTCA discretionary function exception to bar some FTCA claims in a lawsuit but not others. The court noted that it "must examine carefully the allegations made to determine whether they are sufficiently separable from protected discretionary decisions." *Id.* at 196 (citation omitted). Specifically, the court considered whether the exception barred Mr. Moore's claims

against the Government for certain misconduct, including intimidating and coercing witnesses into changing their testimony; concealing evidence of innocence; manipulating witness testimony; losing, destroying, or concealing exculpatory information; disclosing grand jury testimony to third parties; and withholding exculpatory information after the indictment. *Id.* at 191-92, 197. The D.C. Circuit held that the FTCA's discretionary function exception barred claims based on *some* of these allegations but that disclosing grand jury testimony to unauthorized third parties "is *not* a discretionary activity" and thus Mr. Moore's claim based on that allegation could go forward. *Id.* at 197. Thus, *Moore* holds that it is proper to apply FTCA exceptions to limit governmental liability for some claims but not others within the same lawsuit. The D.C. Circuit erred here by relying on the foreign country exception to dismiss *all* of the Grosses' claims, instead of differentiating between claims to which the exception applied and claims to which it did not.

This Court should grant a writ of certiorari to resolve whether the FTCA bars altogether claims that allege injuries both in the United States and abroad. As shown above, this issue is an important one, and it is one on which lower courts have disagreed.

II. UNDER *CITY OF CLEBURNE*, THE FOREIGN COUNTRY EXCEPTION IS UNCONSTITUTIONAL AS APPLIED WHERE, AS HERE, ENFORCING THE EXCEPTION AS CONSTRUED BY THE LOWER COURTS HAS NO RATIONAL BASIS, IN LIGHT OF THE STATUTORY PURPOSE.

Under Supreme Court Rule 10(c), in determining whether to grant a writ of certiorari, the Court considers whether "a United States court of appeals has decided an important question of federal law . . . in a way that conflicts with relevant decisions of this Court." Here, as discussed above, the question of law decided by the D.C. Circuit is an important one. And, as shown below, the decisions of the lower courts conflict with this Court's decision in *City of Cleburne, Texas v. Cleburne Living Center*, which held that a court's application of a statute in a manner at odds with its stated purpose lacks a rational basis and therefore violates the Equal Protection Clause. 473 U.S. 432-33, (1985). Specifically, the lower courts' application of the foreign country exception creates two classes of plaintiffs, those whose injuries occurred entirely in the United States and those whose injuries occurred wholly or partly abroad. As discussed below, where, as here, foreign law will *not* apply, this distinction bears no rational relationship to the purpose of the foreign country exception, which is to prevent the application of foreign tort law to claims under the FTCA.

A. Under *City of Cleburne*, There Is a Critical Distinction Between Facial and As-Applied Equal Protection Challenges, Even Under Rational Basis Review.

This Court instructed in *City of Cleburne* that a legislative provision that is facially valid nonetheless is unconstitutional as applied where enforcing the provision lacks any rational basis in light of the purpose of the provision. *City of Cleburne* involved both a facial and an as-applied equal protection challenge to a municipal zoning ordinance governing special use permits for homes serving the mentally disabled. *Id.* at 436-37. The owners of such a home brought suit against the city after it refused to grant them a permit, arguing that the ordinance, and its application to them, discriminated against the mentally disabled in violation of their equal protection rights. *Id.* Specifically, the ordinance required group homes to obtain special permits, but not other homes with multiple unrelated residents, such as fraternity houses. *Id.* at 447.

The Court first held that it was appropriate to apply rational basis review (rather than heightened scrutiny). *Id.* at 439-40. In doing so, the Court rejected the argument that the mentally disabled are a suspect or quasi-suspect class and that operating a group home is a fundamental right. *Id.* at 442, 444.

The Court then noted that it was proper to consider the as-applied challenge before passing on the facial challenge:

> We inquire first whether requiring a special use permit for the Featherston home in the circumstances here deprives respondents of the equal protection of the laws. If it does, there will be no occasion to decide whether the special use permit provision is facially invalid . . . . This is the preferred course of adjudication since it enables courts to avoid making unnecessarily broad constitutional judgments.

Id. at 447. Thus, the Court assumed for purposes of this analysis that the ordinance was facially valid.

The Court in *City of Cleburne* conducted the as-applied analysis and concluded that because "the record does not reveal any rational basis for believing that the Featherston home would pose any special threat to the city's legitimate interests, we affirm the judgment below insofar as it holds the ordinance invalid as applied in this case." *Id.* at 448. The "record" included the city's purposes in enacting the ordinance, including concerns over actions by the group home's mentally disabled inhabitants and concerns over the home's size. *Id.* at 448-49. The Court concluded that the facts regarding the particular group home supported a conclusion that giving the home a permit would not implicate any of these concerns. Among other things, the Court noted that the home would have a limited number of disabled residents and that it would have well-qualified staff members overseeing the disabled residents. *Id.* at 449-50.

B. Under the As-Applied Analysis Required By *City of Cleburne*, the Foreign Country Exception Is Unconstitutional As Applied Because Enforcing the Exception Will Not Serve Its Purpose.

As the Court has observed on multiple occasions, the purpose of the foreign country exception is to prevent the application of foreign law to claims against the Government. In *United States v. Spelar*, for example, the Court noted that "Congress . . . was unwilling to subject the United States to liabilities depending upon the laws of a foreign power." 338 U.S. at 221. This Court in *Sosa* similarly stated that "[t]he application of foreign substantive law . . . was, however, what Congress intended to avoid by the foreign country exception." 542 U.S. at 707; *see also id.* at 710 n.8 (stating that preventing application of foreign law was "the clear congressional mandate embodied by the foreign country exception"). The Court in *Sosa* even noted that a pre-*Sosa* D.C. Circuit case, which proffered an additional purpose for the exception—avoiding the logistical difficulties of obtaining evidence abroad—was "attempting to recast" the exception's true purpose. *Id.* at 707. (citing *Sami v. United States*, 617 F.2d 755, 762 (D.C. Cir. 1979)).

Here, there is nothing in the record to support a concern that foreign law might apply—and indeed the record is to the contrary. DAI agreed with the Grosses that foreign law would not apply, stating in briefing below that, "although [Mr. Gross's] injury occurred in Cuba, applying Cuban law is not

supported by a governmental-interest analysis." The Government never contested this point.

Yet, although both the District Court and the D.C. Circuit accepted that Cuban law would not apply, they held that this point was irrelevant because the foreign country exception's purpose of avoiding foreign tort law is rational in general. Pet. App. A7–A11, A29–A30. In so holding, the D.C. Circuit stated that the constitutional analysis for both facial and as-applied challenges is the same and that only the scope of remedy differs. Pet. App. A9–A10. Thus, the D.C. Circuit concluded that "the Grosses' objections that the District Court erred by failing to engage in a fact-specific analysis and to allow discovery fail." Pet. App. A11. This decision is contrary to *City of Cleburne*, and thus certiorari is appropriate.

CONCLUSION

The petition for a writ of certiorari should be granted.

February 12, 2015 Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 19, 2014

Decided November 14, 2014

No. 13-5168

ALAN GROSS AND JUDITH GROSS, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 1:12-cv-01860)

[USCA Case #13-5168 Document #1522265
Filed 11/14/2014]

Barry I. Buchman argued the cause for appellants. With him on the briefs were *Scott D. Gilbert*, *Natalie A. Baughman*, and *Emily P. Grim*.

Alan Burch, Assistant U.S. Attorney, argued the cause for appellee. On the brief were *Ronald C. Machen Jr.*, U.S. Attorney, and *R. Craig Lawrence* and *Michelle Lo*, Assistant U.S. Attorneys.

Before: HENDERSON, ROGERS and KAVANAUGH, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* ROGERS.

ROGERS, *Circuit Judge*: The Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996, Pub. L. No. 104–114, 110 Stat. 785 (1996) (codified at 22 U.S.C. § 6021 *et seq*.), aimed "to assist the Cuban people in regaining their freedom and prosperity, as well as in joining the community of democratic countries that are flourishing in the Western Hemisphere." *Id.* § 3, 22 U.S.C. § 6022(1). The Act authorized the President "to furnish assistance and provide other support for individuals and independent nongovernment organizations to support democracy-building efforts for Cuba." *Id.* § 109, 22 U.S.C. § 6039. In that regard, the United States Agency for International Development ("USAID") entered a contract with a private consulting firm, Development Alternatives, Inc. ("DAI"), to provide humanitarian support to groups within Cuba. DAI, in turn, contracted with Alan Gross to train the Jewish community in Cuba to use and maintain information and communication technologies, such as mobile phones, wireless technologies, and personal computers. As his fifth trip to Cuba was drawing to a close in December 2009, Mr. Gross was detained and interrogated by Cuban authorities. In 2011, he was convicted for his participation in "a subversive project of the U.S. government that aimed to destroy the Revolution through the use of communications systems out of the control of [Cuban] authorities" and sentenced to fifteen years' imprisonment. Compl. ¶ 115 (alteration in original).

In 2012, Mr. Gross and his wife Judith sued DAI and the United States, alleging negligence, gross negligence, negligent infliction of emotional

distress, and loss of consortium in connection with Mr. Gross's work in Cuba. In addition to physical and emotional harm suffered by Mr. Gross, they alleged that they "have suffered significant economic losses *due to* Mr. Gross's wrongful arrest and continuing wrongful detention," including "the destruction of Mr. Gross's business," lost income, legal fees, and medical expenses. *Id.* ¶ 129 (emphasis added). The Grosses settled their claims against DAI. The United States moved to dismiss the claims against it on the ground of sovereign immunity. The district court granted the motion, ruling that the foreign country exception to the waiver of sovereign immunity in the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2680(k), foreclosed the Grosses' claims "[b]ecause [their] injuries . . . stem from [Mr.] Gross's imprisonment in Cuba," and that the exception did not, under rational basis scrutiny, violate the Equal Protection Clause as applied to the Grosses. *Gross v. Dev. Alternatives, Inc.*, 946 F. Supp. 2d 120, 124, 127 (D.D.C. 2013).

The Grosses appeal, and our review is *de novo*, *see, e.g.*, *Janko v. Gates*, 741 F.3d 136, 139 (D.C. Cir. 2014). The court "accept[s] the well-pleaded factual allegations set forth in [the Grosses'] complaint as true for purposes of this stage of the litigation and construe[s] reasonable inferences from those allegations in [their] favor, although we are not required to accept [the Grosses'] legal conclusions as true." *Doe v. Rumsfeld*, 683 F.3d 390, 391 (D.C. Cir. 2012). For the following reasons, we affirm the dismissal of the complaint.

I.

The FTCA waives the United States's sovereign immunity from tort claims and, subject to exceptions, renders the United States liable in tort as if it were a private person. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 700 (2004); 28 U.S.C. § 1346(b)(1). When determining whether one of the exceptions to that waiver applies, the court "is to identify those circumstances which are within the words and reason of the exception — no less and no more." *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 492 (2006) (quoting *Kosak v. United States*, 465 U.S. 848, 853 n.9 (1984)) (internal quotation marks omitted). Under the foreign country exception, the United States retains sovereign immunity from "[a]ny claim arising in a foreign country." 28 U.S.C. § 2680(k). The Grosses contend the United States failed to meet its burden to show this exception applies. Insofar as they maintain the district court erred as a matter of law in construing the scope of the exception, their challenge must fail at the outset.

In *Sosa*, the Supreme Court held that the foreign country exception "bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred." 542 U.S. at 712. The Court rejected the "headquarters doctrine," under which this exception had not applied to claims that a domestic act or omission had its operative effect in another country. *See id.* at 701–10. "[F]ollow[ing] the lead of *Sosa*," this court held in *Harbury v. Hayden*, 522 F.3d 413, 423 (D.C. Cir. 2008), that a plaintiff "cannot plead around the FTCA's foreign-country exception simply by claiming

injuries . . . that are derivative of the foreign-country injuries at the root of the complaint" — in that case, a widow's "emotional injuries in the United States as a result of the death of her husband [in Guatemala]." *Id.*

Resisting the force of this precedent, the Grosses emphasize that Mr. Gross's alleged economic injuries "have occurred exclusively in the United States" and consequently are not derivative of the injuries he has suffered in Cuba. Reply Br. 6. They also point to the "unique facts," Appellants' Br. 20, that his injuries were sustained when the United States sent him to Cuba to fulfill U.S. objectives. But these arguments are either another way of invoking the headquarters doctrine rejected in *Sosa* or suggesting we can ignore this court's interpretation in *Harbury* of the foreign country exception as extending to derivative injuries, which we cannot do, *see LaShawn A. v. Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996). Likewise, their characterization of Mr. Gross's economic injuries as "primary" rather than "derivative," Reply Br. 7, does not advance the Grosses' cause because it misapprehends the holding in *Harbury* and ignores the allegations of their own complaint. The Grosses' complaint attributes all of their alleged injuries to Mr. Gross's imprisonment in Cuba; they allege that they "have suffered significant economic losses *due to* Mr. Gross's wrongful arrest and continuing wrongful detention." Compl. ¶ 129 (emphasis added). The complaint, on its face, therefore establishes that the Grosses' alleged economic injuries are "based entirely on" injuries suffered by Mr. Gross in Cuba and are

"derivative" of those injuries under *Harbury*, 522 F.3d at 423.[1]

The Grosses insist that to cloak the United States in immunity when "it sends a U.S. citizen into a foreign country to accomplish U.S. Government objectives in what the United States knows to be a dangerous fashion, and that citizen suffers at least some injury in the United States as a result," would create a "sweeping new 'government operations' exception." Appellants' Br. 20–21. This view is foreclosed by the plain text of the foreign country exception and cases interpreting it. In *Harbury*, the court considered the potential effect of allowing derivative claims to proceed, despite the foreign country exception, explaining that to do so "would threaten to 'swallow the foreign country exception whole.'" 522 F.3d at 423 (quoting *Sosa*, 542 U.S. at 703). Insofar as the Grosses seek to highlight the

[1] The Grosses' reliance on the non-binding analysis in *S.H. v. United States ("S.H. II")*, — F. Supp. 2d. —, No. CIV. S-11-1963 LKK D, 2014 WL 3362366 (E.D. Cal. July 8, 2014), and *S.H. ex rel. Holt v. United States ("S.H. I")*, No. CIV.S-11-1963 LKK DAD, 2013 WL 6086775 (E.D. Cal. Nov. 19, 2013), is unavailing. In *S.H.*, the Eastern District of California addressed the foreign country exception in a negligence case where the alleged injuries to a child born in Spain consisted of catastrophic neurological damage and cerebral palsy. A threshold question was when and where the cerebral palsy "occurred." The *S.H.* district court conducted a choice-of-law analysis to conclude, in the murky medical diagnostic context, that her injury occurred in the United States. *See S.H. II*, 2014 WL 3362366, at *14, 16–17. Because the complaint here alleges that Mr. Gross's primary "injury" is his imprisonment in Cuba, *see* Compl. ¶ 139, no choice-of-law analysis is necessary to determine that the foreign country exception bars the Grosses' claims.

inequity in denying redress to individuals sent to foreign countries at the behest of the United States, their policy argument is better directed to Congress.

The foreign country exception thus deprived the district court of jurisdiction to address the Grosses' FTCA claims, all of which are based on or derivative of injuries suffered in Cuba.

II.

The Grosses' contention under the Equal Protection Clause fares no better. Reprising an argument they raised in opposing the government's motion to dismiss the complaint, they maintain that the foreign country exception is unconstitutional as applied to them because it "differentiates between two classes of U.S. citizens injured due to U.S. Government negligence: those whose injuries occur abroad and those whose injuries occur in the United States." Appellants' Br. 21. Applying rational basis scrutiny, which the Grosses agreed was the proper inquiry, the district court found that a rational basis for the disparity exists because the foreign country exception "protect[s] the United States' coffers from the whims of foreign law," *Gross*, 946 F. Supp. 2d at 126.

The Grosses maintain that "it is irrelevant whether Congress's basis in enacting the foreign country exception was rational in general," Appellants' Br. 22, and that application of the foreign country exception cannot be sustained because its "sole stated purpose" — avoiding the application of foreign law — "would not be served" in

their case, *id.* at 24. The district court thus erred, they continue, by rejecting their constitutional challenge without performing a choice-of-law analysis or allowing for discovery and "by ascribing a purpose to the foreign country exception different from the one actually stated by Congress." *Id.* at 28.

As an initial matter, to accept the Grosses' view that the foreign country exception applies only when foreign law would control is contrary to Supreme Court instruction. In *Smith v. United States*, 507 U.S. 197 (1993), the Court rejected the argument that, as to a FTCA claim arising in Antarctica, which has no law of its own, applying the foreign country exception was unnecessary to further the exception's goal of "insulat[ing] the United States from tort liability imposed pursuant to foreign law." *Id.* at 200. In so doing, the Court looked to the text of the foreign country exception, 28 U.S.C. § 2680(k); a different provision of the FTCA, 28 U.S.C. § 1346(b), which it had interpreted as "more than a choice-of-law provision" and instead to "delineate[] the scope of the United States' waiver of sovereign immunity"; and "the presumption against extraterritorial application of United States statutes." *Id.* at 201–03.

Thereafter, in *Sosa*, the Court reaffirmed that Congress did not write the exception to apply only when foreign law would be implicated. The Court rejected the notion of "selective application of headquarters doctrine . . . when a State's choice-of-law approach would not apply the foreign law of place of injury." 542 U.S. at 711. Such an application of the exception, the Court concluded, would result

in "a scheme of federal jurisdiction that would vary from State to State, benefitting or penalizing plaintiffs accordingly," *id.*, and the idea Congress would have intended such a scheme of federal jurisdiction "is too implausible to drive the analysis to the point of grafting even a selective headquarters exception onto the foreign country exception itself," *id.* at 712. The Court acknowledged that the argument "would be well taken . . . if Congress had written the exception to apply when foreign law would be applied. But that is not what Congress said." *Id.* at 711. The foreign country exception, the Court observed, was "written at a time when the phrase 'arising in' was used in state statutes to express the position that a claim arises where the harm occurs; and the odds are that Congress meant simply this. . . ." *Id.*

Consequently, the Grosses attempt to minimize *Sosa* as addressing only the scope of the foreign country exception, not an as-applied challenge to the constitutionality of the exception. Even so, well-settled precedent establishes that, under the lenient rational basis test, "a classification neither involving fundamental rights nor proceeding along suspect lines . . . cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Armour v. City of Indianapolis*, 132 S. Ct. 2073, 2080 (2012) (quoting *Heller v. Doe*, 509 U.S. 312, 319–20 (1993)) (internal quotation marks omitted). "[T]he distinction between facial and as-applied challenges . . . goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint." *Edwards v.*

District of Columbia, 755 F.3d 996, 1001 (D.C. Cir. 2014) (alterations in original) (quoting *Citizens United v. FEC*, 558 U.S. 310, 331 (2010)) (internal quotation marks omitted); "[t]he substantive rule of law is the same for both challenges," *id.*; *see Smith v. City of Chicago*, 457 F.3d 643, 652 (7th Cir. 2006).

The precedents on which the Grosses rely to support their view that the foreign country exception should not apply where doing so would be inconsistent with the exception's stated purpose, even if that purpose is otherwise legitimate, are not to the contrary. In *Wheeling Steel Corp. v. Glander*, 337 U.S. 562 (1949), the Supreme Court held that an Ohio *ad valorem* tax that had the purpose and effect of taxing the goods of nonresidents, while exempting the goods of Ohio residents, denied two out-of-state corporations the equal protection of Ohio law. *Id.* at 563–64, 573–74. The Court did not hold, as the Grosses suggest, that "application of [a] statute in a manner that is inconsistent with its stated purpose is unconstitutional," Appellants' Br. 22. In *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), the Supreme Court upheld a facial challenge to the constitutionality of the coverage provision of the Voting Rights Act on the ground that it was "irrational for Congress to distinguish between States in such a fundamental way based on 40-year-old data, when today's statistics tell an entirely different story." *Id.* at 2630–31. That the Court insisted that Congress's judgment be rational in light of "current conditions," *id.* at 2631, does not aid the Grosses; it is not the "current circumstances," Appellants' Br. 22, of a particular litigant that mattered to the Court, but rather the "current

conditions" that were before Congress when it enacted the statute, *see Shelby County*, 133 S. Ct. at 2628–29.

Similarly, the Grosses' objections that the district court erred by failing to engage in a fact-specific analysis and to allow discovery fail. In *Richmond Medical Center for Women v. Herring*, 570 F.3d 165, 172 (4th Cir. 2009), on which the Grosses rely, the Fourth Circuit did not state that all as-applied challenges require a court to engage in a fact specific analysis. Neither does *Greater Baltimore Center for Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore*, 721 F.3d 264, 282 (4th Cir. 2013), on which they also rely, show the district court was required to allow discovery. Although these cases indicate that "a developed factual record" may sometimes be required in as-applied constitutional challenges, *Richmond Med. Ctr.*, 570 F.3d at 172; *see also Greater Balt. Ctr.*, 721 F.3d at 282, neither addressed rational basis review in the context of an as-applied Equal Protection challenge. (The district court opinions in *S.H.* also do not aid the Grosses as no constitutional challenge to the foreign country exception was raised. *See* 2014 WL 3362366; 2013 WL 6086775.) Moreover, the government responds, inasmuch as the Grosses never moved for discovery nor defended against the motion to dismiss their complaint on the ground they had not yet taken discovery, no error can be assigned on that ground. *See Second Amendment Found. v. U.S. Conf. of Mayors*, 274 F.3d 521, 525 (D.C. Cir. 2001). Even on appeal, the Grosses do not identify any particular discovery they needed to defend against the government's motion to dismiss on

jurisdictional grounds. Absent a plausible basis that would permit them to overcome the jurisdictional bar, the Grosses fail to show error by the district court in any event. *Cf. Herbert v. Nat'l Acad. of Sciences*, 974 F.2d 192, 198 (D.C. Cir. 1992).

Finally, the Grosses object that the district court erred by ascribing a purpose to the foreign country exception different from that stated by Congress and acknowledged by courts, by referring to logistical burdens potentially posed by their lawsuit. *See Gross*, 946 F. Supp. 2d at 127. We find no error. Having properly rejected the Grosses' framing of the Equal Protection inquiry — as requiring a rational basis for the exception as applied to a U.S. citizen injured abroad where domestic law would control the tort liability — the district court rejected their Equal Protection challenge to the exception, referring to Congress's concern about the effect on the Treasury absent the exception. *See id.* at 126 (citing *Sosa*, 542 U.S. at 707). The district court then pointed out that even under the Grosses' framing of the inquiry the foreign country exception did not violate the Equal Protection Clause. The district court noted that other circuit courts of appeal had recognized the exception protects the United States from particularly burdensome litigation. *See id.* at 127. Its own unremarkable observation regarding logistical difficulties involving foreign injuries required no development of the record and was irrelevant to the Grosses' claims.

Accordingly, we affirm the judgment of dismissal. In so doing, we endorse the views

expressed in the penultimate paragraph of the district court's opinion, *Gross*, 946 F. Supp. 2d at 127.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-5168

September Term, 2014
FILED ON: NOVEMBER 14, 2014

ALAN GROSS AND JUDITH GROSS, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 1:12-cv-01860)

Before: HENDERSON, ROGERS and KAVANAUGH, *Circuit Judges*

[USCA Case #13-5168 Document #1522264
Filed 11/14/2014]

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:
/s/
Jennifer M. Clark
Deputy Clerk

Date: November 14, 2014

Opinion for the court filed by Circuit Judge Rogers.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 12-1860 (JEB)

ALAN GROSS and JUDITH GROSS, Plaintiffs,

v.

DEVELOPMENT ALTERNATIVES, INC. and UNITED STATES OF AMERICA, Defendants.

[Case 1:12-cv-01860-JEB Document 23
Filed 05/28/13]

MEMORANDUM OPINION

For three and a half years, American Alan Gross has wasted in a Cuban prison, convicted of "acts against the independence or territorial integrity of the state" for his work as a federal subcontractor. Another decade of imprisonment looms. Gross was arrested while bringing internet access to Jewish communities in Cuba, part of a collaboration between the U.S. Agency for International Development and its contractor Development Alternatives, Inc. to promote democracy in that nation. According to Gross, USAID and DAI understood the risks that his work entailed, but gave him inadequate warnings and training. He and his wife Judith thus sued, and DAI subsequently settled. The United States now moves to dismiss, asserting sovereign immunity. Because the Federal Government retains immunity for injuries suffered in foreign countries, the Court will grant the Motion.

I. Background

As the Motion at issue is a motion to dismiss, the Court draws the facts from the Complaint, assuming them to be true at this stage. Passed and signed in 1996, the Cuban Liberty and Democratic Solidarity Act authorized support for democracy-building efforts in Cuba. See Pub. L. No. 104-114, § 109, 110 Stat. 785, 799 (1996) (codified at 22 U.S.C. § 6039). Among the agencies tasked with this democracy promotion was USAID. See Compl., ¶ 20. Its Cuba Program "was expressly designed to hasten Cuba's peaceful transition to a democratic society." Id., ¶ 22 (internal quotation marks omitted). In putting that Program into place, USAID often worked with contractor DAI. See id., ¶¶ 35, 37. This case arises out of their collaboration.

In late 2008, at USAID's request, DAI sought proposals for projects to increase internet and "new media" access in Cuba. See id., ¶¶ 43-44, 48-49, 53-55, 60. Alan Gross, who had worked with DAI in the past, responded with a bid to "train[] the Jewish community in Cuba on the use and maintenance of information and communication technologies ('ICTs') through, among other things, the use of mobile phones, wireless technologies, and personal computers." Id., ¶¶ 52, 56-57. DAI selected Gross's proposal and, with USAID's approval, entered a subcontract with his single-member LLC on February 10, 2009. See id., ¶¶ 61-64. The subcontract emphasized that in performing the project, "time is of the essence." Id., ¶ 67. DAI directly oversaw the project, but was required to

regularly update USAID, which retained ultimate control. See id., ¶¶ 45-47, 65, 68-74.

Gross traveled to Cuba four times in mid-2009, each time staying in a different Cuban Jewish community for one to two weeks. See id., ¶¶ 59, 77, 84, 94-95, 101. At each project site, he would "establish[] internet connections using multiple redundant devices in order to improve intra and intergroup communications channels" and then train those in the Cuban Jewish community "to use ICT devices to connect to the internet so that they can have regular and direct contact with each other and with [Gross]." Id., ¶ 66 (quoting subcontract). These new internet connections undercut the Cuban government's censorship. See id. After each of his four trips, Gross wrote a new memo to DAI (which was always shared with USAID) warning of the riskiness of this covert work and the perils if caught. See id., ¶¶ 77-79, 84-86, 95-96, 101-03. Despite these dangers, Gross and DAI (with USAID's approval) agreed to extend the project. See id., ¶¶ 73, 108-09, 111.

Gross left for his fifth trip to Cuba on November 23, 2009. See id., ¶ 112. On December 3, the night before he was to return to the United States, Cuban authorities arrested him. See id. He was initially held as a political prisoner, where he was extensively interrogated and psychologically abused. See id., ¶ 114. Only in February 2011 was he finally charged with a crime: "acts against the independence or territorial integrity of the state." See id., ¶ 113. Following a summary trial in which the Cuban court determined that he had

"participated in 'a subversive project of the U.S. government that aimed to destroy the Revolution through the use of communications systems out of the control of Cuban authorities,'" Gross was convicted on March 11, 2011, and handed a 15-year sentence. Id., ¶ 115 (brackets omitted). Three and a half years after his arrest, Gross lives in harrowing conditions, with little hope of improvement:

> Mr. Gross resides in a 10-by-12 foot room with two other inmates, he has lost over 100 pounds, and he is battling chronic arthritis pain and what appears to be a cancerous tumor beneath his shoulder blade. His business and career have been destroyed, and his family has been deprived of their primary wage earner. . . . While Mr. Gross remains confined in Cuba, his oldest daughter has been battling breast cancer and his mother has been suffering from terminal lung cancer. At this time, there are no indications that Mr. Gross will return to his family within the next decade.

Id. at 3-4; see also id., ¶¶ 128-31. Despite diplomatic efforts, so far the United States has failed to secure Gross's release. See Mot. at 1-2.

According to Plaintiffs, better precautions by DAI and USAID could have averted Gross's incarceration. Although DAI and USAID understood the risks and dangers he faced, they never fully

disclosed those risks, trained him on how to minimize them, or provided additional protection. See Compl., ¶¶ 75, 118, 121, 123. Nor did they heed the warnings Gross gave after all four trips. See id., ¶¶ 120, 125. Instead, they repeatedly let him return to Cuba. See id., ¶¶ 118(d), 121(d). USAID, moreover, ignored various manuals, directives, and agreements on disclosure and training. See id., ¶¶ 121(e), 122, 124. All of these failings undergird this lawsuit.

After exhausting administrative remedies, see id., ¶¶ 132-33, Gross and his wife Judith filed suit against DAI (negligence, gross negligence, and negligent and grossly negligent infliction of emotional distress as to Alan; loss of consortium as to both) and the United States (negligence and negligent infliction of emotional distress as to Alan; loss of consortium as to both). See id., ¶¶ 136-171. Both Defendants moved to dismiss. Before the filing of DAI's Reply, however, Plaintiffs and DAI notified the Court that they had settled and expect DAI's dismissal shortly. The United States' Motion is now ripe.

II. Legal Standard

Under Federal Rule of Civil Procedure 12(b)(1), a court must dismiss a claim for relief when the complaint "lack[s] . . . subject-matter jurisdiction." To survive a motion to dismiss under Rule 12(b)(1), Plaintiffs bear the burden of proving that the Court has subject-matter jurisdiction to hear their claims. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992); U.S. Ecology, Inc. v. Dep't

of Interior, 231 F.3d 20, 24 (D.C. Cir. 2000). A court has an "independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party." Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006). "For this reason 'the [p]laintiff's factual allegations in the complaint . . . will bear closer scrutiny in resolving a 12(b)(1) motion' than in resolving a 12(b)(6) motion for failure to state a claim." Grand Lodge of the Fraternal Order of Police v. Ashcroft, 185 F. Supp. 2d 9, 13-14 (D.D.C. 2001) (quoting 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1350 (2d ed. 1987) (alteration in original)). Additionally, unlike with a motion to dismiss under Rule 12(b)(6), the Court "may consider materials outside the pleadings in deciding whether to grant a motion to dismiss for lack of jurisdiction." Jerome Stevens Pharm. v. FDA, 402 F.3d 1249, 1253 (D.C. Cir. 2005); see also Venetian Casino Resort, LLC v. EEOC, 409 F.3d 359, 366 (D.C. Cir. 2005) ("given the present posture of this case — a dismissal under Rule 12(b)(1) on ripeness grounds — the court may consider materials outside the pleadings"); Herbert v. Nat'l Acad. of Sciences, 974 F.2d 192, 197 (D.C. Cir. 1992).

III. Analysis

"Sovereign immunity is jurisdictional in nature," and "[a]bsent a waiver, sovereign immunity shields the Federal Government and its agencies from suit." FDIC v. Meyer, 510 U.S. 471, 475 (1994). In suing the United States here, Plaintiffs rely on the waiver in the Federal Tort Claims Act, which usually makes the Federal Government liable for

tort claims "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674; see also 28 U.S.C. § 1346(b)(1) (granting jurisdiction over such claims). The Act retains sovereign immunity for certain categories of claims, however, including "[a]ny claim arising in a foreign country." 28 U.S.C. § 2680(k). This exception, predictably, has spawned litigation over where a claim "aris[es]." The Supreme Court put that confusion to bed a decade ago in Sosa v. Alvarez-Machain, 542 U.S. 692 (2004), "hold[ing] that the FTCA's foreign country exception bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred." Id. at 712.

Because Plaintiffs' injuries here stem from Gross's imprisonment in Cuba, the foreign-country exception would seem to apply. Plaintiffs nonetheless toss out a hodgepodge of statutory and constitutional arguments in a determined effort to overcome the exception. As cataloged below, however, the Supreme Court or D.C. Circuit has already considered and rejected each statutory bypass, and while the constitutional gambit is novel, it ultimately fails as well.

A. Statutory Arguments

Plaintiffs first suggest that, because USAID's negligent direction and oversight occurred in the United States, the foreign-country exception should not apply. See Opp. at 2 ("Gross was arrested by the Cuban government solely as a result of his work on a U.S. Government project, which Defendant United

States funded and oversaw entirely from Washington, D.C."). But that line of reasoning is precisely what Sosa rejected:

> Some Courts of Appeals, reasoning that "the entire scheme of the FTCA focuses on the place where the negligent or wrongful act or omission of the government employee occurred," Sami v. United States, 617 F. 2d 755, 761 (CADC 1979), have concluded that the foreign country exception does not exempt the United States from suit "for acts or omissions occurring here which have their operative effect in another country," id., at 762 (refusing to apply § 2680(k) where a communique sent from the United States by a federal law enforcement officer resulted in plaintiff's wrongful detention in Germany). Headquarters claims typically involve allegations of negligent guidance in an office within the United States of employees who cause damage while in a foreign country, or of activities which take place within a foreign country. In such instances, these courts have concluded that § 2680(k) does not bar suit. . . .
>
> The potential effect of this sort of headquarters analysis flashes the yellow caution light. "It will virtually always be possible to assert that the negligent activity that injured the

> plaintiff abroad was the consequence of faulty training, selection or supervision – or even less than that, lack of careful training, selection or supervision – in the United States." Beattie v. United States, 756 F. 2d 91, 119 (CADC 1984) (Scalia, J., dissenting). . . . The headquarters doctrine threatens to swallow the foreign country exception whole, certainly at the pleadings stage.

542 U.S. at 701-03 (footnote, some citations, internal quotation marks, and brackets omitted); see also id. at 710, 712 ("headquarters analysis should have no part in applying the foreign country exception").

Plaintiffs next float an argument based on congressional intent. In Sosa, the Court explained that "[w]hen the FTCA was passed, the dominant principle in choice-of-law analysis for tort cases was lex loci delicti: courts generally applied the law of the place where the injury occurred." Id. at 705. Foreign law, under that traditional principle, determines liability for an injury suffered abroad. "The application of foreign substantive law . . . was, however, what Congress intended to avoid by the foreign country exception." Id. at 707. This case is different, Plaintiffs argue, because modern D.C. choice-of-law rules would apply D.C. tort law; as a result, trotting out the foreign-country exception here is not necessary to effect Congress's intent. Once again, the Sosa Court contemplated the same argument for permitting the headquarters doctrine "when a State's choice-of-law approach would not apply the foreign law of place of injury." Id. at 711.

Yet the Court rejected such an atextual exception: "The point would be well taken, of course, if Congress had written the exception to apply when foreign law would be applied. But that is not what Congress said." Id.

Even if the foreign-country exception bars recovery for some injuries, Plaintiffs contend it should not bar all of their claims: How, they argue, could the exception proscribe recovery for loss of consortium in the United States, Judith Gross's only alleged injury? See Opp. at 12-13. But this, too, is an argument higher courts have seen and dealt with. In Harbury v. Hayden, 522 F.3d 413 (D.C. Cir. 2008), the American widow of a Guatemalan rebel allegedly killed by the CIA sued the United States for emotional distress:

> [T]o the extent Harbury alleges her own emotional injuries in the United States as a result of the death of her husband, those derivative claims similarly arise in Guatemala for purposes of the FTCA because they are based entirely on the injuries her husband suffered there. A plaintiff in Harbury's situation cannot plead around the FTCA's foreign-country exception simply by claiming injuries such as "emotional distress" that are derivative of the foreign-country injuries at the root of the complaint. Much like the now-defunct "headquarters doctrine," that practice would threaten to "swallow the foreign

> country exception whole." We follow the lead of Sosa and decline to allow this kind of creative pleading to water down the foreign-country exception to the FTCA.

Id. at 423 (citations omitted).

Plaintiffs, finally, suggest that all FTCA exceptions (including the foreign-country one) must be construed narrowly because "'unduly generous interpretations of the exceptions run the risk of defeating the central purpose of the statute, which waives the Government's immunity from suit in sweeping language.'" Opp. at 10 (quoting Dolan v. U.S. Postal Serv., 546 U.S. 481, 492 (2006) (citation and internal quotation marks omitted)). The Dolan Court itself, however, instructed that "the proper objective of a court attempting to construe one of the subsections of 28 U.S.C. § 2680 is to identify those circumstances which are within the words and reason of the exception – no less and no more." 546 U.S. at 492 (internal quotation marks omitted). In any event, there is nothing for the Court to "construe" here. Binding precedent has already interpreted the foreign-country exception to foreclose claims for injuries suffered abroad. The Court is obliged to follow suit.

B. Constitutional Argument

In a last-ditch stab to pierce the United States' immunity, Plaintiffs invoke the Equal Protection Clause. They argue that the Government has no justification for excluding them from the

FTCA because "the sole basis for the foreign country exception – avoiding application of foreign law to the United States in FTCA cases – is wholly inapplicable." Opp. at 13. Despite the Government's protests, Plaintiffs did not need to raise this argument in their Complaint to preserve it. The Federal Rules call for a "short and plain statement of the grounds for the court's jurisdiction," not a subsection-by-subsection schlepp through § 2680. See Fed. R. Civ. P. 8(a).

The Fourteenth Amendment's Equal Protection Clause requires that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." That equal-protection guarantee similarly constrains the Federal Government. See Bolling v. Sharpe, 347 U.S. 497 (1954). Plaintiffs agree that rational-basis scrutiny applies here, *see* Opp. at 14, meaning that the Court must uphold the exception if it finds "a rational relationship between the disparity of treatment and some legitimate governmental purpose." Armour v. City of Indianapolis, Ind., 132 S. Ct. 2073, 2080 (2012) (citation omitted). Constitutional challenges reviewed under this relaxed standard face an uphill climb:

> On rational-basis review, a classification in a statute . . . comes to us bearing a strong presumption of validity, and those attacking the rationality of the legislative classification have the burden to negative every conceivable basis which might support it. Moreover, because we

> never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature. . . . [A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.

FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 314-15 (1993) (citations and internal quotation marks omitted).

At the outset, Plaintiffs' challenge poses the wrong question. The Equal Protection Clause demands a rational basis for the line drawn by the statute (*i.e.*, injuries abroad vs. injuries here) – not one for the carve-out Plaintiffs seek (*i.e.*, injuries to U.S. citizens abroad when domestic law would apply vs. when it would not). See, e.g., Armour, 132 S. Ct. at 2079-80 ("As long as the City's distinction has a rational basis, that distinction does not violate the Equal Protection Clause.") (emphasis added). And § 2680(k)'s distinction between domestic and foreign injuries clearly has that rational basis: protecting the United States' coffers from the whims of foreign law. See Sosa, 542 U.S. at 707 (§ 2680(k) "codified Congress's 'unwillingness to subject the United States to liabilities depending upon the laws of a foreign power'") (quoting United States v. Spelar, 338 U.S. 217, 221 (1949)) (brackets omitted). Such foreign law would govern because "[w]hen the FTCA

was passed . . . courts generally applied the law of the place where the injury occurred." Id. at 705. While that "traditional approach to choice of substantive tort law has lost favor," a "good many States" retain it. Id. at 708-09.

Even under Plaintiffs' framing of the equal-protection inquiry – as applied to a U.S. citizen injured abroad where domestic law would control the tort liability – § 2680(k) passes muster. As courts have long recognized, the foreign-country exception protects the United States from particularly burdensome litigation. See Burna v. United States, 240 F.2d 720, 722 (4th Cir. 1957) (reasons for § 2680(k) include "the absence of United States courts in such countries, with resulting problems of venue, and the difficulty of bringing defense witnesses from the scene of the alleged tort to places far removed"); see also Beattie, 756 F.2d at 116-17 (Scalia, J., dissenting) (same); Meredith v. United States, 330 F.2d 9, 10 (9th Cir. 1964) (same); Al-Zahrani v. Rumsfeld, 684 F. Supp. 2d 103, 119 (D.D.C. 2010) (same); Developments in the Law: Extraterritoriality, 124 Harv. L. Rev. 1226, 1265 (2011) (same). Lawsuits about foreign injuries will often prove complicated and costly: evidence may be hard to collect and witnesses may be much more difficult to procure. Documenting Gross's damages here is made far trickier by the fact that Gross was injured in Cuba – instead of, say, Colorado. Obtaining the testimony of Cuban prison officials, for example, hardly seems a simple task. The foreign/domestic filter is imperfect, of course: suits over foreign injuries are sometimes simple, and suits over domestic injuries can be complicated by

countless circumstances. Yet rational-basis scrutiny tolerates such imperfection. See Vance v. Bradley, 440 U.S. 93, 108 (1979) ("Even if the classification involved here is to some extent both underinclusive and overinclusive, and hence the line drawn by Congress imperfect, it is nevertheless the rule that in a case like this perfection is by no means required.") (internal quotation marks omitted). Avoiding onerous litigation is a legitimate governmental purpose, and by foreclosing all litigation over injuries suffered abroad, the foreign-country exception rationally advances that purpose.

As the background section of this Opinion hopefully makes clear, the Court is in no way condoning what happened to Gross or implying he is to blame. Sympathy with his plight, however, is not a basis on which to circumvent clear precedent concerning the FTCA. The FTCA exceptions "mark the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals." Molzof v. United States, 502 U.S. 301, 311 (1992) (internal quotation marks omitted). As Gross's injuries here fall within the foreign-country exception, dismissal is the only warranted course.

IV. Conclusion

For the aforementioned reasons, the Court will grant the Government's Motion to Dismiss. A separate Order consistent with this Opinion will be issued this day.

/s/ James E. Boasberg
JAMES E. BOASBERG
United States District Judge

Date: May 28, 2013

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 12-1860 (JEB)

ALAN GROSS and JUDITH GROSS, Plaintiffs,

v.

DEVELOPMENT ALTERNATIVES, INC. and
UNITED STATES OF AMERICA, Defendants.

[Case 1:12-cv-01860-JEB Document 22
Filed 05/28/13]

ORDER

For the reasons set forth in the accompanying Memorandum Opinion, the Court ORDERS that:

1. The United States of America's Motion to Dismiss is GRANTED;

2. The case is DISMISSED WITHOUT PREJUDICE as to the United States.

SO ORDERED.

/s/ James E. Boasberg
JAMES E. BOASBERG
United States District Judge

Date: May 28, 2013

STATUTORY PROVISIONS

28 U.S. Code § 2674 - Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the

Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter.

28 U.S. Code § 2680

The provisions of this chapter and section 1346 (b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer, except that the provisions of this chapter and section 1346 (b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if—

(1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;

(2) the interest of the claimant was not forfeited;

(3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and

(4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law.. [1]

(d) Any claim for which a remedy is provided by chapter 309 or 311 of title 46 relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1–31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

[(g) Repealed. Sept. 26, 1950, ch. 1049, § 13 (5),64 Stat. 1043.]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346 (b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

PROVISIONS FROM THE U.S. CONSTITUTION

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Case No: 12-1860
JURY DEMAND

ALAN GROSS, 2501 PORTER STREET NW, APT. 116, WASHINGTON, D.C. 20008 AND JUDITH GROSS, 2501 PORTER STREET NW, APT. 116, WASHINGTON, D.C. 20008, PLAINTIFFS,

v.

DEVELOPMENT ALTERNATIVES, INC., 7600 WISCONSIN AVENUE, SUITE 200, BETHESDA, MARYLAND 20814 AND THE UNITED STATES OF AMERICA, DEFENDANTS.

[Case 1:12-cv-01860 Document 2 Filed 11/16/12]

COMPLAINT

Plaintiffs Alan Gross and Judith Gross, by and through undersigned counsel, hereby file this Complaint against Defendants, Development Alternatives, Inc. ("DAI") and the United States of America (the "United States"), for damages arising from tortious conduct committed against them by Defendants, and allege as follows:

INTRODUCTION AND NATURE OF THE ACTION

Plaintiff Alan Gross, a United States citizen who was born and raised in this country, has been imprisoned in Cuba since December 3, 2009. Mr.

Gross is imprisoned in Cuba due to his work on a project that Defendant United States negligently directed, organized, and oversaw, and that Defendant DAI, the government contractor chosen for the project, conducted not only negligently, but also with gross negligence and a willful disregard for Mr. Gross' rights and safety. The project, which was intended to increase the availability of internet access in Cuba, required that Mr. Gross make several trips there, the fifth of which resulted in his wrongful arrest and detention. Unless Mr. Gross's wife, Plaintiff Judith Gross, succeeds in her efforts to secure his earlier release, Mr. Gross likely will remain imprisoned in Cuba for another 12 years, the remainder of the 15-year sentence that the Cuban government imposed on him.

As discussed further below, Mr. Gross' arrest and imprisonment were entirely avoidable, and are due to the tortious conduct of the Defendants. Among other things, both before and after Mr. Gross began traveling to Cuba, Defendants failed to disclose adequately to Mr. Gross the superior knowledge that they had, or should have had, about the material risks that Mr. Gross faced due to his participation in the referenced project. Defendants also failed, in response to that knowledge, to take basic remedial measures to protect Mr. Gross, including failing to provide Mr. Gross with the education and training that was necessary to minimize the risk of harm tohim, and failing to call him back from Cuba and/or preclude him from returning there.

Worse, Defendant DAI, with negligence, gross negligence and willful disregard for Plaintiffs' rights, failed to take these basic remedial steps because doing so would have delayed or prevented DAI's complete performance under part of a lucrative contract with Defendant United States, thereby depriving Defendant DAI of significant revenue. Indeed, upon information and belief, Defendant DAI's business model depends upon obtaining and performing contracts with Defendant United States.

Defendant DAI engaged in this behavior – putting profits before safety – despite having, along with Defendant United States, superior knowledge regarding the risks posed to Mr. Gross, and despite being the entity that primarily interacted with Mr. Gross on the project. Indeed, on several occasions during the project, Mr. Gross expressed concerns about the operation. DAI did nothing in response, choosing, instead, simply to forward those concerns to Defendant United States, while DAI continued to make money. Rather than protecting Mr. Gross, DAI responded to Mr. Gross by pressuring him to finish the project or to find someone else who would.

Moreover, in failing to fulfill its own duties to Mr. Gross, Defendant United States, and specifically its U.S. Agency for International Development ("USAID"), failed to follow mandatory, internal directives that governed the referenced project. These directives, among other things, govern both the planning of USAID projects and foreign travel in connection with such projects, particularly to hostile countries like Cuba. Upon information and belief, these directives include instructions about the

warnings, education, training and protection that are to be provided to personnel, who travel to high-risk places like Cuba in connection with USAID projects. Yet, when USAID learned of Mr. Gross' concerns from DAI as noted above, USAID also did nothing.

Since Mr. Gross's wrongful arrest and detention in Cuba, Mr. and Mrs. Gross have suffered immensely. Mr. Gross resides in a 10-by-12 foot room with two other inmates, he has lost over 100 pounds, and he is battling chronic arthritis pain and what appears to be a cancerous tumor beneath his shoulder blade. His business and career have been destroyed, and his family has been deprived of their primary wage earner. Mrs. Gross has lost her husband, and she consequently, along with her husband, has suffered a loss of consortium. While Mr. Gross remains confined in Cuba, his oldest daughter has been battling breast cancer and his mother has been suffering from terminal lung cancer. At this time, there are no indications that Mr. Gross will return to his family within the next decade. Plaintiffs' suffering and loss continues unabated.

Accordingly, Plaintiffs bring this action against Defendant United States, pursuant to the Federal Tort Claims Act ("FTCA"), and against Defendant DAI, pursuant to common law, for negligence, gross negligence, negligent infliction of emotional distress, and loss of consortium. Plaintiffs also seek punitive damages from DAI, for its willful disregard of their rights.

PARTIES

1. Plaintiff Judith Gross, Alan Gross' wife, is a citizen of the District of Columbia who resides at 2501 Porter Street NW, Apt. 116, Washington, D.C. 20008.

2. Mrs. Gross became domiciled in the District of Columbia during the summer of 2010, shortly after Mr. Gross' detention in Cuba. Specifically:

a. In May 2010, Mrs. Gross sold the home that she and Mr. Gross jointly owned in Maryland; Mrs. Gross sold the house on behalf of both herself and Mr. Gross pursuant to a power of attorney that Mr. Gross granted to her;

b. In May 2010, Mrs. Gross moved to the District of Columbia, where she has since resided;

c. Shortly after moving to the District of Columbia, Mrs. Gross relinquished the Maryland license plates and registration for the vehicle that she and Mr. Gross jointly own, and registered the vehicle in the District of Columbia, where it remains registered;

d. Mrs. Gross also obtained, and still maintains, a District of Columbia driver's license;

e. Mrs. Gross is registered to vote in the District of Columbia;

f. Since moving to the District of Columbia, Mrs. Gross has been paying District of Columbia payroll taxes; and

g. Since moving to the District of Columbia, Mrs. Gross, on behalf of herself and Mr. Gross (pursuant to the referenced power of attorney), has filed tax return extension forms with the United States and District of Columbia governments, and listed the above-referenced District of Columbia address as the address for both herself and Mr. Gross.

3. Plaintiff Alan Gross, the husband of Plaintiff Judith Gross, also is a citizen of the District of Columbia. Given his current exceptional circumstances, namely, his incarceration in Cuba, Mr. Gross is not currently able to live with Mrs. Gross at their District of Columbia residence.

4. Mr. Gross intends to reunite with his wife and live with her at their District of Columbia residence upon his release from Cuba and, in anticipation of that reunion, he has taken actions to relinquish his former domicile in Maryland and to establish his domicile in the District of Columbia. Specifically, as noted, Mr. Gross executed a power of attorney allowing Mrs. Gross to act on his behalf. Pursuant to that power of attorney, Mr. Gross, among other things, (a) sold the home in Maryland

that he jointly-owned with Mrs. Gross, (b) turned in the Maryland license plates and registration for the vehicle that he and Mrs. Gross jointly own, and had the vehicle registered in the District of Columbia, where it remains registered, and (c) filed tax return extension forms with both the United States and District of Columbia Governments, listing the above-referenced District of Columbia address as the address for both himself and Mrs. Gross.

5. DAI is a Maryland corporation headquartered at 7600 Wisconsin Avenue, Suite 200, Bethesda, Maryland 20814.

6. DAI is a private consulting firm and government contractor that was founded in 1970 and that specializes in international development. DAI has approximately 1500 employees worldwide, including in the Caribbean. DAI has worked extensively with USAID on numerous projects over an extended period, only one of which was the Cuba project at issue. Indeed, several DAI executives are former USAID officials.

7. Upon information and belief, Defendant DAI is dependent on USAID for the vast majority of its business. DAI's contracts with USAID generate a tremendous amount of revenue for the company. For example, in 2009, upon information and belief, approximately $333 million, which was more than three-quarters of DAI's annual revenue, was derived from USAID projects.

8. Since 2007, upon information and belief, DAI has ranked as one of USAID's top contractors by

revenue, consistently earning approximately $300 million per year.

9. Defendant United States of America is sued on account of the tortious conduct of employees of USAID.

10. Upon information and belief, USAID's headquarters is located exclusively in the Ronald Reagan Building, at 1300 Pennsylvania Avenue NW, Washington, D.C. 20523, or, alternatively, primarily in that building and also at a handful of other facilities in Washington, D.C.

11. Upon information and belief, unlike other federal agencies, such as the Bureau of Prisons, that have offices throughout the United States in addition to their headquarters, USAID's headquarters in the District of Columbia is USAID's only office in the United States and/or is the place where USAID not only *formulates and initiates* its policies and practices, but also where USAID implements its decisions.

12. Among other things, upon information and belief, every significant USAID bureau operates out of the agency's Washington D.C. headquarters; these bureaus include the Bureau for Latin America and the Caribbean, which was the USAID bureau responsible for the Cuba project at issue, and the so-called "Office of Security," which, among other things, is responsible for "developing and conducting travel-related pre-briefings and debriefings" and otherwise addressing the security of USAID personnel who travel abroad in connection with

USAID projects. *See* USAID website, http://www.usaid.gov/who-weare/organization/independent-offices/office-security (last visited Nov. 15, 2012).

JURISDICTION AND VENUE

13. This Court has subject matter jurisdiction over the claims against the United States pursuant to 28 U.S.C. §§ 1346(b), 2671–2680. Pursuant to 28 U.S.C. § 2675, on December 2, 2011, within two years after their claims accrued, Plaintiffs each filed administrative claims with USAID. The claims were denied by USAID in a letter dated May 22, 2012. This action is timely filed against and served on Defendant United States within six months of the mailing of USAID's denial letter.

14. This Court has subject matter jurisdiction over the claims against DAI based on two independent grounds: (1) pursuant to 28 U.S.C. § 1367(a), because the claims are sufficiently related to the claims against the United States that this Court has pendent subject matter jurisdiction over the claims against DAI; and (2) based on diversity of citizenship, pursuant to 28 U.S.C. 1332(a), because Plaintiffs are citizens of the District of Columbia, DAI is a citizen of Maryland, and the amount in controversy exceeds $75,000, exclusive of interest and costs.

15. This Court has personal jurisdiction over the United States because (a) USAID is headquartered in the District of Columbia, (b) USAID engages in a regular course of conduct in the

District of Columbia, including most, if not all, of the conduct at issue in this action, and (c) USAID has tortiously caused injury in the District of Columbia to District of Columbia citizens.

16. This Court has personal jurisdiction over DAI because (a) it regularly solicits and conducts business in the District of Columbia, such as contracts with USAID, including the two agreements with USAID that are at issue in this action, (b) a portion of DAI's conduct at issue in this action occurred in the District of Columbia, and (c) DAI has tortiously caused injury in the District of Columbia to District of Columbia citizens.

17. Venue is proper in this Court as to the United States pursuant to 28 U.S.C. § 1402(b) because the Plaintiffs are citizens of, and reside in, the District of Columbia and because most, if not all, of the United States' actions and omissions complained of herein occurred in the District of Columbia. Among other things, upon information and belief, as noted above, the formulation, initiation, and implementation of the USAID policies, practices and decisions complained of herein occurred in the District of Columbia.

18. Venue is proper in this Court as to DAI pursuant to 28 U.S.C. § 1391(b) because a substantial number of the actions, omissions, and events giving rise to Plaintiffs' claims occurred in the District of Columbia, and because DAI is subject to personal jurisdiction in the District of Columbia as described in paragraph 16 *supra*.

FACTUAL BACKGROUND

A. USAID's Role in the Cuba Program At Issue And Its Agreements With DAI

USAID's Mission

19. In 1996, Congress passed, and President Clinton signed, the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996, 22 U.S.C. § 6039, commonly known as the "Helms-Burton Act."

20. Established in 1961, USAID is one of the United States Government agencies tasked with implementing statutes such as the Helms-Burton Act.

21. USAID's "Cuba Democracy and Contingency Planning Program" (the "Cuba Program") was developed pursuant to the Helms-Burton Act.

22. USAID's Cuba Program was "expressly designed to hasten Cuba's peaceful transition to a democratic society." Task Order No. DFD-I-03-00250-00 ("Cuba Task Order") at B.1.[1] One of its objectives is to "[d]evelop and . . . activate plans for launching a rapid-response programmatic platform that will meet USAID's interest for having and coordinating an on-island presence." *Id.*

[1] Upon information and belief, Defendants possess complete copies of the Cuba Task Order.

The Mandatory, Internal Directives Governing USAID Operations, Including the Cuba Program

23. As USAID acknowledges on its website, although information about USAID's programs is generally available to the public, USAID operations often necessitate "access to sensitive and sometimes classified information provided by other federal departments and agencies." *See* USAID website, http://www.usaid.gov/who-we-are/organization/independentoffices/office-security (last visited Nov. 15, 2012).

24. USAID personnel "can be the target of foreign intelligence services," and thus such personnel "must be made aware of the techniques used by [such] organizations…so that they can properly protect . . . themselves . . . ." *Id.*

25. USAID's Office of Security thus is charged with "1) educating employees on the threat posed by foreign intelligence to USAID domestic and international operations; 2) developing and conducting travel related pre-briefings and debriefings and 3) conducting counterintelligence training for new and existing employees." *Id.*

26. The Office of Security performs this function "in accordance with a number of laws, Presidential orders, Executive Branch-issued guidance as well as policy established by the Department of State." *Id.*

27. One such set of rules that governs USAID projects is a network of electronic interagency manuals known as the Automated Directives System ("ADS").

28. Upon information and belief, many ADS provisions are confidential and thus not accessible to the public.

29. Upon information and belief, several of these ADS provisions also contain mandatory directives regarding how USAID conducts programs such as the Cuba Program.

30. On its website, USAID notes that "Each chapter [of ADS] is further enhanced by both mandatory and non-mandatory references . . . ." USAID website, http://www.usaid.gov/whowe-are/agency-policy/about-ads (last visited Nov.15, 2012).

31. For example, ADS Chapter 569 ("Counterintelligence Manual") lays out directives for USAID's counterintelligence program and refers to a network of information that is not available to the public. The manual sets forth mandatory requirements for (1) educating USAID personnel regarding foreign threats, and (2) reporting by personnel who learn of, among other things, "attempted or actual espionage, subversion, sabotage, terrorism or extremist activities directed against USAID and its personnel, facilities, resources, and activities." Counterintelligence Manual at 3.

32. In particular, the "Foreign Travel" section of the Counterintelligence Manual indicates that USAID must adjust counterintelligence education and training for personnel based on the threat level of the country to which they are traveling. Both the country's threat level and accompanying counterintelligence education and training requirements are confidential:

> "Post threat levels are listed in the Security Environment Threat List (SETL) which is a classified document published by [Department of State] on a semiannual basis that defines the [counterintelligence] program requirements at post. The SETL is available on the classified network via links on the State Department's Web site and is also maintained by [the Office of Security]. If personnel do not have access to the classified network, personnel must consult with [the Office of Security] to determine threat-level listed in the SETL." *Id.* at 14.

33. Section 569.2 of the manual ("Primary Responsibilities") also states that USAID's Office of Human Resources is responsible for "[p]roviding a list of proposed overseas assignees to [the Office of Security] to allow for review of assignments to Critical Human Intelligence (HUMINT) threat posts and [counterintelligence] awareness training prior to departure." *Id.* at 4.

34. USAID also is required to maintain security oversight in each country in which it operates. Specifically, the USAID Director of Security is responsible for "providing oversight of the USAID Counterintelligence (CI) Program," and "forwarding information on matters that require a referral to the Federal Bureau of Investigation and coordination with USAID General Counsel." *Id.* at 3-4.

35. As discussed below, upon information and belief, not only did USAID have safety-related obligations in connection with the Cuba Program, USAID also gave Defendant DAI access to much of the same confidential information that USAID used to fulfill these obligations, so that DAI could fulfill its independent obligations to manage and implement various aspects of the program for USAID.

The "Prime Contract" Between USAID and DAI.

36. As noted, DAI has had extensive business dealings with USAID that have encompassed multiple contracts and projects.

37. One such contract between DAI and USAID, that led to the Cuba project at issue was an agreement dated September 27, 2005 entitled the "Instability, Crisis and Recovery Programs Prime

Contract No. DFD-I00-05-00250-00," (the "Prime Contract").[2]

DAI's Responsibilities Under the Prime Contract

38. Under the Prime Contract, DAI had responsibility for several critical functions, including primary management and implementation of specific "task orders" (or projects) issued pursuant to the Prime Contract.

39. Specifically, in conjunction with those task orders, DAI was tasked with, *inter alia*, the following responsibilities:

a. DAI was "required to conduct conflict and fragility assessments, which includes review of risk factors relevant to specific countries or regions, development of work plans, completion of research, fieldwork and reports, planning and implementation of meetings, workshops and conferences to consider follow-up on assessment findings and recommendations." Prime Contract at 15;

b. DAI was "required to participate in or be responsible for the development of training syllabi, implementation of the training programs and monitoring of

[2] Upon information and belief, Defendants possess complete copies of the Prime Contract.

the application of training lessons by the participants." *Id.* at 19; and

c. DAI could be "asked to participate in or be responsible for the design and implementation of monitoring and evaluation efforts for [USAID] on specific conflict issues." *Id.* at 22.

40. Upon information and belief, to enable DAI to perform these and other important functions, Defendant United States provided DAI access to confidential information. For example, DAI employees requiring access to confidential information were subject to "an appropriate level background investigation by the Defense Security Service (DSS)." *Id.* at 38.

USAID's Right of Oversight Under the Prime Contract

41. Under the Prime Contract, USAID remained responsible for directing and overseeing various aspects of specific projects or task orders undertaken pursuant to the Prime Contract. Specifically:

a. USAID was obligated to provide "technical direction" to DAI, which included providing "directions to [DAI] which fill in details, suggest possible lines of inquiry, or otherwise facilitate completion of work." *Id.* at 34;

b. USAID's Mission Administrative Officer was supposed to receive from DAI certain information for every contract employee or dependent "on or before their arrival in the host country." *Id.* at 37;

c. USAID approval was required "for all international travel directly and identifiably funded by USAID under [the Prime Contract]." *Id.* at 42. DAI was therefore required to share with USAID "an itinerary for each planned international trip, showing the name of the traveler, purpose of the trip, origin/destination (and intervening stops), and dates of travel . . . ." *Id.*

42. Under the Prime Contract, USAID was required to request work from DAI through the issuance of specific task orders. *Id.* at 4.

The Cuba Task Order at Issue

43. As part of the Cuba Program referenced above, Defendant United States asked DAI to come up with a proposal for providing humanitarian support to various groups within the Cuba population (the "Cuba Project").

44. Consistent with its economic dependency on USAID, DAI quickly complied and proposed the Cuba Task Order, which was approved by USAID on August 14, 2008.

DAI's Responsibilities Under the Cuba Task Order

45. The Cuba Task Order tasked DAI with responsibility for day-to-day management and implementation of the Cuba Project. Specifically, among other things:

a. DAI "shall have the primary responsibility for ensuring that activities conducted under [the Cuba Project] contribute to USAID's assistance strategy for Cuba and achieve the anticipated results." Task Order at C.2.K;

b. DAI was empowered to deploy to Cuba and "establish operations supporting the creation of a USAID Mission." *Id.* at C.2.D; and

c. In consultation with USAID officials, DAI was to "identify areas of program management responsibility and hire staff to assist with specific tasks to support USAID's Cuba program. . . ." *Id.* at C.2.F.

46. Further, as with the Prime Contract, upon information and belief, DAI was given access to confidential information in connection with the Cuba Task Order. *See id.* at C.2.M.

USAID's Right of Oversight Under the Cuba Task Order

47. Under the Cuba Task Order, as with the Prime Contract, USAID maintained the right, and duty, to direct and oversee the Cuba Project. Specifically, and among other things:

a. "[USAID's Cuba Program Office] will maintain the right to redirect activities in response to USAID program and strategy requirements, changes in the political situation, or regulatory changes." *Id.* at C.2.L(D);

b. USAID is to receive monthly reporting from DAI on, among other things, "current considerations regarding proposed activities to promote successful democratic transition." *Id.* at 25; and

c. Moreover, USAID's Bureau for Latin America and the Caribbean is required to "provide technical oversight to [DAI] through its designated [Cognizant Technical Officer]." *Id.* at 29.

B. DAI's Subcontract With Plaintiff Alan Gross

48. Upon information and belief, as part of the Cuba Task Order, Defendant United States, through USAID, wanted to increase the availability in Cuba of new media by increasing internet access there.

49. Upon information and belief, Defendant United States wanted to increase internet access in Cuba quickly.

50. Upon information and belief, based on the Cuba Task Order and DAI's extensive experience with USAID, DAI officials knew the types of projects that would ultimately win USAID's approval and drive additional revenue to DAI.

51. Consistent with this knowledge and with its economic dependence on USAID, upon information and belief, DAI assured USAID that DAI could move quickly to perform the task of increasing internet access in Cuba.

52. Upon information and belief, Defendant DAI had worked with Mr. Gross previously on unrelated projects; those projects did not require the skill set, such as fluency in Spanish, that was or should have been required for this particular project.

53. Nonetheless, Defendant DAI began discussions with Plaintiff Alan Gross, a 59-year old Jewish American businessman who did not speak Spanish, about working on the project.

54. DAI management initially communicated with Mr. Gross in the Fall of 2008 about the possibility of his working on the Cuba Task Order and, on October 31, 2008, submitted a "Request for Proposal" to him.

55. DAI's "Request for Proposal" included a "Statement of Work" that detailed the types of

proposals DAI was seeking in its effort to satisfy USAID's requirement to increase access to "new media" in Cuba, stating that: "[the subcontractor] shall design and implement new media initiatives that will stimulate and strengthen the effectiveness of a range of civil society actors in Cuba . . . to participate in local decision making and problem solving . . . . The initiative(s) should focus on increasing the communication and understanding of events on the ground in Cuba; [including] breaking down barriers to Cuban citizens' access to information . . . ." DAI Request for Proposal at 6.

56. Mr. Gross submitted a detailed response to DAI's Request for Proposal on November 7, 2008 ("Response to RFP").

57. Mr. Gross' proposal contemplated training the Jewish community in Cuba on the use and maintenance of information and communication technologies ("ICTs") through, among other things, the use of mobile phones, wireless technologies, and personal computers (the "Cuba ICT Project").

58. Mr. Gross' proposal reflected his lifelong dedication, both professionally and personally, to serving Jewish causes around the world.

59. As part of the Cuba ICT Project, it was contemplated that Mr. Gross would travel to Cuba on multiple occasions. Once in Cuba, Mr. Gross was to interface with various members of the Cuban Jewish community for purposes of configuration, logistics, training, and implementation.

60. Upon information and belief, DAI solicited bids from other prospective offerors in addition to Mr. Gross. Upon receipt of proposals, DAI selected the proposals, including the proposal submitted by Mr. Gross, that it would provide to USAID for review and evaluation.

61. USAID had the right to approve both the selection of Mr. Gross as DAI's subcontractor and the terms of the proposed subcontract, including the scope of work.

62. Upon information and belief, USAID did in fact approve Mr. Gross as DAI's subcontractor and the terms of the subcontract, including the scope of work.

63. Thus, Mr. Gross, through the entity JBDC LLC, of which he was the sole member and employee, entered into a subcontract with DAI on February 10, 2009 (the "Subcontract").[3]

64. Upon information and belief, because JBDC is a single-member LLC, the Internal Revenue Service has treated JBDC as a sole proprietorship for tax purposes.

65. Per DAI's instructions, Mr. Gross, working in consultation with DAI management and subject to USAID approval, developed and implemented the Cuba ICT Project to increase internet access in Cuba.

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[3] Upon information and belief, Defendants possess complete copies of the Subcontract.

66. The Subcontract stated that "[t]he pilot [project] will diminish portions of the information blockage by – on a limited test basis – establishing internet connections using multiple redundant devices in order to improve intra and intergroup communications channels. The pilot will . . . [e]nable target beneficiaries via training to use ICT devices to connect to the internet so that they can have regular and direct contact with each other and with JBDC, as well as enable access to a large volume [of] data and information not previously accessed . . . ." Subcontract at 19.

67. Consistent with DAI's economic dependence on USAID, the Subcontract also provided that: "DAI and [Mr. Gross] recognize that time is of the essence with respect to performance of the subcontract and there is potential for financial loss by DAI in the event that [Mr. Gross] fails to complete the Work." *Id.* at 2.

68. Under the Subcontract, DAI representatives were responsible for technical direction of the Cuba ICT Project, including providing "(i) directions to [Mr. Gross] which direct or redirect the Subcontract effort, shift work emphasis between work areas or tasks, require pursuing of certain lines of inquiry, fill in details or otherwise serve to accomplish the Subcontract Statement of Work, (ii) furnishing information to [Mr. Gross] which assists in the interpretation of specifications or technical portions of the Subcontract Statement of Work, and (iii) review and, where required by the Subcontract, approv[e] of technical reports, specifications, and technical

information to be delivered by [Mr. Gross] to DAI under this Subcontract." Subcontract at 5-6.

69. Throughout the course of the Cuba ICT Project, Mr. Gross worked with DAI management regarding the logistics and operations of the Cuba ICT Project. On March 1, 2009, for example, preceding his first trip to Cuba, Mr. Gross submitted a final "Work Plan" and "Performance Monitoring and Evaluation Plan" to DAI outlining how he intended to accomplish the goals of the Project.

70. DAI had the right under the Subcontract to "inspect, or otherwise evaluate" the work being performed and the premises where it was being performed. Subcontract at 8.

71. Under the Prime Contract, the Cuba Task Order, and USAID's Automated Directives, DAI was required to communicate regularly with USAID regarding the Cuba ICT Project, including regarding Mr. Gross' trips to Cuba. *See* Prime Contract at 37, 42; Task Order at 25; ADS Section 522.1.

72. Upon information and belief, a final copy of the Work Plan and Performance Monitoring and Evaluation Plan were provided to, and approved by, USAID.

73. Upon information and belief, there were five modifications or amendments to the Subcontract. All of these amendments were subject to, and did receive, the ultimate approval of USAID.

74. Upon information and belief, USAID, and the United States' diplomatic mission in Cuba, were required to communicate with each other regularly regarding Mr. Gross' trips to Cuba.

75. Upon information and belief, Mr. Gross was not provided with the same information that Defendants USAID and DAI possessed regarding the specific risks involved in performing this kind of project in Cuba.

C. Mr. Gross' Trips to, and Ultimate Wrongful Detention in, Cuba

76. As discussed further below, Defendants DAI and United States breached their duty to protect Mr. Gross from specific risks that Defendants, based on their position, had the unique ability to know. Defendants also ignored Mr. Gross' own expressions of concern about the Project, opting instead to continue an operation from which Defendant DAI stood to benefit financially and that Defendant United States was committed to ideologically.

77. Mr. Gross departed for his first trip to Cuba on March 30, 2009, during which he initiated contact and established a project site with the Jewish community in Havana. Mr. Gross returned from his first trip on April 6, 2009, and, shortly thereafter, he submitted his first trip memorandum and debriefing to DAI.

78. Following his first visit, Mr. Gross relayed the security concerns of his Cuban contacts to DAI:

"A thorough understanding concerning the sensitive nature of what was about to occur had to be reached before any participation would be ultimately committed . . . The leadership of the target group has specific concerns about government informants and the highest level of discretion is warranted." First Trip Memo. at 7.

79. Upon information and belief, DAI provided a copy of Mr. Gross' first trip memorandum to USAID.

80. Defendant DAI failed to take any action to protect Mr. Gross in response to the concerns expressed in his first trip memorandum.

81. Instead, Defendant DAI ignored these concerns, continued business as usual, and thereby continued to generate revenue from the Cuba ICT Project and other projects with USAID.

82. Defendant United States also ignored the concerns expressed in Mr. Gross' first trip memorandum after receiving it from DAI.

83. Instead, Defendant United States continued, without any adjustment, the Cuba ICT Project, using Mr. Gross as a pawn in its overall Cuban policy efforts.

84. Mr. Gross departed for his second trip to Cuba on April 24, 2009. During his second visit, he established a second project site in Santiago de Cuba, located in Southern Cuba. Shortly after

returning from his second trip, on May 4, 2009, Mr. Gross submitted a second trip memorandum to DAI.

85. Mr. Gross' second trip memorandum included a section dedicated to "Managing Risk," sharing the security concerns of his contacts in Santiago de Cuba. Mr. Gross relayed to DAI that: "Essentially, the committee leader made it abundantly clear that we are all 'playing with fire' by agreeing to participate in [the Cuba ICT Project], and that we need to be extremely careful and quiet about [Cuba ICT Project] activities and to exercise discretion over with whom such activities are discussed." Second Trip Memo. at 3.

86. Upon information and belief, DAI provided a copy of Mr. Gross' second trip memorandum to USAID.

87. Defendant DAI failed to take any action to protect Mr. Gross in response to the concerns expressed in his second trip memorandum.

88. Instead, Defendant DAI ignored these concerns, continued business as usual, and thereby continued to generate revenue from the Cuba ICT Project and other projects with USAID.

89. Indeed, on this occasion, Defendant DAI revealed the financial concerns that were driving it to ignore the risks to Mr. Gross, namely the adverse financial impact to DAI if it failed to complete the Cuba Task Order. Specifically, on May 19, 2009, Mr. Gross spoke with DAI management regarding his second trip memorandum. After that conversation,

DAI management sent Mr. Gross a follow-up memo stating: "[g]iven your concerns regarding your ability to remain on the island, please indicate in writing your contingency plan in the case you are unable to continue working on the island for whatever reason. Who will take over to see the project to completion?"

90. Upon information and belief, DAI pressured Mr. Gross to complete the Cuba ICT Project because "time [was] of the essence with respect to performance of the Subcontract and there [was] a potential for financial loss by DAI in the event that [Mr. Gross] fail[ed] to complete the Work." Subcontract at 2.

91. A failure by Mr. Gross to complete the work would have jeopardized not only the millions of dollars owed to DAI by USAID on the Cuba Task Order, but, upon information and belief, also would have jeopardized other existing, and future, business generally between DAI and USAID.

92. Defendant United States also ignored the concerns expressed in Mr. Gross' second trip memorandum after receiving it from DAI.

93. Instead, Defendant United States continued, without any adjustment, the Cuba ICT Project, using Mr. Gross as a pawn in its overall Cuban policy efforts.

94. Mr. Gross departed for his third trip to Cuba on June 4, 2009. During his third visit, he established a project site in Camagüey in central Cuba, approximately 400 miles from Havana.

95. Mr. Gross returned from his third trip on June 18, 2009, and submitted a third memorandum to DAI, which once again outlined the risks that the Project posed: "This is very risky business in no uncertain terms. Provincial authorities are apparently very strict when it comes to unauthorized use of radio frequencies . . . . Detection usually means confiscation of equipment and arrest of users." Third Trip Memo. at 7.

96. Upon information and belief, DAI provided a copy of Mr. Gross' third trip memorandum to USAID.

97. Defendant DAI failed to take any action to protect Mr. Gross in response to the concerns expressed in his third trip memorandum.

98. Instead, Defendant DAI ignored these concerns, continued business as usual, and thereby continued to generate revenue from the Cuba ICT Project and other projects with USAID.

99. Defendant United States also ignored the concerns expressed in Mr. Gross' third trip memorandum after receiving it from DAI.

100. Instead, Defendant United States continued, without any adjustment, the Cuba ICT Project, using Mr. Gross as a pawn in its overall Cuban policy efforts.

101. Mr. Gross departed for his fourth trip to Cuba on July 19, 2009. He returned from Cuba on

August 2, 2009, and submitted his fourth trip memorandum to DAI.

102. In his fourth trip memorandum, Mr. Gross began his section on risk with the following sentence in bold lettering: "In no uncertain terms, this is very *risky* business." To illustrate the risks involved, he described an incident during which Cuban customs officials attempted to seize some of his team's equipment when they arrived at the airport in Havana. Fourth Trip Memo. at 5. He described efforts by Cuban authorities to detect or "sniff out" wireless networks and other unauthorized radio frequency use, especially outside of Havana. *Id.* at 6. He reiterated that the detection of these networks could result in arrests of his contacts there. *Id.*

103. Upon information and belief, DAI provided a copy of Mr. Gross' fourth trip memorandum to USAID.

104. Defendant DAI failed to take any action to protect Mr. Gross in response to the concerns expressed in his fourth trip memorandum.

105. Instead, Defendant DAI ignored these concerns, continued business as usual, and thereby continued to generate revenue from the Cuba ICT Project and other projects with USAID.

106. Defendant United States also ignored the concerns expressed in Mr. Gross' fourth trip memorandum after receiving it from DAI.

107. Instead, Defendant United States continued, without any adjustment, the Cuba ICT Project, using Mr. Gross as a pawn in its overall Cuban policy efforts.

108. On September 17, 2009, DAI submitted a proposal to USAID for follow-on activities for the Cuba ICT Project. These follow-on activities both extended the term, and expanded the scope of, the Cuba ICT Project. USAID consented to these follow-on activities on October 8, 2009, approving additional funding for the Project. Upon information and belief, USAID's approval of the DAI proposal for follow-on activities resulted in additional revenue for DAI.

109. Although Mr. Gross agreed with the idea of follow-on activities, the proposal for such activities represented a concrete opportunity for both Defendant DAI and Defendant United States to leverage their superior knowledge and position and take basic measures to protect Mr. Gross, like foregoing, or at least delaying, the follow-on activities, or providing additional disclosures, education, training, and protection to Mr. Gross.

110. Yet, upon information and belief, DAI, for pecuniary reasons, and Defendant United States, for ideological reasons, failed to take any such measures and allowed the Cuba ICT Project to continue and expand without any safety adjustments.

111. On October 26, 2009, DAI and Mr. Gross signed Modification No. 5 to the Subcontract,

revising the contract to include follow-on activities to be carried out through October 31, 2010.

112. On November 23, 2009, Mr. Gross departed for his fifth trip to Cuba. On the evening before he was to return to the United States, December 3, 2009, Mr. Gross was arrested by Cuban authorities due entirely to the work he was performing for DAI and USAID.

113. Mr. Gross was imprisoned, but he was not formally charged with a crime until February 2011, when he was charged with "Acts against the Independence or Territorial Integrity of the State."

114. Initially, Mr. Gross was held in one of Cuba's most well-known prisons reserved for political prisoners. During that time, Mr. Gross was subject to extensive interrogation, sleep deprivation, and other psychological abuse.

115. After a summary trial, on March 11, 2011, Mr. Gross was convicted and sentenced to 15 years in prison. The Cuban court determined that Mr. Gross participated in "a subversive project of the U.S. government that aimed to destroy the Revolution through the use of communications systems out of the control of [Cuban] authorities."

116. Mr. Gross appealed his conviction, but his appeal was denied by the Cuban Supreme Court on August 4, 2011.

117. Notwithstanding the verdict by the Cuban court, Mr. Gross' activities were entirely lawful under the laws of the United States.

D. The Defendants' Tortious Conduct Toward Plaintiffs

DAI's Negligence, Gross Negligence, and Willful Disregard of Mr. Gross' Rights

118. Defendant DAI had a duty, but failed, to take basic remedial measures to protect Mr. Gross, despite having superior knowledge, which Mr. Gross did not possess, about specific risks that Mr. Gross faced due to his participation in the Cuba ICT project. Specifically, and among other things, Defendant DAI:

a. failed to disclose those risks to Mr. Gross and warn him about them;

b. failed to provide education and training to Mr. Gross about how to avoid and otherwise address those risks, including, but not limited to, failing to develop and implement proper training programs and syllabi;

c. failed to provide additional protection to Mr. Gross during this trips to Cuba, including but not limited to, additional people and/or equipment;

d. failed to call Mr. Gross back from Cuba or prevent him from returning to Cuba once he was back in the United States;

e. failed to conduct proper conflict and fragility assessments, including proper reviews of risk factors relevant to Cuba and proper follow-up on assessment findings;

f. failed to design and implement appropriate monitoring and evaluation efforts for USAID on conflict issues that were specific to Cuba;

g. failed to identify and implement areas of program management responsibility and hire the appropriate staff to support tasks related to the Cuba ICT Project.

119. Defendant DAI also, with gross negligence and in willful disregard of Mr. Gross' rights, ignored both its superior knowledge of the risks facing Mr. Gross and Mr. Gross' own expressions of concern regarding the project, because DAI, upon information and belief, was more concerned about its own financial gain. Specifically, upon information and belief, Defendant DAI was concerned about the "potential for financial loss by DAI in the event that [Mr. Gross] fail[ed] to complete the work." Subcontract at 2.

120. Consequently, DAI failed to take any action to address Mr. Gross' expressions of concern in his multiple trip reports, and instead pressured him to complete the project or else find someone else who could.

Defendant United States' Negligent Conduct Toward Mr. Gross

121. Defendant United States had a duty, but failed, to take basic remedial measures to protect Mr. Gross despite having superior knowledge about specific risks that Mr. Gross faced due to his participation in the Cuba ICT project. Specifically, and among other things, Defendant United States:

a. failed to disclose those risks to Mr. Gross and warn him about them;

b. failed to provide education and training about how to avoid and otherwise address those risks;

c. failed to provide additional protection to Mr. Gross during this trips to Cuba, including, but not limited to, additional people and/or equipment;

d. failed to call Mr. Gross back from Cuba or prevent him from returning to Cuba once he was back in the United States;

e. failed to comply with all pertinent ADS provisions and all other mandatory internal directives governing the planning and conduct of the Cuba Program, the Cuba Project, and the Cuba ICT Project; and

f. improperly granted approval for the extension and expansion of the Cuba ICT Project (i.e., the follow-on

activities), instead of at least delaying such activities until the risks had been addressed.

122. In particular, and among other things, Defendant United States failed to comply with ADS Section 569—the "Counterintelligence Manual"—in at least the following respects:

a. failing to educate Mr. Gross regarding potential foreign threats;

b. failing to report threats or overt acts against Mr. Gross and his activities and/or against other activities involving the Cuba Program, the Cuba Project, and/or the Cuba ICT Project;

c. failing to conduct, and adjust as necessary, counterintelligence education and training based on the threat level in Cuba, including the "program requirements at post" as reflected in the Security Environment Threat List (SETL);

d. failing to maintain security and counterintelligence oversight in Cuba, including failing to provide proper oversight of the USAID Counterintelligence program, and failing to share all appropriate information with the appropriate agencies;

e. failing to allow for appropriate review of travel assignments to critical threat posts like Cuba and thus allow for appropriate awareness training before departure.

123. Upon information and belief, Defendant United States also:

a. failed to educate Mr. Gross on the threat posed by Cuba intelligence to USAID operations in Cuba, including failing to make him aware of the techniques used by Cuban government intelligence;

b. failed to develop and conduct travel related pre-briefings and debriefings for Mr. Gross; and

c. failed to conduct counterintelligence training for Mr. Gross.

124. Upon information and belief, Defendant United States failed to fulfill its obligations under the Cuba Task Order. Specifically, USAID:

a. failed to redirect activities as necessary based on program requirements. *See* Cuba Task Order at C.2.L(D); and

b. failed to provide technical oversight to [DAI] through its designated [Cognizant Technical Officer]." *See Id.* at 29.

125. Defendant United States further failed to take action even after being informed of Mr. Gross' own concerns through his trip memoranda.

126. According to press reports, as a result of Mr. Gross' imprisonment, USAID has altered the Cuba Program to avoid the use of satellite equipment of the type used by Mr. Gross and to restrict the program to items available on the island.

127. Effective January 23, 2012, after Mr. Gross' detention, USAID implemented an automated directive for overseas contractors requiring that contractors who are "cleared for access to classified information are given a local/Mission security briefing upon arrival, and prior to departure, a debriefing to ensure that they understand security requirements." ADS Section 568.3.5.7.

E. The Immense and Continuing Harm to Plaintiffs Due to Defendants' Tortious Conduct.

128. Mr. Gross remains incarcerated in Cuba in a 10-by-12 foot room that he shares with two other inmates. Since his imprisonment began in December 2009, Mr. Gross has suffered physically and emotionally. He was subjected to extensive interrogation, sleep deprivation, and other psychological abuse. He has lost over 100 pounds, battled chronic arthritis pain, developed a tumor beneath his shoulder blade, and experienced increased difficulty in walking. He also has experienced severe emotional distress being

separated from his family for almost three years, from his existing injuries, and from his continuing fear for his own safety while he remains in Cuban captivity.

129. Mr. and Mrs. Gross likewise have suffered significant economic losses due to Mr. Gross's wrongful arrest and continuing wrongful detention. These economic losses include, but are not limited to: (a) the destruction of Mr. Gross's business; (b) lost income that both Plaintiffs have suffered, and that they will suffer in the future, including any amounts that still may be owed to Mr. Gross under his contract with DAI; (c) past and future legal fees and related expenses; (d) past and future medical expenses for Mrs. Gross; and (e) future medical expenses for Mr. Gross.

130. Both Mr. Gross and Mrs. Gross also have suffered a loss of each other's society, affection, assistance and fellowship as a result of the injuries inflicted on Mr. Gross by Defendants' tortious conduct.

131. As set forth below, Defendant DAI and Defendant United States each are jointly and severally liable for these damages.[4]

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[4] Simultaneously with the filing of this tort complaint, Plaintiffs have filed a lawsuit in the U.S. District Court for the District of Maryland, seeking a declaratory judgment, and damages for breach of contract and insurance bad faith, against Federal Insurance Company ("Federal"), which issued an insurance policy under which Plaintiffs are "Insureds" (the "First-Party Coverage Lawsuit") The First-Party Coverage

F. Procedural History of Claims Against United States

132. On December 2, 2011, within two years of Mr. Gross' detention in Cuba, Mr. and Mrs. Gross each filed administrative claims with USAID under the Federal Tort Claims Act ("FTCA"). True and correct copies of the claims are attached hereto as Exhibit A.

133. On May 22, 2012, Mr. and Mrs. Gross received a letter from USAID denying their administrative claims. A true and correct copy of the letter is attached hereto as Exhibit B.

134. Defendant United States, through USAID, premised its denial of Plaintiffs' administrative claims solely on the so-called "foreign country" exception to the FTCA, 28 U.S.C. § 2680(k). *See* Exhibit B.

135. The "foreign country" exception is not applicable here. Specifically, the Supreme Court's interpretation of the foreign country exception, in

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Lawsuit involves pure insurance coverage, contract interpretation issues that are wholly independent of the tort liability and damages issues in this case. In the First-Party Coverage Lawsuit, Plaintiffs, as Insureds who have direct rights under the policy, seek coverage for certain of the expenses that they have incurred in connection with the wrongful detention of Mr. Gross. Plaintiffs' entitlement to such coverage will turn on the interpretation of various terms and conditions of the insurance contract at issue there; the conduct of Defendants DAI and United States, and of Plaintiffs, will not be at issue.

Sosa v. Alvarez v. Machain, 542 U.S. 692 (2004), does not preclude the claims asserted here because:

a. Plaintiff Alan Gross is a United States citizen born and raised in this country, who was injured while working with Defendant United States as part of its effort to achieve the objective of increasing internet access in Cuba; unlike in *Sosa*, Mr. Gross is not a foreign national plaintiff who helped to prolong the torture, which ultimately resulted in death, of a United States Drug Enforcement Agency ("DEA") agent;

b. Unlike in *Sosa*, where even some of the challenged conduct of Defendant United States – and not just the resulting injury – occurred in Mexico (where the DEA sent its agents to capture Mr. Sosa), all of USAID's tortious conduct alleged here occurred in the United States and, upon information and belief, at USAID's Washington, D.C. headquarters;

c. Unlike in *Sosa*, Mr. Gross's co-plaintiff, his wife Judith Gross, has sustained all of her harm and losses related to her husband's wrongful detention here in the United States; in *Sosa*, the Supreme Court did not apply the foreign country exception to loss of consortium claims; and

d. Cuban law will not apply to Plaintiffs' claims; thus, as noted by Justice Ginsburg and Justice Breyer in their concurring opinion in *Sosa*, the underlying rationale for the "foreign country exception," as reflected in, among other things, the legislative history of the FTCA, does not apply in this case.

FIRST CLAIM FOR RELIEF
(Negligence against the United States as to Alan Gross)

136. Plaintiffs hereby incorporate Paragraphs 1 through 135 of this Complaint.

137. Defendant United States had a duty to take basic remedial measures to protect Mr. Gross based on its superior knowledge, which Mr. Gross did not possess, about specific risks that Mr. Gross faced due to his participation in the Cuba ICT project. Among other things, Defendant United States had a duty to take the remedial measures that it failed to take as set forth in paragraphs 121 through 124 *supra*.

138. Defendant United States failed to take any of those actions, even after being informed of Mr. Gross' own concerns through his trip memoranda.

139. Defendant United States' breaches of its duties were a direct and proximate cause of Mr. Gross' detention and imprisonment in Cuba and the injuries and damages suffered as a result.

140. As a proximate result of Defendant United States' negligent actions and omissions, Mr. Gross has endured, and will continue to endure, severe pain and suffering, and he has been prevented from pursuing his usual and customary activities. He has also suffered economic damages, including, but not limited to, loss of past and future income and expenses for future medical care.

SECOND CLAIM FOR RELIEF
(Negligence against DAI as to Alan Gross)

141. Plaintiffs hereby incorporate Paragraphs 1 through 140 of this Complaint.

142. Any exculpatory, hold harmless, or limitation of liability clauses in the Subcontract are unenforceable because, among other reasons, the transaction affects the public interest and the clauses violate public policy.

143. Defendant DAI had a duty to take basic remedial measures to protect Mr. Gross based on its superior knowledge, which Mr. Gross did not possess, about specific risks that Mr. Gross faced due to his participation in the Cuba ICT project. Among other things, Defendant had a duty to take the remedial measures that it failed to take as set forth in paragraph 118 *supra*.

144. Defendant DAI failed to take any of these actions, even after being informed of Mr. Gross' own concerns through his trip memoranda.

145. Defendant DAI's breaches of its duties were a direct and proximate cause of Mr. Gross' detention and imprisonment in Cuba and the injuries and damages suffered as a result.

146. As a proximate result of Defendant DAI's negligent actions and omissions, Mr. Gross has endured, and will continue to endure, severe pain and suffering, and he has been prevented from pursuing his usual and customary activities. He has also suffered economic damages including but not limited to loss of past and future income and expenses for future medical care.

THIRD CLAIM FOR RELIEF
(Gross Negligence against DAI as to Alan Gross)

147. Plaintiffs hereby incorporate Paragraphs 1 through 146 of this Complaint.

148. Defendant DAI had the duties to Mr. Gross described in paragraph 143 *supra*.

149. Defendant DAI, with gross negligence and willful disregard of Mr. Gross' rights, breached all of the above duties by failing to take the necessary actions as detailed in paragraphs 118 through 120 *supra*.

150. Defendant DAI, with utter indifference to Mr. Gross' rights, ignored both its superior knowledge of the risks facing Mr. Gross and Mr. Gross' own expressions of concern regarding the project, because DAI was, upon information and

belief, more concerned about the financial gain it could realize by taking risks in order to complete the project.

151. Consequently, Defendant DAI failed to take any action to address Mr. Gross' expressions of concern in his multiple trip memoranda, and instead DAI pressured him to complete the project.

152. Defendant DAI's breaches of its duties were a direct and proximate cause of Mr. Gross' detention and imprisonment in Cuba and the injuries and damages suffered as a result.

153. As a proximate result of Defendant DAI's negligent actions and omissions, Mr. Gross has endured, and will continue to endure, severe pain and suffering, and he has been prevented from pursuing his usual and customary activities. He has also suffered economic damages including but not limited to loss of past and future income and expenses for future medical care.

FOURTH CLAIM FOR RELIEF
(Negligent Infliction of Emotional Distress against the United States as to Alan Gross)

154. Plaintiffs hereby incorporate Paragraphs 1 through 153 of this Complaint.

155. Defendant United States' negligence, as outlined in more detail supra, has caused injuries to Mr. Gross, and has placed him in a zone of physical danger resulting from his imprisonment, such that

he has feared, and continues to fear, for his own physical safety.

156. Due to Mr. Gross' injuries, as referenced above, that have resulted from his wrongful detention, and that are a proximate result of Defendant United States' negligence, Mr. Gross also has suffered and continues to suffer severe emotional distress.

157. Moreover, due to Defendant United States' tortious conduct, Mr. Gross remains in a "zone of physical danger," (i.e., captivity by the Cuban government), and, as a result, Mr. Gross has suffered and will continue to suffer severe emotional distress – namely, fear for his safety in the future.

FIFTH CLAIM FOR RELIEF
(Negligent Infliction of Emotional Distress against DAI as to Alan Gross)

158. Plaintiffs hereby incorporate Paragraphs 1 through 157 of this Complaint.

159. Defendant DAI's negligence, as outlined in more detail *supra*, has caused injuries to Mr. Gross, and placed him in a zone of physical danger resulting from his imprisonment, such that he has feared, and continues to fear, for his own physical safety.

160. Due to Mr. Gross' injuries, as referenced above, that have resulted from his wrongful detention, and that are a proximate result of Defendant DAI's negligence, Mr. Gross also has

suffered and continues to suffer severe emotional distress.

161. Moreover, due to Defendant DAI's tortious conduct, Mr. Gross remains in a "zone of physical danger," (i.e., captivity by the Cuban government), and, as a result, Mr. Gross has suffered and will continue to suffer severe emotional distress – namely, fear for his safety in the future.

SIXTH CLAIM FOR RELIEF
(Grossly Negligent Infliction of Emotional Distress against DAI as to Alan Gross)

162. Plaintiffs hereby incorporate Paragraphs 1 through 161 of this Complaint.

163. Defendant DAI's gross negligence, as outlined in more detail *supra*, has caused injuries to Mr. Gross, and placed him in a zone of physical danger resulting from his imprisonment, such that he has feared, and continues to fear, for his own physical safety.

164. Due to Mr. Gross' injuries, as referenced above, that have resulted from his wrongful detention, and that are a proximate result of Defendant DAI's negligence and gross negligence, Mr. Gross also has suffered and continues to suffer severe emotional distress.

165. Moreover, due to Defendant DAI's tortious conduct, Mr. Gross remains in a "zone of physical danger," (i.e., captivity by the Cuban government), and, as a result, Mr. Gross has suffered and will

continue to suffer severe emotional distress – namely, fear for his safety in the future.

SEVENTH CLAIM FOR RELIEF
(Loss of Consortium against the United States and DAI as to Alan Gross and Judith Gross)

166. Plaintiffs hereby incorporate Paragraphs 1 through 165 of this Complaint.

167. Mr. Gross has suffered injuries proximately caused by Defendants' negligence and gross negligence.

168. Mr. and Mrs. Gross are currently married and were married at the time Mr. Gross' injuries were initially suffered, i.e., at the time of Mr. Gross' wrongful arrest.

169. As a result of the injuries suffered by Mr. Gross due to Defendants' tortious conduct, both Mr. Gross and Mrs. Gross have suffered a loss of each other's society, affection, assistance and fellowship.

EIGHTH CLAIM FOR RELIEF
(Punitive Damages against DAI)

170. Plaintiffs hereby incorporate Paragraphs 1 through 169 of this Complaint.

171. DAI acted recklessly and with willful disregard toward Mr. Gross' rights and safety. Specifically, DAI's actions include but are not limited to the following:

a. DAI failed to take basic remedial steps to protect Mr. Gross from harm, which DAI knew to be necessary, because doing so would have delayed or prevented DAI's complete performance under part of a lucrative contract with Defendant United States, thereby depriving Defendant DAI of significant revenue.

b. DAI ignored both its superior knowledge of the risks facing Mr. Gross and Mr. Gross' own expressions of concern regarding the project, because DAI, upon information and belief, was more concerned about the financial gain it could realize by taking risks in order to complete the project, including risks to Mr. Gross' safety. Specifically, upon information and belief, Defendant DAI was concerned about the "potential for financial loss by DAI in the event that [Mr. Gross] fail[ed] to complete the work."

c. Based on its pecuniary interests, DAI failed to take any action to address Mr. Gross' expressions of concern in his multiple trip reports, and instead pressured him to complete the project or else find someone else who could.

d. Not only did DAI fail to take any action to protect Mr. Gross, it advocated for an extension and expansion of the Cuba

ICT Project, after which Mr. Gross was detained in Cuba.

REQUEST FOR RELIEF

WHEREFORE, Mr. and Mrs. Gross seek judgment as follows:

a. That judgment be entered against the Defendants, jointly and severally, and in favor of Mr. and Ms. Gross for compensatory damages as may be awarded at trial;

b. For an award of punitive damages against DAI in connection with the Eighth Claim for Relief;

c. For an award of costs, expenses and reasonable attorneys' fees incurred in prosecuting this action; and

d. For such other and further relief as the Court deems just and proper.

JURY DEMAND

Plaintiffs hereby request trial by jury as to DAI.

Dated: November 16, 2012

Respectfully submitted,
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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-5168

ALAN GROSS, ET AL., Appellants,

v.

UNITED STATES OF AMERICA, Appellee.

Friday, September 19, 2014
Washington, D.C.

The above-entitled matter came on for oral argument pursuant to notice.

BEFORE:

CIRCUIT JUDGES HENDERSON, ROGERS, AND KAVANAUGH

APPEARANCES:

ON BEHALF OF THE APPELLANTS:
BARRY I. BUCHMAN, ESQ.

ON BEHALF OF THE APPELLEE:
ALAN BURCH, ESQ.

CONTENTS

[3] PROCEEDINGS

THE CLERK: Case number 13-5168, Alan Gross, et al., Appellants v. United States of America. Mr. Buchman for the Appellants; Mr. Burch for the Appellee.

JUDGE HENDERSON: Mr. Buchman, good morning.

ORAL ARGUMENT OF BARRY I. BUCHMAN, ESQ.

ON BEHALF OF THE APPELLANTS

MR. BUCHMAN: Good morning, Your Honors. May it please the Court, Barry Buchman on behalf of the Appellants, Alan Gross and Judith Gross. Your Honors, we respectfully submit that the District Court decision should be reversed for two reasons. First, *Sosa* does indeed direct us to focus on the location of injuries, and the Grosses have alleged substantial injuries in the United States. Therefore, purely as a matter of statutory construction this case should not have been dismissed at the initial

pleading stage. Second, even if this Court were to conclude that the Foreign Country Exception bars some of the claims at issue here, *City of Cleburne* makes clear that even under a rational basis of review a statutory provision, or an ordinance, in this case the Foreign Country Exception, can be facially constitutional and still unconstitutional as applied, and that is exactly the situation that we have here. It is the situation that we have here, Your Honors, because there was, in the District Court there was not even [4] a contention, much less a showing or a finding, that Cuban law will apply in this case. Therefore, the purpose of the Foreign Country Exception, which is to preclude the application of foreign tort law in FTCA cases against the Government is not served by applying it here. It therefore is irrational to apply it here when the whole reason for applying it doesn't exist. And I would submit that all the things I've just said are particular true, Your Honors, when we're dealing with a precluded interest, or curtailed interest or right that while not fundamental for purposes of obtaining stricter intermediate scrutiny is certainly very important, and I refer, of course, of the right of U.S. citizens to have access to the courts to seek redress for their injuries.

Now, with respect to the statutory argument, I think it's important to know because I know the government makes a big deal about the domestic injuries being caused by or would not, they would not exist but for the noneconomic injuries that Mr. Gross has suffered in Cuba. A couple of points I want to make about that. The first is I think it's important to draw a distinction between Mr. Gross's status of

incarceration and his injuries and damages resulting from that status. He has physical and mental noneconomic injuries resulting from that status of incarceration, and he has economic injuries resulting from that status of [5] incarceration, but that status is not the injury itself, that is the conduct of the U.S. Government, and the intervening conduct of the Cuban Government in continuing to wrongfully detain him. I would respectfully submit that it is no different than the intervening conduct in *Sosa* that the Supreme Court said would likewise be irrelevant as the U.S. Government's conduct. Your Honors may recall that they said one of the reasons why we don't want to focus on the U.S. Government's conduct in the U.S. is because there often will be intervening conduct overseas, as well, or in a foreign country, as well, in that case the conduct of Mr. Sosa and other Mexican nationals in detaining Mr. Alvarez. I would submit that the intervening act of the Cuban Government in detaining Mr. Gross is no different here. Again, it's Mr. Gross's status of incarceration that is causing his distinct injuries. If Mr. Gross were in the best shape of his life, both physically and mentally, he would still not have been able to attend to his business here in the United States, and his business would have failed as --

JUDGE KAVANAUGH: Won't that often, if not always, be the case when, at least when it's an American citizen who runs into some trouble in a foreign country and then brings a case like this?

MR. BUCHMAN: I would say not always, Your Honor, [6] for the following reason. I would draw a distinction between a case where a U.S.

citizen, as a result of their injury, is not able to work anymore, even after they come back. For example, they get paralyzed overseas, or they, you know, they have a terribly herniated disc in their back, and so their status of incarceration is irrelevant, even after they come back as a result of their physical ailments, they're not able to work anymore. I think that's different than a situation where if they're detained overseas and came back, they might be able to work.

Now, there's no evidence in the record yet about whether --

JUDGE KAVANAUGH: Wait. So, what's your answer for the hypothetical of the person who's injured overseas and comes back?

MR. BUCHMAN: I would say if they're physically injured and, as a direct result of the physical condition, they're not able to work we would, that would be a tougher argument for us. But I would say that here it's the status of incarceration that caused his business to fail.

JUDGE KAVANAUGH: And why are those two things different in terms of arising in a foreign country? Language?

MR. BUCHMAN: I would submit they're different because in one case you're, in Your Honor's hypothetical, [7] the inability to work is flowing directly from the physical condition regardless of where the Plaintiff is, and in this case they have flown from, they have derived from the fact that he was not able, that he has not been, literally, not been

able to come back home. And I would also submit in that regard, Your Honor, if I may, that this case involves the economic injuries here are at least as separate and distinct from the foreign injuries as they were in *S.H. ex re Holt*, which of course we relied on heavily in our briefs, because in that case, as Your Honors may have seen, including in the most recent decision that came out just a couple of months ago after a full bench trial, there was a lot of evidence of physical problems starting even in Spain, and yet the Court found that the cerebral palsy was separate and distinct from those medical problems that started in Spain. We don't even have that here, we're arguing that the economic injuries flow from his continuing wrongful detention.

I would also submit, I know the Government made a big deal about this in their briefing, I understand that *S.H. ex re Holt* is a District Court case from California, I understand that it's not binding on this Court, I would submit to you that there are very few cases post-*Sosa* applying *Sosa* in a factual circumstance like this one. Indeed, I would submit to you that we have not been able to [8] find anyplace that is closer to being on all fours with our case than *S.H. ex re Holt*.

JUDGE ROGERS: I was trying to find my notes, but I thought the allegations in the complaint in that case are meaningfully distinguishable from the allegations in this complaint.

MR. BUCHMAN: Well, actually, Your Honor, I mean, the Court – I'm sorry.

JUDGE ROGERS: In terms of where the injury was.

MR. BUCHMAN: Well, certainly the Court in its original opinion last November denying the Government's motion for summary judgment made a big point about how at least as to the minor plaintiff, and he actually used those words, the District Judge, at least as to the minor plaintiff, are not claiming for any injury other than the cerebral palsy. But if you actually look at the complaint itself, page six of the complaint, actually has a claim on behalf of the mother for the emotional distress that she suffered during the birthing process in Spain, and one of the things he didn't do, the District Judge, was say well, the minor's claims can go forward, and the mother's claims can't. What he did do, what the District Court did do after the bench trial was say look, I understand the Government's argument that some of the damages included in the damage claim here may have been incurred in Spain, but all that is [9] is a damages allocation issue, it doesn't mean the claim doesn't get to go forward in its entirety. And so, I would submit that at worse for us that is the case here, that on remand the District Court could do an analysis of which portion of our damages are attributable strictly to Mr. Gross's noneconomic injuries sustained in Cuba, it does not mean that the whole case should be thrown out in its entirety. And I --

JUDGE KAVANAUGH: What do you do with the language in *Sosa* that says, it's the concluding language, the Foreign Country Exception bars all claims based on any injuries suffered in a foreign

country, based on, because your complaint, I think rightly, talks about that the economic injuries here were suffered as a result of the detention in Cuba. I mean, as a result of -- based on in *Sosa* it does seem, I know *Sosa* has a different fact pattern -- but the broad language in *Sosa* seems to fit the fact pattern in this case.

MR. BUCHMAN: What I would say about that is two things, Your Honor. The first is, as Your Honor correctly notes, all of the injury in *Sosa* occurred in Mexico, and both the Court's opinion and Justice Ginsburg's opinion highlight that. And that's why, frankly, I think *S.H. ex re Holt* felt comfortable drawing that distinction between the injuries that occurred overseas versus the injuries that [10] occurred here.

I would also note in that regard that *S.H. ex re Holt* is not the only case that does something like that in the context of, you know, splitting claims, or immunities in a Federal Tort Claims Act case, and I'm only responding to your question, I know we didn't cite this case in our brief, but the Court's opinion in *Moore v. Valder*, Judge Henderson, your opinion in that case involved a discretionary function exception, and what the Court found was that some of the allegations in terms of the decision to prosecute, you know, the interaction with witnesses were barred by the discretionary function exception, but the claim for unauthorized release of the grand jury testimony to unauthorized third parties could go forward, and the Court said it's important to parse the allegations to figure out which are immune and which are subject to immunity and which are not.

So, in other words, immunity is not an all or nothing proposition.

JUDGE KAVANAUGH: Just thinking about the impact of your theory, it does seem, I'm going back to my first question now that U.S. citizens, this is in essence a backdoor way in terms of results of getting U.S. citizens out of the Foreign Country Exception because U.S. citizens often would be able to plead resulting injuries, and the problem with that I see in terms of effect is Congress [11] specifically considered whether to limit this exception to aliens or not when they first enacted it, and when for whatever reason, I'm not sure I've got the policy, but for whatever reason they enacted the Foreign Country Exception to apply to U.S. citizens, as well.

MR. BUCHMAN: Yes, Your Honor, and I -- I see I'm almost out of time, but I'll answer your question as best I can, and obviously if you permit me, I'll go over. I would say a couple of things. One, whether a citizen or not, that issue arises of if the person is otherwise legally living here and they have a business here they could have that issue. So, I think it's less about the citizenship and more about are the U.S. injuries purely derivative of the foreign injuries, or are they separate and distinct, and for the reasons that I stated earlier, I think they are separate and distinct. This is not a -- Mr. Gross could be in the best condition of his life and he still would not be able to work as a result of his status of incarceration, which is the result of the U.S. Government's conduct, and the Cuban Government's intervening conduct, which *Sosa* said both are

irrelevant. If we're going to focus on the Cuban Government's conduct in that regard, then we should focus on the U.S. Government's conduct. We're not asking for that, we're saying let's focus on the injuries. Understanding, again, purely as a textual matter, that that means some [12] categories of damages may not be recoverable, like they were not in *S.H.*, but then that would just give rise to our constitutional argument, which is that if the whole purpose of the Foreign Country Exception is not implicated by the facts, then there's no rational basis to apply it in this particular case. And as Your Honors noted in *Sandra v. EPA,* that's all an as-applied challenge is, it's saying is it constitutional based on the facts of the particular case, and as Justice White noted for the Court in *City of Cleburne,* it's the preferred method for resolving constitutional issues, it's, we're not obviously making a facial challenge to, seeking to strike the provision, the Foreign Country Exception from the statute as the other cases that the Government cites, like *Heller v. U.S.*, and *Schneider v. U.S.* sought to do.

JUDGE HENDERSON: All right. We'll give you a couple of minutes in reply.

MR. BUCHMAN: Thank you, Your Honor.

JUDGE HENDERSON: Mr. Burch.

ORAL ARGUMENT OF ALAN BURCH, ESQ.

ON BEHALF OF THE APPELLEE

MR. BURCH: Good morning, may it please the Court. With respect to the statutory issue I would say that this Court's decision in *Harbury* certainly foreclosed the statutory claim that they're making. *Harbury* dealt with the [13] claims of a wife based on the injuries of her husband in Guatemala, and the Court's decision applying *Sosa* was very clear and very broad that because he suffered the injuries there that the Foreign Country Exception applied. That language is controlling here, and it goes on to say that her claims are derivative, similarly, her derivative claims similarly arise in Guatemala for purposes of the FTCA because they are based entirely on the injuries her husband suffered there. And indeed, the complaint in this case does, as Judge Kavanaugh alluded to, tie the injuries directly to the detention in Cuba. If you look at the complaint's paragraphs 139, 156, and 168, the counts that apply to the United States, the complaint is explicit that the claims all arise from the injuries he suffered as a result of the detention. So, the location of the detention is clear, and the statutory analysis I think follows easily from *Sosa* and *Harbury*, and the, I think the Court is compelled to follow *Harbury* in that case.

With respect to the constitutional avoidance theory that they are making under the equal protection, I was unable to find any appellate decision that applied the kind of as-applied analysis that they are suggesting to a minimum rationality test, a minimum rationality case. And indeed, to do so would significantly warp the legal standard and convert it to one of heightened scrutiny by requiring [14] that every single plaintiff who shows up be

within the zone of the purposes of the statute. That has never been required, and is directly contradictory to the language in *Sosa* that puts the burden on the plaintiff to, quote, "negative every conceivable basis which might support it," "it" being the law, that's at 508 U.S. 315. And so, the theory here clearly puts an entirely unprecedented spin on the equal protection analysis. The letter I put forth on the Court, before the Court yesterday with respect to *Beach Communications*, certainly the holding in that case was overruled, but the language in the opinion that I quoted in the letter is directly applicable, and I think of the appellate decisions that I saw, this is the one that came closest to addressing this notion of an as-applied challenge under the minimum rationality, and its logic is compelling that there essentially is no difference with the exception of cases that involve either heightened scrutiny, or some fundamental right, and neither of those are implicated here.

JUDGE ROGERS: Go back to *Harbury*. Just hypothetically, if the head of General Motors is asked to go to Cuba on behalf of the United States Government, and basically the same thing happens to him as happened to Mr. Gross.

MR. BURCH: He's arrested, put in jail.

JUDGE ROGERS: He's arrested and incarcerated, and [15] he files a claim along with his wife, just as in the *Harbury* case, and the wife claims loss of consortium, emotional distress, et cetera, that's the *Harbury* case, isn't it? And I know there's very broad language in *Harbury*, but he's --

MR. BURCH: Yes.

JUDGE ROGERS: -- trying to distinguish that from what the head of General Motors might say about the fact that he is being detained outside of the country has adversely effected the corporation, and the value of the corporation has decreased and he's seeking some recovery for that financial loss, very separate it seems the situation from the *Harbury* situation, and therefore, we really, you know, we're back to *Sosa* and the language there that Judge Kavanaugh was discussing with Counsel.

MR. BURCH: Well, the difference would -- I mean, they're making a similar claim about the loss of business interest, and that's certainly a form of damage that would flow from the injury if the injury were one that was recoverable. There's just no question about that.

JUDGE ROGERS: I thought you --

MR. BURCH: The question is an antecedent question as to whether the injury is one that implicates the exception and therefore triggers the sovereign immunity. The analysis is driven by the injury, not by the damages that might flow from it.

[16] JUDGE ROGERS: But the injury, I thought the distinction he was trying to draw in part was the injury is due to the fact that the United States won't get him out of Cuba as distinct --

MR. BURCH: I'm sorry, that the injury was what?

JUDGE ROGERS: The injury in part was due to the fact that the United States won't get him out of Cuba, and I'm just trying to understand how broad that language is, and that's why I gave you the hypothetical --

MR. BURCH: Well, I think that --

JUDGE ROGERS: -- of the head of General Motors with a major corporation where he is integral to the daily operation and decision management, as distinct from Mrs. Harbury, Mrs., yes, Jennifer Harbury, who was like, you know, the wife of the head of General Motors, it's very different. Her injuries stem directly from his being incarcerated, what happens to General Motors is distinct, that's all I'm getting at. But, and I know the language is very broad so I understand --

MR. BURCH: Right.

JUDGE ROGERS: -- that, and that's what the District Court basically said, that we've written so broadly he had no choice, but is there any distinction?

MR. BURCH: The distinction would only be at the remedial stage, I would offer, Your Honor, the location of [17] the causing injury is the same --

JUDGE ROGERS: Well, you can't get by the, past the motion to dismiss, that's your point?

MR. BURCH: Sorry? The Plaintiff cannot get by the motion to dismiss. No. If they were to bring a separate claim for the failure of the United States to

act now, that may well be subject to other exceptions, for example, discretionary function, but that's not a part of the complaint that they're bringing here, so the Court does not need to reach that issue.

Finally, the only thing I would add about the *S.H.* decision is that in both of those decisions it turns on a much more difficult decision in that case as to where the injury occurred, that's what made those cases difficult for the District Court at core, I mean, we could quibble about other aspects of them, as well, but the most important part of it for our purposes is the tricky nature of cerebral palsy and determining where that injury occurred. And if you look at the second decision, *Star 17*, the Court's analysis there shows that, you know, unlike other conditions that it's not a disease, it's tricky to tell, and so the medical consensus is that it doesn't arise until the symptoms are manifest, the symptoms were not manifest until the child was in the United States. So, for purposes of the exception, the Court concluded that the injury occurred in [18] the United States, it's not different, it doesn't provide for a different analysis.

Plaintiffs' theory under the Equal Protection would force the Court to look at all of the major Equal Protection cases all the way back to *Yick Wo* and *San Francisco* and permit someone in Yick Wo's circumstances to go before a court and say, you know, my laundry facility is just as fire safe as any other building in San Francisco, and therefore you shouldn't uphold this zoning ordinance against me,

and that's sort of a radical rewriting is just not in order and supported by the case law. Thank you.

JUDGE HENDERSON: Can I ask you, I know we're not supposed to question the wisdom of the legislature and is acts still being implemented, are we still, is USAID still sending people down there?

MR. BURCH: I don't know. I don't know, Your Honor. I do know that the efforts continue to get Mr. Gross out.

JUDGE HENDERSON: The goal is laudable, but --

MR. BURCH: I'm sorry?

JUDGE HENDERSON: The goal is laudable, but --

MR. BURCH: Yes.

JUDGE HENDERSON: -- practically speaking, this is a very dangerous thing to do, I think. All right. Thank you.

[19] MR. BURCH: Thank you, Your Honor.

JUDGE HENDERSON: Mr. Buchman, why don't you take two minutes.

ORAL ARGUMENT OF BARRY I. BUCHMAN, ESQ.

ON BEHALF OF THE APPELLANTS

MR. BUCHMAN: Just real quickly on the statutory point, I think in addition to *S.H. ex re Holt* you also have the principles of construction from the Supreme Court in *Dolan*, in contrast to the Government's assertion this is not a case like *Nordic Village*, or *Pena* where you were dealing with the Rehabilitation Act, or a bankruptcy code waiver, *Dolan* specifically said the principles enunciated in that case of interpreting immunity broadly, and then resolving ambiguities in the Government's favor specifically are, quote, not helpful, end quote, and that the FTCA is different in terms of broad and unprecedented waiver of liability, and exceptions having to be construed narrowly. I agree that this situation is much more like the one that Judge Rogers described in terms of the distinct economic damages in the United States, even with respect to Mrs. Gross's loss of consortium itself, and by the way, she has two distinct sets of damages too, her economic damages, medical expenses, et cetera, in the United States, as well as her loss of consortium. But as to the loss of consortium part, I would submit that that is as much a result of the [20] status of incarceration as the economic damage. Obviously, we appreciate *Harbury* and that Judge Kavanaugh, you wrote the opinion in that case. We would respectfully submit that a canon should be limited to its facts, which was that the principal plaintiff, the husband, suffered his injuries exclusively overseas, the only connection to the United States was the location of the wife here, and the loss of consortium claim.

With respect to the constitutional issue, we have cited the case, a Supreme Court case, to Your Honors that applies that strikes down an ordinance

under rational basis review solely on an as-applied basis, and that's *City of Cleburne*. If what Counsel for the Government said was true, you could never have an as-applied challenge in a rational basis context, and that's exactly what the Supreme Court said is not true in *City of Cleburne*. This is a case much more like that where though not fundamental in important right, not cable antennas, or sewage fees from the city, like in *Armor*. Thank you, Your Honors.

JUDGE HENDERSON: All right. Thank you.

(Whereupon, at 9:53 a.m., the proceedings were concluded.)

[21] DIGITALLY SIGNED CERTIFICATE

I certify that the foregoing is a correct transcription of the electronic sound recording of the proceedings in the above-entitled matter.

Paula Underwood	September 29, 2014

DEPOSITION SERVICES, INC.