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## SUING CHINA OVER COVID-19

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## INTRODUCTION

On April 21, 2020, the state of Missouri filed a lawsuit in the U.S. District Court for the Eastern District of Missouri against the People’s Republic of China (“PRC” or “China”) and various other parties.<sup>1</sup> The lawsuit seeks damages from the defendants for their role in unleashing the COVID-19 pandemic, an action that, as the state has alleged, roiled the world for the last three months, put millions of people out of work, and killed thousands in the process.<sup>2</sup> According to the complaint, Chinese authorities pursued “[a]n appalling campaign of deceit, concealment, misfeasance, and inaction,” causing our current “unnecessary and preventable” global pandemic.<sup>3</sup> None of the defendants has yet filed an answer to Missouri’s complaint. When they do, one issue that will be front and center is whether Missouri can sue the PRC and the other defendants consistent with principles of foreign sovereign immunity. Under the Judicial Code, the courts will decide whether Missouri can seek damages against China for injuries caused by the latter’s allegedly unlawful acts.

This Article is a prolegomenon on the issue of whether Missouri’s lawsuit can go forward. Part I will discuss the American history of the foreign sovereign immunity doctrine and the Foreign Sovereign Immunity Act of 1976 (“FSIA”), which largely codified the law existing at that time. Part II will analyze

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<sup>1</sup> Complaint, Missouri *ex rel.* Schmitt v. People’s Republic of China, No. 1:20-cv-00099 (E.D. Mo. filed Apr. 21, 2020), ECF No. 1 [hereinafter Complaint]; see Thomas Jipping, *What You Need to Know About Missouri’s Lawsuit Against China Over COVID-19*, DAILY SIGNAL (Apr. 23, 2020), <https://www.dailysignal.com/2020/04/22/what-you-need-to-know-about-missouris-lawsuit-against-china-over-covid-19> [<https://perma.cc/VDQ9-XZ3Q>].

<sup>2</sup> *The New England Journal of Medicine* has made publicly available its collection of medical articles about COVID-19. *Coronavirus (COVID-19)*, NEW ENG. J. MED., <https://www.nejm.org/coronavirus> [<https://perma.cc/2F8D-EPH9>] (last visited June 1, 2020). For other sources of information regarding the pandemic, see, for example, CORONAVIRUS (COVID-19), <https://www.coronavirus.gov> [<https://perma.cc/CA7F-RG8R>] (last visited June 1, 2020); *Coronavirus (COVID-19)*, CTRS. FOR DISEASE CONTROL & PREVENTION, [https://www.cdc.gov/coronavirus/2019-ncov/index.html?CDC\\_AA\\_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2Findex.html](https://www.cdc.gov/coronavirus/2019-ncov/index.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2Findex.html) [<https://perma.cc/DYB6-RLQY>] (last visited June 1, 2020); CORONAVIRUS RESOURCE CENTER, <https://coronavirus.jhu.edu> [<https://perma.cc/KCP9-NEHQ>] (last visited June 1, 2020); *Coronavirus Disease 2019 (COVID-19)*, JAMA NETWORK, <https://jamanetwork.com/journals/jama/pages/coronavirus-alert> [<https://perma.cc/4LX8-W7MA>] (last visited June 1, 2020).

<sup>3</sup> Complaint, *supra* note 1, ¶ 1. In full, the complaint says:

An appalling campaign of deceit, concealment, misfeasance, and inaction by Chinese authorities unleashed this pandemic. During the critical weeks of the initial outbreak, Chinese authorities deceived the public, suppressed crucial information, arrested whistleblowers, denied human-to-human transmission in the face of mounting evidence, destroyed critical medical research, permitted millions of people to be exposed to the virus, and even hoarded personal protective equipment—thus causing a global pandemic that was unnecessary and preventable. Defendants are responsible for the enormous death, suffering, and economic losses they inflicted on the world, including Missourians, and they should be held accountable.

*Id.*

Missouri's complaint to determine whether it satisfies the FSIA requirements for a lawsuit to go forward against a foreign nation. Part III then will discuss some recently introduced federal legislation to allow China to be sued over COVID-19. The bottom line is this: Missouri's lawsuit does not look promising under current law.

## I. SUING A FOREIGN NATION IN THE UNITED STATES

### A. *The Foreign Sovereign Immunity Doctrine*

The principle that a foreign sovereign is immune from suit has deep roots in American law, extending back to Chief Justice John Marshall's 1812 opinion for the Supreme Court of the United States in *The Schooner Exchange v. McFaddon*.<sup>4</sup> Just as no one can sue the federal or state governments without a federal or state law authorizing a lawsuit,<sup>5</sup> so too no party can file a lawsuit against a foreign government in an American court without an act of Congress authorizing litigation.<sup>6</sup> That immunity was also complete; no foreign government could be forced to defend any of its actions, whether governmental or commercial, in any court without the government's consent.<sup>7</sup> In fact, the question whether to allow a suit to go forward against a foreign government was generally not even an issue for judicial resolution. For more than 150 years, that decision rested in the hands of the Executive Branch. The courts were obliged to dismiss a suit against a foreign government or to allow it to go forward depending on the State Department's official judgment.<sup>8</sup>

Following World War II, the international community resumed trade, and governments re-entered commercial markets. As they did, private industrial, commercial, and financial business urged the community of nations to accommodate their interest in resorting to a judicial resolution of commercial disputes with governments. To address those realities, the State Department modified its position on foreign sovereign immunity. In 1952, in an official opinion known as the "Tate Letter," the State Department abandoned the longstanding principle that no foreign government should be subject to a suit in this nation's courts for any type of claim in favor of what was termed the

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<sup>4</sup> 11 U.S. (7 Cranch) 116, 136-39 (1812) (Marshall, C.J.).

<sup>5</sup> See, e.g., *Alden v. Maine*, 527 U.S. 706, 712-13 (1999) (state sovereign immunity); *United States v. Sherwood*, 312 U.S. 584, 586-87 (1941) (federal sovereign immunity).

<sup>6</sup> See, e.g., *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983) ("For more than a century and a half, the United States generally granted foreign sovereigns complete immunity from suit in the courts of this country."); *Republic of Mexico v. Hoffman*, 324 U.S. 30, 34 (1945) (collecting cases); *Ex parte Republic of Peru*, 318 U.S. 578, 586-89 (1943); *Berizzi Bros. Co. v. S.S. Pesaro*, 271 U.S. 562, 563-64 (1926).

<sup>7</sup> See *Verlinden*, 461 U.S. at 486-87.

<sup>8</sup> See *id.* Compare *Ex parte Peru*, 318 U.S. at 588-89 (dismissing suit at the request of the Executive Branch), with *Hoffman*, 324 U.S. at 34-36, 41-42 (allowing suit to go forward when the Executive Branch did not object).

“restrictive theory” of immunity.<sup>9</sup> “Under this theory, immunity is confined to suits involving the foreign sovereign’s public acts, and does not extend to cases arising out of a foreign state’s strictly commercial acts.”<sup>10</sup> Yet, application of that theory proved “troublesome.”<sup>11</sup> For example, one consequence was that it left the State Department in the politically awkward position of having to resolve repeated entreaties by foreign governments to grant their pleas for immunity whether or not their claims satisfied the Tate Letter standard.<sup>12</sup> Not surprisingly, the government made decisions based on “political considerations” rather than on the merits of the “sovereign conduct versus private conduct” divide set forth in the Tate Letter.<sup>13</sup> Nevertheless, that standard remained in effect for more than two decades.<sup>14</sup>

B. *The Foreign Sovereign Immunity Act of 1976*

Congress finally addressed this problem through the FSIA.<sup>15</sup> Exercising its authority over international commerce,<sup>16</sup> Congress adopted a statutory legal standard for resolving immunity claims along the lines of the Tate Letter but transferred decision-making authority from the State Department to the courts.<sup>17</sup> The FSIA comprehensively regulates whether a lawsuit against a foreign state may go forward in this nation’s courts.<sup>18</sup> As the Supreme Court of the United States has made clear, the FSIA supplies “the sole basis” to obtain jurisdiction over a foreign state in an American court.<sup>19</sup>

The act adopts as a presumption the longstanding rule of immunity for any “foreign state,”<sup>20</sup> which is “a body politic that governs a particular territory.”<sup>21</sup>

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<sup>9</sup> Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep’t of State, to Philip B. Perlman, Acting, Att’y Gen., U.S. Dep’t of Justice (May 19, 1952), *reprinted in* 26 DEP’T ST. BULL. 984, 984-85 (1952) [hereinafter Tate Letter]; *see also* Permanent Mission of India to the United Nations v. City of New York, 551 U.S. 193, 199 (2007).

<sup>10</sup> *Verlinden*, 461 U.S. at 487.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*; *see* Tate Letter, *supra* note 9, at 984-85.

<sup>14</sup> *Verlinden*, 461 U.S. at 486-87; *see also* Republic of Austria v. Altmann, 541 U.S. 677, 690-91 (2004).

<sup>15</sup> Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended at 28 U.S.C. §§ 1330, 1602-1611 (2018)).

<sup>16</sup> U.S. CONST. art. I, § 8, cl. 3 (“[The Congress shall have power] To regulate Commerce with foreign Nations . . .”).

<sup>17</sup> *See* 28 U.S.C. § 1602 (2018).

<sup>18</sup> *Id.* §§ 1602-1611.

<sup>19</sup> Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 443 (1989).

<sup>20</sup> 28 U.S.C. § 1604.

<sup>21</sup> *Samantar v. Yousuf*, 560 U.S. 305, 314 (2010) (citing RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 4 (AM. LAW INST. 1965) (defining “state” as “an entity that has a defined territory and population under the control of a government and that engages in foreign relations”)).

Included within that term is any “agency or instrumentality” of a state.<sup>22</sup> In some instances, a corporate entity can be a state agency or instrumentality,<sup>23</sup> but an individual foreign state official cannot make that claim under any circumstances.<sup>24</sup> To meet the business community’s desire that judicial relief be available for commercial disputes with foreign governments, the act also creates certain, limited exceptions to its otherwise comprehensive immunity.<sup>25</sup> Two exceptions are relevant to Missouri’s lawsuit: One applies to claims involving “commercial activity”;<sup>26</sup> the other to tort claims seeking damages for personal injury or property loss.<sup>27</sup> Unless an exception applies, no foreign state may be sued in an American court.<sup>28</sup>

The FSIA seeks to balance two competing and weighty interests. On the one hand, people and companies doing businesses in the United States would like to be able to resort to our courts for legal redress from a foreign government that is

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<sup>22</sup> 28 U.S.C. § 1603.

<sup>23</sup> See *Dole Food Co. v. Patrickson*, 538 U.S. 468, 473-74 (2003); *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488 (1983).

<sup>24</sup> *Samantar*, 560 U.S. at 314-25.

<sup>25</sup> 28 U.S.C. § 1330(a). The grant of jurisdiction to federal district courts is “original” but not “exclusive,” so a plaintiff can also sue a foreign nation in state court. A foreign state, however, can remove any such action to federal court. *Id.* § 1441(d).

<sup>26</sup> *Id.* § 1605(a) (“A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case— . . . (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States . . .”). The FISA defines “commercial activities” as follows: “A ‘commercial activity’ means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.” *Id.* § 1603(d).

<sup>27</sup> *Id.* § 1605(a) (“A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case— . . . (5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused . . .”). Other exceptions apply to cases involving a waiver of sovereign immunity, property taken in violation of international law, or certain terrorist-related activities. See *id.* §§ 1605(a)(1) (waiver), 1605(a)(3) (property taken in violation of international law), 1605A (terrorism), 1605B (terrorism); see also *Bolivarian Republic of Venezuela v. Helmerich & Payne Int’l Drilling Co.*, 137 S. Ct. 1312, 1319 (2017).

<sup>28</sup> See *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993) (“Under the Act, a foreign state is presumptively immune from the jurisdiction of United States courts; unless a specified exception applies, a federal court lacks subject-matter jurisdiction over a claim against a foreign state.”).

responsible for a broken contract, a tort, or some other form of wrongdoing. On the other hand, our government would like to avoid being hauled into foreign courts across the globe wherever and whenever a foreign party claims that one of our government's officers or employees has injured them. The United States has embassies or diplomatic missions in more than 180 foreign nations worldwide, from Afghanistan to Zimbabwe.<sup>29</sup> The federal government and the people of the United States, therefore, have a powerful interest in avoiding meritless lawsuits, as well as ones that are trumped-up complaints filed simply to embarrass and to harass our government or to score political points with our adversaries or other nations.

Deciding whether and when a party may sue a foreign state in an American court was no easy call for Congress. The consequence of opening our doors too narrowly is the denial of judicial relief to legitimately injured parties. The corresponding risk from opening our doors too widely is to leave our nation, its diplomats, and other officials open to lawsuits in any foreign nation that decides to retaliate against the United States. After all, "sauce for the goose is sauce for the gander." Any nation that feels it is being unjustly treated by having to defend a lawsuit in a United States court—along with those nations who just enjoy sticking their fingers in America's eyes—will inevitably retaliate by opening our nation up to litigation in their courts. The unavoidable result is that Congress had to choose between two unfortunate outcomes: Some plaintiffs, both in the United States and across the globe, will wind up without any legal redress for an action where a government, whether ours or someone else's, was clearly in the wrong. Alternatively, there will be far more litigation than is in any nation's interests. It would be idle to pretend that any balance could work out perfectly.

Congress weighed all those factors in deciding how to draft the FSIA. The issue for a court in any particular case, however, is whether one of its exceptions applies. To answer that question, the court and we need to review Missouri's complaint and compare its allegations against the FSIA's exceptions.

## II. THE MISSOURI LAWSUIT

Missouri sued China on its own behalf and on behalf of all Missourians.<sup>30</sup> The complaint names the PRC as the lead defendant but also lists a batch of other entities. Among them are the country's National Health Commission, the Ministry of Emergency Management, the Ministry of Civil Affairs, the People's Government of Hubei Province, and the People's Government of the City of Wuhan.<sup>31</sup> Each one would likely qualify as an "agency or instrumentality" of the PRC for purposes of the FSIA because the complaint identifies each one as "a ministry of the PRC's State Council"<sup>32</sup> or as a "provincial" or "city"

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<sup>29</sup> USEMBASSY.GOV, <https://www.usembassy.gov> [<https://perma.cc/YAX8-NF52>] (last visited June 1, 2020).

<sup>30</sup> Complaint, *supra* note 1, ¶¶ 10-16.

<sup>31</sup> *Id.* ¶¶ 17, 21-26.

<sup>32</sup> *Id.* ¶¶ 21-23; *see* 28 U.S.C. § 1603(b).

government.<sup>33</sup> In addition, the complaint names the Chinese Communist Party as a defendant and alleges that it is not legally part of the PRC government but acted in concert with the government defendants.<sup>34</sup> Finally, the complaint names the Wuhan Institute of Virology and the Chinese Academy of Sciences as defendants but does not specify whether they are state institutions.<sup>35</sup>

Missouri argues that its lawsuit falls into either or both of two FSIA exceptions: one for a sovereign's "commercial activity"; the other, for its torts. The next two subsections will consider those arguments.

A. *The "Commercial Activities" Exception*

The FSIA permits suit against a foreign government for injuries that are "based upon" certain "commercial activities."<sup>36</sup> Each term defines an element of proof that a plaintiff must satisfy.

"*Commercial Activity*": The FSIA defines the phrase "commercial activity"<sup>37</sup> but not the predicate term "commercial," so the Supreme Court had to do so itself. The Court took up that task in *Republic of Argentina v. Weltover, Inc.*<sup>38</sup> *Weltover* involved a default by the Republic of Argentina on certain bonds that it had issued to facilitate access to U.S. dollars for domestic businesses. Argentina later defaulted on the bonds, and three private parties sued in federal district court.<sup>39</sup> The plaintiffs argued that Argentina's default was an act taken "in connection with a commercial activity" that had a "direct effect in the United States," rendering Argentina subject to suit in this nation. The Supreme Court agreed. Drawing on the background to the FSIA, the Court distinguished between a foreign nation's exercise of the sovereign power that only a state can possess and the actions that a state might undertake when acting like a private party in a commercial market.<sup>40</sup> Only the latter, the Court concluded, are the "commercial" conduct that the FSIA makes subject to suit.<sup>41</sup> As the Court explained, "when a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are 'commercial' within the meaning of the FSIA."<sup>42</sup>

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<sup>33</sup> Complaint, *supra* note 1, ¶¶ 24-25.

<sup>34</sup> *Id.* ¶¶ 18-20, 26, 44.

<sup>35</sup> *Id.* ¶¶ 27-28, 31-34.

<sup>36</sup> 28 U.S.C. § 1603(d).

<sup>37</sup> See *supra* note 26 (quoting definition of "commercial activity").

<sup>38</sup> 504 U.S. 607 (1992).

<sup>39</sup> *Id.* at 609-10.

<sup>40</sup> *Id.* at 612-14.

<sup>41</sup> *Id.* at 614-15 (stating that regulations of a "foreign currency exchange is a sovereign activity, because such authoritative control of commerce cannot be exercised by a private party; whereas a contract to buy army boots or even bullets is a 'commercial' activity, because private companies can similarly use sales contracts to acquire goods").

<sup>42</sup> *Id.* at 614.

*“Based Upon”*: The second condition is concerned with the relationship between a foreign state’s “commercial activities” and the plaintiff’s injuries. The “based upon” term in the FSIA requires a plaintiff to prove that a foreign nation’s commercial activity *caused* its alleged injury. To survive dismissal, a plaintiff’s injury must be “based upon” or, as explained below, caused by one of three conditions set forth in subsections of 28 U.S.C. § 1605(a)(2), which I will call Subsections 1, 2, and 3. To withstand dismissal, a plaintiff must satisfactorily allege that his injuries are “based upon” a “commercial activity carried on in the United States by the foreign state” (Subsection 1). Alternatively, a plaintiff must satisfactorily allege that his injuries are “based upon” an “act performed in the United States in connection with a commercial activity of the foreign state elsewhere” (Subsection 2). The last option is for a plaintiff to satisfactorily allege that his injuries are “based upon” an “act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in” this nation (Subsection 3).<sup>43</sup>

Missouri does not appear to invoke either Subsection 1 or 2, and its efforts to rely on Subsection 3 fall short. Accordingly, it is unlikely that Missouri’s allegations can satisfy the FSIA’s requirements.

*Missouri’s Allegations*: According to Missouri, its case fits within the “commercial activity” exception based on the following four factual allegations found in paragraph 40 of its complaint:

On information and belief, the conduct of Defendants described below arises out of commercial activities that have caused a direct effect in the United States and in the State of Missouri, including, but not limited to: (1) operation of the healthcare system in Wuhan and throughout China; (2) commercial research on viruses by the Wuhan Institute and Chinese Academy of Sciences; (3) the operation of traditional and social media platforms for commercial gain; and (4) production, purchasing, and import and export of medical equipment, such as personal protective equipment (“PPE”), used in COVID-19 efforts.<sup>44</sup>

Even if we assume that one or more of those four allegations suffices to show that China engaged in a “commercial activity” of some type, Missouri must still prove that the injuries Missourians have suffered are “based upon” those activities. That latter burden is a difficult one for Missouri to carry.

*Subsections 1 and 2 of § 1605(a)(2)*.—Missouri does not expressly eschew reliance on either Subsection 1 or 2, but the state also does not appear to invoke either one. In any event, neither one would apply. The state does not allege that any of the four actions in Paragraph 40 (or all of them considered together) was a “commercial activity” that was “*carried on in*” (Subsection 1) or was “*performed in*” (Subsection 2) this nation “in connection with” a “commercial

<sup>43</sup> 28 U.S.C. § 1605(a)(2) (2018) (quoted *supra* note 26); see *Weltover*, 504 U.S. at 611.

<sup>44</sup> Complaint, *supra* note 1, ¶ 40.



activity” conducted elsewhere.<sup>45</sup> In fact, the first allegation—viz., “[China’s] operation of the healthcare system *in* Wuhan and *throughout* China”<sup>46</sup>—by definition could *not* have occurred in the United States. Moreover, the opening portion of Missouri’s claim is best read as stating that all of the misconduct described elsewhere in its complaint (“the conduct of Defendants described below”) “arises out of” the four “commercial activities” that comprise paragraph 40. In other words, China could not have undertaken those four actions “*in connection with* a commercial activity”; according to Missouri, those allegations *are themselves* the relevant “commercial activities.” Thus, neither Subsection 1 nor 2 would apply even if Missouri had sought to invoke them.

*Subsection 3 of § 1605(a)(2).*—Missouri’s argument stands or falls based entirely on Subsection 3. It applies to an act taken by China outside the United States “in connection with a commercial activity” China has also taken outside the United States but that “causes a direct effect in the United States.”<sup>47</sup> According to the complaint, however, every action taken by one or more of the defendants was the sovereign act of the PRC. Why? Missouri claims that the PRC is “a communist nation,” that the “Communist Party of China (‘CPC’ or ‘Communist Party’) is the sole governing party within China,” that “the Communist Party’s General Secretary becomes the president of the PRC,” and that “the Communist Party exercised direction and control over the actions of all other Defendants.”<sup>48</sup> If we assume that to be true (as we must for purposes of assessing the adequacy of Missouri’s complaint), then the following must also be true. *First*, the CPC is the “state” for purposes of the FSIA because it controls the actions of the PRC. *Second*, the PRC, as well as each of the other government entities named in the complaint, is an “agency or instrumentality” of the CPC because each one must follow the CPC’s directives. *Third*, the Wuhan Institute and Chinese Academy of Sciences, even if they might otherwise be private parties, are merely carrying out the orders of the CPC and PRC, which makes both the Institute and Academy into an “agency or instrumentality” of the CPC because it has no freedom to deviate from the CPC’s or PRC’s orders. In other words, if the Communist Party is calling all the shots in China, then the *CPC* is the “state” for purposes of the FSIA, not the PRC, and the PRC and every other defendant is an arm of the state.

To be sure, Missouri alleges that “the Communist Party is not an organ or political subdivision of the PRC, nor is it owned by the PRC or a political subdivision of the PRC.”<sup>49</sup> Those two legal claims might be literally true because the CPC is the parent government in China. Nevertheless, they are irrelevant because, according to Missouri, the CPC “exercised direction and control over

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<sup>45</sup> 28 U.S.C. § 1605(a)(2).

<sup>46</sup> Complaint, *supra* note 1, ¶ 40 (emphasis added).

<sup>47</sup> *See id.*

<sup>48</sup> Complaint, *supra* note 1, ¶¶ 17-18, 20.

<sup>49</sup> *Id.* ¶ 19.

the actions of” every other defendant.<sup>50</sup> In other words, Missouri’s *legal* argument that the CPC “is not protected by sovereign immunity”<sup>51</sup> lacks merit because it conflicts with the state’s *factual* assertions that the CPC is running the show. For that reason, Missouri errs in arguing that “the Communist Party is not a foreign state or an agency or instrumentality of a foreign state, and is not entitled to any form of sovereign immunity.”<sup>52</sup> If the Chinese Communist Party can order the PRC what to do and not do, then the CPC is the relevant “state” for purposes of the FSIA. It cannot be sued, and none of the other defendants can be sued either because they are components of the state.<sup>53</sup>

Missouri claims that the decision in *Yaodi Hu v. Communist Party of China*<sup>54</sup> held that that the CPC is not entitled to immunity under the FSIA.<sup>55</sup> Missouri’s interpretation of *Yaodi Hu* is not a factual assertion that a court must assume to be true; it is a legal argument that a court reviews independently.<sup>56</sup> On its merits, Missouri’s legal argument is not persuasive. In *Yaodi Hu*, a magistrate judge stated (almost in passing and likely in dictum) that, under the Supreme Court’s decision in *Samantar v. Yousuf*,<sup>57</sup> the CPC and individual defendants in that case were not entitled to foreign sovereign immunity.<sup>58</sup> The magistrate judge recommended dismissal of the plaintiff’s suit against the CPC and the other individual defendants, however, because the plaintiff had failed to state a claim under the applicable substantive law, the Alien Tort Statute.<sup>59</sup> The magistrate judge did not discuss the issue of whether the CPC is responsible for directing

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<sup>50</sup> *Id.* ¶ 20.

<sup>51</sup> *Id.* ¶ 19.

<sup>52</sup> *Id.* ¶ 44.

<sup>53</sup> That conclusion is consistent with the opinions of commentators as to the role that the Communist Party plays in the Chinese government. See, e.g., DEAN CHENG ET AL., *ASSESSING BEIJING’S POWER: A BLUEPRINT FOR THE U.S. RESPONSE TO CHINA OVER THE NEXT DECADES* 5-6 (2020), <https://www.heritage.org/asia/report/assessing-beijings-power-blueprint-the-us-response-china-over-the-next-decades> [<https://perma.cc/3MSF-53XE>]; ELIZABETH C. ECONOMY, *THE THIRD REVOLUTION: XI JINPING AND THE NEW CHINESE STATE* 1-2 (2018).

<sup>54</sup> No. 1:12-cv-01213, 2012 WL 7160373 (W.D. Mich. Nov. 20, 2012). For the order approving and adopting the U.S. Magistrate Judge’s Report and Recommendation, see *Yaodi Hu v. Communist Party of China*, No. 1:12-cv-01213, 2013 WL 634719 (W.D. Mich. Feb. 20, 2013).

<sup>55</sup> *Yaodi Hu*, 2012 WL 7160373, at \*3. Missouri cites the Report and Recommendation prepared by a U.S. Magistrate Judge for a U.S. District Court Judge, rather than the later opinion by the district court. Complaint, *supra* note 1, ¶19. The district court approved and accepted the magistrate judge’s report without discussing whether the plaintiff could sue the CPC under the FSIA. *Yaodi Hu*, 2013 WL 634719, at \*1-2.

<sup>56</sup> See *United States v. Gaubert*, 499 U.S. 315, 322-34 (1991).

<sup>57</sup> 560 U.S. 305 (2010).

<sup>58</sup> *Yaodi Hu*, 2012 WL 7160373, at \*3 (“Although the remaining defendants (Communist Party of China, certain past and present Chinese government officials, and an Internet site) are not entitled to FSIA immunity, plaintiff’s complaint fails to state a claim upon which relief can be granted against them.”).

<sup>59</sup> 28 U.S.C. § 1350 (2018); see *Yaodi Hu*, 2012 WL 7160373, at \*3-4.

the actions of the PRC and components of the Chinese government. Missouri, however, has raised that issue by virtue of its allegation that “the Communist Party exercised direction and control over the actions of all other Defendants.”<sup>60</sup> That *is* a factual allegation, and a court must accept it as true for purpose of deciding whether the FSIA applies.<sup>61</sup> The magistrate judge in *Yaodi Hu* discussed no similar allegation, so that opinion offers no support for Missouri.

The Supreme Court allowed a plaintiff’s claim to go forward in *Weltover*, but that decision offers Missouri no help. To start with, the activities at issue there—Argentina’s issuance of bonds—differ materially from the ones alleged here. Argentina issued bonds to encourage private parties to engage in commerce with Argentine businesses. *Weltover* held that the bonds issued by the government of Argentina—known as “Bonods”—were not materially different from the bonds that private companies issue, sell, and redeem in the United States.<sup>62</sup> As the Court put it: “[The Bonods] are in almost all respects garden-variety debt instruments: They may be held by private parties; they are negotiable and may be traded on the international market (except in Argentina); and they promise a future stream of cash income.”<sup>63</sup> There is “nothing distinctive about the state’s assumption of debt (other than perhaps its purpose) that would cause it always to be classified as *jure imperii*,” the Court noted.<sup>64</sup> Accordingly, given that “the FSIA has now clearly established that the ‘nature’” of an activity governs, not an actor’s intent, the Court held that Argentina’s issuance of debt must be treated the same as any other commercial activity.<sup>65</sup>

The conduct that Missouri identifies as “commercial activity” is not similar to the bond-issuance that *Weltover* analyzed. Moreover, Argentina is a capitalist nation; China is not. China has a hybrid economy—part state-owned, part privately owned. The PRC’s Constitution makes it clear that China is “a socialist state.”<sup>66</sup> China has a “State-owned economy”—that is, “the socialist economy” is “under ownership by the whole people.”<sup>67</sup> At the same time the Chinese

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<sup>60</sup> Complaint, *supra* note 1, ¶¶ 17-18, 20.

<sup>61</sup> *Gaubert*, 499 U.S. at 327.

<sup>62</sup> *Republic of Argentina v. Weltover*, 504 U.S. 607, 615-16 (1992).

<sup>63</sup> *Id.* at 615.

<sup>64</sup> *Id.* at 615-16.

<sup>65</sup> *Id.*; *see also* *Saudi Arabia v. Nelson*, 507 U.S. 349, 359-60 (1993) (“[A] state is immune from the jurisdiction of foreign courts as to its sovereign or public acts (*jure imperii*), but not as to those that are private or commercial in character (*jure gestionis*). . . . Put differently, a foreign state engages in commercial activity for purposes of the restrictive theory only where it acts ‘in the manner of a private player within’ the market.” (quoting *Weltover*, 504 U.S. at 614)).

<sup>66</sup> *See* XIANFA art. 1 (2004) (“The People’s Republic of China is a socialist state under the people’s democratic dictatorship led by the working class and based on the alliance of workers and peasants. The socialist system is the basic system of the People’s Republic of China. Disruption of the socialist system by any organization or individual is prohibited.”).

<sup>67</sup> *Id.* art. 7 (“The State-owned economy, namely, the socialist economy under ownership by the whole people, is the leading force in the national economy. The State ensures the

constitution permits “private sectors of the economy” to operate, although the state at all times is responsible for their “supervision and control.”<sup>68</sup> Factors like those make it uncertain how the FSIA would treat the four undertakings that Missouri has cited as “commercial activities.” Ultimately, however, there might be no need to answer that question.

Even if those activities are “commercial” for purposes of the FSIA, Missouri must still persuade a court that China’s commercial activities had a direct effect in the United States to fit within this exemption. There is something akin to a “proximate cause requirement” at issue here. In *Weltover*, the Supreme Court rejected the argument that Argentina’s debt default had a “‘direct’ effect in the United States” because it besmirched “New York’s status as a world financial leader.”<sup>69</sup> Even assuming (dubitate) that Argentina’s bond rescheduling would diminish the Big Apple’s status, that effect “is too remote and attenuated to satisfy the ‘direct effect’ requirement of the FSIA.”<sup>70</sup> Argentina’s conduct satisfied the exception, however, for several reasons, including the fact that the parties had designated New York as the site for performance of the bonds’ obligations.<sup>71</sup> Missouri makes no comparable allegation, and it does not aver that any of the four activities Missouri names took place in the United States or contemplated affecting anyone in this nation. *Weltover* is therefore inapposite.

Finally, even if China’s activities had a “direct” effect in this country, Missouri must still show that its injuries are “based upon” those activities. The Supreme Court addressed that FSIA requirement in *Saudi Arabia v. Nelson*.<sup>72</sup> Scott Nelson claimed that he was the victim of an unlawful detention and torture by the Saudi Government. He argued that the government’s decision to hire him to work at a state-owned and -operated hospital fit within the “commercial activity” exception, but the Court disagreed.<sup>73</sup> The FSIA distinguishes between a claim “based upon” commercial activity and one “based upon” acts performed “in connection with” such activity, the Court explained, and “[t]he only reasonable reading of the former term calls for something more than a mere connection with, or relation to, commercial activity.”<sup>74</sup> For that reason, the Saudi government’s actions in recruiting and employing Nelson were not the factual basis for his tort claims, even though they gave rise to his presence in Saudi

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consolidation and growth of the State-owned economy.”).

<sup>68</sup> *Id.* art. 11 (“The State protects the lawful rights and interests of the non-public sectors of the economy such as the individual and private sectors of the economy. The State encourages, supports and guides the development of the non-public sectors of the economy and, in accordance with law, exercises supervision and control over the non-public sectors of the economy.”).

<sup>69</sup> *Weltover*, 504 U.S. at 618 (quoting *Weltover, Inc. v. Republic of Argentina*, 941 F.2d 145, 153 (2d Cir. 1991)).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 618-19.

<sup>72</sup> 507 U.S. 349, 355-63 (1993).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 358.

Arabia.<sup>75</sup> The allegedly tortious actions—the police’s decision to arrest and torture him—were the exercise of powers “peculiar to sovereigns.”<sup>76</sup> The exercise of sovereign power cannot be the basis for a lawsuit under the FSIA, however, because the Act allows a lawsuit to go forward “only where [a foreign state] ‘acts “in the manner of a private player within” the market.’”<sup>77</sup> The plaintiffs’ claim “boils down to abuse of the power of its police by the Saudi Government, and however monstrous such abuse undoubtedly may be,” it was not commercial in nature.<sup>78</sup> Finally, the Supreme Court refused to allow the plaintiffs to recast their claim as a “failure to warn” tort because “a plaintiff could recast virtually any claim of intentional tort committed by sovereign act as a claim of failure to warn, simply by charging the defendant with an obligation to announce its own tortious propensity before indulging it.”<sup>79</sup> That would unreasonably expand the grounds for a lawsuit. “To give jurisdictional significance to this feint of language would effectively thwart the Act’s manifest purpose to codify the restrictive theory of foreign sovereign immunity.”<sup>80</sup>

The Supreme Court’s later decision in *OBB Personenverkehr AG v. Sachs*<sup>81</sup> amplified the discussion in *Nelson* of the “based upon” requirement.<sup>82</sup> Carol Sachs purchased a Eurail pass in the United States from a subsidiary of the Austrian Federal Ministry of Transport, Innovation, and Technology and suffered traumatic injuries while boarding a train in Austria. Relying on *Nelson*, the Court held that the basis for Sach’s claims was what happened in Austria when she fell, not what happened in the United States when she purchased a Eurail pass.<sup>83</sup> The Court explained that, given the decision in *Nelson*, an action is “based upon” the “‘particular conduct’ that constitutes the ‘gravamen’ of the suit,”<sup>84</sup> which occurred outside this nation. “All of [Sachs’s] claims turn on the same tragic episode in Austria, allegedly caused by wrongful conduct and dangerous conditions in Austria, which led to injuries suffered in Austria.”<sup>85</sup> The Court, like in *Nelson*, also refused to allow Sachs to reconfigure her claim as Austria’s failure to warn her of the dangerous conditions in Innsbruck when she purchased her railway pass. Permitting “artful pleading” would defeat the purposes of the FSIA.<sup>86</sup>

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<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 360 (quoting *Weltover*, 504 U.S. at 614).

<sup>77</sup> *Id.* (quoting *Weltover*, 504 U.S. at 614).

<sup>78</sup> *Id.* at 361.

<sup>79</sup> *Id.* at 363.

<sup>80</sup> *Id.*

<sup>81</sup> 136 S. Ct. 390 (2015).

<sup>82</sup> *Id.* at 395-97

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 396 (quoting *Nelson*, 507 U.S. at 356).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*; see *Jam v. Int’l Fin. Corp.*, 139 S. Ct. 759, 772 (2019) (“[I]f the ‘gravamen’ of a lawsuit is tortious activity abroad, the suit is not ‘based upon’ commercial activity within the

What that means is this: Missouri alleges that China's decisions to operate a domestic health care system, to conduct healthcare-related research in China, to operate traditional and social media institutions, and to manufacture, purchase, import, and export healthcare equipment are "commercial activit[ies]" for purposes of the FSIA. That legal conclusion is anything but clear. Nonetheless, even if we assume that Missouri's conclusion is correct, the analysis must continue because Missouri has other hurdles to overcome. To start with, the four activities Missouri names are not the "gravamen" of Missouri's claim of injury. Missouri's complaint focuses on the actions that China took in China to allow the COVID-19 virus to escape from its source, to deny the world information about what had happened in Wuhan, to deceive the world about the severity of the outbreak, and to buy up the world's supply of necessary protective equipment. Those actions are the ones that Missouri claims gave rise to its injuries, and they are quite distinct from the allegedly commercial activities that Missouri proffers as a basis for jurisdiction under the FSIA. Missouri does not explain how China's operation of a domestic healthcare system, for example, caused the misconduct that led to transmission of COVID-19 into the United States. That logical chain, however, is necessary for Missouri to prove that its injuries are "based upon" China's "commercial activities," as the FSIA requires.

That is true regardless of how horrific China's actions might be and how ghastly the consequences of the pandemic have been. *Saudi Arabia v. Nelson* involved allegations describing "monstrous" conduct on the part of Saudi officials, but the Supreme Court refused to allow the atrocious nature of the alleged misconduct to affect its interpretation of the FSIA. To be sure, *Nelson* involved only one person, the COVID-19 pandemic involves millions, and quantity has a quality all its own. The Supreme Court's decision in *Nelson*, however, gives no indication that it was the limited number of alleged atrocities that was dispositive. On the contrary, *Nelson*, like *Weltover*, explained that the "nature" of the conduct at issue is what matters for purposes of the FSIA, not the number of instances in which that conduct occurs.

#### B. *The "Personal Injury" or "Property Damage" Exception*

A second FSIA exception exists where the plaintiff seeks "money damages . . . for personal injury or death . . . occurring in the United States" that was "caused by the tortious act or omission of" the defendant "foreign state" or any of its officials or employees "while acting within the scope of [their] office or employment."<sup>87</sup> Missouri sought damages for the state and its residents under state law based on the following theories of tort liability: China's actions constituted a public nuisance,<sup>88</sup> they involved an abnormally dangerous

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meaning of the FSIA's commercial activity exception." (quoting *Sachs*, 136 S. Ct. at 395-96)).

<sup>87</sup> 28 U.S.C. § 1605(a)(5) (2018).

<sup>88</sup> Complaint, *supra* note 1, ¶¶ 139-48.

activity,<sup>89</sup> and Chinese officials breached their duty of care in two ways—by allowing the transmission of COVID-19 into the United States and by hoarding necessary personal protective equipment.<sup>90</sup> To support those theories, the complaint cites numerous publicly available sources detailing the known history of the COVID-19 pandemic.<sup>91</sup> Given Missouri’s allegations, the tort exception is a far more natural basis for jurisdiction than the commercial activity exception already discussed. Nonetheless, Missouri still faces a daunting hurdle to overcome.

The exception to foreign sovereign immunity for “personal injury” or “property damage” contains its own exception. The FSIA disallows a foreign state to be sued in tort for “any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused.”<sup>92</sup> That exception parallels the “discretionary function” exception to the federal government’s tort liability found in the Federal Tort Claims Act (FTCA).<sup>93</sup>

Like the FSIA, the FTCA became law in 1946 against a background of sovereign immunity. The federal government was immune from suit for damages caused by the negligence or intentional torts of its employees. The only vehicle for an injured party to obtain relief was to persuade Congress to pass a private bill, a “notoriously clumsy” process.<sup>94</sup> Congress passed the FTCA to simplify and to regularize the consideration of tort claims. The act waives the sovereign immunity of the federal government for a variety of personal injury and property damage claims, such as highway motor-vehicle accidents caused by careless federal employees.<sup>95</sup> Nevertheless, the FTCA does not allow the federal government to be sued for the public policy judgments its officers make when exercising the “discretion” that Congress vested by statute in the office they hold or that is inherently part of their official responsibilities. “The ‘discretion’ protected by the section is not that of the judge—a power to decide within the limits of positive rules of law subject to judicial review,” the Supreme Court has explained.<sup>96</sup> “It is the discretion of the executive or the administrator to act according to one’s judgment of the best course, a concept of substantial historical ancestry in American law.”<sup>97</sup> The reason for that limitation is quite simple: allowing the federal government to be sued for those judgments would

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<sup>89</sup> *Id.* ¶¶ 149-62.

<sup>90</sup> *Id.* ¶¶ 163-81.

<sup>91</sup> *Id.* ¶¶ 47-138.

<sup>92</sup> 28 U.S.C. § 1605(a)(5)(A).

<sup>93</sup> *Id.* §§ 1346(b), 2671-2680. The FTCA “discretionary function” provision is found in 28 U.S.C. § 2680(a).

<sup>94</sup> See *Dalehite v. United States*, 346 U.S. 15, 24-25 (1953).

<sup>95</sup> *Id.* at 28.

<sup>96</sup> *Id.* at 34.

<sup>97</sup> *Id.*

transfer policymaking authority from Congress and the Executive Branch to the Judiciary or to private parties sitting as jurors, which Congress never intended.<sup>98</sup>

What is the reach of the “discretionary function” exception? To start, the critical issue is “the nature of the conduct, rather than the status of the actor.”<sup>99</sup> To qualify, an act must be “discretionary in nature,” one that “involve[s] an element of judgment or choice.”<sup>100</sup> By contrast, “if a ‘federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow,’” the exception does not apply “because ‘the employee has no rightful option but to adhere to the directive.’”<sup>101</sup> In addition, not every exercise of discretion is immune from suit. The “purpose” of the discretionary function exception “is to ‘prevent judicial “second-guessing” of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.’”<sup>102</sup> Thus, “the exception ‘protects only governmental actions and decisions based on considerations of public policy.’”<sup>103</sup>

That purpose focuses the inquiry that a court must make when deciding whether the discretionary function exception is applicable. As the Supreme Court explained in *United States v. Gaubert*:

Where Congress has delegated the authority to an independent agency or to the Executive Branch to implement the general provisions of a regulatory statute and to issue regulations to that end, there is no doubt that planning-level decisions establishing programs are protected by the discretionary function exception, as is the promulgation of regulations by which the agencies are to carry out the programs. In addition, the actions of Government agents involving the necessary element of choice and grounded in the social, economic, or political goals of the statute and regulations are protected.

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When established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, it must be presumed that the agent’s acts are grounded in policy when exercising that discretion. For a complaint to survive a motion to dismiss, it must allege facts which would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime. The focus of the inquiry is not on the agent’s subjective intent in exercising the discretion conferred

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<sup>98</sup> *See id.*

<sup>99</sup> *United States v. Gaubert*, 499 U.S. 315, 322 (1991) (quoting *United States v. Varig Airlines*, 467 U.S. 797, 813 (1984)).

<sup>100</sup> *Id.* (quoting *Berkovitz v. United States*, 486 U. S. 531, 536 (1988)).

<sup>101</sup> *Id.* (quoting *Berkovitz*, 486 U. S. at 536).

<sup>102</sup> *Id.* at 323 (quoting *Varig Airlines*, 467 U.S. at 814).

<sup>103</sup> *Id.* (quoting *Berkovitz*, 486 U. S. at 537).



by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis.<sup>104</sup>

*Gaubert* held that the actions of federal bank regulators in managing the affairs of a savings and loan bank to keep it solvent involved the type of discretionary judgments for which Congress drafted the discretionary function exception.<sup>105</sup> The exception, the Court held, can involve judgments made “on the ground,” so to speak, in the exercise of the government’s authority. “Discretionary conduct is not confined to the policy or planning level,” *Gaubert* explained.<sup>106</sup> “A discretionary act is one that involves choice or judgment; there is nothing in that description that refers exclusively to policy-making or planning functions.”<sup>107</sup> Even the “[d]ay-to-day management of banking affairs, like the management of other businesses, regularly requires judgment as to which of a range of permissible courses is the wisest.”<sup>108</sup> Moreover, no statute directed the agencies in how to keep the S&L afloat. “Not only was there no statutory or regulatory mandate which compelled the regulators to act in a particular way, but there was no prohibition against the use of supervisory mechanisms not specifically set forth in statute or regulation.”<sup>109</sup> For that reason, the banking agencies “were not bound to act in a particular way; the exercise of their authority involved a great ‘element of judgment or choice.’”<sup>110</sup> That included the ability to act through “informal means,” such as “the power of persuasion,” instead of an available but fixed statutory process.<sup>111</sup> Finally, *Gaubert* rejected the argument that “the challenged actions fall outside the discretionary function exception because they involved the mere application of technical skills and business expertise.”<sup>112</sup> As the Court saw it, that “is just another way of saying that the considerations involving the day-to-day management of a business concern . . . are so precisely formulated that decisions at the operational level never involve the exercise of discretion,” a conclusion that the Court had already rejected in *Gaubert*.<sup>113</sup>

The question, then, is whether Missouri’s complaint is sufficient.

Missouri alleges that, despite ample evidence to the contrary,<sup>114</sup> the Wuhan Municipal Health Commission declared that “[t]he investigation so far has not found any obvious human-to-human transmission and no medical staff

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<sup>104</sup> *Id.* at 323-25.

<sup>105</sup> *Id.* at 325.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 330.

<sup>110</sup> *Id.* at 329 (quoting *Berkovitz v. United States*, 486 U. S. 531, 536 (1988)).

<sup>111</sup> *Id.* at 331, 333.

<sup>112</sup> *Id.* at 331.

<sup>113</sup> *Id.*

<sup>114</sup> Complaint, *supra* note 1, ¶¶ 54-64.

infection.”<sup>115</sup> As part of their cover-up, the defendants misled the World Health Organization (“WHO”) about the nature and extent of the problem.<sup>116</sup> “Defendants’ denial induced the WHO to also deny or downplay the risk of human-to-human transmission in the critical weeks while the virus was first spreading.”<sup>117</sup> With the onset of the Chinese New Year, China “went ahead with New Year celebrations”—including “a potluck dinner for 40,000 residents” hosted by “Wuhan’s leaders”—“despite the risk of wider infections and let ‘some five million people leave Wuhan without screening,’” many of whom travelled across the globe.<sup>118</sup>

Around that time, the cover-up began in earnest as the defendants began to censor any reports describing the person-to-person transmission of a major disease and silence anyone who mentioned the prospect of another SARS-like disease that could be passed from person to person.<sup>119</sup> For example, using the chat application WeChat, which “has become increasingly popular among [Chinese] doctors who use it to obtain professional knowledge” from other physicians,<sup>120</sup> a Dr. Li Wenliang “told his medical school alumni group about patients at his hospital suffering from a SARS-like illness that may have originated from a coronavirus.”<sup>121</sup> Dr. Wenliang was reputed to be one of the “eight people” against whom “the Wuhan police stated that they had ‘taken legal measures’” for publishing and sharing “rumors,” which included being forced to admit to a misdemeanor for telling the truth about the virus.<sup>122</sup> The defendants suppressed information about the virus in various other ways as well.<sup>123</sup> For

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<sup>115</sup> *Id.* ¶ 65 (alteration in original).

<sup>116</sup> *Id.* ¶¶ 54-64, 70.

<sup>117</sup> *Id.* ¶ 70.

<sup>118</sup> *Id.* ¶ 73 (quoting Jeremy Page, Wenxin Fan & Natasha Khan, *How It All Started: China’s Early Coronavirus Missteps*, WALL STREET J. (Mar. 6, 2020, 10:36 AM), <https://www.wsj.com/articles/how-it-all-started-chinas-early-coronavirus-missteps-11583508932>).

<sup>119</sup> *Id.* ¶¶ 77-115.

<sup>120</sup> *Id.* ¶ 81 (alteration in original).

<sup>121</sup> *Id.* ¶ 62 (citing Yong Xiong & Nectar Gan, *This Chinese Doctor Tried to Save Lives, But Was Silenced. Now He Has Coronavirus*, CNN (Feb. 4, 2020, 8:15 AM), <https://www.cnn.com/2020/02/03/asia/coronavirus-doctor-whistle-blower-intl-hnk/index.html> [<https://perma.cc/N6E8-J9VB>]).

<sup>122</sup> *Id.* ¶ 82 (quoting Xiong & Gan, *supra* note 121); *see id.* ¶ 84 (“The [Wuhan police] message reportedly said, ‘The internet is not a land beyond the law . . . . Any unlawful acts of fabricating, spreading rumors and disturbing the social order will be punished by police according to the law, with zero tolerance.’”); *id.* ¶ 91 (“On January 3, 2020, Dr. Wenliang was forced to confess to a misdemeanor, prepare a self-criticism, and agree not to commit any additional ‘unlawful acts.’” (quoting Xiong & Gan, *supra* note 121)); *see id.* ¶ 113 (“Chinese citizen journalists, who posted videos from Wuhan of overcrowded hospitals and other scenes from the COVID-19 pandemic, have gone missing in recent weeks.”).

<sup>123</sup> *Id.* ¶ 86 (stating that an official at the Hubei Provincial Health Commission ordered a genomics company “to stop testing samples from Wuhan related to the new disease and destroy all existing samples” (quoting Gao Yu et al., *How Early Signs of the Coronavirus*

example, the PRC's "top health authority," its National Health Commission (NHC), "ordered institutions not to publish any information related to the unknown disease, and ordered labs to transfer any samples they had to designated testing institutions, or to destroy them."<sup>124</sup> China also denied members of the U.S. Center for Disease Prevention and Control permission to enter China.<sup>125</sup> China delayed disclosing to the world that it had mapped the genome of the new virus and that it could be spread from person to person, both of which were critical facts in fighting the disease and could have led people to avoid travelling to Wuhan and risking infection.<sup>126</sup> China also delayed quarantining Wuhan's residents for more than a month after the initial reports of the virus and its person-to-person transmission.<sup>127</sup>

In sum, the defendants deceived and lied to the world "about the infection rate, fatality rate, and other key statistics of COVID-19."<sup>128</sup> The defendants delayed revealing that the virus could spread from person to person; they permitted, if not sponsored, mass gathering in Wuhan, the epicenter of the pandemic; they allowed people from across the globe to travel to and from Wuhan; they postponed revealing the genome of the virus; and they did everything but publicly execute anyone who dared to reveal that something was rotten in Denmark. As a result, "COVID-19 spread rapidly across the world."<sup>129</sup> As of April 20, 2020, there were "770,138 confirmed cases in the United States and 37,186 deaths" of whom at least 177 were Missourians.<sup>130</sup>

In deciding whether the exception applies, it is important to keep the following points in mind. *First*, Missouri bears the burden of proving that the discretionary function exception does not apply. As the Supreme Court explained in *Gaubert*, for a complaint like Missouri's to survive a motion to dismiss, "it must allege facts which would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime."<sup>131</sup> *Gaubert* made clear that a plaintiff must prove that the relevant government official lacked any discretion over the matter or that the discretion he or she possessed is not the type of discretion the discretionary

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*Were Spotted, Spread and Throttled in China*, STRAITS TIMES (Feb. 28, 2020 8:57 PM), <https://www.straitstimes.com/asia/east-asia/how-early-signs-of-the-coronavirus-were-spotted-spread-and-throttled-in-china> [<https://perma.cc/8U3Z-2LB5>]); *id.* at ¶¶ 87-88 (stating that a hospital's discipline department criticized a doctor for ordering her staff to wear masks and also "banned staff from discussing the disease in public or via texts or images") (footnote and internal punctuation omitted).

<sup>124</sup> *Id.* ¶ 92 (quoting Yu et al., *supra* note 123).

<sup>125</sup> *Id.* ¶ 97.

<sup>126</sup> *Id.* ¶¶ 97-110.

<sup>127</sup> *Id.* ¶ 111.

<sup>128</sup> *Id.* ¶ 114.

<sup>129</sup> *Id.* ¶ 116.

<sup>130</sup> *Id.* ¶¶ 116-17.

<sup>131</sup> *United States v. Gaubert*, 499 U.S. 315, 324-25 (1991).

function exception sought to protect. Any doubt must be resolved in the defendant's favor.

*Second*, the relevant text of the FSIA and the FTCA are identical. Congress likely added the FTCA discretionary function exemption to the FSIA to avoid disfavoring foreign nations. Without it, the FSIA would render foreign states liable in circumstances where the United States would be immune from suit. Without that exemption, foreign states would certainly have believed that they were the victim of unfair treatment or discrimination. Better to avoid that reaction altogether *ex ante* than to deal with it *ex post* in every case where it arises.

*Third*, the consequence is that the courts must construe and apply the discretionary function to China's conduct in the same manner that they would if the United States was instead the defendant. That is, if Missouri brought a tort action against *our* federal government officials for *their* allegedly negligent actions in response to the pandemic, the federal government would invoke the same discretionary function exception under the FTCA that China can assert under the FSIA. Narrowing the exception because a foreign government stands in the dock would narrow it when our government is a defendant. We cannot try to deceive ourselves into believing that a ruling against China on this ground is like "a restricted railroad ticket, good for this day and train only."<sup>132</sup>

*Fourth*, the discretionary function exception applies as long as the relevant government officials exercised the discretion granted them by law, custom, or tradition *regardless of the outcome*. The discretionary function exception does not apply only when government officials make the right calls; it applies, as the text of the FSIA and FTCA unmistakably state, "whether or not the discretion involved be abused."<sup>133</sup> The purpose of the exception is to prevent courts from second guessing judgments that government officials make when exercising the powers of their offices, regardless of the outcome, to implement the current government's economic, social, or political policy. In fact, it is when something goes wrong that the exception is most necessary. After all, a favorable outcome might not lead to any tort suit because the official averted any harm from occurring.

*Fifth*, Missouri does not allege that the CPC, PRC, or any of the latter's components intentionally or negligently loosed the virus on Wuhan or the world. Missouri identifies several potential theories for how COVID-19 made its way into the local population. One theory is that there was "a zoonotic transmission from animals at a wet market in Wuhan (the 'Wuhan Seafood Market')." <sup>134</sup> A second theory is that "it was released from the Wuhan Institute of Virology, which was studying the virus as part of a commercial activity."<sup>135</sup> As the remainder of Missouri's allegations make clear, the state is criticizing China for

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<sup>132</sup> *Smith v. Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting).

<sup>133</sup> 28 U.S.C. § 2680(a) (2018); *see also id.* § 1605(a)(5).

<sup>134</sup> Complaint, *supra* note 1, ¶ 51.

<sup>135</sup> *Id.* ¶ 52.

its *response* to the release of COVID-19 among the human population, not for causing that release in the first instance.

The problem for Missouri is not that its allegations of misconduct are insufficient—they are ample—but that, given Missouri’s other allegations discussed above, the CPC and PRC had broad discretion to decide how to respond to the outbreak, and they directed every action that the other defendants took. That feature of Missouri’s complaint is important because, in considering whether the discretionary function exception applies, a court must accept as true the allegations in a plaintiff’s complaint.<sup>136</sup> At a minimum, Missouri does not allege that China violated Chinese law in responding to the virus. In fact, Missouri does not identify, as the Supreme Court put it in *Gaubert*, any Chinese “statute, regulation, or policy” that “specifically prescribes a course of action for an employee to follow” in responding to the outbreak.<sup>137</sup> If so, Chinese officials must have had discretion in how to respond and, to quote *Gaubert* again, “it must be presumed that the agent’s acts are grounded in policy when exercising that discretion.”<sup>138</sup> To be sure, Missouri states that “[u]nder Article 6.1 of the International Health Regulations, China had a duty to report ‘all events which may constitute a public health emergency of international concern within its territory’ within 24 hours.”<sup>139</sup> Missouri, however, does not cite any Chinese “statute, regulation, or policy” adopting Article 6.1 as Chinese law or preempting other potentially relevant Chinese laws on the subject. Because Missouri has the burden of proof on that score, that omission would seem to foreclose the state’s tort claim.<sup>140</sup>

That conclusion, by the way, is consistent with the PRC Constitution.<sup>141</sup> The Chinese central government sits atop every other governmental institution.<sup>142</sup> The “highest organ of state power” is the National People’s Congress.<sup>143</sup> The National People’s Congress elects the President and Vice President of the

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<sup>136</sup> See *Gaubert*, 499 U.S. at 327.

<sup>137</sup> See *id.* at 322 (quoting *Berkovitz v. United States*, 486 U. S. 531, 536 (1988)).

<sup>138</sup> See *id.* at 324.

<sup>139</sup> Complaint, *supra* note 1, ¶ 69 (quoting WORLD HEALTH ORG., INTERNATIONAL HEALTH REGULATIONS (2d ed. 2005), <https://apps.who.int/gb/bd/PDF/bd47/EN/constitution-en.pdf?ua=1> [<https://perma.cc/NM9R-3XN6>]).

<sup>140</sup> See *Gaubert*, 499 U.S. at 332 (“We find nothing in *Gaubert*’s amended complaint effectively alleging that the discretionary acts performed by the regulators were not entitled to the exemption.”).

<sup>141</sup> With only one exception (the Thirteenth Amendment’s ban on slavery and involuntary servitude), the U.S. Constitution does not apply to the conduct of private parties. By contrast, the PRC Constitution governs the activities of everyone and every institution in the nation, public or private. XIANFA art. 5 (2004). Every entity in China, public and private, must follow what the PRC Constitution states, to say nothing of what government officials command.

<sup>142</sup> *Id.* art. 30.

<sup>143</sup> *Id.* art. 57. The “permanent body” of the National People’s Congress is the Standing Committee of the National People’s Congress. *Id.* The Standing Committee consists of a Chairman, a Vice Chairmen, a Secretary-General, and other members. *Id.* art. 65.

PRC.<sup>144</sup> There is also a “State Council”—viz., “the Central People’s Government, of the People’s Republic of China is the executive body of the highest organ of state power; it is the highest organ of State administration.”<sup>145</sup> The body of the PRC Constitution does not expressly assign any governing responsibility to the CPC. Nonetheless, the Preamble to the PRC’s Constitution makes it clear that the CPC is, and has always been, responsible for “leadership” and supervision of the nation.<sup>146</sup> If what the CPC says goes, Missouri’s failure to allege that Chinese law cabins the CPC’s discretion in any way would allow the defendants to invoke the discretionary function exception.<sup>147</sup>

If Missouri’s allegations are true, the CPC and PRC did more than botch their efforts to contain the virus and keep it from turning into a pandemic. Fully knowledgeable about what they were dealing with, the defendants made a bad situation worse, perhaps to avoid the embarrassment from failing to contain the COVID-19 outbreak, perhaps to manage domestic Chinese economic and political concerns, perhaps to avoid the conclusion that China’s grand socialist experiment had failed miserably in dealing with a major public health problem, or perhaps to disguise another, even more nefarious explanation for what happened.<sup>148</sup> Nevertheless, the Supreme Court’s *Gaubert* decision makes clear that, absent a controlling law or policy, a government official’s actions are presumptively deemed an exercise of his or her discretion, and a plaintiff bears the burden of proving otherwise. Missouri’s allegations fall short in that regard.

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<sup>144</sup> *Id.* art. 79.

<sup>145</sup> *Id.* art. 85.

<sup>146</sup> *Id.* pmb1.

<sup>147</sup> See *United States v. Gaubert*, 499 U.S. 315, 336 (1991) (Scalia, J., concurring in part and concurring in the judgment).

<sup>148</sup> Writing for *Foreign Affairs*, Laura Rosenberger, who formerly served on the National Security Council and at the U.S. Department of State, recently made that point:

At least some of these efforts may be intended as an internal bank shot: by sowing doubt externally about the virus’s origins, the CCP can reinforce that view within China without officially promoting it. Indeed, Beijing’s strategy is likely driven both by insecurity at home and by opportunism abroad. Through its combination of positive and negative messaging, the CCP has been able to persuade the Chinese people not only that its model is an example for the world but also that the CCP is pushing back on efforts to blame China—and ethnically Chinese people—for the virus. Racist and xenophobic tropes about the virus and anti-Chinese hate crimes—which state media have aggressively recounted to audiences within China—have only helped the CCP, allowing it to stoke nationalism, dismiss criticism of China’s handling of the virus as racism, and present itself as defending the honor of the Chinese people.

Laura Rosenberger, *China’s Coronavirus Information Offensive*, FOREIGN AFF. (Apr. 22, 2020), <https://www.foreignaffairs.com/articles/china/2020-04-22/chinas-coronavirus-information-offensive> [<https://perma.cc/5AD3-HUY6>]; see also Kurt M. Campbell & Rush Doshi, *The Coronavirus Could Reshape Global Order*, FOREIGN AFF. (Mar. 18, 2020), <https://www.foreignaffairs.com/articles/china/2020-03-18/coronavirus-could-reshape-global-order> [<https://perma.cc/7PZL-ASJB>] (“[COVID-19] was called China’s ‘Chernobyl’; Dr. Li Wenliang—the young whistleblower silenced by the government who later succumbed to complications from the COVID-19—was likened to the Tiananmen Square ‘tank man.’”).

Accordingly, a court could readily conclude that Missouri has not carried its burden to show that Chinese officials lacked discretion under Chinese law to take the actions they did, however reckless or malign they might have been.

That is not a conclusion that a court or anyone else would find makes the world even a slightly better place. On the contrary, it's a very hard pill to swallow. Nonetheless, it is the result that the Supreme Court would likely reach based on the allegations in Missouri's complaint because it reflects the best reading of the FSIA and its application to Missouri's allegations.

### III. A POTENTIAL LEGISLATIVE REMEDY

Around the time that Missouri filed its complaint, U.S. Senator Tom Cotton drafted a bill<sup>149</sup> that would strip China of sovereign immunity and allow certain lawsuits to go forward.<sup>150</sup> The Holding the Chinese Communist Party Accountable for Infecting Americans Act of 2020 contains proposed findings declaring that the Chinese Communist Party and PRC officials were deceitful in their response to the outbreak.<sup>151</sup> To remedy Americans' injuries, the Cotton bill would allow China to be sued in four specified federal district courts<sup>152</sup> for the tortious acts that the CPC, the PRC, and any government officials took or failed to take in China.<sup>153</sup>

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<sup>149</sup> See Holding the Chinese Communist Party Accountable for Infecting Americans Act of 2020, S. 3662, 116th Cong. (2020).

Representative Dan Crenshaw introduced a companion bill in the House. See H.R. 6519, 116th Cong. (2020). Senator Josh Hawley also introduced a similar bill. See Justice for Victims of Coronavirus Act, S. 3674, 116th Cong. (2020); see also Press Release, Senator Hawley Announces Bill to Hold Chinese Communist Party Responsible for COVID-19 Pandemic (Apr. 14, 2020), <https://www.hawley.senate.gov/senator-hawley-announces-bill-hold-chinese-communist-party-responsible-covid-19-pandemic> [https://perma.cc/TDR3-3RXN].

<sup>150</sup> The purpose of the bill is set forth in Section 2(b):

The purpose of this Act is to provide civil litigants with the broadest possible basis, consistent with the Constitution of the United States, to seek relief against persons, entities, and foreign countries, wherever acting and wherever they may be found, that are responsible for, or complicit in ordering, controlling, or otherwise directing acts intended to deliberately conceal or distort the existence or nature of COVID-19, if such acts are found to have likely contributed to the global COVID-19 pandemic.

S. 3662 § 2(b).

<sup>151</sup> See *id.* § 2(a).

<sup>152</sup> The bill would vest original and exclusive jurisdiction over any suit in as many as four U.S. District Courts: the United States District Courts for the Southern District of New York, the Northern District of California, the Northern District of Illinois, and the Southern District of Texas. See *id.* § 4(a).

<sup>153</sup> Section 4 of the bill would amend the Judicial Code to add a new provision, 28 U.S.C. § 1605C, that, in part, would provide as follows:

(a) Responsibility of Foreign State.—A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which money damages are sought against a foreign state for physical injury or death, or injury to property or economic interests, occurring in the United States and caused by—(1) the spread

Were the bill to become law, plaintiffs would be able to sue China for personal injury and property damages. To that extent, the law might allow parties to obtain damages for their losses. “Might” is the most that can be said about the bill, however, because there are features of the Cotton bill that could foreclose many, if not most, claims.

One feature is a heightened standard of liability. The Cotton bill is quite clear that negligence would be an insufficient basis for liability. A section of the proposed bill provides that “[a] foreign state shall not be subject to the jurisdiction of the courts of the United States under this section on the basis of a tortious act or acts that constitute mere negligence.”<sup>154</sup> What that means precisely, however, is unclear. Negligence is only one possible tort theory. That provision could mean that a plaintiff can recover only if he or she proves that a defendant acted intentionally or recklessly. It also could allow a plaintiff to rely on the theory that one or more defendants engaged in an inherently dangerous activity. That too is uncertain. Finally, it is difficult to know whether a plaintiff could rely on a nuisance theory. Those questions (and probably more) need answers if we are to know what effect the bill would have as a law.

The other feature that could foreclose plaintiffs from recovering are provisions that effectively allow the federal government to assume control over any lawsuit. The bill would allow the U.S. Attorney General to intervene in any litigation<sup>155</sup> and obtain a stay of any further proceedings if the U.S. Secretary of State certifies that international negotiations are underway to resolve the controversy.<sup>156</sup> In addition, if the Secretary of State certifies that the United States and China have reached a settlement, the district court may dismiss the case over the plaintiffs’ objections.<sup>157</sup> Interestingly, the pending lawsuit filed by Missouri could not go forward under the bill because the U.S. District Court for the Eastern District of Missouri is not one of the four courts that the bill would vest with original and exclusive jurisdiction over any such lawsuit.<sup>158</sup>

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of COVID-19; and (2) a tortious act or acts, including acts intended to deliberately conceal or distort the existence or nature of COVID-19, of the foreign state, or of any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, regardless where the tortious act or acts of the foreign state occurred.

*Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* (“INTERVENTION.—The Attorney General may intervene in any action in which a foreign state is subject to the jurisdiction of a court of the United States under this section for the purpose of seeking a stay of the civil action, in whole or in part.”).

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* Why the Cotton bill provides that a district court “may” dismiss a lawsuit rather than “must” do so is unexplained but would likely generate litigation over its meaning. *See, e.g., Opati v. Republic of Sudan*, No. 17-1268, 2020 WL 2515440, at \*6 (U.S. May 18, 2020); *Minor v. Mechs. Bank of Alexandria*, 26 U.S. (1 Pet.) 46, 64 (1828).

<sup>158</sup> *See supra* note 152.



There are also certain odd features of the Cotton bill. One is its decision to allow private suits to go forward but to permit the federal government to assume control over the litigation. COVID-19 is not a run-of-the-mill case involving lost consumer goods or a fender bender. It is a once-in-a-century pandemic. Given the unique nature of the COVID-19 problem, it makes sense to grant the federal government responsibility for managing any litigation and conducting negotiations to resolve the matter. The problems are not limited to residents of any one state or even any one nation. If so, then perhaps Congress should permit litigation to go forward against China only by and in the name of the United States, without allowing any private parties to bring their own lawsuits. That would approximate the law that existed prior to 1976 since, before the FSIA became law, no lawsuit could go forward against a foreign sovereign if the United States objected.<sup>159</sup> That approach might be particularly appropriate in the case of COVID-19 because the nation's taxpayers will be paying the bills, perhaps for decades to come, resulting from Congress's recent legislation to restart the economy.

Another peculiar feature of the Cotton bill is the decision to limit any litigation to four specific U.S. District Courts. The bill does not explain why those should be the only courts with jurisdiction over lawsuits against China. True, the four courts are in the East, North, West, and South, and so they have a pan-Americana flavor to them. The selections also could be sold to the public on the notion that everyone would be able to be a plaintiff in a court located in one of the nation's four regions. Yet, if the federal government were able to take over the litigation—and it is almost certain that the federal government would exercise that option if it can—it makes far more sense to permit a lawsuit to be filed only in the U.S. District Court for the District of Columbia. Why? The Department of Justice would certainly manage this litigation by using lawyers from the Civil Division rather than a U.S. Attorney's office possibly thousands of miles away from the nation's capital. Finally, the Cotton bill does not address what to do if plaintiffs file separate lawsuits in each of the four specified district courts, particularly if each of the four separate cases seeks to become a nationwide class action. Of course, those problems and anything similar would not arise if only the federal government could sue China.

The ultimate question is whether the approach taken in that bill is a sensible one. That subject is best addressed in a separate article.<sup>160</sup>

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<sup>159</sup> See *supra* text accompanying notes 4-14.

<sup>160</sup> For a discussion of non-judicial remedies that the United States could take, see OLIVIA ENOS, HOLDING THE CHINESE COMMUNIST PARTY ACCOUNTABLE FOR ITS RESPONSE TO THE COVID-19 OUTBREAK (2020), <https://www.heritage.org/sites/default/files/2020-05/IB5074.pdf> [<https://perma.cc/4CL7-PJQZ>].

## CONCLUSION

Albert Camus wrote that, like a war, a plague can sneak up on us, despite the portents we should have seen along the way.<sup>161</sup> Perhaps the COVID-19 virus silently crept up on the city of Wuhan; perhaps not. We don't know. If Missouri is correct, however, the defendants knew late in 2019 that they had a potential plague on their hands, yet they reacted like a two-year-old who denies responsibility for any wrongdoing or even that anything went wrong. Whatever the explanation might be, we have a pandemic on our hands the likes of which we have not witnessed since the 1918 Flu Pandemic.

In terms of the damage that it has caused, COVID-19 makes Bhopal look like a mere headache. The virus has changed life in the modern world. It has returned nations like Italy to the days of walled city-states with no outsiders allowed to enter. It has devastated economies, even ones as strong as the United States's. It has ruined the lives of millions and will continue to do so for the near future. It has already killed hundreds of thousands of people worldwide, and many more will suffer early deaths down the road because of the unemployment and poverty the pandemic has caused. People justifiably want to know if the PRC is responsible for what happened and, if so, how to punish the Communist Party leadership for what they did or allowed to occur. Unfortunately, the tort suit by Missouri does not appear to be the proper vehicle to learn how the pandemic began or, if China is responsible, to punish the Chinese Communist Party or to obtain compensation for the pandemic's victims.

The events here are not the type of ordinary commercial or tort law claim that the FSIA allows in American courts. Missouri does not claim that it is a party to a broken contract or a commercial deal gone sour. Nor does the state aver that its personnel or residents have been the victim of a simple motor vehicle accident or the distribution of a poorly manufactured consumer device. Even if the defendants committed deceit on an unprecedented scale in responding to the outbreak of COVID-19 in Wuhan and are legally responsible for their actions under Missouri law, the FSIA likely does not allow this case to go forward.

Senator Cotton has proposed a remedy for that problem. Whether the legislation he offered would solve it, and whether that approach is a sensible one, are questions that Congress should seriously evaluate and debate rather than pass in the heat and anger of the moment. For now, the issue is whether Missouri can bring its lawsuit under the FSIA. As explained above, that is unlikely.

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<sup>161</sup> As Camus wrote:

Everybody knows that pestilences have a way of recurring in the world; yet somehow we find it hard to believe in ones that crash down on our heads from a blue sky. There have been as many plagues as wars in history; yet always plagues and wars take people equally by surprise.

ALBERT CAMUS, *THE PLAGUE* 35 (Stuart Gilbert trans., Vintage Books 1972) (1948).