No. 14-1206

In the Supreme Court of the United States

PETER GEORGE ODHIAMBO,
Petitioner,

v.

REPUBLIC OF KENYA, *et al.*,
Respondents.

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

BRIEF IN OPPOSITION

Daniel D. Barnowski
Counsel of Record
David I. Ackerman
Dentons US LLP
1301 K. Street, N.W.
Suite 600, East Tower
Washington, DC 20005-3364
202-408-6417
dan.barnowski@dentons.com

Counsel for Respondents

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

Petitioner brought suit in the United States District Court for the District of Columbia, alleging that the Republic of Kenya breached an alleged contract to make reward payments to him in exchange for information that led to Kenya's collection of unpaid taxes from third parties. Petitioner worked as an auditor at a Kenyan bank when he allegedly learned of the reward offer, which was advertised in a Kenyan newspaper and reported that the Kenyan government would pay rewards in Kenyan shillings to individuals who provided information that led to the recovery of unpaid Kenyan taxes. While still residing in Kenya, Petitioner allegedly provided that information and received a reward, but not everything he believed he was entitled to. Several years later, he relocated to the United States, seeking asylum after disclosing his identity and actions to a Kenyan newspaper, which printed his story.

The re-phrased questions presented are:

1. Whether the Court should deny the petition for certiorari to review the Court of Appeals' decision that the Foreign Sovereign Immunities Act ("FSIA") clause one and two commercial activities exceptions do not apply to Petitioner's breach of contract claims, where the claims were not based on activity in the United States, where all of the key facts and events giving rise to the claims occurred in Kenya, and where those Kenya-based facts and events had little connection or contact with the United States?

2. Whether the Court should deny the petition for certiorari to review the Court of Appeals' decision that

the FSIA clause three exception does not apply to breach of contract claims in which no portion of the alleged contract was to be performed in the United States, the contract did not contemplate payment being made outside of Kenya, and the only effects of the breach that were felt in the United States were felt well after the alleged breach took place?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

OTHER AUTHORITIES

COUNTER STATEMENT OF THE CASE

The Foreign Sovereign Immunities Act ("FSIA") grants foreign states complete immunity from litigation brought in United States courts that does not satisfy one of the statutorily enumerated exceptions and, therefore, has no meaningful connection to the United States. Such is the case here.

Petitioner's claim involves application and interpretation of a reward offer made by the Kenyan government, pursuant to a Kenyan statute, communicated in a Kenyan newspaper advertisement, to individuals located in Kenya. Petitioner was working in Kenya at the time he read the advertisement, became aware of the statute, and accepted its offer by disclosing information regarding delinquent payers of Kenyan taxes to the Kenyan government. The Kenyan government then allegedly used that information to apprehend Kenyan tax evaders and recover Kenyan tax revenues. Petitioner received at least partial payment for that information in Kenya in the form of Kenyan shillings. To the extent Petitioner was harmed by the alleged disclosure of his identity, that disclosure also occurred in Kenya.

Petitioner later sought asylum, moved to the United States and again demanded payment from Kenya. Discussions over his demand ensued. When they failed to achieve a resolution, Petitioner brought suit in the United States courts, attempting to force Kenya to defend its Kenya-based actions, taken pursuant to a Kenyan statute, in a United States court.

The courts below both found that Petitioner's claims were not "based upon" any commercial activity of Kenya that: (a) had substantial contact with the United States; (b) was performed in the United States; or (c) caused direct effects in the United States. Consistent with *all* circuit courts to consider these issues, in reaching these conclusions, the Circuit Court determined that "substantial contact" under FSIA is not the same as "minimum contacts" for jurisdictional purposes, and that there are no "direct effects" in the United States from a failure to pay a contractual obligation unless the contract provides for payment here or allows the non-breaching party to decide the place of payment. Petitioner seeks review and asks the Court to significantly weaken the threshold for maintaining suit under the "commercial activities" exception, thereby enabling a flood of lawsuits in the United States courts with attenuated connections to the United States.

Statement of Facts

Petitioner alleges that he "is a citizen and resident of Prince George's County, Maryland," who "arrived in the United States as a refugee" in September 2006. Appendix ("App.") at 137a, 148a. Respondent Republic of Kenya is a foreign sovereign. App. at 138a. The Kenya Ministry of Finance and the Kenya Revenue Authority ("KRA") are political subdivisions of Kenya, equivalent to the U.S. Department of Treasury and the Internal Revenue Service, respectively. *Id*.

Until 2006, Petitioner lived and worked in Kenya. In April 2003, while working as an auditor at a Kenyan bank, Petitioner became aware that certain accountholders at the bank had failed to pay required

taxes to the Kenyan government. App. at 139a. In March 2004, he learned of a reward program for whistleblowing activity that was offered and operated by the KRA pursuant to a Kenyan statute (the "Reward Program"). App. at 139a-140a & 164a. Pursuant to the Reward Program, the KRA offered to pay rewards in Kenyan shillings to individuals who provided the government with information that resulted in the identification or recovery of unpaid Kenyan taxes. App. at 164a.[1]

Petitioner then furnished to the KRA information on over 800 of the bank's customers. App. at 140a. For his information, he received two payments from the KRA, both while still residing in Kenya, in 2004 and 2005. *Id.* at 141a, 143a.

Petitioner also alleges that his identity as a whistleblower became known and blames the KRA for leaking it. *Id.* at 141a.[2] Believing he was in danger for his whistleblowing, Petitioner contacted the Kenya National Commission on Human Rights and a major daily newspaper about his situation. *Id.* The newspaper then "published Odhiambo's story" (widely disclosing his identity as an informant), and Petitioner sought refugee status in the United States. *Id.* at 145a-147a. He "arrived in the United States as a

---

[1] The advertisement attached to the Complaint, by which Petitioner learned of the KRA's offer, advises that it does not communicate all of the terms of the Reward Program and directs the public to log onto the KRA's website to obtain additional details about the Statute. *Id.*

[2] Respondents deny the complaint's allegations generally, but for purposes of this Petition, will treat them as accurate.

refugee" in September 2006, two years after the Reward Program offer was communicated to him, two years after he accepted the offer by providing information, and a year and two years after he was paid an allegedly insufficient amount for his information. *Id.* at 148a.

Petitioner's claim that his "contractual relationship . . . continued for six years in the United States" finds no support in his allegations and was rejected by the district and circuit courts. Petition at 5: App. at 25a-27a, 100a-103a. The complaint alleged only that, between June 2008 and September 2009, Petitioner attempted to obtain additional payments from Kenya, participating in two meetings and one telephone call with Kenyan officials in the United States to discuss his assertion that he was owed additional payments. App. at 149a-150a. Further, although Petitioner asserts in his Petition that "he could not safely bring [his suit] in Kenya," that fact is not alleged anywhere in Petitioner's First Amended Complaint.

Proceedings Below

On March 12, 2012, Petitioner filed a complaint in the U.S. District Court for the District of Columbia asserting two causes of action for breach of contract against Respondents: one for failing to pay him a sufficient reward for his information and one for disclosing his identity as a whistleblower. Petitioner filed an amended complaint asserting the same causes of action against the same defendants on July 2, 2012. App. at 137a and 151a-153a. The sole basis asserted for jurisdiction is the FSIA, 28 U.S.C. § 1602 *et. seq*. App at 138a.

On July 23, 2012, Respondents filed a Motion to Dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), asserting that Petitioner's claims were barred by the FSIA and, in the alternative, that the First Amended Complaint failed to state a claim upon which relief could be granted. On March 13, 2013, Judge Amy Berman Jackson granted the Motion to Dismiss on the grounds that Petitioner's claims were barred by sovereign immunity and did not fall within any of the FSIA exceptions.[3] App. at 81a.

On April 10, 2013, Petitioner filed a Motion to Alter or Amend the Judgment pursuant to Federal Rule of Civil Procedure 59(e). App. at 50a, 52a. He neither sought leave to file a new complaint at that time nor attached a proposed amendment to his filing. On May 19, 2013, Petitioner filed a Motion for Leave to File Second Amended Complaint pursuant to Federal Rule of Civil Procedure 15, and included for the first time a proposed amended complaint. App. at 50a. On May 30, 2013, Judge Jackson issued a second Memorandum Opinion denying both of Petitioner's motions. App. at 49a.

Petitioner appealed the decision to the D.C. Circuit Court of Appeals, which issued its opinion affirming the trial court's dismissal on August 29, 2014. App. at 5a. All three Circuit Court judges agreed that Petitioner's claims did not satisfy the first and second clauses of the commercial activities exception of the

---

[3] Contrary to Petitioner's assertion, the District Court did not "decline[] to accept" Petitioner's "uncontroverted . . . allegations," nor did it "erroneously switch[] Kenya's ultimate burden of proof to him." Petition at 9; App. at 59a, 102a-103a.

FSIA because they were neither "based upon" commercial activity having "substantial contact" with the United States (as required by the clause one exception), nor based upon an act performed in the United States in connection with commercial activity elsewhere (clause two). The Court held that Petitioner's "meetings with Kenyan officials in the United States" -- the only activity with substantial contact with the United States (clause one) and the only activities that occurred in the United States (clause two) -- did not "establish any fact without which his breach-of-contract claim will fail." App. at 14a. The Court rejected Petitioner's "substantial contact" argument on the additional ground that it had not been properly raised below, and therefore, waived. *Id.*

With respect to clause three of the commercial activities exception, the Circuit Court found (with a dissenting opinion) that Petitioner's claim was based upon acts occurring outside the United States in connection with commercial activity occurring outside the United States (the Reward Program), but that the Reward Program activities and breach did not cause "direct effects" in the United States, as required by the statute. App. at 17a-18a, 23a-25a. The Circuit Court surveyed numerous cases applying the "direct effects" exception and reached the following conclusion:

> [T]his Court's direct effect cases involving alleged breaches of contract have turned on whether the contract in question established the United States as a place of performance . . .
>
> To summarize, this Court's cases draw a very clear line: For purposes of clause three of the FSIA commercial activity exception, breaching a

> contract that establishes or necessarily contemplates the United States as a place of performance causes a direct effect in the United States, while breaching a contract that does not establish or necessarily contemplate the United States as a place of performance does not cause a direct effect in the United States.

App. at 19a-23a.

The Court concluded that the alleged breach did not cause a "direct effect" in the United States because "nothing in Kenya's rewards offer suggested that the United States might be a place of performance. If the contract designated any place of performance, that place would be Kenya, because the contract expressly provided that rewards would be paid in Kenyan shillings." App. at 23a.

Petitioner filed petitions for rehearing *en banc* and rehearing by the panel. The Court denied both requests and this Petition followed. App. at 1a-2a.

REASONS FOR DENYING CERTIORARI

I. THE COURT SHOULD NOT GRANT CERTIORARI TO REVIEW THE CIRCUIT COURT'S INTERPRETATION OF CLAUSE ONE OF THE "COMMERCIAL ACTIVITIES" EXCEPTION.

The first clause of FSIA's "commercial activities" exception grants federal courts subject-matter jurisdiction over claims against foreign sovereigns when "the action is based upon a commercial activity carried on in the United States by the foreign state." 28 U.S.C. § 1605(a)(2). The FSIA defines the phrase

"commercial activity carried on in the United States by a foreign state" to mean "commercial activity carried on by such state and having *substantial contact* with the United States." *Id.* § 1603(e) (emphasis added). Construing these phrases, this Court held in *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), that clause one grants federal courts subject-matter jurisdiction if the cause of action is "'based upon' some 'commercial activity' by [the foreign sovereign] that had 'substantial contact' with the United States within the meaning of the Act." *Id.* at 356.

Petitioner asks the Court to clarify the law in this area, arguing that "no consistent test has emerged for the first clause of the exception." Petition at 3. But there is no confusion amongst the circuits. This Court, in *Nelson*, has prescribed the analytical test for evaluating clause one claims. The Court "beg[a]n [its] analysis by identifying the particular conduct on which the [plaintiffs'] action is 'based' for purposes of the Act." 507 U.S. at 356. Because the claim in *Nelson* was not based on "commercial activity" at all, the Court found it unnecessary to apply the second step of the analysis: whether the commercial activity on which the action is based had "substantial contact with the United States." *Id.*

Circuit courts have nearly uniformly followed this two-step analysis. *See, e.g.*, *BP Chems. Ltd. v. Jiangsu Sopo Corp. (Grp.) Ltd.*, 285 F.3d 677, 682 (8th Cir. 2002) ("To rebut a foreign sovereign's presumption of immunity, a plaintiff's action must be (1) based upon (2) a commercial activity carried on in the United States."); *Sachs v. Republic of Austria*, 737 F.3d 584, 590 (9th Cir. 2013) *cert. granted sub nom. OBB*

Personenverkehr AG v. Sachs, 135 S. Ct. 1172 (2015); *Globe Nuclear Servs. & Supply GNSS, Ltd. v. AO Techsnabexport*, 376 F.3d 282, 285 (4th Cir. 2004).

The court in this case used the same analysis, concluding that "the only aspect of Kenya's commercial activity that allegedly established substantial contact with the United States" was "his meetings with Kenyan officials in the United States." App. at 15a. And that activity simply "is not necessary to make out any element of his breach-of-contract claim." *Id.* Thus, his claims were not "based upon" commercial activity with substantial contact with the United States.

Petitioner is really asking the Court to issue a new rule governing the application of the second step of the *Nelson* test: whether the commercial activity that the foreign sovereign's claim is "based upon" has "substantial contact" with the United States. He asks the Court to declare that "substantial contact" actually means the same thing as "minimum contacts" in the personal jurisdiction context, and that the analysis of the two phrases should be identical. Petition at 12, 24. But there is no split amongst the circuits on whether "minimum contacts" means the same thing as "substantial contact." Instead, circuit courts have repeatedly rejected this interpretation. As the Ninth Circuit noted in *Sachs*, "[i]t is generally agreed that" the phrase "substantial contact" connotes "a higher standard for contact than the minimum contacts standard for due process." 737 F.3d at 598. All other circuits that have considered the issue are in agreement.

A. This Case Is Not An Appropriate Vehicle Through Which To Address Any Purported Ambiguity In The Clause One Analysis.

As an initial matter, this is not the appropriate case for the Court to attempt to resolve any supposed confusion in the clause one analysis. The basis for Petitioner's argument on clause one is his assertion that the statutory phrase "substantial contact" is equivalent to the "minimum contacts" analysis for purposes of due process. But, as the Circuit Court held, Petitioner did not properly raise that argument below, and therefore waived it.

Petitioner made no arguments concerning "substantial contact" or "minimum contacts" during briefing on the Motion to Dismiss. *See* App. at 57a-58a (footnote 4), 98a. He did not raise the argument at all until his post-judgment motion under Federal Rule of Civil Procedure 59(e) seeking to amend or alter the judgment. *Id.* But, as the district court found, a Rule 59(e) motion "may not be used to . . . raise arguments or present evidence that could have been raised prior to the entry of judgment." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n.5 (2008) (*quoting* 11 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 2810.1, at 127-28 (2d ed. 1995)); App. at 58a. Petitioner therefore waived the argument. The DC Circuit agreed with the district court's analysis on this point, noting that Petitioner had "forfeited" the argument by failing to raise it properly below. App. at 14a.

Thus, even if this Court granted the Petition and provided further clarity on clause one, Petitioner would

not be entitled to the application of any new test on remand.[4]

B. There Is No Circuit Split On Whether The Phrase "Substantial Contact" Means The Same As "Minimum Contacts."

Petitioner argues that a circuit split exists between the D.C. Circuit's analysis in *Kirkham v. Société Air France*, 429 F.3d 288 (D.C. Cir. 2005), and several other circuits, which apply a supposedly different "nexus" approach under clause one. But there is no such split. The term "nexus" is not equivalent to the "minimum contacts" analysis that Petitioner would have applied here.

As an initial matter, *Kirkham* did not substantively address the meaning of the phrase "substantial contact" because it wasn't required. In *Kirkham*, a U.S. resident "purchased airline tickets through a Washington, D.C. travel agency" for travel abroad, and was injured in a French airport while awaiting a connecting flight to another city. 429 F.3d at 293. She sued seeking damages allegedly arising from the then-government-owned airline's negligence. *Id.* The only conduct with "substantial contact" with the United States was her ticket purchase, which occurred in the United States. The court therefore explained: "The sole question before us is whether Kirkham's negligence claim is 'based upon' her ticket purchase

---

[4] This Court "will not consider" arguments that were "inadequately preserved in the prior proceedings." *Auer v. Robbins*, 519 U.S. 452, 464 (1997).

within the meaning of the FSIA's commercial activity exception." *Id.* at 294-95.

A separate and established line of cases recognized throughout the circuits interprets the phrase "substantial contact" contrary to Petitioner's proposed interpretation. More than 30 years ago, the D.C. Circuit held that the substantial contact test under FSIA is different from the "minimum contacts" due process inquiry:

> In choosing [the phrase "substantial contact"], Congress made clear that the immunity determination under the first clause *diverges from* the "minimum contacts" due process inquiry, as well as from jurisdictional determinations under state long-arm statutes.

Mar. Int'l Nominees Establishment v. Republic of Guinea, 693 F.2d 1094, 1109 (D.C. Cir. 1983) (emphasis added).

Similarly, in *Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511 (D.C. Cir. 1988), the DC Circuit confirmed that the "substantial contact requirement is stricter than that suggested by a minimum contacts due process inquiry, and that isolated or transitory contacts with the United States do not suffice." *Id.* at 1513; *see also In re Papandreou*, 139 F.3d 247, 253 (D.C. Cir. 1998) ("We have never decided precisely what 'substantial contact' amounts to in the FSIA context, though we have said that it requires more than the minimum contacts sufficient to satisfy due process in establishing personal jurisdiction.").

As support for this interpretation, both *Maritime International* and *Zedan* cited the FSIA's legislative

history, which suggested Congress' intent to require more for "substantial contact" than is required under the minimum contacts analysis. *See Mar. Int'l*, 693 F.2d at 1109 n.23; *see also Zedan*, 849 F.2d at 1513. As the D.C. Circuit found in *Zedan*:

> The legislative history gives several examples of what is meant by "substantial contact." These include:
>
> cases based on commercial transactions performed in whole or in part in the United States, import-export transactions involving sales to, or purchases from, concerns in the United States, business torts occurring in the United States (cf. § 1605(a)(5)), and an indebtedness incurred by a foreign state which negotiates or executes a loan agreement in the United States, or which receives financing from a private or public lending institution located in the United States-for example, loans, guarantees or insurance provided by the Export-Import Bank of the United States.

849 F.2d at 1513 (*quoting* H.R. Rep. No. 1487, 94th Cong., 2d Sess. 17 (1976)).

The Second, Fourth, Eighth and Ninth Circuits agree with the D.C. Circuit's interpretation. The Second Circuit has held: "Congress left it to the courts to define the contours of 'substantial contact' . . . . However, it is clear that Congress intended a tighter nexus than the 'minimum contacts' standard for due process." *Shapiro v. Republic of Bolivia*, 930 F.2d 1013, 1019 (2d Cir. 1991) (internal citation omitted). The Fourth Circuit has noted in the context of a FSIA case:

"When the district court examined these contacts it found that the Gerdings had not satisfied the due process 'minimum contacts' standard, *much less the FSIA's 'substantial contacts' requirement*." *Gerding v. Republic of France*, 943 F.2d 521, 527 (4th Cir. 1991) (emphasis added). And the Ninth Circuit has explained: "It is generally agreed that [substantial contact] sets a higher standard for contact than the minimum contacts standard for due process." *Sachs*, 737 F.3d at 598; a*ccord BP Chems. Ltd. v. Jiangsu Sopo Corp. (Grp.) Ltd.*, 420 F.3d 810, 818 n.6 (8th Cir. 2005) (noting that the "substantial contact" standard "probably exceed[s] the constitutional standard" required for a minimum contacts analysis).[5]

The remaining circuits have not addressed the question of whether "substantial contact" imposes a more stringent test than the traditional "minimum contacts" analysis. But there certainly is no divergence among the circuits that have considered the issue. All of the courts that have addressed the issue are in agreement with the test used by the D.C. Circuit in this case.[6]

---

[5] Contrary to Petitioner's assertion, the *Sachs* court did not "cite" any "recurring confusion" regarding application of the phrase "substantial contact." Petition at 3. The Ninth Circuit stated only that the FSIA and prior decisions had not "clearly defined" the phrase, but that "[i]t is generally agreed that it sets a higher standard for contact than the minimum contacts standard for due process." *Sachs,* 737 F.3d at 598.

[6] If Congress intended courts to use the "minimum contacts" analysis to determine whether a FSIA exception applies, Congress simply would have used that phrase in FSIA, instead of requiring "substantial contact."

Nonetheless, Petitioner asserts that decisions using the term "nexus" are somehow applying a different standard, similar to "minimum contacts." They are not. Rather, the decisions Petitioner cites simply use the word "nexus" (if at all) as shorthand to refer to the connection between the United States and the conduct the plaintiff's claim is "based upon."

For example, Petitioner claims the First Circuit applied a conflicting "nexus" test in *Universal Trading & Investment Co. v. Bureau for Representing Ukrainian Interests in International and Foreign Courts*, 727 F.3d 10 (1st Cir. 2013). Petition at 16. The court used the term "nexus" in connection with its analysis of the commercial activities exception, but it employed that term merely as shorthand for the statutory requirements, stating "a nexus between a defendant's commercial activity and the United States may be shown under one of three circumstances under the statute . . .." *Universal Trading*, 727 F.3d at 25. The court did not make any comparisons to the "minimum contacts" analysis, nor did it conclude that a "minimum contacts" test sufficed to determine the court's subject-matter jurisdiction. Instead, the court found that the claim possessed the necessary "substantial contact" with the United States because the contract at issue was alleged to have been negotiated in the United States and "all of the contractual instruments were directed to U.S. addresses" and delivered within the United States. *Id.*

The Eighth Circuit used the word "nexus" in the same way in *BP Chemicals Ltd.*, 285 F.3d 677, which Petitioner cited at page 16. *See id.* at 687 ("For example, [s]olicitation of business within the United

States is generally a sufficient nexus to meet the substantial contacts test") (internal quotation omitted) (alteration in original). The court did not adopt a "minimum contacts" standard, but rather referenced the D.C. Circuit's conclusion in *Maritime International* before concluding that the commercial activity at issue had "[c]ontacts much more significant than isolated visits," including that the foreign sovereign entity "solicited business from vendors in the United States" through its agent "on an ongoing basis." *Id.* at 686-87. Moreover, the same court suggested three years later that "the nexus requirements imposed by the FSIA probably exceed the constitutional standard" for minimum contacts. *BP Chems. Ltd.*, 420 F.3d at 818 n.6.

Although Petitioner claims that the Fourth Circuit "applied the 'nexus' test" in *Globe Nuclear*, 376 F.3d 282, Petition at 16, neither the word "nexus" nor the phrase "minimum contacts" appears in that opinion. The court did not define the phrase "substantial contact," but found the standard was met because the contract at issue concerned transfer of title of uranium that was "located within the United States" and because the contractual termination notice was delivered to the United States. *Id.* at 291-92. The discussion contains no reference to "minimum contacts."[7]

---

[7] Petitioner cites two pre-*Nelson* decisions as evidence of a supposed circuit split, but they similarly fail to establish any differing treatment of the phrase "substantial contact." *Sugarman v. Aeoromexico, Inc.*, 626 F.2d 270 (3rd Cir. 1980), involved a near-identical claim to *Kirkham* in which the plaintiff sought damages from a foreign airline based upon the purchase of an airline ticket

Finally, *Haven v. Polska*, 215 F.3d 727 (7th Cir. 2000), another case cited by Petitioner as evidence of the supposed circuit split, is based upon a near-identical analysis as the Circuit Court's decision below. In *Haven*, U.S. residents who immigrated to Poland sought damages arising from, *inter alia*, the state-owned insurance company's refusal to honor an insurance policy insuring land seized by Poland during World War II. *Id.* at 730. They asserted jurisdiction under clause one because the insurance company advertised via the Internet and "market[ed] insurance to United States consumers." *Id.* at 736. Like the Circuit Court below, the Seventh Circuit concluded that the plaintiff's claims were not "based upon" these activities. *Id.* The word "nexus" is not used to describe the court's analytical framework, but appears only in a quote cited in a parenthetical from another decision. *Id.*

C. The Circuit Court's Decision Under Clause One Also Does Not Conflict With Decisions Of This Court.

The Circuit Court's decision also does not conflict with decisions of this Court. Petitioner's argument is based upon his incorrect assertion that the Court below held that "*Kirkham's* 'fact-lose' test must be applied as

---

in the United States. *Id.* at 271, 273. As in *Kirkham*, the court found subject-matter jurisdiction over the claim based upon that purchase. In *Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigation (C.N.A.N.)*, 730 F.2d 195 (5th Cir. 1984), the Fifth Circuit determined the phrase "based upon" meant "have a nexus with." *Id.* at 206 (dissent). This Court later conclusively interpreted the phrase "based upon" in *Nelson*. *See Nelson*, 507 U.S. at 357.

a substitute for 'substantial contact' in clause one." Petition at 20 (emphasis added). The court made no such finding.

Instead, the Circuit Court did what it was supposed to do by determining what acts Petitioner's claims were based upon, and then determining whether those acts had substantial contact with the United States. The Court determined that Petitioner's claim was not "based upon" "the only aspect of Kenya's commercial activity that allegedly established substantial contact with the United States -- his meetings with Kenyan officials in the United States." App. at 15a. That holding followed *Kirkham*, which correctly construed *Nelson*.

In *Nelson*, this Court definitively addressed the construction of the phrase "based upon" as used in the FSIA:

> Although the Act contains no definition of the phrase "based upon," and the relatively sparse legislative history offers no assistance, guidance is hardly necessary. In denoting conduct that forms the "basis," or "foundation," for a claim . . . the phrase is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case.
>
> Congress manifestly understood there to be a difference between a suit "based upon" commercial activity and one "based upon" acts performed "in connection with" such activity. The only reasonable reading of the former term calls for something more than a mere connection with, or relation to, commercial activity.

507 U.S. at 357-58 (citations omitted). This is the same analysis used by the courts below in this case.

In *Kirkham*, the D.C. Circuit held that this Court's reference to "elements of a claim" in the quotation above "refer[s] to *each fact necessary* to establish a claim. In other words, so long as the alleged commercial activity establishes a fact without which the plaintiff will lose, the commercial activity exception applies." 429 F.3d at 295 (emphasis in original).

Under both *Kirkham* and *Nelson*, the emphasis therefore is on the factual elements of the claims alleged, and whether those factual elements have a "substantial connection" with the United States. Consistent with that approach, the Circuit Court found that "Odhiambo does not seriously contend that his meetings with Kenyan officials in the United States establish any fact without which his breach of contract claim will fail." App. at 14a. Because "the only aspect of Kenya's commercial activity that allegedly established substantial contact with the United States -- his meetings with Kenyan officials in the United States -- is not necessary to make out any element of his breach-of-contract claim," the court concluded that Petitioner's claims were not "based upon" any conduct that had "substantial contact" with the United States. *Id.* at 15a-16a.

Petitioner's attempts to attack *Kirkham* on the grounds that it "applied an 'elements' much less a 'fact-lose' test to decide 'substantial contact'" are misplaced. Petition at 22. Neither *Kirkham* nor the decision below purports to "substitute" an "elements" analysis for the "substantial contact" requirement. Rather, both *Kirkham* and *Nelson* teach that a court should first

determine what factual elements form the basis of the claim and then determine whether those factual elements have a "substantial contact" with the United States. *Nelson*, 507 U.S. at 356. That is precisely what the court did below. App. at 15a.

None of *Globe Nuclear, Universal Trading*, or *Haven* applied a different analysis. In all three cases, the courts focused on "the specific claim . . . asserted . . ., and the elements of that claim that, 'if proven, would entitle [the plaintiff] to relief under [its] theory of the case.'" *Globe Nuclear*, 376 F.3d at 287 (*quoting Nelson*, 507 U.S. at 357) (second alteration in original); *see also Universal Trading*, 727 F.3d at 17-18; *Haven*, 215 F.3d at 736.

Finally, Petitioner argues that the "term 'based upon,' . . . does not support the application of *Nelson*'s elements test to jurisdiction." Petition at 23. Petitioner's argument is incorrect. As this Court noted, "the text and structure of the FSIA demonstrate Congress' intention that the FSIA be the sole basis for obtaining jurisdiction over a foreign state in our courts." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989) (emphasis added). *Nelson* interpreted the FSIA's provisions, and, by its very nature, is applicable to the jurisdictional inquiry.

Petitioner also claims that the Circuit Court misread the term "based upon" by failing to give the phrase "its settled meaning." Petition at 24. This Court's decision in *Nelson* found that "guidance is hardly necessary" to determine the meaning of the phrase, and cited to three different dictionary definitions in support of its definition. 507 U.S. at 357. Petitioner's citations to suits applying a "minimum

contacts" standard have no bearing on this dispute. As explained above, the "substantial contact" and "minimum contacts" analyses are not equivalent.[8]

II. THE CIRCUIT COURT'S INTERPRETATION OF CLAUSE TWO OF THE "COMMERCIAL ACTIVITIES" EXCEPTION DOES NOT CONFLICT WITH DECISIONS OF OTHER CIRCUIT COURTS AND DOES NOT DIVERGE FROM DECISIONS OF THIS COURT.

The second clause of the "commercial activities" exception requires that Petitioner's claims be "based . . . upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere." 28 U.S.C. § 1605(a)(2). Applying the same interpretation of the phrase "based upon" as

---

[8] Earlier this year, the Court granted certiorari in *OBB Personenverkehr AG v. Sachs*, 135 S. Ct. 1172 (2015), which will address how to apply the "based upon" analysis in a case in which some of the necessary elements of the underlying tort claims qualify as FSIA commercial activity and some do not. In those circumstances, the *Sachs* petitioner asks the Court to analyze the "gravamen" of the underlying complaint and determine whether the commercial activity is the "gist" or "essence" of, or fundamental to, the underlying tort claims. The respondent argues that if any necessary element of the tort claims involves FSIA commercial activity then jurisdiction is proper. The Court's resolution of the *Sachs* appeal will not impact this case because, as the Circuit Court below held, none of the elements of the underlying contract claims in this case qualify as FSIA commercial activity. The only actions with a substantial contact with the United States -- the post-performance and post-breach negotiations -- are not elements of any of the claims here (nor are they the "gist" or "essence" of those claims).

noted above, the Circuit Court found that Petitioner's clause two arguments failed for the same reason as his clause one arguments: "His breach-of-contract claim is not *based upon* any alleged 'act performed in the United States in connection with' Kenya's commercial activity." App. at 16a. Instead, his claims are based upon profoundly Kenyan-based activities: a Kenyan statute, a Kenyan newspaper advertisement, his provision while in Kenya of the names and accounts of Kenyan tax evaders, and the Kenyan government's alleged disclosure of his identity and failure to pay him what he believes he deserves.

Petitioner does not seriously contend a circuit split exists with respect to the Circuit Court's analysis of clause two (nor could he). Therefore, this simply is not an issue deserving of the Court's attention.

Rather, Petitioner complains that the Circuit Court "arbitrarily extends for the first time" the *Kirkham* interpretation of the phrase "based upon" to analysis of clause two. Petition at 17. But there is nothing arbitrary about the Circuit Court's analysis. Although the three clauses of the "commercial activities" exception involve three different factual predicates, the statutory phrase "based upon" is common to all three clauses: clause one requires the action be "***based upon*** a commercial activity carried on in the United States by the foreign state;" clause two requires the action be "***based*** . . . ***upon*** an act performed in the United States in connection with a commercial activity of the foreign state elsewhere;" and clause three requires the action be "***based*** . . . ***upon*** an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a

direct effect in the United States." 28 U.S.C. § 1605(a)(2) (emphasis added).

"A standard principle of statutory construction provides that identical words and phrases within the same statute should normally be given the same meaning." *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007). The Circuit Court applied this fundamental notion of statutory construction. "[T]he virtually identical statutory text and structure of clauses one and two lead us to conclude that 'based upon' means the same thing in both clauses." App. at 16a. The court's conclusion is consistent with practices of other circuits. *See, e.g., Rogers v. Petroleo Brasileiro, S.A.*, 673 F.3d 131, 137 (2d Cir. 2012) (applying *Nelson* to a claim under clause two).

Nor is there any conflict between the Circuit Court's analysis and other decisions of this Court. Although this Court's decision in *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983), recognizes the importance of developing a "uniform body of law" governing the FSIA, that phrase is used in a discussion of the reasons that Congress granted "foreign states the right to remove any civil action from a state court to a federal court." *Id.* at 489. Nothing in *Verlinden* dictates that the Court's "minimum contacts" jurisprudence should mirror its FSIA case law.

III. THE COURT SHOULD NOT GRANT CERTIORARI TO REVIEW THE CIRCUIT COURT'S INTERPRETATION OF CLAUSE THREE OF THE "COMMERCIAL ACTIVITIES" EXCEPTION.

The third clause of the "commercial activities" exception provides jurisdiction over a claim that is "based . . . upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere *and that act causes a direct effect in the United States*." 28 U.S.C. § 1605(a)(2) (emphasis added). Petitioner's alleged claims are certainly based on activity of Kenya "elsewhere" -- the formation, performance and alleged breach of a contract. But clause three requires that activity to cause "direct effects" in the United States.

"The requirement that an effect be 'direct' indicates that Congress did not intend to provide jurisdiction whenever the ripples caused by an overseas transaction manage eventually to reach the shores of the United States." *United World Trade, Inc. v. Mangyshlakneft Oil Prod. Ass'n*, 33 F.3d 1232, 1238 (10th Cir. 1994). This Court has held that "an effect is direct if it follows as an *immediate consequence* of the defendant's . . . activity." *Republic of Argentina v. Weltover*, 504 U.S. 607, 618 (1992) (internal quotation marks omitted) (emphasis added). Subject-matter jurisdiction therefore "may not be predicated on purely trivial effects in the United States." *Id*.

In reaching its decision in this case, the Circuit Court surveyed its prior decisions concerning "direct effects" arising from contractual breaches, and concluded that U.S.-felt impacts of a breach should be

considered "direct" only when the contract in some way contemplates the United States as a possible place of performance:

> [T]his Court's direct effect cases involving alleged breaches of contract have turned on whether the contract in question established the United States as a place of performance . . .
>
> To summarize, this Court's cases draw a very clear line: For purposes of clause three of the FSIA commercial activity exception, breaching a contract that establishes or necessarily contemplates the United States as a place of performance causes a direct effect in the United States, while breaching a contract that does not establish or necessarily contemplate the United States as a place of performance does not cause a direct effect in the United States.

App. at 19a-23a.

Petitioner argues that the Circuit Court's analysis conflicts with decisions from other circuits and this Court. But no such conflict exists. And any contrary holding would allow any foreign defendant with an alleged breach of contract claim to establish jurisdiction in the United States simply by moving here and then demanding payment. This is not what Congress intended in enacting the FSIA.

A. The Circuit Court's Analysis Below Does Not Conflict With The Decisions Of Other Circuits.

Petitioner (and the dissenting opinion in this case) contends that the Circuit Court's opinion conflicts with the approaches of the Second, Fifth and Sixth Circuits, and therefore asks the Court to intervene to resolve this supposed conflict. Petition at 17; App. at 38a-39a. There is no conflict.

The Second Circuit has the most developed body of law concerning whether the clause three exception is triggered in a breach of contract case involving nonpayment of contractual obligations. *Weltover, Inc. v. Republic of Argentina*, 941 F.2d 145, 153 (2d Cir. 1991). In *Rogers v. Petroleo Brasileiro, S.A.*, the Second Circuit summarized its jurisprudence in a manner that is extremely similar to the circuit court's discussion in this case:

> In cases involving the default by a foreign state or its instrumentality on its commercial obligations, *an act has a direct effect in the United States if the defaulting party is contractually obligated to pay in this country . . .*
>
> Beyond this scenario, we have found the direct effect requirement satisfied where a defaulting party agreed in advance, pursuant to the terms of a letter of credit, to make payments "according to [a payee's] instruction," and the payee selected a New York bank.

673 F.3d at 139 (emphasis added) (second alteration in original).

The Second Circuit ultimately found clause three not satisfied in the case because:

> [T]here was no requirement that payment be made in the United States nor any provision permitting the holder to designate a place of performance. And contrary to the District Court's finding, there is nothing in the language of the Bonds that suggests a reasonable understanding that the United States could be a possible place of performance.

Id. at 139-40.

Similarly, in *Virtual Countries, Inc. v. Republic of South Africa*, 300 F.3d 230 (2d Cir. 2002), the Second Circuit found no direct effect resulting from a contractual breach where "[n]o obligation -- contractual or otherwise -- ran to the plaintiff from the Republic, *let alone one to be performed in the United States*." *Id.* at 240 (emphasis added).

The Second Circuit's approach is in line with the Circuit Court's conclusion in this case that a contract must "establish or necessarily contemplate the United States as a place of performance" in order to have a "direct effect" in the United States. App. at 23a. Both approaches necessarily look to the terms of the contract, which forms the basis of the parties' relationship. "[T]he mere fact that a foreign state's commercial activity outside the United States caused physical or financial injury to a United States citizen is not itself sufficient to constitute a direct effect in the United States." *Guirlando v. T.C. Ziraat Bankasi A.S.*, 602 F.3d 69, 78 (2d Cir. 2010).

Petitioner contends that the decision below conflicts with *Hanil Bank v. PT. Bank Negara Indonesia, (Persero),* 148 F.3d 127 (2d Cir. 1998), but he is mistaken. In *Hanil Bank*, the court found the clause three exception satisfied where the plaintiff "was entitled under the letter of credit to indicate how it would be reimbursed, and it designated payment to its bank account in New York." *Id.* at 132. The possibility of contract performance in the United States therefore was contemplated and the failure to pay caused an "immediate consequence" in the United States, without intervening actors, actions or decisions. This decision makes sense in light of this Court's precedent. If a contract fails to contemplate the United States as a possible place of payment, then the failure to pay under the contract would not cause an "immediate consequence" in the United States. Direct effects and consequences would be felt only in the country in which payment was supposed to be made. Consequences would be felt in the United States only upon the plaintiff deciding to move here, and then demanding transfer of the funds from the foreign payee bank. Thus, intervening actors and actions come between the breach and the US-felt consequences of it.

Petitioner relies on an out-of-context excerpt to manufacture a distinction between the cases, citing the excerpted phrase "*Weltover* does not insist the 'place of performance' be in the United States in order for a financial transaction to cause a direct effect in this country." *Id.* at 133. However, read in context with the surrounding language, it is clear that statement refers only to the defendant's argument that "Indonesia [was] the 'place of performance' *under letter of credit law*." *Id.* (emphasis added). The court responded: "Even

assuming that Indonesia *is* the place of performance under letter of credit law, *Weltover* does not insist the 'place of performance' be in the United States in order for a financial transaction to cause a direct effect in this country." *Id.* Despite what the letter of credit law provided, the parties' contract allowed plaintiff to require payment in the United States and that was the hook for jurisdiction. The failure to pay in the United States constituted a breach and the breach caused "immediate consequences" in the United States. The context omitted from the Petition makes clear that the court was not referring generally to the requirement that some performance occur in the United States.

Nor is there any conflict between the Circuit Court's decision and the Fifth Circuit's approach. Petitioner claims a conflict with *Callejo v. Bancomer, S.A.*, 764 F.2d 1101 (5th Cir. 1985), a pre-*Weltover* decision that found a direct effect in the United States resulting from refusal to make payment on a certificate of deposit. In that case, the court found a "direct effect" in the United States where the bank "was well-aware that it was dealing with American investors -- it called them in the United States, mailed the certificates to them there, and remitted payments through an American correspondent bank." *Id.* at 1112. Thus, at least some "performance" of the underlying contractual obligations was "contemplated" in the United States, and the failure to pay when due caused immediate consequences in the United States. *Callejo* found that the parties' dispute regarding "the legal place of payment" was irrelevant in light of this conduct. *Id.*

Petitioner also cites *Voest-Alpine Trading USA Corp. v. Bank of China*, 142 F.3d 887 (5th Cir. 1998),

but that case involves a situation similar to *Hanil Bank*, in which the plaintiff corporation "expressly instructed the Bank of China to wire payment on the letter of credit directly into [its] bank account in Houston" and the payments were not made. *Id.* at 896. The breach was the failure to pay in Houston and that failure caused "immediate consequences" in the United States. More recent Fifth Circuit cases also have focused on the place of performance of the contract, consistent with the approach here. *See, e.g., UNC Lear Servs., Inc. v. Kingdom of Saudi Arabia*, 581 F.3d 210, 218-19 (5th Cir. 2009).

There is also no conflict between the Circuit Court's approach and the Sixth Circuit's jurisprudence. In *Westfield v. Federal Republic of Germany*, 633 F.3d 409 (6th Cir. 2011), a decision Petitioner failed to cite, the Sixth Circuit summarized its treatment of clause three claims in the same manner as the D.C. and Second Circuits have:

> In contrast to situations where foreign sovereigns promised to pay funds to accounts in the United States, if the funds are only payable in a foreign country, failure to receive those funds does not cause direct effects in the United States. This is true even where the entity that was not paid alleges that it intended to transfer the funds to the United States on receipt. When funds are due abroad and not paid, the direct effects occur abroad.
>
> . . . [F]ocusing on the plaintiff's actions and ties to the United States would be inconsistent with our prior decisions recognizing that an American

> entity's mere financial loss is insufficient to establish a direct effect in the United States.

633 F.3d at 416-417.

Finally, Petitioner also asserts a conflict with *DRFP LLC v. Republica Bolivariana de Venezuela*, 622 F.3d 513 (6th Cir. 2010), but none exists. That case involved claims arising from the failure to pay promissory notes. The Sixth Circuit concluded the nonpayment caused a "direct effect" in the United States because "under the terms of the notes . . . the parties implicitly agreed to leave it to the bearer to demand payment of the notes anywhere, including, perforce, Columbus, Ohio, the bearer's place of business." *Id.* at 517. As in *Hanil Bank*, the payee was contractually entitled to select the place of payment. The failure to pay in Ohio was the breach and "immediate consequences" were felt in the United States as a result of that breach.

B. The Circuit Court's Opinion Does Not Conflict With Decisions Of This Court.

The Circuit Court's approach does not conflict with any decisions of this Court either. Contrary to Petitioner's claim, there is no conflict between the decision below and *Verlinden B.V. v. Central Bank of Nigeria*. In *Verlinden*, the Court determined that non-U.S. citizens could bring actions under the FSIA. After noting that "Congress was aware of concern that our courts [might be] turned into small 'international courts of claims,'" the Court stated: "Congress protected against this danger not by restricting the class of potential plaintiffs, but rather by enacting substantive provisions requiring some form of substantial contact with the United States." 461 U.S. at 490.

Petitioner's argument turns this phrase on its head, claiming that the Circuit Court below somehow created a "proscribed class of 'contract victims' who cannot bring suit after 'mov[ing] to the United States.'" Petition at 27 (quoting App. at 19a). But the Circuit Court did not prohibit foreign plaintiffs from bringing suit in the United States; it merely explained that their claims must have some "form of substantial contact" with the United States in order to bring suit here. *Verlinden*, 461 U.S. at 490.

Nor is there any conflict with *Weltover*, which found a "direct effect" as the result of the plaintiff's contractually-authorized designation of New York as the place of performance. 504 U.S. at 609-10. "Respondents had designated their accounts in New York as the place of payment," consistent with the contractual provision authorizing such a designation, "and Argentina made some interest payments into those accounts" prior to the breach. *Id.* at 619. The Court concluded: "Because New York was thus the *place of performance* for Argentina's ultimate contractual obligations, the rescheduling of those obligations necessarily had a 'direct effect' in the United States." *Id.* (emphasis added).

Nor does the Circuit Court's finding contradict *Weltover's* rejection of a line of cases that equated the "directness" of effects with their "foreseeability." 504 U.S. at 618. If a contract either requires payment in the United States or gives the plaintiff the option of directing payment here, the failure to pay money to a United States bank causes "immediate consequences" in the United States. On the other hand, if a contract does not provide for payment in the United States, but

a plaintiff with connections to the United States moves here, it might be foreseeable that a breach of the obligation to pay into a foreign bank will later cause impacts in the United States -- but any failure to pay funds into the foreign bank would not cause "immediate consequences." The consequences would be directly and immediately felt abroad, and would only visit consequences in the United States upon the intervention of actors or actions. In other words, foreseeable impacts of a breach need not necessarily be "immediate consequences" of the same breach.

C. Petitioner's Watered-Down Direct Effects Test Would Enable Foreign Plaintiffs With Potential Breach Of Contract Claims To Establish Jurisdiction In The United States Simply By Moving Here.

As the Circuit Court pointed out in its decision below, acceptance of Petitioner's "direct effects" argument would eviscerate the meaning of the third clause of the FSIA exception and open the courts to a myriad of claims from overseas plaintiffs seeking to take advantage of the U.S. court system:

> Construing clause three to permit suits in that latter category would create an incentive for every breach of contract victim in the world to move to the United States, demand payment here, and then sue alleging a direct effect of nonpayment in the United States.

(App. at 19a).

In enacting the FSIA, Congress did not intend that any plaintiff with a potential breach of contract suit --

no matter how unconnected to the United States -- could create jurisdiction in the United States simply by moving here and demanding payment. Such a result would turn the U.S. courts into "small international courts of claims" for anyone who has the means to move here.

D. The Circuit Court's Analysis Was Correct In Finding That Any "Effects" In The United States Of Kenya's Alleged Failure To Pay Were Not "Direct."

The Court also should decline certiorari because the Circuit Court's decision in this case was correct. The United States "effect" of Kenya's nonpayment was not a "direct" result of the alleged breach of contract. App. at 24a. Petitioner argues that, under a more "holistic" approach to the clause three analysis, Petitioner experienced "direct effects" in the United States because Kenya assisted in Petitioner's resettlement. Petition at 29. But, as the district court found, Petitioner's relocation was not a "direct effect" of any alleged contractual breach.

Petitioner's relocation to the United States was not the "direct effect" of any breach, but rather "there were a number of intervening events -- including [Petitioner's] own decision to disclose his identity as an informant to a major newspaper and the newspaper's publication of that information." App. at 24a, 111a. Moreover, as the Circuit Court found, "Kenya's assistance in his *asylum application"* did not have "any impact on the place of performance designated in the *rewards offer*." App. at 26a (emphasis added). The asylum efforts did not modify the terms of the alleged contract, either expressly or implicitly. The "effects" of

Kenya's alleged failure to pay amounts due in the United States therefore are not directly related either to the alleged disclosure of Petitioner's identity or to Kenya's later role in his seeking refugee status.

CONCLUSION

For the foregoing reasons, the Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

Daniel D. Barnowski
Counsel of Record
David I. Ackerman
Dentons US LLP
1301 K. Street, N.W.
Suite 600, East Tower
Washington, DC 20005-3364
202-408-6417
dan.barnowski@dentons.com

Counsel for Respondents