No. _____

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

PETITION FOR WRIT OF CERTIORARI

Robert W. Ludwig
Counsel of Record
LUDWIG & ROBINSON, PLLC
1717 Pennsylvania Ave., N.W.
Ste. 650
Washington, D.C. 20006
(202) 289-1800

Counsel for Petitioner

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

QUESTIONS PRESENTED

1. Whether the courts, perpetuating a four-decade decisional gap over the heart of the Foreign Sovereign Immunities Act, may decline jurisdiction without actually deciding that given by Congress, despite its purpose to provide court access and their unflagging obligation to exercise jurisdiction given?

2. Whether the Foreign Sovereign Immunities Act, under any construction, confers jurisdiction over a foreign state that directs its contract party and obligations to the United States, and carries on a six-year course of dealing, causing financial loss here, which the dissent below "readily" found created a "genuine nexus"?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE D.C. CIRCUIT

Peter George Odhiambo respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The majority and dissenting opinions of the D.C. Circuit are reported at 764 F.3d 31, and reproduced in the appendix ("App.") at 5a, 29a. The D.C. Circuit's denials of rehearing and rehearing en banc, App. 1a, 2a, are unreported. The May 30, 2013 Memorandum and Order of the District Court denying reconsideration and leave to amend, App. 49a, is reported at 947 F. Supp. 2d 30. Its March 13, 2013 Memorandum and Order granting dismissal, App. 81a, is reported at 930 F. Supp. 2d 17.

JURISDICTION

The judgment of the Court of Appeals was entered on August 29, 2014. App. 3a. On October 29, 2014, that court denied a timely petition for rehearing and rehearing en banc. App. 1a, 2a. This petition is timely under 28 U.S.C. § 2101(c) and Rules 13.1, 13.5, time having been extended by the Honorable Chief Justice John G. Roberts, Jr., as circuit justice. Dkt. 14A783. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 1605(a) of the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§ 1330, 1332(a)(4), 1391(f), 1441(d), 1602 *et seq.*, set forth more fully at App. 120a, provides, in relevant part:

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

Section 1603 of the FSIA provides, in relevant part:

> (d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. …
>
> (e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

INTRODUCTION

This case presents important questions, growing imbalances and widening conflicts over the meaning of jurisdiction given by Congress under the FSIA "commercial-activity exception," the primary prong of which has never been decided, from which the other two flow.

After nearly 40 years of applying the statute, no consistent test has emerged for the first clause of the exception, "commercial activity…having substantial contact with the United States," 28 U.S.C. § 1603(e), 1605(a)(2)(cl.1), the heart of the "most significant" exception to immunity. *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 611 (1992). More remarkably, no court has decided what "substantial contact" means, the prescribed nexus for *clause one* jurisdiction, and this critical term has never been interpreted by the Court. The lower courts were anticipating 20 years ago that *Saudi Arabia v. Nelson* would resolve the "thicket of statutory interpretation and gloss," *Tubular Inspectors, Inc. v. Petroleos Mexicanos*, 977 F.2d 180, 184 n.10 (5th Cir. 1992), but the Court stated: "Because we conclude that the suit is not based upon any commercial activity, we need not reach the issue of substantial contact with the United States," 507 U.S. 349, 356 (1993), leaving for future resolution a four-way split.

In *OBB Personenverkehr AG v. Sachs*, No. 13-1067, accepted for review by this Court on January 23, 2015, the Ninth Circuit en banc cited the recurring confusion, noting "'substantial contact' is not clearly defined in the FSIA or by our circuit or

our sister circuits," *Sachs v. Republic of Austria*, 737 F.3d 584, 598 (9th Cir. 2013), citing *Shapiro v. Republic of Bolivia*, 930 F.2d 1013, 1019 (2d Cir. 1991), and *Maritime Int'l Nominees Estab. v. Rep. of Guinea,* 693 F.2d 1094 (D.C. Cir. 1982), *overruled on other grounds by Weltover*, 504 U.S. at 617-18. The Ninth Circuit also did not define the term, 737 F.3d at 599, and the petitioner in *Sachs* did not raise the question. By contrast, this case squarely presents the question and an opportunity to resolve what has widened since *Nelson* to a six-way split.

Two approaches, engendered by the D.C. Circuit and reaffirmed in this case, include that of *Maritime* cited in *Sachs* and followed in *Shapiro*, which created much of the confusion. The other, sixth approach comes from *Kirkham v. Société Air France*, 429 F.3d 288 (D.C. Cir. 2005), which *Sachs* cited as a case "most like this one," 737 F.3d at 593 n.5, and the court below stated it "must follow" and is "correct," though *Kirkham* never addressed much less decided "substantial contact." *Kirkham*, interpreting *Nelson* rather than the statute, which did not reach the issue, held "so long as the alleged commercial activity establishes a fact [in the United States] without which the plaintiff will lose, [*clause one*] applies." 429 F.3d at 292.

In this case, the D.C. Circuit, applying *Kirkham's* "fact-lose" requirement to *clause one* as a substitute for "substantial contact," extended it also to *clause two* of the exception as a substitute for its prescribed nexus, "an act performed in the United States," though unexpressed in either statute.

Dividing over *clause three* of the exception, the panel, interpreting *Weltover* and circuit precedent rather than its prescribed nexus, "a direct effect in the United States," held that a place of performance in the United States, which *Weltover* found *sufficient* for jurisdiction, is *necessary*, announcing a *per se* requirement, and a proscribed class of "contract victim[s]" who "move" here, App. 19a, 23a, not expressed in that statute either. The dissent disagreed with this "particularly restrictive form of the overruled 'foreseeability' condition" engrafted by *Maritime*, citing "conflicts with *Weltover* and the decisions of this and other circuits…." App. 38a.

With these rulings, adding to the thicket of statutory gloss, in conflict with decisions of this Court and other federal courts of appeals, the D.C. Circuit sanctioned the dismissal of a case based on a contractual relationship originating in Kenya that continued for six years in the United States.

The D.C. Circuit's decision also perpetuates, contrary to the obligation to decide jurisdiction given, a four-decade decisional gap over the term "substantial contact"—a meaning hiding in plain sight that was overlooked by *Maritime* and the courts since—and a resulting imbalance in how the statutory framework is being applied by the courts. This Court should grant certiorari to resolve the recurring conflicts and confusion, so as to effectuate the intent Congress expressed to provide court access, and rebalance the three bases of statutory long-arm jurisdiction it enacted.

STATEMENT OF THE CASE

Statutory Background. The transition from centuries of applying the rule of absolute immunity, permitting foreign states to breach commercial obligations with impunity, to the "restrictive theory" of sovereign immunity, "engender[ed] much confusion and conflict." *Republic of Mexico v. Hoffman*, 324 U.S. 30, 40 (1945) (Frankfurter, J., concurring). Under the modern rule a state's immunity is restricted to cases based on its public acts (*jure imperii*), and does not extend to its private acts (*jure gestionis*), *i.e.* when it engages in commercial activity like any party in the marketplace. "Congress abated the bedlam in 1976, replacing the old executive-driven, factor-intensive, loosely common-law-based immunity regime with the [FSIA's] 'comprehensive set of legal standards governing claims of immunity'" in U.S. courts. *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250, 2255 (2014) (quoting *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488 (1983)). Today, rather than an "'uniform body of law,'" an important purpose of the FSIA, *Verlinden*, 461 U.S. at 489 (quoting H.R. Report No. 1487, 94th Cong., 2d Sess. 32 (1976) ("H.R. Rep." or "House Report")), there exists instead a hopelessly inconsistent immunity regime that varies by circuit.

The FSIA, "'a constant bane of the federal judiciary,'" statutory "labyrinth[]," or "Gordian knot," *Stena Rederi AB v. Comision de Contratos del Comite Ejecutivo General,* 923 F.2d 380, 382 (5th Cir. 1991); *Texas Trading & Milling Corp. v. Federal Rep. of Nigeria*, 647 F.2d 300, 307 (2d Cir. 1981), is more charitably a "marvel of compression" which

combines in interlocking, "tersely worded sections" three questions: "the availability of sovereign immunity as a defense,…subject matter jurisdiction over the claim, and…personal jurisdiction over the defendant." *Id.* at 306. *Texas Trading*, a seminal decision cited in *Weltover*, 504 U.S. at 618, and *Nelson*, 507 U.S. at 356-57, recognized: "This economy of decision has come…at the price of considerable confusion in the district courts." 647 F.2d at 307. That confusion soon extended to the circuit courts.

The FSIA was major remedial legislation enacted to bring U.S. practice in line with international law. 28 U.S.C. § 1602. Including as its statutory purpose an intent to "protect the rights of…litigants in United States courts," *id.*, and provisions treating foreign states like "private" parties, § 1606, for personal service, § 1608, and enforcement of judgments, § 1610, Congress for the first time provided "our citizens…access to the courts" and effective remedies against foreign states. H.R. Rep. at 6; *Verlinden*, 461 U.S. at 490 (quoting House Report).

The FSIA's "general purpose is simple: To assure that American citizens are not deprived of normal legal redress against foreign states who engage in ordinary commercial transactions or who otherwise act as a private party would." *Hearings on H.R. 11315 Before the Subcom. on Admin. Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 24 (1976) (testimony of Monroe Leigh, Legal Advisor, Department of State). As the bill was considered, the Court in *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976), noting the "injury to the private

party, who is denied justice through judicial deference to a raw assertion of sovereignty," recognized "the need for merchants 'to have their rights determined in courts' outweighs any injury to foreign policy." *Id.* at 706 n.18 (quoting State Department).

Factual Background. Odhiambo, an auditor at Charterhouse Bank in Kenya, in 2004 documented 800 cases of potential tax evasion for Kenya's revenue authorities, under an ad offering rewards for information leading to the identification and recovery of unpaid taxes, of 1% and 3%, respectively. App. 8a (majority quoting ad in part); App. 139a-41a ¶¶9-12, 164a. The ad further "assured of strict confidentiality to safeguard identifies" against a "vendetta," *id.*, a contract obligation addressed only by the dissent. App. 164a; App. 30a, 34a, 45a.

In July 2006, as its revenue authorities wrote "to assure" Odhiambo that when "taxes are identified or paid as a direct result of the information…we shall pay your" rewards, App. 147a¶31, 166a, Kenya, by its National Commission on Human Rights, arranged asylum to the United States, having breached its obligation to safeguard his identity. App. 145a-47a ¶¶25, 28-31. As the U.S. ambassador explained:

> The closure of Charterhouse Bank…advanced the U.S. policy…in Kenya. Mr. Odhiambo's efforts as a whistleblower earned him the enmity of the senior political and business leaders who were affected. In Kenya there is a…history of intimidation of activists who expose corruption…and assassination.... As a result of

> the threat to Mr. Odhiambo, he was given refugee status…. [App. 167a]

Kenya then over the *next six years*, while eventually confirming hundreds of millions in unpaid taxes Odhiambo reported, had "extensive communications and meetings" with him in the United States, including seeking his sworn statement, a telephone call from Kenya, and meetings with its Prime Minister, Chief of Staff or both in Washington, Maryland and New York, as alleged in the first amended complaint ("FAC"). App. 149a-50a ¶¶ 35-40.

Proceedings Below. In 2012, Odhiambo, having become a U.S. citizen, brought the suit he could not safely bring in Kenya. The gravamen of the FAC was: having breached confidentiality and arranged his asylum, Kenya directed him—and its ongoing obligation to report tax recoveries and pay rewards thereon—to the United States, leading to six years of communications before breaching and causing loss here. Kenya moved to dismiss, offering no evidence to support its ultimate burden to prove immunity.

The district court granted dismissal, holding this is a Kenyan matter, "not about Odhiambo's asylum to the United States…." App. 93a. Applying *Kirkham's* "fact-lose" test to *clause one*, and holding other clauses unsatisfied, App. 98a, 103a, 107a, it declined to accept his uncontroverted FAC allegations of six years of contacts, evidence, or reasonable inferences, and erroneously switched Kenya's ultimate burden of proof to him. H.R. Rep. at 17, App. 129a; App. 88a.

After undersigned counsel substituted in, moved for reconsideration and leave to file a second amended complaint ("SAC") alleging two interim payments and a misrepresentation significantly understating tax recoveries and reward owed to Odhiambo in the United States, and other contacts, *e.g.* 156a-63a ¶¶61-76, 137(e), alternatively requesting discovery regarding Kenya's intent and use of a mutual agent as intermediary, the court denied relief. App. 49a.

On August 29, 2014, a divided panel affirmed. The panel, not deciding what "substantial contact" means, endorsed *Kirkham's* unsupported "fact-lose" requirement for *clause one*, and extended it to *clause two.* Conceding *clause three* presents the "closest question," App. 17a, the majority, relying on *Zedan v. Kingdom of Saudi Arabia,* 849 F.2d 1511 (D.C. Cir. 1988), App. 20a, 23a, abrogated like *Maritime* by *Weltover*, engrafted as a "clear line" on *clause three* a "place of performance rule" for all contract cases, that "dictates our result here." App. 19a-21a, 22a.

Dissenting, Judge Pillard objected that this *per se* rule "arbitrarily shrinks the class of contract claims that may survive…to those in which there is a United States place-of-performance clause," declining to join the majority's "narrowing approach." App. 39a-40a. Noting Kenya caused and directed Odhiambo to go to the United States, the dissent found his presence and financial loss to be a "genuine nexus," and *clause three* "readily met." App. 41a, 43a, 45a.

Odhiambo filed a timely petition for rehearing or rehearing en banc, which the court denied. App. 1a.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER CIRCUITS OVER THE FSIA COMMERCIAL-ACTIVITY EXCEPTION, WIDENING A SPLIT LEFT DECADES AGO FOR FUTURE RESOLUTION

Clause One. The D.C. Circuit's decision deepens the conflict and confusion over *clause one*, which stems in large part from prior decisions of the Circuit. Early on, the D.C. Circuit recognized:

> [I]n the statute's "*Findings and declaration of purpose*" it is asserted that "states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned…." We think that it ought to be difficult for defendants engaged in commercial activity with substantial American contact…to invoke successfully sovereign immunity when sued for underlying commercial misdeeds. This is especially so in view of the fact that FSIA was written in great measure to ensure that "our citizens will have access to the courts in order to resolve ordinary legal disputes."

Gilson v. Republic of Ireland, 682 F.2d 1022, 1028 (D.C. Cir. 1982) (quoting 28 U.S.C. § 1602 and H.R. Rep. at 6).[1] *Gilson* noted this purpose was consistent with *McGee v. International Ins. Co.*, 355 U.S. 220,

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[1] *Accord*, *Texas Trading*, 647 F.2d at 312-13 (courts "should be mindful…of Congress's concern with providing 'access to the courts,'" and "[n]o rigid parsing of § 1605(a)(2) should lose sight of that purpose") (quoting H.R. Rep. at 6).

223 (1957), establishing the forum's "'manifest interest in providing effective means of redress for its residents.'" *Id.* (quoting *McGee*).

Months later, the D.C. Circuit in *Maritime* "read 'substantial contact' as demanding more than 'minimum contacts,'" declaring: "Congress made clear that the immunity determination under the first clause diverges from the 'minimum contacts' due process inquiry," 693 F.2d at 1109 & n.23. Asserting the "legislative history does not contradict the clear import of the words Congress chose," *Maritime* quoted the explanation that the three clauses "'prescribe the necessary contacts [the 'minimum contacts' requirement of *International Shoe Co. v. Washington*, 326 U.S. 310…(1945)] which must exist before our courts can exercise personal jurisdiction.'" *Id.* (quoting H.R. Rep. at 13) (brackets in original).

Maritime, citing only *International Shoe,* omitted the House Report's pin-cite to *McGee*, 355 U.S. at 223, which defined "minimum contacts" as requiring a "substantial connection" with the forum. H.R. Rep. at 13. Dismissing the House Report's guidance that the FSIA is "'in effect, a Federal long-arm statute over foreign states…patterned after the long-arm statute Congress enacted for the District of Columbia,'" the court found "significant differences," asserting "the 'substantial contact' requirement has not even a remote relative in that statute." 693 F.2d at 1109 n.23 (citing H.R. Rep. at 13, noting D.C. Code § 13-423(a)(1) "allows personal jurisdiction as to a claim arising from the person's 'transacting any business'"). Overlooking that the D.C. statute extended to the constitutional "substantial connect-

ion" limit announced in *McGee*, *Maritime* also did not consider that its "transacting business" prong was rephrased "commercial activity" in the FSIA to distinguish commercial from sovereign activity, as required under the restrictive theory of immunity.

In 1988, the D.C. Circuit, citing *Maritime*, reaffirmed that "substantial contact" "is stricter than that suggested by the minimum contacts due process inquiry," *Zedan*, 849 F.2d at 1513, again not deciding what it meant. Noting "substantial contact" was "'intended to reflect a degree of contact beyond that occasioned simply by U.S. citizenship or U.S. residence of the plaintiff,'" *id.* (quoting H.R. Rep. at 17), *Zedan* did not consider whether that minimal bar reflected minimum contacts.

Fifteen years after enactment, the Second Circuit, observing caselaw remained "scant" on this "critical question," also declared "it is clear that Congress intended a tighter nexus than the 'minimum contacts' standard," *Shapiro,* 930 F.2d at 1019, 1020, citing *Maritime*.

Meanwhile, the Third Circuit applied a "nexus" approach consistent with "due process," *Sugarman v. Aeromexico, Inc.*, 626 F.2d 270, 272-73 (3d Cir. 1980), a "construction of the [FSIA] required by its syntax and confirmed by its legislative history." *Id.* The court emphasized that the FSIA codified the principle that immunity is "'restricted'" to sovereign acts and does not extend to suits based on commercial acts, "'under procedures that insure due process.'" *Id.* at 275 (quoting H.R. Rep. at 7).

The Fifth Circuit adopted the Third Circuit's "nexus" test, *Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigation*, 730 F.2d 195, 202 (5th Cir. 1984), citing a four-way split:

> Despite strong congressional intent to promote uniformity…through judicial application of the first clause…readings…have not been consistent. Courts of appeals and district courts have announced widely varying formulations[,]…divided into four categories: (1) a "literal" approach; (2) a "nexus" approach; (3) a bifurcated literal and nexus approach; and (4) a "doing business" approach.

Id. at 199-200. Judge Higginbotham disagreed with *Maritime*, concluding "substantial contact" does not indicate a "more stringent" test than minimum contacts, noting "the phrase could be lifted straight from *International Shoe*," *id.* at 206 (Higginbotham, J., dissenting), also overlooking *McGee*.

The Eleventh Circuit in *Nelson,* adopting the nexus test of the Third, Fifth, Sixth and Ninth Circuits, raised the "varying interpretations of the… first clause," *Nelson v. Saudi Arabia,* 923 F.2d 1528, 1534 (11th Cir. 1991) (citing cases), *rev'd on other grounds sub nom. Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), which this Court expressly did not reach.

The same conflicts remain, becoming exacerbated since. Prior to *Nelson*, no circuit applied the "doing business" or "literal" variants. *Vencedora*, 730 F.2d at 200-01. After *Nelson*, the Ninth Circuit recognized the former in *Theo. H. Davies & Co., Ltd. v. Republic of Marshall Islands*, 174 F.3d 969, 975 (9th Cir. 1998)

(citing dissents by Justice Stevens in *Nelson* and Judge Higginbotham in *Vencedora*). The Tenth Circuit applied the latter in *Orient Mineral Co. v. Bank of China*, 506 F.3d 980, 996 (10th Cir. 2007), applying *clause one's* text, "activity carried on in the United States," not its "substantial contact" definition, a literal reading previously "repudiated by the circuits." *Vencedora*, 730 F.2d at 200 (citing cases).

Two decades after the FSIA became law, the D.C. Circuit acknowledged it had "never decided precisely what 'substantial contact' amounts to in the FSIA context, though we have said that it requires more than the minimum contacts," *In re* Papandreou, 139 F.3d 247, 253 (D.C. Cir. 1998), citing *Maritime*.

Three decades after enactment, the D.C. and Second Circuits, still not deciding that critical term, or mentioning it at all, imposed a fifth variant drawn from *Nelson,* paradoxically on the issue it did not reach. In 2005, the D.C. Circuit in *Kirkham* applied *Nelson's* "elements" test for determining sovereign acts to jurisdiction. Overlooking the separate "substantial contact" inquiry, the D.C. Circuit held: "*The sole question*…is whether Kirkham's negligence claim is 'based upon' her ticket purchase," and "[u]nder the commercial activity exception as interpreted by *Nelson*, we must determine whether the ticket sale is one 'those elements of a claim that, if proven, would entitle [Kirkham] to relief under [her] theory of the case.'" 429 F.3d at 292 (quoting *Nelson*, 507 U.S. at 357) (emphasis added).[2] The

[2] The analysis should have been straightforward: *clause one* was met where the claim for injury during a Paris stopover, while under Air France's control, was based on commercial

Second Circuit in *Kensington Int'l, Ltd. v. Itoua*, 505 F.3d 147, 156 (2d Cir. 2007), citing *Kirkham*, likewise applied *Nelson's* elements test to jurisdiction, *id.* at 156, as did the Tenth Circuit in *Orient Mineral*, 506 F.3d at 993. None of these cases involved any question of sovereign acts to which *Nelson* applied its test.

Creating a sixth variant, *Kirkham* went further, holding *Nelson's* reference to "elements of a claim" refers to "*each fact necessary* to establish a claim, creating its "fact-lose" test. 429 F.3d at 292 (emphasis in original). The court in this case, still misreading *Nelson* and the Act endorsed the test, made without reference to "substantial contact," as "correct," holding Odhiambo did not meet it. App. 16a.

In conflict with the D.C., Second and Tenth Circuits, the First, Fourth, Seventh and Eighth Circuits have since applied the "nexus" test, joining the Third, Fifth and Eleventh Circuits. *Universal Trading & Inv. Co. v. Bureau for Representing Ukrainian Interests*, 727 F.3d 10, 25-26 (1st Cir. 2013); *Globe Nuclear Servs. & Supply (GNSS), Ltd. v. AO Techsnabexport*, 376 F.3d 282, 291-92 (4th Cir. 2004); *Haven v. Rzeczpospolita Polska*, 215 F.3d 727, 736 (7th Cir. 2000); *BP Chemicals Ltd. v. Jiangsu Sopo Corp.*, 285 F.3d 677, 687 (8th Cir. 2002). The Ninth Circuit, having applied the nexus and doing business tests, in *Sachs* adopted the tighter nexus test, concluding it is "generally agreed that [substantial contact] sets a higher standard for contact than the minimum contacts standard," 737

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activity (contract of safe carriage), having substantial contact (ticketing and originating flight) with the United States.

F.3d at 598, citing *Maritime* and *Shapiro.* Far from "generally agreed," the meaning of "substantial contact" remains hopelessly divided and undecided.

Clause Two. The D.C. Circuit holding in this case arbitrarily extends for the first time *Kirkham's* "fact-lose" requirement, which it engrafted on *clause one*, to *clause two* which requires "an act performed in the United States," App. 71a, in conflict with all other circuits. Just as *Kirkam's* test was unnecessary to decide that *clause one* case, *supra* note 2, there is no rationale or logic for creating a new test for the lower courts to apply to *clause two*, rather than the clear text and established jurisprudence governing a single "act" in the forum.

Clause Three. The D.C. Circuit's *per se* rule that a contract *ex ante* specify a place of payment in the United States is in conflict with the Second, Fifth and Sixth Circuits, as Judge Pillard pointed out:

> Following *Weltover*, our sister circuits have rejected the restrictive contention that a contract must explicitly specify the United States as a place of performance for its breach to cause a direct effect. *See DRFP L.L.C. v. Republica Bolivariana de Venez.*, 622 F.3d 513, 517 (6th Cir. 2010) ("We do not read *Weltover* as creating an additional requirement that the United States be specifically mentioned…."); *Hanil Bank v. PT. Bank Negara Indon. (Persero)*, 148 F.3d 127, 133 (2d Cir. 1998) ("… *Weltover* does not insist the 'place of performance' be in the United States… for a financial transaction to cause a direct effect…."); *see also Callejo v. Bancomer, S.A.*, 764

> F.2d 1101, 1110-12 (5th Cir. 1985) (finding a direct effect in…claim for payment on Mexican Certificates of Deposit despite an express clause specifying payment in Mexico…). [App. 38a-39a]

The Sixth Circuit in *DRFP* recognized that, as here, "the parties implicitly agreed to leave it to the bearer to demand payment of the notes anywhere, including, perforce…the bearer's place of business." 622 F.3d at 517 (citing Second Circuit's "similar conclusion" in *Hanil Bank*, 148 F.3d at 132); *see also Rote v. Zel Custom Mfg., LLC,* 2015 U.S. Dist. LEXIS 16700, *24 (S.D. Ohio Feb. 11, 2015) ("Demonstrating that the foreign state has an obligation running to the United States is simply one way to satisfy the direct effect requirement.").

The Fifth Circuit consistently has rejected the majority's holding, both pre-*Weltover* in *Calejo*, cited in *Nelson*, 507 U.S. at 357-58 and later in *Voest-Alpine Trading USA Corp. v. Bank of China,* 142 F.3d 887, 897 n.15 (5th Cir. 1998), which explained:

> *…Callejo* did not turn on whether the place of payment was in the United States…[and] refused to attach any significance…to where the certificate of deposits were payable as a…legal matter. *See id.* at 1112 ("we do not perceive any material difference whether the legal place of payment was Mexico or the United States"). The third clause…was designed to avoid the…problems such questions created: "Arcane doctrines regarding the place of payment are largely irrelevant.… 'Congress did not intend to incorporate…every ancient sophistry concerning 'where' an act or

> omission occurs….' *Id.* (quoting *Texas Trading*). Instead of focusing on where payment occurred… the court turned its analysis to the effects of the defendant's activity and whether those effects were felt in the United States.

Id. at 895 (citations omitted); *see id.* at 897 (Reavley, J., concurring) ("*Callejo* plainly said that 'the question whether there was a direct effect in the United States can be resolved without reference to the place of payment.'").[3]

In sum, the D.C. Circuit's decision creates standards for the exercise of jurisdiction in conflict with the standards applied in other circuits. Claims over which jurisdiction is found in other circuits cannot proceed in the D.C. Circuit, assigned special venue to decide cases against foreign sovereigns like Kenya. 28 U.S.C. § 1391(f)(4). If this decision stands, no claim can be adjudicated in the Circuit under *clause*

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[3] This conflict is part of a conflict over the "legally significant act" test of the D.C. and Second Circuits, *Guirlando v. T.C. Ziraat Bankasi A.S.*, 602 F.3d 69, 75-79 (2d Cir. 2010) (citing conflicts and "confusion"); *Zedan*, 849 F.2d at 1514, rejected by the Fifth, Sixth and Tenth Circuits as foreclosed by *Weltover*. *See Voest-Alpine,* 142 F.3d at 894; *Keller v. Central Bank of Nig.,* 277 F.3d 811, 818 (6th Cir. 2002); *Orient Mineral*, 506 F.3d at 998. *Voest-Alpine,* noting that requiring a place of performance or "legally significant act" in the United States "merges the third clause into the second clause," 142 F.3d at 895, an interpretation that "leaves [*clause three*] with no perceivable purpose, as plaintiffs would always opt" for "the 'lesser included' second clause. We are confident Congress did not intend such a meaningless construction of the commercial activity exception…." *Id.* Despite this prediction and the availability of *clause one* as well as *two*, jurisdiction invariably continues to be analyzed under the "lesser" third clause.

one unless the commercial activity "establishes a fact without which the plaintiff will lose," or under *clause two* unless the same "fact-lose" test is met, or under *clause three* unless, as noted in dissent, a "particularly restrictive form of the overruled 'foreseeability' condition" is shown. The D.C. Circuit stands alone in imposing these standards, and this Court should grant certiorari to resolve the conflicts.

II. THE DECISION BELOW, IMPOSING RESTRICTIONS NOT EXPRESSED IN THE ACT, CONFLICTS WITH DECISIONS OF THIS COURT

Clause One. This Court's decisions consistently reject statutorily unexpressed, mechanical tests for determining personal jurisdiction, whether over domestic, foreign or foreign state defendants. *See Weltover*, 504 U.S. at 617-18 (rejecting "suggestion that § 1605(a)(2) contains any unexpressed requirement"); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 478 (1985) (rejecting "mechanical tests").

1. The D.C. Circuit's holding that *Kirkham's* "fact-lose" test must be applied as a substitute for "substantial contact" in *clause one*, App. 16a, a mechanical requirement not expressed in the statute, is in conflict with *Weltover* and *Burger King*.

2. That holding, applying *Kirkham's* extrapolation of *Nelson's* "elements" test, conflicts with *Nelson* itself. Not reaching "substantial contact," *Nelson* rested its elements test for determining sovereign acts on four cases, 507 U.S at 356-57, three of which did not apply that test in deciding jurisdictional

nexus: *Texas Trading*, 647 F.2d at 311 n.30, 312-13; *Callejo*, 764 F.2d at 1110 n.8; and *Millen Indus., Inc. v. Coord. Council for N. Am. Affairs*, 855 F.2d 879, 886 (D.C. Cir. 1988). *Kirkham's* confusion can be traced to the fourth, *Santos v. Compagnie Nationale Air France*, 934 F.2d 890 (7th Cir.1991). Misreading *Santos*, *Kirkham* misread *Nelson*.[4] *Nelson* explained its test was to isolate sovereign "elements" in determining whether suit is based on "activities sovereign in character," stating: We do not mean to suggest…every element of a claim be commercial, and we do not address the case where a claim consists of both commercial and sovereign elements." 507 U.S. at 358 n.4.

Kirkham, relying on *Nelson* for a jurisdictional analysis this Court never made, did not mention or apply the "substantial contact" standard, in conflict with *Nelson*' concurring and dissenting opinions which did. None applied an "elements" much less a "fact-lose" test to decide "substantial contact." *See* 507 U.S. at 370 (White, J., concurring); at 372 (Kennedy, J., dissenting); at 377 n.2 (Stevens, J.,

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[4] *Santos*, having no need to decide if activity was sovereign, misread *Callejo* which did. *Callejo* treated that inquiry—"perhaps the most important…in an FSIA suit," *Texas Trading*, 647 F.2d at 308—with care, otherwise it would "read the exception out of the law." 764 F.2d at 1109. *Callejo*, applying an elements test for sovereign acts (at 1109, cited in *Nelson*), then under the heading "*B. Jurisdictional Nexus,*" focused on "what activities in the United States would be sufficient to satisfy the first clause…." *Id.* at 1110 n.8. *Santos*, misreading *Callejo*, misapplied its elements test to nexus. 877 F.2d at 893. *Kirkham*, also having no need to decide sovereign acts, misstated that *Santos*' extension of *Callejo's* elements test to nexus was "*cited with approval in Nelson*." 429 F.3d at 293. *Nelson* never considered the issue.

dissenting). The panel (App. 15a) misread Justice White's concurrence, which applied neither test, but whether "employment practices" and "disciplinary procedures" had a "connection to this country." 507 U.S. at 370. Misreading *Nelson*, the D.C. Circuit failed to observe Justice Stevens' caution: "These two conditions should be separately analyzed because they serve two different purposes. The former excludes commercial activity from the scope of the foreign sovereign's immunity from suit; the second identifies the contacts with the United States that support the assertion of jurisdiction over the defendant." 507 U.S. at 377 (Stevens, J., dissenting).

Other circuits recognize that commercial activity is the jurisdictional element, not the elements of claims. The Fourth Circuit in *Globe Nuclear*, applying the starting point of *Weltover* and *Nelson* to determine the *nature* of the activity, held "courts must isolate the specific conduct that underlies the suit, rather than" a broad program that "would almost inevitably be characterized as sovereign," reversing the "capacious view" below. 376 F.3d at 286-91 (internal quotation marks omitted). Finding commercial activity, the Fourth Circuit then held that from "these ties, it is clear that [defendant's] conduct has 'substantial contact' with the United States," not applying an "elements" analysis to jurisdiction. *Id.* at 291-92.[5] As the Sixth Circuit earlier recognized: "The 'commercial activity' is the jurisdictional element, just as the presence of the

[5] *Globe Nuclear,* applying "substantial contact," held that two contacts besides residence "fit[] comfortably under this definition," 376 F.3d at 291-92, just like *McGee*, 355 U.S. at 223, neither analyzed as "elements" of a claim.

defendant in the forum state is the jurisdictional element…. In personal jurisdiction cases, we do not require the plaintiff to prove the elements of the cause of action stated in order to sustain jurisdiction." *Gould, Inc. v. Mitsui Mining & Smelting Co.*, 947 F.2d 218, 221 (6th Cir. 1991). *See also Universal Trading*, 727 F.3d at 25-26 (First Circuit); *Haven*, 215 F.3d at 736 (Seventh Circuit).

3. The term "based upon," as *clause one's* two-step construction makes clear, does not support the application of *Nelson's* elements test to jurisdiction. As recognized in *Texas Trading,* cited in *Nelson* and *Weltover*, "Congress intended the sovereign immunity and subject matter jurisdiction decisions to remain slightly distinct, and it drafted the Act accordingly." 647 F.2d at 307.

Paraphrasing *clause one* and *Nelson*, the court below reasoned: "under clause one, the plaintiff's claim must be 'based upon some commercial activity by' the foreign state 'that had substantial contact with the United States." App. 13a (internal quotation marks omitted). *Clause one*, however, requires that the action be "based upon a commercial activity carried on in the United States by the foreign state," 28 U.S.C. § 1605(a)(2)(cl.1), the operative phrase of which, as defined, "means commercial activity carried on by such state ***and*** having ***substantial contact*** with the United States." 28 U.S.C. § 1603(e) (emphasis added). The court in *Kirkham* did not address the statute's definition, and in this case construed neither "substantial contact" nor the conjunction "and." "Every word must have its due force, and appropriate meaning…." *Wright v. United*

States, 302 U.S. 583, 588 (1938). Given its ordinary reading, *clause one* confers jurisdiction when the action is "based upon commercial activity," the first condition addressed by *Nelson's* elements test, "and having substantial contact with the United States," the second condition *Nelson* did not reach but its concurrence and dissents did.

Further, the term "based upon," when used for deciding jurisdiction, is given its settled meaning. *Weltover*, 504 U.S. at 613; *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981). The term, as the Court's precedents demonstrate, does not turn on "elements" much less a "fact-lose" extrapolation. In *McGee*, the Court upheld jurisdiction where suit was "based on a contract which had substantial connection" with the forum, 355 U.S. at 223 ("[t]he contract was delivered in California, premiums were mailed from there, and the insured was a resident"). In *Walden v. Fiore*, the Court reaffirmed that for "'*minimum contacts'*…to create specific jurisdiction…suit-related conduct must create a *substantial connection* with the forum," that is, "jurisdiction must be *based on*…conduct by the defendant that creates the necessary contacts with the forum." 134 S. Ct. 1115, 1121-23 (2014) (emphasis added).

The D.C. Circuit otherwise recognizes for jurisdictional purposes that *Burger King* "rejected 'mechanical tests,'" and requires a "'highly realistic" approach in determining "*minimum contacts*…that create a *'substantial connection'* with the forum...." *Thompson Hine, LLP v. Taieb*, 734 F.3d 1187, 1190 (D.C. Cir. 2013) (citations omitted, emphasis added). It also recognizes *McGee's* "*based on…substantial*

connection" language in determining jurisdiction. *Id.* at 1193 (emphasis added). "Based on" cannot mean one thing under *Taieb* and another under *Kirkham*, both opinions by the same judge.[6]

If the courts are to effect a portentous change in "based upon" analysis for jurisdictional purposes, in rejection of six decades of the Court's precedents applying it, that change should come from this Court. Any conflict on the meaning of "based upon" between *Nelson* and *McGee's* progeny likewise should be resolved by this Court.

Clause Two. The D.C. Circuit's holding that *Kirkham's* "fact-lose" test must also be applied as a substitute for "act" in *clause two*, App. 16a, a mechanical restriction not expressed in that statute, conflicts with *Weltover*, *Burger King*, and this Court's other jurisprudence governing a single "act" in the forum. Such a test, arbitrarily extended to *clause two*, conflicts with *Verlinden* which recognized the "'importance of developing a uniform body of law.'" 461 U.S. at 489 (quoting H.R. Rep. at 32).

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[6] Nor can it mean one thing for jurisdiction and another for venue, which "requires the court to determine the locus of any substantial part of the events or omissions on which the claim is based." 17 Moore's Federal Practice, § 110.04[1], at 110-42 (3d ed. 2009) (citing, *e.g., Setco Enters. Corp. v. Robbins,* 19 F.3d 1278, 1281 (8th Cir. 1994) ("we ask whether the district… had a substantial connection to the claim")). To find a "substantial" connection "in contract cases, courts must consider not only the place of performance but all relevant events such as…where the alleged harm occurred...." *Id.* at 110-43.

The D.C. Circuit, in extending this restriction to *clause two*, paraphrased the House Report that the clause is "'limited to those' acts 'which in and of themselves are sufficient to form the basis of a cause of action," App. 17a, but the Report refers in full to "acts (*or omissions*)." H.R. Rep. at 19 (emphasis added). Dropping the reference to "omissions," contrary to the Report and common usage, *see Texas Trading*, 647 F.2d at 311 n.30, the court did not consider Odhiambo allegations concerning Kenya's omissions to pay, App. 148a-52a (or its interim payments and misrepresentation alleged in the proposed SAC) in the United States.

What happened to Odhiambo is analogous to the *clause two* example given in the House Report: the "wrongful discharge in the United States of an employee of the foreign state…employed in connection with a commercial activity carried on in some third country…." H.R. Rep. at 19. When he left Kenya in 2006, Kenya assured he would be paid his reward after its revenue authorities completed investigation and recovery efforts, which then took years. His rights were breached while he was in the United States in connection with the commercial activity in Kenya, no different than had he been employed in Kenya and wrongfully discharged here.[7]

Clause Three. The majority, declining jurisdiction the dissent "readily" found conferred, did so by creating a prohibited classification, an unexpressed

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[7] Such acts "might also be considered to be a 'commercial activity carried on in the United States,' as broadly defined in section 1603(e)," H.R. Rep. at 19, the "substantial contact" standard for *clause one*.

restriction and a *per se* rule, abandoning a "realistic" appraisal of jurisdictional contacts, in square conflict with *Verlinden*, *Weltover*, and *Burger King*.

1. In conflict with *Verlinden*, the majority creates for the first time a proscribed class of "contract victim[s]" who "move to the United States." App. 19a. At the outset it stated the following rationale for its U.S.-place-of-performance rule: "Construing clause three to permit suits in th[e]…category" where a "plaintiff's move to this country" results in a "different…place of performance," would "create an incentive for every breach of contract victim in the world to move to the United States" and turn the courts into "'small international courts of claims,'" App. 19a, citing *Verlinden*, 461 U.S. at 490. *Verlinden* rejected categorical rules in recognizing FSIA jurisdiction in suits between aliens, explaining: "Congress protected against this danger *not by restricting the potential class of plaintiffs,* but rather by…requiring some form of substantial contact with the United States." *Id.* (emphasis added).

2. In conflict with *Weltover,* the majority engrafted for the first time a requirement that all contracts contain a U.S. place-of-performance term, nowhere expressed in *clause three*. Worse, as Judge Pillard objected, it engrafted the very "requirement of 'foreseeability' that *Weltover* rejected," which "cannot have binding effect." App. 33a. "Indeed, to require ex ante contractual designation of the United States as the place of performance imposes a particularly restrictive form of the overruled 'foreseeability' condition, demanding not only an objectively 'foreseeable' effect, as this court's

overruled precedent had, but a contract term memorializing that the parties actually contemplated an effect in the United States." App. 38a.

3. In conflict with *Burger King,* the majority announces a mechanical rule, limited to place of performance. *Burger King* holds: "The Court long ago rejected the notion that personal jurisdiction might turn on 'mechanical' tests, or on 'conceptualistic… theories of the place of contracting or of performance[.]'" 471 U.S. at 478. "Instead, we have emphasized the need for a 'highly realistic' approach that recognizes," *inter alia*, "actual course of dealing," which "must be evaluated." *Id.* at 479.

4. Creating proscribed classifications and rules, the majority misread *Weltover*, which held "an effect is direct if it follows as an immediate consequence of the defendant's…activity." 504 U.S. at 618 (internal quotation marks omitted). *Weltover* instructed that the effect is not required to be foreseeable or substantial, only nontrivial. *Id.* Not requiring a place of performance in the United States, *Weltover* had "little difficulty" finding it sufficient, *id.,* and "makes clear" it is "not necessary." App. 41a.

Nor did *Weltover,* citing *Texas Trading*, disagree with its analysis: "the relevant inquiry under the direct effect clause when plaintiff is a corporation is whether the corporation has suffered a 'direct' financial loss." 647 F.2d at 312. In *Weltover*, the parties were all foreign, had no U.S. presence, and "no other connections" than the election by foreign holders of Argentina's bonds for payment through a New York bank. Odhiambo had a six-year presence

and course of dealing with Kenya in the United States, and inevitably felt the effects of its breach and a financial loss here. That satisfies *clause three*, as held by the dissent, App. 45a, and recognized by the First and Fifth Circuits,[8] as well as the D.C. Circuit itself in *Cruise Connections Chtr. Mgmt. 1, LP v. Attorney Gen'l of Canada,* 600 F.3d 661, 665 (D.C. Cir. 2010) ("direct loss of millions" is sufficient effect in the United States, distinguishing *Zedan*).

3. Judge Pillard also noted: "As the FSIA cases consistently demonstrate, there is no single factual *sine qua non* of a…direct effect," App. 36a. The dissent addressed what the majority disdained—the "'highly realistic'" approach required by *Burger King* that examines all relevant facts, including course of dealing. "Under the holistic analysis the precedents require, the direct-effects test is readily met here, as it was in *Weltover*, *Cruise Connections,* and *De Csepel [v. Republic of Hung.,* 714 F.3d 591 (D.C. Cir. 2013)]." App. 45a. Taking the "facts that Odhiambo alleges, and the reasonable inferences drawn in his favor," "Kenyan government officials actively assisted in resettling" him in the United States, and "Odhiambo necessarily experiences here the direct effect of Kenya's continued failure to pay." App. 30a. "Under these circumstances, Odhiambo's presence in

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[8] *See Universal Trading*, 727 F.3d at 26-27 ("'significant financial harm when…defendants refused to remit the commission due'" is "sufficient" effect); *UNC Lear Servs., Inc. v. Kingdom of Saudi Arabia*, 581 F.3d 210, 218 (5th Cir. 2009); *Voest-Alpine*, 142 F.3d at 897 ("financial loss incurred in the United States… constitutes a direct effect"); *id.* at 897 (Reavley, J., concurring) ("Since the Callejos were located in the United States, the effects of…breach were inevitably felt by those there.'").

the United States and the financial loss he suffers here are a direct effect of [its] actions…." App. 45a.

The dissent stressed a salient point: where a state "causes a plaintiff to leave its country and helps direct him to the United States, as is alleged here, the FSIA should not bar suit…." App. 33a. Hardly needing a "refugee exception" as the majority supposed, App. 27a, the dissent showed that the result would be no different where the state "hires an American employee or firm abroad without specifying place of performance, and, once the work is complete, reneges on payment and deports the employee to the United States," App. 33a, in effect applying the wrongful discharge illustration for *clause two* in the House Report, *supra.*

As recognized by the dissent, Kenya caused and then directed Odhiambo's transfer to the United States. Entry "into the [forum]—through an agent, goods, mail, or some other means—is certainly a relevant contact," *Walden*, 134 S. Ct. at 1122, including when defendant "sent anything or anyone." *Id.* at 1124. Kenya, after breaching the confidentiality term of its contract, "sent" Odhiambo, with its attendant obligation to report recoveries and pay rewards, to the United States. As in *Callejo*, Kenya then "engaged in a regular course of business conduct with [him] over a several-year period," 764 F.2d at 1112. The remaining breach occurred here, after Kenya completed its investigations and recoveries, App. 150a ¶¶41-42, and "reneged on millions it owes," causing financial loss here. App. 35a; *see supra* note 8 (citing cases).

III. THE CONFLICTS AND DECADES OF UNCERTAINTY OVER JURISDICTION PRESENT RECURRING QUESTIONS OF NATIONAL IMPORTANCE

Without knowing the meaning of a jurisdictional statute, it is unclear how the courts, having an "unflagging obligation…to exercise the jurisdiction given them," *Colorado River Water Conserv. Dist. v. United States*, 424 U.S. 800, 817 (1976), can determine whether they are exercising the jurisdiction given. With "no option to throw up our hands," *Nelson*, 507 U.S. at 359, presumably the obligation includes, in applying a rule, the necessity to interpret it. *Marbury v. Madison*, 5 U.S. 137, 177 (1803). Long thwarting these mandates, or unable to meet them without this Court's guidance, the courts have defeated the intent of Congress.

1. Four decades after enactment the D.C. Circuit and other circuits still uphold dismissals and reverse findings of jurisdiction without deciding what *clause one* means, or necessarily *clauses two* and *three.* For example, the D.C. Circuit in *Maritime*, not deciding "substantial contact," overturned a district court's finding that Guinea's contract meetings in the United States and other contacts were "more than sufficient" to satisfy *clause one*, 505 F. Supp. 141, 143 (D.D.C. 1981), holding jurisdiction lacking to confirm a $25 million arbitral award. Similarly, the Second Circuit in *Kensington*, not addressing "substantial contact," reversed a finding that *clause one* was satisfied by the sale of millions of oil barrels to U.S. purchasers and million-dollar payments through a New York bank. 505 F.3d at 154.

Today, the D.C. Circuit, not deciding jurisdiction given, adheres to guidance cited by Kenya and the District Court in this case, that the FSIA generally is "not a particularly generous" basis for jurisdiction over a foreign state. App. 90a (citing *Peterson v. Royal Kingdom of Saudi Arabia*, 416 F.3d 83, 86 (D.C. Cir. 2005)). That is true only because the D.C. Circuit and others, misapprehending the statute, have restricted jurisdiction, not immunity.

2. A statutory term for determining jurisdiction is "not mere whimsy," *Ins. Corp. of Ireland, Ltd. v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 712 n.3 (1982) (Powell, J., concurring), and is not a "riddle." *NML Capital*, 134 S. Ct. at 2258. "To understand the effect of the Act, one must know something about the regime it replaced." *Id.* at 2255. From at least 1952 when the State Department adopted the modern rule of restrictive immunity, through 1976 when the FSIA codified that rule, foreign states were subject to suit like any party in interstate or foreign commerce. "Before the FSIA, plaintiffs enjoyed a broad right to bring suits against foreign states, subject only to State Department intervention," *Texas Trading*, 647 F.2d at 312-13, and Congress "certainly did not intend significantly to constrict jurisdiction; it intended to regularize it." *Id.* at 313.

The meaning of a statutory term is that "attached …at the time the statute was enacted." *Weltover*, 504 U.S. at 613; *NLRB*, 453 U.S. at 329 ("Where Congress uses terms that have accumulated settled meaning…a court must infer, unless the statute otherwise dictates, that Congress means to incorpor-

ate the established meaning…."). Two decades before the FSIA, this Court established "substantial connection" as the constitutional minimum, which Congress invoked as "substantial contact." A simple comparison makes the point:

Jurisdiction over out-of-state defendants exists when
"the suit was based on a contract
which had substantial connection with that State."

McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957)

Jurisdiction over a foreign state exists when
"the action is based upon a commercial activity"
"having a substantial contact with the [U.S.]."

28 U.S.C. §§ 1603(e), 1605(a)(2)(cl.1) (1976)

While *International Shoe* required "certain minimum contacts" such that "suit does not offend 'traditional notions of fair play and substantial justice,'" 326 U.S. 310, 316 (1945), *McGee* defined those contacts, holding it "sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State." 355 U.S. at 223. *Hanson v. Denckla* reaffirmed *McGee*, using "substantial connection" and "contact" interchangeably. 357 U.S. 235, 252-53 (1958). That standard still governs interstate and foreign commerce over domestic and foreign defendants, even those half-owned by foreign states. *See* 28 U.S.C. § 1603(b)(2); *Burger King*, 471 U.S. at 475, 477, 479; *Asahi Metal Indus. Co., Ltd. v. Super. Ct.*, 480 U.S. 102, 109, 112 (1987) ("'substantial connection,' …necessary for…minimum contacts"); *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2788 (2011)

(affirming *Asahi*); *Walden*, 134 S. Ct. at 1121-23 (applying "substantial connection" and "contacts").

The structure of the Act further demonstrates what Congress provided. Congress placed *clause one* and its "substantial contact" standard with single "act" and "direct effect" clauses, both manifestly minimum contacts provisions, a structure showing minimum contacts were codified in *clause one* as well. *Holloway v. United States*, 526 U.S. 1, 6 (1999) ("'we consider not only the bare meaning' of the critical…phrase 'but also its placement and purpose'"). It removed foreign state defendants from the diversity statute, noting "a similar jurisdictional basis…becomes superfluous." H.R. Rep. at 14. It provided venue under the same "substantial part of the events or omissions" standard used generally. *Compare* 28 U.S.C. § 1391((b)(2) *with* § 1391(f)(1). Providing a presumption of immunity, 28 U.S.C. § 1604, Congress placed the ultimate burden on states to prove it; otherwise they "shall be liable" as a "private individual." 28 U.S.C. § 1606.

Consistent with the text and structure, the legislative history explained that the Act provides federal long-arm jurisdiction to the limits of due process, stating the "requirements of minimum jurisdictional contacts…are embodied in…each of the immunity provisions…, requir[ing] some connection between the lawsuit and the United States." H.R. Rep. at 13 (citing *International Shoe*, pin-citing *McGee*). The House Report further explained that a single act or omission can satisfy *clause one* or *two.* H.R. Rep. at 18-19; *see Burger King*, 471 U.S. at 476 ("So long as it creates a 'substantial connection' with

the forum, even a single act can support jurisdiction," citing *McGee*).

As also explained in hearings on the 1973 bill, cited in *Texas Trading*, 647 F.2d at 309 n.23 (reviewing history), foreign states were to be subject to the same jurisdictional standards as private parties: "In each of these instances, the conduct, transaction, or act of the foreign state must have sufficient connection with the United States…. In this respect, *the jurisdictional standard is the same for the activities of a foreign state as for the activities of a foreign private enterprise*." *Hearings on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary*, 93rd Cong., 1st Sess. 41 (1973) (State Department Section-by-Section Analysis of 1973 bill) (emphasis added).

Early on this Court in *Verlinden*, reviewing the text and history, explained: "As the language of the statute reveals, Congress…enact[ed] substantive provisions requiring some form of substantial contact with the United States." 461 U.S. at 490. The courts, mystified for decades over the meaning of "substantial contact," overlooked that Congress "lifted" that term and the language of *clause one* almost verbatim from *McGee*. Its settled meaning, long hiding in plain sight, is minimum contacts.

3. The costs of leaving unexamined *Maritime*, *Shapiro* and their progeny, including this case, are staggering. Months after the D.C. Circuit in *Gilson* said it "ought to be difficult to invoke immunity," 682 F.2d at 1028, *Maritime*, not deciding "substantial contact," created a placeholder making it less so.

Similarly, though the Second Circuit in *Weltover, Inc. v. Republic of Argentina* reiterated, "[w]e have cautioned…courts must be concerned with Congress' goal of opening the courthouse doors 'to those aggrieved by the commercial acts of a foreign sovereign,'" 941 F.2d 145, 151 (2d Cir. 1991) (citing *Texas Trading*), *aff'd sub nom.*, 504 U.S. 607, *Shapiro* that same year created a "tighter nexus" placeholder, ironically closing its courts to citizens harmed in the global economy by foreign states.

Courts accustomed to applying minimum contacts to domestic and foreign defendants engaged in interstate and foreign commerce—including entities half-owned by foreign states, 28 U.S.C. § 1603(b)(2)—have assumed, for decades, the term "substantial contact" used by Congress was a new standard, peculiar to a small subset of foreign state defendants and their majority-owned enterprises, without ever deciding what it meant, not recognizing, as could be expected, it codified that jurisprudence.[9]

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[9] In effect, the courts have been keeping two sets of jurisdictional books, not recognizing they share established standards. One set, governed by this Court's minimum contacts jurisprudence, requires that suit be based on a "substantial connection" with the forum for "transacting business," single "act" and "effects" jurisdiction. The second, governed by the FSIA, requires that suit be based on commercial activity having a "substantial contact," single "act" or "direct effect" in the forum. A third set for venue, sharing standards for general and FSIA cases alike, requires venue based on a "substantial part of the events or omissions" in the judicial district. 28 U.S.C. § 1391(b)(2), (f)(1); *see* note 6 *supra*.

As a result, the primary prong, providing transacting business (*clause one*) jurisdiction, is seldom applied; single act (*clause two*) jurisdiction, which overlaps *clause one*, is rarely invoked;[10] and effects (*clause three*) jurisdiction, ordinarily a residual basis, has become the default into which most cases are shoehorned. This outcome, the reverse of how long-arm jurisdiction is applied by the courts, is contrary to the language, purpose, structure, and history of the Act, turning it on its head.

Nothing in the FSIA permits this parallel universe, or skewed application. The confusion and recurrent error in constricting and sidelining *clauses one* and *two* needlessly defeats uniformity, the statutory long-arm framework, and the *ratio legis* of the Act to provide court access.

This case presents an opportunity finally to cut "the FSIA's Gordian knot, and to vindicate the Congressional purposes behind the Act." *Texas Trading,* 647 F.2d at 307. The Court should grant review to abate the bedlam over the long-arm statute that Congress enacted, and establish clear standards that will guide the courts.

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[10] *See, e.g., BP Chemicals*, 285 F.3d at 686-87 (citing *Maritime* as reason for "reluctan[ce]" to apply *clause one*); *Santos*, 934 F.2d at 892 ("Cases applying the second clause are rare to the point of vanishing.").

CONCLUSION

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

Respectfully submitted,

Robert W. Ludwig
Counsel of Record
LUDWIG & ROBINSON, PLLC
1717 Pennsylvania Ave., N.W.
Ste. 650
Washington, D.C. 20006
(202) 289-1800
rludwig@ludwigrobinson.com

KIRUI & PRIETO
1600 Wilson Blvd.
Ste. 205
Arlington, VA 22202

Counsel for Petitioner