No. 14-1206

In the Supreme Court of the United States

PETER GEORGE ODHIAMBO, PETITIONER

v.

REPUBLIC OF KENYA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1330, 1602 *et seq.*, provides that foreign states are generally immune from suit in U.S. courts, subject to limited statutory exceptions. The commercial-activity exception gives U.S. courts jurisdiction in a case "in which the action is based [1] upon 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." 28 U.S.C. 1605(a)(2). The questions presented are:

1. Whether the court of appeals correctly held that an action claiming that the Republic of Kenya breached a contract by failing to pay a reward to a Kenyan whistleblower and failing to keep his identity confidential in Kenya is not "based upon a commercial activity carried on in the United States" by Kenya within the meaning of clause one or "based upon * * * an act performed in the United States" within the meaning of clause two.

2. Whether the court of appeals correctly held that the alleged breach of contract did not "cause[] a direct effect in the United States" within the meaning of clause three despite the fact that the whistleblower resettled in the United States as an asylee and continued to demand payment after his resettlement.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. The Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1330, 1602 *et seq.*, establishes "a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities." *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 488 (1983). The FSIA provides that a foreign state is "immune from the jurisdiction of the courts of the United States" unless the suit falls with-

in one of the statute's exceptions to immunity. 28 U.S.C. 1604; see 28 U.S.C. 1603.

The commercial-activity exception provides that "[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States" in certain circumstances involving such activity. 28 U.S.C. 1605(a). The exception, which has three clauses, applies in a case "in which the action is based [1] upon 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." 28 U.S.C. 1605(a)(2). The FSIA defines "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." 28 U.S.C. 1603(e); see 28 U.S.C. 1603(d) (defining "commercial activity").

2. a. In 2012, petitioner Peter Odhiambo, a former resident of Kenya, filed a breach-of-contract suit in the District Court for the District of Columbia against Kenya and several Kenyan agencies and officials. Pet. App. 49a, 81a. His first amended complaint includes the following allegations.

Petitioner began working as an auditor for Charterhouse Bank in Kenya in 2003. Pet. App. 139a. In 2004, he provided information to the Kenyan government about possible tax evasion by hundreds of accountholders at the bank. *Id.* at 140a-141a. He did so in response to a program under which the Kenyan

government offered a reward to individuals who provided "[i]nformation leading to the identification" or "recovery" of "hitherto undisclosed taxes." *Id.* at 140a. Program materials set limits on the reward (listing one limit as an amount in Kenyan shillings) and assured whistleblowers "of strict confidentiality to safeguard identities." *Ibid.*; see *id.* at 164a.

In 2004 and 2005, the Kenyan government paid petitioner a total of 450,279 Kenyan shillings (equivalent to approximately $5900) in Kenya under the reward program. Pet. App. 141a, 143a; see *id.* at 9a. In 2006, the Central Bank of Kenya reported that it had uncovered "significant tax evasion" at Charterhouse Bank, and the Kenyan government placed the bank under statutory management. *Id.* at 143a (citation omitted); see *id.* at 144a.

A few months after petitioner disclosed information to the government, he "began receiving disquieting calls." Pet. App. 142a. When the Central Bank of Kenya hired petitioner as an advisor, the calls stopped. *Ibid.* But in July 2006, police officers confronted petitioner with a "bogus warrant." *Id.* at 145a. Fearing additional police action, petitioner contacted a major Kenyan newspaper and various government authorities. *Ibid.* Shortly thereafter, the newspaper published an article telling petitioner's story, and he subsequently received threatening phone calls and saw "suspicious people" near his house. *Id.* at 145a-146a.

The Kenya National Commission on Human Rights then helped petitioner apply for asylum in the United States. Pet. App. 146a-147a. The United States granted his application, and he moved to this country in September 2006. *Id.* at 148a. While living in the

United States, he sought additional reward payments from the Kenyan government. In 2008 and 2009, he had meetings in the United States with Kenyan officials regarding allegedly outstanding payments, but those payments were not forthcoming. *Id.* at 149a.

Based on those allegations, petitioner claimed that Kenya and various of its agencies and officials breached a contract—both by failing to pay amounts allegedly due to him under the reward program and by disclosing his role as a whistleblower. Pet. App. 151a-152a. He sought $30 million in compensatory damages. *Id.* at 153a.

b. On March 13, 2013, the district court granted respondents' motion to dismiss for lack of subject matter jurisdiction based on sovereign immunity. Pet. App. 117a-119a.

The district court ruled that—even assuming that Kenya's actions constituted "commercial activity," see Pet. App. 97a—petitioner's suit did not fall within the scope of the commercial-activity exception because the acts on which the breach-of-contract claims were based lacked a sufficient nexus to the United States. *Id.* at 94a-116a. The court explained that "the reward scheme was advertised in 'Kenya's print and online newspapers'; the reward was to be paid in Kenyan Shillings; [petitioner] 'accepted' the offer by providing information in Kenya; [respondents] allegedly disclosed [his] identity as a whistleblower in Kenya; and [respondents] allegedly paid [him] less than he was owed while he was in Kenya." *Id.* at 100a-101a (citations omitted). The court rejected petitioner's argument that "U.S.-based acts" he identified—primarily consisting of his meetings with Kenyan officials in the United States—were sufficient to establish that his

suit was "based upon" commercial activity or acts in this country. *Id.* at 106a; see *id.* at 100a-107a. The court also rejected petitioner's argument that "the contractual breach caused a 'direct effect' in the United States," explaining that the United States was not a "'place of performance' where the reward payment was 'supposed' to be made," and that petitioner's relocation was not "an 'immediate consequence'" of the alleged breach "with 'no intervening element.'" *Id.* at 108a-110a, 113a (citing *Republic of Arg.* v. *Weltover*, 504 U.S. 607 (1992)); see *id.* at 11a.

c. In April 2013, petitioner filed a Rule 59(e) motion to alter or amend the judgment. Pet. App. 50a. Before the district court acted on that request, petitioner filed a separate motion seeking leave to file a second amended complaint. *Ibid.*

In support of his Rule 59(e) motion, petitioner submitted an affidavit indicating that "although the [Kenyan] officials knew that [petitioner] was no longer in Kenya," they made several reward-program payments to him after September 2006 by writing "checks * * * out to [petitioner] in Kenyan Shillings in Kenya" and allowing an intermediary to "pick up the checks in Kenya and forward him the money." Pet. App. 55a. Petitioner's proposed amended complaint included similar allegations. *Id.* at 67a-68a; see *id.* at 157a-159a.

The district court denied both motions. It determined that the evidence petitioner proffered in support of his Rule 59(e) motion was not "new" and did not undermine the judgment. Pet. App. 52a-57a. In particular, the court rejected petitioner's argument that the intermediary could be characterized as an agent of the Kenyan government. *Id.* at 55a-56a.

3. a. The court of appeals affirmed, ruling that none of the three clauses of the commercial-activity exception is applicable in this case. Pet. App. 5a-28a; see *id.* at 28a n.3 (affirming denial of post-judgment motions).

First, with respect to clause one, the court of appeals concluded that the meetings between petitioner and Kenyan officials in the United States did not form the basis of petitioner's suit because they were "not necessary to make out any element of" petitioner's breach-of-contract claims. Pet. App. 15a; see *id.* at 13a-16a. The court also rejected petitioner's argument that the commercial activity upon which his suit was based was Kenya's whole reward program, which in turn had substantial contact with the United States as a result of the meetings. *Id.* at 14a. Because petitioner failed to raise that argument in the district court, the court of appeals ruled, he "forfeited it." *Ibid.* But the court further stated that "mere business meetings in the United States do not suffice to create substantial contact with the United States for these purposes," and that in any event clause one applies only if a claim is "'based upon' the aspect of the foreign state's commercial activity that establishes substantial contact." *Id.* at 14a-15a (emphasis omitted).

Second, the court of appeals ruled that petitioner's "clause two argument falters on the same grounds as his clause one argument: His breach-of-contract claim is not *based upon* any alleged 'act performed in the United States in connection with' Kenya's commercial activity." Pet. App. 16a (quoting 28 U.S.C. 1605(a)(2)). The court explained that petitioner had not cited any act in the United States that established a "fact without which [he] will lose." *Id.* at 17a.

Finally, the court of appeals rejected the argument that "Kenya's alleged breach of the rewards offer caused a 'direct effect in the United States'" within the meaning of clause three. Pet. App. 18a (quoting 28 U.S.C. 1605(a)(2)). The court explained that "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 establishes a different or unspecified place of performance can affect the United States only *indirectly*, as the result of some intervening event such as the plaintiff's move to this country." *Id.* at 19a, 22a-23a. Here, the court concluded, nothing in Kenya's reward program established or contemplated the United States as a place of performance—particularly given that the offer provided for payment in Kenyan shillings. *Id.* at 23a-24a.

The court of appeals rejected petitioner's contention that Kenya modified the place of performance by facilitating his asylum in the United States and making payments that reached him after he moved here. The court noted that the additional payments, first mentioned in the district court in a post-judgment motion, "did not need to [be] consider[ed]." Pet. App. 25a. Moreover, the court of appeals explained, Kenya consistently refused to make payments outside of Kenya, *id.* at 26a-27a, and the direct-effect analysis does not apply differently when a foreign sovereign "played a role in * * * refugees' relocation to the United States," *id.* at 27a-28a.

b. Judge Pillard dissented "to explain why [she] believe[d] that this case should have been allowed to proceed under the third clause." Pet. App. 29a. She rejected the majority's focus on where payments un-

der the reward program were to be made, and found it significant that Kenya helped petitioner obtain asylum in the United States. *Id.* at 31a-33a, 38a-45a. In her view, the alleged breach of contract had a "direct effect" in the United States because petitioner "is in the United States and experiencing the effect of Kenya's nonpayment here as the direct consequence of accepting Kenya's offer * * * and Kenya's failure to fulfill its part of the bargain." *Id.* at 45a.

DISCUSSION

The court of appeals correctly held that none of the three clauses of the FSIA's commercial-activity exception applies in this case, and its decision does not conflict with any decisions of this Court or other courts of appeals. The issue on which petitioner primarily focuses—whether the "substantial contact" language in the definition of "commercial activity carried on in the United States by a foreign state" should be interpreted to have a meaning equivalent to "minimum contacts" in the personal jurisdiction context—is not properly presented for review here, and it is not the subject of disagreement in the lower courts in any event. Moreover, disturbing the decision of the court of appeals could have negative reciprocal consequences for the United States in foreign courts. This Court's review is not warranted.

A. Further Review Of The Court Of Appeals' Rulings On Clause One And Clause Two Of The Commercial-Activity Exception Is Not Warranted

1. The court of appeals correctly decided that neither clause one nor clause two of the FSIA's commercial-activity exception applies in this case.[1]

a. Clause one provides that a foreign state is not immune from jurisdiction 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)—that is, upon "commercial activity carried on by such state and having substantial contact with the United States," 28 U.S.C. 1603(e). In *OBB Personenverkehr AG* v. *Sachs*, 136 S. Ct. 390 (2015), this Court held that "an action is 'based upon' the 'particular conduct' that constitutes the 'gravamen' of the suit." *Id.* at 396 (quoting *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 356-358 (1993)). Determining the "gravamen" requires a court to "zero[] in on the core of the[] suit." *Ibid.*; see *ibid.* (looking to "acts that actually injured" the plaintiff).

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[1] Although the parties did not litigate the question in the court of appeals, see Pet. App. 14a n.1, there is substantial reason to doubt that the Kenyan reward program is properly regarded as "commercial activity" under the FSIA. That program offers monetary rewards as part of a scheme to identify tax evaders and take law-enforcement action, and Kenyan officials have statutory discretion to decline to pay a reward. See D. Ct. Doc. 14-2, Ex. 1 (July 23, 2012). Government efforts to enforce tax laws, and officials' discretionary decisions about treatment of informants, do not appear to be the "*type* of actions by which a private party engages in 'trade and traffic or commerce.'" *Republic of Arg.* v. *Weltover*, 504 U.S. 607, 614 (1992) (citation omitted); but see *Guevara* v. *Republic of Peru*, 468 F.3d 1289, 1298-1305 (11th Cir. 2006).

As the court of appeals ruled, petitioner's suit is not based upon "the meetings that Kenyan officials held with him in the United States to discuss the disputed rewards" (or any other "instances of commercial activity by Kenya" in this country). Pet. App. 13a. The gravamen of petitioner's claims—the particular acts as to which he is aggrieved—are the Kenyan government's alleged failure to pay the promised reward in Kenya and to keep his identity confidential in Kenya, not any meetings that its officials attended later to discuss petitioner's grievances. See *id.* at 13a-14a.

To be sure, the court of appeals applied a more permissive interpretation of "based upon" than *Sachs* later adopted. The court asked only whether the activity "establishe[d] one of the 'elements of [the] claim that, if proven, would entitle a plaintiff to relief.'" Pet. App. 13a (quoting *Nelson*, 507 U.S. at 357). Under *Sachs*, "the mere fact that the [commercial activity] would establish a single element of a claim is insufficient." 136 S. Ct. at 395. Still, having failed to satisfy the lenient understanding of "based upon" applied by the court below, petitioner cannot meet the more demanding standard dictated by *Sachs*.

b. As the court of appeals explained, petitioner's "clause two argument falters on the same grounds as his clause one argument: [h]is breach-of-contract claim[s] [are] not *based upon* any alleged 'act performed in the United States in connection with' Kenya's commercial activity." Pet. App. 16a (quoting 28 U.S.C. 1605(a)(2)). In reaching that conclusion, the court ruled that "the virtually identical statutory text and structure of clauses one and two lead [it] to conclude that 'based upon' means the same thing in both

clauses." *Ibid.* Petitioner does not appear to contest that ruling. Pet. 24-26.

c. Petitioner's arguments that the court of appeals erred lack merit.

i. Petitioner primarily contends (Pet. 12-13, 35) that the D.C. Circuit and other courts of appeals have erred in holding that the "substantial contact" standard for determining whether a foreign state has "carried on" commercial activity in the United States under clause one requires a more extensive connection to this country than the "minimum contacts" standard for personal jurisdiction. But, as to the only relevant activity petitioner identified in the district court, the court of appeals' ruling that clause one is inapplicable to this case has nothing to do with any question of "substantial contact." Pet. App. 13a-16a. No one disputes that the meetings between petitioner and Kenyan officials were held in the United States. The court's ruling turned instead on the determination that those activities were not the foundation of petitioner's breach-of-contract claims within the meaning of the separate "based upon" requirement. *Id.* at 13a-14a. It is irrelevant to that ruling whether "substantial contact" is different from or equivalent to "minimum contacts."

ii. Perhaps petitioner also means to contend (Pet. 23-25) that the court of appeals was wrong to reject his argument that the entire Kenyan reward program "constitutes a commercial activity" that "had substantial contact with the United States because of his meetings with Kenyan officials in the United States." Pet. App. 14a. But the court held that petitioner "failed to raise this argument in the district court and therefore has forfeited it." *Ibid.* The "substantial

contact" issue embedded in that argument is therefore not properly presented in this Court. See *Sachs*, 136 S. Ct. at 397-398.

In any event, as the court of appeals also pointed out (Pet. App. 14a-16a), the argument is wrong. *Sachs* establishes that a suit is "based upon" the "particular conduct" at the "core of the[] suit" that forms the gravamen of a plaintiff's claim. 136 S. Ct. at 396; see *Nelson*, 507 U.S. at 356. The specificity that *Sachs* contemplates makes it inappropriate to treat petitioner's claims as "based upon" Kenya's reward program as a whole.[2] Such an approach would allow courts to conclude that the "based upon" requirement is satisfied whenever a foreign state's commercial activity involves some domestic conduct, even if the "core of the[] suit" consists exclusively of overseas conduct. That would permit plaintiffs to evade the FSIA's restrictions through the sort of "artful pleading" that this Court was careful to guard against in *Sachs*. 136 S. Ct. at 396. And it would be a far more expansive approach than is employed to assess personal jurisdiction, since it would eliminate the requirement that a claim arise out of or relate to contacts with the relevant forum (as is required for specific jurisdiction) or that the defendant have its home base in that forum (as is required for general jurisdiction). See generally *Daimler AG* v. *Bauman*, 134 S. Ct. 746, 754-755, 761 (2014); see also Pet. App. 14a-15a.

Moreover, even if Kenya's entire reward program could be deemed the "commercial activity" on which

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[2] The petitioner in *Sachs* argued that the defendant's "*entire* railway enterprise constitutes the 'commercial activity' that has the requisite 'substantial contact,'" 136 S. Ct. at 397, but this Court deemed that argument forfeited, see *ibid.*

petitioner's claims are based, the isolated meetings in the United States alleged here do not give an activity otherwise conducted overseas the requisite "substantial contact" with this country. See Pet. App. 14a; accord *Terenkian* v. *Republic of Iraq*, 694 F.3d 1122, 1133, 1137 (9th Cir. 2012), cert. denied, 134 S. Ct. 64 (2013); *Gerding* v. *Republic of Fr.*, 943 F.2d 521, 527 (4th Cir. 1991), cert. denied, 507 U.S. 1017 (1993). That conclusion would hold true even if "substantial contact" were interpreted to require nothing more than the sort of "minimum contacts" that suffice for personal jurisdiction purposes. See *Gerding*, 943 F.2d at 527; see also, *e.g.*, *Calphalon Corp.* v. *Rowlette*, 228 F.3d 718, 722-723 (6th Cir. 2000); pp. 14-15, *infra*.

iii. Finally, petitioner argues (*e.g.*, Pet. 26, 30) that Kenya's alleged failure to satisfy its obligations while he was living in the United States is an "act" in the United States upon which his suit is based for purposes of clause two. That argument is incorrect. Kenya maintains that it has no performance obligations in the United States, and it has never made a payment to petitioner that was not issued in Kenya and paid in Kenyan shillings. See Pet. App. 26a-27a. Under those circumstances, the Kenyan government's alleged decision not to perform is an act in Kenya, not an act in the United States. See *Rogers* v. *Petroleo Brasileiro, S.A.*, 673 F.3d 131, 137-138 (2d Cir. 2012).

2. Contrary to petitioner's assertions (Pet. 11-17, 20, 25), the court of appeals' decision that clause one and clause two of the commercial-activity exception are inapplicable to this case does not conflict with any decision of another court of appeals or of this Court.

Petitioner primarily argues that the decision below contributes to a circuit conflict concerning the proper

interpretation of the term "substantial contact" in 28 U.S.C. 1603(e).[3] As explained above, however, that issue is not presented in this case, see pp. 11-12, *supra*; nor has petitioner shown that application of a "minimum contacts" standard would alter the outcome here.

In any event, no such disagreement exists. Every court of appeals that has analyzed the issue has correctly concluded that "substantial contact" requires a more extensive showing than the "minimum contacts" that suffice to establish personal jurisdiction. See *Shapiro* v. *Republic of Bol.*, 930 F.2d 1013, 1019 (2d Cir. 1991); *Gerding*, 943 F.2d at 527; *Sachs* v. *Republic of Austria*, 737 F.3d 584, 598 (9th Cir. 2013) (en banc) ("It is generally agreed that [substantial contact] sets a higher standard for contact than the minimum contacts standard for due process."), rev'd on other grounds *sub nom. Sachs*, *supra*; see also *BP Chems. Ltd.* v. *Jiangsu SOPO Corp.*, 420 F.3d 810, 818 n.6 (8th Cir. 2005) (FSIA requirements "probably exceed the constitutional standard"); *In re Papandreou*, 139 F.3d 247, 253 (D.C. Cir. 1998).

Petitioner's insistence that the issue is the subject of a complex, multi-part division of authority seems to be grounded, at least in part, in a mistaken conflation of the separate "based upon" and "substantial contact" concepts. Thus, petitioner relies (Pet. 13-17) on decisions that use the term "nexus" to refer generally to the requirement under all three clauses that the action be based upon an act or activity with a connection

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[3] To the extent the petition can be read (Pet. 20-23) to claim a conflict on whether the "based upon" requirement is satisfied when the relevant commercial act or activity establishes a single element of a plaintiff's claim, *Sachs*—decided after the petition was filed—resolved that issue. See 136 S. Ct. at 395-396.

to the United States, see *Universal Trading & Inv. Co.* v. *Bureau for Representing Ukrainian Interests in Int'l & Foreign Courts*, 727 F.3d 10, 25-27 (1st Cir. 2013); *Haven* v. *Polska*, 215 F.3d 727, 736 (7th Cir.), cert. denied, 531 U.S. 1014 (2000); *Sugarman* v. *Aeromexico, Inc.*, 626 F.2d 270, 272-273 (3d Cir. 1980), or that describe confusion about the meaning of "based upon" that pre-dates this Court's decisions in *Nelson* and *Sachs*, see *Vencedora Oceanica Navigacion, S.A.* v. *C.N.A.N.*, 730 F.2d 195, 199-202 (5th Cir. 1984) (per curiam).[4] Those decisions do not establish any disagreement between the court below and other courts of appeals. Petitioner also cites (Pet. 20, 25) this Court's decisions in *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480 (1983), *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462 (1985), and *Republic of Argentina* v. *Weltover*, 504 U.S. 607 (1992)—but none of those decisions resolves how the FSIA term "substantial contact" compares to the due process standard.

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[4] Petitioner also relies on a Ninth Circuit decision that focuses on a personal jurisdiction analysis and that appears inconsistent with preceding and following decisions of that court, compare *Theo. H. Davies & Co.* v. *Republic of the Marsh. Is.*, 174 F.3d 969, 975-976 (9th Cir. 1999), with *Sachs*, 737 F.3d at 598-599, and *America W. Airlines, Inc.* v. *GPA Grp., Ltd.*, 877 F.2d 793, 796-797 (9th Cir. 1989), and a Fourth Circuit decision that applies the "substantial contact" language without mentioning minimum contacts, see *Globe Nuclear Servs. & Supply GNSS, Ltd.* v. *AO Techsnabexport*, 376 F.3d 282, 291-292 (4th Cir. 2004).

B. Further Review Of The Court Of Appeals' Ruling On Clause Three Of The Commercial-Activity Exception Is Not Warranted

1. The court of appeals was also correct to conclude that petitioner's action does not fall within clause three of the commercial-activity exception.

a. Clause three applies to an action that is based upon "an act outside the territory of the United States in connection with a commercial activity of the foreign state" if "that act causes a direct effect in the United States." 28 U.S.C. 1605(a)(2). In *Weltover*, this Court held that "an effect is 'direct'" under clause three "if it follows 'as an immediate consequence of the defendant's . . . activity.'" 504 U.S. at 618 (citation omitted). The claims in *Weltover* were based upon Argentina's failure to pay government bonds that provided for payment "through transfer on the London, Frankfurt, Zurich, or New York market, at the election of the creditor." *Id.* at 609-610. Because the bondholder had chosen New York, the Court concluded that "New York was * * * the place of performance for Argentina's ultimate contractual obligations." *Id.* at 619. Argentina's nonpayment therefore "necessarily" created the requisite direct effect: "[m]oney that was supposed to have been delivered to a New York bank for deposit was not forthcoming." *Ibid.*

Following *Weltover*, it is plain that breach-of-contract claims based on nonpayment have the requisite "direct effect" in the United States if the contract designates the United States as the place of payment or if the payee has the right to designate the United States as the place of payment and exercises that right. See, *e.g.*, *Hanil Bank* v. *PT. Bank Negara Indon.*, 148 F.3d 127, 129-130, 132 (2d Cir. 1998); *Ad-*

ler v. *Federal Republic of Nigeria*, 107 F.3d 720, 729 (9th Cir. 1997); see also *Keller* v. *Central Bank of Nigeria*, 277 F.3d 811, 817-818 (6th Cir. 2002), abrogated on other grounds by *Samantar* v. *Yousuf*, 560 U.S. 305 (2010). If the contract does not designate or give the payee the right to designate the United States as a place of payment, however, nonpayment does not create a direct effect in the United States simply because the financial harm is felt by an entity in the United States. See, *e.g.*, *Rogers*, 673 F.3d at 139-140; *Lu* v. *Central Bank of Republic of China (Taiwan)*, 610 Fed. Appx. 674, 675 (9th Cir. 2015); *United World Trade, Inc.* v. *Mangyshlakneft Oil Prod. Ass'n*, 33 F.3d 1232, 1237-1238 (10th Cir. 1994), cert. denied, 513 U.S. 1112 (1995).

b. As the court of appeals correctly ruled, in this case there was no "direct effect" in the United States from the alleged breach of contract. The court found that the alleged agreement between the parties did not designate the United States as the place of payment or give petitioner the right to do so. See Pet. App. 23a-24a. To the contrary, Kenya's description of the reward program as involving payment in Kenyan shillings suggested that the place of payment would be Kenya. *Ibid.* Moreover, the court noted, Kenya refused to issue payments outside of that country, and petitioner received certain additional payments after he moved to the United States "only through an intermediary in Kenya who obtained the payments in Kenya and then sent them to [petitioner]." *Id.* at 26a; see *id.* at 25a; cf. *United World Trade*, 33 F.3d at

1239.[5] And the court found no indication that Kenya ever agreed to modify the place of performance. The facts thus failed to establish a "direct effect" in the United States.

As to petitioner's claim of breach of a promise of confidentiality, that alleged act did not "cause[] a direct effect in the United States," 28 U.S.C. 1605(a)(2), merely because petitioner ultimately resettled here. See Pet. App. 27a-28a. According to petitioner's allegations, it was not until after he decided to publicize his own story through a newspaper that the threats against him became sufficiently serious that he decided to seek asylum. See *id.* at 145a-148a. And although the Kenya National Commission on Human Rights supported petitioner's asylum application, that conduct was quintessentially sovereign, not commercial. See *id.* at 111a n.6. The panel majority properly rejected a rule that "refugees * * * be allowed to bring suits in U.S. courts against their former sovereigns if those sovereigns played a role in the refugees' relocation to the United States." *Id.* at 27a.

2. Petitioner contends that the court of appeals erred by "engraft[ing]" onto clause three "the very 'requirement of "foreseeability" that *Weltover* rejected.'" Pet. 27 (quoting Pet. App. 38a (Pillard, J., dissenting in part)). But *Weltover* itself looked to place of performance, see 504 U.S. at 619—not because it demonstrated foreseeability, but because it went to the directness of the harm. If a payee has no right to payment in the United States, then any harm here is

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[5] Petitioner states (Pet. 10) that the intermediary was a "mutual agent," but the district court rejected that contention in an unchallenged ruling. Pet. App. 55a-57a.

likely the "result of some intervening event." Pet. App. 19a.

Petitioner also contends that the court of appeals' analysis erroneously requires "ex ante contractual designation of the United States as the place of performance." Pet. 27 (quoting Pet. App. 38a (Pillard, J., dissenting in part)). That is incorrect. The court recognized that a direct effect exists if the payee exercises a contractual right to elect the United States as one of several payment locations. Pet. App. 18a. The same result may well obtain if the payee has the contractual right to select a payment location of its choice and selects the United States, even if the United States is not specifically named in the contract. See *Hanil Bank*, 148 F.3d at 132; *DRFP L.L.C.* v. *Republica Bolivariana de Venez.*, 622 F.3d 513, 516 (6th Cir. 2010), cert. denied, 132 S. Ct. 1140 (2012).

Finally, petitioner asserts that the decision below does not sufficiently examine "all relevant facts, including course of dealing," in making the "direct effect" determination. Pet. 29 (quoting Pet. App. 36a (Pillard, J., dissenting in part)). But the majority did indeed consider a variety of facts—including Kenya's course of conduct of making payments only in that country—in considering whether payment was supposed to made in the United States. See, *e.g.*, Pet. App. 26a. The court thus appropriately recognized that determining whether a "direct effect" exists requires an examination of the facts of the particular case.

3. There is no relevant conflict among the circuits about the meaning of "direct effect." As noted above, courts of appeals applying clause three of the commercial-activity exception in breach-of-contract cases

involving nonpayment have consistently looked to whether the plaintiff has a right to payment in the United States. See pp. 16-17, *supra*.

Petitioner contends (Pet. 18-19) that the Fifth Circuit took a different approach in *Voest-Alpine Trading USA Corp.* v. *Bank of China*, 142 F.3d 887 (5th Cir.), cert. denied, 525 U.S. 1041 (1998), which stated that "a financial loss incurred in the United States by an American plaintiff may constitute a direct effect that supports jurisdiction." *Id.* at 893. There is no inconsistency. The contract at issue in *Voest-Alpine* was silent as to place of payment; the Fifth Circuit found that nonpayment had a direct effect in this country because "it [was] the [defendant's] customary practice to send payments on a letter of credit to wherever the presenting party specifies," the plaintiff specified payment in the United States, and no account outside the United States that was to receive payments had been identified. *Id.* at 896. In this case, by contrast, Kenya consistently refused to perform the alleged contract anywhere except Kenya. See Pet. App. 26a-27a. Accordingly, applying the reasoning of *Voest-Alpine* would not result in a different outcome here.[6]

Petitioner also mistakenly asserts (Pet. 17-18, 29 & n.8) that the decision below conflicts with decisions of the First, Second, and Sixth Circuits. In *Universal Trading*, *supra*, the First Circuit found a direct effect in the United States where the facts established that the defendant "would have performed its obligations under the Agreements in Massachusetts." 727 F.3d at

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[6] Petitioner also claims a conflict with *Callejo* v. *Bancomer, S.A.*, 764 F.2d 1101 (5th Cir. 1985)—but that case focused on the very foreseeability analysis that *Weltover* later negated, see *id.* at 1112.

26. In *Hanil Bank*, *supra*, the Second Circuit found a direct effect in the United States where the plaintiff asserting breach of contract "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." 148 F.3d at 132. And in *DFRP*, *supra*, the Sixth Circuit found a direct effect in the United States where the defendant allegedly failed to pay even though "under the terms of the notes," including Swiss law incorporated into the notes, "the parties implicitly agreed to leave it to the bearer to demand payment of the notes anywhere, including, perforce, Columbus, Ohio." 622 F.3d at 516-517. Petitioner's case involves a distinct fact pattern.

Finally, petitioner claims (Pet. 26-29) that the decision below conflicts with various decisions of this Court. But those decisions either support the decision below, see *Weltover*, 504 U.S. at 609-610, 618-619, or are irrelevant to its holding, see *Verlinden*, 461 U.S. at 482, 490, 497-498 (stating that the FSIA does not restrict "the citizenship of the plaintiff"); *Burger King*, 471 U.S. at 475-478, 487. For instance, while petitioner argues that the D.C. Circuit's analysis conflicts with *Verlinden* by creating "a proscribed class of 'contract victim[s]' who 'move to the United States," Pet. 27 (citation omitted), the decision below accepts that plaintiffs who move to the United States and assert breach-of-contract claims can successfully meet the "direct effect" requirement under certain circumstances.

C. Finding The Commercial-Activity Exception Applicable To Petitioner's Claims Would Threaten Adverse Treatment Of The United States In Foreign Courts

Petitioner contends (Pet. 31) that the issues he raises "present recurring questions of national importance." Given that the court of appeals correctly interpreted the FSIA and that the decision below does not conflict with the decisions of other courts, petitioner is mistaken. A contrary holding, moreover, could substantially harm the United States by leading foreign courts to take reciprocal action that second-guesses decisions on the implementation of U.S. reward programs. Contra Pet. App. 47a (Pillard, J., dissenting in part).

The United States has various reward programs that provide payments to individuals who furnish information to the government. For instance, the State Department administers programs such as Rewards for Justice (targeting terrorists and war criminals) and the Narcotics Rewards Program (targeting narcotics traffickers), both of which give the Secretary of State "discretion" to decide whether to reward an informant. 22 U.S.C. 2708(b). The Department of Defense likewise administers a reward program targeting terrorism that gives the Secretary of Defense discretion to determine whether a reward is warranted. See 10 U.S.C. 127b(a). Under those programs, the government's decision about provision of a reward is not subject to judicial review. See 22 U.S.C. 2708(j); 10 U.S.C. 127b(g); see also 26 U.S.C. 7623 (establishing tax-related reward program and permitting appeals to the United States Tax Court).

If the United States permits suit against foreign sovereigns based on a claimed failure to pay a reward

under a government program, despite the fact that such a program is best regarded as sovereign rather than commercial activity, see note 1, *supra*, then foreign states may reciprocate by permitting similar claims against the United States in their tribunals. See, *e.g.*, *Persinger* v. *Islamic Republic of Iran*, 729 F.2d 835, 841 (D.C. Cir.), cert. denied, 469 U.S. 881 (1984). But serious problems would arise if decisions about U.S. reward programs were subject to review in foreign courts. Foreign courts cannot be counted upon to be sensitive to the concerns that inform decisions by U.S. officials whether to pay a reward, including national security interests. And foreign courts might well seek to inquire into what precisely a confidential informant told U.S. law-enforcement officials and how that information did (or did not) satisfy the terms of the reward program. Courts in other countries may also be unsympathetic to U.S. efforts to invoke the law-enforcement privilege or to resist the disclosure of classified information.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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