No. 14-1206

In The
Supreme Court of the United States

PETER GEORGE ODHIAMBO,
Petitioner,

v.

REPUBLIC OF KENYA, ET AL.,
Respondents.

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

SUPPLEMENTAL BRIEF OF PETITIONER

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INTRODUCTION

The United States and Republic of Kenya offer no coherent reason why this Court should not address a 40-year decisional gap over the heart of the Foreign Sovereign Immunities Act, recurrent circuit splits and confusion over the term "substantial contact," and oversights of this Court's jurisprudence and a simple pin-cite showing it means "minimum contacts," Pet. 12, 32-34, that have needlessly skewed application of the long-arm statute enacted by Congress.

Respondent, failing to address the splits and confusion, admitted by the courts themselves, and claiming there is "no divergence" among those which conjectured for decades it "probably" exceeds "minimum contacts," Resp. Br. 14 (quoting D.C. Circuit), avoids addressing what it means. Instead it relies on the elements test of *Kirkham v. Société Air France*, 429 F.3d 288 (D.C. Cir. 2005) that was imposed below, and since overruled. *OBB Personenverkehr, AG v. Sachs*, 136 S. Ct. 390, 395-96 (2015).

The government likewise has no answer to the splits and confusion, or what "substantial contact" means, though its views were invited hours after the argument in *Sachs*. This is all the more inexplicable when it participated in that argument, after some justices voiced agreement with the points made in Odhiambo's petition.

In sum, none of the government's or Kenya's arguments supports denial of review on any of the important questions presented.

I. THIS CASE PRESENTS RECURRING CONFLICTS AND UNRESOLVED QUESTIONS

The government's and respondent's efforts to marginalize decades-long conflicts and unanswered questions are unpersuasive.

A. The United States confirms that the D.C. Circuit's decision imposing an "elements" test, U.S. Br. 10, "conflicts with relevant decisions of this Court," S. Ct. R. 10(c), "one of the strongest possible grounds" for certiorari, E. Gressman *et al.*, *Supreme Court Practice* §4.5, p. 250 (9th ed. 2007).

Sachs, agreeing with this petition where the point was made, Pet. 20-25, held that the elements test of the Ninth Circuit, following other circuits misapplying *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), is "flatly incompatible" with *Nelson*. 136 S. Ct. at 395-96 (flawed approach is "overreading of one part of one sentence" of *Nelson*). Odhiambo argued likewise that the court of appeals decision, "applying *Kirkham's* extrapolation of *Nelson's* "elements" test, conflicts with *Nelson* itself," Pet. 20, objecting to its imposition below. *Sachs* has now resolved the fifth and sixth conflicts he identified, caused by misreading *Nelson* on the "substantial contact" issue it never reached. Pet. 4, 15-16.

This leaves the four-way conflict over its meaning that the circuits recognized and anticipated would be resolved in *Nelson*, Pet. 4, 13-16, that remains unresolved. The government's response that it "predates this Court's decisions in *Nelson* and *Sachs*,"

U.S. Br. 15, which did not reach the issue, is no response at all.

This Court grants certiorari when a lower court opinion appears "inconsistent with prior decisions of this Court," *Lugar v. Edmondson Oil Co,* 457 U.S. 922, 926 (1982), or when the circuits are in direct conflict. S. Ct. R. 10(a); *Supreme Court Practice* § 4.4, p. 242. Both grounds are presented here, and the Court should do so again.

B. *Sachs*, generally agreeing with Odhiambo, Pet. 15-16, 23-24, notes: "*Nelson* instead teaches that an action is 'based upon' the 'particular conduct' that constitutes 'gravamen' of the suit." 136 S. Ct. at 396. *Sachs* emphasizes, as Odhiambo did: "We cautioned in *Nelson* that the reach of our decision was limited," 136 S. Ct. at 397 n.2, which did not reach any "substantial contact" issue. "[S]imilar caution is warranted here. …[D]ifferent types of commercial activity may play a more significant role in other suits under the first clause," and "we consider here only a case in which the gravamen…is found in the same place." *Id. Sachs* left open the door to a case, like Odhiambo's, originating in Kenya but followed by a six-year course of dealing here, unlike the attenuated internet sale of a Eurail pass where injury arose at one of 29 railways. *Id.* at 393.

C. *Sachs* then proceeded to address "substantial contact," but did not reach the issue because Sachs' theory, "that OBB's entire railway enterprise…has the requisite 'substantial contact'" through "marketing and selling Eurail passes in the United

States," was "never presented to any lower court and is therefore forfeited." 136 S. Ct. at 397.

Unlike Sachs, Odhiambo did not rely on any new "substantial contact" argument not presented below. As he consistently has argued: "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." Pet. 9. This case squarely presents the issue not reached in *Sachs*.

D. Odhiambo's remaining points resonated with some justices at the outset of the argument in *Sachs*, who voiced agreement that "substantial contact" means nothing more than "minimum contacts," Pet. 31-36, and that "based upon" is nothing more than the predicate for specific jurisdiction and ensuring commercial activity. Pet. 23-25. Yet the government, having participated, has not given any assistance at all on these issues, though invited by order that day.

For example, Justice Kagan, the government's last solicitor general, said:

> JUSTICE KAGAN: … **[I]t doesn't seem… that wording is very different from the wording that we've used in specific jurisdiction cases. The wording here is "based on" -- we've used "arising out of."**

> **Sometimes we've used "related to."**[1] … [I]t's pretty clear that the FSIA is meant to ensure that when a foreign government is acting as a commercial actor, it gets treated like a foreign corporation. **And the language here is very similar, right? There's the insistence on a sufficient contact, a minimum contact**, **and** then there is the **insistence on a particular kind of relationship between that contact… and the claim**.
>
> …**I'm having trouble of thinking why… there would be a different test.**

Official Tr., *OBB Personenverkehr AG v. Sachs* (Oct. 5, 2015), at 5-6, available on the Court's website (emphasis added).

Justice Scalia voiced a similar view with a caveat:

> JUSTICE SCALIA: … **It seems to me that the definition…is the due process test.** The definition is, "…having substantial contact with the United States." That **sounds to me like… the due process test. But…it has to be based on** a commercial activity carried on in the United States. **And it seems to me that is something …added to the…constitutional test.**

Id. at 13 (emphasis added).

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[1] The Court has so far not found any distinction between "arise out of" and "relate to." *Helicopteros Nacionales De Colombia v. Hall*, 466 U.S. 408, 416 n.10 (1984).

Justice Sotomayor expressed the view that the "work" of "minimum contacts" is found in "substantial contact," as argued by Odhiambo:

> JUSTICE SOTOMAYOR … **I don't even understand why we're talking about "based upon."**
>
> As Justice Ginsburg said, there's no dispute here that whether the based-upon is the ticket sale or the operation of the train, both of them are commercial activities.
>
> **Isn't the work in substantial contact with the United States? Isn't that what we should be looking at instead?** …

Id. at 6-7 (emphasis added).

Justices Kagan and Sotomayor, no doubt among others, correctly construe the Act. "Based upon" has no more talismanic significance than "arising from" or other rubrics of specific jurisdiction—none adding to the due process test as Justice Scalia supposed.[2] Rather, "based upon" was invoked to best ensure that conduct on which suit is based is commercial—the critical concern of the Act. Pet. 6-7, 23-24.

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[2] When this Court defined "minimum contacts" in *McGee v. International Ins. Co.*, 355 U.S. 220 (1957), it held it "sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State." *Id.* at 223; Pet. 12, 33. *McGee's* use of "based upon" has never been viewed as requiring something more than "minimum contacts."

To conclude otherwise overlooks also the District of Columbia long-arm statute on which the FSIA was patterned, Pet. 12, which uses "based upon" and "arising from" conduct interchangeably:

> §13-423. Personal jurisdiction **based upon** conduct
>
> (a) A District of Columbia court may exercise jurisdiction over a person, who acts directly or through an agent, as to a claim for relief **arising from** the person's --
>
> (1) transacting any business in the District of Columbia;
>
> …
>
> (3) causing tortious injury … by an act or omission in the District of Columbia;
>
> (4) causing tortious injury … by an act or omission outside the District of Columbia if….

D.C. Code §13-423 (emphasis added).

Overlooking these unmistakable similarities, the government argued otherwise in *Sachs*:

> MR. KNEEDLER: … I'd like to start with… whether the FSIA simply incorporates due process standards, and we think it does not. …
>
> Congress did not simply incorporate the D.C. Long-Arm Statute or due process principles…. It enacted specific statutory terms. And it's --
>
> …

> JUSTICE KAGAN: Well, but **how is based-upon different from the language we routinely use in specific jurisdiction cases? …[I]t just seems as though Congress…used language that's virtually synonymous with the language that we use….**
>
> MR. KNEEDLER: But…it did it in…a statutory structure that is designed…[for] what could be very sensitive international questions of having U.S. courts pass judgment on what happens in a foreign country. For example --
>
> JUSTICE KENNEDY: **Well, except it did so in the context of distinguishing between commercial activity and sovereign activity.**

Id. at 23-25 (emphasis added).

These points were not briefed in *Sachs*, but in Odhiambo's petition. Odhiambo does not presume any justice has decided these issues. He offers the excerpts to show his points were taken seriously and warranted a serious response by the government, which is entirely lacking in its brief. One can only surmise it offers no response because it has none.

II. THE GOVERNMENT'S CLAIMED VEHICLE PROBLEMS ARE NO BASIS FOR DENYING REVIEW

The government, like respondent, tosses out supposed vehicle defects, none of which are colorable much less a basis for denying review.

A. With respect to *clause one*, the government offers two purported reasons why the Court *could* deny review, but none why it *should*, and let a 40-year fundamental oversight and misapplication of the FSIA continue, at a staggering cost to litigants and the federal courts. Pet. 35-37.

1. The government's first argument, that there is no need to reach the issue of "substantial contact" on these facts, citing the holding below, U.S. Br. 11; Pet. 13a-14a, ignores that it rests on *Kirkham's* overruled "fact-lose" elements test. It reads: "Odhiambo does not seriously contend that his meetings with Kenyan officials…establish any fact without which his breach-of[contract claim will fail," *id.*—the holding *Sachs* overruled as "flatly inconsistent" with *Nelson*.

2. Its other argument is a straw man: "Perhaps petitioner also means to contend (Pet. 23-25) that the court…was wrong to reject his argument that the entire Kenyan reward program…'had substantial contact'…Pet. App. 14a." U.S. Br. 11. Odhiambo never argued "the entire Kenyan reward program," and the court never rejected that argument. He argued that Kenya, after directing him here, then over the *next six years*, while verifying or recovering hundreds of millions in taxes to determine his rewards, 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, Pet. 9, a long course of dealing or "regular course of

commercial conduct" that constituted "substantial contact" with the United States. Pet. 2; 28 U.S.C. §§ 1603(d),(e).[3] When the court of appeals held he "'failed to raise this argument in the district court and therefore has forfeited it,'" U.S. Br. 11, "this argument" referred to "substantial contact…because of his meetings with Kenyan officials," Pet. 14a—not "the entire Kenyan reward program."

The government uses this straw man to argue under *Sachs* it "was never presented to any lower court and is therefore forfeited." 136 S. Ct. at 397. *See* U.S. Br. 12 & n.2. Odhiambo made the same argument in the district court (on reconsideration) and the court of appeals, Pet. 9-10, 13a-14a, which may properly be reviewed by this Court. *Id.*

B. Regarding *clause two,* the government argues the failure to pay was an "act" in Kenya and not in the United States, U.S. Br. 13, ignoring allegations concerning its "omissions" to pay, as did the court, App. 148a-52a (and payments and misrepresentation directed here as alleged by proposed SAC. App. 9-10). "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….'"

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[3] Similarly, due process analysis considers not just contract formation but "the parties' actual course of dealing,'" *Thompson Hine, LLP v. Taieb*, 734 F.3d 1187, 1192 (D.C. Cir. 2013) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 479 (1985). Though *Taieb* involved "no evidence of any meetings, phone calls, or emails between Taieb and the firm's D.C.-based lawyers" over seven months, *id.*, this case did, over six years. Pet. 9, 24, 29-30.

Voest-Alpine Trading USA Corp. v. Bank of China, 142 F.3d 887, 895 (5th Cir. 1998) (citations omitted).

C. Regarding *clause three,* the government seeks to minimize that Kenya directed Odhiambo—and its attendant obligation to report tax recoveries and pay rewards—to the United States, leading to six years of contacts before breaching and causing loss here.

1. The government, not disputing no place of payment was specified, argues the court found no indication Kenya agreed to modify it. U.S. Br. 18. That is only because Kenya offered no evidence under its burden, improperly switched to Odhiambo, and no discovery was allowed. Pet. 9-10. And his allegations of six years of contacts and directing him here, give rise to the inference reports and payments would likewise be directed here. The court's "finding" that "Kenya has continually refused to issue any payments outside Kenya," U.S. Br. 17, rests on no evidence. Pet. 26a.[4]

2. The government's assertion that asylum was a sovereign act overlooks the reality it was caused by Kenya's breach of its contractual "assur[ance] of strict confidentiality to safeguard identities" against "vendetta[s]." Pet. 8, 30, 34a-35a. This case is no different, as the dissent noted, from one where the state "hires an American employee…abroad without specifying place of performance, and…reneges on payment and deports the employee[.]" App. 30, 33a.

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[4] Odhiambo did appeal whether the person the parties used to convey payments was a "mutual agent." U.S. Br. 18 n.5. *See* Pet. 26a-27a (using neutral term "intermediary").

Such a suit would is not based on the deportation, but nonpayment.

3. The government fails to address all financial-loss cases the dissent and petitioner cited. Pet. 17-19, 28-30, 41a-46a. It ignores the separate holding in *Universal Trading & Inv. Co. v. Bureau for Representing Ukrainian Interests*, 727 F.3d 10, 26-27 (1st Cir. 2013) ("In addition…significant financial harm…creates a sufficient direct effect."). It distinguishes *Voest-Alpine* only by arguing Kenya "refused" to pay anywhere but Kenya. U.S. Br. 20. And *Voest-Alpine*, 142 F.3d at 895-96, rejected its argument dismissing *Callejo v. Bancomer, S.A.*, 764 F.2d 1101 (5th Cir. 1985).

III. THE GOVERNMENT'S COMITY CONCERN IS MISGUIDED AND CONTRARY TO THE STATUTE

The government's final contention, speculating that enforcing this reward program may cause foreign courts to question U.S. reward programs, is misconceived and immaterial.

A. The government acknowledges contrary authority, U.S. Br. 9 n.1, 23 (citing *Guevara v. Republic of Peru*, 468 F.3d 1289, 1298-1305 (11th Cir. 2006)), but fails to rebut it, or the dissent below. Pet. 47a & n.3. As explained in *Guervara*:

> Accepting Peru's position, dressed though it is in the clothing of sovereignty,[5] would frustrate

[5] The government's "doubt" on whether such programs are commercial activity, U.S. Br. 9 n.1, 23, was also rejected in

> rather than further the ability of countries to carry out their sovereign functions. Anything that makes it easier…to welch on their promises to pay for information…makes it less likely that an offer will be accepted. … The holding Peru asks us to reach would jeopardize not only its vital interests but those of every country that offers rewards for information, including this country.

Id. at 1303-04 (reviewing U.S. reward programs). "Absent a clear requirement in the FSIA, we will not create impediments to the enforcement of reward contracts entered into by this or any other country." *Id.* at 1305. Indeed, there can be no implied impediment to jurisdiction, over reward programs or other commercial activity. *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 617-18 (1992); Pet. 20.[6]

B. More basically, the specter of consequences has no place in the jurisdictional analysis:

> Congress passed the [FSIA] in order to free the Government from the case-by-case diplomatic pressures…and to "[assure] litigants…decisions are made on purely legal grounds and under procedures that insure due process," H. R. Rep. No. 94-1487, p. 7 (1976).

Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 488 (1983). While "[a]ctions against foreign

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Guervara, and Kenya, having the burden, Pet. 9, waived the issue on appeal, Pet. 14a n.1, and this review. Resp. Br. 3 n.2.

[6] *Persinger v. Islamic Rep. of Iran*, 729 F.2d 835, 841 (D.C. Cir. 1984), imposed no unexpressed restriction, *id.*, which would be negated by *Weltover*.

sovereigns in our courts raise sensitive issues," they are removed by the threshhold determination of commerical conduct. *Id.* at 488-89, 493-94. In such cases, "it is beyond cavil that part of the foreign relations law…is that the commercial obligations of a foreign government may be adjudicated in those courts otherwise having jurisdiction[.]" *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 705 (1976). "In their commercial capacities, foreign governments…exercise only those powers that can also be exercised by private citizens. Subjecting them…to the same rules of law that apply to private citizens is unlikely to touch very sharply on 'national nerves.'" *Id.* at 704.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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