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SUPREME COURT, U.S.

No. 07-1095

IN THE

Supreme Court of the United States

ORIENT MINERAL COMPANY and
WIL-BAO MINERAL CO., LTD.,

Petitioners,

v.

BANK OF CHINA,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether certiorari should be denied where the Petition seeks review of an interlocutory judgment of the Tenth Circuit but makes no attempt to show that review is necessary to prevent "extraordinary inconvenience and embarrassment in the conduct of the cause," and where in any event, no such showing can be made.

II. Whether certiorari should be denied where there is no circuit conflict presented by the various circuits' application of the exceptions to foreign sovereign immunity set forth in 28 U.S.C. § 1605(a)(2), or *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), that would impact the outcome of this case.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Respondent Bank of China (the "Bank") is a corporation organized and existing under the laws of the People's Republic of China.

Until 2004, the Bank was wholly owned by the People's Republic of China. On or about August 26, 2004, the Chinese government converted the Bank into a joint stock company, and the Bank became Bank of China Limited.

Bank of China Limited's majority owner is Central SAFE Investment Limited. No publicly held company owns 10 percent or more of Bank of China Limited's stock.

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JURISDICTIONAL STATEMENT

While 28 U.S.C. § 1254(1) gives this Court discretion to exercise its certiorari jurisdiction over the Tenth Circuit's interlocutory judgment, Petitioners fail to show that this case presents the extraordinary circumstances typically required for such review. *See Am. Constr. Co. v. Jacksonville, Tampa & Key W. Ry. Co.*, 148 U.S. 372, 384 (1893). As is discussed in greater detail *infra* at pp. 11-13, this case in fact presents none of the indicia that warrant exercise of this Court's certiorari jurisdiction to review an interlocutory ruling.

STATEMENT OF THE CASE

I. Yue's Embezzlement

This case, part of which still is being litigated below, arises from the loss by Orient of its investment in the Wil-Bao gold mining venture in China, due to Petitioners' own negligence and mismanagement and due to the criminal misconduct of its director, Yue Xiaocun (a/k/a David Yue).

In 1996, Orient partnered with a Chinese company to form Wil-Bao Mineral Co., Ltd. ("Wil-Bao"), a joint venture whose purpose was to mill and mine gold in the Lingbao area in Henan Province, China. (Opinion, Pet. App. 4a). Orient obtained $3 million in funding for the venture from a wealthy investor, R. Ellsworth McKee. (Wil-Bao Board Resolution, 1a; Opinion, Pet. App. 5a).

On May 14, 1996, Yue informed the sub-branch of Respondent Bank of China ("the Bank") in Lingbao, China, that it would receive a wire transfer of $3 million

and requested an account number for the transfer. The Bank provided a letter giving wire-transfer instructions and a temporary account number to be used for the transfer. (District Court's Findings of Fact & Conclusions of Law (hereafter, "FF/CL"), 14a; Opinion, Pet. App. 7a). The Bank also stated that it would keep the funds safe pending the arrival of Orient's representative. (*Id.*). Yue faxed a copy of the Bank's letter to Art Wilson, Orient's Chairman of the Board, in Nevada. (FF/CL, 14a & n.18; Opinion, Pet. App. 3a, 8a). On May 21, 1996, McKee arranged for $3 million to be transferred from his bank in Georgia to the Bank's Lingbao sub-branch, China; it was routed through the Bank's New York branch. (FF/CL, 17a; Opinion, Pet. App. 9a).

On May 24, Wil-Bao's board of directors passed a resolution that, among other things, authorized Jones to approve any expenditure over $25,000. (Resolution, 5a; FF/CL, 17a; Opinion, Pet. App. 6a). The Wil-Bao board resolution did not contain any reference to the Bank or to disbursements or disposition of funds from any account at the Bank, nor did it bear any indicia of corporate authority. (Resolution, 4a-5a; FF/CL, 26a-27a).

Early in the morning of May 27, 1996, the Lingbao sub-branch received the $3-million transfer and placed those funds in a temporary account. (FF/CL, 35a-36a). Later that morning, four representatives of Orient and Wil-Bao, including Preston Jones, Art Wilson, F. Thomas Eck III, and David Yue, came to the Bank to open U.S. dollar and local currency accounts for Wil-Bao. The four representatives met with officers of the Bank's sub-branch. (*Id.*, 36a; Opinion, Pet. App. 9a-10a). The Bank's officers did not speak or understand English, and Jones, Eck, and Wilson did not speak or understand Chinese. Yue, who was

a director of both Petitioners, acted as the sole translator during the meeting, at Petitioners' request and desire. (FF/CL, 18a-19a; Opinion, Pet. App. 10a).

Petitioners' representatives presented the Bank with a letter from Orient dated May 16, 1996, and with a Resolution by Orient's Board of Directors. The Resolution stated that Jones was to have sole and exclusive authority concerning disposition of the $3 million. (Orient Board Resolution, 1a-2a; FF/CL, 16a; Opinion, Pet. App. 8a-9a). It also provided that Orient would indemnify and hold harmless the Bank "from all claims or liabilities of any kind whatsoever," as long as the Bank followed Jones's instructions. (Resolution, 1a; FF/CL, 15a-16a). These were formal documents bearing corporate seals. (FF/CL, 16a; Opinion, Pet. App. 10a). Given their formal appearance, a bank clerk translated the written documents. (Opinion, Pet. App. 10a). Yue confirmed that the documents designated Jones as the authorized person to dispose of the funds. The May 24, 1996 Wil-Bao Board Resolution was not provided to the Bank during the May 27 meeting. (Wil-Bao Board Resolution, 4a-5a; FF/CL, 18a; Opinion, Pet. App. 9a).

Based on the written translation and what Yue told the Bank officers, the Bank prepared Wil-Bao's account opening documentation for a U.S. dollar account and a local currency account, as well as a slip to transfer the $3 million from the temporary account into Wil-Bao's U.S. dollar account. (Opinion, Pet. App. 11a). Jones, as Orient's designated representative, signed the transfer slip. (*Id.*). The account documentation included three required signatories, none of whom was Jones. No limitations were placed on the accounts. (FF/CL, 27a; Opinion, Pet. App. 11a).

During the following months, Wil-Bao directed the Bank to make transfers of funds from the Wil-Bao accounts, without Jones's knowledge or authorization. (Opinion, Pet. App. 13a). These transfers included three transfers from Wil-Bao's U.S. dollar account to the United States, including the transfer at issue in this case, for $400,000 to defendant Saren Gaowa in Utah. (FF/CL, 19a, 31a-32a; Opinion, Pet. App. 13a). The District Court found that the Bank acted properly, in accordance with the request of its customer, Wil-Bao, in processing the transfer requests, and that the transfer slips bore the required three seals. (FF/CL, 31a-32a). The three transfers were routed from the Bank's Lingbao sub-branch to the designated bank in the United States and through the Bank's New York branch. (Opinion, Pet. App. 39a).

Over time, the funds in Wil-Bao's accounts were depleted, and the Wil-Bao joint venture failed. (Opinion, Pet. App. 13a-15a). David Yue was arrested in China, tried, and found guilty of embezzlement. (*Id.*, Pet. App. 15a).

II. Deficiencies in Petitioners' Recitation of the Facts

Petitioners' Statement of the Case misstates numerous important facts – in many instances, in a manner directly contrary to findings made by the District Court and affirmed by the Tenth Circuit. By way of example:

- Petitioners intimate that the Bank sent the May 14, 1996 letter to Orient in Nevada. (Pet. 4). In fact, as the lower

courts both found, the Bank provided this letter (written in Chinese) to Yue in *China*; Yue then transmitted the letter to Art Wilson, Orient Mineral's chairman, in Nevada. (FF/CL, 14a & n.18; Opinion, Pet. App. 39a). The distinction is critical, since the Tenth Circuit specifically found that the relevant inquiry was whether that act taken outside the United States had a "direct effect" within this country – and the court held that it did not. (Opinion, Pet. App. 39a).

- The Petition incorrectly states that "Orient wired $3 million to [the Bank's] New York branch, for transmittal to its branch in Lingbao, China." (Pet. 5). In fact, Orient's investor, R. Ellsworth McKee, initiated a wire transfer from his account in Georgia to the Lingbao sub-branch in China; unbeknownst to McKee, Wachovia happened to route the funds through the Bank's New York branch. But the transfer did not involve $3 million wired "to the New York branch" – both the District Court and Tenth Circuit correctly found that that the wire transfer was to the sub-branch in Lingbao. (FF/CL, 17a; Opinion, Pet. App. 9a).

- Petitioners incorrectly state that Jones at the May 27, 1996 meeting submitted the Wil-Bao board resolution concerning his authority to approve

disbursements over $25,000. (Pet. 5). In fact, the District Court specifically found that the Wil-Bao board resolution, which concerned *expenditures* over $25,000 and did not refer to the Bank in any way, was provided to the Bank on May 29, 1996 – two days after the Wil-Bao accounts were opened. (FF/CL, 25a). The Tenth Circuit affirmed the District Court's holding that the board resolution and its $25,000 limitation did not form part of Wil-Bao's contract with the Bank. (FF/CL, 31a-32a; Opinion, Pet. App. 47a-48a).

- The Petition incorrectly states that Yue sent $400,000 to the Bank's New York branch. (Pet. 5). In fact, Yue initiated a wire transfer on behalf of Wil-Bao that included its three required seals. This transfer was to Saren Gaowa's bank account in Utah, and the funds were routed through the Bank's New York branch. (FF/CL, 19a). It was this transfer alone that the District Court found was a commercial activity overseas that caused a direct effect in the United States under the third prong of the commercial activity exception (and which, it ultimately held, did not constitute a breach of contract). (FF/CL, 31a-32a).

III. Procedural Background

Orient filed this action against the Bank in 1998, alleging breach of contract and a variety of tort claims, and seeking to recover the $3 million McKee invested, as well as lost profits anticipated from the joint venture. In May 2001, Wil-Bao joined as a co-plaintiff. At the time the suit was filed, the Bank was a foreign corporation owned by the government of China, and it is undisputed that under the Foreign Sovereign Immunities Act ("FSIA"), it was immune from the subject-matter and personal jurisdiction of U.S. courts unless one of the exceptions to FSIA immunity applied. *See* 28 U.S.C. § 1604.

Soon after the action was filed, the Bank moved for judgment on the pleadings based on lack of subject-matter and personal jurisdiction. The District Court ruled that there was probable jurisdiction under the "direct effect" (third) clause of the commercial activity exception to the FSIA, 28 U.S.C. § 1605(a)(2), limited solely to the single $400,000 transfer from Wil-Bao's account to Gaowa in Utah. (Memorandum Opinion and Order, Pet. App. 114a-133a). The Bank appealed the finding of probable jurisdiction; Orient – which at that point was the only plaintiff – did not appeal the District Court's limitation of jurisdiction.

The Tenth Circuit directed Orient to show that it had made valid service on the Bank. When Orient failed to do so, the court remanded the case with directions that the District Court vacate that part of its ruling finding probable jurisdiction and resolve the service-of-process issue. (Order and Judgment, Pet. App. 106a-

113a). The parties continued to litigate, and Petitioners in 2004 sought a writ of mandamus to remove the trial judge, but their request was denied. (Order, Pet. App. 103a-105a).

Following a 13-day bench trial, the District Court in early 2005 entered its 235-page Findings of Fact and Conclusions of Law, including its rulings on various pending motions. (FF/CL, excerpts at 7a-32a). The District Court found that it had jurisdiction only as to Petitioners' claims relating to the $400,000 transfer, for which the third prong of the FSIA's commercial activity exception provided jurisdiction, and that none of Petitioners' other claims fell within any exception. (FF/CL, 28a-32a). As to Petitioners' claims relating to the $400,000 transfer, the District Court dismissed them on the merits. The following day, the District Court entered its Judgment and Order of Dismissal, Judgment, District Court R. 339, and later entered an order dismissing the Bank's counterclaim for indemnification for attorneys' fees. Order, District Court R. 363.

The parties each appealed portions of the District Court's rulings. Petitioners argued that all three clauses of 28 U.S.C. § 1605(a)(2) provided jurisdiction over each of their claims, asserted that the District Court made clear errors in its findings of fact and asked the Tenth Circuit to make its own findings and remand the case to a different judge. The Bank cross-appealed, asserting that the FSIA did not provide jurisdiction over Petitioners' claims relating to the $400,000 transfer. It also appealed the District Court's dismissal of its counterclaim for indemnification.

The Tenth Circuit affirmed the dismissal of Petitioners' claims. (Opinion, Pet. App. 1a-58a). It found that the FSIA did not give the District Court jurisdiction over the claims (other than the ones relating to the $400,000 transfer) since they were not based upon either commercial activity by the Bank in the United States, or upon an act within the United States in connection with the Bank's commercial activity elsewhere. (*Id.*, Pet. App. 20a-42a). With regard to the claims relating to the $400,000 transfer, the Tenth Circuit affirmed their dismissal on the merits. (*Id.*, Pet. App. 42a-53a). Significantly, the Tenth Circuit rejected Petitioners' challenge to the District Court's factual findings, holding that "the trial record fully supports the district court's determination." (Opinion, Pet. App. 46a).

The Tenth Circuit also reversed the District Court's dismissal of the Bank's counterclaim for indemnification and remanded with specific instructions that the District Court consider the merits of that claim:

> It is far from clear whether Orient Mineral's resolution of May 16, 1996, agreeing to hold the bank "harmless from all claims or liabilities of any kind," includes the Bank's expenditure for its own attorneys' fees. However, the district court never reached the merits of the matter. Instead, the district court erroneously rejected the claim, believing that its award to the Bank of its costs gave the Bank all the relief it was seeking in the counterclaim. We do not intimate anything at this time about the merits of the Bank's claim for attorneys'

> fees, but that matter should be considered in the first instance by the district court. (Opinion, Pet. App. 53a-57a).[1]

Following issuance of the Tenth Circuit's Opinion, the case continues to be litigated in the District Court. The Bank in March 2008 filed an Amended Counterclaim for Indemnification, and as of this writing, Orient and the members of its board of directors have pending motions to dismiss that counterclaim. (Amended Counterclaim, 33a; Orient Mineral Company's 4/2/08 Motion to Dismiss, 41a; Individual Counterclaim Defendants' 4/16/08 Motion to Dismiss, 44a).

Petitioners now seek this Court's review of part of the Tenth Circuit's Opinion.

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[1] Given that it had affirmed the District Court's dismissal of all of Petitioners' claims, the Tenth Circuit declined to address Petitioners' request that the case be remanded to a new judge. (Opinion, Pet. App. 53a). However, while its ruling reviving the Bank's counterclaim necessarily would result in further proceedings on remand, the Tenth Circuit specifically noted that Petitioners' had failed to make the same request for a new judge on remand in Appeal No. 05-4220, the Bank's appeal as to its counterclaim. (Opinion, Pet. App. 57a). Accordingly, proceedings on remand are again before Judge Jenkins, who is intimately familiar with the extensive facts and legal background of the case.

REASONS FOR DENYING THE PETITION

I. The Tenth Circuit's Interlocutory Judgment Provides No Basis for Invoking This Court's Certiorari Jurisdiction at This Time.

While 28 U.S.C. § 1254(1) gives this Court discretion to review non-final judgments of the Federal circuit courts, the Court generally awaits final judgment before exercising its certiorari jurisdiction. *See Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring in denial of certiorari), *citing Am. Constr. Co. v. Jacksonville, Tampa & Key W. Ry. Co.*, 148 U.S. 372, 384 (1893), and *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook Ry. Co.*, 389 U.S. 327, 328 (1967) (per curiam); *see also* Gressman, Geller et al., SUPREME COURT PRACTICE, § 4.18, pp. 280-81 (9th ed. 2007). "[E]xcept in extraordinary cases, the writ is not issued until final decree." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (citations omitted) (lack of finality in a lower-court decree "of itself alone furnished sufficient ground for the denial of the application").

The Tenth Circuit's Opinion is undeniably interlocutory. After the District Court's rulings collectively disposed of all of Petitioners' claims and the Bank's counterclaim, the Tenth Circuit affirmed the former decisions, but reversed the dismissal of the Bank's counterclaim for indemnification and remanded the case for further proceedings. (Opinion, Pet. App.

57a-58a). The Tenth Circuit discussed in detail the issues the District Court is to resolve on remand:

> It is far from clear whether Orient Mineral's resolution of May 16, 1996, agreeing to hold the bank "harmless from all claims or liabilities of any kind," includes the Bank's expenditure for its own attorneys' fees. However, the district court never reached the merits of the matter. Instead, the district court erroneously rejected the claim, believing that its award to the Bank of its costs gave the Bank all the relief it was seeking in the counterclaim. We do not intimate anything at this time about the merits of the Bank's claim for attorneys' fees, but that matter should be considered in the first instance by the district court. (Opinion, Pet. App. 53a-57a).

Thus, while the District Court's ruling was final in terms of disposing of all the claims of all the parties, the Tenth Circuit's opinion is decidedly *non*-final and is not ripe for review. Indeed, the matter currently is being litigated below. The Bank in March 2008 filed its Amended Counterclaim for Indemnification, seeking its costs of defense in this decade-old litigation that by now are in excess of $900,000. (Amended Counterclaim, 33a). Petitioners have filed various motions to dismiss the counterclaim that remain pending as of this writing. (Orient Mineral Company's 4/2/08 Motion to Dismiss, 41a; Individual Counter-Claim Defendants' 4/16/08 Motion to Dismiss, 44a). In short, Petitioners seek review by this Court of a matter they are actively litigating in the District Court.

This is the identical context in which *Brotherhood of Locomotive Firemen & Enginemen* came to this Court. In that case, the District Court entered final remedies in the form of injunctive relief and contempt orders, but the Court of Appeals, after reviewing, remanded for further analysis of various contempt-related issues. Rejecting the petition for certiorari, this Court noted that "because the Court of Appeals remanded the case, it is not yet ripe for review by this Court." 389 U.S. at 328, *citing Hamilton-Brown Shoe Co.*, 240 U.S. at 257-58. The same can be said here, and, as was the case with *Brotherhood of Locomotive Firemen & Enginemen*, this matter is not ripe for this Court's review.

This Court long has required a heightened showing before granting certiorari for an interlocutory judgment, requiring that immediate review be "necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *Am. Constr. Co.*, 148 U.S. at 384. Petitioners, however, have failed even to acknowledge that the Tenth Circuit's judgment is interlocutory, much less discussed why review is needed to prevent "extraordinary inconvenience and embarrassment in the conduct of the cause." Doubtless, that is because they cannot meet that standard. This case is a decade old, and Petitioners can point to no "extraordinary inconvenience," nor any other factor sufficient to require immediate review by this Court.

II. The Petition Offers Nothing That Warrants Review by This Court.

A. Petitioners Merely Quibble with the Lower Courts' Factual Determinations and Accurate Application of the FSIA's Plain Text and This Court's Precedents Interpreting It.

At its core, the Petition seeks simply to have this Court replicate the extensive analysis conducted by both lower courts of the voluminous factual record from the 13-day bench trial. For instance, Petitioners complain that the District Court "disregarded" certain facts in the course of its 235-page findings and opinion. (Pet. 9). But Petitioners fully aired their challenge to the District Court's factual findings in the Tenth Circuit, which rejected them out of hand "because the trial record fully supports the district court's determination." (Opinion, Pet. App. 46a). Even had factual errors occurred below – which they did not – they plainly do not warrant the grant of certiorari under Rule 10.[2]

Likewise, the Petition asserts that the Tenth Circuit misapplied properly stated legal rules. Petitioners complain about the Tenth Circuit's "literal approach" to the FSIA (Pet. 17-27), without acknowledging that, in interpreting the FSIA (as with any statute), this Court "begin[s], as always, with the text of the statute." *Permanent Mission of India to the United Nations v. City of New York*, 127 S. Ct. 2352, 2356 (2007) (citation

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[2] The District Court did not "disregard" any "determinative" facts – the "disregarded" facts that Petitioners cite (Pet. 9) had nothing to do with this case.

omitted). Petitioners then survey the varying circuits' pre-*Nelson* analyses of the first clause of 28 U.S.C. § 1605(a)(2) and argue that, while the Tenth Circuit correctly cited the applicable rule from *Nelson*, it misapplied that rule. (Pet. 20-21). Again, even assuming that Petitioners' charge were correct, which it is not, the mere misapplication of a properly stated rule of law does not justify the grant of certiorari. Rule 10.

Petitioners in the end offer nothing beyond their unhappiness with the Tenth Circuit's ruling. But a litigant's mere displeasure falls far short of the "compelling reasons" required to justify the grant of certiorari.

B. The Four-Way Circuit Split Touted by Petitioners Is Illusory and, Even If It Exists, By Petitioners' Own Admission Predates *Nelson* and Is of No Meaningful Import to FSIA Jurisprudence.

Petitioners assert a four-way conflict among the circuits in interpreting the first clause of the commercial-activity exception, 28 U.S.C. § 1605(a)(2). Specifically, they argue that the Tenth Circuit improperly held that the wrongful act by the foreign state has to have occurred in the United States in order to satisfy the first clause. (Pet. 20). But no such conflict exists, and their position is based in large part on their own misinterpretation of the applicable law, and of the facts as found and affirmed by the lower courts.

1. The Petition asserts repeatedly and prominently that the Tenth Circuit decision is part of a "widening

conflict" among the circuits (Pet. i) (Questions Presented), and "**completes a four-way circuit split**," (Pet. 17) (point heading) (bold in original). But elsewhere it admits that the purported conflict in fact predates *Nelson*. (Pet. 19). The cases on which Petitioners base their claim of circuit conflict clearly bear that out. (Pet. 17-21, *citing*, *inter alia*, *Ministry of Supply, Cairo v. Universe Tankships, Inc.*, 708 F.2d 80 (2d Cir. 1983), *Sugarman v. Aeromexico, Inc.*, 626 F.2d 270 (3d Cir. 1980), *Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigation*, 730 F.2d 195 (5th Cir. 1984) and *Gilson v. Republic of Ireland*, 682 F.2d 1022, 1027 n.22 (D.C. Cir. 1982)). Even if the differences among those decisions amounted to genuine distinctions in interpreting the first clause of 28 U.S.C. § 1605(a)(2), which they do not, Petitioners offer no explanation of how another ruling from this Court will resolve a circuit conflict that *Nelson* apparently failed to resolve.

2. In point of fact, the Tenth Circuit faithfully applied *Nelson*. Contrary to Petitioners' assertion that the question is whether the Bank's entire "course of conduct . . . cumulatively had substantial contact with the United States," (Pet. 23), *Nelson* set the analytical starting point as "identifying the *particular* conduct on which the [plaintiffs'] action is 'based' for purposes of the Act." 507 U.S. at 356-57 (citations omitted) (emphasis added). *Nelson* went on to hold that, in determining which conduct forms the basis for plaintiff's claim, the statutory phrase "based upon" "is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." *Id.* at 357 (citations omitted).

The Tenth Circuit conducted that exact analysis in finding that none of Petitioners' claims are "based upon" the Bank's commercial activity in the United States for purposes of the first clause. (Opinion, Pet. App. 24a-31a). Petitioners try to evade that language by claiming that it "addressed only whether the activity was sovereign," (Pet. 23), but that misreads *Nelson*. Though *Nelson* ultimately found that the specific conduct by Saudi Arabia on which plaintiff's claim was based – exercise of its police power through which it allegedly tortured plaintiff – was sovereign, and not commercial, nothing in *Nelson* restricts that language in the manner Petitioners assert. To the contrary, this Court specifically made those statements in the context of defining the term "commercial activity" as used in the FSIA:

> If [28 U.S.C. § 1603(d)] is a definition, it is one distinguished only by its diffidence; as we observed in our most recent case on the subject, it "leaves the critical term 'commercial' largely undefined. . . . We do not, however, have the option to throw up our hands. The term has to be given some interpretation, and congressional diffidence necessarily results in judicial responsibility to determine what a "commercial activity" is for purposes of the Act. [507 U.S. at 358-59 (internal citations omitted)].

Tellingly, Petitioners criticize the Tenth Circuit for failing to follow the Fourth Circuit's analysis in *Nelson*, (Pet. 23-25) – a ruling that this Court reversed. 507 U.S. at 363. They also cite other circuits that, like the Tenth

Circuit, have faithfully applied *Nelson*. (Pet. 23-25, *citing Globe Nuclear Servs. & Supply, Ltd. v. AO Techsnabexport*, 376 F.3d 282 (4th Cir. 2004) and *Kensington Int'l, Ltd. v. Itoua*, 505 F.3d 147 (2d Cir. 2007)). This demonstrates plainly that *Nelson* is being properly applied by the lower courts, including the Tenth Circuit, and does not need to be revisited.

3. To the extent Petitioners assert a circuit conflict between the Tenth Circuit's ruling and other post-*Nelson* cases, their assertion is internally inconsistent and incorrect. Petitioners cite the Tenth Circuit's Opinion and the Second Circuit's ruling in *Kensington Int'l* as examples of instances in which courts "routinely depart from the language and intent of the Act. . . ." (Pet. 15). Elsewhere, however, they portray the Tenth Circuit's ruling as "the first time that any court of appeals has applied a 'literal' interpretation to clause one of the exception, to deny jurisdiction over the action of a U.S. citizen [*sic*] based upon commercial activity of a foreign state which had substantial contact with the United States." (Pet. 12). Petitioners cannot have it both ways, and in arguing that certiorari is warranted both because the Tenth Circuit applied the first clause literally, and because it departed from the statutory language, Petitioners' position is fundamentally inconsistent.

It also is incorrect, since there is no post-*Nelson* circuit split on any issue germane to the one presented by this case. The various cases that Petitioners cite as

establishing a circuit conflict either are factually inapposite or actually support the Bank:

- In *Theo. H. Davies & Co., Ltd. v. Republic of Marshall Islands*, 174 F.3d 969, 971, 973-74 (9th Cir. 1998) (Pet. 20), the Ninth Circuit held that the foreign state engaged in commercial activity in the United States by entering into an agreement in the United States; the alleged wrongful act was the breach of that agreement. Here, in contrast, the Tenth Circuit found that certain actions of the Bank were taken *in China*, not in the United States, and that the Bank's lone action that could be deemed to constitute carrying on commercial activity here – its operation of a branch in New York City – was not an activity upon which Petitioners' claims were based. (Opinion, Pet. App. 27a-31a). *Theo. H. Davies & Co.* does not conflict with the Tenth Circuit's ruling.

- Petitioners portray *Kensington Int'l* as one of four variants among the circuits in interpreting *Nelson*, (Pet. 19-21), but it in fact constitutes a straightforward application of *Nelson*. In the passage on which Petitioners rely (Pet. 20), the Second Circuit merely held that in construing whether plaintiff's action is "based upon" the foreign state's commercial activity carried on in the United States, something more than "but

for" causation is required – the "degree of closeness" between the commercial activity and the gravamen of plaintiff's complaint must be considered. 505 F.3d at 155, *citing Transatlantic Shiffahrtskontor GmbH v. Shanghai Foreign Trade Corp.*, 204 F.3d 384, 390 (2d Cir. 2000). Rejecting plaintiff's argument that it met its burden under the first clause because oil was shipped to the United States and payments made to a New York bank, the Second Circuit noted that those activities, while concededly in the United States, were not the basis of plaintiff's claim. Rather, the gravamen of plaintiff's claim was that the foreign state tried to thwart plaintiff's ability to collect a debt by entering into a prepayment agreement with a bank, which was not commercial activity in the United States. The same holds true here: the Bank concedes that its maintenance of a New York branch constitutes commercial activity, but that activity has nothing to do with the gravamen of Petitioners' claims. *Kensington Int'l* supports the Bank.

- In *Kirkham v. Societe Air France*, 429 F.3d 288, 292 (D.C. Cir. 2005) (Pet. 26), defendant airline sold a plane ticket to plaintiff in the United States. Applying *Nelson*, the D.C. Circuit held that because that commercial activity was necessary to

plaintiff's tort claim, the claim was "based upon" that commercial activity, and jurisdiction was appropriate. *Id.* Likewise, in *Globe Nuclear Servs.*, the Fourth Circuit followed *Nelson* in "precisely identify[ing] the conduct by [the foreign state] upon which [plaintiff's] lawsuit is based." 376 F.3d at 285. The court determined that plaintiff's claim was based upon the foreign state's entry into a contract to supply plaintiff with uranium hexafluoride and the foreign state's subsequent repudiation of that contract: the contract called for the foreign state to transfer title to uranium hexafluoride that was located within the United States, and the foreign state served its notice of termination of the contract upon the plaintiff in Maryland. Therefore, the foreign state's conduct had "substantial contact" with the United States and fit within the first clause of the commercial activity exception.

Both *Kirkham* and *Globe Nuclear Servs.* show that, notwithstanding Petitioners' alarmism, court decisions under the FSIA are not depriving citizens of "normal legal redress against foreign states," contrary to the Act's purposes. (Pet. 34 (*citing* House hearings on FSIA)). To the contrary, the courts are faithfully applying the Act, and allowing suits to proceed where the specific conduct on which the

gravamen of plaintiff's claim is based meets the statutory test. Here, it plainly does not.

- Finally, *Voest-Alpine Trading USA Corp. v. Bank of China*, 142 F.3d 887 (5th Cir. 1998) (Pet. 21), is inapposite because the Fifth Circuit in that case never reached the issue of whether the Bank's conduct satisfied the first clause. Petitioners' argument that the Fifth Circuit "nearly" applied a "literal standard" in contravention of *Nelson*'s teachings, is misplaced.

C. The Tenth Circuit's Ruling Is a Correct Interpretation of the Statutory Text and This Court's Precedents.

The FSIA "provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989). Under the FSIA, a foreign state is presumptively immune from the jurisdiction of the United States courts, and unless a specified exception applies, a Federal court lacks subject-matter jurisdiction over a claim against it. *Nelson*, 507 U.S. at 355; *see also Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983); 28 U.S.C. § 1604. Petitioners argued that all three clauses of the commercial activity exception provide jurisdiction, but the Tenth Circuit held that, with one exception, they did not. (Opinion, Pet. App. 1a). Petitioners fail to demonstrate any error in that ruling.

Petitioners err in arguing that the lower courts ignored the "substantial contact" component of 28 U.S.C. § 1603(e), which defines "commercial activity carried on in the United States by a foreign state" as "commercial activity carried on by such state and having substantial contact with the United States." Petitioners assert that the "'substantial contact' standard contained in 28 U.S.C. § 1603(e) has never been interpreted by this Court," and that as a result, "no consistent test has emerged for applying this fundamental standard." (Pet. 14). But they fail to note that this case would not give this Court a vehicle with which to interpret that statutory provision.

Consistent with both the plain statutory language and common sense, the Tenth Circuit found that nearly all of the acts complained of by Petitioners – the Bank's provision of the May 14, 1996 letter to Yue in China and its subsequent receipt of the two Orient Mineral documents in China; its wiring of funds through its New York branch or its transfer of $400,000 in Wil-Bao funds to the bank in Utah – did not involve commercial activity in the United States upon which Petitioners' claims were based. (Opinion, Pet. App. 27a-31a). As such, the "substantial contact" component of 28 U.S.C. § 1603(e) is irrelevant: because a claim must be "*based upon* [1] commercial activity carried on in the United States by the foreign state" (emphasis added), which in turn requires *both* "commercial activity carried on by such state" and that that activity have a "substantial contact" with the United States, the fact that Petitioners' claims are based upon commercial activity in China is dispositive. No amount of judicial parsing or

interpretation of the "substantial contact" clause of 28 U.S.C. § 1603(e) would change the outcome in any way.[3]

The Tenth Circuit also correctly held that Petitioners cannot satisfy the second and third clauses of the commercial activity exception, which extend jurisdiction based upon "an act performed in the United States in connection with commercial activity of the foreign state elsewhere" or an action outside the United States "in connection with a commercial activity of the foreign state elsewhere [which] causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2). (Pet. App. 32a-42a). As the court properly noted, Petitioners did not satisfy this requirement because their case was not based upon any act of the Bank in the United States. (*Id.*). At most, the Bank's transmission of the $400,000 from China to Utah was "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act cause[d] a direct effect in the United States," thereby satisfying the third clause – but Petitioners' other allegations do not meet the statutory test.

Petitioners would have the FSIA analysis begin and end with "opening the courthouse doors" to parties such

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[3] Contrary to Petitioners' claim that the Bank breached its contract with them by not placing a restriction on the Wil-Bao account, (Pet. 24), the District Court concluded that there was no $25,000 restriction placed on the Wil-Bao account and that therefore, the Bank did not breach its contract with Wil-Bao. (FF/CL, 30a-32a). The District Court also found that the Bank did not breach its contract with Orient. (*Id.*, 29a-30a). The Tenth Circuit affirmed these determinations. (Opinion, Pet. App. 46a).

as themselves. (Pet. 31). Instead, the analysis should focus on the text of the 28 U.S.C. § 1605(a)(2) as it applies to the detailed factual findings made by the District Court. The Tenth Circuit correctly found that, with one exception, the statutory text does not provide jurisdiction over Petitioners' claims against the Bank.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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