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 Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION WITH SUPPLEMENTAL APPENDIX

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PETITIONERS' REPLY TO BRIEF IN OPPOSITION

In their petition, Petitioners demonstrated that the decision below: (1) widens a conflict under clause one of the Foreign Sovereign Immunities Act ("FSIA") over the term "substantial contact" left unresolved in *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993) (Pet. 16-27); (2) conflicts, as to clause two, with decisions holding its view of instruments placed in U.S. commerce "entirely anomalous" (Pet. 27-29); (3) conflicts, as to clause three, with decisions of the Court and Second Circuit in limiting jurisdiction to part of a transaction or occurrence, and splitting claims between U.S. courts and China (Pet. 29-32); (4) presents important and recurring questions, such as the meaning of "substantial contact," derived from *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220 (1957) (Pet. 33-37); and (5) sanctions "grossly unfair" departures that call for this Court's supervision. (Pet. 37-38.)

Respondent does not dispute any of these points,[1] except the first concerning the clause-one conflict, that it attempts to minimize through a novel argument that *Nelson* removed any conflict over a question it did not reach. Instead, in its opposition, Respondent addresses principally a supposed lack of finality, and then the merits, of the decision below, but fails to advance any reason why that decision ought not to be reviewed by this Court.

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[1] *See* Opp. 24 (no discussion of clause two and three conflicts, or of cramped view of clause three to limit jurisdiction to split claims); Opp. 23-25 (no discussion of meaning of "substantial contact" or *McGee*, or of district court's limiting discovery to third of five transfers, yet subjecting Petitioners to trial on all).

I. RESPONDENT'S CONTENTION THAT THE DECISION BELOW IS NOT FINAL IS FRIVOLOUS

Respondent resists review by miscasting the decision below as "undeniably interlocutory." (Opp. 11-13). The Tenth Circuit rendered a final judgment on jurisdiction and the merits, remanding only a "claim for attorney's fees." (Pet. App. 57a.) As this Court has held, "we think it indisputable that a claim for attorney's fees is not part of the merits of the action to which the fees pertain." *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 200 (1988). "Courts and litigants are best served by a bright-line rule, which accords with traditional understanding, that a decision on the merits is a "final decision" for purposes of § 1291, whether or not there remains for adjudication a request for attorney's fees attributable to the case." *Id.* at 202-03.[2]

II. RESPONDENT'S CONTENTION THAT *NELSON'S* DEFINING OF "COMMERCIAL ACTIVITY" IS PROPERLY USED BY THE TENTH AND OTHER CIRCUITS TO DEFINE "SUBSTANTIAL CONTACT" UNDERSCORES A NEED FOR REVIEW

Respondent otherwise opposes certiorari by contending this Court's decision fifteen years ago in *Nelson* makes it unnecessary to address the all too

[2] The Court has also used a "'finality' test" for 28 U.S.C. § 1254. *City of New Orleans v. Dukes*, 427 U.S. 297, 301-02 (1976). Respondent's cases involve remand of a central issue. Even in such cases, this Court has granted review "to resolve a Circuit conflict. . . ." *INS v. Cardozo-Fonseca*, 480 U.S. 421, 426 (1987).

evident circuit conflicts. *Nelson* expressly did not decide conflicts that were then apparent and have now caused increased divergence. Just as important, the Tenth Circuit and other courts have misapplied *Nelson* as bearing on an issue that decision never reached, creating *more* conflict and confusion, not less. This situation only reinforces the need for this Court to issue a writ of certiorari in this case.

1. Respondent asserts that this Court, having in *Nelson* construed the term "commercial activity" in deciding the *nature* of activity under 28 U.S.C. §§ 1605(a)(2) and 1603(d), need not engage in "judicial parsing or interpretation" of the phrases "commercial activity carried on in the United States" and "substantial contact" under §§ 1605(a)(2) and 1603(e) in deciding the *jurisdictional nexus* of that activity. (Opp. 17, 23-24). This Court, however, speaking through Justice Souter, expressly did not decide the jurisdictional issue: "Because we conclude that the suit is not based upon any *commercial activity*, we need not reach the issue of *substantial contact* with the United States." 507 U.S. at 356 (emphasis added). Yet Respondent claims *Nelson* supplies the "applicable rule," and that the decision below involves at most "misapplication of a properly stated rule of law." (Opp. 15, 18). There is no "properly stated rule," as this Court never addressed the issue.

Respondent similarly asserts Petitioners "try to evade" *Nelson*'s "analytical starting point," of "'identifying the *particular* conduct on which the [plaintiffs'] action is 'based','" namely the "'elements of a claim,'" (Opp. 16-17). While such analysis may ensure the *nature* of each act is not sovereign – a

"starting point" inapplicable to this case since the commercial nature of Respondent's acts is undisputed – this case requires a jurisdictional analysis under clause one that considers the scope of Respondent's conduct and its "substantial contact" with the United States. Respondent's argument ignores *Nelson's* limited holding, and Justice Stevens' caution: "These two conditions should be separately analyzed because they serve different purposes." 507 U.S. at 377 & n.2 (Stevens, J., dissenting). It also overlooks guidance in concurring and dissenting opinions which did address "substantial contact."[3] It likewise ignores *McGee*, from which Congress derived the standard. (Pet. 35-37.) *McGee* involved only three contacts, none considered elements of a claim, holding instead: "It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State." 355 U.S. at 223.

2. Respondent does not deny a clause-one conflict was identified by the courts of appeals themselves as warranting this Court's resolution, (Pet. 14, 19), but contends any conflict "[p]re-dates *Nelson*" and is "illusory." (Opp. 15.) That is not true.

[3] Justice White recognized that activity can *either* be "carried on in the United States," or as defined, have "substantial contact" through a "sufficient nexus" or "connection to this country." 507 U.S. at 370 (White, J., concurring). Justice Kennedy applied a similar analysis, noting the activities had "more than substantial contact with the United States; most of them were 'carried on in the United States.'" *Id.* at 372-73 (Kennedy, J., dissenting). Justice Stevens concluded: "Whether the first clause . . . authorizes 'general' . . . [or] only 'specific' jurisdiction over . . . claims that have a substantial contact with the United States, petitioners' contacts are, in my view, plainly sufficient," *id.* at 379 (Stevens, J., dissenting).

While this Court tried in *Nelson* to set out a general guide to interpretation of the FSIA and clause one, that effort has not reduced the divergence over clause one's jurisdictional scope. The same conflicts remain, and have become exacerbated since.

Respondent also does not dispute the Tenth Circuit's precedent-setting approach to clause one was "literal," (Opp. 14, 18),[4] or that the Ninth Circuit applied a "doing business" standard in *Theo. H. Davies & Co., Ltd. v. Republic of Marshall Islands*, 174 F.3d 969 (9th Cir. 1998),[5] completing, among the circuits, a four-way doctrinal split left undecided in *Nelson*. The Second and D.C. Circuits applied a "tighter nexus" standard before *Nelson*, (Pet. 19-20, 36 n.3), and after, followed by the Eighth Circuit. *See Kensington Int'l, Ltd. v. Itoua*, 505 F.3d 147, 155 (2d Cir. 2007)("'greater than common law causation'"); *BP Chemicals Ltd. v. Jiangsu SOPO Corp.*, 420 F.3d 810, 818 n.6 (8th Cir. 2005)("nexus requirements . . .

[4] Respondent attempts to justify the approach as consistent with rules of construction. But the approach has been rejected by other circuits precisely because it does not follow the cardinal rule of construction that *all* of the statute be considered, as Justice Thomas reminds: "begin . . . 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). The Tenth Circuit focused on only part of the text: "commercial activity carried on in the United States," § 1605(a)(2), without considering the rest, § 1603(e), which defines that phrase to "mean[] commercial activity carried on by such state and having substantial contact with the United States."

[5] Contrary to Respondent's argument, *Theo. H. Davies & Co.* is in direct conflict, finding jurisdiction although the breach, by "refus[al] to pay the balance," occurred in the Marshall Islands. 174 F.3d at 972. Here, the Tenth Circuit denied jurisdiction, literally requiring an actionable wrong in the United States.

probably exceed" minimum contacts); *In re Minister Papandreou*, 139 F.3d 247, 253 (D.C. Cir. 1998). The D.C. Circuit reaffirmed its *pre-Nelson* holding that "substantial contact" "requires more than minimum contacts," *id.* at 253, still overlooking the term comes from the "substantial connection" equivalent to minimum contacts set out in *McGee.* Yet it is one of few courts noting that *Nelson* left the "'***substantial contact' issue open.***" *Id.* (emphasis added).

Other circuits still apply a fourth "nexus" approach, (Pet. 18-19), as in *Globe Nuclear Servs. & Supply, Ltd. v. AO Techsnabexport*, 376 F.3d 282 (4th Cir. 2004). The Fourth Circuit was not "reversed" by *Nelson* as Respondent mistakenly states, and is not "like the Tenth Circuit" (Opp. 17-18), but in square conflict. The Fourth Circuit applied *Nelson's* starting point to determine the *nature* of the activity, 376 F.3d at 286-91, after which it applied jurisdictional principles in finding that from "these ties, it is clear that [defendant's] conduct has 'substantial contact' with the United States," *id.* at 291-92.

Those post-*Nelson* cases that apply *Nelson's* "based-on elements" analysis for "commercial activity" to whether the activity had "substantial contact" – yet a fifth approach – are in conflict with the Fourth and Sixth Circuits. *See Gould, Inc. v. Mitsui Mining & Smelting Co.*, 947 F.2d 218, 221 (6th Cir. 1991)("'commercial activity' is the jurisdictional element" not "the elements of the cause of action," finding activity "involved substantial contact with the United States"). They also conflict with each other, spawning further inconsistency. For example, the Eighth Circuit, in finding jurisdiction, ruled

"only one element" "must concern commercial activity conducted in the United States." *BP Chemicals,* 420 F.3d at 816. The D.C. Circuit has more broadly held: "we think it more consistent with *Nelson* and the FSIA to read 'elements' as referring to *each fact necessary* to establish a claim." *Kirkham v. Air France,* 429 F.3d 288, 292 (D.C. Cir. 2005) (emphasis in original). In contrast, the Second Circuit, in denying jurisdiction, holds more narrowly that "the 'based upon' element requires a 'degree of closeness . . . considerably greater than common law causation requirements.'" *Kensington,* 505 F.3d at 155. Remarkably, besides relying upon *Nelson* for a jurisdictional analysis this Court never made, decisions like *Kirkham* and *Kensington* never mention, let alone apply, the "substantial contact" standard. Thus the circuits, without this Court's guidance, are adding yet more "gloss" and departing even further from the language and purpose of the statute. Meanwhile, the Court's decision in *McGee* remains hidden in plain view, for over forty years.

Respondent questions "how another ruling of this Court will resolve a circuit conflict that *Nelson* apparently failed to resolve." (Opp. 16.) Absent from its brief is any explanation how these conflicts could be resolved without this Court's ruling.

3. Respondent's remaining arguments, directed to the merits, are erroneous. While there are factual disputes between the parties,[6] they do

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[6] For example, there is a significant anomaly in conclusions drawn below. In the petition, Petitioners did not assign dates to two bank meetings, (Opp. 5-6), but did inadvertently imply, as they alleged (SAC ¶19, Reply App. 6sa), that the Wil-Bao

not affect the facts needed to resolve any of the three jurisdictional questions presented for review.[7]

Respondent persists in mischaracterizing the single $400,000 transfer as a "claim," (Opp. 8), when it merely was the third of five unauthorized transfers covered by each claim. (Reply App. 8sa-9sa, SAC, ¶¶28-32). The First Amended Complaint (May 25, 2001) and Second Amended Complaint ("SAC") plead, *inter alia*, contract, negligence and fraud "claims," alleging, for example, Respondent breached its contract by: "(a) failing to follow directions given by Preston Jones . . . to establish a $25,000 restricted Wil-Bao USD account, in all cases subject to his approval and control, and (b) failing to take

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resolution was given at the first. After that meeting, on May 27, 1996, the court found key facts the Bank denied: (a) a second meeting occurred on May 29; (b) Jones gave the Bank authorization to transfer $1.215 million from Wil-Bao's account; and (c) the resolution, in Chinese, confirming his sole authority to authorize disbursements over $25,000, was presented "[m]ore likely than not" on May 29, not May 27. (Opp. App. 22a-25a; Pet. App. 11a-12a.) The court indicated that had the resolution been presented on May 27, it would have found the Bank was "alerted to [a] specific need to ascertain the intentions of Mr. Jones concerning the Wil-Bao account through direct communication with Jones," (FF/CL ¶¶ 427, 429, Reply App. 19sa-20sa). The lower courts never explained why presentation on May 29 failed to cause the Bank to ascertain Jones' intentions "directly," while presentation on May 27 would, or why his $1.2 million authorization did not also serve that purpose, if the Bank believed he relinquished control two days before. Both events took place before the first two unauthorized transfers on June 4 and 5, 1996.

[7] Despite Respondent's "alarmism" that Petitioners seek review of the "factual record from the 13-day bench trial," (Opp. 14), Petitioners only seek to have this Court clarify the proper scope of FSIA jurisdiction, and remand for discovery and a new trial.

reasonable safeguards to prevent the unauthorized transfer of funds," (SAC, ¶57, Reply App. 13sa). This contract "claim" incorporated, and encompassed, all five unauthorized transfers, which the courts below were bound to consider as one unified claim, "under [Petitioners'] theory of the case," *Nelson*, 507 U.S. at 357, as well as usual pleading rules.

Respondent also attempts to suggest this case is an unsuitable "vehicle" for review, contending "nearly all of the acts complained of . . . did not involve commercial activity in the United States." (Opp. 23.) This contention invites the same error below, through a repudiated half-literal reading of clause one, which does *not* "'require the act complained of to occur in the United States.'" (Pet. 18-19)(citations omitted). To the extent Respondent contends this action is not based upon activity that had "substantial contact" with the United States, the record is otherwise. The following significant facts and allegations are part of the record below:

a) Bank letter offering to safeguard funds was meant for and received by "the American party" in Nevada (Pet. App. 78a, 102a; Pet. 4, 29 n.2);[8]

b) contract was "created . . . in the United States" as "[t]he district court agreed" (Pet. App. 28a n.18);

[8] Despite Respondent's contentions, (Opp. 4-6), while this letter was "addressed and given to Yue in China," (Pet. App. 39a), it was "addressed" to Yue of "Sino-U.S. Joint Venture Henan Wil-Bao," (Pet. App. 78a), "acting as Wil-Bao's general manager," (Pet. App. 6a), and its assurances were meant for "the American party," (*id.*), as its author admitted. (Pet. App. 102a.)

c) letter induced the American party to wire funds from the United States (*Id.;* Pet. App. 50a-51a & n.29);

d) "Plaintiffs initiated [transfer] of US$ 3 million" "through [branch] in New York" (FF/CL ¶74, Reply App. 19sa);

e) Bank took custody of the funds in New York (*id.*; *cf.* Pet. App. 100a);

f) performance by two transfers through the New York branch to Nevada, authorized by Jones in Tennessee (Pet. App. 13a, 29a; SAC ¶26, Reply App. 7sa-8sa);

g) breaches through five unauthorized transfers, (SAC, ¶¶28-32, Reply App. 8sa-9sa), including the third transfer to Utah through the New York branch (Pet. 12, Pet. App. 100a);

h) omissions to obtain Jones' authority in Tennessee for five unauthorized transfers (Pet. App. 26a n.17).

4. Finally Respondent urges that the analysis "should focus on the text of the [sic] 28 U.S.C. § 1605(a)(2)," as "the 'substantial contact' component of 28 U.S.C. § 1603(e) is irrelevant" herein. (Opp. 23-25.) Such an approach miscasts the statute, and by positing the wrong clause one standard, can only

reach the wrong result, as demonstrated by this case.[9]

The analysis requires focus not just on the text of § 1605(a)(2), but of its definition, § 1603(e), that Respondent would disregard. *See* note 4, *supra*. It also requires concern for statutory purpose, set out in § 1602 ("protect the rights of . . . litigants"), and § 1606 ("the foreign state shall be liable in the same manner and to the same extent as a private individual"). This Court, by Justice Scalia, unanimously affirmed a decision that noted: "We have cautioned that . . . courts must be concerned with Congress' goal of opening the courthouse doors 'to those aggrieved by the commercial acts of a foreign sovereign.'" *Republic of Argentina v. Weltover, Inc.*, 941 F.2d 145, 151 (2d Cir.), *aff'd*, 504 U.S. 607 (1992). In *Nelson*, Justices Stevens and White suggested a similar "touchstone":

> If the same activities had been performed by a private business, I have no doubt jurisdiction would be upheld. And that, of course, should be the touchstone of our inquiry; for as Justice White explains, when a foreign nation . . . seeks out the benefits of the private marketplace, it must, like any private party, bear the . . . responsibilities imposed by that marketplace.

507 U.S. at 379 (Stevens, J., dissenting).

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[9] This precedent, unless reviewed by the Court, will lead to further such results, much as the Tenth Circuit relied on *Voest-Alpine Trading USA Corp. v. Bank of China*, 142 F.3d 887, 892 (5th Cir. 1998) throughout the decision below, (Pet. App. 22a-24a, 36a-37a), and no doubt its *dicta* stating the same wrong standard for clause one. (Pet. 21.)

CONCLUSION

None of Respondent's objections casts doubt on this case's appropriateness for resolving widening conflicts, and important and persistent questions of federal law, which directly undermine the purposes of the FSIA. The petition for writ of certiorari should be granted.