No. _____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, under a widening conflict left unresolved in *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), the jurisdiction of United States courts, under the first clause of the "commercial activity" exception of the Foreign Sovereign Immunities Act (FSIA), is to be determined by a (i) "literal" standard as applied for the first time by the Tenth Circuit below, (ii) "tighter nexus" standard as applied by the Second and District of Columbia Circuits, (iii) "nexus" standard as variously applied in other circuits, or (iv) "doing business" standard as applied in the Ninth Circuit.

2. Whether the purely commercial activities of a foreign state, under an agreement formed in the United States to safeguard funds and cross-border banking services carried out in part through its U.S. branch, confer jurisdiction in United States courts under the first, second and third clauses of the FSIA "commercial activity" exception.

3. Whether the jurisdiction of United States courts over an "action," "transaction or occurrence" may properly be limited to a single "act," and a U.S. citizen required to split claims for discovery and trial while directed to litigate the rest of its split claims abroad, under the third clause of the FSIA "commercial activity" exception, whose very purpose was to ensure U.S. citizens access to their courts against foreign states acting as private players in the marketplace.

RULE 14.1(b) STATEMENT

The following entities were parties before the United States Court of Appeals for the Tenth Circuit:

Plaintiffs-Appellants-Cross-Appellees and Petitioners Orient Mineral Company ("Orient") and Wil-Bao Mineral Co., Ltd. ("Wil-Bao")

Defendant-Appellee-Cross-Appellant Bank of China.

Pursuant to this Court's Rule 29.6, petitioners state that Orient, a Nevada corporation, has no corporate parent and that no publicly held corporation owns 10 percent or more of its stock. Wil-Bao, a Chinese joint venture, is owned by Orient and a Chinese municipality-owned entity, and no publicly held corporation owns 10 percent or more of its stock.

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

Orient Mineral Company and Wil-Bao Mineral Co., Ltd. respectfully petition for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1a-58a) is reported at 506 F.3d 980 (10th Cir. 2007). Its prior opinion vacating the denial of dismissal (App. 107a-113a) is available at 2000 U.S. App. LEXIS 31764 (10th Cir. Dec. 12, 2000). Its opinion denying mandamus (App. 104a-106a) is unreported. The opinion of the District Court (App. __a-, attached separately in full), is unreported, as is its original vacated opinion (App. 114a-133a).

JURISDICTION

The Tenth Circuit issued its opinion and entered judgment on October 24, 2007. This petition is timely filed under 28 U.S.C. § 2101(c) and Supreme Court Rules 13.1 and 13.5; time was extended for thirty days by the Honorable Stephen Breyer, Circuit Justice for the Tenth Circuit. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

STATUTES INVOLVED

The statutory provisions involved in this case, 28 U.S.C. §§ 1330, 1391(f), 1602-1604, 1605(a)(2), 1606-1607, of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1332(a)(4), 1391(f), 1441(d), 1602-1611 ("FSIA"), are reproduced at App. 134a-14-a.

The relevant "commercial activity" exception of the FSIA, codified at 28 U.S.C. § 1605(a)(2), provides: "(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . (2) in which the action is based upon [1] a commercial activity carried on in the United States by the foreign state; or [2] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [3] upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States. . . ."

The relevant definitions, codified at 28 U.S.C. § 1603(d) and (e), provide: "(d) A 'commercial activity' means either a regular course of commercial conduct or a particular commercial transaction or act"; and (e) A 'commercial activity carried on in the United States by a foreign state' means commercial activity carried on by such state and having substantial contact with the United States."

The relevant provisions within the interconnected sections of the FSIA governing subject matter jurisdiction, 28 U.S.C. § 1330(a), personal jurisdiction,

28 U.S.C. § 1330(b), and sovereign immunity, 28 U.S.C. §§ 1604, 1605-1607, extend personal jurisdiction "to any claim for relief . . . arising out of any transaction or occurrence enumerated in sections 1605 – 1607 of this title," 28 U.S.C. § 1330(c), and "to any counterclaim—(a) for which a foreign state would not be entitled to immunity under section 1605 . . ., or (b) arising out of the transaction or occurrence that is the subject matter of the claim . . . ." 28 U.S.C. § 1607(a),(b).

The relevant declarations of statutory purpose state:

> The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from jurisdiction of foreign courts insofar as their commercial activities are concerned . . . . Claims of foreign states to immunity should henceforth be decided by courts of the United States . . . in conformity with the principles set forth in this chapter.

28 U.S.C. § 1602.

> As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to

> the same extent as a private individual under like circumstances. . . .

28 U.S.C. § 1606.

STATEMENT OF THE CASE

Petitioner, Orient Mineral Company ("Orient"), a Nevada corporation, filed this case against Bank of China ("BOC"), a commercial bank owned by the People's Republic of China, to recover for breach of an agreement, formed in the United States, to safeguard Orient's investment funds in a Chinese joint venture, through BOC's failure to set and observe a $25,000 restriction on the joint venture's account, and allowing a rapid depletion of the funds through unauthorized transfers totaling $1.8 million, including a $400,000 transfer to Utah through BOC's branch in New York. The suit was later joined by the Chinese joint venture, Petitioner Wil-Bao Mineral Co., Ltd., a gold mining joint venture in China, formed by Orient and Jiaocun Gold Company, a municipality-owned entity of Jiaocun Town, Lingbao, China.

By letter of April 7, 1996, BOC represented that it was capable of administering the funds of the Wil-Bao joint venture, dollar exchange, and remittances for equipment purchases and profits. Before funding the joint venture, Orient sought further assurances that its funds would be safeguarded, which BOC provided by formal letter of May 14, 1996 received by Orient in Nevada, stating: "our bank will be responsible for safekeeping these funds . . . so that the funds can be used in the joint venture in accord with arrangements

made by the representative of the American party." App. 78a-79a. In reliance, Orient wired $3 million to BOC's New York branch, for transmittal to its branch in Lingbao, China. Orient by board resolution designated a special director, Preston Jones in Tennessee, with "sole" authority for disbursing its funds and arranging their use in the joint venture. Jones and other Orient representatives submitted the resolution to BOC officials at a meeting in China, which BOC translated. Jones also submitted a resolution of Wil-Bao's board, in Chinese and English, which confirmed he also had sole authority for Wil-Bao to approve disbursements over $25,000. Orient's agent in China, Yue Xiaocun ("Yue"), was Wil-Bao's general manager and an Orient shareholder and director who assisted as interpreter. Yue was to have signing authority on the Wil-Bao dollar account, subject to the $25,000 limit of its board. Instructing BOC through the documents and Yue, and understanding this control to be in place, Jones signed a transfer slip releasing Orient's $3 million into the Wil-Bao account. Two days later, Jones gave BOC his written authorization to transfer $1.215 million from Wil-Bao's account, for purchase of a mine and mill, and returned to the United States. Jones' sole reason for going to China was to assure the creation of a control account, subject to his authorization thereafter from Tennessee.

Within weeks of account opening, Yue embezzled virtually all funds remaining in the account by five transfers over $25,000 without Jones' authorization, including a $400,000 transfer to BOC's New York branch, which forwarded the funds to Yue's ex-wife's account in Utah. Yue was convicted in China.

A. Proceedings in the District Court

In 1998, Orient brought suit in the District of Utah asserting breach of contract, fraud, negligent misrepresentation, negligence and conspiracy against BOC, based on its failure to safeguard the funds and follow the directions of Jones. Orient alleged BOC's failures allowed Yue to abscond with $1.8 million, and caused the loss of gold mines valued at over $4 million. BOC moved to dismiss, asserting immunity from suit under the Foreign Sovereign Immunities Act (FSIA). BOC claimed immunity, notwithstanding that it extended a formal offer and representation intended for Orient in the United States that it would safeguard funds and follow the directions of Orient's American representative, that its offer was accepted and representation relied upon in the United States by Orient's wiring of the funds, thus forming a contract in the United States, that it took custody of the funds at its New York branch, that it routed through that branch two remittances to Nevada and an unauthorized transfer to Utah, and that it omitted to obtain authorization from Jones in Tennessee for the Utah transfer and four transfers over $25,000 in China, all comprising commercial activity carried on in and having substantial contact with the United States.

In 1999, the court denied BOC's motion, finding probable jurisdiction under the third clause of the FSIA "commercial activity" exception, 28 U.S.C. § 1605(a)(2), but only as to the Utah transfer, not recognizing that this transfer triggered jurisdiction over the action, or addressing the first or second clause. App. 124a. The court found "the 'act by which

the defendant purposefully avails itself of . . . this forum, if any, must be [BOC's] transfer of $400,000 to Zions Bank," and personal jurisdiction "based upon its 'contacts' represented by the $400,000 transfer." App. 126a-128a. In 2000, on interlocutory review sought by BOC, the Tenth Circuit vacated the finding of jurisdiction "over the controversy," for resolution of whether service was effected. App. 109a, 113a. On remand, service was perfected, and Wil-Bao added by amended complaint. BOC filed an answer, but objected to discovery.

In May, 2002, the court ordered abbreviated discovery as to the Nevada remittances and unauthorized Utah transfer. When Petitioners expressed concern over being forced "to pretrial and then trial without having discovery on the merits of the other transfers," the court responded: "If you want to sue them on transfers in China go to China. We'll deal with the 3 [Nevada and Utah transfers], that's what we'll deal with at this point as far as discovery goes." App. 82a-83a.

At pretrial in February, 2003, the court again declined jurisdiction over the other transfers, failing still to address clauses one and two of Section 1605(a)(2).[1] The court then summarily dismissed

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[1] The relevant colloquy proceeded as follows:

> THE COURT: [U]sing your theory. . .they didn't keep your funds safe. . . . They didn't do what they promised you they'd do but that doesn't necessarily equate to fraud. . . .
> MR. LUDWIG: Well I tried to argue that evidence in support

Orient on finding BOC did what Jones directed by processing a transfer slip releasing Orient's $3 million into the Wil-Bao account, without the $25,000 restriction, while acknowledging "there may be some question as to whether [BOC] did what Jones said." App. 93a-96a. Petitioners' motion to reconsider, or certify for interlocutory review of the court's jurisdiction and premature fact-finding in advance of hearing the evidence, was denied.

Petitioners sought mandamus, asking the Tenth Circuit to compel the district judge to exercise

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of the fraud theory and the court refused to hear that evidence and said that the [other transfers] are not at issue[,] it's only the $400,000 transfer. . . .
THE COURT: [I]f you want to sue them in China have at it. We're dealing with the impact here. . . .
MR. LUDWIG: . . . clearly that changes the complexion of the case not only in a damages sense but apparently in the court's view as to what evidence is relevant and admissible to support our claims.
. . .
MR. LUDWIG: . . . [Plaintiffs sued in the U.S.] . . . and we think we're supported in that under the FSIA and applicable case law. Is the court ruling that we may recover no more than the $400,000 transfer. . . ?
[THE COURT]: Well that's the one where there's the impact.
MR. LUDWIG: Well impact is . . . the third prong only of Section 1605(a)(2) of FSIA. I've argued all 3 prongs. I've also argued that the impact is broader. . . . I think that if the court is going to reduce the scope to $400,000 . . . [i]t might make more sense if that's the court's ruling to permit an interlocutory appeal–
THE COURT: No. We're going to try that case. . . .
[App. 86a-92a]

jurisdiction over the entire action, or direct his recusal. While the petition was pending, the district court reconsidered its prior order, allowing Orient back into the case and Petitioners to seek to recover upon other unauthorized transfers, but only subsequent to the Utah transfer as consequential damages. The Tenth Circuit denied mandamus. App. 104a-105a.

In April 2004 the court conducted a bench trial, denying an advisory jury. On January 26, 2005, the court reentered its same finding as before, that BOC followed Jones' direction by processing the transfer slip, failing to address BOC's admission that it was required to follow Jones' direction in opening the Wil-Bao account. App. 98a. The court reaffirmed jurisdiction over the Utah transfer, App. 73a, and ordered judgment dismissing Petitioners' action as to that transfer on the merits, and the rest for lack of jurisdiction. App. 77a. Nonetheless, the court announced it had decided "the merits of Plaintiffs' claims in their entirety" if reversed on jurisdictional grounds, App. 75a, regardless of discovery.

In its conclusions of law, the court recognized that Petitioners "assert FSIA jurisdiction over this case on all three bases set forth in § 1605(a)(2)," App. 67a-70a, but still failed to address clause one or two. App. 65a-76a. The court's 235-page opinion disregarded determinative undisputed facts, nowhere mentioning BOC's activities in the United States, including that it routed the Utah transfer and two Nevada remittances through its New York branch, through which it took custody of Orient's funds.

Instead, the court limited its evaluation to clause three, as it had in 1999, ruling: "The court was and is persuaded that the Bank's [transfer to Utah] had a 'direct effect in the United States' within the meaning of" the clause. App. 73a. The court rejected the contention that this breach of the contract to safeguard funds extended jurisdiction over the case. App. 74a.

B. The Court of Appeals Proceedings

Four questions were presented to the Tenth Circuit: (1) whether the district court erred in limiting jurisdiction under clause three to a split claim, while ignoring clauses one and two, and limiting discovery and effectively trial to one transfer; (2) whether it precluded a fair trial in denying discovery as to all but one transfer, and making findings on transfers for which discovery was denied; (3) whether based on an incomplete and distorted record, its findings were clearly erroneous; and (4) whether the Court of Appeals should determine facts not in dispute, direct judgment for Petitioners on their contract and negligence claims, and reassign the rest to a new judge, where the court pre-judged the case.

The Tenth Circuit reached only the first question, affirming jurisdiction under the third clause limited to the Utah transfer. App. 42a. Addressing the remaining clauses without a ruling below, the court held clause one not satisfied, viewing in isolation, rather than cumulatively, each of the "several ways in which [Plaintiffs assert] BOC carries on commercial activity in the United States":

> First, the Bank drafted a letter, dated May 14, 1996, promising to keep safe the funds. . . . [Orient] then responded . . . [with] documents . . . to China. This series of events can not be construed as the Bank's carrying on commercial activity in the United States.
>
> . . .
>
> Plaintiffs point to the fact that . . . [the $3 million] wire transfer went through the Bank's New York branch. And when the Bank transferred Wil-Bao funds back . . . as Jones requested, those transfers also may have gone through the New York branch. These connections alone, however, are insufficient . . . because none of Plaintiff's claims . . . are 'based upon' these particular transactions.
>
> Plaintiffs further argue that the Bank's transfer of $400,000 of Wil-Bao's funds to the bank in Utah amounts to . . . commercial activity in the United States. We later conclude that this activity [satisfies the third clause]. However, we do not believe this single act constitutes 'commercial activity carried on in the United States' . . . The Bank acted within China, not the United States.

App. 26a-31a (emphasis in original). The Tenth Circuit, like the district court, nowhere acknowledged that BOC's transfer to Utah was conducted through its New York branch, or that branch's acts in forwarding the funds to Utah, as its senior official testified:

> [T]his fund was transferred through many levels of transaction, we had to go through Sanmenxia. Sanmenxia had to go through Hunan. . . . Then . . . New York had to transfer the fund into bank here that's stated on this voucher . . . not only involve branch had to be responsible for this, Sanmenxia branch, Hunan . . . and the New York branch. . . . [App. 100a]

Addressing clause two, the Tenth Circuit held it unsatisfied for "the same reasons," that the action was not based upon "any action the Bank took in the United States." App. 32a. The court expressly did not reach Petitioners' arguments "that the district court abused its discretion in limiting pretrial discovery to facts relevant only to this Utah transfer." App. 53a.

REASONS FOR GRANTING THE WRIT

This case presents important questions and a widening conflict concerning the proper interpretation of the commercial activity exception of the FSIA. The Tenth Circuit's decision in this case marks 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 based upon commercial activity of a foreign state which had substantial contact with the United States. The decision also marks the first time that any circuit court has held that introducing funds into the United States, *inter alia*, was an act that occurred only abroad, in denying jurisdiction under clauses one and two. This case likewise is the first time that jurisdiction under clause three was limited to a single

act, rather than exercised over the action, transaction or occurrence, as provided. These rulings are not only unprecedented, but wrong. Each conflicts with decisions of the Court and other circuits, misinterprets the FSIA, and defeats congressional intent.

The FSIA was enacted to bring United States practice in line with international law and the "restrictive" theory of sovereign immunity, to provide that when foreign states act in the marketplace as private players, they are so treated in United States courts, ensuring U.S. citizens access to their own courts for redress. *See* 28 U.S.C. § 1602, 1606. Transferring the determination of jurisdictional immunity from the State Department "to serve the interests of justice," the Act was intended to "protect the rights of *both* foreign states and litigants in United States courts." *Id.* § 1602 (emphasis added).

The FSIA also was intended to create a single rule of decision. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 489 (1983) (noting "'importance of developing a uniform body of law in this area,'" quoting H.R. Report No. 1487, 94th Cong., 2nd Sess. 10, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6604, 6631 ("House Report"). The need for uniform application is particularly acute with respect to the commercial activity exception. *See* House Report at 6617 (describing exception as "most important instance in which foreign states are denied immunity.") Despite its importance, the Court has had occasion to address the exception only twice, in *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992) and *Saudi Arabia v. Nelson*, 507 U.S. 349

(1993), analyzing in each case whether the activity was sovereign or commercial, but not the remaining "nexus" component—at least under the most consequential first clause of the exception—of whether that activity, if commercial, had "substantial contact" with the United States. After the critical sovereignty determination, subjecting foreign states engaged in commercial activity "to the same rules of law that apply to private citizens is unlikely to touch very sharply on 'national nerves.'" *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 705 (1976). "[T]he need for merchants 'to have their rights determined in courts' outweighs any injury to foreign policy," to avoid "injury to the private party, who is denied justice . . . and a consequent injury to international trade." *Id.* at 706 n.18.

This "substantial contact" standard, contained in 28 U.S.C. § 1603(e), has never been interpreted by this Court. Thirty years after the FSIA's enactment in 1976, no consistent test has emerged for applying this fundamental standard. The lower courts were anticipating fifteen years ago that *Nelson* would resolve the "thicket of statutory interpretation and gloss," *Tubular Inspectors, Inc. v. Petroleos Mexicanos*, 977 F.2d 180, 184 (5th Cir. 1992), but the Court held: "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. The lack of guidance has led to a four-way circuit split in clause one decisions, creating the recurrent problem that an American litigant's protected right to its own courts varies by circuit.

This Court should grant the petition for three reasons. First, the Tenth Circuit's "literal" approach completes, among the circuits, a four-way doctrinal split to clause one that was left unresolved in *Nelson*.

Second, the untenable analysis and result in this case, and a similarly untenable decision the week before in *Kensington Int'l, Ltd. v. Itoua*, 505 F.3d 147 (2d Cir. 2007), illustrates how far the courts routinely depart from the language and intent of the Act, and the pervasive confusion that exists in determining when clause one confers jurisdiction. This Court's guidance is necessary to overcome the gloss that has obscured the fact that Congress derived the term "substantial contact" from the "substantial connection" equivalent to minimum contacts established in *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957), and intended that the courts apply the principles of *in personam* jurisdiction over nonresidents laid down by this Court, not a new, more stringent standard.

Third, this Court is asked to review the Tenth Circuit's rulings affirming the exercise of jurisdiction narrowed to a single act, and the direction that a U.S. citizen pursue the remnants of its splintered claims in China. These rulings, and the sanctioning of, *inter alia*, a district court's delay of jurisdictional findings until trial, and forcing Petitioners to trial on less than full discovery, which other circuits term "inappropriate" and "grossly unfair," have so departed from the accepted course of proceedings as to call for this Court's supervisory power.

I. THE DECISION BELOW DIRECTLY CONFLICTS WITH THE DECISIONS OF THIS COURT AND OF OTHER CIRCUITS

A. As To Clause One Of 28 U.S.C. § 1605(a)(2), The Tenth Circuit's Holding Conflicts With Decisions Of Other Circuits, Widening A Split This Court Left for Future Resolution In *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993)

Clause one of the FSIA commercial activity exception bestows jurisdiction over foreign states in United States courts in any case "in which the action is based upon a commercial activity carried on in the United States," 28 U.S.C. § 1605(a)(2). The FSIA defines "commercial activity" as "either a regular course of commercial conduct or a particular transaction or act," *id.* § 1603(d), and "commercial activity carried on in the United States" as "commercial activity carried on by such state and having substantial contact with the United States." *Id.* § 1603(e). The legislative history explains that "a commercial activity carried on in the United States by a foreign state would include . . . cases based on commercial transactions performed in whole or in part in the United States," House Report at 6615-16.

1. The Tenth Circuit's Literal Approach, Requiring the Alleged Wrongful Acts to Occur in the United States, Completes a Four-Way Circuit Split

The nexus component of clause one requires that Petitioners' action be based upon "activity carried on in the United States," 28 U.S.C. § 1605(a)(2), that is, activity having "substantial contact with the United States." *Id.* § 1603(e). Clause one expresses no requirement that the wrong occur in the United States; that requirement is expressed in clause two.

The Tenth Circuit held, nonetheless, that clause one requires the wrong complained of to occur in the United States. Addressing BOC's unauthorized transfer through its New York branch to Utah, the Tenth Circuit ruled: "we do not believe this single act constitutes 'commercial activity carried on in the United States' by the Bank under the first clause of § 1605(a)(2). The Bank acted within China, not the United States." App. 31a.

The Second Circuit, by contrast, held in *Ministry of Supply v. Universe Tankships, Inc.* 708 F.2d 80 (2d Cir. 1983), that "the first clause . . . withdraws immunity . . . based not only on acts within . . . but . . . outside the United States if they comprise an integral part of the state's 'regular course of commercial conduct' or 'particular commercial transaction' 'having substantial contact with the United States." *Id.* at 84. The court found the claim based on the "entire course of activity in arranging in the United States for the purchase of the wheat and its transportation to Egypt,

not simply on the acts done (or not done) . . . in . . . unloading at Port Said." *Id.* The court cited the House Report, noting "the 'substantial contact' standard of § 1603(e) can be met by as little activity as 'receiv[ing] financing from'" the United States, *id.* at 84, indicating the standard is determined by the contacts of the activity itself—receiving financing from the United States—not necessarily its breach.

The Third Circuit held in *Sugarman v. Aeromexico, Inc.*, 626 F.2d 270 (3d Cir. 1980): "The only way . . . the first clause . . . could be read not to comprehend Sugarman's claim . . . is to construe the phrase 'in which the action is based upon a commercial activity carried on in . . .' to be a requirement that the particular misconduct . . . take place 'in the United States.' But so limiting a construction is belied by the very next clause, which excepts from immunity an action 'based . . . upon an act performed in the United States in connection with a commercial activity . . . elsewhere.' When Congress intended to limit . . . liability to acts carried out . . . in the United States, the statute makes that limitation clear." *Id.* at 273. The court held only a "nexus" is required between the grievance and the activity "in the United States." *Id. See also Velidor v. L/P/G Benghazi*, 653 F.2d 812, 820 (3d Cir. 1981) ("It is immaterial that the acts constituting breach of contract may have taken place outside the United States").

The Fifth Circuit in *Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigation*, 730 F.2d 195 (5th Cir. 1984), concurred: "We believe that the Third Circuit's nexus

interpretation of the first clause . . . is sound and therefore adopt it as our own. We note first that this clause cannot mean what it literally says. A literal reading of the clause would require the act complained of to occur in the United States; 'the drafters of the FSIA intended no such niggardly construction.'" *Id.* at 202 (citations omitted).

The Tenth Circuit's approach is one of four divergent approaches to clause one that preexisted and was not resolved in *Nelson*. The decision below, *Nelson v. Saudi Arabia,* 923 F.2d 1528 (11th Cir. 1991), reported that "the courts had varying interpretations of the jurisdictional reach of the first clause," *id.* at 1534, citing *Vencedora,* in which the Fifth Circuit summarized the conflict:

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

730 F.2d at 199-200. Of these four variants, the circuits were then divided between the "nexus" approach, and the "bifurcated" or "tighter nexus" approach. The latter, requiring that the "activity in the United States constitutes or directly causes the

occurrence of an element of the cause of action," was applied by the D.C. Circuit in *Gilson v. Republic of Ireland,* 682 F.2d 1022, 1027 n.22 (D.C. Cir. 1982), and the Second Circuit in its more recent decisions in *Kensington*, 505 F.3d at 156 ("'considerably greater than common law causation'") (citation omitted), and *Shapiro v. Republic of Bolivia*, 930 F.2d 1013, 1019 (2d Cir. 1991) ("tighter nexus").

Prior to *Nelson*, no circuit had adopted either the "literal" or the "doing business" approach. *See Vencedora*, 730 F.2d at 200-01. Since *Nelson*, the "doing business" approach has been adopted by the Ninth Circuit in *Theo. H. Davies & Co., Ltd. v. Republic of Marshall Islands*, 174 F.3d 969 (9th Cir. 1998), following dissents by Justice Stevens in *Nelson*, 507 U.S. at 379 & n.3, and Judge Higginbotham in *Vencedora*, 730 F.2d at 204-10.

No circuit court, however, until the Tenth Circuit decision below, had ever adopted the "literal" approach. "This literal reading of the first clause," as summarized in *Vencedora*, "was rejected by the *Gibbons* court, and, on the rare instances where it has been applied by district courts, it has been repudiated by the circuits." 730 F.2d at 200 (citing, *inter alia*, *Gibbons v. Udaras*, 549 F. Supp. 1094 (S.D.N.Y. 1982) and *Sugarman*). Nothing in clause one requires that the acts complained of occur in the United States. As framed in *Nelson,* the "action must be 'based upon' some 'commercial activity' by [a foreign state] that had 'substantial contact' with the United States within the meaning of the Act." 507 U.S. at 356. While the Tenth Circuit recited this passage, App. 23a, it proceeded to

consider only the literal meaning of clause one's language—"activity carried on in the United States", 28 U.S.C. § 1605(a)(2)—without applying its definition as highlighted in *Nelson*—"having substantial contact with the United States" 28 U.S.C. § 1603(e)—in effect reading the definition out of the Act. Its literal construction also renders clause one itself meaningless by limiting its scope to acts otherwise actionable under clause two, as recognized in *Sugarman*.

A Second Circuit decision handed down a week before this case, *Kensington Int'l,* may be read to have likewise applied a literal approach, by its language: "we cannot agree . . . that its action is 'based upon' the alleged acts in the United States," 505 F.3d at 156. Similarly, the Fifth Circuit, having repudiated the literal approach in *Vencedora*, nearly applied it in another decision involving BOC, stating: "The question, then, is whether Bank of China's failure to pay occurred in the United States (first clause)," *Voest-Alpine Trading USA Corp. v. Bank of China*, 142 F.3d 887, 892 (5th Cir. 1998), but found clause three satisfied and did not reach clause one. To pose the wrong question, however, is to reach the wrong result, which is what the Tenth Circuit did in this case, widening a split that should be resolved by this Court.

2. The Tenth Circuit's Approach Conflicts with the Teachings of *Nelson* and Decisions of Other Circuits as to "Substantial Contact"

Believing clause one required that the acts complained of take place in the United States, and not

finding such acts, the Tenth Circuit never considered the scope of BOC's activity and its connection to the United States, electing instead to view each activity or act separately, in conflict with the teachings of *Nelson* and the decisions of other circuits.

Nelson explained: "We begin our analysis by identifying the particular conduct on which the . . . action is 'based,' 507 U.S. at 356-57 (citing *Texas Trading & Milling Corp. v. Federal Rep. of Nigeria*, 647 F.2d 300, 308 (2d Cir. 1981)). *Texas Trading* stated: "our first task is to identify what particular conduct . . . is relevant. Subsection 1603(d) states that 'commercial activity' might consist of either 'a regular course of commercial conduct' or 'a particular commercial transaction or act.' The words "regular course of conduct' seem to authorize courts to cast the net wide, and to identify a broad series of acts as the relevant set of activities. Here, the relevant 'course of conduct' is undoubtedly Nigeria's massive cement purchase program. House Report at 6615. Alternatively, each of its contracts . . . qualify as 'a particular transaction.'" 647 F.2d at 308. By contrast, the Court noted in *Nelson*: "The Nelsons have not, after all, alleged breach of contract, 507 U.S. at 358.

Here, Petitioners did allege a breach of contract to safeguard funds, as the heart of their case, involving as in *Texas Trading* both a "course of conduct"—BOC's cross-border banking activities in this case, and a "particular transaction"—its contract. As the Tenth Circuit otherwise recognized: "all of [plaintiffs'] claims are based on the Bank's alleged breach of a duty, created contractually or otherwise, 1) to keep safe the

funds Orient Mineral wired to its temporary account in BOC's Lingbao sub-branch, and to disburse those funds only according to Jones' directions; and 2) to require Jones' authorization for any withdrawals from Wil-Bao's accounts in an amount greater than $25,000." App. 24a-26a. This duty arose from a contract "created . . . in the United States" as "[t]he district court agreed." App. 28a.

1. Parsing BOC's activity in search of actionable wrongs in the United States, the Tenth Circuit did not determine whether BOC's course of conduct and contract, on which it recognized "all of [plaintiffs'] claims are based," cumulatively had substantial contact with the United States, in conflict with the decision of the Fourth Circuit on which it relied. The Tenth Circuit reasoned: "'Our focus, then, must be on the 'specific claim[s]' . . . and the elements of th[ose] claim[s] that, "if proven would entitle [Plaintiffs] to relief under [their] theory of the case.' *Globe Nuclear Servs. & Supply (GNSS), Ltd. v. AO Techsnabexport*, 376 F.3d 282, 287 (4th Cir. 2004) (quoting *Nelson*).'" App. 24a-25a. The passage quoted, derived from *Nelson*, addressed only whether the activity was sovereign. The Fourth Circuit, after finding commercial activity under *Nelson*, 376 F.3d at 286, then found "substantial contact" in a passage the Tenth Circuit did not cite: "It is readily apparent that Tenex's conduct has "substantial contact with the United States" and thus fits comfortably under this definition. First, GNSS is a United States corporation. Second, under the terms of the Tenex Contract, Tenex transfers to GNSS title to uranium . . . located within the United States. Third, Tenex's notice of

termination" was served in Maryland. *Id.* at 291-92. BOC's conduct fits just as comfortably. Orient is a U.S. corporation. The contract was formed here. BOC took custody of the funds at its New York branch, and remitted funds to Nevada. BOC breached contract and tort duties created here by not placing a restriction on the Wil-Bao account, and transferring funds without Jones' authorizations from Tennessee, including through its New York branch to Utah.

In applying *Nelson's* analysis for determining sovereign activity, in lieu of the substantial contact standard, the Tenth Circuit is not alone. As recently analyzed by the Second Circuit in *Kensington Int'l*: "The Supreme Court has found that the phrase 'based upon' in the first [clause] . . . is 'read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory.' The term 'calls for something more than a mere connection with, or relation to, commercial activity.'" 505 F.3d at 155 (quoting *Nelson*). The Second Circuit applied that test without citing the substantial contact standard. What such decisions overlook is that *Nelson's* language addressing a *connection or relation to commercial activity* concerns whether the activity is sovereign or commercial, not whether that *activity, once found to be commercial, has a connection (or substantial contact) to the United States.* Misreading *Nelson*, such decisions fail to observe Justice Stevens' caution: "These two conditions should be separately analyzed because they serve two different purposes. The former excludes commercial activity from the scope of the foreign sovereign's immunity from suit; the second identifies the contacts with the United States that support the

assertion of jurisdiction over the defendant." 507 U.S. at 377 (Stevens, J., dissenting).

Applying this common misconception of *Nelson*, neither the recent Tenth or Second Circuit decision applied the substantial contact standard, in disregard of the text and purpose of the statute, and in conflict with at least the Fourth and Sixth Circuits. The Fourth Circuit decision post-dated *Nelson*, yet resisted the tendency to apply *Nelson's* element analysis for determining sovereign activity to jurisdictional contacts, a different concept. Prior to *Nelson*, the Sixth Circuit made this point in *Gould , Inc. v. Mitsui Mining & Smelting Co.* (*"Gould II"*), 947 F.2d 218 (6th Cir. 1991): "The 'commercial activity' is the jurisdictional element, just as the presence of the defendant in the forum state is the jurisdictional element in cases raising issues of personal jurisdiction. In personal jurisdiction cases, we do not require the plaintiff to prove the elements of the cause of action stated in order to sustain jurisdiction." *Id.* at 221 (finding activities "involved substantial contact with the United States").

2. Even viewing BOC's activities in isolation rather than cumulatively as required, the Tenth Circuit's holding that the creation of contract and tort duties in the United States does not satisfy clause one, conflicts directly with the decisions of most circuits. The Tenth Circuit stated that BOC's contract to safeguard funds was "created . . . in the United States" as "[t]he district court agreed." Op. at 26, n.18. Nonetheless, the Tenth Circuit held: "Even so, BOC's actions in this regard are insufficient to establish that

BOC was carrying on commercial activity in the United States," concluding that the contract was negotiated and to be performed in China. This ruling places the Tenth Circuit in direct conflict with numerous "safe passage" decisions involving a flight and injury overseas, holding clause one satisfied through a mere ticket purchase in the United States, regardless of negotiation. *See, e.g., Barkanic v. CAAC*, 822 F.2d 11, 13 (2d Cir. 1987) (travel in China ticketed in United States), *Sugarman, supra*; *Santos v. Compagnie Nationale Air France*, 934 F.2d 890, 893 (7th Cir. 1991) (noting House Report "states that the making of 'a single contract' in the United States can support jurisdiction"); *Kirkham v. Air France,* 429 F.3d 288 (D.C. Cir. 2005). The same principle applies no less to a simple contract to safeguard funds.

3. Viewed also improperly in isolation, the Tenth Circuit's ruling that BOC's "single act" of transferring funds to Utah does not satisfy clause one because the act occurred "within China, not the United States," conflicts not only with all other circuits, but also with the Second Circuit decision in *Shapiro,* holding that "transportation to this country" of promissory notes "constituted 'substantial contact'. . ." 930 F.2d at 1019. "We know of no theory that would cause us to read the FSIA to allow a foreign state to issue bearer notes to an intermediary in the United States and then to deny that it was engaged in commercial activity as defined in the FSIA. The very presence of such highly transferable instruments . . . suffices to satisfy the 'substantial contact' requirement of the statute." *Id.*

The ruling also conflicts with decisions of the Second Circuit in *Texas Trading* and of the Fifth Circuit in *Callejo v. Bancomer, S.A.*, 764 F.2d 1101 (5th Cir. 1985), noting: "'Congress in writing the FSIA did not intend to incorporate into modern law every ancient sophistry concerning 'where' an act or omission occurs. Conduct crucial to modern commerce . . . transfers of intangible debits and credits – can take place in several jurisdictions. Outmoded rules placing such activity 'in' one jurisdiction or another are not helpful here.'" *Id.* at 1112 (quoting *Texas Trading*). The ruling further conflicts with decisions of other circuits, recognizing: "It is clear that both the place of sending and place of receipt constitute locations in which conduct takes place when the mails or instrumentalities of interstate commerce are used to transmit communications." *Travis v. Anthes Imperial, Ltd.*, 473 F.2d 515, 526 n.16 (8th Cir. 1973).

B. As To Clause Two, The Tenth Circuit Holding That A Funds Transfer Does Not Constitute "An Act Performed In The United States" Conflicts With Decisions Of Other Circuits

Clause two of the exception provides jurisdiction in any case in which the action is based on "an act performed in the United States in connection with commercial activity of the foreign state elsewhere." 28 U.S.C. § 1605(a)(2). Conduct that confers jurisdiction under clause one often satisfies clause two as well. *Santos*, 934 F.2d at 892.

Petitioners alleged that BOC induced Orient's reliance by means of a formal letter, which caused it to part with funds that were rapidly absconded in China. The action is based upon BOC's "act" of providing those assurances, its "acts" of introducing funds to the United States and of its New York branch in forwarding them to Utah, and its "omissions" to obtain Jones' authorizations from Tennessee for the five transfers over $25,000, all of which were "acts" performed in the United States in connection with its activities in China. Nonetheless, the Tenth Circuit found clause two unsatisfied, citing the "same reasons stated above," that the action was not based upon "any action BOC took in the United States." App. 32a.

With respect to the Utah transfer, this holding conflicts with decisions, *supra*, which hold such a view of instruments placed in U.S. commerce to be "entirely anomalous," and recognize that the "act" occurs both at the place of transfer and receipt.

As to inducement, the Ninth Circuit, by contrast, held in *Siderman de Blake v. Argentina*, 965 F.2d 699 (9th Cir. 1992) that allegations of soliciting guests in the United States "fall squarely within clause two," *id.* at 710. The D.C. Circuit in *Gilson* similarly held clause two satisfied, on allegations plaintiff was "induced" to enter into a venture in Ireland. 682 F.2d at 1024. The Tenth Circuit, addressing inducement under clause three, not clause two, held Orient's reliance "was ultimately the result of Yue's unlawful" intervening act, App. 38a-40a. That reasoning conflicts with *Gilson*, recognizing allegations of "collusion of all defendants," *id.* at 1027, as Petitioners similarly

alleged a conspiracy between BOC and Yue, negating any intervening cause.[2] App. 26a.

As for BOC's omission to obtain Jones' authorization for transfers over $25,000, the Tenth Circuit held: "But that omission, as alleged, occurred in the United States, and thus would not satisfy the third clause of § 1605(a)(2)." App. 40a. Had the court analyzed the issue under clause two and not three, it necessarily should have found that this omission "in the United States" conferred jurisdiction. *See* House Report at 6618 (noting "acts (or omissions) [are] encompassed in this category").

C. As To Clause Three, The Tenth Circuit Holding That Narrowed Jurisdiction Over This "Action," "Transaction or Occurrence" To A Single "Act" Conflicts With Decisions Of This Court And The Second Circuit

Clause three of the exception similarly provides that a "foreign state shall not be immune from the jurisdiction of the courts of the United States in any case—(2) in which the action is based . . . 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). In a case against a foreign state, personal jurisdiction is

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[2] The court also overlooked that BOC's formal letter conveyed through Yue itself evidences its promises were made to assure "the American party," as its author also admitted. App. 78a, 102a.

provided with respect to any claim "arising out of any transaction or occurrence enumerated in sections 1605 – 1607 of this title." 28 U.S.C. § 1330(c). "The term 'transaction or occurrence' includes each basis set forth in sections 1605-1607 for not granting immunity," House Report at 6612. *See also* 28 U.S.C. § 1607(a),(b).

In this case, Petitioners' claims were based upon a transaction or occurrence consisting of a contract and inducement to safeguard funds, as the Tenth Circuit recognized. App. 24a-26a; *see also* App. 44a ("the theory of recovery underlying most of Plaintiffs' claims is that the Bank breached its duty to follow Jones' directions"). Yet, the Tenth Circuit affirmed the district court's narrowing jurisdiction to the Utah transfer, sheering away the four others in China. The Tenth Circuit reasoned: "By its very terms, then, § 1605(a)(2)'s third clause gives American courts subject matter jurisdiction over claims stemming from a specific 'act' outside the United States that has a direct effect in the United States." App. 41a. Neither court below cited any authority for a construction focused on the term "act" and not "action," or that would justify splitting Petitioners' action, and "theory of recovery," into separate breaches.

The Tenth Circuit's holding squarely conflicts with the Second Circuit's decision in *Commercial Bank of Kuwait v. Rafidain Bank*, 15 F.3d 238, 241 (2d Cir. 1994), cited by Petitioners which the court did not address. *Rafidain Bank* was a suit against a commercial bank owned by Iraq based upon "loan agreements, guarantees, supplementary agreements and letters of credit," and Iraq's central bank "based on

[its] guarantees of Rafidain's obligations and on a letter of credit," *id.* at 239-40. Of all these instruments, "the agreements in Counts V-VII require[d] the Iraqi Banks to make payments in U.S dollars into accounts in New York City." *Id.* at 241. The court found that the "failure of the Iraqi Banks to remit funds in New York . . . had a direct effect in the United States under *Weltover*." *Id.* Although these effects arose from agreements referenced in certain counts, the Second Circuit held: "the Iraqi Banks do not enjoy sovereign immunity ***from any part of this action***." *Id.* (emphasis added).

This ruling also conflicts with *Weltover*, holding the district court "properly asserted jurisdiction, under the FSIA, over the breach-of-contract claim based on" Argentina's "rescheduling of the maturity dates on those instruments," 504 U.S. at 620. There the Court recognized the breach was the rescheduling, affecting multiple bonds, not one failure to pay. Similarly here, the breach was the failure to follow Jones' direction for a $25,000 restriction, not one resulting transfer. As emphasized by the Second Circuit in the decision below: "'Parsing the statute . . . is 'an enterprise fraught with artifice.' We have cautioned that, rather than getting steeped in the metaphysics of such amorphous terms. . . , courts must be concerned with Congress' goal of opening the courthouse doors 'to those aggrieved by the commercial acts of a foreign sovereign.'" 941 F.2d at 151 (citations omitted).

The Tenth Circuit's holding, steeped in the metaphysics of the term "act," drastically reduced Petitioners' action to a single act, in conflict with this

Court's seminal decision in *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966): "A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show. The number and variety of the facts alleged do not establish more than one cause of action so long as their result, whether they be considered severally or in combination, is the violation of but one right by a single legal wrong." *Id.* at 722-24 (citation omitted). The Tenth Circuit's holding to limit the scope of clause three, defined like each clause to encompass any claim "arising out of any transaction or occurrence enumerated in sections 1605 – 1607," 28 U.S.C. § 1330(c), further conflicts with the Court's seminal "transaction" decision in *Moore v. New York Cotton Exchange*, 270 U.S. 593 (1926). In *Moore,* the Court emphasized the "flexible meaning" of the term: "It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship. The [breach] . . . is one of the links in the chain which constitutes the transaction upon which appellant here bases its cause of action." *Id.* at 610.

Nothing in clause three permits the exercise of jurisdiction over less than an action, transaction or occurrence—or claim for that matter—or permits directing a U.S. citizen to litigate a split claim partly in its courts and partly in China. On the contrary, as recognized in *Verlinden*: "When one of these or the other specified exceptions applies, 'the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances,'" 461 U.S. at 488-89 (quoting § 1606).

II. THIS CASE PRESENTS IMPORTANT AND RECURRING QUESTIONS OF FEDERAL LAW WHICH THIS COURT SHOULD RESOLVE

This case presents important issues that pre-existed *Nelson* and will not go away, until resolved by the Court. As this case shows, claims that can readily proceed in other circuits were dismissed in the Tenth Circuit, creating the very real and intolerable possibility that the availability of access and redress turns upon the circuit in which suit is brought. By allowing a conflict among the circuits to persist, this Court would paradoxically permit FSIA decisions to revert to the pattern of inconsistency Congress charged the judiciary to rectify. Only this Court can resolve the conflict, which is regularly recurring, and widening rather than resolving, in the absence of a workable standard. This Court should grant review to establish clear standards for clause one, as well as clauses two and three, that will guide the courts through a final important component of the FSIA statutory framework.

This case also presents an "opportunity to untie the FSIA's Gordian knot, and to vindicate the Congressional purposes behind the Act," *Texas Trading,* 647 F.2d at 307. Apart from resolving thirty years of disagreement, this Court should correct basic misconceptions of the FSIA that underlie much of the dispute, as well as the procedure followed in this case.

A. The Tenth Circuit Decision Defeats Congress' Intent In Enacting The FSIA

This case starkly illustrates, by its unprecedented expansion of immunity under all three clauses, how the courts often fail to recognize that the FSIA's "general purpose is simple: To assure that American citizens are not deprived of normal legal redress against foreign states who engage in ordinary commercial transactions or who otherwise act as a private party would." *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Admin. Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 24 (1976) ("House Hearings"). The centrality of this purpose is declared in sections 1602 and 1606 of the Act, and was reiterated throughout its legislative history. *See, e.g.*, House Report at 6605.

At bottom, the FSIA was enacted to "bring American practice in the area of foreign sovereign immunity in line with the demands of the latter part of the 20th century," to ensure that the United States and its citizens are not placed "at a disadvantage." House Hearings at 32 (testimony of Bruno Ristau), 26-27 (testimony of Monroe Leigh). *See also Alfred Dunhill*, 425 U.S. at 703 (recognizing "[t]he potential injury to private businessmen – and ultimately to international trade itself"). The FSIA was special legislation by which the forum "manifest[ed its] interest in providing effective means of redress" for citizens injured by nonresidents. *McGee*, 355 U.S. at 223, a mandate infrequently applied by the courts.

B. The Lower Courts Have Misconceived The Ordinary Meaning Of "Substantial Contact" As Used In The FSIA, Overlooking That Congress Derived The Term From This Court's Decision In *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220 (1957)

The text and purpose of the FSIA have so thoroughly been reconstructed by a long succession of cases that the contours of what Congress actually said, and did, have been obscured, particularly as to the term "substantial contact." Given its ambiguity, evidenced by the four-way circuit split, the term must be read in light of the legislative history of the Act:

> (b) *Personal Jurisdiction.*—Section 1330(b) provides, ***in effect, a Federal long-arm statute*** over foreign states. . . . The requirements of ***minimum jurisdictional contacts*** and adequate notice ***are embodied in the provision***. Cf. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and *McGee v. International Life Insurance Co.*, 355 U.S. 220, 223 (1957). . . . Significantly, each of the immunity provisions in the bill, sections 1605-1607, requires ***some connection*** between the lawsuit and the United States. . . . These immunity provisions, therefore, prescribe the ***necessary contacts*** which must exist before our courts can exercise personal jurisdiction.

House Report at 6612 (emphasis added). In citing *International Shoe* and *McGee*, the drafters gave a pin-cite only to *McGee*, which held: "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 (emphasis added). The connection characterized as substantial was: "The contract was delivered in California, the premiums were mailed from there and the insured was a resident of the State when he died." *Id.* (emphasis added). Since *McGee,* this Court has continued to apply a "substantial connection" standard, combining concepts of "minimum contacts" and "purposeful availment," explaining: "Jurisdiction is proper . . . where the contacts proximately resulted from actions by the defendant *himself* that create a 'substantial connection' with the forum," *Burger King Corp. v. Rudzewicz,* 471 U.S. 462 (1985) (emphasis in original). *See also Hanson v. Denkla,* 357 U.S. 235, 252-53 (1958) (finding no "substantial connection").

It is evident, then, that Congress adapted the "substantial contact" standard for clause one from *McGee,* which the courts have overlooked.[3] The *McGee* pin-cite also evidently explains the nexus requirement for clause two, as this Court has held its test applicable to a single "act," explaining: "So long as it creates a 'substantial connection' with the forum, even a single act can support jurisdiction. *McGee* [], 355 U.S. at 223." *Burger King*, 471 U.S. at 476. Congress did not set a high bar for clause one, but explained that the standard "is intended to reflect a degree of

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[3] For example, the Second Circuit held "it is clear that Congress intended a tighter nexus than the 'minimum contacts' standard for due process." *Shapiro*, 930 F.2d at 1019 (following D.C. Circuit).

contact beyond that occasioned simply by U.S. citizenship" of the plaintiff. House Report at 6616. This statement is consistent with *McGee*, which involved only two contacts besides residence. Those facts were met or exceeded here, warranting the exercise of jurisdiction over Petitioners' case.

C. The Decision Below Sanctions Such Departures From Accepted Proceedings As To Call For This Court's Supervisory Power

Another "principal purpose" of the FSIA was "to assur[e] litigants that these often crucial decisions are made . . . under procedures that insure due process." House Report at 6606. In this case, not only were Petitioners forced to litigate a splintered portion of single unified claims, but were denied the usual discovery to prove that portion, and subjected to trial on the rest for which they were completely denied discovery, by a court that then decided "the merits of Plaintiffs' claims in their entirety." App. 75a. Postponing jurisdictional findings until trial and "requiring the plaintiff to prove the merits of the case" on less than full discovery is "inappropriate" and "grossly unfair." *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 451 (6th Cir. 1988); *Gould II*, 947 F.2d at 221 (6th Cir. 1991).

Petitioners, by timely repeated motions to the district court, and by timely petition for mandamus to the Court of Appeals, provided opportunities for both courts below to rectify these serious breaches of statutory duty and fair procedure. Petitioners'

motions to the district court were simply ignored, and their petition to the Court of Appeals was summarily denied. These actions so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

CONCLUSION

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

Respectfully submitted,

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