No. 07-853

In the Supreme Court of the United States

UNITED ARAB EMIRATES AND THE EMBASSY OF THE UNITED ARAB EMIRATES,

Petitioners,

v.

MOHAMED SALEM EL-HADAD,

Respondent.

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

BRIEF FOR RESPONDENT IN OPPOSITION

SYLVIA J. ROLINSKI
DANIELLE M. ESPINET
Rolinski & Suarez, LLC
14915 River Road
Potomac, MD 20854
(240) 632-0903

PHILIP M. MUSOLINO
Musolino & Dessel
Suite 440
1615 L Street NW
Washington, DC 20036
(202) 466-3883

ANDREW J. PINCUS
Counsel of Record
CHARLES A. ROTHFELD
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

DAN M. KAHAN
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4800

Counsel for Respondent

QUESTION PRESENTED

The commercial activity exception to the Foreign Sovereign Immunities Act grants federal courts subject matter jurisdiction over suits against foreign states "in which the action is based upon a commercial activity carried on in the United States by the foreign state * * *." 28 U.S.C. § 1605(a)(2).

The question presented is whether an action for breach of contract and defamation filed by a third country national who worked as a non-civil servant, non-policymaking auditor and accountant in the office of a foreign state's cultural attaché, performing tasks identical to those performed in commercial enterprise, constitutes an "action * * * based upon a commercial activity" within the meaning of the Foreign Sovereign Immunities Act.

TABLE OF CONTENTS

TABLE OF CONTENTS – continued

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

TABLE OF AUTHORITIES – continued

Page(s)

MISCELLANEOUS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 496 F.3d 658. The district court's initial opinion denying petitioners' motion to dismiss (Pet. App. 94a-125a) is reported at 69 F. Supp. 2d 69 (D.D.C. 1999). The court of appeals' opinion on interlocutory appeal reversing and remanding the district court's initial determination (Pet. App. 79a-93a) is reported at 216 F.3d 29 (D.C. Cir. 2000). The district court's opinion after remand (Pet. App. 70a-78a) and its subsequent opinion on the merits (Pet. App. 23a-69a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 27, 2007. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(2), provides in pertinent part:

> (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 a commercial activity carried on in the United States by the foreign state * * * .

STATEMENT

Petitioners portray the decision below as an unprecedented intrusion on sovereign immunity. But the "commercial activity" exception to the Foreign Sovereign Immunities Act and this Court's precedents plainly contemplate that lawsuits relating to

foreign states' employment relationships may be heard by U.S. courts, and such claims have in fact been entertained on that basis. Moreover, the United States regularly submits to the jurisdiction of foreign courts with respect to employment claims similar to the one pressed here, confirming that the holding below breaks no new ground. Petitioners cannot demonstrate a conflict among the lower courts, nor have they shown that the question presented is one of substantial importance. Review by this Court therefore is not warranted.

A. Statutory Background

Prior to the enactment of the Foreign Sovereign Immunities Act ("FSIA"), "there [were] no comprehensive provisions in [United States] law available to inform parties when they [could] have recourse to the courts to assert a legal claim against a foreign state." H.R. Rep. No. 94-1487, at 7 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6605. Instead, "the State Department would determine in the first instance whether a foreign state was entitled to immunity and make an appropriate recommendation to the courts." *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 357 n.5 (1993). See also *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 486-488 (1983).

Congress enacted the FSIA in 1976 to provide for "the determination by United States courts of the claims of foreign states to immunity * * * ." 28 U.S.C. § 1602. Congress was concerned that allowing the State Department to make immunity determinations risked attempts by "the foreign state * * * to bring diplomatic influences to bear upon the State Department's determination." H.R. Rep. No. 94-1487, at 7 (1976). The Act therefore transferred the immunity determination "from the executive branch to the ju-

dicial branch" in order to "free[]" the State Department "from pressures from foreign governments to recognize their immunity from suit." *Ibid.* That change aligned U.S. law with the practices of "virtually every other country – where sovereign immunity decisions are made exclusively by the courts and not by a foreign affairs agency." *Ibid.*

State Department practice had followed "the restrictive theory of foreign sovereign immunity[,] under which immunity is confined to suits involving the foreign sovereign's public acts and does not extend to cases arising out of its strictly commercial acts." *Verlinden*, 461 U.S. at 481. The Act's "manifest purpose" was "to codify the restrictive theory of foreign sovereign immunity." *Nelson*, 507 U.S. at 363.

Section 1605(a)(2), the provision at issue in this litigation, precludes recognition of sovereign immunity in, and grants federal courts subject matter jurisdiction over, any case "in which the action is based upon a commercial activity carried on in the United States by the foreign state." A "commercial activity" may range from "a regular course of commercial conduct" to "a particular commercial transaction or act." 28 U.S.C. § 1603(d).

Congress provided that "the nature of the course of conduct" rather than its "purpose" determines the commercial character of the activity. *Ibid.* Thus:

> [T]he question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a

> private party engages in "trade and traffic or commerce."

Republic of Argentina v. *Weltover*, 504 U.S. 607, 614 (1992) (internal quotation marks omitted).

"Commercial activity" within the meaning of Section 1605(a)(2) thus encompasses "the sort of action by which private parties can engage in commerce" as opposed to action that is "peculiarly sovereign in nature," such as "the powers of police." *Nelson*, 507 U.S. at 361-62. Employment relationships plainly can constitute "commercial activity" under this standard. Indeed, the Court's analysis in *Nelson* presupposed that a claim based on the foreign state's recruitment and employment of the plaintiff would fall within the "commercial activity" exception (*id.* at 358), a point that Justice White emphasized in his concurring opinion: "'[A] foreign government's * * * employment or engagement of laborers, clerical staff or marketing agents * * * would [therefore] be among those included within' the definition of commercial activity." *Id.* at 365 (White, J., concurring in the judgment) (quoting H.R. Rep. No. 94-1487, at 16 (1976), and S. Rep. No. 94-1310, at 16 (1976)).

Congress recognized that given the myriad factual settings in which the issue might arise, it was "unwise to attempt an excessively precise definition" of commercial activity. H.R. Rep. No. 94-1487, at 16 (1976). Courts must consider the factual circumstances presented by individual cases "in determining what is a 'commercial activity.'" *Ibid.*

B. Factual Background

Respondent Mohamed Salem El-Hadad, an Egyptian citizen, was for many years a successful auditor in Egypt, the United Arab Emirates, and Washing-

ton, D.C. Pet. App. 24a-25a. From 1982 to 1992, respondent worked as an auditor in the U.A.E.'s Ministry of Education. *Id.* at 25a. While on vacation in the United States in the summer of 1992, respondent learned that the cultural attaché's office of the U.A.E.'s Washington embassy was seeking to hire an auditor. Respondent applied for and was offered the job. *Ibid.* Respondent formally resigned his position in the U.A.E. (*ibid.*) and relocated with his family to Washington at his personal expense (*id.* at 44a) to work as an accounting auditor for the cultural attaché's office.[1]

The terms of respondent's job offer were governed by the Local Employees Laws and Regulations for the U.A.E. Missions Abroad, 1983 ("LER"). *Id.* at 26a. The LER explained that a U.A.E. mission's "local employees" – a class consisting of administrative, clerical and maintenance workers – could be nationals of the host country or, in some circumstances, nationals of a third country. *Id.* at 13a-14a. According to the LER, local employees from the host country or a third country could not be civil servants, because that status is reserved for U.A.E. citizens. *Id.* at 14a.

---

[1] Petitioners claim that respondent was "*brought* [to the United States] by the UAE from Abu Dhabi." Pet. 3 (emphasis supplied). See also *id.* at 30 (respondent was "brought from overseas"). To the extent petitioners seek to imply that respondent's move to Washington constituted a transfer from his previous job in Abu Dhabi, the record makes clear that is not true. The district court found that respondent's employment in Washington was "separate and unrelated to his prior employment in the UAE." Pet. App. 75a. The court of appeals concluded that "there can be no question that [respondent] formally and completely terminated his employment in the U.A.E. before beginning work in the United States." *Id.* at 14a.

Respondent commenced his employment in January 1993. *Id.* at 26a. His position required him to perform typical auditing tasks, including reviewing the expenditures and accounting methods of the cultural attaché's office and reconciling bank statements. Respondent also supervised other office accountants. *Ibid.* Respondent "had no role in the creation or administration of government policy * * * [in] political deliberations or government decision-making * * * [and] did not represent or act or speak for the UAE government." *Id.* at 39a.[2]

In the course of performing these traditional auditing functions, respondent in mid-1993 discovered an embezzlement scheme involving the cultural attaché and other mission employees. *Id.* at 27a. Respondent reported these matters to authorities in the U.A.E., who initiated an official investigation. *Ibid.* In December 1993, an investigative team from the U.A.E.'s Ministry of Finance confirmed the embezzlement. *Ibid.* The cultural attaché and others implicated in the scandal were fired the following year. *Id.* at 28a.

Well over a year after the cultural attaché's removal, respondent was accused of participating in the very embezzlement he had uncovered. *Id.* at 28a-29a. Despite a complete absence of evidence indicating any impropriety on the part of respondent and letters of support from embassy officials (*id.* at 31a-

---

[2] Petitioners erroneously characterize respondent as "a senior Embassy official." Pet. 30. See also *id.* at 3. The district court made no such finding; rather, as petitioners concede (*id.* at 13), the district court found that respondent "did standard accounting work."

33a), the Ministry of Higher Education and Scientific Research (the "Higher Education Ministry"), which had final authority over the matter, ordered respondent's dismissal. Respondent's employment was terminated in February 1996. *Id.* at 34a.

In the summer of 1996, an official from the Higher Education Ministry met with the employees of the cultural attaché's office and told them that respondent had been discharged for "not doing his job properly or honestly." *Id.* at 35a. Similar allegations were memorialized in published documents. *Id.* at 56a.

Over the course of the next year, respondent's applications for a variety of accounting jobs in the Washington area were rejected after the prospective employers made inquiries about his prior employment. *Id.* at 35a-36a. On at least one occasion, U.A.E. embassy personnel informed a prospective employer that respondent had been terminated for cause. *Ibid.* Since his firing in 1996, respondent has not received a single job offer in his field and his efforts to find other profitable employment have failed as well. *Id.* at 36a.

C. Proceedings Below

Respondent filed the instant action for breach of contract and defamation in August 1996, asserting claims under District of Columbia law.

1. The district court denied petitioners' motion to dismiss on sovereign immunity grounds, holding that respondent's claims fell within the FSIA's commer-

cial activity exception. Pet. App. 94a-125a.[3]

Identifying petitioners' employment and termination of respondent as the relevant activity (*id.* at 101a), the court held that a foreign state's employment of Americans or third country nationals in the United States was per se a commercial activity (*id.* at 106a). Because respondent was a third country national employed by a foreign state in the United States, the court determined that Section 1605(a)(2) conferred jurisdiction over respondent's claims. Pet. App. 107a.

2. The court of appeals reversed and remanded on petitioners' interlocutory appeal. *Id.* at 79a-93a. It rejected the district court's bright line rule and instead directed the district court to undertake several factual inquiries relevant to determining the "ultimate question to be answered[:] * * * whether El-Hadad's employment constituted commercial activity." *Id.* at 87a. The court of appeals specified five factual inquiries relevant to the commercial activity determination: whether respondent's job fell within the U.A.E.'s definition of civil service; whether respondent and petitioners had "a true contractual arrangement, or [respondent's] 'contract' claim instead [was] based, as the U.A.E. contends, solely upon the civil service laws of the U.A.E."; what relationship, if any, existed between respondent's employment in Washington and his previous employment in the U.A.E.; the nature of respondent's work; and the relevance of respondent's nationality to the facts of the case. *Id.* at 87a-88a.

---

[3] The court dismissed for lack of personal jurisdiction claims against three U.A.E. officials named as defendants.

The court cautioned that it did "not regard [these inquiries] as an exclusive list, nor as necessarily applicable in all cases." *Id.* at 87a. A case-specific, multifactor inquiry was required, the court said, because "Congress expressly concluded that it was unwise to attempt an excessively precise definition of commercial activity * * *." *Id.* at 89a (citation and internal quotation marks omitted).

3. Following the submission of additional evidence and briefing on the immunity issue, the district court, applying the court of appeals' multifactor approach, issued a pretrial order denying petitioners' renewed motion to dismiss on sovereign immunity grounds. *Id.* at 70a-78a. The court found that respondent "had a contractual arrangement with the UAE that did not include '[c]ivil servant benefits'" (*id.* at 75a); that his employment in Washington was "separate from and unrelated to his prior employment in the UAE" (*ibid.*); and that he "had no role in the creation of UAE government policy and was not privy to UAE political deliberations" (*id.* at 76a). Based on these findings and petitioners' "fail[ure] to present evidence of other factors tending to show [respondent's] civil service status or that his work did not constitute commercial activity," the district court held that the commercial activity exception conferred jurisdiction over respondent's claims. *Id.* at 77a-78a.

4. The district court again addressed the sovereign immunity issue following trial, concluding that the evidence adduced at trial "only reinforced [its] decision." *Id.* at 37a n.7. The court rejected petitioners' attempts to highlight similarities between respondent's employment terms and those of U.S. civil servants as "unpersuasive." *Id.* at 42a. Relying on

the Second Circuit's opinion in *Kato* v. *Ishihara*, 360 F.3d 106 (2d. Cir. 2004), the court explained that it would not look to "whether th[e] employment resembles the contemporary civil service of the American democracy, but [would] instead inquire whether the particular actions that the foreign state performs [through that employee] * * * are the type of actions by which a private party engages in trade and traffic or commerce." *Ibid.* (internal quotation marks omitted) (quoting *Kato*, 360 F.3d at 114)).

The record at trial "provide[d] no evidence that El-Hadad had any more discretion in conducting his audits or that he executed his duties with any more state authority than an external auditor on contract would have had." Pet. App. 39a. The court therefore concluded that respondent's "employment as an internal auditor of accounts was a commercial activity, as that term is defined by the FSIA." *Id.* at 42a.

The district court entered judgment in favor of respondent on the breach of contract and defamation claims. *Id.* at 43a-69a. It found that petitioners' allegations of impropriety on the part of respondent were "at least false" and therefore termination of respondent's employment constituted a breach of contract. *Id.* at 52a. The written and spoken statements made by petitioners and at least one of their officials were false and defamatory (*id.* at 58a-66a) and, the court found, "destroyed [respondent]'s professional life" (*id.* at 67a). The court awarded respondent $1,745,961 in combined damages on the contract and defamation claims. *Id.* at 55a, 67a.

4. A unanimous panel of the court of appeals affirmed in relevant part. The "ultimate question," the court said, "is whether [respondent's] employment

constituted commercial activity." *Id.* at 9a (citation omitted). The court utilized a two-step inquiry to resolve this question.

It first asked whether respondent was a civil servant, in which case his claims would fall outside the commercial activity exception. The court adopted a "flexible and inclusive approach to determining whether a foreign government's employee is a civil servant." *Ibid.* That approach required examining the case-specific factors the court of appeals had identified in its prior opinion as most relevant to respondent's particular employment situation. *Id.* at 12a. The court reviewed in detail the evidence relating to these factors. It concluded that although "[m]ulti-factor tests tend to be inconclusive * * * the evidence here suggests El-Hadad is *not* a civil servant." *Id.* at 17a (emphasis in original). Even had that inquiry been "inconclusive," however, "that very fact, together with the U.A.E.'s burden of proof, would [have] decide[d] the matter in El-Hadad's favor." *Ibid.*

Second, the court examined the nature of respondent's work, because an "employee [who] might not be a civil servant * * * [could] still be engaged in quintessentially governmental work * * *." *Id.* at 8a-9a. It assessed "whether [respondent's] work involves the exercise of 'powers that can also be exercised by private citizens, as distinct from those powers peculiar to sovereigns.'" *Ibid.* (quoting *Nelson*, 507 U.S. at 360).

A "distinctive mark of governmental work," the court observed, "is discretionary involvement with sovereign law or policy." *Id.* at 18a. Respondent's employment did not have this key characteristic. Re-

spondent "had no role in the creation of governmental policy" but rather performed routine accounting duties "of a character easily found in commercial enterprise." *Ibid.* Because respondent "was not a civil servant * * * and [because] his work did not involve the exercise of distinctively governmental powers" the court held that the district court correctly applied the commercial activity exception to deny petitioners sovereign immunity. *Id.* at 2a.[4]

5. Petitioners filed a petition for rehearing and rehearing en banc. Their request was denied with no member of the court requesting a vote. *Id.* at 127a.

ARGUMENT

Review of the court of appeals' fact-bound ruling plainly is not warranted. The decision below accords with the text of the "commercial activity" exception and is entirely consistent with the decisions of this Court and with the decisions of numerous courts – and the FSIA's legislative history – recognizing that foreign governments' employment relationships may be commercial in nature. Moreover, the United States' practice of routinely submitting to the jurisdiction of foreign courts in employment cases abroad demonstrates that the decision below breaks no new or unusual ground.

Petitioners assert the existence of a conflict among the lower courts, but – as the opinions below demonstrate – this is an area of the law in which outcomes are heavily fact-dependent. Some courts may apply different labels to their analysis, but they all assess the same factors in determining whether

[4] The court of appeals remanded the case on an unrelated issue related to the calculation of damages. Pet. App. 21a-22a.

the particular employment context constitutes a "commercial activity." The differing results to which petitioners point are the consequence of different factual settings rather than inconsistent legal standards.

In view of the fact-bound nature of the inquiry, moreover, intervention by this Court would have limited value. Any legal standard would have to be general and heavily fact-dependent to accommodate the variety of factual situations that arise. This Court likely could do nothing more than identify the relevant factual considerations – precisely what the lower courts already have done.

Finally, the question presented lacks substantial importance. There are fewer than twenty reported wrongful termination cases raising the commercial activity exception in the last thirty years. Even more telling, the United States government has not participated at any stage of this litigation, confirming that the case presents no issue of practical concern.

I. The Court Of Appeals Correctly Applied The Commercial Activity Exception.

A. The Decision Below Accords With The Plain Language Of The FSIA.

The "beginning point" of statutory interpretation "must be the language of the statute." *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992). The FSIA provides that "[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case * * * in which the action is based upon a commercial activity carried on in the United States by the foreign state * * *." 28 U.S.C. § 1605(a)(2). The Act defines "commercial activity" to mean:

> either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

Id. § 1603(d).

The statute requires a court to identify a "regular course of commercial conduct or a particular transaction or act" that the claim is "based upon." The court then must determine whether the conduct is commercial by "reference to [its] nature" rather than to its purpose. *Nelson*, 507 U.S. at 356-59. See also *Weltover*, 504 U.S. at 617 (stating that "the statute unmistakably commands" that the commercial character of an activity be determined by reference to its nature and not its purpose). The key inquiry is "whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in trade and traffic or commerce." *Id.* at 614 (internal quotation marks omitted).[5]

The relevant conduct here is respondent's employment as an auditor tasked with reviewing expenditures and accounting methods, reconciling bank statements and supervising other accountants. These activities are plainly commercial. As the district court concluded:

---

[5] Petitioners invoke (Pet. 18) *De Sanchez* v. *Banco Central de Nicaragua*, 770 F.2d 1385 (5th Cir. 1985), to argue that "profit" is the appropriate test for commercial activity. But this Court's subsequent decision in *Nelson* squarely rejected a "profit motive" standard. 507 U.S. at 360.

> Audits and auditors are an integral part of a regular course of commercial conduct. The orderly conduct of commerce and trade depends on audits and auditors. * * * Thus, the plain language of the FSIA statute leads to the conclusion that El-Hadad's employment as an internal auditor of accounts was a commercial activity, as that term is defined by the FSIA.

Pet. App. 41a-42a.

The court of appeals similarly rested its decision on the "resemblance between 'the outward form' of [respondent's] conduct and powers and those of private citizens." Pet. App. 18a (quoting *Weltover*, 504 U.S. at 617). It pointed out that respondent "had no role in the creation of governmental policy * * * * [and] [i]nstead, El-Hadad did standard accounting work * * * of a character easily found in commercial enterprise." *Ibid.* (citation omitted). The court thus properly held that respondent's claim fell within FSIA's commercial activity exception.[6]

---

[6] Petitioners emphasize (Pet. 10) the court of appeals' statement that the question of respondent's civil service status was "exceedingly close" (Pet. App. 12a) and assert (Pet. 12) that the court of appeals failed to engage in meaningful analysis. But the court of appeals' opinion (Pet. App. 1a-22a) records that court's close review of the factual record, which included reliance on a letter from the U.A.E. cultural attaché stating that respondent "'doesn't have the [c]ivil service benefits'" common to other U.A.E. employees (*id.* at 13a (citation omitted)).

Petitioners also argue (Pet. 8-9) that the district court on remand failed to apply the standard specified by the court of appeals in its initial decision. But the court of appeals did not find any such deficiency in its detailed review of the district court's determination. See Pet. App. 12a-18a. And petitioners did not

The correctness of the holding below is confirmed by State Department practice prior to enactment of the FSIA. This Court has repeatedly held that "the meaning of 'commercial' for purposes of the Act must be the meaning Congress understood the restrictive theory to require at the time it passed the statute." *Nelson*, 507 U.S. at 359 (1993) (citing *Weltover*, 504 U.S. at 612-13). As we have discussed (see page 3, *supra*), the State Department applied this "restrictive theory prior to adoption of the FSIA.

In one of the last requests for a letter of immunity received prior to the enactment of FSIA, the Department recognized that the employment of an individual to perform services in connection with a public relations function was not a uniquely governmental activity, but rather resembled a commercial transaction. Office of the Legal Advisor, U.S. Dep't of State, Digest of United States Practice in International Law 1977, app. at 1079-80 (1977). The Department declined to provide a letter of immunity because "it would not be appropriate to recognize sovereign immunity in this case." *Ibid.*

That pre-FSIA standard is reflected in the FSIA's legislative history, which states that the commercial activity encompasses the "employment or engagement of laborers, clerical staff or public relations or marketing agents" and excludes "the employment of diplomatic, civil service, or military personnel." H.R. Rep. No. 94-1487, at 16 (1976). The court of appeals' determination in this case is thus entirely consistent with the pre-FSIA standard that Congress adopted when it enacted the statute.

---

argue before the district court or court of appeals for changes in the factual inquiries specified in the court of appeals' initial opinion.

Finally, the United States' construction of the FSIA's "commercial activity" exception in the context of employment claims is consistent with both its pre-FSIA position and the decision of the court below. Thus, the United States has taken the position that, in the context of wrongful termination claims of foreign state employees, FSIA requires "a detailed factual inquiry" to determine whether sovereign immunity may be asserted in wrongful termination claims filed in U.S. courts by foreign states' employees. See Statement of Interest of the United States at 12, 17-19, *Mukkaddam* v. *Permanent Mission of Saudi Arabia to the United Nations*, 111 F. Supp. 2d 460 (S.D.N.Y. 2000) (No. 99 Civ. 3354) [hereinafter Mukaddam Statement of Interest], *available at* http://www.state.gov/documents/organization/6651.doc.

Indeed, the United States has expressly endorsed the approach of the D.C. Circuit taken in this case. *Id.* at 16-17. (expressing the government's agreement with the analytical framework and the factors to be considered when applying the commercial activity exception that were adopted in the first court of appeals decision in this case). That too confirms the correctness of the decision below.[7]

---

[7] Petitioner asserts (Pet. 26-27) that the court of appeals' interpretation of the statutory phrase "based upon" – in the statutory standard providing that immunity does not apply when the "action is *based upon* a commercial activity" – is inconsistent with this Court's decision in *Nelson*. That contention is without merit. In *Nelson*, this Court held that "based upon" means "those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." 507 U.S. at 357. There, the plaintiff was arrested, beaten and tortured by the Saudi Arabian *police* after repeatedly complaining of procedures at a Saudi hospital. Although the Court accepted that the plaintiff's employment by the hospital as a "monitoring systems

B. The Court Of Appeals' Decision Conforms With The United States' Practice In Invoking Sovereign Immunity Abroad.

Petitioners claim (Pet. 4) that the decision below "pernicious[ly]" interferes with "the internal affairs of foreign nations." But the United States itself routinely submits to the jurisdiction of foreign courts in cases "involving conditions of employment or discharge at its diplomatic and consular missions in other countries" because it considers such cases "commercial in nature." Mukaddam Statement of Interest, *supra*, at 21.[8] The government's sovereign immunity practice thus wholly undermines petitioners' claim.

It is United States policy "not to plead sovereign immunity in foreign courts for instances where, under United States law, the United States would not recognize a foreign state's immunity." Office of the

engineer" constituted "commercial activity" for purposes of § 1605(a) (see 507 U.S. at 358), it concluded that his personal injury claim was not based upon commercial activity because the "[e]xercise of the *powers of police and penal officers* is not the sort of action by which private parties can engage in commerce" (*id*. at 362 (emphasis added)). In this case, by contrast, respondent's allegations are directed at his superiors' actions in *firing* him and thereafter *defaming* him as he attempted to secure new employment. Those actions were clearly "based upon" *respondent's* employment to perform "commercial activity" under § 1605(a), and unlike the exercise of "powers of police and penal officers" were by no means "peculiarly sovereign in nature" (507 U.S. at 361). Indeed, as the court of appeals observed (Pet. App. 7a-8a), focusing the commercial activity analysis on "the employment relationship between [respondent] and the U.A.E. embassy as a whole" was "not in dispute in [this] case."

[8] Other countries follow a similar practice. *See* Mukaddam Statement of Interest, *supra*, at 23.

Legal Adviser, U.S. Dep't of State, Digest of United States Practice in International Law 1989-1990, at 295 (2003). With respect to employment termination claims of foreign nationals employed at U.S. missions abroad, the United States has disclaimed sovereign immunity in foreign courts because such "claim[s] [are] within the commercial claim exception to foreign sovereign immunity under U.S. law." *Ibid.*[9]

Only in rare cases where the specific factual circumstances of the employment relationship implicate the governmental operations of a mission does the United States consider asserting sovereign immunity. See Mukaddam Statement of Interest, *supra*, at 21-22. United States practice, then, supports the precise approach taken by the courts below here: careful consideration of the specific facts of the particular employment relationship to ensure it is commercial and not governmental in nature, in the context of a general assumption that immunity will not be appropriate absent some close relationship between the claim and the mission's sovereign functions.

The consistency between the decision below and the United States' view of its own sovereign immunity – and with the United States' construction of the FSIA exception in the employment context – confirms that the decision below is a routine and appro-

---

[9] See also Letter from Office of the Legal Advisor, Diplomatic Law and Litig. Div., U.S. Dep't of State 3 (Oct. 23, 1990), *available at* http://www.state.gov/documents/organization/28510.pdf ("Employment of local nationals by diplomatic or consular mission is generally deemed to constitute commercial activity"; the "Department does take the position * * * [that] claims for labor benefits or breach of contract money damages can generally be adjudicated by local courts.").

priate exercise of jurisdiction.[10]

II. The Courts Of Appeals Are In Substantial Agreement Regarding The Application Of The Commercial Activity Exception In The Employment Context.

Petitioners argue (Pet. 27-31) that the lower courts apply different standards in determining the applicability of the commercial activity exception in the employment context. In fact, all courts assess whether exercising jurisdiction would improperly intrude upon the sovereign prerogatives of the foreign state. To make that determination, they engage in the very same factual inquiries. Although some courts have applied different labels to their analysis, and some may divide their analysis into separate stages, the analysis is essentially the same. Indeed, it is clear that each of the courts of appeals that has addressed these issues would have reached the same conclusion as the court below on the facts presented here. There simply is no conflict among the lower courts warranting this Court's attention.

---

[10] Petitioners argue that the district court "effectively refereed" a dispute between various U.A.E. officials about respondent's "conduct and thus his fate." Pet. 10. But the court of appeals observed (Pet. App. 3a) that "[w]hy [respondent] was accused – for the record and the district court's opinion make clear that the accusation was baseless to the core – is a mystery." The lower courts did not attempt to ascertain the reasons for the accusation or to determine the reasons for the conflicting views of different U.A.E. officials. They addressed only the circumstances relevant to respondent's claim – the undisputed facts that the accusations were false and that respondent was discharged without cause.

A. The Courts Of Appeals Employ The Same Inquiries In Applying The Commercial Activity Exception To Employment-Based Claims.

The courts of appeals all distinguish "commercial" employment relationships from governmental ones on the basis of fact-dependent inquiries focused on four basic factors: whether the foreign employer considers the employee a "civil servant"; whether the employee is involved in governmental policymaking; whether the employee is a third country national; and whether the employee's activity has an analog in the private sector.

Of course, whether a court will assess a particular factor in a given case will depend on whether the factor is relevant in that factual setting. But each court applies a multi-factor standard that looks to the same fundamental considerations.[11]

1. *Civil Servant, Diplomatic, or Military Officer.* One factor that courts assess is whether the employee is a civil servant, diplomatic officer, or military officer under the foreign nation's practices and laws. Here, relying in substantial part on a letter from the U.A.E.'s cultural attaché, the court below concluded that respondent was not a civil servant under U.A.E. law. Pet. App. 12a-13a.

---

[11] Petitioners inexplicably disaggregate the multiple factors that courts consider in these cases, isolating each to assert that consideration of that factor alone would "lead to preposterous results." Pet. 25. We agree, but no court employs petitioners' hypothetical single-factor approach. Rather, each looks to multiple factors in making the commercial activity determination. Petitioners' hypothetical analysis is not reflected in any decision and provides no basis for review by this Court.

Similarly, the plaintiff in *Holden* v. *Canadian Consulate*, 92 F.3d 918 (9th Cir. 1996), another case in which immunity was rejected, was not a civil servant because she "did not compete for any examination prior to being hired, was not entitled to tenure, was not provided the same benefits as foreign service officers and did not receive any civil service protections from the Canadian government." *Id.* at 921. The plaintiff in *Segni* v. *Comm. Office of Spain*, 835 F.2d 160, 165 (7th Cir. 1987), was permitted to pursue his case in part on the ground that he too was not a civil servant, because he was not sufficiently "supervised or monitored" by the Spanish government.

The Second Circuit, on the other hand, observed that an employee was "concededly a 'civil servant' under Japanese law" in a case in which immunity was upheld. *Kato*, 360 F.3d at 111.[12]

In *Butters* v. *Vance Int'l, Inc.*, 225 F.3d 462 (4th Cir. 2000), the only other appellate decision to consider the commercial activity exception in the employment context, the defendant was an American corporation that successfully asserted derivative sovereign immunity. Since the relevant foreign state was not the plaintiff's employer, the Fourth Circuit

---

[12] While the Second Circuit in the particular case rested its decision on the determination that the plaintiff's employment activities were governmental and not commercial in nature, and thus did not rely on her civil service status to reach its decision, it nevertheless instructed lower courts on the proper way to consider the civil servant factor – making clear that this factor is relevant in the Second Circuit. See *Kato*, 360 F.3d at 112. ("[T]he category of 'civil service' should be interpreted to include the broad range of civil service employment relationships used by countries other than the United States.")

had no occasion to consider whether the plaintiff was a member of that state's civil service. It did not disclaim such an inquiry, however.

Petitioners contend (Pet. 19-20) that there is a conflict among the lower courts with respect to consideration of the civil service factor. But the court below stated that "like many of [its] sister circuits" it had held that employment claims involving civil servants, diplomats, and soldiers fall outside the commercial activity exception. Pet. App. 8a & 9a n.2. It went on to observe that – on the other hand – employment claims by individuals who are not civil servants, diplomats, or soldiers do not necessarily qualify for the exception, noting that such employees may nonetheless play a policymaking role. The court below did state that two other courts of appeals had either "suggested" or "assume[d]" that non-civil servants claims necessarily involved commercial activities. *Ibid*. But both of those courts look to the same factors as the court below when applying the commercial activity exception (considering them in connection with the civil service inquiry), and neither has denied immunity to non-civil servants exercising policy functions, demonstrating that the courts' approaches are similar in all material respects.

Petitioners also challenge (Pet. 20) what they characterize as the "[m]echanical" application of the civil service factor, but they do not and cannot contend that the courts in this case engaged in any such mechanical analysis. Instead, they complain only that the courts did not address "employment for life" as "*the* critical attribute of civil service under our system." *Id.* at 21 (emphasis in original).

Even assuming that U.S. civil service norms are pertinent to a determination of U.A.E. civil service

norms, however, petitioners point to nothing in the record establishing that for cause dismissal is associated only with civil service employment. In the trial court's thorough description of petitioners' arguments on this issue, no mention is made of either "employment for life" or its more correct characterization as for cause dismissal. Pet. App. 42a.

The trial court did address, and reject, petitioners' arguments that a "grade" salary system and competitive examinations support a finding of civil service employment: "a standardized grade/step salary system and a competitive qualifying examination are features of employment that are by no means unique to governmental civil service employment, but are common to employers engaged in private commerce as well." *Id.* at 43a. See also *id.* at 10a (discussing characteristic features of United States civil service). In the end, petitioners' argument is that the courts below reached the wrong conclusion with respect to the "civil servant" determination. But there is no reason that this Court should reevaluate that fact-bound determination.

2. *Political Deliberation and Policy Making.* Because employees engaged in policymaking should not expect the protection of U.S. courts in disputes with their own regimes, the courts of appeals look to whether the employee's duties included responsibility for the creation of government policy. The court below noted that "[o]ne distinctive mark of governmental work is discretionary involvement with sovereign law or policy." *Id.* at 18a. It also pointed out that respondent "lacked authority to determine or articulate policy * * *." *Id.* at 15a.

The same conclusion was reached by the courts in the other cases in which immunity was denied.

The plaintiff in *Holden* also "was not involved in any policy-making and was not privy to any governmental policy deliberations * * * did not engage in lobbying activity [and] could not speak for the government." 92 F.3d at 922. In *Segni*, the employee was not "so privy to [the Commercial Office's] political deliberations, as to be considered as a part of the Spanish government." 835 F.2d at 165.

3. *Third Country National.* "[A] person hired by his own country's government to work abroad should have a somewhat lesser expectation of suing his homeland in his host nation's courts." *Segni*, 835 F.2d at 165 n.7. Courts therefore examine whether the employee is a third country national. The court below, for example, considered whether "a foreign state can engage in noncommercial (i.e., governmental) activity through third country nationals." Pet. App. 16a (internal quotation marks omitted)). It noted that respondent was an Egyptian citizen employed by the United Arab Emirates. *Id.* at 16a-17a.[13]

Other courts also consider the employee's nationality. The court in *Segni* pointed out that "Segni is not a citizen of Spain" – the country that employed him. 835 F.2d at 165 n.7. The court noted in *Holden* that the employee was an American and, as such, "was not allowed in the Consulate unless in the company of a foreign service officer." 92 F.3d at 922. In

---

[13] Because the U.A.E. regularly hires non-citizens, the D.C. Circuit ultimately concluded that "El-Hadad's nationality is all but irrelevant." Pet. App. 17a. But that court considers the plaintiff's nationality to be a relevant factor in general. "[T]he relevance of a plaintiff's nationality [is] * * * a matter of context." *Id.* at 16a.

Kato, where immunity was upheld, the plaintiff was a Japanese citizen suing the Japanese government. 360 F.3d at 109.

4. *Private Sector Analog*. All of the courts of appeals consider whether the employee's activities involve "powers that can also be exercised by private citizens, as distinct from those powers peculiar to sovereigns." *Nelson*, 507 U.S. at 360 (internal quotation marks omitted). See Pet. App. 17a; *Kato*, 360 F.3d at 111; *Butters*, 225 F.3d at 465; *Holden*, 92 F.3d at 920. See also *Segni*, 835 F.2d at 165 (a pre-*Nelson* case describing the need to "examine the nature of Segni's 'employment activities' in order to determine whether *they* are governmental or private") (emphasis in original)). Thus, common to every court's analysis is an inquiry into whether the employee is discharging peculiar sovereign functions or, on the other hand, is engaging in functions "of a character easily found in commercial enterprise." Pet. App. 18a.

For example, the court in *Butters* concluded that the hiring of a private security guard for a Saudi Arabian princess did not have an analog in the private sector, because the relevant act in the case, protecting a nation's leaders, is quintessentially an act "peculiar to sovereigns." 225 F.3d at 465 (internal quotation marks omitted). Similarly, the court in *Kato* found that the activities of a government marketing agent were "only superficially similar to actions typically undertaken by private parties" engaging in commerce, because a private party would not typically promote Japan's entire product base. 360 F.3d at 111.

Employment relationships in other cases do resemble commercial enterprise. In *Holden*, the Ninth

Circuit found that the plaintiff's work "promoting and marketing" Canadian products was of a type "regularly done by private persons." 92 F.3d at 922. Similarly, in *Segni* the Seventh Circuit concluded that plaintiff's employment as a "marketing agent" was "certainly an activity * * * in which a private person could engage." 835 F.2d at 165 (internal quotation marks omitted).[14]

Thus *Butters*, *Segni*, *Holden*, and *Kato* all considered whether there was a private sector analog, reaching different conclusions based on the facts of the three cases.

Petitioners' contention that the standards adopted by the courts are "irreconcilable" is thus incorrect. The standards these courts apply look to the very same factors. There simply is no conflict warranting this Court's attention.

B. This Case Would Be Resolved Similarly In Every Circuit That Has Addressed The Issue.

Petitioners also contend that "the courts have reached wildly inconsistent results based upon similar facts" (Pet. 27), citing in particular what they perceive to be tension between the *Segni* and *Kato* decisions (see *id.* at 27-29). But those two decisions

---

[14] Petitioners do not contend that any court of appeals has rejected this factor; they assert only that determining whether the function in question has a private sector analog is "[n]ot [u]seful." Pet. 23. But that is the precise analysis specified by this Court in *Nelson* and, moreover, petitioners did not object to consideration of this factor below. Finally, petitioners' claim that consideration of this factor "would make immunity a rarity" (*id.* at 23) is undercut by *Kato* and *Butters*, where the courts of appeals relied on the private sector analog to *uphold* immunity.

clearly did *not* rest upon "similar facts." Indeed, though the legal standards applied by the two courts were similar, the circumstances of those cases differed considerably, only further emphasizing the fact-dependency of the inquiry in this area of the law.

The plaintiff in *Segni* was a non-civil servant, third country national employed by the Spanish government. The Seventh Circuit's decision in *Segni* recognized "the rule that the nature of a transaction for FSIA purposes may be divined by asking whether a similar agreement could have been entered into with a private party." 835 F.2d at 164.

The *Kato* plaintiff was a Japanese citizen and "concededly a 'civil servant' under Japanese law." 360 F.3d at 111. The Second Circuit based its conclusion at least in part on whether the defendants' activities "were typical of a private party engaged in commerce." *Ibid.*

Petitioners' contention that "identical factual scenarios result in irreconcilable decisions," (Pet. 4), is therefore plainly wrong. These differing results reflect the courts of appeals' different views of the particular facts of the two cases.

Most significantly, petitioners do not and cannot contend that the result here would be different in any circuit. That fact not only confirms the absence of a conflict; it also demonstrates that this case is a poor vehicle for addressing the question presented.

1. The court in *Holden*, for example, considered the "employment of diplomatic, civil service or military personnel" to be governmental "and the employment of other personnel" to be commercial. 92 F.3d at 921. Whether the plaintiff is a member of a

nation's civil service, diplomatic, or military personnel, however, depends upon the same factors considered by the D.C. Circuit: whether the employee is involved in policymaking, whether the foreign country considers the plaintiff a civil servant, and whether the employment relationship has a commercial analog. *Id.* at 921-22. Since respondent was not engaged in policymaking, was not a civil servant under U.A.E. law, and performed tasks similar to those performed in commercial enterprise, the Ninth Circuit would conclude that respondent's employment was commercial.

The *Segni* court would also resolve this case in the same way as the D.C. Circuit. That court stresses the "nature of [the plaintiff's] 'employment activities' in order to determine whether they are governmental or private." *Segni*, 835 F.2d at 165 (emphasis omitted). Because that inquiry turns on precisely the factors just described, the Seventh Circuit would likewise conclude that respondent's suit could proceed.

2. The facts here are plainly distinguishable from the two cases in which courts have held that the plaintiffs' claims fell outside the commercial activity exception. The court in *Butters*, for example, focused on whether the "relevant act" is "quintessentially an act 'peculiar to sovereigns.'" 225 F.3d at 465. That question depended on a key factor relied upon by the D.C. Circuit: whether the employment relationship is "the sort of action by which private parties can engage in commerce." *Ibid.* (citation omitted). Unlike the sovereign function at issue in *Butters* – the safeguarding of a national leader – respondent's auditing and accounting activities are plainly analogous to jobs performed in the private sector. The Fourth Circuit would therefore agree with the holding below.

The court in *Kato* would likewise conclude that the commercial activity exception applies to permit respondent's suit. That court looks to whether the employee is a civil servant and to whether the state "exercises only those powers that can also be exercised by private citizens, as distinct from those powers peculiar to sovereigns." *Kato*, 360 F.3d at 111 (citations and internal quotation marks omitted). While the plaintiff in *Kato* was "concededly a 'civil servant' under Japanese law," respondent is *not* a civil servant. Also, respondent was a third country national while the *Kato* plaintiff was a Japanese citizen employed by the Japanese government.

Furthermore, while the *Kato* employee's responsibility to promote all Japanese products did not have a commercial analog, respondent's auditing and accounting activities are indisputably commonly performed in commercial enterprise. The duties inherent to respondent's employment lacked the degree of discretion present in *Kato*. The Second Circuit would therefore reach the same conclusion as the D.C. Circuit.

In view of the absence of any conflict with respect to the application of the commercial activity exception to these facts, there is no need for review by this Court of the judgment in this case.

III. Diverse Results Across Varied Fact Patterns Is Perfectly Consistent With The Fact-Bound Nature Of The Commercial Activity Inquiry.

The fact-bound nature of the inquiry under the commercial activity exception provides yet another reason why review by this Court is not warranted here. Determinations whether particular activities

qualify as "commercial" are inherently fact-specific. Any standard generated by this Court would itself need to be quite general in order to provide for flexible application across diverse fact patterns. It is unlikely that this Court could provide guidance more specific than what already is available from the decisions of the courts of appeals.

Petitioners concede that "Congress purposefully ceded a 'great deal of latitude' to the courts to establish a standard for identifying 'commercial activities.'" Pet. 4. Courts must decide whether, in each case, the particular set of facts constitutes a "commercial activity." Congress's decision to forego a precise statutory definition underscores the difficulty this Court would have in crafting a rule providing additional guidance to the lower courts. With the relevant factors already agreed upon, the courts of appeals are much better situated to resolve the variety of different factual scenarios that arise.

If, however, this Court nonetheless concludes that it is possible to provide the lower courts with a more precise definition of "commercial activity," there are three reasons why it would not be appropriate to undertake such an effort in this case. First, this is one of only very few lower court decisions applying the "commercial activity" standard to employment-related claims. By addressing the commercial activity question in the context of the much more common, non-employment fact pattern, the Court would be better able to craft a more detailed "commercial exception" standard with wider applicability.

Second, this case differs from the vast majority of "commercial exception" cases in that it involves a foreign national – one of the classes of individuals expressly identified by Congress as likely engaged in

"commercial activities."

Third, petitioners did not argue below that the court of appeals had identified the wrong factual inquiries or that the district court should have been required to address other considerations. Rather, their contention was that the district courts erred in conducting the factual assessment directed by the court of appeals. That fact-specific contention provides no basis for revising the factual inquiries specified by the court of appeals.

IV. The Application Of FSIA's Commercial Activity Exception To Employment Claims Is Not Worthy Of This Court's Attention.

The miniscule volume of wrongful termination litigation under the FSIA demonstrates that the issue is not sufficiently important to warrant this Court's review. In the thirty-year history of the FSIA, there appear to have been fewer than twenty reported cases of wrongful termination involving the commercial activity exception. The relative dearth of litigation in this area shows that the issue lacks the practical importance necessary to justify this Court's attention.

The relative unimportance of the underlying issues is further reflected by the absence of amicus participation by the United States in this case. Petitioners contend that this case presents "uniquely profound" issues regarding "the internal affairs of foreign sovereigns." Pet. 13. If that were true, the United States would have participated in the extensive litigation below.

The United States regularly participates in FSIA litigation to "ensure the proper application of sover-

eign immunity principles." U.S. Br. as Amicus Curiae at 3, *Ministry of Defense* v. *Elahi*, 495 F.3d 1024 (9th Cir. 2007) (No. 03-55015). Concern about unwarranted judicial intrusions into the internal affairs of sovereigns is a chief motivation for such participation. See *ibid.* (addressing immunity issue to prevent the United States from "receiv[ing] reciprocal unfavorable treatment in foreign litigation").

The absence of an amicus filing by the United States – especially in view of the importance of the District of Columbia Circuit's interpretation of the FSIA, given the large concentration of diplomatic missions in Washington – provides further evidence that the issue in the case does not rise to the level of importance necessary to warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SYLVIA J. ROLINSKI
DANIELLE M. ESPINET
Rolinski & Suarez, LLC
14915 River Road
Potomac, MD 20854
(240) 632-0903

PHILIP M. MUSOLINO
Musolino & Dessel
Suite 440
1615 L Street NW
Washington, DC 20036
(202) 466-3883

ANDREW J. PINCUS
Counsel of Record
CHARLES A. ROTHFELD
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

DAN M. KAHAN
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4800

Counsel for Respondent

MARCH 2008