No. 18-

IN THE
Supreme Court of the United States

PETRÓLEO BRASILEIRO S.A.,
Petitioner,

v.

EIG ENERGY FUND XIV, L.P., *et al.*,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondents invested in a Luxembourgian subsidiary, which invested in another Luxembourgian subsidiary, which invested in a Brazilian corporation, which invested in a Brazilian investment fund. Respondents allege that Petitioner, a sovereign instrumentality of Brazil, defrauded them by inducing them to invest. They further allege that their investment in their Luxembourgian subsidiaries became less valuable when the Brazilian investment fund sought judicial restructuring protections.

The questions presented are:

1. Whether the D.C. Circuit, in conflict with three other courts of appeals, correctly held that there is a "direct effect" in the United States under the Foreign Sovereign Immunities Act when the plaintiff's alleged loss flowed through three foreign companies and two countries before being booked in the United States.

2. Whether the D.C. Circuit, in conflict with four other courts of appeals, correctly held that there is a "direct effect" in the United States under the Foreign Sovereign Immunities Act when the legally significant act causing the effect occurred overseas.

PARTIES TO THE PROCEEDING

Petróleo Brasileiro S.A., petitioner on review, was the defendant-appellant below.

EIG Energy Fund, XIV, L.P., EIG Energy Fund XIV-A, L.P., EIG Energy Fund XIV-B, L.P., EIG Energy Fund XIV (Cayman), L.P., EIG Energy Fund XV, L.P., EIG Energy Fund, XV-A, L.P., EIG Energy Fund XV-B, L.P., EIG Energy Fund XV (Cayman), L.P., and EIG Management Company, LLC, respondents on review, were the plaintiffs-appellees below.

Odebrecht, S.A., Odebrecht Participaes e Engenharia S.A., Keppel Corporation Ltd., Keppel Offshore & Marine Ltd., Sembcorp Industries Ltd., Sembcorp Marine Ltd., and Jurong Shipyard PTE Ltd. were defendants below, but did not participate in the court of appeals and are not parties to this petition.

CORPORATE DISCLOSURE STATEMENT

Petróleo Brasileiro S.A. (Petrobras) has no parent company, and no publicly held corporation owns 10% or more of its shares. The Brazilian Federal Government owns 50.26% of the ordinary shares of Petrobras.

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Petróleo Brasileiro S.A. ("Petrobras") respectfully petitions for a writ of certiorari to review the judgment of the D.C. Circuit in this case.

OPINIONS BELOW

The D.C. Circuit's opinion is reported at 894 F.3d 339. Pet. App. 1a-23a. The District Court's opinion is reported at 246 F. Supp. 3d 52. Pet. App. 24a-96a. The D.C. Circuit's orders denying panel rehearing and rehearing en banc are not reported. *Id.* at 97a-100a.

JURISDICTION

The D.C. Circuit entered judgment on July 3, 2018. Pet. App. 1a. Petrobras timely petitioned for panel rehearing and rehearing en banc, which were denied on October 1, 2018. *Id.* at 97a-100a. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1604 provides:

> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. § 1605(a)(2) provides in relevant 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; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or 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 * * * .

INTRODUCTION

Respondents are American and Cayman Islands hedge funds that created two subsidiaries in Luxembourg to invest in a Brazilian investment fund that invested in a Brazilian company engaged in building drill ships for off-shore oil exploration and development. Respondents allege that Petitioner Petrobras, Brazil's state-owned energy company, fraudulently concealed information material to their decision to invest and that they lost money when the Brazilian drill ship company sought judicial restructuring protection.

But Respondents do not allege that the Brazilian drill ship company's restructuring directly caused them a monetary loss. They claim that the drill-ship company's insolvency caused the Brazilian investment fund to lose value, which caused their Luxembourgian subsidiaries to lose value, which ultimately caused Respondents a loss when they wrote down the value of their Luxembourgian subsidiaries. The question presented is whether that chain of accounting entries, culminating with a write-down in the United States, is a "direct effect" in the United States that can breach Petrobras's sovereign immunity under the Foreign Sovereign Immunities Act (FSIA).

To ask the question should have answered it. But a divided D.C. Circuit, breaking from other circuits, held that Respondents' circuitous loss *was* direct. The majority held that even if Respondents' loss occurred in Luxembourg, it was felt directly in the United States when it was reflected on Respondents' books as a diminution in the value of their Luxembourgian subsidiaries. The Second, Fifth, and Tenth circuits, by contrast, have concluded that similar effects were not sufficiently direct to abrogate a sovereign's immunity. *See International Housing Ltd.* v. *Rafidain Bank Iraq*, 893 F.2d 8, 11 (2d Cir. 1989); *Frank* v. *Commonwealth of Antigua & Barbuda*, 842 F.3d 362, 365-366, 368-370 (5th Cir. 2016); *United World Trade, Inc.* v. *Mangyshlakneft Oil Prod. Ass'n*, 33 F.3d 1232, 1238 (10th Cir. 1994). And four circuits have suggested that an effect cannot be direct if the legally significant act that caused it occurred abroad. *See Guirlando* v. *T.C. Ziraat Bankasi A.S.*, 602 F.3d 69, 76-77 (2d Cir. 2010); *Adler* v. *Federal Republic of Nigeria*, 107 F.3d 720, 727 (9th Cir. 1997); *United World Trade*, 33 F.3d at 1239; *Rush-Presbyterian-St. Luke's Med. Ctr.* v. *Hellenic Republic*, 877 F.2d 574, 581-582 (7th Cir. 1989).

This Court should step in. As it currently stands, little more than geography dictates whether a loss abroad can be litigated here in the United States. And because the District of Columbia District Court is a permissible forum for *all* suits against foreign states and their political subdivisions, the D.C. Circuit's decision allows American FSIA plaintiffs to shop their claims to a forum uniquely receptive to them. The Court should not allow the split to linger.

The D.C. Circuit's position is also wrong on multiple fronts. It misconstrues precedents from this Court; it misunderstands the meaning of "effect" in the FSIA; and it effectively reads the word "direct" out of the statute. Letting the D.C. Circuit's ruling stand would expand the FSIA's commercial-activity exception from a narrow carve-out to a sovereign's presumptive immunity to a gaping loophole, satisfied even when an effect—to quote the D.C. Circuit—"ricochet[s]" around the globe. Pet. App. 19a. Such an expansion undermines the United States' respect for the sovereignty of foreign nations, and threatens to undermine foreign nations' respect for the United States' own sovereignty.

The Court should grant the petition and reverse.

STATEMENT

A. Factual Background

1. In 2006, Petrobras, an energy company majority owned by the Brazilian government, announced that an estimated 50 billion barrels of new oil reserves had been discovered off the coast of Brazil. Pet. App. 28a.[1] Petrobras proposed building a fleet of drill-ships to extract the oil, which it estimated would cost $20 billion. *Id.* An independent entity, Sete Brasil Participações ("Sete"), was formed to attract investors for the project. *Id.* One investment came from Respondents, a group of American and Cayman Island hedge funds managed by United States-based EIG Management Company ("EIG"). *See id.* at 3a, 29a.

Before making their investment, Respondents created a pair of subsidaries in Luxembourg: EIG Sete Parent SÀRL and EIG Sete Holdings SÀRL ("EIG

[1] We draw on the facts set forth in the District Court's opinion, which construed Respondents' allegations in the light most favorable to them. *See* Pet. App. 38a (citing *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009)).

Luxembourg"). *Id.* at 5a, 32a. Respondents first invested in EIG Sete Parent SÀRL; EIG Sete Parent SÀRL invested in EIG Luxembourg; EIG Luxembourg invested in a Brazilian investment fund, FIP Sondas; and FIP Sondas invested in Sete. *Id.* at 32a-33a.

2. Respondents allege that Petrobras induced them to invest by omitting that it was engaged in a fraudulent kickback scheme. *See id.* at 4a, 32a-34a. When the Brazilian government uncovered the scheme, lenders allegedly withdrew their support of the drilling project. *Id.* at 6a, 34a. Respondents contend that this withdrawal of debt financing forced Sete to seek judicial restructuring. *Id.* at 34a.

Respondents allege that Sete's restructuring caused them to lose their money. *Id.* But that loss, in the words of the D.C. Circuit, "ricocheted" twice across the Atlantic Ocean. *Id.* at 19a. Sete's alleged failure caused FIP Sondas to become less valuable, which impaired EIG Luxembourg's investment in FIP Sondas, which impaired EIG Parent SÀRL's investment in EIG Luxembourg, which impaired Respondents' investment in EIG Luxembourg. Indeed, *EIG Luxembourg* reported the loss in its public filings. *See* C.A. J.A. 60.

B. Procedural History

1. Respondents sued Petrobras for fraud in the District of Columbia District Court. Pet. App. 6a. As an instrumentality of Brazil, Petrobras is presumptively immune from suit in the United States. 28 U.S.C. § 1604; *see* C.A. J.A. 19 (Respondents' concession that Petrobras is a foreign state for FSIA purposes). Petrobras therefore moved to dismiss for lack

of subject matter jurisdiction, asserting its immunity under the FSIA. Pet. App. 6a.

The District Court denied the motion. *Id.* at 6a-7a. It concluded that the FSIA's commercial-activity exception applied because Petrobras's alleged fraud "cause[d] a direct effect in the United States." *Id.* at 7a (quoting 28 U.S.C. § 1605(a)(2)). According to the District Court, Petrobras injured the Respondents when it induced Respondents to invest, an injury that "occurred, at least in part, in the United States." *Id.* at 50a. Because this injury partially occurred in the United States, the District Court concluded that the fact that Respondents had invested in two Luxembourgian companies that then invested in a Brazilian intermediary that then invested in Sete did not render Respondents' injury indirect. *Id.*

2. Petrobras appealed. *See id.* at 8a; *see also Jungquist* v. *Sheikh Sultan Bin Khalifa Al Nahyan*, 115 F.3d 1020, 1025 (D.C. Cir. 1997) (explaining that the denial of a sovereign's motion to dismiss on FSIA immunity grounds is appealable under the collateral-order doctrine). A divided D.C. Circuit panel affirmed. *See* Pet. App. 19a-20a.

Unlike the District Court, the D.C. Circuit did not conclude that EIG's injury occurred in the United States. *See id.* at 17a. Instead, the panel majority held that even if Respondents' injury *had* occurred in Luxembourg, it still caused a direct effect in the United States. *Id.* at 17a, 19a.

The panel majority first questioned whether EIG's use of foreign intermediaries—EIG Sete Parent SÀRL and EIG Luxembourg—mattered at all. *See id.* at 17a-18a. Indeed, the court expressed skepticism that established "principle[s] of corporate formalism" would prevent plaintiffs like Respondents from bringing suit under the FSIA. *See id.* at 18a.

The court next rejected Petrobras's argument that there is only a direct effect for FSIA purposes in the place where the loss occurs. *See id.* at 18a-19a. It instead concluded that a loss occurring overseas did not necessarily defeat FSIA jurisdiction, *see id.* at 18a, and that a foreign plaintiff could bring a suit in U.S. courts if it showed harm to U.S. shareholder plaintiffs, even if the corporation itself was a foreign citizen. *See id.* at 18a-19a.

The panel majority then opined that any loss EIG Luxembourg would have booked in Luxembourg, Respondents would have also booked in the United States as a loss in the value of their EIG Sete Parent SÀRL shares. *See id.* at 19a. It thus reasoned that because there was *some* loss by *some* EIG entity in the United States, "Petrobras cannot avoid U.S. jurisdiction because the effects of its [alleged] fraud ricocheted halfway around the globe." *Id.*

3. Judge Sentelle dissented. *Id.* at 20a. He explained that although Respondents may have pleaded an *effect* in the United States from Petrobras's alleged fraud, "the controlling issue in the case is whether [Respondents] have shown *direct* effects." *Id.* Judge Sentelle further observed that "[t]he adjective 'direct' is as much a provision of the statute as the noun 'effects.' " *Id.* at 21a. Judge Sentelle explained that none of the "cases relied upon by the majority[ ] mandate a conclusion that a loss suffered by a Luxembourg entity, owned by another Luxembourg entity, in turn owned by United States enti-

ties, constitutes a direct effect in the United States." *Id.* at 22a. The majority's contrary holding was "inconsistent with Congress's express language in the relevant exception." *Id.* And Judge Sentelle concluded that it was "unlikely that Congress would have included as plain a word as 'direct' in the creation of an exception to foreign sovereign immunity unless it had more apparent content than the majority's interpretation would allow." *Id.* at 22a-23a.

4. The panel and the full D.C. Circuit denied Petrobras's timely rehearing petition. *See id.* at 97a-100a. This petition for certiorari followed.

REASONS FOR GRANTING THE PETITION

I. THE CIRCUITS ARE SPLIT OVER THE MEANING OF "DIRECT EFFECT" IN THE FSIA.

The FSIA "establishes a comprehensive framework for determining whether a court in this country, state or federal, may exercise jurisdiction over a foreign state." *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607, 610 (1992). Under the FSIA, "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States" unless one of the Act's exceptions applies. 28 U.S.C. § 1604.

The exception at issue here, the so-called commercial-activity exception, provides that a foreign sovereign loses its presumptive immunity if a suit 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." *Id.* § 1605(a)(2) (emphasis added).

This Court first parsed the "direct effect" requirement in *Weltover*. The Court considered whether Argentina rescheduling the maturity dates of government-issued bonds, and its consequent failure to timely pay holders of the bonds, had a "direct effect" in the United States. 504 U.S. at 610, 618-619. This Court held that it did, reasoning that because New York had been designated as the place of performance on the bonds, "[m]oney that was supposed to have been delivered to a New York bank for deposit was not forthcoming." *Id.* at 619. That was a direct effect. *See id.* This Court explained that to be direct, an effect need not be "substantial[ ]" or "foreseeab[le]." *Id.* at 618. Instead, an effect is "direct" when "it follows as an immediate consequence of the defendant's activity." *Id.* (internal quotation marks and alteration omitted).

In the years since *Weltover*, the courts of appeals have diverged on how to apply its teachings. The D.C. Circuit's opinion in this case highlights a growing split among the circuit courts on two aspects of the "direct effects" requirement: (1) Just how direct an effect must be to subject a foreign state to the jurisdiction of the U.S. courts; and (2) Whether a tort's foreign locus means there is not a direct effect in the United States. Both splits require this Court's intervention to resolve.

A. The Circuits Are Divided Over How Direct An Effect Must Be To Defeat Immunity.

The Second, Fifth, and Tenth Circuits all have interpreted "direct" in the FSIA to require a moreproximate connection between the foreign conduct and the United States effect than the D.C. Circuit did below.

The Tenth Circuit has twice held that there is no "direct effect" in the United States when an American company fails to receive promised funds abroad. In *Big Sky Network Canada Ltd.* v. *Sichuan Provincial Government*, 533 F.3d 1183, 1191 (10th Cir. 2008), a Canadian broadcaster owned by an American parent company lost money it had invested in Chinese local broadcasting after the Chinese regional government enforced a directive banning foreign ownership of cable companies. *Id.* at 1184, 1190. The Canadian company sued the Chinese regional government in the United States for intentional interference with its contract. *Id.* at 1184. The company argued that the district court had jurisdiction under the FSIA because the subsequent losses suffered by its American parent corporation were "direct effect[s]" in the United States. *Id.* at 1190.

The Tenth Circuit disagreed. Then-Judge Gorsuch, writing for the Court, explained that "an American corporation's failure to receive promised funds abroad will not qualify as a 'direct effect in the United States.' " *Id.* at 1191. Even though the American company's financial injury was "ultimately felt in the United States" those effects were merely "derivative of a financial injury Big Sky suffered in China, and thus are not sufficiently direct * * * to invoke the commercial activity exception." *Id.* In reaching that conclusion, Judge Gorsuch relied on the Tenth Circuit's previous decision in *United World Trade, Inc.* v. *Mangyshlakneft Oil Production Associ-*

ation, 33 F.3d 1232, 1238 (10th Cir. 1994). There, the Tenth Circuit held that there was no direct effect in the United States where the plaintiff, "had it received additional funds in London pursuant to the contract, would have then transferred those funds to the United States." *Id.* at 1239. The court admonished that "[t]he requirement that an effect be 'direct' indicates that Congress did not intend to provide jurisdiction whenever the ripples caused by an overseas transaction manage eventually to reach the shores of the United States." *Id.* at 1238.

The Second Circuit has also concluded that there was no "direct effect" in the United States when a foreign corporation was injured by a foreign government's breach of contract abroad, even when the corporation was controlled by United States principals and officers. *International Housing Ltd.* v. *Rafidain Bank Iraq*, 893 F.2d 8, 11 (2d Cir. 1989). The court explained that "[t]he fact that some or all of [the plaintiff's] principals or officers may be United States citizens does not outweigh the facts that *they organized the company outside the United States and that its losses in the instant transaction thus occurred elsewhere*." *Id.* (emphasis added). The fact that the losses were ultimately felt by the principals in the United States did not create a direct effect in the United States. *See id.*

The Fifth Circuit likewise has held that there was no "direct effect" in the United States where the plaintiffs merely invested in the person who suffered the actual financial loss. *See Frank* v. *Commonwealth of Antigua & Barbuda*, 842 F.3d 362, 370 (5th Cir. 2016). In *Frank*, American plaintiffs alleged that a foreign sovereign abetted a Ponzi scheme by accepting loans it never intended to pay back, thus depriving the schemer's victims of funds that could otherwise have been used to make them whole. The court explained that "the relationship between [the sovereign] and Plaintiffs is too indirect to satisfy the 'direct effect' requirement." *Id.* at 370. Although the money loaned to the sovereign was money that could not go to the victims, "[t]he financial loss due to [the sovereign's] failure to repay the loans was most directly felt by [the schemer] who was the actual lender in the loan transactions." *Id.* The court concluded that, as mere "investors and customers of" the schemer, the plaintiffs had not "directly felt" "the financial loss resulting from [the sovereign's] failure to repay the loans" and therefore "the 'direct effect' requirement [was] not met." *Id.* at 370 & n.9.

In sharp contrast to each of these circuits, the D.C. Circuit allowed Respondents' suit to proceed because Respondents, some of whom are United States entities, suffered a loss transmitted to them through FIP Sondas and their Luxembourgian subsidiaries. *See* Pet. App. 15a-19a. That loss would not qualify as a direct effect in the Second, Fifth, or Tenth Circuits. The financial loss from Petrobras's alleged fraud was directly felt by EIG Luxembourg, the actual investor in FIP Sondas. *See Frank*, 842 F.3d at 370 & n.9. EIG Luxembourg's ultimate parent companies may be American; so was the parent company in *Big Sky*, the principals in *International Housing*, and the investors in *Frank*. Respondents chose to organize EIG Luxembourg and EIG Sete Parent SÀRL overseas. EIG's losses in the Sete transaction "thus occurred elsewhere." *International Housing*, 893 F.2d at 11.

The practical impact of this split is significant given the outsize role the D.C. Circuit plays in FSIA cases. The FSIA allows all suits against a sovereign and its political subdivisions to be brought in the District of Columbia District Court. *See* 28 U.S.C. § 1391(f). It therefore introduces real mischief to have a different "direct effect" test in the D.C. Circuit: Plaintiffs can now choose not only their preferred forum, but their preferred "direct effects" test. This Court should harmonize the circuits.

B. The Circuits Are Divided Over Whether There Is A "Direct Effect" In The United States When The Legally Significant Act Giving Rise To The Effect Occurs Elsewhere.

The courts of appeals are also divided on whether the direct-effects exception to sovereign immunity is satisfied when the legally significant act giving rise to the claimed harm occurred outside the United States. Four circuits have held that the FSIA's direct-effect provision requires that a "legally significant act" cause direct effects in the United States. *See Weltover, Inc.* v. *Republic of Argentina*, 941 F.2d 145, 152 (2d Cir. 1991) ("In determining where the effect is felt directly, courts often look to the place where legally significant acts giving rise to the claim occurred."), *aff'd*, 504 U.S. 607 (1992); *Siderman de Blake* v. *Republic of Argentina*, 965 F.2d 699, 711 n.11 (9th Cir. 1992) (explaining "general rule" that "a direct effect occurs at the locus of the injury directly resulting from the sovereign defendant's wrongful acts") (internal quotation marks omitted); *United World Trade*, 33 F.3d at 1239 (applying the "legally significant acts" test by " 'look[ing] to the place where legally significant acts giving rise to the claim occurred' in determining the place where a direct effect may be said to be located") (citation omitted); *Rush-Presbyterian-St. Luke's Med. Ctr.* v. *Hellenic Republic*, 877 F.2d 574, 581-582 (7th Cir. 1989) ("The fact that an American corporation or individual has suffered * * * injury due to the foreign state's actions may not be sufficient to establish FSIA jurisdiction unless the foreign state has performed some 'legally significant act' here.").

Courts that have adopted this rule have explained that, without it, American plaintiffs could sue foreign sovereigns in the United States merely because they suffered *some* financial harm here from a distant, foreign tort. The legally-significant-act requirement "reflect[s] the principle that the mere fact that a foreign state's commercial activity outside of the United States caused physical or financial injury to a United States citizen is not itself sufficient to constitute a direct effect in the United States." *Guirlando* v. *T.C. Ziraat Bankasi A.S.*, 602 F.3d 69, 78 (2d Cir. 2010); *see also Rush-Presbyterian*, 877 F.2d at 581-582 ("The fact that an American corporation or individual has suffered financial injury due to the foreign state's actions may not be sufficient to establish FSIA jurisdiction unless the foreign state has performed some 'legally significant act' here.")

The D.C. Circuit below split with these circuits—and, for good measure, the District Court. The District Court concluded that there was a direct effect in the United States because EIG's injury occurred in the United States. *See* Pet. App. at 16a-17a, 52a. The D.C. Circuit took a different approach. It instead explained that it made no difference whether Respondents' injury occurred abroad because "a foreign locus" of a sovereign defendant's alleged tort "does not always mean that a tort causes no 'direct effect' in the United States." *Id.* at 15a. The D.C. Circuit reasoned that where the loss—the legally significant act—occurred was beside the point since "the third clause of the commercial activity exception turns on the requisite site of the direct effects of the defendant's alleged tort, not its 'locus' as a matter of tort law"—a conclusion that the D.C. Circuit claimed did not conflict with the law of other circuits. *Id.*

Not so. In the Second, Seventh, Ninth, and Tenth Circuits, the D.C. Circuit's acceptance of Petrobras's argument that the locus of Petrobras's alleged tort was in Luxembourg would have compelled dismissal of EIG's claims because in those jurisdictions, the legally significant act is deemed to have occurred at the locus of the tort. In the D.C. Circuit, however, EIG's suit was permitted to proceed. *See id.* at 16a. And such a split is especially pernicious in the FSIA context because (again) it will allow plaintiffs to exercise their option to sue in D.C. solely to avoid the stricter rule. *See supra* at 14. The Court should resolve it.

II. THE D.C. CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S CASES AND THE FSIA'S PLAIN TEXT.

The Court should also grant certiorari because the position adopted by the D.C. Circuit conflicts with this Court's cases on an important question: the scope and limits of the sovereign immunity of foreign countries and their instrumentalities. The D.C. Circuit also disregarded the FSIA's text—misconstruing the word "effect," while reading "direct" out of the statute entirely. The Court should step in to reaffirm its precedents and the FSIA's text.

1. The D.C. Circuit's decision broke from two of this Court's FSIA cases, *Weltover* and *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 474 (2003).

Relying on *Weltover*, the panel majority stated that Petrobras could not "avoid U.S. jurisdiction because the effects of its [alleged] fraud ricocheted halfway around the globe." Pet. App. 19a. The court cited *Weltover*'s holding that there is a direct effect in the United States when a foreign sovereign reneges on a contract calling for a deposit of funds into a U.S. bank, finding "no basis to treat [Respondents'] investment loss differently." *Id.* (citing *Weltover*, 504 U.S. at 619).

The D.C. Circuit was mistaken twice over. For one, the "ricochet[ ]" the D.C. Circuit described *does* have substantive importance. A direct effect in the United States is not an effect that occurs at the tail end of a global "ricochet." *Id.*; *see Weltover*, 504 U.S. at 618 (a direct effect is one that "follows '*as an immediate* *consequence* of the defendant's * * * activity' ") (ellipses in original, emphasis added, and citation omitted). For another, the D.C. Circuit misunderstood *Weltover*. There was a direct effect in the United States in *Weltover* because the contract called for payment to an American bank account; the sovereign's failure abroad to make that payment caused a direct financial effect *in the United States*. *See Weltover*, 504 U.S. at 618-619.

There was nothing analogous here. EIG's suit sounds in tort, not contract, so there is no place of performance in the United States as there was in *Weltover*. And the Sete investment agreement does not call for any payment to American banks or in American dollars, as the bonds in *Weltover* did. *See* Pet. App. 16a. *Weltover* undermines, not supports, the D.C. Circuit's conclusions.

The D.C. Circuit also thought that Respondents, EIG Luxembourg, and EIG Sete Parent SÀRL may not even be separate entities for FSIA purposes. *Id.* at 17a-18a. It acknowledged that *Dole* held that the presumption of separateness applied to a sovereign and a corporation in which it held shares. *Id.* (citing 538 U.S. at 476-447). But the D.C. Circuit intimated that that presumption may not apply here because its application in *Dole* tended to *narrow* sovereign immunity—the sovereign in *Dole* was not a majority owner of the defendant corporation and the corporation therefore was not the sovereign's instrumentality—whereas the presumption's application against Respondents would *expand* sovereign immunity by blocking Respondents' lawsuit. *Id.*

That is an unduly cramped reading of *Dole*. *Dole* rested on what it called "[a] basic tenet of American corporate law"—"that the corporation and its shareholders are distinct entities." 538 U.S. at 474. *Dole* then explained that "[t]he fact that the shareholder is a foreign state does not change the analysis." *Id.* at 475; *see also Burnet* v. *Clark*, 287 U.S. 410, 415 (1932) ("A corporation and its stockholders are generally to be treated as separate entities."). The D.C. Circuit thus got its analysis backwards. Corporate separateness "is one of the traditional background principles 'against which Congress legislate[s],' " and is the default rule across all American law—the FSIA included. *Burrage* v. *United States*, 571 U.S. 204, 214 (2014) (brackets in original and citation omitted); *see also United States* v. *Bestfoods*, 524 U.S. 51, 62 (1998) (describing corporate separateness as a "bedrock" principle of American law). Those "traditional background principles" do not drop out of the background depending on whether they are being applied against the plaintiff or the defendant. *Burrage*, 571 U.S. at 214.

Indeed, *Dole* teaches that Respondents' corporate structure *is* a proper consideration in the direct-effect analysis. The purported instrumentality in *Dole* argued that this Court should "ignore corporate formalities" and "ask whether, in common parlance, [the sovereign] would be said to own the" company. 538 U.S. at 474. The Court declined, explaining that "[i]n issues of corporate law[,] structure often matters." *Id.*

Structure matters here, too. Respondents chose the layered corporate structure that they did, and

Dole requires holding Respondents to the jurisdictional consequences of that choice. The D.C. Circuit's decision contravenes *Dole* by permitting Respondents to reap the benefits of a layered corporate structure while avoiding its jurisdictional consequences.

2. The D.C. Circuit also misunderstood the meaning of both "direct" and "effect" in the FSIA. The D.C. Circuit's opinion effectively reads the word "direct" out of the commercial-activity exception's third clause. As Judge Sentelle noted in dissent, the majority spent the bulk of its opinion proving that *an effect*—Respondents' eventual financial loss—arguably occurred in the United States. *See* Pet. App. 20a-21a. But the relevant question is whether there was a *direct* effect in the United States, as the commercial-activity exception's third clause demands. *See* 28 U.S.C. § 1605(a)(2). It is a " 'cardinal principle' of interpretation that courts 'must give effect, if possible, to every clause and word of a statute.' " *Loughrin* v. *United States*, 134 S. Ct. 2384, 2390 (2014) (citation omitted). As Judge Sentelle put it in dissent below, "[t]he adjective 'direct' is as much a provision of the statute as the noun 'effects.' " Pet. App. 21a. And it is "unlikely that Congress would have included as plain a word as 'direct' in the creation of an exception to foreign sovereign immunity unless it had more apparent content than the majority's interpretation would allow." *Id.* at 22a-23a.

By holding that a loss that passed to Respondents from Sete and through three separate entities—FIP Sondas, EIG Luxembourg, and EIG Sete Parent

SÀRL—was sufficiently "direct" to trigger the third clause of the commercial-activity exception, the D.C. Circuit effectively read the word out of the FSIA. *See id.* at 21a-23a. That outcome, as Judge Sentelle explained in dissent, is "inconsistent with Congress's express language in the relevant exception." *Id.* at 22a.

The D.C. Circuit also purported to adhere to the principle that financial loss to an American citizen alone cannot constitute a direct effect by observing that Respondents also were "targeted" by Petrobras in the United States. Pet. App. 16a. But targeting is an affirmative *act*, not an *effect*, and there is a separate clause of the commercial-activity exception for actions predicated on a sovereign's acts in the United States. *See* 28 U.S.C. § 1605(a)(2); Petrobras C.A. Opening Br. 35-41 (explaining why Respondents' claims do not satisfy that clause). "Distinctions among descriptions juxtaposed against each other are naturally understood to be significant * * * ." *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 357 (1993). In holding that "targeting" constituted a direct *effect* in the United States, the D.C. Circuit conflated the two clauses of the commercial-activity exception. The Court should correct the D.C. Circuit's misapprehension of its precedent and the FSIA's text.

III. THE QUESTION PRESENTED IS IMPORTANT.

Finally, the question presented is important. Just how "direct" an effect need be to allow a U.S. court to exercise jurisdiction over a foreign sovereign has consequences for foreign governments, for how the

U.S. government is treated abroad, and for the power of U.S. courts.

Allowing the D.C. Circuit's rule to stand will permit the commercial-activity exception to swallow the general rule of sovereign immunity. Currently, the exception is a narrow carve-out to the established norm that foreign sovereigns are immune from suit in U.S. courts. *See Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 488 (1983) ("A foreign state is *normally* immune from the jurisdiction of federal and state courts subject to a set of exceptions * * * .") (emphasis added and internal citation omitted). Under the D.C. Circuit's new rule, however, any financial loss experienced by a U.S. company would be sufficient for jurisdiction, even if that loss was channeled through multiple separate foreign corporate entities—entities that, as in this case, are often created and maintained specifically to *avoid* the tax and other consequences of United States incorporation. *See* Pet. App. 4a-5a (explaining that Respondents formed the Luxembourg subsidiaries to take advantage of tax incentives).

Congress had good reasons to not give the U.S. courts jurisdiction over acts taken by foreign sovereigns that have only indirect effects in the United States. As with all cases involving events in foreign countries, the United States has a diminished interest in an action when it only indirectly affects this country. *Cf. Restatement (Third) of Foreign Relations Law* § 421(2)(j) (1987) ("a state's exercise of jurisdiction to adjudicate" foreign conduct is reasonable only if the entity "had carried on outside the state an activity having a substantial, direct, and foreseeable effect within the state"). And once a foreign state's immunity is breached and jurisdiction attaches, the state will be subject to American discovery and litigation, which is uniquely burdensome. That burden puts pressures on sovereigns to settle, or at the very least gives significant leverage to plaintiffs like Respondents. *Cf. Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 741 (1975) (explaining that expansive legal rules allow "a plaintiff with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value").

Keeping the FSIA's narrow exceptions to sovereign immunity narrow also protects the United States' sovereignty. Acknowledging other countries' sovereignty encourages them to respect the United States' sovereignty in return. *See Bolivarian Republic of Venezuela* v. *Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1319 (2017); *see also Verlinden B.V.*, 461 U.S. at 493 ("Actions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States * * * ."). This case is accordingly of great practical importance to both other countries and the United States itself.

It is therefore unsurprising that this Court routinely grants certiorari in FSIA cases. *See, e.g.*, *Rubin* v. *Islamic Republic of Iran*, 137 S. Ct. 2326, 2327 (2017) (mem.); *Bolivarian Republic of Venezuela* v. *Helmerich & Payne Int'l Drilling Co.*, 136 S. Ct. 2539 (2016) (mem.); *Bank Markazi* v. *Peterson*, 136 S. Ct. 26 (2015) (mem.); *OBB Personenverkehr AG* v. *Sachs*, 135 S. Ct. 1172, 1173 (2015) (mem.); *Republic of*

Argentina v. *NML Capital, Ltd.*, 571 U.S. 1118 (2014) (mem.). And this Court has done so even when the split of authority was less clear than it is here. *See Bank Markazi* v. *Peterson*, 136 S. Ct. 1310, 1322-23 (2016) (granting certiorari without any noted circuit split). At minimum, this Court should invite the Solicitor General to express the views of the United States. *See*, *e.g.*, *Republic of Sudan* v. *Harrison*, 138 S. Ct. 293 (2017) (mem.) (calling for views of the Solicitor General in a FSIA case); *Rubin* v. *Islamic Republic of Iran*, 565 U.S. 1193 (2012) (mem.) (same).

Finally, it is important to correct the D.C. Circuit's errors because they are the D.C. Circuit's errors. As explained, the District of Columbia District Court is the default venue for FSIA suits against foreign states and their political subdivisions. *See* 28 U.S.C. § 1391(f). FSIA plaintiffs can therefore shop their suits against foreign sovereigns to the D.C. Circuit to take advantage of the decision below. The Court should avoid that troublesome—and troubling—result by granting the writ and correcting the D.C. Circuit's incorrect holdings.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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