No. 18-716

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

REPLY BRIEF IN SUPPORT OF CERTIORARI

CATHERINE E. STETSON
Counsel of Record
ADAM K. LEVIN
DAVID M. FOSTER
SEAN MAROTTA
ERIN R. CHAPMAN
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
cate.stetson@hoganlovells.com
Counsel for Petitioner

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INTRODUCTION

The real deficiency in Respondents' brief in opposition is not so much what it says, but what it does not. It maintains that there is no division among the circuits about how direct an effect must be to grant jurisdiction under the Foreign Sovereign Immunities Act (FSIA), but neglects to acknowledge that multiple circuits have found no direct effect on similar facts. It contends that the D.C. Circuit's reading of the FSIA is consistent with this Court's precedents and the Act's text, but overlooks how the decision below guts the Act's requirement that there be *direct* effects in the United States as a result of a sovereign's foreign conduct. And in service of its alterna-

tive narrative, it repeatedly contorts the record to say that Respondents "invest[ed] in Sete," (Opp. 14, 18, 20, 23), when, in fact, Respondents invested in a fund (EIG Sete Parent SÀRL) that invested in another fund (EIG Luxembourg) that invested in a Brazilian investment fund (FIP Sondas) that invested in the company (Sete) that lost money as a result of the alleged fraud. *See* Pet. App. 32a-33a.

Respondents thus do not refute the petition's core: The divided D.C. Circuit below broke from its sister circuits in interpreting the "direct effects" prong of the FSIA's commercial-activity exception. Petrobras's petition offers this Court the opportunity to resolve (1) how "direct" an effect must be to subject a foreign state to U.S. jurisdiction; and (2) whether there is a direct effect in the United States when a sovereign's alleged tort has a foreign locus. Answering those questions is all the more important because the D.C. Circuit is a catch-all venue for FSIA cases—a role made much more prominent now that the D.C. Circuit has flung the doors open for indirectly injured plaintiffs.

The Court should grant the petition and reverse.

ARGUMENT

I. THE D.C. CIRCUIT'S INTERPRETATION OF "DIRECT EFFECT" SPLITS WITH ITS SISTER CIRCUITS.

The D.C. Circuit's direct-effect holding below breaks from those of other circuits both before and after *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607 (1992). Pet. 9-16. The divided panel found a direct effect even though, in the panel's own words,

"the effects of [the alleged] fraud ricocheted halfway around the globe before coming to rest in EIG's Washington, D.C. office." Pet. App. 19a. Other circuits require both a tighter connection between the United States and the effects of the defendants' foreign commercial activities and hold that when a tort's locus occurs outside the United States, there is no direct effect in the United States. Pet. 10-16.

Respondents brush away the split by misrepresenting a key fact. Despite Respondents' repeated statements (Opp. 14, 18, 20, 23), Respondents did *not* "invest in Sete." They invested in a Luxembourgian subsidiary that invested in another Luxembourgian subsidiary that invested a Brazilian holding company that invested in Sete. *See* Pet. App. 32a-33a. That Respondents must alter the record to reconcile the case law only emphasizes the need for this Court's review.

A. Other Circuits Require A Closer Connection Between Foreign Conduct And United States Effects Than The Panel Below.

1. The Second, Fifth, and Tenth Circuits all require a tighter connection between the foreign conduct and the United States effect than the D.C. Circuit did below.

The Tenth Circuit epitomizes this approach, which is why we led with it. *See* Pet. 11-12. Respondents appear to agree, which is why they discuss those cases last. Opp. 19-20. For good reason: In the Tenth Circuit, Respondents' claims would have been dismissed. *See* Pet. 11-12.

In *Big Sky Network Canada Ltd.* v. *Sichuan Provincial Government*, 533 F.3d 1183 (10th Cir. 2008) (Gorsuch, J.), the Tenth Circuit rejected the argument Respondents now make: that the FSIA confers jurisdiction when an American parent corporation records foreign losses. *Id.* at 1190-91. The court explained that such "financial injury, though ultimately felt in the United States, is too attenuated to qualify as direct." *Id.* at 1191 (citing *United World Trade, Inc.* v. *Mangyshlakneft Oil Prod. Ass'n*, 33 F.3d 1232, 1239 (10th Cir. 1994)).

Respondents argue that *Big Sky* is distinguishable because the "plaintiff who made the investment [there] was not a U.S. entity." Opp. 19. But the entity that made the investment here was *also* not a U.S. entity. EIG did not wire money "from U.S. bank accounts to Sete." Opp. 25. EIG Luxembourg made the investment, after Respondents "first transferred capital to EIG Luxembourg, which, in turn, invested those funds into a Brazilian holding company, FIP Sondas, which in turn, invested those funds into a Brazilian holding company, FIP Sodas." Pet. App. 32a.

Another Tenth Circuit case, *United World Trade*, held 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." 33 F.3d at 1238. Respondents argue that *United World Trade* is inapplicable because it is a contract case. *See* Opp. 20. That categorical distinction (which Respondents repeat (Opp. 17-18)) is not one this Court has ever recognized. *Weltover*, which Respondents agree governs (*see* Opp.

13, 14), was itself a breach-of-contract case. 504 U.S. at 610.

The Fifth Circuit has also held that there is no direct effect in the United States where, as here, American plaintiffs merely invested in the allegedly injured entity. *See Frank* v. *Commonwealth of Antigua & Barbuda*, 842 F.3d 362, 370 (5th Cir. 2016). Respondents counter that in *Frank* the "plaintiffs had no connection with or relationship with the bank" that was engaged in fraud. Opp. 18. Not so. *Frank* held that "the relationship between *Antigua* and Plaintiffs [was] too indirect to satisfy the 'direct effect' requirement" because "the financial loss * * * was not directly felt by Plaintiffs, who" were mere "investors and customers of" the one who actually suffered the loss. 842 F.3d at 370 (emphasis added).

Frank did not turn on whether Antigua "dealt directly" with the plaintiffs. Opp. 18. The Fifth Circuit instead concluded that as mere "investors and customers of" the schemer, the plaintiffs had not "directly felt" the "financial loss resulting from Antigua's failure to repay the loans." *Id.* at 370 & n.9. So too here, where Respondents were merely investors in funds that ultimately invested in Sete. *See* Pet. App. 32a-33a.

The Second Circuit has similarly concluded that there was no "direct effect" in the United States when a foreign corporation controlled by Americans was injured abroad. *See International Housing Ltd.* v. *Rafidain Bank Iraq*, 893 F.2d 8, 11 (2d Cir. 1989). Respondents nonetheless contend that *Atlantica Holdings, Inc.* v. *Sovereign Wealth Fund Samruk-*

Kazyna JSC, 813 F.3d 98 (2d Cir. 2016), "controls the law of the Second Circuit in cases like this one." Opp. 18.

Hardly. *Atlantica* does not mention *International Housing*, much less overturn it. That is because *Atlantica* rested on a different principle entirely. In *Atlantica*, the Second Circuit held that the sovereign's alleged misrepresentations caused a direct effect in the United States because *some* of the plaintiff investors "suffered an economic loss in this country"—a loss felt directly in the United States, unmediated by any foreign investment vehicles. 813 F.3d at 110. *Atlantica* thus holds that the FSIA requires only a direct effect in the United States, not a direct effect *on the plaintiff* in the United States. *Id.* at 111. Respondents never timely contended that some other party was directly affected in the United States by Petrobras's actions, so *Atlantica*'s holding is not relevant here—which is why Petrobras did not cite it. *See* Opp. 2, 15 (making a mountain out of that molehill).

2. Confronted with the split, EIG contends that Petrobras's alleged "target[ing]" of U.S. investors constitutes the "effect" and distinguishes this case from all the others. *See* Opp. 3, 6, 7, 14-16, 18, 20, 23, 25, 28, 31. But the statute differentiates act and effect. A separate clause applies to actions predicated on a sovereign's *acts* in the United States. *See* Petrobras C.A. Opening Br. 35-41. The commercial activity exception's direct-effects requirement, true to its name, concerns itself with the *effects* of a foreign sovereign's *acts*. *See* 28 U.S.C. § 1605(a)(2). In substituting acts for the missing effects, Respond-

ents—like the D.C. Circuit—erroneously conflate the two clauses. Pet. 21.

B. Other Circuits Find No Direct Effect In The United States When The Legally Significant Act Giving Rise To The Effect Occurs Elsewhere.

1. The D.C. Circuit did not accept EIG's argument that its injuries occurred in the United States. Pet. App. 17a. The panel majority instead held that even if the locus of Petrobras's alleged tort was outside the United States, there was still a "direct effect" in the United States. *See* Pet. App. 17a, 19a. But that assumption was wrong. As the Second Circuit concluded in a decision this Court affirmed, to determine where a direct effect occurs, courts "look to the place where legally significant acts giving rise to the claim occurred." *Weltover, Inc.* v. *Republic of Argentina*, 941 F.2d 145, 152 (2d Cir. 1991), *aff'd*, 504 U.S. 607 (1992). The D.C. Circuit's assumption that the legally significant act here (the financial loss) occurred abroad should have ended the inquiry. And in four other circuits it would have, because those courts have concluded that the FSIA's direct-effect provision requires that the "legally significant act" occur in the United States. *See* Pet. 14-16.

Respondents acknowledge that the Second Circuit has split with the D.C. Circuit and embraced the legally significant acts test. *See* Opp. 22. They instead argue that the Second Circuit has not *always* applied the test. *See id*. But Respondents' cases do not bear that out. In *Petersen Energía Inversora S.A.U.* v. *Argentine Republic*, 895 F.3d 194 (2d Cir. 2018), *petition for cert. filed*, No. 18-581 (Oct. 31,

2018), the Second Circuit did not even reach the "legally significant act" question; the sovereign there "d[id] not challenge the district court's conclusion that its [actions] * * * caused a direct effect in the United States." *Id.* at 205. And *Atlantica* reiterated *Guirlando* v. *T.C. Ziraat Bankasi A.S.*, 602 F.3d 69, 79 (2d Cir. 2010)'s holding that "being forced to live in 'much reduced circumstances' upon returning to the United States was not a direct effect," even though it did not use that opinion's "legally significant acts" language. *Atlantica*, 813 F.3d at 112 (quoting *Guirlando*, 602 F.3d at 79). The Second Circuit has not "abandoned" the test.

Respondents likewise appear to acknowledge that the Tenth Circuit has applied the legally significant acts test. *See* Opp. 21. And, contrary to Respondents' claims (Opp. 2, 21), the Tenth Circuit did not "disavow[ ]" the test in *Orient Mineral Co.* v. *Bank of China*, 506 F.3d 980, 998 (10th Cir. 2007). *Orient Mineral* said that "where the legally significant acts occurred" is "one of several means to determine whether a direct effect occurred in the United States," that must be examined alongside "all of the facts," including whether the act at issue was really an omission and whether the effect "was only a loss of corporate profit." *Id.* at 998-999 (internal quotation marks omitted). And here, the only effect in the United States was a "loss of corporate profit" that entered on U.S. ledgers only after being passed through foreign corporations.

Respondents next argue that *Weltover* overruled the Seventh and Ninth Circuit's adoptions of the legally significant act test. *See* Opp. 21-22. But

Weltover did not speak to the legally-significant-acts question; it overruled decisions that had held that a direct effect must be "substantial" and "foreseeable." *See* 504 U.S. at 618. *Weltover* thus did not repudiate *Rush-Presbyterian-St. Luke's Medical Center* v. *Hellenic Republic*'s conclusion that "[t]he 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," 877 F.2d 574, 581-582 (7th Cir. 1989). Nor did it disturb the Ninth Circuit's statement of "the general rule that a direct effect occurs at the locus of the injury directly resulting from the sovereign defendant's wrongful acts." *Siderman de Blake* v. *Republic of Argentina*, 965 F.2d 699, 710 n.11 (9th Cir. 1992) (internal quotation marks omitted). Indeed, Respondents *concede* that the Ninth Circuit has applied the legally significant acts test post-*Weltover*. Opp. 22 (citing *Adler* v. *Federal Republic of Nigeria*, 107 F.3d 720 (9th Cir. 1997)).

2. In the end, Respondents fall back on their argument that a legally significant act *did* happen in the United States when Petrobras "targeted" Respondents, when Respondents wired money, and when Respondents suffered losses. *See* Opp. 23. But EIG Luxembourg, not Respondents, wired the money. And EIG Luxembourg suffered the initial loss. That is why even the D.C. Circuit majority assumed the locus of the tort to exist outside the United States. And even if Petrobras's actions "targeting" Respondents occurred in the United States, the *effects* caused by that legally significant act did not. *See supra* pp.

6-7. Had the D.C. Circuit followed its sister circuits, it would have dismissed Respondents' claims.

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

The decision below not only throws the circuits into disarray; it also conflicts with *Weltover* and *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 474 (2003). And it reads the word "direct" out of the statute entirely.

Under *Weltover*, an effect that occurs at the tail end of a global "ricochet" simply cannot constitute a "direct effect" in the United States. Pet. 17-18. Respondents argue that Petrobras's Luxembourgian focus is an attempt to "elevate[ ] form over substance." Opp. 25. But that only underscores the conflict with *Dole*. There, this Court emphasized that, "[i]n issues of corporate law[,] structure"—that is, form—"often matters." 538 U.S. at 474. Anyway, Respondents concede they made conscious tradeoffs in funneling their investment through Luxembourgian subsidiaries. They concede that they set up the subsidiaries "to obtain tax benefits from [the] corporate structure." Opp. 26; *see also id.* 28. Respondents are sophisticated hedge funds that chose those tax benefits over a direct U.S. investment that would have made suit under the FSIA easier. Having done so, they cannot escape their choice's jurisdictional consequences. *See* Pet. 19-20.

Respondents parrot the D.C. Circuit's explanation that *Dole* is not applicable because it would narrow liability here. Opp. 27. But *Dole* is not about ex-

panding or contracting FSIA liability. Rather, *Dole* made clear that it is "[a] basic tenet of American corporate law" that "the corporation and its shareholders are distinct entities." 538 U.S. at 474. Respondents do not explain why that tenet is any less basic when it is applied against a FSIA plaintiff. *See* Opp. 27.

2. The D.C. Circuit also expanded the meaning of "direct" under the FSIA far beyond its ordinary meaning. By holding that a loss that passed to Respondents from Sete and through three separate entities was sufficiently "direct," the D.C. Circuit effectively read the word out of the statute. *See* Pet. 20-21. Respondents respond that the Luxembourg entities were "pass-through" companies. *See* Opp. 28-29. But Respondents' Luxembourgian subsidiaries have *legal* substance. As Judge Sentelle explained in dissent, concluding that such circuitous effects count as "direct" is "inconsistent with Congress's express language in the relevant exception." Pet. App. 22a; *see also RJR Nabisco, Inc.* v. *European Cmty.*, 136 S. Ct. 2090, 2105 (2016) (defining "commerce directly involving the United States" as "commerce between the United States and a foreign country"). This Court should so hold.

III. THE QUESTION PRESENTED IS IMPORTANT.

Respondents do not contest that this case has potentially far-reaching implications for foreign governments, for how the U.S. government is treated abroad, and for the power of U.S. courts. They instead argue that the FSIA's commercial-activity exception strikes a balance between sovereignty and

responsibility. Opp. 30. But the D.C. Circuit upset that balance by transforming the FSIA's commercial-activity exception from a narrow exception to a gaping loophole that can be satisfied any time an American company suffers a financial loss attributable to a foreign sovereign's conduct. *Id.*

Respondents also argue that the decision below does not threaten the United States' foreign relations because Congress "meant" the FSIA to protect U.S. citizens. Opp. 31. But Congress "meant" to protect U.S. citizens only to a point. *See Frank*, 842 F.3d at 369-370 (denying relief to U.S. victims of a Ponzi scheme); *Guirlando*, 602 F.3d at 72, 79-82 (denying recovery to 67-year-old American citizen who lost her life savings). "The question," after all, "is not what Congress 'would have wanted,' but what Congress enacted in the FSIA." *Weltover*, 504 U.S. at 618. Congress gave no indication that it wanted to protect American parent companies of foreign subsidiaries whose losses—if any—are accounting fictions transmitted across the Atlantic.

In a last-ditch effort, Respondents parade out a non-prosecution agreement Petrobras entered into in a separate case on different facts and with no relevance to the questions before the Court. *See* Opp. 32. Their diversionary tactic is telling because it shows Respondents' true aim: to strong-arm Petrobras into litigating or settling a case that, had it been brought elsewhere, would have been jurisdictionally barred. By granting the writ to harmonize the circuits—as the Court often does in FSIA cases—the Court could prevent this and similar abuses. *See* Pet. 23-24.

Finally, Respondents contest the importance of correcting the D.C. Circuit's errors because the Second Circuit has decided "nearly as many" FSIA cases. Opp. 33. True—so far. After the decision below, plaintiffs will find the D.C. Circuit a uniquely appealing venue, and will be likely to shop their cases to the D.C. District Court's doorstep—which they can do in nearly all cases, since the D.C. District Court is the statutory default venue for FSIA suits against foreign states. *See* 28 U.S.C. § 1391(f). The Court should avoid that troubling outcome and grant the writ.

CONCLUSION

For the foregoing reasons and those in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

CATHERINE E. STETSON
Counsel of Record
ADAM K. LEVIN
DAVID M. FOSTER
SEAN MAROTTA
ERIN R. CHAPMAN
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5491
cate.stetson@hoganlovells.com

Counsel for Petitioner

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