No. _____

IN THE

Supreme Court of the United States

ARUN KUMAR BHATTACHARYA,

Petitioner,

v.

STATE BANK OF INDIA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

To bring a civil action against a foreign state, a litigant must satisfy one of the exceptions to immunity in the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. 1602 *et seq*. One such exception, under the "direct effects clause" of the FSIA's commercial-activity exception, 28 U.S.C. 1605(a)(2), provides that a foreign state may be sued "in any case 'in which the action is based . . . upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.'" *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607, 611 (1992) (quoting 28 U.S.C. 1605(a)(2)).

The Courts of Appeals have divided as to the application of this exception. Some Circuits, adhering to the plain text of the statute, consider solely whether the relevant foreign act on which the suit is based had a "direct effect" here. But other Circuits, like the Seventh Circuit below, require more. In the decision below, that Circuit required a "legally significant act" in the United States.

The question presented is:

Whether, to establish a "direct effect in the United States" under 28 U.S.C. 1605(a)(2), a plaintiff must make an extratextual showing that either the sovereign engaged in a U.S.-based "legally significant act," or that the U.S. effects were "legally significant" in addition to being direct.

PARTIES TO THE PROCEEDING

Petitioner Arun Kumar Bhattacharya was plaintiff in the district court and appellant below.

Respondent State Bank of India was defendant in the district court and appellee below.

RELATED PROCEEDINGS

- *Bhattacharya* v. *State Bank of India*, No. 1:20-cv-03361, U.S. District Court for the Northern District of Illinois. Judgment entered September 27, 2022.

- *Bhattacharya* v. *State Bank of India*, No. 22-2734, U.S. Court of Appeals for the Seventh Circuit. Judgment entered June 12, 2023.

There are no other proceedings in state or federal courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14(b)(1).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The decision of the Court of Appeals for the Seventh Circuit is reported at 70 F.4th 941 and reproduced at Appendix ("Pet. App.") 1a. The decision of the Northern District of Illinois is unreported but available at 2022 WL 4482764, and reproduced at Pet. App. 11a.

JURISDICTION

The Seventh Circuit filed its published decision affirming the dismissal of Petitioner's complaint on June 12, 2023. Pet. App. 1a. On August 24, 2023, on Petitioner's application, Justice Barrett extended the time to file a petition for certiorari through and including October 11, 2023. This petition is timely, and the Court has jurisdiction under 28 U.S.C. 1254(1).

PROVISIONS INVOLVED

The Foreign Sovereign Immunities Act's commercial-activity exception, 28 U.S.C. 1605(a)(2), provides:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
>
> . . .
>
> (2) in which the action is based upon 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[.]

Other relevant statutory provisions of the Act, 28 U.S.C. 1330, 1602, 1603, 1604, 1605, and 1606, are reprinted in the Appendix at 25a–33a.

STATEMENT OF THE CASE

This case concerns the interpretation of the most commonly invoked exception to sovereign immunity under the Foreign Sovereign Immunities Act ("FSIA"), the commercial-activity exception, and it raises a question that divides the Courts of Appeals

and affects the foreign relations of the United States. Under the third clause of the commercial-activity exception, the FSIA provides that a foreign state can be sued in a U.S. court if the state engages in conduct *outside* U.S. territory and that conduct causes a "direct effect" *in* the United States. 28 U.S.C. 1605(a)(2). Yet, in the decision below, the Seventh Circuit interpreted this clause to require that the foreign state must actually perform a "legally significant" act *in* the United States. In doing so, the Seventh Circuit exacerbated a recognized conflict among circuit courts, which are split on the question presented in at least three ways.

I. Legal Background

Enacted in 1976, the FSIA "comprehensively regulat[es] the amenability of foreign nations to suit in the United States." *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 493 (1983). As the Court has observed on multiple occasions, "[t]he key word . . . is *comprehensive*." *Republic of Argentina* v. *NML Capital, Ltd.*, 573 U.S. 134, 141 (2014).

Prior to the FSIA's enactment, questions of foreign-sovereign immunity were subject to an "old executive-driven, factor-intensive, loosely common-law-based immunity regime." *Ibid.* Congress replaced that old and uncertain regime with a set of uniform and predictable legal rules setting forth conditions under which foreign states could be subject to civil proceedings in U.S. courts. Following the FSIA's enactment, "any sort of immunity defense made by a

foreign sovereign in an American court must stand on the Act's text. Or it must fall." *Id.* at 141–42.

The FSIA provides that a "foreign state," as defined in § 1603(a), is presumptively immune from the jurisdiction of courts in the United States. See *Fed. Republic of Germany* v. *Philipp*, 141 S. Ct. 703, 709 (2021); *Bolivarian Republic of Venezuela* v. *Helmerich & Payne Int'l. Drilling Co.*, 581 U.S. 170, 176 (2017). Congress, however, made the presumption of immunity subject to significant exceptions. See 28 U.S.C. 1605(a), 1605A, 1605B. When one of these exceptions apply, the district court shall have jurisdiction, 28 U.S.C. 1330, and a foreign state "shall be liable in the same manner and to the same extent as a private individual under like circumstances," 28 U.S.C. 1606.

"Most significantly, foreign governments are not immune from actions based upon certain kinds of commercial activity in which they engage." *Jam* v. *Int'l Fin. Corp.*, 139 S. Ct. 759, 765 (2019). The commercial-activity exception to immunity, codified in § 1605(a)(2), contains three avenues to establishing jurisdiction against a foreign state.

Under the first clause, a foreign state is not immune if "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) (emphasis added).

Under the second clause, a foreign state is not immune if "the action is based upon . . . an act performed *in the United States* in connection with a

commercial activity of the foreign state *elsewhere*." *Ibid.* (emphasis added).

And under the third clause, a foreign state is not immune if "the action is based . . . upon an act *outside* the territory of the United States in connection with a commercial activity of the foreign state *elsewhere* and that act causes a *direct effect in the United States*." *Ibid.* (emphasis added).[1]

II. Factual Background

Petitioner Arun Kumar Bhattacharya is a U.S. citizen who was born in India. He has resided in the United States since 1987, and has lived in Chicago at all times relevant to this proceeding.

Respondent State Bank of India ("SBI") is a state-owned instrumentality of India. See Pet. App. 15a; 28 U.S.C. 1603(a)–(b) (providing that state-owned instrumentalities are "foreign states" for purposes of the FSIA). SBI markets itself as one of the largest commercial banks in the world, one that has operated in the United States for more than forty years and has FDIC-insured branches in New York

[1] As noted above, the direct-effect clause of the FSIA's commercial activity exception is the "most frequently litigated exception to immunity under the FSIA." Adam S. Chilton & Christopher A. Whytock, *Foreign Sovereign Immunity and Comparative Institutional Competence*, 163 U. Pa. L. Rev 411, 456 & n.165 (2015) (citing George Bermann, Transnational Litigation 132 (2003)).

and Chicago.[2] In its capacity as a global financial institution, SBI designed a non-resident account program to target senior citizens who are born in India but reside beyond its borders, including in the United States. See generally SBI Website ("The Bank offers variety of products and services to its customers. These encompass retail, corporate, trade, treasury and remittance needs of our clients in US.").

SBI actively advertised these non-resident accounts to U.S. citizens residing in the United States, including Petitioner. Under the advertised terms, for each certificate of deposit purchased by the account holder, Respondent SBI agreed to apply a fixed interest rate, plus an additional 1.5%, so long as the account holder remained a non-resident of India.

In 2012, upon turning 65 and based on SBI's targeted promotion campaign, Petitioner opened a non-resident account with Respondent by depositing, in U.S. dollars, his retirement pension. Given the terms advertised by Respondent, Petitioner considered the SBI non-resident account to be a safe and profitable way to secure and grow his retirement savings.

In February 2020, however, Respondent informed Petitioner that India's central bank had eliminated

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[2] State Bank of India, *About State Bank of India*, https://sbius.statebank/about-sbi ("SBI Website") (last visited Oct. 11, 2023); see also *State Bank of India* v. *N.L.R.B.*, 808 F.2d 526, 533 (7th Cir. 1986) ("[SBI] is doing business in the United States and in fact has made it clear that they intend to expand their market share in this country.")

the additional 1.5% interest for non-resident seniors in 2012, the same year Petitioner opened his account. Then, a month later, Respondent retroactively debited Petitioner's account for the "extra" 1.5% interest payments it had made over the 2012-20 period which indisputably harmed Petitioner's finances and his financial wellbeing in the United States.

As Petitioner began to review his bank records, he identified another upsetting change Respondent made to his account without his knowledge—starting in 2017, Respondent SBI unilaterally began applying a variable interest rate to his certificates of deposit, instead of the promised fixed interest rate.

Upon discovering these violations, Petitioner demanded that Respondent provide Petitioner in Chicago with copies of all interest records for his account dating back to 2017. SBI repeatedly refused. Worse still, Respondent froze his account, liquidated his certificates of deposit, and transferred his funds into a locked, non-interest-bearing account that Petitioner was unable to access in order to withdraw funds.

III. Procedural History

A. The District Court

In June 2020, Petitioner filed a complaint against Respondent in the U.S. District Court for the Northern District of Illinois. Based on the facts above, he alleged a breach of contract claim as well as a

statutory claim that Respondent violated consumer protection laws under 15 U.S.C. 1693a *et seq*.

Respondent moved to dismiss the complaint under Federal Rules of Civil Procedure 12(b)(1) and (2), alleging that it is a foreign state under the FSIA, and, therefore, immune from jurisdiction.

Petitioner opposed the motion, contending that he satisfied the FSIA's commercial-activity exception because, *inter alia*, Respondent's acts in India were connected with commercial activity by India abroad and caused a "direct effect" here.

The district court granted Respondent's motion to dismiss. Applying the Seventh Circuit's rule that a plaintiff can demonstrate a direct effect in the United States only if "the foreign state . . . performed some legally significant act here," the Court held that no such act was alleged in the case. *Bhattacharya* v. *State Bank of India*, 2022 WL 4482764, at *5 (N.D. Ill. Sept. 27, 2022) (quoting *Rush-Presbyterian-St. Luke's Med. Ctr.* v. *Hellenic Republic*, 877 F.2d 574, 582 (7th Cir. 1989)). The court then dismissed the numerous U.S. effects that Petitioner had alleged as insufficient because these did not meet the legally-significant test.

B. The Decision Below

Petitioner appealed to the Seventh Circuit, arguing that the district court misapplied the "direct effects" clause of the commercial-activity exception.

The Seventh Circuit affirmed in a published opinion. *Bhattacharya* v. *State Bank of India*, 70 F.4th 941 (7th Cir. 2023), Pet. App. 1a. Agreeing with the district court, the Circuit held, as a general matter, that "financial injury to a U.S. citizen is insufficient unless the foreign state performed some 'legally significant act' in the United States." Pet. App. 9a. And, with respect to contract cases in particular, it held that "a [contract] plaintiff wishing to invoke the commercial activity exception by pointing to a direct effect in the United States must be able to identify language in the agreement that designates the United States as a site for performance on the contract." Pet. App. 6a–7a.

REASONS FOR GRANTING THE PETITION

I. The Courts of Appeals Are Divided On The Question Presented

Justice Scalia explained for the Court in *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607 (1992), that the direct-effects exception in § 1605(a)(2) does not contain any "unexpressed requirement[s]," and thus held there was no extra-textual requirement that the U.S. effect caused by foreign conduct be foreseeable or substantial. *Id.* at 618.

In spite of this Court's rejection of any extra-textual requirement, the Courts of Appeals have divided on whether, to satisfy the direct-effects exception to foreign sovereign immunity, the plaintiff must prove not just what the statute's plain text prescribes, but also that there was a "legally

significant" act and/or effect *in* the United States, or a "legally significant act" *abroad* that caused a direct effect here. Indeed, the Restatement (Fourth) on the Foreign Relations Law of the United States recognizes the existence of a "circuit split" as to whether "the direct-effect requirement is satisfied only by a legally significant act in the United States or by a legally significant act with a direct effect in the United States." § 454, Reporters' Note 8; see also Maryam Jamshidi, *The Political Economy of Foreign Sovereign Immunity*, 73 Hastings L.J. 585, 656 (2022) (noting circuit split); Joseph F. Morrissey, *Simplifying the Foreign Sovereign Immunities Act: If a Sovereign Acts like a Private Party, Treat It like One*, 5 Chi. J. Int'l L. 675, 686-87 (2005) (same).

A. To begin, the Seventh, D.C., and Ninth Circuits require a "legally significant" act/effect inside the United States to satisfy the direct-effects clause of the commercial-activity exception. In the context of contract cases, that has led these Circuits to require that the place of performance be here.[3]

1. As noted, in the decision below, the Seventh Circuit held and reaffirmed that "financial injury to a U.S. citizen is insufficient" to satisfy the direct-effects clause of the commercial-activity exception "unless the foreign state performed some 'legally significant act' in the United States." Pet. App. 7a (quoting *Rush-*

[3] "The 'legally significant act' formulation causes conceptual problems in the context of contract suits, because it conflates an act with the act's effect." *Guirlando* v. *T.C. Ziraat Bankasi A.S.*, 602 F.3d 69, 76 (2d Cir. 2010).

Presbyterian-St. Luke's Med. Ctr., 877 F.2d at 581). Moreover, applying that rule to contract cases, the Court held that a plaintiff can proceed here only if the United States is the contractually mandated place of performance, yet another requirement that has no basis in the text of the FSIA. Pet. App. 6a–7a.

2. The D.C. Circuit has adhered to a form of the "legally significant act" test that coincides with the Seventh Circuit's view, specifically holding in the context of breach-of-contract disputes that there is no direct effect in the United States unless the place of performance is designated to be in the United States. *Goodman Holdings* v. *Rafidain Bank*, 26 F.3d 1143, 1146 (D.C. Cir. 1994); see also *id.* at 1147 (Wald, J., concurring) ("I am uncomfortable with the reliance in [my colleagues'] rationale on the lack of New York as a contractually designated place of performance.").

Thus, in *Odhiambo v. Republic of Kenya*, 764 F.3d 31 (D.C. Cir. 2014) (Kavanaugh, J.), the Circuit found, adhering to its prior decisions (*id.* at 36), that a foreign sovereign's breach of contract did not have a direct effect in the United States when no one could "reasonably conclude that [the sovereign] promised to perform specific obligations in the United States or was supposed to pay recipients in the United States." *Id.* at 41 (internal quotation marks omitted); see also *id.* at 44 (Pillard, J., concurring) ("The majority's determination that the lack of a place-of-performance clause defeats [the plaintiff's] claim misconstrues the FSIA's direct-effects analysis.").

3. The Ninth Circuit employs a formulation of the direct-effect clause that, at a minimum, requires that the effect in the United States be "legally significant and non-trivial," *Terenkian* v. *Republic of Iraq*, 694 F.3d 1122, 1135 (9th Cir. 2012), meaning that the effect itself must give rise to the plaintiff's claims, see *Gregorian* v. *Izvestia*, 871 F.2d 1515, 1527 (9th Cir. 1989) (requiring that "something legally significant actually happen in the U.S." (internal quotation marks omitted)). At times, this Circuit has also gone on to say that only a "legally significant *act*" by the sovereign in the United States qualifies as a "direct effect." See, e.g., *Terenkian*, 694 F.3d. at 1138 ("While the cancellation of the contracts directly precluded plaintiffs from buying oil, the non deposit of payment for the oil in a New York bank was . . . not the 'legally significant' act that gave rise to the plaintiffs' claim."); *Farhang* v. *Indian Inst. of Tech., Kharagpur*, 529 F. App'x 812, 813 (9th Cir. 2013) ("The non-payment of profits to plaintiffs is merely an indirect effect of the [defendant's] alleged breach and is not the 'legally significant' act that gave rise to plaintiffs' claims . . . ." (internal quotation marks omitted)).

Therefore, for breach of contract claims brought under the commercial-activity exception's direct-effect test, the Ninth Circuit asks whether there was a "failure . . . to perform in the United States" or "any other legally significant event in this county." *Terenkian*, 694 F.3d at 1138.

B. In contrast to the Seventh, Ninth, and D.C. Circuits, the Second Circuit holds that there must be

a "legally significant" act *abroad* that has an effect in the United States, but no legally significant act or effect need take place in the United States. See *Virtual Countries, Inc.* v. *Republic of S. Afr.*, 300 F.3d 230, 240 (2d Cir. 2002) (explaining that the "legally significant acts" test "requires that the conduct having a direct effect in the United States be legally significant conduct in order for the commercial activity exception to apply" (citation omitted)).

Moreover, the Second Circuit explicitly held in 2010, contrary to what the Seventh Circuit held in the decision below, that it "do[es] not interpret the 'legally significant act' test as one requiring that the foreign state have 'performed' an act 'in the United States.'" *Guirlando* v. *T.C. Ziraat Bankasi A.S.*, 602 F.3d 69, 76 (2d Cir. 2010). It has since reaffirmed this position, stating that, "[s]imply put, the statute says that the act on which the plaintiff's claims are based must have had a domestic effect, not that the plaintiff's claims must be based upon the act's domestic effect." *Atlantica Holdings, Inc.* v. *Sovereign Wealth Fund Samruk-Kazyna JSC*, 813 F.3d 98, 111 (2d Cir. 2016).

Moreover, in *Atlantica Holdings*, the Circuit also rejected the notion espoused by the Ninth Circuit, namely, that the U.S. *effects* must be "legally significant" (or, said differently, that the claim must arise from the U.S. effects). *Ibid.* Again, the Second Circuit requires only "that the act on which the plaintiff's claims are based [] have had a domestic

effect, not that the plaintiff's claims must be based upon the act's domestic effect." 813 F.3d at 111.[4]

C. The Fifth, Sixth, and Tenth Circuits also reject the need for a "legally significant" act or effect in the United States, although they go farther than the Second Circuit; in those Circuits, the foreign act causing U.S. effects need not itself be "legally significant."

The Fifth Circuit appears to have been the first Circuit to reject the "legally significant act" test, explaining that "nothing in the text of the third clause supports such a requirement," and, thus, it "has been renounced by *Weltover*." V*oest-Alpine Trading USA Corp.* v. *Bank of China*, 142 F.3d 887, 894 (5th Cir. 1998). Consistent with *Weltover*, it held that "an effect in the United States is sufficient to support jurisdiction . . . so long as it is 'direct'—with no other modifying adjectives." *Id.* at 893.

The Sixth Circuit has agreed with the Fifth Circuit. Rejecting the "legally significant acts" test, it "interpret[s] *Weltover* as an 'admonishment to courts not to add any unexpressed requirements to the language of the statute.'" *Rote* v. *Zel Custom Mfg. LLC*, 816 F.3d 383, 394 (6th Cir. 2016) (citation omitted) (holding that injury constitutes direct effect).

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[4] In the decision below, the Seventh Circuit stated that its ruling was consistent with the views of the Second Circuit in *Atlantica Holdings*. Pet. 6a. But the quoted passage was a dictum, as *Atlantica Holdings* concerned a tort rather than a contract case, 813 F.3d at 108–09, and, as noted in the text, the Second Circuit has rejected the approaches of the Seventh and Ninth Circuit.

As such, the Sixth Circuit reasons that "the addition of unexpressed requirements to the statute is unnecessary." *Keller* v. *Cent. Bank of Nigeria*, 277 F.3d 811, 817–18 (6th Cir. 2002), *abrogated on other grounds by Samantar* v. *Yousuf*, 560 U.S. 305 (2010).

Finally, the Tenth Circuit, too, explained that it has "not adopt[ed] any 'legally significant acts' test." *Big Sky Network Canada, Ltd.* v. *Sichuan Provincial Gov't*, 533 F.3d 1183, 1191 n.5 (10th Cir. 2008) (Gorsuch, J.). In fact, the Tenth Circuit has "explicitly reject[ed] that additional, judicially-created criteri[on] to satisfy 28 U.S.C. § 1605(a)(2)'s third clause." *Orient Min. Co.* v. *Bank of China*, 506 F.3d 980, 998 (10th Cir. 2007). In the Tenth Circuit, courts "look to where the legally significant acts occurred as simply one of several means to determine whether a direct effect occurred in the United States," and "apply the third clause of § 1605(a)(2) as it is written, without judicial adornment." *Id.* at 998–99.[5]

* * * *

As Section 454 of the Fourth Restatement on Foreign Relations recognizes, the circuits are divided as to whether a plaintiff must demonstrate a legally significant act or effect in the United States to meet the "direct effects" exception to immunity. Three

[5] The Eighth Circuit follows a similar approach. Although it has not formally rejected the "legally significant" requirement for the direct-effect test, it also does not apply it. See *Dumont* v. *Saskatchewan Gov't Ins. (SGI)*, 258 F.3d 880, 883 & n.6 (8th Cir. 2001) (insurance coverage provided by Canadian government subsidiary to Canadians "while they traveled by automobile in the United States" constituted "direct effect").

circuits (the Seventh, Ninth, and D.C. Circuits) require a "legally significant act" or effect *in the United States*, grafting an additional requirement onto the text of § 1605(a)(2). The Second Circuit has required that the U.S. effects be caused by a "legally significant" act *abroad*. And at least three circuits (the Fifth, Sixth, and Tenth) have expressly rejected *any* "legally significant" requirement. Certiorari should be granted to resolve this split among more than half of the nation's Courts of Appeals.

II. The Test Imposed by the Seventh, Ninth, And D.C. Circuits Conflicts With *Weltover* And The Text Of The Statute

As explained by the Circuits that have rejected the "legally significant" test, this requirement contravenes this Court's decision in *Weltover* and the statute's text.

In *Weltover*, the Court "expressly admonished the circuit courts not to add 'any unexpressed requirement[s]' to the third clause" of the commercial activity exception. *Voest-Alpine Trading USA Corp.*, 142 F.3d at 894 (quoting *Weltover*, 504 U.S. at 618); *Keller*, 277 F.3d at 818 (describing *Weltover*'s holding as "an admonishment to courts not to add any unexpressed requirements to the language of the statute"). *Weltover* rejected the notion that the U.S. "effects" needed to satisfy the direct-effects clause needed to be "foreseeable" or "substantial," holding that Congress had used the word "direct." It follows that there is no warrant to add an extra-statutory

requirement to the FSIA mandating that the plaintiff show a "legally significant" act or effect here.

Moreover, the decision below, which imposed the requirement that a plaintiff show an act by the foreign sovereign in the United States, contravenes the text and structure of the statute. The first two clauses of the FSIA's commercial-activity exception were designed for U.S. conduct by the foreign sovereign, but the third clause applies only to foreign conduct with U.S. *effects*. Indeed, as the Fifth Circuit put it, the "legally significant act" test ignores the statutory structure. "[R]equiring the [domestic] effect to have a causal nexus with some legally significant act in the United States merges the third clause into the second clause of the commercial activity exception." V*oest-Alpine Trading USA Corp.*, 142 F.3d at 895. Indeed, although the second clause of § 1605(a)(2) requires that a plaintiff's claims be based upon "an act in the United States," the third clause applies to suits based upon an act abroad.

Courts adhering to the legally significant act test, including the decision below, have pointed out that in *Weltover*, the foreign state breached its obligation to perform in the United States, and this was a legally significant act/effect here. But this conflates what is sufficient to show a direct effect with what is necessary. Or, as the Fifth Circuit put it, that "[a] legally significant act in the United States will certainly cause a direct effect in the United States . . . does not mean that a direct effect in the United States can be caused *only* by a legally significant act in the

United States." *Voest-Alpine Trading USA Corp.*, 142 F.3d at 894.

III. The Question Presented Is Important

A. There Is No Warrant To Ignore The Text Congress Adopted In The FSIA

This Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat. Bank* v. *Germain*, 503 U.S. 249, 253–54 (1992) (Thomas, J.) (collecting cases). It is the court's "role . . . to interpret the language of the statute enacted by Congress" and it is Congress's job to write it. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461 (2002). Thus, when "the words of a statute are unambiguous, the judicial inquiry is complete." *Babb* v. *Wilkie*, 140 S. Ct. 1168, 1177 (2020) (Alito, J.) (cleaned up); *Desert Palace, Inc.* v. *Costa*, 539 U.S. 90, 98 (2003) (same).

These observations, true in any case of statutory construction, have special purchase in the FSIA's context, given the comprehensiveness of the statutory scheme. Congress enacted the FSIA to adopt a set of bright-line rules that comprehensively govern immunity claims by way of federal legislation rather than judicial decision. For that reason, in *Weltover* and countless other decisions, this Court has rejected litigants' efforts to enlarge or change the meaning of the FSIA's plain text, admonishing time and again that in interpreting the FSIA, "[t]he question . . . is not what Congress 'would have wanted' but what

Congress enacted in the FSIA." *Weltover*, 504 U.S. at 618; *NML*, 573 U.S. at 146 (explaining that any "apprehensions" about the FSIA's sweep "are better directed to that branch of government with authority to amend the Act—which, as it happens, is the same branch that forced our retirement from the immunity-by-factor-balancing business nearly 40 years ago."). Clarification of the direct-effect clause to the FSIA's commercial activity exception is necessary to ensure that the FSIA's text is followed as Congress intended, and that the law is uniformly applied across the Circuits.

B. The Case Implicates Important Issues Bearing On The Foreign Relations

In cases that touch upon foreign relations, it is particularly important that the American judiciary speaks with one voice—the voice of this Court. The FSIA implicates key issues in U.S. foreign relations, *Verlinden*, 461 U.S. at 493 ("Actions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States."), and, therefore, it is critical that there be "a uniform body of federal law to govern the amenability of foreign states and their instrumentalities to suit in the United States." *Cassirer* v. *Thyssen-Bornemisza Collection Found.*, 596 U.S. 107, 113 (2022).

The commercial activity exception is the "most significant . . . exception" to foreign sovereign immunity. *Weltover*, 504 U.S. at 611; see also *Jam*, 139 S. Ct. at 766. Uniformity in its application is crucial to

preserving stability in foreign relations and international commerce. The current state of the law breeds confusion and allows plaintiffs to increase their odds of success by electing to bring suit in a different forum. Discord among the circuits provides a strong justification for granting certiorari in this context. *JPMorgan Chase Bank* v. *Traffic Stream (BVI) Infrastructure Ltd.*, 536 U.S. 88, 91 (2002) ("Because the Second Circuit's decision conflicts with those of other Circuits . . . and implicates serious issues of foreign relations, we granted certiorari."); *cf. Monasky* v. *Taglieri*, 140 S. Ct. 719, 725 (2020) (granting certiorari to clarify "an important question of federal and international law"); *BG Grp., PLC* v. *Republic of Argentina*, 572 U.S. 25, 32 (2014) (granting certiorari "[g]iven the importance of the matter for international commercial arbitration").

IV. This Case Presents An Ideal Vehicle To Decide The Question Presented

The question presented here is squarely implicated and was outcome-dispositive below. The Seventh Circuit applied the "legally significant act" test and dismissed the Petitioner's claims because he failed to show that his agreements with Respondent specified the United States as the place of performance. Pet App. 7a. In doing so, the Circuit failed to consider the full extent of the direct effects alleged by Petitioner. The decision below did not give any alternate or secondary holding, making this case an ideal vehicle to address the question presented.

In that regard, consider that the Fourth Foreign Relations Restatement gives contract cases as the example of a case where the recognized "circuit split" regarding "the legally significant act test may matter." § 454, Reporters' Note 8. The Restatement thus explains that, in some circuits, a plaintiff may proceed with a contract dispute here "even if a contract does not designate (or allow the payee to designate) payment in the United States," but "[c]ases in circuits applying the legally significant act test have held or suggested, by contrast, that unless there is a legal obligation to make payment in the United States, the direct-effect test is not satisfied." *Ibid.*

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, FILED JUNE 12, 2023

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 22-2734

ARUN KUMAR BHATTACHARYA,

Plaintiff-Appellant,

v.

STATE BANK OF INDIA,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 1:20-cv-3361 — **Andrea R. Wood**, *Judge.*

Submitted May 12, 2023* — Decided June 12, 2023

Before BRENNAN, SCUDDER, and KIRSCH, *Circuit Judges.*

SCUDDER, *Circuit Judge.* Arun Bhattacharya, a U.S. citizen and Illinois resident of Indian origin, opened a non-resident account with State Bank of India through

* We have agreed to decide this case without oral argument because the brief and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. See FED. R. APP. P. 34(a)(2)(C).

one of its India-based branches. When State Bank of India retroactively changed the terms of the account, Bhattacharya sued for breach of contract. The district court dismissed his complaint for lack of subject matter jurisdiction, concluding that the Foreign Sovereign Immunities Act applied to Bhattacharya's claim and immunized the Bank from suit. We agree and affirm.

I

A

The doctrine of foreign sovereign immunity developed at common law as "a matter of grace and comity on the part of the United States." *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 821, 200 L. Ed. 2d 58 (2018) (quoting *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486, 103 S. Ct. 1962, 76 L. Ed. 2d 81 (1983)). In support of these principles, federal courts traditionally "deferred to the decisions of the political branches—in particular, those of the Executive Branch—on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities." *Verlinden*, 461 U.S. at 486. For the first 150 years of our nation's history, this meant that foreign states generally held absolute immunity from suit in U.S. courts. See *id.*

That changed in 1952. It was then that the State Department responded to foreign governments' increasing engagement in commercial activity by adopting a new, restrictive theory of foreign sovereign immunity. See *Jam v. Int'l Fin. Corp.*, 139 S. Ct. 759, 766, 203 L. Ed. 2d

53 (2019) (citing Letter from Jack B. Tate, Acting Legal Adviser, Dep't of State, to Philip B. Perlman, Acting Att'y Gen. (May 19, 1952), *reprinted in* 26 Dep't State Bull. 984-85 (1952)). This new approach would confer immunity on foreign governments "only with respect to their sovereign acts, not with respect to commercial acts." *Id.*

In 1976 Congress codified this more restrictive theory of foreign sovereign immunity in the Foreign Sovereign Immunities Act. Pub. L. No. 94-583, 90 Stat. 2891 (codified at 28 U.S.C. §§ 1330, 1602-1611); see also *Verlinden*, 416 U.S. at 488. The FSIA "transferred 'primary responsibility for immunity determinations from the Executive to the Judicial Branch.'" *Jam*, 139 S. Ct. at 766 (quoting *Republic of Austria v. Altmann*, 541 U.S. 677, 691, 124 S. Ct. 2240, 159 L. Ed. 2d 1 (2004)).

To aid courts in their new role, the Act provides "a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities." *Verlinden*, 461 U.S. at 488. This includes a presumption that foreign sovereigns and their instrumentalities are immune from suit in U.S. courts. See 28 U.S.C. § 1604; see also *Turkiye Halk Bankasi A.S. v. United States*, 143 S. Ct. 940, 946, 215 L. Ed. 2d 242 (2023). The only exceptions to this general grant of foreign sovereign immunity are codified in the Act itself. See *Rubin*, 138 S. Ct. at 822 (explaining that the FSIA provides "certain express exceptions" to foreign sovereign immunity).

Appendix A

B

Bhattacharya's appeal concerns an exception for foreign sovereigns engaged in commercial activity. The FSIA does not grant foreign sovereigns or their instrumentalities immunity when

> 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.

28 U.S.C. § 1605(a)(2).

Before diving into the various substantive components of the commercial activity exception, it is important to pause on the meaning of one of its key terms. The FSIA defines "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act" and further provides that "[t]he 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." 28 U.S.C. § 1603(d). The Supreme Court has interpreted this to mean that a foreign sovereign's actions are commercial for purposes of this exception when it acts "not as regulator of a market, but in the manner

of a private player within it." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614, 112 S. Ct. 2160, 119 L. Ed. 2d 394 (1992).

Now for the substance of the commercial activity exception. By its terms, the exception applies—and federal courts retain jurisdiction—in three kinds of situations: (1) if a lawsuit is based on commercial activity carried on in the United States; (2) if it is based on an act performed in the United States in connection with commercial activity elsewhere; or (3) if it is based on an act outside the territory of the United States in connection with commercial activity elsewhere and the act caused a direct effect in the United States. See 28 U.S.C. § 1605(a)(2).

If we focus on the third situation where the exception applies, we find three elements that must be established. There must be an extraterritorial act, a connection to extraterritorial commercial activity, and a direct effect in the United States. See *Weltover*, 504 U.S. at 611.

This case involves this third situation, and more specifically the third element—the presence of a direct effect in the United States. In its 1992 *Weltover* decision, the Supreme Court provided a starting point for understanding what the term "direct effect" means. The Court determined that Argentina's unilateral rescheduling of bond payments had a direct effect in the United States because the plaintiffs had designated New York bank accounts as the place for payment, so New York was "the place of performance for Argentina's ultimate contractual obligations." *Id.* at 619. *Weltover* thus stands

for the proposition that a sovereign's actions affecting accounts held in the United States qualify as acts in connection with commercial activity that have a direct effect for purposes of the FSIA.

Other circuits, relying on *Weltover*, have found that the existence or absence of a designated place of payment in the United States is often decisive in the direct effect analysis. See, *e.g.*, *Atlantica Holdings v. Sovereign Wealth Fund Samruk-Kazyna JSC*, 813 F.3d 98, 108-09 (2d Cir. 2016) ("Based on *Weltover*'s holding, courts have consistently held that, in contract cases, a breach of a contractual duty causes a direct effect ... so long as the United States is the place of performance for the breached duty."); *R&R Int'l Consulting LLC v. Banco do Brasil, S.A.*, 981 F.3d 1239, 1244 (11th Cir. 2020) (finding a direct effect where the affected bonds—by their terms—could be redeemed for payment in a bank's Miami branch); *Valambhia v. United Republic of Tanzania*, 964 F.3d 1135, 1142, 448 U.S. App. D.C. 91 (D.C. Cir. 2020) (finding no direct effect where the parties "had no arrangement that called for Tanzania's use of a [U.S.] bank account or invited the Valambhias to demand payment within the United States").

Though we have not yet had occasion to weigh in on this issue, we think the approach taken by our fellow circuits is sound. We therefore conclude that—at least in a dispute that, like this one, involves straightforward allegations of breach of contract—a plaintiff wishing to invoke the commercial activity exception by pointing to a direct effect in the United States must be able to identify

language in the agreement that designates the United States as a site for performance on the contract.

II

With this legal framework in place, we review Bhattacharya's claim against State Bank of India.

A

State Bank of India operates branches in India and all over the world, including three in the United States. Among other options available to its clients, State Bank of India offers non-resident accounts to senior citizens of Indian origin living outside India. These accounts are offered only through the Bank's India-based branches; they do not have any connection with the Bank's overseas branches. State Bank of India does, however, conduct individual and commercial banking activity through its overseas branches, including those in the United States.

In 2012, and while living in Chicago, Bhattacharya opened a non-resident account with State Bank of India. He deposited his retirement pension into the account and purchased certificates of deposit that promised to earn a fixed rate of interest, plus an additional 1.5% that rolled over into new certificates of deposit when the original certificates reached maturity. But in 2020 State Bank of India informed Bhattacharya that the Reserve Bank of India (India's central bank) had eliminated the increased 1.5% interest earnings for any accounts held by non-resident Indian senior citizens. This rate reduction

had apparently gone into effect in 2012, so State Bank of India told Bhattacharya that it would retroactively debit his account for the extra 1.5% interest payments he had been receiving for the eight years he had his account.

Bhattacharya objected and, in the course of challenging the Bank's actions, learned more upsetting news. He found out that in 2017 State Bank of India began applying a variable interest rate—rather than the fixed interest rate he was promised in 2012—to his certificates of deposit. So he understandably complained and demanded copies of all interest records for his account dating back to 2017. State Bank of India refused his request and, according to Bhattacharya, retaliated against him for his complaints by freezing his account, liquidating his certificates of deposit, and transferring his funds into a locked, non-interest-bearing account.

Bhattacharya sued State Bank of India for breach of contract in federal court in Illinois. Later he amended his complaint to add a demand for an accounting of all interest, as well as a claim that the Bank violated American consumer-protection laws. State Bank of India moved to dismiss the complaint, asserting that the FSIA stripped the district court of jurisdiction over the case. Bhattacharya acknowledged the Bank's status as an instrumentality of a foreign sovereign but argued that his claims fell within the FSIA's commercial activity exception. He contended that State Bank of India's activities—including its operation of U.S. branches, its marketing efforts to U.S. citizens, and its actions taken with respect to his non-resident account—directly

affected him in the United States and therefore fit within the FSIA's commercial activity exception.

B

In a careful and thorough opinion, the district court concluded that the commercial activity exception did not apply, so it held that it lacked jurisdiction over Bhattacharya's claims against State Bank of India. At the outset, the district court agreed with both parties and found that the FSIA applies to State Bank of India because the Indian government is the Bank's majority shareholder. See 28 U.S.C. § 1603(a), (b)(2); *Turkiye Halk Bankasi*, 143 S. Ct. at 946-47.

The district court went on to find that Bhattacharya's suit was not based upon commercial activity carried on in the United States. It explained that Bhattacharya never held an account with one of the Bank's U.S. branches, and the contested actions—the withdrawals and interest rate changes—resulted from regulatory actions taken by India's central bank. Bhattacharya may have suffered financial loss in his account, the court recognized, but financial injury to a U.S. citizen is insufficient unless the foreign state performed some "legally significant act" in the United States—a showing that Bhattacharya had not made. See *Rush-Presbyterian-St. Luke's Med. Ctr. v. Hellenic Republic*, 877 F.2d 574, 581-82 (7th Cir. 1989).

III

On appeal Bhattacharya contends that the district court misapplied the direct effect provision of the commercial activity exception. He maintains that State Bank of India's actions had a direct effect in the United States as evidenced by its operation of U.S.-based branches, the advertisement of its accounts to U.S. citizens, and the "enormous loss and mental agony" it has caused him. Bhattacharya highlights the Bank's solicitation practices inviting U.S. citizens to open non-resident accounts as a direct effect of its commercial activity.

The district court was correct to conclude that these activities—without more—are insufficient to establish a direct effect in the United States. Bhattacharya's non-resident account is maintained in India, and the relevant transactions were with the Bank's India-based branches. Bhattacharya did not allege that his suit related to any account held with a U.S.-based branch of the Bank or was otherwise related to any actions the Bank had taken here. Nor did he point to any agreement with State Bank of India that established the United States as the site of performance. To the contrary, Bhattacharya's contract agreement established his account with Indian branches of the Bank.

Because the district court got the analysis exactly right, we AFFIRM.

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, FILED SEPTEMBER 27, 2022

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 20-cv-03361

Signed September 27, 2022

ARUN KUMAR BHATTACHARYA,

Plaintiff,

v.

STATE BANK OF INDIA,

Defendant.

ANDREA R. WOOD, United States District Judge.

MEMORANDUM OPINION AND ORDER

Plaintiff Arun Kumar Bhattacharya purchased certificates of deposit from Defendant State Bank of India ("SBI") and deposited them into an account he had opened there. Plaintiff brought the present action after SBI allegedly took actions that violated the terms of its certificates of deposit. Now, SBI argues that, as an agency or instrumentality of India, it is a foreign state immune from jurisdiction of courts in the United States under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C.

§ 1602 *et seq.*, and therefore seeks dismissal of the case for lack of subject-matter jurisdiction and lack of personal jurisdiction pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(2). (Dkt. No. 41.) For the reasons that follow, SBI's motion is granted.

BACKGROUND

The following allegations are drawn from Plaintiff's amended complaint.

As alleged, Plaintiff was born in India in 1946 but has resided in the United States since 1987 and became a United States citizen in 1991. (Am. Compl. ¶¶ 9-12, Dkt. No. 34.) He currently lives full time in Chicago. (*Id.* ¶ 9.) Shortly after turning 65, Plaintiff placed his retirement pension in a special certificate of deposit account that SBI offered to non-resident Indian senior citizens ("NRI Account"). (*Id.* ¶¶ 14-17, 20.) Under the terms of Plaintiff's NRI Account, each time he purchased a certificate of deposit from SBI, SBI agreed to pay Plaintiff an additional 1.5% in interest on top of the generally applicable interest rate at the time of purchase. (*Id.* ¶¶ 18-19.) Further, there was no fixed end to SBI's promise to pay that additional interest, so long as Plaintiff remained a non-resident of India. (*Id.* ¶¶ 20, 23-24.) Between 2012 and 2020, Plaintiff purchased several certificates of deposit, each subject to SBI's promise to pay the fixed interest rate in effect at the time of purchase plus the additional 1.5% interest. (*Id.* ¶¶ 16, 21-22.)

In February 2020, SBI informed Plaintiff that the Reserve Bank of India (India's central bank) had changed

the rules providing non-resident Indian senior citizens with an additional 1.5% interest. (*Id.* ¶ 25.) Because India's central bank had effected the rule change in 2012, SBI informed Plaintiff that it would be debiting the extra 1.5% interest payments he had received going back to 2012. (*Id.* ¶ 26.) Accordingly, in April 2020, SBI made the debits from Plaintiff's NRI Account over Plaintiff's objection. (*Id.* ¶¶ 27-29.)

During the course of this dispute, Plaintiff further became aware that SBI had taken another action that was contrary to its original agreement with him. (*Id.* ¶ 30.) Despite its promise that each certificate of deposit would earn a fixed rate of interest, Plaintiff noticed that SBI started applying a variable rate of interest on the certificates of deposit beginning in 2017. (*Id.* ¶¶ 31-33.) SBI unilaterally made this change in 2017 without ever informing Plaintiff. (*Id.* ¶ 36.) Upon learning of SBI's action, Plaintiff demanded that it provide him copies of all interest records for his NRI Account going back to 2017. (*Id.* ¶ 37.) However, SBI repeatedly refused Plaintiff's requests. (*Id.*) In addition, when Plaintiff complained about SBI's conduct, SBI retaliated against Plaintiff by freezing his NRI Account and transferring his funds to a locked, non-interest-bearing administrative account, leaving Plaintiff unable to access his funds for nearly a year. (*Id.* ¶ 40.)

Based on SBI's alleged actions in debiting the extra 1.5% interest payments, switching to a variable certificate of deposit rate, and retaliating against Plaintiff for his complaints, Plaintiff has brought the present action asserting a claim for breach of contract, alleging that SBI

violated the Electronic Funds Transfer Act, 15 U.S.C. § 1693a *et seq.*, and seeking an accounting of all interest paid and deducted from his NRI Account.

DISCUSSION

SBI moves to dismiss Plaintiff's complaint under both Rule 12(b)(1) and Rule 12(b)(2), claiming that, as an agency or instrumentality of India, it is a foreign state immune from this Court's jurisdiction under the FSIA. A defendant may raise either a facial or factual challenge to subject-matter jurisdiction. *Silha v. ACT, Inc.*, 807 F.3d 169, 173 (7th Cir. 2015). A facial challenge requires "only that the court look to the complaint and see if the plaintiff has sufficiently ***alleged*** a basis of subject[-]matter jurisdiction." *Apex Digit., Inc. v. Sears, Roebuck & Co.*, 572 F.3d 440, 443 (7th Cir. 2009). By contrast, "a factual challenge lies where the complaint is formally sufficient but the contention is that there is ***in fact*** no subject[-] matter jurisdiction." *Id.* at 444 (internal quotation marks omitted). Where a defendant mounts a factual challenge, "the court may look beyond the pleadings and view any evidence submitted to determine if subject matter[-] jurisdiction exists." *Silha*, 807 F.3d at 173.

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 several statutorily defined exceptions applies." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 610-11, 112 S. Ct. 2160, 119 L. Ed. 2d 394 (1992) (quoting 28 U.S.C. § 1604). The FSIA's exceptions "allow the court to obtain subject[-]matter jurisdiction over the case and provide the minimum contacts with

the United States required by due process before a court can acquire personal jurisdiction." *Int'l Ins. Co. v. Caja Nacional De Ahorro y Seguro*, 293 F.3d 392, 397 (7th Cir. 2002) (internal quotation marks omitted). Thus, "personal jurisdiction, like subject-matter jurisdiction, exists only when one of the exceptions . . . applies." *Argentine Republic v. Amerada Hess Shipping Co.*, 488 U.S. 428, 435 n.3, 109 S. Ct. 683, 102 L. Ed. 2d 818 (1989); *see also* 28 U.S.C. § 1330(b) ("Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.").

Here, the parties agree that SBI is a foreign state for purposes of the FSIA and thus presumptively immune from jurisdiction. *See Shih v. Taipei Econ. & Cultural Representative Off.*, 693 F. Supp. 2d 805, 809 (N.D. Ill. 2010). The issue, then, is whether one of the FSIA's enumerated exceptions to sovereign immunity applies. *Republic of Austria v. Altmann*, 541 U.S. 677, 691, 124 S. Ct. 2240, 159 L. Ed. 2d 1 (2004) ("At the threshold of every action in a district court against a foreign state, the court must satisfy itself that one of the exceptions applies, as subject-matter jurisdiction in any such action depends on that application."). It is the plaintiff's burden to establish that one of the exceptions applies. *See Enahoro v. Abubakar*, 408 F.3d 877, 882 (7th Cir. 2005).

According to Plaintiff, the FSIA's commercial-activity exception applies to SBI's alleged conduct. The commercial-activity exception provides that a foreign state is not immune where:

> 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 a 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.

28 U.S.C. § 1605(a)(2). The FSIA defines "commercial activity" as "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." 28 U.S.C. § 1603(d). However, the word "commercial" itself is left largely undefined. *Weltover*, 504 U.S. at 612. Nonetheless, the Supreme Court has held that "commercial" should be understood by reference to the "restrictive" theory of sovereign immunity, which the FSIA intended to codify. *Id.* at 612-13. Under the restrictive theory of sovereign immunity, "a state is immune from the jurisdiction of foreign courts as to its sovereign or public acts (*jure imperii*), but not as to those that are private or commercial in character (*jure gestionis*)." *Saudi Arabia v. Nelson*, 507 U.S. 349, 359-60, 113 S. Ct. 1471, 123 L. Ed. 2d 47 (1993). The Supreme Court has further explained that "a state engages in commercial activity . . . where it exercises 'only those powers that can also be exercised by private citizens,' as distinct from those 'powers peculiar to sovereigns.'" *Id.* at 360 (quoting

Weltover, 504 U.S. at 614). "Put differently, a foreign state engages in commercial activity for purposes of the restrictive theory only where it acts 'in the manner of a private player within' the market." *Id.* (quoting *Weltover*, 504 U.S. at 614).

SBI does not dispute that, by issuing certificates of deposit to Plaintiff, making payments on the instruments, and opening and operating his NRI Account, it was engaged in commercial activities for purposes of the FSIA. Plaintiff thus contends that the first prong of the commercial-activity exception applies because SBI engaged in numerous commercial activities within the United States. In particular, Plaintiff notes that SBI has branches located in the United States, including one in Chicago, and it advertised and issued certificates of deposit to American nonresident Indian senior citizens, including Plaintiff. However, the fact that a foreign state engaged in a commercial activity within the United States does not automatically compel the application of the commercial-activity exception. Rather, for the first prong of the FSIA's commercial-activity exception to apply, the action must be "based upon a commercial activity carried on in the United States." 28 U.S.C. § 1605(a)(2). The statute's use of the phrase "based upon" means that the commercial activity carried on in the United States must constitute "those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." *Nelson*, 507 U.S. at 357.

"[A]n action is 'based upon' the 'particular conduct' that constitutes the 'gravamen' of the suit." *OBB*

Personenverkehr AG v. Sachs, 577 U.S. 27, 35, 136 S. Ct. 390, 193 L. Ed. 2d 269 (2015). Here, the gravamen of the suit concerns SBI's withdrawal of the additional 1.5% interest payments it claimed were improperly paid to Plaintiff, its unilateral application of a variable rate of interest on his certificates of deposit in contravention of instruments' terms, and its transfer of Plaintiff's funds into a frozen administrative account. SBI has introduced declaration evidence demonstrating that all actions taken with respect to Plaintiff's NRI Account occurred not in the United States but in India. First, SBI is owned and controlled directly by the Indian government and its principal place of business is located in Mumbai, India. (Def.'s Mot. to Dismiss, Ex. 2, Tucker Decl. ¶¶ 3-6, Dkt. No. 41-2.) While SBI has three branches in the United States, SBI "does not open, close, or operate in the United States any non-resident Indian accounts, which instead are offered only by the branches of SBI's parent company in India." (Def.'s Mot. to Dismiss, Ex. 1, Haninger Decl. ¶ 7, Dkt. No. 41-1; Tucker Decl. ¶¶ 7, 11.) Accordingly, NRI Accounts are not covered by the Federal Deposit Insurance Corporation and are not supervised by United States banking regulators. (Haninger Decl. ¶ 7; Tucker Decl. ¶ 11.)

Despite one of SBI's United States branches being located in Plaintiff's hometown of Chicago, Plaintiff has never had an account with SBI's Chicago branch. (Haninger Decl. ¶ 4.) Indeed, Plaintiff's own evidence shows that his funds were held by SBI branches located in India and denominated in Indian rupees. (Pl.'s Opp'n, Ex. 6, Dkt. No. 46-6.) And his amended complaint's allegations

further point to India as the location of the conduct underlying his injury: India's central bank effected the rule change upon which SBI relied as the basis for withdrawing the supposed excess interest payments from Plaintiff's NRI Account. (Am. Compl. ¶ 25.)

Plaintiff's primary response when confronted with SBI's evidence showing that the relevant conduct occurred in India is to disparage its declarations as "self-serving." (Pl.'s Opp'n at 1, 7, 14, Dkt. No. 46.) But the fact that SBI's declarations may be self-serving does not undermine their evidentiary value. *See Wilson v. McRae's, Inc.*, 413 F.3d 692, 694 (7th Cir. 2005) ("Most affidavits are self-serving, as is most testimony, and this does not permit a district judge to denigrate a plaintiff's evidence when deciding whether a material dispute requires trial."); *Clark v. Bumbo Int'l Tr.*, No. 15 C 2725, 2017 U.S. Dist. LEXIS 137607, 2017 WL 3704825, at *4 (N.D. Ill. Aug. 28, 2017) ("[T]he mere self-serving nature of the declaration does not permit the Court to discount it." (citation omitted)). Because SBI has introduced competent evidence calling this Court's jurisdiction into question, Plaintiff must respond with his own proof to avoid dismissal. *Apex Digit.*, 572 F.3d at 444-46.

While Plaintiff submits some evidence concerning SBI's U.S.-based commercial activities, none of those activities relate to the conduct upon which his action is based. Again, it is not enough that SBI has branches in the United States when those branches' activities are entirely disconnected from Plaintiff's NRI Account. Plaintiff does argue that SBI actively advertises NRI Accounts to non-resident

Indian senior citizens living in the United States. But he fails to explain how SBI's advertisements are anything but ancillary to his claims. For example, Plaintiff does not contend that the advertisements misrepresented the terms of the certificates of deposit; rather, he claims that SBI breached the financial instruments' terms. Nor does Plaintiff submit any evidence showing that he purchased certificates of deposit as a result of SBI's advertisements targeted to U.S.-based non-resident Indians. In any case, Plaintiff's evidence does not show that SBI's United States branches took any steps to advertise NRI Accounts. It is true that the websites for SBI's United States branches have a page for non-resident Indian services. (Pl.'s Opp'n, Ex. 5, Dkt. No. 46-5.) Those pages, however, simply inform visitors that SBI's United States branches do not open, close, or operate NRI Accounts, and provide a link to SBI's Indian website for more details regarding such accounts. (*Id.*) Further, the pages contain the following disclaimer: "This link is provided as a service to our parent company or prospective customers for general guidance and is neither a solicitation for business, investment advice nor tax advice." (*Id.*)[1]

1. Plaintiff's other advertising evidence includes a tweet from SBI's official Twitter account. (Pl.'s Opp'n, Ex. 1, Dkt. No. 46-1.) The tweet appears to have come from SBI's primary Twitter account and not an account for one of its United States branches. Further, Twitter has global reach and there is nothing in the tweet itself to suggest that it is specifically targeted at American non-resident Indians as opposed to nonresident Indians generally. In addition, Plaintiff submits a news article providing an overview of NRI Accounts. (Pl.'s Opp'n, Ex. 2, Dkt. No. 46-2.) But there is no indication that the news article was sponsored content or should be viewed as something other than an ordinary news article.

Even if his action is found to be based upon SBI's India-based activities such that the first prong of the commercial-activity exception does not apply, Plaintiff argues that those acts caused a "direct effect" in the United States and therefore jurisdiction is available under the commercial-activity exception's third prong. For the direct effect requirement to be met, the effect must "follow[] as an immediate consequence of the defendant's activity." *Weltover*, 504 U.S. at 618. But financial injury to a U.S. citizen alone will not be sufficient "unless the foreign state has performed some legally significant act here." *Rush-Presbyterian-St. Luke's Med. Ctr. v. Hellenic Republic*, 877 F.2d 574, 582 (7th Cir. 1989). For example, "[i]n cases involving the default by a foreign state or its instrumentality on its commercial obligations, an act has a direct effect in the United States if the defaulting party is contractually obligated to pay in this country." *Rogers v. Petroleo Brasileiro, S.A.*, 673 F.3d 131, 139 (2d Cir. 2012); *see also Glob. Index, Inc. v. Mkapa*, 290 F. Supp. 2d 108, 113 (D.D.C. 2003) ("[I]n almost every case, in this circuit and others, involving the direct effect exception, the existence or absence of an expressly designated place of payment has been decisive. When a contract or note designates the United States for payment, courts have found a direct effect . . . .").

Here, Plaintiff fails to demonstrate or introduce evidence showing that SBI's conduct had any direct effect in the United States beyond causing financial loss to Plaintiff. Moreover, SBI points out that Plaintiff's own evidence shows that SBI's payments on the certificates of deposit were deposited into Plaintiff's India-based

accounts and denominated in Indian rupees. (Pl.'s Opp'n, Ex. 6.) That the funds in Plaintiff's NRI Account were transferred there from a United States bank account has no bearing on the direct-effect analysis. *See Guirlando v. T.C. Ziraat Bankasi A.S.*, 602 F.3d 69, 80 (2d Cir. 2010) ("[T]he transfer of funds ***out of*** a New York bank account ***is not*** itself sufficient to place the effect of a defendant's conduct in the United States . . . ." (internal quotation marks omitted)); *Goel v. Am. Digit. Univ., Inc.*, Nos. 14-cv-2053 (KBF), 14-cv-1895 (KBF), 2017 U.S. Dist. LEXIS 41336, 2017 WL 1082458, at *16 (S.D.N.Y. Mar. 21, 2017) (same). Thus, Plaintiff cannot show that the commercial-activity exception's third prong applies. And because Plaintiff does not claim that any of the FSIA's other exceptions apply, and the Court can identify no other exception that might apply to Plaintiff's allegations, SBI has shown that it is immune from Plaintiff's lawsuit under the FSIA.

Anticipating that the Court might find that he failed to demonstrate the applicability of the commercial-activity exception, Plaintiff asks that the Court nonetheless allow him to conduct jurisdictional discovery instead of dismissing the amended complaint. Plaintiff asserts that courts often allow jurisdictional discovery before dismissing on sovereign immunity grounds. However, when jurisdictional discovery is permitted in the FSIA context, it is because the plaintiff has demonstrated a reasonable possibility that discovery would produce facts supporting jurisdiction. *See, e.g.*, *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 694-65 (7th Cir. 2012) ("The Szarvas Declaration is enough to raise a question as to

what, if any, commercial activity the national railway conducts in the United States, and that jurisdictional question cannot be resolved on the pleadings."); *MMA Consultants 1, Inc. v. Republic of Peru*, 245 F. Supp. 3d 486, 513 (S.D.N.Y. 2017) ("[J]urisdictional discovery is only permitted in the FSIA context to verify allegations of specific facts crucial to an immunity determination, not to uncover those facts in the first instance." (internal quotation marks omitted)); *see also Goodman Holdings v. Rafidain Bank*, 26 F.3d 1143, 1147, 307 U.S. App. D.C. 79 (D.C. Cir. 1994) ("[W]e do not see what facts additional discovery could produce that would affect our jurisdictional analysis above and therefore conclude the district court did not abuse its discretion in dismissing the action when it did."). That is because "the principles of comity underlying the FSIA require the district court . . . to balance the need for discovery to substantiate exceptions to statutory foreign sovereign immunity against the need to protect a sovereign's or sovereign agency's legitimate claim to immunity from discovery." *Butler v. Sukhoi Co.*, 579 F.3d 1307, 1314 (11th Cir. 2009) (internal quotation marks omitted).

Plaintiff, however, has given the Court no reason to believe that he will be able to establish subject-matter jurisdiction if he is permitted to take discovery. Indeed, based on Plaintiff's allegations, the Court would expect that any information relevant to the applicability of the commercial-activity exception should already be within Plaintiff's personal knowledge or within his possession or control. For example, to show that the action was based upon SBI's commercial activities in the United States,

Plaintiff could have submitted a declaration that described the nature of his interactions with SBI in the United States. Similarly, if the SBI's India-based commercial activities had a direct effect in the United States, Plaintiff would presumably be aware of those direct effects and be able to present evidence on the issue. That Plaintiff did not respond to SBI's jurisdictional challenge with any evidence supporting the applicability of one of the FSIA's exceptions suggests to the Court that jurisdictional discovery would be nothing more than a fishing expedition. Consequently, the Court denies Plaintiff's request for leave to conduct jurisdictional discovery and dismisses his amended complaint without prejudice for lack of subject-matter jurisdiction.

CONCLUSION

For the foregoing reasons, SBI's motion to dismiss for lack of jurisdiction (Dkt. No. 41) is granted. The amended complaint is dismissed without prejudice.

APPENDIX C — RELEVANT STATUTORY PROVISIONS

EXCERPTS FROM THE FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976

28 U.S.C. § 1330

Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title.

Appendix C

28 U.S.C. § 1602

Findings and declaration of purpose

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

Appendix C

28 U.S.C. § 1603

Definitions

For purposes of this chapter--

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means 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.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

Appendix C

28 U.S.C. § 1604

Immunity of a foreign state from jurisdiction

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.

Appendix C

28 U.S.C. § 1605

General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case--

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(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;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to--

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award

is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

. . . .

Appendix C

28 U.S.C. § 1606

Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.