No. 23-390

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Seventh Circuit Court of Appeals correctly held that State Bank of India was immune from jurisdiction under the Foreign Sovereign Immunities Act because State Bank of India's alleged debiting of and failure to deposit additional Indian Rupees into an account held in India did not cause a direct effect in the United States, especially where no agreement requiring payment to be made in the United States existed between the parties with respect to the account at issue.

RULE 29.6 STATEMENT

State Bank of India states that there is no parent corporation and that no publicly held company owns 10% or more of its stock.

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BRIEF IN OPPOSITION

Respondent, State Bank of India, respectfully submits this brief in opposition to the petition for a writ of certiorari filed by Petitioner, Arun Kumar Bhattacharya.

OPINIONS BELOW

The Seventh Circuit's opinion is reported at 70 F.4th 941. *See also* Pet. App. 1a. The district court's opinion is unreported but is available at 2022 WL 4482764. *See also* Pet. App. 11a.

JURISDICTION

The Seventh Circuit entered its final judgment on June 12, 2023. On Petitioner's application, Justice Barrett extended the time to file a petition to and including October 11, 2023. On State Bank of India's motion, this Court extended the time to file a brief in opposition to and including December 13, 2023. This Court has jurisdiction. 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Petitioner provides the entirety of the commercial activity exception of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602 *et seq*. ("FSIA"). Pet. 2. Only the third prong of § 1605(a)(2) is at issue. Properly narrowed, the provision at issue 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 . . . 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[.]

§ 1605(a)(2).

Other, background statutory provisions are reprinted in Appendix C of the petition. Pet. App. 25a–33a.

STATEMENT

Petitioner held special certificate of deposits ("CDs") for non-resident Indians offered by State Bank of India and held two accounts with State Bank of India. Those CDs and accounts were held in India at State Bank of India's India-based branches, the Chandni Chowk Branch and the Varanasi City Branch. Petitioner claimed that State Bank of India was to make interest payments, plus an additional 1.5%, on the CDs. The record developed in the district court established that the Chandni Chowk Branch deposited the interest payments into one of Petitioner's India-based accounts in Indian Rupees. There was no evidence that State Bank of India deposited money into an account in the United States. Nor was there evidence that State Bank of India was contractually obligated to deposit money into an account in the United States that belonged to Petitioner. All relevant activity occurred in India.

At some point, per Petitioner's allegations, State Bank of India informed Petitioner that a retroactive rule change put into effect by India's central bank meant that Petitioner would no longer receive the additional 1.5% interest rate and, further, that State Bank of India was required to debit one of his accounts to correct improperly paid 1.5% interest payments. Thereafter, Petitioner claimed he started to receive a variable rate.

Petitioner sued State Bank of India in the United States District Court for the Northern District of Illinois. The gravamen of the claims asserted by Petitioner sounded in contract. Petitioner claimed he should have received and should have continued to receive the additional 1.5% interest, not a variable rate, and that State Bank of India improperly debited one of his accounts. All of the relevant activity occurred in India.

With the relevant activity having occurred abroad and the effects of that activity having been felt abroad, State Bank of India moved to dismiss the Amended Complaint, arguing it was immune from jurisdiction under the FSIA. The district court agreed and so too did the Seventh Circuit.

Petitioner now presents a new argument, which he never raised and which the courts below never passed upon, before this Court. For the reasons explained herein, the petition should be denied.

I. LEGAL BACKGROUND

The FSIA "codifies, as a matter of federal law, the restrictive theory of sovereign immunity." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488 (1983). It also provides the "sole basis for obtaining jurisdiction" over a foreign state, or its agency or instrumentality, in United States courts. *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 30 (2015) (quoting *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989)). A foreign state is immune from jurisdiction unless a statutory exception applies under the FSIA. *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993); 28 U.S.C. § 1604.

While there are several exceptions to immunity afforded under the FSIA, only one is relevant to this

action: the third prong of the commercial activity exception. That prong permits jurisdiction over a foreign sovereign when "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." § 1605(a)(2). "In denoting conduct that forms the 'basis' or 'foundation' for a claim, the phrase ['based upon'] is read most naturally to mean 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 (citations omitted); *see also Sachs*, 577 U.S. at 35 ("an action is 'based upon' the 'particular conduct' that constitutes the 'gravamen' of the suit."). "[A]n effect is 'direct' if it follows 'as an immediate consequence of the defendant's . . . activity.'" *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992) (citation omitted).

II. FACTUAL BACKGROUND

State Bank of India was created by an act of India's Parliament, the State Bank of India Act of 1955, which requires that the Indian government maintain a majority stake in State Bank of India at all times. Docket Entry 41-2 ¶¶ 4–6.[1] Thus, since its inception, a majority stake of State Bank of India has been owned and controlled directly by the Indian government. *Id*.

State Bank of India has more than 20,000 branches throughout the world. *Id.* ¶ 2. Three of those branches are located in California, Illinois, and New York, with a representative office in Washington, D.C. *Id.* ¶ 7.

[1] Citations to "Docket Entry" refer to the filings on the district court's docket.

State Bank of India's principal place of business and place of incorporation are each Mumbai, India. *Id.* ¶ 3.

The Illinois branch operates as State Bank of India–Chicago. *Id.* ¶ 8. State Bank of India–Chicago uses a computer system that does not have a centralized database, so State Bank of India–Chicago cannot access existing accounts or property that are opened or held in other branches. *Id.* ¶ 9; Docket Entry 41-1 ¶¶ 5–6. Additionally, State Bank of India "does not open, close, or operate in the United States any non-resident Indian accounts." Docket Entry 41-1 ¶ 7; 41-2 ¶ 11. Non-resident Indian accounts are offered only by the branches in India. Docket Entry 41-1 ¶ 7; 41-2 ¶ 11. The online disclosure expressly stated that "non-resident Indian accounts in India 'are not covered by FDIC Insurance and are not supervised by any US banking regulators since they are domiciled in India and are regulated by the Reserve Bank of India.'" Docket Entry 41-1 ¶ 7; 41-2 ¶ 11.

In 2012, Petitioner placed funds into a CD at State Bank of India in India, in which State Bank of India agreed to pay him the prevailing interest rate plus an additional 1.5%. Docket Entry 34 ¶¶ 16–18. There was no fixed end to this program and Petitioner would continue to receive an additional 1.5% in interest as long as he remained a senior citizen and non-resident of India living in the United States. *Id.* ¶ 20. Petitioner purchased an unspecified number of CDs over the next eight years, with each rolling over into the next. *Id.* ¶ 21. In February 2020, State Bank of India informed Petitioner of a rule change by "the Reserve Bank of India (Central Bank)," which led to a debit from his account. *Id.* ¶¶ 25–29. Petitioner alleges other violations of his agreement with State Bank of India, as well as a failure to provide records. *Id.* ¶¶ 30–40.

Petitioner "does not now have, and has never had, an account with SBI-Chicago." Docket Entry 41-1 ¶ 4. Although not alleged in the Amended Complaint or submitted in the form of an affidavit or declaration, Respondent submitted bank documents with his response to State Bank of India's motion to dismiss before the district court, which showed that he held accounts at two India-based branches; the money in his India-based accounts was held in Rupees; and interest payments were deposited in Rupees into one of his India-based accounts. Docket Entry 46-6–46-7.

III. PROCEDURAL BACKGROUND

Petitioner instituted this action by filing a complaint in the United States District Court for the Northern District of Illinois. With the aid of court-appointed counsel, Petitioner filed an Amended Complaint. The ultimate theory of liability was that State Bank of India should have paid Petitioner more money than it did into and should not have debited his account held in India that received interests payments denominated in Indian Rupees in India.

State Bank of India moved to dismiss for lack of subject-matter and personal jurisdiction, arguing it was immune from jurisdiction under the FSIA. The motion to dismiss was filed pursuant to Rules 12(b)(1) and 12(b)(2), Fed. R. Civ. P., which permit a defendant to make a factual challenge to a complaint. *Silha v. ACT, Inc.*, 807 F.3d 169, 173 (7th Cir. 2015) (12(b)(1)); *Purdue Research Found. v. Sanofi-Synthelabo, S.A.*, 338 F.3d 773, 782 (7th Cir. 2003) (12(b)(2)). Because State Bank of India made a factual challenge, Petitioner was required to submit affirmative evidence establishing jurisdiction. *See Apex Digital, Inc. v. Sears, Roebuck & Co.*, 572 F.3d 440, 444–45 (7th Cir. 2009); *see also Enahoro v. Abubakar*, 408 F.3d 877, 882

(7th Cir. 2005) (explaining plaintiff bears the burden of producing evidence that an exception to immunity applies). Petitioner "did not respond to [the] jurisdictional challenge with any evidence supporting the applicability of one of the FSIA's exceptions . . . ." Pet. App. 24a.

The district court granted the motion and denied jurisdictional discovery. Pet. App. 17–24a. The Seventh Circuit affirmed because Petitioner's accounts were maintained in India, the relevant transactions were with State Bank of India's India-based branches, there was no allegation that the action related to an account held with a U.S.-based branch or otherwise related to an action State Bank of India took within the United States, and there was no agreement requiring State Bank of India to perform in the United States. *Id.* 10a.

Petitioner now petitions this Court for a writ of certiorari.

REASONS FOR DENYING THE PETITION

This Court should deny the petition for four reasons.

First, Petitioner failed to preserve his newly asserted argument regarding whether a "legally significant act" in the United States is required when a plaintiff alleges nothing more than a financial injury to trigger the third prong of § 1605(a)(2). Unsurprisingly, given Petitioner's failure to assert that argument, neither the Seventh Circuit nor the district court passed on the question raised by Petitioner's argument. Petitioner cannot present an argument he failed to preserve.

Second, Petitioner's statement of the facts misstates the record. Petitioner's statement of the factual background, along with his allegation that the district

court "dismissed the numerous U.S. effects that Petitioner had alleged," Pet. 8, seems to suggest that Petitioner had presented evidence in response to State Bank of India's factual challenge pursuant to Rules 12(b)(1) and 12(b)(2). In truth, Petitioner failed to meet his evidentiary burden because he failed to submit a verified complaint, a declaration, an affidavit, or other form of evidence that would provide a basis to invoke the commercial activity exception to the FSIA.

Third, there is no actual conflict among the Circuits. When, as here, the gravamen of the claim is that money should have been paid but was not, then the direct effect of the decision not to pay or to debit an account to correct the balance occurs where the money should have been paid or should have remained.

Fourth, this action is not a good or proper vehicle to resolve any differences in how the Circuits analyze the third prong of § 1605(a)(2).

I. PETITIONER FAILED TO PRESERVE, AND THE LOWER COURTS DID NOT PASS ON, THE QUESTION PETITIONER PRESENTS

Petitioner's essential argument is that a "legally significant act" requirement is unsupported by the text of the FSIA and therefore improper. Petitioner's argument is fundamentally flawed on the merits. Yet, this Court need not spend its resources on the merits (or lack thereof) of Petitioner's argument because he failed to preserve it.

In the district court, Petitioner did not argue it was improper to require a "legally significant act" in the United States where a financial injury was claimed by a United States citizen or resident. *See generally* Docket Entry 46. Nor did he raise such a challenge

before the Seventh Circuit. *See generally* Document No. 14; 21.[2]

In fact, Petitioner's arguments before the Seventh Circuit can be placed into one of eight categories: (i) ineffective assistance of counsel, (ii) unpled claim, (iii) engagement in a commercial activity, (iv) not being an organ of a foreign state, (v) international law, (vi) immunity in criminal actions, (vii) policy, and (viii) jurisdictional discovery. Petitioner also asserted new—but unsupported—allegations. While Petitioner launched a broadside attack against the district court's opinion before the Seventh Circuit, his attack did not include a challenge regarding how the district court applied the "legally significant act" requirement. Nor did it include a challenge with respect to whether such a requirement was proper.

"This Court usually will decline to consider questions presented in a petition for certiorari that have not been considered by the lower court." *Patrick v. Burget*, 486 U.S. 94, 99 n.5 (1988) (citing *Youakim v. Miller*, 425 U.S. 231, 234 (1976)). This Court's aversion to considering questions not raised below or passed on by the lower courts is well-settled. *See, e.g.*, *id.* (adhering to practice of not considering unpreserved questions); *see also FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 226 n.4 (2013) (declining to address issue not raised by the parties or passed on by the lower courts (citing *United Parcel Serv., Inc. v. Mitchell*, 451 U.S. 56, 60 n.2 (1981))); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) (stating, "[w]here issues are neither raised before nor considered by the Court of Appeals, this Court will not

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[2] Citations to "Document No." refer to the filings on the Seventh Circuit's docket.

ordinarily consider them" (citations omitted)); *cf.* Sup. Ct. R. 15.2 (respondent must object to consideration of a question presented based on what occurred below in its brief in opposition).

Petitioner failed to preserve the argument he now presses before this Court. Neither lower court considered the question Petitioner presents before this Court. Consistent with long-held practice, this Court should not hear Petitioner's unpreserved argument.

II. PETITIONER'S RECITATION OF THE FACTS IS INACCURATE AND IGNORES THE EVIDENTIARY LACUNAE PETITIONER FAILED TO FILL

Before addressing the claimed conflict, it is necessary to correct the factual record. Petitioner's Factual Background contains several statements that lack evidentiary support.

Petitioner baldly asserts that "SBI actively advertised these non-resident accounts to U.S. citizens residing in the United States, including Petitioner." Pet. 6. Petitioner doubles-down on his unsupported contention by also claiming he opened a non-resident Indian account "based on SBI's targeted promotion campaign" and he "considered the" account "to be safe" "[g]iven the terms advertised by" State Bank of India. *Id.*

Petitioner, however, failed to submit evidence before the district court that would support those statements. In fact, the district court expressly found that Petitioner "fail[ed] to explain how SBI's advertisements are anything but ancillary to his claims. For example, [Petitioner] . . . [did not] submit any evidence showing that he purchased [CDs] as a result of SBI's advertisements targeted to U.S.-based non-resident Indians." Pet. App. 20a. The district court continued by stating:

"[i]n any case, [Petitioner's] evidence does not show that SBI's United States branches took any steps to advertise [non-resident Indian] Accounts." *Id.*

The district court's observations in denying Petitioner's request for jurisdictional discovery are even more telling. According to the district court,

> . . . [Petitioner] 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, [Petitioner] would presumably be aware of those direct effects and be able to present evidence on the issue. That ***[Petitioner] 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.

Pet. App. 24a. (emphasis added).

Petitioner's unsupported statements ignore the record he failed to develop below and appear to be an attempt to argue an exception not argued below. This Court should ignore Petitioner's factually unsupported statements.

III. THE SEVENTH'S CIRCUIT DECISION ACCORDS WITH THE DECISIONS OF THE OTHER CIRCUITS THAT HAVE ADDRESSED THE ISSUE

Contrary to Petitioner's argument, no actual conflict exists among the Circuits that have addressed the third prong of § 1605(a)(2) in the context of an action based upon claims that money should have been paid

abroad to a United States citizen, but was not. The survey of cases below, *infra* §§ III.A–B, demonstrates the same rule of law is at play in all of the cases discussed. On the one hand, when money is to be paid to an American into an account located in the United States, a direct effect will exist in the United States. On the other hand, the direct effect of an American not receiving funds abroad exists outside the borders of the United States, and the financial injury, though perhaps ultimately felt in the United States by an American, is too attenuated to qualify as direct. Simply put, the direct effect analysis is focused on "where" rather than "whom."

The Seventh Circuit applied the foregoing logic to this case and determined, given the factual record before the district court, that a direct effect in the United States did not exist because all of the relevant acts and effects occurred in India. The Seventh Circuit's decision neither created, nor furthered a Circuit split.

A. What the Seventh Circuit Held

In addition to his statements attempting to re-write the record, Petitioner misstates what the Seventh Circuit held. Petitioner claims that 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. 10 (citing Pet. App. 7a). Petitioner is wrong and it is again necessary to correct the record.

After summarizing how the Second, Eleventh, and D.C. Circuits have ruled following *Weltover*, 504 U.S. 607, the Seventh Circuit concluded that a plaintiff in a breach of contract action wishing to invoke the

third prong of § 1605(a)(2) "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. Notably, the Seventh Circuit saw its conclusion as joining—not conflicting with—the decisions of the Second, Eleventh, and D.C. Circuits. *Id.* 6a.

What the Seventh Circuit did not do was frame its analysis in terms of a "legally significant act." In fact, the phrase "legally significant act" appeared only once in the Seventh Circuit's opinion, and that was when discussing how the district court phrased its analysis. *See id.* 9a.

Applying the rule announced at the end of Section I of its opinion, the Seventh Circuit affirmed because Petitioner did not "point to any agreement with State Bank of India that established the United States as the site of performance," the account at issue was held in India, and the relevant transactions all occurred in India. Pet. App. 10a.

Petitioner is incorrect that the Seventh Circuit required a "legally significant act" to have occurred in the United States. The Seventh Circuit merely required a direct effect in the United States, *Id.* 5a–7a, and its holding is nothing more than the commonsense conclusion that not depositing money into, and debiting, an account held in India does not produce a direct effect in the United States. The direct effect occurred in the place where "[m]oney that was [allegedly] supposed to have been delivered . . . was not forthcoming." *Weltover*, 504 U.S. at 619. And that place was India.

B. There Is No Conflict Among the Circuits

Selectively pulling quotations from various decisions without regard to the facts of those decisions, Petitioner argues the Seventh Circuit's opinion furthers a Circuit conflict with respect to the third prong of § 1605(a)(2). A review of Circuit decisions demonstrates consistent outcomes, given the facts in a particular case, which can be harmonized and distilled into an easy to apply rule of law. No conflict exists.

1. *First Circuit*

In *Universal Trading & Investment Co., Inc. v. Bureau for Representing Ukrainian Interests in International and Foreign Courts*, 727 F.3d 10 (1st Cir. 2013), the plaintiff, a Massachusetts corporation, sued Ukraine and two of its agencies and instrumentalities ("Ukraine") for breach of contract. Ukraine filed a motion to dismiss, arguing it was immune from jurisdiction under the FSIA, which the district court denied. *Id.* at 15.

On appeal, the First Circuit considered, among other issues, whether a direct effect in the United States existed. The record revealed that if Ukraine had "paid [plaintiff], the funds would have been received on [plaintiff's] accounts in Massachusetts." *Id.* at 26. Because money was supposed to have been deposited into an account in the United States but was not, the direct effect was felt in the United States, which was sufficient to trigger the third prong of § 1605(a)(2). *Id.*

Universal Trading is the mirror image of this case. In *Universal Trading*, money was supposed to have been delivered in the United States but was not, which warranted jurisdiction because the direct effect was in

the United States. In this case, money was supposed to have been delivered in India but was allegedly not, which put the direct effect in India, not the United States. Jurisdiction existed in the former, not the latter.

2. *Second Circuit*

While Petitioner spends an entire subsection on authority from the Second Circuit, he failed to mention a recent, on-point decision that accords with the Seventh Circuit's decision: *Daou v. BLC Bank, S.A.L.*, 42 F.4th 120 (2d Cir. 2022). *Daou* illuminates what is required within the Second Circuit and removes the shadow of conflict Petitioner attempts to conjure.

In *Daou*, plaintiffs were dual citizens of the United States and Lebanon. *Id.* at 126. Plaintiffs had more than $18.5 million on deposit in two different commercial banks in Lebanon. *Id.*

A financial crisis in Lebanon resulted in Lebanon's central bank making it "nearly impossible to remove large quantities of" United States dollars from Lebanon. *Id.* Plaintiffs requested that their Lebanese banks transfer money to an account in the United States, which requests were denied. *Id.* So, plaintiffs opened an account with a third commercial bank in Lebanon, and deposited a large sum allegedly "on the understanding that [they] would eventually be able to wire it to" the United States. *Id.* at 127. The third bank, however, refused to wire money into the United States. *Id.* Plaintiffs finally agreed to accept checks from the three commercial banks drawn against Lebanon's central bank. *Id.* Each check "stated on its face . . . that it was 'payable [at] Beirut.'" *Id.*

Plaintiffs later filed suit for, *inter alia*, breach of contract. *Id.* The district court, upon motion, dis-

missed the central bank of Lebanon under the FSIA. *Id.* at 128. Plaintiffs appealed and the Second Circuit affirmed. *Id.* at 133–37.

Relevant here, the Second Circuit relied on two simple principles of law. First, "the mere fact that a foreign state's commercial activity outside of the United States caused . . . financial injury to a United States citizen is not itself sufficient to constitute a direct effect in the United States." *Id.* at 135 (citation omitted). And second, "the place where a direct effect is felt is generally either a contract's designated place of performance (if any) or the locus of the tort, depending on the particular sort of alleged unlawful conduct that forms the gravamen of the complaint." *Id*.

Thus, insofar as the plaintiffs' claims sounded in contract, there was no direct effect in the United States because "the checks [did] not designate the United States as a place of payment" and the checks did not "allow either the [c]ommercial [b]anks or the [plaintiffs] to specify a place of payment." *Id.* at 136. Similarly, to the extent the claims sounded in tort, the claims asserted a harm to chattel and "the place of wrong" for such a harm "is the place where the force takes effect on the thing." *Id.* at 137. Whatever force was exerted over the money at issue in *Dauo* occurred in Lebanon, where the money was located. *Id.*

Dauo is consistent with the Seventh Circuit's decision. In both cases, money was located, and payment was to be made, in a foreign country, not the United States. Consequently, jurisdiction did not exist in either case.

It remains only to note that with respect to Second Circuit authority, the cases cited by Petitioner, Pet. 12–14, do not alter the conclusion reached above. In

Daou, the Second Circuit analyzed *Guirlando v. T.C. Ziraat Bankasi A.S.*, 602 F.3d 69 (2d. Cir. 2010), which itself relied in part on *Virtual Countries, Inc. v. Republic of South Africa*, 300 F.3d 230 (2d Cir. 200), and *Atlantica Holdings v. Sovereign Wealth Fund Samruk-Kazyna JSC*, 813 F.3d 98 (2d Cir. 2016), to formulate two of the three principles of law that showed there was no direct effect in the United States. *Daou*, 42 F.4th at 135–37.

3. *Third Circuit*

The Third Circuit also applies a rule wholly consistent with the Seventh Circuit's decision. For example, in *Aldossari v. Ripp*, the Third Circuit concluded that the third prong of § 1605(a)(2) had not been triggered because the "contractual duty that . . . went unfulfilled — payment . . . — would have been expected in Saudi Arabia." 49 F.4th 236, 254 (3d Cir. 2022). There was no allegation or suggestion that "any party . . . was required or expected to perform any obligation in the United States," nor was there any allegation that any of the "arrangements" between the parties "called for the use of a U.S. bank account or invited a party to demand payment within the United States." *Id.* (cleaned up). Hence there was no direct effect in the United States. *Id.* at 254–55.

The lack of a direct effect remained even though the plaintiff was "based in the United States." *Id.* at 255. The Third Circuit aptly noted that the "plaintiff's location or citizenship tells us nothing of any effects caused by the defendants' acts" and a "contrary rule would permit jurisdiction in practically every case in which a U.S. domiciliary claimed harm from the acts of a foreign sovereign." *Id.* Such an outcome "would undermine the FSIA's background presumption of affording immunity to foreign states." *Id.*

The Third Circuit's precedent accords with that of the Seventh Circuit.

4. *Fifth Circuit*

Petitioner relies on *Voest-Alpine Trading USA Corp. v. Bank of China*, 142 F.3d 887 (5th Cir. 1998), to argue a conflict exists between the Fifth and Seventh Circuits. His reliance on *Voest-Alpine* is misplaced.

In *Voest-Alpine*, an American corporation "suffered a . . . financial loss in the United States in the form of funds not remitted to its account at a Texas Bank." *Id.* at 896. The failure to receive money in Texas occurred even though the American corporation "expressly instructed the Bank of China to wire payment . . . directly into [its] bank account in Houston." *Id.* Moreover, it was Bank of China's "customary practice to send payments . . . to wherever the presenting party specifies." *Id.* In other words, had Bank of China not refused to send payment, "it would have wired the money directly to [the] Texas bank account." *Id.*

Despite some of the broad dicta that Petitioner relies upon, the reality is that *Voest-Alpine* turned on where money should have been deposited but was not. Notably, even under *Voest-Alpine*'s reasoning, Petitioner still would not have triggered the third prong of § 1605(a)(2) because Petitioner was not supposed to receive money in the United States, he did not expressly instruct State Bank of India to send money into an account in the United States, and State Bank of India did not have a customary practice to send Petitioner payment directly into the United States.

Cases decided after *Voest-Alpine* demonstrate that the Fifth Circuit does indeed follow an approach regarding the third prong of § 1605(a)(2) that is similar to the Seventh Circuit's. *Janvey v. Libyan*

Investment Authority, 840 F.3d 248 (5th Cir. 2016), is particularly instructive on both the law and the facts.

First, the law. In discussing what was required to trigger the third prong of § 1605(a)(2), the Fifth Circuit in *Janvey* stated that the "mere fact that [a foreign state's] commercial activity outside of the United States caused financial injury to a United States citizen is not itself sufficient to constitute a direct effect in the United States." *Id.* at 262 (cleaned up). For a financial injury to constitute a direct effect in the United States, the foreign state must "cause[] the injury through its failure to perform an obligation that it was required to perform in the United States." *Id.* To support that statement of law, the Fifth Circuit included a footnote collecting a number of decisions, including three Fifth Circuit decisions for the proposition "that there was a direct effect in the United States because [a foreign state] failed to perform its obligation to transfer assets to an entity in the United States," and two decisions from other Circuits establishing no direct effect where the foreign state "had not obligated itself to do anything in the United States." *Id.* at 262 n.57.

And now for the facts. In *Janvey*, a receiver for a Ponzi scheme brought claims against two Libyan entities, which qualified as foreign states, to recover proceeds on CDs. *Id.* at 254, 259–61. In the Ponzi scheme, Allen Stanford and his related entities sold "sham CDs issued by [Stanford International Bank, Ltd.] to unsuspecting investors." *Id.* at 254. One of the Libyan entities purchased $138 million in CDs. *Id.* at 255. Two years later, that Libyan entity decided to divest itself of the CDs and instructed that they be redeemed upon maturity. *Id.* As the CDs matured, Stanford International Bank transferred the proceeds

from accounts in Canada and England to accounts in Libya and Switzerland. *Id.* None of the accounts were held in the United States. *Id.*

The receiver brought claims against the Libyan entity that purchased the CDs for fraudulent transfer and unjust enrichment, with the other entity brought along through allegations of alter ego status. *Id.* at 256. Both Libyan entities moved to dismiss under the FSIA. *Id.* While the district court granted the motion as to one, it denied it as to the entity that actually purchased the CDs. *Id.*

On appeal, the Fifth Circuit considered whether a direct effect in the United States existed. The Fifth Circuit concluded no such effect existed because the non-dismissed Libyan entity had "purchased, repurchased, and redeemed the CDs from" Stanford International Bank, which was based in Antigua, all of the non-dismissed entity's acts occurred in Switzerland and Libya, and all of Stanford International Bank's acts occurred outside of the United States. *Id.* at 262–63. Moreover, the non-dismissed entity "acted only pursuant to its obligations under the" CDs, which "did not require any act in the United States, much less the act of funneling money through the Stanford [Ponzi] scheme . . . in the United States." *Id.* Because there was no direct effect in the United States, the district court erred in not dismissing the entity that had purchased the CDs. *Id.* at 263.

Janvey and even *Voest-Alpine* demonstrate that the Fifth Circuit takes a similar approach as did the Seventh Circuit below. If payment was supposed to have been made in the United States but was not, the third prong of § 1605(a)(2) will be triggered. Conversely, if payment was supposed to have been made outside of the United States but was not, the

third prong of § 1605(a)(2) will not be triggered. No conflict exists.

5. *Sixth Circuit*

Petitioner also relies on *Rote v. Zel Custom Manufacturing LLC*, 816 F.3d 383 (6th Cir. 2016), to support his argument of a Circuit split. *Rote* is not applicable because it concerned a products-liability claim, not a breach of contract claim. "[I]n the context of product-liability cases, courts have routinely held that an injury caused by an allegedly defective product meets the 'direct effect element,'" *Id.* at 396 (direct effect existed where defective product caused physical injury in the United States), whereas "the place where a direct effect is felt is," in a contract case, "generally . . . [the] contract's designated place of performance (if any) . . .," *Daou*, 42 F.4th at 135; *see also id.* at 136. Thus, *Rote* concerned a different species of claim than does this action and, consequently, the two actions involved different rules of law for locating where an a foreign act caused a direct effect.

Keller v. Central Bank of Nigeria, 277 F.3d 811 (6th Cir. 2002), *abrogated on other grounds by Samantar v. Yousuf*, 560 U.S. 305 (2010), is more on point. There, a plaintiff and a person purporting to act on behalf of the Nigerian government entered into a contract for the purchase of plaintiff's mobile medical devices. *Id.* at 814. Payments due to the plaintiff under the agreement were never made. *Id.* Plaintiff sued for breach of contract, among other claims. *Id.*

Defendants moved to dismiss on the ground that they were immune from jurisdiction, which the district court denied. *Id.* at 815. On appeal, the Sixth Circuit affirmed because "defendants agreed to pay but failed to transmit the promised funds to an account in a

Cleveland bank." *Id.* at 818. The "failure to pay promised funds to a Cleveland account constituted a direct effect in the United States." *Id. Keller*'s holding turned on where payment was supposed to have been made. Because payment was supposed to have been paid under the agreement in the United States, the failure to make such a payment caused a direct effect in the United States.

Subsequent opinions demonstrate the consistency of the rule. In *DRFP LLC v. Republica Bolivariana de Venezuela*, 622 F.3d 513 (6th Cir. 2010), for example, the "dispositive issue was whether the terms of the bonds called for Venezuela to make a payment in the United States." *Westfield v. Federal Republic of Germany*, 633 F.3d 409, 415 (6th Cir. 2011) (discussing *DRFP*). "If they did not, and the creditor merely intended to move funds it received in Venezuela to the United States, Venezuela's failure to make payment would not have caused a direct effect in the United States." *Id.* at 415–16. And in *Westfield*, the Sixth Circuit summarized the rule as: "if the funds are only payable in a foreign county, failure to receive those funds does not cause direct effects in the United States. . . . When funds are due abroad and not paid, the direct effects occur abroad." *Id.* at 416.

The Sixth Circuit's approach to the third prong of § 1605(a)(2) is consistent the Seventh Circuit's.

6. *Ninth Circuit*

Terenkian v. Republic of Iraq, 694 F.3d 1122 (9th Cir. 2012), which Petitioner relies on in furtherance of his attempt to create a conflict, can be harmonized with the approaches taken by the other Circuits discussed herein.

In *Terenkian*, the Ninth Circuit considered *Weltover* and determined *Weltover* was consistent with the Ninth Circuit's analysis. *Id.* at 1138. According to the Ninth Circuit, *Weltover* "held that the foreign sovereign's failure to perform its obligation to make certain payments necessarily had a direct effect in the United States where the foreign sovereign's place of performance was the United States." *Id.* (citations omitted). In contrast, the foreign sovereign in *Terenkian* "had no obligation to perform in the United States; the contracts required Iraq only to deliver oil . . . in either Iraq or Turkey, and the act that form[ed] the basis of plaintiff's lawsuit, Iraq's cancellation of the contracts, occurred in Iraq." *Id.* Thus, unlike the situation in *Weltover*, there was no direct effect in the United States.

It remains only to note that Petitioner's parenthetical quotation of *Terenkian* is taken out of context. Petitioner quotes the Ninth Circuit as saying: "[w]hile 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." Pet. 12 (quoting *Terenkian*, 694 F.3d at 1138). That altered quotation suggests the Ninth Circuit imposed a legally significant act requirement and payment should have been made in the United States but was not as a direct effect of a breach of contract. The omitted portion of the quotation provides critical context that negates Petitioner's implications.

The full statement by the Ninth Circuit reads:

> [w]hile 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 ***merely an indirect***

> ***effect of Iraq's breach and is*** not the 'legally significant' act that gave rise to the plaintiffs' claim***, which is based on the breach, not the non-deposit of payment***.

Terenkian, 694 F.3d at 1138 (emphasis added to show portions omitted by Petitioner). The "act that form[ed] the basis of plaintiffs' lawsuit" was Iraq's "cancellation of the contracts," which occurred in Iraq. *Id.*

When viewed in context, the Ninth Circuit's reference to a legally significant act is more appropriately read as referring to § 1605(a)(2)'s "based upon" requirement. That is to say, the Ninth Circuit was focusing on the direct effect of the relevant act, i.e., the act that formed the basis of the action. *See Nelson*, 507 U.S. at 356–57 (discussing the "based upon" requirement of § 1605(a)(2)).

Properly framed and understood, the Ninth Circuit does not impose a requirement that conflicts with the Seventh Circuit's approach to the third prong of § 1605(a)(2).

7. *Tenth Circuit*

Writing for a unanimous panel, then Judge, now Justice, Gorsuch applied a rule similar to what the Seventh Circuit did below. In *Big Sky Network Canada, Ltd. v. Sichuan Provincial Government*, the Tenth Circuit explained that its precedent "set down the rule that an American corporation's failure to receive promised funds abroad will not qualify as a 'direct effect in the United States.'" 533 F.3d 1183, 1191 (10th Cir. 2008) (quoting *United World Trade, Inc. v. Mangyshlakneft Oil Prod. Ass'n*, 33 F.3d 1232, 1238–39 (10th Cir. 1994)). The direct effect "in such a case is the failure to receive the funds, which occurs abroad . . . and the financial injury, though ultimately

felt in the United States, is too attenuated to qualify as direct." *Id.* (citation omitted).

The Tenth Circuit further explained that the court looks "at only two facets of an effect to determine whether it can be the basis for jurisdiction . . .: whether it is direct and whether it is in the United States." *Id.* at 1192. There was not a direct effect in the United States, because the record in *Big Sky* showed, at most, that the parties "contemplated that at some point down the road contractual payments made to Big Sky—*outside of the United States*—would be passed through to [a company] in the United States." *Id.* (emphasis added).

Petitioner also cites to *Orient Mineral Co. v. Bank of China*, 506 F.3d 980 (10th Cir. 2007), but that case does not create a conflict. In *Orient Mineral*, the Tenth Circuit concluded that "commercial activity in China produced a 'direct effect' in the United States" because $400,000 had been transferred into a Utah bank. *Id.* at 999. *Orient Mineral* is therefore factually distinguishable from other Tenth Circuit decisions, such as *Big Sky* and *United World Trade*, 33 F.3d at 1237, where "no part of the contract . . . was to be performed in the United States."

Viewed as polestars, *Orient Mineral* on the one end and *Big Sky* and *United World Trade* on the other end provide easy comparators that exemplify the rule. If a decision results in money being or not being transferred into the United States, a direct effect in the United States exists. If, however, a decision results in money being or not being transferred into a country other than the United States, no direct effect in the United States exists; the direct effect exists where the money was or should have been paid. Simply because this case falls on the *Big Sky* and *United World Trade*

side of the spectrum does not mean there is a Circuit split.

In sum, in the Tenth Circuit, "mere financial loss to an American . . . resulting from the failure to receive monies abroad cannot constitute a direct effect within the meaning of the commercial activity exception to the FSIA." *Big Sky*, 533 F.3d at 1192. That rule is entirely consistent with the Seventh Circuit's decision.

8. *Eleventh Circuit*

The Eleventh Circuit, too, follows the place-of-payment rule. For example, in *R&R International Consulting LLC v. Banco do Brasil, S.A.*, 981 F.3d 1239, 1244 (11th Cir. 2020), the Eleventh Circuit determined that the third prong of § 1605(a)(2) had been triggered because the bonds at issue "promised that they could be redeemed at any of the Bank's branches, and [plaintiff] demanded payment at the Miami branch." Money "that was supposed to have been delivered to a [Miami] bank for deposit was not forthcoming" in Miami and, therefore, a direct effect in the United States existed. *Id.*

R&R International is, like *Universal Trading*, the mirror image of this case. In *R&R International*, money was supposed to have been delivered in the United States but was not, warranting jurisdiction. Conversely, in this case, money was supposed to have been delivered in India but was allegedly not. Money payable abroad, but which was not so paid, does not create a direct effect in the United States.

9. *D.C. Circuit*

Another member of this Court, Justice Kavanaugh, also wrote an opinion addressing the third prong of § 1605(a)(2) while sitting as a Circuit Judge.

Odhiambo v. Republic of Kenya, 764 F.3d 31 (D.C. Cir. 2014), *abrogated on other grounds by Sachs*, 577 U.S. 349. In *Odhiambo*, Kenya offered a monetary reward for information about undisclosed taxes. *Id.* at 33. The plaintiff "blew the whistle on hundreds of accountholders" resulting in Kenya "making some rewards payments," but plaintiff claimed he was entitled to millions more and, so, he sued. *Id.* at 33–35. Kenya moved to dismiss under the FSIA, which the district court granted. *Id.* at 35.

On appeal, the D.C. Circuit considered whether a direct effect in the United States existed. The D.C. Circuit summarized its direct-effect cases involving a breach of contract as "turn[ing] on whether the contract in question established the United States as a place of performance," which "follows from the text and purpose of the FSIA." *Id.* at 38. According to the D.C. Circuit, "[b]y definition, breaching a contract that establishes the United States as a place of performance will have a *direct* effect here, whereas breaching a contract that establishes a different or unspecified place of performance can affect the United States only *indirectly*, as the result of some intervening event . . . ." *Id.* The third prong of § 1605(a)(2) was not triggered because Kenya's offer did not contemplate the United States as a place of performance and, in fact, contemplated Kenya as the place of performance because the contract provided that rewards would be paid in Kenyan shillings. *Id.* at 40–41.

The approach taken by the D.C. Circuit is consistent with the Seventh Circuit. In both Circuits, when a contract sets the place for payment in a location outside of the United States, then failing to make a payment outside of the United States does not create a direct effect in the United States. If it were other-

wise, "U.S. courts [would turn] into 'small international courts of claims.'" *Id.* at 39.

C. No Conflict Exists Among the Circuits

As can be seen from the foregoing survey, whatever distinctions might exist in how the Circuits phrase their analyses, those distinctions are differences without meaning. The fundamental rule of law distilled from the holdings of the Circuits that have addressed the issue is internally consistent. In an action involving the payment of money, the direct effect of the act (namely, the decision to pay or the decision not to pay) is felt where the money was or should have been deposited. Moreover, financial injury to an American citizen alone cannot be sufficient to trigger the third prong of § 1605(a)(2) because if it were, then the exception would swallow the rule in any action involving an American plaintiff, like Petitioner.

There is no conflict among the Circuits.

IV. THIS IS NOT A GOOD OR PROPER VEHICLE TO DECIDE THE QUESTION PETITIONER PRESENTED

This action does not present a good or proper vehicle to decide the question Petitioner presents. Petitioner failed to preserve his argument. Petitioner's argument also misstates the factual record developed before the district court, as well as the Seventh Circuit's holding. Finally, there is no actual conflict warranting this Court's intervention.

CONCLUSION

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

Respectfully submitted,

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