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

REPLY BRIEF

VINCENT LEVY
Counsel of Record
KEVIN D. BENISH
JESSICA MARDER-SPIRO
HOLWELL SHUSTER
& GOLDBERG LLP
425 Lexington Avenue
14th Floor
New York, NY 10017
(646) 837-5120
vlevy@hsgllp.com

Counsel for Petitioner

December 22, 2023

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Statutes

REPLY IN SUPPORT OF PETITION FOR CERTIORARI

I. There Are No Vehicle Problems

In the published decision below, the Seventh Circuit held that a plaintiff invoking the direct-effect clause of the FSIA's commercial-activity exception, 28 U.S.C. 1605(a)(2) must identify a "'legally significant act' in the United States," which it took to mean that a plaintiff suing for breach of contract "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. Because it found that Petitioner did not meet that requirement, or otherwise identify a U.S.-based "legally significant act," it affirmed the dismissal of his case. In other words, the question presented was the rule of decision below, and it was outcome dispositive.

Nonetheless, in an effort to avoid review, Respondent tries to conjure a vehicle problem. Opp. 8–11. This misguided effort fails.

A. Respondent's lead argument is that the question presented cannot be reviewed because Petitioner did not present it below. *Ibid.* This makes no sense given the Court's precedents adhering to a pressed-*or*-passed-upon rule, under which a question is properly presented for review so long as the issue is raised in, or decided by, the court below. Indeed, the decisions cited by Respondent all make this point (Opp. 9), de-

clining review when a question was "neither raised before *nor considered* by the Court of Appeals." *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) (emphasis added); see also *FTC* v. *Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 226 n.4 (2013) (issue not raised by the parties or passed on by the lower courts). Here, the Seventh Circuit clearly considered the question presented—and again, it was outcome-dispositive. Pet. 20–21; Pet App. 9a (affirming on the basis of the "legally significant act" test). So the "raised"-*or*-"considered" test is met. *Adickes*, 398 U.S. at 147 n.2.

B. Respondent next argues that factual "lacunae" prevent review. Opp. 10–11. It is unclear what Respondent even means by this, but all of Respondent's factual arguments go to the underlying merits of Petitioner's case, and whether he should prevail in the Seventh Circuit should this Court reverse the decision below and remand. It would be for the Seventh Circuit rather than this Court to determine these matters, which are entirely irrelevant to whether the question presented on this petition is properly before this Court and satisfies the standard for certiorari. The only question in this Court will be whether the rule of decision applied by Seventh Circuit complies with the text of the FSIA and this Court's precedents. See 28 U.S.C. 1605(a)(2).

II. Circuit Courts Are Deeply Divided

As Petitioner's opening brief explains, this case implicates an important and well-established split among the Courts of Appeals. Pet. 9–16.

Courts and commentators alike recognize there is a deeply entrenched circuit split on whether a plaintiff must show a "legally significant act" in the United States to satisfy the third clause of the commercial activity exception to the FSIA. See, e.g, *Aldossari on Behalf of Aldossari* v. *Ripp*, 49 F.4th 236, 254 n.26 (3d Cir. 2022) (discussing "the circuit split about whether a direct effect must involve 'legally significant acts' in the United States"); *Voest-Alpine Trading USA Corp.* v. *Bank of China*, 142 F.3d 887, 894–95 (5th Cir. 1998) (noting that the Fifth Circuit declines to adopt the "legally significant act" requirement used by other courts); *Westfield* v. *Fed. Republic of Germany*, 633 F.3d 409, 414 (6th Cir. 2011) ("Unlike some of our sister circuits, we have expressly rejected the requirement that a 'legally significant act' take place in the United States in order to establish a direct effect."); see also Restatement (Fourth) of Foreign Relations Law § 454 (Am. L. Inst. 2018), Reporters' Note 8 (noting split); Maryam Jamshidi, *The Political Economy of Foreign Sovereign Immunity*, 73 Hastings L.J. 585, 656 (2022) (same); 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).

In the face of this, Respondent attempts to argue there is no split of authority because, according to Respondent, the Circuits would reach the same conclusion in evaluating foreign sovereign immunity in a breach of contract case, regardless of the test those courts apply. Opp. 14–28. This does not detract from

the fact that there is a split regarding the "legally significant" test (on which the court below relied), and Respondent's reframing fails on its own terms.

A. As discussed in Petitioner's opening brief, the Seventh Circuit (in the instant case) and the Ninth Circuit explicitly require that a "legally significant act" occur *in the United States* in order to find a direct effect here. Pet. 10–12. The Seventh Circuit ratified the district court's assessment of this issue and adopted a requirement that "the foreign state performed some 'legally significant act' in the United States." Pet. App. 9a. The court explained that, as a result, Plaintiff would need to show that the place of performance was in the United States to proceed.

Contrary to Respondent's allegations, the Ninth Circuit also requires a legally significant event here; in *Terenkian* v. *Republic of Iraq*, the court dismissed the plaintiff's claims because "there was neither a failure by Iraq to perform in the United States *nor any other legally significant event in this country*." 694 F.3d 1122, 1138 (9th Cir. 2012) (emphasis added). This decision added to a line of cases in which the Ninth Circuit has held that "a direct effect requires that *legally significant acts* giving rise to the claim occurred in the United States.'" *Adler* v. *Fed. Republic of Nigeria*, 219 F.3d 869, 876 (9th Cir. 2000) (quotation marks omitted) (emphasis added), as amended on denial of reh'g and reh'g en banc (Aug. 17, 2000); see also *Gregorian* v. *Izvestia*, 871 F.2d 1515, 1527 (9th Cir. 1989) ("direct effect" requires showing "*something legally significant* actually happened in the U.S." (emphasis added)).

The D.C. Circuit follows a similar approach, as Petitioner noted in his opening brief. In the D.C. Circuit, the "direct effect" that occurs in the United States must be legally significant in order to establish jurisdiction under Section 1605(a)(2)'s third prong. *Odhiambo* v. *Republic of Kenya*, 764 F.3d 31, 38–39 (D.C. Cir. 2014) (Kavanaugh, J.).

Thus, in these Circuits, when a plaintiff brings a breach of contract claim or indeed any other case pursuant to the direct-effect prong of Section 1605(a)(2), they must show that a "legally significant" act *or* "legally significant" *effect* occurred in the United States.

B. Contrary to Respondent's assertions, the other Circuits do not take these approaches, which are inconsistent with *Republic of Argentina* v. *Weltover* 504 U.S. 607 (1992). See, e.g., *Odhiambo*, 764 F.3d at 47 (Pillard, J., concurring) (noting that the majority's holding conflicts with *Weltover*, decisions of other circuits, and decisions of the D.C. Circuit). Indeed, the Second, Fifth, Sixth, and Tenth Circuits all explicitly disclaim the need to show *any* "legally significant" act or effect. And, in contract cases, they have rejected the need to show that the place of performance is here (there, as in *Weltover*, it is a sufficient but not a necessary condition).

The Second Circuit does *not* follow the "legally significant" act/effect test embraced by the Seventh, Ninth, and D.C. Circuits. See Pet. 12–14. Indeed, in interpreting the direct-effect prong of Section 1605(a)(2), the Second Circuit expressly does not require "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), or "that the plaintiff's claims must be based upon the act's domestic effect," *Atlantica Holdings* v. *Sovereign Wealth Fund Samruk-Kazyna JSC*, 813 F.3d 98, 111 (2d Cir. 2016). Further demonstrating this conflict, the Second Circuit has also held that a "FSIA plaintiff need only show a direct effect on *someone* in the United States, plaintiff or not." *Ibid.* (emphasis added).

Moreover, in breach of contract actions, the Second Circuit has clearly stated that the direct-effect clause does not require the place of breach or performance to be in the United States:

> *Weltover* does not insist the "place of performance" be in the United States in order for a financial transaction to cause a direct effect in this country. Rather, it only requires an effect in the United States that follows as an immediate consequence of the defendant's actions overseas. Further, it need not be the location where the *most* direct effect is felt, simply *a* direct effect.

Hanil Bank v. *PT. Bank Negara Indonesia (Persero)*, 148 F.3d 127, 133 (2d Cir. 1998).

The Fifth Circuit has also considered *and rejected* a rule that would require a plaintiff to show that a "legally significant act" occurred in the United States, as discussed in Petitioner's brief. Pet. 14, 16–17 (discussing *Voest-Alpine Trading*).

In *Voest-Alpine Trading*, 142 F.3d at 895, the Fifth Circuit also rejected a rule that would require that "the place of payment was in the United States":

> In sum, we hold that a financial loss incurred in the United States by an American plaintiff, if it is an immediate consequence of the defendant's activity, constitutes a direct effect sufficient to support jurisdiction under the third clause of the commercial activity exception to the FSIA. Here, Voest–Alpine, an American corporation, incurred a nontrivial financial loss in the United States as a direct result of the Bank of China's failure to pay on a letter of credit it issued. This loss is sufficient to support jurisdiction under the third clause [of Section 1605(a)(2)].

Id. at 897. Respondent urges that only "dicta" distinguishes *Voest-Apline* from the other Circuits. Opp. 18. But this was plainly the Circuit's "hold[ing]," as the foregoing passage shows.

Turning to the Sixth Circuit, which also "expressly reject[s] the requirement that a 'legally significant act' take place in the United States in order to establish a direct effect," *Westfield*, 633 F.3d at 414; see Pet. 14–15, Respondent again attempts to wish away the conflict in how lower courts are interpreting the text of Section 1605(a)(2). Opp. 21–22. But, in direct contrast to the Seventh and Ninth Circuits, the Sixth Circuit "do[es] *not* hold that the only actions that may cause a direct effect in the United States are those

where the sovereign is obligated to perform in the United States." *Westfield*, 633 F.3d at 417 (emphasis added).

Similarly, the Tenth Circuit has rejected the proposition that "a legally significant act [must] occur within the United States." *Orient Min. Co.* v. *Bank of China*, 506 F.3d 980, 998 (10th Cir. 2007). Rather, the Tenth Circuit "look[s] at only two facets of an effect to determine whether it can be the basis for jurisdiction under the third prong of the commercial activity exception: whether it is direct and whether it is in the United States." *Big Sky Network Canada, Ltd.* v. *Sichuan Provincial Gov't*, 533 F.3d 1183, 1192 (10th Cir. 2008) (Gorsuch, J.). Respondent's attempt to extract an additional "rule" from the Tenth Circuit's cases applying the FSIA's direct-effect test is unavailing, as the passage represented by Respondent is merely an assessment of the specific facts of that case. See Opp. 24–25 (quoting *Big Sky*, 533 F.3d at 1191).

C. Respondent attempts to underplay this conflict by pointing to more recent contract cases in the Second and Fifth Circuit that, Respondent argues, require a showing that the place of performance was here, in contrast to the earlier decisions Petitioner has cited. Opp. 15–20 (citing *Janvey* v. *Libyan Inv. Auth.*, 840 F.3d 248, 261–62 (5th Cir. 2016); *Daou* v. *BLC Bank, S.A.L.*, 42 F.4th 120 (2d Cir. 2022)).

The alleged intra-circuit conflict in these two circuits, however, supports rather than undermines the need for review. Stephen M. Shapiro, et al., Supreme

Court Practice § 4.6 (11th ed. 2019) ("[W]hen [an] intracircuit conflict relates to a recurring and important issue or is accompanied by a 'widespread conflict among the circuits,' it may become one of the factors inducing the Court to grant certiorari." (quoting *Commissioner* v. *Estate of Bosch*, 387 U.S. 456, 457 (1967)).

In any event, although the courts in the cases cited by Respondent found no jurisdiction on the basis that the place of performance in the particular contract case was outside the United States, they were merely considering the specific facts before them, and the plaintiff in those cases had not identified any other effect that would have been direct. Moreover, if there is a conflict, "the earlier-in-time decision controls." *16 Front St., L.L.C.* v. *Mississippi Silicon, L.L.C.*, 886 F.3d 549, 560 (5th Cir. 2018) ("[T]he earlier-in-time decision controls."); *Tanasi* v. *New Alliance Bank*, 786 F.3d 195, 200 n.6 (2d Cir. 2015).

Petitioner adds that, to the extent the focus is specifically on contract cases, a more recent D.C. Circuit decision plainly holds that, in contrast to the statement of law in *Odhiambo*, 764 F.3d 31, in a contract case a plaintiff may proceed under the direct-effects clause of Section 1605(a)(2) even if the place of performance is outside the United States. *Wye Oak Tech., Inc.* v. *Republic of Iraq*, 24 F.4th 686, 703 (D.C. Cir. 2022) (Jackson, J.) (listing relevant "examples of direct effects in the United States that flowed directly from the breach [of contract]"). The D.C. Circuit in *Wye Oak Technology* considered a relevant "direct effect" to be the allegation that "Iraq knew that, when the bill was not paid, [the plaintiff's] loss of revenue

would be felt in the United States." *Ibid.* That is directly at odds with the reasoning of the Seventh Circuit in the decision below, and the reasoning of the other cases requiring that the United States be the place of performance or payment.

D. Finally, Respondent attempts to bolster its argument by pointing to decisions from three other circuits that do not stake out a clear position on whether a "legally significant act" is required. Opp. 14, 17, 26 (discussing the First, Third, and Eleventh Circuits). None of these cases change the fact that there is an existing and widespread circuit split among the other Circuits. If anything, the holdings of the cases from those three circuits only deepen the undeniable split detailed above and in Petitioner's opening brief. See, e.g., *Aldossari*, 49 F.4th at 254 (finding no direct effect because "[t]here is no suggestion that any party to the main deal or to the corollary transactions was required or expected to perform any obligation in the United States"); *Universal Trading & Inv. Co.* v. *Bureau for Representing Ukrainian Ints. In Int'l & Foreign Cts.*, 727 F.3d 10, 26 (1st Cir. 2013) ("significant financial harm" to "an American company" can "create[] a sufficient direct effect"); *R&R Int'l Consulting LLC* v. *Banco do Brasil, S.A.*, 981 F.3d 1239, 1244 (11th Cir. 2020) (allegation that "money that was supposed to have been delivered to a Miami bank for deposit was not forthcoming" is a "direct effect" (cleaned up)).

III. The Question Presented Is Important, As Respondent Concedes

For the reasons stated in Petitioner's brief, clarification of the direct-effect clause to the FSIA's commercial activity exception—the most-used exception in a statute that implicates important issues bearing on foreign relations of the United States—is necessary to ensure that the FSIA's text is followed as Congress intended, and that the law is uniformly applied across (and even within) the Circuits. See Pet. 18–20. Respondent does not deny this.

Lower courts' inconsistent statements regarding what constitutes a "direct effect in the United States" under Section 1605(a)(2), including in contract cases, requires this Court's guidance. Without this Court's intervention, private commercial actors will remain unsure of when they can obtain judicial relief from a foreign sovereign that fails to pay what is owed or fails to satisfy its contractual obligations. Likewise, foreign states will continue to be uncertain about whether their acts or omissions will subject them to jurisdiction in U.S. courts. In turn, this undermines one of the principal purposes of the FSIA—which is that questions of sovereign immunity should be resolved by applying clearly defined and predictable rules set forth in a comprehensive statutory scheme. *Republic of Argentina* v. *NML Cap., Ltd.*, 573 U.S. 134, 141 (2014). Given the importance of the question presented, the Court should grant the petition and provide guidance on the meaning of this significant statutory provision.

Consistent with *Weltover*, which a number of Circuits have effectively ignored, the Court should hold that a U.S. effect need only be "direct" to satisfy the direct-effects clause of the commercial-activity exception, and that a plaintiff need only show a direct U.S. effect—not a "legally significant" act nor a "legally significant" effect in the United States.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

VINCENT LEVY
Counsel of Record
KEVIN D. BENISH
JESSICA MARDER-SPIRO
HOLWELL SHUSTER
& GOLDBERG LLP
425 Lexington Avenue
14th Floor
New York, NY 10017
(646) 837-5120
vlevy@hsgllp.com

Counsel for Petitioner

December 22, 2023