No. 24-_____

IN THE
Supreme Court of the United States

WYE OAK TECHNOLOGY, INC.,

Petitioner,

v.

REPUBLIC OF IRAQ AND MINISTRY OF DEFENSE OF THE REPUBLIC OF IRAQ,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

C. ALLEN FOSTER
ERIC C. ROWE
WHITEFORD, TAYLOR & PRESTON LLP
1800 M Street N.W.
Washington, D.C. 20036
Tel.: (202) 659-6800

NEAL KUMAR KATYAL
Counsel of Record
REEDY C. SWANSON
J. ANDREW MACKENZIE
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
Tel.: (202) 637-5600
neal.katyal@hoganlovells.com

Counsel for Petitioner

QUESTIONS PRESENTED

This case concerns the correct interpretation of two clauses of the Foreign Sovereign Immunities Act (FSIA) that have resulted in two circuit splits.

The latter two clauses of the FSIA's commercial-activity provision authorize suits against foreign sovereigns that are based "[2] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [3] 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."

The questions presented are:

1. Whether, in a breach of contract case under the FSIA's third clause, it is sufficient to prove a "direct effect" in the United States applying traditional causation principles, as four circuits have held, or whether courts must make an additional finding that the contract at issue established or necessarily contemplated the United States as a place of performance, as six circuits have held.

2. Whether the "act performed in the United States" giving rise to jurisdiction in an action under the FSIA's second clause must be an "act" by the foreign sovereign, as the D.C. Circuit has held, or whether the FSIA's text contains no such limitation, as the Fourth Circuit has held.

PARTIES TO THE PROCEEDING

Petitioner in this Court is Wye Oak Technology, Inc. Respondents are the Republic of Iraq and the Ministry of Defense of the Republic of Iraq.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner Wye Oak Technology, Inc., hereby states that Wye Oak has no parent corporations, and no publicly held company owns ten percent or more of Wye Oak.

STATEMENT OF RELATED PROCEEDINGS

U.S. Supreme Court

Republic of Iraq v. *Wye Oak Tech., Inc.*, No. 11-1294 (June 25, 2012) (reported at 567 U.S. 936).

U.S. Court of Appeals for the District of Columbia Circuit:

Wye Oak Tech., Inc. v. *Republic of Iraq*, No. 23-7009 (July 16, 2024) (reported at 109 F.4th 509).

Wye Oak Tech., Inc. v. *Republic of Iraq*, No. 23-7009 (Oct. 16, 2024) (available at 2024 WL 4508509)

Wye Oak Tech., Inc. v. *Republic of Iraq*, No. 23-7078 (Dec. 4, 2024) (unreported)

Wye Oak Tech., Inc. v. *Republic of Iraq*, No. 19-7162 (Feb. 4, 2022) (reported at 24 F.4th 686)

Wye Oak Tech., Inc. v. *Republic of Iraq*, No. 21-7102 (Apr. 12, 2022) (unreported)

Wye Oak Tech., Inc. v. *Republic of Iraq*, No. 10-7097 (July 3, 2012) (unreported)

U.S. District Court for the District of Columbia:

Wye Oak Tech., Inc. v. *Republic of Iraq*, No. 1:10-cv-01182-RCL (Dec. 20, 2022) (available at 2022 WL 17820569)

Wye Oak Tech., Inc. v. *Republic of Iraq*, No. 1:10-cv-01182-RCL (Aug. 27, 2019) (available at 2019 WL 4044046)

U.S. Court of Appeals for the Fourth Circuit:

Wye Oak Tech., Inc. v. *Republic of Iraq*, No. 10-1874 (Dec. 29, 2011) (reported at 666 F.3d 205)

U.S. District Court for the Eastern District of Virginia:

Wye Oak Tech., Inc. v. *Republic of Iraq*, No. 1:09-cv-793 (AJT/JFA) (June 29, 2010) (available at 2010 WL 2613323)

TABLE OF CONTENTS

Page(s)

QUESTIONS PRESENTED i
PARTIES TO THE PROCEEDING ii
CORPORATE DISCLOSURE STATEMENT iii
STATEMENT OF RELATED PROCEEDINGS iv
TABLE OF AUTHORITIES viii
OPINIONS BELOW 1
JURISDICTION 2
STATUTE INVOLVED 2
INTRODUCTION 2
STATEMENT OF THE CASE 6
A. Factual Background 6
B. Procedural Background 9
1. Fourth Circuit Proceedings 9
2. Iraq's First D.C. Circuit Appeal 10
3. Iraq's Second D.C. Circuit Appeal 12
REASONS FOR GRANTING THE PETITION 14
I. The Decision Below Exacerbates An Existing 6-4 Split Regarding The FSIA's Direct-Effects Clause 14
A. There Is An Open And Acknowledged Split Among Ten Circuits 14
1. Six circuits superimpose additional requirements on the direct-effects clause that have no basis in text 17

TABLE OF CONTENTS—Continued

Page

2. Four circuits have adhered to the FSIA's text 21
B. The Decision Below Is On The Wrong Side Of The Split....24
C. This Case Presents An Excellent Vehicle To Resolve This Exceptionally Important Circuit Split....29
II. The Decision Below Splits From The Fourth Circuit Regarding The FSIA's Second Clause 31
A. The D.C. Circuit Erred By Breaking From The Fourth Circuit....31
B. This Case Is An Excellent Opportunity To Correct The D.C. Circuit's Legal Error....34
CONCLUSION 36

TABLE OF AUTHORITIES

Page(s)

CASES:

Aldossari on Behalf of Aldossari v. *Ripp*,
49 F.4th 236 (3d Cir. 2022) 19

American Telecom Co., L.L.C. v. *Republic of Lebanon*,
501 F.3d 534 (6th Cir. 2007) 17

Atlantica Holdings v. *Sovereign Wealth Fund Samruk-Kazyna JSC*,
813 F.3d 98 (2d Cir. 2016)..... 19, 28

Bhattacharya v. *State Bank of India*,
70 F.4th 941 (7th Cir. 2023)..... 20

Big Sky Network Canada, Ltd. v. *Sichuan Provincial Gov't*,
533 F.3d 1183 (10th Cir. 2008) 5, 14, 16, 24, 25, 27

Daou v. *BLC Bank, S.A.L.*,
42 F.4th 120 (2d Cir. 2022) 19

Devengoechea v. *Bolivarian Republic of Venezuela*,
889 F.3d 1213 (11th Cir. 2018) 21

EIG Energy Fund XIV, L.P. v. *Petroleo Brasileiro*,
894 F.3d 339 (D.C. Cir. 2018) 28

Exxon Mobil Corp. v. *Corporacion CIMEX, S.A.*,
111 F.4th 12 (D.C. Cir. 2024).....26, 28

Frank v. *Commonwealth of Antigua and Barbuda*,
842 F.3d 362 (5th Cir. 2016).....22, 25

TABLE OF AUTHORITIES—Continued

Page(s)

General Elec. Capital Corp. v. *Grossman*,
991 F.2d 1376 (8th Cir. 1993) 23

Guirlando v. *T.C. Ziraat Bankasi A.S.*,
602 F.3d 69 (2d Cir. 2010).....16

Keller v. *Central Bank of Nigeria*,
277 F.3d 811 (6th Cir. 2002) 5, 16, 17, 22, 23, 28

Milner v. *Department of Navy*,
562 U.S. 562 (2011) 34

Missouri ex rel. Bailey v. *People's Republic of China*,
90 F.4th 930 (8th Cir. 2024) 16, 23

National Rifle Ass'n v. *Vullo*,
602 U.S. 175 (2024) 35

Odhiambo v. *Republic of Kenya*,
764 F.3d 31 (D.C. Cir. 2014) 5, 6, 14, 17, 18, 19, 25, 26, 27

Orient Mineral v. *Bank of China*,
506 F.3d 980 (10th Cir. 2007) 23, 24

Princz v. *Federal Republic of Germany*,
26 F.3d 1166 (D.C. Cir. 1994) 26

Republic of Argentina v. *Weltover*,
504 U.S. 607 (1992) 3, 6, 15, 16, 21, 22, 25, 26, 34

Republic of Iraq v. *Wye Oak Tech., Inc.*,
567 U.S. 936 (2012) 10

Rote v. *Zel Custom Mfg. LLC*,
816 F.3d 383 (6th Cir. 2016) 14, 22

TABLE OF AUTHORITIES—Continued

Page(s)

Samco Global Arms, Inc. v. *Arita*,
395 F.3d 1212 (11th Cir. 2005) 20

Saudi Arabia v. *Nelson*,
507 U.S. 349 (1993) 33

Terenkian v. *Republic of Iraq*,
694 F.3d 1122 (9th Cir. 2012) 16, 20

Voest-Alpine Trading USA Corp. v. *Bank of China*,
142 F.3d 887 (5th Cir. 1998) 16, 17, 21, 22, 24, 26, 27

Wye Oak Tech., Inc. v. *Republic of Iraq*,
666 F.3d 205 (4th Cir. 2011) 5, 10, 32

Wye Oak Tech, Inc. v. *Republic of Iraq*,
No. 1:09-cv-793 (AJT/JFA), 2010 WL 2613323 (E.D. Va. June 29, 2010) 9

STATUTES:

28 U.S.C. § 1605 2
(a) 28
(a)(2)..... 4, 14, 24, 32-34

RULES:

Sup. Ct. R. 13.1 2

Sup. Ct. R. 13.3 2

OTHER AUTHORITIES:

Direct, Black's Law Dictionary (5th ed. 1979).....25

Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012)....25

IN THE
Supreme Court of the United States

No. 24-_____

WYE OAK TECHNOLOGY, INC.,
Petitioner,

v.

REPUBLIC OF IRAQ AND MINISTRY OF DEFENSE OF THE REPUBLIC OF IRAQ,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

Wye Oak Technology, Inc., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The D.C. Circuit's decision regarding the first question presented (Pet. App. 1a-22a) is reported at 109 F.4th 509. The D.C. Circuit's order denying Wye Oak's petition for rehearing en banc (Pet. App. 247a-248a) is not reported but is available at 2024 WL 4508509. The District Court's opinion regarding the first question presented (Pet. App. 23a-72a) is not reported but is available at 2022 WL 17820569.

The D.C. Circuit's decision regarding the second question presented (Pet. App. 73a-107a) is reported at 24 F.4th 686. The District Court's opinion regarding the second question presented (Pet. App. 108a-246a), which also includes its findings of fact after trial, is not reported but is available at 2019 WL 4044046.

JURISDICTION

The D.C. Circuit entered judgment on July 16, 2024. Pet. App. 1a-22a. The court denied Petitioner's rehearing petition on October 16, 2024. Pet. App. 247a-248a. Petitioner is timely filing this petition on January 14, 2025. *See* Sup. Ct. R. 13.1, 13.3. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The commercial-activity exception of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605, provides in pertinent part:

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

(2) in which the action is based * * * [2] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [3] upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

INTRODUCTION

This case presents the opportunity to resolve two acknowledged circuit splits regarding the commercial-activity exception of the Foreign Sovereign

Immunities Act, the most commonly litigated basis for exercising jurisdiction over foreign sovereigns in U.S. courts. On both issues, the D.C. Circuit has adopted exactly the sort of "unexpressed requirement[s]" for bringing suit that this Court disapproved in *Republic of Argentina* v. *Weltover*, 504 U.S. 607, 618 (1992). This Court's intervention is required to resolve these splits and to ensure that courts apply the statute Congress enacted, rather than judicially-conjured rules for exercising jurisdiction over foreign sovereigns.

This petition stems from the 15-year effort of a U.S.-based defense contractor, Wye Oak Technology, Inc., to secure compensation for valuable services it provided Iraq during Iraq's transition to democracy. At the U.S. government's request, Iraq's Ministry of Defense executed an agreement appointing Wye Oak to salvage military equipment in Iraq—a project that General David Petraeus testified in this case provided the "centerpiece" of the effort to rebuild Iraq's military and allow U.S. troops to come home. Pet. App. 66a.

In addition to the work on the ground in Iraq, Wye Oak personnel were engaged in critical work in the United States at Wye Oak's headquarters. Among other things, Wye Oak developed sophisticated software to track the far-flung equipment at issue and managed all electronic communications related to the project.

Wye Oak upheld its end of the bargain, restoring a full brigade of tanks in time for Iraq's first democratic elections. To date, however, Iraq has never paid a penny for Wye Oak's services.

After a full bench trial, the District Court concluded that Iraq was subject to suit for breach of

contract under the FSIA for two independent reasons. First, Iraq's breach had a "direct effect in the United States" because it directly resulted in Wye Oak ending its daily work in the United States on the contract. 28 U.S.C. § 1605(a)(2)[3]. Second, the suit was based at least in part on Wye Oak's "act[s] performed in the United States in connection with [Iraq's] commercial activity" abroad. 28 U.S.C. § 1605(a)(2)[2].

The D.C. Circuit reversed on both clauses of the FSIA, and both holdings contributed to an acknowledged circuit split on the proper interpretation of the FSIA.

The first split, involving ten circuits, concerns the direct-effects clause. The D.C. Circuit held that, even though Iraq's breach "ground [Wye Oak's] domestic work to a halt," it did not "count[]" as a direct effect as a matter of law because the contract did not "establish[] or necessarily contemplate[] performance in the United States." Pet. App. 10a, 16a (quotation marks and alterations omitted). With this holding, the D.C. Circuit cemented its position along with five other circuits—the Second, Third, Seventh, Ninth, and Eleventh—in applying an inflexible rule that an effect can *never* be direct in a breach of contract case unless the contract at issue specified or necessarily implied that the United States was a place of performance. This rule effectively turns a uniform statutory standard for all cases into a game of contractual drafting.

Four other circuits—the Fifth, Sixth, Eighth, and Tenth—have rejected a place-of-performance requirement. These circuits look to familiar principles of causation law—including whether there were intervening or superseding causes—to determine whether an effect is "direct," and have consistently rejected

additional judge-made rules including the place-of-performance requirement. As then-Judge Gorsuch recognized, these circuits "look 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." *Big Sky Network Canada, Ltd.* v. *Sichuan Provincial Gov't*, 533 F.3d 1183, 1192 (10th Cir. 2008). Lower courts and circuit judges have frequently noted the circuits' diverging approaches on this issue. *See, e.g.*, *Keller* v. *Central Bank of Nigeria*, 277 F.3d 811, 817-818 (6th Cir. 2002); *Odhiambo* v. *Republic of Kenya*, 764 F.3d 31, 47 (D.C. Cir. 2014) (Pillard, J., concurring in part and dissenting in part).

The second circuit split concerns whether the "act" in the United States that supports jurisdiction under the commercial-activity exception's second clause must be an act *of the foreign sovereign*. The D.C. Circuit held that only the foreign sovereign's acts can support jurisdiction—and, therefore, that Wye Oak's own performance on the contract in the United States did not suffice. Even though the relevant clause of the FSIA contains no such limitation, the D.C. Circuit purported to divine this rule from different clauses in the Act and the legislative history. The court acknowledged that, in imposing this limitation, it disagreed with the Fourth Circuit *on the facts of this very case*. This unusual intra-case circuit split arose because the Fourth Circuit reached the opposite conclusion when holding that Wye Oak's complaint stated a claim before the case was ultimately transferred to the District of Columbia. *See Wye Oak Tech., Inc.* v. *Republic of Iraq*, 666 F.3d 205, 216-217 (4th Cir. 2011) (*Wye Oak 2011*).

On both issues, the D.C. Circuit erroneously relied on judge-made rules rather than the FSIA's text—directly contrary to this Court's admonition in *Weltover* not to add "unexpressed requirement[s]" to the FSIA. 504 U.S. at 618. This case presents an excellent opportunity to address both questions. As the District Court's undisturbed factual findings demonstrate, Wye Oak would have been entitled to enforce its right to compensation had its suit proceeded in one of the circuits that adheres to the FSIA's plain text.

This Court should grant certiorari to resolve these important conflicts. As Judge Pillard explained, the D.C. Circuit's judicial gloss "arbitrarily shrinks the class of contract claims that may survive the FSIA." *Odhiambo*, 764 F.3d at 48 (Pillard, J., concurring in part and dissenting in part). These judge-made rules impose particular burdens on American companies, like Wye Oak, that are likely to directly experience the effects of a foreign sovereign's breach of contract in the United States. Unless those companies have the foresight to list every potential effect of a breach in their contract, the D.C. Circuit's restrictive reading of the FSIA deprives them of access to an American court. This Court should grant certiorari to ensure a uniform interpretation of the FSIA consistent with the text that Congress enacted.

STATEMENT OF THE CASE

A. Factual Background

In 2003, after the U.S. military invaded Iraq and ousted Saddam Hussein, the United States and Iraq sought to rebuild the Iraqi armed forces. Pet. App. 111a. In the words of President Bush, the mission was to empower Iraqi troops to "stand up" so that U.S.

forces could "stand down." Pet. App. 66a-67a. To facilitate this goal, a multinational coalition led by then Lieutenant General David Petraeus developed the Iraqi Military Equipment Recovery Project (the "Project") to salvage the "military equipment that was scattered across Iraq." Pet. App. 112a.

"[A]t the recommendation of the United States government," Iraq's Ministry of Defense hired "Wye Oak, a private defense contractor headquartered in Pennsylvania" and led by Dale Stoffel. Pet. App. 80a. In August 2004, the Ministry and Wye Oak entered into the Broker Services Agreement (the "Agreement"). Pet. App. 114a; *see* Pet. App. 249a-262a. The Agreement appointed Wye Oak the Ministry's "sole and exclusive Broker" for "the provision of Military Refurbishment Services" and "the arranging of any Scrap Sales" for equipment that could not be refurbished. Pet. App. 251a. Wye Oak was not required "to spend any" of its own money in performing. Pet. App. 171a. At the time the agreement was signed, the Ministry notified Wye Oak by separate letter that it was "free to pursue any outside assistance it deems necessary, domestic or foreign, in [its] efforts." D.C. Cir. J.A. 486.

In fact, Wye Oak relied substantially on "daily" operations "in the United States." Pet. App. 53a. "David Stoffel—Dale's brother and the head of Wye Oak's information technology department, which was located in the United States—began to oversee all I.T. services for Wye Oak." Pet. App. 81a. David's U.S.-based work included purchasing materials and developing a sophisticated computer program from scratch to track the equipment that Wye Oak was to refurbish or sell. Pet. App. 143a. David also monitored email communications from the United States because Iraq's

internet service was unreliable. *Id.* David was in regular contact with Wye Oak's team in Iraq. *Id*.

With this essential support from its U.S. headquarters, Wye Oak began construction in Iraq on two repair facilities, surveying and refurbishing equipment, and identifying scrap. Pet. App. 121a-124a. In October 2004, Wye Oak submitted its first set of invoices to the Ministry, totaling approximately $24.7 million. Pet. App. 126a-127a. The invoices stated that payment was due to Wye Oak in Baghdad. Pet. App. 9a.

"There is no dispute" that Iraq "never paid" these invoices—or, indeed, that Iraq never made *any* payment to Wye Oak for its work under the Agreement. Pet. App. 81a. Instead, Ministry officials funneled the money to a company run by a Lebanese businessman. Pet. App. 138a. Iraqi proceedings later determined that this side-deal was a criminal conspiracy "to steal millions." Pet. App. 126a; *see also* Pet. App. 136a-137a.

The dispute over Iraq's nonpayment stretched into December 2004, when Dale Stoffel returned to Iraq for a meeting to secure the funds Wye Oak was owed. Pet. App. 143a-148a. At that meeting, ministry officials "agreed the money should be released" from the Lebanese businessman to Wye Oak. Pet. App. 148a. Officials "and Dale Stoffel believed they had finally solved this critical issue," which would allow Wye Oak's work to continue. Pet. App. 149a.

Tragically, they were wrong. Three days later, Dale Stoffel was traveling from one of Wye Oak's worksites in Baghdad "to arrange for funding to be released later in the day." Pet. App. 149a. His car was attacked, and Dale Stoffel and a colleague were killed.

Id. "Although a terrorist group claimed responsibility for their murders, numerous witnesses" at trial suspected that the Lebanese businessman who received the money owed to Wye Oak was "actually responsible." Pet. App. 150a.[1]

Despite the murder, Wye Oak "actually exceeded the goal of producing a mechanized brigade of operational armored vehicles for Iraq's January 2005 parliamentary election." Pet. App. 151a. But the lack of contractually obligated funding ultimately proved an insurmountable problem, forcing Wye Oak to stop all work on the Agreement. Pet. App. 153a. David Stoffel stopped his "daily" work in the United States. Pet. App. 53a. No Wye Oak personnel traveled to Iraq again, although they were willing to do so despite Dale Stoffel's murder "if Wye Oak got paid the money it was owed" and could use that money to guarantee appropriate security. Pet. App. 190a. In short, "Iraq's nonpayment resulted in the cut-off of capital, personnel, data, and intangible services between the United States and Iraq, a flow which [had] occurred daily for months." Pet. App. 60a.

B. Procedural History

1. Fourth Circuit Proceedings

Wye Oak sued Iraq for breach of contract in the Eastern District of Virginia. Iraq moved to dismiss, invoking the FSIA, and alternatively moved to transfer the case to the District of Columbia. *Wye Oak Tech, Inc.* v. *Republic of Iraq*, No. 1:09-cv-793 (AJT/JFA), 2010 WL 2613323, at *1 (E.D. Va. June 29,

[1] The District Court did not definitively resolve who was responsible for Dale's murder. *See* Pet. App. 150a n.12.

2010). The District Court denied the motion to dismiss after concluding that Wye Oak adequately stated a claim under all three clauses of the FSIA's commercial-activity exception, but granted the motion to transfer. *See id.* at *7-11.

Before the transfer, Iraq took an interlocutory appeal to the Fourth Circuit. That court affirmed the district court's immunity ruling, holding that under the FSIA's second clause Wye Oak "made a sufficient showing that its breach of contract claim [was] based upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere." *Wye Oak 2011*, 666 F.3d at 216. Specifically, the court held the suit was based in part on Wye Oak's own acts of performance in the United States. *Id.* at 216-217.

This Court denied certiorari. *Republic of Iraq* v. *Wye Oak Tech., Inc.*, 567 U.S. 936 (2012).[2] After the Fourth Circuit remanded, the case was transferred to the District of Columbia.

2. Iraq's First D.C. Circuit Appeal

The District Court held an eight-day bench trial, with hundreds of exhibits and nearly a dozen witnesses, including General Petraeus and other high-level officials. The court ultimately issued a 105-page opinion ruling for Wye Oak. Pet. App. 108a-246a.

The District Court began by holding that it had subject-matter jurisdiction under the FSIA's second clause. The court treated the Fourth Circuit's jurisdictional holding as law of the case, but also

---

[2] Iraq's petition did not raise the Fourth Circuit's interpretation of the FSIA's second clause.

independently concluded that the Fourth Circuit's "determination was correct," because Wye Oak's "acts performed in the U.S. were done in connection with Iraq's commercial activity" abroad and constituted "a necessary aspect to succeeding in a breach of contract case." Pet. App. 163a, 165a-166a.

On the merits, the District Court held that Iraq breached the Agreement by failing to pay. Noting that its damages calculations were in many respects "conservative," Pet. App. 216a, 223a, 229a, the District Court awarded approximately $89 million in compensatory damages, plus interest and attorneys' fees. Pet. App. 245a-246a.

Iraq appealed to the D.C. Circuit. The court, in an opinion by then-Judge Jackson, agreed that Wye Oak had performed in the United States, but held as a matter of law that Wye Oak's acts could not satisfy the commercial-activity exception's second clause. Pet. App. 99a. According to the D.C. Circuit, that clause "requires that the act at issue be one that *the foreign state* has performed in the United States in connection with its commercial activity elsewhere." *Id.*

The D.C. Circuit acknowledged that, in reaching this conclusion, it "disagree[d] with the view of the * * * Fourth Circuit." Pet. App. 102a. It principally inferred this limit from the fact that "the first and third clauses have long been interpreted to relate only to the conduct of the foreign state." Pet. App. 99a. The court also relied on "the legislative history." Pet. App. 102a.

Although the panel rejected Wye Oak's claim under the second clause, it explained that the record before it "at least plausibl[y]" supported jurisdiction under

the direct-effects clause, and remanded for the District Court to analyze that clause in the first instance. Pet. App. 105a.

3. Iraq's Second D.C. Circuit Appeal

On remand, the District Court conducted supplemental factfinding and determined that it had jurisdiction under the FSIA's direct-effects clause. Pet. App. 23a-72a.

Among other direct effects, the court concluded "that Iraq's nonpayment resulted in a direct effect in the United States based on the cut-off of data, services, capital, and personnel," including by forcing Wye Oak to cease its performance on the Agreement. Pet. App. 48a. The court reiterated its finding that "Wye Oak carried out a number of activities in the United States daily in connection with the" Project—including David's work on the computer program, his I.T. services, and his communications management. Pet. App. 53a-54a; *supra* pp. 7, 10. All "these activities stopped when Wye Oak stopped working on the [Project] as a result of Iraq's nonpayment." Pet. App. 54a.

The court also found that "Wye Oak had clear plans to use funds from the [P]roject to expand its business in the United States to support the [Agreement] and the company's work in Iraq." *Id*. "Iraq's nonpayment obviously, and predictably, prevented Wye Oak from carrying on these activities," and thus directly "disrupted capital flows between" Iraq and the United States. Pet. App. 55a, 54a.

The District Court rejected Iraq's argument that these effects were "inherently indirect * * * because the agreement did not contemplate Wye Oak's

business activities in the United States." Pet. App. 58a (quotation marks omitted). The court emphasized that "the trial record establishe[d]" as a matter of fact "that Iraq's failure to pay the invoices as required by the [Agreement] prevented Wye Oak from expanding or continuing U.S. operations *devoted to the [Project]*, not the company's activities in general." *Id*. This was "a clear example of a direct effect in the United States," regardless of whether those activities had been memorialized in advance in the Agreement. *Id.* On the strength of these findings, the District Court reentered judgment in favor of Wye Oak. Pet. App. 72a.

The D.C. Circuit again reversed. The court did not disturb the District Court's factual findings that Iraq's nonpayment forced Wye Oak to cease its performance in the United States. The court of appeals agreed that "Iraq's breach ground [Wye Oak's] domestic work to a halt" and caused Wye Oak to "cancel[] multiple planned business ventures, including plans to * * * expand its U.S.-based computer infrastructure and personnel." Pet. App. 7a, 10a. And the court noted without disagreement the District Court's factual finding that "Iraq's failure to pay also stopped the frequent trips * * * Wye Oak employees made between the United States and Iraq." Pet. App. 10a.

For the D.C. Circuit, however, none of these factual findings were sufficient as a matter of law. The court held that "for a breach of contract" case, an effect "counts as a direct effect in the United States *only if* the contract 'establishe[d] or necessarily contemplate[d] the United States as a place of performance[.]'" Pet. App. 16a (emphasis added)

(quoting *Odhiambo*, 764 F.3d at 40). Applying that rule here, the court held that the "halt in commerce" caused by Iraq's nonpayment did not "count[]" because "[n]othing in Wye Oak's Agreement with Iraq established or necessarily contemplated performance in the United States." *Id.* (alterations and quotation marks omitted).

Wye Oak sought rehearing en banc, explaining that the decision in this case conflicted with this Court's precedent in *Weltover* and that of multiple other circuits. *See Odhiambo*, 764 F.3d at 46-47 (Pillard, J., concurring in part and dissenting in part) (noting disagreement among circuits). The court denied rehearing. Pet. App. 247a. This petition follows.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Exacerbates An Existing 6-4 Split Regarding The FSIA's Direct-Effects Clause.

A. There Is An Open And Acknowledged Split Among Ten Circuits.

The third clause of the FSIA's commercial-activity exception applies when the commercial "act" upon which the plaintiff's suit is based causes "a direct effect in the United States." 28 U.S.C. § 1605(a)(2).

That provision "has been the subject of much litigation." *Rote* v. *Zel Custom Mfg. LLC*, 816 F.3d 383, 394 (6th Cir. 2016). As then-Judge Gorsuch observed, "drawing lines between what qualifies as a direct, rather than an indirect, effect" requires careful analysis resembling "efforts to distinguish between proximate and contributing causes." *Big Sky*, 533 F.3d at 1190.

A number of circuits have shortcut the analysis Congress required by replacing traditional causation principles with judicially crafted bright-line rules. Before this Court's decision in *Weltover*, several courts of appeals adopted requirements that an effect had to be "foreseeable," "substantial," or both. 504 U.S. at 617. *Weltover* rejected that approach and admonished lower courts not to smuggle "any unexpressed requirement[s]" into the direct-effects provision. *Id*. at 618. Sticking to the ordinary meaning of the FSIA's statutory terms, the Court instructed that "an effect is 'direct' if it follows 'as an immediate consequence of the defendant's activity.'" *Id*. (alteration omitted).

Unfortunately, that guidance did not end the splintering among lower courts over what qualifies as a direct effect in the United States. In contract cases, the circuits have assembled into two camps.

The Second, Third, Seventh, Ninth, Eleventh, and D.C. Circuits have crafted another bright-line rule that looks to the terms of the contract at issue to determine whether that contract contemplates the United States as a place of performance. If the answer is no, the analysis ends—even if, applying traditional causation principles, the U.S. effect results directly from the foreign sovereign's act. Courts have sometimes shorthanded this requirement as the "legally significant acts" test, understanding it to reflect the view that "the effect of [an] act [must be] legally

significant" to qualify as direct. *Terenkian* v. *Republic of Iraq*, 694 F.3d 1122, 1135 (9th Cir. 2012).[3]

The second camp—comprised of the Fifth, Sixth, Eighth, and Tenth Circuits—correctly reads *Weltover* as "an admonishment to courts not to add any unexpressed requirements to the language of the" direct-effects clause. *Keller*, 277 F.3d at 818 (citing *Voest-Alpine Trading USA Corp.* v. *Bank of China*, 142 F.3d 887, 894 (5th Cir. 1998)), and therefore requires only that the proffered "direct effect" in the United States follow "as an immediate consequence" of the commercial act underlying the plaintiff's cause of action, *Weltover*, 504 U.S. at 618. This approach evaluates each case on its own terms using traditional causation principles. *See e.g.*, *Big Sky*, 533 F.3d at 1190 (Gorsuch, J.); *Missouri ex rel. Bailey* v. *People's Republic of China*, 90 F.4th 930, 937 (8th Cir. 2024) (explaining that "a consequence is immediate if no intervening act breaks the chain of causation leading from the asserted wrongful act to its impact in the United States" (internal quotation marks omitted)).

The courts of appeals have repeatedly recognized that their respective approaches are in conflict. *See*

---

[3] A separate strain of the "legally significant act" doctrine asks whether the foreign state's act abroad was "legally significant." *Guirlando* v. *T.C. Ziraat Bankasi A.S.*, 602 F.3d 69, 75-77 (2d Cir. 2010). Although this requirement also does not appear in the FSIA's text, it is not at issue in this case because Wye Oak's direct-effects argument is that the legally significant act of breaching the contract had direct effects in the United States. When referring to the "legally significant act" test, this petition thus refers to the requirement that the *effect* in the United States be "legally significant" in the sense that it was contemplated by the terms of the contract. *See e.g.*, *Terenkian*, 694 F.3d at 1135.

e.g., *Voest-Alpine,* 142 F.3d at 894 (listing cases that embrace a contractual place-of-performance requirement); *id*. at 897 (Reavley, J., concurring) (expressing preference for the place-of-performance requirement adopted by other circuits); *Keller*, 277 F.3d at 817-818 (juxtaposing circuits that require a plaintiff to demonstrate the foreign defendant's "failure to make payment when the contract designates a place in the United States as the place of performance" with those that have "rejected" the addition of "unexpressed requirements to the language of the" FSIA's commercial-activity exception); *American Telecom Co., L.L.C.* v. *Republic of Lebanon*, 501 F.3d 534, 539-540 (6th Cir. 2007) (breaking down the circuit split); *Odhiambo*, 764 F.3d at 47 (Pillard, J., concurring in part and dissenting in part) (noting that "[f]ollowing *Weltover*, our sister circuits have rejected the restrictive contention that a contract must explicitly specify the United States as a place of performance for its breach to cause a direct effect").

This Court should grant certiorari to resolve the conflict and hold, as in *Weltover*, that the unexpressed requirement imposed by the D.C. Circuit and others has no basis in the FSIA's text.

1. Six circuits superimpose additional requirements on the direct-effects clause that have no basis in text.

In breach of contract cases, six circuits require a plaintiff to show that an effect was "established or necessarily contemplated" by the contract before jurisdiction will attach.

The D.C. Circuit's decision below held that "for a breach of contract" case, an effect "counts as a direct effect in the United States *only if* the contract

"establishe[d] or necessarily contemplate[d] the United States as a place of performance[.]" Pet. App. 16a (emphasis added) (quoting *Odhiambo*, 764 F.3d at 40). The court drew this rule from its earlier decision in *Odhiambo*, which adopted "a very clear line": "breaching a contract that establishes or necessarily contemplates the United States as a place of performance causes a direct effect in the United States, while breaching a contract that does not establish or necessarily contemplate the United States as a place of performance does not cause a direct effect in the United States." *Odhiambo*, 764 F.3d at 40.

This case illustrates the rigidity of the D.C. Circuit's rule. The panel did not disturb—and, indeed, repeatedly echoed—the District Court's finding that "Iraq's breach ground [Wye Oak's] domestic work to a halt." Pet. App. 10a; *see also* Pet. App. 18a (acknowledging that Wye Oak stopped its U.S.-operations as a "result of Iraq's breach"). But rather than ask whether the causal connection between the breach and these impacts was sufficiently "direct" based on traditional causation principles—such as whether there were any superseding or intervening causes—the panel treated the absence of an explicit place-of-performance provision in the underlying contract as dispositive. Pet. App. 16a.

Judge Pillard opposed this approach in *Odhiambo*. *See* 764 F.3d at 44-48 (Pillard, J., concurring in part and dissenting in part). As Judge Pillard recognized, the text of the direct-effects provision does not condition jurisdiction on "the bargained-for character of an effect." *Id*. at 47. The place-of-performance requirement thus "arbitrarily shrinks the class of contracts claims that may survive the FSIA sovereign-immunity bar" by turning a uniform test into a rigid rule that

depends on the niceties of contractual draftsmanship. *Id*. at 48.

The Second Circuit follows the same atextual approach. As with the D.C. Circuit, the rule in the Second Circuit is that "in contract cases, a breach of a contractual duty causes a direct effect in the United States sufficient to confer FSIA jurisdiction so long as the United States is the place of performance for the breached duty." *Daou* v. *BLC Bank, S.A.L.*, 42 F.4th 120, 136 (2d Cir. 2022) (alteration omitted) (quoting *Atlantica Holdings* v. *Sovereign Wealth Fund Samruk-Kazyna JSC*, 813 F.3d 98, 108-109 (2d Cir. 2016)). The *Daou* plaintiffs argued that a direct effect existed because the defendants had not honored U.S.-dollar denominated checks in the United States. *Id*. at 125. The Second Circuit rejected their argument, holding that "[t]o the extent" the plaintiffs' claims "sound in contract," their "direct-effect argument fails because the checks do not designate the United States as a place of performance." *Id*. at 136.

The Third Circuit expressly embraced *Odhiambo*'s place-of-performance requirement in *Aldossari on Behalf of Aldossari* v. *Ripp*, 49 F.4th 236, 253-254 (3d Cir. 2022) (quoting *Odhiambo*, 764 F.3d at 40). Although *Aldossari* leaves open what rule the Third Circuit would apply outside the breach-of-contract context, *see id.* at 254, for contract cases it adopted the D.C. Circuit's bright-line rule requiring the plaintiff to show that "arrangements between the parties called for the use of a U.S. bank account or invited a party to demand payment in the United States." *Id*. (quotation marks and alterations omitted). Applying that rule, the court rejected jurisdiction because there was "no suggestion that any party" to the contracts "was required or

expected to perform any obligation in the United States." *Id.*

The Seventh Circuit has agreed with its "fellow circuits" that have held that, in a breach of contract case, the plaintiff "must be able to identify language in the agreement that designates the United States as a site for performance on the contract." *Bhattacharya* v. *State Bank of India*, 70 F.4th 941, 944 (7th Cir. 2023). The court applied that rule to reject a claim against the State Bank of India where the plaintiff could not cite "any agreement * * * that established the United States as the site of performance." *Id.* at 945.

The Ninth Circuit also applies the place-of-performance requirement. In *Terenkian* v. *Republic of Iraq*, U.S.-based oil brokers sued the Republic of Iraq for unilaterally terminating oil contracts. 694 F.3d at 1125. Even though the court recognized that "the cancellation of the contracts *directly* precluded plaintiffs from buying oil," the court thought it dispositive that "Iraq had no obligation to perform in the United States." *Id.* at 1138 (emphasis added); *see also id.* at 1134 ("[s]atisfying the requirement that an effect be 'immediate' and thus 'direct' is not sufficient by itself"). The Ninth Circuit treated this place-of-performance requirement as part and parcel of its demand that "the effect" of the foreign sovereign's act abroad must be "legally significant." *Id.* at 1135; *see also id.* at 1138.

Finally, the Eleventh Circuit employed the place-of-performance test in *Samco Global Arms, Inc.* v. *Arita* to hold that it could disregard the effects of the breach of a bailment contract based solely on the fact that "no monies or goods were due in the United States." 395 F.3d 1212, 1217 (11th Cir. 2005). The court rejected the plaintiffs' claims that a direct effect resulted from

Honduras's withholding of arms because it meant the plaintiffs could not "ship the arms to the United States" to sell. *Id.*; *accord Devengoechea* v. *Bolivarian Republic of Venezuela*, 889 F.3d 1213, 1225 (11th Cir. 2018) (citing *Samco* and noting that "[w]e have construed *Weltover* to stand for the proposition that a 'direct effect' occurs in the United States when 'monies or goods [are] due in the United States'").

2. Four circuits have adhered to the FSIA's text.

When evaluating what constitutes a "direct effect," four circuits take a very different approach by looking solely to the statutory condition that a domestic effect followed "as an immediate consequence of the defendant's activity." *Weltover*, 504 U.S. at 618 (alteration omitted). These circuits have consistently rejected additional requirements, including the place-of-performance requirement, as unwarranted judicial gloss.

The Fifth Circuit became the standard bearer for this textual approach in *Voest-Alpine*. The Bank of China refused to pay on a letter of credit owed to the plaintiff, and the plaintiff sued for breach of contract. 142 F.3d at 890-891. Relying on decisions from other circuits, the Bank responded that the failure to receive promised funds in the United States does not constitute a "direct effect" unless the contract in issue contains a place-of-performance provision identifying the United States as the place of payment. Brief of Appellant, *Voest-Alpine Trading USA Corp.* v. *Bank of China*, No. 97-20322, 1997 WL 33565545, at *17 (5th Cir. Dec. 15, 1997); *see also Voest-Alpine*, 142 F.3d at 894.

The Fifth Circuit sided with the plaintiffs. "First and foremost," the court could find "nothing in the text

of the third clause" to support a place-of-performance requirement. *Voest-Alpine*, 142 F.3d at 894. And *Weltover* "expressly admonished the circuit courts not to add 'any unexpressed requirement[s]' to the third clause." *Id*. (quoting *Weltover*, 504 U.S. at 618). The court departed from its sister circuits to hold that the direct-effects clause hinges exclusively on whether the asserted effect was "an immediate consequence of the defendant's activity." *Id*. at 897.

As the Fifth Circuit has since elaborated, that rule turns on familiar principles of proximate causation. In *Frank* v. *Commonwealth of Antigua and Barbuda*, for example, the court explained that an "effect is 'direct' if it follows 'as an immediate consequence of the defendant's activity' and 'is one which has no intervening element, but, rather, flows in a straight line without deviation or interruption.'" 842 F.3d 362, 368 (5th Cir. 2016) (alterations and quotation marks omitted). Thus, in *Frank*, the criminal activity of a third party "served as an intervening act interrupting the causal chain between [the defendant's] actions and any effect on" the plaintiffs in the United States. *Id*. at 370.

The Sixth Circuit adopted *Voest-Alpine*'s textual approach in *Keller*, agreeing that "the addition of unexpressed requirements to the statute is unnecessary." 277 F.3d at 818 (citing *Voest-Alpine*, 142 F.3d at 894). Most recently, in *Rote*, the Sixth Circuit applied *Keller* to reject an effort to attach a minimum-contacts requirement to the direct-effects provision. 816 F.3d at 392-395. The court reasoned that, "[t]aken together, *Weltover* and *Keller* counsel us that we may not read anything into the statute, but must, quite simply, read it." *Id*. at 394. Courts do not have "free rein to

read into the statute requirement upon requirement to no end in sight, widening the gulf between the statute as enacted and the statute as interpreted." *Id*.

The Eighth Circuit has likewise recognized that courts are "to pay attention only to 'what Congress enacted'" with respect to the direct-effects provision. *Bailey*, 90 F.4th at 939. The Eighth Circuit asks only whether the plaintiff has alleged a "direct causal chain" between the foreign conduct giving rise to its claim and a direct effect in the United States. *Id*. at 937; *accord General Elec. Capital Corp.* v. *Grossman*, 991 F.2d 1376, 1387 (8th Cir. 1993) (acknowledging other circuits' use of the legally significant act test, but relying instead on a traditional causation analysis). In *Bailey*, for example, the Eighth Circuit permitted Missouri to sue China for hoarding personal protection equipment at the outset of the COVID-19 pandemic based on the "immediate shortage" that conduct caused in Missouri. *Id*. at 938. The court focused on the absence of any intervening or superseding cause and concluded that "China's market power and its superior knowledge about the virus meant that no one else other than the defendants had to act to create those effects." *Id*. at 939.

The Tenth Circuit, too, disallows the "engrafting" of unexpressed requirements onto the third clause of the FSIA's commercial-activity exception. *Orient Mineral* v. *Bank of China*, 506 F.3d 980, 998 (10th Cir. 2007). In *Orient Mineral*, the Bank of China urged the Tenth Circuit to adopt the requirement that any effect in the United States must be "legally significant," and the Tenth Circuit forcefully declined. *Id.* Although it had occasionally been lumped in with circuits that have adopted that test, *see e.g.*, *Keller*, 277 F.3d at 817, the

court insisted that it had never done so and took the opportunity "to explicitly reject that additional, judicially-created criteria." *Orient Mineral*, 506 F.3d at 998.

Citing *Voest-Alpine*, *Keller*, and *Weltover*, the Tenth Circuit joined those courts in observing that "the statute's text does not require" such a test, and that "the Supreme Court has counseled against adding extra-legislative requirements to statutory text." *Orient Mineral*, 506 F.3d at 998. The court determined that it would "simply apply the third clause * * * as it is written, without judicial adornment." *Id.* at 999; *accord Big Sky*, 533 F.3d at 1192 (reiterating that the court looks "at only two facets of an effect * * *: whether it is direct and whether it is in the United States").

B. The Decision Below Is On The Wrong Side Of The Split.

The place-of-performance test employed by the D.C. Circuit below is wrong for at least three reasons.

First, as four circuits have recognized, the place-of-performance requirement has no basis in the FSIA's text. *See e.g.*, *Voest-Alpine*, 142 F.3d at 894 (observing that "nothing in the text of the third clause supports such a requirement"). Congress provided that in "*any case*" where the foreign sovereign's commercial act abroad causes "a direct effect in the United States," the statute abrogates immunity. 28 U.S.C. § 1605(a)(2) (emphasis added). Nothing in this straightforward text supports a rule turning on the contents of a contract, and "[t]he principle that a matter not covered is not covered is so obvious that it seems absurd to recite it." Antonin Scalia & Bryan A.

Garner, *Reading Law: The Interpretation of Legal Texts* 93 (2012).

The ordinary meaning of "direct" does not support the D.C. Circuit's rule. "[D]irect" simply means "[i]mmediate; proximate; by the shortest course; without circuity; operating by an immediate connection or relation, instead of operating through a medium." Black's Law Dictionary (5th ed. 1979). This Court applied that ordinary meaning in *Weltover* when it defined a "direct effect" as one that "follows 'as an immediate consequence of the defendant's * * * activity'" and proceeded to ask whether a proffered effect was "too remote and attenuated." 504 U.S. at 618.

The FSIA thus directs courts to apply familiar concepts from causation law—such as whether there has been a superseding or intervening cause—in evaluating whether an effect is sufficiently "direct." Then-Judge Gorsuch recognized this relationship to "causation doctrine" in *Big Sky*. 533 F.3d at 1190; *see also, e.g.*, *Frank*, 842 F.3d at 370 (rejecting a direct effect based on the "intervening act" of criminal misconduct).

No court has identified a definition of the term "direct" connoting a contractual place of performance. Congress could easily have written the commercial-activity exception to turn on "the bargained-for character of an effect." *Odhiambo*, 764 F.3d at 47 (Pillard, J., concurring in part and dissenting in part). Its choice not to do so should be honored.

Even the circuits that have adopted the place-of-performance requirement have recognized that the most natural reading of the text entails looking to traditional principles of causation—though they need not

get that far if the case can be resolved using their bright-line place-of-performance requirement. In non-contract cases, for instance, the D.C. Circuit has stated that an effect in the United States is sufficiently direct if it "has no intervening element, but, rather, flows in a straight line without deviation or interruption." *Exxon Mobil Corp.* v. *Corporacion CIMEX, S.A.*, 111 F.4th 12, 33 (D.C. Cir. 2024) (quoting *Princz* v. *Federal Republic of Germany*, 26 F.3d 1166, 1172 (D.C. Cir. 1994)). The court explained that the actions of a third party often constitute a superseding cause breaking the chain of causation, but not "[w]hen the involvement of third parties is an entirely foreseeable (and even intended) consequence of the defendants' relevant actions." *Id*. Neither the D.C. Circuit, nor any court on its side of the split, has explained why these principles must be supplemented by a rigid place-of-performance requirement in contract cases.

Second, the place-of-performance test conflicts with *Weltover*, which "expressly admonished the circuit courts not to add 'any unexpressed requirement[s]' to the third clause and specifically rejected the argument that direct effects must be substantial or foreseeable." *Voest-Alpine*, 142 F.3d at 894 (quoting *Weltover*, 504 U.S. at 618). As Judge Pillard explained dissenting in *Odhiambo*, when "*Weltover* rejected a requirement of foreseeability," it "*a fortiori*" rejected "any requirement of a place-of-performance clause." 764 F.3d at 47. If the direct-effects provision does not require that a foreign sovereign foresee a direct effect, it cannot possibly require the foreign sovereign to *agree* (expressly or by implication) that a breach will cause a direct effect in the United States. *Id*. "Indeed, to require *ex ante* contractual designation of the

United States as the place of performance imposes a particularly restrictive form of the overruled 'foreseeability' condition, demanding not only an objectively 'foreseeable' effect * * * but a contract term memorializing that the parties actually contemplated an effect in the United States." *Id*.

To be sure, "*Weltover* ultimately found a direct effect in the fact that the foreign state in that case had, under its contract, breached its obligation to pay (*i.e.*, to perform) in the United States." *Voest-Alpine*, 142 F.3d at 894. But that "does not mean that a direct effect in the United States can be caused *only*" under those circumstances. *Id.* The circuits that have adopted the place-of-performance requirement have thus turned something that this Court held was *sufficient* in *Weltover* into a strict requirement that is *necessary* in every direct-effects contract case.

Weltover rejects such judicial shortcuts. As Judge Pillard explained, "there is no single factual *sine qua non* of a United States direct effect. Where the facts, taken together, show that a foreign government's commercial activity has a direct effect in the United States, claims in United States court relating to that commercial activity are not barred by the FSIA." *Odhiambo*, 764 F.3d at 46 (Pillard, J., concurring in part and dissenting in part); *see also Big Sky*, 533 F.3d at 1192 (Gorsuch, J.) ("[W]e look 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.").

Third, the place-of-performance requirement arbitrarily penalizes contracting parties by leading to diverging outcomes in contract and non-contract cases

that are impossible to explain based on the statutory text or first principles.

The D.C. Circuit, for example, has recognized that "an inflow of capital and an outflow of goods constitutes a direct effect in the United States" in a case arising under the Cuban Liberty and Democratic Solidarity Act, which creates a private right of action against those who traffic in property confiscated by the Cuban government. *CIMEX*, 11 F.4th at 35. Yet it rejected the *same* type of effects here—a cutoff of services from the United States—merely because this happens to be a breach-of-contract case and the United States was not mentioned in the contract. The D.C. Circuit has noted the disparity—its only explanation being that different rules apply in contract cases. *See EIG Energy Fund XIV, L.P.* v. *Petroleo Brasileiro*, 894 F.3d 339, 348 (D.C. Cir. 2018) (refusing to apply the rule from *Odhiambo* because "as a contract case, 'the analogy is not precise' to a tort case like this one").

The Second Circuit similarly takes a differing view of what effects are sufficiently direct based on the cause of action. In *Atlantica*, that court explained that, in tort cases, it would generally conclude that where a "plaintiff's initial injury" is a "financial loss suffered" in the United States, that will generally be sufficient to "count as a direct effect" even as it recognized that this will *never* be true in contract cases unless "the United States is the place of performance for the breached duty." 813 F.3d at 108-109, 113.

These diverging approaches in tort and contract cases have no basis in statutory text. The statute applies the same analysis to "any case," 28 U.S.C. § 1605(a); under that approach, the *same* effect cannot

count as "direct" in a tort case but not a contract case. It is especially unfair to draw these distinctions in a way that penalizes companies with the diligence to formalize their relationships with foreign sovereigns through contracts. And there is no basis in law or fact for the view that a breach of contract can *never* cause a "direct effect" in the United States even when the specified place-of-performance is elsewhere. This Court should grant certiorari to reverse the D.C. Circuit and clarify that lower courts must simply apply the text that Congress enacted without requiring any "addition[al] unexpressed requirements." *Keller*, 277 F.3d at 818.

C. This Case Presents An Excellent Vehicle To Resolve This Exceptionally Important Circuit Split.

This case presents an ideal vehicle to resolve the longstanding disagreement over what constitutes a direct effect in contract cases. The relevant holding of the D.C. Circuit turns entirely on the *legal* question of whether the direct-effects clause incorporates a place-of-performance requirement.

The District Court found as a matter of fact that "Iraq's nonpayment resulted in the cut-off of capital, personnel, data, and intangible services between the United States and Iraq" and that this was a "direct effect" with no intervening or superseding causes. Pet. App. 60a. That finding was conclusively established in the trial record, which proved that Iraq was solely responsible for funding *all* of Wye Oak's work on the contract. Pet. App. 171a, 253a; *see also* Pet. App. 168a. Iraq's nonpayment thus left Wye Oak without any funding to continue or expand its work, including its work in the United States. *See* Pet. App.

52a-60a. Nonpayment also meant that Wye Oak was unable to fund minimally adequate security for its personnel in Iraq, resulting in their return to the United States. *See* Pet. App. 190a.

The D.C. Circuit did not take issue with these factual findings. Instead, the court held that these effects did not "count" as a matter of law because "[n]othing in Wye Oak's Agreement with Iraq established or necessarily contemplated performance in the United States." Pet. App. 16a (quotation marks omitted). The court repeatedly invoked this rule, holding that putting an end to Wye Oak's work in the United States was not a direct effect because "Iraq never agreed to, or necessarily contemplated, [its] work in the United States in the first place." Pet. App. 18a. The same was true for the cessation in travel between the United States and Iraq, which the court again rejected "especially since the Agreement simply never established or contemplated any travel or performance in the United States to begin with." Pet. App. 19a.

There is no reason to delay resolving this issue. Ten circuits have taken a clear position and the split has only deepened in recent years. The D.C. Circuit's decision to deny rehearing in this case, even after Wye Oak pointed out the inconsistency with other circuits, Pet. App. 247a, confirms that the split will not resolve on its own.

This question has enormous ramifications for U.S. businesses that contract with foreign sovereigns, including the thousands of defense contractors like Wye Oak that serve the national security interests of the United States. In half the circuits, those businesses must attempt to anticipate everywhere that performance might occur—and anywhere that a breach

might have effects—when writing the contract to ensure their rights are enforceable in U.S. courts, rather than at the whim of foreign courts (if at all).

The approach followed by the D.C. Circuit is particularly burdensome for small businesses like Wye Oak, which may lack the leverage to demand a U.S. place-of-payment and may not be able to predict at the outset of contracting every possible direct effect a breach will cause. The record here also illustrates the absurdity of the D.C. Circuit's rule. Consider the letter Iraq sent *at the time of* contracting stating that Wye Oak could pursue any "assistance it deems necessary, *domestic or foreign*." D.C. Cir. J.A. 486 (emphasis added). Had the parties included that line (or one very like it) in the contract itself, instead of a letter sent at the very same time, it is likely that the D.C. Circuit's place-of-performance rule would have been satisfied. Congress did not impose such a pointless formality. This Court should intervene.

II. The Decision Below Splits From The Fourth Circuit Regarding The FSIA's Second Clause.

A. The D.C. Circuit Erred By Breaking From The Fourth Circuit.

The second clause of the FSIA's commercial-activity exception is the subject of a circuit split in this very case. Before this case was transferred to D.C., the Fourth Circuit held that jurisdiction was proper based on the second clause of the commercial-activity exception, relying on Wye Oak's performance in the United States to conclude that Wye Oak had properly alleged that the suit was based at least in part on "an act performed in the United States in connection with a

commercial activity of the foreign state elsewhere." 28 U.S.C. § 1605(a)(2). Specifically, Wye Oak "presented sufficient facts to support a reasonable inference that Iraq * * * engaged—pursuant to the contract—in preparation for sale and sale of scrap metal in Iraq—a commercial activity." *Wye Oak 2011*, 666 F.3d at 216. Wye Oak also "presented sufficient facts to support a reasonable inference that it performed acts in the United States (accounting, computer programming, contacting agents of foreign nations, etc.) in connection with the scrap sale activities" of Iraq. *Id*. "Therefore," the Fourth Circuit concluded, Wye Oak made "a sufficient showing that its breach of contract claim is based upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere." *Id*.

The D.C. District Court subsequently found that the relevant facts had occurred as alleged, Pet. App. 143a, 52a-60a, and held that the Fourth Circuit's FSIA ruling was substantively "correct," Pet. App. 163a.

The D.C. Circuit took a different view *in the same case*, expressly breaking from the Fourth Circuit to hold that the second clause of the FSIA's commercial-activity exception "requires that the act at issue be one that *the foreign state* has performed in the United States in connection with its commercial activity elsewhere." Pet. App. 99a. In other words, the D.C. Circuit "disagree[d] with the view of the district court (and, for that matter, the Fourth Circuit) that the second clause of the commercial activities exception can be satisfied for FSIA purposes based on the various acts that *the plaintiff* (Wye Oak) took inside the United States." Pet. App. 102a.

The D.C. Circuit's position again fails to heed the plain text of the commercial-activity exception. The second clause provides that a foreign state is not immune from suit "in any case * * * in which the action is based upon * * * an act performed in the United States in connection with a commercial activity of the foreign state elsewhere." 28 U.S.C. § 1605(a)(2). This broad language—requiring only "*an act* performed in the United States," *id.* (emphasis added)—is a conspicuous departure from language in the remainder of the commercial-activity exception, which repeatedly specifies when a court's consideration is limited to "activity" "of the foreign state." *Id*. Congress included no such limitation for the "act" in the second clause. Because "[d]istinctions among descriptions juxtaposed against each other are naturally understood to be significant," *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 357 (1993), the reader is led to conclude that the predicate "act" under the second clause may be performed by the plaintiff.

The D.C. Circuit flipped ordinary interpretive principles on their head in reasoning that because "the first and third clauses have long been interpreted to relate only to the conduct of the foreign state," the second clause should be too. Pet. App. 99a. That reasoning simply does not account for the material variation in the statute's text. *Nelson*, 507 U.S. at 357.

The D.C. Circuit also cited a number of authorities that "focused on" the foreign sovereign's activities when conducting a clause-two analysis. *See* Pet. App. 101a. But those cases arose in a context in which only the acts of the foreign sovereign were at issue. It does not follow from the fact that a foreign sovereign's

conduct *can* qualify as a clause-two "act" that a domestic plaintiff's conduct cannot.

The D.C. Circuit concluded its analysis with putative support from snippets of legislative history. Pet. App. 102a. But "[l]egislative history, for those who take it into account, is meant to clear up ambiguity, not create it." *Milner* v. *Department of Navy*, 562 U.S. 562, 574 (2011); *accord Weltover*, 504 U.S. at 618 (rejecting foreseeability and substantiality requirements imported from legislative history). And here the text admits of no ambiguity. Other aspects of the commercial-activity exception expressly limit consideration to activity "of the foreign sovereign." Clause two does not.

B. This Case Is An Excellent Opportunity To Correct The D.C. Circuit's Legal Error.

This case squarely presents the question of whether the second clause of the commercial-activity exception can be satisfied based on acts that the plaintiff took inside the United States. There can be no clearer split: The D.C. Circuit and Fourth Circuit disagreed over the same legal question on the same set of facts.

In a footnote, the D.C. Circuit suggested there might be an alternative basis for holding that the second clause is inapplicable, grounded in the requirement that the action for which the plaintiff seeks to invoke the court's subject matter jurisdiction is "based upon" the predicate "act performed in the United States." 28 U.S.C. § 1605(a)(2); Pet. App. 103a n.2. But that suggestion was qualified—the court stated only that it was "reasonably obvious" this was the case but acknowledged that the District Court had not addressed this factual issue. Pet. App. 103a n.2.

Subsequent factfinding by the District Court has only confirmed the centrality of Wye Oak's U.S.-based performance to this suit. *See* Pet. App. 52a-60a.

This footnote is no barrier to this Court's review of the legal question regarding the second clause that divided the D.C. and Fourth Circuits because the D.C. Circuit might reach a different view of the "based upon" question in light of the more developed factual record and this Court's legal analysis of the second clause. *See, e.g.*, *National Rifle Ass'n* v. *Vullo*, 602 U.S. 175, 199 n.7 (2024) (holding that the lower court could revisit an independent basis for its judgment on remand).

Had Wye Oak's case proceeded in the Fourth Circuit, it would be entitled to the compensation it is owed under the indisputably commercial contract to which Iraq agreed. The enforceability of that contract should not depend on which side of the Potomac venue lies. This Court should step in to resolve the acknowledged conflict between the D.C. and Fourth Circuits on this important question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

C. ALLEN FOSTER
ERIC C. ROWE
WHITEFORD, TAYLOR & PRESTON LLP
1800 M Street N.W.
Washington, D.C. 20036
Tel.: (202) 659-6800

NEAL KUMAR KATYAL
Counsel of Record
REEDY C. SWANSON
J. ANDREW MACKENZIE
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
Tel.: (202) 637-5600
neal.katyal@hoganlovells.com

Counsel for Petitioner

January 2025