No. 24-759

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

This case presents two important circuit splits about the scope of the Foreign Sovereign Immunities Act (FSIA). In both, the D.C. Circuit adopted limitations to the commercial-activity exception found nowhere in the statute. The resulting brittle rules make it exceptionally difficult for small American businesses, like the plaintiff here, to enforce their contracts with foreign sovereigns. This Court should grant certiorari to reverse.

The first question asks whether a breach-of-contract plaintiff must show that an effect in the United States was "established or necessarily contemplated" by the contract for that effect to be "direct" under the FSIA. Pet. 14-17. Iraq agrees that six circuits have adopted this requirement.

Four circuits, by contrast, correctly read this Court's precedents to forbid that "unexpressed requirement." *Republic of Argentina* v. *Weltover*, 504 U.S. 607, 618 (1992). Multiple courts and judges have pointed to and openly commented on the conflict. *See* Pet. 16-17. That is why Judge Pillard urged the D.C. Circuit (unsuccessfully) to follow its "sister circuits [that] 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." *Odhiambo* v. *Republic of Kenya*, 764 F.3d 31, 47 (D.C. Cir. 2014) (Pillard, J., concurring in part and dissenting in part). Iraq's effort to avoid the clear and acknowledged split disregards the plain language of the circuits on the other side of the split, which expressly reject Iraq's preferred rule.

Iraq also cannot avoid that the place-of-performance requirement was determinative in this case. Iraq's effort to conjure an "independent" holding relies on a carefully truncated quote. In context, the excerpt actually *reinforces* the centrality of the erroneous place-of-performance requirement to the panel's analysis.

The question also has widespread ramifications for U.S. businesses, which in six circuits are significantly disadvantaged in protecting their contractual rights. Those circuits essentially expect businesses who contract with foreign sovereigns to become soothsayers, predicting in the contract every possible direct effect a breach might create. Congress did not impose this onerous burden. It required only that the U.S. effect be direct, nothing more.

The second question presented likewise warrants this Court's review. The Fourth Circuit and the D.C. Circuit expressly disagreed about the meaning of the FSIA's second clause on the facts of this very case. As with the first question, the D.C. Circuit imposed a limitation not grounded in the text.

Because of the D.C. Circuit's two legal errors, the plaintiff in this case—an American contractor hired by Iraq at the behest of the U.S. Government whose work was praised extensively by General David Petraeus at trial—will not see a penny for work that it *concededly* performed during a pivotal period in Iraq's transition at enormous personal cost. This Court should grant certiorari and reverse.

ARGUMENT

I. The Court Should Grant Certiorari To Address A 6-4 Split Regarding The FSIA's Direct-Effects Clause.

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

Iraq agrees that six circuits require breach-of-contract plaintiffs to prove an effect was "established or necessarily contemplated" in the contract to qualify as "direct" under the FSIA. *See* Pet. 17-21. The Fifth, Sixth, Eighth, and Tenth Circuits properly eschew this "unexpressed requirement." *Weltover*, 504 U.S. at 618.

Iraq nevertheless insists (at 3) that there are no "material differences" between the circuits. That is wrong. Iraq ignores the actual reasoning of the cited decisions, conflates a sufficient condition for jurisdiction with a necessary one, and leans on an artificial and atextual distinction between tort and contract cases.

Iraq contends (at 20) that *Voest-Alpine Trading USA* v. *Bank of China*, 142 F.3d 887 (5th Cir. 1998), does not contribute to a division of authority because *Voest-Alpine* did not "ignore[] where the contract was to be performed." Iraq neglects to mention that "the United States was [not] the 'place of payment' " under the letter of credit at issue. *Id*. at 893. It also fails to grapple with the Fifth Circuit's emphatic rejection of the place-of-performance requirement. *Voest-Alpine* was clear: "[A] nontrivial effect in the United States need only be an immediate consequence of the foreign state's activity to support jurisdiction under the third clause." *Id*. at 896. The court was unpersuaded by

the defendant's argument that there was no direct effect "because the United States was neither the 'place of payment' nor the place of any other 'legally significant act.' " *Id.* at 893.

Voest-Alpine ultimately held that the third clause applied despite the absence of a U.S.-based place-of-performance provision because "the Bank of China conceded at oral argument" that "it is the Bank's customary practice to send payments on a letter of credit to wherever the presenting party specifies," which in that case would have been Houston. *Id*. at 896. That is precisely the kind of *non*-contractual evidence of a direct effect that the decision below forecloses.

Janvey v. *Libyan Investment Authority*, 840 F.3d 248 (5th Cir. 2016), is not to the contrary. The single sentence on which Iraq relies—stating an injury "constitute[s] a direct effect only if" it results from an act the foreign state "was required to perform in the United States"—is pure dictum. The court ultimately resolved *Janvey* based on traditional causation principles because the only U.S. connection resulted from the intervening act of a third party. *Id*. at 262-263. *Janvey* cannot be read to abrogate the clear holding of *Voest-Alpine* that there was no "significance whatsoever to where [funds] were payable as a technical matter." *Voest-Alpine*, 142 F.3d at 895; *accord Spong* v. *Fidelity Nat'l Prop. & Cas. Ins. Co.*, 787 F.3d 296, 305 (5th Cir. 2015) (the earlier panel opinion controls in the event of a conflict). Nor can Iraq dismiss the prior-panel rule by claiming (at 21) that *Weltover* somehow abrogated the pre-*Weltover* decision in *Callejo* v. *Bancomer*, 764 F.2d 1101 (5th Cir. 1985). *Voest-Alpine* was decided four years *after Weltover*, and confirms that the critical components of *Callejo* were not just

consistent with *Weltover*, but *compelled* by it. 142 F.3d at 894-896.

Iraq's attempt (at 22) to place the Sixth Circuit in its camp both ignores that court's legal analysis and erroneously conflates a sufficient condition with a necessary one. *Keller* v. *Central Bank of Nigeria* followed *Voest-Alpine* to reject the theory that only a "legally significant act" in the form of a "failure to make payment when the contract designates the United States as the place of performance" counts as a direct effect. 277 F.3d 811, 817 (6th Cir. 2002); *see also id*. at 817-818 (noting circuit split). Although a direct effect was shown "[i]n th[a]t case" by the fact that the "defendants agreed to pay but failed to transmit the promised funds to an account in a Cleveland bank," *id*. at 818, the Sixth Circuit has since reaffirmed its opposition to the view "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* v. *Federal Republic of Germany*, 633 F.3d 409, 417 (6th Cir. 2011).

Iraq dismisses the Eighth Circuit because its cases involve tort rather than contract claims. Opp. 22-23. But nowhere does the Eight Circuit limit its commitment to "pay attention only to 'what Congress enacted' " to tort claims. *Missouri ex rel. Bailey* v. *People's Republic of China*, 90 F.4th 930, 939 (8th Cir. 2024). And nothing in the text of the commercial-activity exception supports such disparate treatment. *See* Pet. 27-29; *infra* p. 8.

Finally, the Tenth Circuit has not stated that a breach of contract can cause a direct effect in the United States "only if" contractual performance was due there. *Contra* Opp. 23. *Orient Mineral* v. *Bank of*

China, 506 F.3d 980 (10th Cir. 2007), involved no place-of-performance provision at all. More importantly, it expressly rejected adding "judicially-created criteria" to the FSIA. *Id*. at 998; *see also id*. (noting split). And the cited excerpt (at 24) from *Big Sky* simply supports the limiting principle that "an American corporation's failure to receive promised funds abroad" does not, *standing alone*, "qualify as a 'direct effect in the United States.' " *Big Sky Network Canada, Ltd.* v. *Sichuan Provincial Gov't*, 533 F.3d 1183, 1191 (10th Cir. 2008). That principle has no application to this case, where Wye Oak relies on more than mere financial injury—most notably, the termination of Wye Oak's daily work on the contract in the United States. *See* Pet. App. 48a-58a.

In short, there is a clear division of authority between those circuits that treat the terms of a breached contract as the *sole* basis on which a court can find a direct effect, and those that treat them as one possible way of doing so. This Court should intervene.

B. The Split Was Determinative Here.

Iraq contends (at 27-29) that the D.C. Circuit reached an "independent holding" that the cutoff of performance in the United States "did not 'flow immediately' from the breach." Iraq can make this assertion only by misleadingly truncating the quoted passage.

What the D.C. Circuit actually said was: "[Wye Oak's] 'decision[s] to cease business' in the United States did not 'flow immediately' from Iraq's breach. * * * They were orthogonal to the disrupted Iraq-based work, *especially since the Agreement simply never established or contemplated any travel or*

performance in the United States to begin with." Pet. App. 18a-19a (emphasis added). Underscoring the point, the D.C. Circuit explained that the interruption to Wye Oak's operation in the United States "[came] up short" because "Iraq never agreed to, or necessarily contemplated, [Wye Oak's] work in the United States in the first place." Pet. App. 18a. The same goes for the court's observation that Wye Oak could not complete its "planned American-based expansion," which the D.C. Circuit rejected because it "fell outside the scope of the Agreement." *Id.*

In other words, the D.C. Circuit's only stated reason for concluding that the cessation of performance "did not 'flow immediately' from Iraq's breach" was the absence of any provision specifying the United States as a place-of-performance. *See id.* at 18a-19a. That holding is not "independent" of the D.C. Circuit's place-of-performance requirement—it is inextricably intertwined with it.

Perhaps most tellingly, the D.C. Circuit never once purported to find any "clear error" in the District Court's factual findings establishing that Iraq's breach was the sole reason Wye Oak ceased performance in the United States and stopped traveling to Iraq—including because Iraq was solely responsible for funding all work on the contract. Pet. 29-30. Iraq thus fails to identify any holding "independent" from the question presented.

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

The Court should grant certiorari to repudiate the atextual place-of-performance requirement. Iraq does not offer *any* response to Wye Oak's straightforward

textual arguments. Nor does Iraq attempt to explain how the FSIA could require direct effects to be contractually specified when this Court has squarely held that they do not even need to be "foreseeable." *Weltover*, 504 U.S. at 617-618.

Iraq instead leans on policy arguments, complaining (at 18) that a textual approach would permit plaintiffs to "manufacture direct effects anywhere in the world." Such policy concerns cannot "surmount the plain language of the statute, especially given countervailing ones that better conform to the plain text." *Republic of Hungary* v. *Simon*, 145 S. Ct. 480, 497 (2025) (citations and quotation marks omitted); *see also* Pet. 30 (outlining the "enormous ramifications for U.S. businesses").

Iraq is wrong in any event. Wye Oak's rule does not mean a plaintiff could always create jurisdiction by "unilaterally decid[ing] to relocate to the United States" after a breach in contract occurs. *Odhiambo*, 764 F.3d at 49 (Pillard, J., concurring in part and dissenting in part). In many if not most such cases, the plaintiff will not be able to show any injury other than an indirect financial burden. But the proper analysis should depend on traditional causation principles and the result should be different where, as here, a foreign government's breach of contract directly—with no intervening or superseding cause—grinds a firm's ongoing domestic work on the contract to a halt. *See* Pet. App. 10a.

Iraq's attempt (at 25-26) to defend the D.C. Circuit's disparate treatment of contract and tort claims also fails. Just a few weeks ago, this Court rejected a similarly artificial distinction. Just as "[t]he plain text of the [FSIA's] expropriation exception treats all

'property' alike, whether that property is tangible (like a piece of art) or fungible (like cash)," *Simon*, 145 S. Ct. at 492, the commercial-activity exception treats all "act[s]" upon which an action is based equally, 28 U.S.C. § 1605. It "does not draw any distinctions between" torts and contractual breaches. *Simon*, 145 S. Ct. at 495.

The Court should renew its admonition against "unexpressed requirement[s]" like the place-of-performance requirement. *Weltover*, 504 U.S. at 618. The D.C. Circuit's rule puts American businesses at enormous disadvantage in vindicating their contractual rights—even if, like Wye Oak, they have supplied millions of dollars in services. After all, it is American businesses who are mostly likely to suffer the direct effects of a contractual breach in the United States—even if they could not have foreseen the specific effect when contracting. The FSIA does not condone the D.C. Circuit's restrictive rule. This is the perfect vehicle to say so.

II. The D.C. Circuit Expressly Rejected The Fourth Circuit's Understanding Of The FSIA On The Facts Of This Case.

This case presents a rare intra-case circuit split. Before the case was transferred to D.C., the Fourth Circuit held that jurisdiction was proper because Wye Oak's substantial performance in the United States qualified as "act[s] performed in the United States" under the second clause of the commercial-activity exception. *Wye Oak Tech., Inc.* v. *Republic of Iraq*, 666 F.3d 205, 216-217 (4th Cir. 2011). The D.C. Circuit, after trial, expressly "disagree[d] with the view of * * * the Fourth Circuit" because it read "the second clause of the commercial activities exception" to be

"triggered *only* by acts of the foreign state." Pet. App. 100a, 102a (emphasis added). It is hard to imagine a clearer split.

Iraq tries (at 32-33) to dodge this disagreement by pointing to *OBB Personenverkehr AG* v. *Sachs*, 577 U.S. 27 (2015). But *Sachs* did not address whether the "act" in the FSIA's second clause must be an "act" of the foreign sovereign. *Sachs* instead addressed the proper understanding of "based upon"—an entirely different phrase in the statute. 577 U.S. at 33.

Iraq seeks to bridge this gap by creating yet *another* atextual bright-line rule. It claims (at 33) that "*Sachs* establishes that in breach-of-contract cases" the "gravamen" of the suit will always be "the sovereign's breach." The opposite is true: *Sachs* expressly rejected lower court opinions holding that "based upon" should be read to correspond to an essential element of the plaintiff's claim. 577 U.S. at 34. Instead, the Court emphasized that each case should be taken on its own terms to determine those facts that form "the core of the[] suit." *Id.* at 35. *Sachs* makes clear that these "core" facts can include the plaintiff's own acts and injuries. *Id.* When Wye Oak sues to be compensated for work it performed, the "core" of the suit is "based upon" Wye Oak's performance, including in the United States.

Not even the D.C. Circuit embraced Iraq's strained reading of *Sachs*. It addressed *Sachs*'s "based upon" requirement separately from the meaning of the second clause—"incidentally" in a footnote. Pet. App. 103 n.2. That "brief alternative holding" is no barrier to certiorari. *FDA* v. *Wages & White Lion Invs., LLC*, 2025 WL 978101, at *24 n.9 (2025). Since that opinion, moreover, the District Court has issued further

analysis confirming the centrality of Wye Oak's U.S. performance to its work on the contract overall. Pet. App. 48a-60a. This Court should follow its usual practice by resolving the threshold legal dispute and allowing the lower courts to resolve any remaining issues on remand.

Iraq likewise fails to salvage the D.C. Circuit's analysis as a textual matter. Iraq points to *nothing* in the text that could conceivably be understood to limit the "act" in clause two to an act "of the foreign sovereign"—even though the commercial-activity exception repeatedly specifies elsewhere *who* must be engaged in "activity." *See* Pet. 33-34.

Iraq instead turns to the direct-effects clause, insisting that "act" must be read in *both* clauses to be limited to an act of the foreign sovereign so as to "harmonize[] the various provisions." Opp. 31 (quoting *Republic of Sudan* v. *Harrison*, 587 U.S. 1, 15 (2019)). But that limitation on the direct-effects clause likewise has no foundation in the FSIA's text.[1] And although Iraq claims (at 31-32) that there is a consensus in favor of its reading, *none* of its cited cases analyzed or decided the question here.

Iraq's real argument is one of policy, not text. Iraq seeks to engraft onto the word "act" (in clauses two *and* three) unexpressed limitations on the scope of the FSIA. That is "Congress's job," and the judiciary's "job [is] to follow the policy Congress has prescribed." *See SAS Inst. Inc.* v. *Iancu*, 584 U.S. 357, 368 (2018). And,

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[1] Wye Oak did not "concede[]" this point, as Iraq claims (at 31). Iraq cites language from the petition discussing the first question presented, which is obviously tailored to Wye Oak's specific arguments on that issue.

indeed, Congress addressed Iraq's policy concerns elsewhere by requiring that the suit be "based upon" the predicate act. 28 U.S.C. § 1605(a)(2). That limitation ensures that foreign states are only subject to jurisdiction for acts that form the "core of the[] suit." *Sachs*, 577 U.S. at 35. Iraq disputes whether that separate requirement has been satisfied here, *see supra* p. 9, but that is no basis for refusing to address a clear split on the legal issue underlying the decision below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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