No. 24-759

In the Supreme Court of the United States

WYE OAK TECHNOLOGY, INC., PETITIONER

v.

REPUBLIC OF IRAQ, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

D. JOHN SAUER
Solicitor General
Counsel of Record
BRETT A. SHUMATE
Assistant Attorney General
HASHIM M. MOOPPAN
Deputy Solicitor General
JOSHUA Y. DOS SANTOS
Assistant to the Solicitor General
SHARON SWINGLE
JENNIFER L. UTRECHT
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

In the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1330, 1602 *et seq.*, Congress provided that foreign states are generally immune from suit in this country, subject to limited exceptions. The commercial-activity exception applies in cases "in which the action is based [1] upon a commercial activity carried on in the United States by the foreign state; or [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." 28 U.S.C. 1605(a)(2). The questions presented are:

1. Whether the foreign state's failure to make contractual payments to petitioner that were owed in Baghdad, for contractual services that were required to be performed in Iraq, caused a "direct effect" in the United States under the third clause of the commercial-activity exception.

2. Whether petitioner can rely on its own domestic acts, rather than an act attributable to the foreign state, to satisfy the second clause of the commercial-activity exception.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

In the Supreme Court of the United States

No. 24-759

WYE OAK TECHNOLOGY, INC., PETITIONER

v.

REPUBLIC OF IRAQ, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. The Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1330, 1602 *et seq.*, establishes a "comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities." *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 488 (1983). The FSIA provides that foreign states are "immune from the jurisdiction of the courts" in this country unless the suit falls within one of the statute's exceptions. 28 U.S.C. 1604.

One of those exceptions applies in three enumerated circumstances involving "commercial activity." 28 U.S.C. 1605(a)(2). This exception applies when "the action is based [1] upon a commercial activity carried on in the United States by the foreign state; or [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." *Ibid.*

2. This suit arises from a contract dispute between petitioner Wye Oak Technologies, Inc., a defense contractor headquartered in Pennsylvania, and respondents, the Republic of Iraq and its Ministry of Defense. Pet. App. 2a, 80a-83a.

In August 2004, at the recommendation of the United States, the Iraqi Ministry of Defense executed a Broker Services Agreement in Iraq for petitioner to help re-equip the Iraqi military by salvaging or scrapping equipment scattered across Iraq. Pet. App. 4a-5a. The agreement provided that petitioner would submit invoices to the Ministry, which would then pay petitioner "in the form and manner" "directed" in the invoices. *Id.* at 5a.

Petitioner performed scrap and refurbishment services as required by the contract. Pet. App. 5a, 121a-124a. In addition, although not required or contemplated by the contract, petitioner engaged in activities in the United States to support its services in Iraq. *Id.* at 5a-6a; see *id.* at 16a. These domestic activities included developing a computer program to inventory equipment in Iraq, monitoring petitioner's electronic communications in Iraq, and communicating with petitioner's employees in Iraq. *Id.* at 5a-6a.

By October 2004, petitioner had submitted pro forma invoices to the Ministry totaling $24.7 million, and petitioner chose to direct that payment be made at the Ministry's Baghdad office. Pet. App. 6a, 26a-27a. Respondents never paid petitioner and instead transferred the payment to a Lebanese "businessman" named Raymond Zayna. *Id.* at 6a.

Petitioner continued work while it pursued various efforts to secure payment, including by contacting U.S. government officials. See Pet. App. 6a-7a, 27a-29a. In December 2004, petitioner's C.E.O., Dale Stoffel, traveled to Iraq for a meeting with Ministry officials, Zayna, and U.S. military officers. *Id.* at 7a, 28a. Three days after a meeting with Zayna and the Ministry, Stoffel and a colleague were murdered in an attack for which a "terrorist group" claimed responsibility. *Id.* at 7a, 28a, 150a. Petitioner subsequently withdrew its personnel from Iraq. *Id.* at 7a.

In January 2005, petitioner ceased all work in Iraq due to lack of funding. Pet. App. 7a. Petitioner likewise ceased its supporting activities in the United States and cancelled multiple planned business ventures. *Ibid.*

3. a. In 2009, petitioner sued the Republic of Iraq for breach of contract in the United States District Court for the Eastern District of Virginia. Pet. App. 7a-8a. That court denied the Republic's motion to dismiss and transferred the case to the United States District Court for the District of Columbia. *Id.* at 8a, 83a-84a. The Republic appealed to the United States Court of Appeals for the Fourth Circuit. *Id.* at 84a.

The Fourth Circuit affirmed the denial of the Republic's motion to dismiss. *Wye Oak Tech., Inc.* v. *Republic of Iraq*, 666 F.3d 205, 217 (4th Cir. 2011). It held that petitioner's suit fell within the second clause of the commercial-activity exception—which covers suits "based

* * * upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere"—because petitioner had "performed acts in the United States" "in connection with the scrap sale activities * * * in Iraq." *Id.* at 215-216. This Court denied certiorari. *Republic of Iraq* v. *Wye Oak Tech., Inc.*, 567 U.S. 936 (2012).

b. After the case was transferred, the D.C. District Court held an eight-day bench trial and awarded petitioner $89 million in damages. Pet. App. 108a-246a. Like the Fourth Circuit, the district court determined that the suit satisfied the second clause of the commercial-activity exception because of domestic activities that petitioner engaged in to support its services in Iraq. *Id.* at 165-166a.

The United States Court of Appeals for the D.C. Circuit reversed. Pet. App. 73a-107a. As relevant here, the court of appeals held, in an opinion written by then-Judge Jackson, that the second clause did not apply for two related reasons. First, based on the statute's "language and structure," the court held that the second clause "is only applicable when the act inside the United States upon which the plaintiff's claim is based is an act *of the foreign sovereign*." *Id.* at 89a, 99a. Second, the court held that petitioner's claims are not "based upon" its own contract-support activities in the United States. *Id.* at 103a n.2. This Court's decision in *OBB Personenverkehr AG* v. *Sachs*, 577 U.S. 27, 35 (2015)—which post-dated the Fourth Circuit's decision—"made clear that" the relevant act upon which jurisdiction is based must constitute the "gravamen" of the suit, and it was "reasonably obvious that the gravamen of [petitioner's] breach of contract suit is not any act * * * that [petitioner] undertook," but "Iraq's nonperformance." Pet. App. 103a n.2. The D.C. Circuit remanded for the district court to consider

whether the third clause of the commercial-activity exception applied. *Id.* at 106a–107a.

c. On remand, the district court held that respondents' breach in Iraq had direct effects in the United States under the third clause. Pet. App. 23a-72a. The court concluded that the breach had caused petitioner to cease its contract-support activities in the United States, end the frequent travel of its employees between the United States and Iraq, and alter its plans to expand domestic operations. *Id.* at 53a-57a.

d. The D.C. Circuit again reversed. Pet. App. 1a-22a. As it explained, under this Court's decision in *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607, 618 (1992), "'[a]n effect is direct if it follows as an immediate consequence of the defendant's activity.'" Pet. App. 4a, 12a. The court of appeals held that any direct effects of respondents' failure to pay occurred in Iraq "because Iraq, not the United States, was the place designated" for payment. *Id.* at 16a; see *id.* at 14a-16a.

The court further concluded that any effects on petitioner's domestic activities were not direct. Pet. App. 16a-19a. The court explained that "Iraq never agreed to, or necessarily contemplated" petitioner's domestic work. *Id.* at 18a. Instead, "[t]he contract was for the rehabilitation or scrapping of military equipment entirely in Iraq." *Id.* at 16a. Moreover, the court reasoned that petitioner's "'decisions to cease business' in the United States" and forgo "planned American-based expansion" were "unilateral business judgment[s]" that "did not 'flow immediately' from Iraq's breach." *Id.* at 18a-19a.

The court of appeals accordingly directed the district court to dismiss for lack of subject matter jurisdiction. Pet. App. 22a. Petitioner filed a petition for rehearing en banc, which the court denied. *Id.* at 247a-248a.

DISCUSSION

The court of appeals correctly rejected petitioner's contentions that its breach-of-contract claim falls within the second and third clauses of the FSIA's commercial-activity exception. That decision does not conflict with any decisions of this Court or implicate any disagreement among the courts of appeals warranting this Court's review. To be clear, the United States does not condone respondents' treatment of petitioner. But petitioner's overbroad reading of the commercial-activity exception could have adverse reciprocal consequences for the United States in foreign courts and for American companies seeking to do business with foreign governments. And American companies can ensure that jurisdiction exists for contract payment disputes simply by choosing, unlike petitioner, to require payment in this country. The petition should be denied.

A. The Court of Appeals' Holding that The Third Clause Of The FSIA's Commercial-Activity Exception Is Inapplicable Does Not Warrant Further Review

1. The court of appeals correctly held that petitioner's suit does not fall within the third clause of the commercial-activity exception.

a. The third clause provides that a foreign state is not immune when the suit is based upon "an act outside the territory of the United States in connection with a commercial activity of the foreign state" and "that act causes a direct effect in the United States." 28 U.S.C. 1605(a)(2). This Court has held that "an effect is 'direct'" "if it follows 'as an immediate consequence of the defendant's * * * activity.'" *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607, 618 (1992). And lower courts have recognized that an effect is immediate if it

"has no intervening element, but, rather, flows in a straight line without deviation or interruption." *Princz* v. *Federal Republic of Germany*, 26 F.3d 1166, 1172 (D.C. Cir. 1994), cert. denied, 513 U.S. 1121 (1995); accord *Lyon* v. *Agusta S.P.A.*, 252 F.3d 1078, 1083 & n.3 (9th Cir. 2001), cert. denied, 534 U.S. 1079 (2002).

In *Weltover*, this Court examined whether a contractual breach for failure to pay had a "direct" effect in the United States. That case concerned Argentina's failure to pay government bonds that provided for payment "through transfer on the London, Frankfurt, Zurich, or New York market, at the election of the creditor." 504 U.S. at 609-610. Because the bondholder had chosen New York, the Court concluded that "New York was * * * the place of performance for Argentina's ultimate contractual obligations." *Id.* at 619. Argentina's nonpayment therefore "necessarily" created the requisite direct effect because "[m]oney that was supposed to have been delivered to a New York bank for deposit was not forthcoming." *Ibid.*

Following *Weltover*, the courts of appeals have held that breach-of-contract claims based on nonpayment have a "direct effect" in the United States in various circumstances when payment was due in the United States. See, e.g., *Adler* v. *Federal Republic of Nigeria*, 107 F.3d 720, 729 (9th Cir. 1997); *DRFP L.L.C.* v. *Republica Bolivariana de Venezuela*, 622 F.3d 513, 517-18 (6th Cir. 2010), cert. denied, 565 U.S. 1177 (2012). But the courts of appeals have uniformly held that, when payment is required abroad, a failure to pay does not create a direct effect in the United States simply because the unpaid entity feels some financial impact in this country. See, e.g., *Rogers* v. *Petroleo Brasileiro, S.A.*, 673 F.3d 131, 139-140 (2d Cir. 2012); *Westfield* v.

Federal Republic of Germany, 633 F.3d 409, 417 (6th Cir. 2011).

Here, petitioner sued over respondents' failure to pay invoices, Pet. App. 2a, but the invoices were supposed to be paid in Baghdad, because that was the place of payment that petitioner chose to designate pursuant to the contract, *id.* at 6a. Moreover, insofar as it is relevant that petitioner chose to stop performing under the contract in light of the nonpayment, *id.* at 7a, the contractual performance concerned services "entirely in Iraq," *id.* at 16a. Accordingly, as the court of appeals explained, "Iraq was the center of [petitioner's] entire commercial relationship with the Ministry, and Iraq is where the breach's direct effects occurred." *Id.* at 11a. Respondents' breach of contract did not have a "direct" effect in the United States, as the breach itself did not immediately result in anything occurring or not occurring in the United States. *Id.* at 13a.

Petitioner contends (Pet. 18, 29) that the financial consequences of Iraq's failure to pay in Baghdad eventually caused petitioner to stop certain contract-support activities that petitioner unilaterally had chosen to conduct in the United States, such as contract monitoring and development of a computer program to track inventory. But petitioner's cessation of domestic activities "depend[ed] crucially on variables independent of the conduct of the foreign state." *Guirlando* v. *T.C. Ziraat Bankasi A.S.*, 602 F.3d 69, 75 (2d Cir. 2010) (quotation marks omitted).

To start, petitioner's decision to engage in those activities domestically was a result of its intervening discretionary choices, not a direct consequence of the contract. As the D.C. Circuit emphasized, the contract did not even contemplate—much less require—any of the domestic conduct on which petitioner relies. Pet. App. 18a. Instead, respondents explicitly disclaimed "responsibility"

for any "administrative costs" that were "necessary or incidental" to petitioner's operations. *Id.* at 257a.[1]

Moreover, just as petitioner's decision to *start* those domestic activities did not follow directly from the contract to perform services in Iraq, its decision to *stop* those activities did not immediately flow from respondents' contract breach in Iraq. Indeed, petitioner initially decided to continue its domestic activities after the breach. Pet. 8-9. Its eventual decision to stop them months later was an independent business decision, not the "immediate consequence" of the nonpayment in Baghdad. *Weltover*, 504 U.S. at 618.[2]

Similarly, petitioner's argument (Pet. 29) that Iraq's nonpayment "left [petitioner] without any funding" to "expand its work * * * in the United States" asserts a quintessentially *indirect* financial injury. As the D.C. Circuit explained, petitioner's unilateral plans for expansion were "orthogonal to the disrupted Iraq-based work." Pet. App. 19a. The downstream impacts of a financial loss on future business plans are insufficient to show a "direct effect," for otherwise virtually any company with U.S. operations could claim a "direct effect" in this country based on a contractual breach abroad. See, e.g., *Big Sky Network Canada, Ltd.* v. *Sichuan Provincial Gov't*, 533 F.3d

---

[1] Petitioner points (Pet. 31) to a letter from Iraq stating that Petitioner could obtain any "assistance it deems necessary, *domestic or foreign*." But even if that letter were part of the contract, its language still leaves decisions about which activities to pursue and where to pursue them in petitioner's discretion.

[2] This case thus does not present the question whether a party's cessation of performance in response to a foreign state's breach would constitute a "direct effect" in the United States if the contract required or contemplated the party's performance in this country, or if the breach rendered performance impossible.

1183, 1192 (10th Cir. 2008) (Gorsuch, J.) (rejecting similar alleged effect as indirect), cert. denied, 571 U.S. 818 (2013); *Westfield*, 633 F.3d at 417 ("[A]n American entity's mere financial loss is insufficient to establish a direct effect in the United States."); *Daou* v. *BLC Bank, S.A.L.*, 42 F.4th 120, 135 (2d Cir. 2022) (same).

b. Petitioner argues (Pet. i, 15, 17) that courts should not focus on whether the contract required or contemplated payment or other performance in the United States because doing so effectively adds an "unexpressed requirement" to the statute. But to determine the immediate consequences of a breach of contract, a court necessarily must look to the location of contractual performance and the contractual consequences of a breach, just as this Court did in *Weltover* when it looked to the place where payment was due. 504 U.S. at 619. That is not a "judicially crafted bright-line rule[]" (Pet. 15), but an application of *Weltover* to breach-of-contract claims.

Much for the same reason, petitioner is wrong (Pet. 26) that the court of appeals adopted a "foreseeability" requirement like the one this Court rejected in *Weltover*. That case simply held that an effect need not be "substantial" or "foreseeable" to be "direct." 504 U.S. at 617-618. But in the very same passage, this Court held that directness requires the effect to be "an immediate consequence" of the foreign state's action. *Ibid.* And the D.C. Circuit's analysis repeatedly focused on this immediacy requirement, correctly holding that it was not satisfied by petitioner's unilateral choices in responding to the breach with respect to activities it had chosen to conduct in this country. See Pet. App. 12a-19a. Indeed, the effects of respondents' nonpayment on petitioner's domestic activities may well have been

foreseeable. The problem is that they were not immediate and thus not direct.

Petitioner is similarly incorrect (Pet. 28) that the court of appeals' decision leads to "diverging approaches in tort and contract cases." In both tort and contract cases, the inquiry centers on the immediate effects of the alleged wrongdoing. Petitioner notes (Pet. 28-29) that some courts of appeals consider the location of a tort as part of their analysis, and those courts have determined the location of a tort differently than the way they determine the location of a contract breach. See, e.g., *EIG Energy Fund XIV, L.P.* v. *Petroleo Brasileiro, S.A.*, 894 F.3d 339, 347 (D.C. Cir. 2018) (*EIG*), cert. denied, 586 U.S. 1223 (2019). But that difference stems from longstanding choice-of-law principles, not any interpretation of the FSIA. The "locus of the tort" has traditionally been the place of the "initial injury" that "completed" the tort. *Atlantica Holdings, Inc.* v. *Sovereign Wealth Fund Samruk-Kaznya JSC*, 813 F.3d 98, 112-113 (2d Cir.), cert. denied, 580 U.S. 998 (2016); see *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 705-706 (2004) (recognizing this principle when interpreting an exception to the waiver of sovereign immunity in the Federal Tort Claims Act). Meanwhile, courts of appeals have reasoned that a "contractual breach occurs" in the place where performance should have occurred under the contract. *Virtual Countries, Inc.* v. *Republic of South Africa*, 300 F.3d 230, 239 (2d Cir. 2002).

In all events, petitioner is wrong to suggest (Pet. 28) that differences in determining the location of a tort versus a contract breach lead to diverging outcomes in cases like this. In particular, here, the location of respondents' nonperformance and petitioners' initial injury are the same: petitioner did not receive its money

in Baghdad. Thus, if this were a tort case—for example, if respondents had paid petitioner inside the Ministry's Baghdad office and then sent agents to steal the money outside—both the location of the tort and its immediate effects would still be in Baghdad. See *Daou*, 42 F.4th at 137 (concluding that the domestic effect of a Lebanese bank's failure to honor checks was indirect regardless of whether the claim was brought in contract or tort).[3]

Petitioner objects (Pet. 19) that the D.C. Circuit's decision turns the jurisdictional inquiry into a matter of "contractual draftsmanship." But the question under the statutory language and this Court's precedent is where the direct, immediate effects of a contract breach occur. It is thus predictable and appropriate that courts look to what the contract provides about the place of performance and the consequences of nonperformance.

For the same reason, petitioner is misguided (Pet. 31) in worrying about policy consequences for American companies. On the one hand, those companies can simply insist on payment in the United States (or else demand a risk premium for payment abroad). On the other hand, expanding "direct effects" to reach the types of harms invoked by petitioner could deter foreign

---

[3] The D.C. Circuit cases on which petitioner relies (Pet. 28) do not demonstrate inconsistency between tort and contract cases. In one, the plaintiff's claim centered on fraudulent inducement in the United States. *EIG*, 894 F.3d at 348. In the other, the court reasoned that the foreign state's commercial activities potentially targeted the United States. See *Exxon Mobil Corp.* v. *Corporacion CIMEX, S.A.*, 111 F.4th 12, 19, 21, 32-37 (D.C. Cir. 2024). Neither fact-bound decision is inconsistent with cases involving contracts, and in all events "[i]t is primarily the task of a Court of Appeals to reconcile its internal difficulties." *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

states from doing business with American contractors, given the risk of losing sovereign immunity in U.S. courts based on the unilateral actions of U.S. contractors. It also could lead to adverse reciprocal consequences for the United States in foreign courts. The D.C. Circuit's holding thus likely benefits American interests in the long run, even if the result is unfortunate for petitioner due to its contractual choices.

2. The D.C. Circuit's fact-bound decision does not implicate any relevant disagreement among the courts of appeals. Courts uniformly recognize that a failure to pay abroad for services due abroad does not create a direct effect in the United States. See, e.g., *Daou*, 42 F.4th at 136; *Aldossari on behalf of Aldossari* v. *Ripp*, 49 F.4th 236, 253-254 (3d Cir. 2022); *Janvey* v. *Libyan Inv. Auth.*, 840 F.3d 248, 262 (5th Cir. 2016) (per curiam); *Westfield*, 633 F.3d at 415; *Bhattacharya* v. *State Bank of India*, 70 F.4th 941, 944 (7th Cir. 2023), cert. denied, 144 S.Ct. 682 (2024); *Terenkian* v. *Republic of Iraq*, 694 F.3d 1122, 1138 (9th Cir. 2012), cert. denied, 571 U.S. 818 (2013); *Big Sky*, 533 F.3d at 1191; *Samco Global Arms, Inc.* v. *Arita*, 395 F.3d 1212, 1217 (11th Cir. 2005). Petitioner fails to identify any contrary decision on similar facts. Nor does petitioner succeed in cherry-picking language to suggest that there is a relevant division in legal reasoning.

a. Most importantly, Petitioner is wrong (Pet. 16) that the Fifth, Sixth, Eighth, and Tenth Circuits would reach a different result in this case by applying "traditional causation principles." When those courts have applied such principles to similar circumstances, they have reached the same result.

The Fifth Circuit has recognized that a financial "injury will constitute a direct effect only if the agency or

instrumentality of a foreign state causes the injury through its failure to perform an obligation that it was required to perform in the United States." *Janvey*, 840 F.3d at 262. Petitioner invokes (Pet. 21) *Voest-Alpine Trading USA Corp.* v. *Bank of China*, 142 F.3d 887 (5th Cir. 1998), cert. denied, 525 U.S. 1041 (1998), but the plaintiff there, unlike here, had designated payment in the United States, *id.* at 896.

The Sixth Circuit also has acknowledged that "[w]hen funds are due abroad and not paid, the direct effects occur abroad" even if the plaintiff "feel[s] the financial injury at home." *Westfield*, 633 F.3d at 416. Contrary to petitioner's contention (Pet. 22), *Keller* v. *Central Bank of Nigeria*, 277 F.3d 811 (6th Cir. 2002), does not demonstrate any inconsistency, because that decision concerned an agreement to send payment "to an account in a Cleveland bank," *id.* at 818.

The Tenth Circuit's position likewise undermines, rather than supports, petitioner's. As explained in an opinion by then-Judge Gorsuch, that court's precedent "set[s] down the rule that an American corporation's failure to receive promised funds abroad will not qualify as a 'direct effect in the United States,'" and that remains true even if the "company was forced to restructure its operations" as a result. *Big Sky*, 533 F.3d at 1191-1192; accord *United World Trade, Inc.* v. *Mangyshlakneft Oil Prod. Ass'n*, 33 F.3d 1232, 1237 (10th Cir. 1994) (no "direct effect" exists when "the defendants' performance" "ha[s] no connection [to] the United States"), cert. denied, 513 U.S. 1112 (1995).

As for petitioner's Eighth Circuit cases (Pet. 23), they are inapposite because they did not even involve a contractual failure to pay. See *Missouri ex rel. Bailey* v. *People's Republic of China*, 90 F.4th 930, 938-939

(2024) (claims about improper market manipulation); *General Elec. Capital Corp.* v. *Grossman*, 991 F.2d 1376, 1379 (1993) (claims for fraudulent inducement).

Conversely, petitioner is doubly wrong (Pet. 6, 15) that the Second, Third, Seventh, Ninth, Eleventh, and D.C. Circuits are applying a novel "judge-made rule[]" requiring domestic performance "even if" "the U.S. effect results directly from the foreign sovereign's act" under traditional causation principles. For starters, Petitioner cannot demonstrate a circuit conflict by emphasizing that other circuits agree with the D.C. Circuit. Nor is it surprising that the D.C. Circuit has lots of company, because these courts are simply applying *Weltover*'s definition of "direct" to facts like those presented here (just like courts on the other side of the illusory split). For example, in a prior D.C. Circuit decision that the panel here invoked (Pet. App. 14a), then-Judge Kavanaugh explained that, under *Weltover*, "breaching a contract that establishes a different or unspecified place of performance can affect the United States only *indirectly*, as the result of some intervening event." *Odhiambo* v. *Republic of Kenya*, 764 F.3d 31, 38 (D.C. Cir. 2014), cert. denied, 579 U.S. 927 (2016). The other circuits that petitioner places with the D.C. Circuit have similarly described their holdings as a straightforward application of *Weltover*'s interpretation that a "direct" effect must be an "immediate" consequence. See, e.g., *Daou*, 42 F.4th at 135; *Aldossari*, 49 F.4th at 253-254; *Bhattacharya*, 70 F.4th at 943-944; *Samco*, 395 F.3d at 1217.

b. Petitioner separately points (Pet. 15-16, 21-24) to a disagreement among some courts of appeals about whether a direct effect must also be "legally significant" in relation to the elements of the plaintiff's claim.

Compare *Terenkian*, 694 F.3d at 1138-1139 (requiring that an effect be both "direct and legally significant"); *Hanil Bank* v. *PT. Bank Negara Indonesia, (Persero)*, 148 F.3d 127, 133 (2d Cir. 1998) (same), with *Voest-Alpine*, 142 F.3d at 894 (rejecting such a requirement); *Keller*, 277 F.3d at 817-818 (same); *Orient Mineral Co.* v. *Bank of China*, 506 F.3d 980, 997-999 (10th Cir. 2007) (same), cert. denied, 553 U.S. 1079 (2008). But the decision below did not rest on or even consider any requirement that an effect be "legally significant," see Pet. App. 12a-16a, and the D.C. Circuit *rejected* that requirement in another decision just two weeks later, *Exxon Mobil Corp.* v. *Corporacion CIMEX, S.A.*, 111 F.4th 12, 34 (D.C. Cir.) ("[A]cts can cause a direct effect in the United States regardless of whether * * * a 'legally significant act' occurred in the United States."), petition for cert. pending, No. 24-699 (filed Dec. 27, 2024).

Similarly, petitioner references (Pet. 17) an arguable disagreement over the precise degree to which payment in the United States must be contractually specified for nonpayment to cause a domestic direct effect. Compare *Voest-Alpine*, 142 F.3d at 896 (finding a direct effect because the plaintiff specified payment in the United States according to "customary practice"); *Hanil Bank*, 148 F.3d at 133 (same where the contract allowed plaintiff to designate any place of payment and the plaintiff designated the United States); *Adler*, 107 F.3d at 727 (similar); *DRFP*, 622 F.3d at 517-518 (similar); with *Odhiambo*, 764 F.3d at 40-41 (stating that a "pay wherever you are" arrangement is insufficient). This case does not implicate that potential dispute because petitioner chose to designate Baghdad as the place of payment (for services performed in Iraq). Again, petitioner

identifies no court that would have reached a different outcome on these facts.

B. The Court of Appeals' Holding That The Second Clause Of The FSIA's Commercial-Activity Exception Is Inapplicable Does Not Warrant Further Review

1. The court of appeals also correctly held that petitioner's suit does not fall within the second clause of the commercial-activity exception.

a. The second clause provides that a foreign state is not immune when "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). In *OBB Personenverkehr AG* v. *Sachs*, 577 U.S. 27 (2015), this Court clarified that "an action is 'based upon' the 'particular conduct' that constitutes the 'gravamen' of the suit," meaning the "sovereign acts that actually injured" the plaintiff. *Id.* at 35 (quoting *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 357 (1993)). The Court thus concluded that a plaintiff's claims of injury on a train in Austria "turn[ed] on" the "dangerous conditions in Austria." *Ibid.* The Court rejected the argument that some of plaintiffs' claims were based on the sale of the train ticket in the United States, reasoning that, even if the sale "would establish a single element of a claim," events in Austria "remain[ed] at [the claim's] foundation." *Id.* at 34-36.

Here, petitioner has never identified any injurious action attributable to respondents in the United States. Instead, petitioner relies solely on acts that its own employees performed domestically—such as writing computer programs and monitoring electronic communications to support its work in Iraq. As the court of appeals explained, petitioner's own activities do not satisfy the

second clause for two related reasons. See Pet. App. 73a-107a.

First, petitioner cannot invoke jurisdiction under the second clause by relying on its own acts, rather than the "sovereign acts" of the foreign state that injured plaintiff. *Sachs*, 577 U.S. at 35; Pet. App. 89a. As *Sachs* held, the "act" referenced in clause two must be the injurious act that is the "gravamen" of the suit. 577 U.S. at 35-36. The FSIA governs suits against foreign states, so the "act" on which a suit is based logically must be attributable to the foreign state. Courts thus have long focused on acts attributable to the foreign state to determine whether clause two applies. See generally Restatement (Fourth) of Foreign Relations Law of the United States § 454, Reporters' Note 6 (2018).[4]

Second, even if a suit based upon the domestic acts of *someone* other than the foreign state could satisfy the second clause, a plaintiff's own domestic acts cannot suffice, because the suit plainly cannot be "based upon" *those* acts. Under *Sachs*, the court must "zero[] in on the core of the[] suit"—namely, the conduct that "actually injured" the plaintiff. 577 U.S. at 35. Petitioner's suit obviously is not complaining of any injury caused by its own activities. The "gravamen" of petitioner's suit "is Iraq's nonperformance," which "occurred in Iraq." Pet. App. 103a n.2.

b. Petitioner contends (Pet. 33) that the second clause can be satisfied by the domestic acts of persons other than

---

[4] See, e.g., *Gilson* v. *Republic of Ireland*, 682 F.2d 1022, 1027 n.22 (D.C. Cir. 1982); *Riedel* v. *Bancam, S.A.*, 792 F.2d 587, 591 (6th Cir. 1986); *Can-Am Int'l, LLC* v. *Republic of Trinidad & Tobago*, 169 Fed. Appx .396, 406 (5th Cir.), cert. denied, 549 U.S. 881 (2006); *Universal Trading & Inv. Co.* v. *Bureau for Representing Ukrainian Interests in Int'l & Foreign Courts,* 727 F.3d 10, 16-17 (1st Cir. 2013).

the foreign state. It reasons that, while the commercial-activity exception specifies that the relevant commercial activity must be "of" or "by" "the foreign state," the second clause contains no similar modifier for the "act" upon which the suit must be "based." 28 U.S.C. 1605(a)(2). That argument is doubly flawed.

Most importantly, that broad interpretation of "act" does nothing to refute the D.C. Circuit's second holding that a plaintiff's *own* domestic actions cannot satisfy the second clause in light of *Sachs*'s interpretation of "based upon." Even giving petitioner's textual comparison full weight, it at most shows that Congress may have allowed the domestic acts of *someone* other than the foreign state to satisfy the second clause—perhaps, for example, a third party acting on the foreign state's behalf. But it does not remotely suggest that the plaintiff's own domestic acts qualify, which is contrary to *Sachs*.

Tellingly, petitioner does not urge this Court to hold otherwise. Rather, observing that the D.C. Circuit's "alternative" holding was only "in a footnote," petitioner merely suggests that the D.C. Circuit might revisit that holding on remand in light of the district court's subsequent findings "confirming the centrality of [petitioner's] U.S. performance to its work on the contract overall." Pet. Reply Br. 10-11. But no matter how significant petitioner's domestic conduct was, that conduct did not "actually injure[]" petitioner and thus is not "the 'particular conduct' that constitutes the 'gravamen' of the suit." *Sachs*, 577 U.S. at 35. That is sufficient reason to deny review on the second clause.

In all events, petitioner's attempt to expand the second clause beyond acts attributable to the foreign state is unpersuasive on its own terms. It is unsurprising that the commercial-activity exception makes clear that the

relevant commercial activity must be "of" or "by" the foreign state, because Congress did not wish to waive the foreign state's sovereign immunity based upon the commercial activity of a person whose conduct was not attributable to the foreign state. If the exception permitted suits against a foreign state based on "an act" "in connection with a commercial activity," without specifying that the act must relate to *the foreign state's* commercial activity, then the exception could have been read to permit suits based on a foreign state's "act" as a regulator of the "commercial activity" of others. 28 U.S.C. 1605(a)(2). After clarifying that the commercial activity must be the foreign state's, and in the context of a statute that governs suits against foreign states, Congress had no need to spell out the obvious proposition that suits against foreign states must be "based upon" acts that are actually attributable to them. 28 U.S.C. 1605(a)(2); see H.R. Rep. No. 1487, 94th Cong., 2d Sess. 19 (1976) (describing the second clause as "look[ing] to conduct of the foreign state"). The default rule is that foreign states are immune from legal process subject only to enumerated, codified exceptions, and indeed, the stronger inference is that Congress would speak more clearly if it intended to permit suits against a foreign state "based upon" injurious acts attributable to others. Simply put, Congress deemed it redundant to say "upon an act [of the foreign state] performed in the United States in connection with a commercial activity of the foreign state elsewhere." 28 U.S.C. 1605(a)(2).

Moreover, even if the second clause "might be amenable" to petitioner's reading "[i]n complete isolation," statutory structure forecloses it. *Turkiye Halk Bankasi A.S.* v. *United States*, 598 U.S. 264, 275 (2023). The first clause of the commercial-activity exception is clearly limited to the foreign state's acts. 28 U.S.C. 1605(a)(2). And the

third clause's requirement that the foreign state's acts abroad must have a "direct effect" in the United States would likely have no practical effect if the plaintiff's own domestic acts satisfied the second clause. As the court of appeals explained, context makes petitioner's interpretation "entirely anomalous." Pet. App. 100a.

This Court also has instructed that where several "plausible" readings of an FSIA provision exist, the "most natural reading" is one that avoids "oddities." *Republic of Sudan* v. *Harrison*, 587 U.S. 1, 8, 15 (2019). And if the second clause applied based upon acts by *anyone*, then "opportunistic plaintiffs" could "unilaterally hal[e] foreign sovereigns into United States courts" in virtually any modern contract case. *Odhiambo*, 764 F.3d at 47 (Pillard, J., concurring in part and dissenting in part). Here, for example, petitioner seeks to subject a foreign state to jurisdiction based on petitioner's routine back-office tasks, such as "monitoring electronic communications" from the United States. Pet. App. 7a. Such expansive liability would upset Congress's "carefully calibrated scheme." *Turkiye*, 598 U.S. at 273. And once more, it could end up hurting rather than helping American companies, as foreign states may be deterred from hiring U.S. contractors if such banal domestic conduct triggered the commercial-activity exception for suits challenging contractual breaches abroad.

2. Petitioner observes (Pet. 34-35) that the D.C. Circuit's decision departs from the Fourth Circuit's decision in a prior appeal in this case, which held that the second clause of the commercial-activity exception applied based on petitioner's domestic activities supporting its contract. See *Wye Oak Tech., Inc.* v. *Republic of Iraq*, 666 F.3d 205, 215-216 (4th Cir. 2011). But the Fourth Circuit's conclusion predated *Sachs*'s clarification that the relevant "act"

must be the conduct that "actually injured" the plaintiff. 577 U.S. at 35-36. After *Sachs*, there is no reason to expect that the Fourth Circuit would adhere to its prior decision, and petitioner identifies no other potential conflict with another court of appeals. This Court's review is unwarranted at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

D. JOHN SAUER
Solicitor General
BRETT A. SHUMATE
Assistant Attorney General
HASHIM M. MOOPPAN
Deputy Solicitor General
JOSHUA Y. DOS SANTOS
Assistant to the Solicitor General
SHARON SWINGLE
JENNIFER L. UTRECHT
Attorneys

SEPTEMBER 2025