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

SUPPLEMENTAL BRIEF FOR PETITIONER

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The Government's brief provides no reason to deny certiorari regarding two acknowledged circuit splits. As the petition explained, to determine whether a contractual breach causes a direct effect in the United States, six circuits apply a bright-line rule that a direct effect exists only when the contract "established or necessarily contemplated" the United States as a place of performance. Four circuits, by contrast, apply traditional causation principles, and reject the view that an effect can only be direct if the contract specifies the United States as a place of performance. The Government does not dispute this split. Nor does the Government provide any coherent defense of the D.C. Circuit's rule. Instead, the Government primarily argues that Wye Oak would not prevail even applying traditional causation principles. The Government is wrong, but its argument is beside the point at this stage. The Court should grant certiorari to resolve this longstanding conflict on a vital question about the scope of jurisdiction under the FSIA. The Court should also grant certiorari on the second question, where the Government acknowledges the split between the Fourth and D.C. Circuits in this case.

The petition should be granted.

I. The Court Should Grant Certiorari On The First Question Presented.

A. The Government Does Not Dispute The Split.

The Government does not deny that there is an open and acknowledged split as to whether the effect of a foreign sovereign's actions must be "established or necessarily contemplated" in a contract case to qualify

as "direct." *See* Pet. 16-17. On the contrary, it recognizes that four courts "have applied" traditional causation principles rather than looking exclusively to the contractual place of performance. U.S. Br. 13. The Government nevertheless insists these courts do not create any "*relevant* disagreement" because the two approaches "reach[] the same result." *Id.* (emphasis added). That is wrong.

Take *Voest-Alpine Trading USA Corp.* v. *Bank of China*, 142 F.3d 887 (5th Cir. 1998). Even though "the United States was [not] the 'place of payment' " under the letter of credit at issue, the Fifth Circuit held that the Bank's refusal to pay created a direct effect in the United States because it was "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 893, 896. *Voest-Alpine* confirms and builds upon the Fifth Circuit's earlier holding in *Callejo* v. *Bancomer, S.A.*, which held that a failure to pay American plaintiffs had a "direct effect in the United States * * * without reference to the place of payment" specified in the contract. 764 F.2d 1101, 1111-12 (5th Cir. 1985).

The Fifth Circuit thus considers the kind of *non*-contractual evidence that would have led to a different result here. Indeed, the D.C. Circuit rejected evidence that Wye Oak gave directions to pay in the United States precisely because it concluded there was no *contractual* obligation to do so. *See* Pet. App. 13a-16a.

The Government responds to *Voest-Alpine*, (at 13-14) by citing dicta from *Janvey* v. *Libyan Investment Authority*, 840 F.3d 248 (5th Cir. 2016). But *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.' " Pet. Reply 4 (quoting *Voest-Alpine*, 142 F.3d at 895). Wye Oak previously explained why the lone sentence in *Janvey* upon which the Government relies was unnecessary to the result. *Id.* The Government offers no response.

Regarding the Sixth Circuit, the Government relies (at 14) on *Westfield* v. *Federal Republic of Germany*, but that decision disclaimed the Government's position: "we do not hold that the only actions that may cause a direct effect in the United States are those where the sovereign is obligated to perform in the United States." 633 F.3d 409, 417 (6th Cir. 2011). Elsewhere, the Sixth Circuit has acknowledged the split, explaining that some courts will find a direct effect only where "the contract designates * * * the United States as the place of performance," whereas the Sixth Circuit and other courts "reject[]" the addition of such "unexpressed requirements." *Keller* v. *Central Bank of Nigeria*, 277 F.3d 811, 817-818 (6th Cir. 2002).[1] The Government's argument (at 14) that *Keller* "does not demonstrate any inconsistency" ignores *Keller*'s legal analysis and erroneously conflates a *sufficient* condition for jurisdiction to attach with a necessary one. Again, Wye Oak has already explained as much. *See* Pet. Reply 5. And again, the Government ventures no response.

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[1] The Government (at 15-16) points to additional confusion among the circuits over the meaning of the term "legally significant act." But courts have used the term "legally significant act" to refer to the place-of-performance requirement. *See* Pet. 16 n.3 (citing *Terenkian* v. *Republic of Iraq*, 694 F.3d 1122, 1135 (9th Cir. 2012)).

The Government's cited excerpt (at 14) from the Tenth Circuit's *Big Sky Network Canada, Ltd.* v. *Sichuan Provincial Government*, 533 F.3d 1183 (10th Cir. 2008), is taken out of context. That case involved a situation where the "only connection to the United States" was that an American corporation "intended to transfer" funds due in London back to the United States. *Id.* at 1190. It held that "an American corporation's failure to receive promised funds abroad will not," without more, "qualify as a 'direct effect in the United States,' " *id*. at 1191, which is entirely consistent with Wye Oak's position. Wye Oak relies on much more than a bare financial injury: its daily work in the United States ground to a halt, which the District Court found to result directly (and exclusively) from Iraq's breach. *See* Pet. App. 48a-58a. The Government again ignores the legal *rule* articulated by then-Judge Gorsuch in *Big Sky*, which is squarely at odds with the place-of-performance requirement—namely, that courts should "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." *Id*. at 1192.

Finally, the Government offers a perfunctory attempt (at 14-15) to distinguish the Eighth Circuit's cases "because they did not even involve a contractual failure to pay." But nowhere has the Eighth Circuit limited 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). Nor does anything in the text of the commercial-activity exception support such disparate treatment. *See* Pet. 27-29.

B. The Government's Defense Of The Place-Of-Performance Requirement Fails.

The Government's blink-and-you'd-miss-it effort (at 10) to defend the place-of-performance requirement on the merits is not persuasive. The Government asserts—without citation or elaboration—that "a court necessarily must look to the location of contractual performance and the contractual consequences of a breach" to "determine the immediate consequences of a breach." U.S. Br. 10. But the Government provides no defense of interpreting the word "immediate" to mean only the "contractual consequences" of a breach. *See Republic of Argentina* v. *Weltover*, 504 U.S. 607, 617 (1992). Indeed, the Government's substitution of "contractual consequences" for the statutory term "direct effect" just highlights the *absence* of any support for the D.C. Circuit's rule in the FSIA. The Government's judicial gloss "arbitrarily shrinks the class of contract claims that may survive the FSIA." *Odhiambo* v. *Republic of Kenya*, 764 F.3d 31, 48 (D.C. Cir. 2014) (Pillard, J., concurring in part and dissenting in part).

The Government refers to *Weltover*'s gloss on the statutory text as requiring an "immediate" consequence. But in this context, the concept of "immediacy" refers to something "proximate." *Immediate*, Black's Law Dictionary (12th ed. 2024). That is, something "[h]aving a direct impact; without an intervening agency." *Id*. That meaning follows from the term Congress chose: "direct." *See, e.g.*, "Immediate," American Heritage Dictionary 643 (2d ed. 1982) ("1. Acting or occurring without the interposition of another agency or object; *direct*") (emphasis added).

The Government's limitation of "immediate" consequences to "contractual consequences" also cannot be reconciled with this Court's longstanding recognition that questions of causation—including proximate cause—are primarily questions of fact subject only to "limited review." *Exxon Co., U.S.A.* v. *Sofec, Inc.*, 517 U.S. 830, 840-841 (1996); *see Milwuakee & St. Paul Ry. Co.* v. *Kellogg*, 94 U.S. 469, 474-475 (1876). The Government's approach would take the fact-dependent test Congress adopted and reduce it to an exercise of contractual interpretation. But as then-Judge Gorsuch explained in *Big Sky*, Congress instead chose a rule that involves a careful, context-specific analysis rather than a one-size-fits-all approach. 533 F.3d at 1190.

The Government (at 11) also cannot dispute that the D.C. Circuit's rule leads to absurd results. Most prominently, the Government cannot avoid that the *exact same consequence* could qualify as "direct" or not based on the arbitrary happenstance of whether the parties wrote it down in advance. *See* U.S. Br. 9 n.2. The Government does not even try to defend this bizarre outcome. *See id.*

Next, the Government fails to rebut that the D.C. Circuit's rule generates disparate outcomes in contract and tort cases. As the Second Circuit frankly acknowledges, a "financial loss suffered" in the United States will generally be sufficient to "count as a direct effect" in tort, but that will *never* be true for contract cases in circuits applying the place-of-performance requirement unless "the United States is the place of performance for the breached duty." *Atlantica Holdings* v. *Sovereign Wealth Fund Samruk-Kazyna JSC*, 813 F.3d 98, 108-109, 113 (2d Cir. 2016).

The Government instead argues (at 11) that the difference will not "lead to diverging outcomes" when it just so happens that "the location of * * * nonperformance and * * * initial injury are the same." But that will not be true in all cases (just as it is not true here). The Government is therefore obliged to defend the tort-contract distinction, arguing that it stems from "longstanding choice-of-law principles." U.S. Br. 11. But Congress, in the FSIA, already made the relevant choice. The FSIA applies the same "direct" standard to "any case." 28 U.S.C. § 1605(a). Superimposing a distinction between tort and contract law is thus inconsistent with this Court's recent decision in *Republic of Hungary* v. *Simon*, where the Court declined to announce different rules for different types of property under the FSIA's expropriation exception. 604 U.S. 115, 128 (2025). Just as "[t]he plain text of [FSIA's] expropriation exception treats all 'property' alike," *id*., the commercial-activity exception employs the same standard for all "act[s]" upon which an action is based, 28 U.S.C § 1605.

The Government's policy arguments (at 12-13) "cannot surmount the plain language of the statute." *Republic of Hungary*, 604 U.S. at 138 (quotation omitted). They fail on their own terms in any case. It is American businesses who are most likely to suffer the direct effects of a contractual breach in the United States—even if they could not have foreseen those effects when contracting. Faithfully applying the FSIA's text strikes the appropriate balance between preventing "opportunistic plaintiffs from unilaterally haling foreign sovereigns into United States courts," while "also ensur[ing] that private parties are not disadvantaged in commercial dealings with foreign state

entities." *Odhiambo*, 764 F.3d at 47 (Pillard, J., concurring in part and dissenting in part). For good reason, a plaintiff may not "unilaterally decide[] to relocate to the United States" after a breach occurs to generate jurisdiction here. *Id*. at 44. But that did not happen in this case and the FSIA commands a different result where, as here, a foreign government's breach of contract directly grinds a firm's ongoing domestic work on the contract to a halt. *See* Pet. App. 10a. The Government's contrary approach would have indefensible consequences for American businesses like Wye Oak. Although Wye Oak's work under the contract was, as General Petraeus testified, the "centerpiece" of the U.S. effort to rebuild Iraq's military, Pet. App. 66a, and although there is no dispute that Iraq brazenly breached its agreement, the Government's rule would leave Wye Oak with nothing.

The Government acknowledges (at 12) that the place-of-performance requirement "turns the jurisdictional inquiry into a matter of 'contractual draftsmanship.' " It sees this as a virtue because companies "can simply insist on payment in the United States (or else demand a risk premium for payment abroad)." U.S. Br. 12. But this imposes an artificial constraint on companies that Congress did not: It requires companies who lack bargaining leverage or are otherwise unable to negotiate a U.S. place-of-payment provision to anticipate everywhere performance might occur to ensure enforceability in U.S. courts. That rule will fall hardest on small American businesses like Wye Oak, who are most likely to experience direct effects in the United States.

Moreover, the circuit split on this issue creates an administrative burden of its own—requiring companies like Wye Oak, headquartered in the Third Circuit, to anticipate *before* contracting what rules every other circuit in the country *might* apply. Congress did not lay this trap for the unwary.

C. The Government's Alternative Arguments For Affirmance Are No Basis To Deny Certiorari.

It is telling that the Government concentrates its efforts (at 8-10) not on defending the place-of-performance requirement but on attempting to show that Wye Oak's injuries would not be a direct effect of Iraq's breach even applying traditional proximate causation principles. But to get there, the Government ignores the District Court's extensive factual findings, which the D.C. Circuit did not disturb.

The Government asserts, for example, that Wye Oak's "eventual decision to stop" its work in the United States "was an independent business decision." U.S. Br. 9. That is not what the District Court found. 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—or, indeed, any other causes at all. 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 its work, including its work in the United States. *See* Pet. App. 52a-60a.

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. *See* Pet. 30; *cf. Sofec*, 517 U.S. at 841 (holding that questions of causation are "subject to limited review" on appeal). Those findings make clear that Wye Oak's injuries were not, as the Government contends (at 9), the "*downstream* impacts of a financial loss," such as when a company claims that it lost a separate profit opportunity because a breach-of-contract deprived it of needed capital.[2] The District Court's undisturbed finding was that the *immediate* impact of Wye Oak's failure to pay was to force Wye Oak to stop operating; there were no intervening events or even any other causes. The D.C. Circuit's decision thus turned entirely on its view that "the Agreement simply never established or contemplated any travel or performance in the United States." Pet. App. 19a.

Regardless, at most, the Government supplies arguments for the lower courts to address on remand after this Court has clarified the governing legal framework. This Court has previously declined to follow the Government's recommendation in FSIA cases. *See, e.g.*, *OBB Personenverkehr AG* v. *Sachs*, 577 U.S. 27 (2015) (granting certiorari despite contrary

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[2] Wye Oak's petition does not rely on collateral lost opportunities, such as its "planned American-based expansion," which is what the D.C. Circuit described as a "unilateral business judgment." Pet. App. 18a. Contrary to the Government's characterization (at 5), the D.C. Circuit never described Wye Oak's termination of existing performance as a "unilateral" business judgment. *See* Pet. App. 18a.

Government recommendation). The Court should do so again here, grant certiorari, and reverse.

II. The Court Should Grant Certiorari On The Second Question Presented.

The Government does not deny that the second question presents an intra-case circuit split. It tries (at 21-22) to dodge the disagreement between the Fourth Circuit and the D.C. Circuit because "the Fourth Circuit's conclusion predated" this Court's opinion in *Sachs*. 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.

The Government argues (at 18) that after *Sachs* "the 'act' on which a suit is based logically must be attributable to the foreign state." *Sachs* says no such thing. *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 examined to determine those facts that form "the core of the[] suit." *Id*. at 35.

These "core" facts can include the plaintiff's own acts and injuries. *Id*. When Wye Oak sues for work it performed, the "core" of the suit is "based upon" Wye Oak's performance. Nothing in *Sachs* suggests that there must be only a *single* gravamen for every lawsuit. And although the D.C. Circuit suggested Wye Oak could not satisfy the "based upon" requirement in a footnote, *see* Pet. App. 103a n.2, the Government does not dispute that this Court has declined to treat

such scant alternative holdings as a barrier to review, *see* Pet. Reply 10.

Wye Oak has already explained why the Government's textual and legislative-history-based arguments fail. *See* Pet. 33. Its policy arguments cannot fill the void. Addressing any "oddities" that may result from Congress's text, U.S. Br. 21 (citation omitted), is "Congress's job," *SAS Inst. Inc.* v. *Iancu*, 584 U.S. 357, 368 (2018).

CONCLUSION

The petition should be granted.

Respectfully submitted,

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