No. 24-759

In the

Supreme Court of the United States

WYE OAK TECHNOLOGY, INC.,

Petitioner,

v.

REPUBLIC OF IRAQ, *et al.*,

Respondents.

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

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BRIEF IN OPPOSITION OF RESPONDENTS REPUBLIC OF IRAQ AND THE MINISTRY OF DEFENSE OF THE REPUBLIC OF IRAQ

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether, in a breach-of-contract suit against a foreign state, where the action is "based upon" the "act" constituting the sovereign's alleged breach, it is appropriate to look to the place where contractual performance is due to identify where the immediate consequence (and thus the "direct effect") of that breach occurred for purposes of clause three of the commercial activities exception of the FSIA?

   The D.C. Circuit correctly answered this question in the affirmative and, contrary to Wye Oak's claim of a circuit split, no circuit rejects looking to the place of contractual performance to decide whether the breach of the commercial contract that is the "act outside the territory of the United States" upon which the plaintiff's claim is "based" "causes a direct effect in the United States."

2. Whether the "act performed in the United States," referred to in clause two of FSIA's commercial activities exception, which abrogates a foreign state's sovereign immunity in an action "based upon" that act, must be the act of the foreign sovereign defendant and not of the plaintiff, where (a) under clause one and clause three of the same provision, it is the defendant's conduct that must provide the necessary U.S. nexus for establishing an immunity exception, and (b) the plaintiff must have been actually injured by that "act performed in the United States"?

The D.C. Circuit also correctly answered this question in the affirmative, and the circuit split claimed by Wye Oak is illusory, because the only contrary decision (the Fourth Circuit's decision at the outset of this case) is clearly wrong and in any event superseded by this Court's decision in *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 35 (2015) ("*Sachs*") which eliminates any doubt that the "act" must be that of the foreign state defendant if the plaintiff's claim is to be "based upon" that act, as the statute requires.

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INTRODUCTION

Wye Oak Technology, Inc. ("Wye Oak") sued Iraq and its Ministry of Defense (the "Ministry") for failing to pay three invoices due by their terms in Baghdad, Iraq. The invoices were issued by Wye Oak under a contract with the Ministry, the Broker Services Agreement (the "Agreement"), providing for Wye Oak to refurbish or scrap military equipment located in Iraq. Wye Oak proposed the Agreement to the Ministry in Iraq, then negotiated and signed it in Iraq, and the Agreement was governed by Iraqi law. As Judge Millett recounted:

> From the start, Wye Oak and the Ministry fully anchored their relationship in Iraq.
>
> The work involved rebuilding Iraqi military equipment for use by Iraq's armed forces. The equipment was already in Iraq, and the maintenance and refurbishment work were to be performed there as well.
>
> The breach occurred in Iraq too. When the time came for payment, Wye Oak chose Iraq as the place where the Ministry should pay. Those withheld dollars—which should have changed hands in Baghdad—were meant to fund Wye Oak's ongoing work in Iraq.

Pet. App. 12a-13a (internal citations omitted).

Respondents are therefore immune from suit, as the D.C. Circuit twice held, because there simply is no nexus between Iraq's commercial activity conducted in Iraq, and the United States, a nexus that the FSIA's commercial activities exception requires before subjecting a foreign state to suit here. Respondents did nothing in the United States in

connection with the Agreement, Pet. App. 99a, and "all of the immediate consequences of Iraq's breach were felt in Iraq, not the United States," Pet. App. 12a.

Wye Oak instead relies on its own conduct in the United States in seeking to satisfy the FSIA's commercial activities exception, arguing that: (1) administrative tasks Wye Oak performed in the U.S. in support of its work in Iraq, constitute the "act performed in the United States in connection with a commercial activity of the foreign state elsewhere" under clause two of that exception; and (2) Wye Oak's choice to cease those administrative activities in the U.S. and to stop sending its employees to Iraq in response to (and months after) the Ministry's non-payment in Iraq, constitute a "direct effect in the United States" of the Ministry's breach under clause three of that exception.

On separate appeals, the D.C. Circuit rejected both of Wye Oak's attempts to bootstrap its own actions and decisions in the United States into an exception to Iraq's sovereign immunity.

First, the D.C. Circuit rightly rejected the argument that Wye Oak's own administrative activities in the United States could serve as the "act performed in the United States" required by clause two of the FSIA's commercial activities exception, because "the second clause is only applicable when the act inside the United States is an act *of the foreign sovereign*," and because the plaintiff's claim must be "based upon" that act. Pet. App. 89a. (emphasis in original).

Second, the D.C. Circuit correctly applied the standard adopted by this Court in *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1993)

("*Weltover*"), to conclude that the Ministry's non-payment in Iraq caused no "direct effect" or immediate consequence in the United States, because "[n]othing in Wye Oak's Agreement with Iraq established or necessarily contemplated performance in the United States." Pet. App. 16a (applying *Odhiambo v. Republic of Kenya*, 764 F.3d 31 (D.C. Cir. 2014) (Kavanaugh, J.)). Additionally, the D.C. Circuit specifically found the particular domestic effects that Wye Oak claimed provided a U.S. nexus were not the immediate, inexorable result of Iraq's failure to pay money due in Baghdad, but entailed intervening decisions or actions of Wye Oak and third parties in response to the breach. Pet. App. 18a-19a.

This Court need not review either D.C. Circuit decision because: (i) there are no material differences among the Courts of Appeals over the proper approach to identifying whether a sovereign's breach of contract abroad causes a "direct effect" in the United States under clause three, and (ii) the only circuit that differed on whose "act in the United States" abrogates the sovereign's immunity under clause two, did so *before* this Court's decision in *Sachs* that resolves this question in accord with the D.C. Circuit's decision.

On clause three, Wye Oak insists review is warranted because, it contends, the circuits are split 4-to-6 over whether a "direct effect" of a contract breach can be found only when performance is due in the United States. There is no circuit split on this question. Wye Oak does not cite a single court decision finding a "direct effect" where performance was due outside the United States, as it was here; nor a single court that applied the "traditional causation principles" that Wye Oak advocates. This case would

not be decided differently under any of the decisions cited by Wye Oak.

If the cases cited by Wye Oak demonstrate any "split," it concerns a question not presented in this case: whether a contract must specify the United States explicitly as a place of performance in order for a breach to cause a "direct effect," or whether it is sufficient that the plaintiff had the right to choose the place of performance and selected the United States. That question has no relevance here, as Wye Oak selected Iraq as the place of payment of its invoices.

The Circuits – including the ones Wye Oak claims split from the D.C. Circuit – uniformly find, like the D.C. Circuit, *no direct effect in the United States* where *no contractual performance was due here*. *Big Sky Network Canada, Ltd. v. Sichuan Provincial Gov't*, 533 F.3d 1183, 1191 (10th Cir. 2008) (Gorsuch, J.); *Janvey v. Libyan Inv. Auth.*, 840 F.3d 248, 262 (5th Cir. 2016); *Westfield v. Fed. Republic of Ger.*, 633 F.3d 409, 415 (6th Cir. 2011).

Wye Oak also ignores (and does not challenge in its petition) the D.C. Circuit's alternative holding, namely, that each of Wye Oak's claimed effects in the United States "did not 'flow immediately' from [the Ministry's] breach" in Iraq because they resulted from *Wye Oak's* response to that breach or involved intervening actions of Wye Oak or third parties. Pet. App. 18a-19a.

On clause two, Wye Oak argues that although both other clauses of the commercial activities exception are satisfied only by acts of the foreign sovereign defendant, the D.C. Circuit should have read clause two as satisfied by *anyone's acts* inside the

United States, as Fourth Circuit did in the 2011 interlocutory appeal in this case.

Wye Oak fails to acknowledge that the "act performed in the United States" satisfies clause two only if Wye Oak's suit is "based upon" that act. As this Court explained in *Sachs*, the "based upon" requirement mandates that the "act" at issue must be one that "actually injured the plaintiff." 577 U.S. at 35. As the D.C. Circuit recognized (but Wye Oak does not discuss), the relevant "act" here is the Ministry's nonpayment of invoices in Iraq. Pet. App. 104a. Wye Oak's own actions in the U.S. obviously did not injure Wye Oak, so this case is not "based upon" them. The circuit split claimed by Wye Oak is an illusion. The only court that has found an act of the plaintiff to constitute the "act performed in the United States" – the Fourth Circuit in this very case – did not cite any authority for its interpretation and preceded this Court's decision in *Sachs*.

In short, this is a straightforward, fact-bound dispute over nonpayment of money due in Iraq under a contract proposed, signed, and to be performed in Iraq. All relevant authorities are in agreement with the D.C. Circuit's analyses and holdings. There is no reason for this Court to review them.

STATEMENT OF THE CASE

A. Factual Background

After the fall of Saddam Hussein, in early 2004, Dale Stoffel, the CEO of Wye Oak, "a small American company" with four employees, traveled to Iraq and "approached the Iraqi Ministry of Defense, in Iraq, about doing business there." Pet. App. 2a, 12a. He proposed to the Ministry "a plan to inventory and assess Iraq's existing military equipment, refurbish

what equipment it could, and sell the rest for scrap." Pet. App. 5a. Dale Stoffel called his proposal the "Iraqi Military Equipment Recovery Program" ("IMERP"). Pet App. 45a. "In June 2004, Wye Oak sent the [Ministry] a letter formally proposing the IMERP in Iraq" as well as a contract under which Wye Oak would carry it out. Pet. App. 45a. "In August 2004, Wye Oak and the [Ministry] officially executed the [Agreement] in Iraq." Pet. App. 45a. The United States is not a party to, nor is it mentioned in the Agreement. Pet. App. 249a-264a (Agreement).

Wye Oak undertook to refurbish Iraqi military equipment at bases in Iraq then under U.S. military control and to arrange scrap sales of the unsalvageable equipment. Pet. App. 5a, 26a. The Agreement did not require Wye Oak to do anything in the United States, nor did it require anything to be sent to or sourced from the United States. Pet. App. 249a-264a (Agreement).

Although the Ministry confirmed, upon Wye Oak's request, that Wye Oak was "free to pursue any outside assistance it deems necessary, domestic or foreign," Pet. 7, Wye Oak had complete discretion if and what outside assistance it would obtain for its work in Iraq – but Wye Oak would not be paid for it under the Agreement. Wye Oak was not required to spend any of its own money on its performance under the Agreement, but was "responsible for its own administrative costs, expenses and charges necessary or incidental to its functions [under the Agreement]." Pet. 257a (Agreement §10).

After signing, Wye Oak began its performance in Iraq, hiring contractors from "Ukraine, Moldova, Belarus, and Russia" (because the Iraqi military

equipment was primarily of Soviet origin) as well as "local Iraqi employees." Pet. App. 57a. Back in the United States, David Stoffel (Dale's brother) "overs[aw] all I.T. services for Wye Oak" (consisting of "reviewing all email communications that came through the server that housed Wye Oak's data" and "purchasing computer equipment and software") and performed other administrative tasks. Pet. App. 81a.

The entirety of Wye Oak's compensation was for its Iraq-based performance: 10% commission for scrap sales and 10% of the cost of refurbishing services. Pet. App. 81a, 254a (Agreement §3). Wye Oak also included a 15% overhead charge in each invoice, Pet. App. 127a, without regard to whether or where Wye Oak incurred any overhead costs. The Ministry was to pay Wye Oak pursuant to pro forma invoices, advancing money for Wye Oak's proposed work, to be "reconciled by final invoice" once it completed that work. Pet. App. 120a, 254a (Agreement §5(b)). The invoices were payable "in the form and manner as directed by [Wye Oak]." Pet. App. 5a, 254a-255a (Agreement §5(b)).

In October 2004, Wye Oak submitted three invoices to the Ministry totaling $24.7 million. Pet. App. 26a. Exercising its contractual right to specify the form and manner of payment, Wye Oak instructed the Ministry to pay each invoice "at the Baghdad Iraq office of [the Ministry]." Pet. App. 26a-27a.

Despite the Ministry's failure to pay by the end of October, Wye Oak continued its work in Iraq, and meanwhile "pursued various efforts to secure payment." Pet. App. 6a. Wye Oak "contacted several American officials," and "[a]s a result of that outreach, a Senator contacted the State Department," and then

"[t]he State Department talked to the Department of Defense." Pet. App. 6a.

Although Wye Oak's U.S. personnel left Iraq in December 2004 following the death of Dale Stoffel, relying on local contractors, Wye Oak continued to refurbish equipment until the January 2005 parliamentary elections, after which it decided to cease its work in Iraq. Pet. App. 83a.

B. Procedural History

1. Fourth Circuit Affirms Denial Of Iraq's Motion To Dismiss On Immunity Grounds

In 2009, Wye Oak filed its one-count complaint for breach of contract in the United States District Court for the Eastern District of Virginia ("E.D.Va."). Iraq moved to dismiss, asserting, *inter alia*, sovereign immunity. *Wye Oak Tech, Inc. v. Republic of Iraq*, No. 1:09-cv-793 (AJT/JFA), 2010 WL 2613323 (E.D. Va. June 29, 2010). Wye Oak argued that all three clauses of the commercial activities exception applied. The E.D.Va. rejected Iraq's immunity arguments.

Iraq pursued an interlocutory appeal. The Fourth Circuit affirmed, considering only clause two, and holding that Wye Oak's allegation that "it performed acts in the United States" in connection with the Ministry's commercial activity in Iraq satisfied its obligation to plead "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." *Wye Oak Tech., Inc. v. Republic of Iraq*, 666 F.3d 205, 215-16 (4th Cir. 2011). The Fourth Circuit cited no authority (caselaw or otherwise) for its clause two interpretation and included no explanation how Wye Oak's claim was

"based upon" it performing "accounting, computer programming [tasks and] contacting agents of foreign nations." *Id.*

2. The D.C. Circuit Holds That Wye Oak's Own Acts Cannot Satisfy Clause Two Of The Commercial Activities Exception

The case was then transferred (on venue grounds) to the District Court for the District of Columbia ("D.D.C."), where Wye Oak continued arguing that its own acts satisfied both clause two and clause three of the commercial activities exception. Following a bench trial, the D.D.C. considered itself bound by the Fourth Circuit's decision on clause two under the law-of-the-case doctrine, but also independently agreed that subject matter jurisdiction existed under clause two, holding that Wye Oak's "writing a computer program[,]" "maintaining email communications[,]" and other "administrative activities" constituted "acts performed in the U.S." – and that Wye Oak's breach of contract claim was "based" on those acts because they "were done in connection" with Wye Oak's work under the Agreement in Iraq. Pet. App. 165-66a.

The D.D.C. then found the Ministry breached the Agreement as of October 28, 2004 by failing to pay Wye Oak's invoices and awarded substantial damages. Pet. App. 176a.

Respondents appealed. In an opinion by then-Judge Jackson, the D.C. Circuit unanimously reversed. Pet. App. 75a. The D.C. Circuit held that the Fourth Circuit's decision did not constitute law-of-the-case as to the D.D.C.'s jurisdiction to enter a judgment post-trial. Pet. App. 93a. It further held

that the "finding of subject-matter jurisdiction rest[ed] on an erroneous interpretation of the second clause of the commercial activities exception" because that "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." Pet. App. 75a, 89a. The D.C. Circuit's holding rested on two independent bases:

First, clause two has to be read together with the "first and third clauses," which "link abrogation of sovereign immunity to the fact and implications of the state's own activities," and so it would be "entirely anomalous … to now read clause two to dispense with immunity if just anyone performs an act in the United States in connection with the foreign state's commercial activity." Pet. App. 100a.[1]

Second, "yet another reason why Wye Oak's clause two argument fails" is that under clause two, the claim must be "based upon" the "act in the United States" that the plaintiff invokes. Pet. App. 103a. Applying this Court's ruling in *Sachs* that the "based upon" requirement refers to "the gravamen of the suit," meaning the conduct that "actually injured plaintiff," the D.C. Circuit held that in a breach-of-contract case, the act upon which the action is based is the foreign sovereign's "nonperformance of its promised

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[1] The D.C. Circuit added that while it is not, "[t]o the extent that one might think that the second clause is ambiguous … the legislative history of section 1605(a)(2) leaves no doubt." Pet. App. 102a. The House and Senate Judiciary Committee Reports state that the FSIA's phrase "act performed in the United States in connection with a commercial activity of the foreign state elsewhere,' looks to conduct of the foreign state in the United States." Pet. App. 102a (citing S. Rep. No. 94-1310, at 12 (1976); H.R. Rep. No. 94-1487, at 19 (1976)).

obligations." Pet. App. 103a. Since Wye Oak sued for the Ministry's non-payment, which occurred in Iraq, clause two was inapplicable.

Because the D.D.C's post-trial decision considered its jurisdiction only under clause two, the D.C. Circuit remanded to the D.D.C. to assess, "whether the facts support application of" the third clause of § 1605(a)(2). Pet. App. 75a.

3. The D.C. Circuit Holds That The Ministry's Failure To Pay In Iraq Did Not Cause Any Direct Effect In The United States

On remand, Wye Oak argued that the Ministry's nonpayment in Iraq caused six different "direct effects in the United States." The D.D.C. rejected Wye Oak's first three purported direct effects, finding: *first*, no direct effect due to money not arriving in a U.S. bank account, because the Ministry was not "obligated to make a payment in the United States," Pet. App. 42a; *second*, Iraq did not target Wye Oak as a U.S. company, because "the record does not show any affirmative actions taken by Iraq or [the Ministry] in the United States to identify Wye Oak" but rather the steps to begin the relationship were taken by Wye Oak in Iraq, Pet. App. 44a; and *third*, the breach did not directly "disrupt[] Wye Oak's [unsigned] subcontract with CLI [Wye Oak's affiliate]," because "the [Agreement] did not require Wye Oak to hire CLI." Pet. App. 50a.

The D.D.C., however, sustained three other direct effects in the United States resulting from non-payment of the invoices in Iraq: (1) Wye Oak's decision to "cut-off … capital, personnel, data, and intangible services between the United States and Iraq,"

following non-payment and Dale Stoffel's death, was "a direct effect of the Ministry's nonpayment," Pet. App. 60a; (2) "U.S. government officials' attempts to secure payment for Wye Oak were an 'immediate consequence' of Iraq's nonpayment," Pet. App. 65a; and (3) "Iraq's nonpayment of Wye Oak caused a direct effect in the United States by disrupting a program that bore directly on the U.S. military's readiness to withdraw from Iraq," Pet. App. 71a.

Respondents again appealed, and the D.C. Circuit again unanimously reversed. Pet. App. 2a. The D.C. Circuit found that "Iraq was the center of Wye Oak's entire commercial relationship with the Ministry, and Iraq is where the breach's direct effects occurred." Pet. App. 11a. Applying *Weltover*, the D.C. Circuit found that none of Wye Oak's proposed effects in the United States were "direct," because none constituted an "immediate consequence" of the Ministry's breach in Iraq. Pet. App. 12a-22a. Specifically:

- Any "halt in commerce" between the United States and Iraq resulting from Wye Oak's decision to cease its operations in Iraq months after the breach was not an immediate consequence of Ministry's failure to pay in Baghdad because:

  (a) Applying its own prior precedent, *Odhiambo v. Republic of Kenya*, 764 F.3d 31 (D.C. Cir. 2014) (Kavanaugh, J.), the D.C. Circuit concluded that because "[n]othing in Wye Oak's Agreement with Iraq established or necessarily contemplated performance in the United States," the Ministry's failure to make payment in Baghdad did not cause a

"direct effect in the United States," Pet. App. 16a; and

(b) Wye Oak's own "decisions to cease business" in the United States and "stop[] operations in Iraq" three months after the breach "did not flow immediately from Iraq's breach." Pet. App. 18a-19a.

- U.S. officials' intercessions on behalf of Wye Oak and "diplomatic and military impacts in the United States" were not immediate consequences of the breach because of "intervening and independent elements" – such as "Wye Oak's decision to seek out the officials; the officials' own decisions to act based on Wye Oak's overtures; and the government's response to those overture." Pet. App. 19a. "[T]oo many discretionary steps made by too many actors" between the breach and those effects made them indirect. Pet. App. 21a.

Because no exception to Respondents' sovereign immunity applies, the D.C. Circuit vacated the judgment and instructed the D.D.C. to dismiss the case.

On August 29, 2024, Wye Oak filed a petition for panel rehearing and rehearing *en banc*, which was denied on October 16, 2024.

REASONS FOR DENYING THE WRIT

A foreign state is presumptively immune from suit in the United States unless one of the narrow exceptions codified in the Foreign Sovereign Immunities Act applies. *Republic of Hungary v. Simon*, 145 S. Ct. 480, 488 (2025); 28 U.S.C. § 1604.

Under all three prongs of the FSIA's commercial activities exception, a plaintiff suing for breach of contract must demonstrate that: (a) the activity of the foreign state underlying the contract is commercial; and (b) the foreign state's act on which the plaintiff is suing has a sufficient U.S. nexus. *See Saudi Arabia v. Nelson,* 507 U.S. 349, 355 (1993); *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 490 (1983) ("by enacting substantive provisions requiring some form of substantial contact with the United States," the Congress, in the FSIA, "protected against th[e] danger" of opening American courts to "any dispute which any private party may have with a foreign state anywhere in the world").[2]

Here, the dispute is over whether there is a sufficient nexus between the Ministry's breach of the admittedly "commercial" Agreement, and the United States. Unable to point to any act *of Iraq* in the United States, Wye Oak insists that *its own* administrative acts here created the required U.S. nexus for purposes of clauses three and two of the commercial activities exception.

Contrary to Wye Oak's assertions, under clause three, there is no split over what courts properly consider in determining whether a breach of contract abroad causes immediate consequences in the United States. Under clause two, this Court's decision in *Sachs* settles any lingering dispute whether a plaintiff's "act in the United States" can satisfy the exception. Wye Oak also does not challenge the alternative grounds for both of the D.C. Circuit's rulings, which means that even if there were any

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[2] *See* 28 U.S.C. §§ 1605(a)(2)-(a)(6), specifying for each FSIA exception, what must occur "in the United States."

circuit split, this case would be an inappropriate vehicle to resolve any differences in the standards applied by the circuits.

I. The D.C. Circuit's Decision Does Not Exacerbate Any Circuit Split Regarding The Direct Effects Clause

"There is no dispute that Wye Oak's lawsuit" is over the Ministry's breach of the Agreement, and therefore "is based upon an act of Iraq that took place outside of United States territory: its failure to pay the invoices." Pet. App. 34a. That nonpayment is the "foreign sovereign's commercial act abroad" that must cause a "direct effect in the United States" under clause three to establish the required U.S. nexus necessary to deprive Respondents of their sovereign immunity. Pet. 24; 28 U.S.C. § 1605(a)(2)[3].

In *Weltover*, this Court held that "an effect is direct" only if it "follows as an immediate consequence" of the sovereign's act abroad. 504 U.S. at 618. Applying this requirement in a breach-of-contract action, this Court found that Argentina's nonpayment "had a 'direct effect' in the United States" because "New York was [] the place of performance for Argentina's ultimate contractual obligations." *Id.* at 619. Thus, *Weltover* looked to where contractual performance was due to determine whether an immediate consequence of a breach occurred in the United States.

Before this Court, Wye Oak does not challenge the D.C. Circuit's rejection of five of the six U.S. effects that it claimed resulted from the Ministry's non-payment in Baghdad. Wye Oak's Petition focuses exclusively on *one* effect, namely: the "cut-off of capital,

personnel, data, and intangible services between the United States and Iraq." Pet. 12; Pet. App. 16a-19a.[3]

Wye Oak challenges the D.C. Circuit's focus on whether the Agreement "established or necessarily contemplated performance in the United States," Pet. (i), 18, in deciding whether an immediate consequence of the non-payment in Baghdad was the cut-off of the activities in support of the Agreement that Wye Oak had been conducting in the United States.

Wye Oak argues that the D.C. Circuit along with five other circuits have erred in adopting an impermissible "bright line rule" for contract cases based on the terms and context of the breached agreement and thereby failed to heed *Weltover's* admonition against adding "any unexpressed requirement[s]" to the direct effects clause. Pet. 15. Wye Oak does not identify any performance by Iraq that the Agreement contemplated would occur in the United States, nor does it contend that the Agreement required, or even anticipated, that any of the

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[3] Wye Oak bases its "cut-off" theory on *McKesson Corp. v. Islamic Republic of Iran*, where the D.C. Circuit found a direct effect in the United States because there *Iran* forced an Iranian dairy in which McKesson had been a long-term investor and supplier to oust McKesson-designated directors from the dairy's board, to expel McKesson's employees from Iran, and to "cut off all the dairy's existing commercial ties with McKesson in the United States," effectively terminating the decades-long flows between McKesson in the U.S. and the dairy in Iran. 52 F.3d 346, 350 (D.C. Cir. 1995). Thus, the "halt to the flow of capital, equipment and personnel [from the U.S.] … was a direct consequence of *Iran's* interference with McKesson's rights to participate in the management of Pak Dairy." *Id.* at 350 n.8 (emphasis added). Here, the Ministry failed to pay money due in Iraq; it did not expel Wye Oak from Iraq or prohibit it from continuing work in Iraq. It was Wye Oak that decided whether and when to stop all activities in connection with the Agreement.

administrative tasks it performed here were to be conducted in the United States.

Nonetheless, Wye Oak argues that "had its suit proceeded in one of [four] circuits" (the Fifth, Sixth, Eighth, Tenth), Wye Oak's proposed "cut-off" effect would have been found to be direct, because those four circuits "adhere[] to the FSIA's plain text," Pet. 6, and apply "traditional causation principles" rather than exclusively considering the place of contractual performance to ascertain if a foreign state's breach of contract caused an immediate consequence in the U.S. Pet. 16. Under "traditional causation principles," Wye Oak contends, its cessation of its U.S. activities constitutes a "direct effect" because that cessation "result[ed] directly from the foreign sovereign's act" of not paying its invoices. Pet. 15. In other words, Wye Oak argues that because the Ministry's non-payment was a breach of the Agreement entitling Wye Oak to elect, at any time thereafter, to stop its own performance and sue for damages, Wye Oak's choice, months after the October 2004 payment default, to cease activities associated with the Agreement is a "direct effect" of the Ministry's breach.

Wye Oak's premises are incorrect.

To start, considering the terms of the contract in deciding whether its breach caused an immediate consequence in the United States does not add an "unexpressed requirement" to the "direct effects" clause, Pet. 26. *Weltover* rejected adding an unexpressed requirement that the effect in the United States be "substantial" or "foreseeable" *in addition to* "direct." 504 U.S. at 618. But considering the place of performance contemplated by a contract is simply a way of identifying where the "direct" or "immediate"

consequences of the breach occurred. The suit is based on a failure by the defendant to engage in conduct required by the contract. The contract specifies where that conduct was to occur or allows one of the parties to choose that location. This location is where the immediate consequences of the breach occur, as all Circuits agree.[4]

No court has applied what Wye Oak calls "traditional causation principles" to find a "direct effect in the United States" where the contract contemplated no performance in the United States. The four Circuits Wye Oak cites as supposedly applying "traditional causation principles" do not use that term; nor have they ever decided that breach of a contract to be performed outside the United States caused a "direct effect in the United States." There is no circuit split for this Court to resolve; the only split is between Wye Oak's theory and the established law.

By urging adoption of "traditional causation principles," Wye Oak is effectively arguing that the results of actions *Wye Oak* chose to take in response to the Ministry's breach – *i.e.*, ceasing its U.S. administrative activities – are direct effects of the breach itself. If results of plaintiffs' exercise of its right to stop performance following a breach counted as direct effects of that breach, then plaintiffs could manufacture direct effects anywhere in the world. That is not what "immediate consequence" means; "the foreign sovereign's actions, and not the plaintiff's"

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[4] Where the breach is a cancellation by the foreign state of a contract contemplating the procuring of goods or services from the U.S., that breach also causes a direct effect here. *See Cruise Connections Charter Mgmt. 1, LP v. Attorney General of Canada*, 600 F.3d 661 (D.C. Cir. 2010); *UNC Lear Servs., Inc. v. Kingdom of Saudi Arabia*, 581 F.3d 210 (5th Cir. 2009).

must create the direct effect. *Westfield*, 633 F.3d at 417. *See also Terenkian v. Republic of Iraq*, 694 F.3d 1122, 1138 (9th Cir. 2012) (where the immediate consequence of the sovereign's breach was that oil due at the Turkish border was not delivered there, the plaintiff thereafter not remitting payment to a designated account in New York was "merely an indirect effect of Iraq's breach"). Wye Oak's theory would effectively erase the FSIA's U.S. nexus requirement and allow the plaintiff unilaterally to abrogate the defendant's sovereign immunity in contract cases.

Additionally, the D.C. Circuit concluded that none of Wye Oak's claimed effects in the U.S. were "immediate consequences" of the breach because they also were caused by intervening acts and decisions of Wye Oak (and others). Wye Oak ignores that alternative holding.

A. There Is No Circuit Split Relevant To This Case

1. All Circuits Look To Whether Any Performance Was Due In The United States To Decide Whether A Breach Of Contract Is A Direct Effect

Contrary to Wye Oak's position, courts in the Fifth, Sixth, Eighth and Tenth Circuits have emphatically *not* "consistently rejected … the place of performance requirement," when deciding whether a breach of contract abroad causes a direct effect in the United States. Pet. 21; *see* Pet. 19-21 (explaining that the Second, Third, Seventh, Ninth, and Eleventh Circuits also consider the place of contractual performance in deciding where a direct effect occurs). Indeed, Wye Oak does not cite a single case in any of

those circuits finding a "direct effect" here from breach of a contract that was to be performed fully abroad.

Fifth Circuit. Wye Oak cites *Voest-Alpine Trading USA Corp. v. Bank of China*, 142 F.3d 887 (5th Cir. 1998), to suggest that the Fifth Circuit takes a "textual approach" to the direct effects clause that supposedly ignores where the contract was to be performed. Pet. 21.[5]

But *Voest-Alpine* found a direct effect in the U.S. based on the finding that because the Bank of China should "have wired the money directly to Voest-Alpine's Texas bank account," its "failure to pay on the letter of credit caused a direct effect in the United States, that is, Voest–Alpine's nonreceipt of funds in its Texas bank account followed as an 'immediate consequence' of the Bank of China's actions." *Voest-Alpine*, 142 F.3d at 886.

Wye Oak ignores the Fifth Circuit's actual analysis, and instead quotes the court's statement that "nothing in the text of the third clause supports such a requirement" to suggest that *Voest-Alpine* was declining to look at whether contractual performance was due in the U.S. Pet. 21-22 (citing *Voest-Alpine*, 142 F.3d at 894). But, "such a requirement" in the quoted passage referred to the Fifth Circuit's rejection of the defendant's argument that clause three also requires a "legally significant act" to occur in the United States. *Voest-Alpine*, 142 F.3d at 894.

Voest-Alpine also cited a pre-*Weltover* Fifth Circuit opinion in which the direct effect finding "did not turn on whether the place of payment was in the

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[5] The other Fifth Circuit case Wye Oak cites, *Frank v. Commonwealth of Antigua and Barbuda*, 842 F.3d 362 (5th Cir. 2016), was a tort case.

United States," *id.* at 895. But even that precedent, *Callejo v. Bancomer*, relied on a finding that the contractual payment should have been remitted to the United States – based on the sovereign's "regular course of business conduct with [plaintiffs] over a several-year period," including "remitt[ing] payments [to plaintiffs] through an American correspondent bank." 764 F.2d 1101, 1112 (5th Cir. 1985).

And to the extent *Callejo* could be read as finding that a failure to pay under a contract caused a direct effect in the U.S. solely because the plaintiffs "were located in the United States," and so "the effects of Bancomer's breach were inevitably felt by them there," *id.*, that is no longer good law. Since *Weltover*, the Fifth Circuit (and every other court) has made clear that "the mere fact that [a sovereign]'s commercial activity outside of the United States caused … financial injury to a United States citizen is not itself sufficient to constitute a direct effect in the United States," and Wye Oak does not argue otherwise. *Janvey*, 840 F.3d at 262 (quoting the Second Circuit); *see also Westfield*, 633 F.3d at 417 ("an American entity's mere financial loss is insufficient to establish a direct effect in the United States").

The Fifth Circuit's more recent jurisprudence (which Wye Oak ignores) makes clear that whether contractual performance is due in the United States is dispositive in the direct effect analysis. In *Janvey*, the Fifth Circuit held that a breach of contract can cause "a direct effect only if the … foreign state [defendant] … fail[s] to perform an obligation that it was required to perform in the United States." 840 F.3d at 262 (citing *Voest-Alpine* as consistent with this holding). Like the D.C. Circuit here, the Fifth Circuit

in *Janvey* went on to find that "the district court erred in deciding that the third clause of the commercial activity exception applied" because the "agreements" there "did not require any act in the United States." *Id.* at 263.

Sixth Circuit. The only Sixth Circuit contract case cited by Wye Oak[6] holds that where the sovereign had "agreed to pay but failed to transmit the promised funds to an account in a Cleveland bank," that failure "constituted a direct effect in the United States." *Keller v. Central Bank of Nigeria*, 277 F.3d 811, 818 (6th Cir. 2002).

The Sixth Circuit subsequently made clear that absent a contractual obligation in the United States, a breach does not cause a direct effect here. *Westfield*, 633 F.3d at 415 ("Because Germany had not obligated itself to do anything in the United States, we cannot say that its actions caused a direct effect in the United States based on the *Weltover* line of cases."); *see id.* (explaining that *Keller* found a direct effect because of a "preexisting duty" to perform in the United States).

Eighth Circuit. The Eighth Circuit has not issued any decision concerning the direct effects clause in breach-of-contract cases. Both Eighth Circuit decisions Wye Oak cites are tort cases, *see* Pet. 23 and neither suggests the circuit would eschew consideration of contractual place of performance. Indeed, in *General Elec. Capital Corp. v. Grossman* (involving fraudulent inducement into a contract), the

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[6] *Rote v. Zel Custom Mfg. LLC*, 816 F.3d 383 (6th Cir. 2016) was a tort case; and the section cited by Wye Oak (Pet. 22) concerned a dispute not over the meaning of "direct effect," but whether the sovereign must have minimum contacts with the United States. *Id.* at 392-95.

Eighth Circuit refused to find a direct effect in part because the defendant owed plaintiff no obligations in the United States. 991 F.2d 1376, 1386 (8th Cir. 1993).

Tenth Circuit. Wye Oak cites two Tenth Circuit cases, Pet. 23-24, both of which recognize that a breach of contract can cause a direct effect in the United States only if some contractual performance was due or occurred here.

In *Orient Mineral v. Bank of China*, plaintiff alleged that the sovereign defendant wrongfully – in breach of contract – transferred $400,000 from China to a Utah bank account. 506 F.3d 980, 997 (10th Cir. 2007). A transfer of money into the United States obviously produces a direct effect here. Unsurprisingly, the Tenth Circuit found that "it is clear that the Bank's commercial activity in China produced a "direct effect" in the United States—the [unauthorized] transfer of $400,000 to a Utah bank." *Id.* at 999.

In *Big Sky*, the Tenth Circuit found no direct effect in the United States from a sovereign's acts in China allegedly violating a joint venture agreement because "by contrast [to *Weltover*], the joint venture did not require any action in the United States, the failure of which to occur could constitute a direct effect." 533 F.3d at 1191. *Big Sky* adheres to the court's earlier precedent in *United World Trade Inc. v. Mangyshlakneft Oil Production Ass'n*, establishing that when "the defendants' performance of their contractual obligations ha[s] no connection at all with the United States," breaching that contract does not cause any "direct effect" here. 33 F.3d 1232, 1237 (10th Cir. 1994), cited by *Big Sky*, 533 F.3d at 1190. Because the joint venture in *Big Sky* was anchored in

and contemplated activities only in China, the "direct effect of defendants' acts … occurred instead [only] in China." *Id.* at 1192.

Wye Oak sidesteps *Big Sky*'s holding and reasoning and instead repeatedly quotes its statement that "we 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." Pet. 5, 24, 27 (citing *Big Sky*, 533 F.3d at 1192). Wye Oak reads this passage as an admonition that consideration of the terms of the contract imposes an impermissible extra-textual requirement onto clause three. *Id.* But then-Judge Gorsuch wrote those words as the reason for *rejecting* the plaintiff's argument that when an effect in the U.S. is "substantial," it is "sufficient" to satisfy clause three even if not an immediate consequence of the act abroad. *Big Sky*, 533 F.3d at 1192. *Big Sky* is thus fully in accord with the decision below.

* * *

Accordingly, there is no "longstanding disagreement over what constitutes a direct effect in contract cases," Pet. 29. Every circuit to consider the issue, including those that Wye Oak invokes, applies the "direct effects" clause exactly as written, and identifies where the "immediate consequence" of a contractual breach occurred by reference to the place of contractual performance.[7]

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[7] Wye Oak repeatedly cites Judge Pillard's dissenting opinion in *Odhiambo* as supposed evidence of an "acknowledged" circuit split. Pet. 5, 6, 14. But Judge Pillard merely pointed out that some circuits, unlike the D.C. Circuit, had found a direct effect as long as the plaintiff designated the U.S. as the place of

2. Tort Cases Offer No Basis For Ignoring Contractual Terms In Contract Cases

Wye Oak also contends that "the place-of-performance requirement arbitrarily penalizes contracting parties by leading to diverging outcomes in contract and non-contract cases." Pet. 27. Wye Oak quotes the D.C. Circuit's statement that in "a contract case, 'the analogy is not precise' to a tort case" as a supposed admission that it adopted improperly "diverging approaches." Pet. 28 (citing *EIG Energy Fund XIV, L.P. v. Petroleo Brasileiro*, 894 F.3d 339, 348 (D.C. Cir. 2018)). Not so.

There are a number of issues on which contract claims differ from tort claims. Here, and in contract cases generally, the parties set out their agreement in advance as to what Wye Oak and the Ministry were to do, where, and when. The fact that such *ex ante* agreement defining the boundaries of the parties' relationship is absent from tort disputes, is not a

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payment before the breach, even if the contract itself did not explicitly mention the U.S. as place of payment. *See Odhiambo*, 764 F.3d at 47 (Pillard, J., dissenting in part) (citing *Hanil Bank v. PT. Bank Negara Indonesia (Persero)*, 148 F.3d 127 (2d Cir. 1998); *DRFP L.L.C. v. Republica Bolivariana de Venezuela*, 622 F.3d 513 (6th Cir. 2010)). That split is immaterial here because it is undisputed that "Iraq, not the United States, was the place designated by Wye Oak where the money was supposed to have been paid." Pet. App. 16a. The remainder of Judge Pillard's dissent reflects a disagreement over whether Kenya's active facilitation of the resettlement of the plaintiff to the United States constituted a tacit agreement to pay his whistleblower bounty here. *Odhiambo*, 764 F.3d at 48. Judge Pillard agreed, however, that "the connection [to the U.S.] must not be one created unilaterally by the plaintiff," which "prevents opportunistic plaintiffs from unilaterally haling foreign sovereigns into United States courts." *Id.* at 47.

reason to reject a focus on the contract where one exists.

Moreover, Wye Oak's own cases explain that the analysis courts adopt in tort and contract cases as to "direct effects" is analogous. The Second Circuit has explained that "in tort, the analog to contract law's place of performance is the locus of the tort." *Atlantica Holdings v. Sovereign Wealth Fund Samruk-Kazyna JSC*, 813 F.3d 98, 109 (2d Cir. 2016). In other words, a tort causes a direct effect in the United States if the tort is "completed" here. *Id.* And a tort is complete only once "plaintiff's initial injury" occurs. *Id.* at 113. For example, "courts have consistently held that the direct-effect clause is satisfied by allegations that a plaintiff was injured in the United States by a faulty product manufactured by the defendant abroad." *Id.*[8]

Of course, when the sovereign defendant's tortious conduct itself consists of sending property to or obtaining property from the United States, that will also constitute a direct effect. Wye Oak complains

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[8] Conversely, where plaintiff's initial injury occurs abroad, no U.S. direct effect occurs. *See, e.g.*, *Guirlando v. T.C. Ziraat Bankasi A.S.*, 602 F.3d 69, 79 (2d Cir. 2010) (where an American citizen was injured abroad by a state-owned bank, her living in "much reduced circumstances" upon returning to the U.S. was not a direct effect because the initial injury was suffered—and the tort completed—abroad). *Missouri ex rel. Bailey v. People's Republic of China*, cited by Wye Oak, is an outlier in holding (with no appearance by the defendant) that a "shortage" of protective masks in Missouri was a direct effect of China having "bought up much of the rest of the world's supply" in alleged violation of U.S. antitrust laws. 90 F.4th 930, 938 (8th Cir. 2024). In any event, *Bailey* provides no basis to conclude that in a contract case, the Eighth Circuit would not look to where performance was due.

about inconsistency between this case and the D.C. Circuit's direct effect finding in *Exxon Mobil Corp. v. Corporacion CIMEX, S.A.*, 111 F.4th 12 (D.C. Cir. 2024), contending that court "rejected the *same* type of effects here … merely because … the United States was not mentioned in the contract." Pet. 28. But the difference between this case and *CIMEX* is significant. In *CIMEX*, the D.C. Circuit found a direct effect in the U.S. because the foreign sovereign's "entire remittance business [at issue] is aimed at *bringing money from the United States* into Cuba." 111 F.4th at 34 (emphasis added). This is analogous to the Tenth Circuit's finding of a direct effect where a defendant wrongfully transferred $400,000 *into a U.S. bank account*. *Orient Mineral*, 506 F.3d at 999 (emphasis added). But here, Respondents did not send anything into or obtain anything from the United States. The Ministry simply failed to pay invoices due in Iraq; any "cutoff" of flow of services or money between the United States and Iraq was Wye Oak's response to the breach occurring in Baghdad. Pet App. 18a-19a.

B. This Court Should Deny Review Because The Outcome Is Supported By An Independent, Unchallenged Holding

Wye Oak argues that this case "presents and ideal vehicle" to resolve the "exceptionally important circuit split" alleged by Wye Oak. Pet. 29. No genuine circuit split exists, but even if one did, this Court should deny review because the outcome below is supported by an independent holding, not challenged by Wye Oak.

Wye Oak ignores the D.C. Circuit's alternative reasoning that the fact that "Wye Oak eventually

stopped operations in Iraq" and "[i]ts U.S.-based personnel correspondingly stopped traveling to Iraq and no longer worked in the United States to support those Iraqi operations" did not "flow immediately" from the breach, because they were results of Wye Oak's intervening "decision[s] to cease business" months after the breach. Pet. App. 18a-19a.

In so holding, the D.C. Circuit applied its precedent in *Helmerich & Payne Int'l Drilling Co. v. Bolivarian Republic of Venezuela*, 784 F.3d 804 (D.C. Cir. 2015). There, an American corporation sued Venezuela's state oil company for failure to pay under a contract to drill oil in Venezuela, alleging that flows of money, machinery, services, and data between the U.S. and Venezuela ceased as a direct effect of that nonpayment. *Id.* at 818-19. The D.C. Circuit disagreed because "any interruptions in commerce between the United States and [Venezuela] flowed immediately not from [the sovereign's] breach of contract, but rather from [U.S. plaintiff's] decision to cease business in Venezuela." *Id.*

The D.C. Circuit's alternative holding in this case that the cessation of any flows between Iraq and the U.S. "did not flow immediately" from the Ministry's breach was a straightforward application of *Helmerich*. As Wye Oak acknowledges, an effect is not direct when it is caused by "intervening element[s]." Pet. 22. Here, this "cut off" by Wye Oak was caused by the intervening element of Wye Oak's election to reduce and ultimately stop work and when to do so. Pet. App. 18a-19a.

Because Wye Oak does not challenge this holding, nor discuss *Helmerich*, the outcome of this

case would stand even if there were a legitimate Circuit split over clause three (which there is not).

C. Wye Oak's Theory Would Render Sovereign Immunity The Exception

Wye Oak complains that looking to the place of contractual performance causes sovereign immunity to turn on "the niceties of contractual draftsmanship," Pet. 19, and would require contracting parties to enumerate "every potential effect of breach in the[] contract" to permit a suit in the U.S. Pet. 6. Not so.

First, Wye Oak had the right under the Agreement to specify in its invoices the "form and manner" of their payment. Pet. App. 5a; Pet. App. 254a-255a (Agreement §5(b)). Wye Oak exercised that right by "specifically instruct[ing] the [Ministry] to remit its payment to Wye Oak at the Baghdad Iraq office of [the Ministry]." Pet. App. 81a. Having elected to demand payment in Baghdad, not the U.S., Wye Oak cannot complain that the decision below imposed unanticipated contract drafting "niceties."

Second, the commercial terms of the Agreement demonstrate why a breach for nonpayment was not going to result in any immediate consequence in the United States. The "contract was for the rehabilitation or scrapping of military equipment entirely in Iraq." Pet. App. 16a. From Iraq's perspective, that work had no U.S. connection and needed nothing to be done in, or be delivered from, the U.S. That is why "Wye Oak and [the Ministry] negotiated the scope of th[e] work" limited to Iraq. Pet. App. 12a.

The Ministry agreed to pay Wye Oak's commissions only for Wye Oak's work in Iraq, not because of imprecise or incomplete drafting, but

because no contractual performance in the United States was requested or necessary to achieve the Agreement's purpose. Anything Wye Oak decided to do in the U.S. was its "unilateral business judgment … outside the scope of the Agreement." Pet. App. 18a.

Third, parties concerned about having recourse to U.S. courts do not need to list every potential breach; they can include a waiver of sovereign immunity in the contract, govern the contract under U.S. law, or agree to arbitration (with awards enforceable in U.S. courts), each of which would establish an FSIA exception to sovereign immunity.

II. This Court Should Not Review The D.C. Circuit's Decision On Clause Two

In its first decision in this case, the D.C. Circuit held that "the district court's application of [clause two] to support its jurisdiction based on Wye Oak's actions cannot be sustained" because that clause "requires that the act at issue be one that the foreign state has performed in the United States." Pet. App. 99a, 103a. The D.C. Circuit's reading of clause two is plainly correct and supported by *Sachs*, which resolves any possibility of a lingering split between the D.C. Circuit and the Fourth Circuit.

A. D.C. Circuit Correctly Read Clause Two

Wye Oak argues that the D.C. Circuit's decision "fails to heed the plain text" of the FSIA because the word "act" in clause two is not immediately followed by "of the foreign state" so therefore the clause can be satisfied by anyone's act in the United States. Pet. 33. The Fourth Circuit cited no authority for that reading of clause two and did not consider clause two within the context of the exception as a whole.

Even when there may be several "plausible" readings of an FSIA provision, "the most natural reading" – the one that "avoids oddities that [another] interpretation would create" and "harmonizes the various provisions" of a self-contained section – controls. *Republic of Sudan v. Harrison*, 587 U.S. 1, 8, 15 (2019).

In holding that clause two requires an act by the sovereign defendant in the United States, the D.C. Circuit read that clause in the context of the commercial activities exception "taken as a whole." Pet. App. 99a. Since "the first and third clauses have long been interpreted to relate only to the conduct of the foreign state—i.e., it is the foreign state that has to have engaged in activity that took place in the United States, or that has to have engaged in acts elsewhere that have an effect inside the United States," the second clause should also be read as "triggered only by acts of the foreign state." Pet. App. 99a.

The D.C. Circuit's harmonizes the reading of the word "act" appearing in both clause two and clause three. 28 U.S.C. § 1605(a)(2). Although clause three also does not specify whose "act" abroad it speaks to, Wye Oak concedes that it is the act of the foreign sovereign. Pet. 24; *Weltover*, 504 U.S. at 617. It would be anomalous to read the word "act" differently in clause two from how it is universally understood under clause three.

Accordingly, construing the required "act" to be that of the foreign sovereign "is the most natural" reading of the statute. *Harrison*, 587 U.S. at 8. It is also in accord with every other Circuit's reading. *See Siderman de Blake v. Republic of Argentina*, 965 F.2d

699, 709 (9th Cir. 1992) (clause two looks to "the sovereign's acts in the United States," which "must themselves represent an element in the plaintiff's cause of action"); *Riedel v. Bancam, S.A.*, 792 F.2d 587, 591 (6th Cir. 1986) (clause two is satisfied "when the foreign state, in connection with the foreign state's commercial activity elsewhere, performs an act in the United States"); *Can-Am Int'l, LLC v. Republic of Trinidad & Tobago*, 169 F. App'x 396, 406 (5th Cir. 2006) (same); *Chettri v. Nepal Rastra Bank*, 834 F.3d 50, 57 (2d Cir. 2016) (clause two "plainly" not satisfied where the sovereign defendant's "act" of freezing the plaintiff's funds did not occur in the U.S.); *Crystallex Int'l Corp. v. Venezuela*, 251 F. Supp. 3d 758, 770 (D. Del. 2017) (same). *See also* Restatement (Fourth) of Foreign Relations Law of the United States (2018) §454, Reporters' Note 6 (clause two requires "an act of the foreign state 'performed in the United States in connection with a commercial activity carried on outside the United States'").

B. The Fourth Circuit's Decision Has Been Superseded By *Sachs*, Eliminating Any Need For Review

That the D.C. Circuit's ruling "splits from the Fourth Circuit['s]," Pet. 32-33, provides no reason for review. The Fourth Circuit's reading of clause two is not only wrong, but this Court's intervening precedent in *Sachs* renders that reading no longer viable and thus eliminates any split going forward.

The second clause requires that the action be "based upon" the "act performed in the United States." 28 U.S.C. § 1605(a)(2)[2]. In 2015, four years after the Fourth Circuit's decision, this Court clarified that an action is "based upon" the "particular conduct" that

constitutes the "gravamen" of the suit, meaning "the core of the [plaintiffs'] suit: the acts that actually injured them." *Sachs*, 577 U.S. at 35.

Wye Oak dismisses the D.C. Circuit's discussion of *Sachs* as merely a "qualified" "suggest[ion that] there might be an alternative basis" for the D.C. Circuit's reading of clause two. Pet. 34. But the D.C. Circuit did not "suggest" that *Sachs* might support it decision; it clearly stated that *Sachs* provided "yet another reason why Wye Oak's clause two argument fails." Pet. App. 103a. That reason is that "the gravamen of …Wye Oak's breach of contract suit is not any act of performance that Wye Oak undertook pursuant to the [Agreement]. Rather, it is Iraq's nonperformance of its promised obligations …, and that nonperformance occurred in Iraq, not in the United States." Pet. App. 103a.

Sachs establishes that in breach-of-contract cases, the "act" for purposes of clause two is the sovereign's breach – because that is what injures the plaintiff – and not any act of plaintiff. After *Sachs*, there is no reason to expect that the Fourth Circuit would adhere to its decision that the plaintiff's own act in the United States could satisfy clause two, and thus no prospect of an ongoing circuit split for this Court to resolve.

CONCLUSION

For the reasons stated above, this Court should deny Wye Oak's Petition.

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