No. 24-17

IN THE
Supreme Court of the United States

DEVAS MULTIMEDIA PRIVATE LIMITED,

Petitioner,

v.

ANTRIX CORP. LTD.; CC/DEVAS (MAURITIUS) LIMITED; DEVAS MULTIMEDIA AMERICA, INC.; DEVAS EMPLOYEES MAURITIUS PRIVATE LIMITED; TELCOM DEVAS MAURITIUS LIMITED,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY FOR PETITIONER

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RULE 29.6 DISCLOSURE STATEMENT

The corporate disclosure statement in the petition for a writ of certiorari remains accurate.

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REPLY FOR PETITIONER

INTRODUCTION

Abandoning the court of appeals' rationale and its own statutory concessions below, Antrix now rests its FSIA argument on a phrase in the arbitration exception that no court—and apparently no treatise, scholar, or other authority—has ever construed the way Antrix does. Antrix notes that only an arbitral award "concerning a subject matter capable of settlement by arbitration under the laws of the United States" triggers the arbitration exception. But that phrase—both its plain meaning and the New York Convention provision it references—does not require a connection to U.S. commerce. It requires only that

U.S. law would permit arbitrators—rather than courts—to decide the "subject matter" of the underlying dispute. International commercial matters like the Devas-Antrix dispute are precisely the sort for which the arbitration exception was enacted.

Antrix's reading of this phrase further conflicts with the provision's broader context and evident purpose. Congress knew how to require connections to U.S. territory or commerce in the FSIA, and it did so explicitly in the Act's original exceptions. It took a different path with the arbitration exception and one of the terrorism exceptions. The arbitration exception, for its part, reflects a congressional determination that certain agreements to arbitrate constitute a waiver of immunity against the award's enforcement. That understanding furthers U.S. treaty obligations and facilitates U.S. enforcement of overseas awards by U.S. and foreign companies alike, regardless of any connection to U.S. commerce.

This Court need only honor the political branches' judgment about the limits of foreign sovereign immunity to reverse the Ninth Circuit's statutory holding and either remand the constitutional questions or resolve them in light of *Fuld* v. *Palestine Liberation Organization*, Nos. 24-20, 24-151.

ARGUMENT

I. THE FSIA'S ARBITRATION EXCEPTION DOES NOT REQUIRE A CONNECTION BETWEEN THE ARBITRAL DISPUTE AND U.S. COMMERCE

A. Rather than requiring a connection to U.S. commerce, the arbitration exception defines what arbitration agreements waive immunity

1. Invoking the same legislative history that led the Ninth Circuit astray 45 years ago, Antrix insists that *all* FSIA exceptions must require a significant connection between the underlying dispute and the United States'

territory or commerce because the original FSIA exceptions did so. Antrix Br. 15-18. Thus, despite the apparent lack of any similar U.S.-connection requirement in the arbitration exception—especially in § 1605(a)(6)(B)—that provision must nonetheless be forced onto the Procrustean bed of Antrix's imagining. This is nothing more than the Ninth Circuit's minimum-contacts approach cloaked in a thin garb of statutory interpretation.

Antrix's attempt to impose an overarching interpretive principle onto the FSIA has multiple structural problems. First, as Antrix ultimately concedes, the FSIA's exceptions themselves "spell out the types of contacts with the United States that are required for jurisdiction." Antrix Br. 15; see 28 U.S.C. § 1330(a)-(b). Because the arbitration exception does not require a connection between the underlying dispute and U.S. commerce, that should be the end of the matter. See *infra* pp. 6-12.

Second, to force its unifying vision onto the FSIA, Antrix glosses over the fundamental distinction between the U.S. connections required under § 1605(a)(2)-(5) and one of the later-enacted terrorism exceptions, § 1605A. Unlike those original exceptions, § 1605A requires no connection to U.S. territory. Antrix Br. 18 (conceding § 1605A "is not territorially bounded"). Rather, "the only required link" to the United States in § 1605A is the U.S.-nationality or U.S.-contractor status of the victim and the fact that the United States has designated the defendant as a state sponsor of terrorism. *Price* v. *Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 90 (D.C. Cir. 2002); see also Pet. Br. 26.

Despite lacking a connection to U.S. territory, Antrix correctly describes § 1605A as "hard-wired to U.S. interests." Antrix Br. 18. But the same is true of the arbitration exception, although it similarly does not require that the underlying dispute be connected to U.S. territory. It instead provides, *inter alia*, that U.S. courts may enforce

arbitral awards where "the arbitration takes place * * * in the United States," 28 U.S.C. § 1605(a)(6)(A), or where "the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards," *id.* § 1605(a)(6)(B). Congress deemed these U.S. connections sufficient to overcome immunity because the defining characteristic of the FSIA's exceptions is not connection to U.S. territory or commerce but advancement of the Nation's interests. *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 493 (1983) (Congress crafted FSIA exceptions "[t]o promote * * * federal interests," such as "foreign commerce and foreign relations"). "Such [foreign policy] decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative." *Chicago & S. Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948). Antrix errs by effectively asking the Court to reweigh the political branches' judgment regarding the type of U.S. connections that are sufficient to overcome foreign sovereign immunity.

Contrary to Antrix's suggestion, Congress's judgment to allow enforcement of certain arbitral awards regarding non-U.S. commerce was eminently reasonable. The United States has a strong interest in complying with its obligations under international agreements to recognize and enforce foreign arbitral awards, regardless of connections to U.S. commerce. Pet. Br. 25; U.S. Br. 21; Feldman Br. 23-29. And Congress understood that U.S. businesses will often agree to arbitrate with foreign states regarding wholly foreign matters and will need recourse to U.S. courts to enforce those agreements. USCIB Br. 21-22 (discussing legislative history). Indeed, U.S. businesses often use the arbitration exception to confirm awards arising out of purely foreign disputes. See, *e.g.*, *Chevron Corp.* v. *Ecuador*, 795 F.3d 200, 202 (D.C. Cir. 2015)

(confirming award governed by New York Convention arising out of an agreement to develop Ecuadorean oil fields that was arbitrated at The Hague). And this Court has already rejected efforts to limit the class of FSIA plaintiffs to U.S.-connected persons. *Verlinden*, 461 U.S. at 490-491 ("If an action satisfies the substantive standards of the Act, it may be brought in federal court regardless of the citizenship of the plaintiff.").

Antrix mistakenly asserts that requiring U.S.-commercial contacts is consistent with Congress's intent in 1976 to "draft[] the FSIA to 'embody basic principles of international law long followed both in the United States and elsewhere.'" Antrix Br. 18 (quoting *Bolivarian Republic of Venezuela* v. *Helmerich & Payne Int'l Drilling Co.*, 581 U.S. 170, 179 (2017)). But the international-law principles Congress sought to codify were "those principles embodied in * * * the 'restrictive' theory of sovereign immunity"—and had nothing to do with connections to U.S. commerce. *Helmerich*, 581 U.S. at 180. Antrix's discussion (at 18) of a state's limited jurisdiction to regulate foreign conduct is similarly misplaced. The FSIA (and especially the arbitration exception) does not regulate foreign conduct but merely specifies circumstances in which foreign states are amenable to suit. See *infra* p. 13; see also Restatement (Second) of Foreign Relations Law of the United States § 6 (1965) ("'Jurisdiction,' as used in the Restatement of this Subject, means the capacity of a state under international law to prescribe or to enforce a rule of law.'").

Third, Antrix's attempt to import a U.S.-commerce requirement from the original exceptions overlooks that the original FSIA also revoked immunity where "the foreign state has waived its immunity either explicitly or by implication." 28 U.S.C. § 1605(a)(1). The arbitration exception embodies Congress's judgment that an agreement to arbitrate waives immunity to U.S. enforcement so long as it

satisfies the requisites of the arbitration exception. That is confirmed not only by the legislative history and an *amicus* brief by the provision's drafter. See Pet. Br. 24-25; Feldman Br. 11-18. It is also explicit in the text, which lists three possible ways an arbitration agreement satisfies the arbitration exception, and then adds a fourth—when "paragraph (1) of this subsection [*i.e.*, the waiver exception] is *otherwise* applicable." 28 U.S.C. § 1605(a)(6)(D) (emphasis added). The arbitration exception thus follows the original FSIA's design, which reflected that waiver *or* U.S.-commercial contacts were sufficient to overcome sovereign immunity.[1] *Verlinden*, 461 U.S. at 490 & n.15.

In sum, Congress judged it to be in the United States' interest to allow domestic enforcement of specified types of arbitration agreements against foreign states. The arbitration exception must therefore be interpreted on its own terms, free of misguided presumptions that the FSIA generally requires a connection between the underlying dispute and U.S. territory or commerce.

2. After conceding below that the arbitration exception was satisfied, Pet. App. 21a-22a, Antrix now contends that the Devas-Antrix agreement does not "concern[] a subject matter capable of settlement by arbitration under the laws of the United States." 28 U.S.C. § 1605(a)(6); see Antrix Br. 19-24. Antrix posits that "[t]his language limits the arbitration exception to disputes concerning

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[1] Antrix complains (at 22) that provisos (A)-(D) are superfluous if an agreement to arbitrate is enough to waive immunity in U.S. court. Not so. Congress specified three common circumstances in which agreeing to arbitrate would automatically constitute waiver, 28 U.S.C. § 1605(a)(6)(A)-(C), and then clarified that § 1605(a)(1)'s waiver rule may also be "otherwise applicable" to arbitration agreements, *id.* § 1605(a)(6)(D). Nothing about this statute "is difficult to square" with Congress's intent to codify its understanding that a foreign state waives immunity against award-enforcement actions through certain agreements to arbitrate. Antrix Br. 22.

commerce within or with the United States, because disputes concerning entirely foreign commerce are not arbitrable under U.S. law." Antrix Br. 19. Antrix cites no case (or *any* authority) adopting this reading of the arbitration exception. That is for good reason. Antrix's novel interpretation conflicts with plain meaning, statutory context, and the New York Convention provision from which the "subject matter" language is lifted.

a. Start with plain meaning. "*Subject matter* capable of settlement by arbitration under the laws of the United States" most naturally refers to substantive categories of cases that U.S. law deems arbitrable. See *Subject Matter*, Black's Law Dictionary (12th ed. 2024) ("The issue presented for consideration; the thing in which a right or duty has been asserted; the thing in dispute."). The subject matter of the Devas-Antrix dispute is a contract to launch satellites and lease telecommunications spectrum. Pet. App. 17a-18a. No U.S. law prohibits arbitrating disputes about that subject matter. "Subject matter" does not typically refer to territorial limitations extrinsic to the substantive nature of the dispute.

b. Statutory context confirms this commonsense reading. Congress knew how to mandate U.S.-commerce or territorial connections as a prerequisite to overcoming immunity. The FSIA's original exceptions use terms like "commercial activity," "direct effect," and "in connection with" to impose nexus requirements with "the United States." 28 U.S.C. § 1605(a)(2)-(3). Others require that property or injuries be "in the United States." *Id.* § 1605(a)(4)-(5). Congress could easily have followed this pattern and limited enforcement of arbitral awards to those that involve "commercial activity" with effects "in the United States," or something similar. But it did not. Given the well-worn roadmap at its disposal, it would be passing strange for Congress to use the "subject matter" proviso to backdoor a U.S.-commerce limitation into the

arbitration exception. The only rational conclusion is that Congress meant something different. See *Roberts* v. *Sea-Land Servs., Inc.*, 566 U.S. 93, 102 n.5 (2012) ("[D]en[ying] effect to Congress' textual shift * * * runs afoul of the usual rule that when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.") (citation and internal quotation marks omitted).

The arbitration exception itself likewise contains sub-provisions covering arbitrations that take place "in the United States," 28 U.S.C. § 1605(a)(6)(A), and where "the underlying claim" could have been brought under FSIA exceptions that require U.S.-commercial or territorial connections, *id.* § 1605(a)(6)(C). Why then would Congress use the ill-fitting words "subject matter capable of settlement by arbitration" to duplicate these sub-provisions' requirements that the underlying claim be connected to the United States? Antrix has no answers for these fundamental questions.

c. Antrix correctly notes (at 20) that the FSIA's "subject matter capable of settlement by arbitration" language is transplanted from the New York Convention. The Convention uses that phrase consistent with its plain meaning to exclude substantive categories of cases that are not arbitrable under domestic law but must instead be decided by courts. The Convention does not use the phrase to exclude disputes that lack connections to domestic commerce. Bjorklund Br. 8; Bermann Br. 8-14.

The Convention's Article II(1) requires signatory states to recognize agreements to arbitrate "concerning a subject matter capable of settlement by arbitration." New York Convention, June 10, 1958, art. II(1), 21 U.S.T. 2517, 2519, T.I.A.S. No. 6997. Article V(2)(a) allows a signatory to refuse to recognize arbitral awards if "[t]he subject matter of the difference is not capable of settlement by

arbitration under the law of that country." *Id.* art. V(2)(a), 21 U.S.T. at 2520.

This Court has explained that the Convention's "subject matter" provision "contemplates exceptions to arbitrability grounded in domestic law." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 639 n.21 (1985). That is, it addresses "whether a subject matter can be resolved through arbitration, or is reserved for resolution by courts." United Nations Commission on International Trade Law ("UNCITRAL") Secretariat, UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) 228 (2016). As a leading scholar explains, "[a]rbitration legislation or judicial decisions in many states provide that particular categories of disputes or subject matters are not capable of settlement by arbitration." Born, International Commercial Arbitration 1028 (3d ed. 2021). Article V(2)(a) simply "allows national courts to refuse to recognize and enforce an arbitral award where * * * the subject matter of the underlying dispute * * * is not 'arbitrable'" under domestic law. UNCITRAL Secretariat, *supra*, at 228; see Born, *supra*, at 1030-1031.

The Convention's non-arbitrability doctrine "rests on the notion that some matters so pervasively involve either 'public' rights and concerns, or interests of third parties, that agreements to resolve such disputes by 'private' arbitration should not be given effect." Born, *supra*, at 1029; see also Smutny & Pham, *Enforcing Foreign Arbitral Awards in the United States: The Non-Arbitrable Subject Matter Defense*, 25(6) J. of Int'l Arb. 657, 657 (2008). Common examples of non-arbitrable "categories of disputes" in various jurisdictions include "criminal matters," "trade sanctions," and "bankruptcy." Born, *supra*, at 1029; see also Smutny & Pham, *supra*, at 657.

Echoing the Convention, the FSIA's "subject matter" limitation therefore provides that U.S. courts will not

enforce awards against foreign states regarding subject matters that U.S. law deems non-arbitrable. While U.S. courts once treated many types of claims as non-arbitrable, Born, *supra*, at 1051, today claims are generally considered arbitrable unless federal legislation "expressly" requires otherwise. See *Mitsubishi Motors*, 473 U.S. at 639 n.21; see also *id.* at 628; Born, *supra*, at 1054. Foreign disputes, if anything, are *more likely* to be arbitrable than domestic disputes because "th[e] federal policy [in favor of arbitration] applies with special force in the field of international commerce." *Mitsubishi Motors*, 473 U.S. at 631; accord *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974). Nonetheless, "Congress may specify *categories of claims* it wishes to reserve for decision by our own courts without contravening this Nation's obligations under the Convention." *Mitsubishi Motors*, 473 U.S. at 639 n.21 (emphasis added); see Born, *supra*, at 1054 n.161 (collecting statutes making certain claims non-arbitrable).

In short, the "subject matter" limitation in the FSIA and the Convention references "categories of claims" that Congress has specifically declared non-arbitrable because they must be heard by courts. It has nothing to do with barring confirmation of arbitral awards arising out of purely foreign commercial disputes.

3. Rather than identify a statute specifically barring arbitration of the "subject matter" of the Devas-Antrix dispute, Antrix turns to generic provisions in Chapter 1 of the Federal Arbitration Act ("FAA"). Antrix Br. 19-20. Those provisions merely state that an arbitration agreement in a "contract evidencing a transaction involving commerce * * * shall be valid, irrevocable, and enforceable." 9 U.S.C. § 2. "Commerce," in turn, is defined as interstate commerce or international commerce with the United States. *Id.* § 1. These provisions embody "a congressional declaration of a liberal federal policy favoring arbitration agreements," *Moses H. Cone Mem'l Hosp.* v.

Mercury Constr. Corp., 460 U.S. 1, 24 (1983), ending the "hostility of American courts to the enforcement of arbitration agreements," *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 111 (2001). Yet Antrix leaps from these general, affirmative provisions to conclude that disputes involving purely foreign commerce are not arbitrable under U.S. law and are therefore not "subject matter[s] capable of settlement by arbitration" under the FSIA's arbitration exception. Even setting aside the fatal conflict between Antrix's position and the plain meaning of "subject matter"—as reinforced by the Convention—Antrix's argument fails on its own terms.

Antrix conveniently overlooks FAA Chapter 2, which implements the New York Convention. See 9 U.S.C. § 201; see also *id.* § 203 ("An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States."). Given the "subject matter" proviso's roots in the Convention and the arbitration exception's cross-reference to the Convention, 28 U.S.C. § 1605(a)(6)(B), Chapter 2—rather than Chapter 1—would be the relevant source to consult on when foreign disputes are arbitrable. FAA Chapter 2 requires no connection to U.S. commerce as a precondition to enforcement. It deems "[a]n arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as *commercial, including* a transaction, contract, or agreement described in section 2 of this title" to "fall[] under the Convention." 9 U.S.C. § 202 (emphasis added). And "arbitral award[s] falling under the Convention * * * shall [be] confirm[ed]" in U.S. courts unless one of the Convention's enforcement defenses apply. *Id.* § 207.

Congress's use of the undefined term "commercial"—not "commerce"—shows that Chapter 2 has a "broader" scope than Chapter 1 and does not require a connection to U.S. commerce. *Zhongshan Fucheng Indus. Inv. Co. LTD*

v. *Fed. Republic of Nigeria*, 112 F.4th 1054, 1059, 1064 (D.C. Cir. 2024), pet. for cert. filed, No. 24-532 (Nov. 12, 2024). "[C]ommercial" relationships "includ[e]" the U.S.-linked relationships "described in [9 U.S.C. § 2]," but are not limited to them. 9 U.S.C. § 202; see *Groman* v. *Comm'r of Internal Revenue*, 302 U.S. 82, 86 (1937) ("[W]hen an exclusive definition is intended the word 'means' is employed * * * whereas here the word used is 'includes.'"); *Zhongshan*, 112 F.4th at 1064. And as the Restatement explains, "[a] matter or relationship may be commercial * * * so long as it has a connection with commerce, whether or not that commerce has a nexus with the United States." *Belize Soc. Dev. Ltd.* v. *Gov't of Belize*, 794 F.3d 99, 104 (D.C. Cir. 2015) (quoting Restatement (Third) of U.S. Law of Int'l Comm. Arb. § 1-1 cmt. e (2012)).

Thus, nothing in the relevant U.S. law prohibits the arbitrability of purely foreign commercial disputes. Quite the contrary. Consistent with the FSIA's plain meaning and the United States' obligations under the New York Convention, courts routinely exercise jurisdiction under the arbitration exception when the underlying dispute has no connection to U.S. commerce. See, *e.g.*, *Process & Indus. Devs. Ltd.* v. *Fed. Republic of Nigeria*, 27 F.4th 771, 772 (D.C. Cir. 2022) (arbitration exception satisfied where company founded by Irish nationals entered into natural-gas agreement with Nigeria and obtained award in London); *Belize Soc. Dev.*, 794 F.3d at 100-101 (arbitration exception applied to London-issued award arising out of dispute between Belize and Belizean telecommunications company over agreement to serve Belize's "communication needs") (citation and internal quotation marks omitted). Despite Antrix's worries of comity harms and discovery abuses (at 26-27), Antrix produces no evidence that its fears have materialized despite the FSIA's long-settled meaning outside the Ninth Circuit.

B. No clear-statement rule can salvage Antrix's interpretation of the arbitration exception

Antrix contends (at 25-28) that two interpretive canons counsel reading the arbitration exception to require a connection to U.S. commerce. Neither applies here.

Presumption against extraterritoriality. Antrix cites no case applying the presumption against extraterritoriality to defeat application of an FSIA exception. After all, the presumption "typically" applies to "conduct-regulating" statutes, Antrix Br. 25, and the FSIA is a jurisdictional statute. It does not define the bounds of permissible conduct by a foreign state—other sources of law do that—but only elucidates the U.S. connections (or waiver) that suffice to hale the foreign state into U.S. court. See 28 U.S.C. § 1606 (when a foreign state is not immune, it is "liable in the same manner and to the same extent as a private individual under like circumstances"); *Cassirer* v. *Thyssen-Bornemisza Collection Found.*, 596 U.S. 107, 114 (2022) ("Section 1606 directs a 'pass-through' to the substantive law that would govern a similar suit between private individuals."). Antrix notes that the Court applied the presumption to the Alien Tort Statute ("ATS")—a jurisdictional statute—but it did so because the ATS "allows federal courts to recognize certain causes of action based on sufficiently definite norms of international law." *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U.S. 108, 116 (2013). That is a far cry from the FSIA.

Regardless whether the presumption could ever apply to the FSIA, it is not implicated here because the arbitration exception has only domestic application. The arbitration exception merely authorizes the domestic confirmation of arbitral awards that are governed by treaties like the New York Convention. 28 U.S.C. § 1605(a)(6)(B). While the substantive law governing the underlying agreement regulates extraterritorial conduct and the

treaty imposes obligations on a foreign state, the confirmation proceeding authorized by the FSIA does neither. Instead, "[c]onfirmation is a summary proceeding that converts a final arbitration award into a judgment of the court." *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran* v. *Cubic Def. Sys., Inc.*, 665 F.3d 1091, 1094 n.1 (9th Cir. 2011).

Thus, the arbitration exception does not "regulate the foreign commercial activity of foreigners." Antrix Br. 26. Antrix voluntarily submitted to arbitration that would adjudicate its foreign conduct under Indian law, and India submitted to a treaty that allows enforcement of the resulting arbitral award. The arbitration exception merely allows conversion of that award into a domestic judgment if the arbitration—not Antrix's underlying conduct—meets certain standards. Unlike the ATS, the arbitration exception does not threaten to grant U.S. courts jurisdiction to adjudicate "conduct occurring in the territory of a foreign sovereign." *Kiobel*, 569 U.S. at 115. It therefore does not trigger the presumption against extraterritoriality. See *Compañía de Inversiones Mercantiles S.A.* v. *Grupo Cementos de Chihuahua S.A.B. de C.V.*, 58 F.4th 429, 472 (10th Cir. 2023) (order requiring judgment debtor to turn over foreign assets was not an extraterritorial application of U.S. law because it did not "regulate[] the conduct underlying [the] judgment").[2]

Anti-abrogation canon. The requirement that Congress state clearly an intent to abrogate sovereign immunity likewise does not apply. This Court "ha[s] invoked that

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[2] To the extent providing jurisdiction to confirm a foreign arbitral award is considered to regulate foreign conduct, the arbitration exception states a clear intent to apply extraterritorially. It applies to arbitration agreements entered into by *foreign* states under treaties like the New York Convention that apply only to awards that are *foreign* in scope.

clear-statement rule * * * in cases naming the federal government, States, and Indian tribes as defendants." *Fin. Oversight & Mgmt. Bd. for Puerto Rico* v. *Centro de Periodismo Investigativo, Inc.*, 598 U.S. 339, 346 (2023). Antrix identifies no case applying this rule to foreign states, and for good reason. Foreign sovereign immunity arises not from background principles of constitutional or common law but as "a matter of grace and comity on the part of the United States." *Verlinden*, 461 U.S. at 486.

Regardless, the clear-statement standard would be satisfied because the "statute says in so many words that it is stripping immunity from a sovereign entity." *Fin. Oversight & Mgmt. Bd. for Puerto Rico*, 598 U.S. at 347; see also *ibid.* (text stating that a state "'shall not be immune,' under any 'doctrine of sovereign immunity, from suit in Federal court' * * * 'could not have made any clearer Congress's intent' to abrogate immunity.") (citations omitted). Here, § 1604 generally grants foreign states immunity, and § 1605(a) clearly states Congress's intent to establish exceptions under which "[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States." 28 U.S.C. § 1605(a). These "statutory exceptions are to be read fairly, not narrowly." *HollyFrontier Cheyenne Refin., LLC* v. *Renewable Fuels Ass'n*, 594 U.S. 382, 396 (2021). Read fairly, the arbitration exception readily encompasses this dispute, and the Court should not add Antrix's desired U.S.-commerce test into the statute.

* * *

Antrix's newfound requirement of a U.S.-commerce connection is indeterminate—how much of a connection is sufficient? And to the extent Antrix presumes (at 24) that this dispute is wholly unconnected to U.S. commerce, that is incorrect. Pet. App. 22a-26a (finding minimum contacts satisfied given formation of Devas by U.S. businessmen

and Antrix's dealings in U.S. related to the agreement).[3] Antrix would force courts to make ad hoc judgments about what U.S. commercial connections are sufficient—a task that would make the Ninth Circuit's minimum-contacts test appear bright-line in comparison. But one thing about Antrix's U.S.-commerce test is certain: It represents a stark departure from longstanding U.S. policy that would disrupt the international business community's reliance on international arbitration against foreign states and the United States' status as an important jurisdiction for the fair enforcement of such arbitral awards. Bjorklund Br. 12-14; USCIB Br. 9-17. While Antrix observes that the United States would not violate Convention obligations if a court refused to enforce agreements governing non-arbitrable "subject matter[s]" or where personal jurisdiction was lacking, Antrix Br. 23-24, neither is the case here. The arbitration exception confers personal jurisdiction via the long-arm statute, 28 U.S.C. § 1330(b), and foreign commercial disputes are manifestly arbitrable. The United States assuredly *would* breach its Convention obligations if it refused to enforce awards *without* a valid basis for doing so.

II. The Due Process Clause Does Not Afford Minimum-Contacts Protection To Antrix

Although it concedes that Congress did not require an *International Shoe*-style minimum-contacts showing to obtain personal jurisdiction over a foreign state under the FSIA, Antrix argues that the Fifth Amendment requires precisely that as a constitutional matter. While the court of appeals did not pass on Antrix's constitutional defense, this Court can resolve it by applying its forthcoming holding in *Fuld* v. *Palestine Liberation Organization*, Nos. 24-

[3] Thus, even if the Court adopted Antrix's novel test for the arbitration exception, it should vacate and remand for application in the first instance.

20, 24-151, which addresses overlapping issues. The Fifth Amendment's Due Process Clause does not require a showing of minimum contacts to exercise jurisdiction over a foreign corporation, much less a "foreign state," as the FSIA deems Antrix. Pet. App. 21a; 28 U.S.C. § 1603(a)-(b). And in any event, Antrix consented to personal jurisdiction by agreeing to arbitrate in a manner that satisfies the FSIA's arbitration exception.

A. The Fifth Amendment does not impose a minimum-contacts test

Antrix argues (at 30-32, 36-37) that it is not properly considered India's alter ego but is instead a foreign corporation entitled to minimum-contacts protection under the Fifth Amendment's Due Process Clause. The Court may pretermit the alter-ego question because the Fifth Amendment does not impose a minimum-contacts test and because Antrix consented to personal jurisdiction. Cf. Pet. App. 13a-14a (district court resolving alter ego question against Antrix).

1. In *Fuld* v. *Palestine Liberation Organization*, this Court granted certiorari to review the Second Circuit's holding that the Fifth Amendment requires minimum contacts to establish personal jurisdiction over a non-sovereign foreign defendant. 82 F.4th 74, 81 (2d Cir. 2023). Both the United States and the private petitioners in *Fuld* correctly argue that the Fifth Amendment mandates no such showing. U.S. Pet. Br. 30-38; Private Pets. Br. 16-29. Rather, they contend that the Fifth Amendment authorizes personal jurisdiction to the extent prescribed by Congress, Private Pets. Br. 16, or at least when the statute provides clear notice of the jurisdictional consequences of voluntary actions, U.S. Pet. Br. 38. Should the Court resolve *Fuld* in petitioners' favor, it can likewise readily reject Antrix's constitutional defense. Devas and the Intervenors have raised the same arguments as the *Fuld*

petitioners. See Pet. Br. 38-40; Int. Br. 38-41. Likewise, if the Court holds that the Fifth Amendment permits personal jurisdiction when the defendant engages in some statutorily defined, voluntary action, that requirement is also easily satisfied here, where Antrix agreed to arbitrate in a manner that confers jurisdiction under the FSIA's arbitration exception. Compare U.S. *Fuld* Pet. Br. 38 with Pet. Br. 40-41.

2. Citing *Omni Capital International, Ltd.* v. *Rudolf Wolff & Co., Ltd.*, 484 U.S. 97 (1987), Antrix argues (at 32-34) that this Court has already decided that the Fifth Amendment limits Congress's power to authorize personal jurisdiction in federal court. But that case had nothing to do with whether the Fifth Amendment imposes a minimum-contacts test. It held only that federal courts cannot create a rule authorizing service when no federal or state law permits it. *Omni Capital*, 484 U.S. at 102-104, 108-111. The Court stated unremarkably that personal jurisdiction requires "notice to the defendant and a constitutionally sufficient relationship between the defendant and the forum," but it did not address the nature of that "relationship," aside from noting that the district court had concluded that the defendants had sufficient contacts with the United States. *Id.* at 100, 104. Thus, an open question exists regarding the Fifth Amendment's limits on personal jurisdiction that this Court will answer in *Fuld*. The Court should reject Antrix's constitutional defense if it reverses in *Fuld*, or remand for the Ninth Circuit to apply *Fuld* in the first instance (and, if necessary, to resolve Antrix's claim that it is not India's alter ego).

3. Antrix's position that the Constitution—but not the FSIA—imposes a minimum-contacts test would render the FSIA unconstitutional in many applications. As Devas explained, both original and later-enacted FSIA exceptions allow personal jurisdiction based on U.S. connections that would not satisfy a Fourteenth Amendment-style

minimum-contacts test. Pet. Br. 31-34. Antrix never confronts the constitutional conflict it creates. That conflict is yet another reason to reject Antrix's anomalous view that the political branches violate the Constitution when they use their plenary foreign-affairs power to define the jurisdictional immunity of foreign states and their instrumentalities. See U.S. Br. 30-32.

B. Antrix consented to personal jurisdiction

Regardless whether the Fifth Amendment generally incorporates minimum-contacts principles, the Constitution is still satisfied by a defendant's waiver or consent to personal jurisdiction, including through statutory deemed-consent provisions. Pet. Br. 40-41; *Mallory* v. *Norfolk S. Ry. Co.*, 600 U.S. 122, 138 (2023) (plurality op.). Antrix consented to personal jurisdiction when it agreed to arbitrate in a manner that satisfied the FSIA's arbitration exception. Pet. Br. 40-41; see U.S. Br. 23-26.

Antrix argues that "consent is the wrong framework for understanding the arbitration exception." Antrix Br. 44. But the arbitration exception expressly invokes waiver principles by specifying three circumstances where the arbitration exception applies and clarifying that the waiver principles of § 1605(a)(1) can also apply to an arbitration agreement if they are "*otherwise* applicable." 28 U.S.C. § 1605(a)(6)(D) (emphasis added). Congress thus viewed each of the four subsections of the arbitration exception to constitute a waiver of immunity.

The United States did not disagree in an *amicus* brief in *NextEra Energy Global Holdings B.V.* v. *Kingdom of Spain*, 112 F.4th 1088 (D.C. Cir. 2024). Indeed, the Government recognized that the arbitration exception incorporates and refines the general waiver concepts in § 1605(a)(1). U.S. *NextEra Amicus* Br. 22-23. It argued only that in actions brought to confirm an arbitral award, courts must apply the arbitration exception's

requirements in § 1605(a)(6) and cannot use the more general waiver exception in § 1605(a)(1), which lacks threshold requirements like the existence of an arbitration agreement. *Ibid.*

Contrary to Antrix's argument (at 45), Devas does not contend that merely by signing the New York Convention, a foreign state waives personal jurisdiction in all signatory states for enforcement actions. Rather, when a foreign state agrees to arbitrate under terms that satisfy the arbitration exception, it consents to personal jurisdiction in the United States over arbitral-enforcement actions. See Pet. Br. 24-25, 40-41; Feldman Br. 9-11. Just as the statute in *Mallory* validly inferred consent to personal jurisdiction from business registration, the FSIA infers a limited jurisdictional consent from a foreign state's agreement to arbitrate certain disputes. Cf. U.S. *Fuld* Pet. Br. 21-29 (anti-terrorism statute's deeming of consent satisfies *Mallory* and Fourteenth Amendment standards); Private *Fuld* Pets. Br. 33-39 (arguing consent-to-jurisdiction statute easily satisfies *Mallory* if Fourteenth Amendment standard applies).

C. A foreign state is not a "person" for purposes of the Due Process Clause

Antrix agrees (at 38) with Devas and the United States that the Court need not address whether a foreign state is a "person" under the Due Process Clause when the Ninth Circuit addressed neither this question nor the logically antecedent question whether Antrix is India's alter ego. Pet. Br. 34; U.S. Br. 20-22. To the extent the "person" question is not mooted by the broader Fifth Amendment issue presented in *Fuld* (see *supra* pp. 17-18) or Antrix's consent to personal jurisdiction (see *supra* pp. 19-20), the Court should remand it. If the Court reaches the merits, it should agree with nine judges below, the United States, and every circuit post-*Republic of Argentina* v. *Weltover,*

Inc., 504 U.S. 607, 611 (1992), that a foreign state is not a person under the Due Process Clause. See Pet. Br. 35-38; Int. Br. 30-34; U.S. Br. 26-32; Chamber of Commerce Br. 4-25; Bermann Br. 5-6.

III. ANTRIX'S OTHER GROUNDS DO NOT WARRANT AFFIRMANCE

The Court should not address in the first instance Antrix's final proffered grounds for affirmance. Antrix Br. 47-49.

A. The Ninth Circuit did not reach the district court's refusal to dismiss on *forum non conveniens.* See Pet. App. 8a, 15a, 26a n.3. In any event, "*forum non conveniens* is not available in proceedings to confirm a foreign arbitral award because only U.S. courts can attach foreign commercial assets found within the United States," meaning "no adequate alternative forum outside the U.S. exists" in arbitral-confirmation actions. *Tatneft* v. *Ukraine*, 21 F.4th 829, 840 (D.C. Cir. 2021) (citation and internal quotation marks omitted).

B. Neither lower court has passed upon Antrix's contention that the Indian courts' set-aside of Devas's award supports undoing U.S. confirmation, and it is procedurally not before this Court. Pet. App. 8a n.1 (denying as moot Antrix's motion to remand to consider set-aside's effect). As Antrix admits, such foreign rulings are not self-executing, and the district court must evaluate in the first instance the enforceability of an award set aside in the primary jurisdiction after confirmation in the United States. BIO 33; see *Compañía de Inversiones Mercantiles*, 58 F.4th at 444 (affirming refusal to vacate confirmation of award that had been set aside by Bolivian courts after U.S. confirmation). The Court should follow its normal practice of bypassing issues unaddressed below.

CONCLUSION

The Court should reverse.

Respectfully submitted.

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