Nos. 23-1201 & 24-17

IN THE
Supreme Court of the United States

CC/DEVAS (MAURITIUS) LIMITED, ET AL.,
Petitioners,
v.
ANTRIX CORP. LTD., ET AL.,
Respondents.

DEVAS MULTIMEDIA PRIVATE LIMITED,
Petitioner,
v.
ANTRIX CORP. LTD., ET AL.,
Respondents.

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

BRIEF FOR MARK B. FELDMAN AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF FOR MARK B. FELDMAN AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*[1]

Mark B. Feldman has been deeply engaged in United States foreign relations law for many years—in government, private practice, and teaching at Georgetown Law. He served as an attorney at the U.S. Department of

[1] Pursuant to this Court's Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief, and that no person other than *amicus* and his counsel made such a monetary contribution.

State from 1965 to 1981, was appointed Deputy Legal Adviser in 1974, and served as Acting Legal Adviser under both President Ford and President Reagan. He was the primary drafter of the claims agreement in the Algiers Accords that helped resolve the Iran Hostage Crisis in 1981. Mr. Feldman's oral history is available from the Association for Diplomatic Studies and Training's Foreign Affairs Oral History Project. See Interview by Robin Matthewman of Mark B. Feldman (Apr. 28, 2021), adst.org/OH%20TOCs/Feldman.Mark.pdf.

Mr. Feldman was the State Department officer primarily responsible for preparing the revised bill submitted to Congress by President Ford that became the Foreign Sovereign Immunities Act of 1976 ("FSIA"), Pub. L. No. 94-583, 90 Stat. 2891. Mr. Feldman later served as Chairman of the American Bar Association's Ad Hoc Committee on Revision of the Foreign Sovereign Immunities Act. In that role, he was the principal drafter of legislation that the American Bar Association proposed to add an arbitration exception to the FSIA, which Congress enacted in 1988. Pub. L. No. 100-669, 102 Stat. 3969 (1988). Mr. Feldman testified before Congress in support of that legislation. See *Arbitral Awards: Hearing Before the Subcomm. on Administrative Law and Governmental Relations of the H. Comm. on the Judiciary*, 99th Cong. 81 (May 20, 1986) ("*1986 Hearing*"); Mark B. Feldman, *Amending the Foreign Sovereign Immunities Act: The ABA Position*, 20 Int'l Law. 1289 (1986) (reproducing testimony).[2]

[2] The official print of the hearing testimony inadvertently omits page 9 of Mr. Feldman's prepared statement. The version published in *International Lawyer* includes the missing material.

Because Mr. Feldman was one of the principal drafters of the FSIA, and *the* principal drafter of the 1988 arbitration exception, he is uniquely well positioned to comment on the text, context, and purposes of those statutes.

SUMMARY OF ARGUMENT

The Foreign Sovereign Immunities Act authorizes federal courts to exercise personal jurisdiction over a foreign sovereign defendant so long as the court has subject matter jurisdiction under one of the Act's immunity exceptions and the defendant was properly served. 28 U.S.C. § 1330(b). Congress enacted that provision based on the understanding that the Act's immunity exceptions would satisfy due process requirements for asserting personal jurisdiction—for some exceptions, based on minimum contacts, and for others, based on consent. Neither the statute nor the Constitution requires any further showing of minimum contacts.

In 1988, Congress amended the FSIA to add an exception for enforcement of arbitral awards. Pub. L. No. 100-669, 102 Stat. 3969 (1988) (enacting 28 U.S.C. § 1605(a)(6)). In enacting that exception, Congress once again focused on the due process requirements for personal jurisdiction. Congress carefully tailored the exception to comply with those requirements based primarily on principles of consent. Consent is a valid basis for jurisdiction under the Due Process Clause, separate and apart from minimum contacts. Congress correctly reasoned that a party who agrees to arbitrate in a country that is a party to the New York Convention consents to personal jurisdiction for enforcement proceedings in any other Convention state.

That rationale is crystal clear in the history of the 1988 amendment. *Amicus curiae*—who drafted the relevant language—explained the critical role of consent when testifying to Congress in support of the legislation:

> The argument has been made in some cases that a federal district court is precluded from enforcing an arbitration award made in a foreign state if the defendant is not present in the jurisdiction and the underlying transaction has no connection with the United States. It is claimed that the exercise of jurisdiction in these circumstances would not satisfy the "minimum contacts" required by the due process clause of Article V of the Constitution. See *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945).
>
> This contention ignores two important considerations. *First, constitutional objections to the personal jurisdiction of the court may be waived. Nothing in the Constitution precludes a foreign state from waiving its immunity and consenting to the jurisdiction of a United States court.* Second, a federal district court may enforce a judgment or an arbitral award against property within its jurisdiction, even if it would not have jurisdiction to adjudicate the dispute on the merits.

1986 Hearing 97-98 (statement of Mark B. Feldman) (footnotes omitted) (emphasis added).

Congress enacted the FSIA's arbitration exception on the understanding that an agreement to arbitrate in a New York Convention state is a consent to personal jurisdiction for enforcement in any other Convention state. Nothing in the statute imposes an additional "minimum contacts" requirement. And because Congress's understanding was correct as a constitutional matter, consent principles also eliminate any due process objection to personal jurisdiction.

ARGUMENT

I. An Agreement To Arbitrate In A New York Convention State Is A Consent To Personal Jurisdiction For Recognition And Enforcement In Any Other Convention State

The premise underlying the 1988 arbitration amendment was that an agreement to arbitrate in a New York Convention state constitutes a consent to personal jurisdiction for enforcement proceedings in any other Convention state. That premise rests on solid constitutional ground: Consent is a well-established basis for personal jurisdiction, separate and apart from minimum contacts.

A. Consent Is a Well-Established Basis for Personal Jurisdiction

The Fifth Amendment provides that "[n]o person shall * * * be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. That provision limits a court's authority to exercise personal jurisdiction over a foreign defendant. A plaintiff can establish personal jurisdiction by showing that a defendant has "minimum contacts" with the forum that arise out of or relate to the plaintiff's claims. See *Ford Motor Co.* v. *Mont. Eighth Jud. Dist. Ct.*, 592 U.S. 351, 359 (2021). Minimum contacts, however, are merely *one* way to show personal jurisdiction, not the *only* way.

In particular, this Court has long recognized that consent is an independent basis for personal jurisdiction. Most recently, in *Mallory* v. *Norfolk Southern Railway Co.*, 600 U.S. 122 (2023), this Court upheld a Pennsylvania statute that required consent to jurisdiction as a condition to doing business in the state. *Mallory* rejected the argument that "no other bases for personal jurisdiction" exist beyond minimum contacts. *Id.* at 137 (plurality). Instead, *Mallory* explained that minimum contacts and

consent "sit comfortably side by side" as alternative grounds for jurisdiction. *Ibid.* It noted that "'express or implied consent' can continue to ground personal jurisdiction—and consent may be manifested in various ways by word or deed." *Id.* at 138.

Several Members of this Court disagreed that Pennsylvania's business registration statute was a valid basis for finding consent. See *Mallory*, 600 U.S. at 166-171 (Barrett, J., dissenting). But the dissent acknowledged that "[c]onsent is an established basis for personal jurisdiction." *Id.* at 167. There was thus broad consensus that consent is a valid ground for jurisdiction—the only dispute was over how that principle applied to the case.

Mallory is merely the latest in a long line of cases recognizing consent as a basis for personal jurisdiction. This Court has repeatedly found personal jurisdiction from forum selection clauses by which a party agrees to submit disputes to a particular court. See *Nat'l Equip. Rental, Ltd.* v. *Szukhent*, 375 U.S. 311, 315-316 (1964) (holding that "parties to a contract may agree in advance to submit to the jurisdiction of a given court"); *Petrowski* v. *Hawkeye-Sec. Ins. Co.*, 350 U.S. 495, 496 (1956) (upholding jurisdiction where party, "by its stipulation, waived any right to assert a lack of personal jurisdiction"); see also *Mallory*, 600 U.S. at 145 (plurality) (citing "contract with a forum selection clause" as a basis for jurisdiction).

Courts have also found consent to personal jurisdiction even absent an express submission. Under the federal rules, a party waives any objection to personal jurisdiction by not timely asserting it. See Fed. R. Civ. P. 12(h)(1). And in *Insurance Corp. of Ireland, Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982), this Court held that courts could find facts supporting personal jurisdiction as a discovery sanction. *Id.* at 702-707.

A consent to personal jurisdiction applies not only to the court of first instance, but also to subsequent proceedings. See *Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V.* v. *Pemex-Exploración y Producción ("Pemex")*, 832 F.3d 92, 101 (2d Cir. 2016) (party "cannot now re-contest personal jurisdiction" after having forfeited objection in prior appeal), cert. dismissed, 581 U.S. 932 (2017). No one could reasonably argue that a party who agrees to a forum selection clause consenting to jurisdiction in the "U.S. District Court for the Southern District of New York" may nonetheless object to personal jurisdiction on appeal or in this Court. The consent to jurisdiction carries with it consent to subsequent proceedings that are natural steps in the agreed-upon dispute resolution process.

B. An Agreement To Arbitrate Is a Consent to Jurisdiction for Enforcement Proceedings

The same principles apply to arbitration proceedings. "In a private arbitration, the panel derives its authority from the parties' consent to arbitrate." *ZF Auto. US, Inc.* v. *Luxshare, Ltd.*, 596 U.S. 619, 636 (2022). That consent obviously includes consent to personal jurisdiction before the arbitral tribunal itself. See *Ins. Corp. of Ir.*, 456 U.S. at 704 (noting "consent implicit in agreements to arbitrate"). An arbitration agreement also ordinarily constitutes consent to recognition and enforcement proceedings if the losing party refuses to pay the award. That consent may arise from a variety of sources.

First, the arbitration agreement itself may include a consent to enforcement proceedings. In *Reed & Martin, Inc.* v. *Westinghouse Electric Corp.*, 439 F.2d 1268 (2d Cir. 1971), for example, the respondent objected to confirmation proceedings on the ground that "in personam jurisdiction is lacking" because "it ha[d] no minimal con-

tacts with the forum." *Id.* at 1276. The Second Circuit disagreed: The arbitration agreement provided that "judgment upon an award may be entered in any court of competent jurisdiction," so "jurisdiction * * * has been conferred * * * by individual consent." *Ibid.*; see also *Dardana Ltd.* v. *A.O. Yuganskneftegaz*, 317 F.3d 202, 206-209 (2d Cir. 2003). The agreement in this case contains a similar clause: "Any decision or award made by the board of Arbitration shall be final, binding and conclusive on the Parties *and entitled to be enforced to the fullest extent permitted by Laws and entered in any court of competent jurisdiction*." Pet. App. in No. 23-1201, at 18a (emphasis added). That language is an express consent to personal jurisdiction in enforcement proceedings.[3]

Second, a party may consent to enforcement proceedings by agreeing to arbitrate under rules that provide for enforcement. The American Arbitration Association's rules, for example, state that "[p]arties to an arbitration under these Rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof." Am. Arb. Ass'n, *Commercial Arbitration Rules* R-54(c) (Sept. 1, 2022); see also JAMS, *Comprehensive Arbitration Rules & Procedures* R. 25 (June 1, 2021) (similar). An agreement to arbitrate pursuant to rules that provide for enforcement is a valid form of consent. See *Restatement (Third) of U.S. Law of International Commercial and Investor-State Arbitration* ("*Restatement*") §4.25

[3] Arbitration agreements (like the one here) often refer to enforcement in courts of "competent jurisdiction." Pet. App. in No. 23-1201, at 18a. That language refers to *subject matter* jurisdiction and does not require any independent basis for personal jurisdiction. See *Lightfoot* v. *Cendant Mortg. Corp.*, 580 U.S. 82, 95 (2017); *United States* v. *Morton*, 467 U.S. 822, 828 (1984).

reporter's note b (2024) ("Implied consent to jurisdiction in actions to confirm an award has * * * been found in the parties' adoption of institutional rules that themselves presume consent to jurisdiction."); cf. *Rainwater* v. *Nat'l Home Ins. Co.*, 944 F.2d 190, 192-194 (4th Cir. 1991).

Third, a party may consent to enforcement proceedings by agreeing to arbitrate under a regime where a treaty or other legal instrument makes those proceedings a natural consequence of refusing to pay. "Implicit in an agreement to arbitrate is consent to enforcement of that agreement." *Maria Victoria Naviera, S.A.* v. *Cementos del Valle, S.A.*, 759 F.2d 1027, 1032 (2d Cir. 1985). That consent extends not only to courts in the arbitral forum's own territory, but also to courts in other states that have a treaty obligation to enforce the award.

The New York Convention, for example, requires signatory states to "recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon." Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), June 10, 1958, art. III, 21 U.S.T. 2517, 2519. That obligation applies to any award rendered in another signatory state. *Id.* arts. I.1, I.3 & accession proclamation, 21 U.S.T. at 2519, 2560. "[T]he critical element is the place of the award: if that place is in the territory of a party to the Convention, all other Convention states are required to recognize and enforce the award, regardless of the citizenship or domicile of the parties to the arbitration." *Restatement (Third) of Foreign Relations Law of the United States* § 487 cmt. b (1987).

Given that regime, a party who agrees to arbitrate in a New York Convention state consents to personal jurisdiction for enforcement in any other Convention state.

The Convention makes those enforcement proceedings, not just foreseeable, but the natural and predictable next step in the process if a party refuses to pay. Just as a litigant may not agree to a forum selection clause that specifies a district court to hear disputes but then contest jurisdiction in the court of appeals, a party may not agree to arbitrate but then contest jurisdiction in enforcement proceedings after refusing to pay the award.

The Second Circuit addressed this issue in the closely analogous context of sovereign immunity waivers in the leading case *Seetransport Wiking Trader Schiffarhtsgesellschaft MBH & Co., Kommanditgesellschaft* v. *Navimpex Centrala Navala*, 989 F.2d 572 (2d Cir. 1993). There, a Romanian state-owned entity agreed to arbitrate in France, but then objected to enforcement proceedings in the United States on sovereign immunity grounds. *Id.* at 577. The Second Circuit rejected that argument based on consent. "[T]he [New York] Convention," it explained, "expressly permits recognition and enforcement actions in Contracting States." *Id.* at 578. By "enter[ing] into a contract * * * that had a provision that any disputes would be submitted to arbitration," the respondent "had to have contemplated the involvement of the courts of any of the Contracting States in an action to enforce the award." *Id.* at 578-579; see also Mark B. Feldman, *Waiver of Foreign Sovereign Immunity by Agreement To Arbitrate: Legislation Proposed by the American Bar Association*, Arb. J., Mar. 1985, at 24, 29 (noting "significant authority for the proposition that an agreement to arbitrate * * * in a state party to the New

York Convention [is] a waiver of immunity in an action to enforce * * * an arbitral award").[4]

Those same consent principles apply to due process requirements. Consent is a basis for personal jurisdiction for the same reason it is a basis for overcoming sovereign immunity. In either case, the question is simply whether the respondent *consented* to the proceeding. Where a respondent agrees to arbitrate in a New York Convention state, that consent extends to enforcement proceedings in any other Convention state.

II. Congress Enacted The Arbitration Exception On The Premise That An Agreement To Arbitrate Is A Consent To Personal Jurisdiction

Congress relied on those consent principles when it enacted the Foreign Sovereign Immunities Act and then amended the Act to add the arbitration exception.

A. Congress Relied on Consent Principles When It Enacted the FSIA's Waiver Provision

When Congress enacted the Foreign Sovereign Immunities Act in 1976, it did not include an express arbitration exception. See Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891. The Act did, however, include a waiver exception that applied when "the foreign state has waived its immunity either explicitly or by implication." 28 U.S.C. § 1605(a)(1). Congress anticipated that arbitral enforcement would proceed under that exception: "With respect to implicit waivers, the courts have found such waivers in cases where a foreign state

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[4] Indeed, *Seetransport* held that the respondent's consent extended even to a related claim to recognize a foreign judgment enforcing the award. See 989 F.2d at 582-583 ("The cause of action is within the scope of the waiver because the cause of action is so closely related to the claim for enforcement of the arbitral award.").

has agreed to arbitration in another country * * * ." H.R. Rep. No. 94-1487, at 18 (1976).[5]

Congress carefully considered the personal jurisdiction aspects of the legislation. Section 1330(b) states that "[p]ersonal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title." 28 U.S.C. § 1330(b). Section 1330(a), in turn, grants jurisdiction over "any claim for relief in personam with respect to which the foreign state is not entitled to immunity * * * under sections 1605-1607." *Id.* § 1330(a). Congress then carefully tailored those immunity exceptions to comply with due process constraints.

The committee reports explain: "Significantly, each of the immunity provisions in the bill, sections 1605-1607, requires some connection between the lawsuit and the United States, *or an express or implied waiver by the foreign state of its immunity from jurisdiction*. These immunity provisions, therefore, prescribe the necessary contacts which must exist before our courts can exercise personal jurisdiction." H.R. Rep. No. 94-1487, at 13 (emphasis added); see also Mark B. Feldman, *Foreign Sovereign Immunity in the United States Courts 1976-1986*, 19 Vand. J. Transnat'l L. 19, 22 n.17 (1986) ("The draftsmen were mindful of the need to meet constitutional minimum standards for the exercise of personal jurisdiction * * * but considered that the contacts required by section 1605 generally were more stringent than those required by the Fifth Amendment of the Constitution.").

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[5] The FSIA has materially identical House and Senate reports. See H.R. Rep. No. 94-1487 (1976); S. Rep. No. 94-1310 (1976).

Congress thus designed the statute to comply with due process constraints.

Most of the Act's immunity exceptions (commercial activity, expropriation, etc.) require a territorial connection to the United States. 28 U.S.C. § 1605(a)(2)-(5). The waiver exception does not. *Id.* § 1605(a)(1). Congress enacted that exception on a theory of *consent*, not minimum contacts: "A waiver of immunity under § 1605(a)(1) operates as a consent to personal jurisdiction as a matter of law." Mark B. Feldman, *Arbitration Law Strengthened by Congress*, N.Y.L.J., Nov. 10, 1988, at 1, 2.

B. Lower Courts Did Not Consistently Apply the Waiver Exception to Arbitral Enforcement

Consistent with Congress's design, some courts applied the FSIA's waiver exception to arbitral enforcement. In *Ipitrade International, S.A.* v. *Federal Republic of Nigeria*, 465 F. Supp. 824 (D.D.C. 1978), for example, Nigeria agreed to arbitrate under Swiss law pursuant to the rules of the International Chamber of Commerce, but then refused to pay the award. The district court applied the waiver exception to enforce the award, explaining that the United States, Switzerland, and Nigeria were all parties to the New York Convention and that Nigeria's "agreement to adjudicate all disputes arising under the contract * * * by arbitration under International Chamber of Commerce Rules constitutes a waiver of sovereign immunity under the Act." *Id.* at 826; see also *Birch Shipping Corp.* v. *Embassy of United Republic of Tanzania*, 507 F. Supp. 311, 312 (D.D.C. 1980) ("[A]n agreement to arbitrate, standing alone, is sufficient to implicitly waive immunity, as was recognized by Congress * * * .").

Similarly, in *Libyan American Oil Co.* v. *Socialist People's Libyan Arab Jamahirya ("LIAMCO")*, 482 F. Supp. 1175 (D.D.C. 1980), vacated, 684 F.2d 1032 (D.C.

Cir. 1981), the court found jurisdiction to enforce a foreign award where Libya had agreed to arbitrate in a place chosen by the tribunal. The court noted that the FSIA requires personal jurisdiction, but held that the requirement could be met by "an express or implied waiver by the foreign state." *Id.* at 1177. Libya's agreement to arbitrate satisfied that requirement. *Id.* at 1178.

On appeal, the United States filed an *amicus* brief supporting that ruling. See U.S. Br. in *Libyan Am. Oil Co.* v. *Socialist People's Libyan Arab Jamahirya*, No. 80-1207, at 29-37 (D.C. Cir. filed June 16, 1980), reproduced in relevant part at 20 I.L.M. 161 (1981). "In enacting section 1605(a)(1) of the FSIA," the government urged, "Congress manifestly intended that an arbitration agreement should constitute a waiver of foreign sovereign immunity." *Id.* at 32. "Section 1605(a)(1) must be applied by the courts not only where the arbitration agreement explicitly stipulates the United States as the situs of the arbitration, but also where, as here, the arbitration properly takes place in any state which is party to the New York Convention." *Id.* at 34. "This is so because the United States has undertaken a treaty commitment in the Convention to recognize and enforce in United States courts foreign arbitral awards made in the territory of states who are members of the Convention." *Ibid.* The government saw "no constitutional infirmity in enforcing the arbitral award" under the Due Process Clause either. *Id.* at 36. "Libya's implicit consent to suit in the United States to enforce the arbitral award removes any possible constitutional objection * * * ." *Id.* at 37.[6]

[6] Following a settlement, the D.C. Circuit vacated the district court's decision. 684 F.2d 1032 (D.C. Cir. 1981).

Other courts, by contrast, declined to find waivers of immunity from arbitration agreements. See, *e.g.*, *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 488 F. Supp. 1284, 1300-1302 (S.D.N.Y. 1980), aff'd on other grounds, 647 F.2d 320 (2d Cir. 1981), rev'd, 461 U.S. 480 (1983). Most of those cases did not involve award enforcement—they rejected implausible arguments that an agreement to arbitrate waived immunity from separate litigation *on the merits* in U.S. courts. See, *e.g.*, *ibid.* (holding that sovereign's agreement to arbitrate did not waive immunity from lawsuit against related entity for breach of letter of credit). Nonetheless, the cases raised enough doubts that Congress saw a need to intervene again.

C. Congress Enacted the Arbitration Exception To Establish a Clear Foundation of Consent for Arbitral Enforcement

In 1988, Congress enacted a new immunity exception specifically for arbitral enforcement. See Pub. L. No. 100-669, 102 Stat. 3969 (1988) (enacting 28 U.S.C. § 1605(a)(6)). That exception applies to any action (among others) "to confirm an award made pursuant to * * * an agreement to arbitrate, if * * * 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." 28 U.S.C. § 1605(a)(6).

The 1988 amendment stemmed from a proposal of the Ad Hoc Committee on Revision of the Foreign Sovereign Immunities Act of the American Bar Association's Section of International Law and Practice. See *Arbitral Awards: Hearing Before the Subcomm. on Administrative Law and Governmental Relations of the H. Comm. on the Judiciary*, 99th Cong. 2 (May 20, 1986) ("*1986 Hearing*"); *id.* at 3 (reproducing text of H.R. 3106). *Amicus* Mark B.

Feldman served as chair of that committee and was the principal author of the legislation. *Id.* at 81, 89.

In testimony to Congress, Mr. Feldman explained that arbitral awards were meant to be enforceable under the FSIA's waiver exception. *1986 Hearing* 92-93. He specifically cited the *Ipitrade* decision, but noted that "some judges have been uncertain whether the [waiver exception] applies where the agreement provides for arbitration in a third country." *Id.* at 93-94. "The confusion in the U.S. courts as to when an agreement to international arbitration constitutes a waiver of sovereign immunity raises doubts as to the enforceability of awards under arbitration agreements in a great many international contracts and complicates the negotiation of arbitration clauses in new agreements." *Id.* at 95.

The proposed legislation sought to "codif[y] the decision in the *Ipitrade* case that agreement to arbitrate constitutes a waiver of immunity even if the award is rendered abroad." Mark B. Feldman, *Amending the Foreign Sovereign Immunities Act: The ABA Position*, 20 Int'l Law. 1289, 1293 (1986) (reproducing testimony—see note 2, *supra*); see also Feldman, N.Y.L.J., *supra*, at 1 (legislation "confirms the decision in *Ipitrade*"); Feldman, 19 Vand. J. Transnat'l L., *supra*, at 37-40 (similar). "Under [the New York] convention," Mr. Feldman explained, "the United States is obligated to enforce an arbitral award made in the territory of another contracting state." Feldman, 20 Int'l Law., *supra*, at 1294. Enforcement is thus "consistent with the expectations of parties to arbitration agreements." *Ibid.* "[I]t is fair to conclude that any government that agrees to arbitration with a foreign party in a [Convention state] has every reason to expect that the proceeding will result in an award which

is enforceable under the New York Convention." *1986 Hearing* 97.

Mr. Feldman explained why those same consent principles also satisfy due process:

> The argument has been made in some cases that a federal district court is precluded from enforcing an arbitration award made in a foreign state if the defendant is not present in the jurisdiction and the underlying transaction has no connection with the United States. It is claimed that the exercise of jurisdiction in these circumstances would not satisfy the "minimum contacts" required by the due process clause of Article V of the Constitution. See *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945).
>
> This contention ignores two important considerations. *First, constitutional objections to the personal jurisdiction of the court may be waived. Nothing in the Constitution precludes a foreign state from waiving its immunity and consenting to the jurisdiction of a United States court.* Second, a federal district court may enforce a judgment or an arbitral award against property within its jurisdiction, even if it would not have jurisdiction to adjudicate the dispute on the merits.

1986 Hearing 97-98 (footnotes omitted) (emphasis added). The arbitration exception thus rested on the same due process rationale that supported the waiver exception in the original statute: consent.

The statutory text confirms Congress's rationale. It provides an immunity exception in four situations:

> (A) the arbitration takes place or is intended to take place in the United States, (B) 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, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

28 U.S.C. § 1605(a)(6). That text reflects a mix of rationales. The first and third prongs (arbitrations in the United States and disputes otherwise subject to U.S. jurisdiction) both involve a territorial nexus. By contrast, the second and fourth prongs (arbitrations in other Convention states and disputes subject to the waiver exception) rely on consent. Congress thus carefully tailored the arbitration exception to satisfy due process.

III. Lower Courts Struggle To Apply Consent Principles In Arbitral Enforcement Cases

Despite Congress's efforts—not once, but twice—to provide a clear foundation for arbitral enforcement, courts continue to struggle. Those decisions frustrate Congress's considered and constitutionally correct judgment that consent principles satisfy due process in arbitral enforcement.

A. *Creighton* Was Wrongly Decided

The D.C. Circuit addressed this issue in *Creighton Ltd.* v. *Government of State of Qatar*, 181 F.3d 118 (D.C. Cir. 1999). *Creighton* held that an agreement to arbitrate in a New York Convention state is *not* a consent to personal jurisdiction for enforcement in other states. *Id.* at 125-127; see also *First Inv. Corp. of Marsh. Is.* v. *Fujian Mawei Shipbuilding, Ltd.*, 703 F.3d 742, 752 n.6 (5th Cir. 2012) (following *Creighton* in a footnote); cf. *Restate-*

ment § 4.25 reporter's note b. *Creighton*'s reasoning was flawed in multiple respects.

Creighton acknowledged the argument that "Congress designed all the exceptions to sovereign immunity in the FSIA to comport with due process." 181 F.3d at 125. But it held that Congress's intent in 1976 was irrelevant to the arbitration exception, enacted a decade later. *Id.* at 125-126. That reasoning ignores that Congress *also* designed the arbitration exception to comport with due process. *Amicus* clearly explained in his congressional testimony why the arbitration exception satisfied due process: "[C]onstitutional objections to the personal jurisdiction of the court may be waived. Nothing in the Constitution precludes a foreign state from waiving its immunity and consenting to the jurisdiction of a United States court." *1986 Hearing* 97-98 (footnote omitted). *Creighton* simply ignored that testimony.

Creighton also asserted that consent principles were irrelevant because, "unlike § 1605(a)(1), § 1605(a)(6) deals not with waiver but with forfeiture." 181 F.3d at 126. The court cited no support whatsoever for that theory. Congress enacted the arbitration exception to "codif[y] the decision in the *Ipitrade* case that agreement to arbitrate constitutes a *waiver* of immunity even if the award is rendered abroad." Feldman, 20 Int'l Law., *supra*, at 1293 (reproducing testimony) (emphasis added). The arbitration exception thus rests on the exact same waiver principles as the waiver exception. Congress enacted the arbitration exception because certain courts were not properly applying those *waiver* principles.

Creighton asserted that the arbitration exception "contains no intentionality requirement." 181 F.3d at 126. But the statute *does* contain an intentionality requirement: The state must have "agree[d] * * * to submit [the

dispute] to arbitration." 28 U.S.C. §1605(a)(6). States do not *accidentally* agree to arbitrate disputes. Consent to enforcement is implied only in the limited sense that an agreement to arbitrate in a Convention state carries with it the natural and entirely predictable consequence of enforcement in other Convention states—just as consent to litigate in a district court carries with it the obvious prospect of proceedings on appeal.

Finally, *Creighton* relied on an argument based on the Full Faith and Credit Clause. 181 F.3d at 126-127. Because courts in the United States are bound to give full faith and credit to sister state judgments, *Creighton* reasoned, the rationale behind the petitioner's claim of consent to arbitral enforcement would mean that a consent to litigate in one U.S. state would also waive personal jurisdiction in every other U.S. state—a result that *Creighton* thought self-evidently unreasonable. *Ibid.* That argument has multiple problems.

For one thing, the full faith and credit analogy actually undermines *Creighton*'s argument. It is well-established that, once a plaintiff obtains a judgment from one U.S. district court, the plaintiff may register that judgment in any other district court under 28 U.S.C. §1963 without any further showing of personal jurisdiction. See *Fidelity Nat'l Fin., Inc.* v. *Friedman*, 935 F.3d 696, 702 (9th Cir. 2019) ("[O]nce a federal court of competent jurisdiction has determined the parties' substantive rights and entered a judgment following a proceeding that accords with due process, that federal judgment should be enforceable in any other federal district by way of the federal judgment registration statute."). What *Creighton* tried to portray as an absurd result thus is in fact the law: A judgment from one state may be enforced in any other state without any further jurisdictional showing.

Beyond that, sister state judgments are at best only a loose analogy for arbitral enforcement. Arbitral awards are not self-executing. Judicial enforcement is thus a natural and practically inevitable consequence of refusing to pay. Sister state enforcement, by contrast, is at best only a possible consequence of refusing to pay a judgment. The inference that an agreement to arbitrate includes consent to enforcement is thus much stronger than the analogous inference for sister state judgments.

Creighton's reasoning thus fails at every turn. The decision has had a profoundly negative impact on the law. This Court should repudiate it.

B. Other Courts Have Not Adequately Considered Consent Principles

No doubt in large part because of *Creighton*'s misguided lead, other courts have not adequately considered the consent principles on which Congress relied.

Many courts fixate on whether a particular state entity is a "person" for due process purposes. See, *e.g.*, *Gater Assets Ltd.* v. *AO Moldovagaz*, 2 F.4th 42, 64-66 (2d Cir. 2021); *GSS Grp. Ltd.* v. *Nat'l Port Auth.*, 680 F.3d 805, 813-817 (D.C. Cir. 2012); *Frontera Res. Azer. Corp.* v. *State Oil Co. of Azer. Republic*, 582 F.3d 393, 398-401 (2d Cir. 2009); *TMR Energy Ltd.* v. *State Prop. Fund of Ukr.*, 411 F.3d 296, 299-303 (D.C. Cir. 2005). This brief takes no position on that issue, because it was not the rationale on which Congress relied. The entire line of "person" cases stems from dicta in *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607 (1992), a case that postdates the arbitration exception by four years. *Id.* at 619. Congress understood that the FSIA and its arbitration exception were constitutional because they *satisfied* due process, not because certain respondents were *not entitled* to due process. See pp. 15-18, *supra*.

Other courts simply overlook the role of consent. In *Glencore Grain Rotterdam B.V.* v. *Shivnath Rai Harnarain Co.*, 284 F.3d 1114 (9th Cir. 2002), for example, the Ninth Circuit held that the New York Convention "does not abrogate the due process requirement that jurisdiction exist over the defendant's person or property" because a treaty "cannot grant personal jurisdiction where the Constitution forbids it." *Id.* at 1120-1122. That holding is true so far as it goes, but the court ignored that consent, too, is a valid basis for jurisdiction. The Ninth Circuit committed the same error as the respondent in *Mallory*, treating minimum contacts as the *sine qua non* of personal jurisdiction when in reality minimum contacts and consent "sit comfortably side by side." 600 U.S. at 137 (plurality).

The United States, by contrast, has continued to emphasize the role of consent in arbitral enforcement, reaffirming the position it took years ago in the *LIAMCO* case. In *Pemex*, for example, the government invoked consent to urge that "[t]he assertion of personal jurisdiction over PEP in this enforcement proceeding comports with any applicable constitutional requirements." U.S. Br. in *Corporación Mexicana de Mantenimiento Intergral, S. de R.L. de C.V.* v. *Pemex-Exploración y Producción*, No. 13-4022, at 7 (2d Cir. filed Feb. 6, 2015). "PEP, an instrumentality of Mexico, knew or should have known when it entered into the contracts that both Mexico and the United States are parties to the Panama Convention and that, as a result, any Mexican arbitral award could be enforced in U.S. courts." *Ibid.* (citing Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, 1438 U.N.T.S. 245). The government cited *Seetransport* for the proposition that, "[w]hen a country becomes a signatory to the [New York] Convention, * * * the signatory

State must have contemplated enforcement actions in other signatory States"—confirming that the same consent principles apply both to the waiver exception and to personal jurisdiction. *Ibid.* (citing 989 F.2d at 578).

The lower courts are thus in disarray over the role of consent in arbitral enforcement. This Court should reject the mistaken *Creighton* decision and endorse the consent rationale Congress relied on when it enacted the FSIA and its arbitration exception.

IV. REQUIRING MINIMUM CONTACTS FOR ENFORCEMENT OF FOREIGN ARBITRAL AWARDS WOULD UNDERMINE U.S. PUBLIC POLICY AND TREATY OBLIGATIONS

Requiring minimum contacts for arbitral enforcement not only defies Congress's premises in enacting the arbitration exception—it also frustrates important U.S. public policies and treaty obligations.

A. United States Public Policy Strongly Favors Arbitral Resolution of International Commercial Disputes

This Court has repeatedly reaffirmed this country's "emphatic federal policy in favor of arbitral dispute resolution." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985). "[A]t least since this Nation's accession in 1970 to the [New York] Convention, * * * that federal policy applies with special force in the field of international commerce." *Ibid.* That policy enforces the "solemn contracts" by which parties "agree[] in advance on a [dispute resolution mechanism] acceptable to both parties." *Id.* at 629-630. It also reflects other important objectives, including "international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the inter-

national commercial system for predictability in the resolution of disputes." *Id.* at 629.

The United States elevated that policy to a binding treaty obligation when it acceded to the New York Convention in 1970. See New York Convention accession proclamation, 21 U.S.T. at 2560. To ensure that arbitration is an effective means of dispute resolution, the Convention requires contracting states to "recognize arbitral awards as binding and enforce them," subject only to narrow exceptions. *Id.* art. III, 21 U.S.T. at 2519. When submitting the Convention for Senate advice and consent to ratification, President Johnson emphasized that the treaty would "contribute[] in many ways to the promotion of international trade and investment": "[I]t provides greater flexibility for the arranging of business transactions abroad; it simplifies the enforcement of foreign arbitral awards; it gives more binding effect to awards and standardizes enforcement procedures; and it strengthens the concept of safeguarding private rights in foreign transactions." Letter of Transmittal (Apr. 24, 1968), S. Exec. Doc. No. 90-E, at 1 (1968), reprinted in 7 I.L.M. 1042, 1042 (1968). Congress then embraced those principles by enacting Chapter 2 of the Federal Arbitration Act, directing that the Convention "shall be enforced in United States courts." 9 U.S.C. § 201.

The New York Convention is a critical component of the rules-based international order that has supported peaceful relations among states since World War II. One hundred and seventy-two states have now become parties to the Convention. See United Nations Treaty Collection, *Status of Treaties* ch. 22, no. 1, treaties.un.org/Pages/ParticipationStatus.aspx. Any rule that impairs U.S. compliance with its obligations under the Convention would undermine treaty compliance worldwide, in-

creasing the risks for international commercial agreements and raising costs for governments seeking foreign investment, particularly in developing countries.

The United States's support for international arbitration spans decades. In the 1960s, the United States helped create the International Centre for Settlement of Investment Disputes to provide an arbitral forum for resolving investor-state disputes. See Convention on the Settlement of Investment Disputes Between States and Nationals of Other States ("ICSID Convention"), Mar. 18, 1965, 17 U.S.T. 1270. During the same era, Congress repeatedly conditioned foreign aid on agreements to arbitrate with investors. See Foreign Assistance Act of 1962, Pub. L. No. 87-565, §301(d)(3), 76 Stat. 255, 261 ("Hickenlooper Amendment") (requiring "appropriate steps, which may include arbitration, to discharge [state's] obligations under international law"); Pub. L. No. 92-245, 86 Stat. 57, 58 (1972), Pub. L. No. 92-246, 86 Stat. 59, 59-60 (1972), and Pub. L. No. 92-247, 86 Stat. 60, 60-61 (1972) ("Gonzalez Amendments") (requiring submission to ICSID arbitration, among other options). In 1981, the United States and Iran resolved the Iran Hostage Crisis by creating the Iran-United States Claims Tribunal to arbitrate disputes. See Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims (Jan. 19, 1981), 20 I.L.M. 230 (1981).

Thousands of bilateral investment treaties provide for arbitration to resolve disputes. See Cong. Rsch. Serv., No. R43052, *U.S. International Investment Agreements: Issues for Congress* 4-5 (Apr. 29, 2013) (counting over 3,000 bilateral investment treaties and free trade agreements). Those treaties most often call for arbitration either before ICSID or under UNCITRAL rules. *Id.* at 6. International commercial agreements with arbitration

clauses are too numerous to count. See, *e.g.*, Pet. App. in No. 23-1201, at 18a (providing for arbitration in India pursuant to ICC or UNCITRAL rules).

Arbitration's advantages are merely "potential" without the "necessary legal framework" for award enforcement. Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* 1 (1981). The New York Convention is thus "the cornerstone of current international commercial arbitration." *Ibid.*; see also Andrea K. Bjorklund, *Sovereign Immunity as a Barrier to the Enforcement of Investor-State Arbitral Awards: The Re-Politicization of International Investment Disputes*, 21 Am. Rev. Int'l Arb. 211, 217 (2010) ("The New York Convention is fundamental to the success of international arbitration.").

Nearly all the leading international arbitration rules—UNCITRAL, ICC, SCC, SIAC, LCIA, and others—rely on the New York Convention for enforcement of awards. See, *e.g.*, ICC International Court of Arbitration, *Arbitration Rules* 1 (Sept. 2022) (awards "susceptible to enforcement pursuant to * * * the 1958 New York Convention"). The many bilateral investment treaties and international commercial agreements that incorporate those rules thus rely on the Convention for enforcement too. Parties to international agreements often insist on arbitration clauses to resolve disputes in a neutral forum rather than in the other party's home courts. Robust global enforcement mechanisms help ensure that those parties need not rely on the other party's home courts to enforce the award if the other party refuses to pay.

Recognizing the New York Convention's critical role, some institutions specifically require that arbitrations be seated in Convention states. For example, when ICSID created the Additional Facility in 1978 to administer arbi-

trations not arising under the ICSID Convention, it required that "proceedings shall be held only in States that are parties to the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards." ICSID, *Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings* 41 art. 20 (June 1979) (omitted in 2022); see also *id.* at vi (explaining that rule sought "to assure the widest possible international recognition and enforcement of awards"). Similarly, the recent United States-Mexico-Canada free trade agreement ("USMCA") provides that, "[i]f the disputing parties fail to reach agreement, the tribunal shall determine the place [of arbitration] in accordance with the applicable arbitration rules, provided that the place shall be in the territory of a State that is a party to the New York Convention." United States-Mexico-Canada Agreement art. 14.D.7.1, July 1, 2020, ustr.gov/trade-agreements (annex for Mexico-United States disputes).

Those same policies and treaty obligations animated the 1988 amendments to the FSIA. The State Department supported the amendments because they would "advance our long-standing policy favoring arbitration in international commerce and particularly in business and investment relationships between private entities and foreign governments." *1986 Hearing* 32 (statement of Elizabeth G. Verville, Acting Legal Adviser, Department of State). The Department of Justice echoed that support, noting that "[t]he United States has long advocated the use of arbitration in the resolution of international disputes" and that the amendments "g[ave] appropriate recognition to the binding nature of submitting disputes to arbitration." *Id.* at 68 (statement of Stuart E. Schiffer, Deputy Assistant Attorney General, Civil Division).

The arbitration exception was designed to codify the jurisdictional rule adopted in *Ipitrade* and *LIAMCO*—a rule the government itself advocated in its *LIAMCO* brief. See pp. 13-18, *supra*. During the era when those cases were decided, the State Department was already considering proposed legislation similar to what the ABA later proposed. *Ipitrade* and *LIAMCO* relied squarely on the New York Convention. See *Ipitrade*, 465 F. Supp. at 826; *LIAMCO*, 482 F. Supp. at 1176-1178. The government was thus thoroughly familiar with the central role of that Convention when it supported the legislation.

The United States has continued to support international arbitration over the years since. In *BG Group*, for example, the government made clear that "[t]he United States strongly supports the resolution of investment disputes through investor-state arbitration." U.S. Br. in *BG Grp. PLC* v. *Republic of Argentina*, No. 12-138, at 1 (filed Sept. 2013). It urged courts to enforce awards "consistent with investment treaties' general and overarching purpose of attracting investment by providing for a neutral and effective means of resolving investment disputes." *Id.* at 25; see also U.S. Br. in *Pemex*, No. 13-4022, at 2 (invoking interest in "reliable and efficient enforcement of international arbitral awards").

In *amicus*'s view, the United States's longstanding support for international arbitration and robust enforcement reflects interests as weighty today as they were when Congress enacted the arbitration exception nearly forty years ago. "[P]rovisions to enforce arbitration agreements and arbitral awards * * * are vital to effective security for international trade and investment * * *." *1986 Hearing* 82 (statement of Mark B. Feldman); see also Feldman, Arb. J., *supra*, at 32 (enforcement necessary "to achieve [arbitration's] purpose—the peaceful,

impartial, and effective resolution of disputes"). Sovereigns' willingness to satisfy awards "rests on expectations that awards are enforceable in court if they are not implemented voluntarily." *1986 Hearing* 95 (statement of Mark B. Feldman). Potent enforcement regimes are thus crucial to ensure that international arbitration continues to fulfill its role as an effective mechanism for investor-state dispute settlement.

B. Requiring Minimum Contacts for Arbitral Enforcement Undermines U.S. Treaty Obligations and Public Policy

Requiring a petitioner seeking to enforce an award to show that the respondent has minimum contacts with the United States undermines those important interests. It puts the Nation in breach of its treaty obligations and impairs the strong federal policy favoring arbitration.

Article V of the New York Convention specifies seven narrow grounds for refusing to enforce an award. 21 U.S.T. at 2520. The Convention expressly makes those grounds exclusive. See *ibid.* (permitting refusal "only" on specified grounds); *TermoRio S.A. E.S.P.* v. *Electranta S.P.*, 487 F.3d 928, 935 (D.C. Cir. 2007) (court "may refuse to enforce the award only on the grounds explicitly set forth in Article V"), cert. denied, 552 U.S. 1038 (2007). None of the Convention's seven grounds has anything to do with lack of minimum contacts. Denying enforcement on that basis effectively engrafts an eighth, unstated ground onto the Convention, contrary to the Convention's mandate of exclusivity.

To be sure, Article III of the Convention provides that states shall enforce awards "in accordance with the rules of procedure of the territory where the award is relied upon." 21 U.S.T. at 2519. But that provision refers only to "rules of *procedure* * * * such as the form of the re-

quest and the competent authority." van den Berg, *supra*, at 239 (emphasis added). "The conditions for enforcement * * * are those set out in the Convention and are exclusively governed by the [treaty]." *Ibid.* Requiring minimum contacts as a condition of enforcement is an impermissible unstated ground for refusing to enforce an award, not a mere rule of procedure.

Arbitration authorities have thus criticized the use of minimum contacts standards in arbitral enforcement. Requiring minimum contacts, they urge, "place[s] the United States in breach of its treaty obligations under the New York Convention, which limits non-recognition of foreign awards to a narrowly-drafted litany of defenses." William W. Park & Alexander A. Yanos, *Treaty Obligations and National Law: Emerging Conflicts in International Arbitration*, 58 Hastings L.J. 251, 254-255 (2006) (footnote omitted); see also Linda J. Silberman & Aaron D. Simowitz, *Recognition and Enforcement of Foreign Judgments and Awards: What Hath* Daimler *Wrought?*, 91 N.Y.U. L. Rev. 344, 393 (2016) (restrictions "undermin[e] cross-border cooperation on which transnational business relies"); S.I. Strong, *Invisible Barriers to the Enforcement of Foreign Arbitral Awards in the United States*, 21 J. Int'l Arb. 479, 481 (2004) (defense has a "disproportionately severe outcome"); Ronald R. Darbee, Comment, *Personal Jurisdiction as a Defense to the Enforcement of Foreign Arbitral Awards*, 41 McGeorge L. Rev. 345, 365 (2010) (defense "erode[s] the international community's faith in the finality of arbitral awards and the United States' commitment to its treaty obligations under the Convention").

Congress correctly understood that an agreement to arbitrate in a New York Convention state is a consent to enforcement proceedings in any other Convention state,

for purposes of both sovereign immunity and personal jurisdiction. The Court should enforce the statute Congress enacted, consistent with the consent principles on which Congress relied.

CONCLUSION

The court of appeals' judgment should be reversed.

Respectfully submitted.

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