No. 24-759

In the

Supreme Court of the United States

WYE OAK TECHNOLOGY, INC.,

Petitioner,

v.

REPUBLIC OF IRAQ, *et al.*,

Respondents.

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

SUPPLEMENTAL BRIEF FOR RESPONDENTS IN RESPONSE TO SUPPLEMENTAL BRIEF FOR PETITIONER

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INTRODUCTION

Respondents respond to Petitioner Wye Oak Technology, Inc.'s ("Wye Oak") Supplemental Brief with respect to this Court's decision in *CC/Devas (Mauritius) Ltd. v. Antrix Corp., Ltd.*, 145 S. Ct. 1572 (2025) ("*Devas*"). Contrary to Wye Oak's position, *Devas* does not support granting review in this case, because *Devas* is not relevant to the questions presented here. Unlike the Ninth Circuit in *Devas*, the D.C. Circuit did not impose any additional requirement beyond those stated in the plain text of the Foreign Sovereign Immunities Act ("FSIA"). Instead, the D.C. Circuit interpreted the FSIA's text – specifically, the term "direct effect" in clause three of the commercial activities exception, and the term "based upon … an act performed in the United States" in clause two of that exception. 28 U.S.C. § 1605(a)(2). *Devas* is therefore inapposite. And with respect to clause two, the D.C. Circuit did not improperly rely on legislative history as Wye Oak incorrectly contends.

I. *Devas* Does Not Support Wye Oak's Arguments On Either Question Presented

The Court's opinion in *Devas* does not support granting the Petition here because in applying § 1605(a)(2) of the FSIA to the facts of this case, the D.C. Circuit did not commit any of the errors that this Court identified with respect to the Ninth's Circuit's construction of § 1330(b) of the FSIA. *Devas* otherwise provides no support for granting the Petition here. Indeed, if anything, *Devas* supports the D.C. Circuit's two decisions below.

Devas reviewed the Ninth Circuit's reading of 28 U.S.C. § 1330(b), which provides that personal

jurisdiction "shall exist" under the FSIA "as to every claim for relief over which the district courts have jurisdiction under subsection (a)"—i.e., for every claim subject to an immunity exception—and "where service has been made under [S]ection 1608." *Devas*, 145 S. Ct. at 1579. On top of those two statutory requirements, the Ninth Circuit had "imposed a third," "additional requirement," namely, that "the FSIA [also] requires a traditional minimum contacts analysis." *Id*. at 1576, 1579 (quoting Pet. App. for Cert. at 4a, *Devas Multimedia Private Ltd. v. Antrix Corp. Ltd.*, No. 20–36024 (Aug. 1, 2023) (citing *Thomas P. Gonzalez Corp. v. Consejo Nacional de Produccion de Costa Rica*, 614 F. 2d 1247, 1255 (9th Cir. 1980)). Unanimously reversing, the Court held that the "text and structure of the FSIA demonstrate that Congress did not require 'minimum contacts'" to establish personal jurisdiction under the Act, *id.* at 1579, because the "most natural reading of § 1330(b)" is that it imposes only the "two substantive requirements" set out in the statute itself and that "[n]otably absent from § 1330(b) is any reference to 'minimum contacts.'" *Id*. at 1580.

In the present case, the D.C. Circuit did not impose any "additional requirements" beyond the text of the statute. Instead, it interpreted the FSIA's terms, as it was required to do.

A. The D.C. Circuit Did Not Impose Additional Requirements Onto The FSIA's "Direct Effects" Clause

According to Wye Oak, a "'natural reading'" of the FSIA that *Devas* adopted in construing § 1330(b), when applied to the direct-effect provision in § 1605(a)(2)[3] "precludes" what Wye Oak calls "the D.C.

Circuit's atextual place-of-performance test," referring this Court to Wye Oak's prior submissions for its reasoning. Pet'r's Suppl. Br. 3 (citations omitted). In its Petition and Reply, Wye Oak alleges the existence of a circuit split because certain circuits, including the D.C. Circuit below, purportedly "replac[ed] traditional causation principles with judicially crafted bright-line rules" based on whether a "contract contemplates the United States as a place of performance." Pet. 15; Pet. Reply 8 (citing Pet. App. 10a). Wye Oak refers to such "rules" as an "atextual" requirement. Pet. 19; Pet. Reply 7.

Wye Oak mischaracterizes what the D.C. Circuit and other Circuits have done. Rather than imposing any additional requirements, the Courts of Appeal have performed the necessary task of deciding what the statutory term "direct effect" means in the context of a contractual claim – specifically, whether a contractual breach can cause a "direct effect" in the United States where the contract does not designate or even anticipate the United States as a place of performance. 28 U.S.C. § 1605(a)(2)[3].

In the relevant part of its opinion, the D.C. Circuit here found that "a halt in commerce between the United States and another country counts as a *direct effect* in the United States only if the contract 'establishe[d] or necessarily contemplate[d] the United States as a place of performance[.]'" Pet. App. 16a (applying *Odhiambo v. Republic of Kenya*, 764 F.3d 31 (D.C. Cir. 2014) (Kavanaugh, J.), *cert. denied*, 579 U.S. 927 (2016)). Contrary to Wye Oak's argument, no Circuit has suggested, let alone held, that where a contract, as here, contemplates no performance in the United States, the plaintiff can

still establish a "direct effect" in this country by reliance on what Wye Oak terms "traditional causation principles" to identify an immediate domestic consequence of the contract's breach. Opp. 3, 17-18.

Looking at what was contemplated under the contract to determine whether its breach caused a "direct effect in the United States" does not impose an "atextual" limitation on the FSIA's provisions in the way the Ninth Circuit's reading of § 1330(b) in *Devas* plainly did. Rather, examining whether contractual performance was contemplated in the United States merely implements this Court's instruction in *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992), to identify whether the "act" the plaintiff's claim is "based upon" caused an "immediate" consequence in the United States, without there being any further unwritten requirement that such effect also be "substantial or foreseeable." Opp. 17.

Indeed, responding to a similar argument by the Plaintiff/Petitioner in *Odhiambo*, the U.S. Government explained why focusing on the terms of the contract does not reimpose an unwritten limitation on clause three that this Court rejected in *Weltover*:

> … *Weltover* itself looked to place of performance, *see* 504 U.S. at 619 - not because it demonstrated foreseeability, but because it went to *the directness of the harm*. If a payee has no right to payment in the United States, then any harm here is likely the 'result of some intervening event.'

Brief for the United States as *Amicus Curiae* at 18-19, *Odhiambo v. Republic of Kenya*, 764 F.3d 31 (D.C. Cir. 2014) (No. 14-1206), 2016 WL 2997336, at *18-19 (quoting *Odhiambo v. Republic of Kenya*, 764 F.3d at 38 (emphasis added)).

Looking to the terms of the contract is simply a means of assessing compliance with § 1605(a)(2)[3]'s requirement of "directness" – or, in *Weltover*'s terms "immedia[cy]" – of any claimed effect from the particular breach over which the plaintiff is suing. *Weltover, Inc.*, 504 U.S. at 618. The D.C. Circuit did not engraft additional requirements onto clause three or rewrite the statute to adopt a limitation applicable only to contract claims, as Wye Oak incorrectly asserts. Opp. 17-18.

B. *Rote* Does Not Support Wye Oak's Argument

Wye Oak also claims to find support in *Devas* for its Petition from the fact that this Court "favorably cited *Rote v. Zel Custom Mfg. LLC*, 816 F.3d 383, 394 (6th Cir. 2016)," which Wye Oak contends is one of the Circuit Court decisions "on Wye Oak's side" of the supposed Circuit split over clause three. Pet'r's Suppl. Br. 2. But Justice Alito's opinion cited *Rote* only with respect to this Court's agreement with the Sixth Circuit that the "direct effect" clause did not itself incorporate a minimum contacts test, rejecting the Ninth Circuit's contrary conclusion in its earlier decision in *Thomas P. Gonzalez Corp.,* 614 F. 2d 1247. *Devas*, 145 S. Ct. at 1581.

Here, Respondents never made any "minimum contacts" argument under § 1330(b) or § 1605(a)(2), and the D.C. Circuit's two decisions do not rely on any

such argument. Accordingly, there is no basis to infer any support for Wye Oak's Petition from *Devas*' citation to *Rote*. Opp. 22.

C. The D.C. Circuit Did Not Impose An Additional Requirement On Clause Two Of The FSIA's Commercial Activities Exception

Wye Oak next contends that *Devas* supports review of the D.C. Circuit's decision as to clause two of the commercial activities exception, by "confirm[ing] the D.C. Circuit's error in relying on legislative history to support" what Wye Oak calls the D.C. Circuit's "rule" that supposedly imposed an unstated limitation on the textual requirements of clause two. Pet'r's Suppl. Br. 3. *Devas* does not support Wye Oak's position.

The D.C. Circuit did not impose any atextual "rule" in its clause two ruling. Instead, it interpreted the words of the clause and its structure within § 1605(a)(2), to determine whether the "act performed in the United States" in clause two applies to Wye Oak's own performance of administrative activities in the United States in support of its contract with the Ministry in Iraq. 28 U.S.C. § 1605(a)(2)[2]. The D.C. Circuit found this text refers to the *foreign state's* "act," which is the "act" upon which Wye Oak's claim must be based. Pet. App. 103a n.2 (citing *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 35 (2015)).

Wye Oak misinterprets the D.C. Circuit's reference to legislative history. In a footnote, then-Judge Jackson stated that the text of clause two was not ambiguous, but "[t]o the extent that one might think that the second clause is ambiguous … the

legislative history of section 1605(a)(2) leaves no doubt." Opp. 10 (citing Pet. App. 102a). The House Judiciary Committee and Senate Judiciary Committee reports both explicitly state that "the second clause of the commercial activities exception 'looks to conduct *of the foreign state* in the United States.'" Pet. App. 102a quoting H.R. Rep. No. 94-1487, at 19 (1976); S. Rep. No. 94-1310, at 18 (1976) (emphasis added).

Wye Oak mischaracterizes the discussion of the FSIA's legislative history in *Devas*. This Court simply reiterated in *Devas* the unremarkable proposition that legislative history cannot override the text of the law, and found that the legislative history of § 1330(b), when correctly understood, in any event "leads to the same result as [the FSIA's] text." *Devas*, 145 S. Ct. at 1582.

Because the D.C. Circuit in this case interpreted clause two and did not impose any additional "rule" or other requirement, and because its reference to the legislative history was not made to vary the terms of the statute and "leads to the same result" as its interpretation of the text, *Devas* provides no support for review of the clause two ruling below.

D. *Devas* Supports The D.C. Circuit's Decisions

Indeed, if anything, *Devas* affirmatively supports the D.C. Circuit's readings as to both clauses two and three of § 1605(a)(2). *Devas* emphasized that the absence of any minimum contacts requirement in the text of § 1330(b) should not be taken to mean that "Congress dispensed altogether" with the requirement of a U.S. nexus in claims against a foreign state under

the FSIA. *Id*. at 1580. To the contrary, the "FSIA's immunity exceptions themselves require varying degrees of suit-related domestic contact before a case may proceed," with clause three of § 1605(a)(2) "call[ing] for *considerable* domestic nexus." *Id*. at 1580 (emphasis added) (quoting *Verlinden B.V. v. Central Bank of Nigeria,* 461 U.S. 480, 490–491). That "domestic nexus," Justice Alito wrote, entails "proof of contact between the *foreign state* and the United States." *Id*. (emphasis added). "Proof" of such "contact between the *foreign state* and the United States" can be established only by an act performed in the United States by, or legally attributable to, the foreign state (clause two), or an immediate consequence in the United States of the foreign state's act abroad (clause three). Opp. 30-33.

Here, Wye Oak relies on the administrative tasks *it* performed in the United States to satisfy clause two and *its* cessation of those activities as the effect in the United States that supposedly satisfies clause three. Opp. 17. Wye Oak cannot establish the "considerable domestic nexus" between the foreign state and "suit-related domestic contact" required to satisfy the commercial activities exception, where Respondents took no action in the United States and the Ministry's contract with Wye Oak did not "establish[] or necessarily contemplate[] performance in the United States" by either side. Opp. 12.

II. The Issuance Of The *Devas* Decision Does Not Warrant Granting Wye Oak's Petition For Certiorari, Vacating and Remanding To The D.C. Circuit

As the final paragraph of its Supplemental Brief, Wye Oak insists that "at a minimum," this

Court should issue a GVR order that would allow for "further percolation" in the D.C. Circuit as to the issues in this case in light of *Devas*. Pet'r's Suppl. Br. 4. The Court should reject Wye Oak's request.

Where this Court issues a decision that is *relevant* to a pending petition for certiorari, this Court of course has the discretion to then grant the pending petition, vacate the judgment, and remand the case to the lower court in light of that opinion. *See* Stephen M. Shapiro *et al.*, *Supreme Court Practice* 5-38 (11th ed. 2019). Such relief is not appropriate here, however, because, as established above, *Devas* is not relevant to the issues presented in Wye Oak's Petition, and, to the extent the *Devas* opinion contains language that touches on the proper construction of § 1605(a)(2), those statements support the decisions below.

Moreover, in its petition for rehearing, Wye Oak presented to the D.C. Circuit its view that the Court of Appeals erred by supposedly engrafting atextual limitations on the FSIA's provisions. Pet. for Panel Reh'g & Reh'g En Banc at 1, 3, 11-16, *Wye Oak Tech., LLC v. Republic of Iraq*, No. 23-7009 (D.C. Cir. Aug. 29, 2024). There is no reasonable probability that the lower court would alter its holdings upon reexamination in light of *Devas*. *See Lawrence ex rel. Lawrence v. Chater*, 516 U.S. 163, 167 (1996). For that reason, a GVR order should not issue.

CONCLUSION

The Petition should be denied.

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