No. 23-1201

IN THE
Supreme Court of the United States

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

Petitioners,

v.

ANTRIX CORP. LTD.;
DEVAS MULTIMEDIA PRIVATE LIMITED,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENT

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

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REPLY BRIEF FOR PETITIONERS

Antrix concedes that the courts of appeals are divided over the important question whether foreign states are entitled to a minimum-contacts analysis before the courts of the United States may exercise personal jurisdiction. That conflict warrants this Court's intervention because it undercuts Congress's goal in enacting the FSIA of "developing a uniform body of law concerning the amenability of a foreign sovereign to suit in United States courts." *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 622 n.11 (1983) (quotation marks omitted).

Antrix's attempt to defend the Ninth Circuit's holding is unpersuasive and ultimately irrelevant to the question whether this Court should grant review. Antrix ignores the language of the FSIA's personal jurisdiction provision and misconstrues the holdings of the other circuits. As Judge Bumatay observed in his dissent, "no other court interprets the FSIA" the way the Ninth Circuit has. App.49a.

Antrix's other efforts to evade review are equally unpersuasive. The question presented was the *only* issue addressed by the Ninth Circuit, which makes this an appropriate vehicle for the Court to resolve this threshold jurisdictional question. The Ninth Circuit can decide the question it reserved—whether Antrix is India's alter ego—on remand. And the district court could decide whether Antrix is entitled to relief based on foreign court decisions involving the underlying arbitral award if Antrix ever presents that issue.

This Court should grant certiorari and reverse.

ARGUMENT

I. Antrix Concedes A Circuit Split Exists On The Important Question Presented.

Antrix admits that a circuit split exists on the important question whether a minimum-contacts showing is required for U.S. courts to exert personal jurisdiction over a foreign state. Antrix Br. 26-29. And Antrix concedes that this split has "undermined" what should be a "uniform body of law" governing the amenability of foreign states to suit in the United States. *Id.* at 29; see Pet. 20-22. Those concessions confirm the compelling need for certiorari. See Sup. Ct. R. 10(a).

1. While Antrix concedes the circuit conflict, Antrix offers a different count. But Antrix is incorrect that the Third, Fourth, Fifth, Sixth, Eighth, and Eleventh Circuits agree with the Ninth Circuit's approach, Antrix Br. 23, as every judge of the Ninth Circuit who considered the split concluded. The two circuit judges on the panel candidly acknowledged that their precedent "is contrary to the views of other courts of appeals." App.10a-11a. Seven other circuit judges agreed that "no other court interprets the FSIA this way." App.49a.

Antrix's attempt to shore up the Ninth Circuit's holding collapses on the most cursory examination. *None* of the decisions it cites held that lack of minimum contacts warranted dismissal in any case in which an exception to sovereign immunity applied and proper service was made. See Antrix Br. 23-26.

Most of Antrix's cases involve the FSIA's "commercial activities exception," so Antrix—like the Ninth Circuit's erroneous precedent—"simply mixes up subject-matter jurisdiction and personal jurisdiction." App.59a; see, *e.g.*, *Velidor* v. *L/P/G Benghazi*, 653 F.2d 812, 820 (3d Cir. 1981) (analyzing contacts with United States to determine if commercial-activity exception applied).

For subject-matter jurisdiction to exist under the commercial-activity exception, the action must be based (1) "upon a commercial activity carried on *in the United States* by the foreign state"; (2) "upon an act performed *in the United States* in connection with a commercial activity of the foreign state elsewhere"; or (3) upon commercial activity that "causes a *direct effect in the United States*." 28 U.S.C. § 1605(a)(2) (emphases added). These statutory requirements are similar in some respects to the due process minimum-contacts analysis. See *S & Davis International, Inc.* v. *Republic of Yemen*, 218 F.3d 1292, 1298 (11th Cir. 2000) ("[t]he 'direct effects' component of the commercial activity exception to sovereign immunity is inextricably intertwined with the 'minimum contacts' component of the personal jurisdiction issue").

But, while "the 'direct effect' analysis and 'minimum contacts' test are related, * * * the Ninth Circuit appears to stand alone in expressly incorporating the 'minimum contacts' test wholesale." *Rote* v. *Zel Custom Manufacturing LLC*, 816 F.3d 383, 395 n.8 (6th Cir. 2016). And the Ninth Circuit alone applies the minimum-contacts standard for *all* FSIA actions, even those brought under other provisions that, unlike the commercial-activity exception, have no textual reference to contacts with the United States. It is little

surprise that other circuits—including the Sixth Circuit that Antrix counts on its side—"do not find the Ninth Circuit's approach persuasive." *Id.* at 395. "[T]he Ninth Circuit went beyond the plain meaning of the FSIA's terms and relied on * * * legislative history * * * to read into the statute requirements that are simply not there." *Ibid.*

In the two cases Antrix cites that did not involve the commercial-activity exception, there was no occasion to determine whether a minimum-contacts showing was required because minimum contacts existed in any event. *Antoine* v. *Atlas Turner, Inc.*, 66 F.3d 105, 111 (6th Cir. 1995) ("Atlas had sufficient contacts with the United States to support personal jurisdiction"); *Harris Corp.* v. *National Iranian Radio & Television*, 691 F.2d 1344, 1353 (11th Cir. 1982) (similar).

To be sure, some cases held that, even if personal jurisdiction existed under the FSIA, a court must "assess the exercise of authority against the standards of due process." *E.g.*, *Harris Corp.*, 691 F.2d at 1352. That was because "foreign corporations that do not meet *Bancec*'s veil-piercing standards 'enjoy all the due process protections' regularly afforded to litigants challenging personal jurisdiction," even if "the corporation qualifies as an agency or instrumentality of a foreign state under the FSIA." *Gater Assets Ltd.* v. *AO Moldovagaz*, 2 F.4th 42, 65-66 (2d Cir. 2021).

All but one of the cases cited by Antrix involved suits against agencies or instrumentalities of foreign states that were presumed to be legally separate from the foreign sovereign that owned them and thus entitled to due process. See, *e.g.*, *Vermeulen* v. *Renault, U.S.A., Inc.*, 985 F.2d 1534, 1537 (11th Cir. 1993) (suit

against "corporation wholly owned by the French government"). The one case involving suit against a sovereign or its political subdivisions mentioned "due process" only in passing and by way of comparison to the commercial-activity exception's "substantial contacts" requirement. *Gerding* v. *Republic of France*, 943 F.2d 521, 527 (4th Cir. 1991).

Here, the district court held that Antrix was India's alter ego because "[t]he Government of India exercises 'plenary control' over Antrix in a principal-agent relationship" such that "the due process clause does not apply and statutory personal jurisdiction under the FSIA is all that is required." App.14a.[1] The Ninth Circuit did not reach Antrix's challenge to the district court's alter-ego holding, because the court of appeals held that a minimum-contacts showing is required *even if* a defendant is the alter ego of a foreign state. App.5a.

None of the cases that Antrix says agree with the Ninth Circuit held such a thing. And, of course, even if they had—or otherwise agreed with the Ninth Circuit—it would only confirm the division warranting this Court's review.

2. Antrix next attempts to cabin the holdings of the D.C., Second, and Seventh Circuits that a showing of minimum contacts is not required by suggesting those decisions all arise from "a unique FSIA exception not

[1] Antrix attempts to cast doubt on the district court's alter-ego finding because "[t]he district court did not even cite *Bancec*." Antrix Br. 35. The district court cited four courts of appeals decisions on alter ego, each of which cited and applied *Bancec*. App.14a. The Ninth Circuit can assess Antrix's quibble on remand.

at issue here: the terrorism exception." Antrix Br. 26. That is also wrong.

While subject-matter jurisdiction existed in *Price* v. *Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 85 (D.C. Cir. 2002), under the terrorism exception, the court's rejection of Libya's due process argument did not turn on the text of that exception. Rather, its decision was based on the Constitution's "text and structure," as well as "history and tradition." *Id.* at 97.

And the D.C. Circuit announced the FSIA does not require a showing of minimum contacts as a statutory matter in a case, just like this one, *involving the arbitration exception*. *TMR Energy Ltd.* v. *State Property Fund of Ukraine*, 411 F.3d 296, 299 (D.C. Cir. 2005). The D.C. Circuit held that the text of 28 U.S.C. § 1330(b)—not the terrorism exception, which was not applicable—"clearly expresses the decision of the Congress to confer upon the federal courts personal jurisdiction over a properly served foreign state—and hence its agent—coextensive with the exceptions to foreign sovereign immunity in the FSIA," without a showing of "minimum contacts." *Id.* at 303; see Pet. 11. Antrix does not even mention *TMR Energy* in its brief in opposition, let alone grapple with its reasoning.

Nor did the text of the terrorism exception play any role in the decisions of the Second and Seventh Circuits—those courts have applied their no-minimum-contacts required standard in cases involving the arbitration and expropriation exceptions. See *Gater Assets*, 2 F.4th at 49 (no statutory right to minimum-contacts analysis in case involving arbitration exception); *Frontera Resources Azerbaijan Corp.* v. *State Oil Co. of Azerbaijan Republic*, 582 F.3d 393, 399 (2d Cir. 2009) (no

due process right to minimum-contacts analysis in case involving arbitration exception); *Abelesz* v. *Magyar Nemzeti Bank*, 692 F.3d 661, 694 (7th Cir. 2012) (no right to minimum-contacts analysis in case involving expropriation exception).

Antrix's assertions that these decisions were actually rooted in the text of the terrorism exception—even though those cases have nothing to do with the terrorism exception—simply because that exception was the basis for subject-matter jurisdiction in a case on which those courts relied (*Price*) is meritless.

3. Antrix spends most of its opposition attempting to defend the Ninth Circuit's decision. That discussion has little bearing on the need for this Court's review—the lack of uniformity created by the Ninth Circuit's outlier position requires this Court's intervention. Nevertheless, Antrix cannot reconcile the Ninth Circuit's decision with the text and history of the FSIA or the Due Process Clause. Antrix Br. 12-22.

Antrix claims that the Ninth Circuit's decision "aligns with the FSIA's text," Antrix Br. 16, yet at no point in its brief does it quote the relevant text: "Personal 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) (emphasis added). And, remarkably, Antrix cites this provision on only one page of its 36-page brief in opposition. Antrix Br. 16.

Antrix concedes that Section 1330(b) requires an FSIA exception to apply and adequate service. Antrix notes that the text of some exceptions to sovereign immunity—the commercial-activity exception and expro-

priation exception—require a nexus between the foreign state and the United States. Antrix Br. 17-19. Antrix then offers the non sequitur that, because *some* exceptions to sovereign immunity require a nexus between the foreign state and the United States, minimum contacts are *always* required. Not so.

The text of the arbitration exception applicable here requires only that an action be one to confirm an arbitral award "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). In the face of this clear text, Antrix contends that a showing of minimum contacts is "implicit in the very notion of enforcement and confirmation." Antrix Br. 19. Antrix does not cite a single judicial precedent in support of this interpretation, relying only on ambiguous witness testimony from a congressional hearing. *Ibid.*

Antrix's attempt to find support for its position in largely irrelevant statutory and legislative history fares no better. Antrix says that Congress would not allow "any plaintiff, from anywhere in the world, to drag a foreign sovereign that lost an arbitration into U.S. court, and then subject that sovereign to intrusive discovery." Antrix Br. 2, 13-16.[2] But by limiting the arbitral exception to awards "governed by a treaty or

[2] Antrix also ignores the connection between this dispute and the United States, accusing the Liquidator of "misleadingly stat[ing] that [Devas] was founded by American investors and executives." Antrix Br. 8 n.4. It was. See App.24a (district court finding that Antrix's Chairman met with Devas's "CEO and three of its U.S.-based directors in Washington D.C." in 2009); App.53a (Judge Bumatay noting that "Devas was a private company created by a group of American investors and executives").

other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards," Congress has laid out precisely the required nexus between the state and forum (*i.e.*, accession to a relevant treaty), with no mention of minimum contacts. 28 U.S.C. § 1605(a)(6). Antrix's alarm over "intrusive discovery" ignores that this Court has already held that the FSIA contains no "provision forbidding or limiting discovery in aid of execution of a foreign-sovereign judgment debtor's assets." *Republic of Argentina* v. *NML Capital, Ltd.*, 573 U.S. 134, 142 (2014).

Finally, Antrix argues that it is reasonable to ground a foreign state's right to demand a showing of minimum contacts in the Due Process Clause—even though that clause provides no analogous right to the States of the Union—because "U.S. states enjoy many privileges that foreign governments do not," such as representation in the Electoral College. Antrix Br. 20-22. That States enjoy certain constitutional privileges as political entities that "make up the very fabric" of our constitutional system is no basis to "afford greater Fifth Amendment rights to foreign nations, who are entirely alien" to that system. *Price*, 294 F.3d at 96; see Pet. 17-20.

Foreign states are extended the protections Congress and the President afforded in the FSIA. See *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 486 (1983) ("[T]his Court consistently has deferred to the decisions of the political branches" on questions of sovereign immunity). Those protections are uniform and comprehensive, and courts "do not lightly assume that Congress has omitted from its adopted text re-

quirements that it nonetheless intends to apply." *Jama* v. *ICE*, 543 U.S. 335, 341 (2005).

II. This Case Is An Appropriate Vehicle For Resolving The Question Presented.

Even though the question presented is the *only* question that the Ninth Circuit addressed below, App.3a-8a, Antrix insists that the question is not cleanly presented for two reasons, Antrix Br. 32-36. Neither has merit.

1. *First*, Antrix contends that this Court should not resolve the question presented in this case because an Indian court has purported to set aside the arbitral award. Antrix Br. 32-34. That is a merits question that is secondary to the Ninth Circuit's jurisdictional holding. Moreover, Antrix has not presented that issue to any court in the United States, the Ninth Circuit did not consider it, it is not before this Court, and it presents no obstacle to this Court's review.

The question whether the set-aside decision is entitled to recognition in the United States has never been considered by a U.S. court. Antrix never moved for an indicative ruling in the district court under Federal Rule of Civil Procedure 62.1 on whether the set-aside decision provided a basis for relief from the judgment (likely because it did not want a U.S. court to scrutinize the fairness of the set-aside proceedings in India).

If this Court reverses the Ninth Circuit's personal-jurisdiction holding, Antrix could argue on remand that the set-aside decision justifies relief from the judgment under Rule 60(b). Petitioners would oppose that argument. The allegations underlying the Indian proceedings are baseless, and multiple foreign

tribunals have already rejected India's attempts to avoid liability based on those decisions of its own judiciary. As Antrix itself concedes, a decision of a foreign tribunal purporting to set aside an arbitral award has no effect if that proceeding "is repugnant to fundamental notions of what is decent and just in the State where enforcement is sought." *Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V.* v. *Pemex-Exploración y Producción*, 832 F.3d 92, 106 (2d Cir. 2016) (quotation marks omitted); see *Compañía de Inversiones Mercantiles S.A.* v. *Grupo Cementos de Chihuahua S.A.B. de C.V.*, 58 F.4th 429, 454 (10th Cir. 2023) (similar).

In any event, the fact that this Court's decision could lead to "other questions" on remand is no basis to deny review because "those other questions are secondary to whether foreign states are entitled to a minimum-contacts analysis in the first place." App.50a.

Relatedly, Antrix contends that Petitioners cannot seek certiorari because the Supreme Court of Mauritius purported to prohibit anyone from representing the three Mauritian Petitioners anywhere in the world. Antrix Br. 10 n.5. But Antrix does not explain how an order of a Mauritian court could have extraterritorial effect in the United States. Nor does it explain how that order could possibly bar Petitioner Devas Multimedia America, Inc., a Delaware corporation not subject to the jurisdiction of Mauritius, from petitioning for certiorari.

2. *Second*, Antrix contends that this Court should deny certiorari because Antrix disagrees with the district court's conclusion that it is the alter ego of India and therefore its separate corporate entity should be

disregarded for the purpose of determining whether it is entitled to due-process protections. Antrix Br. 34-36. But the Ninth Circuit found no need to consider this question before determining that Antrix had a right to demand a showing of minimum contacts. App.3a-8a. As Judge Bumatay noted, the question of "whether Antrix is sufficiently controlled by India to be considered a foreign state" is "secondary to whether foreign states are entitled to a minimum-contacts analysis in the first place." App.50a.

Antrix's attempt to muddy the question cleanly presented in this case—"the *sole question*" the Ninth Circuit considered, App.56a—by raising the specter of subsidiary questions that could arise *only on remand* is no basis to deny certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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