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 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 PROFESSOR INGRID (WUERTH) BRUNK AS AMICA CURIAE IN SUPPORT OF NEITHER PARTY

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INTERESTS OF AMICA CURIAE

Professor Ingrid (Wuerth) Brunk holds the Helen Strong Curry Chair in International Law and serves as the Director of the Cecil D. Branstetter Litigation & Dispute Resolution Program at Vanderbilt Law School.[1] She was previously a Co-Reporter for the American Law Institute's Restatement (Fourth) of Foreign Relations Law of the United States and is presently Co-Editor-in-Chief of the American Journal of International Law. Her scholarship and teaching focus on international law, foreign relations law, and civil procedure. Amica has written extensively about litigation in U.S. courts involving foreign sovereigns, including on the question of whether foreign sovereigns are "persons" entitled to Fifth Amendment due process protections. Her scholarship on this topic was cited in Judge Bumatay's dissent to the denial of rehearing en banc in this case. Pet. App. 65a-66a. Amica therefore has an interest in ensuring that the Court has full information to evaluate whether foreign states are "persons" for Fifth Amendment due process purposes. She urges the Court to answer that question in the affirmative and to remand for further consideration of what is required by "due process"—a distinct issue, one with potentially broad implications that could extend well beyond cases involving foreign states and their agencies.

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[1] No counsel for a party authored this brief in whole or in part, and no entity or person, other than amica curiae and her counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case may present the question whether foreign sovereigns (and their agencies and instrumentalities) are "persons" entitled to Fifth Amendment due process protections. The answer is yes. As matter of text and history, the question is neither close nor difficult. Misled by dicta in *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607, 619 (1992), which assumed "without deciding" that foreign states are persons for purposes of the Due Process Clause, lower courts have held that foreign states are *not* "persons" under the Fifth Amendment. But neither the Supreme Court in *Weltover* nor the lower courts in the years thereafter have considered originalist sources. Those sources are crystal clear: In the late eighteenth century, states, their agencies, and their instrumentalities (and other artificial "bodies") were unequivocally viewed as "persons" entitled to "process." Brunk (Wuerth), *The Due Process and Other Constitutional Rights of Foreign Nations*, 88 Fordham L. Rev. 633 (2019); Pet. App. 65a-66a. Holding otherwise would disserve the history and structure of the constitution. It would also be unwarranted from a modern policy perspective. Due process is a flexible doctrine—not a one-size-fits-all straitjacket—which means that although foreign states have due process rights, the political branches nevertheless have broad policy flexibility to sanction them, curtail their conduct, or force them to pay for wrongdoing.

ARGUMENT

I. FOREIGN STATES ARE "PERSONS" FOR PURPOSES OF THE FIFTH AMENDMENT

Foreign states are "persons" under the Fifth Amendment. This conclusion flows directly from the constitutional text and originalist history (Part A, *infra*) and the constitutional structure (Part B, *infra*). Policy considerations also militate in favor of recognizing foreign states as "persons" entitled to Fifth Amendment Due Process protections. (Part C, *infra*).

A. Constitutional Text And Originalist History

The idea that foreign states are not "persons" largely derives from dicta in *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607, 619 (1992). That dicta, however, was not grounded in the historical record.[2] And that record, as shown below, demonstrates that foreign states were indeed considered "persons" in the eighteenth century.

When the U.S. constitution and the Bill of Rights were drafted and adopted, the word "person" was

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[2] Lower courts and scholars, too, have ignored these textualist and historical arguments. *See, e.g.*, Damrosch, *Foreign States and the Constitution*, 73 Va. L. Rev. 483 (1987). Professor Donald Childress is an exception, but only in part. He has focused on original sources, but largely to reach the uncontroversial conclusion that foreign states generally enjoyed immunity from suit at the time when the Constitution was adopted. Childress III, *Questioning the Constitutional Rights of Foreign Nations*, 88 Fordham L. Rev. Online 60 (2019). From that basis, Childress reasons that foreign states would not have needed any due process rights related to personal jurisdiction and therefore were not Fifth Amendment persons. But that argument conflates the question of whether foreign states are "persons" with the distinct question of what due process affords to persons (whether in the context of personal jurisdiction or otherwise). His immunity-based analysis offers no response at all to the textual and historical connections between persons, states, and process.

routinely used to describe states. For example, Emmerich de Vattel, an influential eighteenth-century political theorist, wrote that "the body of the nation, the State, remains absolutely free" and referred to nation states as "moral persons" and as "free persons." Vattel, *The Law of Nations*, at lv, 2, 164 (1854). A nation, Vattel explained, is "considered by foreign nations as constituting only one whole, one single person." *Id.* 164.

Vattel was no outlier: leading American jurists at the time employed the same language. James Madison reasoned, for example, that "all sovereigns are equal" for "the sovereignty of each is but a moral person." Madison, *Essay on Sovereignty*, in 9 *The Writings of James Madison* 568, 572 (Gaillard Hunt ed., 1910). Justice Wilson wrote to similar effect in *Chisholm* v. *Georgia*, 2 U.S. (2 Dall.) 419, 455 (1793), that "[b]y a State I mean, a complete body of free persons united together for their common benefit, to enjoy peaceably what is their own, and to do justice to others. It is an artificial person." *See also id.* at 456 (referring to "the person, natural or artificial"). Chief Justice John Jay reasoned similarly that "[s]overeignty is the right to govern; a nation or State-sovereign is the person or persons in whom that resides." *Id.* at 472; *see generally*, Brunk (Wuerth), *The Due Process and Other Constitutional Rights of Foreign Nations*, 88 Fordham L. Rev. 633, 676-679 (2019) (compiling more examples). These late eighteenth century American references to sovereign states as "persons" were not accidental usages, nor were they divorced from historical meaning and concepts. Instead, states were understood as actual "bodies," as the language from Vattel and others illustrate.

The understanding of the state as a "person" is deeply rooted in the Western political tradition. For example, in her work focusing on the territorial exercise of political power, noted historian Annabel Brett explains:

> [M]any of the political theories offered by key figures of the Western tradition do not themselves systematically highlight space as a key element of human politics. Hobbes's Leviathan represents, at least on the surface, a clear case of this. The state is an artificial man constructed by natural men through a covenant, that is, a mutual act of will. It is thus an interpersonal rather than a spatial phenomenon. And the state so constructed is itself, in turn, capable of acting at will: it is a person, though not a natural one. In short, the juridical metaphysics that makes the state, and makes the state an agent, seems to pull directly against an intrinsically spatial conception of it. … The post-Hobbesian conception of the equality of states as moral persons became an anchor of the 'law of nations' not only as a legal but a broader political discourse.

Brett, *The space of politics and the space of war in Hugo Grotius's De iure belli ac pacis*, 1 Global Intellectual History 33, 33-34 (2016). That observation, to be sure, does not directly concern the U.S. constitution, but it proves a broader point: the interpretation of "person" to include states is based on ideas that went to the heart of how people understood governments and sovereignty in the eighteenth century.

Consider Christian Wolff, a noted German philosopher whose work provided the basis for many of Vattel's arguments about sovereignty and the law of nations. In 1749, Wolff published a groundbreaking treatise entitled *The Law of Nations Treated According to the Scientific Method* (Liberty Fund, Inc., 2017). The treatise builds an argument about the rights and obligations of nations in their relationships with each other. Individual people, Wolff posits, have an obligation to perfect themselves.

And the "nation is a moral person, and therefore ought to have a perfection of its own." *Id.* § 174, at p.131. Wolff describes the "law of nations" as "originally nothing else than the law of nature applied to nations, which are considered as individual persons living in a state of nature." *Id.* § 156, at p.121. He continues: "[o]f course nations are to be looked on as free persons and consequently what each desires to be done must be left to its decision." *Id.* § 167, at p.128.[3] Again, the claim that states would have been understood as "persons" is not based on abstracted dictionary definitions or elegantly constructed computer searches focusing on isolated words, but instead upon significant ideas in political and intellectual history.

The Fifth Amendment's Due Process Clause provides further textual support. The Clause identifies due "process" as the obligation that the government owes to a "person." In the eighteenth century, the word "process" was often used in connection with litigation involving foreign sovereigns, underscoring that the Clause

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[3] The quoted language from Wolff is taken from a recent Liberty Fund translation; it does not appear that Wolff's treatise had been translated from its original Latin into English when the Constitution and the Bill of Rights were drafted and enacted. But Wolff's ideas had an enormous influence on Vattel who, as noted above, worked from the same philosophical starting point: states are persons. For more information on the influence of both Wolff and Vattel during the Founding Era, *see* Ramsey, *Executive Agreements and the (Non)treaty Power*, 77 N.C. L. Rev. 133, 169-170 (1998), which notes that Vattel's work "was invariably invoked as authoritative on matters of international law by the likes of Alexander Hamilton, James Madison, James Wilson, Edmund Randolph, Thomas Jefferson, John Marshall, Joseph Story and James Kent, among others. Moreover, it was relied upon by the Second Continental Congress, the Constitutional Convention and the U.S. Congress." (quoting from Adler, *Court, Constitution and Foreign Affairs*, in *The Constitution and the Conduct of American Foreign Policy* 19, 27-32 (David Gray Adler & Larry George eds., 1996)).

would have been understood as applying to them as "persons." For example, in litigation in the 1790s involving the French public vessel *Le Cassius*, U.S. officials argued to the Minister Plenipotentiary of the French Republic that the vessel "should be subjected to the course of legal process before the courts of the United States." Letter from Mr. Pickering to Mr. Adet (Aug. 25, 1795), *in* 1 *America State Papers* 631, 632 (Gales & Seaton 1833). The district attorney in Philadelphia similarly reasoned that "process of information and seizure" against the vessel "brings the sovereign to submit to the tribunal." *Id.* at 637. The published opinion in the case, too, asks whether "public ships" are subject to "process." *The Invincible*, 13 F. Cas. 72, 74 (C.C.D. Mass. 1814) (No. 7054), *aff'd sub nom. The L'Invincible*, 14 U.S. (1 Wheat.) 238 (1816). "Process," in other words, was fully understood as potentially applicable to foreign sovereigns and their property, further supporting the argument "due process" applied to them as "persons."

Thus, on textual and historical grounds, application of Fifth Amendment due process protections to foreign states is straightforward. The historical understanding of the term "person" to include states is clear, as is the extension of "process" to them.

B. Constitutional Structure

In the years leading up to the Supreme Court's decision in *Weltover*, lower courts, commentators, and the federal government all generally assumed that foreign states *did* have due process rights. The Second Circuit held, for example, in *Texas Trading & Milling Corporation* v. *Federal Republic of Nigeria*, 647 F.2d 300, 313 (2d Cir. 1981), *overruled by Frontera Resources Azerbaijan Corp.* v. *State Oil Co. of Azerbaijan Republic*, 582 F.3d 393 (2d Cir. 2009), that the Central Bank of Nigeria was

entitled to due process protections because foreign states are persons under the Fifth Amendment Due Process Clause, citing multiple earlier cases so holding. As for government officials, during congressional hearings about the Foreign Sovereign Immunities Act, both the Attorney General and the Secretary of State wrote that under the statute, "a district court can authorize a special method of service, as long as the method chosen is consonant with due process." 119 Cong. Rec. 3437 (1973).

All of this changed following the Supreme Court's dicta in *Weltover*, which assumed "without deciding" that a foreign state is a "person" for purposes of the Due Process Clause, but also cited to a case holding that U.S. states are not persons. In the decades following *Weltover*, lower courts concluded that foreign states are not persons, sometimes invoking structural arguments in support. These arguments generally take two forms: either foreign states fall entirely outside the constitutional order, or domestic states lack comparable constitutional protections and so foreign states should not be entitled to them, either. Neither argument passes muster.

1. Foreign States as Outsiders

Some courts reason that foreign states are "entirely alien" to our constitutional system. *Price* v. *Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 96 (D.C. Cir. 2002); *see also Frontera Res. Azerbaijan Corp.*, 582 F.3d at 399. This argument fails on multiple levels. As a threshold matter, even "aliens," who are in most senses outsiders to the political community, are entitled to some constitutional rights. *See generally*, Neuman, *Whose Constitution?*, 100 Yale L.J. 909 (1991). Aliens do not enjoy the same set of rights as those with full membership in the political community, but they are not

fundamentally excluded as outsiders, categorically entitled to nothing.

With respect to foreign states, the constitution explicitly extends the judicial power of the United States to include cases between states and foreign states, and in so doing affords to foreign states limited procedural protections inherent in the exercise of "judicial power" over "cases" (and controversies). In addition to their inclusion in Article III, foreign states benefit more generally from separation of powers principles. The constitution itself thus belies any notion that foreign states lie categorically "outside" the constitutional order.

a. *Foreign State Diversity Jurisdiction*

Foreign states are explicitly provided for in Article III, Section 2, Clause I, which extends the judicial power of the United States to controversies "between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." This form of diversity jurisdiction was designed to create a fair forum for certain cases involving foreign states, a forum that would hopefully reduce conflict between the United States and foreign powers. To be sure, Congress decides whether to create lower federal courts at all, as well as the scope of their subject matter jurisdiction, so that foreign states have no constitutional right to a federal forum pursuant to this language.

Nonetheless, this uncontroversial language from Article III shows that federal judicial power was created in part to allow foreign states to be brought into the federal judicial system in order to quell potential disputes with them, to the ultimate gain of the United States. As James Madison asked rhetorically at the Virginia Ratifying Convention about foreign state diversity jurisdiction: "[C]ould there be a more favourable or eligible provision to avoid controversies with foreign powers?

Ought it to be put in the power of a member of the Union to drag the whole community into war? As the national tribunal is to decide, justice will be done." *The Virginia Convention* (June 20, 1788), *in* 10 *The Documentary History of the Ratification of the Constitution* 1412, 1413-1414 (John P. Kaminski et al. eds., 1993). In light of Madison's words (and the text of Article III), it would be passing strange to conclude that foreign states and foreign states alone were not entitled to basic procedural protections in federal court. It also means that conflicts with foreign states were not understood as entirely a matter of sovereign-to-sovereign negotiations. To say otherwise is simply wrong.

Article III also assigns cases between foreign states and U.S. states to the Supreme Court's original jurisdiction. The second clause of Section 2, Article III provides in relevant part that "[i]n all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction." The phrase "those in which a State shall be Party" refers to language quoted above from Section 2, Clause 1, which extends the judicial power of the United States to, among others, controversies involving foreign States. In other words, cases between states and foreign states come within the Court's original jurisdiction not because the word "state" refers to foreign states, but instead because cases "in which a State shall be a party" includes cases between a domestic and a foreign state. In these limited circumstances, foreign states have access to the Supreme Court—access that does not fully depend upon Congress for its execution. *See* Brunk (Wuerth), 88 Fordham L. Rev. at 653-661 (developing this argument in detail). That Article III protects foreign states illustrates that the Constitution provided certain (very limited) benefits to foreign states as a way of

ensuring peace and prosperity for the United States. It also means that foreign states are not entirely "outside" of or "foreign to" the structure of the federal government.

b. *Judicial Power*

Beyond the specific reference to foreign states in Article III, the "judicial power" of the United States is a limited power: it extends only to "cases," a general term that encompassed within it the more limited references to "controversies." *See Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 378 (1821) (describing "cases" and "controversies" as "[j]urisdiction … given to the [c]ourts of the Union, in two classes of cases."). As Justice Story explained, a "case" is "a suit in law or equity, instituted according to the regular course of judicial proceedings." 3 Story, *Commentaries on the Constitution of the United States* §1640, at 507 (1833). Federal courts thus have no constitutional power to act outside of "cases" instituted through regular process. This Court made the same point in *Osborn* v. *Bank of United States*, 22 U.S. (9 Wheat.) 738, 819 (1824), in which Chief Justice John Marshall explained that Article III's "judicial power" is "capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case … ." Marshall had made a similar point decades earlier when he explained in 1800 that to have a "case" there "must be parties to come into court, who can be reached by its process." *Speech of the Hon. John Marshall Delivered in the House of Representatives of the United States on the Resolutions of the Hon. Edward Livingston*, in 4 *The Papers of John Marshall* 82, 95-96 (Charles T. Cullen ed., 1984).

The exercise of "judicial power" was conditioned not only upon the presence of defendants properly summoned to court, but also upon notice. Justice Story

reasoned, for example, that an *in rem* condemnation made without notice of the proceedings as "not so much a judicial sentence, as an arbitrary sovereign edict. It has none of the elements of a judicial proceeding." *Bradstreet* v. *Neptune Ins. Co.*, 3 F. Cas. 1184, 1187 (C.C.D. Mass. 1839) (No. 1793).

The actual rules for process or notice might come from other sources—the legislature might decide "the form prescribed by law"—but courts were bound to follow them. In other words, the precise requirements of process and notice were not necessarily themselves dictated by the Constitution. *See* Brunk (Wuerth), 88 Fordham L. Rev. at 683-684. Today, the requirement that federal courts follow generally applicable legal rules might seem very minimal. But doing so prevented arbitrary judicial action and reinforced the prerogatives of Congress; these were important objectives at a time when courts were still often associated with executive power. Chapman & McConnell, *Due Process as Separation of Powers*, 121 Yale L.J. 1672, 1683 (2012) (describing the historical importance of protections that provide "guarantee of judgment by an independent institution according to procedures designed to take the case out of the hands of the King."). And that restraint of arbitrary judicial action protects foreign states in the same manner it protects all litigants in federal courts.

c. *Separation of Powers*

Foreign states are not wholly without constitutional protections for an additional, related reason: they are generally protected by separation of powers, even outside the context of Article III. Article I limitations on the power of Congress may, for example, benefit foreign states and their property. In *Bank Markazi* v. *Peterson*, 578 U.S. 212 (2016), the Court assumed without

discussion that the Central Bank of Iran was protected by separation-of-powers principles, ones that limit congressional power. *Id.* at 236. Although Bank Markazi did not prevail, both Chief Justice Roberts and Justice Sotomayor would have held in its favor on separation-of-powers grounds. *Id.* at 237 (dissenting op.). No one suggested that the Bank lacked constitutional protections or that it was a private group. The U.S. government has determined, after all, that the Bank is controlled by Iran. *See* Central Bank of Iran, 31 C.F.R. § 535.433 (2019) ("The Central Bank of Iran (Bank Markazi Iran) is an agency, instrumentality and controlled entity of the Government of Iran for all purposes under this part.").

The case also serves as a reminder that separation of powers and due process protection are closely related. Bank Markazi argued that Congress had improperly dictated to the courts the outcome of litigation in a pending case, an argument it framed in separation of powers terms. But the argument could have sounded in due process as well. As Nathan Chapman and Michael McConnell have demonstrated, legislative acts violate due process if they exercise "judicial power" by depriving "specific individuals of rights or property." Chapman & McConnell, 121 Yale L.J. at 1677, 1679, 1694. In other words, a law directing that a particular party should win a case would violate both due process and the vesting of the judicial power in the federal courts. Foreign states are protected by separation of powers which provides a set of protections that overlaps with those provided by due process.

In sum, there is no categorical exclusion of foreign states from the constitutional order. They are protected by general separation of powers principles and by the structure, text, and purposes of Article III.

2. Foreign States and Domestic States

A second structural argument holds that foreign states should not be afforded constitutional rights that domestic states lack. In *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966), this Court rejected South Carolina's challenge to the Voting Rights Act of 1956, reasoning that "[t]he word 'person' in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union" and that "the principle of the separation of powers [served] only as protections for individual persons and private groups, those who are peculiarly vulnerable to nonjudicial determinations of guilt." *Id.* at 323-324. The Court's dicta in *Weltover* cited *Katzenbach* (and only *Katzenbach*) to suggest that foreign states might not have due process rights. The Court's reasoning (in full) was that:

> Assuming, without deciding, that a foreign state is a "person" for purposes of the Due Process Clause, *cf.* … *Katzenbach*, 383 U.S. [at] 323-324 … (States of the Union are not "persons" for purposes of the Due Process Clause), we find that Argentina possessed "minimum contacts" that would satisfy the constitutional test.

Weltover, 504 U.S. at 619. While *Weltover* left open the question, lower courts have held that foreign states are not persons under the Fifth Amendment, relying heavily upon the citation to *Katzenbach* and the analogy to domestic states. The leading case holding that foreign states are not persons reasons, for example, that:

> Indeed, we think it would be highly incongruous to afford greater Fifth Amendment rights to foreign nations, who are entirely alien to our constitutional system, than are afforded to the states,

> who help make up the very fabric of that system. The States are integral and active participants in the Constitution's infrastructure, and they both derive important benefits and must abide by significant limitations as a consequence of their participation. *Compare* U.S. Const. art. IV § 4 ("The United States shall guarantee to every State in this Union a Republican form of Government, and shall protect each of them against Invasion;"), *with id.* at art. VI, cl. 2 ("This Constitution ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Law of the State to the Contrary notwithstanding."), *and id.* at art. 1 § 10 (listing specific acts prohibited to the States). However, a "foreign State lies outside the structure of the Union." *Principality of Monaco* v. *Mississippi*, 292 U.S. 313, 330 (1934). Given this fundamental dichotomy between the constitutional status of foreign states and States within the United States, we cannot perceive why the former should be permitted to avail themselves of the fundamental safeguards of the Due Process Clause if the latter may not.

Price, 294 F.3d at 96-97.

At a minimum, the argument advanced in *Price* is overstated. For the reasons canvassed above, it is misleading and ahistorical to describe states as "entirely alien" to our constitutional system, in particular when it comes to procedural protections in federal courts. It is obviously true that states and foreign states are situated in fundamentally different ways with respect to the constitutional order of the United States and that foreign states have a marginal or even negligible place in that order. But this observation does not compel the

conclusion that "person" in the Fifth Amendment should be interpreted to exclude foreign states, contrary to its ordinary meaning at the time the Constitution was enacted. Indeed, nothing about *Katzenbach* suggests that federal courts may deprive either domestic or foreign states of their property without affording them basic process. If a federal court deprived a domestic state of its property, for example, by disregarding applicable procedural rules governing notice, *Katzenbach* would hardly require the conclusion that doing so was constitutional. And holding that foreign states are "persons" under the Fifth Amendment would hardly mean that they could successfully challenge the Voting Rights Act.

Assuming that *Katzenbach's* statement that domestic states are not "persons" is correct (or at least well settled under stare decisis) does not mandate the equal treatment of states and foreign states. *Katzenbach* rests on the specific relationship between domestic states and the United States and is limited to that context. The Court's reasoning that Article I's separation of powers should protect those persons and groups "who are peculiarly vulnerable to nonjudicial determinations of guilt" puts U.S. states and foreign states on different footing. Foreign states lack many of the institutional protections afforded to U.S. states and they are in this sense vulnerable to political action by the majority in ways that domestic states are not. That observation may not lead to much in constitutional terms, but it does mean that *Katzenbach* need not be read as mandating the equal treatment of foreign and U.S. states, if doing so runs counter to the original history and meaning of "persons" and "process," as well as the structure of Article III. After all, *Katzenbach* itself had nothing to do with foreign states.

C. Policy

Affording due process to foreign states might appear to have contemporary policy disadvantages, perhaps by curtailing the federal government's power to respond to foreign policy exigencies. Some courts and scholars have also expressed concern that affording due process rights to foreign states could limit "the power of Congress and the President to freeze the assets of foreign nations, or to impose economic sanctions on them." *Price*, 294 F.3d at 99. But these concerns betray an unnecessarily rigid understanding of due process. There are also doctrinal and policy benefits of holding that foreign states, state-owned enterprises, and foreign corporations are all "persons" for Fifth Amendment due process purposes.

Due process rights are flexible; the doctrine gives courts adequate room to calibrate the appropriate protections for foreign sovereigns in light of the interests of the federal government. In the context of notice, for example, due process requires only what is "reasonable" "under all the circumstances," a test that easily accommodates a range of governmental interests. *Mullane* v. *Central Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950). More generally, the leading formulation of procedural due process protection explicitly requires courts to consider the U.S. government's interests in the challenged policy. *Mathews* v. *Eldridge*, 424 U.S. 319, 334 (1976) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands[,]" (quoting *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972)), but it requires consideration of governmental interests). Those interests would carry great weight when the nation faces a foreign policy or national security crisis. *See Hamdi* v. *Rumsfeld*, 542 U.S. 507, 531, 578 (2004) (plurality op.) (describing the "weighty and

sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States."). As another example, some rights protect "natural, not artificial persons," and those are likely inapplicable to foreign states just as they are inapplicable to corporations. *See Northwestern Nat'l Life Ins. Co.* v. *Riggs*, 203 U.S. 243, 255 (1906). And due process rights often do not apply extraterritorially, *Zadvydas* v. *Davis*, 533 U.S. 678, 693 (2001), a potentially important limitation when it comes to foreign sovereigns.[4]

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[4] It is true that the content of Fifth Amendment due process protections are presently unresolved when it comes to personal jurisdiction. *Fuld* v. *Palestine Liberation Org.*, No. 24-20 (U.S. Dec. 6, 2024) (granting petition). If the Court holds in *Fuld* that the Fifth Amendment requires that defendants have "minimum contacts" with the United States as a whole for federal jurisdiction to apply, and those limitations apply to foreign states as "persons," one might argue that the U.S. government would be hampered in its ability to bring foreign states before domestic courts. In such a situation, which arises infrequently because the Foreign Sovereign Immunities Act limits suits against foreign states and generally requires contacts between the foreign state and the United States, there is no reason that the personal jurisdiction test cannot be adapted to meet the needs of the federal government. Doing so would be consistent with the flexible modern understanding of due process articulated above, which need not be isolated from the minimum contacts analysis. The Court might, on the other hand, hold that the Fifth Amendment does not require that defendants have "minimum contacts" with United States and that defendants are instead only entitled to the personal jurisdiction protections that Congress affords. *See* Brunk (Wuerth), 88 Fordham L. Rev. at 683 (arguing that cases involving foreign states "suggest that the Constitution itself does not dictate the rules governing personal jurisdiction, whether as a function of Article III or of the Fifth Amendment" and that the constitution can require that courts follow those rules without proscribing their content). If the Court so holds, Congress can decide the extent to which foreign states can be sued in federal court. *Id.* at 683-684. In either event, it is not necessary to distort the original

Recognizing the due process rights of foreign states also has policy *benefits* because it harmonizes a false constitutional distinction between foreign states and foreign corporations. As background, during the Founding Era, States and corporations were both considered bodies with the structure and moral responsibilities of real persons. Scholars have described the evolution of corporate law "from its origins in seventeenth-century English law to its nineteenth-century articulations in the United States" with a focus on "one of its unifying metaphors: the corporation's body." From its earliest origins "the recognition of corporations as persons was justified by jurists and legal commentators of the time because the corporation was imagined to resemble a body." Matambanadzo, *The Body, Incorporated*, 87 Tul. L. Rev. 457, 487-488 (2013). At the Constitutional Convention in 1787, Mr. Pinckney even proposed that the constitution should include language providing that "[t]he United States shall be forever considered as one body corporate and politic in law." Madison, *Journal of the Federal Convention* 558-559 (1894). The close historical conceptual relationship between states and corporations as "persons" makes it untenable to distinguish, as the lower courts now do, between foreign states (without due process rights) and foreign corporations (with due process rights).

Yet lower courts have been compelled to draw these untenable distinctions because they have held that foreign states are not persons, but that foreign corporations are. *Cf. Daimler AG* v. *Bauman*, 571 U.S. 117, 121 (2014) (holding without analysis that Daimler AG, a German corporation, is a person entitled to Fourteenth Amendment due process rights). Doing so has led to

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history and meaning of the word "person" to adapt to modern personal jurisdiction doctrine.

absurd results. For example, it is difficult to explain, in doctrinal or policy terms, why the Daimler Corporation and the Palestine Liberation Organization both have due process rights, but Germany and Israel do not.

The false distinction between corporations and states has also birthed an unnecessary jurisprudence to police the divide. Lower courts have had to decide, for example, whether state-owned foreign corporations (like Respondent here) should be considered as foreign states or as private corporations for Fifth Amendment due process purposes. To do so, lower courts have applied a federal common law rule drawn from *First National City Bank* v. *Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983) ("*Bancec*"). The *Bancec* test was developed to determine when foreign states and state-owned corporations can be held substantively liable for the actions of the other. It is drawn from international law, corporate law, and statutory inferences from the Foreign Sovereign Immunities Act. *Id.* at 623-634. Lower courts have applied the *Bancec* test to decide whether state-owned corporations are "persons" entitled to Fifth Amendment due process protections. If the foreign state exercises too much control over them under the *Bancec* test, they are treated as foreign states (and thus not "persons"), and if the foreign state exercises little control, they are treated as private companies (and thus "persons"). *See, e.g.*, *Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V.* v. *Pemex-Exploración Y Producción*, 832 F.3d 92, 103 (2d Cir. 2016). But the *Bancec* test has nothing to do with the constitution. The adoption of the test to resolve constitutional questions merely underscores that the constitutional distinction driving the question is itself unwarranted. Indeed, everything we know about "persons" in

the late eighteenth century suggests that corporations and states would both be treated as persons.

CONCLUSION

The text, history, and structure of the constitution make abundantly clear that the word "person" in the Fifth Amendment would have been understood in 1791 to apply to foreign states, corporations, and foreign state-owned corporations alike. There are no contemporary reasons that justify holding to the contrary. Denying due process protections to foreign states is not necessary to achieve any significant policy objective because the requirements of due process are limited and flexible. To be sure, the Fifth Amendment's application to personal jurisdiction is currently an open question. But no matter how the Court resolves that issue, modern due process doctrine allows the political branches the necessary flexibility to conduct foreign policy and to define the situations in which foreign states may be sued in federal courts. Holding that states are persons for Fifth Amendment due process purposes poses no threat to those governmental interests.

Respectfully submitted.

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