No. 23-1201 and No. 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 Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENT ANTRIX CORP. LTD.

CARTER G. PHILLIPS*
Counsel Of Record
GREGORY M. WILLIAMS
KWAKU A. AKOWUAH
MADELEINE JOSEPH
AUSJIA PERLOW
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
cphillips@sidley.com

Counsel for Respondent

* Counsel of Record

January 17, 2025

QUESTIONS PRESENTED

Respondent Antrix Corp. Ltd. (Antrix) is a company organized under the laws of the Republic of India. Antrix is owned by the Indian Government but is a "separate legal person," 28 U.S.C. § 1603(b)(1), and is governed by a board that is evenly divided between independent directors and governmental directors. Petitioner Devas Multimedia Private Ltd. (Devas), also an Indian company, brought an arbitration claim against Antrix in India. Devas claimed Antrix breached a contract relating to the launch of satellites from India and the provision of wireless services in India. Applying Indian law, the tribunal seated in India ruled in favor of Devas. Antrix moved, in India, to set aside the award.

While Indian set-aside proceedings were pending, Devas sued Antrix in the United States, seeking to confirm the same award (which the Indian courts subsequently annulled). Devas asserted jurisdiction over Antrix based on the arbitration exception to the Foreign Sovereign Immunities Act (FSIA).

The questions presented are:

1. Whether the arbitration exception to the FSIA, 28 U.S.C. § 1605(a)(6), akin to other immunity-stripping provisions of the Act, requires a plaintiff to establish a connection between the parties' arbitration agreement and the United States to support the exercise of personal jurisdiction under the FSIA's personal-jurisdiction provision, *id.* § 1330(b).

2. Whether a corporation organized under foreign law is a "person" entitled to protection under the Due Process Clause of the Fifth Amendment with respect to whether it may be involuntarily subjected to "a claim for relief in personam," *id.* § 1330(a), notwithstanding that the corporation is classified, by statute, as a "foreign state" under the FSIA, *id.* § 1603(a).

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

1. The Petitioners in No. 23-1201 are CC/Devas (Mauritius) Limited; Devas Multimedia America, Inc.; Devas Employees Mauritius Private Limited; and Telcom Devas Mauritius Limited. These Petitioners were Intervenors-Plaintiffs in the district court, Appellees-Intervenors in Ninth Circuit No. 20-36024, and Intervenors-Plaintiffs-Appellees in Ninth Circuit Nos. 22-35085 and 22-35103. The Petitioner in 24-17 is Devas Multimedia Private Limited, which was Petitioner in the district court and Petitioner-Appellee in Ninth Circuit No. 20-36024.

2. The Respondents in No. 23-1201 are Antrix Corp. Ltd. and Devas Multimedia Private Limited. Antrix Corp. Ltd. was a Respondent in the district court, a Respondent-Appellant in Ninth Circuit Nos. 20-36024 and 22-35103. Respondent Devas Multimedia Private Limited was a Petitioner in the district court, a Petitioner-Appellee in Ninth Circuit No. 20-36024, a Petitioner-Appellant in Ninth Circuit No. 22-35085. The Respondents in 24-17 are Antrix Corp. Ltd., CC/Devas (Mauritius) Limited, Devas Multimedia America, Inc., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited. As stated, Respondent Antrix Corp. Ltd. was Respondent in the district court and Respondent-appellant in Ninth Circuit Nos. 20-36024 and 22-35103. Respondents CC/Devas (Mauritius) Limited; Devas Multimedia America, Inc., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited were Intervenors-Plaintiffs in the district court and Appellees-Intervenors in Ninth Circuit No. 20-36024, and

Intervenors-Plaintiffs-Appellees in Ninth Circuit Nos. 22-35085 and 22-35103.

3. Antrix Corp. Ltd does not have a parent corporation. Antrix is wholly owned by the Government of India. Accordingly, no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

CONSTITUTION AND STATUTES

TABLE OF AUTHORITIES—continued

LEGISLATIVE MATERIALS

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

INTRODUCTION

This case arises from a contract between two companies organized under the laws of the Republic of India. One of those companies, Respondent Antrix Corp. Ltd. (Antrix), is wholly owned by the Indian Government.

Petitioner Devas Multimedia Private Ltd. (Devas) contracted with Antrix to build and launch wireless-spectrum satellites for Devas. A dispute arose when the Indian Government resolved not to allow private exploitation of the relevant S-band spectrum so that India could use the spectrum for national-security and other purposes. Antrix invoked the contract's force majeure clause, cancelled the contract, and offered a refund to Devas. Devas objected that Antrix was in breach. Their contract selected the "Laws of India" as "Governing Law," called for dispute resolution through arbitration, and designated "NEW DELHI in India" as the seat of arbitration. So the parties arbitrated in India under Indian law. The arbitrators ruled for Devas. Antrix then moved, in India, to invalidate the award. The Indian court of competent jurisdiction set aside the award. That decision achieved finality when the Supreme Court of India affirmed.

The core question here is whether any of this is properly the business of U.S. courts. The Ninth Circuit correctly said "no." Its judgment should be affirmed for two reasons—not precisely those articulated by the panel below, which was bound by circuit precedent.

The first reason is grounded in statute. The Foreign Sovereign Immunities Act (FSIA) comprehensively regulates the jurisdiction of the federal courts over sovereign-owned corporations like Antrix. See 28 U.S.C. § 1603(a)–(b) (defining "foreign state" to include such companies). The Act grants immunity to such

corporations unless the suit falls within one of the Act's express exceptions. *Id.* § 1604.

The exception at issue here is the so-called "arbitration exception." *Id.* § 1605(a)(6). This provision abrogates sovereign immunity for arbitration-related civil actions when two relevant requirements are met. First, the parties' agreement must "concern[] a subject matter capable of settlement by arbitration under the laws of the United States." *Id.* Second, the action must satisfy one of four additional provisos. Petitioners focus on proviso (B), which applies when the "agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards," *id.* § 1605(a)(6)(B), claiming the India-only agreement and award fall within it. Even if so, Petitioners overlook the prior requirement that the arbitration agreement "concern[] a subject matter capable of settlement by arbitration under" U.S. law. *Id.* § 1605(a)(6).

That requirement wisely cabins the arbitration exception by linking its scope to domestic arbitration law. And the basic domestic rule is that U.S. arbitration law extends only to matters involving *American* "commerce"—*i.e.*, "commerce among" or "between" the States or Territories or "between" the States or Territories and a "foreign nation." 9 U.S.C. § 1.

Notably absent from this governing definition of "commerce" is any hint that Congress intended our arbitration law to govern purely foreign commerce. Naturally not—the ordinary presumption is that Congress writes laws to govern the United States, not the world. That principle indisputably animates the other FSIA exceptions, each of which requires "some form of substantial contact with the United States." *Verlinden*

B.V. v. *Cent. Bank of Nigeria*, 461 U.S. 480, 490 (1983); see also 28 U.S.C. §§ 1605A, 1605B (conferring jurisdiction over claims for terroristic injuries in the U.S. or to certain U.S. persons). Congress legislated with that same comity principle in mind when it addressed arbitration. A second longstanding comity-infused rule of construction is aligned: statutes abrogating sovereign immunity are read narrowly, with any ambiguity construed in favor of preserving immunity.

The second basis for affirmance is constitutional. Antrix is a foreign corporation. Devas sought to have a U.S. court exercise jurisdiction over Antrix on a "claim for relief in personam," 28 U.S.C. § 1330(a), based on a dispute between Indian parties over a contract negotiated in India for performance in India. That effort clearly violates due process. In path-marking decisions like *Helicopteros* and *Daimler*, this Court affirmed that foreign corporations may object under the Fourteenth Amendment's Due Process Clause to the assertion of jurisdiction by state courts. The same is true for the Fifth Amendment and federal courts. In *Omni Capital International, Ltd.* v. *Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987), a case involving "a British corporation with its offices in London," this Court explained that before a district court "may exercise personal jurisdiction over a defendant," "a constitutionally sufficient relationship between the defendant and the forum must exist." *Id.* at 99, 104.

That rule settles this case. The court of appeals correctly concluded that Antrix has no purposeful, relevant contacts with the United States and that established due-process principles therefore do not permit exercise of personal jurisdiction over Antrix.

Nor did Antrix consent to personal jurisdiction in the United States. A sovereign-immunity waiver must be

"clear." *C & L Enters., Inc.* v. *Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 418 (2001). Antrix's agreement to arbitrate in India (and under the "Laws of India"), which nowhere mentions the United States, did not waive any objection to personal jurisdiction here. And, contrary to the Solicitor General, the agreement did not waive Antrix's due-process rights by providing for confirmation of a resulting arbitral award in "court[s] of competent jurisdiction." That clause (governed by Indian law) is best read to acknowledge the jurisdiction of competent *Indian* courts—which have already exercised their jurisdiction and determined that the award cannot stand. If the Court reaches the due-process question, it should affirm.

STATEMENT

I. BACKGROUND

A. Legal Background

1. From the Founding until the mid-twentieth century, foreign states were generally granted complete immunity from suit in United States courts. *Verlinden*, 461 U.S. at 486. Accordingly, U.S. courts were rarely presented with the "question of the jurisdiction of the … court over the person of a [sovereign] defendant." *Ex parte Republic of Peru*, 318 U.S. 578, 587 (1943). Nevertheless, it was understood that—immunity aside—a foreign sovereign and its property could be subject to "judicial process" in U.S. court for acts in the United States, just like other litigants. As Justice Story wrote:

> [A] foreign sovereign cannot be compelled to appear in our Courts, or be made liable to their judgment, so long as he remains in his own dominions, for the sovereignty of each is bounded by territorial limits. If, however, he comes personally within our limits, although he generally enjoy a

> personal immunity, he may become liable to judicial process.

The Santissima Trinidad, 20 U.S. (7 Wheat.) 283, 353 (1822). The procedures required to summon a defendant before a court and establish the court's jurisdiction over that defendant were one component of "judicial process." See Brunk, *The Due Process and Other Constitutional Rights of Foreign Nations*, 88 Fordham L. Rev. 633, 674–75 (2019).

International law was understood to circumscribe each nation's jurisdiction. As Professor Beale explained, a sovereign "cannot confer legal jurisdiction on [its] courts or [its] legislature, when [the sovereign] has no such jurisdiction … [under] international law." See Beale, *The Jurisdiction of a Sovereign State*, 36 Harv. L. Rev. 241, 243 (1923). And international law generally restricted a sovereign's civil jurisdiction to its territory and its nationals: "The laws of no nation," Justice Story wrote, "can justly extend beyond its own territories, except so far as regards its own citizens." *The Appollon*, 22 U.S. (9 Wheat.) 362, 370 (1824).

2. This century-and-a-half-old immunity regime shifted in 1952. That year, the State Department announced it would no longer request immunity for friendly sovereigns as a matter of course but would instead apply the "restrictive theory" of immunity. *Verlinden*, 461 U.S. at 487. Under that theory, "immunity is confined to suits involving the foreign sovereign's public acts and does not extend to cases arising out of a foreign state's strictly commercial acts." *Id.*

Where immunity was not a barrier to suit in this period, courts generally assumed that foreign states and their instrumentalities enjoyed the same due-process protections as non-sovereign defendants. Courts

examined whether the notice afforded to foreign states was "consistent with due process." *Petrol Shipping Corp.* v. *Kingdom of Greece, Ministry of Com., Purchase Directorate*, 360 F.2d 103, 107 (2d Cir. 1966); see also *Premier S.S. Corp.* v. *Embassy of Alg.*, 336 F. Supp. 507, 510 (S.D.N.Y. 1971). And personal jurisdiction was found lacking over "Romania, and its several agents and agencies" because they had "minimal contacts with the forum in which jurisdiction [wa]s asserted." *Rovin Sales Co.* v. *Socialist Republic of Romania*, 403 F. Supp. 1298, 1302 (N.D. Ill. 1975).

But this immunity regime "proved troublesome." *Verlinden*, 461 U.S. at 487. "[F]oreign nations often placed diplomatic pressure on the State Department in seeking immunity," and "[o]n occasion, political considerations led to suggestions of immunity in cases where immunity would not have been available under the restrictive theory." *Id.* In short, the immunity standards "were neither clear nor uniformly applied." *Id.* at 488.

3. Congress enacted the FSIA "to clarify the governing standards[] and to 'assur[e] litigants that … decisions are made on purely legal grounds and under procedures that insure due process.'" *Verlinden*, 461 U.S. at 488 (quoting H.R.Rep. No. 94-1487, at 7 (1976)). The statute "conform[ed]" U.S. practice "to the practice in virtually every other country—where sovereign immunity decisions are made exclusively by the courts and not by a foreign affairs agency." H.R.Rep. No. 94-1487, at 7. The law also made clear that a foreign, state-owned corporation, though a "separate legal person," counts as a "foreign state." 28 U.S.C. § 1603(a)–(b).

The FSIA "codifies a baseline principle of immunity for foreign states and their instrumentalities" and

"then sets out exceptions to that principle." *Turkiye Halk Bankasi A.S.* v. *United States*, 598 U.S. 264, 272 (2023); see 28 U.S.C. § 1604. The Act's original exceptions cover suits involving waiver; "commercial activity" in or affecting the United States; expropriation of property with a nexus to the United States; rights in property in the United States; and tortious activity occurring in this country. 28 U.S.C. § 1605(a)(1)–(5). The FSIA thus required waiver of immunity or "some form of substantial contact with the United States" to establish jurisdiction over a foreign state. *Verlinden*, 461 U.S. at 490.

Congress added the arbitration exception in 1988. Pub. L. No. 100-669, § 2, 102 Stat. 3969, 3969 (1988). Under the exception, a court may "enforce an agreement made by the foreign state … to submit [disputes] to arbitration." 28 U.S.C. § 1605(a)(6). The court also may "confirm an [arbitral] award." *Id.* The court's authority is limited, however, to agreements that concern "a subject matter capable of settlement by arbitration under the laws of the United States." *Id.* It is further limited to four enumerated 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 [the FSIA], or"
>
> (D) the FSIA's waiver exception "is otherwise applicable."

Id.

More recently, Congress added two exceptions addressed to crimes of terrorism. The first withdraws immunity from foreign states designated as "state sponsor[s] of terrorism" for claims based on enumerated criminal acts that harm certain U.S.-affiliated persons. 28 U.S.C. § 1605A(a)(1), (2)(A)(i)–(ii), (c), and (h)(6). The second covers claims against any "foreign state … for physical injury to person or property or death occurring in the United States and caused by" either "an act of international terrorism" or certain tortious acts attributable to the foreign state. *Id.* § 1605B.

The FSIA confers subject-matter "jurisdiction on district courts … when a foreign state is not entitled to immunity." *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 429 (1989); 28 U.S.C. § 1330(a). It similarly provides 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 [28 U.S.C. §] 1608." *Id.* § 1330(b). Congress viewed Section 1330(b) as a "Federal long-arm statute over foreign states," and explained that "[t]he requirements of minimum jurisdictional contacts and adequate notice are embodied in th[is] provision." H.R. Rep. No. 94-1487, at 13–14.

The Act also addresses venue, 28 U.S.C. § 1391(f), removal from state court, *id.* § 1441(d), and default judgments, *id.* § 1608(e). And it provides that a foreign state "shall be liable in the same manner and to the same extent as a private individual under like circumstances." *Id.* § 1606.

Importantly, the Act addresses execution on judgments separately from questions of liability and entry of judgment, which are governed by the provisions

outlined above. In contrast, Sections 1609–1611 address whether and when foreign-state property in the United States may be attached to satisfy a judgment.

B. Factual Background

Respondent Antrix is a corporation organized under the corporate laws of India. Pet.App.17a. Antrix is wholly owned by the Government of India but acts with a legal personality separate from its shareholder. See C.A. E.R. 110.[1]

Devas is also an Indian company. Former employees of India's Space Research Organization founded Devas in 2004 to develop and provide multimedia services in India. Pet.App.53a; C.A. E.R. 70.

Under a 2005 contract, Antrix agreed to build, launch, and operate two satellites and provide usage rights of S-band spectrum capacity on those satellites to Devas. Pet.App.17a. The parties' contract "was negotiated outside of the United States, executed in India …, and did not require Antrix to conduct any activities or create any ongoing obligations in the United States." *Id.* at 7a. Devas and Antrix agreed that the contract would "be subject to and construed in accordance with the Laws of India." C.A. E.R. 251. They further agreed to arbitrate any disputes relating to the contract "at NEW DELHI in India." *Id.* at 252.

In 2011, the Government of India decided to reserve the entire S-band space spectrum for "national needs, including for the needs of defence, para-military forces, railways and other public utility services." C.A. E.R. 52. Antrix invoked the contract's force majeure

---

[1] Citations to C.A. E.R. are references to Antrix's excerpts of record filed on the Ninth Circuit's 20-36024 docket. Citations to C.A. Doc. are references to that docket.

clause and cancelled the contract, because it could not provide S-band usage rights to Devas, which authority it did not have even at the time of entering into the contract. Devas invoked the arbitration clause, asserting that Antrix had wrongfully repudiated the contract. Pet.App.18a–19a. The subsequent arbitration was seated at New Delhi and applied Indian law. C.A. E.R. 64, 89–90. In 2015, the arbitral tribunal issued an award for Devas. Pet.App.20a.

In 2022, however, the High Court of Delhi set aside that award. Applying Indian law, as stipulated by the contract, the court concluded that the arbitral tribunal had erred in key respects, including by ignoring pre-contractual documents, issuing contradictory rulings, and entering an award contrary to public policy. C.A. Doc. 72, App. A. India's Supreme Court dismissed Devas's appeal, so the decision setting aside the award is final. C.A. Doc. 116, Attach. A.

II. PROCEEDINGS BELOW

1. While Antrix's application to set aside the award was pending in India, Devas petitioned the district court to confirm the same award. Pet.App.54a.

Antrix moved to dismiss for lack of personal jurisdiction and *forum non conveniens*. Antrix explained that "foreign corporations," including "[s]tate-owned corporations" like Antrix, "are entitled to the protections of due process." D.C. Doc. 13 at 19. Moreover, Antrix argued that exercising personal jurisdiction over it would offend due process because "there is no connection between the Parties' dispute and the United States." *Id.* at 20. Antrix's motion was grounded in Ninth Circuit precedent holding that minimum contacts must be shown by a plaintiff seeking to invoke

any FSIA exception. E.g., *Gregorian* v. *Izvestia*, 871 F.2d 1515, 1529 (9th Cir. 1989).

The district court denied the motion. It reasoned that a foreign state "is not a 'person' for due process purposes" and that a state-owned foreign corporation lacks due-process rights by extension when "the state exercises sufficient control over [the] foreign corporation." Pet.App. 13a–14a. The district court concluded that India "exercise[s] 'plenary control' over Antrix," and thus the company was not entitled to due-process protection. *Id.* at 14a. In addition, the court declined to dismiss on *forum non conveniens*, citing "concerns about the neutrality of proceedings in India." *Id.* at 15a. The district court confirmed the award and entered judgment for $1.29 billion for Devas. *Id.* at 37a. Antrix appealed.

2. Meanwhile in India, a specialized corporate-law court determined that Devas was a fraud in its incorporation and management, including because it "resorted [to] various frauds, misfeasance, connived with officials etc., in obtaining" the Devas-Antrix agreement. C.A. Doc. 38-7 ¶ 10. The court placed Devas into liquidation. *Id.* ¶ 13; Pet.App.54a. The Indian Supreme Court upheld that decision. C.A. Doc. 72, App. A at 234–45.

Two Mauritian shareholders of Devas and a U.S. subsidiary were then granted leave to intervene in the district court. Pet.App.54a. The district court also granted Intervenors post-judgment discovery. *Id.* Through discovery, Intervenors identified a debtor with pending bankruptcy proceedings in the Eastern District of Virginia who owed Antrix $146,457. *Id.* at 40a. Over Devas's objection, the district court certified the judgment for Intervenors to register there. *Id.*

Devas appealed, and the Ninth Circuit consolidated Devas's appeal with Antrix's.

3. While both appeals were pending, the Indian court set aside the arbitral award, and Antrix asked the Ninth Circuit for a limited remand to the district court to vacate its judgment. C.A. Doc. 72.

4. The Ninth Circuit reversed. Pet.App.3a. The court of appeals explained that, under circuit precedent, "personal jurisdiction under the FSIA requires a traditional minimum contacts analysis" drawn from due-process caselaw. *Id.* at 4a. This rule, the court stated, "is statutory rather than constitutional" and does not depend on a conclusion that the Due Process Clause applies to foreign sovereigns. *Id.* at 5a. The court of appeals then decided that personal jurisdiction was lacking because Antrix had no "purposeful" contacts with the United States, and "[t]he Agreement between Antrix and Devas was negotiated outside of the United States, executed in India ... and did not require Antrix to conduct any activities or create ongoing obligations in the United States." *Id.* at 6a–7a. Resolving that the district court "erred in exercising personal jurisdiction over Antrix," the panel denied Antrix's remand motion as moot and declined to address any other issue presented. *Id.* at 8a. Rehearing *en banc* was denied. *Id.* at 44a.

SUMMARY OF ARGUMENT

Personal jurisdiction is lacking over Antrix.

I. That conclusion follows first from the FSIA. When Congress first enacted that statute, it conferred jurisdiction only in cases involving a substantial connection to the United States. Congress similarly required a meaningful connection to the United States for jurisdiction when it allowed suits against certain foreign

sovereigns for certain terrorist acts in this country or against U.S.-affiliated persons.

The arbitration exception is no different. It also requires a meaningful connection to the United States. Specifically, the underlying arbitration agreement must "concern[] a subject matter capable of … arbitration under U.S. law." 28 U.S.C. § 1605(a)(6). This language limits jurisdiction to agreements to arbitrate that concern commerce within or with the United States—consistent with the scope of the Federal Arbitration Act (and indeed the Foreign Commerce Clause). But even if the text of the arbitration exception were deemed ambiguous, the presumption against extraterritoriality and the canon declaring that statutes abrogating sovereign immunity must be construed narrowly confirm that Congress did not confer jurisdiction over purely foreign disputes like this one.

II. Alternatively, due process prohibits the exercise of personal jurisdiction over Antrix.

Under this Court's precedent, a foreign corporation like Antrix is entitled to object under the Fifth Amendment to a federal district court's assertion of personal jurisdiction. That Antrix is a state-owned enterprise does not strip it of its due-process rights. And the exercise of jurisdiction over Antrix here violates due process, because Antrix and this suit lack a constitutionally sufficient relationship to the United States, as the Ninth Circuit already held.

Because Antrix is a foreign corporation, not a foreign sovereign, this case does not concern whether foreign sovereigns are "persons" entitled to the protections of the Fifth Amendment's Due Process Clause. But if the Court reaches that question, it should hold that the Due Process Clause permits a foreign sovereign to

object to personal jurisdiction in U.S. court, on par with other foreign juridical entities.

Finally, Antrix did not consent to personal jurisdiction in the United States through the arbitral agreement or otherwise.

III. The Court could also affirm the Ninth Circuit's judgment on one of two other grounds: *forum non conveniens* or the import of the Indian court judgment annulling the very award that Devas seeks to confirm.

ARGUMENT

I. THE FSIA'S ARBITRATION EXCEPTION, LIKE NEIGHBORING PROVISIONS OF THE ACT, REQUIRES A SUBSTANTIAL CONNECTION BETWEEN THE UNITED STATES AND THE ARBITRAL DISPUTE.

It is common ground that in original design, the FSIA stripped the sovereign immunity of foreign sovereigns and their instrumentalities, and granted jurisdiction to the district courts, only in cases involving "some form of substantial contact with the United States." *Verlinden*, 461 U.S. at 490. The same is true of the more recent terrorism exceptions. 28 U.S.C. §§ 1605A, 1605B.

At issue here is whether the arbitration exception—adopted between the original Act and the terrorism-focused innovations—follows this same approach or breaks new ground and requires no U.S. connection.

As explained below, the text of the arbitration exception supports a confined reading consistent with the original logic of the Act: the exception applies only to arbitration agreements that involve American commerce. And that reading easily resolves this case. The district court lacked jurisdiction because the parties'

agreement to arbitrate does not involve commerce within or with the United States; it solely concerns the commerce of India.

A. The Original FSIA Exceptions Require Contacts With The United States To Establish Jurisdiction.

1. When Congress enacted the FSIA, it made a connection between the United States and the dispute a prerequisite for the exercise of jurisdiction over a foreign state or instrumentality. The original exceptions cover suits involving:

- a foreign state's waiver of immunity for purposes of the suit, 28 U.S.C. § 1605(a)(1);
- a foreign state's "commercial activity" in, or causing "a direct effect" in, the United States, *id.* § 1605(a)(2);
- a foreign state's expropriation of property in violation of international law where "that property or any property exchanged for such property" has a nexus to "commercial activity" by the foreign state in the United States, *id.* § 1605(a)(3);
- rights in inherited property and immovable property "in the United States," *id.* § 1605(a)(4);
- a foreign state's non-commercial tortious activity "occurring in the United States," *id.* § 1605(a)(5).

The Act's original exceptions thus spell out the types of contacts with the United States that are required for jurisdiction.

- The waiver exception applies only when the foreign state has explicitly waived immunity as to the claims in the suit or has implicitly waived immunity through actions that "indicate willingness to submit to litigation in this country." E.g., *TIG Ins. Co.* v. *Republic of Arg.*, 110 F.4th 221, 236 (D.C. Cir. 2024).
- Both the commercial-activity and expropriation exceptions trigger jurisdiction only if the suit has a connection with U.S. commerce. See *Weltover*, 504 U.S. at 619–20; *Bolivarian Republic of Venez.* v. *Helmerich & Payne Int'l Drilling Co.*, 581 U.S. 170, 181 (2017) ("[T]he expropriation exception on its face … requir[es] … a commercial connection with the United States.").
- The rights-in-property exception applies if the suit concerns property located within our borders. E.g., *Asociacion de Reclamantes* v. *United Mexican States*, 735 F.2d 1517, 1521 (D.C. Cir. 1984).
- And the non-commercial tort exception concerns torts that "occur[ed] within the territorial jurisdiction of the United States." *Amerada Hess*, 488 U.S. at 441.

From the outset, then, Congress "requir[ed] some form of substantial contact with the United States" before a U.S. court could hear a case brought against a foreign state. *Verlinden*, 461 U.S. at 490. In *Verlinden*, this Court acknowledged that the waiver exception "may be seen" as a departure from the "normal pattern of the Act, which generally requires some form of contact with the United States." *Id.* at 490 n.15. Even then, this Court expressed skepticism that "by waiving

its immunity, a foreign state could consent to suit based on activities wholly unrelated to the United States." *Id.*; see also *Amerada Hess*, 488 U.S. at 442–43 ("Nor do we see how a foreign state can waive its immunity under § 1605(a)(1) by signing an international agreement that contains no mention of a waiver of immunity to suit in United States courts or even the availability of a cause of action in the United States.").[2]

2. Requiring contacts with the United States to establish personal jurisdiction furthered Congress's goals in enacting the FSIA. Following two-and-a-half decades of "case-by-case" immunity determinations made by the Executive Branch under "diplomatic pressure[]," Congress set out to "assur[e]" foreign states that decisions to subject them to suit in the United States "'are made on purely legal grounds and under procedures that insure due process.'" *Verlinden*, 461 U.S. at 488 (quoting H.R.Rep. No. 94-1487, at 7). Section 1330(b) provided that assurance. "The requirements of minimum jurisdictional contacts and adequate notice are embodied in th[at] provision," Congress explained. H.R.Rep. No. 94-1487, at 13 (citing *Int'l Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), and *McGee* v. *Int'l Life Insurance Co.*, 355 U.S. 220, 223 (1957)); S. Rep. No. 94-1310, at 13 (1976) (same). The "immunity provisions prescribe the necessary contacts which must exist before our courts can exercise personal jurisdiction," and Section 1330(b)

[2] Devas objects (at 31–34) that the Ninth Circuit's minimum-contacts requirement—by demanding a showing that a suit arises out of the defendant's contacts with the United States—would "erect[]" an "additional barrier" to suits under the FSIA's original and terrorism-related exceptions. Antrix's interpretation relies on the FSIA's text.

"incorporate[ed] these jurisdictional contacts by reference." H.R.Rep. No. 94–1487, at 7; see also *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before Subcomm. on Admin. Law & Governmental Rel. of the Comm. on the Judiciary*, 94th Cong. 29, 31 (1976) (testimony of Bruno Ristau) ("Absent the requisite contacts, no suit can be maintained since the existence of the contacts with the forum is essential to satisfy the constitutional requirement of due process.").

Congress also drafted the FSIA to "embod[y] basic principles of international law long followed both in the United States and elsewhere." *Helmerich*, 581 U.S. at 179. It hewed to international law's traditional limits on a jurisdiction's power to regulate foreign conduct by requiring contacts sufficient to subject a foreign state to suit in the United States. Those principles were reflected in the then-current Restatement, which explained that a state could regulate foreign parties with "presence … in the territory," "conduct [that] takes place in [its] territory," and certain conduct having "effects within the territory." Restatement (Second) of Foreign Relations Law of the United States § 10 cmt. a (1965).

3. The FSIA's later-enacted terrorism exceptions likewise require a meaningful connection to the United States. One covers claims for injuries "occurring in the United States" and caused by either "an act of international terrorism in the United States" or certain tortious acts attributable to the foreign state. 28 U.S.C. § 1605B(b). The other is not territorially bounded but is in a different sense hard-wired to U.S. interests: it covers suits by U.S. nationals, members of the U.S. armed forces, or U.S. government employees or contractors alleging harm caused by certain acts of

terrorism attributable to a foreign state "designated as a state sponsor of terrorism." *Id.* § 1605A(a)(1), (2)(A)(ii), and (c). This exception effectuates the United States' "significant interest" in providing persons under the protection of the United States with a "forum for redressing injuries inflicted by out-of-state actors." *Ford Motor Co.* v. *Mont. Eighth Jud. Dist. Ct.*, 592 U.S. 351, 368 (2021).

B. The Arbitration Exception Requires A Connection To U.S. Commerce To Confer Jurisdiction.

1. The arbitration exception likewise requires a substantial connection to the United States. That exception confers jurisdiction on actions brought "either to enforce" an arbitration agreement "made by [a] foreign state," or "to confirm an award made pursuant to" such an agreement. 28 U.S.C. § 1605(a)(6). Crucially, for the exception to apply, the underlying arbitration agreement must "concern[] a subject matter capable of settlement by arbitration under the laws of the United States." *Id.*

This language limits the arbitration exception to disputes concerning commerce within or with the United States, because disputes concerning entirely foreign commerce are not arbitrable under U.S. law. The Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, lays out our "substantive law of arbitrability," see *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Under the FAA, a "contract evidencing a transaction involving commerce" is capable of settlement by arbitration. 9 U.S.C. § 2. But "commerce," as defined in the FAA, encompasses only "commerce" within or "with" the United States, or "between" the

United States and a "foreign nation." *Id.* § 1.[3] And because disputes linked to domestic commerce are arbitrable under U.S. law but purely foreign commercial disputes are not, the arbitration exception requires a link between the underlying arbitration and U.S. commerce for jurisdiction.

Context confirms this reading. The phrase "concerning a subject matter capable of settlement by arbitration under the laws of the United States" echoes clauses in related international agreements. For example, the New York Convention obligates contracting states to "recognize" and "enforce" only those arbitration agreements and awards that "concern[] a subject matter capable of settlement by arbitration." Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. II(1), June 6, 1958 (N.Y. Convention); see also Inter-American Convention on International Commercial Arbitration, art. V(2), Jan. 30, 1975 (Panama Convention) (providing that "the State in which the recognition and execution" of an arbitral award "is requested" may refuse if "the subject of the dispute cannot be settled by arbitration under the law

---

[3] The full definition reads:

> "[C]ommerce," as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

9 U.S.C. § 1.

of that State"). Interpreting the New York Convention, this Court has explained that the phrase "'subject matter capable of settlement by arbitration' … contemplates exceptions to arbitrability grounded in domestic law." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 639 n.21 (1985); accord *M & C Corp.* v. *Erwin Behr GmbH & Co., KG*, 87 F.3d 844, 848 (6th Cir. 1996). In the FSIA's arbitration exception, too, the phrase carves out subject matters—including purely foreign commerce—that cannot be settled by arbitration under U.S. law.

2. The alternative interpretation espoused by Petitioners is that the provision supplies jurisdiction so long as one of the four conditions—(A) through (D)—set out in the second half of the exception is met. See Devas Br. 24-25; Intervenors Br. 24-25. They observe that the condition at issue here—an award that may be covered by an international agreement "calling for the recognition and enforcement of arbitral awards," 28 U.S.C. § 1605(a)(6)(B)—may sometimes be satisfied in suits involving arbitrations with no connection to U.S. commerce. See Intervenors Br. 26. And so under Petitioners' interpretation, jurisdiction exists even in disputes that have no U.S. nexus.

The first problem with this interpretation is that it ignores half of the arbitration exception's text—including the language requiring that the dispute "concern[] a subject matter capable of settlement by arbitration" under U.S. law. 28 U.S.C. § 1605(a)(6). The failure to give any force to this clause refutes their reading. See *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001) (statutes should be read to avoid making any "clause, sentence or word ... superfluous, void, or insignificant").

The next hurdle for Devas and Intervenors is that, under their reading, the arbitration exception departs

from the original FSIA's pattern of requiring meaningful U.S. contacts for jurisdiction. Resorting to legislative history, Petitioners claim that this departure was intentional: Congress enacted the arbitration exception, they say, to clarify that a foreign state's mere agreement to arbitrate waives its sovereign immunity in U.S. courts—even where the arbitration agreement lacks a connection to the United States. Devas Br. 25 & n.5; Intervenors Br. 25–26. Yet the "legislative materials" Petitioners cite—"excerpts from committee hearings and scattered floor statements by individual lawmakers"—are "among the least illuminating forms of legislative history." *Advoc. Health Care Network* v. *Stapleton*, 581 U.S. 468, 481 (2017). Further, this understanding of Congress's intent is difficult to square with the provision it enacted. If mere agreement to arbitrate is enough to waive immunity in U.S. court, then why include provisos (A) through (D)?

The legislative history Petitioners prefer is also balanced out by other legislative history showing Congress was focused on arbitrations that involved U.S. businesses. Congress knew that American businesses abroad depended on arbitration agreements to "assur[e]" that disputes with foreign states and state-owned enterprises would be "settled with objectivity and fairness." *Hearing Before the Subcomm. on Admin. Law & Governmental Rel. of the Comm. on the Judiciary*, 100th Cong. 201 (1987) (statement of Monroe Leigh). Congress therefore adopted the arbitration exception to "allow U.S. courts to help Americans engaged in international business to have their fair day in court." 132 Cong. Rec. S14795 (daily ed. Oct. 2, 1986) (statement of Sen. Lugar). "By preventing a foreign government from invoking the sovereign immunity defense," the FSIA could better "secure the safety of U.S. companies' interests abroad." 132 Cong. Rec.

S.17258 (daily ed. Oct. 18, 1986) (statement of Sen. Mathias).

3. Finally, Intervenors (and several *amici*) insist that a no-U.S.-nexus reading of the arbitration exception is compelled by international conventions to which the United States is a party. Intervenors Br. 27–29; see also Devas Br. 25 & n.5. These agreements, Intervenors argue, commit U.S. courts to enforcing and confirming some arbitrations that lack a U.S. connection. So reading the arbitration exception to require such a connection would "place the United States in conflict" with these agreements, Intervenors Br. 27, or would violate the canon instructing courts to construe statutes to avoid "conflict with ... an international agreement," Restatement (Third) of Foreign Relations Law § 114 (1987); see Intervenors Br. 28.

This theory collides with what this Court has already said about the New York Convention: the phrase "'subject matter capable of settlement by arbitration' ... contemplates exceptions to arbitrability grounded in domestic law." *Mitsubishi*, 473 U.S. at 639 n.21. Intervenors' theory also ignores the reality that U.S. courts routinely apply minimum-contacts limits to private-party disputes under the Convention. E.g., *Conti 11. Container Schiffarts-GMBH & Co. KG M.S., MSC Flaminia* v. *MSC Mediterranean Shipping Co.*, 91 F.4th 789, 794–97 (5th Cir. 2024) (also reviewing other circuits' caselaw about personal jurisdiction to confirm awards under the New York Convention). So if requiring a U.S. nexus violated the Convention, the conflict between the Convention and U.S. law would be far-reaching.

In truth, these international agreements are far less rigid than Intervenors suggest. They "reserve[] to each signatory country the right to refuse enforcement of an

award where the 'recognition or enforcement of the award would be contrary to the public policy of that country.'" *Mitsubishi*, 473 U.S. at 638 (quoting N.Y. Convention art. V(2)(b)); see also Panama Convention art. V(2). They also contemplate that only "*competent*" courts where "recognition and enforcement is sought" will have power to confirm and enforce foreign arbitrations. N.Y. Convention art. V; Panama Convention art. V; see also Convention on the Settlement of Investment Disputes between States and Nationals of Other States, art. 54(2), Mar. 18, 1965. A "competent" court is one with subject-matter *and* personal jurisdiction, at least in the context of these agreements governing suits against foreign parties. See *Lightfoot* v. *Cendant Mortg. Corp.*, 580 U.S. 82, 95 (2017) (explaining that the phrase "court of competent jurisdiction" may refer to "a court with personal jurisdiction").

In short, interpreting the FSIA to require a U.S. nexus before confirmation jurisdiction can be exercised does not conflict with these agreements.

4. Jurisdiction is lacking here. This case stems from a contract between two Indian parties that provided for performance in India and called for dispute resolution before an Indian arbitral tribunal under Indian. This arbitral agreement "concern[s] a subject matter"—commerce with no connection to the United States—that is not "capable of settlement by arbitration under the laws of the United States." 28 U.S.C. § 1605(a)(6). As a result, the arbitration exception does not confer jurisdiction.

C. Absent A Clear Statement From Congress, U.S. Courts Lack Jurisdiction To Adjudicate Civil Disputes With No Connection To The United States.

1. Petitioners' theory also conflicts with the presumption against extraterritoriality. That canon holds that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none." *Morrison* v. *Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010). This rule "reflects" the principle "that United States law governs domestically but does not rule the world," *Kiobel* v. *Royal Dutch Petrol. Co.*, 569 U.S. 108, 115 (2013) (internal quotation marks omitted), and guards against the "serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs" that would arise if the U.S. were routinely to apply its laws in foreign territories, *F. Hoffmann-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155, 165 (2004). Those concerns are magnified when, as here, a party claims that Congress gave U.S. courts authority to impose judgments of liability on foreign-state instrumentalities in disputes with citizens of the same foreign country. Congress "alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident." *Kiobel*, 569 U.S. at 116.

Although courts typically apply the presumption "to discern whether" a conduct-regulating statute "applies abroad," the principle applies equally to "strictly jurisdictional" statutes. *Id.* at 117 (quoting *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 713 (2004)). And the presumption is triggered here, where Petitioners read the arbitration exception to compel U.S. courts to impose judgments on foreign parties for entirely foreign conduct.

No "clear indication of extraterritoriality" overcomes the presumption here. *Kiobel*, 569 U.S. at 118. "Nothing in the text of the [FSIA] suggests that Congress intended" for the arbitration exception to cover foreign arbitration disputes that have no nexus to this country. *Id.* Yes, the FSIA is about foreign states. But that does not suggest Congress intended to reach purely foreign conduct—rather, as discussed, it is clear that every other immunity exception requires a meaningful tie to the United States. See *id.* (holding that the Alien Tort Statute, 28 U.S.C. § 1350, did not "evince a clear indication of extraterritoriality," even though it addresses "actions by aliens for violations of the law of nations"). Beyond that, it is far from clear that the Foreign Commerce Clause empowers Congress to regulate the foreign commercial activity of foreigners. As one member of this Court has stated, the Clause "does not confer upon Congress a virtually plenary power over global economic activity." *Baston* v. *United States*, 137 S. Ct. 850, 853 (2017) (Thomas, J., dissenting from denial of certiorari).

Context and history supply no reason to think that Congress intended to cover purely foreign disputes. Congress enacted the FSIA, and its arbitration exception, against the backdrop of international-law norms that limit judicial power over foreign activities and parties by demanding a connection between the dispute and the adjudicating state. See *supra* p. 18; see also Restatement (Third) of Foreign Relations Law § 421 (enumerating specific connections between the state and the defendant that make the exercise of civil jurisdiction reasonable).

Practical considerations also counsel restraint. An unbounded interpretation of the arbitration exception would authorize a district court to compel a foreign

sovereign to arbitrate—even if the underlying dispute had nothing whatsoever to do with the United States. In a confirmation action, a foreign plaintiff could avail itself of the U.S.'s uniquely liberal discovery rules and deploy the resources of the U.S. courts to dig into the foreign sovereign's activities and assets, even if the plaintiff's desire for wide-ranging discovery were its only reason for bringing the dispute here. It cannot be that Congress intended to inject the U.S. courts into such purely foreign controversies. Cf. *ZF Auto. US, Inc.* v. *Luxshare, Ltd.*, 596 U.S. 619, 632 (2022) ("Why would Congress lend the resources of [U.S.] courts to aid purely private bodies adjudicating purely private disputes abroad?"); *Hines* v. *Davidowitz*, 312 U.S. 52, 64 (1940).

2. A second clear-statement rule counsels restraint: Congress must "make its intent to abrogate sovereign immunity unmistakably clear in the language of the statute." *Fin. Oversight & Mgmt. Bd. for P.R.* v. *Centro de Periodismo Investigativo, Inc.*, 598 U.S. 339, 346 (2023). This Court has "invoked that clear-statement rule, and applied it equivalently, in cases naming" all varieties of sovereigns. *Id.*; see also *id.* 346 n.3. A corollary is that "[a]ny ambiguities" in statutory text must "be construed in favor of immunity." *FAA* v. *Cooper*, 566 U.S. 284, 290 (2012).

Here, at a minimum, given the statutory language and treaty text, the arbitration exception does not clearly abrogate immunity over foreign arbitral disputes with no U.S. nexus. Congress instead limited the exception's application to arbitration agreements that "concern[] a subject matter capable of settlement by arbitration" under our law." 28 U.S.C. § 1605(a)(6). That language is best read to require some connection between the underlying agreement and U.S.

commerce, in accord with every surrounding FSIA exception. But if it is thought ambiguous, the ambiguity favors immunity.

* * *

The Court should hold that the FSIA's arbitration exception supports the exercise of personal jurisdiction by a U.S. court only when the underlying arbitration agreement relates to commerce within or with the United States. Because this dispute lacks the required connection, the arbitration exception does not apply, and the district court lacked personal jurisdiction over Antrix.

II. THE DUE PROCESS CLAUSE REQUIRES A MINIMUM CONNECTION TO THE UNITED STATES FOR PERSONAL JURISDICTION OVER ANTRIX, A FOREIGN CORPORATION.

If this Court decides that the FSIA's arbitration exception permits this suit, the Court should affirm the Ninth Circuit's judgment on constitutional grounds. The reason is straightforward: Under this Court's precedent, a foreign corporation is entitled to raise a due-process objection to a federal court's exercise of personal jurisdiction. And exercising personal jurisdiction over Antrix here violates due process: Antrix and this suit lack a constitutionally sufficient relationship to the United States.

Because Antrix is a foreign corporation and not a foreign sovereign, this case does not present the question of whether foreign sovereigns themselves are "persons" entitled to the protections of the Fifth Amendment's Due Process Clause. Accord US Br. 22. But if this Court chooses to answer that question, the Court should hold that where the FSIA strips a sovereign of

immunity in a civil case and treats it as "liable in the same manner and to the same extent as a private individual under like circumstances," 28 U.S.C. § 1606, the Due Process Clause permits the foreign sovereign to object to a U.S. court's exercise of personal jurisdiction, just like other foreign persons or entities haled into U.S. courts.

A. The Due Process Clause Protects Foreign Corporations Like Antrix.

1. A foreign corporation like Antrix may invoke due-process protections to challenge a court's exercise of personal jurisdiction. This Court has repeatedly affirmed that rule under the Fourteenth Amendment's Due Process Clause. See *Daimler AG* v. *Bauman*, 571 U.S. 117, 120 (2014); *Goodyear Dunlop Tires Operations, S.A.* v. *Brown*, 564 U.S. 915, 920 (2011); *J. McIntyre Mach., Ltd.* v. *Nicastro*, 564 U.S. 873, 888 (2011) (Breyer, J., concurring in the judgment); *Asahi Metal Indus. Co.* v. *Super. Ct. of Cal.*, 480 U.S. 102, 106 (1987); *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408, 409 (1984). Just the same, this Court has recognized that the Fifth Amendment's Due Process Clause protects foreign corporations in federal court. In *Omni Capital*, "a British corporation with its offices in London" challenged a district court's exercise of personal jurisdiction. 484 U.S. at 99. The Court explained that "[t]he requirement that a court have personal jurisdiction flows ... from the Due Process Clause" of the Fifth Amendment. *Id.* at 104. And under that Due Process Clause, "before a court may exercise personal jurisdiction over a defendant, … a constitutionally sufficient relationship between the defendant and the forum" must exist. *Id.*

That rule is, and should be, uncontroversial. These decisions are in a long line of precedents holding that

foreign individuals and companies enjoy limited constitutional rights—including Fifth-Amendment rights—once they come within, or possess property within, the territorial jurisdiction of the United States, and in their encounters with U.S. courts. E.g., *Zadvydas* v. *Davis*, 533 U.S. 678, 693 (2001) ("[T]he Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."); see also *Russian Volunteer Fleet* v. *United States*, 282 U.S. 481, 489 (1931) (Russian corporation "was an alien friend, and as such was entitled to the protection of the Fifth Amendment of the Federal Constitution" in Takings-Clause suit); *Johnson* v. *Eisentrager*, 339 U.S. 763, 771 (1950) (at least in peacetime, "the civil and property rights of immigrants or transients of foreign nationality so nearly approach equivalence to those of citizens"). The precise scope and effect of those rights depends on context.

Under these cases, Antrix is entitled to invoke due-process protections to object to personal jurisdiction in this suit. Antrix, a corporation organized under the laws of India, has been summoned into court in the United States by parties seeking to reduce a large arbitral award to judgment. Like the foreign companies in this Court's prior cases, Antrix may raise a due-process challenge to the assertion of jurisdiction.

India's ownership interest in Antrix does not change the equation. The Due Process Clause protects "person[s]," U.S. Const. amend. V, including artificial persons like corporations, e.g., *In re Sinking Fund Cases*, 99 U.S. 700, 718–19 (1878); *Gulf, C. & S.F. Ry.* v. *Ellis*, 165 U.S. 150, 154 (1897) ("It is well settled that corporations are persons within the provisions of the fourteenth amendment of the constitution of the United

States."). And "a corporation's juridical personhood" is not "dependent on the identities of its shareholders." *Gater Assets Ltd.* v. *AO Moldovagaz*, 2 F.4th 42, 65 (2d Cir. 2021). Recognizing as much, Congress expressly defined corporate instrumentalities owned by foreign states as "legal person[s]" in the FSIA. See 28 U.S.C. § 1603(b)(1). Because there is no reason to think the "reach of the Due Process Clauses depends on whether only private as opposed to public entities hold ownership interests in a corporation otherwise entitled to protection," *Gater Assets*, 2 F.4th at 65 n.22, a corporation like Antrix with foreign-state ownership may object to personal jurisdiction, just like a company with private foreign ownership. Every court of appeals to have considered this question has so held. See *id.* at 64–65; *GSS Grp. Ltd* v. *Nat'l Port Auth.*, 680 F.3d 805, 815–17 (D.C. Cir. 2012); *First Inv. Corp. of Marshall Islands* v. *Fujian Mawei Shipbuilding, Ltd.*, 703 F.3d 742, 747-748, 752–56 (5th Cir. 2012).

Nor does this case concern jurisdiction—under the FSIA or the Due Process Clause—to execute against the U.S. assets of a foreign state to satisfy an arbitral award. As two members of the Ninth Circuit panel explained in concurrence, Petitioners "forfeited" any opportunity to "invoke that basis for personal jurisdiction" over Antrix. Pet.App.11a–12a. Furthermore, a dedicated provision of the FSIA governs immunity "from attachment or execution" of "[t]he property in the United States of a foreign state." 28 U.S.C. § 1610; see also *Republic of Argentina* v. *NML Cap., Ltd.*, 573 U.S. 134, 142 (2014). And where such property is at issue, the distinct due-process rules governing proceedings *in rem* or *quasi in rem* would apply. E.g., *Shaffer* v. *Heitner*, 433 U.S. 186, 199 (1977). Here, in contrast, petitioners are pursuing "a claim for relief in personam," 28 U.S.C. § 1330(a), seeking to convert an

arbitral award into a judgment. The personal-jurisdiction rules applicable to *in personam* suits thus apply, and require dismissal.

Antrix's objection to personal jurisdiction must be sustained because there is no "constitutionally sufficient relationship between [Antrix] and the forum." *Omni Capital*, 484 U.S. at 104. As the Ninth Circuit correctly held, Petitioners pointed at most to "random, isolated, or fortuitous" contacts between Antrix and the United States. Pet.App.6a–7a. The exercise of personal jurisdiction in such circumstances offends due process.

2. Devas and Intervenors resist this straightforward conclusion, but their arguments lack merit.

a. Petitioners first contend that the Fifth Amendment does not require minimum contacts or otherwise limit Congress's power to authorize personal jurisdiction over foreign defendants in federal court. Devas Br. 34–41; Intervenors Br. 38–41. According to an allegedly "emerging consensus" among "[l]eading scholars" and "[s]everal appellate judges," the Fifth Amendment was originally understood to require only congressionally authorized service of process to establish personal jurisdiction over a foreign defendant in federal court. Devas Br. 38–39; Intervenors Br. 36–41. Under that theory, due process is satisfied because Antrix was served under the FSIA's liberal service provisions, 28 U.S.C. § 1608. Devas Br. 40; Intervenors Br. 41–42.

But that hypothesis craters under this Court's caselaw. Fifth-Amendment precedent confirms that personal jurisdiction requires *both* a connection to the forum *and* congressionally authorized service of process in civil commercial suits against foreign defendants. In *Omni Capital*, this Court considered whether

a federal district court could exercise personal jurisdiction over a British corporation and a British citizen, even though no statute or state rule authorized service of process. 484 U.S. at 111. The plaintiff argued that in a suit involving claims under a federal statute, the "only limits on a district court's power to exercise personal jurisdiction derive from the Due Process Clause of the Fifth Amendment." *Id.* at 102. Those limits were satisfied, the plaintiff claimed, based on the British defendants' "contacts with the United States." *Id.* at 100. Despite these constitutionally sufficient contacts, the British defendants objected to personal jurisdiction on the ground that they were "not amenable to service of summons in the absence of a statute or rule authorizing such service." *Id.* at 103. This Court sided with the defendants. *Id.* at 111. In doing so, the Court explained that "before a court may exercise personal jurisdiction over a defendant there must be more than notice to the defendant and a constitutionally sufficient relationship between the defendant and the forum." *Id.* at 104. In addition to those two constitutional "prerequisites" to jurisdiction, "[t]here also must be a basis for the defendant's amenability to service of summons." *Id.*

Precedent thus stands squarely in the way of Petitioners' reinterpretation of the Fifth Amendment: *Omni Capital* recognizes that the Fifth Amendment imposes a contacts-based test for personal jurisdiction. See *id.* at 104. And *Omni Capital* affirms that personal jurisdiction requires a connection to the forum in addition to duly authorized service of process.

Devas and Intervenors assert that this Court's Fifth-Amendment precedents have "left open the question whether the Fifth Amendment imposes the same," minimum contacts–based "restrictions on the exercise of personal jurisdiction by a federal court' as the

Fourteenth Amendment imposes on that of a state court." Intervenors Br. 34 (internal quotation marks omitted). Not so. The question this Court left open is narrower. It is whether "a federal court could exercise personal jurisdiction, consistent with the Fifth Amendment, based on an aggregation of the defendant's contacts with the Nation as a whole, rather than on its contacts with the State in which the federal court sits." *Omni Capital*, 484 U.S. at 102 n.5; see also *Bristol-Myers Squibb Co.* v. *Super. Ct. of Cal.*, 582 U.S. 255, 269 (2017) (citing *Omni Capital*, 484 U.S. at 102 n.5); *Asahi*, 480 U.S. at 113 n.* (plurality op.) ("We have no occasion here to determine whether Congress could, consistent with the Due Process Clause of the Fifth Amendment, authorize federal court personal jurisdiction over alien defendants based on the aggregate of *national* contacts, rather than on the contacts between the defendant and the State in which the federal court sits."); *Nicastro*, 564 U.S. at 885 (same). And *that* open question is not implicated here. The court of appeals applied the more plaintiff-friendly standard, looked to all of Antrix's nationwide contacts, and found them wanting even in aggregate. See Pet.App.6a–7a.

This Court need not say more to resolve this case,[4] particularly when neither Petition for Certiorari asked the Court to revisit *Omni Capital* or any other precedent.

Yet the vision of the Fifth Amendment advanced by Devas and Intervenors is also wrong on its own terms. Central to Petitioners' view is a claim that the Fifth

[4] Another case presents the Court with the opportunity to say more. This Court recently granted certiorari to review Fifth-Amendment limits on Congress's power to authorize personal jurisdiction over foreign defendants. *See Fuld* v. *PLO.*, 82 F. 4th 74 (2023), *cert. granted*, Nos. 24-20, 24-151 (Dec. 6, 2024).

Amendment's Due Process Clause diverges from the Fourteenth Amendment's Due Process Clause with respect to the limits imposed on a court's power to assert jurisdiction over a non-resident defendant. But those Due Process Clauses "use the same language and guarantee individual liberty in the same way." *Douglass* v. *Nippon Yusen Kabushiki Kaisha*, 46 F.4th 226, 238 (5th Cir. 2022). And the Fifth and Fourteenth Amendments long have been construed in parallel. Cf. *Bolling* v. *Sharpe*, 347 U.S. 497, 498 (1954) (interpreting the Fifth Amendment to prohibit racial segregation in D.C. public schools based on the Fourteenth-Amendment holding in *Brown* v. *Board of Education*, 347 U.S. 483 (1954)).

There is no good reason to depart from that tradition in this case. Devas and Intervenors assert that evidence from the Early Republic supports their effort to reimagine the Fifth Amendment. Devas Br. 38-40; Intervenors Br. 36-39. But as the author of the leading academic article championing their theory readily admits, the Founding-Era evidence is negligible, because for "almost a century" after the Founding, "Congress strictly limited the venues in which a federal civil suit could be brought" thus "foreclos[ing] virtually any exercise of jurisdiction that might seem at all interesting today." Sachs, *The Unlimited Jurisdiction of the Federal Courts*, 106 Va. L. Rev. 1703, 1710–11 (2020).

Intervenors also argue that the Fourteenth Amendment's minimum-contacts test cannot translate to the Fifth-Amendment context, because the Fourteenth Amendment protects "interstate federalism" interests irrelevant under the Fifth Amendment. Intervenors Br. 35 (quoting *Bristol-Myers Squibb*, 582 U.S. at 263). But this Court has clarified that the federalism "element" of the Fourteenth-Amendment test "must be

seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause." *Ins. Corp. of Ir.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.10 (1982). And the Fifth Amendment's Due Process Clause also protects individual liberty.

b. Petitioners may claim that the district court properly treated Antrix not as a corporation but as a foreign government for purposes of the due-process analysis. Without adequate analysis, the district court denied that Antrix has due-process rights because India supposedly "exercises plenary control over Antrix in a principal-agent relationship." Pet.App.13a–14a (internal quotation marks omitted).

The district court erred. For one, this Court has never suggested that a veil-piercing analysis, under *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba* (*Bancec*), 462 U.S. 611, 629 (1983), or otherwise, may be used to destroy a party's constitutional rights. *Bancec* addressed the distinct question of whether and when a corporate instrumentality may share in a sovereign's liability. It has no proper application outside that context.

And if *Bancec* were applicable, the district court plainly misapplied it. *Bancec* holds that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." *Id.* at 626–27. This presumption is rooted in the FSIA itself: "Congress clearly expressed its intention that duly created instrumentalities of a foreign state are to be accorded a presumption of independent status." *Id.* at 627–28. *Bancec* then held that the presumption of corporate separateness may be overcome only where respecting the corporate form would work an injustice. See *id.* at 630–34. The district court's focus on the Indian Government's

supposed dominance of Antrix was therefore misplaced. Inequity—not dominance—is required to disregard the corporate form of sovereign instrumentalities.

But piercing the corporate veil would not avoid any sort of injustice. Devas's complaint sought to confirm the arbitration award against *Antrix*. Consistent with that, the district court entered judgment against *Antrix* and permitted intervenors to register a judgment against *Antrix* in the Eastern District of Virginia. The district court's analysis treats India as a foil—a tool to negate Antrix's due-process rights. That would be a bizarre use of the veil-piercing concept that *Bancec* cautiously endorsed, with traditional equity principles in mind, to avoid "fraud or injustice" in cases governed by the FSIA. *Bancec*, 462 U.S. at 629 (internal quotation marks omitted).

Likely there is no case in which a U.S. court would be justified in disregarding corporate separateness purely to wash away a defendant's constitutional rights. If there is such a case, surely it is not this one.

c. Finally, the Solicitor General urges the Court to refrain from deciding whether due process protects a corporate instrumentality of a foreign state, because that question is a "weighty issue" that was not "resolved below. US Br. 22. But this Court has the benefit of well-reasoned decisions from other courts of appeals holding that foreign corporations, even if state-owned, are entitled to object to personal jurisdiction on due-process grounds. See *Gater Assets*, 2 F.4th at 64–65; *GSS Grp.*, 680 F.3d at 815–17; *First Inv. Corp.*, 703

F.3d at 747–48, 752–56.[5] And the weightiness of the question points the other way: foreign corporations (private and state-owned alike) depend on the current understanding that they cannot be summoned into our courts to defend against suits lacking any relationship to the United States. This Court should reaffirm that understanding.

B. The Due Process Clause Protects Foreign Sovereigns In This Context.

Because Antrix is a foreign *corporation*, the question whether foreign *sovereigns* have due-process rights is not presented here. But if the Court elects to reach that question, it should hold that a foreign sovereign that is denied immunity and made a defendant to a case in federal court is entitled to raise a due-process objection to personal jurisdiction.

1. That conclusion is supported first by the text of the Fifth Amendment. That Amendment's Due Process Clause states: "nor shall any person ... be deprived of ... property, without due process of law." U.S. Const. Amend. V. As Professor Ingrid Brunk has detailed, at the time of the Founding, sovereigns were often described as "persons," and legal "process" was understood to be granted to foreign sovereigns and their property. See Brunk, *supra*, at 676–79; Brunk Amicus 3–7.

Context, and the constitutional structure, reinforce this understanding that foreign sovereigns are entitled to the protections of process in federal courts.

---

[5] The Solicitor General asserts that "the rationale underlying th[e]se decisions has ... been called into question." US Br. 22 n.5. But the cited concurrence focuses on the oddity of granting constitutional significance to the *Bancec* test. *GSS Grp.*, 680 F.3d at 818 (Williams, J., joined by Randolph, J., concurring).

Article III grants foreign states the right to a forum in the federal courts, by extending the "judicial Power" to include "cases" involving "foreign States." U.S. Const. art. III, § 2. The terms "case[]" and "judicial Power" bestow limited powers on federal courts: The understanding at the Founding was that a "case" existed and "judicial power" was properly exercised only when a defendant has been properly summoned and given notice. E.g., *Osborne* v. *Bank of U.S.*, 22 U.S. (9 Wheat.) 738, 819 (1824) (explaining that the "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"); see also Brunk, *supra*, at 661–69. By expressly including "foreign State[s]" in Article III, the Constitution therefore contemplates that foreign sovereigns are entitled to protection against arbitrary exercises of judicial power.

Finally, recognizing that foreign states are "persons" entitled to object to a federal court's exercise of personal jurisdiction is consistent with the congressional judgment expressed in the FSIA. Congress deemed foreign states to be artificial persons that, once stripped of sovereign immunity, could be subjected to "claim[s] for relief in *personam*," and exercises of "[*p*]*ersonal* jurisdiction." 28 U.S.C. § 1330(a)–(b) (emphases added). Congress also provided that foreign states should be "liable in the same manner and to the same extent as a private individual" when sovereign immunity does not apply. *Id.* § 1606. That is, the FSIA treats foreign sovereigns that have been stripped of immunity on par with all other persons, consistent with the constitutional tradition described by Professor Brunk.

2. Devas, Intervenors, and the United States maintain that foreign sovereigns are not "persons" entitled to object to a federal court's exercise of personal

jurisdiction under the Fifth Amendment. Their arguments are misguided.

They first argue that the term "person does not include the sovereign" in "common usage." Intervenors Br. 30 (internal quotation marks omitted); see also Devas Br. 36; US Br. 27. "But there is no hard and fast rule of exclusion," so "subject matter" and "context" are the ultimate guide. *United States* v. *Cooper Corp.*, 312 U.S. 600, 604–05 (1941). And the context here includes the originalist evidence that foreign states were routinely discussed as "persons" to whom legal "process" could be applied, as well as Congress's similar judgment in the text of the FSIA.

Against that evidence, Devas and Intervenors maintain that the Framers would not likely "have viewed foreign states as persons" because "foreign sovereigns were treated as completely immune from suit at the time of the founding." Intervenors Br. 31 (quoting Childress III, *Questioning the Constitutional Rights of Foreign Nations*, 88 Fordham L. Rev. Online 60, 70 (2019)); see also Devas Br. 37–38. But that is beside the point. Sure, foreign states were generally immune at the Founding. But the FSIA strips immunity, so the apt historical parallel is whether foreign states—when *not* treated as immune—were juridical "persons" entitled to "due process." The evidence shows that, although sovereigns "generally enjoy[ed] a personal immunity," they "may become liable to judicial process." *The Santissima Trinidad*, 20 U.S. at 353; see also Brunk Amicus 3 n.2 (responding to Professor Childress).

Nor does the drafting history of the Fifth Amendment overcome the original evidence that foreign sovereigns were "persons." It is neither here nor there that the initial proposed text of the Fifth Amendment

channeled the Magna Carta by providing due-process rights to any "Freeman." US Br. 30. The drafters wisely abandoned that historically freighted term in favor of a more universal term, "person." And "person" undeniably encompasses foreign persons and entities that never would have qualified as "Freemen" in King John's day.

Finding scant support in text and history, Devas and Intervenors rely largely on an inapt analogy between States of the Union and foreign sovereigns. Devas Br. 35–37; Intervenors Br. 30–34. They draw on a statement in *Weltover* "assuming without deciding, that a foreign state is a 'person' for purposes of the Due Process Clause" and adding a "cf." citation to *South Carolina* v. *Katzenbach*, 383 U.S. 301, 323–24 (1966). *Katzenbach* rejected a due-process attack on the Voting Rights Act of 1965 by holding (without more) 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." 383 U.S. at 323.

Petitioners, like several lower courts, suggest that the *Weltover* cf. means that foreign states are not "persons" under the Due Process Clause, because it would be anomalous "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." *Price* v. *Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 96 (D.C. Cir. 2002). That does not follow. Foreign citizens and foreign corporations are generally alien to our constitutional system too. E.g., *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 264–71 (1990). Yet it is deeply established that foreign individuals and juridical entities acquire limited due-process and other

constitutional rights, depending on the nature and extent of their interaction with the United States. See *supra* p. 30. The same should be true for foreign sovereigns. They cannot claim due-process protection always and everywhere. But in the exceptional circumstance where a foreign sovereign is haled into federal court and stripped of immunity, it has the ordinary due-process right of juridical entities, both foreign and domestic, to object to personal jurisdiction.

To so hold would *not* grant foreign sovereigns greater rights than States. States are better off—they enjoy near-complete immunity from unconsented suit under the Constitution. See *PennEast Pipeline Co.* v. *New Jersey*, 594 U.S. 482, 500 (2021). And, as the United States emphasizes, "it is critically important" that a foreign sovereign "made a party to federal litigation" receive a "fair adjudicatory process." US Br. 32–33. That aim is best achieved by recognizing that foreign sovereigns have the same rights as other litigants to interpose personal-jurisdiction objections when they appear as civil defendants in U.S. courts.

Finally, the United States maintains that the Constitution cedes "to the political Branches" determinations about what process foreign sovereigns are due. *Id.* at 32. It looks for support in cases stating that in matters of foreign relations, Congress and the President enjoy near-exclusive authority, and that the judiciary must generally defer to their judgments. *Id.* But "like every other governmental power," the authority to conduct "international relations … must be exercised in subordination to the applicable provisions of the Constitution," *United States* v. *Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936), including the Fifth Amendment's Due Process Clause, see, e.g., *Haig* v. *Agee*, 453 U.S. 280, 307 (1981) (entertaining due-

process challenge to revocation of an individual U.S. passport); *Regan* v. *Wald*, 468 U.S. 222, 243 (1984) (same). So the political Branches' leading role in foreign affairs does not remotely short-circuit due-process protections.

It is also important to recognize that a holding that the Fifth Amendment requires some connection between the defendant and the forum when a plaintiff seeks a civil commercial judgment against a foreign sovereign would not constrain the federal government in other domains. As this Court has "stressed repeatedly," "due process is flexible, ... and it calls for such procedural protections as the particular situation demands." *Jennings* v. *Rodriguez*, 583 U.S. 281, 314 (2018) (cleaned up). The Court's conclusion here therefore would not dictate what due process demands in other contexts. Contra U.S. Br. 31. Especially misplaced is the Solicitor General's concern about constraining the Executive and Legislative Branches in their dealings with "hostile states" and "state sponsor[s] of terrorism." US Br. 31. This Court has held that hostilities and wartime can affect the constitutional rights of foreign citizens. E.g., *Eisentrager*, 339 U.S. at 771 (the constitutional "protection enjoyed while the nation of [an alien's] allegiance remains in amity with the United States are greatly impaired when his nation takes up arms against us"); *Ludecke* v. *Watkins*, 335 U.S. 160, 171 (1948) (rejecting constitutional challenge to deportation without judicial review during continuing post-war hostilities). It is no leap to say that the same is true for foreign sovereigns.

But questions about wartime and terrorism can be readily reserved for cases that present them. At stake here is the application of ordinary personal-jurisdiction principles to a typical setting—a civil commercial

dispute. The right answer is for the Court to affirm the Ninth Circuit's judgment on the narrow ground that foreign states are entitled to object under the Fifth Amendment to a federal court's exercise of personal jurisdiction and that permitting jurisdiction here—where Antrix and the dispute lack a sufficient connection to the United States—would offend due process.

C. Antrix Did Not Consent To Personal Jurisdiction.

Finally, Devas and *amici* argue that personal jurisdiction is proper, because Antrix consented to confirmation of the arbitral award in U.S. court. Antrix never consented to personal jurisdiction.

1. Devas, backed by some *amici*, proffers a sweeping theory: that Congress "deem[ed] foreign states" to have consented to suit here by signing an arbitration agreement that is subject to the New York Convention or that satisfies one of the arbitration exception's other enumerated conditions. Devas Br. 40–41. In the same vein, according to Petitioners' *amici*, a sovereign party that signs an arbitration agreement consents to suits confirming the resulting award in the arbitral forum *and* in *all* "other states that have a treaty obligation to enforce the award." Feldman Amicus 9; see also Bjorklund Amicus 24–26.

Devas's argument falters at the threshold (even assuming the Convention applies), because consent is the wrong framework for understanding the arbitration exception. The United States, as *amicus* in another case, recently explained that the "plain text of the arbitration exception indicates that it was intended to displace the waiver exception" to sovereign immunity at Section 1605(a)(1). U.S. Amicus Br. at 22–23, *Nextera Energy Glob. Holdings B.V.* v.

Kingdom of Spain, no. 23-7031 (D.C. Cir. Feb. 2, 2024) (*Nextera* Amicus). "[A]t a minimum, application of waiver principles in arbitration cases should not be based on conditions described in subparagraphs (A) through (C)" of the arbitration exception, which (unlike subparagraph (D)) make no reference to waiver. *Id*. Yet that is precisely what Devas seeks to do.

Devas is wrong. Antrix's "agreement to arbitrate in one forum"—India—does not "constitute[] a waiver of the right to challenge personal jurisdiction in another" forum—the United States. *Creighton Ltd.* v. *Gov't of Qatar*, 181 F.3d 118, 126 (D.C. Cir. 1999). That is so notwithstanding that India and the United States are parties to the New York Convention, which provides for confirmation of certain arbitral awards issued in other signatory states. Devas and *amici*'s contrary theory is that, by becoming a party to the Convention, a country waives personal jurisdiction in the courts of over 150 Convention signatory states for all citizens and domestic corporations for all awards resulting from all arbitral contracts touched by that Convention. Unsurprisingly, "circuits that have considered this issue agree" that due process is not automatically satisfied by a sovereign's Convention signature. *First Inv. Corp.*, 703 F.3d at 750 (citing cases). And the United States has cautioned against finding immunity waived in the same circumstance, because of the "implications for the treatment of the United States"—and U.S. companies—"in foreign courts." *Nextera* Amicus 24 (quoting *Process & Indus. Devs. Ltd.* v. *Fed. Republic of Nigeria*, No. 21-7003 (D.C. Cir. 2022)).

2. Apparently unwilling to endorse Devas's sweeping consent theory, the Solicitor General advances a fact-bound one: that Antrix "consented to personal jurisdiction in this case" by agreeing in its contract with Devas

that "any resulting arbitral award," US Br. 24, "shall be ... entitled to be enforced to the fullest extent permitted by Laws and entered in any court of competent jurisdiction," C.A. E.R. 252. The Solicitor General (at 24) suggests that federal district courts are "courts of competent jurisdiction." Thus, Antrix must have consented to suit in U.S. court when it signed the contract.

This novel theory fails to engage with all the relevant contract language. The clause references not just "court[s] of competent jurisdiction," but also "Laws"—meaning the "Laws of India." C.A. E.R. 252; see also *id.* at 251 ("This Agreement …, shall be subject to and construed in accordance with the Laws of India."). Taken in context, the provision is best read as an agreement to subsequent proceedings in any *Indian* court of competent jurisdiction. True to those words, the parties engaged in years-long proceedings in India, which concluded that the award could not stand. If anything, *Devas* by those words waived any right to pursue enforcement in the U.S.

The Solicitor General's tribal-law case actually supports Antrix's construction. US Br. 25–26. The contract there selected the *law* of Oklahoma and the *courts* of Oklahoma to govern any dispute. See *Citizen Band*, 532 U.S. at 418–20. The contract here selects the laws of India, and the analogous reading is that the parties chose the courts of India too. Not to mention, *Citizen Band* emphasizes that "to relinquish its immunity, a [sovereign's] waiver must be clear." *Id.* at 418. Nothing about the contract "clear[ly]" waives Antrix's immunity.

Finally, the notion that Antrix, by this one line, consented not only to jurisdiction in the United States, but also in over 150 Convention countries at once, is dramatically unsound. That is not how the United States

and its instrumentalities relinquish immunities, and that is not how foreign countries and foreign instrumentalities relinquish their immunities either. "[P]rinciples of comity and reciprocity" thus favor Antrix here. US Br. 32.

III. ALTERNATIVELY, THE COURT SHOULD AFFIRM THE NINTH CIRCUIT'S JUDGMENT ON ALTERNATIVE GROUNDS.

If the Court declines to affirm the Ninth Circuit's judgment on either statutory or constitutional grounds, then it should affirm on one of two alternative grounds bypassed by the Ninth Circuit.

A. The Arbitral Award No Longer Exists.

The Indian court of competent jurisdiction set aside the arbitral award that Devas seeks to confirm in this case. The set-aside of the award rendered it unenforceable in U.S. court. See 9 U.S.C. § 207; N.Y. Convention art. V(1)(e). After all, a court cannot confirm an arbitral award that "does not exist to be enforced." *TermoRio S.A. E.S.P. Electranta S.P.*, 487 F.3d 928, 935–36 (D.C. Cir. 2007). Only twice have circuit courts refused to recognize a set-aside as "repugnant to fundamental notions of what is decent and just." See *Corporacion Mexicana De Mantenimiento Integral, S. De R.L. De C.V.* v. *Pemex-Exploracion Y Produccion*, 832 F.3d 92, 106–10 (2d Cir. 2016); *Compania de Inversiones Mercantiles S.A.* v. *Grupo Cementos de Chihuahua S.A.B. de C.V.,* 58 F.4th 429, 460–61 (10th Cir. 2023). That U.S. public-policy "standard is high, and infrequently met." *Esso Expl. & Prod. Nigeria Ltd.* v. *Nigerian Nat'l Petrol. Corp.* 40 F.4th 56, 73-74 (2d Cir. 2022) (internal quotation omitted). No such showing could be made here, where the set-aside decision was thorough and affirmed by the Indian Supreme Court.

This set-aside decision issued while Antrix's appeal was pending, and the Ninth Circuit declined to address the set-aside in disposing of the case for lack of personal jurisdiction. But this Court could make clear that there is no longer an arbitral "award" to "confirm." 28 U.S.C. § 1605(a)(6).

B. *Forum Non Conveniens* And Comity Compel Dismissal.

Forum non conveniens allows a federal court to "dismiss an action on the ground that a court abroad is the more appropriate and convenient forum for adjudicating the controversy." *Sinochem Int'l Co.* v. *Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 425 (2007). Below, Antrix maintained that India was the better forum and urged dismissal for *forum non conveniens*. The district court disagreed. Pet.App.15a. The Ninth Circuit did not review that conclusion.

"This is a textbook case for immediate *forum non conveniens* dismissal." *Sinochem*, 549 U.S. at 435. The award Devas sought to confirm was made by a tribunal convened in India, under an agreement between two Indian companies for performance in India. Pet.App.7a. The parties selected the courts of India in their contract to determine the enforceability of any arbitral award. See *supra* p. 46. An Indian court set aside the award.

In those circumstances, "[j]udicial economy is disserved by continuing litigation in the [district court] given the proceedings long launched in [India]." *Sinochem*, 549 U.S. at 435. Moreover, confirmation of an arbitral award arising out of a contract between Indian parties to be performed in India, addressing a sovereign subject matter, the alleged breach of which

was triggered by a sovereign act of India, "is an issue best left for determination by the [Indian] courts." *Id.*

This Court has "discretion to respond at once to" Antrix's "*forum non conveniens* plea and need not take up first any other threshold objection." *Id.* at 425; see also *id.* at 432 (*forum non conveniens* may be reached before "subject-matter and personal jurisdiction").

Finally, and separate from *forum non conveniens*, considerations of international comity warrant dismissal. There is a true conflict between the Indian court's order setting aside the arbitral award (in a dispute involving India's sovereign spectrum ownership and India's sovereign interests in defeating frauds against its fisc) and the U.S. decision confirming that same award. Cf. *Hartford Fire Ins. Co.* v. *California,* 509 U.S. 764, 798 (1993).

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Ninth Circuit.

Respectfully submitted,

CARTER G. PHILLIPS*
Counsel Of Record
GREGORY M. WILLIAMS
KWAKU A. AKOWUAH
MADELEINE JOSEPH
AUSJIA PERLOW
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
cphillips@sidley.com

Counsel for Respondent

January 17, 2025 * Counsel of Record