Nos. 23-1201 & 24-17

IN THE

Supreme Court of the United States

CC/DEVAS (MAURITIUS) LIMITED, *et al.*,
Petitioners,
v.

ANTRIX CORP. LTD., et al.,
Respondents.

DEVAS MULTIMEDIA PRIVATE LIMITED, *et al.*,
Petitioners,
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 PAUL B. STEPHAN AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

JEFFREY T. GREEN
Counsel of Record
GREEN LAUERMAN
CHARTERED P.L.L.C.
1050 30th Street NW
Washington, D.C. 20007
(240) 286-5686
jeff@greenlawchartered.com

Counsel for Amicus Curiae

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QUESTION PRESENTED

Whether Section 1605(a)(6) of the Foreign Sovereign Immunities Act requires a civil suit seeking to confirm a foreign arbitral award to rest, in accordance with traditional notions of fair play and substantial justice, on minimum contacts between the United States and the persons against whom confirmation is sought.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES

IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

Pursuant to Supreme Court Rule 37, Professor Paul B. Stephan respectfully submits this brief *amicus curiae* in support of Respondent Antrix Corp. Ltd.

Professor Stephan is the John C. Jeffries, Jr., Distinguished Professor of Law at the University of Virginia. He was Coordinating Reporter for the American Law Institute's Restatement (Fourth) of the Foreign Relations Law of the United States, published in 2018. This project, which this Court has cited four times, addresses the interpretation and application of the Foreign Sovereign Immunities Act (FSIA). He has worked in the U.S. government as Counselor on International Law to the Legal Adviser of the Department of State and as Special Counsel to the General Counsel of the Department of Defense. In the course of this public service, he advised the government on issues involving the interpretation and application of the FSIA, including in cases before this Court.

Amicus has an interest in the correct interpretation of the FSIA, which affects the international legal obligations of the United States and our nation's foreign relations.

SUMMARY OF THE ARGUMENT

The Ninth Circuit correctly concluded that the FSIA conditions a district court's jurisdiction over a civil suit

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[1] Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae or his counsel made a monetary contribution to its preparation or submission.

to confirm a foreign arbitral award on satisfaction of a nexus requirement based on minimum contacts between the forum and the person sued. The FSIA bestows jurisdiction over a suit brought against a foreign corporation owned by a foreign state only when the claim has a relationship to the United States. In the case of confirmation of a foreign arbitral award, the minimum contacts requirement can be found in the FSIA's Section 1605(a)(6)(B), which links subject matter and personal jurisdiction to the treaty on which confirmation of the award is based.

The language, structure, and purpose of the FSIA support this conclusion. In all instances where the FSIA, as originally enacted, authorized an exception to state immunity, the accompanying statutory nexus tests addressed potential Fifth Amendment concerns by requiring minimum contacts. The 1988 amendment that added an exception to immunity for lawsuits to confirm an arbitral award took the same course, although less directly.

The statutory nexus requirement in this case requires that, to come within the exception to sovereign immunity, the arbitral award subject to confirmation be "governed by a treaty . . . calling for the recognition and enforcement of arbitral awards." This test requires more than that treaty address recognition and enforcement in the abstract. For subject-matter, and thus personal, jurisdiction to exist, the treaty must require the U.S. to recognize and enforce the claim at issue. The New York Convention, the treaty at the heart of this case, allows the U.S. to refuse to confirm an award when the putative award debtor has no relevant contacts with the U.S.

A review of adjacent treaties, in particular the many bilateral treaties of friendship, commerce and

navigation to which the U.S. is bound, confirms this conclusion. These treaties impose a general rule of nondiscrimination in access to justice with respect to alien companies, whether private or state-owned. In particular, they guarantee foreign nationals access to courts of competent jurisdiction to adjudicate claims against them. Competent jurisdiction includes personal jurisdiction. Adhering to these international legal obligations, the 1988 amendment sought to put state-owned foreign companies on an equal footing with private foreign firms, not to discriminate against them.

The doctrine of constitutional avoidance supports deciding this case on statutory grounds. This Court has not decided whether the Due Process Clause of the Fifth Amendment applies to foreign legal persons owned by a foreign state. However, this Court has consistently recognized that foreign companies not majority-owned by a foreign state do enjoy due process protection, including the conditioning of personal jurisdiction on the establishment of minimum contacts between the person sued and the United States. The Court should not interpret the FSIA as imposing a different rule. Confronting the Due Process Clause implications of that choice would bring into play difficult constitutional issues that should await resolution in a case that requires it.

This suit does not implicate what rules apply in instance of state involvement of terrorism, whether the FSIA's requirements in such cases must comply with the Due Process Clause of the Fifth Amendment, and, if so, what kind of contacts with the United States does the Constitution require of a suit against a terrorism-supporting state. The Court need not

grapple with those difficult questions in this case, especially as they are not at issue here.

ARGUMENT

I. FSIA IMPOSES NEXUS REQUIREMENTS ON ALL SUITS AGAINST FOREIGN STATES FOR WHICH IT PROVIDES SUBJECT MATTER JURISDICTION

For most of our country's history, the question of whether foreign states or the companies they own enjoy constitutional protection under the Fifth Amendment in the course of litigation in our courts could not have arisen. Only with the adoption of the Foreign Sovereign Immunities Act in 1976 did procedural safeguards become relevant. Congress then had to consider whether the rights of companies owned by foreign states stand on a different basis from those of foreign legal persons generally. It responded with nexus requirements that conditioned exceptions to immunity on the existence of substantial contacts with the United States.

Suits to confirm an arbitral award raise problems of fairness and justice to the same extent as the claims covered by the original 1976 exceptions to immunity. A court's confirmation of an arbitral award transforms the winning party from the holder of a contract claim into a judgment creditor entitled to track down and seize the loser's assets wherever they can be found. Symmetrically, confirmation exposes the loser of the arbitral proceedings to much greater legal risk. By design, a confirmation proceeding is far from pro forma and demands reasonable protection of the putative debtor's interests. It is not, as some have suggested to this Court, a ministerial matter, but

rather a consequential contest over important legal interests.[2]

Public policy favors arbitration as an effective means of resolving international commercial disputes. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 13-14 (1972). At the same time, lawmakers and practitioners alike recognize that arbitral proceedings can go off the rails, whether because of arbiter misconduct, conflicts of interest, or misfeasance. Victims of a wrongful arbitration can go to a domestic court with jurisdiction over the proceeding to annul the award, as respondent did here. In some circumstances, however, a domestic court's annulment decision does not have res judicata effect internationally. E.g., *Chromalloy Aeroservices v. Egypt*, 939 F. Supp. 907 (D.D.C. 1996) (refusing to follow annulment decision of Egyptian court); *Yukos Capital Sarl v OJSC Rosneft Oil Co*, [2012] E.W.C.A. Civ. (Ct. App. 2012) (Russian annulment decision not followed by Dutch or British courts); *Judgment of 9 October 1984, Pabalk Ticaret Ltd Sirketi v. Norsolor SA*, XI Y.B. Comm. Arb. 484 (French Cour de Cassation Civ. 1) (1986) (refusing to follow Austrian court decision annulling arbitral award made under Austrian law); GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION § 26.05[C][8][a][ii] (3d ed. 2024).

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[2] Brief of Amicus Curiae Professor George A Bermann in Support of Petitioners at 15 ("role of a court in recognizing or enforcing a judgment or arbitral award is largely ministerial"). Rather, in "satisfying itself of the regularity of the foreign proceedings," id., the court may face significant questions of fact and law. E.g., George A. Bermann, *The Yukos Annulment: Answered and Unanswered Questions*, 27 AM. REV. INT'L ARB. 1 (2016) (cataloging misconduct in prominent international arbitration).

As this case illustrates, the prevailing party in an arbitral proceeding may seek enforcement while annulment is pending or even after its opponent has obtained annulment from the court with jurisdiction over the arbitral proceedings (putting aside whether the law would uphold such a move in this case). A party that has succeeded in annulling the award thus faces legal risk. It must choose between trying to preemptively set aside the award wherever a prevailing party might bring a claim or waiting to contest a domestic confirmation proceeding brought by the arbitral victor. Petitioners contend they can pursue confirmation anywhere in the world, even in places where the persons subject to the award have no contacts and possess no property to defend. It is enough, they maintain, that property might turn up at some later time. If true, the path of preemptive set-aside almost certainly will be wasteful. The alternative of defending against confirmation, however, works only if the defendant has a fair chance to make its case. A careful look at the 1988 amendment makes clear that it recognizes and satisfies the need for a fair confirmation proceeding.

A. Structure and History of the FSIA

The FSIA as first enacted limited legal process against foreign sovereigns and their agencies and instrumentalities to instances where a substantial connection existed between the civil suit and the defendant's activity in the United States. The statute is complex but coherent. It begins with the FSIA's jurisdictional provision, 28 U.S.C. § 1330, which addresses both subject matter and personal jurisdiction.

Section 1330(a) extends subject matter jurisdiction "to any claim for relief in personam with respect to

which the foreign state is not entitled to immunity either under sections 1605–1607 of this title" As this Court held in *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 489-97 (1983), this provision has the collateral effect of qualifying suits covered by the FSIA's exceptions to immunity as "arising under" federal law for purposes of Article III, § 2, cl. 1. Its main purpose, however, is to limit subject matter jurisdiction to cases falling within these exceptions.

Section 1330(b) symmetrically addresses the question of personal jurisdiction, an independent element of the law of federal court jurisdiction. It states that personal jurisdiction over a foreign state "shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a)." Thus, personal jurisdiction exists under the FSIA only if the claim satisfies one of the subject-matter exceptions to immunity. Each exception in turn contains a nexus requirement.[3]

The 1976 version of the FSIA created five exceptions to immunity. Each was accompanied by restrictions that satisfy a minimum contacts test, whether the Fifth Amendment applies of its own force or not. They require a plaintiff either to prove a waiver of objections to jurisdiction or demonstrate a nexus between the claim and the United States.

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[3] Section 1330(b) further requires that, for personal jurisdiction to exist, the lawsuit must comply with the service-of-process rules of Section 1608. It does not appear that any question exists about petitioners' satisfaction of the latter requirement in this case. *Devas Multimedia Private Limited v. CC/Devas (Mauritius) Limited*, 91 F.4th 1340, 1345 (9th Cir. 2024) (Bumatay, J., dissenting).

The legislative history of Section 1330(b), on which the lower court relied, emphasized the FSIA's linking of its nexus requirements to extant constitutional doctrines. H. Rep. No. 54-487, 94th Cong., 2d Sess. 13-14 (1976), *reprinted in* 1976 U.S. Code Cong. & Admin. News at pp. 6604, 6612, cited by *Devas Multimedia Private Limited v. CC/Devas (Mauritius) Limited*, at App. 4a (quoting *Thos. P. Gonzalez Corp. v. Consejo Nacional de Producion de Costa Rica*, 614 F.2d 1247, 1355 n. 5 (9th Cir. 1980)). This statement from the House Report was not, as suggested by the dissenting opinion in the Ninth Circuit's denial of the petition for rehearing en banc, *Devas Multimedia Private Limited v. CC/Devas (Mauritius) Limited*, 91 F.4th 1340, 1342 (9th Cir. 2024) (Bumatay, J., dissenting), an attempt to engraft a new meaning onto the language of Section 1330(b). Rather, it provides an accurate description of how that provision worked in tandem with other provisions of the FSIA, in the version in effect at the time of *Thos. P. Gonzalez Corp*. That legislative history, to be sure, could not and did not address the relationship between Section 1330(b) and later-adopted exceptions to immunity.[4] It does, however, indicate that Congress was aware of the issue and did not intend to discriminate against state-owned companies with respect to personal jurisdiction.

The 1988 enactment of Public Law 100-669, § 2, 102 Stat. 3969, which added Sections 1605(a)(6) and 1610(a)(6) to the FSIA, opened the door to the minimum-contacts question at issue in this case.

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[4] See Brief for the United States as Amicus Curiae Supporting Petitioners at 17 ("The report simply reflects the view that the exceptions to immunity enacted in 1976 applied, as a practical matter, only in contexts in which the committee believed 'minimum jurisdictional contacts' would exist.").

Section 1605(a)(6)'s nexus requirement limits subject matter jurisdiction over arbitration-based claims to instances where:

> the arbitration takes place or is intended to *take place in the United States*, (B) the agreement or award is or may be governed by a *treaty or other international agreement in force for the United States* calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, *could have been brought in a United States court* under this section or section 1607 [related to counterclaims], or (D) paragraph (1) of this subsection [relating to waiver] is otherwise applicable. (Emphasis added).[5]

Items (A), (C), and (D) continue the pattern established in 1976 of expressly requiring links that avoid constitutional minimum-contacts issues. Sub-subsection (B), the only provision applicable to this case, does not in so many words require a nexus between the person sought to be held to an arbitration agreement and its connections to the United States. A careful analysis of the amendment, however, indicates that Congress did not intend to abandon a party-focused principle of minimum contacts.

B. The Nexus Test in the Arbitration-Agreement Exception

Properly understood, Section 1605(a)(6)(B)'s reference to treaties means only those "calling for the recognition and enforcement of arbitral awards" *in the*

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[5] *Amicus* concurs with respondents' argument that Section 1605(a)(6)'s reference to "a subject matter capable of settlement by arbitration under the laws of the United States" adds an additional nexus requirement.

United States. For a treaty to meet this nexus requirement, it must be both in force for the United States and require the United States to recognize and enforce the award at issue. An international commercial arbitration treaty that simply opened up the prospect of recognition and enforcement somewhere in the world would not suffice.

1. Section 1605(a)(6)(B) applies only when a treaty requires recognition and enforcement of an arbitral award in the United States

At the time of the enactment of Section 1605(a)(6)(B), the principal U.S. treaty addressing the legal status of foreign arbitral awards in the United States was the Convention on the Recognition and Enforcement of Foreign Arbitral Award, Jun. 10, 1958, 21 U. S. T. 2517, T.I.A.S. No. 6997 (New York Convention) (U.S. accession as of Sep. 30, 1970).[6] This is the only treaty on which petitioners' rely to satisfy the FSIA's jurisdictional requirements.

The New York Convention does create a presumptive obligation for states that have joined it to recognize and enforce arbitral awards made pursuant to its terms. This obligation, however, is subject to a significant restriction that preserves the capacity of

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[6] The lower courts have used the New York Convention to implement the recognition and enforcement of arbitral awards made pursuant to bilateral investment treaties, including those to which the United States is not a party. E.g., *Zhongshan Fucheng Ind. Inv. Co. v. Federal Republic of Nigeria*, 112 F.4th 1054 (D.C. Cir. 2024); *Republic of Ecuador v. Chevron Corp*., 638 F.3d 384 (2d Cir. 2011). But cf. *Corporación AIC, SA v. Hidroeléctrica Santa Rita S.A*., 66 F.4th 876 (11th Cir. 2023) (domestic arbitration law, and not New York Convention, applies to arbitrations where United States is primary jurisdiction).

states to honor their fundamental principles. It allows a state to reject recognition or enforcement if doing so "would be contrary to the public policy of that country." New York Convention Art. V(2)(b); GARY B. BORN, supra, at § 26.05[C][9] (public policy refers to "the fundamental conceptions of morality and justice of the forum" (quoting *Hebei Imp. & Exp. Corp. v. Polytek Eng'g Co.*, XXIV Y.B. Comm. Arb. 652, 667 (H.K. Ct. Fin. App. 1999))).

Among the principles of "fundamental conceptions of morality and justice" that define the U.S. legal system is that a forum's jurisdiction must rest on "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). Whether or not the Fifth Amendment expresses these notions in all circumstances, a commitment to fair play and substantial justice pervades U.S. law. This commitment requires applying Article V(2)(b) of the New York Convention, and therefore Section 1605(a)(6)(B), so as to bar a confirmation suit where a person against whom a claim is brought has no connection to the forum.

2. The nexus requirements of Section 1605(a)(6)(B) distinguishes between state-owned legal persons and states as such

Employing a "minimum contacts" test under the New York Convention and Section 1605(a)(6)(B) does not require treating foreign states and their majority-owned companies as if they were identical. Legal persons established under the laws of a foreign state enjoy a wide range of rights and privileges under U.S. law. These include the protection of the Fourteenth Amendment's due process clause and its limits on the

assertion of personal jurisdiction, *Daimler AG v. Bauman*, 571 U.S. 117 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011); *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873 (2011); *Asahi Metal Industry Co., Ltd. v. Superior Court of California*, 480 U.S. 102 (1987); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984), and protection under the Fifth Amendment with respect to assertions of personal jurisdiction, *Omni Capital International, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97 (1987), and from uncompensated takings, *Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931).

Treaties to which the United States is a party do grant foreign legal persons access to U.S. courts and protection from lawsuits on the same general terms as U.S. legal persons. Of particular relevance to this case is the standard U.S. bilateral treaty of friendship, commerce and navigation (FCN).[7] The terms of these instruments vary somewhat, but by the end of World War II they had become standardized to the point of virtual identity.

The German FCN treaty is illustrative. It remains in force, it involves a state with which the United

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[7] Although U.S. treaty practice in recent years has moved in the direction of substitutes for traditional bilateral FCN treaties, earlier-generation instruments remain in force with respect to Argentina, Austria, Belgium, Bolivia, Brazil, Brunei, Costa Rica, Denmark, Estonia, Finland, Germany, Greece, Honduras, Ireland, Israel, Italy, Japan, Korea, Latvia, Liberia, Netherlands, Norway, Paraguay, Suriname, Switzerland, and Taiwan. U.S. Dept. of State, Treaties in Force – A List of Treaties and other International Agreements of the United States in Force on Jan. 1, 2020, at 13, 22, 36, 42, 48, 50, 99, 114, 135, 147, 170, 178, 194, 217, 228, 241, 258, 264, 270, 322, 340, 357, 424, 430, 498.

States maintains extensive commercial relations, and its terms represent standard U.S. treaty practice. The German Treaty's Article V provides:

> 3. Neither Party shall take *unreasonable or discriminatory measures* that would impair the legally acquired rights or interests within its territories of nationals and companies of the other Party in the enterprises which they have established, in their capital, or in the skills, arts or technology which they have supplied.
>
> 4. Property of nationals and companies of either Party shall not be taken within the territories of the other Party, except for the public benefit and in accordance with *due process of law*, . . .

Treaty of Friendship, Commerce and Navigation, Ger.-U.S., Oct. 29, 1954, 5 U.S.T. 1829, T.I.A.S. No. 3057, 224 U.N.T.S. 279 (emphasis added).

With respect to judicial process, including recognition and enforcement of arbitral awards, Article VI of the German Treaty states:

> 1. Nationals and companies of either Party shall be accorded *national treatment with respect to access to the courts of justice* . . . .
>
> 2. Contracts entered into between nationals or companies of either Party and nationals or companies of the other Party, that provide for the settlement by arbitration of controversies, shall not be deemed unenforceable within the territories of such other Party merely on the grounds that the place designated for the arbitration proceedings is outside such territories or that the nationality of one or more of the arbitrators is not that of such other Party.

> Awards duly rendered pursuant to any such contracts, which are final and enforceable under the laws of the place where rendered, shall be deemed conclusive in enforcement proceedings brought before *the courts of competent jurisdiction* of either Party, and shall be entitled to be declared enforceable by such courts, *except where found contrary to public policy*. When so declared, such awards shall be entitled to privileges and measures of enforcement appertaining to awards rendered locally. It is understood, however, that awards rendered outside the United States of America shall be entitled in any court in any State thereof only to the same measure of recognition as awards rendered in other States thereof.

Id. (emphasis added).

Virtually all of the FCN treaties currently in force for the United States contain the above or equivalent language. Through them the United States commits: (1) not to discriminate against the interests of treaty-party nationals, whether legal or natural persons; (2) to apply the principles of due process to all governmental interactions with the property of treaty-partner nationals; and (3) to limit the enforcement of arbitral awards involving the national of a treaty party to courts of competent jurisdiction, and then only as consistent with the public policy of the United States.

Article VI(2) contains the key commitment relevant to this case. It guarantees a person subject to an arbitral award under the jurisdiction of one treaty party access to the other party's courts of competent jurisdiction for the award's enforcement. The term "competent jurisdiction" encompasses, as a matter

of U.S. law, personal jurisdiction. E.g., *Lightfoot* v. *Cendant Mortg. Corp.*, 580 U.S. 82, 95 (2017); *Hilton v. Guyot*, 159 U.S. 113, 202 (1895); Restatement (Fourth) of the Foreign Relations Law of the United States § 483 reporters' note 2. The Article thus bars imposing a court lacking personal jurisdiction over the parties on a dispute over enforcement of an arbitral award.

All the FCN commitments granting access to justice in U.S. courts apply to "nationals and companies" of the treaty party, without distinguishing between private and state-owned companies. As a matter of plain language, legal persons that count as an "agency or instrumentality" of a foreign state under Section 1603(b) enjoy the rights protected by the FCN. Were there any doubt, however, Article XVIII settles the matter. It provides:

> 2. No enterprise of either Party, including corporations, associations, and government agencies and instrumentalities, which is publicly owned or controlled shall, if it engages in commercial, industrial, shipping or other business activities within the territories of the other Party, claim or enjoy, either for itself or for its property, immunity therein from taxation, suit, execution of judgment or *other liability to which privately owned and controlled enterprises are subject* therein.

Id. (emphasis added). Concededly, this provision expressly requires only that foreign publicly owned companies will not claim greater rights in the host country's legal system than those accorded to foreign private companies. A sound inference from the provision, however, is that publicly owned companies, at least with respect to recognition and enforcement of

arbitral awards, will not receive worse treatment than their private counterparts.

Significantly, the FCN treaties, when addressing access to justice, do not equate state-owned companies with foreign states. Article XVIII(2) applies only to enterprises, not states themselves. The purpose of FCN treaties is to put the subjects of foreign states on an equal basis, as far as feasible, with those of the host state. This principle applies whatever the ownership of a particular company.

States stand on a different ground from their subjects and cannot be treated as equivalent to subjects of the host state. The distinction is self-evident. Foreign legal persons, whatever the nature of their ownership, undertake a limited range of activities, as defined by their incorporating documents and applicable corporate law. States by their nature have the plenary rights and duties of a sovereign under international law and participate directly in the international legal system, including negotiating and joining international treaties. Both legal persons and states can enter into contracts, but only the latter can make a treaty under international law.[8]

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[8] "'Treaty' means an international agreement concluded between States in written form and governed by international law, . . ." Vienna Convention on the Law of Treaties art. 2(1)(a), May 23, 1969, 1155 U.N.T.S. 331; Restatement (Fourth) of the Foreign Relations Law of the United States, pt. III, introductory note. Although the United States is not a party to the Vienna Convention, it accepts many of its provisions, including this one, as accurate statements of customary international law. International law also recognizes that international organizations created by treaties among states also can take part in the making of treaties.

When Congress enacted the FSIA in 1976 and then amended it in 1988, it gave no sign that it wished to put the United States in breach of these treaty obligations or have the meaning of the statute change on a case-by-case basis depending on whether an FCN treaty applied in a particular case.[9] Rather, it must have understood that the rules for confirming foreign arbitral awards would raise no risk of discrimination against foreign companies in violation of its FCN commitments.

3. The legislative history of Section 1605(a)(6)(B) makes clear that Congress did not intend to discriminate against state-owned companies

It is useful to take note of statements that provide a context for the interpretation of open-ended statutory language. The legislative history of Public Law No. 100-669 makes clear that Congress meant the provision to strip state-owned companies of defenses that would give them greater protection from U.S. litigation than that accorded U.S. or foreign private companies. Congress at no time indicated a purpose of subjecting state-owned companies to greater legal burdens than those imposed on their private counterparts.

The bill that became Public Law No. 100-669 was introduced in the Hundredth Congress as H.R. 1869 by Congressman Hamilton Fish of New York. The

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[9] India, of course, has no FCN treaty with the United States, so respondents do not have particular treaty rights to assert in this case. Congress wrote Section 1605(a)(6)(B), however, with the goal of not violating existing FCN obligations. Respondents are beneficiaries of that purpose whether they enjoy specific treaty rights or not.

bill's goal, Fish explained, was to bar "the use of the act of state doctrine or the sovereign immunity defense to avoid compliance with an otherwise valid arbitration award." Hearing Before the Subcommittee on Administrative Law and Governmental Relations of the House Judiciary Committee on H.R. 1149, H.R. 1689, and H.R. 1888, 100th Cong., 1st Sess. 11 (1987). The bill sought to amend the Federal Arbitration Act to eliminate use of the act-of-state defense in claims to recognize and enforce an arbitral award and to revise the FSIA by introducing what eventually became Section 1605(a)(6). It "would place private parties on a near equal footing with governmental entities in commercial disputes." Id. at 12.

The following year, Congress adopted, and the President signed, S. 2204. At the time that the House of Representatives approved the measure, Congressman Moorhead explained:

> S. 2204 would amend title 9 and title 28 of the United States Code so as to insure that neither act of state doctrine, nor the doctrine of sovereign immunity, may be used to frustrate the effect on an agreement to arbitrate or to interfere with the enforcement of an arbitral award entered against a foreign state. The "Fish bill" – introduced as H.R. 1689 – has the support of the State Department and the Department of Justice. It was the subject of a hearing before the Subcommittee on Administrative Law and Governmental Relations in May. 1987. No testimony was heard in opposition to the measure: there simply is no opposition.

Cong. Rec. H.R. 10679 (Oct. 20, 1988).

This evidence confirms that the FSIA amendments sought to limit the sovereign immunity defense so as to make states as well state-owned entities stand on the same footing as private persons with respect to U.S. legal proceedings based on arbitral agreements.

One amicus before this Court, who contributed to this legislative history, argues that an objective of the 1988 amendments was to create an irrebuttable presumption of waiver of personal jurisdiction based on a state's entry into a treaty providing for recognition and enforcement of an arbitral award in another treaty party's courts, including those of the United States. Brief for Mark B. Feldman as Amicus Curiae Supporting Petitioners at 15-17. The focus of Mr. Feldman's statement in the 1987 Subcommittee Hearings, however, was on waiver of sovereign immunity, not of jurisdiction. Hearing Before the Subcommittee on Administrative Law and Governmental Relations of the House Judiciary Committee, supra, at 74, 89-92 (statement of Mark B. Feldman).

Mr. Feldman's submission did note that, consistent with traditional conceptions of due process, a party could waive objections to jurisdiction. As delivered, however, these remarks conflated waiver of immunity with waiver of objections to jurisdiction, two distinct legal questions. Id. at 93-94. They also addressed proposals advocated by Mr. Feldman to extend arbitral-award jurisdiction beyond what the Fish bill sought. The statement of Deputy Assistant General Schiffer at the same hearing emphasized the distinction between immunity and jurisdiction. He observed that hypothetically legislation might impose an irrebuttable presumption of personal jurisdiction in arbitration recognition cases (as the Feldman proposal

contemplated), but that the bill under consideration did not. Id. at 47 (statement of Deputy Assistant General Schiffer).

* * *

Taking into account the language of the FSIA's arbitral award exception, the relevant international treaties, and the legislative history of the 1988 amendment that added that exception, it is clear that Congress did not intend to dispense with the minimum-contacts requirement with respect to jurisdiction over a suit to confirm an international arbitral award against a state-owned company. The plain language of Section 1605(a)(6)(B) incorporates the limits provided by the New York Convention to the obligation of the United States to recognize and enforce this award. These limits include a minimum-contacts test.

II. THE DOCTRINE OF CONSTITUTIONAL AVOIDANCE COUNSELS AGAINST INTERPRETING FSIA AS IMPOSING ACROSS-THE-BOARD PERSONAL JURSIDICTION OVER ALL MAJORITY-STATE-OWNED LEGAL PERSONS

Until *Argentine Republic v. Weltover*, 504 U.S. 607 (1992), this Court had no occasion to consider whether foreign states enjoy constitutional protection with respect to the personal jurisdiction of a U.S. court. In that case, which involved a foreign state rather than a state-owned company, this Court noted but did not resolve the issue, as Argentina satisfied the "purposeful availment" test applied in Fifth Amendment cases. Id. at 619-20. Since then, several lower courts have ruled that no such protection exists. E.g., *Frontera Resources Azerbaijan Corp. v. State Oil*

Co. of Azerbaijan Republic, 582 F.3d 393 (2d Cir. 2009); *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82 (D.C. Cir. 2002). But see *Gater Assets Limited v. AO Moldovagaz*, 2 F.4th 42 (2d Cir. 2021) (Fifth Amendment protects foreign state-owned company that does not count as "alter ego" of foreign state).

Were this Court to interpret Sections 1330(b) and 1605(a)(6)(B) as deeming the existence of personal jurisdiction across the board in suits seeking to enforce a New York Convention arbitral award against foreign state-owned firms, it would have to address several difficult constitutional questions. First, it would have to decide whether foreign states count as persons for purposes of the Fifth Amendment. This would include grappling with the status of foreign state-owned firms under the Fifth Amendment, as well as whether the Fifth Amendment prescribes rules, such the alter-ego test used by the lower courts, for distinguishing state-owned firms from states as such. Second, if it were to determine that state-owned firms enjoy due process protection, it would have to decide what process suffices to meet constitutional requirements. This last issue implicates an important and fraught collateral question, whether Congress may supply those requirements in derogation of judicially crafted standards. See *Fuld v. Palestine Liberation Organization*, 101 F.4th 190, 219-23 (2d Cir. 2024) (Menashi, J., dissenting from the denial of rehearing en banc), cert. granted, 145 S. Ct. __ (2024).

Each of these questions presents challenging problems with significant, not necessarily self-evident ramifications. It is settled that "aliens receive constitutional protections when they have come within the territory of the United States and developed

substantial connections with this country." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990), and that "once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas* v. *Davis*, 533 U.S. 678, 693 (2001). An assertion of personal jurisdiction brings a person within the territory of the United States for constitutional purposes, which is why suits against alien legal persons must satisfy due process standards. *Daimler AG v. Bauman*, 571 U.S. 117 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011); *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873 (2011); *Omni Capital International, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97 (1987); *Asahi Metal Industry Co., Ltd. v. Superior Court of California*, 480 U.S. 102 (1987); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984). If the Fifth Amendment treats aliens, natural and legal, as "persons" when bringing them into the United States, should it treat legal persons owned by foreign states differently?

As subjects of the international legal system, states engage directly with other states, including the United States, across many fields and in many ways. Virtually all states belong to the United Nations and thus take part in its various New-York-based activities. Virtually every state belongs to multilateral treaties governing matters as diverse as international telecommunications, the law of armed conflict, and human rights. All these treaties create ongoing rights and duties with respect to the United States. Even states with which the United States has suspended diplomatic relations negotiate with our government

over specific matters of mutual concern, including security threats and hostages, and remain in treaty relations. The level of contacts between foreign states and the United States thus is both qualitatively and quantitatively different from those involving foreign state-owned legal persons.

The lower courts have assumed that foreign companies, including the state-owned, do qualify as "persons" under the Fifth Amendment. They have reconciled this outcome with their conclusion that foreign states do not by devising a means of distinguishing such persons from the state that owns them. They rely particularly on the alter-ego concept developed by *First National City Bank* v. *Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983) (*Bancec*). This seemingly tidy solution, however, falls apart upon closer examination.

Applying *Bancec* to minimum contacts issues lacks a clear conceptual basis. *Bancec* developed federal common law to address a creditor-rights problem, namely when a state's creditor may treat a separate legal person's assets as belonging to the state. The factors employed in a *Bancec* analysis are not necessarily relevant to the question whether a foreign state's connections the United States suffice to bring a legally distinct foreign entity into contact with our country for purposes of fundamental fairness and natural justice. Protecting creditors' rights from abusive creditors and ensuring fundamental fairness to a legal entity are completely different tasks.

Were this Court to accept that foreign states as well as the companies they own count as "persons" with respect to our legal system's engagement with them, it then would have to consider how the Fifth Amendment applies to these engagements. It might conclude, for

example, that a state's joining of a treaty that accepts the jurisdiction of U.S. courts with respect to matters governed by that treaty suffices to meet the standards of due process. It would not follow, however, that this consent can be imputed to that sovereign's subjects.

A sovereign may waive rights bestowed on it by international law, but not the rights of its subjects bestowed on them by our constitution. A sovereign generally has the right to waive the immunity from legal process of its employees, agents and representatives, including diplomats, because the immunity inheres in the nature of sovereignty. Whether a sovereign can waive constitutional protection our country accords generally to persons drawn into the legal process is a completely different issue. If foreign persons, including state-owned firms, are entitled as a matter of constitutional law to insist that the personal jurisdiction of a U.S. court over them must rest on minimum contacts between them and the United States, a treaty to the contrary made by the foreign person's sovereign should not suffice to cancel a U.S. constitutional entitlement.

Another issue that this Court has not yet addressed is whether and how footnote 36 of *Shaffer v. Heitner*, 433 U.S. 186, 210 (1977), applies to a suit to confirm an arbitral award.[10] A fair reading of that footnote's reference to a determination "by a *court* of competent jurisdiction" (emphasis supplied) is that it applies only to a judicial judgment, and not an arbitral award. If

[10] The footnote states: "Once it has been determined by a court of competent jurisdiction that the defendant is a debtor of the plaintiff, there would seem to be no unfairness in allowing an action to realize on that debt in a State where the defendant has property, whether or not that State would have jurisdiction to determine the existence of the debt as an original matter."

so, the footnote would sustain personal jurisdiction in a proceeding to levy against any available property a prior judicial judgment recognizing the award, because a competent court (and not just an arbitral tribunal) had determined the defendant's status as a debtor. The footnote would not, however, recognize personal jurisdiction with respect to the initial proceeding to confirm the award, because of the absence of prior involvement by a competent court. See generally Restatement (Fourth) of the Foreign Relations Law of the United States § 482 reporters' note 3. Again, the Court should be reluctant to resolve this issue in a case that it can dispose of on other grounds, and in which the issue has not been fully briefed.[11]

One possible response to these questions over the scope of due process is that the Fifth Amendment, unlike the Fourteenth, does not have individual liberty or fairness at its core. Members of one lower court have argued that the Fifth Amendment instead leaves it to the political branches to decide what constitutes due process with respect to aliens whom civil litigants seek to bring within our legal system.

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[11] Professor Bermann proposes in his amicus brief to treat all suits for recognition and enforcement of an arbitral award as within the limited scope of the in rem jurisdiction preserved by footnote 36 of *Shaffer*. Brief of Amicus Curiae Professor George A Bermann in Support of Petitioners at 16-21. The lower courts are split on this question, as Professor Bermann acknowledges, and the issue is too significant to dispose of in a case where the parties have not fully briefed it. Among other issues, resolution of this argument would require a court to address the language of FSIA Section 1330, which limits FSIA's exceptions to sovereign immunity to "any claim for relief in personam" covered by Sections 1605-07. Whether Professor Bermann's proposal would transgress this limitation is a matter best left for another day.

The Court may find itself called to address that issue in *Fuld v. PLO*, Case No. 24-20, certiorari granted and consolidated with *United States v. PLO*, Case No. 24-151. As those cases illustrate, the ramifications of that question go well beyond the rights and interests under U.S. law of foreign states and the companies they own. It would be imprudent to grapple with the issue here, given the availability of a narrow statutory ground to resolve this case.

III. THIS CASE DOES NOT PRESENT THE QUESTION OF THE CONSTITUTIONAL ADEQUACY OF FSIA'S NEXUS REQUIREMENTS FOR TERRORISM-RELATED CLAIMS

In 1996, Congress again amended the FSIA to permit victims of international terrorism to bring suit for personal injuries against states that the President had designated as sponsors of terrorist acts. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132 § 221, 110 Stat. 1241, adding Sections 1605(a)(7), (e)-(g) and 1610(a)(7). In 2008, it superseded these amendments by enacting Section 1605A. National Defense Authorization Act for Fiscal Year 2008, Pub. L. 110-181 § 1083, 122 Stat. 341. Both the earlier version of the provision and current law strip immunities from a state when an "official, employee, or agent" of that state provides material support to specified terrorist acts, defined in reference to international law, that causes personal injury or death to a U.S. national, a member of the U.S. armed forces, or a U.S. government employee or contractor acting within the scope of employment.

In 2016, Congress further amended the FSIA by adding Section 1605B. Justice Against Sponsors of Terrorism Act, Pub. L. 114-222, § 3(a), Sept. 28, 2016,

130 Stat. 853. This provision excludes from immunity suits for death or personal injury in the United States caused by "a tortious act or acts of the foreign state, or of any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, regardless where the tortious act or acts of the foreign state occurred." The nexus provision here is stronger than that in Section 1605A, as it requires U.S.-based harm. Moreover, the elements of the immunity exception, which excludes "an omission or a tortious act or acts that constitute mere negligence," indicates that the covered conduct will satisfy a purposeful availment standard, thereby eliding whatever constitutional issues might otherwise arise.

The present case has nothing to do with the terrorism exceptions and deciding it on statutory grounds will properly leave open the question of how the Fifth Amendment might apply to such claims. Those exceptions present profoundly different issues that would frame any Fifth Amendment analysis that might apply.

Foreign states themselves have distinctive and ongoing contacts with the United States that are categorically different from those of an entity with a separate legal personality. By their very nature, states maintain a range of connections with the United States that should suffice to satisfy whatever minimum-contacts rule might apply to lawsuits based on sponsorship of terrorism. Membership and participation in the United Nations, for example, entail substantial activity on U.S. territory.

UN involvement aside, participation in multilateral treaties bring most states in the world into direct contact with the United States. In particular, all of the

states that the United States has designated as state sponsors of terrorism have joined treaties that outlaw support for terrorism. These include the UN Charter, the Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, the Geneva Conventions (Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135; Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 3110; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287), and the Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, T.I.A.S. No. 94-1120.1, 1465 U.N.T.S. 85. Each of these treaties, directly or by implication, forbids the activity covered by Section 1605A. Every country that the United States has designated as a state sponsor of terrorism has joined all or most of them.[12] It would not require a great conceptual leap to regard the purposeful breach of a treaty commitment that a state has made to the United States as sufficient to satisfy any minimum

[12] The countries currently designated as sponsors of terrorism are Iran, North Korea, and Syria. Past designees include Cuba, Iraq, Libya, and Sudan. Iran and North Korea have not joined the Convention Against Torture, but belong to the remaining treaties regulating the lawful use of armed force. Syria belongs to all of them.

contacts test that the Fifth Amendment hypothetically might apply.

Each of these issues entails distinct legal questions with profound policy implications. The answers may be in view but should not be presumed self-evident. It suffices to observe that none of the issues before the Court in this case requires an answer.

IV. THE NINTH CIRCUIT CORRECTLY HELD THAT PETITIONERS FAILED TO SATISFY FSIA'S NEXUS TEST FOR CONFIRMATION OF ARBITRAL AWARDS

The Ninth Circuit determined that the contract that served as the basis for the arbitration at the center of this case "was negotiated outside of the United States, executed in India in 2005, and did not require Antrix to conduct any activities or create ongoing obligations in the United States." App. At 7a. In the lower courts, petitioners argued that people associated with Antrix twice came to the United State for meetings, but the Ninth Circuit ruled that none of these "random, isolated, or fortuitous" meetings was related to the contract. Petitioners do not challenge these factual determinations but rather argue that the court applied the wrong legal standard in assessing their significance. The point remains that respondents had no connection with the United States other than entering into a contract in India with an Indian corporation that provided for arbitration of disputes in conformity with the New York Convention, a treaty that opens the door to recognition and enforcement of arbitral awards in the United States but does not mandate that outcome in all circumstances.

The decision of the court below did not focus on the particular nexus requirements imposed by the FSIA's

Section 1605(a)(6). It also did not consider the possibility that its earlier cases, all dealing with the FSIA's original exceptions to immunity, might not necessarily extend to this later provision. Although its analysis might have been incomplete, however, the court nevertheless reached the right conclusion.

The language, structure, and relevant international commitments of the United States, as well as the 1988 amendment's legislative history, all point in the same direction: Section 1605(a)(6)(B), the FSIA's nexus requirement for claims that depend on the New York Convention, demands that a suit for recognition of an arbitral award rest on minimum contacts between a legal person subject to the award and the United States. Were this provision to be read otherwise, the Court would have to consider difficult and potentially far-reaching questions under the Due Process Clause of the Fifth Amendment as well as opening the door to possible violations of U.S. international legal obligations. The Ninth Circuit correctly assessed what the FSIA requires, making it unnecessary to address challenging issues of constitutional and international law. Its judgment should be affirmed.

CONCLUSION

The judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

JEFFREY T. GREEN
Counsel of Record
GREEN LAUERMAN
CHARTERED P.L.L.C.
1050 30th Street NW
Washington, D.C. 20007
(240) 286-5686
jeff@greenlawchartered.com

Counsel for Amicus Curiae

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