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,
Petitioner,

v.

ANTRIX CORP. LTD., ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS CC/DEVAS (MAURITIUS) LIMITED, ET AL.

ANNE CHAMPION
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166

MALAIKA EATON
MCNAUL EBEL NAWROT & HELGREN PLLC
One Union Square
600 University Street
Suite 2700
Seattle, WA 98101

MATTHEW D. MCGILL
Counsel of Record
JACOB T. SPENCER
ANKITA RITWIK
DAVID W. CASAZZA
BRIAN C. MCCARTY
GIBSON, DUNN & CRUTCHER LLP
1700 M Street, N.W.
Washington, DC 20036
(202) 887-3680
mmcgill@gibsondunn.com

Counsel for Petitioners CC/Devas (Mauritius) Limited, et al.

RULE 29.6 STATEMENT

The corporate disclosure statement in the Brief for Petitioners CC/Devas (Mauritius) Limited, et al. remains accurate.

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REPLY BRIEF FOR PETITIONERS CC/DEVAS (MAURITIUS) LIMITED, ET AL.

Antrix concedes that the FSIA confers personal jurisdiction over a foreign state whenever subject-matter jurisdiction exists and service has been made in accordance with Section 1608. Pet. Br. 16-18; see 28 U.S.C. § 1330(b). Antrix thus abandons any attempt to defend the decision below, in which the Ninth Circuit imposed a minimum-contacts requirement with no basis in the statute or Constitution. Pet. Br. 18-24.

Antrix instead encourages this Court to affirm for a reason that Antrix characterizes—with considerable understatement—as "not precisely * * * articulated by the panel below." Antrix Br. 1. Antrix now contends—for the first time in the history of this litigation—that the FSIA's arbitration exception providing jurisdiction to enter judgment was not satisfied. This new argument speaks, at most, only indirectly to the district court's personal jurisdiction over Antrix, but in any event Antrix took the opposite, and correct, position below. The plain text of the arbitration exception to the FSIA allows actions to enforce arbitral awards that are enforceable under the New York Convention, as all parties agree is the case here. Antrix's contorted reading of the arbitration exception has no basis in the provision's text and would absent the United States from the international system of arbitration enforcement.

Alternatively, Antrix argues the Due Process Clause of the Fifth Amendment requires minimum contacts with the United States for the exercise of personal jurisdiction, notwithstanding the FSIA's pre-

scription of when "[p]ersonal jurisdiction * * * shall exist." 28 U.S.C. § 1330(b). Antrix's position is premised on the argument that it is a distinct corporate entity from India. Yet, as the case comes to this Court, the district court's finding that Antrix is the alter ego of India refutes that premise. Because foreign states are not persons with the capacity to invoke the minimum-contacts standard, and Antrix is the alter ego of a foreign state, the standard does not apply. But even if Antrix's assertion of corporate separateness had merit, it would not change the equation. Congress has the authority to set the conditions on which foreign state-owned entities are subject to suit in the United States. In the FSIA, Congress has made them amenable to suit whenever they are properly served and an exception to immunity applies. 28 U.S.C. § 1330(b). No more is required.

ARGUMENT

I. The FSIA Does Not Require Minimum Contacts To Establish Personal Jurisdiction.

Antrix's lead argument abandons the rationale of the decision below and instead urges this Court to engraft onto the arbitration exception a "nexus" standard. Antrix has never previously raised this argument and does not identify any decision adopting it. For good reason: Antrix's novel argument conflicts with the FSIA and New York Convention.

A. Antrix effectively confesses the Ninth Circuit's error and its alternative argument for affirmance is waived several times over.

Effectively confessing error, Antrix casts aside the Ninth Circuit's outlier view that the FSIA requires a showing of minimum contacts. Instead, it now asserts that the FSIA's arbitration exception does not apply because Antrix's arbitration agreement with Devas did not "concer[n] a subject matter capable of settlement by arbitration under the laws of the United States." 28 U.S.C. § 1605(a)(6). Antrix thus argues (at 14) that "[t]he district court lacked jurisdiction."

But in the Ninth Circuit, Antrix conceded that "[t]he district court's subject matter jurisdiction was premised on" the FSIA "because Antrix is not immune from an action to confirm a foreign arbitration award under the FSIA's arbitration exception to sovereign immunity." CA9 (No. 22-35103) Dkt. 13, at 5-6. Thus both the district court and Ninth Circuit explained that Antrix "acknowledges the statutory basis for personal jurisdiction under 28 U.S.C. § 1330(b)," Pet. App. 21a-22a, and that "[t]he parties agree that for purposes of the FSIA, * * * an enumerated exception applies"—*i.e.*, the arbitration exception, Pet. App. 4a.

Antrix then waived in *this* Court any argument that Antrix was immune from jurisdiction. Petitioners stated in their petition for certiorari that "[a]ll parties agree that Respondent Antrix Corp. Ltd. * * * is not immune under the FSIA"—because the arbitration exception applies—and that "Antrix did not dispute that the FSIA's arbitration exception applied." Pet. 2, 6. Consistent with its prior conduct in this lit-

igation, at no point in its 36-page brief in opposition did Antrix even hint that it disagreed. See Sup. Ct. R. 15.2.

Because Antrix litigated all the way to judgment without asserting immunity in the district court, affirmatively conceded that it was *not* immune in the Ninth Circuit, and failed to dispute its lack of immunity in its brief in opposition, it has waived any argument that it was immune from jurisdiction. See 28 U.S.C. § 1605(a)(1) (foreign state not immune when it "has waived its immunity either explicitly or by implication"); *Stati* v. *Republic of Kazakhstan*, 199 F. Supp. 3d 179, 189-90 (D.D.C. 2016) (foreign state waived immunity by opposing petition to confirm arbitral award without asserting immunity).

Because Antrix does not defend the Ninth Circuit's interpretation of the FSIA and waived the only statutory argument it urges in support of affirmance, this Court should reverse the Ninth Circuit's holding that the FSIA required Petitioners to demonstrate that Antrix has sufficient minimum contacts with the United States.

B. The arbitral exception encompasses actions to confirm awards governed by the New York Convention, whether or not the arbitration agreement relates to U.S. commerce.

In any event, Antrix's argument that the FSIA's arbitration exception does not encompass the arbitration agreement between Antrix and Devas is meritless.

Antrix's argument proceeds from the premise that the phrase "concerning a subject matter capable of

settlement by arbitration under the laws of the United States," 28 U.S.C. § 1605(a)(6), is implicitly limited by the definition of "commerce" set out in the Federal Arbitration Act, see 9 U.S.C. § 1 (defining "commerce" to "mea[n] commerce among the several States or with foreign nations"); *id.* § 2 (governing arbitration agreements in "any maritime transaction or a contract evidencing a transaction involving commerce"). That argument finds no support in the text of the FSIA or even the FAA itself.

The FSIA's limitation of "subject matter capable of settlement by arbitration" operates to exclude matters that, "under the laws of the United States," may not be arbitrated. 28 U.S.C. § 1605(a)(6). For example, certain cases relating to a "sexual assault dispute." 9 U.S.C. § 402(a); see also *id.* § 208 (Statute implementing the New York Convention "applies to the extent that [it] is not in conflict with chapter 4"). This is the type of "express congressional language" establishing an "exceptio[n] to arbitrability grounded in domestic law" that the Court hypothesized in its footnote in *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.* 473 U.S. 614, 639 n.21 (1985). But *Mitsubishi* makes clear that there is no room for a "judicially implied exception" for a category of claims; it would "subvert the spirit of the United States' accession to the Convention by recognizing subject-matter exceptions where Congress has not expressly directed the courts to do so." *Ibid.* And Antrix identifies no provision of U.S. law—much less express congressional language like that of Section 402(a)—rendering

incapable of arbitration a breach of contract dispute of the sort underlying this litigation.[1]

Nor is there any reason to think that Congress, in enacting the arbitration exception in 1988, intended to exclude from U.S. courts most actions to enforce arbitral awards obtained by non-U.S. investors against a foreign nation under the ICSID Convention—a treaty to which the United States is a party and that requires the United States to accord full faith and credit to such awards as if they were domestic judgments. 22 U.S.C. § 1650a. Ditto for the New York Convention, which "appl[ies] to the recognition and enforcement of arbitral awards made in the territory of a State *other than* the State where the recognition and enforcement of such awards are sought" and "shall also apply to arbitral awards *not considered as domestic awards* in the State where their recognition and enforcement are sought." N.Y. Convention, Art. I(1) (emphases added). Congress specified that this treaty, too, "shall be enforced in United States courts." 9 U.S.C. § 201. The United States is treaty-obligated to enforce awards resolving "purely foreign commercial disputes" (Antrix Br. 20) under these conventions. So it would be quite odd for Congress to have acted to preclude federal jurisdiction over a wide swath of them, as Antrix suggests.

And any suggestion that U.S. courts' enforcement of the New York Convention itself is limited by the

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[1] The existence of provisions like Section 402(a) (and the possibility of the enactment of other such provisions) confirms that there is no merit to Antrix's contention (at 21) that Petitioners' interpretation of the arbitration exception renders its "subject matter capable" phrase superfluous.

FAA's definition of commerce collides with the text of the provisions in Chapter 2 of Title 9 implementing the Convention. That chapter provides that arbitral awards "fal[l] under the Convention" if they arise "out of a legal relationship, whether contractual or not, which is considered as commercial, *including* a transaction, contract, or agreement described in section 2 of this title." 9 U.S.C. § 202 (emphasis added). The "term 'including'" indicates "that the specifically mentioned" item is "not exclusive." *Herb's Welding, Inc.* v. *Gray*, 470 U.S. 414, 423 n.9 (1985); see also *Bloate* v. *United States*, 559 U.S. 196, 206 (2010) (distinguishing between exclusive and nonexclusive provisions based on use of "including"). Section 202's use of "including" thus shows that the New York Convention is not limited only to transactions "described in section 2." 9 U.S.C. § 202. And Congress further clarified specifically that Chapter 1 of Title 9, which contains Section 2, "applies to actions" under the Convention only "to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States." *Id.* § 208. In short, Section 2 does not limit the scope of awards enforceable under the Convention.

Because Congress has not excluded the subject matter of Devas's arbitral award—which is based on Antrix's breach of a commercial contract—from the scope of awards confirmable under Chapter 2 of the FAA, there is no basis for Antrix's claim that the Devas-Antrix agreement concerns a subject matter not subject to arbitration under the laws of the United States.

C. Antrix's remaining arguments in support of its narrowing of the arbitration exception are unavailing.

1. Antrix (at 22) objects that, notwithstanding its text, the arbitration exception must be read not to depart from "the original FSIA's pattern of requiring meaningful U.S. contacts." But, as Petitioners explained (at 25-26), the FSIA's arbitration exception involves a type of implied waiver of immunity from jurisdiction that aligns with the "pattern" of the original FSIA, namely Section 1605(a)(1)'s waiver exception.

The arbitration exception deprives foreign states of immunity from any action to confirm an arbitral award in circumstances laid out in four clauses. These include clause (B), where the award is governed by a treaty to which the United States is a party calling for recognition and enforcement of awards (the provision applicable here); and clause (D), when "paragraph (1) of this subsection"—the waiver exception—"is *otherwise* applicable." 28 U.S.C. § 1605(a)(6) (emphasis added). These two clauses each involve circumstances in which a foreign state has implicitly waived its immunity from the jurisdiction of U.S. courts. Indeed, the latter clause's use of the term "otherwise" confirms that the preceding clauses rest on a presumption of waiver. See *Begay* v. *United States*, 553 U.S. 137, 151 (2008) (Scalia, J., concurring) (By "using the word 'otherwise' the writer draws a substantive connection between two sets only on one specific dimension—*i.e.*, whatever follows 'otherwise.'").

Clause (B) in fact codifies an international understanding that a foreign state that enters into a treaty requiring the enforcement of international arbitral

awards waives its immunity from actions to enforce such awards against it in the courts of treaty counterparties. See N.Y. Convention, Art. III (providing that "[e]ach Contracting State shall recognize arbitral awards as binding and enforce them").

As Petitioners explained (at 28), other common-law countries consistently hold that "Contracting States have submitted to the jurisdiction" of their treaty counterparties by entering into conventions to recognize and enforce international arbitral awards "and therefore may not oppose the registration of [arbitral] awards against them on the grounds of state immunity." *Infrastructure Services Luxembourg S.À.R.L.* v. *Kingdom of Spain*, No. CA-2023-001556, ¶ 103 (Court of Appeal (Eng. & Wales) Oct. 22, 2024); see *Kingdom of Spain* v. *Infrastructure Services Luxembourg S.À.R.L.*, [2023] HCA 11, ¶ 8 (High Court of Austl. Apr. 12, 2023) (recognizing that "Spain's agreement to [the ICSID Convention] amounted to a waiver of foreign State immunity from the jurisdiction of the courts of Australia to recognise and enforce" an award against Spain).

Indeed, in a recent decision involving another arbitral award arising out of Antrix's repudiation of its contract with Devas, the Court of Appeal of Québec held that, "[b]y ratifying the New York Convention and concluding the Treaty, * * * India necessarily submitted itself to the jurisdiction of the courts at the stage of recognition and enforcement of awards by consenting to the terms of the New York Convention." *Republic of India* v. *CCDM Holdings, LLC*, No. 500-09-030393-235, ¶¶ 80-81 (Court of Appeal of Québec Dec. 4, 2024), *available at* https://perma.cc/BS44-6YYE. Citing decisions of the courts of the United

States, the United Kingdom, Australia, and France, the court noted that "it is accepted in the case law of several foreign courts that a State which submits to international arbitration thereby waives its jurisdictional immunity before the courts which may be called upon to recognize and enforce the resulting award." *Id.* ¶ 84. "Any other interpretation of the terms of [the New York Convention] would deprive it of its effect, which is to ensure the effectiveness of international arbitration awards." *Id.* ¶ 81.

Antrix's U.S. "nexus" construction of the arbitration exception, by contrast, would effectively permit the enforcement only of awards obtained by U.S. nationals against foreign states. That one-sided reading would result in "nothing less than a total abdication by the United States of its obligations under the New York Convention." Bjorklund & Ferrari Amicus Br. 19; see also *id.* at 17-21. It should be rejected.

2. Antrix also asserts (at 25-28) that its interpretation of the arbitration exception is supported by two clear-statement rules: the presumption against extraterritoriality and the presumption against implied abrogation of sovereign immunity. These doctrines are no help to Antrix.

Any presumption against extraterritoriality is overcome here because Congress has clearly stated its intent that U.S. courts recognize and enforce foreign arbitral awards. Recognition under the New York Convention necessarily involves a foreign award because the Convention applies only to "the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought."

N.Y. Convention, Art. I(1). By mandating that the Convention "shall be enforced in United States courts," 9 U.S.C. § 201, Congress directly stated that extraterritorial arbitral awards are enforceable.[2]

Antrix's reference to the presumption against extraterritoriality falters even aside from Congress's clear directive. The presumption has been applied to statutes that affect primary conduct either by regulating it directly, e.g., *F. Hoffmann-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155, 164-67 (2004), or by making a common-law claim cognizable, see *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U.S. 108, 115-17 (2013). Antrix identifies no decision of this Court applying the doctrine to a provision, like Section 1605 of the FSIA, that governs only federal court jurisdiction. That may well be because Congress's regulation of the jurisdiction of the courts of the United States is inherently *territorial*. Cf. *Morrison* v. *National Australia Bank Ltd.*, 561 U.S. 247, 253 (2010) (correcting a "threshold error" of concluding that extraterritorial application of U.S. law deprived court of subject-matter jurisdiction).[3]

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[2] Nor could Antrix complain that application of the New York Convention here amounts to an extraterritorial application of U.S. law. India is a party to the Convention, thus the Convention is part of India's domestic law. Moreover, as Antrix itself acknowledges, the underlying dispute was resolved according to Indian law. Antrix Br. i ("Applying Indian law, the tribunal seated in India ruled in favor of Devas."); *id.* at 1 ("So the parties arbitrated in India under Indian law.").

[3] Citing *Kiobel*, Antrix claims that the extraterritoriality presumption can apply to a "strictly jurisdictional" statute. Br. 25 (quoting *Kiobel*, 562 U.S. at 117). But, as *Kiobel* explains, while the statute there did not "directly regulate conduct or afford re-

Nor, contra Antrix Br. 27, does the clear-statement rule applicable to abrogation of sovereign immunity alter the analysis. In the FSIA, Congress addressed comprehensively the issue of the immunity of foreign states from jurisdiction of U.S. courts. *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 488 (1983). Under the FSIA, "any sort of immunity defense made by a foreign sovereign in an American court must stand on the Act's text. Or it must fall." *Republic of Argentina* v. *NML Capital, Ltd.*, 573 U.S. 134, 141-42 (2014). The FSIA thus displaces the common-law presumption applicable to other types of sovereign immunity. In any event, Congress here has stated expressly that a "foreign state shall not be immune" from an action "to confirm an award" whenever the "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." 28 U.S.C. § 1605(a)(6). That text would overcome any version of the presumption Antrix invokes. And no version of that presumption supplies a basis for implying into the FSIA's clear text the type of purpose-swallowing limitations that Antrix suggests.

* * *

This award is enforceable under the New York Convention, and therefore the FSIA's arbitration exception applies. This Court should reject Antrix's belated effort to impose a "nexus" requirement onto the

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lief" it did "allo[w] federal courts to recognize certain causes of action," and it was the determination of which causes of action to recognize that the Court held to be "constrain[ed]" by "the principles underlying the canon." *Kiobel*, 569 U.S. at 116.

FSIA's arbitration exception where its text supports no such limitation.

II. The Due Process Clause Does Not Require Minimum Contacts To Establish Personal Jurisdiction.

While Antrix abandons any minimum-contacts requirement under Section 1330 of the FSIA, it urges this Court—as it has urged each court below—to hold that the Constitution imposes a minimum-contacts requirement on the exercise of personal jurisdiction over it. Because the Due Process Clause imposes no minimum-contacts constraint on federal court jurisdiction over state-owned enterprises sued under the FSIA, the Court should make clear that a litigant need not "prove minimum contacts before federal courts may assert personal jurisdiction over foreign states sued under" the FSIA. Pet. i.

1. Antrix insists that foreign states—more than the States of this Union, see *South Carolina* v. *Katzenbach*, 383 U.S. 301, 323-24 (1966)—are "persons" holding constitutional due-process rights against the federal government. Antrix Br. 38-44. That argument finds no support in text, history, or precedent. See Pet. Br. 30-34; U.S. Amicus Br. 26-34; Chamber Amicus Br. 4-25; Bermann Amicus Br. 5-6.

Antrix acknowledges (at 40) that there is an "often-expressed understanding that in common usage, the term 'person' does not include the sovereign." *Will* v. *Michigan Department of State Police*, 491 U.S. 58, 64 (1989) (cleaned up). It accepts (at 41) that "several lower courts" have held that "it would be highly incongruous to afford greater Fifth Amendment rights to foreign nations, who are entirely alien to our constitu-

tional 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). And it admits (at 42) that foreign states "cannot claim due-process protection always and everywhere." Yet it asserts that the minimum-contacts standard limits a federal court's exercise of personal jurisdiction over foreign states.

Antrix observes that Article III extends "the 'judicial Power' to * * * 'cases' involving 'foreign States'" and thus grants foreign states a federal forum. Antrix Br. 39. But the same is true of cases involving "a State" or "different States," U.S. Const. art. III, § 2, and *Katzenbach* makes clear the States have no due-process rights vis-a-vis the federal government. There is no reason to read Article III as granting different and greater rights to foreign states. And the fact that *Congress* carefully limited the circumstances under which foreign states could be subject to personal jurisdiction, see Antrix Br. 39, provides no basis for inferring that the Constitution condemns Congress's choice.

Antrix insists (at 42) that according foreign states a right to demand a minimum-contacts showing would not give foreign states more constitutional rights than the States because the States are generally immune from suit under the Constitution, except where Congress abrogates that immunity. But foreign states are also generally immune from suit under the FSIA, 28 U.S.C. § 1604, and in cases where a foreign state or U.S. State is *not* immune from suit, Antrix's interpretation of the Fifth Amendment strangely would accord foreign states protections against federal power that are not extended to States of the Union.

Antrix also contends (at 41-42) that foreign states should hold due-process rights because foreign citizens and corporations enjoy Fifth Amendment rights under certain circumstances. But the fact that *private* foreign entities might enjoy due-process rights similar to those enjoyed by domestic entities has no bearing on the question of whether *foreign states*—the United States's sovereign juridical equals on the international plane—enjoy due-process rights against the federal government. Antrix offers no cogent explanation why the Constitution would give constitutional due-process rights to Russia, China, and North Korea, while withholding them from New York, California, and Texas.

2. Instead, Antrix attempts to sidestep the issue by arguing that "Antrix is a foreign corporation and not a foreign sovereign." Antrix Br. 28. That makes no difference. Congress has defined "foreign state" to include state-owned entities like Antrix, 28 U.S.C. § 1603(a)-(b), and has carefully defined the conditions on which "[p]ersonal jurisdiction over a foreign state shall exist," 28 U.S.C. § 1330(b). The presumption of corporate separateness is just that, a presumption that Congress may abrogate, see *Rubin* v. *Islamic Republic of Iran*, 583 U.S. 202, 211 (2018), not a constitutional requirement.

In any event, the district court found that Antrix is "effectively controlled by the Government of India" such that Antrix's separate corporate identity should be disregarded. Pet. App. 13a. Among other relevant facts, the district court found that the "Government of India itself characterizes Antrix as a 'corporate front'" of the Indian Department of Space and "'as a virtual corporation housed within'" that department "'for the

purposes of staffing, premises and all organizational support,'" with the result that the "Government of India exercises 'plenary control' over Antrix in a principal-agent relationship." Pet. App. 13a-14a.

Antrix insists (at 36) that the district court should not have applied the veil-piercing analysis established in *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba* ("*Bancec*"), 462 U.S. 611 (1983). But it provides no authority limiting that inquiry to substantive liability and excluding it from personal jurisdiction. As the D.C. Circuit has explained, "[w]henever a foreign sovereign controls an instrumentality to such a degree that a principal-agent relationship arises between them, the instrumentality receives the same due process protection as the sovereign: none." *GSS Group Ltd.* v. *National Port Authority*, 680 F.3d 805, 815 (D.C. Cir. 2012).

Antrix's attempt to read *Bancec* as requiring "injustice" in addition to extensive control (at 36-37) misreads this Court's *disjunctive* test. See *Bancec*, 462 U.S. at 629 (recognizing equitable basis to disregard corporate separateness as "addition" to "extensiv[e] contro[l]"); see also *TMR Energy Ltd.* v. *State Property Fund of Ukraine*, 411 F.3d 296, 301-02 (D.C. Cir. 2005) (applying *Bancec* and holding that Ukrainian instrumentality did not enjoy due-process rights because "the State of Ukraine had plenary control over" it); *Doe* v. *Holy See*, 557 F.3d 1066, 1077-78 (9th Cir. 2009) (per curiam) (*Bancec*'s presumption can be overcome "in two instances": extensive control *or* fraud or injustice); *Crystallex International Corp.* v. *Bolivarian Republic of Venezuela*, 932 F.3d 126, 143 (3d Cir. 2019) ("Control alone, if sufficiently extensive, is an

adequate basis to disregard an instrumentality's separate status.").

The Ninth Circuit did not disturb the district court's factual finding that Antrix is India's alter ego; the Ninth Circuit instead concluded that there was no personal jurisdiction in spite of the alter-ego finding because (under circuit precedent) minimum contacts are a prerequisite for personal jurisdiction even for foreign governments themselves. This Court ought not consider whether Antrix is entitled to a minimum-contacts showing based on a premise that the Ninth Circuit itself never considered.

3. Even if Antrix were a "person" entitled to the protections of the Fifth Amendment's Due Process Clause, Congress in the FSIA provided all the protections owed to the agency or instrumentality of a foreign state. Pet. Br. 34-42. Antrix does not meaningfully engage with Petitioners' authorities that Congress may and has in the FSIA established the forms of process that are due to foreign entities under the Fifth Amendment. And even Antrix's lead academic authority (see Antrix Br. 5, 38-40) filed an amicus brief *in this case* agreeing that the Constitution leaves Congress flexibility "to define the situations in which foreign states may be sued in federal courts." Brunk Amicus Br. 21.

Antrix has no response to early cases recognizing that "so long as Congress expressly authorized such expansive process, Fifth Amendment due process does not impose constitutional limits on federal courts' exercise of personal jurisdiction." *Douglass* v. *Nippon Yusen Kabushiki Kaisha*, 46 F.4th 226, 262 (5th Cir. 2022) (en banc) (Elrod, J., dissenting); see *Picquet* v.

Swan, 19 F. Cas. 609, 613, 615 (C.C.D. Mass. 1828) (recognizing that if Congress enacted legislation requiring that "a subject of England, or France, or Russia, * * * be summoned from the other end of the globe to obey our process," the court "would certainly be bound to follow it, and proceed upon the law"); *Toland* v. *Sprague*, 37 U.S. (12 Pet.) 300, 330 (1838) (agreeing with *Picquet* that a court would be bound to enforce the law if "congress acted under the idea that the process of the circuit courts could reach persons in a foreign jurisdiction"). Antrix does not engage with these cases or their arguments.

Nor does Antrix engage with the "emerging consensus" of scholars, Pet. App. 66a, that service of process according to the regime established by Congress is "sufficient to validate personal jurisdiction whether or not the *International Shoe Co.* v. *Washington* minimum contacts test [is] satisfied." Max Crema & Lawrence B. Solum, *The Original Meaning of "Due Process of Law" in the Fifth Amendment*, 108 Va. L. Rev. 447, 530-31 (2022). Even Antrix's lead academic authority has recognized that early "cases involving foreign states 'suggest that the Constitution itself does not dictate the rules governing personal jurisdiction'" and that this Court could accordingly "hold that the Fifth Amendment does not require that defendants have 'minimum contacts' with [the] United States and that defendants are instead only entitled to the personal jurisdiction protections that Congress affords." Brunk Amicus Br. 18 n.4.

Antrix instead turns to dicta from this Court's decision in *Omni Capital International, Ltd.* v. *Rudolf Wolff & Co.*, 484 U.S. 97 (1987), a case that did not turn on the existence of constitutionally sufficient con-

tacts. This Court did not hold there that the Fifth Amendment required minimum contacts but rather that a district court cannot exercise personal jurisdiction in the absence of "authorization for service of summons on the defendant." *Id.* at 104. And lower courts applying *Omni* have not interpreted it to hold that the Fifth Amendment requires a minimum-contacts showing. *Peay* v. *BellSouth Medical Assistance Plan*, 205 F.3d 1206, 1209-11 (10th Cir. 2000) (quoting *Omni* yet noting that "[t]he Supreme Court has not yet defined Fifth Amendment due process limits on personal jurisdiction"); *Douglass*, 46 F.4th at 240 (citing *Omni* and noting that "the Supreme Court has occasionally reserved deciding the question whether 'the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court' as does the Fourteenth Amendment on state courts"). *Omni* therefore has little to say on the question presented other than to reserve it.

Nor is there any sound reason to interpret the Due Process Clause of the Fifth Amendment reflexively to require minimum contacts simply because the Fourteenth Amendment does. See Antrix Br. 34-35. In contrast to the Fifth Amendment, which does not "serve the purposes of federalism," *Davis* v. *Passman*, 442 U.S. 228, 246 n.23 (1979), the Fourteenth Amendment's limitations on personal jurisdiction are "an instrument of interstate federalism" that "are a consequence of territorial limitations on the power of the respective States," *Bristol-Myers Squibb Co.* v. *Superior Court of California*, 582 U.S. 255, 263 (2017); see also U.S. Br. 31-34, *Fuld* v. *Palestine Liberation Organization*, No. 24-20 (U.S. Jan. 28, 2025).

Antrix observes (at 35-36) that the Fourteenth Amendment's limits on personal jurisdiction also protect individual liberty, a purpose shared by the Fifth Amendment. But this counsels in favor of *not* extending a minimum-contacts requirement to the Fifth Amendment, at least in cases where foreign states are defendants. As the D.C. Circuit observed, "[t]he personal jurisdiction requirement recognizes and protects an individual liberty interest," but it is "quite clear that the constitutional law of personal jurisdiction secures interests quite different from those at stake when a sovereign nation such as Libya seeks to defend itself against the prerogatives of a rival government." *Price*, 294 F.3d at 98.

4. Finally, Antrix contends (at 42-43) that according foreign states a judicially imposed minimum-contacts protection would not intrude on Congress's foreign affairs power. Antrix does not engage with this Court's precedents holding that the United States's external relations with foreign states are not governed by "the Constitution nor the laws passed in pursuance of it" but "by treaties, international understandings and compacts, and the principles of international law." *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 315, 318 (1936). While the FSIA's arbitration exception reflects the United States's obligations under international treaties it has ratified, the Fifth Amendment does not. And "[r]elations between nations in the international community are seldom governed by the domestic law of one state or the other." *Price*, 294 F.3d at 97.

Antrix responds that Congress must exercise its foreign-affairs power "in subordination to the applicable provisions of the Constitution." Antrix Br. 42

(quoting *Curtiss-Wright*, 299 U.S. at 320). That response begs the question. Of course, Congress must exercise its powers in accordance with the Constitution. The question is why the judiciary should read into the Constitution a right for foreign states to demand a minimum-contacts showing when that interpretation would seriously impair Congress's power to regulate foreign relations in accordance with international norms. On that question, Antrix has nothing to say.

Antrix also asserts that according due-process rights to foreign states would not constrain the federal government's ability to regulate our nation's interactions with hostile foreign states or state sponsors of terrorism because "due process is flexible" and "calls for such procedural protections as the particular situation demands." Antrix Br. 43 (quotation marks omitted). That is precisely why, as Justice Story long ago recognized, the Constitution gives *Congress* authority to determine when a foreign state can be haled before a federal court. Antrix does not explain why the "flexible" nature of due process is flexible enough to dispense with a minimum-contacts requirement in certain unspecified "other domains" but not flexible enough to dispense with a minimum-contacts requirement "when a plaintiff seeks a civil commercial judgment against a foreign sovereign." *Ibid.*

Antrix suggests that foreign states might not have due-process rights in cases of "wartime and terrorism." Antrix Br. 43. But the problems created by according foreign states due-process rights against the federal government are not limited to times of war. For example, if a foreign state commits a human-rights violation, the federal government's decision to

freeze that state's assets or impose economic sanctions could be challenged by the foreign state as denials of property without due process of law. *Price*, 294 F.3d at 99. And Antrix's suggested limit on the scope of its interpretation would be cold comfort to the plaintiffs whom Congress explicitly determined should be entitled to relief against foreign states in the FSIA yet are nevertheless shut out of court, like Petitioners here.

III. There Is No Basis To Affirm On The Alternative Grounds Offered by Antrix.

Antrix makes a last-ditch effort to persuade this Court to affirm on two alternative grounds, but neither would be a proper basis to affirm at this stage.

First, Antrix asserts (at 47-48) that the Ninth Circuit's decision should be affirmed because the courts of India have set aside the arbitral award against Antrix. As Petitioners previously explained, Antrix (tellingly) has not presented this issue to any court in the United States. Pet. Reply 10-11. Antrix never moved for an indicative ruling in the district court on whether the set-aside decision provides a basis for relief from the judgment, the Ninth Circuit never considered it, and the issue is not presently before this Court. If this Court reverses the decision of the Ninth Circuit and Devas's judgment is reinstated, Antrix would then be free to argue on remand that the set-aside decision provides a ground for relief from the judgment.

If Antrix were to do so, Petitioners would oppose, including on the ground that the Indian set-aside proceedings were "repugnant to fundamental notions of what is decent and just" and accordingly not entitled to respect in United States courts. *Corporación Mexi-*

cana de Mantenimiento Integral, S. de R.L. de C.V. v. *Pemex-Exploración y Producción*, 832 F.3d 92, 106 (2d Cir. 2016). Antrix asserts that Petitioners would not succeed, but the Court of Appeal of the Hague recently held that the "liquidation ruling of the Supreme Court of India cannot be recognized" in the Netherlands "because the requirements of due process and sufficient safeguards were not met" and that "the annulment ruling cannot be recognized in the Netherlands" because it "builds on the liquidation ruling" and "is thus also tainted with the fundamental defect that clings to the liquidation ruling." *Devas Multimedia America Inc.* v. *Antrix Corp. Ltd.*, ¶¶ 6.49-6.50, No. 200.332.942/01 (The Hague Court of Appeal Dec. 17, 2024), *available at* https://perma.cc/K5H8-GR7K. Regardless, there is no basis to affirm based on the Indian set-aside decision when that issue has never been properly raised below, there is no factual record on that issue, and it has not been fully briefed in this Court.

Second, Antrix urges this Court to affirm under the doctrine of *forum non conveniens*, reasoning that the courts of India provide a more appropriate forum for determining whether the arbitral award against Antrix can be recognized and enforced in the United States. This issue also provides no basis for affirmance, not only because it has not been fully briefed but also because it is nonsensical. The defense of "*forum non conveniens* is not available in proceedings to confirm a foreign arbitral award because only U.S. courts can attach foreign commercial assets found within the United States." *Tatneft* v. *Ukraine*, 21 F.4th 829, 840 (D.C. Cir. 2021).

Moreover, the district court's rejection of Antrix's *forum non conveniens* argument is reviewable only for abuse of discretion. See *Carijano* v. *Occidental Petroleum Corp.*, 643 F.3d 1216, 1224 (9th Cir. 2011). This Court should not leapfrog appellate review of a fact-bound, discretionary issue on which it did not grant review.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

ANNE CHAMPION
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166

MALAIKA EATON
MCNAUL EBEL NAWROT
& HELGREN PLLC
One Union Square
600 University Street
Suite 2700
Seattle, WA 98101

MATTHEW D. MCGILL
Counsel of Record
JACOB T. SPENCER
ANKITA RITWIK
DAVID W. CASAZZA
BRIAN C. MCCARTY
GIBSON, DUNN & CRUTCHER LLP
1700 M Street, N.W.
Washington, DC 20036
(202) 887-3680
mmcgill@gibsondunn.com

Counsel for Petitioners CC/Devas (Mauritius) Limited, et al.

February 18, 2025