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

BRIEF *AMICI CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE AMERICAN PETROLEUM INSTITUTE IN SUPPORT OF PETITIONERS

JENNIFER B. DICKEY
JONATHAN D. URICK
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
(202) 463-5337
Counsel for the Chamber of Commerce of the United States of America

PETER B. RUTLEDGE
Counsel of Record
HILLARY K. LUKACS
MORRIS MANNING & MARTIN, L.L.P.
1600 Atlanta Financial Center
3343 Peachtree Road, NE
Atlanta, GA 30326-1044
(404) 233-7000
brutledge@mmmlaw.com
Counsel for Amici Curiae

[Additional Counsel Listed On Inside Cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

RYAN P. MEYERS
JOHN P. WAGNER
AMERICAN PETROLEUM INSTITUTE
200 Massachusetts Avenue, NW
Washington, D.C. 20001
(202) 682-8000
MeyersR@api.org

Counsel for the American Petroleum Institute

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INTEREST OF THE *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts.

The American Petroleum Institute ("API") is a national trade association that represents all segments of America's natural gas and oil industry. API supports more than 11 million U.S. jobs and is backed by a growing grassroots movement of millions of Americans. API's nearly 600 members produce, process, and distribute most of the Nation's energy, and participate in API Energy Excellence, which is accelerating environmental and safety progress by fostering new technologies and transparent reporting.

Amici have participated in many cases addressing the constitutional limits on a court's exercise of personal jurisdiction and the impact of foreign policy and foreign state action on the Nation's business community. Such cases include, *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873 (2011), and *Animal Science Prods., Inc. v. Hebei Welcome Pharmaceutical Co., Ltd.*, 585 U.S. 33 (2018), in which the Chamber filed *amicus* briefs, as well as, *Jesner v. Arab Bank,*

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[1] No counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici*, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

PLC, 584 U.S. 241, 242, (2018), *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 109 (2013), and *Sosa v. Alvarez-Machain*, 542 U.S. 692, 699 (2004), in which the Chamber and API filed joint *amici* briefs.

Amici have a unique perspective and a strong interest in the issues presented by these cases. American businesses rely on predictable rules governing personal jurisdiction. Those rules provide American businesses essential guidance about where disputes can be heard, whether in matters where American businesses are seeking relief or are named as defendants. Those rules are especially important in cases involving foreign sovereigns where considerations of immunity and jurisdiction can affect the choice of forums in which American businesses are able to obtain effective remedies.

SUMMARY OF ARGUMENT

These cases present both statutory and constitutional questions. Petitioners' briefs explore the statutory questions. This brief trains on the lurking constitutional questions and explains why foreign states—and their alter ego corporations—are not "persons" entitled to the protections of the Due Process Clause of the Fifth Amendment. Three reasons support this conclusion.

First, as a textual matter, the Constitution uses both "persons" and "foreign states" in different provisions, and those uses would make little sense if "persons" were interpreted to include foreign states.

Second, as an historical matter, the record around ratification of the Fifth Amendment nowhere suggests that the Framers intended to extend the guarantees of the Due Process Clause to foreign states. To state the obvious, the persons ratifying the Constitution and its Bill of Rights were not focused on ensuring the rights

of foreign states. And the treatment of foreign states in United States Courts was already recognized as governed by the law of nations (insofar as federal common law incorporated it). Thus, in the U.S. scheme, the historical immunity enjoyed by foreign sovereigns ultimately was a matter of grace from the political branches entrusted with decisions about the Nation's foreign relations.

Finally, precedent discussing the purposes of the Due Process Clause confirms what the text and history suggest: constitutional limits on the exercise of personal jurisdiction were never understood or intended to protect foreign sovereign governments or their alter egos. Instead, immunity doctrines offer a primary means for ensuring respectful consideration of the foreign affairs implications of any exercise of personal jurisdiction over foreign sovereigns. These doctrines and others (like case-specific deference) appropriately afford the political branches, entrusted with the management of the Nation's foreign relations, the opportunity to opine on a particular case's implications for those relations.

In short, the D.C. Circuit was exactly right when it unanimously concluded in its authoritative review of the issue: "Neither the text of the Constitution, Supreme Court decisions construing the Due Process Clause, nor long standing tradition provide a basis for extending the reach of this constitutional provision for the benefit of foreign states." *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 99 (D.C. Cir. 2002). *See also* Pet. App. 62a ("As a matter of original meaning and modern precedent, the Fifth Amendment's Due Process Clause does not extend the benefit of minimum contacts to foreign states.") (Bumatay, J., dissenting) (objecting to denial of rehearing *en banc*)). For the reasons explained here and in Petitioners'

briefs, no minimum contacts analysis is necessary to exercise personal jurisdiction over an alter ego of a foreign state.

ARGUMENT

I. FOREIGN STATES AND THEIR ALTER EGO CORPORATIONS ARE NOT ENTITLED TO THE PROTECTIONS OF THE FIFTH AMENDMENT BECAUSE THEY ARE NOT "PERSONS."

Lurking in the background of the Ninth Circuit's interpretation of the Foreign Sovereign Immunities Act ("FSIA") is a constitutional question—whether the Due Process Clause requires a showing of minimum contacts to exercise personal jurisdiction over foreign states and/or their alter ego corporations. The answer to that question is no: Foreign states are not persons entitled to the protections of the Due Process Clause of the Fifth Amendment.[2] Considerations of text, history, and precedent all support this conclusion.

Text. This Court routinely has emphasized that, in matters of constitutional interpretation, text supplies the starting point. *See, e.g., Gamble v. United States*,

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[2] *Amici* agree with Petitioners that this Court takes the case on the premise that Respondent Antrix Corp. Ltd. is the *alter ego* of the foreign sovereign because the question was not addressed by the Ninth Circuit on appeal. Pet. App. 8a. Thus, these cases do not require this Court to decide whether the protections of the Due Process Clause extend to juridically separate "agencies or instrumentalities" falling within the FSIA, *see GSS Group Ltd. v. National Port Authority*, 680 F.3d 805 (D.C. Cir. 2012), or to evaluate the proper test for deciding whether, as a constitutional matter, a juridical entity is separate from the foreign sovereign, *see Frontera Resources Azerbaijan Corp. v. State Oil Co. of Azerbaijan*, 582 F.3d 393 (2d Cir. 2009); *TMR Energy v. State Property Fund of Ukraine*, 411 F.3d 296 (D.C. Cir. 2005).

587 U.S. 678, 683 (2019); *District of Columbia v. Heller*, 554 U.S. 570, 580 (2008); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265-66 (1990); *see also United States v. Rahimi*, 602 U.S. 680, 715 (2024) (Kavanaugh, J., concurring) ("The first and most important rule of constitutional interpretation is to heed the text – that is the actual words of the Constitution – and to interpret that text according to its ordinary meaning as originally understood.").

While the Constitution does not define the term "person," the use of the term throughout the document reveals that the Framers did not intend for it to encompass "foreign states." Rather, the Constitution specifically refers to "foreign states" when addressing their activities in the Nation's charter. The Constitution employs this precise term on two occasions: the Emoluments Clause (U.S. Const. art. I, § 9) and the constitutional grant of diversity jurisdiction (*id.* art. III, § 2). On two other occasions, the Constitution uses similar terms like "foreign nations" (*id.* art. I, § 8) and "foreign Power" (*id.* art. I, § 10). This repeated and deliberate use of the term "foreign state" and its cognates reveals that, had the Framers intended for the Fifth Amendment's protections to extend to this category of litigants, it would have utilized such terms within the definition of parties protected by the Fifth Amendment.

Article III confirms this commonsense conclusion. Article III differentiates between "Citizens," "States," and "foreign States." *Id.* art. III, § 2. The juxtaposition of the three terms lends credence to the idea that the Framers intended to distinguish between these "Citizens" and "foreign States" (or States of the Union). Had the Framers intended to extend the protections of the Due Process Clause to "foreign States," they would

have followed the structure employed by Article III and expressly referenced that category (along with "persons") among the parties entitled to the protections set forth therein. *Compare id.* amend. V, *with id.* art. III, § 2.

The Eleventh Amendment is similar. As this Court has explained, this Amendment aimed to overrule this Court's prior decision in *Chisholm v. Georgia*, 2 U.S. 419 (1793), upholding the exercise of diversity jurisdiction over a citizen-initiated lawsuit against a State of the Union. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 69 (1996); *Principality of Monaco v. State of Mississippi*, 292 U.S. 313, 329 (1934); *Hans v. Louisiana*, 134 U.S. 1, 12 (1890). With terminology paralleling Article III, the Eleventh Amendment again employed the term "Foreign State" while differentiating between the "foreign states" themselves and their "citizens" or "subjects" (who, by that Amendment's plain terms, could no longer commence a "controversy" against "one of the United States" pursuant to the constitutional authorization of diversity jurisdiction).[3] U.S. Const. amend. XI. In other words, the Eleventh Amendment followed the Framers' approach: when constitutional language was meant to govern "foreign states," the drafters employed that term and did not rely on more general terms (like "person" or "citizen") to encompass them. *See Rahimi*, 602 U.S. at 715 (Kavanaugh, J., concurring) ("As a general matter, the text of the Constitution says what it means and means what it says. And unless and until it is amended, that text controls."); *id.* at 737 (Barrett, J., concurring) ("Ratification is a democratic act that renders consti-

[3] Later, in *Principality of Monaco*, 292 U.S. 313, this Court concluded principles of state sovereign immunity precluded an action by a foreign state against a sovereign state without its consent.

tutional text part of our fundamental law, and that text remains law until lawfully altered." (citations and internal quotations omitted)).

This is also consistent with ordinary usage, under which "foreign states" would not typically be thought of as "persons." *Cf. Int'l Primate Protection Leage v. Administrators of Tulane Educational Fund*, 500 U.S. 72, 82-83 (1991); *South Carolina v. Katzenbach*, 383 U.S. 301, 323-24 (1966) ("The word 'person' in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union, and to our knowledge this has never been done by any court.").

Some scholarship contends otherwise. *See* Ingrid Wuerth, *The Due Process and Other Constitutional Rights of Foreign Nations*, 88 Fordham L. Rev. 633 (2019). Specifically, one scholar argues that foreign states were "often" described as persons at the Founding, citing as an example a passage from Vattel's leading international treatise stating that, "[t]he law of nations is the law of sovereigns: free and independent states are moral persons, whose rights and obligations we are to establish in this treatise." E. de Vattel, *The Law of Nations or the Principles of Natural Law: Applied to the Conduct and to the Affairs of Nations and of Sovereigns,* Bk. II, Ch.1, §12 (Charles G. Fenwick trans., Carnegie Institution of Washington 1916) (1758) (hereinafter "Vattel*, Law of Nations*").

The description of foreign states as "persons" in certain discussions of international law does not establish that they are "persons" under the Fifth Amendment. When Vattel spoke of the "rights and obligations" of foreign states (*qua* "moral persons"), he was speaking specifically of their rights and obligations *under the law of nations*. Foreign states

represent the agents at the plane of international law who can enter treaties (effectively "contracts between independent nations," *Santovincenzo v. Egan*, 284 U.S. 30, 40 (1931)), and it makes sense in those circumstances that they would be referred to as persons. The Fifth Amendment is not a discussion of international law, and the ordinary usage therefore should prevail, particularly where, as here, the Constitution otherwise includes explicit references to foreign states.

In sum, a close reading of the Constitution's text supports the proposition that the term "person" in the Fifth Amendment does not include "foreign states."

History. What textual analysis suggests, historical inquiry confirms. This Court has routinely consulted historical sources to illuminate the meaning of constitutional terms, including the Due Process Clause. *Mallory v. Norfolk Southern Ry. Co.*, 600 U.S. 122, 128-31 (2023) (plurality opinion); *Burnham v. Supererior Court of California*, 495 U.S. 604, 609 (1990) (plurality opinion); *id.* at 628 (White, J., concurring in part and concurring in the judgment); *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997) ("We begin, as we do in all due process cases, by examining our Nation's history, legal traditions, and practices."); *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 277 (1855) (defining due process by "look[ing] to those settled usages and modes of proceeding" in Anglo-American courts). Relevant sources include pre-ratification history, *see Heller*, 554 U.S. at 592, and, at least in some instances, history in the period immediately following ratification, *Rahimi*, 602 U.S. 723-29 (Kavanaugh, J., concurring); *id.* at 737 (Barrett, J., concurring). Here, because the relevant language concerns the Fifth Amendment's Due Process Clause,

the late eighteenth and early nineteenth century supplies the relevant reference point.[4]

At the time of the Founding, the Fifth Amendment, which applied only to the federal government, *see Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 251 (1833), was not the focus of constitutional constraints on the exercise of personal jurisdiction. Instead, constitutional constraints on the exercise of judicial jurisdiction over nonresident defendants traced their origins to jurisprudence interpreting the Full Faith and Credit Clause, U.S. Const. art. IV, § 1, and the accompanying federal legislation, Act of May 26, 1790, Ch. 11, 1 Stat. 122. *See* Robert H. Jackson, *Full Faith and Credit: The Lawyer's Clause of the Constitution*, 45 Colum. L. Rev. 1, 10 (1945).

Under this jurisprudence, principles of full faith and credit did not obligate one state to give effect to a sister state's judgment where the judgment-rendering court lacked jurisdiction. In such instances, a judicial proceeding without jurisdiction was *coram non judice*. *See Rose v. Himely*, 8 U.S. (4 Cranch) 241, 271, 276-77 (1808). Typically, *in personam* jurisdiction over a non-resident defendant would be lacking absent personal service in the forum state or the defendant's voluntary

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[4] While these cases arise out of litigation in federal court, the same analysis should inform litigation against foreign states in state court. The FSIA applies in state court, *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 496 (1983), and supplies a federal ingredient sufficient to give rise to federal question subject-matter jurisdiction, *id.* at 491-97. There is no suggestion that a different understanding prevailed at the time of ratification of the Fourteenth Amendment and, therefore, the term "person" in the Fourteenth Amendment's Due Process Clause should not be given a different construction than that suggested here for the Fifth Amendment.

appearance.[5] Joseph Story, *Commentary on the Conflicts of Laws* § 549, at 921-22 (4th ed. 1852) (hereinafter "Story, *Conflicts*"). Story described this as the known maxim "from an international point of view" of conflicts: "*Extra territorium jus dicenti impune non paretur* … no sovereignty can extend its process beyond its own territorial limits, to subject either persons or property to its judicial decisions." *Id.* § 539 at 905-06.

Story's formulation reflected the territoriality principle: a sovereign generally enjoyed unfettered authority to exercise judicial (and prescriptive) jurisdiction within its own territory but not beyond that territory. *See* Gary B. Born & Peter B. Rutledge, *International Civil Litigation in United States Courts* 91-93, 735-39 (7th ed. 2023) (*hereinafter* "Born & Rutledge").[6] These early decisions, which supplied the intellectual foundations for this Court's later due process jurisprudence, *see Pennoyer v. Neff*, 95 U.S. 714 (1878), exclusively concerned individual defendants, *see, e.g., Flower v. Parker*, 9 F. Cas. 323 (C.C.D. Mass. 1823), and, with the demise of the nonmigration theory in the late 1820s, nonresident corporations and other entities, *see Lafayette Ins. Co. v. French*, 59 U.S. (18 How.) 404 (1855); *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519 (1839). *See*

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[5] Different rules applied in cases of *in rem* or *quasi-in-rem* jurisdiction where the sovereign's interest in title over property located within its forum could justify the exercise of jurisdiction even when the absent defendant was not personally served and did not voluntarily appear. *See* Joseph J. Kalo, *Jurisdiction as an Evolutionary Process: The Development of* Quasi in Rem *and* in Personam *Principles*, 1978 Duke L.J. 1147, 1160-61.

[6] Prescriptive (or legislative) jurisdiction concerns the power of a state to make its law applicable to certain activities; by contrast judicial (or adjudicatory) jurisdiction concerns the power of a court to resolve a particular dispute. *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 812-13 (1993) (Scalia, J., dissenting).

generally Stephen E. Sachs, Pennoyer *Was Right*, 95 Tex. L. Rev. 1249, 1274 (2017) (collecting cases); Max Rheinstein, *The Constitutional Bases of Jurisdiction*, 22 U. Chi. L. Rev. 775, 792 & n. 74 (1955) (same). Nothing in the early history suggests a similar set of constitutional constraints around the exercise of judicial jurisdiction over foreign states.

This absence of constitutional protection did not, however, leave foreign states defenseless during the Founding Era. At the time of the Fifth Amendment's ratification, foreign states generally were absolutely immune from jurisdiction in another sovereign's courts. *See* Born & Rutledge at 248. Alexander Hamilton recognized this point in Federalist 81: "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual WITHOUT ITS CONSENT." The Federalist No. 81 at 487 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis in original). While making this point in the context of state sovereign immunity, Hamilton drew upon international legal principles to substantiate it. *See id.* ("This is the general sense, and the general practice of mankind."). Prevailing treatises reflected this dominant principle. Vattel, *Law of Nations* Bk. II, Ch. 3, § 35; Story, *Conflicts* § 585 at 977.

This Court's jurisprudence immediately following the Constitution's ratification did likewise. Especially instructive is Chief Justice Marshall's opinion for the Court in *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812). *Schooner Exchange* involved a libel against an armed ship belonging to the French Empire driven by distress into an American port. *Id.* at 118-19. American libellants laid claim to the vessel and petitioned the Court to restore their ownership through a proceeding in admiralty. *Id.* at 118-19.

Rejecting that claim, the Court explained that a public ship of a friendly foreign state was immune from attachment and, again invoking the territoriality principle, reasoned that "[t]he jurisdiction of the nation within its own territorial jurisdiction is necessarily exclusive and absolute. . . . This full and absolute territorial jurisdiction being alike the attribute of every sovereign. . . . would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects." *Id.* at 137. In other words, even though sovereigns enjoyed complete authority to assert judicial jurisdiction over persons (including individuals and corporations) found within their territory, that authority did not extend to "foreign sovereigns." *Id*.

This absolute immunity, grounded in the law of nations, could still be overridden by the political branches entrusted with management of the Nation's foreign affairs. *Schooner Exchange* did not consider the issue squarely because the Executive Branch had appeared and argued that immunity would be appropriate. *Id.* at 134. However, as this Court later repeatedly recognized, *Schooner Exchange* made equally clear that "foreign sovereign immunity is a matter of grace and comity on the part of the United States and not a restriction imposed by the Constitution." *Verlinden*, 461 U.S. at 486; *see also Republic of Austria v. Altmann*, 541 U.S. 677, 688 (2004) (explaining that, under *Schooner Exchange*, "foreign sovereigns have no right to immunity in our courts"). Under *Schooner Exchange*, the immunity extended only to "friendly" foreign states, implying an authority in the political branches to decide what foreign states qualified as "friendly" and, thus, entitled to the immunity. *See Pfizer, Inc. v. Gov't of India*, 434 U.S. 308, 319-20 (1978) ("It has long been established that only governments recognized by the United States and at peace with us are entitled to

access to our courts, and that it is within the exclusive power of the Executive Branch to determine which nations are entitled to sue."); *Baker v. Carr*, 369 U.S. 186, 212 (1962) (discussing deference to Executive Branch determinations regarding the recognition of foreign sovereigns).

Executive Branch recognition aside, Justice Story's influential decision in *The Santissima Trinidad*, 20 U.S. 283 (1822), rendered shortly after the ratification of the Constitution, reaffirmed the role played by the political branches in regulating the immunity of foreign states from jurisdiction. The case involved a libel action by the Consul of Spain alleging that certain cargo had been unlawfully removed from that ship by two armed vessels allegedly under the command of citizens of the United States and supported by a foreign power. In ruling on the ownership question, the Court considered whether public ships of war are immune from jurisdiction under the law of nations and, if so, their cargo is as well. Seizing the opportunity to explicate the Court's prior decision in *Schooner Exchange*, Justice Story explained that sovereign immunity "stands upon principles of public comity and convenience, and arises from the presumed consent or license of nations[.]" *Id.* at 353. For a court affirmatively to require the immunity over the express objection of its own government, Justice Story explained, "would be to give [the foreign state] sovereign power beyond the limits of his own empire." *Id.* at 352. Precisely because such consent flows "from the general usage of nations," *id.* at 353, it can be withdrawn by the political branches and is not insulated from that prerogative by constitutional rule. *See* Donald Earl Childress III, *Questioning the Constitutional Rights of Foreign Nations*, 88 Fordham L. Rev. Online 60, 68 (2019).

The Santissima Trinidad illustrates that principles derived from the law of nations, such as foreign state immunity, could be affirmatively overridden by action by the political branches. That would not be the case if the Constitution required a minimum contacts analysis for suits against foreign sovereigns.

In sum, history confirms what the text suggests: The term "person" in the Fifth Amendment was not understood to include "foreign states."

Precedent. This Court's precedent, glossing the policies underpinning the Due Process Clause, comports with the understanding that foreign states are not "persons" under the Fifth Amendment.

This Court made clear in *Katzenbach*, 383 U.S. at 323, that States of the Union are not "persons" under the Due Process Clause. Later, the Court in *Republic of Argentina v. Weltover, Inc.*, strongly suggested through dicta that the same conclusion necessarily follows for foreign states. 504 U.S. 607, 619 (1992). This case presents the Court with an opportunity to convert its dicta in *Weltover* to doctrine, foreclosing any argument that foreign states are "persons" under the Fifth or Fourteenth Amendments.

This Court's definition of "person" within the Due Process Clause (whether the Fifth Amendment or the Fourteenth Amendment) has consistently differentiated between individual and corporate defendants on the one hand and sovereign defendants on the other. While *Pennoyer* ushered in this Court's era of constitutional limits on the exercise of personal jurisdiction over nonresident defendants in a case involving an individual, several subsequent cases during the *Pennoyer* era applied its principles to juridical ones. *See Simon v. S. Ry. Co.*, 236 U.S. 115, 130 (1915)

(concluding court without personal jurisdiction over railway company); *Old Wayne Mut. Life Ass'n v. McDonough*, 204 U.S. 8, 21-23 (1907) (same as to out-of-state mutual life insurance company); *Baltimore & Ohio R.R. Co. v. Harris*, 79 U.S. (12 Wall.) 65, 69 (1870) (upholding jurisdiction over out-of-state corporation); *St. Clair v. Cox*, 106 U.S. 350, 359 (1882) ("The doctrine of [*Pennoyer*] applies, in all its force, to personal judgments of state courts against foreign corporations."); *Ex parte Schollenberger*, 96 U.S. 369, 378 (1877) (upholding jurisdiction over out-of-state insurance company).

Similarly, when *International Shoe* replaced the *Pennoyer* standard with the modern-day "minimum contacts" test, it applied that test to a nonresident corporation. *Int'l Shoe Co. v. State of Washington*, 326 U.S. 310, 316 (1945). That landmark test requires if the defendant "be not present within the territory of the forum, [that] he have certain minimum contacts with [the forum state]" such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Id.* (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). Accordingly, the very foundation of the minimum contacts theory of the Due Process Clause finds its origins in a case regarding a nonresident corporation.

Numerous subsequent decisions have tracked *International Shoe*'s implicit premise that corporations constitute "persons" within the meaning of the Due Process Clause, both domestic, *see, e.g., Ford Motor Co. v. Montana Eighth Judicial District Court*, 592 U.S. 351, 360 (2021); *Bristol-Myers Squibb Co. v. Superior Court of California*, 582 U.S. 255, 262 (2017); *BNSF Ry. Co. v. Tyrrell*, 581 U.S. 402, 414 (2017); *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476–78 (1985);

Keeton v. Hustler Mag., Inc., 465 U.S. 770, 775 (1984), and international, *see, e.g., Daimler AG v. Bauman,* 571 U.S. 117, 118 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 923 (2011); *Nicastro*, 564 U.S. at 887; *Asahi Metal Indus. Co. v. Superior Court of California*, 480 U.S. 102, 112 (1987); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 415 (1984); *World-Wide Volkswagen Corp. v. Woodson*, 444 U. S. 286, 293 (1980); *Perkins v. Benguet Consol. Min. Co*., 342 U.S. 437, 443 (1952).

Including corporate defendants within the meaning of "persons" protected by the Due Process Clause makes sense. The "core of the concept" of due process is "to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice." *County of Sacramento v. Lewis,* 523 U.S. 833, 845-46 (1998). The Due Process Clause therefore "recognizes and protects an individual liberty interest." *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee,* 456 U.S. 694, 702 (1982). And constitutional rights afforded to corporate entities represent an extension of the individual liberty interests held by the persons who comprise and control them. *See Railroad Tax Cases*, 13 F. 722, 744, 747–48 (C.C.D. Cal. 1882) (Field, J., riding circuit) ("[I]n all text writers, in all codes, and in all revised statutes, it is laid down that the term 'person' includes, or may include, corporations; which amounts to what we have already said, that whenever it is necessary for the protection of contract or property rights, the courts will look through the ideal entity and name of the corporation to the persons who compose it, and protect them, though the process be in its name."). As Chief Justice Marshall observed, "[t]he great object of an incorporation

is to bestow the character and properties of individuality on a collected and changing body of men." *Providence Bank v. Billings*, 29 U.S. 514, 524 (1830), *quoted in Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania*, 125 U.S. 181, 189 (1888) ("[C]orporations are merely associations of individuals united for a special purpose, and permitted to do business under a particular name, and have a succession of members without dissolution."). And "[c]orporations, 'separate and apart from' the human beings who own, run, and are employed by them, cannot do anything at all." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 707 (2014).

Individuals do not surrender their liberty interests by virtue of exercising their right to "*associate* [] *with other individual persons*." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 392 (2010) (Scalia, J., concurring) (emphasis in original) (observing First Amendment does not discriminate between "single individuals to partnership of individuals, to unincorporated associations of individuals, to incorporated associations of individuals"). Stated differently, "[t]he association of individuals in a business corporation . . . cannot be denied" their constitutional rights simply because the corporation is not "an individual American[.]" *Id.*; *Burwell v. Hobby Lobby*, 573 U.S. at 706–07 ("A corporation is simply a form of organization used by human beings to achieve desired ends . . . . When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people."). One scholar succinctly summarizes the point:

> [T]he argument that corporations should not have standing to assert *any* constitutional right is quite weak indeed. Remember, the

> opposite of a constitutional right is a government power. If corporations have no rights, then governmental power in connection with corporations is at its maximum. That power can be abused, and corporate personhood is a necessary bulwark.

Kent Greenfield, *In Defense of Corporate Persons*, 30 Const. Comment. 309, 316 (2015) (emphasis in original).

Sovereign defendants stand on a very different footing. They have no "owners"; they have citizens or subjects. *See* U.S. Const. art. III, § 2; *id.* amend. XI; *id.* amend. XIV. That is why the States and the United States assert their rights to represent their citizens under the doctrine of *parens patriae* rather than through associational standing. As Justice Holmes explained in *Georgia v. Tennessee Copper Co.*, in "a suit by a State for an injury to it in its capacity of *quasi*-sovereign . . . the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain." 206 U.S. 230, 237 (1907), *quoted in Massachusetts v. E.P.A.*, 549 U.S. 497, 518–19 (2007); *Alden v. Maine,* 527 U.S. 706, 715 (1999) (observing that in the federal system, the States "are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty"); *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez,* 458 U.S. 592, 607 (1982) ("One helpful indication in determining whether an alleged injury to the health and welfare of its citizens suffices to give the State standing to sue *parens patriae* is whether the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers."); *Commonwealth of Massachusetts v. Mellon*, 262 U.S. 447, 485 (1923) (delineating when States of the Union versus the

United States have standing to represent American citizens as *parens patriae*). *See also Town of Milton, Massachusetts v. Fed. Aviation Admin.*, 87 F.4th 91, 96 (1st Cir. 2023) (concluding municipality did not have "associational standing" because it did not have "members," but rather, must assert the alleged interests of its "citizens" under the doctrine of "*parens patriae*").

This Court therefore correctly concluded in *Katzenbach* that States of the Union do not qualify as "persons" entitled to the protections of the Due Process Clause. 383 U.S. at 323. "The word 'person' in the context of the Due Process Clause of the Fifth Amendment" the Court said, "cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union, and to our knowledge this has never been done by any court." *Id.*

Compared to States of the Union, the claims of foreign states to qualify as "persons" are even weaker. A foreign state "lies outside the structure of the Union" and is "entirely alien to our constitutional system." *Principality of Monaco,* 292 U.S. at 330*; Price*, 294 F.3d at 96. As some scholars surmise, foreign states interact with the United States "as juridical equals on the level of international law . . . with rights and duties on the international plane not deriving from the Constitution[.]" Lori Fisler Damrosch, *Foreign States and the Constitution*, 73 Va. L. Rev. 483, 521 (1987); *see also* Childress, Fordham L. Rev. Online at 68 (explaining that "immunity, personal jurisdiction, notice, or due process were not rights held by the foreign state," but rather, "granted, if at all, by the United States or its courts in applying the law of nations").

The States, by contrast "are integral and active participants in the Constitution's infrastructure, and they both derive important benefits and must abide by

significant limitations as a consequence of their participation." *Price*, 294 F.3d at 96. *Compare* U.S. Const. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican form of Government, and shall protect each of them against Invasion[.]"), *with id*. art. VI, cl. 2 ("This Constitution ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Law of the State to the Contrary notwithstanding."), *and id*. art. I, § 10 (listing specific acts prohibited to the States). If the States, "who help make up the very fabric" of our Union, "cannot avail themselves of the fundamental safeguards of the Due Process Clause, . . . foreign states, as sovereigns wholly outside the Union, should [not] be in a more favorable position." *Frontera Resources Azerbaijan Corp. v. State Oil Co. of the Azer. Republic*, 582 F.3d 393, 399 (2d Cir. 2009) (citing *Price*). Indeed, "[t]o the extent that the Constitution is a social contract establishing a system of self-government, permanent outsiders such as foreign sates seem to have little claim to invoke constitutional 'rights.'" Damrosch, 73 Va. L. Rev. at 487.

Perhaps alluding to these arguments, this Court in *Weltover*, "assum[ed], without deciding, that a foreign state is a 'person' for purposes of the Due Process Clause," 504 U.S. at 619, but then included a "cf." cite to its holding in *Katzenbach* that "States of the Union are not 'persons' under the Fifth Amendment[.]" *Id.*

Lower courts have since uniformly relied on the dicta from *Weltover* to conclude – or, at a minimum, assume without deciding – that foreign states are not "persons" protected by the Fifth Amendment's Due Process Clause. *See, e.g., Gater Assets Ltd. v. AO Moldovagaz*, 2 F.4th 42, 53 (2d Cir. 2021) (acknowledging "foreign

sovereigns and their alter egos" are not entitled to due process protection); *Frontera*, 582 F.3d at 399 (refusing to treat foreign states as persons under the Due Process Clause); *GSS Grp. Ltd v. Nat'l Port Auth.*, 680 F.3d 805, 809 (D.C. Cir. 2012) ("[F]oreign sovereigns and their extensively-controlled instrumentalities are not "persons" under the Fifth Amendment's Due Process Clause—and thus have no right to assert a personal jurisdiction defense."); *TMR Energy Ltd. v. State Prop. Fund of Ukr.*, 411 F.3d 296, 302 (D.C. Cir. 2005) (holding that foreign states are not persons for due process purposes); *Price*, 294 F.3d at 96 (rejecting the notion that a foreign state is a person under the Fifth Amendment); *S & Davis Int'l, Inc. v. The Republic of Yemen*, 218 F.3d 1292, 1303 (11th Cir. 2000) (concluding foreign state did not possess "liberty interest[s] for the purposes of substantive due process analysis"); *First Inv. Corp. of Marshall Islands v. Fujian Mawei Shipbuilding, Ltd.*, 703 F.3d 742, 752 (5th Cir. 2012) ("[W]e assume, without deciding, that a foreign sovereign cannot raise a personal jurisdiction defense as it is not a 'person' under the Due Process Clause."). *See generally* David P. Stewart, *A Commentary on Ingrid Wuerth's the Due Process and Other Constitutional Rights of Foreign Nations*, 88 Fordham L. Rev. Online 102, 103-04 (2019).

Conflicting lower court decisions predating *Weltover* applied due process almost reflexively in the face of scant precedent. Those cases either predated passage of the FSIA or based their holding on pre-FSIA precedent. *See Texas Trading & Mill. Corp. v. Fed. Republic of Nigeria*, 647 F.2d 300, 313 (2d Cir. 1981) (concluding foreign state is a "person" within meaning of due process clause based on pre-FSIA precedent resting on *quasi-in-rem* jurisdiction); *Petrol Shipping Corp. v. Kingdom of Greece*, 360 F.2d 103, 110 (2d Cir.

1966) (pre-FSIA case holding that service on sovereign agent was sufficient and suggesting in a single sentence of dicta that due process applied); *Purdy Co. v. Argentina*, 333 F.2d 95, 98 (7th Cir. 1964) (pre-FSIA case holding that service of process on Argentinian consul not sufficient to establish service over Argentina). As one of those courts observed, "pre-FSIA suits against foreign states were generally brought *quasi in rem*, and the due process clause was not uniformly applied to *quasi in rem* suits until 1977, a year after the FSIA was passed." *Texas Trading*, 647 F.2d at 313.

Moreover, when presented with the opportunity to readdress the issue after *Weltover*, most Circuits corrected course – and in some cases expressly overruled prior precedent – to conclude that foreign states are not "persons" entitled to due process protection under the Constitution. *See Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 694 (7th Cir. 2012) (ignoring pre-FSIA precedent and citing to cases decided after *Weltover* to conclude that foreign states were not "persons" entitled to Constitutional due process); *Frontera*, 582 F.3d at 400 ("Accordingly, to the extent that *Texas Trading* conflicts with our holding today that foreign states are not 'persons' entitled to rights under the Due Process Clause, it is overruled."); *Creighton Ltd. v. Gov't of State of Qatar*, 181 F.3d 118, 124–25 (D.C. Cir. 1999) (observing shift in D.C. Circuit precedent from pre-*Weltover* cases, holding FSIA did not affect the requirements of constitutional due process, to post-*Weltover* cases, holding "that the requirement of personal jurisdiction does not apply to a foreign state"). Against this growing "consensus among the circuit courts," the judges dissenting from rehearing *en banc* recognized that the Ninth Circuit now "stands alone" as the outlier. Pet. App. 68a (Bumatay, J., dissenting).

("[W]hen it comes to the law, experimentation isn't usually a virtue.").

To be sure, foreign states are not without recourse if they believe they have been unreasonably haled into a U.S. court. Rather, they have a "panoply of mechanisms in the international arena through which to seek vindication or redress." *See Price*, 294 F.3d at 98 (citing Damrosch, 73 Va. L.Rev. at 525). "These mechanisms, not the Constitution, set the terms by which sovereigns relate to one another." *Id.*; *see also Douglass v. Nippon Yusen Kabushiki Kaisha*, 46 F.4th 226, 268 (5th Cir. 2022) (Elrod, J., dissenting) ("While there is, of course, a considerable tradition rooted in natural law and the law of nations against expansive extraterritorial exercises of jurisdiction, it is not the role of the federal judiciary to constitutionalize such under the auspices of 'due process.'").

Some mechanisms are diplomatic ones, uniquely available to foreign states. *See Ex parte Republic of Peru*, 318 U.S. 578, 589 (1943) ("[O]ur national interest will be better served . . .[if] cases . . . involving our relations with a friendly foreign power, are righted through diplomatic negotiations rather than by the compulsions of judicial proceedings."); *Schooner Exchange*, 11 U.S. at 146 (noting that "the sovereign power of the nation is alone competent to avenge wrongs committed by a sovereign" and that any questions arising from those wrongs are "questions of policy than of law, that they are for diplomatic, rather than legal discussion"). *See generally*, Damrosch, 73 Va. L. Rev. at 521 (recognizing that "diplomacy outside the constitutional system . . . has shaped the Supreme Court's approach to various problems of domestic law").

Other generally applicable doctrines like the act-of-state doctrine, the foreign sovereign compulsion doctrine,

and the doctrine of *forum non conveniens*, may remain viable defenses existing outside the contours of the Constitution, thereby mitigating any concern that U.S. courts will be reduced to international courts of claims. *See Verlinden,* 461 U.S. at 490 n. 15 (noting the availability of *forum non conveniens* in cases under the FSIA); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964) (act-of-state doctrine); Restatement (Fourth) Foreign Relations Law of the United States § 442 (2018) (foreign sovereign compulsion doctrine); *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 581 U.S. 170, 187 (2017) (noting that "a court should decide the foreign sovereign's immunity defense at the threshold of the action . . . resolving any factual disputes as near to the outset of the case as is reasonably possible"); *see also Price* 294 F.3d at 99.

Finally, other case-specific doctrines like deference, comity, and the political question doctrine may afford foreign sovereigns additional arguments against assertions of jurisdiction which tread upon the foreign relations of the United States, often with the benefit of the views of the Nation's political branches entrusted with the maintenance of its foreign affairs. *See Sosa*, 542 U.S. at 733 n. 21 (discussing "case-specific deference" to the political branches in cases under the Alien Tort Statute); *Altmann*, 541 U.S. at 702 ("[S]hould the State Department choose to express its opinion on the implications of exercising jurisdiction over particular petitioners [including foreign states] in connection with their alleged conduct that opinion might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy." (footnote omitted)). *See generally* William S. Dodge, *International Comity in American Law*, 115 Colum. L. Rev. 271 (2015) (discussing various

applications of the comity doctrine); Born & Rutledge at 26-27 & n. 140 (discussing application of the political question doctrine in international civil cases).

In sum, precedent, glossing the purposes of the Due Process Clause, comports with the text and history, reaffirming the conclusion that foreign states do not qualify as "persons" within the meaning of the Fifth Amendment. To conclude otherwise "would distort the very notion of 'liberty' that underlies the Due Process Clause." *Price* 294 F.3d at 99. A remedy at the expense of liberty is necessarily "worse than the disease." *Citizens United*, 558 U.S. at 355.

CONCLUSION

For the foregoing reasons, in addition to those offered by Petitioners, the judgments in both cases should be reversed.

Respectfully submitted,

JENNIFER B. DICKEY
JONATHAN D. URICK
U.S. CHAMBER
LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Counsel for the Chamber of Commerce of the United States of America

RYAN P. MEYERS
JOHN P. WAGNER
AMERICAN PETROLEUM
INSTITUTE
200 Massachusetts Ave., NW
Washington, D.C. 20001
(202) 682-8000
MeyersR@api.org

Counsel for the American Petroleum Institute

PETER B. RUTLEDGE
Counsel of Record
HILLARY K. LUKACS
MORRIS MANNING &
MARTIN, L.L.P.
1600 Atlanta Financial Center
3343 Peachtree Road, NE
Atlanta, GA 30326-1044
(404) 233-7000
brutledge@mmmlaw.com

Counsel for Amici Curiae

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