No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DEVAS MULTIMEDIA PRIVATE LTD.,

Petitioner,

v.

ANTRIX CORP. LTD., ET AL.,

Respondents.[1]

APPLICATION FOR AN EXTENSION OF TIME IN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable Elena Kagan, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Ninth Circuit:

Petitioner Devas Multimedia Private Ltd. ("Devas") respectfully requests a 60-day extension of time, to and including July 5, 2024, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case, *Devas Multimedia Private, Ltd.* v.

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[1] CC/Devas (Mauritius) Ltd., Devas Multimedia America, Inc., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited each intervened below as a petitioner-appellee. These intervenors have not petitioned for a writ of certiorari as of this date.

Antrix Corp. Ltd, No. 20-36024.[2] The Ninth Circuit entered its judgment on August 1, 2023. Devas timely filed a petition for rehearing en banc, and the Ninth Circuit denied the petition February 6, 2024. Unless extended, the time for filing a petition for a writ of certiorari would expire on May 6, 2024. Under this Court's Rule 13.5, this application is being filed at least 10 days before that date.

This Court's jurisdiction would be invoked under 28 U.S.C. § 1254(1). A copy of the opinion of the Ninth Circuit is attached as Exhibit 1, and a copy of the order denying rehearing en banc is attached as Exhibit 2.

1. This case raises an important, circuit-splitting issue under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 *et seq*. ("FSIA"): Whether the exercise of personal jurisdiction over a foreign state under the FSIA requires satisfaction of the minimum-contacts test. The Ninth Circuit's answer to this question is at odds with the plain language of the FSIA. Its holding openly conflicts with the four other circuits to have addressed this question and creates unnecessary hurdles for plaintiffs seeking to assert their rights against foreign states and their agents.

2. Under the FSIA, "[p]ersonal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction * * * where service has been made under section 1608 of this title." 28 U.S.C.

[2] Pursuant to this Court's Rule 29.6, Devas states that it has no parent corporation, and no publicly held corporation owns more than 10% of the stock of Devas.

§ 1330(b). In this case, Devas, a telecommunications provider in India formed by U.S. businessmen, obtained an arbitral award for breach of contract against Antrix Corporation Ltd. ("Antrix"), a corporation wholly owned by the Republic of India and incorporated by the government to market goods and services created by its space program. Devas petitioned to confirm the arbitral award in the Western District of Washington, relying on the arbitral exception to immunity under the FSIA. *See* 28 U.S.C. § 1605(a)(6) (foreign state not immune in cases "in which the action is brought . . . to confirm an award made pursuant to . . . an agreement to arbitrate" that "is or may be governed by a treaty or other international agreement in force . . . calling for the recognition and enforcement of arbitral awards").

Although it was uncontested that Antrix was a "foreign state" under the FSIA, service was proper, and Devas's claim fell under the arbitral exception to immunity, Antrix still argued personal jurisdiction was improper under a minimum-contacts analysis. The district court disagreed, reasoning that the parties did not dispute that personal jurisdiction existed under the statutory text and that foreign states are not protected by a minimum-contacts requirement under the Due Process Clause. *See Devas Multimedia Priv. Ltd.* v. *Antrix Corp.*, No. C18-1360 TSZ, 2020 WL 6286813, at *3 (W.D. Wash. Oct. 27, 2020). It thus confirmed the award and entered judgment for roughly $1.3 billion. *Id.* at *7.

3. On appeal, the Ninth Circuit ruled that the district court was bound to apply a minimum-contacts analysis by its prior decision in *Thomas P. Gonzalez Corp.* v. *Consejo Nacional De Produccion De Costa Rica*, 614 F.2d 1247 (9th Cir. 1980). The court explained that the Ninth Circuit's minimum-contacts requirement is based on statutory interpretation of the FSIA (not the Due Process Clause). *Devas Multimedia Priv. Ltd.* v. *Antrix Corp.*, 2023 WL 4884882, at *1-2 (9th Cir. 2023). Because minimum contacts were lacking, the panel held that the lower court erred in exercising personal jurisdiction over Antrix. *Id.* at *2-3.

Judge Miller, joined by Judge Koh, concurred in the panel's disposition as a correct application of circuit precedent but doubted that the Ninth Circuit's minimum-contacts requirement had any basis in the Constitution or the FSIA. *Id.* at *3-4. To the extent its cases suggested the Due Process Clause mandated this rule, Judge Miller agreed with the D.C., Second, and Seventh Circuits that "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." *Id.* at *3 (cleaned up). He agreed with the panel's decision that the better reading of the court's caselaw dictates that the minimum-contacts requirement is a statutory rule derived from the FSIA. *Id.* at *4. "But the statutory theory of a minimum-contacts requirement is little better than the constitutional one" because "[n]othing in the text of the FSIA's long-arm provision describes a minimum-contacts requirement."

Ibid. Judge Miller observed that other circuits have held that the FSIA's long-arm provision requires nothing more than proper service and satisfaction of an enumerated exception to immunity. *Ibid.* Thus, in his view, "our precedent applying the minimum-contacts test to the exercise of personal jurisdiction over foreign states has no foundation in the Constitution or the FSIA, and it is contrary to the views of other courts of appeals." *Ibid.*

4. Devas petitioned for rehearing en banc, which the Ninth Circuit denied. *Devas Multimedia Priv. Ltd. v. Antrix Corp.*, 91 F.4th 1340 (9th Cir. 2024). Judge Bumatay, joined by Judges Callahan, Ikuta, Bennett, R. Nelson, and VanDyke, dissented. *Id.* at 1340. He emphasized that the FSIA's text does not require a minimum-contacts analysis, and that the Ninth Circuit is the only federal court to hold that the FSIA requires that plaintiffs prove minimum contacts before a court may assert personal jurisdiction over a foreign state. *Id.* at 1347-49. He also stressed that federal courts have uniformly recognized that foreign states are not entitled to the protection of the Fifth Amendment's Due Process Clause. *Id.* at 1349-52. "This case presented an opportunity to correct [the Ninth Circuit's] erroneous precedent and apply the FSIA the way Congress enacted it." *Id.* at 1343. As he noted, this decision "means that we lock the courthouse doors to plaintiffs whom Congress expressly granted access. So victims of terrorism, those harmed by violations of international law, and persons who suffered from torture may be barred from seeking justice in our courts." *Id.* at 1342. "Under a proper

reading of the FSIA, those plaintiffs should be welcome to bring their claims in [the Ninth Circuit]." *Id.* at 1344. Senior Circuit Judge O'Scannlain wrote a statement expressing his agreement with Judge Bumatay's dissent. *Id.* at 1340.

As numerous judges recognized below, the Ninth Circuit's "atextual reading [of the FSIA] creates a needless roadblock for plaintiffs seeking to assert their rights against foreign states and their agents." *Id.* at 1352. In other circuits, plaintiffs may hale a sovereign into court by achieving proper service and invoking a FSIA exception – including enforcing an arbitral award or challenging acts of terrorism, 28 U.S.C. §§ 1605(a)(6), 1605A – without the need to prove the sovereign had minimum contacts with the United States. This Court's intervention is necessary to resolve this circuit split.

5. Devas respectfully requests an extension of time within which to file its petition for a writ of certiorari. Counsel has been and will continue to be heavily engaged with the press of matters in other courts, including a reply brief filed on March 28, 2024, in *Su* v. *Fernandez*, Nos. 23-2758 and 23-3290, in the Seventh Circuit; a response brief filed on April 1, 2024, in *RSM Production Corp.* v. *Gaz du Cameroun, S.A.*, No. 23-20583, in the Fifth Circuit; an opening brief filed on April 1, 2024, in *Utah* v. *EPA*, No. 23-1157, in the D.C. Circuit; a reply brief in support of a motion for summary judgment filed on April 8, 2024, in *Groff* v. *DeJoy*, No 5:19-cv-01879-JLS, in the Eastern District of Pennsylvania; a motion for a stay pending appeal to be filed on April 25, 2024, in *Center for Biological Diversity* v. *Michael*

Regan, No 24-5101, in the D.C. Circuit; an amicus brief due on May 5, 2024, in *Alliance for Fair Board Recruitment* v. *SEC*, No. 21-60626, in the Fifth Circuit (en banc); an intervenor's brief due on May 10, 2024, in *Industrial Energy Consumers of America* v. *FERC*, No. 23-1334, in the D.C. Circuit; a response brief due on May 15, 2024, in *Port Arthur Community Action Network* v. *TCEQ*, No. 24-0116, in the Supreme Court of Texas; oral argument on May 14, 2024, in *Su* v. *Fernandez*, Nos. 23-2758 and 23-3290, in the Seventh Circuit; and oral argument on June 3, 2024, in *DM Arbor Court, Ltd.* v. *City of Houston, Tex.*, No. 23-20385, in the Fifth Circuit.

Thus, the requested 60-day extension is necessary to afford counsel time to prepare and file a petition that would be helpful to the Court.

Respectfully submitted.

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April 25, 2024

Exhibit 1

NOT FOR PUBLICATION

FILED

AUG 1 2023

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DEVAS MULTIMEDIA PRIVATE LIMITED, Petitioner-Appellee, CC/DEVAS (MAURITIUS) LIMITED; DEVAS MULTIMEDIA AMERICA, INC.; DEVAS EMPLOYEES MAURITIUS PRIVATE LIMITED; TELCOM DEVAS MAURITIUS LIMITED, Appellees-Intervenors, v. ANTRIX CORP. LTD., Respondent-Appellant,	No. 20-36024 D.C. No. 2:18-cv-01360-TSZ MEMORANDUM*
DEVAS MULTIMEDIA PRIVATE LTD., Petitioner-Appellant, v. CC/DEVAS (MAURITIUS) LTD; TELCOM DEVAS MAURITIUS LIMITED; DEVAS MULTIMEDIA AMERICA, INC.; DEVAS EMPLOYEES MAURITIUS PRIVATE	No. 22-35085 D.C. No. 2:18-cv-01360-TSZ

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

LIMITED,

Intervenor-Plaintiffs-Appellees,

v.

ANTRIX CORP. LTD.,

Respondent.

DEVAS MULTIMEDIA PRIVATE LIMITED,

Petitioner,

and

CC/DEVAS (MAURITIUS) LIMITED; DEVAS MULTIMEDIA AMERICA, INC.; DEVAS EMPLOYEES MAURITIUS PRIVATE LIMITED; TELCOM DEVAS MAURITIUS LIMITED,

Intervenor-Plaintiffs-Appellees,

v.

ANTRIX CORP. LTD.,

Respondent-Appellant,

No. 22-35103

D.C. No. 2:18-cv-01360-TSZ

Appeal from the United States District Court
for the Western District of Washington
Thomas S. Zilly, District Judge, Presiding

Argued and Submitted June 7, 2023

San Francisco, California

Before: MILLER and KOH, Circuit Judges, and MOLLOY,** District Judge.

These three companion appeals concern an agreement between two Indian corporations: Devas Multimedia Private Ltd. ("Devas") and Antrix Corp. Ltd. ("Antrix"). In the Confirmation Appeal (20-36024), Antrix challenges the district court's orders denying its motion to dismiss and confirming an International Chamber of Commerce ("ICC") arbitration award in favor of Devas. In the Registration Appeals (22-35085 and 22-35103), Antrix and Devas challenge the district court's order granting the motion of CC/Devas (Mauritius) Ltd., Telcom Devas Mauritius Ltd., Devas Employees Mauritius Private Ltd., and Devas Multimedia America, Inc. (collectively "Intervenors") to register the judgment in the Eastern District of Virginia. We hold that the district court erred in exercising personal jurisdiction over Antrix, and we reverse.

1. The district court erroneously concluded that a minimum contacts analysis was unnecessary to exercise personal jurisdiction over Antrix. Personal jurisdiction over a foreign state in a civil action is governed by the long-arm provision of the Foreign Sovereign Immunities Act ("FSIA"). *See Broidy Cap. Mgmt., LLC v. State of Qatar*, 982 F.3d 582, 589 (9th Cir. 2020). Under the FSIA,

** The Honorable Donald W. Molloy, United States District Judge for the District of Montana, sitting by designation.

a foreign state "shall be immune from the jurisdiction of the courts of the United States" unless an enumerated exception applies. 28 U.S.C. § 1604. The FSIA also provides that "[p]ersonal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title." 28 U.S.C. § 1330(b). The parties agree that for purposes of the FSIA, Antrix is a "foreign state," service has been made, and an enumerated exception applies.

In *Thomas P. Gonzalez Corp. v. Consejo Nacional De Produccion De Costa Rica* ("*Gonzalez*"), we rejected the plaintiff's argument that the FSIA's long-arm provision changed the minimum contacts analysis for foreign states. 614 F.2d 1247 (9th Cir. 1980). We held that "[t]he legislative history of the Act confirms that the reach of [§] 1330(b) does not extend beyond the limits set by the International Shoe line of cases. Personal jurisdiction under the [FSIA] requires satisfaction of the traditional minimum contacts standard." *Id.* at 1255 (footnote omitted). Since *Gonzalez*, we have continued to apply the rule that personal jurisdiction under the FSIA requires a traditional minimum contacts analysis. *See, e.g.*, *Theo. H. Davies & Co. v. Republic of Marshall Islands*, 174 F.3d 969, 974 (9th Cir. 1998) ("[The FSIA's] long-arm statute, however, is constrained by the minimum contacts required by *International Shoe* . . . and its progeny." (citation omitted)); *Gregorian v. Izvestia*, 871 F.2d 1515, 1529 (9th Cir. 1989) ("[I]f

defendants are not entitled to immunity under the FSIA, a court must consider whether the constitutional constraints of the Due Process clause preclude the assertion of personal jurisdiction over them." (emphasis omitted)); *Richmark Corp. v. Timber Falling Consultants, Inc.*, 937 F.2d 1444, 1446 (9th Cir. 1991) ("Personal jurisdiction under the FSIA is determined by resorting to the traditional minimum contacts tests.").

Devas and Intervenors argue that these precedents have been called into question by the Supreme Court's decision in *Republic of Argentina v. Weltover, Inc.*, in which the Court stated, "Assuming, without deciding, that a foreign state is a 'person' for purposes of the Due Process Clause, . . . we find that Argentina possessed 'minimum contacts' that would satisfy the constitutional test." 504 U.S. 607, 619 (1992) (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 323–24 (1966)). However, our prior precedents are binding unless "the relevant court of last resort [has] undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable." *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc). Our prior precedents are not "clearly irreconcilable" with *Weltover* for two reasons. First, *Weltover* left open the question of whether foreign states are persons—and thus entitled to a minimum contacts analysis under the Due Process Clause—and only suggested how the Supreme Court might rule on the issue. Second, the application of the

minimum contacts analysis to actions under the FSIA in *Gonzalez* is statutory rather than constitutional. Rather than relying on a foreign state's personhood, *Gonzalez* relies on a reading of the FSIA's legislative history to conclude that the FSIA was intended to be consistent with the minimum contacts analysis. 614 F.2d at 1255 n.5. It follows that if a foreign state is not a person and thus not entitled to a minimum contacts analysis through the Constitution, it is still entitled to a minimum contacts analysis through our reading of the FSIA.

Thus, the district court erred in ignoring our precedents requiring it to conduct a minimum contacts analysis.

2. The district court also erred in concluding that Antrix has the requisite minimum contacts with the United States. A defendant is subject to specific personal jurisdiction if "(1) the defendant performed an act or consummated a transaction by which it purposely directed its activity toward the forum state; (2) the claims arose out of defendant's forum-related activities; and (3) the exercise of personal jurisdiction is reasonable." *San Diego Cnty. Credit Union v. Citizens Equity First Credit Union*, 65 F.4th 1012, 1034–35 (9th Cir. 2023). "The plaintiff has the burden of proving the first two prongs. If he does so, the burden shifts to the defendant to set forth a compelling case that the exercise of jurisdiction would not be reasonable." *Picot v. Weston*, 780 F.3d 1206, 1211–12 (9th Cir. 2015) (citation and quotation marks omitted). "Where service is made under FSIA

section 1608, the relevant area in delineating contacts is the entire United States, not merely the forum state." *Richmark*, 937 F.2d at 1447 (cleaned up) (quoting *Meadows v. Dominican Republic*, 817 F.2d 517, 523 (9th Cir. 1987)).

Devas has failed to meet its burden under the first prong to show that Antrix purposefully availed itself of the privilege of conducting activities in the United States. Devas primarily relies on the Antrix and Indian Space Research Organization ("ISRO") Chairman's 2003 visit to Washington D.C. to meet with Forge Advisors and a series of 2009 meetings between ISRO officials and the Devas team. Assuming that ISRO's contacts with the United States may be attributed to Antrix, these meetings are still insufficient because they are not purposeful, but rather "random, isolated, or fortuitous." *LNS Enters. LLC v. Cont'l Motors, Inc.*, 22 F.4th 852, 859 (9th Cir. 2022) (quoting *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1025 (2021)). Indeed, ISRO officials came to the United States in 2009 for "unrelated meetings." The Agreement between Antrix and Devas 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. *See, e.g.*, *Picot*, 780 F.3d at 1213 (finding insufficient contacts with California because, although the defendant physically entered California, the trips held "no special place in his performance under the agreement as a whole," especially where the agreement was executed in Michigan

and contemplated obligations largely in Michigan); *Boschetto v. Hansing*, 539 F.3d 1011, 1017 (9th Cir. 2008) (holding that a contract for sale negotiated in California did not establish minimum contacts in the state because it did not create ongoing obligations in the state); *Holland Am. Line Inc. v. Wartsila N. Am., Inc.*, 485 F.3d 450, 462 (9th Cir. 2007) (finding no minimum contacts when a foreign company made a presentation on a cruise ship in Miami, Florida). Moreover, to the extent that the district court relied on Devas's connections to the United States to justify the exercise of personal jurisdiction over Antrix, this reliance is erroneous because it is the defendant's conduct that must drive the personal jurisdiction analysis, not the plaintiff's. *See Picot*, 780 F.3d at 1212–13 (citing *Walden v. Fiore*, 571 U.S. 277, 289 (2014)).

Thus, the district court erred in holding that Antrix had the requisite minimum contacts for personal jurisdiction.

* * *

Because we hold that the district court erred in exercising personal jurisdiction over Antrix, its judgment is reversed, and we need not address any of the other issues raised in the Confirmation Appeal. Because there is no judgment to register, the district court's order permitting Intervenors to register the judgment in the Eastern District of Virginia is also reversed, and we need not address any of the issues raised by the Registration Appeals.

REVERSED.[1]

[1] Antrix's motion for a limited remand, **20-36024 Dkt. 72**, is DENIED. CCDM Holdings, LLC; Telcom Devas, LLC; and Devas Employees Fund US, LLC's motions to intervene, **20-36024 Dkt. 94, 22-35085 Dkt. 44, 22-35103 Dkt. 48**, are DENIED.

MILLER, Circuit Judge, with whom KOH, Circuit Judge, joins, concurring:

I join the court's disposition because it correctly applies our precedent that "[p]ersonal jurisdiction under the [Foreign Sovereign Immunities Act] requires satisfaction of the traditional minimum contacts standard." *Thomas P. Gonzalez Corp. v. Consejo Nacional de Produccion de Costa Rica*, 614 F.2d 1247, 1255 (9th Cir. 1980). I write separately to make two observations about the origins of the minimum-contacts requirement and the ways in which it can be satisfied.

First, although our cases have clearly recognized a minimum-contacts requirement for subjecting foreign states to personal jurisdiction, they have been less clear about the source of that requirement. Some of our cases have suggested that the Due Process Clause requires a minimum-contacts analysis. *See*, *e.g.*, *Gregorian v. Izvestia*, 871 F.2d 1515, 1529 (9th Cir. 1989). I agree with the District of Columbia Circuit, however, that "[n]either 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); *accord Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 694 (7th Cir. 2012); *Frontera Res. Azerbaijan Corp. v. State Oil Co. of Azerbaijan Republic*, 582 F.3d 393, 399 (2d Cir. 2009). "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." *South Carolina v. Katzenbach*, 383 U.S. 301, 323 (1966). It would be even less reasonable to interpret "person" to encompass foreign states. Whereas the 50 States are part of the constitutional compact—they "derive important benefits and must abide by significant limitations as a consequence of their participation"—foreign states are "entirely alien to our constitutional system." *Price*, 294 F.3d at 96. Principles of comity, diplomacy, and international law, including "a panoply of mechanisms in the international arena," protect the interests that foreign states have in resisting the jurisdiction of United States courts. *Id.* at 97–98. The Due Process Clause does not.

As the court explains today, the better reading of our cases is that "the application of the minimum contacts analysis to actions under the FSIA . . . is statutory rather than constitutional." But the statutory theory of a minimum-contacts requirement is little better than the constitutional one. Nothing in the text of the FSIA's long-arm provision describes a minimum-contacts requirement. 28 U.S.C. § 1330(b). To the contrary, that provision says categorically that "[p]ersonal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title." *Id.* In so doing, it "clearly

expresses the decision of the Congress to confer upon the federal courts personal jurisdiction over a properly served foreign state—and hence its agent—coextensive with the exceptions to foreign sovereign immunity in the FSIA," and it imposes no additional limitations. *TMR Energy Ltd. v. State Prop. Fund of Ukraine*, 411 F.3d 296, 303 (D.C. Cir. 2005).

In sum, our precedent applying the minimum-contacts test to the exercise of personal jurisdiction over foreign states has no foundation in the Constitution or the FSIA, and it is contrary to the views of other courts of appeals. In an appropriate case, we should reconsider it en banc.

Second, in most cases involving the enforcement of an arbitral award under the New York Convention, the minimum-contacts requirement will have little practical significance because it can easily be satisfied by the presence of assets in the forum. In *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, we held that, "in suits to confirm a foreign arbitral award under the [New York] Convention," a court may exercise "jurisdiction over the defendant against whom enforcement is sought *or his property*." 284 F.3d 1114, 1122 (9th Cir. 2002) (emphasis added); *see* Restatement (Third) of Foreign Rels. L. § 487 cmt. c. (Am. L. Inst. 1987) ("[A]n action to enforce a foreign arbitral award requires jurisdiction over the award debtor or his property."). We explained that "[c]onsiderable authority" supports the exercise of jurisdiction to enforce an arbitral award against

a respondent's forum property "even if that property has no relationship to the underlying controversy between the parties." *Glencore Grain*, 284 F.3d at 1127. And in most cases in which a party is seeking to enforce an arbitral award against a foreign state in the United States, that state will have assets here. (Why else would anyone seek to enforce an award here?)

In response to questioning at oral argument, Intervenors sought to invoke that basis for personal jurisdiction, arguing that Antrix had assets in the United States against which Devas sought to enforce its award. But it is the plaintiff's burden to establish personal jurisdiction, *FDIC v. British-American Ins. Co.*, 828 F.2d 1439, 1441 (9th Cir. 1987), and no party raised this theory in the district court or in the briefing on appeal. Indeed, it appears that Devas did not identify any assets that Antrix had in the United States until after the confirmation of the award. *See Glencore Grain*, 284 F.3d at 1128. Because the argument has been forfeited, the court appropriately declines to consider it today. *See Ellis v. Salt River Project Agric. Improvement & Power Dist.*, 24 F.4th 1262, 1271 (9th Cir. 2022). And I agree with the court that Devas's other efforts to establish minimum contacts are unsuccessful.

Exhibit 2

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEVAS MULTIMEDIA PRIVATE LIMITED, *Petitioner-Appellee*, CC/DEVAS (MAURITIUS) LIMITED; DEVAS MULTIMEDIA AMERICA, INC.; DEVAS EMPLOYEES MAURITIUS PRIVATE LIMITED; TELCOM DEVAS MAURITIUS LIMITED, *Appellees-Intervenors*, v. ANTRIX CORP. LTD., *Respondent-Appellant*.	No. 20-36024 D.C. No. 2:18-cv-01360-TSZ ORDER
DEVAS MULTIMEDIA PRIVATE LIMITED, *Petitioner-Appellant*,	No. 22-35085 D.C. No. 2:18-cv-01360-TSZ

CC/DEVAS (MAURITIUS) LIMITED; TELCOM DEVAS MAURITIUS LIMITED; DEVAS MULTIMEDIA AMERICA, INC.; DEVAS EMPLOYEES MAURITIUS PRIVATE LIMITED,

Intervenor-Plaintiffs-Appellees,

v.

ANTRIX CORP. LTD.,

Respondent.

DEVAS MULTIMEDIA PRIVATE LIMITED,

Petitioner,

and

CC/DEVAS (MAURITIUS) LIMITED; DEVAS MULTIMEDIA AMERICA, INC.; DEVAS EMPLOYEES MAURITIUS PRIVATE LIMITED; TELCOM DEVAS MAURITIUS LIMITED,

No. 22-35103

D.C. No. 2:18-cv-01360-TSZ

Intervenor-Plaintiffs-Appellees,

v.

ANTRIX CORP. LTD.,

Respondent-Appellant.

Filed February 6, 2024

Before: Eric D. Miller and Lucy H. Koh, Circuit Judges, and Donald W. Molloy,* District Judge.

Order;
Statement by Judge O'Scannlain;
Dissent by Judge Bumatay

SUMMARY**

Personal Jurisdiction / Foreign Sovereign Immunities Act

The panel filed an order denying petitions for rehearing en banc and directing that no further petitions will be

* The Honorable Donald W. Molloy, United States District Judge for the District of Montana, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

entertained, in a case in which the panel held that the district court erred in exercising personal jurisdiction over Antrix Corp. Ltd., an Indian corporation, under the Foreign Sovereign Immunities Act, because plaintiff failed to establish that Antrix had the requisite minimum contacts for personal jurisdiction.

In a statement respecting the denial of rehearing en banc, Judge O'Scannlain wrote that he agreed with the views expressed by Judge Bumatay in his dissent from the denial of rehearing en banc.

Dissenting from the denial of rehearing en banc, Judge Bumatay, joined by Judges Callahan, Ikuta, Bennett, R. Nelson, and VanDyke, wrote that the Foreign Sovereign Immunities Act, governing when foreign states may be sued in federal court, does not require plaintiffs to also prove "minimum contacts" to assert personal jurisdiction over a foreign state, and this court's error in holding otherwise should be corrected through rehearing en banc.

ORDER

The panel has unanimously voted to deny the petitions for rehearing en banc. Judge Miller and Judge Koh have voted to deny the petitions for rehearing en banc, and Judge Molloy so recommends.

The full court has been advised of the petitions for rehearing en banc. A judge of the court requested a vote on en banc rehearing. The matter failed to receive a majority of votes of non-recused active judges in favor of en banc consideration. Fed. R. App. P. 35(f).

The petitions for rehearing en banc, (20-36024 Dkts. No. 111, 112; 22-35085 Dkt. No. 56; 22-35103 Dkt. No. 63), are DENIED. No further petitions for rehearing or rehearing en banc will be entertained. Judge O'Scannlain's statement respecting the denial of en banc rehearing and Judge Bumatay's dissent from the denial of en banc rehearing are filed concurrently herewith.

O'SCANNLAIN,[1] Circuit Judge, respecting the denial of rehearing en banc:

I agree with the views expressed by Judge Bumatay in his dissent from the denial of rehearing en banc.

BUMATAY, Circuit Judge, joined by CALLAHAN, IKUTA, BENNETT, R. NELSON, and VANDYKE, Circuit Judges, dissenting from the denial of rehearing en banc:

Federal courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821). We thus have a "virtually unflagging" obligation to "hear and decide cases within [our] jurisdiction." *Lexmark Int'l, Inc. v. Static Control*

[1] As a judge of this court in senior status, I no longer have the power to vote on calls for rehearing cases en banc or formally to join a dissent from failure to rehear en banc. *See* 28 U.S.C. § 46(c); Fed. R. App. P. 35(a). Following our court's general orders, however, I may participate in discussions of en banc proceedings. *See* Ninth Circuit General Order 5.5(a).

Components, Inc., 572 U.S. 118, 126 (2014) (simplified). When reading jurisdictional statutes, our task is to simply "apply traditional principles of statutory interpretation" and ask whether Congress authorized suit. *See id*. at 128. It should go without saying that we do not "ask whether in our judgment Congress *should* have authorized . . . suit." *Id.*

In 1976, Congress enacted the Foreign Sovereign Immunities Act ("FSIA") to govern when foreign states may be sued in federal court. 28 U.S.C. § 1602 *et seq*. As a default, the FSIA establishes that foreign states are immune from the jurisdiction of federal courts. *Id.* § 1604. But Congress set aside sovereign immunity for claims that fall within certain specified exceptions. *See id.* §§ 1605, 1605A, 1605B. Those exceptions range from pursuing state sponsors of terrorism to recovering damages for violations of commercial agreements. And Congress did not mince its words in providing jurisdiction for these claims. The FSIA states that "[p]ersonal jurisdiction over a foreign state *shall exist*" when enumerated claims are brought with proper service. *Id.* § 1330(b) (emphasis added). Such mandatory language leaves no room for courts to alter the immunity inquiry. Put simply, "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 Cap., Ltd*., 573 U.S. 134, 141–42 (2014).

This case presents a straightforward question. Despite the FSIA's text, does the Act require plaintiffs to *also* prove "minimum contacts" to assert personal jurisdiction over a foreign state? Unlike every other federal court, the Ninth Circuit answers "yes." And saying "yes" is a big deal—it means that we lock the courthouse doors to plaintiffs whom Congress expressly granted access. So victims of terrorism, those harmed by violations of international law, and persons

who suffered from torture may be barred from seeking justice in our courts. *See* 28 U.S.C. §§ 1605, 1605A, 1605B. Congress swung the doors open and we slammed them shut. Our failure to correct this error violates the separation of powers and anoints ourselves gatekeepers in a way not contemplated by Congress or the Constitution.

The problem started more than 40 years ago. Back then, our court appended minimum contacts to the list of requirements that plaintiffs must establish to assert jurisdiction over a foreign state. *See Thomas P. Gonzalez Corp. v. Consejo Nacional De Produccion De Costa Rica* ("*Gonzalez*"), 614 F.2d 1247, 1255 (9th Cir. 1980). There, we said, "[p]ersonal jurisdiction under the [FSIA] requires satisfaction of the traditional minimum contacts standard." *Id*. We thus replaced the words "shall exist" in § 1330(b) with "may exist" and substituted our own view that Congress must have really wanted foreign states to also have sufficient minimum contacts with the United States. Under our rule, then, personal jurisdiction exists only when our judicially created hurdle is satisfied.

And we made this interpretive move under the most dubious of guises—legislative history. While strongly disfavored today, back in 1980, it was more common to determine meaning not from statutory text, but from legislative accoutrements. And that's what we did. We looked at a single House Committee Report and surmised what we thought Congress really wanted. *See Gonzalez*, 614 F.2d at 1255 ("The legislative history of the Act confirms that the reach of § 1330(b) does not extend beyond the limits set by the *International Shoe* line of cases."). "The question, however, is not what Congress 'would have wanted' but what Congress enacted in the FSIA." *Republic of Argentina v. Weltover, Inc*., 504 U.S. 607, 618 (1992).

Today, it's obvious that we cannot appeal to legislative history to undo a statute's plain meaning. *See Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 523 (2018). So we know that *Gonzalez*'s interpretation is wrong. But even if that history mattered, the Report doesn't say what *Gonzalez* thought it said about minimum contacts. The Report merely observed that the Act's exceptions "embodied" a minimum-contacts analysis. *Gonzalez*, 614 F.2d at 1255 n.5 (quoting the Committee Report). It says nothing about adding *another* layer of minimum-contacts review before denying foreign-state immunity. To my knowledge, no other court interprets the FSIA this way.

And nothing in the Constitution requires a minimum-contacts analysis either. Federal courts have uniformly recognized that foreign states are not entitled to the protection of minimum contacts under the Fifth Amendment. *See Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 99 (D.C. Cir. 2002); *Frontera Res. Azerbaijan Corp. v. State Oil Co. of Azerbaijan Republic*, 582 F.3d 393, 399–400 (2d Cir. 2009); *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 694 (7th Cir. 2012). The Supreme Court has also suggested the same. *See Weltover*, 504 U.S. at 619. So the Due Process Clause fails to justify our wayward precedent.

Despite all this, our court not only perpetuates, but arguably expands, the minimum-contacts requirement here. *See Devas Multimedia Priv. Ltd. v. Antrix Corp.*, 2023 WL 4884882, at *1–2 (9th Cir. 2023). While *Gonzalez* merely dealt with the commercial activities exception, *see* 614 F.2d at 1255, our court seemingly rules that the minimum-contacts inquiry extends to *all* exceptions under the FSIA. *Devas*, 2023 WL 4884882, at *1–2. In this case, we applied it to a new context—the arbitral exception—for the first

time. *See* 28 U.S.C. § 1605(a)(6). We did so even while a majority of the panel recognized that "our precedent applying the minimum-contacts test to the exercise of personal jurisdiction over foreign states has no foundation in the Constitution or the FSIA, and it is contrary to the views of other courts of appeals." *Devas*, 2023 WL 4884882, at *4 (Miller, J., joined by Koh, J., concurring). So while the majority of the panel disagrees with our precedent, it expanded its troubling reach.

This case presented an opportunity to correct our erroneous precedent and apply the FSIA the way Congress enacted it. But our court refuses to step in and denies en banc review. And it's hard to explain why. Sure, it's true that the specific dispute between Devas Multimedia and Antrix Corporation raises some *other* complexities—like whether Antrix is sufficiently controlled by India to be considered a foreign state. But those other questions are secondary to whether foreign states are entitled to a minimum-contacts analysis in the first place. Those subsidiary questions are thus distractions that should have been left to the three-judge panel to resolve. At a minimum, we should have overruled *Gonzalez* and discarded our blanket bar to bringing claims against foreign states unless plaintiffs can prove minimum contacts.

After all, how many would-be plaintiffs gave up valid claims in the Ninth Circuit because of our out-of-sync rule? How many plaintiffs had to seek redress in other courts to sidestep our precedent? And how many plaintiffs were simply kicked out of our courts by the minimum-contacts requirement? The effect of our ruling is unquestionably significant. Under a proper reading of the FSIA, those plaintiffs should be welcome to bring their claims in our circuit.

Because we fail our "unflagging" duty to hear and decide cases within our jurisdiction, I respectfully dissent from the denial of rehearing en banc.

I.

A.

Let's begin with a brief overview of the FSIA. The FSIA "establishes a comprehensive framework for determining whether a court in this country, state or federal, may exercise jurisdiction over a foreign state." *Weltover*, 504 U.S. at 610. The Act "standardize[s] the judicial process with respect to immunity for foreign sovereign entities in civil cases." *Turkiye Halk Bankasi A.S. v. United States*, 598 U.S. 264, 272 (2023).

The FSIA starts from the "baseline" that foreign states and their instrumentalities are entitled to sovereign immunity in our courts. *Id*. (citing 28 U.S.C. § 1604). But Congress then specified certain exceptions when that immunity is withheld. The FSIA provides that:

> (a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as 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 or under any applicable international agreement.
>
> (b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over

> which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

28 U.S.C. § 1330.

So whenever an exception applies, Congress grants personal jurisdiction over a foreign state "as to every claim for relief" after proper service. *Id.* § 1330(b). Thus, the FSIA "bars federal and state courts from exercising jurisdiction when a foreign state *is* entitled to immunity, and [then] confers jurisdiction on district courts to hear suits brought by United States citizens and by aliens when a foreign state is *not* entitled to immunity." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). In other words, Congress closed the door on suits against foreign states, while leaving the keys for some types of claims.

The FSIA exceptions to immunity cover many subject matters.

- *Commercial Activities*— Cases "in which the action is based upon a commercial activity . . . that . . . causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2).
- *Expropriation*— Cases "in which rights in property taken in violation of international law are in issue and that property [has a connection to the United States]." 28 U.S.C. § 1605(a)(3).
- *Arbitration*— Cases "in which the action is brought . . . to confirm an award made pursuant to . . . an agreement to arbitrate" including when that award

"is or may be governed by a treaty or other international agreement in force . . . calling for the recognition and enforcement of arbitral awards." 28 U.S.C. § 1605(a)(6).

- *Terrorism*— Cases "in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources . . . [by] a state sponsor of terrorism." 28 U.S.C. § 1605A.

As part of Congress's "carefully calibrated scheme," it also established procedures governing suits under the FSIA. *Turkiye Halk Bankasi*, 598 U.S. at 273. Congress included many specifics, like a venue provision, 28 U.S.C. § 1391(f), service of process requirements, *id.* § 1608, and a bar on punitive damages, *id.* § 1606. And foreign states are "liable in the same manner and to the same extent as a private individual under like circumstances." *Id.*

Finally, the FSIA does not just cover direct suits against a foreign government. Instead, "[t]he FSIA defines a 'foreign state' to [also] encompass instrumentalities of a foreign state." *Turkiye Halk Bankasi*, 598 U.S. at 272 (citing 28 U.S.C. §§ 1603(a)–(b)). This definition "includ[es] entities that are directly and majority-owned by a foreign state." *Id*. Thus, personal jurisdiction may exist over a foreign sovereign and its state-owned companies.

B.

Now, a quick rundown of this case. Antrix is a company wholly owned by the Republic of India. India incorporated Antrix to market goods and services created by the country's

Department of Space and the Indian Space Research Organization. Devas was a private company created by a group of American investors and executives to develop telecommunications services in India. The two companies agreed to work together to build, launch, and manage telecommunication satellites. To carry out this agreement, they signed a contract which included an arbitration provision. Eventually, Antrix sought to terminate the agreement; Devas responded by initiating arbitration. A foreign arbitration tribunal found for Devas and awarded it $562.5 million in damages. Devas and Antrix then filed dueling petitions in the Indian courts—Devas's to confirm the award and Antrix's to set it aside.

While the Indian proceedings were pending, Devas sought to confirm the award elsewhere. It petitioned to confirm the arbitration award in the Western District of Washington, where Antrix has business relationships with several firms. Devas relied on the arbitral exception to the FSIA. *See* 28 U.S.C. § 1605(a)(6). Although it was uncontested that Antrix is a "foreign state" under the FSIA, service was proper, and Devas's claim falls under the arbitral exception, Antrix still argued personal jurisdiction was improper.

The district court rejected Antrix's jurisdictional challenge. It first held that personal jurisdiction was satisfied under the FSIA, because the "parties d[id] not dispute that personal jurisdiction exists as a matter of statute." The district court then concluded that foreign states are not entitled to minimum contacts under the Due Process Clause and, even if they were, Antrix had sufficient contacts. And the district court held that the Republic of India "exercises sufficient control" over Antrix such that it should be treated the same as the country for purposes of the due

process analysis. As a result, the district court ruled that personal jurisdiction was proper, confirmed the award, and entered judgment for $1.293 billion (after the inclusion of pre-award and post-award interest). Antrix then appealed from the district court's judgment.

After that notice of appeal, there were two developments. First, the Indian government placed Devas into liquidation on the grounds that it had fraudulently conducted its affairs. As a result, several shareholders of the company and its American subsidiary intervened. The district court then permitted the intervenors post-judgment discovery and granted them leave to register the judgment. Both Antrix and Devas (under the control of a liquidator) appealed the order granting them leave to register the judgment.

Second, during the appeal, an Indian court set aside the arbitration award. Antrix now claims that the award is no longer enforceable, which Devas and the intervenors dispute. Because these events occurred after the notice of appeal here, Antrix sought a limited remand to determine whether the district court should reverse its judgment on the merits.

On appeal, our court brushed past all these developments and complications and simply held that the district court lacked personal jurisdiction over Antrix. The panel ruled that the district court was bound to apply the minimum-contacts analysis from *Gonzalez* because (1) the Supreme Court has not contradicted our prior holding and (2) our court's minimum-contacts inquiry is based on a statutory interpretation of the FSIA. The panel then easily rejected the argument that minimum contacts were satisfied here. Because it concluded that the district court lacked personal

jurisdiction, the panel didn't address any other question on appeal.

Judge Miller wrote a concurrence, joined by Judge Koh. He explained that "our precedent applying the minimum-contacts test to the exercise of personal jurisdiction over foreign states has no foundation in the Constitution or the FSIA, and it is contrary to the views of other courts of appeals." *Devas*, 2023 WL 4884882, at *4 (Miller, J., concurring). He recommended that, "[i]n an appropriate case," we should reconsider our erroneous precedent en banc. *Id.*

So the *sole question* for the en banc court was whether plaintiffs must prove minimum contacts before federal courts may assert personal jurisdiction over foreign states under the FSIA. Of course, answering that question may lead to other questions.[1] But that's no reason to punt on this case. As we often do, we could have left those subsidiary questions to the three-judge panel or district court after correcting our precedent. We were wrong to shy away from this significant question.

I now turn to that question.

[1] For example, Antrix argues that its corporate status may independently mean it deserves due process protection. While that question adds another wrinkle to this case, it would not prevent the en banc court from answering whether a foreign state is entitled to a minimum-contacts inquiry under the FSIA or the Due Process Clause. We could have then remanded to the district court to see whether Antrix should be treated the same as India. *See Frontera,* 582 F.3d at 400–01 (remanding to the district court to determine whether a state-owned corporation was entitled to due process).

II.

While the Supreme Court has called the FSIA Congress's "comprehensive framework" for resolving claims of sovereign immunity, *Weltover*, 504 U.S. at 610, the Ninth Circuit thinks it is not quite comprehensive enough. Forty years ago, our court held that Congress's command that personal jurisdiction "shall exist" when an enumerated exception is met, 28 U.S.C. § 1330(b), was really just the starting point. We then rewrote the statute to add a minimum-contacts requirement. Only after satisfying our minimum-contacts inquiry does our court permit personal jurisdiction over a foreign state.

This is not the law enacted by Congress and signed by the President. We have no authority to make up our own rules, especially when dealing with international affairs. *See Rubin v. Islamic Republic of Iran*, 583 U.S. 202, 208 (2018) ("[C]ourts traditionally deferred to the decisions of the political branches . . . on whether to take jurisdiction over actions against foreign sovereigns." (simplified)). And nothing in the Due Process Clause mandates our statutory interpretation. Rather than extending our dubious precedent, we should have used this case to discard it.

A. The FSIA's Text Doesn't Require Minimum Contacts

Despite the clear command that personal jurisdiction over a foreign state "shall exist" when an enumerated exception applies, 28 U.S.C. § 1330(b), we adjoined a new requirement to the FSIA in *Gonzalez*. In that case, we said that "[p]ersonal jurisdiction under the Act requires satisfaction of the traditional minimum contacts standard." *Gonzalez*, 614 F.2d at 1255. We thus added a layer of review found nowhere in the text.

What supported this minimum-contacts regime? The tersest of reasoning.

Gonzalez first looked to the phrase "direct effect" in one exception—the commercial activities exception—and seemingly read an across-the-board minimum-contacts requirement from those two words. The commercial activities exception provides for jurisdiction "upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2). *Gonzalez* explained that the term "'direct effect' . . . ha[s] been interpreted as embodying the minimum contacts standard" of *International Shoe* and its progeny. 614 F.2d at 1255. As support, *Gonzalez* cited two opinions suggesting that § 1605(a)(2) incorporates the minimum-contacts requirement. *Id*. (citing *Carey v. Nat'l Oil Corp.*, 592 F.2d 673, 676 (2d Cir. 1979) and *East Eur. Domestic Int'l Sales Corp. v. Terra*, 467 F. Supp. 383, 388–90 (S.D.N.Y. 1979)). *But see Rote v. Zel Custom Mfg. LLC*, 816 F.3d 383, 394 (6th Cir. 2016) (holding that "the 'direct effect' requirement does not incorporate the 'minimum contacts' test").

Next, *Gonzalez* looked outside the text—to legislative history. It stated that "[t]he legislative history of the Act confirms that the reach of § 1330(b) does not extend beyond the limits set by the *International Shoe* line of cases." *Gonzalez*, 614 F.2d at 1255.

That's the entirety of *Gonzalez*'s textual analysis. Based on these flimsy data points, *Gonzalez* broadly proclaimed: "Personal jurisdiction under the Act requires satisfaction of the traditional minimum contacts standard." *Id*.

The errors here are obvious—

First, *Gonzalez* didn't ground its analysis in the text of § 1330(b). And it is hard to imagine a clearer statute. It states that "[p]ersonal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under [an FSIA exception and] where service has been made[.]" 28 U.S.C. § 1330(b). That presents a simple if-then statement. When subject-matter jurisdiction and service are proper under the FSIA, the district court "shall" have personal jurisdiction. The word "shall" connotes a "mandatory" requirement. *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 154 (2013). When "the statutory language is mandatory," Congress "does not [provide for] discretion." *See Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 661 (2007).

Every circuit that has analyzed the FSIA has refused to find a statutory minimum-contacts requirement under § 1330(b). *See TMR Energy Ltd. v. State Prop. Fund of Ukraine*, 411 F.3d 296, 303 (D.C. Cir. 2005); *Frontera*, 582 F.3d at 396; *Abelesz*, 692 F.3d at 694; *S & Davis Int'l, Inc. v. The Republic of Yemen*, 218 F.3d 1292, 1303 (11th Cir. 2000). The FSIA thus "clearly expresses the decision of the Congress to confer upon the federal courts personal jurisdiction over a properly served foreign state." *TMR Energy*, 411 F.3d at 303.

Second, *Gonzalez* simply mixes up subject-matter jurisdiction and personal jurisdiction. The commercial activities exception, along with the other FSIA exceptions, provides subject-matter jurisdiction to federal courts. *See Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 706 (9th Cir. 1992) ("A federal court lacks subject-matter jurisdiction over a claim against a foreign state unless the

claim falls within an exception to immunity under the FSIA."). But *subject-matter jurisdiction* is a separate question from *personal jurisdiction*, which is governed by § 1330(b). So holding that § 1605(a)(2) creates a universal minimum-contacts requirement for § 1330(b) conflates the two concepts and makes no textual sense.

Third, *Gonzalez* was wrong to alter the clear text of § 1330(b) based on legislative history. While there was once a time when courts would look to legislative history to discern a statute's meaning, that time has long since passed. *See Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 412 n.29 (1971) (only looking to the "statutes themselves" after concluding that the legislative history was "ambiguous"). Today, the rule is simple: "legislative history is not the law." *Epic Sys. Corp.*, 584 U.S. at 523. "[I]t is the statute, and not the Committee Report, which is the authoritative expression of the law." *City of Chicago v. Env't Def. Fund*, 511 U.S. 328, 337 (1994). So "to interpret the statute, we look first to the statute's language itself and the specific context in which that language is used." *Resisting Env't Destruction on Indigenous Lands, REDOIL v. EPA*, 716 F.3d 1155, 1161 (9th Cir. 2013) (simplified).

Even for those who find legislative history persuasive, it does not support *Gonzalez*'s minimum-contacts test for the FSIA. *Gonzalez*'s analysis of that legislative history consisted merely of a block quote of a House Committee Report:

> (b) Personal Jurisdiction. Section 1330(b) provides, in effect, a Federal long-arm statute over foreign states (including political subdivisions, agencies, and instrumentalities of foreign states). It is patterned after the

> long-arm statute Congress enacted for the District of Columbia. Public Law 91-358, sec. 132(a), title I, 84 Stat. 549. The requirements of minimum jurisdictional contacts and adequate notice are embodied in the provision. Cf. International Shoe Co. v. Washington, 326 U.S. 310 (, 66 S.Ct. 154, 90 L.Ed. 95) (1945), and McGee v. International Life Insurance Co., 355 U.S. 220, 223 (, 78 S.Ct. 199, 201, 2 L.Ed.2d 223) (1957). For personal jurisdiction to exist under section 1330(b), the claim must first of all be one over which the district courts have original jurisdiction under section 1330(a), meaning a claim for which the foreign state is not entitled to immunity. Significantly, each of the immunity provisions in the bill, sections 1605-1607, requires some connection between the lawsuit and the United States, or an express or implied waiver by the foreign state of its immunity from jurisdiction. These immunity provisions, therefore, prescribe the necessary contacts which must exist before our courts can exercise personal jurisdiction. Besides incorporating these jurisdictional contacts by reference, section 1330(b) also satisfies the due process requirement of adequate notice by prescribing that proper service be made under section 1608 of the bill. Thus, sections 1330(b), 1608, and 1605-

> 1607 are all carefully interconnected. (Footnotes omitted.)

Gonzalez, 614 F.2d at 1255 n.5 (quoting H.R. Rep. No. 94-1487, at 13–14 (1976)).

Although unclear, perhaps *Gonzalez* relied on the Report's statement that the "requirements of minimum jurisdictional contacts and adequate notice are embodied in" § 1330(b). *Id*. But that doesn't support appending an additional minimum-contacts inquiry to § 1330(b). The Report was just noting that the FSIA's *enumerated exceptions* by themselves satisfy the requirement of "some connection between the lawsuit and the United States, or an express or implied waiver by the foreign state of its immunity from jurisdiction." *Id*. So the Report determined that satisfying one of these exceptions meets "the necessary contacts which must exist before our courts can exercise personal jurisdiction." *Id*. It says nothing about a minimum-contacts analysis over and above satisfying a statutory exception. And if all that were not enough, the arbitral exception was added more than a decade after the Committee Report, making application of a minimum-contacts test here even more dubious. *See* Pub. L. No. 100-669, § 2, 102 Stat. 3969, 3969 (1988).

All told, this was the time to correct our circuit's misstep. All parties agree that an FSIA exception applied and service was proper. *Devas*, 2023 WL 4884882, at *1. With those two requirements satisfied, Congress's command should have been mandatory. Rather than adhering to the plain text of the statute, we instead expanded our precedent to cover all FSIA exceptions.

B. The Due Process Clause Doesn't Require Minimum Contacts

Perhaps realizing *Gonzalez*'s shaky textual foundation, some of our later precedents began couching our minimum-contacts inquiry as a constitutional requirement. *See Gregorian v. Izvestia*, 871 F.2d 1515, 1528–29 (9th Cir. 1989) (sourcing the requirement in the "constitutional constraints of the Due Process clause"); *Altmann v. Republic of Austria*, 317 F.3d 954, 969–70 (9th Cir. 2002) (after concluding that the FSIA is satisfied, conducting a minimum-contacts analysis "[a]ssuming that a foreign state is a 'person' for purposes of the Due Process Clause"). But the Due Process Clause does not rescue our improper addition of a minimum-contacts requirement. 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.

Start with modern jurisprudence. The Supreme Court has never said that the Due Process Clause applies to foreign states. In fact, it has suggested the opposite. Nearly 60 years ago, the Court held that "[t]he word 'person' in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union." *South Carolina v. Katzenbach*, 383 U.S. 301, 323 (1966). Later, while leaving whether "a foreign state is a 'person' for purposes of the Due Process Clause" open, the Supreme Court strongly hinted that foreign states should be treated the same as domestic States—meaning no due process protection. *Weltover*, 504 U.S. at 619 (citing *Katzenbach*'s holding that "States of the Union are not 'persons' for purposes of the Due Process Clause").

Since *Weltover*, the consensus of circuit courts has followed the Supreme Court's lead and definitively held that foreign states are not entitled to the protections of the Due Process Clause.

The D.C. Circuit gave the most thorough explanation. It said that conferring due process protections to foreign states was "not only textually and structurally unsound, but it would distort the very notion of 'liberty' that underlies the Due Process Clause." *Price*, 294 F.3d at 99. According to that court, common usage of the term "person" didn't "include the sovereign." *Id.* at 96 (quoting *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64 (1989)). Indeed, the court said, "foreign states stand on a fundamentally different footing than do private litigants who are compelled to defend themselves in American courts." *Id.* at 98. Unlike most "person[s]," "foreign nations are the juridical equals of the government that seeks to assert jurisdiction over them." *Id.*

And structurally, the D.C. Circuit described foreign states as "entirely alien to our constitutional system." *Id.* at 96. Even though domestic States "derive important benefits and must abide by significant limitations as a consequence of their participation," they receive no protection under the Due Process Clause. *Id.* Given this, the D.C. Circuit reasoned that foreign states must also be excluded. *Id.* at 97. It would be "strange," the court observed, if domestic States, which were "integral and active participants in the Constitution's infrastructure," were unprotected by the Due Process Clause while foreign states were. *Id.* at 96.

"[H]istory and tradition" also counseled in favor of excluding foreign states from the Due Process Clause, according to the D.C. Circuit. *Id.* at 97. As a historical

matter, the "principles of comity and international law . . . protect[ed] foreign governments." *Id.* Thus, "[t]he most a foreign state can demand is that other states observe *international* law, not that they enforce provisions of domestic law." *Id.* (quoting Lori Fisler Damrosch, *Foreign States and the Constitution*, 73 Va. L. Rev. 483, 520 (1987)). So "foreign states have available to them a panoply of mechanisms in the international arena through which to seek vindication or redress." *Id*. at 99 (citing Damrosch, *supra*, at 525).

Based on all this, the D.C. Circuit held that "[n]either 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." *Id*.

The Second Circuit and Seventh Circuit agree. *See Frontera*, 582 F.3d at 400 ("[F]oreign states are not 'persons' entitled to rights under the Due Process Clause."); *Abelesz*, 692 F.3d at 694 ("Other circuits have confronted the issue and have held that foreign states are not 'persons' entitled to rights under the Due Process Clause. . . . We agree."). After *Weltover*, no other circuit court has ruled otherwise.[2]

[2] Before *Weltover*, the Third Circuit and Fifth Circuit ruled that foreign states are entitled to due process. *See Velidor v. L/P/G Benghazi*, 653 F.2d 812, 819 n.12 (3d Cir. 1981) ("We must also inquire . . . whether the assertion of personal jurisdiction comports with the due process clause."); *Callejo v. Bancomer, S.A.,* 764 F.2d 1101, 1107 n.5 (5th Cir. 1985) ("As with all suits, however, the exercise of personal jurisdiction must comply with the due process clause."). Both circuit courts cited Second Circuit precedent which has since been overruled. *See Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 308 (2d Cir. 1981), *overruled by Frontera*, 582 F.3d at 399.

And the original meaning of the Due Process Clause supports the view that foreign states are not entitled to the protection of minimum contacts.

To be fair, recent scholarship has suggested foreign states were understood to be "persons" at the time of the Founding. For example, one author argues that Founding-era sources show "foreign states were viewed as 'persons' entitled to 'process.'" Ingrid Wuerth, *The Due Process and Other Constitutional Rights of Foreign Nations*, 88 Fordham L. Rev. 633, 637 (2019). As an example, Emmerich de Vattel, an influential 18th-century international law scholar, wrote, "[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." Emmerich de Vattel, The Law of Nations or the Principles of Natural Law, bk. I, ch. I § 12 (1758) (Charles G. Fenwick trans., 1916).

Another disagrees. According to this scholar, it is "unlikely that the framers of the Fifth Amendment would have viewed foreign states as persons given that foreign sovereigns were treated as completely immune from suit at the time of the founding." Donald Earl Childress III, *Questioning the Constitutional Rights of Foreign Nations*, 88 Fordham L. Rev. Online 60, 70 (2019).

But even assuming some process is due—an emerging consensus shows that the original understanding of the Fifth Amendment's Due Process Clause does not require minimum contacts for foreign states. Instead, these sources all agree that the political branches may dictate what process is afforded to foreign sovereigns. As Professor Wuerth concludes, "[t]hat foreign states are protected by due process does not tell us what the content of those protections

are[.] . . . [W]hen it comes to personal jurisdiction, due process limitations may be largely coextensive with the process that Congress chooses to provide." Wuerth, *supra*, at 679–86; *see* Stephen E. Sachs, *The Unlimited Jurisdiction of the Federal Courts*, 106 Va. L. Rev. 1703, 1743 (2020) ("The Fifth Amendment bars the execution of a federal judgment only if the federal court lacked jurisdiction. And Congress gets to answer th[e jurisdiction] question."); 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) ("Because the Due Process of Law Clause requires process, . . . service on a defendant" may be "sufficient to validate personal jurisdiction whether or not the *International Shoe Co. v. Washington* minimum contacts test was satisfied." (simplified)).

Indeed, the view that Congress could legislate the bounds of jurisdiction over foreign sovereigns finds support in a well-known case from Justice Joseph Story. Riding circuit in 1828, Justice Story considered whether a French plaintiff could successfully obtain a default judgment against a Massachusetts defendant who was living in Paris. *Picquet v. Swan*, 19 F. Cas. 609, 609–10 (C.C.D. Mass. 1828) (No. 11,134). The plaintiff argued that attaching the Massachusetts property was a sufficient method of serving process on the Paris-residing Massachusetts resident. *Id.* Justice Story rejected the argument, concluding Congress had not clearly chosen to authorize that kind of extraterritorial jurisdiction and thus "there ha[d] been no sufficient service of the process." *Id.* at 613, 619. Even so, he explained that it was well within the power of Congress to have, "a subject of England, or France, or Russia . . . summoned from the other end of the globe to obey our process, and submit to the judgment of our courts." *Id.*

at 613. Congress need only do so clearly. *Id.* at 615 ("If congress had prescribed such a rule, the court would certainly be bound to follow it, and proceed upon the law."). In sum, Justice Story opined that foreign-based defendants were owed no more than service authorized by Congress before being haled into our federal courts.

So modern jurisprudence, tugged by the gravitational pull of original meaning, points to excluding foreign states from the protection of minimum contacts. Like every other circuit court post-*Weltover*, we should have followed suit. This was yet another reason to take this case en banc.

III.

Forty years ago, our court disregarded the plain language of the FSIA to add minimum contacts to the requirements for personal jurisdiction over a foreign state. And we did so using questionable interpretive moves. Today, the consensus among circuit courts squarely rejects any constitutional basis for a minimum-contacts regime. So, yet again, the Ninth Circuit stands alone. And when it comes to the law, experimentation isn't usually a virtue.

Our atextual reading creates a needless roadblock for plaintiffs seeking to assert their rights against foreign states and their agents. And we are simply incompetent to interfere in these matters of foreign affairs. Imagine requiring a state sponsor of terrorism to have minimum contacts with our country before allowing our citizens to vindicate the death or injury of a loved one at the hands of a terrorist. *See* 28 U.S.C. § 1605A. But that is the regime that the Ninth Circuit erects.

With no constitutional provision requiring otherwise, we should have deferred to the political branches here. FSIA

plaintiffs deserve a full opportunity to litigate their cases as Congress determined. By freelancing in this area, we do the legislative process, separation of powers, and rule of law a disservice.

Faced with an opportunity to correct course, we again close the courthouse doors. And we refuse to act despite overwhelming evidence that our position is wrong. Our failure to fix our precedent is a serious mistake.

I respectfully dissent from the denial of rehearing en banc.