No. __-____

In the Supreme Court of the United States

UKRAINE,
C/O MR. PAVLO PETRENKO, MINISTER OF JUSTICE
PETITIONER,

v.

PAO TATNEFT, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

MARIA KOSTYTSKA
Counsel of Record
ANDREW C. NICHOLS
THOMAS M. BUCHANAN
PAUL N. HAROLD
Winston & Strawn LLP
1700 K Street N.W.
Washington, DC 20006
(202) 282-5000
mkostytska@winston.com

Counsel for Petitioner

QUESTIONS PRESENTED

The Foreign Sovereign Immunities Act states that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided" in the Act. 28 U.S.C. § 1604. The Act "provides the sole basis for obtaining [subject-matter] jurisdiction over a foreign state." *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 355 (1993). "[U]nless a specified exception applies," foreign states are immune. *Ibid.*

This case involves two exceptions: the *waiver exception* and the *arbitration exception*. Under the waiver exception, a state is not immune when it "has waived its immunity * * * by implication." § 1605(a)(1). Under the arbitration exception, a state is not immune in an action "to enforce an [arbitration] agreement made by the foreign state with or for the benefit of a private party * * * or to confirm an award made pursuant to such an agreement if * * * paragraph (1) of this subsection is otherwise applicable." § 1605(a)(6)(D). "[P]aragraph (1)" refers to the waiver exception. Thus, the arbitration exception specifies three predicates not present in the waiver exception: "an arbitration agreement," with a "private party," and (as relevant here) "an award made pursuant to such an agreement."

The questions presented are: Whether the D.C. Circuit correctly held that: (1) all 160 signatories to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (*i.e.*, the New York Convention) waived their sovereign immunity because they "must have contemplated arbitration-enforcement actions in other signatory countries"; and (2) a petitioner enforcing an arbitral award may invoke the waiver exception without making the more specific showings required by the arbitration exception.

PARTIES TO THE PROCEEDINGS

Petitioner is Ukraine, a sovereign state.

Respondent is PAO Tatneft, the state oil company of Tatarstan, a subdivision of the Russian Federation.

RELATED PROCEEDINGS

United States District Court (D.D.C.):

Pao Tatneft v. *Ukraine*, No. 1:17-cv-00582 (Mar. 19, 2018) (denying a motion to dismiss)

United States Court of Appeals (D.C. Cir.):

Pao Tatneft v. *Ukraine*, No. 18-07057 (May 28, 2019), petition for reh'g denied, Sept. 16, 2019

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INTRODUCTION

This petition seeks review of a decision of the D.C. Circuit asserting federal jurisdiction over the 160 foreign sovereigns that have signed the New York Convention, thus parting ways with other circuits and rewriting the Foreign Sovereign Immunities Act (FSIA). Until now, the circuits have refused to read treaties silent on immunity to waive immunity. And for good reason. This Court has long held that it cannot "see how a foreign state can waive its immunity * * * by signing an international agreement that contains no mention of a waiver of immunity or even the availability of a cause of action in the United States." *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 442–443 (1989). The New York Convention does not mention immunity or a cause of action against a sovereign in the United States. Thus, if the Convention waives sovereign immunity, *any* treaty can do so—as litigants below are now showing right and left. Thanks to the decision below, it is now open season on sovereigns in the District of Columbia, where venue for suits against foreign states always lies.

There is more. The D.C. Circuit's implied-waiver holding swallows an express exception Congress created for cases just like this, in which a petitioner seeks to enforce an arbitral award against a sovereign (here, Ukraine). In that situation, the FSIA requires a petitioner to establish predicate facts: (1) an arbitration agreement; (2) with a private party; and (3) an award made pursuant to that agreement. Under the FSIA, such factual prerequisites are not optional; they raise "jurisdictional questions" that must be resolved "as near to the outset of the case as is reasonably possible." *Bolivarian Republic of Venezuela* v. *Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1316 (2017).

Yet under the decision below, these statutory predicates vanish. A petitioner need not produce an agreement or an award, or show that the petitioner is a private party. The petitioner need only hold up a treaty signed by the respondent sovereign that purportedly "contemplates" enforcement in the United States.

Predictably, parties enforcing arbitral awards against sovereigns are now busy explaining that they no longer need to establish "the existence or validity of any arbitration agreement." *Eiser Infrastructure Ltd.* v. *Kingdom of Spain*, 1:18-cv-01686, ECF No. 45 at 3 (D.D.C. June 3, 2019). After all, the court below skipped "[t]hose considerations," which must be "thus irrelevant to jurisdiction." *Ibid.* "[A]s the D.C. Circuit recently ruled in *Tatneft*, Spain necessarily waived its immunity by signing [a particular treaty], irrespective of the validity of Spain's consent to arbitrate." *Masdar Solar & Wind Cooperatief U.A.* v. *Kingdom of Spain*, 1:18-cv-02254, ECF No. 23 at 14 (D.D.C. June 24, 2019). So much for the arbitration exception.

The FSIA's private-party requirement holds special urgency here, as the petitioner, Tatneft, is not a private party. As Tatneft admitted to the Securities & Exchange Commission, Tatneft is controlled by Tatarstan, a subdivision of the Russian Federation. Yet under decision below, no court need ever *reach* the question of whether the petitioner is a private party. Merely signing a treaty that "contemplates" enforcement in the United States waives immunity. Three circuits have rejected the mere "contemplation" standard. If that standard is to be the law—and if the arbitration exception's prerequisites are to be written out of the FSIA—the word should come from this Court.

Recognizing the gravity of its decision, the D.C. Circuit stayed its mandate pending this Court's resolution of this case. This petition should be granted.

OPINIONS BELOW

The D.C. Circuit's opinion (App. 1a–5a) is reported at 771 F. App'x. 9. The orders denying rehearing and rehearing en banc (App. 48a–51a) are unreported. The decision of the District Court for the District of Columbia (App. 6a–45a) is reported at 301 F. Supp. 3d 175.

JURISDICTION

The D.C. Circuit entered judgment on May 28, 2019, and denied a timely rehearing petition on September 16, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1605(a) of Title 28 provides:

A foreign state shall not be immune from the jurisdiction of courts of the United States in any case –

> (1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;
>
> * * *
>
> or
>
> (6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject

matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if

(A) the arbitration takes place or is intended to take place in the United States,

(B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards,

(C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or

(D) paragraph (1) of this subsection is otherwise applicable.

28 U.S.C. § 1605(a)(1), (6).

STATEMENT

A. The Foreign Sovereign Immunities Act

For most of this Nation's history, foreign sovereigns were completely immune from suit in the United States. See *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983). The courts "deferred to the decisions of the political branches," and the Executive "ordinarily requested immunity in all actions against friendly foreign sovereigns." *Ibid.* In 1952, however, the State Department announced—in a document that came to be called the Tate Letter—that the Department would decline to request immunity in "cases arising out of a foreign state's strictly commercial acts." *Id.* at 487. This new, individualized approach "proved

troublesome"; "[n]ot surprisingly, the governing standards were neither clear nor uniformly applied." *Ibid.* The Letter "threw immunity determinations into some disarray," "muddling matters." *Republic of Argentina* v. *NML Capital, Ltd.*, 573 U.S. 134, 141 (2014).

Finally, in 1976, Congress "abated the bedlam" by enacting the Foreign Sovereign Immunities Act, Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended at 28 U.S.C. §§ 1602 *et seq*.). *NML Capital, Ltd.*, 573 U.S. at 141. The FSIA "replac[ed] the old executive-driven, factor-intensive, loosely common-law-based immunity regime with [a] comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state." *Ibid.*

The FSIA preserves the general rule that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States." 28 U.S.C. § 1604. Section 1605 then lists carefully circumscribed exceptions to that jurisdictional immunity. Two exceptions are relevant here: the *waiver exception* and the *arbitration exception*.

Under the waiver exception, a foreign state is not immune when it "has waived its immunity either explicitly or by implication." § 1605(a)(1). A waiver of immunity must be narrowly construed "in favor of the sovereign" and may not be enlarged "beyond what the language requires." *Library of Cong*. v. *Shaw*, 478 U.S. 310, 318 (1986) (internal quotation marks omitted); *cf. C & L Enters., Inc*. v. *Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 418, 421 n.3, 423 (2001) ("to relinquish its immunity, a tribe's waiver must be clear" and "not ambiguous," and finding instructive "the law governing waivers of immunity by foreign sovereigns" (internal quotation marks omitted)).

Applying these standards, the circuits generally "have found an implicit waiver of sovereign immunity in only three situations," each taken from "[t]he legislative history of the FSIA." *Gutch* v. *Fed. Republic of Germany*, 255 F. App'x 524, 525 (D.C. Cir. 2007); *Frolova* v. *Union of Soviet Socialist Republics*, 761 F.2d 370, 377 (7th Cir. 1985). These are: (1) "fil[ing] a responsive pleading without raising the defense of sovereign immunity"; (2) "agree[ing] to arbitrate" in the United States; and (3) "adopt[ing] a particular choice of law." *World Wide Minerals, Ltd.* v. *Republic of kazakhstan*, 296 F.3d 1154, 1162 n.11 (D.C. Cir. 2002). "Since the FSIA became law, courts have been reluctant to stray beyond these examples when considering claims that a nation has implicitly waived its defense of sovereign immunity." *Frolova*, 761 F.2d at 377.

Under the arbitration exception, added in 1988, a foreign state is not immune in an action "to enforce an [arbitration] agreement made by the foreign state with or for the benefit of a private party * * *, or to confirm an award made pursuant to such an agreement to arbitrate, if * * * the agreement or award is or may be governed by a treaty * * * calling for the * * * enforcement of arbitral awards * * * or paragraph (1) of this subsection is otherwise applicable." § 1605(a)(6)(D). "[P]aragraph (1)" refers to the waiver exception. *Ibid.* To enforce an arbitral award, then, a petitioner must show the existence of an arbitration agreement, an award based on that agreement, and that the petitioner be a private party. *Ibid.*

Under the FSIA, such statutory predicates raise "jurisdictional questions," and where they "turn upon further factual development, the trial judge may take evidence and resolve relevant factual disputes." *Bolivarian Republic*, 137 S. Ct. at 1316. "But, consistent with foreign sovereign immunity's basic objective,

namely, to free a foreign sovereign from suit, the court should normally resolve those factual disputes and reach a decision about immunity as near to the outset of the case as is reasonably possible." *Id*. at 1317.

B. The New York Convention

The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, known as the New York Convention, is a multilateral treaty for recognizing and enforcing arbitral awards. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, *reprinted in* 9 U.S.C. § 201 (historical and statutory note). At present, 160 countries have signed the New York Convention. UNCITRAL, *Status*, CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS (New York, 1958) (available at: https://bit.ly/2pJSLU0). Ukraine signed the Convention in 1958, 12 years before the United States. *Ibid*.

The New York Convention does not mention immunity. Nor does it speak to recognizing or enforcing arbitral awards against state parties. The Convention was focused on harmonizing the substantive grounds for recognizing and enforcing awards against private parties. As one commentator explained, "[t]he New York Convention was not designed for enforcement of arbitral awards against state parties," and "the issue that was being addressed" was instead "the enforcement of awards made in transnational commercial disputes between private parties." MUTHUCUMARASWAMY SORNARAJAH, THE SETTLEMENT OF FOREIGN INVESTMENT DISPUTES 301, 308 (2000).

C. The parties and the underlying dispute

Petitioner Ukraine is a sovereign state that declared independence from the Soviet Union in August 1991. Respondent Tatneft is the Tatarstan state oil

company, which operates under pervasive state control. The Republic of Tatarstan is a political subdivision of the Russian Federation. JA428–29.

Tatneft was created by a Soviet Union resolution signed by Joseph Stalin in April 1950. JA407. After the Soviet Union collapsed, Tatarstan transformed Tatneft into a shareholding company. JA407. Tatarstan owns the "golden share" in Tatneft, which gives it significant influence over the company by appointing members of the board of directors, including the chairman of the board of directors, and exercising veto power over important decisions. JA909, 972, 974, 1006–07. The Chairman of the Board of Tatneft is the President of Tatarstan, and many other high-level government officials sit on the board, including the Minister of Finance, the Minister of Land and Property Relations, and the Adviser to President on Development of Crude Oil and Gas Fields. JA974, 1009–11. As Tatneft told the SEC in 2006, "Tatarstan continues to own * * * controlling or substantial minority stakes in or to exercise significant influence over operations of virtually all of the major enterprises in Tatarstan"—including Tatneft. JA910.

The underlying dispute arises out of a treaty between Ukraine and Tatarstan following the collapse of the Soviet Union to reestablish the supply of oil from Tatarstan to a refinery in Ukraine. JA440. To accomplish this goal, the treaty created an interstate entity called Ukrtatnafta. *Ibid.* In exchange for a stake in Ukrtatnafta, each state was required to make contributions. Ukraine was required to contribute the Kremenchug refinery—which it did. Tatneft and Tatarstan were required to contribute oil-related fixed assets—which they did not do. App. 8a–9a.

A later dispute over the legality of Tatneft's actions led to Ukrainian courts invalidating Tatneft's shares. Tatneft sought to arbitrate under an agreement called the Russia-Ukraine Bilateral Investment Treaty. An arbitral tribunal in Paris rejected all of Tatneft's claims but one, awarding Tatneft $112 million. JA249.

D. The district court's decision

Tatneft petitioned to confirm its award in the District Court for the District of Columbia, asserting jurisdiction over Ukraine under the arbitration exception. Ukraine moved to dismiss for lack of subject-matter jurisdiction based on foreign sovereign immunity, noting that Tatneft was substantially owned and controlled by Tatarstan and thus not a private party under § 1605(a)(6). In response, Tatneft belatedly invoked the waiver exception of § 1605(a)(1).

The court sided with Tatneft. App. 16a–30a. As to the FSIA's jurisdictional requirement that a party invoking the arbitration exception be a "private party," the district court attempted to defer to the arbitrators' statement that they had jurisdiction over Tatneft under the Russia-Ukraine Bilateral Investment Treaty (BIT) because Tatneft was a "private investor." App. 22a. By doing so, the court sub-delegated its own decision whether it had jurisdiction under the FSIA to the arbitrators tasked with deciding whether they had jurisdiction under the BIT. The court did not explain why a term in a treaty between Russia and Ukraine has any bearing on the meaning of the FSIA. As an alternative holding, the district court ruled that Ukraine impliedly waived its immunity by "agree[ing] to arbitrate in the territory of a state [France] that has signed the New York Convention, and it is also a sig-

natory to the Convention; thus, it should have anticipated enforcement actions in signatory states." App. 30a.

E. The D.C. Circuit's decision

The D.C. Circuit affirmed solely "based on the waiver exception." App. 2a. The court disagreed that applying the waiver exception in this arbitration case "would swallow up the more specific arbitration exception," which "applies only to actions to enforce certain arbitration agreements, and only under certain conditions." App. 3a. According to the D.C. Circuit, "while the exceptions partially overlap, each contains its own unique elements," and "[b]ecause the overlap is incomplete, no structural considerations justify narrowing the waiver exception." *Ibid.*

As to whether Ukraine waived its immunity, the court held that "[b]ecause *Creighton* [v. *Gov't of Qatar*, 181 F.3d 118 (D.C. Cir. 1999)] controls, the waiver exception applies here." *Ibid.* According to the court, *Creighton* "concluded that a sovereign, by signing the New York Convention, waives its immunity from arbitration-enforcement actions in other signatory states." *Ibid.* The court did not mention that in *Creighton*, the sovereign had not signed the New York Convention: "*Qatar not having signed the Convention*, we do not think that its agreement to arbitrate in a signatory country, without more, demonstrates the requisite intent to waive its sovereign immunity in the United States." 181 F.3d at 123 (emphasis added). While effectively creating new law in the D.C. Circuit, the court declined to publish the decision.

Two third parties asked the court to publish its decision, so that litigants could "expedit[e] the enforcement of arbitral awards against foreign states." See

Motion of Eiser Infrastructure Limited and Energia Solar Luxembourg S.A.R.L. to Publish Unpublished Opinion at 1, Case No. 18-7057, Doc. No. 1795084 (June 28, 2019). The court denied the motion.

Ukraine petitioned for rehearing and rehearing en banc, and the D.C. Circuit called for a response. The court ultimately denied rehearing, but over Tatneft's objection stayed issuance of the mandate pending this Court's resolution of the case. App. 48a–51a, App. 52a.

REASONS FOR GRANTING THE PETITION

The D.C. Circuit's decision conflicts with the decisions of other circuits and this Court, and raises two exceptionally important questions under the FSIA. As to the FSIA's *waiver exception*, this Court has long been unable to "see how a foreign state can waive its immunity * * * by signing an international agreement that contains no mention of a waiver of immunity or even the availability of a cause of action in the United States." *Amerada Hess*, 488 U.S. at 442–43. Multiple circuits have followed that instruction, requiring unambiguous evidence of a knowing and intelligent waiver, usually by appearing in court without contesting jurisdiction. Yet the court below required only that the foreign sovereign somehow "contemplate[]" being sued, without saying so, by signing a treaty that does not mention immunity or a suit against a sovereign. Remarkably, the D.C. Circuit then lowered the bar still further by reading the *arbitration exception* out of the statute and eliminating the jurisdictional facts a petitioner must show to enforce an arbitral award.

These questions could hardly be more important. Virtually all sovereign states have signed the New York Convention and are now subject to U.S. jurisdiction. This case thus presents questions of both national and international importance. This case is an

excellent vehicle to consider both questions, which are pure questions of law. And although the decision below is unpublished, "[n]onpublication must not be a convenient means to prevent review." *Smith* v. *United States*, 502 U.S. 1017, 1020 (1991) (Blackmun, J., dissenting from the denial of certiorari). Indeed, that "the decision below is unpublished" is "disturbing * * * and yet another reason to grant review." *Plumley* v. *Austin*, 574 U.S. 1127, 1131–32 (2015) (Thomas, J., dissenting from denial of certiorari). Already, litigants are relying on the decision to assert jurisdiction over foreign sovereigns. *Infra* at 15–16 (collecting cases). And practically speaking, the decision below will almost certainly be the last word on the subject, as petitioners have no reason to seek review anywhere but the District of Columbia, where venue is always proper. 28 U.S.C. § 1391(f)(4).

There is also no question that the decision below is wrong. The D.C. Circuit's reading of the FSIA's waiver exception ignores the statutory language, the legislative history, and *Amerada Hess*. Likewise, the court's reading of the arbitration exception flouts settled canons of construction—chiefly, that no provision in a statute should be read to be meaningless.

Certiorari is warranted.

I. The decision below breaks with the decisions of other circuits on how a foreign sovereign may impliedly waive its immunity.

A. The D.C. Circuit's "contemplation" rule cannot be reconciled with decisions of the Second, Seventh, and Ninth Circuits.

By interpreting the FSIA to erect a mere "contemplation" standard for implied waiver—a pure question of law—the court below split with three other circuits.

In each case, if the circuit's reasoning had been applied by the D.C. Circuit, it would have found no waiver.

For example, the Seventh Circuit has held that a sovereign cannot waive immunity by signing a treaty—in that case between Poland and the United States—that "contains no mention of any waiver of sovereign immunity." *Haven* v. *Polska*, 215 F.3d 727, 733 (7th Cir. 2000). This reasoning tracks the FSIA's legislative history, in which "waiver by treaty [was] not included in the list of examples of implicit waivers." *Frolova*, 761 F.2d at 377–78; *infra* at 22. Instead, only treaties with "explicit waivers of sovereign immunity" would suffice because "[c]ourts have generally required convincing evidence that a treaty was intended to waive sovereign immunity before holding that a foreign state may be sued." *Ibid.* If the D.C. Circuit had adopted this reasoning, it could never have found an implied waiver in the New York Convention, which never mentions immunity or anything about enforcing arbitral awards against sovereigns.

Similarly, the Ninth Circuit found no waiver in a treaty—the U.N. Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment—that "does not mandate that * * * redress [of torture claims against foreign sovereigns] occur in the United States courts." *Hilao* v. *Estate of Marcos (In re Estate of Marcos Human Rights Litig.)*, 94 F.3d 539, 548 (9th Cir. 1996). Here, too, the D.C. Circuit could not have found a waiver in the New York Convention had it followed this reasoning. After all, the Convention does not "mandate" enforcement against foreign sovereigns in the United States.

Likewise, the Second Circuit has observed that the examples of implied waiver in the FSIA's legislative history are "drawn entirely from the context of conduct related to the litigation process." *Smith* v. *Socialist*

People's Libyan Arab Jamahiriya, 101 F.3d 239, 244 (2d Cir. 1996). And thus the court has held that implied waiver is limited "to the litigation context" and cannot be inferred by an unrelated agreement. *Id.* at 246. This reasoning, too, would have changed the result in the present case.

A split between one circuit and three others is more than enough to merit certiorari. But the conflict here is particularly intolerable because the D.C. Circuit is the primary forum for suits against sovereigns. The very purpose of the FSIA is to ensure "'a uniform body of law in this area'" "'in view of the potential sensitivity of actions against foreign states.'" *Verlinden*, 461 U.S. at 489 (brackets removed) (quoting H.R. Rep. No. 94-1487, at 32). Indeed, "'uniformity in decision'" is essential because "'disparate treatment of cases involving foreign governments may have adverse foreign relations consequences.'" *Goar* v. *Compania Peruana de Vapores*, 688 F.2d 417, 422 (5th Cir. 1982) (quoting H.R. Rep. 94-1487, at 13). Review is urgently needed to restore this uniformity.

B. This Court often reviews FSIA cases, even absent a square circuit split, which is unlikely to develop further here.

Nor does it make sense to wait for a deeper or sharper split to emerge—for at least two reasons.

First, as noted, petitioners will migrate to the District of Columbia, where venue is always proper (28 U.S.C. § 1391(f)(4)) and the law is now attractive. Indeed, the decision has already attracted attention from aggressive litigants seeking to hale foreign sovereigns into U.S. courts without proving these jurisdictional facts. Two third parties asked the court to publish its decision, so petitioners can "expedit[e] the enforcement of arbitral awards against foreign states." See

Motion of Eiser Infrastructure Limited and Energia Solar Luxembourg S.A.R.L. to Publish Unpublished Opinion at 1, Doc. No. 1795084 (June 28, 2019). Many others are relying on the decision to assert jurisdiction over foreign sovereigns. *E.g.*, *Tethyan Copper Co. Pty Ltd.* v. *Islamic Republic of Pakistan*, 1:19-cv-02424, ECF No. 1 at 2 (D.D.C. Aug. 9, 2019); *Masdar Solar & Wind Cooperatief U.A.* v. *Kingdom of Spain*, 1:18-cv-02254, ECF No. 23 at 14 (D.D.C. June 24, 2019); *Eiser Infrastructure Ltd.* v. *Kingdom of Spain*, 1:18-cv-01686, ECF No. 45 at 3 (D.D.C. June 3, 2019).

Second, the matter cannot wait. "Actions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States." *Verlinden*, 461 U.S. at 493 (1983). "[P]rotecting relations with foreign governments" is a "plainly compelling" interest. *Medellin* v. *Texas*, 552 U.S. 491, 524 (2008).

Nearly every Term, this Court grants certiorari to review judgments that may infringe the sovereignty of foreign states.[1] The Court frequently reviews FSIA

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[1] *Republic of Sudan* v. *Harrison*, 139 S. Ct. 1048 (2019); *Rubin* v. *Islamic Republic of Iran*, 138 S. Ct. 816 (2018); *Bolivarian Republic of Venezuela* v. *Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312 (2017); *Bank Markazi* v. *Peterson*, 136 S. Ct. 1310 (2016); *OBB Personenverkehr AG* v. *Sachs*, 136 S. Ct. 390 (2015); *Republic of Argentina* v. *NML Capital, Ltd.*, 573 U.S. 134 (2014); *Mohamad* v. *Palestinian Auth.*, 566 U.S. 449 (2012); *Samantar* v. *Yousuf*, 560 U.S. 305 (2010); *Republic of Iraq* v. *Beaty*, 556 U.S. 848 (2009); *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran* v. *Elahi*, 556 U.S. 366 (2009); *Republic of Philippines* v. *Pimentel*, 553 U.S. 851 (2008); *Powerex Corp.* v. *Reliant Energy Servs., Inc.*, 551 U.S. 224 (2007); *Permanent Mission of India to the United Nations* v. *City of New York*, 551 U.S. 193 (2007); *Ministry of Def. & Support for Armed Forces of Islamic*

and similar cases even absent a circuit split, and sometimes when the legal issues are seldom recurring. See *Republic of Philippines* v. *Pimentel*, 553 U.S. 851 (2008); *Powerex Corp.* v. *Reliant Energy Servs., Inc.*, 551 U.S. 224 (2007); *First Nat'l City Bank* v. *Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983); *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981).

Indeed, this Court reviews FSIA cases even where—unlike in this case—the issues are "narrow" and non-recurring. *E.g.*, *NML Capital*, 573 U.S. at 140, 145 (citing "[t]he single, narrow question before us" and the "rather unusual circumstances of this case"); *Samantar*, 560 U.S. at 308 (discussing "[t]he narrow question we must decide"); *Beaty*, 556 U.S. at 851 (considering a "now repealed" provision). Here, by contrast, the question affects 160 foreign sovereigns, and thus is "clearly of widespread importance." *Sumitomo Shoji Am., Inc.* v. *Avagliano*, 457 U.S. 176, 182 n.7 (1982).

Review is needed because the decision below creates a split among the circuits. But even if it did not, review would be warranted given the sensitive international issues presented.

II. The decision below is exceptionally important because it subjects all 160 New York Convention signatories to federal jurisdiction, even if they signed no agreement to arbitrate.

Review is also needed because the panel decision is exceptionally important. In a single stroke, the court

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Republic of Iran v. *Elahi*, 546 U.S. 450 (2006); *Republic of Austria* v. *Altmann*, 541 U.S. 677 (2004); *Dole Food Co.* v. *Patrickson*, 538 U.S. 468 (2003).

below expanded federal jurisdiction to all 160 signatories to the New York Convention. In the process, the court destroyed the FSIA's limits on arbitration-enforcement actions, creating yet another issue of law urgently calling for this Court's review.

A. When Congress created jurisdiction in arbitration-enforcement actions, it did so "only * * * to enforce certain arbitration agreements, and only under certain conditions." App. 3a. Petitioners must establish jurisdictional facts, such as the existence of an arbitration agreement and an award based on that agreement, and that the petitioner be a private party. § 1605(a)(6)(B). Under the decision below, however, these facts are irrelevant.

The decision below creates jurisdiction even where litigants have not shown "the existence or validity of any arbitration agreement." *Eiser*, *supra*, ECF No. 45 at 3; see *Masdar*, *supra*, ECF No. 23 at 14 ("[A]s the D.C. Circuit recently ruled in *Tatneft*, Spain necessarily waived its immunity by signing the ICSID Convention [*i.e.*, International Centre for Settlement of Investment Disputes Convention], irrespective of the validity of Spain's consent to arbitrate."). Of course, even in non-FSIA cases, "a sovereign's consent to arbitration is important," and this Court has granted review based solely on "the importance of the matter for international commercial arbitration." *BG Group, PLC* v. *Republic of Argentina*, 572 U.S. 25, 32 (2014). These considerations apply with extra force under the FSIA, where they are jurisdictional prerequisites. Yet the decision below reads them out of the statute.

By the same token, the D.C. Circuit's decision allows a petitioner to bring a foreign sovereign into federal court even where the petitioner has not shown that it is a "private party." § 1605(a)(6). Here, Tatneft

is no private party, as it is controlled by Tatarstan, which in turn is part of the Russian Federation.

The D.C. Circuit justified its reading by pointing to the more broadly worded implied-waiver exception. But where "a general authorization and a more limited, specific authorization exist side-by-side," "[t]he terms of the specific authorization must be complied with." *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 566 U.S. 639, 645 (2012). Thus, when Congress added an exception to the FSIA for actions "brought * * * to confirm an [arbitration] award" (28 U.S.C. § 1605(a)(6)), petitioners had to "compl[y] with" "[t]he terms of th[at] specific authorization" (*RadLAX*, 566 U.S. at 645). To ignore these requirements is to allow the waiver exception to swallow the arbitration exception, removing jurisdictional barriers protecting foreign sovereigns from being subject to all-purpose federal jurisdiction.

B. As soon as the decision below issued, parties seized on the ruling to contend that they no longer need to establish "the existence or validity of any arbitration agreement." See *Eiser Infrastructure*, *supra*, ECF No. 45 at 3. After all, "[t]hose considerations" must be "thus irrelevant to jurisdiction." *Ibid.*

Nor are parties merely invoking the New York Convention. "[A]s the D.C. Circuit recently ruled in *Tatneft*, Spain necessarily waived its immunity by signing the ICSID"—*i.e.*, the International Centre for Settlement of Investment Disputes Convention—"*irrespective of the validity of Spain's consent to arbitrate*." *Masdar Solar*, *supra*, ECF No. 23 at 14 (emphasis added). These parties concede that "the ICSID Convention does not expressly 'mention * * * immunity to suit,' but neither does the New York Convention," so under the D.C. Circuit's decision, just "contemplat[ing]" being sued "is enough to effect a waiver of

immunity." *Eiser*, *supra*, ECF No. 47 at 3. Doubtless litigants soon will seek to extend this principle to the Inter-American Convention on International Commercial Arbitration, which was "intended to achieve the same results" as the New York Convention. *Productos Mercantiles E Industriales, S.A.* v. *Faberge USA*, 23 F.3d 41, 45 (2d Cir. 1994) (quoting H.R. Rep. No. 501, 101st Cong., 2d Sess. 4 (1990), *reprinted in* 1990 U.S.C.C.A.N. 675, 678)).

In short, if the decision below stands, *every* treaty will be a candidate for mere "contemplation" review. And because venue for suits against foreign states always lies in the District of Columbia, the "contemplation" standard will become an effectively national rule. 28 U.S.C. § 1391(f)(4). Conversely, the arbitration exception will become a dead letter. If that is to be the law, the word should come from this Court.

Review is needed.

III. By making sweeping new law while splitting with other circuits, yet conspicuously refusing to publish its decision, the D.C. Circuit only highlighted the urgent need for review.

This case is an excellent vehicle for deciding the questions presented here, both of which are questions of law. That is true even though the D.C. Circuit conspicuously refused to publish its decision.

"[T]he fact that the Court of Appeals' order under challenge here is unpublished carries no weight in [this Court's] decision to review the case." *C.I.R.* v. *McCoy*, 484 U.S. 3, 7 (1987); see also *Smith*, 502 U.S. at 1020 (Blackmun, J., dissenting from denial of certiorari) ("The fact that the Court of Appeals' opinion is unpublished is irrelevant."). This Court regularly grants certiorari to review unpublished decisions. *E.g.*, *Shapiro* v. *McManus*, 136 S. Ct. 450, 454 (2015)

(granting review where "[t]he Fourth Circuit summarily affirmed in an unpublished disposition"); *Felkner* v. *Jackson*, 562 U.S. 594, 597 (2011) (granting review of a Ninth Circuit "three-paragraph unpublished memorandum opinion"); *Krupski* v. *Costa Crociere S. p. A.*, 560 U.S. 538, 546, (2010) (granting review where "[t]he Eleventh Circuit affirmed in an unpublished per curiam opinion"); *Beaty*, 556 U.S. at 855 (granting review where the D.C. Circuit "summarily affirmed in an unpublished order"); *Kimbrough* v. *United States*, 552 U.S. 85, 93 (2007) (granting review of an "unpublished *per curiam* opinion").

Indeed, that "the decision below is unpublished" is "disturbing * * * and yet another reason to grant review." *Plumley*, 574 U.S. at 1131–32 (Thomas, J., dissenting from denial of certiorari). "Nonpublication must not be a convenient means to prevent review." *Smith*, 502 U.S. at 1020 (Blackmun, J., dissenting from denial of certiorari).

Yet the D.C. Circuit's choice not to publish its decision in a case of this magnitude raises questions. The court had before never held that a sovereign waives its immunity by signing the New York Convention. To be sure, the court *said*, "[b]ecause *Creighton* [v. *Gov't of Qatar*, 181 F.3d 118 (D.C. Cir. 1999)] controls, the waiver exception applies here." App. 4a. But *Creighton* stated: "*Qatar not having signed the Convention*, we do not think that its agreement to arbitrate in a signatory country, without more, demonstrates the requisite intent to waive its sovereign immunity in the United States." 181 F.3d at 123 (emphasis added). Thus, *Creighton* could not have held that signing the New York Convention waives immunity because the sovereign in *Creighton* had not signed the Convention. Nor had any court ever read *Creighton* that way.

The D.C. Circuit knew all this. The issue was squarely addressed in briefing, at oral argument, and in a motion by third parties to publish the decision. Appellant's Br. 38–40; Reply Br. 16–17; Oral Argument Recording at 3:44–5:00 (available at https://bit.ly/2pHOQaf); Motion of Eiser Infrastructure Limited and Energia Solar Luxembourg S.A.R.L. to Publish Unpublished Opinion, Doc. No. 1795084 (June 28, 2019). And as we explained in seeking rehearing, the decision is already being invoked below by parties who appreciate the decision's expansion of jurisdiction over foreign sovereigns. Pet. for Rehr'g 14–15. Yet the court refused to publish the opinion.

It is often the case that "[a]n unpublished opinion may have a lingering effect in the Circuit[.]" *Ibid.* That is an understatement here. Everybody knows the D.C. Circuit's decision establishes for the first time that signing the New York Convention waives immunity. App. 4a (holding that "*Creighton* controls," even "if wrongly decided"). Review should be granted.

IV. The sweeping rule announced below cannot be reconciled with the FSIA and flouts this Court's decisions.

The D.C. Circuit's decision is demonstrably wrong, both in interpreting the FSIA's waiver exception and the arbitration exception. We address each in turn.

A. The court's reading of the FSIA's waiver exception ignores the statutory language, the legislative history, and *Amerada Hess*.

By its terms, the waiver exception applies only where a foreign state "has waived its immunity either explicitly or by implication." § 1605(a)(1). In ordinary usage, a "waiver is the intentional relinquishment or

abandonment of a known right." *Hamer* v. *Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13, 17 (2017) (citations and internal quotations omitted). That is always a rigorous test, but it takes on extra force when the question is whether a sovereign waived its immunity. In that context, any question of waiver must be "strictly in favor of the sovereign" and may not be enlarged "beyond what the language requires." *Shaw*, 478 U.S. at 318 (internal quotation marks omitted); *cf. C & L Enters., Inc.*, 532 U.S. at 418, 421 n.3, 423 ("to relinquish its immunity, a tribe's waiver must be clear" and "not ambiguous," and finding instructive "the law governing waivers of immunity by foreign sovereigns" (internal quotation marks omitted)).

All of this is particularly true where the supposed waiver of sovereign immunity is *implied*. As noted, the circuits generally "have found an implicit waiver of sovereign immunity in only three situations," each taken from "[t]he legislative history of the FSIA." *Gutch*, 255 F. App'x at 525; *Frolova*, 761 F.2d at 377. These include: (1) "fil[ing] a responsive pleading without raising the defense of sovereign immunity"; (2) "agree[ing] to arbitrate" in the United States; and (3) "adopt[ing] a particular choice of law." *World Wide Minerals, Ltd.*, 296 F.3d at 1162 n.11; see generally H.R. Rep. No. 94-1487, at 18 (1976). "[C]ourts have been reluctant to stray beyond these examples when considering claims that a nation has implicitly waived its * * * immunity." *Frolova*, 761 F.2d at 377.

This Court captured these concerns in *Amerada Hess*, where it addressed the notion of an implied waiver of immunity in a treaty. The Court could not "see how a foreign state can waive its immunity * * * by signing an international agreement that contains

no mention of a waiver of immunity or even the availability of a cause of action in the United States." 488 U.S. at 442–43.

Under these (or any) standards, there is no implied waiver New York Convention. "The interpretation of a treaty, like the interpretation of a statute, begins with its text." *Medellin*, 552 U.S. at 506. Nothing in the text of the New York Convention—which was signed during an era of immunity long before the FSIA—suggests any intent to waive immunity. The Convention makes "no mention" of a waiver of immunity or the recognition and enforcement of arbitral awards against state parties. *Ibid.* To the contrary, the Convention provides that "[e]ach Contracting State shall recognize arbitral awards as binding and enforce them *in accordance with the rules of procedure of the territory where the award is relied upon*." Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. III, June 10, 1958, 21 U.S.T. 2517, *reprinted in* 9 U.S.C. § 201 (historical and statutory note) (emphasis added). And foreign sovereign immunity was one of the bedrock common-law rules "of the territory where the award [was] relied upon"—here, the United States.

Moreover, the Convention provides that "[t]he provisions of the present Convention shall not * * * deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon." *Id.*, art. VII(1). By extension, the provisions of the Convention shall not affect the rights of sovereign states to avail themselves of their rights under international and domestic law, including immunity.

B. Turning to the arbitration exception, the decision below flouts bedrock rules of statutory construction. Arbitration-enforcement actions should proceed only under the FSIA's arbitration exception, which was specifically added to the FSIA by Congress for that purpose. "Where a general authorization and a more limited, specific authorization exist side-by-side," "[t]he terms of the specific authorization must be complied with." *RadLAX*, 566 U.S. at 645–46.

Not only does the decision below empower litigants to circumvent the arbitration exception's jurisdictional prerequisites, it renders § 1605(a)(6)(D) meaningless. That subsection governs where "the action is brought * * * to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen * * * or to confirm an award made pursuant to such an agreement * * * if * * * (D) paragraph (1) of this subsection is otherwise applicable." § 1605(a)(6)(D). Of course, "paragraph (1) of this subsection" is the waiver exception. The decision below allows parties "to confirm an award" under the waiver exception without meeting the jurisdictional prerequisites of § 1605(a)(6), including the existence and validity of an arbitration agreement with a private party. That violates the principle that courts "must give effect to every word of a statute wherever possible." *Leocal* v. *Ashcroft*, 543 U.S. 1, 12 (2004). Other circuits have thus rightly rejected interpretations of the waiver exception that would "in effect broaden the application of [other] exception[s] beyond the parameters intended by Congress." *Cabiri* v. *Gov't of Republic of Ghana*, 165 F.3d 193, 203 (2d Cir. 1999). Any reading of the waiver exception that would render limits on other exceptions "superfluous" (*Calzadilla* v. *Banco Latino Internacional*, 413 F.3d 1285, 1288 (11th Cir. 2005)) or

"would void the operation of" limits on other exceptions (*Blaxland* v. *Commonwealth Dir. of Pub. Prosecutions*, 323 F.3d 1198, 1209 (9th Cir. 2003)) cannot be reconciled with the FSIA.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

MARIA KOSTYTSKA
Counsel of Record
ANDREW C. NICHOLS
THOMAS M. BUCHANAN
PAUL N. HAROLD
Winston & Strawn LLP
1700 K Street N.W.
Washington, DC 20006
(202) 282-5000
mkostytska@winston.com

Counsel for Petitioner

NOVEMBER 2019