No. 19-606

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

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR PETITIONERS

Tatneft does not dispute that if the court below held that a foreign sovereign waived its immunity by signing the New York Convention, that "sweeping" holding would immediately subject all 160 signatories to the New York Convention to jurisdiction in the United States. Br. 11, 12. Nor does Tatneft dispute that the D.C. Circuit's holding expressly states: "Because Ukraine and the United States have both signed the New York Convention, Ukraine falls within the waiver exception[.]" App. 3a. Standing alone, these concessions confirm that this case warrants urgent review.

There is also an undoubted circuit split on these important issues. Tatneft identifies no other decision finding an implied waiver in a treaty; nor does Tatneft dispute that multiple circuits have declined to find implied waivers in treaties. Tatneft also identifies no language in the New York Convention mentioning immunity or anything about a cause of action against a sovereign *anywhere*, much less in the United States. If signing the New York Convention waives sovereign immunity, so does signing any other treaty silent on immunity—which is doubtless why other circuits reject the path taken below.

In sum, Tatneft opposes certiorari on the first question presented based on two words: "in Paris." App. 2a. The decision below "was a limited one," Tatneft contends, because "[i]n summarizing the facts," the court below noted that the arbitral tribunal was "in Paris." Br. 12 (citing App. 2a). From these two words, Tatneft extrapolates four pages of its opposition. Br. 12–15. But a passing reference to Paris cannot limit the holding. If the decision below were as pedestrian as Tatneft asserts, the court below would never have

granted the exceptional remedy of staying its mandate. Review is needed on the first question presented.

Tatneft's response on the second question presented is no more persuasive. Tatneft does not dispute that the decision below declines to require petitioners to establish the jurisdictional facts required by the FSIA in arbitration-enforcement actions—including the existence of an arbitration agreement, an award based on that agreement, and that a petitioner be a private party. Pet. 6. Instead, the court used the waiver exception to swallow the arbitration exception. Tatneft does not contend that revising the FSIA in this manner is unimportant. Nor could it. After all, the FSIA's requirements 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, 1316–1317 (2017). None of the circuit authorities that Tatneft cites condones eliminating the arbitration exception—confirming that the decision below created a second split. Here, too, certiorari is needed.

ARGUMENT

I. The decision below rests on a holding of international importance and splits the circuits on implied waivers of sovereign immunity.

A. The decision below expressly rested solely on the sovereign's signing a treaty.

Rather than grapple with the decision below as it is—and as future courts and litigants will face it—Tatneft rewrites the decision. In a similar manner, Tatneft recasts the New York Convention, the circuit split created by the decision below, and other elements of the petition.

1. According to Tatneft, the court of appeals found waiver not only because Ukraine signed the New York Convention, but because Ukraine entered into a treaty with Russia, and the arbitration here was "seated in * * * France," a signatory to the Convention. Br. 12. The court never said that. It said:

> The waiver exception applies to this case. In *Creighton* [v. *Gov't of Qatar*, 181 F.3d 118 (D.C. Cir. 1999)], we concluded that a sovereign, by signing the New York Convention, waives its immunity from arbitration-enforcement actions in other signatory states. Because Ukraine and the United States have both signed the Convention, Ukraine falls within the waiver exception as *Creighton* construed it.

App. 3a. It further said, "[b]ecause *Creighton* controls, the waiver exception applied here." App. 4a. That is the whole holding. Nowhere does the decision suggest that Ukraine impliedly waived immunity because it agreed to arbitrate in France.

It is no answer to say that the court of appeals mentioned Paris. Br. 12. Here is what the court said, in the third sentence of the opinion: "An arbitral tribunal in Paris awarded Tatneft $112 million in damages against Ukraine." App. 2a. That did not even purport to be dictum; it was a background fact. Nor could the holding below have silently rested on an agreement to arbitrate in France—because Ukraine *challenged* that alleged agreement, as Tatneft admits. Br. 13 n.5 ("Ukraine did, and still does, dispute that its offer to arbitrate with Russian investors under the Russia-Ukraine BIT applies to Tatneft * * *").

By its terms, the decision below held that Ukraine waived its immunity based on its bare signing of the New York Convention—reasoning that applies to all

160 sovereigns that have signed the Convention. That is a sweeping, nationally significant holding that merits immediate review.

2. Attempting to minimize the significance of the decision below, Tatneft also recasts the New York Convention. In *Amerada Hess*, this Court explained that it 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." *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 442–443 (1989). Not to worry, says Tatneft, "providing 'the availability of a cause of action in the United States' * * * is precisely what the New York Convention does." Br. 17. Not so.

Tatneft cites no provision of the Convention creating a cause of action. Nor could it; as this Court has explained, the Convention is "non-self-executing." *Medellin* v. *Texas*, 552 U.S. 491, 521 (2008). Instead, Tatneft cites the Convention's implementing statute and quotes an unpublished district court decision. Br. 17 (citing 9 U.S.C. §§ 201–208; *Compagnie des Bauxites de Guinee* v. *Hammermills, Inc.*, 1992 WL 122712 (D.D.C. May 29, 1992)). But the statute is not the Convention, which contains "no mention" of a cause of action in the United States—much less against a sovereign. *Amerada Hess*, 488 U.S. at 442–443. And the district court decision speaks vaguely of the purpose of the Convention without mentioning sovereigns at all: "The principal purpose of the Convention and its implementation by Congress was to remove pre-existing obstacles to enforcement of foreign arbitration awards." *Compagnie des Bauxites de Guinee*, 1992 WL 122712, at *3. Tatneft offers no textual basis for finding a waiver in the Convention.

The text of the Convention does not speak to immunity. And even as to non-sovereigns, the Convention delegates the question of enforcement to each signatory country. It states: "Each 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*." App. 65a (emphasis added). As we have explained (Pet. 4–5, 23), here those "rules of procedure" were nonexistent; the law was in chaos until 1976, when—in this Court's words—Congress "abated the bedlam" by enacting the Foreign Sovereign Immunities Act. *Republic of Argentina* v. *NML Capital, Ltd*., 573 U.S. 134, 141 (2014). Ukraine signed the Convention almost 20 years earlier, when the law was still in a state of bedlam. That did not waive immunity in the United States.

3. Finally, Tatneft says the circuits agree with the court below, but points to no circuit that has held that merely signing the New York Convention waives immunity. The closest Tatneft comes is a Second Circuit case that found an implied waiver by a country that signed the Convention *and* owned a company that "enter[ed] into a contract" with a private party calling for the application of French law. *Seetransport Wiking Trader* v. *Navimpex Centrala*, 989 F.2d 572, 578–79 (2d Cir. 1993). That says nothing about whether signing the New York Convention *by itself* is an implied waiver. *Seetransport* never even cited *Amerada Hess*. Tatneft also points to *S & Davis International, Inc*. v. *Republic of Yemen*, 218 F.3d 1292 (11th Cir. 2000), but the court there held "there was no waiver of sovereign immunity." *Id*. at 1301.

The decision below is internationally important and creates a circuit split. Review is needed.

B. The decision below was wrong.

The decision below is also wrong. The FSIA speaks of a sovereign "waiv[ing]" immunity "by implication" (28 U.S.C. § 1605(a)(1)), but Tatneft does not dispute that waiving requires intentionally relinquishing a known right. And there is not a speck of evidence in the New York Convention that its signatory states knew that that signing waived their sovereign immunity *anywhere*, much less in every other signatory state.

According to Tatneft, Ukraine is "ignor[ing]" the FSIA's legislative history, which provides that foreign state's "agree[ment] to arbitration *in another country*" is one of the paradigm examples of implied waiver. Br. 20–21. Not so. Of course an express agreement to arbitrate in the United States would waive immunity in the United States. But it over-reads the legislative history to say that "where a foreign state has agreed to arbitration *in another country*," it waives its immunity in *every* other country. Br. 20.

Tatneft's own favored case confirms Tatneft's error: "If the language of the legislative history were applied literally, a foreign government would be subject to the United States's jurisdiction simply because it agreed to have the contract governed by another country's laws, or agreed to arbitrate in a country other than itself, even though the agreement made no reference to the United States." *Seetransport*, 989 F.2d at 577. That "would vastly increase the jurisdiction of the federal courts over matters involving sensitive foreign relations." *Ibid.* "Vastly increase the jurisdiction of the federal courts" is exactly what Tatneft advocates, and what the court of appeals did.

Thus, it is no answer to say that "there is no principled basis for distinguishing cases finding an implied

waiver of immunity based on an agreement to arbitrate in the United States—which Ukraine appears to accept— and this case." Br. 21. The reason agreements to arbitrate in the United States are waivers is because "such agreements could only be effective if deemed to contemplate a role for United States courts in compelling arbitration that stalled along the way." *Mar. Int'l Nominees Establishment* v. *Republic of Guinea*, 693 F.2d 1094, 1103 (D.C. Cir. 1982). By contrast, an agreement to arbitrate, as here, in Paris can be effective without involving United States courts.

Backpedaling, Tatneft warns that we are reading waiver "by implication" out of the statute. Br. 20. Again, not so. Of course there can be implied waivers, such as filing a responsive pleading without asserting a defense of sovereign immunity. But "waiver by treaty [was] not included in the list of examples of implicit waivers." *Frolova* v. *Union of Soviet Socialist Republics*, 761 F.2d 370, 377–378 (7th Cir. 1985); Pet. 6, 13. And notion of an *implied* waiver by treaty cannot be squared with *Amerada Hess*.

Lastly, Tatneft says other academics disagree with our treatise showing that "[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). But Tatneft's first authority is a student note from 1983 arguing that signing the Convention *should* be a waiver. See O'Brien, *The Validity of the Foreign Sovereign Immunity Defense in Suits Under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 7 Fordham Int'l L. J.

321 (1983). And Tatneft's other article concedes that "[t]he wording of the text of the Convention does not give any direct hint from which it would be possible to infer that states are also capable of being parties to an arbitral agreement and subject of an arbitral award." Cappelli-Perciballi, *The Application of the New York Convention of 1958 to Disputes Between States and Between State Entities and Private Individuals: The Problem of Sovereign Immunity*, 12 Int'l Law. 197, 198 (1978). Signing the Convention is not a waiver.

For all these reasons, review is needed.

II. The decision below discards the FSIA's express requirement of showing jurisdictional facts in arbitration-enforcement actions.

It is undisputed that the second question is exceptionally important. Tatneft never disputes that 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). Allowing petitioners like Tatneft to skip these jurisdictional showings by relying on the waiver exception in § 1605(a)(1) disrupts Congress's circumscribed grant of jurisdiction over foreign sovereigns and sensitive foreign-relations disputes. Unable to dispute the importance of the question presented, Tatneft attempts to defend the *correctness* of the decision below. None of its arguments have merit.

Tatneft concedes that, unlike the court below, three other circuits "have limited the reach of the waiver exception in light of other provisions of the FSIA." Br. 24 n.12. And Tatneft does not dispute that, as all those

circuits found, implied waiver should not be used in a manner 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). Tatneft's only quibble is that the arbitration exception was "later-enacted." Br. 24 n.12. But Tatneft cites no authority suggesting that this distinction matters. If anything, by pausing before amending the statute, Congress confirmed that it acted intentionally and with great care—"deliberately target[ing] [a] specific problem[] with [a] specific solution." *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 566 U.S. 639, 645 (2012).

Tatneft contends that other courts have "implicitly rejected Ukraine's argument" by "considering" whether either exception to sovereign immunity applied. Br. 24–25. Not so. In each of those cases, the petitioner satisfied the arbitration exception's jurisdictional prerequisites. Once the required jurisdictional facts are shown, the arbitration exception expressly permits courts to consider jurisdiction under any of its subsections, including whether "paragraph (1) of this subsection [i.e., the waiver exception] is otherwise applicable." § 1605(a)(6)(D).

According to Tatneft, it satisfied both the waiver and the arbitration exceptions below. Br. 25–27. In reality, the court below "affirmed based on the waiver exception"—period. App. 2a. This was an implicit rejection of the district court's ruling, likely because the district court never made an independent judgment about its jurisdiction. Instead, the court "defer[red] to the arbitral tribunal's determination on jurisdiction" (App. 36a)—even though the tribunal was "obviously not * * * dealing with the FSIA," as Tatneft now concedes (Br. 26 n.13). In other words, no court has yet considered whether Tatneft is a "private party"

(§ 1605(a)(6))—a matter on which Ukraine sought and was denied jurisdictional discovery (App. 35a–37a). There is no vehicle problem here.

It is also no answer to say that Ukraine seeks an "implied repeal" of the waiver exception. Br. 27–29. An implied repeal, Tatneft says, requires "some affirmative showing of an intention to repeal." *Id*. at 28 (quoting *Morton* v. *Mancari*, 417 U.S. 535, 549 (1974)). But there is no repeal, implied or otherwise. The arbitration exception grants jurisdiction when the waiver exception "is otherwise applicable." § 1605(a)(6)(D). By incorporating the waiver exception *into* the arbitration exception, Congress gave continued life to the waiver exception, while placing conditions on its use in arbitration cases. Expressly conditioning the use of a statute is not the same as repealing it.

Finally, ignoring the statutory text, Tatneft points to the legislative history of the FSIA to suggest that "Congress intended the opposite of repealing the waiver exception." Br. 29. The witness testimony Tatneft cites, however, was based on a different draft of the statute—before Congress added § 1605(a)(6)(D). By adding § 1605(a)(6)(D), Congress intended that waiver-based arguments in arbitration enforcement actions proceed only when the petitioner can establish the arbitration exception's jurisdictional facts.

Tatneft's arguments as to the second question presented are makeweights. Review is needed.

CONCLUSION

For the foregoing reasons and those stated in the petition, certiorari should be granted.

Respectfully submitted.

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