No. 20-1275

IN THE

Supreme Court of the United States

VESUVIUS USA CORPORATION AND CHRISTOPHER YOUNG,
Petitioners,

v.

ROYSTON PHILLIPS,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Ohio, Eighth Appellate District

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF

The petition explained why the recent wave of foreign privacy laws, exemplified by the European Union's General Data Privacy Regulation and comparable national laws, requires that this Court again address the interaction of American discovery rules with foreign laws restricting cooperation with discovery. The last time this Court addressed this topic, 35 years ago in *Société Nationale Industrielle Aérospatiale v. United States District Court for the Southern District of Iowa*, 482 U.S. 522 (1987), the Court faced a foreign blocking statute. Following *Aérospatiale*, American courts have almost uniformly overridden foreign laws restricting compliance with discovery obligations and enforced broad American discovery. This outcome makes sense when the foreign impediment to compliance is a blocking statute aimed specifically at protecting foreign interests and frustrating American law.

More recently, foreign governments—including, as relevant here, the European Union and the United Kingdom—have enacted laws restricting compliance with discovery processes based on substantive, and strongly felt, privacy policies. As the Court recognized in *Aérospatiale*, American courts should accord *more deference* to "substantive rules of law at variance with the law of the United States" than to foreign blocking statutes. 482 U.S. at 544 n.29 (quoting Restatement (Third) of Foreign Relations Law of the United States § 437 reporters' note 5 (1987)). But that has not happened. Instead, American courts have not adjusted their approach, as *Aérospatiale* contemplated, when addressing foreign privacy laws. Instead, in almost all cases, they have used

Aérospatiale as justification to override foreign privacy protections. This outcome is contrary to *Aérospatiale*. It also puts multinational businesses in a difficult quandary: either violate their American discovery obligations or breach foreign privacy laws, with potentially serious consequences whichever option they choose. To address the failure of the lower courts to adapt as the nature of foreign laws has changed, and to remedy this quandary, the Court should grant this petition.

Respondent Royston Phillips never demonstrates that any of this is wrong. He ignores the wave of substantive privacy legislation enacted throughout Europe, and he does not deny that these privacy laws, unlike, for example, the French blocking statute at issue in *Aérospatiale*, are motivated by substantive policy considerations. In asking this Court to deny the petition, Phillips contends that petitioners waived their "core arguments" and that the issue presented is not important. He also contends that the court of appeals correctly applied *Aérospatiale* in this case. Phillips is wrong on all counts, and the Court should grant the petition.

I. Petitioners preserved the arguments made in the petition.

Phillips argues that in numerous respects petitioners forfeited the arguments they present in the petition by failing to assert them below. But Phillips is wrong, either because he misunderstands the arguments in the petition or because he misunderstands the rules governing forfeiture.

Phillips contends that petitioners waived arguments that *Aérospatiale* "is inapplicable to the

GDPR" and that its balancing test "should be altered because of the GDPR," because they never made those arguments below. Opp. 6. It is true that petitioners did not make those arguments below, but petitioners did not make these arguments in the petition, either. Instead, petitioners contend that the courts below misapplied the comity standard set forth in *Aérospatiale* in the context of the GDPR—not that comity principles did not apply to the GDPR.

Phillips further contends that petitioners waived their arguments because, in the trial court, they never raised *Aérospatiale* or the availability of the Hague Convention to obtain the documents at issue. Opp. 5–7. He is wrong again.

To begin with, Phillips made the same argument to the Ohio Court of Appeals: That petitioners waived any argument regarding the GDPR and the Hague Convention by failing to preserve such arguments in the trial court. *See* Phillips' Ohio Ct. App. Br. 17–18. The Ohio Court of Appeals never mentioned Phillips' waiver argument, instead addressing petitioners' arguments on the merits. By deciding the merits of the appeal, the court of appeals necessarily rejected those waiver arguments. In any event, any argument that is addressed by the court below is preserved for this Court's review. *See Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) ("[E]ven if this were a claim not raised by petitioner below, we would ordinarily feel free to address it since it was addressed by the court below. Our practice 'permit[s] review of an issue not pressed so long as it has been passed upon. . . .'") (quoting *United States v. Williams*, 504 U.S. 36, 41 (1992)) (second brackets and omission in the original) (emphasis deleted).

Further, when a party has presented a claim below, "a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992). Petitioners have consistently argued in opposition to the motion to compel from the trial court onward that production of the personnel files would violate the GDPR and expose Vesuvius and its affiliates to the risk of substantial fines and other enforcement measures. Where, as here, "the defendants consistently presented the heart of their . . . argument" below, waiver should not be found. *Fox v. Hayes*, 600 F.3d 819, 832 (7th Cir. 2010); *see also Lawson v. Sun Microsystems, Inc.*, 791 F.3d 754, 761 (7th Cir. 2015) (rejecting argument that defendant waived an issue because its argument was "more elaborate on appeal than it was in the district court").

Finally, Phillips says that petitioners waived their contentions because they "made no argument about any 'blocking-privacy' dichotomy to the trial court." Opp. 6. But that is irrelevant, because "parties are not limited to the precise arguments they made below." *Yee*, 503 U.S. at 534.

II. Petitioners presented the lower courts with sufficient information to determine that the GDPR applies to the information at issue.

Phillips argues that because petitioners failed "to provide the trial court with information of sufficient particularity and specificity to allow a determination whether the discovery sought was indeed prohibited by the GDPR," and the court of appeals then "[a]ssum[ed] without deciding" that the discovery fell within the GDPR, "no lower court has even

determined that the GDPR even applies to the discovery sought in this case." Opp. 7–8. Again, this is simply not the case.

Petitioners argued in opposition to the motion to compel in the trial court that production of the personnel files would violate the GDPR. Petitioners clearly stated in their opposition to the motion to compel that the employees in Europe were considered "data subjects" under the GDPR; that EU subjects have a right of privacy in the processing of their personal data; and that retrieval of personal data in response to a third-party request constitutes processing that can only be done pursuant to a lawful basis, with no exception for civil discovery requests from U.S. courts in a case in which the processor is not a party. Petitioners also relied on the U.K. Data Protection Act 2018 as containing the same obligations with respect to UK citizens. Correspondence between counsel reflecting similar arguments was attached as an exhibit to the opposition to the motion to compel. Vesuvius also attached three articles showing the likelihood of the Vesuvius group companies facing significant fines if found to have violated the GDPR.

Thus, petitioners provided notice that they would be relying on specific foreign laws before the filing of the motion to compel, referenced those laws in its brief to the trial court, and presented evidence of the heavy penalties corporations can face for failure to comply with those laws. This was enough to satisfy their burden as to the applicability of the GDPR. *See Strauss v. Credit Lyonnais, S.A.*, 242 F.R.D. 199, 207 (E.D.N.Y. 2007) (finding burden met by discovery objections based on, *inter alia*, "applicable French

anti-money laundering laws" and "French laws prohibiting the disclosure of information relating to a criminal investigation"); *Weiss v. Nat'l Westminster Bank, PLC*, 242 F.R.D. 33, 40 (E.D.N.Y. 2007) (finding burden met by discovery objections based on, *inter alia*, "the UK Data Protection Act 1998").

III. The issue presented is sufficiently important to warrant this Court's consideration.

Phillips contends this case is not important enough to merit resolution by this Court because it does not involve an important question of unsettled federal law, there is no circuit split, and the court of appeals did not depart from the accepted and usual course of proceedings. Opp. 8–11. Phillips is incorrect.

As petitioners pointed out, Pet. 10, interlocutory cross-border discovery disputes rarely receive appellate review. *See Aérospatiale*, 482 U.S. at 554 (Blackmun, J., dissenting) (noting "the limited appellate review of interlocutory discovery decisions, which prevents any effective case-by-case correction of erroneous discovery decisions" (footnote omitted)); *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, No. 05-MD-1720 (JG)(JO), 2010 WL 3420517, at *7 (E.D.N.Y. Aug. 27, 2010) (noting that the "relative dearth of appellate decisions makes it more difficult to identify a coherent body of doctrine"). A circuit split, therefore, is very unlikely ever to develop with respect to these issues. This case presents an unusual opportunity for the Court to update its guidance on application of the *Aérospatiale* factors to the current international landscape.

Furthermore, while, as petitioners have acknowledged, foreign laws obstructing U.S. discovery are nothing new, the enactment of the GDPR and similar national privacy laws has greatly expanded the potential for conflict between U.S. discovery obligations and foreign legal restrictions, necessitating updated guidance reflective of current realities.

Phillips misunderstands (Opp. 9–11) petitioners' discussion of the distinction between naked blocking statutes and substantive privacy protections. Blocking statutes are intended "to prevent domestic individuals or corporations from having to comply with U.S. discovery requests" and generally prohibit "the disclosure, copying, inspection, or removal of documents located in the territory of the enacting state in compliance with orders of foreign authorities." Kristen A. Knapp, *Enforcement of U.S. Electronic Discovery Law Against Foreign Companies: Should U.S. Courts Give Effect to the EU Data Protection Directive?*, 10 Rich. J. Glob. L. & Bus. 111, 122 (2010) (citation omitted). By contrast, privacy statutes "exist as a result of the considered decision of [foreign governments] to enact strong . . . personal data privacy protections. They do not exist—and there is no basis to claim that they exist—for the purpose of impeding enforcement of United States laws." *In re Application Pursuant to 28 U.S.C. § 1782 of Okean B.V. & Logistic Sol. Int'l to Take Discovery of Chadbourne & Parke LLP*, No. 12 Misc. 104(PAE), 2013 WL 4744817, at *3 (S.D.N.Y. Sept. 4, 2013).

The GDPR is such a privacy statute. Data protection is considered a fundamental human right in the EU and is incorporated in the Charter of

Fundamental Rights of the European Union. *See* GDPR recital 1; Charter of the Fundamental Rights of the European Union, art. 8, 2012 O.J. (C 326) 391, 397.[1] Thus, Phillips misses the mark by claiming that "any 'blocking' statute could be easily justified under the pretext of protecting 'privacy,' and any 'privacy' regulation will have the same practical effect as a 'blocking' statute." Opp. 10. While privacy laws and blocking statutes might have similar practical effects on litigation in U.S. courts, "[p]rivacy laws differ from blocking statutes in one fundamental respect. Unlike blocking statutes, privacy laws are enacted to fulfill a legitimate purpose." Knapp, *supra*, at 130. Indeed, "[i]t is for this reason that U.S. courts must pay particular attention to how they balance the legitimate interest of protection of individual privacy against the equally legitimate interest in ensuring fair access to documents in litigation proceedings." *Id.*

Moreover, there is no evidence that petitioners—or any significant number of other companies—"abuse foreign 'privacy' statutes to frustrate discovery rules." Opp. 10. Vesuvius did not store U.S.-originated data abroad in an attempt to circumvent U.S. discovery rules. Rather, the information Phillips requested was created and maintained in Europe and concerned employment information regarding European citizens working for European companies in Europe.

As to Phillips' contention that no "policy reasons" exist for the Court to consider this case, Opp. 11, Phillips again misunderstands what petitioners ask of this Court. Petitioners do not seek a new test specific

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[1] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2012:326:FULL&from=EN

to the GDPR; they simply request updated guidance from the Court as to the proper application of the *Aérospatiale* factors in light of the changes that have occurred in the 35 years since the decision. Presumably, if this was an important enough question for the Court to consider 35 years ago, it is more so today in light of the increasing frequency with which foreign companies transact business in the United States.

IV. The court of appeals misapplied *Aérospatiale*.

Phillips contends that he "will prevail on the merits of this case." Opp. 12. Phillips is again mistaken.

First, Phillips' argument that the GDPR does not apply to the information subject to his discovery requests, Opp. 12–13, is simply incorrect. Phillips argues that the GDPR is inapplicable for lack of processing by "automated means," or of data from a "filing system." However, if the requested files are stored electronically, their retrieval would involve computers and can only be accomplished "partly with automated means." The UK data protection authority (the "ICO") advises that "automated and computerized personal information kept about workers by employers is covered by [EU data protection rules]." ICO Employment Practices Code 7 (2011).[2]

Alternatively, if the information sought by Phillips is stored on paper, the files logically must be capable

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[2] https://ico.org.uk/media/for-organisations/documents/1064/the_employment_practices_code.pdf

of retrieval by reference to the employee's name. The position of EU data protection authorities is that "given the necessarily structured nature of employment records, [the concept of 'filing system,' as it relates to paper records] will include most information kept about workers whether centrally or by line managers." Art. 29 Working Party, *Opinion 8/2001 on the processing of personal data in the employment context*, 13 (adopted 13 September 2001).[3]

In short, whether the relevant records are stored electronically or in paper form, GDPR Article 2 applies.

GDPR Articles 6 and 9 prohibit *all* processing of personal data (e.g., its retrieval, copying, and sharing), unless permitted by one of the limited grounds provided *in those two Articles*. Phillips ignores this and wrongly shifts the discussion to GDPR Article 49, which concerns unrelated GDPR rules—namely, GDPR Chapter V's prohibition on transferring personal data out of the European Economic Area. Chapter V data transfer rules, like other GDPR hurdles faced by Vesuvius group companies here, are not even in play unless GDPR Articles 6 and 9 are satisfied, which Phillips' overbroad request cannot accomplish.

Furthermore, even if GDPR Articles 6 and 9 could be satisfied, the GDPR Article 49 provision cited by Phillips would not solve the ensuing international data transfer problem, because it only applies to transfers that are "necessary" for overseas proceedings. This is interpreted narrowly, since

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[3] https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2001/wp48_en.pdf

GDPR Article 49 is an exception to a protective rule. European Data Protection Bd., *Guidelines 2/2018 on derogations of Article 49 under Regulation 2016/679*, 12 (adopted 25 May 2018).[4] In sum, Phillips' interpretation of the GDPR is simply incorrect.

Finally, Phillips fares no better with respect to his assertion that the Ohio court of appeals correctly applied *Aérospatiale*. Opp. 13–17. As to the first factor, the trial court ordered production of the *entire* personnel files, including much information (such as compensation data) completely irrelevant to the case. Contrary to Phillips' contention, Opp. 14, petitioners *do* take issue with the court of appeals' resolution of the second factor. Again, because Phillips sought the entire personnel files, which include much irrelevant information, it can hardly be said that the requests were specific. With respect to the third factor, it has never been disputed that the documents are located in the European Union and subject to the GDPR. As to the fourth factor, none of Phillips' arguments dispute that the Hague Convention was *available* as an alternative means of securing the information.

The fifth *Aérospatiale* factor "is the most important, as it directly addresses the relations between sovereign nations." *Laydon v. Mizuho Bank, Ltd.*, 183 F. Supp. 3d 409, 422 (S.D.N.Y. 2016); *see also Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1476 (9th Cir. 1992) ("the most important factor"). According to Phillips, Opp. 16–17, petitioners never established which countries were actually implicated, never explained how the court could

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[4] https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_guidelines_2_2018_derogations_en.pdf

conduct a targeted balance of competing national interests without demonstrating which countries were at issue, and provided no evidence of enforcement.

However, Phillips ignores the fact that the court of appeals only focused on the interests of the United States in analyzing this factor. The court of appeals completely failed to address "the extent to which . . . compliance with the [discovery] request would undermine important interests" of the *foreign* state. *Aérospatiale*, 482 U.S. at 544 n.28. The passages cited by Phillips to the contrary were not even part of the court's analysis of the fifth factor. Petitioners have indicated which countries are at issue and in any event the privacy interests of those countries are necessarily aligned with the EU's interest in adopting the GDPR. The court of appeals further ignored *Aérospatiale*'s admonition that courts must "exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position." 482 U.S. at 546. Finally, petitioners attached as exhibits to their opposition to the motion to compel three articles showing the likelihood that the Vesuvius group companies could face significant fines if found to have violated the GDPR.

CONCLUSION

For the foregoing reasons, the Court should grant the petition.

Respectfully submitted.

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