No. 21-1574

In the Supreme Court of the United States

SAINT-GOBAIN PERFORMANCE PLASTICS EUROPE,
PETITIONER

v.

BOLIVARIAN REPUBLIC OF VENEZUELA

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

BRIEF IN OPPOSITION

E. WHITNEY DEBEVOISE
ALLON KEDEM
SALLY L. PEI
STEPHEN K. WIRTH
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000

KENT A. YALOWITZ
Counsel of Record
ARNOLD & PORTER KAYE SCHOLER LLP
250 West 55th Street
New York, NY 10019
(212) 836-8000
kent.yalowitz@arnoldporter.com

QUESTION PRESENTED

Article 15(1) of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters provides that, in a case where "the defendant has not appeared, judgment shall not be given until it is established that" the summons was "served by a method prescribed by the internal law" of the receiving state or "was actually delivered … by another method provided for by this Convention."

The question in this case is whether Article 15(1) establishes a free-standing method for service of process on a foreign state pursuant to 28 U.S.C. § 1608(a)(2); and, if so, whether the provision applies in a case where the defendant *has* appeared and the summons was *not* served by a method prescribed by the internal law of the receiving state or actually delivered by another method for service of process provided for by the Convention.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes—Continued Page(s)

Other Authorities

Other Authorities—Continued Page(s)

In the Supreme Court of the United States

SAINT-GOBAIN PERFORMANCE PLASTICS EUROPE,
PETITIONER

v.

BOLIVARIAN REPUBLIC OF VENEZUELA

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

BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 19a-30a) is reported at 23 F.4th 1036. The opinion of the district court (Pet. App. 30a-57a) is unreported but is available at 2021 WL 326079. The district court's decision followed a pre-transfer ruling set forth in a Memorandum Order issued by the United States District Court for the District of Delaware (Pet. App. 58a-87a). That ruling is unreported but is available at 2019 WL 6785504.

JURISDICTION

The court of appeals entered judgment on January 25, 2022. Pet. App. 19a. The court denied a timely rehearing petition on March 18, 2022. Pet. App. 16a. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

A. Legal Background

"Before a federal court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied." *Omni Cap. Int'l, Ltd.* v. *Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987).

1. The Foreign Sovereign Immunities Act

Before 1976, there was "no statutory procedure for service of process by which [a litigant could] obtain personal jurisdiction over foreign states." *Hearing on H.R. 3493 Before the Subcomm. on Claims and Gov't Rels. of the H. Comm. on the Judiciary*, 93d Cong., 1st Sess. 14 (1973) (statement of Hon. Charles N. Brower, Legal Adviser, Dep't of State). That changed with the passage of the Foreign Sovereign Immunities Act (FSIA), which sets forth "a comprehensive set of legal standards" for obtaining jurisdiction over a foreign state. *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 488 (1993).

As relevant here, the FSIA permits a court to exercise personal jurisdiction over a foreign state only "where service has been made under section 1608 of [title 28]." 28 U.S.C. § 1330(b). Section 1608, in turn, "sets forth the exclusive procedures with respect to service on … a foreign state." H.R. Rep. No. 94-1487, at 23 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6622. These specialized service provisions, which are exclusive and exhaustive, reflect Congress's understanding that cases involving foreign sovereign defendants have "sensitive diplomatic implications." *Republic of Sudan* v. *Harrison*, 139 S. Ct. 1048, 1062 (2019). "[T]he rule of law" accordingly requires "adherence to [their] strict requirements." *Ibid.*

Section 1608(a) specifies four methods for serving a foreign state, which are listed in "hierarchical order," *id.* at 1054:

(1) delivery "in accordance with any special arrangement for service,"

(2) delivery "in accordance with an applicable international convention on service of judicial documents,"

(3) mail "by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned," and

(4) mail to the U.S. Secretary of State in Washington, D.C., for transmittal "through diplomatic channels to the foreign state."

28 U.S.C. § 1608(a). This case involves the method of service authorized by subsection (a)(2)—namely, service "in accordance with an applicable international convention on service of judicial documents."

2. The Hague Service Convention

The United States and the Bolivarian Republic of Venezuela are both parties to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638 ("Convention"), known as the Hague Service Convention. "[T]he Hague Service Convention specifies certain approved methods of service and pre-empts inconsistent methods of service wherever it applies." *Water Splash, Inc.* v. *Menon*, 137 S. Ct. 1504, 1507 (2017) (quotation marks omitted).

The Convention authorizes what have been called "one main channel of transmission" and "several alternative channels of transmission." Permanent Bureau of the Hague Conference on Private Int'l Law, *Practical Handbook on the Operation of the Service Convention* ¶ 110 (4th ed. 2016) ("*Practical Handbook*"). These terms are something of a misnomer: the term "alternative channels" does not appear in the Convention, and "[t]here is neither a hierarchy nor any order of importance among the various

channels of transmission, and transmission through one of the other channels does not lead to service of lesser quality." *Id.* ¶ 236.

"Main channel" service consists of a two-step process that proceeds through an intermediary, called the "Central Authority," designated by the contracting state.

First, a person authorized by law must "forward" a "request for service" to the receiving state's Central Authority, under cover of a form entitled "Request for Service Abroad of Judicial or Extrajudicial Documents." Convention art. 3; see *id.* art. 2 (specifying that each Central Authority is "to receive requests for service" and "proceed in conformity with the provisions of Articles 3 to 6").

Second, if the Central Authority is satisfied that the request complies with the Convention's formal requirements, see *id.* art. 4, the Central Authority "shall itself serve the document or shall arrange to have it served by an appropriate agency, either (a) by a method prescribed by its internal law for the service of documents in domestic actions upon persons who are within its territory, or (b) by a particular method requested by the applicant, unless such a method is incompatible with the law of the State addressed," *id.* art. 5.

Once the Central Authority has served the relevant document, it "complete[s] a certificate…stat[ing] that the document has been served" and returns the certificate to the applicant. *Id.* art. 6.

The Convention's alternative methods of service are set forth in Articles 8 through 11 and Article 19. See *Volkswagenwerk Aktiengesellschaft* v. *Schlunk*, 486 U.S. 694, 699 (1988). These are:

- direct consular or diplomatic channels (Art. 8);
- indirect service through the "authorities of another Contracting State" or diplomatic channels (Art. 9);

- postal channels (Art. 10(a));
- direct communication between judicial officers, officials, or other competent persons (Art. 10(b));
- direct communication between an interested party and judicial officers, officials, or other competent persons of the state of destination (Art. 10(c));
- and such other "channels of transmission" as the contracting states may "agree[] to permit" (Art. 11).

(Some of these methods are available only if the receiving state does not object.)

B. Proceedings below

1. On December 12, 2018, petitioner commenced this action in the United States District Court for the District of Delaware, seeking confirmation of an arbitral award against the Republic. The arbitral tribunal had awarded petitioner approximately $42 million in compensation for the unlawful expropriation of a factory owned by its subsidiary. Pet. App. 22a.[1]

Ordinarily, actions to confirm arbitral awards against foreign sovereigns must be filed in the District of Columbia, which is the default location under the FSIA's venue provision. 28 U.S.C. § 1391(f)(4). But the Delaware district court had recently held in another case that the Republic was the alter ego of its instrumentality Petróleos de Venezuela, S.A., a ruling that resulted in the attachment of shares in a Petróleos de Venezuela-owned holding company in anticipation of a judicial auction of those shares to enforce a judgment against the Republic. See *Crystallex Int'l Corp.* v. *Bolivarian Republic of Venez.*, 333 F. Supp. 3d 380, 406, 426 (D. Del. 2018), *aff'd and*

[1] Petitioner also sued Petróleos de Venezuela SA, an instrumentality of the Republic. The Delaware district court dismissed the claims against Petróleos de Venezuela due to improper service, and Petitioner did not pursue those claims further.

remanded, 932 F.3d 126 (3d Cir. 2019). As petitioner's counsel told the Delaware district court, petitioner filed in Delaware to "be in a position to participate in any auction that the Court may supervise and to attach the shares that are of concern" in the *Crystallex* case. C.A. App. 1921; see *id.* at 1963.

Two days after filing suit, petitioner sent forms, entitled "Request for Service Abroad of Judicial or Extrajudicial Documents," to the Director of Venezuela's Office of Consular Affairs. Pet. App. 33a. The Office of Consular Affairs is the Republic's Central Authority for receiving requests for service under the Hague Service Convention. See Hague Conference of Private International Law, *Venezuela–Central Authority & Practical Information*.[2] The "Request for Service" asked for service on the Republic. C.A. App. 343-347. Like the Hague Service Convention itself, the "Request for Service" form gives a party more than one option for effecting service in the destination state. In this case, petitioner checked the box on each form requesting service under Article 5(1)(a) of the Hague Service Convention—that is, service "by a method prescribed by" Venezuelan law. Convention art. 5(a); see C.A. App. 343, 1049.

Two individuals, identified as "I. Ruiz" and "T. Flores," signed for delivery of the documents on December 21 and 27, 2018. Pet. App. 33a. The affiliation of these individuals with the Office of Consular Affairs (if any) is unknown to the parties.[3] The parties agree that service of process under the requirements of Venezuelan law was not thereafter effected by the Central Authority or

---

[2] https://bit.ly/3K0LsvC.

[3] Petitioner asserts without basis (at 6) that these individuals were "[e]mployees of the Foreign Ministry." The Republic disputed this characterization below. Pet. App. 33a-34a.

anyone acting on its behalf. Pet. App. 25a. Petitioner has not attempted service by any other method.

2. The Republic then underwent a significant transition in governance. On January 10, 2019, the fairly elected Venezuelan National Assembly determined, in accordance with the Venezuelan Constitution, that former president Nicolás Maduro had claimed victory in a fraudulent election. The National Assembly accordingly declared the presidency vacant; in an effort to restore democracy and constitutional rule, National Assembly President Juan Guaidó assumed the interim Presidency of the Republic on January 23. The United States immediately recognized Mr. Guaidó as the legitimate Interim President of Venezuela. U.S. Dep't of State, *Recognition of Juan Guaido as Venezuela's Interim President* (Jan. 23, 2019).[4] Following recognition by the United States, only the Guaidó Presidency has standing to appear for the Republic. See *Crystallex*, 932 F.3d at 135 n.2; U.S. Government's Response to the Bolivarian Republic of Venezuela's Motion for Victim Status and Restitution, at 4-5, *United States* v. *Ortega*, Case No. 18-cr-20685 (S.D. Fla. May 17, 2019), ECF No. 99.

Mr. Maduro has nevertheless refused to relinquish his position or to surrender control of the organs of government, such as the Foreign Ministry and the Ministry of Justice. Today, Mr. Maduro controls the Central Authority, which is an office in the Foreign Ministry.

3. On June 12, 2019, the clerk of the Delaware district court entered a clerk's default against the Republic. Pet. App. 34a. On June 24, petitioner moved for a default judgment. *Ibid.* The Republic, now under instructions from Interim President Guaidó, opposed petitioner's motion and

[4] https://bit.ly/2Ty0CCv.

cross-moved to dismiss for lack of personal jurisdiction due to insufficient service. *Ibid.*

On December 12, 2019, the Delaware district court denied petitioner's motion for default judgment and vacated the clerk's default. *Id.* at 80a. The court held that venue was improper and ordered that the case be transferred to the District of Columbia. *Id.* at 83a-84a. The Delaware court also ruled on the Republic's motion to dismiss for lack of personal jurisdiction, holding that "by serving the appropriate documents directly to the Central Authority designated by the Republic of Venezuela, Saint-Gobain served the Republic." *Id.* at 85a.

4. After transfer to the District of Columbia, petitioner moved for summary judgment, and the Republic cross-moved to dismiss for lack of personal jurisdiction. *Id.* at 35a. On February 1, 2021, the court granted petitioner's motion for summary judgment and denied the Republic's cross-motion, ruling that "service was properly made on the Republic." *Id.* at 57a.

In so ruling, the district court did not determine that petitioner had properly effected service under Article 5 of the Hague Service Convention, the provision petitioner had invoked in its Request for Service. Instead, the court held that "service was made on the Republic under Article 15 of the Convention." *Id.* at 52a. Article 15(1) provides that, in a case where "*the defendant has not appeared*, judgment shall not be given" absent certain specified conditions, including:

> (a) that the writ of summons "was served by a method prescribed by the internal law of the [receiving] State," or
>
> (b) that "the document was actually delivered to the defendant or to his residence by another method provided for by this Convention."

Convention art. 15(1) (emphasis added).

The district court acknowledged the Republic's observation that "there is no explicit authorization of service in the text of Article 15." Pet. App. 54a. But the court stated that "presumably … service can [be] inferred" in situations where the summons has actually been delivered to the Central Authority and the defendant is the receiving state. *Id.* at 50a-51a. Proceeding from the premise that "the Central Authority [is] the state that was served," the court held that, in cases where a foreign sovereign is "the party being served, no further action [is] required for service beyond actual delivery to the Central Authority." *Id.* at 56a.

5. The Republic appealed. The United States appeared as *amicus curiae* supporting the Republic. Among other things, the United States explained that "Article 15 does not create a service method." C.A. U.S. Br. 3. Instead, Article 15 "solely imposes requirements for entering a default judgment." *Ibid.* But "[e]ven if Article 15 had some bearing on the service question," the United States explained, "Saint-Gobain did not meet the requirements for judgment under that provision." *Id.* at 26. Article 15 applies only where "'the defendant has not appeared,'" but here the Republic has "appeared in the litigation." *Id.* at 26-27 (quoting Convention art. 15(1)).

Even apart from those problems, the United States explained, petitioner also did not "satisfy the particular requirements of either subsection of Article 15(1)." *Id.* at 27. Subsection (a) was not satisfied because petitioner did not serve the summons in the manner "required by Venezuelan law." *Id.* at 28. And subsection (b) was not satisfied because the summons was not "'actually delivered to the defendant by another method provided for by th[e] Convention.'" *Ibid.* (quoting Convention art. 15(1)(b)) (ellipsis omitted). Although the summons was delivered to Venezuela's Central Authority, the United States explained, "the Central Authority is not 'the defendant' in suits

against the state." *Ibid.* Finally, "even if the Central Authority could be served on behalf of the state, Saint-Gobain did not deliver the documents 'by another method provided for by this Convention.'" *Ibid.*

6. The D.C. Circuit reversed. Pet. App. 19a-29a. The court began its analysis by addressing whether petitioner had served the Republic under Article 5 of the Hague Service Convention. The court observed that "[t]he plain text of Article 5 of the Hague Convention requires that the Central Authority serve the defendant 'by a method prescribed by its internal law.'" *Id.* at 25a. Here, the court noted, "[t]he parties do not dispute … that the Attorney General [of Venezuela] was not served," as Venezuelan law requires. *Ibid.* "Consequently, service was not completed under Article 5 of the Convention." *Ibid.*

Next, the D.C. Circuit rejected petitioner's argument that, in cases where the defendant to be served is a state, merely transmitting a *request* for service to the Central Authority suffices under Article 5, on the theory that "the Central Authority is the state." *Ibid.* Petitioner's argument, the D.C. Circuit explained, "is unsupported by the plain text of the Convention." *Ibid.* Though the Central Authority receives requests for service, transmitting such a request does not itself constitutes service. See *id.* at 25a-26a. The Convention also provides that the Central Authority "retains the power to object to requests that do not comply with the Convention or that infringe the receiving state's sovereignty." *Ibid.* Thus, "[v]iewing the Central Authority as legally equivalent to a sovereign defendant would amend the Convention by effectively rendering irrelevant the signatory state's law in determining whether service is complete." *Id.* at 26a.

The D.C. Circuit also rejected petitioner's separate theory that Article 15(1) of the Convention provided a method for effecting service on the Republic. *Id.* at 26a-

27a. That provision applies only where "'the defendant has not appeared,'" but "[t]he Republic appeared before both the Delaware district court and the District of Columbia district court to challenge the personal jurisdiction of the courts." *Ibid.* (quoting Convention art. 15(1)). In addition, the D.C. Circuit explained, petitioner did not satisfy either subsection of Article 15(1): Petitioner "has neither completed service in compliance with Venezuelan law, which requires service on the Attorney General, nor identified another method of service under the Convention with which it complied." *Id.* at 27a.

The D.C. Circuit further explained that, to the extent the district courts in this case had concerns about the Republic's failure to ensure that its Central Authority carried out service under Venezuelan law pursuant to Article 5, "the plain text of the Convention speaks for itself." *Id.* at 28a. Nothing in the Convention relieves a plaintiff of the requirements of service when the defendant is a sovereign state. To the contrary, "[e]ven when 'the equities of a particular case may seem to point in the opposite direction,' the Supreme Court has required courts to adhere to the plain text of the FSIA and the Hague Convention in view of the 'sensitive diplomatic implications'" implicated by cases involving sovereign defendants. *Ibid.* (quoting *Harrison*, 139 S. Ct. at 1062).

In addition, the D.C. Circuit pointed out that "Saint-Gobain has alternative means of effecting service on the Republic." *Ibid.* In particular, the FSIA allows service through diplomatic channels, see 28 U.S.C. § 1608(a)(4), and the Convention also allows such service in case of "difficulties" or "exceptional circumstances." Pet. App. 28a. In any event, any claims of "inconvenience" by petitioner "do not affect how the courts are required by Supreme Court precedent to interpret the Convention." *Ibid.* (citing *Harrison*, 139 S. Ct. at 1062).

The D.C. Circuit reversed the judgment and remanded to afford petitioner an opportunity to effect service pursuant to any permissible method under the Hague Service Convention and 28 U.S.C. § 1608. Pet. App. 28a. Petitioner sought rehearing, but no member of the court called for a vote on petitioner's request. *Id.* at 17a.

To date, petitioner has not attempted to serve the Republic through diplomatic channels.

REASONS FOR DENYING THE PETITION

Petitioner asks this Court to decide "[w]hether a District Court deciding a motion for default judgment may find service upon a foreign State pursuant to Article 15 of the Hague Service Convention … where the plaintiff actually delivered service papers to the State's Central Authority." Pet. i. Yet that issue is not presented here because judgment was not entered on default. Rather, the Republic appeared, the Delaware district court *denied* petitioner's motion for a default judgment, and the D.C. district court entered judgment on the merits. Pet. App. 57a, 80a. On appeal, petitioner never challenged the denial of its motion for a default judgment, and the court of appeals never addressed it. Thus, this case is not a proper vehicle to decide issues concerning motions for default judgments, and the petition should be denied for that reason alone.

Even beyond that fatal flaw, review is unwarranted. Petitioner asserts (at 16) that the decision below is "inconsistent with federal law and the approach taken by other federal courts." Neither part of that assertion is correct. No other court of appeals has upheld service on a foreign sovereign under petitioner's theory. And as the D.C. Circuit correctly held, petitioner's interpretation of the Convention is inconsistent with "the plain text." Pet. App. 25a, 27a. The petition should be denied.

I. This Case Does Not Implicate Any Circuit Conflict

Petitioner asserts (at 17-18) a supposed conflict between the decision below and rulings of the Second and Fifth Circuits. But neither of those decisions—which concerned whether a default judgment was proper notwithstanding the absence of a certificate evidencing service—even considered petitioner's theory that Article 15(1) of the Convention establishes a free-standing method for service of process on a foreign state in *any* case, let alone in a case where the terms of Article 15(1) plainly are not met.

A. In *Box* v. *Dallas Mexican Consulate General*, 487 Fed. App'x 880 (5th Cir. 2012), the plaintiff brought a breach-of-contract action against the Dallas Mexican Consulate General. *Id.* at 882. The plaintiff "served the Consulate," which nevertheless "failed to answer or appear." *Ibid.* The district court entered a default judgment, which the district court then refused to set aside. *Id.* at 883-84. On appeal, the consulate argued that "the Hague Convention requires the foreign state to issue a certificate indicating service on itself, which Mexico never did in this case." *Id.* at 885. Thus, "the *sole argument* for lack of personal jurisdiction [wa]s that the Mexican government did not issue this certificate." *Ibid.* (emphasis added).

The Fifth Circuit rejected that argument in an unpublished, non-precedential order. Non-precedential orders are not the stuff of circuit splits. But *Box* does not conflict with the D.C. Circuit's decision in this case anyway.

As an initial matter, the Mexican consulate in *Box* "failed to answer or appear," and the district court entered a default judgment; the question for the court was accordingly whether to set aside a validly entered default judgment. *Id.* at 882. But here, "[t]he Republic appeared before both the Delaware district court and the District of

Columbia district court to challenge the personal jurisdiction of the courts," Pet. App. 26a-27a, and no default judgment was ever entered, see *id.* at 80a.

Moreover, in *Box*, the plaintiff "served the Consulate," so that "the sole argument for lack of personal jurisdiction" was "that the Mexican government did not issue th[e] certificate" required by the Convention. 487 Fed. App'x at 885. The Fifth Circuit held that service may be "properly perfected" "notwithstanding the failure of the Central Authority to return a Certificate." *Id.* at 886 (quotation marks omitted). Here, by contrast, the D.C. Circuit said nothing about the absence of a *certificate*; rather it based its decision on the undisputed fact that the plaintiff actually failed to effect *service* in accordance with local law or by another method authorized by the Convention. See Pet. App. 26a-27a.

Finally, the Fifth Circuit in *Box* did not construe Article 15(1) as a free-standing method of service, so the decision could not create any conflict regarding the proper reading of that provision.

B. The Second Circuit's decision in *Burda Media, Inc.* v. *Viertel*, 417 F.3d 292 (2d Cir. 2005), is even farther afield. The question there (as in *Box*) was whether a default judgment was properly entered against an individual defendant notwithstanding the failure of the French Ministry of Justice (France's Central Authority) to return a formal certificate of service. *Id.* at 299-300. The Second Circuit held that the default judgment was proper. *Id.* at 300. Although "the Ministry of Justice failed to return a formal Certificate," the court explained, the Ministry of Justice had effected service by dispatching the French police, which issued a report that "provide[d] all of th[e] information and thus serve[d] the same purpose as a formal Certificate." *Id.* at 300-01. In the Second Circuit's view, "[t]he fact that the French police, rather than the

Ministry of Justice, completed the report is immaterial." *Id.* at 30; see *ibid.* ("We see no reason why the police report cannot serve as a substitute for a formal Certificate in this case.").

The D.C. Circuit's decision in this case does not conflict with *Burda Media*. As in *Box* (but unlike here), the district court entered a default judgment after the defendant failed to "appear[]." *Id.* at 297. And as in *Box* (but unlike here), the dispute concerned issuance of the formal *Certificate*. The Second Circuit's conclusion that a police report could serve as an "adequate substitute" for the Certificate has no application to this case. In *Burda Media*, moreover, "French police served [the] summons on [the defendant]" himself, *id.* at 303,[5] and there was no dispute that such service complied with local French law. See *id.* at 296. That contrasts sharply with this case, where petitioner's failure to "complete[] service in compliance with Venezuelan law" was key to the D.C. Circuit's ruling. Pet. App. 27a. Finally, as in *Box*, the Second Circuit did not construe Article 15(1) as a free-standing method of service, so the decision could not create any conflict regarding the proper reading of that provision.

Petitioner latches onto the Second Circuit's statement that "the Hague Convention should be read together with Rule 4 [of the Federal Rules of Civil Procedure], which stresses actual notice, rather than strict formalism." Pet. 19 (quoting *Burda Media*, 417 F.3d at 301) (cleaned up). Petitioner insists (at 22) that this reasoning conflicts with the D.C. Circuit's adherence to the "strict formal requirements of the Hague Service Convention." That is nonsense. Rule 4 itself distinguishes between service on individuals (where actual notice and practicality are paramount, under Rule 4(f)) and service on foreign

[5] The defendant claimed that he never received the summons, but the Second Circuit found this assertion "patently incredible." *Ibid.*

states (which under Rule 4(j) requires strict compliance with 28 U.S.C. § 1608(a), see *Harrison*, 139 S. Ct. at 1062). *Burda Media* concerned service on an individual, not a foreign state.

II. The D.C. Circuit's Decision Is Correct

Petitioner argues (at 22-23) that the Court should grant review for error correction, asserting that the D.C. Circuit created a "loophole" in the Convention that permits foreign sovereigns to "evade" service by failing to complete main-channel service under local law. Even if error correction were a basis for review, the D.C. Circuit made no error here. It simply applied the unambiguous text of the Convention as written, which required either (a) completion of service in accordance with Venezuelan law (which admittedly never occurred) or (b) service under another method authorized by the Convention (which petitioner has thus far elected not to initiate).

In reality, petitioner is asking this Court to rewrite the Convention in a way that would make service on a foreign sovereign easier than the procedure provided for by the text to which the contracting states agreed. But "where the text [of a treaty] is clear, as it is here, [courts] have no power to insert an amendment." *Chan* v. *Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989).

A. Petitioner argues (at 27) that Article 15 of the Convention authorizes service of process upon a foreign sovereign merely by delivery to the Central Authority of a *request* for service. The D.C. Circuit correctly rejected that theory on multiple independent grounds.

1. As an initial matter, Article 15 does not provide a method of service *at all*. The Convention contains a number of articles that expressly authorize methods of service, see arts. 5, 8-11, 19, but Article 15 is not one of them. See also *Schlunk*, 486 U.S. at 699 (citing "methods of service" authorized under other articles of the Convention,

but not Article 15). Indeed, to the extent Article 15 refers to service at all, it points the reader to methods of service authorized *elsewhere*. See Convention art. 15(1)(a) (referring to service "by a method prescribed by the internal law of the State"). In sum, as the United States explained in its amicus brief in the court of appeals (at 23), "Article 15 is not a service provision."

Rather than authorize service, Article 15 "limit[s] the circumstances in which a default judgment may be entered." *Schlunk*, 486 U.S. at 699. That is apparent from its text. Under Article 15(1), in a case where "the defendant has not appeared, *judgment shall not be given* until it is established" that the writ of summons either (a) "was served by a method prescribed by the internal law" of the receiving state or (b) "was actually delivered to the defendant … by another method provided for by this Convention." Convention art. 15(1) (emphasis added). And the effect of the italicized phrase in limiting default judgment is made even clearer by the Article's second sentence: "Each Contracting State shall be free to declare that the judge, *notwithstanding the provisions of the first paragraph of this Article, may give judgment* even if no certificate of service or delivery has been received, if all the following conditions are fulfilled." *Id.* art. 15(2) (emphasis added). Here, of course, no default judgment is at issue, so Article 15 is inapplicable.

But even if Article 15(1) did establish a free-standing method of service, that would not help petitioner: As the D.C. Circuit explained, petitioner "has not satisfied [its] requirements." Pet. App. 27a. For one thing, Article 15(1) only applies where "the defendant has not appeared." The Republic "appeared before both the Delaware district court and the District of Columbia district court." *Id.* at 26a-27a. For another, petitioner has not satisfied the requirements of either subparagraph of Article 15(1): Petitioner "has neither [a] completed service in compliance

with Venezuelan law, which requires service on the Attorney General, nor [b] identified another method of service under the Convention with which it complied." *Id.* at 27a. Petitioner does not address either aspect of the D.C. Circuit's reasoning—let alone explain how both were incorrect.

2. Rather than engage with the decision below, or the treaty text on which it is based, petitioner contends (at 28) that "Article 15 may provide the basis for finding service by virtue of the fact that it also authorizes a court to enter a final default judgment." Petitioner reasons (*ibid.*) that Article 15 implicitly authorizes service, or else "the court would have no authority to enter a judgment in the first place." Petitioner thus concludes that valid service was made on the Republic when the "service papers were 'actually delivered'" to its Central Authority. *Ibid.* (quoting Convention art. 15(1)(b)).

Petitioner's "implied authority" argument is incorrect. To read a treaty's *silence* as providing implied authority is fundamentally incompatible with the judicial function in our constitutional system, which delegates power to make treaties to the Executive and the Senate. As this Court has explained, "to alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty." *In re The Amiable Isabella*, 19 U.S. (6 Wheat.) 1, 71 (1821). That principle applies with particular force here, where service on a foreign sovereign has "sensitive diplomatic implications." See *Harrison*, 139 S. Ct. at 1062.

But petitioner's logic is faulty even on its own terms. Article 15(1)(b) forbids a default judgment in the absence of "actual delivery" of the summons; but that does not mean that actual delivery is a *substitute* for authorized

service. Rather, Article 15(1)(b)'s actual-delivery requirement imposes a *heightened* standard in a subset of cases—those in which service is not made in compliance with the internal laws of the receiving state.

Some methods provided for by the Convention, in particular Article 5(a), affirmatively require service as "prescribed by [the] internal law for the service of documents" in the receiving state. Article 15(1)(a) covers those cases by requiring "service by a method prescribed by the internal law" of the receiving state as a prerequisite to entry of a default judgment. Other methods of service provided for by the Convention, however, do not require service as prescribed by the internal law of the receiving state.

Article 15(1)(b) covers those other methods of service. It provides that if service is made "by another method provided for by this Convention," then a default judgment may not issue until the summons has been "actually delivered" by that other method. According to the official report accompanying the initial draft of the Convention, the drafters were "more demanding" ("*plus exigeant*") in subparagraph (b) because some of the Convention's alternative channels (e.g., service by mail or service through diplomatic or consular channels) "give the defendant fewer safeguards than the fulfillment of the formalities required by the receiving state obtained through the Central Authority." III Conférence de la Haye de Droit International Privé, *Actes et Documents de la Dixième Session* 95 (1964) (*Actes et Documents*).[6] The

[6] https://perma.cc/5SN2-TKUB ("Il institue une sanction indirecte à l'encontre du demandeur qui n'aurait pas fait, selon les termes de la convention, la notification de l'acte introductif d'instance ou d'un acte équivalent."). See also *id.* at 95 (" [O]n a été plus exigeant que précédemment. Les voies de transmission subsidiaires, comme la voie postale ou l'intervention directe des agents diplomatiques ou

drafters affirmatively rejected proposals that would have permitted judgment if the defendant were merely put in a position to defend itself or contacted without any formalities (as allowed in some circumstances by English law). *Ibid.*

Petitioner relies on a snippet from the Convention's drafting history in which the drafters described Article 15 as instituting an "indirect sanction against those who ignore" the Convention's mechanisms. Pet. 28 (citing *Schlunk*, 486 U.S. at 705). But the full sentence confirms that the Convention's drafters designed Article 15 as a shield for *defendants*—in cases where *the plaintiff* did not serve process according to the Convention—not as a sword for plaintiffs who desire an alternative channel for service upon a foreign sovereign: "It establishes an indirect sanction *against the requesting party that has not served*, in accordance with the terms of the Convention, the document instituting the proceedings or an equivalent document." *Actes et Documents* 92 (emphasis added).[7]

3. In addition to the flaws just described, petitioner's textual argument is faulty in yet another respect: It depends on establishing that "the Central Authority amounts to the State itself." Pet. 26. Petitioner argues (*ibid.*) that when its request for service was delivered to the Republic's Central Authority (the Foreign Ministry), that was the equivalent of service on the State itself because "[t]he Foreign Ministry is part in parcel [sic] of Venezuela's government." Unless the Central Authority is

---

consulaires, ne donnent pas autant de garanties au défendeur que l'accomplissement des formalités de l'Etat requis obtenues par l'entremise de l'Autorité centrale.").

[7] https://perma.cc/5Sn2-TKUB; see *id.* at 363 (explaining that "[t]his indirect sanction had, above all, the purpose of defending the interests of the defendant") ("Cette sanction indirecte a surtout eu pour but de défendre les intérêts du défendeur.").

treated as equivalent to the state, petitioner argues (at 26-27), the Convention would allow "an arm of the State [to] simultaneously receive service papers, review them for compliance, and ultimately claim ignorance as to their contents." According to petitioner (at 26), any reading that would allow such a result is "a stretch."

But it is petitioner's reading that stretches the text. The Convention makes clear that the Central Authority is *not* the state—nor even an agent authorized to accept service of process on the state's behalf. Rather, the Central Authority "will undertake to receive *requests for service* … and to proceed in conformity with the provisions of Articles 3 to 6." Convention art. 2 (emphasis added). Those provisions thus distinguish "requests" for service, which any competent officer under the law of the originating state may "forward" to the Central Authority, *id.* art. 3 (emphasis added), from *actual* "service," which the Central Authority "itself" (or "an appropriate agency") must complete, *id.* art. 5(a). The D.C. Circuit was accordingly correct to reject petitioner's argument as "unsupported by the plain text of the Convention." Pet. App. 25a.

Petitioner's argument would make a hash out of other aspects of the Convention as well. When attempting service through a sovereign's Central Authority, service must be made "by a method prescribed by [the sovereign's] internal law for the service of documents in domestic actions." Convention art. 5(a). Petitioner's theory would nullify that requirement. As the D.C. Circuit explained, "[v]iewing the Central Authority as legally equivalent to a sovereign defendant would amend the Convention by effectively rendering irrelevant the signatory state's law in determining whether service is complete." Pet. App. 26a.

Petitioner's attempt to equate the Central Authority with the state itself is also at odds with the unbroken

understanding of numerous contracting states—including the United States itself—whose interpretation merits "great weight." See *Water Splash, Inc.*, 137 S. Ct. at 1512. From the start, signatories understood that a plaintiff does not effect service on a sovereign defendant by delivering a request for service to the Central Authority. The lead member of the U.S. delegation involved in drafting the Convention stated that the Central Authority's role is to "serve the document" or to "have it served" by an appropriate agency. Philip W. Amram, *The Proposed International Convention on the Service of Documents Abroad*, 51 A.B.A.J. 650, 652 (1965). Consistent with that understanding, the United States' own Central Authority advises that "receipt of a request for service from a foreign court by the U.S. Central Authority is not effective service. Service is only complete upon receipt of the documents by the appropriate U.S. Government office or agency." U.S. Dep't of Justice, Office of Int'l Judicial Assistance, *Service of Judicial Documents on the United States Government Pursuant to the Hague Service Convention* (Jan. 12, 2018).[8] The brief filed by the United States in the court of appeals makes the same point. See C.A. U.S. Br. at 15 ("[T]he Central Authority is not an agent for service.").

"Other states parties [to the Convention] agree that service is not made upon the Central Authority." *Id.* at 17 (collecting authorities). The Hague Conference itself warns that "[t]he Central Authority is *only* an authority in charge of transmitting documents to the recipient; it *may not* be treated as an agent of the defendant on whom

[8] https://bit.ly/3QT3uT0.

the document may be served." *Practical Handbook* ¶ 112 (emphases added).[9]

4. Petitioner's point is not really about the Convention's text at all. Petitioner expresses concern (at 25) that applying the text as written would frustrate the supposed "purpose" of the Convention because it would allow a foreign state to "us[e] its Central Authority, an arm of its own government … to filter out unwelcome service requests." Allowing sovereigns to avoid service in that manner, petitioner says (*ibid.*), would "effectively render[] the Convention's purpose futile."

Even if petitioner's concern about evasion were valid, of course, it would not justify excusing compliance with the Convention's requirements. As this Court recently explained in rejecting an attempt at service by terrorism victims suing a state sponsor of terrorism, "there are circumstances in which the rule of law demands adherence to strict requirements even when the equities of a particular case may seem to point in the opposite direction." *Harrison*, 139 S. Ct. at 1062. The requirements of serving a sovereign nation, "which apply to a category of cases with sensitive diplomatic implications, clearly fall into this category." *Ibid.*

But petitioner's concern about rendering "the Convention's purpose futile" is *not* valid. As petitioner acknowledges, the Central Authority retains the power "to object to service requests that are deemed to 'infringe

---

[9] Petitioner notes (at 26) that the FSIA permits service upon a state through the transmission of documents by the clerk of court to the head of the ministry of foreign affairs of the state concerned. But the FSIA provision that authorizes such service, 28 U.S.C. § 1608(a)(3), is not at issue here and is irrelevant to the interpretation of the Convention's text. If anything, the absence of language in the Convention parallel to that of § 1608(a)(2) reinforces that petitioner's reading of the Convention is wrong.

[national] sovereignty or security.'" Pet. 27 (quoting Convention art. 13); see Convention art. 4 (authorizing Central Authority to reject request for service where "the Central Authority considers that the request does not comply with the provisions of the present Convention"). Nothing in the Convention limits the Central Authority's ability to exercise that power in cases where the state itself is the defendant. See Pet. App. 27a ("At no point does the Hague Convention modify [its provisions] to dispense with their requirements for service when the defendant is a state.").

The Convention also makes alternative methods of service—specifically, service through diplomatic channels—available. Convention art. 9(2). As explained below, service through diplomatic channels has been available to petitioner since the start of this dispute; petitioner has simply chosen not to avail itself of that option. See pp. 25-28, *infra*. In any event, that the Convention was generally intended to "simplify, standardize, and generally improve the process of serving documents abroad," Pet. 25 (quoting *Water Splash, Inc.*, 137 S. Ct. at 1507), provides no license to create atextual shortcuts for service upon foreign states.

B. The Question Presented is "[w]hether a District Court deciding a motion for default judgment may find service upon a foreign State pursuant to Article 15 of the Hague Service Convention" under the circumstances of this case. Yet, confusingly, petitioner complains (at 24) about the way "[t]he D.C. Circuit Court interpreted the text of Article 5." Petitioner's argument concerning the proper reading of Article 5 is thus outside its own Question Presented.

Petitioner's argument is also baseless. As the D.C. Circuit explained:

> The plain text of Article 5 of the Hague Convention requires that the Central Authority serve the defendant "by a method prescribed by its internal law" or "by a particular method requested by the applicant, unless such a method is incompatible with the law of the State addressed." Because Saint-Gobain did not propose its own method of service, this court looks to the method of service prescribed by the law of the Republic to determine whether Article 5's requirements were met. Under Venezuelan law, lawsuits against the Republic must be served on the Attorney General of the Republic. The parties do not dispute either that the Attorney General was not served or that Saint-Gobain did not receive a certificate of service from the Central Authority. Consequently, service was not completed under Article 5 of the Convention.

Pet. App. 25a (citations and paragraph break omitted).

Petitioner argues (at 24) that the D.C. Circuit misread Article 5 by failing to appreciate "that the plain text of the Convention was drafted in the context of service upon foreign individuals and entities as opposed to foreign States themselves." But the Convention itself provides that it "shall apply in *all cases*, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad." Convention art. 1 (emphasis added). As the United States explained in the court of appeals, "there is no basis to apply the Convention's terms differently simply because the defendant to be served is a sovereign state." C.A. U.S. Br. at 2-3. This Court has already rejected "the dangerous principle that judges can give the same statutory text different meanings in different cases," *Clark* v. *Martinez*, 543 U.S. 371, 386 (2005), and the same principle applies to treaty interpretation.

III. This Court's Review Is Unnecessary

Petitioner asserts (at 13) that "the facts of this case." illustrate the need for this Court's review. But the facts of this case merely demonstrate that a stubborn litigant that refuses readily available opportunities for service of process can generate years of unnecessary litigation.

The vast majority of litigants who have elected to seek judgment against the Republic have availed themselves of the method of service that *is* available in light of the unusual status of the Guaidó government—diplomatic service by the U.S. State Department. See p. 28 n.10, *infra*. The State Department and the Republic recognize such service as proper, and litigants who utilize it proceed to an adjudication on the merits of their claims.

In contrast to all these litigants, this petitioner alone insists on taking a shortcut. This case thus reflects the intransigence of a litigant dissatisfied with the result it got after careful consideration by the D.C. Circuit, not a significant or recurring conflict among the Circuits.

A. Petitioner contends (at 15) that the D.C. Circuit's reading of the Convention creates "perverse incentive for States to abuse both international and United States' domestic law." That is baseless hyperbole. As the D.C. Circuit explained, petitioner "has alternative means of effecting service on the Republic," including "service through diplomatic channels." Pet. App. 28a (citing 28 U.S.C. § 1608(a)(4)). As in *Harrison*, therefore, insisting on proper service does not have to be "the end of the road" for petitioner's claims. 139 S. Ct. at 1062.

Service through diplomatic channels is "widely used in international practice," and in fact "is accepted and *indeed preferred* by the United States in suits brought against the United States Government in foreign courts." H.R. Rep. No. 94-1487 at 25 (citing Dep't of State, Circular Instruction No. CA-10922, 56 Am. J. Int'l L. 532-33

(1962)) (emphasis added). The drafters of the Convention contemplated that diplomatic channels would remain a safety valve for service in the event other methods of service were unsuccessful. Each contracting state is authorized to "use diplomatic channels" to forward documents for service "if exceptional circumstances so require." Convention art. 9(2); see *Actes et Documents* at 373. And the Convention further provides that "[d]ifficulties which may arise in connection with the transmission of judicial documents for service shall be settled through diplomatic channels." Convention art. 14; see *Actes et Documents* at 107 (diplomatic service remains "the ultimate guarantee" (*l'ultime garantie*)).

Diplomatic channels are also a backstop under the FSIA. Section 1608(a)(4) authorizes plaintiffs to serve process on foreign sovereigns via diplomatic channels if the other methods of service—including service under "an applicable international convention on service of judicial documents," 28 U.S.C. § 1608(a)(2)—have not succeeded. Congress included that provision to foreclose the possibility of recalcitrant states escaping the jurisdiction of U.S. courts. Indeed, the House Judiciary Committee amended the bill to eliminate a provision that would have permitted foreign states to object to service through diplomatic channels. See H.R. Rep. 94-1487 at 11; *Hearing Before the Subcomm. on Admin. Law and Gov't Rels. of the Comm. on H. Comm. on the Judiciary*, 94th Cong., 2d Sess., at 70. Thus, Section 1608(a)(4) permits service through diplomatic channels even *without* the consent of the receiving state.

B. The Republic has repeatedly advised petitioner since August 2019 that it does not object to service of process through diplomatic channels. It made the same representation to the court of appeals and both district courts. *E.g.*, C.A. Br. 18-19. Numerous other litigants have used diplomatic channels successfully to accomplish

valid service on the Republic, including during the pendency of this litigation.[10] This track record gives the lie to petitioner's assertion (at 16) that "Venezuela…has a long history of evading service and obfuscating otherwise summary proceedings to avoid an inevitable judgment."

Indeed, while petitioner complains (at 15-16) that the failure to complete service has impeded the progress of its attempts to enforce its arbitral award, this is a self-inflicted wound. Petitioner has refused even to *initiate* such service, asserting that "there is no indication of how long diplomatic service may take." Pet. App. 28a. But petitioner's intransigence is baffling. It has been litigating the adequacy of service for more than three years. Had petitioner taken the modest step of commencing service through diplomatic channels, service would have been completed long ago.

---

[10] See *Neuhauser* v. *Bolivarian Rep. of Venez.*, No. 1:20-cv-10342-AT (S.D.N.Y. May 18, 2022), ECF No. 29-1; *Syracuse Mountains Corp.* v. *Bolivarian Rep. of Venez.*, No. 1:21-cv-02678-AT (S.D.N.Y. Mar. 9, 2022), ECF No. 33-1; *Chickpen, S.A.* v. *Bolivarian Rep. of Venez.*, No. 1:21-cv-00597-AT (S.D.N.Y. July 30, 2021), ECF No. 30-2; *Lovati* v. *Bolivarian Rep. of Venez.*, No. 1:19-cv-04796-ALC-VF (S.D.N.Y. July 15, 2021), ECF No. 63; *Lovati* v. *Bolivarian Rep. of Venez.*, No. 1:19-cv-04793-ALC-VF (S.D.N.Y. July 15, 2021), ECF No. 58; *Altana Credit Opportunities Fund SPC* v. *Bolivarian Rep. of Venez.*, No. 1:20-cv-08402-AT (S.D.N.Y. June 24, 2021), ECF No. 31-1; *Pharo Gaia Fund, Ltd.* v. *Bolivarian Rep. of Venez.*, No. 1:20-cv-08497-AT (S.D.N.Y. Mar. 8, 2021), ECF No. 17; *ConocoPhillips Petrozuata B.V.* v. *Bolivarian Rep. of Venez.*, No. 1:19-cv-00683-CJN (D.D.C. Jan. 16, 2020), ECF No. 20; *ACL1 Invs. Ltd.* v. *Bolivarian Rep. of Venez.*, No. 19-cv-09014 (LLS) (S.D.N.Y. Feb. 4, 2020), ECF No. 26; *Contrarian Capital Mgmt., LLC* v. *Bolivarian Rep. of Venez.*, No. 1:19-cv-11018-AT-KNF (S.D.N.Y. Feb. 3, 2020), ECF No. 27; *Valores Mundiales, L.S.* v. *Bolivarian Rep. of Venez.*, No. 1:19-cv-00046-FYP-RMM (D.D.C. Aug. 1, 2019), ECF No. 10.

C. Finally, even if this Court were inclined to consider granting the petition, the Court should first seek the views of the United States.

The United States is a party to the Convention; it played a "leading role" in its negotiation; and it "has a substantial interest in ensuring that the Convention is properly construed." C.A. U.S. Br. at 1. As the United States explained to the D.C. Circuit, "[i]ncorrect application of the Convention by U.S. courts risks exposing the United States to accusations that it has breached its international legal obligations under the Convention as well as adverse reciprocal treatment in foreign litigation." *Id.* at 1-2. The Court should therefore not disturb the well-reasoned decision below without at least hearing the position of the United States.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

E. WHITNEY DEBEVOISE
ALLON KEDEM
SALLY L. PEI
STEPHEN K. WIRTH
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000

KENT A. YALOWITZ
Counsel of Record
ARNOLD & PORTER
KAYE SCHOLER LLP
250 West 55th Street
New York, NY 10019
(212) 836-8000
kent.yalowitz@arnoldporter.com

AUGUST 2022