22-6019

No.

IN THE

Supreme Court of the United States

RICHARD L. GREEN

Petitioner

v.

DINH HOANG PHUONG

Respondent

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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ORIGINAL

QUESTIONS PRESENTED

The Hague Convention on the Recognition and Enforcement of Foreign Arbitral Awards commonly referred to as The New York Convention 1958 Article III requires that, "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,..."

On August 28, 2014 Mr. Green and Ms. Dinh contracted in Indonesia for binding arbitration in Indonesia, under Indonesian law before a specific religious tribunal. The contract provides for enforcement in Indonesia, the United States and Vietnam and any other State where Mr. Green resides. In December 2018 the parties had a dispute and the matter was referred to the party appointed arbitrator in Indonesia. The Arbitrator was appointed on March 16, 2020. The arbitrator accepted his appointment and set the arbitration schedule and the parties preceded with the International Indonesian Foreign Arbitration as is required by law. Both parties were represented by counsel and on April 16, 2020 the Indonesian Tribunal issued its Partial Final Award on Jurisdiction Enforceability. On May 5, 2020 Ms. Dinh was dissatisfied with the Tribunals findings and moved the Alaska State Court to stay the ongoing Indonesian Arbitration. Mr. Green filed in United States District Court on May 15, 2020 for confirmation and enforcement of the Indonesian Arbitral Award (Partial Final Award on Enforceability and Jurisdiction). The Indonesian Tribunal issued the

Final Award on All Issues on May 17, 2020. After the Indonesian Arbitration was complete on May 19, 2020 the Alaska State Court issued an order to "stay" the Indonesian Foreign Arbitration conducted in Indonesia under Indonesian law as the parties contract required. The State Court cited outdated state law (AS 09.43.020(b).[1] During confirmation Ms. Dinh did not raise any of the 6 enumerable defenses required by the Convention in Article V. The District Court refused confirmation citing the Younger Doctrine. The United States Court of Appeals for the Ninth Circuit affirmed citing *Younger v. Harris*, 401 U.S. 37 (1971) stating,

"The district court properly dismissed Green's action as barred under the *Younger* abstention doctrine because federal courts are required to abstain from interfering with pending state court proceedings where "the federal action would have the practical effect of enjoining the state proceedings."

The questions presented are:

1. Whether it was improper for the Federal Court to abstain using the Younger Doctrine in direct contradiction to this court's ruling in *New Orleans Public*

[1] In 2005 the State of Alaska fully adopted the Revised Uniform Arbitration Act. AS 09.43.300 **(a)** AS 09.43.300 - 09.43.595 govern an agreement to arbitrate made on or after January 1, 2005. The State Courts use of this statutory provision is inapplicable and is outdated law that does not apply to the parties 2014 contract to arbitrate.

Service, Inc. v. Council of City of New Orleans, 491 U. S. 350, 368 (NOPSI) and Sprint Communications, Inc. v. Jacobs.

2. Weather is was improper for the Federal Court to abstain where the Federal Jurisdiction has original jurisdiction in foreign arbitral enforcement actions under 9 U.S. Code § 203?[2]
3. Was it improper for the Federal Court to refuse confirmation and enforcement when none of the six enumerable defenses had not been raised?
4. Was it improper for the court to refuse res judicata when a decision has already been made on jurisdiction and on the issues?

[2] "The **district courts of the United States** (including the courts enumerated in section 460 of title 28) **shall have original jurisdiction** over such an action or proceeding…" [emphasis added]

PARTIES TO THE PROCEEDING

All parties to the proceeding are named in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Richard Green respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS

The court of appeals' en banc opinion and denial of review/rehearing and the District Courts order is attached in Appendix A to the Petition.

JURISDICTION

The judgment of the court of appeals was entered on May 4, 2022. This court has jurisdiction under 28 U.S.C. § 1254(1).

TREATY AND STATUTORY PROVISIONS INVOLVED

THE HAGUE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS COMMONLY REFERRED TO AS ("THE NEW YORK CONVENTION 1958") ARE REPRODUCED IN APPENDIX I AND THE RELEVANT PORTIONS OF ITS ENABLING STATUTE, THE 9 U.S. CODE CHAPTER 2 – CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS ARE REPRODUCED IN APPENDIX J TO THE PETITION.

STATEMENT OF CASE

Jurisdiction in an International contract dispute is the threshold question especially with a broad arbitration[1] clause that includes *"any and all disputes".*

Whether a court has subject-matter jurisdiction is a "threshold determination" in any action.[2][3] This reflects the fundamental principle that "[j]urisdiction is power to declare the law."[4] Jurisdiction to hear and decide a case is the fundamental basis for all cases. The answer controls which court is the proper court to hear and decide a case. In this case the codified statutes[5] clear vest original[6] (but secondary)

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[1] In *Preston v. Ferrer, 552 U.S. 346 (2008)* the United States Supreme Court held, *"When parties agree to arbitrate* ***all questions*** *arising under a contract, the Federal Arbitration Act (FAA), 9 U. S. C. §1 et seq.,* ***supersedes state laws lodging primary jurisdiction in another forum,*** *whether judicial or administrative. Pp. 4–16."*

[2] In *Albano this court held, "when parties voluntarily agree to arbitrate,* ***they waive access to the court,*** *and* ***any decision rendered will be binding and subject to review only under limited circumstances,*** *as described infra."*

[3] Am. Telecom Co. v. Republic of Lebanon, 501 F.3d 534, 537 (6th Cir. 2007).

[4] Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94 (1998) (quoting Ex parte McCardle, 74 U.S. (7 Wall.) 506, 514 (1868)).

[5] U.S.C. 9 § 201-207

[6] ***9 U.S. Code § 203*** *"An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States ...* ***shall have original jurisdiction*** *over such an action or proceeding, regardless of the amount in controversy." NOTE:* Original jurisdiction - A court's power to hear and decide a case before any appellate review. A trial court must necessarily have original jurisdiction over the types of cases it hears....the Court's jurisdiction is not only "original," it is exclusive.

jurisdiction[7] in the District Court for confirmation, registration and enforcement of foreign arbitral awards. Confirmation and enforcement are mandatory[8] unless one of the six enumerable defenses is raised in the first pleading. There is no provision for the District Court to refuse or decline to enforce a foreign award.[9]

The Ninth Circuit's decision to abstain is in direct opposition to its own previous rulings in G.C. and K.B. v. Wilson (9th Cir. 2003)[10], *Mozes v. Mozes, 239 F.3d 1067, 1085 n. 55 (9th Cir. 2001)*[11], and *ReadyLink Healthcare, Inc. v. State Comp. Ins. Fund,*

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[7] ***"United States courts have secondary jurisdiction over a foreign award, so they may not vacate, set aside, or modify the award,*** *but are limited to deciding whether the award may be enforced. Kakhri v. Marriot Int'l Hotels, Inc. 201 F. Supp. 3d 696, 710-11 (D Md. 2016)."*

[8] ***9 U.S. Code § 207*** *"Within three years after an arbitral award falling under the Convention is made, ...* ***The court shall confirm the award*** *unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention."*

[9] *In Figueiredo Ferraz, the Second Circuit cited American Dredging Co. v. Miller, 510 U.S. 443, 453 (1994) the court held, "and could be contemplated under the New York convention's provisions that says that* ***states shall ("recognize arbitration awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon."*** *665 F. 3d at 392...") ("the procedure provision of the treaties permit variation with regard to the manner in which signatory states enforced international arbitration awards,* ***they do not provide a means by which a state may decline to enforce such awards at all.")***

[10] *The Appellee did not make an appearance in the arbitration they did seek to prevent the arbitration from going forward. the arbitrator, in February, 2000, granted an award in favor of GC KB on its claim."*

[11] *"The district court, in confirming GC KB's arbitration award, did not have to find that the Hawaii state court order was wrong. It simply dealt with the confirmability of the award pursuant to section 9 of the FAA,"*

754 F.3d 754, 758 (9th Cir. 2014)[12]. In rendering this decision to abstain from exercising jurisdiction under Younger for registration and enforcement of a foreign arbitral award the Nineth Cricut departed from the standard set and reaffirmed several times by this Court and is in direct opposition to this Court's precedent in *Scherk v Alberto-Culver Co 417 US 506 (1974)*[13], *Mitsubishi Motors Corporation. V. Soler Chrysler Plymouth, Inc. 63 U.S. 614, 631 (1985); see also ESAB Grp. Inc. V. Zurich Ins. PLC, 685 F. 3d 376, 390 (4th Cir. 2012)*[14] *and Sprint v Jacobs EIGHTH CIRCUIT No. 12–815 (2013)*[15], *New Orleans Public Service, Inc. v. Council of City of*

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[12] "Younger did not apply to state court proceedings because the proceedings involve the dispute between the private parties, which was adjudicated by a state officer." Readylink summary. See also: Allstate Life Ins. v. Rapid Settlements 328 F. App'x 289 (5th Cir. 2009)

[13] "The United States is the signatory to the New York Convention and has an *"emphatic federal policy in favor of arbitral dispute resolution"*

[14] *In the context of foreign arbitral awards, this policy includes "concerns of international comity, respect for the capacities of foreign and transnational tribunals...." Mitsubishi motors,)*

[15] Invoking Younger v. Harris, 401 U. S. 37, the Federal District Court abstained from adjudicating Sprint's complaint in deference to the parallel state-court proceeding. The Eighth Circuit affirmed the District Court's abstention decision, concluding that Younger abstention was required because the ongoing state-court review concerned Iowa's important interest in regulating and enforcing state utility rates.
Held: *This case does not fall within any of the three classes of exceptional cases for which Younger abstention is appropriate. Pp. 6–12.*
(a) The District Court had jurisdiction to decide whether federal law preempted the IUB's decision, see Verizon Md. Inc. v. Public Serv. Comm'n of Md., 535 U. S. 635, 642, and thus had a "virtually unflagging obligation" to hear and decide the case, Colorado River Water Conservation Dist. v. United States, 424 U. S. 800, 817.

New Orleans, 491 U. S. 350, 368 (NOPSI)[16] *and Colorado River, 424 U.S. at 817, 96 S. Ct. 1236*[17].

The American Bar Association reviewing the new case law which narrowly defined the Younger doctrine stated;

> *"Federal courts should abstain from deciding cases only in "exceptional" circumstances, the U.S. Supreme Court reinforced in Sprint Communications, Inc. v. Jacobs. In a strongly worded decision, the Supreme Court explained that federal courts have a "virtually unflagging" obligation to hear cases within their jurisdiction.* ***The unanimous ruling emphasizes that abstention pursuant to Younger v. Harris is not appropriate merely because a state court is considering a case involving the same subject matter.*** *" [emphasis added]*

The Ninth Circuit ruled that a foreign arbitration award is not res judicata even when personal and subject-matter jurisdiction has already been litigated and a final ruling on all of the issues has been made on the merits. This ruling is a clear departure from previous case law in *G.C. and K.B. Investments, Inc. v. Wilson 326*

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[16] *NOPSI identified three such "exceptional circumstances." 1. First, Younger precludes federal intrusion into ongoing state criminal prosecutions. See 491 U. S., at 368. 2. Second, certain "civil enforcement proceedings" warrant Younger abstention. Ibid. 3. Finally, federal courts should refrain from interfering with pending "civil proceedings involving certain orders . . . uniquely in furtherance of the state courts' ability to perform their judicial functions." Ibid. This Court has not applied Younger outside these three "exceptional" categories, and rules, in accord with NOPSI, that they define Younger's scope. Pp. 6–8.*

[17] *"If the mere "initiation" judicial or quasi-additional administrative proceedings were an act of civil enforcement, younger would extend every case in which a state judicial officer resolve the dispute between two private parties. This would render meaningless the "virtually unflagging obligation of the federal court to exercise the jurisdiction given them" and "stand younger to virtually all parallel state and federal proceedings, at least where a party could identify a possible important state interest," Sprint, 134 S. Ct. at 593. "The district court therefore erred by abstaining." *quoted from Ready link (2014) at 760.*

F.3d_1096 (9th Cir. 2003)[18], and is in direct violation of this courts president held in *Hart Steel Co. v. Railroad Supply Co.,* 244 U. S. 294, 244 U. S. 299. Pp. 452 U. S. 398-402.[19]

The Ninth Circuit opined that without a motion for removal under 9 U.S. Code § 205 from State Court, the District Court somehow lacks jurisdiction when the State case is ongoing in the preliminary/interim stages. This also cannot be supported by the previous ruling in several circuits.

In this case Mr. Green has never asked the State Court to register, confirm and enforce the foreign awards under U.S.C 9 § 207 and the State Court action was in preliminary/interim stages and at the filing of this petition the State case is still pending but has been stayed indefinitely. Thus there are no overlapping issues.

The Court should grant the writ to provide a definitive answer these four questions.

1. Is abstaining under the Younger Doctrine proper when confirming or enforcing a foreign arbitral award?

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[18] *"Under the rubric of* ***either jurisdiction or res judicata****, the crux of the question is whether there* ***has already been actual consideration of and a decision on the issue*** *presented."*

[19] *"[The] doctrine of* **res judicata** *is not a mere matter of practice or procedure. . . . It is a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts. . . ."*

2. Is removal under § 205 a prerequisite for the district court to exercise its original jurisdiction to register, confirm and enforce a foreign arbitral award when original jurisdiction is fully authorized by Congress in § 203?

3. Is a foreign arbitral award res judicata on personal and subject-matter jurisdiction and the issues that have been fully adjudicated or

4. Can a dissatisfied party to an international arbitration bring suit in the U.S. State Courts in hopes of a more favorable decision and the District Court support and encourage this international forum shopping?

Indeed when Congress adopted legislation implementing The New York Convention 1958, it expressly stated that the District Court shall have original jurisdiction over registration and enforcement of foreign arbitral awards. This was to ensure uniformity across our country and to stop State Courts from using local legislation to interfere with foreign arbitral contracts, proceedings and awards. The Convention fosters foreign relations in that other member countries can rely on the United States recognizing and enforcing their arbitral awards and as such United States arbitral awards will be recognized and enforced in those member countries.

The circuits are split and the Ninth Circuit has departed from the established case law of this Court in all four areas. Uniformity will be impossible without this Court's intervention and a clear precedent to preserve foreign relations. Without review a litigant who is unhappy with a foreign arbitral award would be free to relitigate the issues over and over again, jumping from country to country seeking a more favorable ruling. This would be in direct conflict of this Court's precedent in

Scherk v Alberto-Culver Co 417 US 506 (1974)[20], and *Preston v. Ferrer, 552 U.S. 346 (2008).*[21]

1. The Unites States ratified the Convention on September 30, 1970. Indonesian ratified the Convention on October 7, 1981. The very purpose of the Convention is to ensure that foreign arbitral awards are recognized and enforced uniformly across all member States unless one of the six enumerable defenses are successfully raised in the first pleading. Ms. Dinh did not appeal the Tribunals findings, conclusions or the awards in any court, if fact Ms. Dinh was invited to file for reconsideration and refused even that option that was within her legal right. Ms. Dinh has never raised any of the six enumerable defenses to registration, confirmation and enforcement. Thus the United States District Court was and is bound to register, confirm and enforce the foreign awards.[22]

Petitioner Mr. Green, has been living in Tampaksiring, Indonesia since 2013 and contracted with Ms. Dinh in Indonesia, under Indonesia law for binding arbitration

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[20] The U.S. Courts are not to hear cases or interfere with international contracts that have international arbitration clauses. That includes State Courts.

[21] *"When parties agree to arbitrate* ***all questions*** *arising under a contract, the Federal Arbitration Act (FAA), 9 U. S. C. §1 et seq.,* ***supersedes state laws lodging primary jurisdiction in another forum,*** *whether judicial or administrative. Pp. 4–16."*

[22] 9 U.S. Code § 207 - ***The court shall confirm the award*** *unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.*

before a specific party appointed Tribunal. (Appendix B) The Arbitrator's appointment arrived from Indonesia in Bahasa and English on March 16, 2020. (Pl. FC Ex. 1 – Appendix C) The notice of the Arbitrator's appointment was filed with the State Court on March 28, 2020. The Mr. Green made the demand for arbitration, (Pl. SC Ex. 7 Appendix D) the arbitrator accepted his appointment and set the arbitration schedule (Pl. SC Ex. 9 Appendix E) and the parties preceded with the International Indonesian Foreign Arbitration as is required by law. April 5, 2020 Mr. Green's counsel made an appearance and on April 15, 2020 Ms. Dinh's counsel made an appearance in the Indonesian case as was granted an extension of time to file her briefs and affidavits. (Pl. SC Ex. 21 – Appendix F) and the arbotrator issued a rule violation (Pl. FC Ex. 16 Appendix G) The parties' received the Arbitrator's Partial Final Award dated April 16, 2020. (corrected on June 5, 2020) (Pl. FC Ex. 3 Appendix H)

In part the Tribunals findings were:

"the choice of governing law is clearly Indonesia. The contract was negotiated, agreed, written, approved and provided to the Ministry of Marriage and Civil Registry in Indonesia and contained anticipated future enforcement provisions in "Indonesia, Vietnam and in the United States of America and any other country or state that Richard Lee Green may reside in". (page 18 @12) And "under Indonesian law this agreement should be treated as a settlement to settle or prevent a suit and thus is a judgment of the court." (Page 20 @7).

After the Partial Final Award was issued on jurisdiction and enforceability Ms. Dinh moved for and was granted an extension of time to file her required briefs and exhibits. (Pl. SC Ex. 21 Appendix F) Ms. Dinh then decided she did not like the Arbitrator's ruling and ran to the Alaska State Court to stay the Indonesian

proceedings so she could seek a more favorable decision in the State Court. Prior to any State Court rulings Mr. Green filed in U.S. District court on May 15, 2020 for confirmation, registration and enforcement of the Indonesian Foreign Arbitral Award (Partial Final Award on Enforceability and Jurisdiction) issued on April 16, 2020. (later corrected on May 19, 2020 to conform with Indonesian law). (Pl. FC Ex. 43 and 44 also Dkt. entry #7). After 2 more scheduled hearings, which Ms. Dinh failed to appear, the Indonesian Tribunal issued the Final Award on All Issues on May 17, 2020 (corrected June 5, 2020) in accordance with the law. (Pl. FC Ex. 4)

Ms. Dinh has never sought to vacate or set aside nor has she ever contested the award in any court.[23]

2. The District Court refused confirmation and enforcement based on the Rooker-Fieldman and Younger Doctrines.

3. On appeal the Ninth Circuit dismissed the Districts Court's reliance on the Rooker-Fieldman Doctrine (consistent with its earlier case law) but upheld that the Younger Doctrine did apply to civil disputes between private citizens in international contracts with binding arbitration clauses. The Ninth Circuit went one step further adding the requirement of a § 205 filing and denying the long established policy of

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[23] *Ass'n of Flight Attendants v. Rep. Airlines, 797 F.2d 352 (failure to vacate in time period waives ability to contest the award for confirmation). Service Emp. Intern. Union v. Office Ctr, 670 F.2d 404 / (DEFAULT AWARD) (defense not raised in the 90 days is waiver to the defense) (a defense to vacate should be raised immediately and not during confirmation.) Caribbean Trading v. Nigerian Nat. Petroleum, 948 F.2d 111 (cannot raise a defense in second pleading).*

res judicata for acts of foreign governments fully adjudicated within their legal process.

4. The Ninth Cricut refused a request for rehearing despite the case law brief filed that clearly showed that the panel had departed from clearly established case law from within the Ninth Circuit, other sister circuits and case law directly from the U.S. Supreme Court.

REASONS FOR GRANTING THE PETITION

In the past, the U.S. Supreme Court has addressed the issue of foreign arbitral awards several times but has never directly addressed Younger absenteeism in foreign arbitral confirmation and enforcement proceedings when a party seeks to relitigate their dispute by filing in the State Court. The Court needs to issue a solid ruling on the effect of res judicate as it applies to foreign arbitral proceedings when a party seeks to relitigate their dispute in the U.S. Court's and weather a U.S. Court is even permitted to hear a foreign contract dispute when the contract clearly calls for binding arbitration in a foreign country before a party appointed arbitrator. The Ninth Circuit has gone adrift in this ruling. In the absence of clarification regarding this essential element of the New York Convention 1958, parties to international contracts with arbitration clauses have no assurance that when a final arbitral award is entered that it is final at all. The Ninth Circuit's ruling leaves a clear open door for any international litigant who are unhappy with their foreign arbitral award to simple file in the U.S. State Courts and relitigate over and over again hoping for a more favorable decision.

This Court should not permit these inconsistent rulings to exist. This ruling even violates the previous rulings within the Ninth Circuit.

The Court should not permit these intolerable conflicts to persist. This Court should grant review to restore the "uniformity" and assurance of recognition and enforcement that Congress deemed essential in the New York Convention over 50 years ago.

THE ARBITRATION CLAUSE

The parties contract clearly states;

"This agreement shall be subject to the Laws of God and the Holy Ordinances as found in the Holy Bible and general interpretations of the Presbyterian Faith and ***any and all disputes shall be subject to exclusive and binding arbitration*** *to/by Jeffrey H. Klett and/or his successors and assignees.* ***Both parties agree that any decision(s) by the arbitrator are absolutely binding and that a court of competent jurisdiction shall uphold any decision rendered by the arbitrator.*** *" (Pl. FC Ex. 2) "This agreement shall be binding in Indonesia, Vietnam and the United States of America or any other Country or State that Richard L. Green shall reside in." (Pl. FC Ex. 2)*

THE FINDINGS OF THE INDONESIAN TRIBUNAL

The Indonesian Tribunals Award corrected on June 5, 2020 titled Corrected "Partial Final Award", page 11, section titled XII. LEGAL ANAYLSYS Section B. Jurisprudence in Arbitration; clearly defines the applicable Indonesian Arbitration Law. Section C. (3)(a), page 13-14, Indonesian Law clearly provides,

"...on the basis of which a deed shall be drafted by and official of the Civil Registry" and sub-section C(5)(a), page 14, "The aforementioned agreement has never been revoked and thus is legal and binding upon the parties." Section 8, page 16, "As a matter of law, the above agreement is considered and has full force and effect as a stipulation to settle or prevent a future lawsuit." Sub-Section 9, page 17, *"The*

aforementioned settlement shall have the same effect as a judgement of the court. As such is not appealable or subject to further action in court. ICC 2009" Section 10, page 17, *"A judicial decision [a judgement] can be appealed within 30 days of the execution of the limitations or after judgment is issued by the court. The opportunity for the parties to appeal has passed. ICC 2009."* Sub-Section 12, Page 18, *"the choice of governing law is clearly Indonesia. The contract was negotiated, agreed, written, approved and provided to the Ministry of marriage and civil registry in Indonesia and contained anticipated future enforcement provisions in "Indonesia, Vietnam and the United States of America in any other country or state that Richard Lee Green may reside in."*

After a full hearing on the merits the Indonesian "Tribunal" concluded on page 19,

Section VIII. FINAL CONCLUSIONS OF LAW;

"This award resolves the issues of jurisdiction, venue, contract validity, in force ability and the validity of the binding arbitration clause and arbitrability of all current disputes in this proceedings. All of their claims or result are reserved for further hearings on that matter."

The Tribunal issued its clarification titled, Clarification to the Partial Final Award Dated April 24, 2020 corrected and notarized on July 20, 2020. On page 2, section XII, (B) states,

"testimony and exhibits before the arbitrator clearly indicate that the parties contractual relationship was to build an international commercial business trading between Vietnam, Indonesia and the United States and acquiring commercial interest in property in all three countries. The parties are clearly engaged in international trade and commerce as defined in the United States Commercial Code in the International Commercial Contracting Standards." [sic]

When Ms. Dinh was 'confused' by the Final Award and who got what, pretending she didn't understand a second request for clarification was asked of the Tribunal and on March 15, 2021 the Tribunal issued a second clarification titled, "Clarification as to Commercial Property Division/Distribution to the Final Award on All Issues

dated July 5, 2020." In that clarification on Page 3-4, Ms. Dinh was specifically awarded,

the Christmas Store valued at $120,000.00, Raw materials in Indonesian valued at $22,000.00, Commercial rental property in Rach Gia, Vietnam valued at $30,000.00, Commercial rental property in Uong Bi, Vietnam valued at $550,000.00, and lastly Ms. Dinh was awarded all banks accounts in Vietnam (see the exert from Ms. Dinh's spreadsheet for the value of those bank accounts) valued at over $ 225,000.00 in cash.

Section III (A) (18), on Page 5, the Tribunal found that,

"the parties personal property is limited to hand carry items in personal effects. There is really nothing to divide as the basis for this contractual relationship which is commercial in nature."

I. Certiorari is Warranted to Clarify the Younger Doctrine

In *G.C and K.B Investments, Inc. v. Wilson 326 F.3d 1096 (9th Cir. 2003* - the Ninth Circuit dealt with the interplay between the State and District Court's and clearly determined that,

"In this case, we deal with the interplay between federal and state courts in a bitter and protracted dispute involving the enforcement of an arbitration award."

"The synopsis of this case is similarly related the issue before this court, here the parties had also agreed to "binding arbitration of all claims arising from there contract".

"...agreement contained an arbitration clause, requiring the" ...(parties to)... "the agreement to binding arbitration. ***The agreement provided that arbitration was to be the sole dispute resolution method, and was to be conducted pursuant to ...the agreed arbitrator."***

The Court went on to address the process of arbitration;

"In this case the Appellee was served notice of the arbitration proceedings, the terms of the agreement and the statutes to demand arbitration. The Appellee objected to the arbitration and on that basis refused to participate. The Appellee did not

make an appearance in the arbitration ***they did seek to prevent the arbitration from going forward. The arbitrator, in February, 2000, granted an award in favor of GC KB on its claim."***

Just a few years ago the Ninth Cricut's position was confirmation was very distinct and separate issue from the litigation of facts. But they have departed so far from the norm that this Court needs to clarify the Younger Doctrine. Case law shows that the State Courts can be at odds in the Federal District Court confirmation process.[24] But that has never prevented the District Court from its jurisdiction that is specifically conferred by Congress. The District Court cannot abstain from jurisdiction when it is specifically granted statutorily.[25]

A. The Ninth Circuits Decision Encourages International Forum Shopping in the U.S. Courts.

In *Scherk v Alberto-Culver Co 417 US 506 (1974)* this court was very clear that International contracts with arbitration clauses would not be permitted to be heard/litigated in the U.S. Courts. This put a stop to the international forum shopping and gave assurance that international arbitration clauses would be respected and honored in ALL U.S. Courts. This ruling from the Nineth Circuit promotes,

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[24] *In this case, we deal with the interplay between federal and state courts in a bitter and protracted dispute involving the enforcement of an arbitration award. The Wilsons opposed, claiming that the California courts had already determined the agreement was illegal, and hence the arbitration award was invalid. The Wilsons claimed *1102 that, taken together, the June and October orders issued in Hawaii invalidated the Louisiana arbitration award, the default award was confirmed and affirmed by this court. G.C. and K.B. Investments, Inc. v. Wilson 326 F.3d 1096 (9th Cir. 2003)*

[25] 9 U.S. Code § 203

encourages and paves the way for international forum shopping in the State Courts. Foreign countries/States who are members of the New York Convention 1958 have no assurance that their contracts and arbitration clauses and final awards will be upheld in the United States District Courts.

B. The Ninth Circuits Decision is in Direct conflict With The New York Convention and the Codified Statutes.

In 1970 Congress passed the Revised Federal Arbitration Act in 9 U.S. Code § 1-16 and 9 U.S. Code § 201-207. The Codified statute was to ensure that the U.S. District Court adhered to the U.S. Treaties and promoted foreign relations. 9 U.S. Code § 201 states that foreign arbitral awards "shall be enforced". The Treaties provisions are violated when the District Court refuses registration and enforcement of foreign arbitral awards.

Article V 1. Provides that, Recognition and enforcement of the award may [only] be refused, at the request of the party against whom it is invoked, [and] only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (a) said agreement is not valid, (b) A party was not given proper notice of the appointment and of the arbitration proceedings, (c) the award deals with a difference not within the terms of the agreement, (d) The arbitration panel or procedure was not in conformity with the agreement, (e) The award is not yet binding, (2) the subject matter is not capable of settlement by arbitration, or against public policy.

In this case Ms. Dinh did not raise any of the permitted defenses[26] and none of the defenses apply. In fact Ms. Dinh does not contest that she contracted for binding arbitration in Indonesia, under Indonesian law and she does not contest that the awards fall under the Convention.

The Nineth Circuit's refusal to recognize and enforce the foreign arbitral award opens the door to unhealth international relations. Article XIV provides that the Unites States will no longer be able to rely on Indonesia or any other Contracting State to enforce arbitral awards from the United States.

Even Vietnam as a Contracting State enforces foreign awards against their citizens like Ms. Dinh (who has no resident status in the U.S.). But the U.S. violates the treaties clear provisions by refusing recognition and enforcement.

C. Procedural Deficiencies Do Not Justify Refusal for Confirmation and Enforcement.

Under § 205 District Court are to enforce international arbitration clauses then remanded those issues that turn out not to be subject to arbitration, such that the State Court will be able to resolve the merits of the remaining dispute(s). The purpose of the removal clause is to ensure that the states respect the international arbitration clause because the U.S. has a national policy favoring arbitration and the United

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[26] *Polimaster Ltd. v. RAE Systems, Inc, 623 F.3d 832 (Award must be confirmed unless a proper defense is raised)* Bu8 Sdn. Bhd. v. Creagri, Inc. No. C-14-4503-EMC Decided Mar 6, 2015.

States Supreme Court has clearly held that the State Courts cannot hear claims were international contracts call for arbitration.[27]

Removal under § 205 was codified by Congress to make sure that the enforcement of international arbitration clauses was handled on a Federal level to ensure uniformity among the states.[28/i] In this case both parties had already made an appearance in the Indonesian arbitration with counsel and the arbitration had begun and the Indonesian arbitrator had issued his "partial final award on jurisdiction and enforceability". Removal under § 205 was not necessary since the parties had already participated in the Indonesian arbitration and a the Partial Final Award had been issued. In Beiser v. Weyler 284 F.3d 665 (5th Cir. 2002)[29] and In *Infuturia Global v. Sequus Pharmaceuticals, 631 F.3d 1133* this Court held,

> *"The language of § 205 refers to the action being removed and "the trial thereof." The meaning of the section is clear: a defendant may remove a qualifying state court action to the federal court at any time before the claims raised in a state court action have been adjudicated."* [30]

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[27] *Scherk v Alberto-Culver Co 417 US 506 (1974)*

[28] BEISER V. WEYLER 284 F.3D 665 (5TH CIR. 2002)

[29] Recognizing that removal was not necessary since the arbitration was complete.

[30] *See LaFarge Coppee v. Venezolana De Cementos*, S.AC.A., C.A., 31 F.3d 70, 72 (2d Cir. 1994) *(holding that removal was not accomplished "before the trial" because the state court had already adjudicated "the entirety of the claim that the plaintiffs tendered for decision"); Pan Atl. Grp., Inc. v. Republic Ins. Co.*, 878 F.Supp. 630, 638-39 (S.D.N.Y. 1995).

In this case the Indonesian arbitrator still has exclusive and continuing jurisdiction and as such the arbitration remains active and ongoing. Additional issues have been contested and motions for clarification submitted and the last finding and award was issued on October 10, 2021.

At the first hearing the District Court heard arguments and made a decision that it had jurisdiction over the subject-matter of the case at hand.[31] A motion to remove by Mr. Green was not "necessary" since the court had already confirmed that it had subject-matter jurisdiction in this case.

In Velchez v. Carnival Corp. 331 F.3d 1207 (11th Cir. 2003) the Court held,

"The law disfavors court meddling with removals based upon procedural — as distinguished from jurisdictional — defects, because "[w]e . . . recognize that a plaintiff may acquiesce to federal jurisdiction, and forgive any of the defendant's procedural errors in removing the case." Id. at 1321."

The Nineth Circuit ruling is inconsistent with the other circuits on the issue of removal under § 205 and this Court needs to clarify and set a clear precedent when the circuits are divided.

D. The Nineth Circuits Decision Conflicts With This Courts Precedent.

This Court ruling cited above are clear and concise, Congress and this Court has made it clear the U.S. District Court or any State Court in the U.S. cannot refuse recognition and enforcement of a foreign arbitral award unless one of the six enumerable defenses is successful raised. This Courts precedents are cited above but

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[31] Over 100,000.00 in wholesale cargo awaiting export from Indonesia to the U.S.

we need only look at *American Dredging Co. v. Miller, 510 U.S. 443, 453 (1994) the Court held,*

"and could be contemplated under the New York convention's provisions that says that ***states shall ("recognize arbitration awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon."*** *665 F. 3d at 392...") ("the procedure provision of the treaties permit variation with regard to the manner in which signatory states enforced international arbitration awards,* ***they do not provide a means by which a state may decline to enforce such awards at all.")***

II. Certiorari Is Warranted To Resolve Whether a Foreign Award Constitutes Res Judicata.

The Nineth Circuit stated, *"We reject as without merit Green's contentions that the arbitration award constituted a res judicata determination."* This decision in in direct conflict with principles of international comity, the Acts of State Doctrine and this Court's precedent.

In Mitsubishi motors, 63 U.S. at 629, this Court held,

"In ***the context of foreign arbitral awards,*** *this policy includes "concerns of international comity,* ***respect for the capacities of foreign and transnational tribunals....***"

The Acts of State Doctrine, in pertinent part, states as follows,

"It ***is well established that courts in United States will refrain from examining the validity of acts of foreign governments where those acts take effect within the territory of the foreign State.*** *This rule, commonly known as the Act of State doctrine, has been stated and discussed by the U.S. Supreme Court in various cases. The Act of State doctrine says that a nation is sovereign within its own borders, and* ***its domestic actions may not be questioned in the courts of another nation.*** *The doctrine is not required by international law, but it is* ***a principle recognized and adhered to by United States federal courts.*** *Its aim is not to protect other nations' sovereignty by intervention from the U.S.",*

"Every sovereign State is bound to respect the independence of every other sovereign State, and ***the courts of one country will not sit in judgment on the acts of the government of another...*** *"*

In *Underhill v. Hernandez* strongly indicates that, *the doctrine had its origins in notions of sovereign equality and was based on the view that international law-imposed limits on the ability of States to exercise jurisdiction over other States.*

In *Sabbatino*, the court held that,

"If a transaction takes place in one jurisdiction and the forum is in another, ***the court merely declines to adjudicate or makes applicable its own law to parties or property before it.*** *The refusal of one country to enforce the penal laws of another is a typical example of an instance when a court will not entertain a cause of action arising in another jurisdiction.*

"the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government"

In *Kirkpatrick*, the Court reconfirmed that,

"Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them." To the extent that a case involves the "official act of a foreign sovereign," the Act of State doctrine applies only when a U.S. Court must declare such official act "invalid, and thus ineffective as a rule of decision for the courts of this country.'"

"This is the principle that the validity of an act is to be determined by the law of the territory where the act took place. ***Thus, acts of the sovereign, or acts of state, done within the sovereign's own territory, are legally valid everywhere."***

Under the Act of State doctrine;

"The courts of one State will not question the validity of public acts performed by other sovereigns *within their own borders, even when such courts have jurisdiction over a controversy in which one of the litigants has standing to challenge those acts.*

Under this section passed in 1988, ***enforcement of arbitral agreements, confirmation of arbitral awards, and execution upon judgements based on order confirming such awards shall not be refused*** *on the basis of the Act of State doctrine.*

The doctrine represents deference to the superior exercise of jurisdiction by the territorial State and ***prevents the U.S. from unlawfully extending its jurisdiction*** *to situations and acts authoritatively determined by the territorial State.* ***As such, the doctrine represents an acknowledgment that the U.S. does not possess the legal competence to reverse the acts of foreign sovereigns carried out abroad."***

The California Appellant Court in *Dial 800 v. Fesbinder 118 Cal. App. 4th 32 (Cal. Ct. App. 2004)* has addressed the issue of religious arbitration agreed to in a foreign country and the court and held;

"As a general matter, ***an arbitration award is the equivalent of a final judgement which renders all factual and legal matters in the award res judicata."***

In G.C. and K.B. Investments, Inc. v. Wilson 326 F.3d 1096 (9th Cir. 2003) this court held;

"Under the rubric of ***either jurisdiction or res judicata,*** *the crux of the question is whether there* ***has already been actual consideration of and a decision on the issue*** *presented."*

In Wenmar v. Ecosmatre Planet Friendly No. A08-1973 (Minn. Ct. App. 2009) the court held;

"To provide the relief requested by appellant, ***we would first have to look outside the "four corners" of the arbitration award*** *.... We would,* ***in effect, be second-guessing the arbitrator's legal determinations.*** *This is a step that long-established* ***precedent prevents us from taking."***

The Court held that,

"Since question of ***subject-matter jurisdiction have been fully litigated in the original forum,*** *the issue could not be retried in a subsequent action between the parties."*[32]

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[32] U.S. ex Rel. Robinson Rancheria v. Borneo 971 F.2d 244 (9th Cir. 1992) "Thus, there can *251 be little doubt that jurisdictional determinations, like others, are final.", "Question of subject matter jurisdiction has been falling in fairly litigated by the California Trail Court.

The U.S. Supreme Court has ruled,

"Principles of res judicata apply to a court's jurisdictional determinations, both personal and subject-matter."[33]

In *Federated Department Stores, Inc. v. Moitie, 452 U.S. 394 (1981)* the Nineth Cricut Court tried to make an exception to the long standing principle of res judicata the U.S. Supreme Court held,

"The only question presented in this case is whether the Court of Appeals for the Ninth Circuit validly created an exception to the doctrine of **res judicata.** *The court held that* **res judicata** *does not bar relitigation of an unappealed adverse judgment where, as here, other plaintiffs in similar actions against common defendants successfully appeal the judgments against them. We disagree with the view taken by the Court of Appeals for the Ninth Circuit, and reverse."*

III. This Case Presents An Excellent Vehicle To Address These Important Questions.

The actual provisions of the New York Convention 1958 are, Article III.

"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...".

Article 11 (1), Congress explicitly agreed to;

"recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen...*between them in respect of*

The ruling was not appealed. Thus, the issue has been fully finally decided. Under California claim preclusion law, this court must give "call faith and credit" to that determination. See 28 U.S.C. $ 1738; Kremer v Chemical Contr. Corp., 456 U.S. 461, 481-82, 102 S.Ct. 1883, 1897-98, 72 L.Ed.2d 262 (1982); St. Sava Mission Corp., 223 Cal.All3d at 1364, 273 Cal.Rptr. at 346." See also: Durfee v Duke, 375 U.S. 106, 111-12, 84 S. Ct. 242, 245, 11 L.Ed.2d 186 (1963).

[33] *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee,* 456 U.S. 694, 702 n. 9, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982).

a defined legal relationship, whether contractual or not, ***concerning a subject matter capable of settlement by arbitration."***

This Court has previously ruled,

"A parochial refusal by the court of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages."[34]

"The Court may not overrule the arbitrator's factual findings or contract interpretations because we [the U.S Court] disagree with them".[35]

CONCLUSION

The Convention is a key document and Treaty with 180 Nations/State signatories and sets the standard for international relations. The New York Convention 1958 has been in place for over 50 years I in the United States and serves as an important deterrent to stop forum international forum shopping and gives stability around the world in international contracting. For the District Court to refuse to adjudicate the registration and enforcement of a foreign award is abhorrible at best.

State Courts have used local legislation to block foreign contracts and international arbitration clause for years. The competition for jurisdiction has and continues to be fought vigorously between the District Court and the State Courts who most of the time refuse to adhere to the international Treaties in favor of keeping

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[34] *Scherk v Alberto-Culver Co 417 US 506 (1974) @ 516-17, 94 S.Ct. at 2456.*

[35] Champion Boxed Beef Company, Plaintiff- counter-defendant-appellee, v. Local No. 7 United Food and Commercial Workers International union, Named As: United Food and Commercial workers, Defendant-counter-claimant-appellant, 24 F.3d 86 (10th Cir. 1994)

jurisdiction in the local courts. For the District Court to deny registration, confirmation and enforcement and force this issue to be intermingled with Ms. Dinh's re-litigation efforts in State Court is without merit and completely defies the very purpose of the Convention and Congress express codification giving original jurisdiction to the Federal Courts.

Congress enacted the Revised Federal Arbitration Act to bring uniformity across the states but as we have seen in this case the circuits are split and without this Courts intervention international relations will be strained and international contracts will be subject to litigation in State courts despite the strong policy favoring arbitration. This court's previous ruling forbidding forum shopping in the U.S. Courts when the parties have an international contract that calls for binding arbitration and this Court should take this case and narrow that standard to ensure that registration and enforcement is never bogged down in the State Courts and never mixed with litigating the issues especially when a final award has been issued. This Court needs to make it plain and clear that the Foreign Arbitral Award is res judicata in both personal and subject-matter jurisdiction and the issues subject to arbitration cannot ever be litigated or re-litigated in the State Courts.

Respectfully submitted.

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[i] Beiser v. Weyler 284 F.3d 665 (5th Cir. 2002)

We have twice commented on the importance of a defendant's right to appeal the refusal to enforce an arbitration clause under the Convention. *Sedco, Inc. v. Petroleos Mexicanos Mexican National Oil Co.,* 767 F.2d 1140, 1149 (5th Cir. 1985); *McDermott International, Inc. v. Lloyds Underwriters of London,* 944 F.2d 1199, 1211-12 (5th Cir. 1991). In *Sedco,* we held that the Convention abrogated a rule of admiralty law that otherwise would have barred appeal of the district court's refusal to enforce an arbitration clause. We noted in particular that the Convention contains a reciprocity clause. *Sedco,* 767 F.2d at 1149; *see also* Convention, Art. XIV, 21 U.S.T. 2517. By the terms of that clause, other countries must respect the rights of U.S. citizens under the Convention only to the extent that the United States implements the Convention within its own borders. Because the refusal to enforce an arbitration clause under the Convention risks jeopardizing the United States's treaty obligations with 65 nations, the *Sedco* court held that appellate review of such refusals must be available notwithstanding a maritime law rule to the contrary.

One important reason for the clear statement rule was our conclusion that Congress favored federal jurisdiction over Convention-related claims in order to promote the development of a uniform body of law under the Convention. We quoted language from the Supreme Court that the "goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was . . . to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries." *Scherk v. Alberto-Culver Co.,* 417 U.S. 506, 520 n. 15, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974); *McDermott,* 944 F.2d at 1212.

In *McDermott,* we considered whether a clause in an arbitration agreement waived a defendant's right to remove to federal court under § 205. We established a clear statement rule for waivers of a litigant's rights under § 205. A party may only waive his right to remove under the statute by clearly and explicitly saying so in the agreement. *Id.* at 1209. One important reason for the clear statement rule was our conclusion that Congress favored federal jurisdiction over Convention-related claims in order to promote the development of a uniform body of law under the Convention. We quoted language from the Supreme Court that the "goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was . . . to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries." *Scherk v. Alberto-Culver Co.,* 417 U.S. 506, 520 n. 15, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974); *McDermott,* 944 F.2d at 1212. Reducing local variations in how courts interpret and enforce arbitration clauses makes it easier for businesses engaged in international transactions to use and rely on such clauses. In *McDermott,* we commented that broad federal

arbitration clause provides a defense. For example, if the district court had sided with Beiser and remanded the case for lack of jurisdiction, the district court's conclusion that the arbitration clauses did not bind Beiser personally would not be appealable. If the conclusion were not appealable, res judicata would not prohibit the state court from reexamining the issue. The state court might therefore reach a different conclusion about a dispute's arbitrability than the federal court. In light of the precedents establishing arbitration as a special area of federal concern, we cannot conclude that Congress intended state courts to duplicate factual and legal inquiries already conducted by federal judges. *See Moses H. Cone,* 460 U.S. at 24-25, 103 S.Ct. 927 (commenting that the Federal Arbitration Act establishes arbitration as a special area of federal concern).

Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B 825 F.2d 709 (2d Cir. 1987)

Choice of Law. Before considering the merits of the appeal, we face a choice of law issue, both with respect to Victrix's claim for enforcement of the London arbitration award and its claim for enforcement of the British judgment. With respect to the claim for enforcement of the arbitration award, it is clear that federal law applies. The Convention is a treaty of the United States governing the enforcement of foreign arbitration awards. It sets forth a procedure for enforcement of foreign arbitration awards to which all signatories are expected to abide. The obligations of the United States under the Convention would be undermined if they were not determined according to a uniform body of federal law. Though the nature of obligations under the Convention are matters of federal law, it is arguable that state law might nevertheless supply the rule of decision for claims that seek enforcement of foreign arbitration awards without resort to the Convention. We think, however, that the Convention preempts state laws and leaves the entire subject of enforcement of foreign arbitration awards governed by its terms. *See Island Territory of Curacao v. Solitron Devices, Inc.*, 489 F.2d 1313, 1319 (2d Cir. 1973) (ruling that Convention does not preempt state law governing enforcement of foreign money *judgments* but indicating, by implication, that it would preempt state law concerning enforcement of foreign arbitral *awards*), *cert. denied,* 416 U.S. 986, 94 S.Ct. 2389, 40 L.Ed.2d 763 (1974).