No. 19-606

In The Supreme Court of the United States

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

v.

PAO TATNEFT,
Respondent.

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

BRIEF IN OPPOSITION FOR RESPONDENT PAO TATNEFT

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RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Supreme Court Rules, PAO Tatneft certifies that it has no parent corporation and that there is no publicly held corporation owning 10% or more of stock in PAO Tatneft.

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INTRODUCTION

The courts below held—consistent with every lower court to have considered the issue—that Petitioner Ukraine impliedly waived its sovereign immunity from this suit to enforce an arbitral award by signing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention or Convention) *and* then by agreeing to arbitrate the underlying dispute in France, another signatory to the Convention. The New York Convention is a treaty that expressly provides for "the availability of a cause of action in the United States"—specifically, to enforce arbitral awards made in other signatory states, such as France—which this Court has previously identified as a basis for finding an implied waiver under the Foreign Sovereign Immunities Act (FSIA), 28 U. S. C. § 1605(a)(1). See *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U. S. 428, 442–443 (1989).

The Petition simply ignores these rulings and materially mischaracterizes the lower courts' decisions in this case. Based on this mischaracterization, the Petition's first question asks this Court to weigh in on an issue *not* raised by the decisions below—whether Ukraine's signing the New York Convention *by itself* constitutes a blanket waiver of its sovereign immunity from any suit in U.S. court, *regardless* of whether that suit is brought to enforce a Convention award. The courts below did not address that question because they did not need to: Ukraine does not dispute either that it agreed to the underlying arbitration in France or that, by its terms, the New York Convention therefore applies to this case.

The Court should deny review of the first question for this reason alone.

There is good reason Ukraine does not seek review of the question actually decided below. *Every* court of appeals that has considered the question has concluded, as did the courts below here, that a foreign sovereign that signs the New York Convention and agrees to arbitration in another signatory state impliedly waives its sovereign immunity from a suit brought in U.S. district court to enforce the resulting arbitration award. Ukraine does not try to show a conflict between these other lower court decisions and the decision below in this case—indeed, the Petition does not even bother to cite them. And the cases Ukraine *does* cite in an effort to show a circuit split or a conflict with this Court's precedent are inapposite. Each one found that a foreign sovereign had not waived its immunity by signing a treaty that—unlike the New York Convention—does *not* provide a cause of action in U.S. courts.

In any event, the decision below was clearly correct. Among other things, Ukraine's argument that a waiver of sovereign immunity must be explicit ignores the statutory text, which plainly states that "[a] foreign state shall not be immune . . . in any case . . . in which the foreign state has waived its immunity *either* explicitly *or by implication*." 28 U. S. C. § 1605(a)(1) (emphasis added). Ukraine also ignores the FSIA's legislative history, which notes that a foreign state's "agree[ment] to arbitration in another country" is one of the paradigm examples of

conduct constituting an implied waiver that Congress contemplated when it passed the FSIA. H.R. Rep. No. 94–1487 p. 6617 (1976).

The Petition's second question asks this Court to decide the novel question of whether a suit to enforce an arbitration award against a foreign sovereign *must* be brought under the FSIA's specific arbitration exception, 28 U. S. C. § 1605(a)(6), rather than the more general waiver exception. Pet. for Cert. 18.

Ukraine does not even try to argue that there is a circuit split on this question—and there is none. While numerous lower courts have addressed both the arbitration and waiver exceptions in the same case—thus implicitly rejecting Ukraine's argument—Respondent PAO Tatneft (Tatneft) is not aware of any court (and Ukraine cites none) to have considered whether the two exceptions are mutually exclusive, and the D.C. Circuit correctly held that they are not. Granting certiorari on this issue now would be premature, to say the least. In any event, the district court found, and the D.C. Circuit left undisturbed, that all of the elements of the arbitration exception are met here, making this case a poor vehicle to address the issue.

And, again, the decision below was clearly correct on this issue. While Ukraine frames the question under the general/specific canon, that canon does not apply to statutory provisions that were enacted separately at different times, as the waiver and arbitration exceptions were (the arbitration exception was enacted 12 years after the waiver exception).

This Court has long held that a subsequent enactment should not be interpreted as impliedly repealing an earlier one, absent circumstances that do not exist here.

Apparently recognizing the lack of any cert-worthy issues presented by this case, the Petition repeatedly cites not judicial decisions, but arguments made by *advocates* in other cases. No court has adopted Ukraine's construction of the D.C. Circuit's holding. There will be opportunity enough to review these arguments if any court of appeals were to adopt them, but the opinion in the present case did not. This Court does not grant certiorari to render advisory opinions on arguments of inventive litigants in cases not before the Court.

STATEMENT OF THE CASE

I. The Parties And The Underlying Dispute

Tatneft is a publicly-traded open joint-stock company, established and existing under the laws of the Russian Federation. Pet. App. 8a. While Tatneft was "created" during the Soviet era, Pet. for Cert. 8, Tatneft was privatized and incorporated in its present form as a "shareholding company" following the Soviet Union's collapse, as Ukraine acknowledges, *id.* The Republic of Tatarstan—a constituent republic of the Russian Federation—owns approximately 36% of Tatneft's shares, appoints less than a majority of its board of directors, and does not control its day-to-day affairs. JA2549 (Jurisdiction Decision

¶ 130).[1] The majority of Tatneft's shares are traded on public stock exchanges in Europe. JA2543 (Jurisdiction Decision ¶ 113).

On July 4, 1995, Tatarstan entered into a commercial agreement with Ukraine to create CJSC Ukrtatnafta Transnational Financial and Industrial Oil Company (Ukrtatnafta), a Ukrainian joint-stock company that owns and operates the Kremenchug Refinery, the largest oil refinery in Ukraine. Pet. App. 8a. When Ukrtatnafta was formed, Tatneft, Ukraine, and Tatarstan were its three major shareholders. *Id.*

In 2007, Ukrtatnafta became the target of a group of companies (the Privat Group) that at all relevant times was controlled by an influential oligarch named Igor Kolomoisky with close political ties to the government of Ukraine and a notorious "raider" of other businesses. JA64–65, 86 (Final Award ¶¶ 69, 143). In January 2007, the Privat Group acquired a 1% interest in Ukrtatnafta. Pet. App. 9a. Soon afterwards, the Privat Group enlisted the assistance of Ukrainian courts and prosecutors in a series of strong arm tactics and pretextual legal actions to seize control of Ukrtatnafta at the expense

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[1] This statement of facts, which corrects the mischaracterizations about Tatneft made in the Petition, draws on the extensive decision and award made by the arbitrators, who closely examined the question of Tatneft's status and the other underlying facts, including those going to the arbitral tribunal's jurisdiction. These rulings are entitled to deference under this Court's precedent. See *BG Group PLC* v. *Republic of Argentina*, 572 U. S. 25, 40–41 (2014).

of Tatneft. JA115–116, 129–130, 170, 171–173 (Final Award ¶¶ 223, 266–268, 396, 400–404).

Through this series of actions in which Ukrainian government actors were complicit—including unlawful court orders, the physical seizure of the Kremenchug Refinery under the direction of a Ukrainian court bailiff and with the assistance of Ukrainian troops, and various judgments purporting to nullify Tatneft's rights—the Privat Group ousted Tatneft from both the management of Ukrtatnafta and its ownership of its shares. This could not have been accomplished without the indispensable aid of Ukrainian state agents, both executive and judicial. JA82–83, 88, 90-97, 115–120, 133–135, 146, 147-148, 149, 191 (Final Award ¶¶ 126–128, 147, 156, 159–162, 169–171, 174–176, 221–238, 276–280, 316, 320, 325, 465).

II. The Arbitration

A. Notice of Arbitration Pursuant to The Russia-Ukraine BIT

On December 11, 2007, Tatneft sent a notice of dispute to Ukraine, requesting that Ukraine open negotiations pursuant to Article 9(1) of the November 27, 1998 bilateral investment treaty between the Russian Federation and Ukraine (the Russia-Ukraine BIT), which requires that a state party to the treaty (here, Ukraine) and an investor of the other state party (here, Tatneft) exert their best efforts to resolve a dispute through negotiations. Pet. App. 9a; JA292 (Russia-Ukraine BIT Art. 9(1)). Tatneft and Ukraine were unable to settle their dispute. JA53 (Final Award ¶ 6).

On May 21, 2008, Tatneft served Ukraine with a Notice of Arbitration and Statement of Claim under the United Nations Commission on International Trade Law (UNCITRAL) rules. Pet. App. 9a. Tatneft initiated the arbitration pursuant to Article 9(2) of the Russia-Ukraine BIT, which provides that if a dispute is not resolved through negotiations within six months, the dispute may be decided by an UNCITRAL arbitral tribunal. JA53 (Final Award ¶ 6); JA292–293 (Russia-Ukraine BIT Art. 9(2)). Ukraine subsequently agreed that the arbitration would be seated in Paris, France. Pet. App. 30a.

B. The Jurisdiction Decision

At Ukraine's request, the arbitral tribunal bifurcated proceedings in order to first consider Ukraine's various "Objections to Jurisdiction and Admissibility." JA2510 (Jurisdiction Decision ¶¶ 16–19). On September 28, 2010, following extensive written submissions and a hearing, the arbitral tribunal issued a decision (the Jurisdiction Decision) confirming that it had jurisdiction over Tatneft's claims.

In the Jurisdiction Decision, the tribunal carefully considered and rejected, *inter alia*, Ukraine's "object[ion] to the jurisdiction of the Tribunal on the ground that [Tatneft] is not an investor protected under the Russia-Ukraine BIT because it is controlled by the Government of Tatarstan," JA2538 (Jurisdiction Decision ¶ 101), finding that while "[t]here is undoubtedly a government presence in Tatnef[t]," JA2548 (Jurisdiction Decision ¶ 129), "the Tribunal must conclude that business-related aspects predominate in Tatneft's operations and

that it is thus entitled to claim *as a private investor* under the Russia-Ukraine BIT." JA2554 (Jurisdiction Decision ¶ 150) (emphasis added).

C. The Final Award

After further proceedings and a hearing on the merits, the arbitral tribunal issued its final award (Final Award) on July 29, 2014, which concluded that Ukraine's actions resulted in a "total deprivation of [Tatneft's] rights as a shareholder of Ukrtatnafta." JA191 (Final Award ¶ 464). The tribunal explained that "almost every decision adopted [by the Ukrainian courts] resulted in a sequence that was with each step more adverse to [Tatneft] and directly l[ed] to findings that would in the end deprive [Tatneft] of all rights in [Ukrtatnafta]." JA130 (Final Award ¶ 267). In each instance, "the relevant cases were initiated by requests that the [Ukrainian] Prosecutor brought to the courts, invariably seeking to reopen matters in respect of which limitation periods had long become applicable." JA130 (Final Award ¶ 268). The Final Award held that the Ukrainian courts wrongfully refused to apply the relevant statutes of limitations, gave inadequate notice to Tatneft, and disregarded key Ukrainian statutory provisions. JA170–172, 173 (Final Award ¶¶ 398–400, 404–406).

Having concluded that Ukraine was liable to Tatneft, the tribunal ordered Ukraine to "pay [Tatneft] the amount of US$ 112 million as compensation for its breaches of the Russia-Ukraine BIT" plus interest. JA249 (Final Award ¶ 642(1)).

III. Proceedings Below

On March 30, 2017, Tatneft filed a petition in the district court to recognize and enforce the Final Award under the New York Convention. See Petition to Confirm Arbitral Award and to Enter Judgment in Favor of Petitioner in No. 17-cv-0582 (DC), ECF 1. On July 25, 2017, Ukraine filed a motion to dismiss the petition. See Motion to Dismiss in No. 17-cv-0582 (DC), ECF 21. In its motion to dismiss, Ukraine attempted to repurpose its argument made to the arbitral tribunal that Tatneft is a state-controlled entity or alter-ego of Tatarstan, rather than a "private investor" with whom Ukraine agreed to arbitrate under the Russia-Ukraine BIT, into a contention that Tatneft was not a "private party" for purposes of the "arbitration exception" to the FSIA, 28 U. S. C. § 1605(a)(6). In response, Tatneft pointed out, *inter alia*, that Ukraine was relying on the same allegations that it had made to the arbitral tribunal in support of its "private investor" argument, which the tribunal rejected, and that in any event the FSIA's implied waiver exception also applied to this case, which does not have a "private party" requirement. See Opposition to Motion to Dismiss in No. 17-cv-0582 (DC), ECF 26.

Simultaneously with its motion to dismiss, Ukraine filed an opposition to Tatneft's petition in which Ukraine raised several defenses to enforcement of the Final Award under Article V of the New York Convention. See Opposition to Petition to Confirm Arbitral Award in No. 17-cv-0582 (DC), ECF

22.[2] The district court, however, indicated that it would consider the sovereign immunity issues raised in Ukraine's motion to dismiss before it would consider Ukraine's defenses under the New York Convention. See Minute Order in No. 17-cv-0582 (DC), Aug. 28, 2017.

On March 19, 2018, the district court issued a 33-page memorandum opinion denying Ukraine's motion to dismiss, finding that both the arbitration exception and the waiver exception were satisfied. Pet. App. 6a–45a. As for the arbitration exception, the district court applied settled D.C. Circuit precedent to find that Tatneft satisfied its burden by producing the Russia-Ukraine BIT, the notice of arbitration under that BIT, and the resulting Final Award. Pet. App. 17a. The district court also concluded that Ukraine's regurgitated "jurisdictional" arguments regarding Tatneft's purported status as a "state-controlled entity" did not rebut Tatneft's showing, particularly because the arbitral tribunal was competent to and did decide these issues. Pet. App. 18a–26a. As for the waiver exception, the district court again applied D.C. Circuit precedent to find that

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[2] Under the New York Convention, signatory states "shall" recognize and enforce foreign arbitral awards made in other signatory states unless one of the narrow exceptions in Article V of the New York Convention is met. See New York Convention, Art. III, June 10, 1958, 21 U. S. T. 2517. In this case, Ukraine argues that the Final Award should not be enforced on grounds that the arbitral tribunal composition was not in accordance with the parties' agreement and recognition and enforcement of the award would be contrary to United States public policy.

Ukraine impliedly waived its immunity by signing the New York Convention and agreeing to arbitrate in France, which also is a signatory to the Convention. Pet. App. 27a–30a.

The district court then directed Tatneft to respond to the defenses Ukraine had raised under the New York Convention. Pet. App. 45a. But one day after Tatneft had done so, Ukraine filed a notice of appeal from the denial of its motion to dismiss, see Notice of Appeal in No 18-7057 (CADC), Docket No. 1727964.[3]

On appeal, a panel of the D.C. Circuit unanimously affirmed the district court's ruling on the implied waiver issue in an abbreviated disposition. See Pet. App. 1a–5a. The panel did not reach the question of whether the arbitration exception applies in this case. The full D.C. Circuit then unanimously—and without opinion—denied Ukraine's petition for rehearing en banc on September 16, 2019. See Pet. App. 50a–51a.

REASONS FOR DENYING THE PETITION

I. The First Question Presented Does Not Warrant Review

A. The First Question Is Not, In Fact, Presented By This Case

Ukraine purports to seek this Court's review of a sweeping holding that a foreign sovereign waives its

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[3] The district court then granted Ukraine's motion to stay further proceedings pending the outcome of Ukraine's appeal. See Order in No. 17-cv-0582 (DC), ECF 40.

immunity for all purposes simply by signing the New York Convention. See, *e.g.*, Pet. for Cert. 11 ("[T]he court below required only that the foreign sovereign somehow 'contemplate[]' being sued, without saying so, by signing a treaty that does not mention immunity or a suit against a sovereign."); *id.*, at 18 (arguing that the decision below creates "all-purpose federal jurisdiction" over foreign sovereigns).

That sweeping question is not presented here. Contrary to Ukraine's straw-man description of the holding below, the D.C. Circuit's decision was a limited one.

In summarizing the facts supporting its affirmance of the district court's ruling that the implied waiver exception applies in this case,[4] the D.C. Circuit emphasized that Tatneft had commenced this case to recognize and enforce a US$ 112 million award it had obtained against Ukraine in an arbitration brought under the Russia-Ukraine BIT and seated in Paris, France. Pet. App. 2a. The New York Convention, the court noted, is "a treaty in which

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4 Ukraine ignores that because the D.C. Circuit's decision was in the form of an "abbreviated disposition" pursuant to Circuit Rule 36(d), it must be read together with the district court's more detailed memorandum opinion that it affirmed, and not as a full explication of a new rule to be applied in future cases. See *In re Grant*, 635 F. 3d 1227, 1231–1232 (D. C. Cir. 2011) ("[B]ecause the panel issuing such a disposition must unanimously agree that it does not 'alter[ ], modif[y], or significantly clarif [y] a rule of law,' D.C.Cir. R. 36(2), these decisions are frequently announced in a way that makes them not 'suitable for governing future cases.'" (citation omitted)).

signatories agree to enforce arbitral awards made in other signatory countries," *id.* and Ukraine, France, and the United States are all signatories to the New York Convention. Pet. App. 3a. None of these facts are disputed by Ukraine.[5]

The district court below straightforwardly applied a previous decision of the D.C. Circuit—*Creighton Ltd.* v. *Government of State of Qatar*, 181 F. 3d 118 (D. C. Cir. 1999)—to find that the implied waiver exception was satisfied on these facts. Specifically, in *Creighton*, the D.C. Circuit stated that it did not believe that a foreign sovereign's "agreement to arbitrate in a [New York Convention] signatory country, *without more*, demonstrates the requisite intent to waive its sovereign immunity in the United States." *Id.*, at 123 (emphasis added). Unlike in this case, however, the foreign sovereign in *Creighton* (Qatar) had *not* signed the New York Convention, which the court found to be dispositive. *Id.* In doing

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[5] While Ukraine did, and still does, dispute that its offer to arbitrate with Russian investors under the Russia-Ukraine BIT applies to Tatneft, see Pet. for Cert. 2, that is an "arbitrability" argument that, at most, constitutes a defense to enforcement of the Final Award under Article V of the New York Convention. See New York Convention, Art. V(1)(c), June 10, 1958, 21 U. S. T. 2517. It does not go to the *court's* jurisdiction to consider such a defense under the Convention. See, *e.g.*, *Chevron Corp.* v. *Republic of Ecuador*, 795 F. 3d 200, 205 (D. C. Cir. 2015) (noting Ecuador's argument that it was entitled to sovereign immunity because it never validly consented to arbitrate underlying dispute "conflate[d] the jurisdictional standard of the FSIA with the standard for review under the New York Convention"), cert denied, *Republic of Ecuador* v. *Chevron Corp.*, 136 S. Ct. 2410 (2016).

so, the D.C. Circuit adopted the Second Circuit's reasoning in *Seetransport Wiking Trader Schiffarhtsgesellschaft MBH & Co.* v. *Navimpex Centrala Navala*, 989 F. 2d 572, 578 (CA2 1993), that if a foreign state—which is itself a signatory to the Convention—agrees to arbitrate in another signatory state, it waives its sovereign immunity in all signatory states by virtue of the fact that "when a country becomes a signatory to the Convention, by the very provisions of the Convention, the signatory state must have contemplated enforcement actions in other signatory states." *Creighton Ltd.* v. *Government of State of Qatar*, *supra*, at 123 (internal quotation marks and citation omitted).

"[F]ollowing the standard set forth in *Creighton*," the district court found Ukraine impliedly waived its sovereign immunity in this case by "agree[ing] to arbitrate in the territory of a state [France] that has signed the New York Convention" because, unlike the foreign sovereign in *Creighton*, Ukraine "is also a signatory to the Convention; thus, it should have anticipated enforcement actions in signatory states," including the United States. Pet. App. 30a.

After "afford[ing] the issues full consideration and . . . determin[ing] that they do not warrant a published opinion," the court of appeals issued a succinct Judgment "affirm[ing]" the denial of Ukraine's motion to dismiss "based on the waiver exception." Pet. App. 1a–2a. In its unpublished decision, the court noted its agreement with the district court's application of *Creighton* to the facts of this case. See

Pet. App. 3a ("In *Creighton*, we concluded that a sovereign, by signing the New York Convention, waives its immunity from arbitration-enforcement actions in other signatory states . . . . Because Ukraine and the United States have both signed the Convention, Ukraine falls within the waiver exception as *Creighton* construed it.").

In other words, the D.C. Circuit decided (like the district court) that the waiver exception applied not *solely* because Ukraine had signed the New York Convention—which is the premise of the first question presented in the Petition—but because Ukraine had *also* agreed to arbitrate the underlying dispute in another signatory state and, therefore, must have contemplated *this* suit in the United States to enforce the Final Award under the Convention.

B. The D.C. Circuit's Ruling That Ukraine Impliedly Waived Its Immunity From This Suit Does Not Conflict With Any Decision Of This Court, Nor Does It Create or Deepen A Circuit Split

Egregiously, despite arguing that there is a circuit split on the first question presented, the Petition does not cite any decision outside of the D.C. Circuit that has previously considered whether a foreign sovereign impliedly waives its immunity from an arbitration enforcement suit by signing the New York Convention and agreeing to the underlying arbitration in another signatory state. That is not because there are no such decisions. As Ukraine ignores, every such decision has concluded, as did both

courts below, that the implied waiver exception applies on these facts.

First, as noted above, in *Creighton*, the D.C. Circuit cited and agreed with the Second Circuit's decision in *Seetransport*, in which the court held that Romania had impliedly waived its sovereign immunity by signing the New York Convention and agreeing to arbitrate the underlying dispute in another signatory state. See *Seetransport*, 989 F. 2d, at 578–580; *Creighton*, 181 F. 3d, at 123. The Second Circuit subsequently reaffirmed and extended that holding in cases involving the ICSID Convention. See *Blue Ridge Investments, L.L.C.* v. *Republic of Argentina*, 735 F. 3d 72, 84 (CA2 2013); *Mobil Cerro Negro Ltd.* v. *Bolivarian Republic of Venezuela*, 863 F. 3d 96, 104–105 (CA2 2017).

Second, in turn, the Eleventh Circuit followed *Creighton* and concluded that while a foreign sovereign's mere agreement to arbitrate in another signatory state is insufficient to waive immunity, if it also is a signatory to the New York Convention, then it has impliedly waived its immunity from a suit in U.S. district court to enforce the award under the Convention. See *S & Davis International, Inc.* v. *Republic of Yemen*, 218 F. 3d 1292, 1301 (CA11 2000).

Although this Court has not had occasion to address this question, Ukraine argues that the D.C. Circuit's decision nonetheless conflicts with this Court's precedent. Pet. for Cert. 11, 21–23. In particular, Ukraine points to this Court's observation in *Amerada Hess*, 488 U. S., at 442–444, that it could not "see how a foreign state can waive its immunity

under § 1605(a)(1) by signing an international agreement that contains no mention of a waiver of immunity to suit in United States courts or even the availability of a cause of action in the United States."[6] As the Petition ignores, however, providing "the availability of a cause of action in the United States," *id.*, is precisely what the New York Convention does. See 9 U. S. C. §§ 201–208; *Compagnie des Bauxites de Guinee* v. *Hammermills, Inc.*, Civ. A. No. 90-0169 (JGP), 1992 WL 122712, at *3 (DC May 29, 1992) ("The principal purpose of the Convention and its implementation by Congress was to remove pre-existing obstacles to enforcement of foreign arbitration awards." (internal quotation marks omitted)).

Finally, while ignoring the decisions of the Second and Eleventh Circuits discussed above that address the impact of a foreign sovereign's signing the New York Convention and agreeing to arbitrate in another signatory state, Ukraine argues that the D.C. Circuit's decision in this case "split with three other circuits." Pet. for Cert. 12. But none of the other court of appeals decisions cited in support of this argument was an arbitration enforcement case, and each one involved a treaty or international agreement that was silent as to the existence of a

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6 In *Argentine Republic* v. *Amerada Hess Shipping Corp.*, *supra*, at 442–444, this Court found that Argentina had not impliedly waived its immunity by signing the Geneva Convention on the High Seas and the Pan-American Maritime Neutrality Convention because they neither contained a waiver of immunity to suit nor provided a cause of action in the United States.

cause of action in the United States, unlike the New York Convention. See *Frolova* v. *Union of Soviet Socialist Republics*, 761 F. 2d 370, 378 (CA7 1985) (finding "absolutely no evidence from the language, structure or history" of the Helsinki Accords and United Nations Charter "to conclude that the nations that are parties to these agreements anticipated when signing them that American courts would be the means by which the documents' provisions would be enforced")[7]; *Haven* v. *Polska,* 215

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7 *Frolova* was expressly distinguished by the Second Circuit in *Seetransport Wiking Trader Schiffarhtsgesellschaft MBH & Co.* v. *Navimpex Centrala Navala*, *supra*, at 578–580, one of the decisions the Petition ignores, on grounds that serve equally to distinguish *Frolova* from *this* case:

> The facts surrounding *Frolova* make it distinguishable from the case at hand. As we have stated, Seetransport seeks recognition and enforcement of the I.C.C. arbitral award pursuant to the Convention, which expressly permits recognition and enforcement actions in Contracting States. Thus, when Navimpex entered into a contract with Seetransport that had a provision that any disputes would be submitted to arbitration, and then participated in an arbitration in which an award was issued against it, logically, as an instrumentality or agency of the Romanian Government—a signatory to the Convention—it had to have contemplated the involvement of the courts of any of the Contracting States in an action to enforce the award. Accordingly, we conclude that under § 1605(a)(1), Navimpex implicitly waived any sovereign immunity defense and, therefore, the district court had subject matter jurisdiction.

F. 3d 727, 735–737 (CA7 2000) (same conclusion as to treaty between Poland and the United States); *In re Estate of Ferdinand Marcos Human Rights Litig*ation, 94 F. 3d 539, 548 (CA9 1996) (same conclusion as to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment); *Smith* v. *Socialist People's Libyan Arab Jamahiriya*, 101 F. 3d 239, 245–246 (CA2 1996) (same conclusion as to Libyan government official's letter to the Secretary General of the United Nations).[8]

The cases on which Ukraine relies are therefore distinguishable, and do not create any conflict warranting this Court's review.[9]

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8 Ukraine argues that the D.C. Circuit's decision in this case cannot be reconciled with the Second Circuit's observation in *Smith* that the examples of conduct constituting an implied waiver listed in the FSIA's legislative history are all "related to the litigation process." Pet. for Cert. 13–14 (citing *Smith* v. *Socialist People's Libyan Arab Jamahiriya*, *supra*, at 244). Putting aside that the D.C. Circuit's decision in this case is consistent with Second Circuit precedent that Ukraine ignores, see *supra* 16, Ukraine also ignores *Smith*'s observation that a foreign sovereign's "agree[ment] to arbitration in another country"—*i.e.*, what Ukraine did here—is one of the examples of conduct "related to the litigation process" that Congress intended to constitute an implied waiver under the FSIA. See *Smith* v. *Socialist People's Libyan Arab Jamahiriya*, *supra*, at 243.

9 Ukraine asserts that the purported circuit split here "is particularly intolerable" because parties will now "migrate to the District of Columbia, where venue is always proper (28 U. S. C. § 1391(f)(4))." Pet. for Cert. 14. But, as the decisions

C. The D.C. Circuit's Ruling That Ukraine Impliedly Waived Its Immunity From This Suit Was Correct

Another reason for denying review of the first question presented is that the decision below was correct.

First, Ukraine's argument that a foreign sovereign's waiver of immunity must be explicit is irreconcilable with the text of the FSIA's waiver exception. See 28 U. S. C. § 1605(a)(1) ("A foreign state shall not be immune . . . in any case . . . in which the foreign state has waived its immunity *either* explicitly *or by implication*." (emphasis added)).

Second, Ukraine's conduct in this case falls squarely within one of the examples given in the FSIA's legislative history of acts constituting a waiver of immunity "by implication." See H.R. Rep. No. 94–1487 p. 6617 (1976) (listing three examples: (1) "where a foreign state has agreed to arbitration *in another country*," (2) "where a foreign state has agreed that the law of a particular country should govern a contract," or (3) "where a foreign state has

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of other courts of appeals cited in the Petition demonstrate, actions to enforce arbitration awards are regularly filed under the FSIA in federal courts outside of the District of Columbia because, although there is always (non-exclusive) venue for suits against foreign states and their political subdivisions in the District of Columbia, see 28 U. S. C. § 1391(f)(4), that is not the case for suits against agencies or instrumentalities of foreign states which often must be brought where they are "licensed to do business or [are] doing business," see *id.* § 1391(f)(3).

filed a responsive pleading in an action without raising the defense of sovereign immunity." (emphasis added)).

Ukraine misleadingly replaces the italicized phrase above with the phrase "in the United States" to suggest that only an agreement to arbitration in the United States would constitute an implied waiver of sovereign immunity. Pet. for Cert. 22. To be sure, courts have generally declined to interpret the FSIA's legislative history literally to mean that *any* agreement to arbitrate in a foreign country constitutes an implied waiver—instead, they generally have required something "more," such as the act of signing the New York Convention and agreeing to arbitrate in a Convention jurisdiction. See, *e.g.*, *Creighton* 181 F. 3d, at 123; see also *supra* 16. That is exactly what Ukraine did here.

In any event, there is no principled basis for distinguishing cases finding an implied waiver of immunity based on an agreement to arbitrate in the United States—which Ukraine appears to accept—and this case. In a line of cases that pre-dates the FSIA,[10] federal courts have recognized that where a

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10 Courts have recognized that, generally speaking, the FSIA codified existing case law construing the "restrictive theory" of sovereign immunity, which the United States adopted years before the FSIA in the "Tate Letter" of 1952. See *Amerada Hess*, 488 U. S., at 434 n. 1. Moreover, the legislative history explaining the waiver exception, in particular, refers to previous case law as helpful in defining the circumstances in which an implied waiver should be found. See H.R. Rep. No. 94–1487 p. 6617 (1976).

foreign sovereign agrees to arbitrate in the United States, that sovereign necessarily also consents to the jurisdiction of courts in the United States under the Federal Arbitration Act (the FAA), even though that statute says nothing about a waiver of sovereign immunity. See, *e.g.*, *Victory Transport Inc.* v. *Comisaria General de Abastecimientos y Transportes*, 336 F. 2d 354, 363 (CA2 1964) ("By agreeing to arbitrate in New York, where the United States Arbitration Act makes such agreements specifically enforceable, the Comisaria General must be deemed to have consented to the jurisdiction of the court that could compel the arbitration proceeding in New York. To hold otherwise would be to render the arbitration clause a nullity.").

By parity of reasoning, by signing the New York Convention and agreeing to arbitrate in another signatory state, a foreign sovereign must be deemed to have consented to the jurisdiction of a U.S. district court to enforce the resulting award under the New York Convention, which was codified by Congress as Chapter 2 of the FAA and provides a cause of action to enforce foreign arbitral awards in federal court just as Chapter 1 of the FAA provides a cause of action to enforce domestic arbitral awards. See 9 U. S. C. §§ 201–208.[11]

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11 Unable to cite a single case in support of its view that the New York Convention does not apply to arbitration awards against sovereigns, Ukraine relies on a single treatise instead. Pet. for Cert. 7 (citing Muthucumaraswamy Sornarajah, The Settlement of Foreign Investment Disputes 301, 308 (2000)).

* * *

For any or all of these reasons, the Court should deny review of the first question presented.

II. The Second Question Presented Does Not Warrant Review

A. No Court Has Adopted Ukraine's Argument That The Waiver And Arbitration Exceptions Are Mutually Exclusive

Ukraine argues that "[w]hen Congress created" the arbitration exception to immunity, it also limited FSIA jurisdiction to actions to enforce only certain arbitration awards, and only under certain conditions—namely, those set forth in the arbitration exception, 28 U. S. C. § 1605(a)(6). Pet. for Cert. 17. Ukraine contrasts this purportedly "more specific" exception with the "more general" waiver exception, 28 U. S. C. § 1605(a)(1), and argues that, under the general/specific canon of statutory construction, the arbitration exception displaces the waiver exception in cases involving the enforcement of an arbitration

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But the views of one academic—with which others disagree, see, *e.g.*, O'Brien, The Validity of the Foreign Sovereign Immunity Defense in Suits Under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 7 Fordham Int'l L. J. 321, 336 (1983); Cappelli-Perciballi, The Application of the New York Convention of 1958 to Disputes Between States and Between State Entities and Private Individuals: The Problem of Sovereign Immunity, 12 Int'l Law. 197, 198–199 (1978)—hardly provide an appropriate basis for the Court to exercise its certiorari jurisdiction.

award. See *id.*, at 18 (citing *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 566 U. S. 639, 645 (2012)).

As a threshold matter, Ukraine does not argue that there is a circuit split on this issue. In fact, other than the decision below rejecting Ukraine's argument, the Petition does not cite a single case that has even considered whether the arbitration exception displaced the waiver exception in arbitration enforcement actions.[12] The Court should deny review of the second question presented for this reason alone.

Moreover, while not mentioned in the Petition, at least four different circuits have implicitly rejected Ukraine's argument by considering both the waiver and arbitration exceptions in the same case without finding that the latter displaced the former.

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12 While Ukraine points to three cases in which lower courts have limited the reach of the waiver exception in light of other provisions of the FSIA, Pet. for Cert. 24–25, these cases are distinguishable from the present case for an important reason: the other FSIA provisions they consider—namely, 28 U. S. C. § 1605(a)(5) in *Calzadilla* v. *Banco Latino Internacional*, 413 F. 3d 1285 (CA11 2005), and *Blaxland* v. *Commonwealth Director of Public Prosecutions*, 323 F. 3d 1198 (CA9 2003); and 28 U. S. C. § 1607 in *Cabiri* v. *Government of Republic of Ghana*, 165 F. 3d 193 (CA2 1999)—were enacted at the same time as the waiver exception as part of the original FSIA. By contrast, the arbitration exception was enacted many years later by a different Congress, and there is no basis to use the later-enacted arbitration exception to limit the scope of the earlier-enacted waiver exception, particularly when the legislative history of the later provision shows no such intent. See *infra* 27–29.

See *Creighton*, 181 F. 3d, at 122–125 (considering both exceptions without suggesting one supplanted the other); *Mobil Cerro Negro Ltd.*, 863 F. 3d, at 104–106 (same); *Blue Ridge Investments,* 735 F. 3d, at 83–86 (same); *S & Davis International, Inc.*, 218 F. 3d, at 1300–1303 (same); *Trans Chemical Ltd.* v. *China National Machinery Import & Export Corp.*, 161 F. 3d 314, 319 (CA5 1998) (same).

B. This Case Would Be A Poor Vehicle To Consider The Second Question Because Both The Waiver And The Arbitration Exceptions Are Satisfied In This Case

Ukraine argues that the "private party requirement" of the arbitration exception "holds special urgency here, as . . . Tatneft . . . is not a private party." Pet. for Cert. 2. In fact, the opposite is true—each of the elements of the arbitration exception, including the "private party" requirement, is satisfied in this case. Far from being especially urgent, therefore, the second question presented is immaterial to the outcome of this case.

As noted above, the district court below found that the arbitration exception applies here, and that ruling was left undisturbed by the D.C. Circuit. See *supra* 10–11. Moreover, the relevant facts on which the district court's ruling in this respect was based are again not disputed: Tatneft seeks enforcement of an arbitral award that was brought pursuant to the Russia-Ukraine BIT and is governed by the New York Convention.

Ukraine purports to dispute that the Final Award was made "pursuant to" "an agreement made

by the foreign state with or for the benefit of a private party" to submit their disputes to arbitration. 28 U. S. C. § 1605(a)(6). But, the Russia-Ukraine BIT easily fits within this statutory standard. See *BG Group PLC* v. *Republic of Argentina*, 572 U. S. 25, 32 (2014) (construing bilateral investment treaty as arbitration agreement between sovereign state and potential investors of other state). To the extent Ukraine's argument is that the Final Award was not made "pursuant to" the Russia-Ukraine BIT because that BIT did not contain an agreement by Ukraine to arbitrate with "state-controlled entities," as Ukraine alleges Tatneft is,[13] that question was for the arbitrators to decide, see *id.*, at 33 (noting "it is up to the parties to determine whether a particular matter is primarily for arbitrators or for courts to decide").[14] They decided it against Ukraine. See *supra* 7–8.

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13 Although not necessary to decide whether to deny the Petition, Ukraine's allegations that Tatneft is not a private party are meritless, and the arbitral tribunal, while obviously not in terms of dealing with the FSIA, rejected their factual predicate in finding that Tatneft was a private investor eligible to bring claims under the Russia-Ukraine BIT.

14 Article 9(2)(c) of the Russia-Ukraine BIT provides that disputes may be submitted for arbitration "in accordance with the Arbitration Rules of the [UNCITRAL]." JA293 (Russia-Ukraine BIT, Art. 9(2)(c)). In turn, Article 21 of the UNCITRAL Rules expressly provides that "[t]he arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement," and "[t]he arbitral tribunal shall have the

The question of the arbitrators' jurisdiction to hear the underlying dispute (*i.e.*, "arbitrability") does not go to the *court's* jurisdiction to hear this award enforcement action under settled law, which Ukraine does not ask this Court to review. See, *e.g.*, *Chevron Corp.* v. *Republic of Ecuador*, 795 F. 3d 200, 204 (D. C. Cir. 2015), cert denied, *Republic of Ecuador* v. *Chevron Corp.*, 136 S. Ct. 2410 (2016). At best, a foreign sovereign's arbitrability challenge could be a defense to enforcement of the award under Article V of the New York Convention. It does not divest the court of jurisdiction to consider that defense.

C. The D.C. Circuit's Conclusion That The Waiver And Arbitration Exceptions Are Not Mutually Exclusive Was Correct

In any event, the D.C. Circuit's holding that the arbitration exception does not displace the waiver exception was correct.

Ukraine's argument that the general/specific canon applies to the arbitration and waiver exceptions, see Pet. for Cert. 18, 24–25, ignores one critical fact: Those exceptions were not enacted at the

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power to determine the existence or the validity of the contract of which an arbitration clause forms a part." JA2596 (UNCITRAL Rules, Art. 21). Ukraine invoked that power by asking the tribunal to rule on the same issues presented here in a separate jurisdictional phase of the arbitration. This is clear and unmistakable evidence that the parties intended for the arbitrators to determine questions of arbitrability. See *Chevron Corp.*, 795 F. 3d, at 207–209 (D. C. Cir. 2015) (construing BIT with virtually identical language incorporating Article 21 of the UNCITRAL Rules).

same time. The waiver exception was included as part of the FSIA as originally enacted in 1976, see Pub. L. 94–583, 90 Stat. 2891, but it was not until 1988 that Congress added the arbitration exception, see Pub. L. 100–669, 102 Stat. 3969. Accordingly, whatever Congress intended by enacting the arbitration exception, such intent cannot be attributed to the earlier Congress that passed the waiver exception. See *Food Marketing Institute* v. *Argus Leader Media*, 139 S. Ct. 2356, 2366 (2019) (other related statutes passed by Congress after FOIA's Exemption 4 "tel[l] us nothing about Congress's understanding of the language it enacted in Exemption 4 in 1966").

In order to demonstrate that the arbitration exception limits the scope of the waiver exception, Ukraine must instead show that the arbitration exception impliedly repealed the waiver exception. It is a "cardinal rule," however, "that repeals by implication are not favored." *Morton* v. *Mancari*, 417 U. S. 535, 549 (1974) ("In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable.").

The Petition includes no such affirmative showing of an irreconcilable conflict. As the D.C. Circuit noted, "while the [arbitration and waiver] exceptions partially overlap, each contains its own unique elements." Pet. App. 3a. For example, in *Creighton*, 181 F. 3d, at 124, the D.C. Circuit held that, although the waiver exception did not apply (because

Qatar had not itself signed the New York Convention), the arbitration exception did. As the D.C. Circuit therefore held in this case, "[b]ecause the overlap is incomplete, no structural considerations justify narrowing the waiver exception." Pet. App. 3a.

Furthermore, the legislative history of the arbitration exception affirmatively suggests Congress intended the opposite of repealing the waiver exception. As a prominent proponent of adding the arbitration exception to the FSIA explained to Congress, "this amendment does not replace Sectio[n] 1605(a)(1) . . . of the Act. A court may still hold that a particular agreement to arbitrate constitutes a waiver of immunity and consent to the jurisdiction of the court." Hearing before the Subcommittee on Administrative Law and Governmental Relations of the Committee on the Judiciary House of Representatives, 100th Cong., 1st Sess., 92 (1987) (statement of Mark B. Feldman, Chairman, Committee on Foreign Sovereign Immunity, American Bar Association, Section of International Law and Practice, dated May 28, 1987); see also Hearing before the Subcommittee on Administrative Law and Governmental Relations of the Committee on the Judiciary House of Representatives, 100th Cong., 1st Sess., 46 (1987) (statement of Stuart E. Schiffer, Deputy Assistant Attorney General, dated Oct. 5, 1988) ("[W]e agree with the basic concept underlying this provision that an agreement to arbitrate may evidence intent to waive sovereign immunity from domestic courts.").

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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