No.

IN THE
Supreme Court of the United States

FEDERAL REPUBLIC OF NIGERIA
Petitioner,
v.

ZHONGSHAN FUCHENG INDUSTRIAL
INVESTMENT CO. LTD.
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

Keith Bradley
Counsel of Record
ScheLeese Goudy
Kayla Marie Mendez
717 17th St., Suite 1825
Denver, CO 80202
(303) 830-1776
keith.bradley@squirepb.com

Raúl B. Mañón
200 S. Biscayne Blvd.,
Suite 3400
Miami, FL 33131

Samuel B. Ballingrud
2500 M Street NW
Washington, DC 20037

SQUIRE PATTON BOGGS (US) LLP

Counsel for Petitioner

QUESTIONS PRESENTED

The New York Convention applies to arbitration awards "arising out of differences between persons, whether physical or legal." The word "person" in ordinary English does not encompass a sovereign, and certainly not a sovereign acting in its sovereign capacity (as opposed to a government entity participating in markets in a private-law capacity). Meanwhile, at the time of the Convention's adoption (in 1958), only some countries had recently begun exposing foreign government bodies to suit in court, and only for private-law activities. No country anywhere had even contemplated stripping a sovereign of immunity for cases arising from its sovereign conduct.

Yet the D.C. Circuit holds that the Convention mandates judicial enforcement of arbitration awards against sovereign nations for cases arising solely from their roles as sovereigns—here, Nigeria's sovereign obligations under a treaty with China and under public international law. The D.C. Circuit did so by refusing to adhere to this Court's precedents on the meaning of "person"—on a theory that they address only domestic law—and ignoring the context in which the Convention was negotiated.

This case thus presents two related questions.

(1) Whether, for interpreting the intentions of the treaty parties regarding a word like "person," extra-textual information such as historical context and contemporary domestic law is a material input in parallel with the textual analysis; and

(2) Whether the New York Convention applies for arbitration agreements governing a dispute with a sovereign nation arising out of its role as a sovereign.

RELATED PROCEEDINGS

The following proceedings are directly related to this petition:

Zhongshan Fucheng Industrial Investment Co. Ltd. v. *Federal Republic of Nigeria*, No. 23-7016 (D.C. Cir. Aug. 9, 2024).

Zhongshan Fucheng Industrial Investment Co., Ltd. v. *Federal Republic of Nigeria*, No. 22-cv-00170-BAH (D.D.C. Jan. 26, 2023).

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PETITION FOR A WRIT OF CERTIORARI

The Federal Republic of Nigeria ("Nigeria") respectfully seeks a writ of certiorari to review the judgment of the U.S. Court of Appeals for the District of Columbia Circuit.

OPINION BELOW

The opinion below, with a dissent, is reported at 112 F.4th 1054. App. 1a-65a. The district court's unpublished decision is available at 2023 WL 417975. App. 66a. The arbitration award is at App. 92a.

JURISDICTION

The D.C. Circuit entered judgment on August 9, 2024. This Court has jurisdiction under 28 U.S.C. 1254(1).

STATUTORY AND TREATY PROVISIONS

Pertinent provisions are reproduced at Appendix 182a-194a.

INTRODUCTION

This case, arising from efforts by respondent ("Zhongshan") to wield the power of U.S. courts against the sovereign government of Nigeria, raises key questions about the role of the courts in relations between sovereign States, and about how courts understand the treaties defining such relations. Zhongshan seeks to enforce an arbitration award arising purely out of Nigeria's role as a sovereign. The sole basis for Zhongshan, a Chinese company, to hale

Nigeria into a U.S. court is the asserted application of the New York Convention. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3, App. 182a.

That Convention applies to arbitrations arising from disputes between "persons." App. 184a, art. I § 1. When the Convention was adopted, it was well understood the term "person" might encompass a government-owned company, but not the government itself as a sovereign. In international relations, it was equally well-settled that courts would not exercise jurisdiction over another sovereign acting in sovereign capacity. It would have been a bombshell if the Convention's drafters had extended its enforcement regime to such sovereigns. To the contrary, they repeatedly said the Convention's purview was "private law" disputes. The U.S. government, describing its understanding of the treaty shortly afterwards, said the same.

But the D.C. Circuit held—over a dissent by Judge Katsas—that the Convention applies to a sovereign government acting solely in its sovereign capacity.

The D.C. Circuit's interpretive methodology extends a deep circuit split. Some circuits interpret treaties like statutes, looking solely to a text's plain meaning with resort to extrinsic evidence only if the text is ambiguous. Other circuits interpret this Court's precedents to require consideration of the text and context in parallel.

That difference was dispositive here. As Judge Katsas's dissent demonstrated, the historical context

leaves no doubt the Convention's adopters did not intend to apply the Convention to sovereign governments *qua* sovereigns. The panel majority ignored that historical context. The D.C. Circuit believes a treaty must be interpreted as a freestanding text, with contextual materials relevant only upon a finding of textual ambiguity. Consequently, the panel majority refused to consider such context because the Convention did not explicitly exclude sovereigns-as-sovereigns.

Moreover, the D.C. Circuit expressly refused to follow this Court's precedents holding that the common usage of the word "person" does not include sovereigns. Other circuits have recognized that these precedents are binding about the meaning of that word, but the D.C. Circuit considers that caselaw binding only for interpretation of federal statutes.

The D.C. Circuit's decision is profoundly flawed, with significant ramifications for the nation's foreign relations. This Court has recognized that the "judicial seizure of the property of a friendly state" has the potential to harm the country's relations with that state. *Republic of Mexico* v. *Hoffman*, 324 U.S. 30, 35-36 (1945). The D.C. Circuit's decision expands the circumstances in which a court may do precisely that, and ultimately places U.S. courts in the position of enforcing an international agreement (the treaty establishing the arbitration) between two other foreign nations.

This Court should grant certiorari and reverse the D.C. Circuit's judgment.

STATEMENT

A. Legal Background

1. Traditionally, the United States did not subject other nations to suit in its courts; this foreign sovereign immunity was respected by other nations in their courts as well. Until the middle of the 20th century, the United States followed this "'classical or virtually absolute theory of sovereign immunity,' under which 'a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign.'" *Permanent Mission of India to the United Nations* v. *City of New York*, 551 U.S. 193, 199 (2007) (quoting Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dept. of State, to Acting U.S. Attorney General Phillip B. Perlman (May 19, 1952) ("Tate Letter")).

2. In the years after the Second World War, the classical concept of foreign sovereign immunity began to relax. *Republic of Mexico* allowed a suit against a vessel owned by the Mexican Government, because the Court distinguished mere "ownership" by the sovereign and the sovereign's actual possession of the vessel. 324 U.S., at 36-38. Concurring, Justices Frankfurter and Black praised the relaxation of absolute immunity, because of the "enormous growth" of sovereigns engaged in "ordinary merchandizing" activity. *Id.*, at 40-41 (Frankfurter, J., concurring). Soon after, in the Tate Letter, the State Department announced that the United States would no longer adhere to the absolute theory. Instead, the United States would use what is called the "restrictive theory," under which "immunity is confined to suits involving the foreign sovereign's public acts, and does not extend to cases arising out of a foreign state's

strictly commercial acts," *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 487 (1983) (describing restrictive immunity). The distinction between a government acting in its sovereign capacity and acting in its private-law capacity as a marketplace participant is sometimes expressed with the phrases *jure imperii* (the former) and *jure gestionis* (the latter). *See Bolivarian Republic of Venezuela* v. *Helmerich & Payne Int'l Drilling Co.*, 581 U.S. 170, 181-82 (2017) (noting expropriation is *jure imperii*).

The State Department's adoption of the restrictive theory was consistent with its adoption in foreign jurisdictions. *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 702 n.15 (1976) (surveying foreign decisions from 1951 to 1976).

3. U.S. courts had long recognized such a distinction between a domestic sovereign's governmental role and its activities in private markets. Chief Justice Marshall wrote that "when a government becomes a partner in any trading company, it devests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen." *Bank of the United States* v. *Planter's Bank of Ga.*, 22 U.S. 904, 907 (1824). In 1946, the Court reiterated "there is a Constitutional line between the State as government and the State as trader"; and it elaborated that, in the tax sphere, the distinction is whether the revenue is in a form "uniquely capable of being earned only by a State" as opposed to being available "equally [to] private persons upon the same subject matter." *New York* v. *United States*, 326 U.S. 572, 579, 582, 584 (1946). When a plurality in *Alfred*

Dunhill discussed the distinction between a government's sovereign activities and those as a market participant, it invoked these domestic cases. *Alfred Dunhill*, 425 U.S., at 695.

3. This distinction was regularly applied in interpreting the word "person." "In common usage that term [person] does not include the sovereign, and statutes employing it will ordinarily not be construed to do so." *United States* v. *United Mine Workers of Am.*, 330 U.S. 258, 275 (1947). This principle was a general rule of construction, apart from concepts of sovereign immunity. But the difference between governments acting in their sovereign capacity and acting as market participants held sway here too. For example, *United States* v. *Cooper Corp.* held that the United States, as a sovereign, cannot sue for treble damages under the Sherman Act authorization for suit by "'any person' injured by [a] violation." 312 U.S. 600, 606 (1941). "[T]he Act envisaged two classes of actions,—those made available only to the Government, ... and, in addition, a right of action for treble damages granted to redress private injury." *Id.*, at 608. The "any person" clause, the Court explained, described the latter.

4. By the 1950s, the growth in international trade had generated significant interest in efficient mechanisms for resolving disputes arising in the course of that trade. Arbitration was well-regarded, but the enforcement of arbitration agreements and awards was not necessarily reliable. Existing international agreements were widely judged unsatisfactory. *Yusuf Ahmed Alghanim & Sons* v. *Toys "R" Us, Inc.*, 126 F.3d 15, 22 (2d Cir. 1997) (discussing deficiencies in the

mechanisms for cross-border enforcement of arbitral awards).

5. Preparation for what would become the New York Convention began as the United States and Western European countries were just beginning to apply the restrictive model of sovereign immunity—in which *jure gestionis* activities could be subject to another nation's courts, but *jure imperii* activities remained immune.

In an early proposal, Article I described the scope as "arbitral awards arising out of commercial disputes between persons subject to the jurisdiction of different States or involving legal relationship arising, on the territories of different States." U.N. Economic & Social Council, Statement Submitted by International Chamber of Commerce, E/C.2/373, at 12 (Oct. 28, 1953). The United Nations Economic and Social Council, sitting in New York, established a Committee on the Enforcement of International Arbitral Awards to develop the actual treaty. That Committee promptly changed the name of the draft, because "international arbitral awards" was thought to refer to "arbitration between States" which was not what the new Convention would address. U.N. Economic & Social Council, Report of the Committee on the Enforcement of International Arbitral Awards, E/AC.42/4/Rev.1 ¶ 17 (Mar. 21, 1955) ("Committee Report").

The Committee revised Article I, which would "define[] the scope and limit" of the treaty, *id.* ¶ 20, to refer to disputes "between persons, whether physical or legal." *Id.* ¶ 24. Belgium, an early leader on the shift to restrictive immunity, "had proposed that the

article should expressly provide that public enterprises and public utilities should be deemed to be legal persons for purposes of this article if their activities were governed by private law." *Id.* The United Kingdom, India, and the Soviet Union all wanted clarity about "whether semi-State agencies would be able to claim immunity." Draft Convention, 3d Committee mtg., at 3-4, U.N. Doc. E/AC.42/SR.3 (March 2, 1955). "The Committee," addressing the suggestion from Belgium and the response from others, "was of the opinion that such a provision would be superfluous and that a reference in the present report would suffice." Committee Report, ¶ 24.

6. The Convention was adopted, at a Conference on International Commercial Arbitration, in June 1958. The chair of the U.S. delegation reported back to the Secretary of State about his understanding of the treaty. He explained that the "differences between persons" clause "defines the scope of the convention," and that it "includes public as well as private corporations." W.T.M. Beale, Official Report of the U.S. Delegation to the United Nations Conference on International Commercial Arbitration (1958), *reprinted in* 19 AM. REV. INT'L ARB. 91, 99 (2008) ("Beale Report"). "The intention of the Conference was in fact to cover arbitrations to which public corporations had become parties in their capacity as entities having rights and duties under private law." *Id.*

7. The United States did not join the Convention at first (for reasons unrelated to its scope). But in 1968, responding to input from "members of the business community concerned with international trade," President Johnson submitted the Convention to the

Senate for ratification. Message of U.S. President Transmitting U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards to the Senate for Consent to Ratification, *reprinted in* 7 I.L.M. 1042, 1056 (1968) ("Transmittal Letter"). That package included an analysis of the Convention by the State Department. Its analysis reiterated the concept from the Beale Report that the "differences between persons" clause "is intended to cover not only corporate bodies under public law but also state trading corporations." *Id.*

The United States joined with the "commercial reservation," permitted by the Convention, applying it only to "differences arising out of legal relationships … which are considered as commercial" under domestic law. Convention art. I § 3, App. 183a. Congress implemented the commercial reservation in 9 U.S.C. 202.

8. In 1976, Congress embodied the restrictive theory of sovereign immunity in the Foreign Sovereign Immunities Act ("FSIA"), Pub. L. 94-1487, 90 Stat. 2891, conferring a general grant of immunity with certain specified exclusions. One exception is when a sovereign waives its immunity (paragraph (a)(1)); another is for "a commercial activity carried on in the United States by the foreign state" (paragraph (a)(2)). 28 U.S.C. 1605(a)(2). Paragraph (a)(3) excludes sovereign immunity for "rights in property taken in violation of international law" where the property has certain specified connections to the United States. 28 U.S.C. 1605(a)(3). This stripping of sovereign immunity for an act *jure imperii* is unique to U.S. law; no

comparable provision "has yet been adopted in the domestic immunity statutes of other countries." Restatement (Fourth) of Foreign Relations Law of the United States § 455, Reporter's Note 15 (2018).

9. In 1988, Congress amended the FSIA to add an exception for arbitration enforcement. This paragraph (a)(6) exception covers an action "to enforce an agreement made by the foreign state ... or to confirm an award made pursuant to such an agreement to arbitrate," if the arbitration is in the United States or the agreement or award is "governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards." 28 U.S.C. 1605(a)(6).

B. Factual and Procedural Background

1. The present dispute arises pursuant to a 2001 treaty between Nigeria and the People's Republic of China. Agreement Between the Government of the People's Republic of China and the Government of the Federal Republic of Nigeria for the Reciprocal Promotion and Protection of Investments, China-Nigeria, Aug. 27, 2001, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3366/download ("Nigeria-China Treaty"). That treaty obligated each nation to protect investments by investors from the other, and to refrain from "unreasonable or discriminatory measures" against the other party's investors. *Id.* art. 2.

If there are disputes between one of the nations and an investor from the other country, the investor is allowed to "submit the dispute to the competent court" or to submit the dispute "to an ad hoc arbitral

tribunal." *Id.* art. 9, §§ 2-3. The Nigeria-China Treaty does not place these arbitrations under the auspices of the International Convention on the Settlement of Investment Disputes ("ICSID"). *Id.* art. 9, §§ 4-5. The tribunal's decision is to be "final and binding upon both parties to the dispute," and both Nigeria and China "shall commit themselves to the enforcement of the award." *Id.* art 9, § 6.

2. In line with the provisions of the 1999 Constitution (as amended), Nigeria is a federal republic, comparable to the United States, with a federal government (petitioner here) and multiple states that are parties to the federation. The 1999 Constitution contemplates a three-tier federal structure consisting of federal government, state government and the local government; each of these governments are to be democratically elected. *AG Federation* v. *AG Abia State & 35 ORS* (2024) LPELR-62576 (SC). Each state exists not as an appendage of another government but as an autonomous entity in the sense of being able to exercise its own will in the conduct of its affairs, free from direction by another government. *AG Abia* v. *AG Federation* (2006) 16 NWLR part 1005, 265 (Nigeria).

3. One of the autonomous states within the federation, Ogun, established a free-trade zone. App. 95a-99a, ¶¶ 6,15. Beginning in 2007, Ogun contracted with several Chinese companies, including an affiliate of Zhongshang, to develop the free trade zone. App. 100a, ¶¶ 18-19. Nigeria did not participate in any of these agreements or activities.

In 2016, Ogun State officials accused a Zhongshan affiliate of fraud regarding the free trade zone. Ogun

then terminated that affiliate's appointments and drove Zhongshan out of the country.

4. Zhongshan's affiliate sued Ogun and several of its officials in Nigerian courts. App. 110a-111a, ¶ 42. Zhongshan also filed an arbitration demand against Nigeria itself under the Nigeria-China Treaty.

In the arbitration (in London), Nigeria objected that it was not part of the activities regarding the free trade zone and had no involvement in the relevant agreements. The arbitration tribunal acknowledged the point, but it held that under principles of public international law, Nigeria is responsible for the public-law misconduct of a constituent state. App. 120a, ¶ 72.

The arbitrators awarded Zhongshan approximately $70 million to be paid by Nigeria as compensation for the expropriation by Ogun State. App. 198a, ¶ 198.

5. Zhongshan petitioned the U.S. District Court for the District of Columbia to enforce the award. Nigeria moved to dismiss on grounds of foreign sovereign immunity. In response, Zhongshan asserted, as its sole exception, that the award is subject to the Convention thus incurring FSIA's arbitration exception. App. 40a. The district court denied Nigeria's motion to dismiss, and Nigeria appealed. "[D]enial of a foreign state's motion to dismiss on the ground of sovereign immunity is subject to interlocutory appeal under the collateral order doctrine." *El-Hadad* v. *United Arab Emirates*, 216 F.3d 29, 31 (D.C. Cir. 2000).

6. Before the D.C. Circuit, Nigeria contended that the award is not subject to the New York Convention because the Convention covers only disputes between "persons" and that phrase encompasses only governmental bodies acting in private-law (*jure gestionis*) capacity, not sovereigns *qua* sovereigns (*jure imperii*). Zhongshan has not denied, nor did the D.C. Circuit, that Nigeria's role in the dispute and the arbitration was solely *jure imperii*. Rather, Zhongshan insisted the Convention covers disputes with sovereign governments regardless of their character.

7. The D.C. Circuit held that "person" in Convention article I section 1 includes sovereign governments, in all their forms, capacities, and guises, even a sovereign acting solely *jure imperii*. App. 35a-36a. The panel majority stated that "interpretation of a treaty is like the interpretation of a statute." App. 20a. It believed the word "persons" ordinarily includes sovereigns, on the basis of a usage in a 1987 Restatement of U.S. foreign relations law. App. 21a.[1] The Court rejected this Court's precedents stating the opposite as irrelevant because they involved only "domestic statutes." App. 36a (emphasis omitted). The panel further noted there is no explicit carveout in the Convention for sovereigns *jure imperii*. App. 20a. "Absent any explicit textual indication, we hesitate to

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[1] The Restatement that was contemporaneous to the Convention's adoption did not use "persons" that way. Restatement (Second) of the Foreign Relations Law of the U.S. § 3 (1965) (listing "state, international organization, *or* person" (emphasis added)).

read such a partially-in and occasionally-out definition into the Convention's single use of the word 'persons.'" App. 22a.

Regarding the "commercial reservation," the panel ruled that the Nigeria-China Treaty imposed on Nigeria "legally enforceable duties to Chinese investors," and those duties constituted a "legal relationship" between Nigeria and Zhongshan. App. 5a-13a. That relationship is "considered as commercial" under 9 U.S.C. 202, the court said, in that it has a connection to commerce. App. 14a-16a.

8. Judge Katsas dissented because he believed the Convention "does not extend to states acting in their sovereign capacity." App. 39a. Judge Katsas explained that "[w]hen interpreting treaties, 'we begin with the text of the treaty *and the context* in which the written words are used.'" App. 43a (emphasis added). Regarding the text, he recalled that "persons" in U.S. statutes might be interpreted to include governments when they "act in their private capacity," App. 46a-47a, but "the presumption against including sovereigns is strongest" for "official acts," *id.* Indeed, he observed that this Court has "sometimes construe[d] words like 'person' to cover sovereigns acting in a proprietary capacity but not in a sovereign capacity." *Id.* He pointed out that these domestic cases are relevant for interpreting the Convention because it was drafted in English in New York City. App. 47a-48a.

The interpretive question, Judge Katsas observed, required "'orient[ing] ourselves to the time of ... adoption,' here 1958." *Id.* (omission in original). He noted that while some countries denied sovereign immunity when a government "when it acts as a private party,

such as when it engages in commercial transactions," all of them "still granted immunity for governmental acts—those only a sovereign may undertake." App. 49a.

> In this legal and historical context, with no clear text or contemporaneous mention of fundamentally altering the scope of foreign sovereign immunity, mere use of the word 'persons' cannot be deemed to reach the governmental acts of foreign sovereigns. Just as Congress does not hide elephants in mouseholes, ... neither do treaty negotiators. And if the Convention did have the revolutionary effect that Zhongshan claims, then surely someone, from among the many nations and individuals negotiating the treaty, would have at least mentioned it.

App. 50a.

9. On Nigeria's motion, the D.C. Circuit stayed its mandate pending the filing and disposition of this petition.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari to resolve a deep and recurring disagreement among the circuits on fundamental issues of treaty interpretation. Different circuits have read precedent from this Court in mutually incompatible ways and have adopted differing methods of analysis that are outcome-determinative for questions arising under the nation's many treaties. Some circuits have adopted a strict text-

based approach while others assess extrinsic evidence in parallel with the text. The inconsistent approaches across the circuits speak to the lack of clarity from this Court.

This case, a perfect example of the confusion, illustrates cleanly how different approaches determine important interpretive questions—and thereby the outcome of live disputes. Unquestionably, when the Convention was adopted, no state would have expected a signatory to impose judicial enforcement against a foreign sovereign acting purely as a sovereign. Yet that is what the D.C. Circuit's interpretation permits in this case. The D.C. Circuit misinterpreted the term "person" in the New York Convention because it failed to account for the historical context of the Convention's drafting. Moreover, the D.C. Circuit, departing from other circuits, outright refused to follow this Court's precedents about the ordinary meaning of the word "person."

Subjecting a foreign nation to the authority of this country's courts is an act of great significance for the United States, and should not be undertaken lightly. *Cf. Bolivarian Republic of Venezuela*, 581 U.S. at 181 (conforming to "accepted international standards … diminish[es] the likelihood that other nations would go their own way, thereby 'subjecting' the United States 'abroad' to more claims 'than we permit in this country'" (citation omitted)).

The United States deliberated at length before accepting the New York Convention, cognizant of the careful balance struck on these issues by the Convention. The D.C. Circuit's erroneous interpretation of the Convention, contrary to how the U.S. government understood the treaty at the time, has all the more

significance because the D.C. Circuit is a guaranteed venue for any action against a foreign state.

The Court should grant certiorari to provide guidance to the lower courts about how to interpret treaties, and to correct the important error in the D.C. Circuit's understanding of the word "person" and interpretation of the New York Convention.

A. The Courts of Appeals are divided on how to interpret treaties.

A treaty is "in the nature of a contract between nations to which general rules of construction apply." *Société Nationale Industrielle Aerospatiale* v. *United States Dist. Court for Southern Dist. of Iowa*, 482 U.S. 522, 533 (1987) (cleaned up). The analysis therefore begins with "the text of the treaty *and the context* in which the written words are used." *Id.*, at 534 (emphasis added). "The treaty's history, the negotiations, and the practical construction adopted by the parties may also be relevant." *Id.* A court's task is "to find out the intention of the parties," *The Amiable Isabella*, 6 Wheat. 1, 71 (1821) (Story, J.), and its "responsibility" is "to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties." *Air France* v. *Saks*, 470 U.S. 392, 399 (1985).

How to divine those shared expectations is a question on which the circuits are significantly divided.

The **Third**, **Sixth**, **Seventh,** and **Federal Circuits** recognize that extra-textual information such as historical context can be as important as the text of a treaty itself.

The **Seventh Circuit** holds that "courts consider several factors in discerning the intent of the parties to the agreement: (1) the language and purposes of the agreement as a whole; (2) the circumstances surrounding its execution; (3) the nature of the obligations imposed by the agreement" (as well as additional factors that were specific to the interpretive question at issue). *Frolova* v. *Union of Soviet Socialist Republics*, 761 F.2d 370, 373 (7th Cir. 1985). For example, in *Wolgel* v. *Mexicana Airlines*, the Seventh Circuit assessed whether the Warsaw Convention makes an airline liable for delay caused by a discriminatory bumping off a passenger off a flight. Beginning its analysis with the "history of the Warsaw Convention," the Circuit went on to note that "treaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." 821 F.2d 442, 444 (7th Cir. 1987) (quoting *Air France*, 470 U.S., at 396).

The **Third Circuit** agrees with "the general approach set forth in *Frolova*." *Gross* v. *German Found. Indus. Initiative*, 549 F.2d 605, 615 (3d Cir. 2008). In one example, the Third Circuit considered a treaty that guaranteed Korean companies the right to employ "executive personnel" "of their choice." *MacNamara* v. *Korean Air Lines*, 863 F.3d 1135, 1158 (3d Cir. 1988). An American citizen charged his Korean former employer with discrimination. The Third Circuit viewed the treaty's text as "absolute and ostensibly self-defining," *id.*, at 1143, but it nonetheless concluded that the treaty did not allow discriminatory treatment, because "a literal interpretation cannot be reconciled with the Treaty's intent and negotiating

history." *Id*. To assess the intent of the treaty parties, the court considered the historical context establishing the problem that the treaty was meant to address. *Id*. ("[T]he signatories had no reason to bargain for the right to discriminate within the host country's labor pool.").

The **Sixth Circuit** uses a similar approach. Sitting *en banc* in *Martinez* v. *United States*, the circuit interpreted the term "lapse of time" in a United States-Mexico treaty by extensive discussion of extra-textual evidence. 828 F.3d 451, 459 (6th Cir. 2016). That evidence included "foreign cases, dictionaries, legislative provisions, treatises and scholarly writing, and other legal materials," the "history" of extradition treaties, and the meaning of the term "in American law, where it has been used in the context of state laws." *Id*., at 459-461.

The **Federal Circuit** holds a treaty's terms are "given their ordinary meaning in the context of the treaty and are interpreted, in accordance with that meaning, in the way that best fulfills the purposes of the treaty." *Xerox Corp*. v. *United States*, 41 F.3d 647, 652 (Fed. Cir. 1994). "[E]xtrinsic material is often helpful in understanding the treaty and its purposes, thus providing an enlightened framework for reviewing its terms." *Id*. *Xerox* reviewed a significant of historical background to inform its understanding of the relevant treaty.

In none of the foregoing cases did the courts impose a prerequisite that a treaty should be ambiguous before a court considers the extra-textual materials. Indeed, in *Martinez*, Judge Clay, dissenting, objected that the court had departed from the principle, which

he thought should prevail, that a court can only consult such materials if a text is "ambiguous." *Martinez*, 828 F.3d, at 475 (Clay, J., dissenting).

By contrast, the **First**, **Second**, **Fifth**, and **D.C. Circuits** hold that extra-textual evidence can only be pertinent if a court has first found a treaty's text to be ambiguous.

The **Second Circuit** has held that the interpretation of a treaty "begins with the literal language," and a court can "apply traditional methods of interpretation only when the text of a treaty is unclear." *Tai Ping Ins. Co.* v. *Northwest Airlines, Inc.*, 94 F.3d 29, 31 (2d Cir. 1996). The Second Circuit has specifically noted that "the negotiating and drafting history of a treaty" has a "usefulness that is conditional and secondary to the text and context." *Mora* v. *New York*, 524 F.3d 183, 207 (2d Cir. 2008).[2] *Victoria Sales Corp.* v. *Emery Air Freight, Inc.*, interpreting the treaty phrase "transportation by air," said it must "begin[] with the literal language" and "end[] there if the language is reasonably susceptible to only one interpretation." 917 F.2d 705, 707 (2d Cir. 1990).

The **First Circuit** holds a court can consult "nontextual sources such as the treaty's ratification history and its subsequent operation" only "[t]o the extent that the treaties' terms are ambiguous with respect to the issue before us." *United States* v. *Li*, 206 F.3d 56, 63 (1st Cir. 2000).

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[2] In *Mora*, "context" meant the other content within a treaty surrounding the phrase to be interpreted; *Mora* did not consider extra-textual context such as the historical circumstances of the treaty's adoption.

In the **Fifth Circuit**, older cases looked to extra-textual sources in parallel with the text of a treaty. For example, *United States* v. *Postal* considered whether the Convention on the High Seas is self-executing. The plain text, the court held, "[o]n its face ... would bear a self-executing construction," but a court should "look beyond the written words to the history of the treaty" and other inputs. 589 F.2d 862, 877 (5th Cir. 1979). *Postal* noted that a self-executing interpretation would have significantly changed traditional practice, and thought "considerably more attention" would have been paid, in the negotiations, before making such a change. *Id.*, at 878.

Since then, the **Fifth Circuit** has regarded *Chan* v. *Korean Air Lines, Ltd.*, 490 U.S. 122 (1989), and *Medellín* v. *Texas*, 552 U.S. 491 (2008), as mandating a different approach. In *Kreimerman* v. *Casa Veerkamp, S.A. de C.V.*, the Fifth Circuit said a court "look[s] beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties," but "[o]nly when the language of a treaty ... is ambiguous." 22 F.3d 634, 639 (5th Cir. 1994) (citing *Chan*). *United States* v. *Jeong* drew a similar conclusion from *Medellín*. 624 F.3d 706, 710 (5th Cir. 2010) (citing *Medellín*, *Chan*, and *Kreimerman*).[3]

The **D.C. Circuit**, in the judgment below, stated "the interpretation of a treaty is like the interpretation of a statute." App. 20a. In response to Nigeria's appeal to the negotiating history of the treaty, the

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[3] Per *Martinez*, discussed above, the Sixth Circuit has continued its full use of extra-textual materials for treaty interpretation after *Chan* and *Medellín*.

court said such history could not be relevant because "nothing in the text of the Convention even hints at the private-act prerequisite that Nigeria proposes." App. 30a. The court declined entirely to consider the historical context, reviewed by Judge Katsas in his dissent, that showed the treaty drafters would not have expected "person" to encompass sovereigns *qua* sovereigns. The D.C. Circuit refused to countenance the nuanced interpretation of "person" that all these extra-textual sources call for, because it demanded some "explicit textual indication" supporting the *imperii / gestionis* distinction. App. 22a.

A short review of Judge Katsas's dissent reveals the contrast between the interpretive approaches. *Postal*, the older case from the Fifth Circuit, noted that in the context in which the Convention on the High Seas was developed, self-executing status for a provision like that treaty's Article 6 would have changed traditional practice, so that "considerably more attention" would have been paid in the negotiations had the drafters intended that. 589 F.2d, at 878. That is the same analysis that Judge Katsas recommended in this case, and that the panel rejected. *MacNamara*, from the Third Circuit, reasoned that the drafters of the Korea-U.S. treaty at issue would not have been negotiating for an exclusion from anti-discrimination laws, and the court relied on that insight despite the literal text of the treaty. Similarly, here, Judge Katsas pointed out that the New York Convention was intended for disputes in "private commercial trade," App. 51a; yet the panel insisted on its reading of the literal text without regard for that contextual clue. Had this case been in the courts that decided those other cases, the historical context discussed by

Judge Katsas's dissent would have led to an interpretation opposite from the D.C. Circuit's.

Commentators have long noted the confusion and lack of consensus over basic elements of treaty interpretation. Joshua Weiss, *Defining Executive Deference in Treaty Interpretation Cases*, 79 GEO. WASH. L. REV. 1592, 1606 (2011) (treaty interpretation is "plagued by incoherence and confusion"); David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 UCLA L. REV. 953, 963 (1994) (discussing "the confusion over essential principles in treaty interpretation"). The circuits all purport to base their contrasting approaches on this Court's decisions, yet they derive different lessons from this Court's teachings.

For example, in *Chan*, the question arose whether the Warsaw Convention strips an airline of liability protections if the passenger's ticket is formally deficient (by omitted certain statements that the treaty requires to be present). 490 U.S., at 127. The Court refused to allow "the labyrinth of the Convention's drafting history" to overcome the text of the agreement. *Id.*, at 133. Some lower courts, such as *Victoria* from the Second Circuit, have concluded from *Chan* that a court can only consult historical context once it has found a treaty ambiguous. 917 F.2d, at 707. But in *Chan*, the treaty was not just unambiguous. It contained a clear statement, 490 U.S., at 133 ("irregularity ... of the passenger ticket shall not affect the existence or the validity of the contract of transportation"), which the petitioner sought to contravene by means of negotiating history. Other courts do not regard *Chan* as excluding contextual materials for interpreting more open-ended provisions. For instance, the Sixth Circuit's *en banc* decision in *Martinez* interpreted the

phrase "lapse of time," which is obviously not a clear and direct statement as in *Chan*. *Martinez* did not identify that phrase as ambiguous in its usage in the treaty but considered historical context in parallel with the text anyway, over a dissent that insisted *Chan* barred that approach.

Here, "persons, whether physical or legal" is not the sort of clear statement that was determinative in *Chan*. The D.C. Circuit refused to countenance historical context absent an "explicit textual indication" favoring Nigeria's interpretation, whereas *Chan* excluded historical context only when it would contradict clear statements in the text.

As another example, this Court has repeatedly said that, while interpretation starts with a treaty's text, "to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Air France*, 470 U.S., at 396; *Eastern Airlines, Inc.* v. *Floyd*, 499 U.S. 530, 535 (1991) (quoting *Air France*). *Volkswagen Aktiengesellshaft* v. *Schlunk*, as an illustration, consulted U.S. domestic law for the meaning of a term, as well as the negotiating history of the treaty involved. 486 U.S. 694, 704-706 (1988). Later, *Medellín* restated the formula slightly to say that treaty interpretation, "like the interpretation of a statute, begins with its text." 552 U.S., at 507. *Medellín* then followed that statement by reiterating that "we have also considered as 'aids to its interpretation' the negotiation and drafting history of the treaty." *Id.* Some lower courts, such as the Fifth Circuit and the D.C. Circuit here, take *Medellín* to mean that a treaty must be interpreted in all ways like a statute, meaning a resort to extratextual

sources only if a provision is found ambiguous. *Jeong*, 624 F.3d, at 711. Other courts, such as the Sixth and Seventh Circuits, recognize the importance of the second sentence, as well as the full analysis that *Medellín* undertook that included a consideration of extra-textual materials. *E.g.*, *Instituto Mexicano del Seguro Social* v. *Zimmer Biomet Holdings, Inc.*, 29 F.4th 351, 362 (7th Cir. 2022) (quoting *Medellín*'s statement about extra-textual sources)*; cf. Martinez*, 828 F.3d, at 475 (Clay, J., dissenting) (asserting that *Medellín* mandates a focus solely on the text and criticizing the majority for violating that principle).

B. The D.C. Circuit's interpretation of the Convention conflicts with other circuits and with this Court's precedents.

The D.C. Circuit now holds that where the New York Convention describes its scope as covering disputes between "persons, physical and legal," that phrase encompasses sovereign nations—not just governments as parties to commercial contracts, but sovereigns in every guise. This interpretation is highly significant in the development of the New York Convention, and would have been startling to any negotiator or any nation involved in developing the Convention. The D.C. Circuit reached it only by explicitly refusing to follow this Court's precedents about the meaning of the word "person," and further by ignoring this Court's guidance about treaty interpretation.

For decades, the term person was held to apply "to natural persons, and also to artificial persons,—bodies politic, deriving their existence and powers from legislation,—but cannot be so extended as to include within its meaning the Federal government." *United States* v. *Fox*, 94 U.S. 315, 321 (1876). Just a few years

before the Convention, this Court held that "[i]n common usage that term does not include the sovereign." *United Mine Workers*, 330 U.S., at 275. The Court has relied on that premise repeatedly since *United Mine Workers*. *E.g.*, *Return Mail, Inc.* v. *Postal Service*, 587 U.S. 618, 626-627 (2019) (invoking "common usage" that "'person' does not include the sovereign"); *Will* v. *Mich. Dept. of State Police*, 491 U.S. 58, 64 (1989) (same). In *South Carolina* v. *Katzenbach*, the Court relied on the ordinary meaning of the word to conclude that "person," in the Fifth Amendment, does not include States within the Union. 383 U.S. 301, 323-324 (1966).

The D.C. Circuit rejected *United Mine Workers* on grounds that it addressed a federal statute and therefore cannot inform the interpretation of a treaty. App. 36a. But *United Mine Workers* said that the "common usage" of the English word "person" does not include the sovereign. *Fox,* from 150 years ago, had said the same. "This is no sapling of an interpretive rule—rather, it is a storied redwood of nineteenth-century origin." *Peck* v. *U.S. Dept. of Labor*, 996 F.3d 224, 231 (4th Cir. 2021). These cases are binding precedent not just about how to interpret a federal statute; they are binding on federal courts about the ordinary meaning of this word.

The **Second Circuit** has recognized as much, applying the *Mine Workers* understanding to that court's interpretation of a New York state law. *Bainbridge Fund Ltd.* v. *Republic of Argentina*, 37 F.4th 847, 850 (2d Cir. 2022). The **Fourth Circuit**, while interpreting a federal statute, understood that *Mine Workers* and *Fox* establish the "common usage" of the word

"person," not just a rule about interpreting statutes. *Peck*, 996 F.3d, at 231. *Katzenbach*, from this Court, took the ordinary meaning of the word for granted for understanding the U.S. Constitution. 383 U.S., at 323-324.[4]

The D.C. Circuit's refusal to follow *Mine Workers* is contrary to these other circuits, and contrary to the repeated holdings of this Court about the ordinary meaning of "person."

A historical hypothesis illustrates the import of the D.C. Circuit's decision. During the Civil War, the United Kingdom allowed shipyards to build vessels for the Confederate navy (the ensuing controversy was later named after the most famous of these vessels, the *Alabama*). These vessels destroyed substantial volumes of U.S. commerce, and the United States demanded compensation for the United Kingdom's departure from neutrality. Eventually, the two nations agreed to arbitrate their dispute (as well as other disputes that had arisen about fishing rights). The resulting award "rejected American claims for indirect damages" but did award $15.5 million in direct damages against the United Kingdom. U.S. Dept. of State, Office of the Historian, *The Alabama Claims, 1862-1872*, https://history.state.gov/milestones/1861-1865/alabama (accessed Nov. 6, 2024). Though this predated the New York Convention by nearly a century, imagine the Convention had been in force. It

[4] *CC/Devas (Mauritius) Ltd.* v. *Antrix Corp.*, currently before the Court, asks whether a foreign sovereign is a "person" under the Fifth Amendment. No. 23-1201, 2024 WL 4394121 (U.S. Oct. 4, 2024).

would have been startling for either side of this dispute to contemplate that by resolving their sovereign dispute through arbitration, they were submitting to enforcement of the award by a court—not just in this country or the United Kingdom, but in any country that is party to the Convention. But that is the unavoidable result of the D.C. Circuit's decision. The United States and the United Kingdom are "persons" according to the D.C. Circuit, regardless that they were navigating a purely sovereign dispute.

As another example, in 1974—four years after the United States joined the New York Convention—a U.S. warship grounded off the Netherlands. *B.V. Bureau Wijsmuller* v. *United States*, No. 76-2494, 1976 WL 6455361, at *1 (S.D.N.Y. Dec. 22, 1976). To obtain salvage services, the captain, an officer of the U.S. Navy, signed a standard agreement that included an arbitration clause. The salvor then asked a U.S. district court to compel the United States to arbitrate the salvor's compensation claims, in London, pursuant to the agreement. The United States resisted, and the court refused to enforce the agreement. Against the invocation of the New York Convention, the court observed that the Convention is about "international commercial disputes"; the United States did not intend to abrogate its sovereign immunity by joining the Convention; and "relations arising out of the activities of warships have never been regarded as 'commercial' within the context of sovereign immunity." *Id.* But under the D.C. Circuit's interpretation of the Convention, the salvor would have been entitled to have a

United Kingdom court compel the United States to arbitration in London;[5] and had the United States declined to participate, and suffered an award against it by default, the salvor would have been entitled to have a U.K. court enforce the award, perhaps by seizing U.S. assets in that country.

Such hypothetical outcomes would have been shocking when the Convention was drafted and agreed in the 1950s. As Judge Katsas observed, "there was an ongoing worldwide debate" at that time "about whether countries should always be immune from the domestic courts of other countries or whether they should be immune only for their sovereign acts. Nobody suggested that states should have no immunity." App. 50a. Moreover, "some countries that still embraced the traditional, absolute theory of immunity also signed the Convention," *id.*, so that their joining would have contravened their own bedrock foreign-relations principles had the Convention subjected sovereigns to enforcement as the D.C. Circuit thinks.

This Court has long held "it is our responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties." *Air France*, 470 U.S., at 399. Those expectations, as explained by Judge Katsas, cannot have included subjecting a sovereign to judicial enforcement as a private-law party simply because it agreed to ar-

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[5] The Convention mandates enforcement of an arbitration agreement within its scope, by compelling arbitration, as well as enforcement of an arbitration award. App. 183a-184a.

bitrate a sovereign dispute. To interpret the Convention to have that effect, the D.C. Circuit ignored key sources demonstrating the expectations of the parties at the time of adoption—sources of types that this Court has repeatedly held are relevant. In this way, too, the D.C. Circuit contravened this Court's precedents.

First, the historical context, as discussed above and in Judge Katsas's dissent, "make[s] it especially implausible that the Convention's use of 'persons' sweeps in foreign states acting in their sovereign capacity." App. 48a. Giving the Convention that meaning and effect would have been—and would be today—a radical change from the immunity that nations around the world respected for their fellow nations.[6]

That sort of historical information has been significant in the Court's interpretation of other treaties. For example, *Société Nationale Industrielle Aerospatiale*, interpreting the Hague Evidence Convention, described how common-law courts historically exercised "broad discovery powers ... over foreign litigants subject to their jurisdiction"; given that history, "we are unable to accept the hypothesis that the common-law contracting states abjured recourse to all pre-existing discovery procedures." 482 U.S., at 536. *Cook* v. *United States*, interpreting a bilateral treaty with the United Kingdom about the limits of territorial waters, explained that "[i]n construing the Treaty its history should be consulted." 288 U.S. 102, 112 (1933). The

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[6] *See supra*, at 10 (noting the FSIA's expropriation exception is possibly unique in subjecting a foreign sovereign to suit for *jure imperii* activities).

Court's description of not just the negotiating statements, but the full historical context of the international dispute that led to that treaty, was nearly dispositive of the interpretation. *Id.*, at 112-16.

The majority opinion below, by contrast, betrays no awareness of the historical context of the 1958 Convention.

Second, even considering cases like *United Mine Workers* solely as domestic law, this Court has repeatedly consulted domestic-law sources in treaty interpretation. *Air France* said that "[t]o determine the meaning of the term 'accident' in [Warsaw Convention] Article 17 we must consider its French legal meaning." 470 U.S., at 399. "We look to the French legal meaning for guidance as to these expectations because the Warsaw Convention was drafted in French by continental jurists." *Id. Volkswagenwerk*, similarly, consulted U.S. domestic law sources, including the Wright & Miller treatise, to interpret a term in the Hague Convention on Service, a treaty in English. 486 U.S., at 700. The New York Convention was drafted in New York, in English, with significant participation from the United States, the host country. So the meaning of the English word "person" in U.S. law at the time is highly informative about what the parties to the Convention intended and expected when they used that word. To reject this Court's cases on the word "person" outright, holding them fully irrelevant simply because they were interpreting domestic statutes, is contrary to this Court's precedents on treaty interpretation.

C. The D.C. Circuit's decision was wrong.

The D.C. Circuit's interpretation of the Convention also cannot be squared with the history, the text, the previously-expressed views of the Executive, or common sense.

First, until just a decade or two before the Convention the near-universal understanding was that a sovereign government is *never* subject to suit in another country's courts. When the Convention was being prepared and adopted, the live issue, with a developing—but not universally adopted—consensus, was that government instrumentalities could be sued for their private-law, *jure gestionis* activities. When the Convention drafters discussed whether the Convention would (or should) reach arbitrations involving government bodies, they can only have been referring to that developing issue. They could not have contemplated or intended to overturn the still-universal doctrine that sovereigns acting *jure imperii* are immune. As Judge Katsas observed, "it is highly unlikely that treaty drafters would have effected such sweeping changes through an unadorned reference to 'persons,' in a Convention focused mainly on private commercial trade." App. 51a.

Bolivarian Republic interpreted the FSIA to avoid "a radical departure from … basic principles." 581 U.S., at 181. The D.C. Circuit refused to employ that same caution for interpreting the Convention.

Second, the only basis for conceivably reaching sovereigns *qua* sovereigns is that sole word "persons." "In common usage that term does not include the sovereign." *United Mine Workers*, 330 U.S., at 275.

Third, the U.S. delegation to the Conference adopting the Convention explained the scope in a manner fully consistent with this context and ordinary meaning. "The intention of the Conference was in fact to cover arbitrations to which public corporations had become parties in their capacity as entities having rights and duties under private law." Beale Report, at 11. Public corporations are, per *Fox*, bodies "deriving their existence and powers from legislation," 94 U.S., at 321, as opposed to the ultimate sovereign itself.

Similarly, when President Johnson transmitted the Convention for Senate ratification, he informed the Senate that "[t]he expression "legal persons" in paragraph 1 is intended to cover not only corporate bodies under public law but also state trading corporations." Transmittal Letter, at 18. The notion that the Convention would eviscerate the sovereign immunity of the Government in some matters, as well as other national sovereigns, would surely have been important to mention had the Executive conceived that possibility. Then just a few years later, the Government itself resisted enforcement of the Convention against it, on grounds that the Convention did not deprive the Government of sovereign immunity.[7]

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[7] The D.C. Circuit claimed that the United Sates "endorsed" applying the Convention to sovereign conduct based on a footnote in an *amicus* brief the Government filed in a 1981 case, *Libyan American Oil Co.* v. *Socialist People's Libyan Arab Jamahirya*, 684 F.2d 1032 (D.C. Cir. 1981) (Table) (the court case reached no decision due to a settlement). App. 25a-26a. But

Fourth, two sovereigns (here, Nigeria and China) should be able to exercise their prerogatives as sovereigns to make treaty commitments to each other, and have those treaty commitments include peaceful resolution of disputes by means of arbitration, without thereby automatically submitting themselves to the courts of every country in the world for enforcement. The Nigeria-China Treaty, unlike some, does not allow arbitrations under the ICSID Convention, nor does it use any language evoking the New York Convention. It bears no sign that Nigeria or China considered the treaty obligations to be anything other than sovereign obligations owed to each other. To be sure, the arbitrations to be undertaken with investors were to be binding. But "submitting to jurisdiction and agreeing to be bound are two different things." *Medellín*, 552 U.S., at 507. Public international law is full of binding obligations that nobody would expect

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that case had nothing to do with the question presented here; the claims against Libya stemmed from a private-law contract the government had entered, *Libyan Am. Oil Co.* v. *Socialist People's Libyan Arab Jamahirya*, 482 F. Supp. 1175, 1176 (D.D.C. 1980), unlike Nigeria's purely sovereign conduct. The Government's brief did not address the question posed by this case or indicate the Government considered or took a position on it. It is also dubious whether an expression in an *amicus* brief decades after the Convention should prevail over the views of the Executive from the time of the drafting (and the time of accession). *Cf. GE Energy Power Conversion France SAS, Corp.* v. *Outokumpu Stainless USA, LLC*, 590 U.S. 432, 444 (2020) (reserving that question).

to be enforced, against the sovereigns thus bound, in domestic courts. *Cf.* App. 50a-52a.

D. The questions presented are exceptionally important.

How to interpret a treaty—purely textually, with resort to context only after identifying a specific ambiguity, or with a view to historical and legal context in parallel with the text to understand the intentions of the parties—is a recurring and important question. The State Department's 2020 Treaties in Force publication, with the 2021-2023 supplement, runs over 650 pages, covering hundreds of treaties and other international agreements to which the United States is a party. Courts regularly interpret treaty terms, and for some treaties in some courts, it is a matter of course to consider extra-textual materials. For example, some courts routinely rely on the Pérez–Vera Report when interpreting the Hague Convention on the Civil Aspects of International Child Abduction. *See, e.g.*, *Robert* v. *Tesson*, 507 F.3d 981, 988 n.3 (6th Cir. 2007) (noting that "[m]any circuits hold Professor Elisa Perez-Vera's report to be an authoritative source for interpreting the Convention's provisions").

The scope of the New York Convention, in particular, is a highly significant issue. The Department of Justice's Office of Foreign Litigation regularly defends litigation abroad, approximately 1,800 cases at a given time, Dept. of Justice, Office of Foreign Litig., https://www.justice.gov/civil/office-foreign-litigation (March 22, 2023). Many foreign jurisdictions recognize sovereign immunity on a reciprocal basis, *Persinger* v. *Islamic Republic of Iran*, 729 F.2d 835, 841 (D.C. Cir. 1984), so any expansion of domestic liability

for foreign sovereigns threatens the same for the United States in other courts. Brief of the United States as Amicus Curiae, at 21-22, *Bolivarian Republic*, 581 U.S. 170. In particular, the United States would be, as far as Nigeria has found, the first country to decide that the Convention covers not just government instrumentalities under private law, but sovereigns *jure imperii.* That precedent will surely be influential in other countries when this question arises elsewhere, including potentially in cases involving the United States. *Cf. Bolivarian Republic*, 581 U.S. at 181 (noting the importance of consistency with established international law to "diminish the likelihood that other nations would each go their own way" and potentially expand the U.S. vulnerability to suit). The *Wijsmuller* case above is a stark illustration. A U.S. naval vessel stranded at sea in Europe obtained salvation only by agreeing to arbitration—which, under the D.C. Circuit's interpretation, means the United States could be compelled to arbitrate in London and subjected to enforcement of the award in a London court.

The D.C. Circuit's interpretation is also significant for future Convention litigation in U.S. courts. A party wanting to use U.S. courts to enforce an arbitration award against a sovereign *qua* sovereign will always be able to enjoy the D.C. Circuit's new precedent, because venue is always appropriate in the District of Columbia district court for any suit against a foreign government body. 9 U.S.C. 204; 28 U.S.C. 1391(f)(4). That district is already the primary venue for actions against foreign government instrumentalities, *Bolivarian Republic*, 581 U.S., at 186, and parties with *Zhongshan*-type awards would, sensibly, only bring

their claims in that district. Competing views in other circuits will not develop. The D.C. Circuit has committed itself to a program of exercising judicial authority against foreign sovereign nations, under a deeply flawed interpretation of the Convention. Only this Court's intervention can prevent it.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

Keith Bradley
Counsel of Record
ScheLeese Goudy
Kayla Marie Mendez
717 17th Street,
Suite 1825
Denver, CO 80202
(303) 830-1776
keith.bradley@squirepb.com

Raúl B. Mañón
200 S. Biscayne Blvd.,
Suite 3400
Miami, Fl 33131

Samuel B. Ballingrud
2500 M Street NW
Washington, DC 20037

SQUIRE PATTON BOGGS (US) LLP

Counsel for Petitioner

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