NO. 15-1088

In the
Supreme Court of the United States

REPUBLIC OF ECUADOR,

PETITIONER,

v.

CHEVRON CORPORATION
AND TEXACO PETROLEUM COMPANY,

RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether a party seeking confirmation of an arbitral award against a foreign sovereign under 28 U.S.C. § 1605(a)(6) must prove, to a federal court exercising *de novo* review of the arbitral tribunal's decision, that the tribunal correctly found the claims asserted in the arbitration to fall within the scope of the arbitration agreement.

RULE 29.6 STATEMENT

Respondent Chevron Corporation is a publicly traded company (NYSE: CVX) with no parent corporation. No publicly held company owns 10% or more of its stock.

Respondent Texaco Petroleum Company is an indirect subsidiary of Chevron Corporation. No other publicly held company owns 10% or more of its stock.

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BRIEF FOR RESPONDENTS IN OPPOSITION

For the last half-decade, the Republic of Ecuador has shirked payment of a final and binding arbitral award to respondents Chevron Corporation and Texaco Petroleum Company ("TexPet"). Ecuador's petition is just the latest delay tactic. Ecuador asks this Court to review the D.C. Circuit's use of a burden-shifting approach to decide whether federal jurisdiction exists under the Foreign Sovereign Immunities Act's arbitration exception, 28 U.S.C. § 1605(a)(6). But Ecuador not only failed to challenge that framework below; it asked the D.C. Circuit to apply it. Ecuador thus has waived its lead argument for certiorari. In addition to having waived its argument about *how* a court should decide whether jurisdictional facts required by section 1605(a)(6) exist, Ecuador's petition fails to seek review of the D.C. Circuit's holding about *which* facts are and are not jurisdictional. That latter holding, however, makes Ecuador's argument irrelevant as well as waived, for there is no dispute as to the existence of the facts that the D.C. Circuit held were jurisdictional. There is no reason for this Court to grant certiorari to decide a splitless question whose answer will not affect the judgment below.

STATEMENT

1. Between 1991 and 1993, TexPet filed seven cases against Ecuador in the Ecuadorian courts, seeking over $553 million in damages. In those cases, TexPet claimed that Ecuador breached an investment agreement under which TexPet had spent two decades exploring and developing the country's

hydrocarbon reserves. When TexPet and Ecuador terminated that agreement in a settlement signed in 1995, they expressly preserved the seven pending cases. TexPet's breach-of-contract claims would ultimately linger in the Ecuadorian courts for more than a decade without resolution. Pet. App. 2a–3a, 19a.

Meanwhile, in 1993, the United States and Ecuador signed a bilateral investment treaty, or "BIT," that guaranteed reciprocal protections to investors from each nation. Pet. App. 81a–121a. The BIT, which entered into force in 1997, is both a completed agreement between the signatory nations to submit to arbitration for the benefit of their "national[s]" and "compan[ies]," and a standing offer by each nation, addressed to investors, to arbitrate disputes. Pet. App. 111a. By executing the BIT, Ecuador consented to arbitrate "any investment dispute" with a U.S. company, and to do so pursuant to the Arbitral Rules of the United Nations Commission on International Trade Law, G.A. Res. 31/98, U.N. Doc. A/RES/31/98 (Dec. 15, 1976), commonly known as the "UNCITRAL Rules." Pet. App. 111a–12a. Because the UNCITRAL Rules delegate to arbitrators the power to resolve questions regarding the scope of an arbitration agreement, Ecuador's adoption of them in the BIT amounts to an offer to arbitrate any arbitrability questions. *See* Pet. App. 13a–14a, 32a–33a. Both courts below expressly so held, *id.*, and Ecuador's petition does not seek review of those holdings—or even mention them.

In 2006, TexPet and its ultimate corporate parent (collectively, "Chevron") accepted Ecuador's

open offer to arbitrate by submitting a notice of arbitration in accordance with the BIT. Pet. App. 19a–20a; *see also* Pet. App. 112a. Only then did the Ecuadorian courts adjudicate the seven cases that had been languishing since the early 1990s. Upon submission of the notice of arbitration, Ecuador and Chevron formed "an 'agreement in writing' for purposes of [the New York Convention]," Pet. App. 112a, which is an international agreement on the recognition and enforcement of foreign arbitral awards. *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, 330 U.N.T.S. 3 (June 10, 1958); *see also* 9 U.S.C. § 201.

A three-member tribunal presided over the ensuing arbitration, in which Chevron alleged that Ecuador had breached the BIT and international law by unduly delaying TexPet's seven cases. *See* Pet. App. 16a (quoting BIT provision that "[e]ach party shall provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations"). Chevron and Ecuador appointed one member apiece, and those members jointly selected a third member. Pet. App. 34a. The tribunal fixed the seat of arbitration as The Hague, Netherlands. Pet. App. 20a. The arbitration spanned four years and involved thousands of pages of briefing and numerous hearings. Pet. App. 20a, 34a.

The tribunal first addressed Ecuador's objection to the arbitrability of Chevron's claims, in accordance with the UNCITRAL Rules, and unanimously concluded that Chevron's claims fell within the scope

of the BIT. Pet. App. 3a. In a 140-page decision, the tribunal found that the arbitration concerned an "investment," as the BIT required, Pet. App. 103a, because TexPet's seven cases "concern the liquidation and settlement of claims relating to [its investment in oil exploration and extraction] and, therefore, form part of that investment," Pet. App. 35a. As a result, the tribunal rejected Ecuador's argument that "Chevron's investments in Ecuador had terminated no later than 1995, two years prior to the entry into force of the BIT." Pet. App. 3a.

On the merits, the tribunal unanimously held that Ecuador breached its obligations under the BIT—especially its duty to "provide effective means of asserting claims and enforcing rights with respect to investment[s]," Pet. App. 107a—by refusing timely adjudication of TexPet's seven breach-of-contract cases. The tribunal further found that Chevron had suffered roughly $700 million in damages. In a final award issued in 2011, the tribunal concluded that, after accounting for Ecuador's 87% tax rate, Ecuador owed Chevron $96.3 million in after-tax damages plus interest. Pet. App. 3a; C.A. J.A. 940–1348.

Ecuador petitioned a court in The Hague to set aside the arbitral award, arguing—as it has argued in five courts in two countries since then, in various guises—that Chevron's claims fell outside the scope of what Ecuador agreed to arbitrate in the BIT. The Hague district court rejected Ecuador's argument. On *de novo* review, the Court of Appeal of The Hague also rejected Ecuador's argument, holding that arbitration of Chevron's claims was consistent with the BIT's text and purpose. Ecuador renewed its

arbitrability challenge in the Dutch Supreme Court, where it lost once again. Pet. App. 3a–4a.

2. Chevron petitioned the U.S. District Court for the District of Columbia for confirmation of the award under the Federal Arbitration Act, which creates a cause of action to enforce arbitral awards governed by the New York Convention. 9 U.S.C. § 207. Chevron invoked federal jurisdiction under the arbitration exception of the Foreign Sovereign Immunities Act ("FSIA"). *See* 28 U.S.C. §§ 1330(a), 1605(a)(6). The arbitration exception provides that "[a] foreign state shall not be immune from the jurisdiction of courts of the United States . . . in any case . . . in which the action is brought . . . to confirm an award made pursuant to . . . an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration," where "the agreement or award is or may be governed by" the New York Convention. *Id.* § 1605(a)(6).

The D.C. district court granted Chevron's petition and confirmed the award. Pet. App. 18a. With respect to federal jurisdiction, the district court agreed that the confirmation action fell within the FSIA's arbitration exception because the arbitral award was rendered pursuant to the BIT and was governed by the New York Convention. Pet. App. 21a–23a. As in its Dutch set-aside case, Ecuador argued that Chevron's arbitration claims fell outside the scope of the BIT—and that the district court was required to decide that arbitrability issue *de novo*, without deference to the tribunal's decision, in order to exercise jurisdiction under section 1605(a)(6). The district court rejected Ecuador's "unprecedented" and

"novel" attempt to refashion its challenge to the tribunal's arbitrability decision—a potential merits defense to confirmation under the New York Convention—into a challenge to the court's jurisdiction under section 1605(a)(6). Pet. App. 23a–25a.

As for the merits, the district court rejected Ecuador's arguments against confirmation under the New York Convention, Article V of which provides the exclusive grounds for refusing to confirm an arbitral award according to 9 U.S.C. § 207. Pet. App. 26a–41a. Among other things, the district court held that the BIT's offer to arbitrate under the UNCITRAL Rules was clear and unmistakable evidence that Ecuador and Chevron intended the arbitral tribunal, rather than a court in a confirmation action, to decide arbitrability questions. Pet. App. 32a–33a. For that reason, the district court deferred to the tribunal's determination that Chevron's claims were within the scope of the BIT's arbitration agreement. Pet. App. 33a–36a. At the same time, the district court also considered the substance of Ecuador's arbitrability challenge and explained that the tribunal's decision would pass muster "even under a very mildly deferential standard," because that decision "appears well reasoned and comprehensive." Pet. App. 34a.

3. The D.C. Circuit affirmed in an opinion written by Judge Wilkins and joined by Chief Judge Garland and Judge Srinivasan. It held that jurisdiction under section 1605(a)(6) depends on two facts: the existence of an arbitration agreement by the foreign state and the existence of an arbitral

award that is or may be governed by a treaty like the New York Convention. Pet. App. 6a–7a & n.2. Applying a burden-shifting approach dictated by circuit precedent, the D.C. Circuit held that Chevron had satisfied its burden of production on these two jurisdictional facts by producing the BIT, Chevron's notice of arbitration pursuant to the BIT, and the arbitral award, while Ecuador failed to carry its resulting burden to rebut those facts. Pet. App. 7a–10a. The court also made clear, however, that nothing turned on this burden-shifting approach, observing that "Ecuador does not dispute the existence of the BIT, Chevron's notice, or the tribunal's arbitration decision." Pet. App. 7a.

The D.C. Circuit rejected Ecuador's argument that arbitrability—that is, whether Chevron's claims fell within the scope of the BIT's arbitration agreement—is a jurisdictional fact under the FSIA. Pet. App. 8a ("In Ecuador's view, the arbitrability question is . . . a jurisdictional question that must be addressed by the District Court. Ecuador conflates the jurisdictional standard of the FSIA with the standard for review under the New York Convention."); Pet. App. 10a ("The dispute over whether the lawsuits were 'investments' for purposes of the treaty is properly considered as part of review under the New York Convention."). Like the district court, however, the D.C. Circuit went on to consider the substance of Ecuador's challenge to the tribunal's arbitrability decision and held in the alternative that even a *de novo* determination of arbitrability still favored Chevron. Pet. App. 10a–12a.

Having held that jurisdiction existed under section 1605(a)(6), the D.C. Circuit then turned to Ecuador's defenses to confirmation under the New York Convention. Pet. App. 12a–17a. Ecuador's argument on the merits echoed its putative argument about FSIA jurisdiction, namely, that Chevron's underlying claims were not arbitrable. *See* Pet. App. 13a (quoting New York Convention provision allowing a court to decline confirmation of an award "not falling within the terms of the submission to arbitration"). The D.C. Circuit rejected that argument against arbitrability, explaining that the BIT's adoption of the UNCITRAL Rules meant that "Ecuador . . . consented to allow the arbitral tribunal to decide issues of arbitrability—including whether Chevron had 'investments' within the meaning of the treaty." Pet. App. 14a.

Ecuador filed a petition for rehearing en banc. The D.C. Circuit denied the petition, with no judge calling for a vote or even a response from Chevron. Pet. App. 46a.

REASONS FOR DENYING THE PETITION

I. Ecuador Has Waived Its Lead Argument.

Ecuador's lead argument in this Court is that *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983), foreclosed the burden-shifting approach employed by the courts below and instead imposed on Chevron the burden of proving jurisdictional facts under the FSIA before a federal court exercising *de novo* review. Pet. 14–18. Ecuador's plea for certiorari on this issue fails, however, because

Ecuador waived this argument below.

The district court applied the burden-shifting approach laid out in the D.C. Circuit's FSIA precedent, explaining that Ecuador bore "the burden of proving that the plaintiff's allegations do not bring its case within a statutory exception to immunity." Pet. App. 21a (quoting *Phoenix Consulting, Inc. v. Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000)). Far from challenging this analysis on appeal, Ecuador explicitly suggested it to the D.C. Circuit: "This Court applies a burden-shifting analysis to determine whether an [FSIA] exception applies." C.A. Appellant's Br. 21. Indeed, the very sentence of the D.C. Circuit's decision that Ecuador now says "conflicts with three formidable lines of precedent" from this Court, Pet. 13, tracks Ecuador's brief verbatim: Once the plaintiff's initial burden of production is met, "the burden of persuasion rests with the foreign sovereign claiming immunity, which must establish the absence of the factual basis by a preponderance of the evidence." C.A. Appellant's Br. 21 (quoting *Agudas Chasidei Chabad of U.S. v. Russian Fed'n*, 528 F.3d 934, 940 (D.C. Cir. 2008)); Pet. App. 7a (same, quoting *id.*). Ecuador's petition for rehearing would have been too late to raise a new argument, but in any event it too failed to raise any challenge to the D.C. Circuit's burden-shifting analysis. *See Wills v. Texas*, 511 U.S. 1097, 1097 (1994) (mem.) (O'Connor, J., concurring in denial of certiorari) ("It has been the traditional practice of this Court . . . to decline to review claims raised for the first time on rehearing in the court below.").

Ecuador thus not only forfeited but waived the

Verlinden argument contained in its petition by failing to raise it below and by encouraging the D.C. Circuit to use the very burden-shifting analysis that it now asks this Court to reject. *See, e.g.*, *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002). Ecuador's petition does not acknowledge that it failed to raise its *Verlinden* argument below, so Ecuador's theory for why certiorari is warranted on this unpreserved issue is unknown. To the extent Ecuador contends in its reply brief that raising this argument below would have been futile given D.C. Circuit precedent, that is no excuse. Ecuador could easily have flagged the point while acknowledging the contrary circuit precedent—and at the very least, Ecuador could have refrained from affirmatively asking the court below to do what its petition now contends was improper. *See, e.g.*, *Greenlaw v. United States*, 554 U.S. 237, 243–44 (2008); *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 125 (2007).

II. Answering The Question Presented Will Not Change The Judgment Below.

Ecuador's request that this Court decide "[w]hether the D.C. Circuit erred in . . . concluding that . . . the party invoking federal court jurisdiction bears only a burden of production as to the facts supporting jurisdiction, while the foreign state bears the ultimate burden of persuasion as to the absence of those facts," Pet. i, fails not only because that issue is unpreserved but also because it is irrelevant to this case.

A. Ecuador's question presented asks the Court to decide how courts should go about deciding

whether the facts that section 1605(a)(6) makes jurisdictional exist. But the only facts that the D.C. Circuit held were jurisdictional are *undisputed*, and Ecuador does not seek certiorari to review the D.C. Circuit's holding as to *which* facts are jurisdictional. Because the facts at issue are thus undisputed, Ecuador's question about who bears what burden to prove them is irrelevant.

1. The D.C. Circuit held that only two facts are jurisdictional under section 1605(a)(6): whether there is an agreement to arbitrate by the foreign state, and whether there is an arbitral award that is or may be governed by the New York Convention or a similar treaty calling for the confirmation of arbitral awards. Pet. App. 6a–7a & n.2. The second of those questions requires no further discussion, because Ecuador has conceded that the award here is governed by the New York Convention. Pet. App. 7a n.2. The first question is equally undisputed, despite Ecuador's efforts to obscure what the D.C. Circuit held, because "Ecuador does not dispute the existence of the BIT [or] Chevron's notice" of arbitration pursuant to the BIT. Pet. App. 7a.

Ecuador's argument in all of its many court challenges to this award—in the Netherlands and in this country—has been that Chevron's claims contained in its notice of arbitration did not fall within the scope of the BIT, properly construed. Ecuador argued in the district court and in the D.C. Circuit that whether Chevron's claims were arbitrable under the BIT went to whether jurisdiction existed under section 1605(a)(6).

The D.C. Circuit expressly rejected that argument, holding in section II.B of its opinion, Pet. App. 8a–10a, that the existence of an arbitration agreement was a jurisdictional fact under section 1605(a)(6), but whether the tribunal correctly construed that arbitration agreement in finding that Chevron's claims fell within its scope was not. The D.C. Circuit's holding warrants quoting, given its absence from the petition:

> Ecuador argues that the FSIA required the District Court to make a *de novo* determination of whether Ecuador's offer to arbitrate in the BIT encompassed Chevron's breach of contract claims. According to Ecuador, if Chevron's claims are not covered by the BIT, then Ecuador never agreed to arbitrate with Chevron, and the District Court consequently lacked jurisdiction. In Ecuador's view, the arbitrability question is therefore a jurisdictional question that must be addressed by the District Court.
>
> Ecuador conflates the jurisdictional standard of the FSIA with the standard for review under the New York Convention. * * *
>
> The BIT includes a standing offer to all potential U.S. investors to arbitrate investment disputes, which Chevron accepted in the manner required by the treaty. The FSIA therefore allows federal courts to exercise jurisdiction over Ecuador in order to consider an action to confirm or enforce the award. The dispute over

> whether [Chevron's breach-of-contract] lawsuits were "investments" for purposes of the treaty is properly considered as part of review under the New York Convention.

Pet. App. 8a, 10a; *see also* Pet. App. 23a–24a (district court rejecting Ecuador's "novel" attempt to obtain "unprecedented merits-based review" of tribunal's arbitrability decision in the guise of whether FSIA jurisdiction existed).

2. Ecuador's petition ignores this key holding below. The petition repeatedly assumes that the arbitrability of Chevron's underlying claims is "the core 'jurisdictional fact' " under section 1605(a)(6). Pet. 13 (alteration omitted); *see also, e.g.*, *id.* at 31 (arguing that "FSIA jurisdiction here turns on whether Chevron had an 'investment' under the BIT"); *id.* at 12 (complaining that the D.C. Circuit "deferr[ed] to the arbitrators' findings on jurisdictional facts") (emphasis omitted). But as just explained, the D.C. Circuit squarely rejected that argument in a section of its opinion that Ecuador inexplicably cites for the proposition that the decision below deferred to the arbitral tribunal on "core FSIA 'jurisdictional facts.' " Pet. 16 (citing Pet. App. 8a–10a).

Ecuador was free not to seek certiorari to review this holding, and its decision not to do so is not surprising given that there is no circuit split on it. But Ecuador cannot wish away this holding while seeking certiorari on a question that it renders irrelevant.

3. As noted, the court below recognized that "Ecuador does not dispute the existence of the BIT [or] Chevron's notice" of arbitration submitted pursuant to the BIT. Pet. App. 7a. By signing the BIT, Ecuador offered to arbitrate claims alleging breaches of the BIT, and Chevron accepted that offer in its notice of arbitration. Pet. App. 10a; *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 392 (2d Cir. 2011) (holding that "Ecuador, by signing the BIT, and Chevron, by consenting to arbitration, have created a separate binding agreement to arbitrate"). The district court noted that the existence of an agreement to arbitrate—as distinct from the proper interpretation of its scope—was "a point Ecuador does not truly contest." Pet. App. 31a. And even now Ecuador concedes that Chevron's notice of arbitration was "procedurally valid." Pet. 36.

To be sure, Ecuador continues to insist, despite having lost the issue in five courts, that the tribunal misinterpreted the BIT in finding that Chevron's claims fell within its scope. But the court below explained why that objection to arbitrability was properly considered as part of the court's merits review of the award under the New York Convention, not as part of whether jurisdiction existed under section 1605(a)(6) to perform that review, Pet. App. 10a, and Ecuador does not seek this Court's review of that holding. *See also Schneider v. Kingdom of Thailand*, 688 F.3d 68, 73–74 (2d Cir. 2012) (holding that whether claims were arbitrable under BIT went only to the scope of the arbitration agreement, not its existence). Contrary to Ecuador's petition, therefore, the court below did not "defer to foreign arbitrators on th[e] core FSIA jurisdictional fact" of "whether

there is an agreement to arbitrate." Pet. i. Rather, the D.C. Circuit held that "the BIT and Chevron's notice to arbitrate satisfied the jurisdictional requirements of the FSIA," Pet. App. 12a, and the court did not need to defer to any degree to anyone as to the existence of that fact, because it was undisputed.

* * * * *

Ecuador would have this Court opine on "the standard of review applicable to jurisdictional facts under the FSIA's arbitration exception[] and who bears the burden of proving (or disproving) those facts." Pet. 11. But Ecuador does not, and cannot, dispute the only two facts that the court below held were jurisdictional, so the D.C. Circuit's holding that jurisdiction existed will stand no matter who should bear the burden of proving or disproving those facts. And while Ecuador believes that Chevron's claims were not arbitrable, it does not challenge the D.C. Circuit's holding that arbitrability is not a jurisdictional fact under section 1605(a)(6). Nothing this Court could hold with respect to how jurisdictional facts should be proved, therefore, would affect the disposition below as to this non-jurisdictional fact.

In short, because Ecuador's petition neither disputes the existence of the two facts that the D.C. Circuit held *were* jurisdictional nor asks the Court to review the D.C. Circuit's holding that whether Chevron's claims were arbitrable is *not* a jurisdictional fact, Ecuador's petition seeks an advisory opinion with no purpose other than further delaying payment of the award.

B. The failure of Ecuador's petition to deal directly with the D.C. Circuit's holding that the correctness of the tribunal's arbitrability decision is not a jurisdictional fact under section 1605(a)(6) counsels in favor of lengthening this brief in opposition by pointing out another holding below about judicial review of the tribunal's arbitrability decision that Ecuador's petition likewise does not challenge—namely, that the BIT's adoption of the UNCITRAL Rules, which empower the tribunal to decide whether claims asserted under the BIT are arbitrable, delegated that issue to the tribunal and required courts to review its decision deferentially. Pet. App. 13a–14a; *accord* Pet. App. 28a–29a, 32a–33a; *see First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (holding that "a court must defer to an arbitrator's arbitrability decision when the parties submitted that matter to arbitration").

The point of Ecuador's effort to transform its disagreement with the tribunal's arbitrability decision from a New York Convention merits defense to confirmation into an objection to jurisdiction under the FSIA was to claim a right to *de novo* review of that arbitrability decision; Ecuador understood that a court would review that decision deferentially under the Convention because the BIT delegated arbitrability to the arbitrators, but hoped that characterizing the issue as jurisdictional would lead to *de novo* review. *See* Pet. App. 24a (describing Ecuador's attempt "to get two bites at the apple of the merits of its dispute with Chevron, by seeking to have this Court separately determine the arbitrability of the underlying dispute under both the FSIA and the New York Convention"). Both courts

below rejected that ploy, however.

Now, for all of Ecuador's complaints about the tribunal's arbitrability decision, it has not presented any question for this Court that would allow the Court to address the arbitrability issue. First, because the petition does not seek certiorari on whether arbitrability is a jurisdictional fact, there is no basis for the Court to grant certiorari to decide whether it is—or whether, if so, that would trump the deference otherwise owed to the tribunal.

Second, Ecuador also does not seek certiorari on how courts should review tribunals' arbitrability decisions where the parties have adopted the UNCITRAL Rules. To be sure, the petition accuses the D.C. Circuit of "abandon[ing] its sentry post [by] deferring to a non-Article III arbitral finding that Ecuador agreed to arbitrate Chevron's claims" and leaving foreign sovereigns at "risk [of] being haled into U.S. courts without their consent." Pet. 26, 28. But what Ecuador expects this Court to do to address that complaint is unclear. The petition does not even mention the UNCITRAL Rules or the D.C. Circuit's holding that by adopting them in the BIT, Ecuador "consented to allow the arbitral tribunal to decide issues of arbitrability—including whether Chevron had 'investments' within the meaning of the treaty." Pet. App. 14a; *see also id.* ("There was no need for the District Court to independently determine that Chevron's suits satisfied the BIT's parameters once it had concluded that the parties had delegated this task to the arbitrator."). Nor could Ecuador have sought certiorari on this issue, because it conceded below that adopting the UNCITRAL Rules submits

arbitrability to the tribunal and thus limits courts in confirmation actions to deferential review of the tribunal's decision. Pet. App. 33a (district court noting that "Ecuador wisely yields to the unequivocal authority on this issue") (citing ECF No. 26 at 6).

Ecuador also fails to account for the D.C. Circuit's alternative holding that "[e]ven were we to conclude that the FSIA required a *de novo* determination of arbitrability . . . we would still find that the District Court had jurisdiction." Pet. App. 10a; *see also* Pet. App. 35a (district court finding that tribunal's "analysis is alone sufficient to survive even the more searching form of review Ecuador contends is applicable here"). This alternative holding makes clear that the proper standard for judicial review of the tribunal's arbitrability decision is irrelevant to the outcome: whether judicial review of arbitrability is deferential or *de novo*, Ecuador loses this case.

For these reasons, the arbitrability decision about which Ecuador complains so bitterly is insulated from this Court's review on multiple levels. There is no reason for the Court to spend its time deciding a question that will not affect the outcome in this case. *See* STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE 249 (10th ed. 2013).

C. Chevron also has an alternative argument that makes it uncertain whether the Court would reach the question Ecuador presents if certiorari were granted. As discussed above, the D.C. Circuit held that two facts—the existence of an arbitration agreement and the existence of an award—are jurisdictional under section 1605(a)(6). Pet. App. 6a–7a & n.2. How those facts must be proved is

irrelevant here because they are undisputed, but the Court might not reach that question for an additional reason: It is not clear that section 1605(a)(6) renders even those two facts jurisdictional.

Chevron argued below that section 1605(a)(6) is better understood as one of those statutes under which "jurisdiction depends on the plaintiff's asserting a particular type of claim," rather than on proof of some factual predicate. *Agudas Chasidei Chabad v. Russian Fed'n*, 528 F.3d 934, 940 (D.C. Cir. 2008) (so holding with respect to another provision of the FSIA) (citing *Bell v. Hood*, 327 U.S. 678 (1946)). The D.C. Circuit disagreed, Pet. App. 6a, but this Court would have no occasion to decide how jurisdictional facts must be proved if it held that even the two undisputed facts relied upon by the court below were not jurisdictional in the first place. *Cf. Sarhank Grp. v. Oracle Corp.*, 404 F.3d 657, 659–60 (2d Cir. 2005) (holding that asserting a non-frivolous claim to enforce an arbitral award under the New York Convention is the sole prerequisite to jurisdiction under 9 U.S.C. § 203, such that a district court is not obliged "to determine independently whether [the defendant] consented to arbitration").

III. The Question Presented Is Not Certworthy In Any Event.

Even if Ecuador had preserved the question it seeks to present to this Court, *but see* Part I, and even if something turned on that question in this case, *but see* Part II, that question still would not warrant certiorari.

Ecuador concedes that the question presented

has not occasioned a circuit split. Pet. 29–31. As the petition notes, *id.* at 16–18 & n.2, every circuit has agreed with the opinion below that if the plaintiff carries its burden of production on the applicability of an FSIA exception, then the foreign sovereign bears the burden of persuasion on the exception's inapplicability, *see* Pet. App. 7a. Plaintiffs have no reason to "head straight for the U.S. District Court for the District of Columbia" (Pet. 30) when the same burden-shifting approach applies everywhere. Meanwhile, the D.C. Circuit is the first to confront Ecuador's "unprecedented" and "novel argument" for *de novo* review of arbitrability in the guise of jurisdiction under section 1605(a)(6), Pet. App. 23a–24a, so it is not surprising that no split exists on that question (which, as noted, the petition does not raise in any event, *see supra* at 13–15).

Unable to muster a certworthy circuit split, Ecuador argues that the decision below warrants review because it conflicts with no fewer than "three formidable lines of precedent" from this Court. Pet. 13. If it seems implausible that the distinguished panel below would unanimously make such a drastic break with binding precedent, that is because Ecuador is wrong. *Cf.* Bolivia Amicus Br. 1 (similarly accusing the D.C. Circuit of an "attack on sovereign immunity").

A. According to Ecuador, *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983), shows that Chevron had the burden of proving jurisdictional facts under section 1605(a)(6). Pet. 14–18. But the *Verlinden* Court had no occasion to address the particulars of how an FSIA jurisdictional

predicate must or may be produced, proved, or rebutted when it answered the "core question" in the case by holding "that the 'arising under' clause of Article III provides an appropriate basis" for the FSIA's grant of subject-matter jurisdiction. *Verlinden*, 461 U.S. at 491, 492. It is one thing to declare in broad terms that a district court "must satisfy itself that one of the [FSIA's] exceptions applies" and may not assume that jurisdiction exists just because the defendant failed to appear, *id.* at 493–94 & n.20, and quite another to dictate a burden or method of proof and a standard of review, *see* Pet. 15. That Ecuador reads too much into *Verlinden* is confirmed by the fact that all twelve of the circuits to apply a burden-shifting approach under the FSIA have done so in the years since *Verlinden* was decided. *See* Pet. 16–18 & n.2 (collecting cases).

B. Ecuador next argues that the decision below conflicts with this Court's holding that "exceptions to (and waivers of) sovereign immunity must be narrowly construed in favor of the sovereign." Pet. 19 (citing *United States v. Bormes*, 133 S. Ct. 12, 16 (2012); *Lane v. Pena*, 518 U.S. 187, 192 (1996); *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 33–34 (1992); *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95 (1990); *Block v. North Dakota*, 461 U.S. 273, 287 (1983)). Ecuador chides the court below for "not attempt[ing] to reconcile its decision with this principle," Pet. 19–20, but all five cases cited by Ecuador concern *federal* sovereign immunity, not *foreign* sovereign immunity. The D.C. Circuit thus had no reason to "reconcile" its decision with these cases; it did not discuss them for the simple reason that they are not applicable, and it cannot be said

that the decision below "conflicts with relevant decisions of this Court." SUP. CT. R. 10(c).

Ecuador's misplaced reliance on federal sovereign immunity is of a piece with its basic misapprehension of how foreign sovereign immunity works. A foreign sovereign's amenability to suit under the FSIA is not, as Ecuador and its amicus repeatedly suggest, a product of its having "waive[d]" sovereign immunity or "consent[ed]" to being sued. *E.g.*, Pet. 3, 4, 11, 19, 20, 26, 33; Bolivia Amicus Br. 1, 2, 3, 14, 22; *cf.* 28 U.S.C. § 1605(a)(1) (one FSIA provision creating jurisdiction where "the foreign state has waived its immunity either explicitly or by implication"). Instead, foreign sovereign immunity must yield because Congress partially abrogated it by codifying "the restrictive view of sovereign immunity" in the FSIA, *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 199 (2007), in an exercise of its "undisputed power to decide . . . whether and under what circumstances foreign nations should be amenable to suit in the United States," *Verlinden*, 461 U.S. at 493. The fact that Ecuador lost this case does not mean the D.C. Circuit took an improperly narrow view of foreign sovereign immunity, for the decision below falls squarely within the FSIA's arbitration exception.

C. Finally, Ecuador argues that "[t]he decision below departs from the presumption against retroactivity." Pet. 21. This question-begging argument ignores the repeated and unanimous determinations—by the arbitral tribunal, three levels of the Dutch judiciary, the D.C. district court, and the D.C. Circuit—that TexPet's breach-of-contract cases

were an "investment" within the meaning of the BIT. Pet. App. 3a–4a, 10a–12a, 16a, 34a–35a. Those seven cases were still in existence when the BIT took effect in 1997, so this Court's retroactivity decisions are beside the point. There is nothing "[r]emarkabl[e]" (Pet. 12) about the D.C. Circuit's having remained silent as to an inapplicable principle with which it had no quarrel.

CONCLUSION

The petition should be denied.

Respectfully submitted.

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