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No. 20-13039

IN THE

United States Court of Appeals for the Eleventh Circuit

CORPORACIÓN AIC, SA

Petitioner - Appellant

v.

HIDROELECTRICA SANTA RITA S.A.

Respondent - Appellee

On Appeal from the U.S. District Court for the Southern District of Florida (Miami Division)
No. 1:19-cv-20294-RNS

EN BANC BRIEF OF APPELLANT

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Appellant, Corporación AIC, S.A., a Guatemalan company ("AICSA"), by and through undersigned counsel, files this Certificate of Interested Persons and Corporate Disclosure Statement under Eleventh Circuit Rule 28-1 and FRAP 26.1.

Certificate of Interested Persons

The undersigned counsel of record certifies that the following listed persons and entities have an interest in this case's outcome. These representations are made so that the judges of this Court may evaluate possible disqualification or recusal.

1. Corporación AIC, S.A., a Guatemalan company, Petitioner-Appellant.
2. Hidroelectrica Santa Rita, S.A., a Guatemalan company, Respondent-Appellee.
3. Bianchi, Jaime A. of the law firm of White & Case LLP, counsel for Respondent-Appellee, Hidroelectrica Santa Rita, S.A.
4. Fowler, III, George J. of the law firm of Jones Walker LLP, counsel for Petitioner-Appellant, Corporación AIC, S.A.

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9. Philp, Sheldon A. of the law firm of White & Case LLP, counsel for Respondent-Appellee, Hidroelectrica Santa Rita, S.A.
10. Rosen, Michael A. of the law firm of Jones Walker LLP, counsel for Petitioner-Appellant, Corporación AIC, S.A.

Corporate Disclosure Statement

Corporación AIC, S.A. is a private Guatemalan company. No publicly held corporation owns 10% or more of its stock.

Dated: December 12, 2022

/s/ George J. Fowler, III
George J. Fowler, III
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STATEMENT REGARDING ORAL ARGUMENT

This Court has ordered that en banc oral argument will be conducted the week of February 13, 2023, and that each side will be allotted 20 minutes for oral argument.

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EN BANC BRIEF OF APPELLANT

PRELIMINARY STATEMENT

This appeal presents important issues arising from this Court's failure to address the role of primary jurisdiction in its prior decisions on the law applicable to vacatur of non-domestic arbitration awards under the Convention on the Recognition and Enforcement of Foreign Arbitral

Awards ("New York Convention") and the Federal Arbitration Act ("FAA").

The New York Convention encourages the recognition and enforcement of international arbitration awards. It does so, in part, by listing in Chapter V the exclusive grounds on which a court may refuse to recognize and enforce an international arbitration award if the award was not made in, or under the law of, the country in which the court sits. These courts are said to have "secondary jurisdiction."

But the New York Convention preserves, and through its text and structure confirms, a critical background rule: the country where an arbitration occurs or whose law governs the proceedings may set aside or suspend an international arbitration award, and may do so based on that country's domestic law found outside the Convention's constraints on secondary jurisdictions. This is known as "primary jurisdiction," which recognizes the greater interest of these countries in comparison to countries that are only asked to enforce an award.

The FAA is the United States' primary source of domestic law on the confirmation, vacatur, and modification of arbitration awards. Chapter 1 of the FAA, which governs domestic arbitration awards in the

first instance, provides that a basis for vacatur is if the arbitrators exceeded their powers. Chapter 2 of the FAA, which enacts the New York Convention, instructs that the provisions of Chapter 1 extend to review of non-domestic awards under the Convention and Chapter 2, barring only actual conflict with those laws.

This case involves an arbitration award between two non-domestic parties issued in the United States. The United States thus has primary jurisdiction over the award, and its domestic law of vacatur controls. That domestic law—the FAA—provides that the same grounds for vacatur of a domestic award may be used to vacate a non-domestic award absent conflict with the law of non-domestic awards. Neither the New York Convention nor Chapter 2 of the FAA preclude a court of primary jurisdiction from vacating an award where the arbitrators exceed their powers. To the contrary, the Convention (which Chapter 2 enacts) is silent on the precise grounds on which a primary jurisdiction may vacate an international arbitration award, leaving to that jurisdiction's domestic law when to set aside or suspend an award. Here, that means that the FAA's exceeding-powers ground for vacatur is available.

This Court's precedents, however, blur the key distinction between primary and secondary jurisdiction. They hold that an arbitration award under the New York Convention may be vacated—even in a court of *primary* jurisdiction—based only on the limited grounds stated in Article V of the Convention (which itself includes a primary-jurisdiction carve-out), and not those provided in Chapter 1 of the FAA. Those precedents are accurate insofar as they involve secondary jurisdiction, but they overlook the Convention's and the FAA's separate approach toward primary jurisdiction. As a result, the Eleventh Circuit's interpretation of the standards governing a primary jurisdiction's vacatur of non-domestic arbitration awards has been rejected by every other Circuit to address the question, and is also at odds with the Supreme Court's treatment of the issue.

None of this was lost on the panel majority, which expressed its "belie[f] that our Circuit is out of line with Supreme Court precedent." *Corporacion AIC, SA v. Hidroelectrica Santa Rita S.A. ("AICSA")*, 34 F.4th 1290, 1292 (11th Cir. 2022), *vacated, reh'g en banc granted*, 50 F.4th 97 (11th Cir. Oct. 5, 2022). But the panel's "hands were tied" by two prior decisions of three-judge panels of this Court: (1) *Inversiones y*

Procesadora Tropical INPROTSA, S.A. v. Del Monte Int'l GmbH, 921 F.3d 1291 (11th Cir. 2019), and (2) *Industrial Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH,* 141 F.3d 1434 (11th Cir. 1998). *Id.* Those cases compelled the panel to affirm the District Court's holding that it could not vacate an arbitral award under the New York Convention on the exceeding-powers ground contained in Chapter 1 of the FAA, even though the precedents "missed an important distinction . . . [between] primary and secondary jurisdiction" and "failed to consider that domestic defenses to enforcement of arbitration awards" are available for vacatur of a non-domestic award in courts of primary jurisdiction. *AICSA,* 34 F.4th at 1297–98. Concurring, Judge Jordan agreed that these same "aspects of *Industrial Risk* and *Inversiones* were wrongly decided." *Id.* at 1302. And all three panel judges concluded that en banc review was necessary to reconsider and overrule the prior Eleventh Circuit precedent because "the exceeding powers ground is a valid basis for vacatur under both the New York Convention and the FAA." *Id.* at 1292.

The Court granted rehearing en banc and vacated the panel decision. *AICSA*, 50 F.4th at 98. As recognized by each panel member, this Court's precedents: are inconsistent with the text, structure, and

history of the New York Convention and the FAA; are outliers among the Circuit Courts; and are at odds with the Supreme Court's decision in *BG Group, PLC v. Republic of Argentina,* 572 U.S. 25 (2014).

The en banc Court should now, on a clean slate, hold that the FAA's exceeding-powers ground is a valid basis for vacatur of a non-domestic arbitral award rendered in the United States under the New York Convention and overturn the Court's contrary holdings in *Industrial Risk* and *Inversiones*.

JURISDICTIONAL STATEMENT

The District Court had jurisdiction because the arbitral award falls under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Art. IV, June 10, 1958, 21 U. S. T. 2519 ("New York Convention"); 9 U.S.C. §§ 201, 203, 208; 9 U.S.C. § 10.

STATEMENT OF THE ISSUE PRESENTED BY THE COURT

Whether a federal court may vacate a non-domestic arbitration award issued under the New York Convention on the ground that the arbitrators exceeded their powers under the Federal Arbitration Act, 9 U.S.C. § 10(a)(4).

STATEMENT OF THE CASE

A. Factual Background

This case stems from a Miami-based arbitration proceeding between two Guatemalan entities: the Appellant, Corporación AIC, S.A. ("AICSA"), and the Appellee, Hidroelectrica Santa Rita, S.A. ("HSR"). The facts of this dispute reveal the effect and importance of the legal issues before the Court.[1]

AICSA and HSR were parties to a 2012 Engineering, Procurement and Construction Agreement ("EPC Contract"). The EPC Contract provided for AICSA to construct a hydroelectric power plant in Cobán, Guatemala. Attendant to the EPC Contract, AICSA executed a sub-contract with engineering and design company Novacom, S.A. ("Novacom"). From the commencement of the construction project, HSR made several advance payments to AICSA and to Novacom.

In October 2013, HSR issued a notice of force majeure halting all work. Five months later, HSR terminated the agreement. In turn, AICSA

[1] These facts were presented to the District Court in the Second Amended Petition and Motion to Vacate Arbitration Awards. (Doc. 31-1, pp. 1–28).

was forced to terminate the Novacom subcontract. HSR subsequently disputed Novacom's invoices and insisted that AICSA return to HSR all payments to Novacom, including the money AICSA received from HSR and forwarded to Novacom and payments HSR made directly to Novacom.

B. Procedural History

1. Arbitration

HSR initiated arbitration proceedings ("Arbitration") against AICSA in Miami, Florida, in October 2016, seeking to recover all advance payments it made under the EPC Contract. (Doc. 1-7). AICSA invoked the EPC Contract's joinder provision and requested the Arbitration Tribunal ("Tribunal") join Novacom as a party to the proceedings. With a split decision, the Tribunal rejected AICSA's request to join Novacom.

Over two years later, after several hearings and briefing rounds, the Tribunal issued its Final Award. It held that AICSA was entitled to keep US$2,429,627.08 and €703,290.00 for work done under the EPC Contract, but it also ordered AICSA:

- to return to HSR US$7,017,231.52 and €435,168.00, plus interest;
- to reimburse HSR US$26,940.00 for certain costs; and

- to keep in place certain Advance Payment Bonds that AICSA originally provided under the EPC Contract, but in an amount equal to or greater than the amounts granted in and accrued under the Final Award.

One arbitrator dissented in part to the Final Award, specifically taking issue with the denial of AICSA's claim against HSR for breach of the EPC Contract's bribery provision.

In March 2019, while the District Court proceedings were pending, the Tribunal issued its "Decision and *Addendum*." (Doc. 31-1). Among other things, the Tribunal held that if any issuer contends that the existing Advance Payment Bonds had lapsed, AICSA would then have to post a second set of new bonds. (Doc. 31-1, p. 304).[2]

[2] The April 7, 2017 Partial Arbitration Award is attached to AICSA's First Amended Petition, Doc. 30-4. The October 29, 2018, Final Award is attached to the Petition as Doc. 30-2. The March 11, 2019 Decision and *Addendum* is attached to the Second Amended Petition as Doc. 31-1, pp. 304–24. Together, the Partial Arbitration Award, the Final Award, and the Decision and *Addendum* are referred to collectively as the "Arbitration Awards."

The Tribunal's decision to require new bonds disregards the express terms of the EPC Contract and exceeds the Tribunal's powers. Section 30.4 of the EPC Contract states:

> In the event of any termination of the Agreement, all of the security provided by either Party, including the letters of credit and the bonds, *shall remain* in full force and effect until the beneficiary of any such security determines, in its sole discretion, that all claims and potential claims are fully and finally settled and satisfied and no fact or circumstance exists which may give rise to a claim.

(Doc. 30-4, p. 31) (emphasis added). Only the bonds that are already in effect can "remain" in effect. Yet the Tribunal ordered AICSA to post *new* bonds:

> . . . for the avoidance of doubt, the term "*keep in place*" at paragraphs 258 and 440(d) of the Final Award means (i) providing and maintaining *new* Advance Payment Bonds in force, should any insurer consider that any of the Bonds have lapsed, and (ii) maintaining the original Advance Payment Bonds in force, should every insurer agree that the original Bonds remain in place.

(Doc. 31-1, p. 321) (emphasis added).

The Tribunal's order requiring AICSA to post new Advance Payment Bonds is more than mere interpretation of the contract—it imposes an extra-contractual remedy. AICSA fulfilled its contractual obligations by furnishing bonds that HSR accepted. If HSR believed it had a remedy

under the Advance Payment Bonds, it should have made a timely claim against the bonding companies.

2. Litigation

On January 22, 2019, two months before the Tribunal issued its "Decision and *Addendum*," AICSA filed its Petition and Motion to Vacate Arbitration Awards. (Doc. 1). Two weeks later, the District Court referred this case to the magistrate judge for recommendation on dispositive matters. (Doc. 18, p. 1).

AICSA argued in its Petition, as amended, that the Tribunal exceeded its powers in several ways and that, pursuant to 9 U.S.C. § 10(a)(4), the Arbitration Awards should be vacated, and the matter should be remanded to the Tribunal. AICSA identified five separate instances where the Tribunal exceeded its powers: (1) by creating a new requirement for (non)joinder of parties and refusing to allow subcontractor Novacom to be joined to the arbitration; (2) by creating a new condition precedent to enforcing the anti-corruption provisions of the EPC Contract; (3) by failing to follow mandatory Guatemalan law, as called for in the EPC Contract, (a) by not providing for the "indemnification" required by Guatemalan law when an owner terminates a contract, and (b) by

awarding interest on advance payments as though they were loans; (4) by refusing to enforce the mandatory provision in the EPC Contract that AICSA, as the prevailing party, is entitled to recover its fees and costs in the arbitration, and instead denying AICSA an award of fees and costs; and (5) in requiring AICSA to post a replacement or new set of bonds. (Doc. 31-1, pp. 6–7).

On April 16, 2020, the magistrate judge recommended that AICSA's Petition, as amended, be denied. (Doc. 41). The magistrate judge reasoned that the exceeding-powers ground was an invalid basis to vacate the Arbitration Awards. That recommendation relied largely on this Court's decisions in *Industrial Risk* and *Inversiones*. Based on those precedents, the magistrate judge concluded that AICSA is not entitled to rely on Section 10(a)(4) of the FAA (the exceeding-powers provision) because the Arbitration Awards are "international arbitral awards" subject to vacatur only under Article V of the New York Convention and Chapter 2 of the FAA. (Doc. 41, pp. 6–7).

Over AICSA's objections, the District Court adopted the magistrate judge's Report and Recommendation, denied AICSA's Petition and motion

to vacate, and dismissed the case. (Doc. 52). AICSA timely appealed. (Doc. 53).

On May 27, 2022, a panel of this Court affirmed the District Court, despite agreeing with AICSA that 9 U.S.C. § 10(a)(4) provides "a valid basis for vacatur under both the New York Convention and the FAA." *AICSA*, 34 F.4th at 1292. The panel found itself "powerless" to vacate the arbitral awards because of this Circuit's precedent in *Inversiones* and *Industrial Risk*. *Id.*

This Court granted rehearing en banc on October 5, 2022. *AICSA*, 50 F.4th 97. The Court's review of AICSA's petition to vacate the Arbitration Awards is *de novo*. *Frazier v. CitiFinancial Corp., LLC*, 604 F.3d 1313, 1321 (11th Cir. 2010).

SUMMARY OF ARGUMENT

The New York Convention encourages the recognition and enforcement of international arbitration awards. Thus, it enumerates the exclusive grounds on which courts of party-nations may refuse to recognize and enforce an arbitration award made abroad under foreign law. Such courts, which have secondary jurisdiction, lack a substantial

interest in the award and are treaty-bound to the Convention's handful of specific grounds for rejecting the award.

But the New York Convention is a treaty, not a supranational legal union. It recognizes that an arbitration award may be "set aside or suspended" by a court "of the country in which, or under the law of which, that award was made" according to that country's domestic law. In such cases, that court has primary jurisdiction, and the Convention leaves to that court's domestic law the particular grounds on which the award may be vacated.

This is a primary-jurisdiction case, and the FAA supplies the pertinent domestic law. Chapter 2 of the FAA enacts the New York Convention as to non-domestic arbitration awards. Chapter 1 provides that domestic arbitration awards may be vacated "where the arbitrators exceeded their powers." And Chapter 2 instructs that Chapter 1's exceeding-powers ground for vacatur applies to non-domestic awards barring only "conflict" with New York Convention or Chapter 2. Neither the Convention nor its enactment in Chapter 2 of the FAA precludes vacatur of an award because an arbitration tribunal exceeded its powers.

The answer to the question presented is clear: a federal court may vacate a non-domestic arbitration award made in the United States on the ground that the arbitrators exceeded their powers. The text, structure, and history of the New York Convention and the FAA compel that answer. At least five federal appellate courts have adopted that answer as circuit law. The Supreme Court has all but explicitly agreed, taking for granted that Chapter 1's domestic vacatur standards extend to Convention awards under Chapter 2. And international arbitration scholarship and commentary, spanning decades, piles on.

This Court's precedent is the outlier, in a limited but fundamental respect. Everyone agrees with this Court's holdings that courts of Convention-party nations may refuse to recognize and enforce an arbitration award made *abroad* under *foreign law* only under the specific, exclusive grounds listed in the Convention. Much of this Court's surrounding analysis in those decisions is true, too. Yet this Court's precedent has overlooked the foundational distinction between primary and secondary jurisdiction. In doing so, that precedent handicaps a primary jurisdiction's authority down to that of all secondary

jurisdictions. The Court should seize this opportunity to correct its errant precedents.

ARGUMENT

I. Starting Fresh: Domestic Grounds for Vacatur Apply to Non-Domestic Arbitration Awards Where the United States is the Primary Jurisdiction.

The en banc Court has a clean slate. Much of this Court's precedent holds true: Chapter 2 of the FAA "mandates the enforcement of the New York Convention in United States courts." *Indus. Risk*, 141 F.3d at 1440. The New York Convention, as "an exercise of the Congress' treaty power and as federal law," transcends "all prior inconsistent rules of law." *Id.* (quoting *Sedco, Inc. v. Petroleos Mexicanos Mexican Nat'l Oil Co. (Pemex)*, 767 F.2d 1140, 1145 (5th Cir. 1985)). The New York Convention applies to "awards not considered as domestic awards in the country where enforcement of the award is sought," including, under the FAA, any arbitral award that is not "entirely between citizens of the United States." *Indus. Risk*, 141 F.3d at 1440. To be sure, the New York Convention "contemplates and expressly recognizes vacatur proceedings." *Inversiones*, 921 F.3d at 1299. And—at least where a *secondary* jurisdiction considers a non-domestic award—the "award must

be confirmed unless appellants can successfully assert one of the seven defenses against enforcement of the award enumerated in Article V of the New York Convention," with the burden falling on the party invoking the defense. *Indus. Risk*, 141 F.3d at 1441–42.

As the panel acknowledged, however, the Court's prior decisions overlooked the critical distinction between primary and secondary jurisdiction. *AICSA*, 34 F.4th at 1300-01. As a result, Eleventh Circuit precedent stands alone among the Circuit Courts and in tension with the Supreme Court's conception of the standards governing vacatur of non-domestic arbitration awards under the FAA and New York Convention where the United States is the primary jurisdiction. In such cases, domestic grounds for vacatur—including the FAA's exceeding-powers ground—apply with full force. The Court should now correct course.

A. The FAA and the New York Convention.

The FAA consists of three chapters. Chapter 1 covers domestic arbitrations. *See* 9 U.S.C. §§ 1–16. A domestic arbitration is one that arises out of a commercial relationship that is "entirely between citizens of the United States" and contemplates enforcement in the United States. 9 U.S.C. § 202. Chapter 2 covers non-domestic arbitrations under the

New York Convention. *See* 9 U.S.C. §§ 201–208. A non-domestic arbitration award falls within one of two categories: either (1) it was made abroad, or (2) it is "not considered as domestic" in the country where enforcement is sought (that is, it does not qualify as domestic under the FAA). *Indus. Risk*, 141 F.3d at 1440; *see also* New York Convention, Art. 1.[3] Chapter 3 of the FAA—not directly applicable here—covers arbitrations under the Panama Convention.[4] *See* 9 U.S.C. §§ 301–307.

All agree that the underlying proceeding here is *non-domestic*, as it involves foreign parties (two Guatemalan entities) arbitrating in Miami,

[3] The Second Circuit has drawn the lines somewhat more finely, holding that "the New York Convention applies to three types of arbitral awards: (1) arbitral awards made in a foreign country that a party seeks to enforce in the United States (known as foreign arbitral awards); (2) arbitral awards made in the United States that a party seeks to enforce in a different country; and (3) nondomestic arbitral awards that a party seeks to enforce in the United States, where such awards are nondomestic on account of their connections with a foreign legal framework." *Beijing Shougang Mining Inv. Co. v. Mongolia*, 11 F.4th 144, 158–59 (2d Cir. 2021) (internal quotation marks omitted).

[4] Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, S. Treaty Doc. No. 97-12, 1438 U.N.T.S. 24384.

Florida. The New York Convention and Chapter 2 of the FAA thus control at the outset.

The New York Convention is "a multilateral treaty that addresses international arbitration." *GE Energy Power Conversion Fr. SAS, Corp. v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637, 1644 (2020). The Senate ratified the New York Convention in 1970 to "encourage the recognition and enforcement of international arbitral awards" and to "relieve congestion in the courts and to provide parties with an alternative method for dispute resolution that [is] speedier and less costly than litigation." *Indus. Risk*, 141 F.3d at 1440 (internal citations omitted). Congress implemented the New York Convention as Chapter 2 of the Federal Arbitration Act. *See* 9 U.S.C. §§ 201–208; *Lindo v. NCL (Bahamas) Ltd.*, 652 F.3d 1257, 1262 (11th Cir. 2011). Section 201 of the FAA provides that the New York Convention "shall be enforced in United States courts in accordance with [Chapter 2 of the FAA]." 9 U.S.C. § 201. "As an exercise of the Congress' treaty power and as federal law," the New York Convention "must be enforced according to its terms over all prior inconsistent rules of law." *Indus. Risk*, 141 F.3d at 1440 (internal quotation marks omitted). Even so, "Congress, as it added the [New York]

Convention Act and then the [Panama Convention] Act to title 9, anticipated conflicts among these treaty-implementing statutes and the FAA." *Bautista v. Star Cruises*, 396 F.3d 1289, 1297 (11th Cir. 2005). And Congress "addressed potential conflicts" in a way that "limits the degree to which title 9 may be considered a single statute." *Id.* Most important here, Congress gave the New York Convention "primacy" over any conflicting FAA provisions in the first instance, but added a residual-application clause. *Id.* That residual-application clause requires that Chapter 1's domestic-arbitration provisions—all of them—govern non-domestic arbitrations under Chapter 2 so long as they are "not in conflict with [Chapter 2] or the Convention." 9 U.S.C. § 208.

So then, as the panel observed, there are three potential bodies of law here: (1) the New York Convention, which governs non-domestic arbitration awards like the one here; (2) Chapter 2 of the FAA, which implements the New York Convention; and (3) Chapter 1 of the FAA, which typically controls domestic arbitrations but, via Chapter 2's residual-application clause, extends to non-domestic arbitrations so long as it does not conflict with the New York Convention or Chapter 2. *AICSA*, 34 F.4th at 1294.

B. Survey of the Pertinent Text.

Four interrelating provisions of these three bodies of law decide the question before this en banc Court. They are: (1) the provision in Chapter 2 of the FAA concerning a federal district court's confirmation, refusal, or deferral as to the recognition or enforcement of a non-domestic arbitration award; (2) Article V of the New York Convention, which lists grounds for refusal or deferral of recognition or enforcement of an arbitration award, including where the award is set aside or suspended by a competent authority of the country in which that award was made; (3) the residual-application clause of Chapter 2 of the FAA, which incorporates all non-conflicting aspects of Chapter 1 of the FAA for proceedings regarding non-domestic arbitration awards under the New York Convention; and (4) Section 10 of Chapter 1 of the FAA, which provides specific grounds for vacating arbitration awards, including where arbitrators exceeded their powers. Because these provisions factor repeatedly into various stages of the analysis, AICSA briefly lists them here as a point of reference.

1. Section 207 of the FAA.

Chapter 2 of the FAA identifies the power of a district court to confirm (or not) a non-domestic arbitration award under the New York Convention in Section 207:

> Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award *unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention*.

9 U.S.C. § 207 (emphasis added).

2. Article V of the New York Convention.

The New York Convention, in turn, specifies the "grounds for refusal or deferral of recognition or enforcement of the award" adverted to in section 207 of the FAA. There are seven of them. Article V provides:

> (1) Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
>
> (a) The parties to the agreement . . . were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
>
> (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or

> of the arbitration proceedings or was otherwise unable to present his case; or
>
> (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
>
> (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
>
> (e) *The award* has not yet become binding on the parties, or *has been set aside or suspended by a competent authority of the country in which*, or under the law of which, *that award was made*.
>
> (2) Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
>
> (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
>
> (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

New York Convention, Art. V (emphases added). These seven grounds are the "only grounds [for refusing to recognize and enforce] explicitly

provided under the [New York] Convention." *Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc.*, 126 F.3d 15, 19 (2d Cir. 1997).

Article V(1)(e) speaks of an award being "*set aside or suspended* by a competent authority of the country in which . . . that award was made." New York Convention, Art. V(1)(e) (emphasis added). This language finds kinship in Article VI, which provides that "[i]f an application for the *setting aside or suspension* of the award has been made to a competent authority referred to in article V(1)(e)," the competent authority may postpone decision or require the aggrieved party to post security. New York Convention, Art. VI.

3. The Residual-Application Clause of the FAA.

Chapter 2 of the FAA, as discussed, also incorporates all non-conflicting aspects of Chapter 1 of the FAA for proceedings regarding non-domestic arbitration awards under the New York Convention. Section 208 provides:

> Chapter 1 [9 U.S.C. §§ 1–16] applies to actions and proceedings brought under this chapter [9 U.S.C. §§ 201–208] to the extent that chapter is not in conflict with this chapter [9 U.S.C. §§ 201–208] or the Convention as ratified by the United States.

9 U.S.C. § 208.

4. Section 10 of Chapter 1 of the FAA.

Chapter 1 of the FAA—which, barring conflict, applies to Chapter 2 and the New York Convention—contains its own grounds for vacatur of arbitration awards. Section 10 provides:

> In any of the following cases the United States court in and for the district wherein the award was made *may make an order vacating the award* upon the application of any party to the arbitration—
>
> (1) where the award was procured by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators *exceeded their powers*, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10 (emphasis added).

* * *

The upshot of these interactive provisions is that *if* Section 10 of Chapter 1 of the FAA applies to non-domestic arbitration awards under

New York Convention, the Arbitration Awards here *may* be vacated *if* the Tribunal indeed exceeded its powers.

C. The Critical Distinction between Primary and Secondary Jurisdiction.

A deeper structural principle bears on, and largely resolves, that textual question. As the Fifth Circuit has observed, "[t]he New York Convention provides a carefully structured framework for the review and enforcement of international arbitral awards." *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Karaha II)*, 364 F.3d 274, 287 (5th Cir. 2004). That is, the Convention assigns "different roles to national courts to carry out the aims of the treaty." *Karaha Bodas Co. v. Negara (Karaha I)*, 335 F.3d 357, 368 (5th Cir. 2003). The New York Convention "mandates very different regimes for the review of arbitral awards (1) in the [countries] in which, or under the law of which, the award was made, and (2) in other [countries] where recognition and enforcement are sought." *Karaha II*, 364 F.3d at 287 (quoting *Yusuf*, 126 F.3d at 23). This is the distinction between *primary* and *secondary* jurisdiction. "Under the Convention, the country in which, or under the arbitration law of which, an award was made is said to have

primary jurisdiction over the arbitration award." *Id.* (cleaned up). "All other signatory states are secondary jurisdictions." *Id.*

This distinction flows directly from the text, structure, and history of the New York Convention. The Convention spends most of its energy on secondary jurisdiction, constraining in various ways the powers of authorities in countries where recognition and enforcement of a foreign arbitration award made in, or under the law of, another country is sought. Article III sets the stage, providing "that the secondary jurisdiction 'shall' enforce the award unless the party opposing enforcement furnishes proof that one (or more) of seven exceptions described in Article V obtains." *Thai-Lao Lignite (Thail.) Co. v. Gov't of the Lao People's Democratic Republic*, 864 F.3d 172, 178–79 (2d Cir. 2017) (citing New York Convention, Arts. III, V). Articles IV and V then "specify the procedures for courts of secondary jurisdictions to follow when deciding whether to enforce a foreign arbitral award." *Karaha I*, 335 F.3d at 368. Article IV "provides that a party can obtain enforcement of its award by furnishing to the putative enforcement court the authenticated award and the original arbitration agreement (or a certified copy of both)." *Id.* Article V, in turn, "enumerates specific

grounds on which the court *may* refuse enforcement if the party contesting enforcement provides proof sufficient to meet one of the bases for refusal." *Id.* Article VI adds to the mix, "allow[ing] a court of secondary jurisdiction to stay enforcement proceedings if an application to set aside the award is pending in the primary jurisdiction." *Gulf Petro Trading Co. v. Nigerian Nat'l Petroleum Corp.*, 512 F.3d 742, 746 (5th Cir. 2008).

The New York Convention also addresses primary jurisdiction. This is most apparent in Article V(1)(e), which provides that "[r]ecognition and enforcement" of an arbitration award "may be refused . . . only if [the requesting] party furnishes to the competent authority where the recognition and enforcement is sought, proof that" the award "has been set aside or suspended *by a competent authority of the country in which*, or under the law of which, *that award was made*." New York Convention, Art. V(1)(e) (emphasis added). Other provisions strengthen the distinction Article V(1)(e) draws between primary and secondary jurisdiction. *See* New York Convention, Art. V(1)(a), (1)(d) (recognizing the importance of the location of arbitration and allowing vacatur when there is some arbitration defect under the law of the country in which the arbitration

award was rendered); *id.*, Art. VI (granting stay and security authority to secondary jurisdictions "[i]f an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e)," that is, one *of the country in which, or under the law of which, that award was made*"); *Outokumpu*, 140 S. Ct. at 1644 (2020) ("Article VI addresses when an award can be set aside or suspended.").[5]

In other words, the New York Convention, particularly Article V(1)(e), affirms that a competent authority in the country in which the award was made—being an authority with primary jurisdiction—may set the award aside according to its domestic law. As the panel majority put it, "Article V(1)(e) defines primary jurisdiction." *AICSA*, 34 F.4th at 1299. In short, "a country has primary jurisdiction when it is either the location of the arbitration or its laws were used to conduct the arbitration." *Id.* at 1297 (citing New York Convention, Art. V(1)(e)). By contrast, "a country has secondary jurisdiction when it is simply asked to recognize and

[5] *See also Ingaseosas Int'l Co. v. Aconcagua Investing, Ltd.*, 479 F. App'x 955, 960 (11th Cir. 2012) (Article VI "expressly contemplates a situation where a court of secondary jurisdiction has a pending motion to enforce an arbitration award, and where an application to set aside the award is made to a primary-jurisdiction court.").

enforce a foreign arbitration award it had nothing to do with otherwise." *Id.* (citing New York Convention, Art. V(2)(b)).

The distinction between primary and secondary jurisdiction has important consequences for courts reviewing international arbitration awards. "Only a court in a country with *primary* jurisdiction over an arbitral award may annul that award." *Karaha II*, 364 F.3d at 287 (emphasis added). As this Court has recognized, the New York Convention "contemplates and expressly recognizes vacatur proceedings." *Inversiones*, 921 F.3d at 1299 (crediting party's concession that "[a]lthough the Convention does not provide grounds for vacatur, *it explicitly permits such proceedings* in the countries in which an award was rendered or whose law served as governing law for the arbitration" (emphasis in original)). By contrast, *secondary* jurisdiction courts are "limited to deciding whether the award may be enforced in that country." *Id.*

While perhaps not fully appreciating the consequences of this distinction before the vacated panel decision, this Court endorsed "[t]he nomenclatures of '*primary* jurisdiction' and '*secondary* jurisdiction'" in its unpublished decision in *Ingaseosas Int'l Co.* In *Ingaseosas*, the appellant

belatedly sought to vacate an adverse non-domestic arbitration award issued in Miami under New York law—where the award had already been recognized, reduced to judgment, and fully enforced and satisfied in a secondary jurisdiction. *Ingaseosas*, 479 F. App'x at 956–58. Making matters worse, the appellant failed to post bond to stay proceedings in the secondary jurisdiction, agreed to a stay of the district-court case during the secondary jurisdiction's proceedings, and failed to appeal the secondary jurisdiction's judgment. *Id.* at 956–58, 961.

Ultimately, those "particular and unique facts" required the case to be dismissed because the appellant had sat on his U.S. rights and allowed the foreign court to enforce the award, destroying the possibility of effective district-court relief. *Id.* at 959–60, 964.[6] The Court's discussion of primary versus secondary jurisdiction and vacatur of non-domestic

[6] The *Ingaseosas* panel emphasized that these facts were peculiar, and that its mootness holding did not mean that a court of primary jurisdiction could never vacate an award "notwithstanding an inconsistent previous decision of a secondary-jurisdiction court enforcing the award." *Id.* at 961. For instance, this Court surmised that the primary jurisdiction would retain the power to provide effective vacatur relief where "the party seeking to vacate the award in a primary-jurisdiction court was not given the opportunity to post bond and stay the enforcement proceedings in a secondary-jurisdiction court." *Id.*

arbitration awards is nonetheless instructive here, where no such mootness concerns lurk. The *Ingaseosas* Court acknowledged "the binary scheme under the New York Convention for addressing non-domestic arbitrations." *Id.* at 960 n.11 (citing *Karaha I*, 335 F.3d at 367–68). That scheme "assigns different roles to the courts in the country in which, or under the law of which, an award is rendered—primary-jurisdiction courts—and the courts of all other signatory countries—secondary-jurisdiction courts." *Id.* Further, the Court correctly observed that courts of secondary jurisdiction "have limited authority to review and decide whether to enforce a foreign arbitral award," whereas courts of primary jurisdiction "have the exclusive authority to affirmatively set aside or annul the award." *Id.* (citing *Karaha I*, 335 F.3d at 367–68)).

Ingaseosas thus presaged the panel's analysis here. As the panel majority explained, "[w]hen the United States has primary jurisdiction, based on Article V, a competent authority, i.e., the District Court here, has the authority to 'set aside' an arbitration award, rather than just refuse to enforce it." *AICSA*, 34 F.4th at 1299.

D. The District Court's Primary Jurisdiction Entails Annulment Power under Section 10 of Chapter 1 of the FAA.

This much is clear from the text and structure of the New York Convention: a competent authority in a primary jurisdiction has the power to set aside or suspend a non-domestic arbitration award. What source of law, however, provides a court exercising primary jurisdiction with the grounds for vacating an arbitration award? Here, too, the New York Convention provides an unequivocal answer by way of text, structure, and history: the domestic law of the country with primary jurisdiction.

1. The text, structure, and history of the New York Convention demonstrate that primary jurisdictions may apply domestic vacatur law.

Article V(1)(e) does not itself enumerate the grounds on which a "competent authority of the country in which . . . th[e] award was made" may "set aside or suspend[]" the award. New York Convention, Art. V(1)(e). But it would defeat the purpose of primary jurisdiction to do so. By its silence, the Convention does not restrict the grounds for vacatur, "thereby leaving to a primary jurisdiction's local law the decision whether to set aside an award." *Karaha I*, 335 F.3d at 368. As the panel

majority put it, "[t]he implication is that a district court would set aside such an arbitration award based on domestic law such as Chapter 1 of the FAA." *AICSA*, 34 F.4th at 1299.

Any other interpretation would offend common sense, comity, and the canon against surplusage. Cue again the panel majority:

> If Article V(1)(e) did not incorporate domestic law, it would say that a district court could refuse to enforce an arbitration award if it could set aside an arbitration award under the other provisions of Article V. That would be odd indeed because Article V(1) *already says that refusal of enforcement is allowed if made on one of the bases of Article V.*

AICSA, 34 F.4th at 1299 (emphasis added).

To construe Article V(1)(e)'s "set aside or suspend[]" provision as being synonymous with Article V's other, separately enumerated grounds for refusing an award's recognition and enforcement would implausibly render Article V(1)(e) circular and superfluous. *See Geofroy v. Riggs*, 133 U.S. 258, 270 (1890) ("It is a rule, in construing treaties as well as laws, to give a sensible meaning to all their provisions if that be practicable."); *Mass. Dep't of Revenue v. Shek (In re Shek)*, 947 F.3d 770, 777 (11th Cir. 2020) ("This surplusage canon obliges us, whenever possible, to disfavor an interpretation when that interpretation would render a clause,

sentence, or word superfluous, void, or insignificant." (cleaned up)).[7] Article V(1)(e) is there for a reason.

This reading finds more support in the New York Convention's history. Foreign arbitration existed before 1958; so did international efforts to govern it. Before either the Panama or New York Conventions existed, "the Convention on the Execution of Foreign Arbitral Awards, Sept. 26, 1927, 92 L.N.T.S. 301"—known as the Geneva Convention—took the first swing at managing the recognition and enforcement of international arbitration awards. *Wilson v. Carnival Corp.*, No. 22-22492, 2022 WL 17250521, 2022 U.S. Dist. LEXIS 213770, at *9 (S.D. Fla. Nov. 28, 2022) (citing *Yusuf*, 126 F.3d at 22). "The primary defect of the Geneva Convention was that it required an award first to be recognized in the rendering state before it could be enforced abroad," an inconvenience known as the "double *exequatur*." *Yusuf*, 126 F.3d at 22. "Thus, a competent body in the primary jurisdiction would have to 'sign off' on an arbitral award before it could be recognized in a secondary

[7] *See also* Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012) ("Because legal drafters should not include words that have no effect, courts avoid a reading that renders some words altogether redundant.").

jurisdiction." *Wilson*, 2022 U.S. Dist. LEXIS 213770, at *9; *see also Yusuf*, 126 F.3d at 22.

The New York Convention gave the fix. Simplifying cross-jurisdictional procedures, it "eradicat[ed] the requirement that a court in the rendering state recognize an award before it could be taken and enforced abroad." *Yusuf*, 126 F.3d at 22. In other words, it made it easier to enforce a foreign award in a secondary jurisdiction. *Id.* And so we see the features of Articles IV and V discussed above. But, in doing so, the New York Convention preserved "the power and authority of the local courts of the rendering state." *Id.* at 23. "There is no indication" that the New York Convention, in solving the double-*exequatur* problem, "deprive[d] the rendering state"—the primary jurisdiction—"of its supervisory authority over an arbitral award, including its authority to set aside that award under domestic law." *Id.* at 22. "This explains why the Panama and New York Conventions only contemplate 'annulment or suspension' by a rendering state." *Wilson*, 2022 U.S. Dist. LEXIS 213770, at *9; *see also Karaha I*, 335 F.3d at 358.

It can thus be understood that "the entire purpose of the New York Convention" was uncoupling primary versus secondary jurisdiction and

clarifying the attendant powers competent authorities may exercise thereunder. *CBF Industria de Gusa v. AMCI Holdings, Inc.*, 850 F.3d 58, 72 (2d Cir. 2017). The Convention did not, however, provide "an international mechanism to insure the validity of the award where rendered." *Yusuf*, 126 F.3d at 22 (quoting W. Laurence Craig, *Some Trends and Developments in the Laws and Practice of International Commercial Arbitration*, 30 Tex. Int'l L.J. 1, 11 (1995)). Instead, the Convention left vacatur grounds to "local law." Put simply, the "Convention provides no restraint whatsoever on the control functions of local courts at the seat of arbitration." *Id.*[8]

2. The exceeding-powers ground for vacatur of Chapter 1 of the FAA comports with the New York Convention and its enactment in Chapter 2.

That deliberate silence means that there is no conflict between Chapter 1 of the FAA's exceeding-powers ground for vacatur and the Convention or its enactment in Chapter 2 of the FAA. The Supreme Court articulated this precise interpretive rule two years ago in *Outokumpu*, which concerned "whether the equitable estoppel doctrines permitted

[8] Judge Jordan's concurrence recounts this history in greater depth. *See AICSA*, 34 F.4th at 1302–04.

under Chapter 1 of the FAA . . . conflict with . . . the Convention" under the residual-application clause, such that equitable estoppel available to permit the enforcement of a non-domestic arbitration agreement by a non-signatory. 140 S. Ct. at 1644. There, as here, an article of the New York Convention set forth a general rule about the enforcement of arbitration agreements, but did not specifically "restrict contracting states from applying domestic law to refer parties to arbitration in other circumstances." *Id.* at 1645. The specific provision at issue in *Outokumpu* was Article II(3), which "provides that arbitration agreements must be enforced in certain circumstances, but it does not prevent the application of domestic laws that are more generous in enforcing arbitration agreements." *Id.* Like the Convention's provisions regarding the setting aside or suspension of arbitration awards, "Article II(3) *contains no exclusionary language*; it does not state that arbitration agreements shall be enforced only in the identified circumstances." *Id.* (emphasis added).

"This silence," the Supreme Court held, "is dispositive." *Id.* A fundamental rule of treaty interpretation is that "'a matter not covered is to be treated as not covered'—a principle 'so obvious that it seems absurd to recite it.'" *Id.* (quoting Scalia & Garner, *Reading Law: The*

Interpretation of Legal Texts 93). After all, "[g]iven that the Convention was drafted against the backdrop of domestic law, it would be unnatural to read" it "to displace domestic doctrines in the absence of exclusionary language." *Id.* Because "[t]he text of the [New York] Convention does not address" the specific grounds on which an arbitration award may be set aside or suspended, instead remaining "simply silent on the issue," "nothing in the text of the Convention 'conflict[s] with' the application of domestic . . . doctrines permitted under Chapter 1 of the FAA," including the exceeding-powers ground for vacatur. *Id.* (quoting 9 U. S. C. § 208). Put more simply: the text of the Convention "*does not prohibit* the application of domestic law" to a primary jurisdiction's consideration of whether to set aside or suspend an arbitration award, and so it "does not conflict" with the grounds for vacatur provided in Chapter 1 of the FAA. *Id.* at 1648 (emphasis added).

3. A building consensus of authorities agree that primary jurisdictions may apply domestic grounds for vacatur of non-domestic awards.

The interpretation that the New York Convention preserves a primary jurisdiction's power to vacate a non-domestic arbitration award

based on domestic law mirrors that of at least five other Circuits[9] and numerous international-arbitration scholars.

It is the result reached by the Second Circuit. *See Yusuf*, 126 F.3d at 23 ("The Convention specifically contemplates that the state in which, or under the law of which, the award is made, will be free to set aside or modify an award in accordance with its domestic arbitral law and its full panoply of express and implied grounds for relief." (citing New York Convention, Art. V(1)(e))).[10]

The Third Circuit adopted *Yusuf*'s holding verbatim and observed that the result is consistent with Congress's decision, through the residual-application clause, to "explicitly provide[] for the application of the domestic FAA to the extent that it did not conflict with the

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[9] Not all federal courts of appeals have yet had occasion to address the issue before the en banc Court. *See, e.g.*, *Hawaiian Host, Inc. v. Citadel Pac. Ltd.*, No. 22-00077, 2022 U.S. Dist. LEXIS 197950, 2022 WL 16554080, at *12 n.7 (D. Haw. Oct. 31, 2022) (observing that the question whether Article V(1)(e) permits courts to apply domestic arbitral law is "an open question in the Ninth Circuit"). And this Court's precedent stands alone in taking the contrary view. *Id.* ("Only the Eleventh Circuit . . . has precluded the FAA's standards for vacatur from applying in reviewing any award falling under the New York Convention.").

[10] *See also CBF Industria*, 850 F.3d at 73–74; *Beijing Shougang Mining*, 11 F.4th at 160 n.15; *Thai-Lao Lignite*, 864 F.3d at 176.

Convention." *Ario v. Underwriting Members of Syndicate 53 at Lloyds*, 618 F.3d 277, 292 (3d Cir. 2010). *Ario* elaborated on the intersection of the FAA's residual-application clause and Article V(1)(e) of the New York Convention, stating that when the situs of both the arbitration and enforcement of an award under the Convention occur in the United States (there, in Philadelphia), "there is no conflict between the Convention and the domestic FAA because Article V(1)(e) of the Convention incorporates the domestic FAA and allows awards to be 'set aside or suspended by a competent authority of the country in which . . . that award was made.'" *Id.* In such a situation, "we may apply United States law, including the domestic FAA and its vacatur standards." *Id.*

Likewise, the Fifth Circuit has long held that "courts of a primary jurisdiction country may apply their own domestic law in evaluating a request to annul or set aside an arbitral award." *Karaha I*, 335 F.3d at 368; *see also Karaha II*, 364 F.3d at 287–88 (confirming the point); *Gulf Petro*, 512 F.3d at 746–47 (reiterating that "the Convention permits a primary jurisdiction court to apply its full range of domestic law to set aside or modify an arbitral award"); *OJSC Ukrnafta v. Carpatsky Petro. Corp.*, 957 F.3d 487, 497 (5th Cir. 2020) (outlining the award-annulment

consequences of primary versus secondary jurisdiction under the New York Convention).

So has the Sixth Circuit. *See Jacada (Europe), Ltd., v. Int'l Mktg. Strategies, Inc.*, 401 F.3d 701, 709 (6th Cir. 2005) ("Because this award was made in the United States, we can apply domestic law, found in the FAA, to vacate the award."), abrogated on other grounds by *Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576 (2008)).

The D.C. Circuit has adopted the same reading of the New York Convention and the FAA. *See TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 935 (D.C. Cir. 2007) ("The Convention provides a carefully crafted framework for the enforcement of international arbitral awards. Under the Convention, '[o]nly a court in a country with primary jurisdiction over an arbitral award may annul that award.'" (quoting *Karaha II*, 364 F.3d at 287)); *see also Diag Human S.E. v. Czech Rep. - Ministry of Health*, 907 F.3d 606, 609 (D.C. Cir. 2018) ("An award may also be 'set aside' by a 'competent authority' of the *rendering* jurisdiction." (citing New York Convention, art. V(1)(e) (emphasis added)).[11]

[11] The Seventh Circuit has also observed that "the New York Convention contains no provision for seeking to vacate an award,

And the Tenth Circuit recently adopted the same view under the Panama Convention, whose structure and provisions largely mirror those of the New York Convention. *See Goldgroup Res., Inc. v. DynaResource de Mexico, S.A. de C.V.*, 994 F.3d 1181, 1190 (10th Cir. 2021) (discussing *Yusuf*, *Ario*, *Gulf Petro*, *Jacada*, and *TermoRio*, and holding that the Panama Convention "expressly contemplates that U.S. courts may apply U.S. arbitral law to awards rendered in or under the law of the United States," with the result that "FAA defenses are available in proceedings to confirm a nondomestic arbitration award rendered in or under the law of the United States").

The Supreme Court buttressed this interpretation in *BG Group, PLC v. Republic of Argentina*, 572 U.S. 25 (2014). BG Group involved a dispute between a British investment group and Argentina over whether Argentina's tariff-calculation adjustment from dollars to pesos (when the exchange rate was favorable to Argentina) violated an investment treaty between the United Kingdom and Argentina. *Id.* at 29–30. Arbitration

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although it contemplates the possibility of the award's being set aside in a proceeding under local law and recognizes defenses to the enforcement of an award." *Lander Co. v. MMP Investments, Inc.*, 107 F.3d 476, 478 (7th Cir. 1997) (citing New York Convention, Art. V(1)(e)).

took place in Washington, D.C., and the investment group obtained an award against Argentina that it sought to enforce in the D.C. federal court. Argentina asked the court to vacate the award, claiming in part that the arbitrators exceeded their powers. *Id.* at 31–32.

The Supreme Court addressed the specific question "whether a court of the United States, in reviewing an arbitration award made under the [the applicable treaty], should interpret and apply the local litigation requirement [of that treaty] de novo, or with the deference that courts ordinarily owe arbitration decisions." *Id.* at 33. The Court held that the interpretation of the local litigation requirement was appropriately left to the arbitrators and that courts could only review the arbitrators' determinations on such matters "with considerable deference." *Id.* at 41.

In its analysis, the Court operationalized the distinction between primary and secondary jurisdiction and confirmed that domestic vacatur standards governing non-domestic arbitration awards apply where primary jurisdiction obtains. The Court cited Article V(1)(e) of the Convention to apply the domestic law of the arbitral seat to determine whether to set aside an award. *Id.* at 32–33, 37. The Court observed that "arbitral awards pursuant to treaties are subject to review under the

arbitration law of the state where the arbitration takes place"—that "[t]he national courts and the law of the legal situs of arbitration control a losing party's attempt to set aside [an] award." *Id.* (internal quotation marks omitted). And the Court considered precisely what AICSA seeks here: a petition to vacate the arbitration award under the exceeding-powers ground in Section 10(a)(4) of Chapter 1 of the FAA. *Id.* at 44. Although the petitioner Argentina lost, the Supreme Court effectively answered the *legal* question that is before the en banc Court—in favor of AICSA's position.[12]

The Supreme Court doubled down on the enduring applicability of domestic law to arbitration awards that fall under the New York Convention in *Outokumpu*. As discussed, in *Outokumpu* the Court examined Article II(3) of the New York Convention and held that district courts facing challenges to non-domestic arbitrations *must* consider

[12] *Cf. Goldgroup*, 994 F.3d at 1189 (opining that the conclusion that Chapter 1 FAA defenses are available in Panama Convention proceedings to confirm a non-domestic arbitration award rendered in or under U.S. law "is supported at least implicitly by the Supreme Court's decision in *BG [Group]*" because the Court's "consideration of the [exceeding powers] defense is consistent with the conclusion that FAA defenses are available to nondomestic awards issued in the United States or under U.S. arbitral law").

domestic law where the Convention sets forth a general rule but is silent on the particulars. 140 S. Ct. at 1645. "Again, the [New York] Convention requires courts to rely on domestic law to fill the gaps; it does not set out a comprehensive regime that displaces domestic law." *Id.* In so holding, the Supreme Court reversed this Court's contrary ruling, which "did not analyze" whether the treaty provision at issue conflicted with domestic arbitration law. *Id.* at 1647–48.

AICSA anticipates that HSR will attempt to diminish the statements in *BG Group* and *Outokumpu* as mere dicta. "However, there is dicta and then there is dicta, and then there is Supreme Court dicta." *Schwab v. Crosby*, 451 F.3d 1308, 1325 (11th Cir. 2006) (E. Carnes, J.). This Court has routinely recognized that "dicta from the Supreme Court is not something to be lightly cast aside, but rather is of considerable persuasive value." *F.E.B. Corp. v. United States*, 818 F.3d 681, 690 n.10 (11th Cir. 2016). *See also McCoy v. Mass. Inst. of Tech.*, 950 F.2d 13, 19 (1st Cir. 1991) (suggesting federal appellate courts "are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings" especially when "of recent vintage") (cited favorably in *Schwab*, 451 F.3d at 1326)).

International-arbitration scholars have joined the chorus. The prevailing view is that Article V(1)(e) does not provide specifically the grounds on which a local authority of the rendering state may set aside or suspend an arbitration award because authors of the New York Convention did not want to usurp local law. For instance:

> Significantly, [Article V(1)(e)] fails to specify the grounds upon which the rendering State may set aside or suspend the award. While it would have provided greater reliability to the enforcement of awards under the Convention had the available grounds been defined in some way, such action would have constituted meddling with national procedure for handling domestic awards, a subject beyond the competence of the Conference.

Leonard V. Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 Yale L.J. 1049, 1070 (1961). Put differently, Article V(1)(e),

> . . . in effect, incorporates the entire body of review rights in the issuing jurisdiction . . . . If the scope of judicial review in the rendering state extends beyond the other six defenses allowed under the New York Convention, the losing party's opportunity to avoid enforcement is automatically enhanced: The losing party can first attempt to derail the award on appeal on grounds that would not be permitted elsewhere during enforcement proceedings.

Daniel M. Kolkey, *Attacking Arbitral Awards: Rights of Appeal and Review in International Arbitrations*, 22 Int'l Law. 693, 694 (1988).

The list goes on. As another commentator put it, Articles V and VI of the Convention "*unequivocally* lay down the principle that the court in the country in which, or under the law of which, the award was made has the exclusive competence to decide on the action for setting aside the award." Albert Jan Van Den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* 350 (1981) (emphasis altered). *See also* Domenico Di Pietro & Martin Platte, *Enforcement of International Arbitration Awards: The New York Convention of 1958* 169 (2001) (explaining that by failing to restrict the grounds for setting aside an award in the rendering country, the Convention left the matter to that country's domestic law).

AICSA breaks no new ground here. As the Second Circuit summarized the state of scholarship in *Yusuf*, "[t]here appears to be no dispute among these authorities that an action to set aside an international arbitral award, as contemplated by Article V(1)(e), is controlled by the domestic law of the rendering state." *Yusuf*, 126 F.3d at 21 (collecting authorities, domestic and foreign).

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The late Judge Harold Leventhal famously joked that a certain approach toward legal citation is like "looking over a crowd and picking your friends." Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 Iowa L. Rev. 195, 214 (1983). Not so here. The text, structure, and history of the New York Convention and the FAA; the Courts of Appeals' construction of the Convention and the FAA; the Supreme Court's treatment, too; and the great balance of scholarly treatments of the Convention and the FAA—they are friends all to AICSA's interpretive position. There is one glaring outlier: an errant holding in this Court's precedent.

E. The New York Convention's Reservation of Annulment Power under Domestic Law for Authorities with Primary Jurisdiction Is Functionally Equivalent to "Incorporation" of Domestic Law via Article V(1)(e).

The above analysis—which draws on and (AICSA believes) is consistent with the opinions of both the panel majority and the concurrence—is all that is necessary to decide the issue before the Court. But Judge Jordan's concurring opinion addresses two points of potential

confusion concerning vacatur of non-domestic arbitration awards under the New York Convention that merit comment.

First, Judge Jordan points out that, strictly speaking, 9 U.S.C. § 10(a)(4) is not "incorporated" into the Convention; it applies here because of the District Court's primary jurisdiction and the FAA's residual-application clause. *See AICSA*, 34 F.4th at 1305–06 (Jordan, J., concurring). Judge Jordan further observes that several courts have invoked the language of "incorporation" at the potential expense of interpretive clarity. *Id.* at 1314.

The distinction between primary and secondary jurisdiction and the attendant powers reserved or given to competent authorities govern the analysis. Rather than the language of formal "incorporation," AICSA agrees that it is more accurate to say that "Article V(1)(e) 'contemplates' that the primary jurisdiction will apply its domestic law . . . *i.e.*, that Article V(1)(e) recognizes that the primary jurisdiction's law, in this case the FAA, supplies the grounds for vacatur." *Id.* at 1313 n.8 (Jordan, J., concurring). In this respect, AICSA understands that while the panel majority used the language of "incorporation" once in its opinion, it did so in the "contemplative" sense: "[t]he *implication* [of Article V the New

York Convention] is that a district court [sitting as the primary jurisdiction] would set aside such an arbitration award based on domestic law such as Chapter 1 of the FAA." *See id.* at 1299 (emphasis added).

Second, and related, Judge Jordan points out that Article V, itself, "does not provide (nor seek to provide) grounds for vacatur," instead speaking to the recognition and enforcement of an international arbitration award. *See id.* at 1309. It is true that "the New York Convention provides no specific standards for *vacating* an award—as its full title indicates, it concerns 'recognition and enforcement' of foreign arbitral awards." *Hawaiian Host*, 2022 WL 16554080, 2022 U.S. Dist. LEXIS 197950, at *8. Further, "[a] request for refusal of recognition and enforcement of an arbitration award plainly is different from a request to annul or suspend an arbitration award." *DRC, Inc. v. Republic of Hond.*, 999 F. Supp. 2d 1, 6 (D.D.C. 2012) (citing *TermoRio*, 487 F.3d at 935–37). "But the analysis does not end there." *Hawaiian Host*, 2022 WL 16554080, at *8.

Once again, the consequences of primary jurisdiction *evidenced* by Article V(1)(e) resolve the matter. A request for refusal of recognition and enforcement of an arbitration award "can be done in any jurisdiction in

which the award is attempted to be enforced"—that is, in any secondary jurisdiction. *Id.* "[B]ut an action to annul or suspend an award must be filed in the seat of arbitration and must comply with the procedural laws of the seat of arbitration"—that is, the primary jurisdiction. *Id.* (citing *TermoRio*, 487 F.3d at 937); *see also Coutinho Caro & Co. U.S.A., Inc. v. Marcus Trading, Inc.*, No. 3:95cv2362, 2000 WL 435566, 2000 U.S. Dist. LEXIS 8498, at *16–17 (D. Conn. Mar. 14, 2000) (observing that both Articles V(1)(e) and VI, which envision actions to set aside or vacate arbitration awards, "make reference only to such an action being taken" in the primary jurisdiction); *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 500 F.3d 111, 115 n.1 (2d Cir. 2007) (similar).

At bottom, this primary-versus-secondary-jurisdiction feature of the New York Convention is why the Convention "distinguishes between 'recognition and enforcement' of an award, and affirmatively 'setting aside or suspending' (i.e., vacating or annulling) an award." *Hawaiian Host*, 2022 U.S. Dist. LEXIS 197950, at *6 n.66 (citing *Zeiler v. Deitsch*, 500 F.3d 157, 165 n.6 (2d Cir. 2007)). Thus, the domestic vacatur standards are unavailable where a U.S. court is "reviewing an arbitration

award that falls under the New York Convention by virtue of being issued *outside* the United States": the court "would have no power to annul or vacate that award (that is, to 'set aside' or 'suspend' it under article V(1)(e))." *Id.* Only a court in the primary jurisdiction would enjoy that power, to the extent permitted under its domestic law. *Id.* And this is a primary-jurisdiction case.

II. Looking Back: Where this Court's Precedent Went Wrong.

The panel affirmed the District Court on the sole basis that it was bound by this Court's precedent, *Industrial Risk* and *Inversiones*. *AICSA*, 34 F.4th at 1300–01. But, as the panel explained in two opinions, both *Inversiones* and *Industrial Risk* were wrongly decided because they neglected the distinction between primary and secondary jurisdiction. *Id.* at 1299.

First came *Industrial Risk*, nearly a quarter century ago—a complex commercial dispute involving several U.S. companies and a German manufacturer. After a partial litigation resolution, the German company and a Louisiana company agreed to arbitrate several issues, and the tribunal ultimately found for the German company. *Indus. Risk*, 141 F.3d at 1439. Dissatisfied with the outcome, the Louisiana company

filed suit to annul or vacate the arbitration award at the seat of the arbitration—the U.S. District Court for the Middle District of Florida—asserting that the arbitration panel's award was "arbitrary and capricious" and that the panel "improperly and prejudicially admitted certain testimony and evidence." *Id*. The district court denied the motion to vacate and confirmed the award, finding that the grounds for challenge were not cognizable under the New York Convention and that the "arbitrary and capricious" ground was not an enumerated basis under Chapter 2 of the FAA. *Nitram, Inc. v. Indus. Risk Insurers*, 848 F. Supp. 162, 165 (M.D. Fla. 1994).

The Louisiana company appealed, squarely presenting the question whether the FAA Chapter 1 grounds for annulment applied to non-domestic awards. *Indus. Risk*, 141 F.3d at 1439. This Court held that Chapter 2 of the FAA governed the annulment proceeding—and not Chapter 1—because Chapter 2 applied to "all arbitral awards not 'entirely between citizens of the United States'" and because the arbitral panel's award was issued "within the legal framework of another country." *Id.* at 1440-41. In other words, the Court concluded that the international nature of the award required that Chapter 2 controlled all

disputes, leaving no room for courts of the jurisdiction in which the award is made to annul or vacate an award on grounds set forth in domestic arbitration law.

The Court then examined whether a litigant could challenge such an arbitral award on "arbitrary and capricious" grounds and concluded that the question was controlled by the narrow provisions of Article V of the New York Convention, without resort to the FAA's residual-application clause. *Id.* at 1443, 1445–46. Constrained by its incorrect analysis of the Convention itself, the Court concluded that an "arbitrary and capricious" ground could not be used to challenge an arbitration award. *Id.* at 1446.

As the panel observed, *Industrial Risk* not only overlooked the residual-application clause of Chapter 2 of the FAA, but also "did not consider whether the 'arbitrary and capricious' defense was tucked into Article V(1)(e)" of the New York Convention. *AICSA*, 34 F.4th at 1295. The core problem was that *Industrial Risk* "did not note the difference between primary and secondary jurisdiction" and the role of the federal district court called on to act on an arbitration award. *Id.* at 1299. The courts of the country whose law governs the arbitration or that was the

seat of arbitration have primary jurisdiction. In contrast, other courts that are asked to recognize and enforce an award made elsewhere and under the law of a different country have secondary jurisdiction. *Id.* at 1297, 1300–01. *Industrial Risk*, however, erroneously "treated all cases of vacatur under Article V like secondary jurisdiction cases." *Id.* at 1300.

A second panel repeated this error in *Inversiones*, when it was presented with the question whether "*Industrial Risk* was both wrongly decided and abrogated by the Supreme Court's subsequent decision in *BG Group*." 921 F.3d at 1301. The panel lacked the power to decide the former and determined that *BG Group* stopped short of overruling *Inversiones* because it did not "directly conflict[] with *Industrial Risk*." *Id.*

But even the *Inversiones* panel acknowledged that the writing was on the wall. As the panel noted, the Supreme Court in *BG Group* "was asked to vacate [a non-domestic arbitration] award on the ground that the arbitrators 'exceeded their powers' within the meaning of 9 U.S.C. § 10(a)(4) of the [FAA]—a ground not specifically provided by the Convention." *Id.* at 1302. And the Court did in fact consider the merits of that ground for vacatur. *Id.* The panel conceded that the Court's

analysis—which, recall, invoked Article V(1)(e) in proceeding to the merits of the exceeding-powers vacatur claim, *BG Group*, 572 U.S. at 37—"*indirectly* suggests that the Convention does not supply the exclusive grounds for vacating an international arbitral award." *Inversiones*, 921 F.3d at 1302. But, applying this Court's exacting abrogation standard, the panel concluded that the Supreme Court's consideration of the *merits* of the exceeding-powers ground for vacatur "does not *directly* conflict with *Industrial Risk*'s holding that such a ground would not have warranted vacatur because the ground is not enumerated in the Convention" in the first place—curious as it would be for the Supreme Court to spill ink on the merits of a supposedly non-existent defense. *Id.*

The *Inversiones* panel so held even though a previous panel of this Court, in reliance on *BG Group*, had "assume[d], without deciding," that Section 10 of Chapter 1 of the FAA applied to review of a non-domestic arbitration award where the United States had been the location of the arbitration. *Bamberger Rosenheim, Ltd. (Isr.) v. OA Dev., Inc. (United States)*, 862 F.3d 1284, 1287 & n.2 (11th Cir. 2017). And it did so without mentioning, let alone grappling with, the distinction between primary

and secondary jurisdiction or the effect of Article V(1)(e)—repeating the error of *Industrial Risk*.[13]

Simply put, the Court's decisions in *Industrial Risk* and *Inversiones* erred by misapprehending the role of domestic law in an action to vacate a non-domestic award where the United States is the primary jurisdiction. Those decisions should be overruled.

III. Looking Forward: The Court Should Remand this Case to the District Court to Consider Whether the Tribunal Exceeded Its Powers.

The District Court should have applied United States procedural arbitral law, including Section 10(a)(4) of the FAA, to this case. As detailed in AICSA's panel briefing, the Tribunal exceeded its powers in at least five ways, foisting millions of dollars in unwarranted harm on AICSA. Given the limited legal question presented by this Court's en

[13] *See* Harout Jack Samara, *Two to Tango: Domestic Grounds for Vacatur under the New York Convention*, 20 Am. Rev. Int'l Arb. 367, 382 (2009) (explaining that *Industrial Risk* "simply stopped at the conclusion that the grounds enumerated in the Convention are exclusive without analyzing these grounds and considering whether one or another of them provided an avenue for the consideration of domestic bases for nonrecognition, as Article V(1)(e) of the Convention most clearly does").

banc briefing notice, AICSA will not rehash the Tribunal's egregious errors here. But because the answer to that legal question is clear, and the District Court got it wrong in applying this Court's erroneous precedents, this Court should remand this case to the District Court with instructions to consider the merits of AICSA's motion to vacate the arbitration awards and consider whether the Tribunal exceeded its powers.

CONCLUSION

This Court "should join [its] sister circuits in acknowledging the role of domestic law in international arbitrations under the FAA and the New York Convention." *AICSA*, 34 F.4th at 1301. In so doing, the Court should remand this case to the District Court to address whether the Tribunal exceeded its powers.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i), the typeface requirements of Fed. R. App. P. 32(a)(5)(A), and the type-style requirements of Fed. R. App. P. 32(a)(6). This brief contains 11,749 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), and it has been prepared in a proportionally spaced font in Microsoft Word using Century Schoolbook 14 point font.

SO CERTIFIED, this 12th day of December, 2022.

/s/ George J. Fowler, III
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CERTIFICATE OF SERVICE

I do hereby certify that on December 12, 2022, I electronically filed the Appellant's En Banc Brief with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit using the CM/ECF system, which will send notice of this filing to all parties specified on the electronic filing receipt:

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Pursuant to 11th Cir. R. 35-7 and this Court's October 31, 2022, "Memorandum to Counsel or Parties," I also caused 15 true and correct copies of the Appellant's En Banc Brief to be transmitted to the Court.

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