No. _____

In the Supreme Court of the United States

BRADLEY CHRISTOPHER STARK,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Anthony Lake
Counsel of Record
GILLEN WITHERS & LAKE LLC
400 Galleria Parkway
Suite 1920
Atlanta, GA 30339
(404) 842-9700
aclake@gwllawfirm.com

Counsel for Petitioner

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

1. Whether, on a motion to dismiss raising a defense of sovereign immunity, a plaintiff possesses a burden to do more than allege an unequivocal waiver of sovereign immunity, pursuant to the Fifth Amendment and the simplified notice pleading standards of the Federal Rules of Civil Procedure.

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PETITION FOR A WRIT OF CERTIORARI

Bradley Christopher Stark respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals is reported at 726 F. App'x 767 and is reproduced in Appendix A. (App. 1-4). The Eleventh Circuit Court of Appeals' denial of Petitioner's petition for rehearing and petition for rehearing *en banc* is unreported and is reproduced in Appendix C. (App. 11-12). The District Court's Order granting Respondent's motion to dismiss is not published, but it is available at 2017 WL 6551362, and is reproduced in Appendix B. (App. 5-10).

STATEMENT OF JURISDICTION

The Eleventh Circuit's denial of Stark's petition for rehearing and petition for rehearing *en banc* was filed on August 24, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . ."

STATEMENT OF THE CASE

In 2012, Stark was convicted of wire fraud and securities fraud in the United States District Court for the Northern District of Texas. App. 21, 24-25. On February 3, 2017, Stark and another claimant filed an Application to Confirm Interim Arbitration Awards ("Application") against the United States in the United States District Court for the Northern District of Georgia. *Id*. at 13-48. Stark's Application requested that the District Court confirm two arbitration awards issued in claimants' favor on February 5 and February 26, 2016, and enter a judgment conforming to the awards pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 *et seq*., and also grant other relief. *Id*. at 47.

Stark alleged in the Application that, on November 11, 2009, he had sent the Attorney General a petition for redress, pursuant to the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 551 *et seq*. App. 22, 23. The Application alleged that the petition for redress contained an express term of acceptance by silence, and that it was validly entered into and binding on the parties. *Id*. at 23. It alleged that, on June 9, 2014, an arbitrator issued an award pursuant to the petition for redress. *Id*. at 26.

The Application further alleged that, on June 22, 2015, Stark and others entered into a Stipulation and

Settlement Agreement ("Agreement") with the United States based upon the petition for redress and the arbitration award, and that Respondent was bound by the Agreement. App. 16, 19-20, 27, 29, 40. The Application alleged that the Agreement was entered into between the parties was to resolve claimants' unlawful imprisonment, and that the United States was obligated under the Agreement to release claimants from incarceration and vacate claimants' sentences, and to provide other relief. *Id*. at 29. The Agreement also provided that the parties agreed to arbitrate any disputes under the Agreement. *Id*. at 16, 30-31.

The Application alleged that Respondent breached the Agreement, and that the dispute was submitted to arbitration. App. 27-28, 29, 30. It alleged that, on February 5, 2016, the arbitrator issued an Affidavit, Opinion, Findings of Fact, Conclusions of Law, and Pre-Award Ruling of the Arbitrator, and an Interim Award. *Id*. at 28, 35. It further alleged that, on February 26, 2016, the arbitrator issued a Second Interim Award. *Id*. The arbitrator's Interim Awards pertained to equitable relief. *Id*. 16-17

Claimants alleged in the Application that Respondent failed to move or apply to vacate, modify, or correct the arbitration awards, pursuant to 9 U.S.C. §§ 10, 11, or 12, and that Respondent was bound by the awards. App. 35, 38, 40. Claimants alleged that the awards were enforceable. *Id*. at 32, 44.

The Application alleged that the District Court possessed jurisdiction over the action through a number of statutes, including 28 U.S.C. § 1331; the FAA; and the APA, 5 U.S.C. §§ 551 *et seq*. App. 17, 19,

32, 36. Claimants alleged that they had suffered injuries in violation of the Constitution and statutory law as a result of Respondent and its officers and employees. *Id*. at 20, 41. Claimants furthermore alleged that Congress had expressly and specifically waived sovereign immunity as it related to the action by means of several statutory provisions, including 5 U.S.C. § 702. *Id*. at 16, 45.

The government filed a motion to dismiss claimants' Application. App. 5. On September 27, 2017, the District Court issued an Order granting the government's motion. *Id*. at 5-10. The District Court found that claimants' claims were subject to dismissal on jurisdictional grounds and for failure to state a claim. *Id*. at 7.

Additionally, the District Court concluded that claimants had the burden of identifying an unequivocal waiver of sovereign immunity. App. 7. It found that claimants had not, and could not, establish that the United States waived sovereign immunity for actions seeking confirmation of arbitration awards. *Id*. The Court also found that claimants had not, and could not, establish a grant of subject matter jurisdiction to district courts. *Id*.

Stark appealed the District Court's Order. App. 1. On June 14, 2018, the Eleventh Circuit issued a brief opinion, affirming the judgment of the District Court. *Id*. at 1-3. Similar to the District Court, the Eleventh Circuit found that Stark possessed a "burden" to prove that jurisdiction existed, and an unequivocally expressed waiver of sovereign immunity. *Id*. at 2 (citing *King v. United States*, 878 F.3d 1265, 1267 (11th Cir. 2018); *Carmichael v. Kellogg, Brown & Root Servs.,*

Inc., 572 F.3d 1271, 1279 (11th Cir. 2009); *OSI, Inc. v. United States*, 285 F.3d 947, 951 (11th Cir. 2002)). The Court found that Stark had not "carried his burden" and pointed to a statute that either conveys subject matter jurisdiction or unequivocally waives sovereign immunity. App. 2. *Id*. at 2-3. Stark filed a petition for rehearing and petition for rehearing *en banc*, which was denied on August 24, 2018. *Id*. at 11-12.

This petition followed.

REASONS FOR GRANTING THE PETITION

I. DISMISSAL OF A PLAINTIFF'S CLAIMS ON A MOTION TO DISMISS RAISING A DEFENSE OF SOVEREIGN IMMUNITY WHILE DENYING A PLAINTIFF AN OPPORTUNITY TO REACH THE ISSUE OF IMMUNITY VIOLATES DUE PROCESS AND IS CONTRARY TO SIMPLIFIED NOTICE PLEADING STANDARDS

The principle of sovereign immunity, which predates the founding of the Republic and has its roots in the common law, stands for the proposition that "the government is not liable to be sued, except with its own consent, given by law." *United States v. McLemore*, 45 U.S. 286, 288 (1846). "'It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*.'" *Sossamon v. Texas*, 563 U.S. 277, 283–284 (2011) (emphasis in original) (quoting The Federalist No. 81, p. 511 (Alexander Hamilton) (Wright ed.1961); *see also Nevada v. Hall*, 440 U.S. 410, 414 (1979) ("The immunity of a truly independent sovereign from suit in its own courts has been enjoyed as a matter of absolute right for

centuries"). The rule of sovereign immunity of the Federal Government and its corollary, that the Federal Government is immune from suit or liability unless it has "consented" to suit, i.e. unless it has "waived" its immunity, has passed, little changed, through generations as the modern rule that "[s]overeign immunity shields the United States from suit absent a consent to be sued that is 'unequivocally expressed.'" *United States v. Bormes*, 568 U.S. 6, 9 (2012) (quoting *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33–34 (1992); quoting *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95 (1990)).[1]

The Eleventh Circuit affirmed the District Court's dismissal of Stark's Application, finding that Stark had allegedly "not pointed" to a statute which unequivocally waived sovereign immunity. App. 2. In fact, Stark's Application did point to § 10 of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551 *et seq*., 5 U.S.C. § 702, states, in relevant part, that:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee

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[1] Granting the general rule of the government's immunity from suit as sovereign, it has nonetheless been recognized that Congress has elected to waive immunity for "a wide range of suits…" *Dep't of Army v. Blue Fox, Inc.*, 525 U.S. 255, 260 (1999). Notable examples include the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq*., and the Tucker Act, 28 U.S.C. § 1491. *Id*.

> thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States . . .

5 U.S.C. § 702. The Court has recognized, on a number of occasions, that § 10 of the APA "waives the Government's immunity from actions seeking relief 'other than money damages…'" *Dep't of Army v. Blue Fox, Inc.*, 525 U.S. 255, 260-261 (1999); *see also Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 215 (2012); *Bowen v. Massachusetts*, 487 U.S. 879, 910 (1988). In the passage of § 10, Congress was clear regarding its intention "'to eliminate the sovereign immunity defense in *all equitable actions for specific relief* against a Federal agency or officer acting in an official capacity.'" *Bowen*, 487 U.S. at 899 (emphasis in original) (quoting *Maryland Dept. of Human Resources v. Department of Health and Human Services,* 763 F.2d 1441 (D.C. Cir. 1985); quoting H.R.Rep. No. 1656 94th Cong., 2d Sess. (1976); S.Rep. No. 996 94th Cong., 2d Sess. (1976); U.S.Code Cong. & Admin.News 1976, p. 6129).[2] The

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[2] Pursuant to the doctrine of sovereign immunity, the Court has promulgated canons of statutory interpretation for determining whether sovereign immunity may be waived. One such canon of interpretation is that any such waiver "must be 'unequivocally expressed' in statutory text." *F.A.A. v. Cooper*, 566 U.S. 284, 290 (2012) (citing *Lane v. Peña*, 518 U.S. 187, 192 (1996); *Nordic*

APA's "'generous review provisions' must be given a 'hospitable' interpretation.'" *Id.* at 904 (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140–141 (1967)). Accordingly, it is clear that § 10 of the APA contains an unequivocal waiver of sovereign immunity for actions seeking other than money damages.

Stark's Application therefore did specifically allege an unequivocal waiver of sovereign immunity under § 10 of the APA. App. 19, 22. Furthermore, contrary to the Eleventh Circuit's findings, Stark possessed viable claims against the government for failure to comply with arbitration awards pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. 1 *et seq*.[3] "Jurisdiction

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Village, Inc., 503 U.S. at 33; *Irwin*, 498 U.S. at 95). Another is that any "ambiguities in the statutory language are to be construed in favor of immunity, [cit.], so that the Government's consent to be sued is never enlarged beyond what a fair reading of the text requires." *Id.* at 290 (internal citation omitted) (citing *United States v. Williams*, 514 U.S. 527, 531 (1995); *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685–686 (1983); *Eastern Transp. Co. v. United States*, 272 U.S. 675, 686 (1927)). The Court, in *Dep't of Army* and *Bowen*, has already determined that § 10 of the APA contains an unequivocal waiver of sovereign immunity for actions seeking relief other than money damages. *See Dep't of Army*, at 260-261; *Bowen*, at 910.

[3] "[T]he FAA was designed to promote arbitration." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 345 (2011). 9 U.S.C. §§ 10 and 11 "provide exclusive regimes for the review provided by the statute…" *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 590 (2008).

> On application for an order confirming the arbitration award, the court "must grant" the order "unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title." There is nothing malleable about

over any suit against the Government requires a clear statement from the United States waiving sovereign immunity, [cit.], together with a claim falling within the terms of the waiver…" *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003) (citing *United States v. Mitchell*, 445 U.S. 535, 538-539 (1980); *United States v. Mitchell*, 463 U.S. 206, 216-217 (1983)). § 10 of the APA "waives the Government's immunity from actions seeking relief 'other than money damages…'" *Dep't of Army*, 525 U.S. at 260-261. The phrase "money damages," as used in § 10, "'refers to a sum of money used as compensatory relief.'" *Bowen*, 487 U.S. at 895 (quoting *Maryland Dept. of Human Resources*, 763 F.2d at 1446). Stark's claims seeking any relief other than compensatory relief therefore fell within the scope of the waiver contained in § 10 of the APA.[4] Stark's Application sought confirmation of arbitration awards awarding equitable relief. App. 16-17, 47.

The Eleventh Circuit's reference to Stark's alleged failure to point to "agency action" in addition to

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> "must grant," which unequivocally tells courts to grant confirmation in all cases, except when one of the "prescribed" exceptions applies.

Id. at 587.

[4] The Eleventh Circuit further concluded that § 10 did not apply to Stark's case because Stark allegedly pointed to no "agency action" which he was challenging. App. 2. On the contrary, Stark alleged in his Application that the government had breached its agreement. App. 27, 30. Furthermore, the Eleventh Circuit's conclusion ignored the fact that the definition of "agency action" under the APA includes a "failure to act." *See Heckler v. Chaney*, 470 U.S. 821, 828 (1985) (quoting 5 U.S.C. §§ 702, 704).

pointing to a waiver of sovereign immunity, and the Court's statement that a "plaintiff must demonstrate an unequivocally expressed waiver of sovereign immunity," App. 2 (citing *King v. United States*, 878 F.3d 1265, 1267 (11th Cir. 2018)), as well as the District Court's holding that "[p]laintiffs have the burden of identifying an unequivocal waiver of sovereign immunity," raise an issue of considerable importance: what is required of a pleading when confronted with a motion to dismiss raising a defense of sovereign immunity?[5]

Rule 8(a) of the Federal Rules of Civil Procedure provides, in relevant part, that a pleading must contain "(1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support; [and] (2) a short and plain statement of the claim showing that the pleader is entitled to relief . . ." Fed. R. Civ. P. 8(a). Rule 8(a) is the embodiment of the Federal Rules' simplified notice pleading standard, "which was adopted to focus litigation on the merits of a claim." *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 514 (2002) (citing *Conley v. Gibson*, 355 U.S. 41, 48 (1957), *abrogated by Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)). Instead, the Rules rely on "liberal discovery rules and summary judgment motions to

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[5] *King v. United States*, 878 F.3d 1265 (11th Cir. 2018), relied upon by the Eleventh Circuit, did not find that a plaintiff had to prove that the government had waived immunity in regard to his claims. App. 2 (citing *King*, at 1267). Rather, it found that the statute which the appellant pointed to as waiving sovereign immunity, 31 U.S.C. § 3730(c) (5), did not constitute an express waiver of sovereign immunity. *Id*.

define disputed facts and issues and to dispose of unmeritorious claims." *Id.* at 512 (citing *Conley*, at 47-48; *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168–169 (1993)). The Rules recognize that "the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Conley*, at 48 (citing *Maty v. Grasselli Chemical Co.*, 303 U.S. 197 (1938)); *see also Bell Atl. Corp.*, 550 U.S. at 575 (Kennedy, J., dissenting) ("Under the relaxed pleading standards of the Federal Rules, the idea was not to keep litigants out of court but rather to keep them in. The merits of a claim would be sorted out during a flexible pretrial process and, as appropriate, through the crucible of trial") (citing *Swierkiewicz*, at 514).

If "[s]overeign immunity is by nature jurisdictional," *Henderson v. United States*, 517 U.S. 654, 675 (1996) (citing *FDIC v. Meyer,* 510 U.S. 471, 475 (1994)), then Stark alleging a waiver of sovereign immunity in his Application should have been held sufficient to survive a motion to dismiss pursuant to Rule 8(a) and the simplified notice pleading standard of the Federal Rules. "Before deciding that there is no jurisdiction, the district court must look to the way the complaint is drawn to see if it is drawn so as to claim a right to recover under the Constitution and laws of the United States." *Bell v. Hood*, 327 U.S. 678, 681 (1946).

The District Court peremptorily dismissed Stark's case, holding that he could not identify a waiver of sovereign immunity, when Stark in fact had identified such a waiver. Instead, in keeping with the Federal Rules' express policy favoring determination on the merits, the District Court should have, at very least,

afforded Stark an opportunity for limited discovery on the question of waiver of sovereign immunity, or should have reserved ruling on the government's sovereign immunity defense until summary judgment. "'The provisions for discovery are so flexible and the provisions for pretrial procedure and summary judgment so effective, that attempted surprise in federal practice is aborted very easily, synthetic issues detected, and the gravamen of the dispute brought frankly into the open for the inspection of the court.'" *Swierkiewicz*, 534 U.S. at 512-513 (quoting 5 C. Wright & A. Miller, Federal Practice and Procedure § 1202, p. 76 (2d ed. 1990)).

Involuntary dismissal of a pleading alleging a waiver of sovereign immunity on a motion to dismiss based upon sovereign immunity, without an opportunity to reach the facts of the issue of immunity, violates a plaintiff's due process rights. The Court "traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982). It has "read the 'property' component of the Fifth Amendment's Due Process Clause to impose 'constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause.'" *Id*. (quoting *Societe Internationale v. Rogers*, 357 U.S. 197, 209 (1958); citing *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 349-351 (1909); *Hovey v. Elliott*, 167 U.S. 409

(1897); *Windsor v. McVeigh*, 93 U.S. 274 (1876); *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974)).[6]

Of course, a long line of cases by the Court address the standard for motions to dismiss for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp.*, 550 U.S. at 570). In this case, Stark's Application alleged numerous specific facts concerning agreements with the government, the arbitration proceedings, and the arbitration awards. App. 16-17, 19-20, 22, 23, 25-26, 27-28, 29, 30-31, 35.

However, on issues other than the sufficiency of a plaintiff's claims, such as the existence of jurisdiction or defenses, *see Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 766 (2002) ("Sovereign immunity does not merely constitute a defense to monetary liability or even to all types of liability. Rather, it provides an immunity from suit"), due process and simplified notice pleading require that a federal court should refrain from determining such an issue on the face of the pleadings, and should afford the plaintiff some opportunity to reach the merits of the issue.

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[6] As Justice Black stated in his dissent in *In re Winship*, 397 U.S. 358 (1970), in his view, the only correct meaning of the phrase "due process of law" was that the government "must proceed according to the 'law of the land'—that is, according to written constitutional and statutory provisions as interpreted by court decisions." *In re Winship*, at 382 (Black, J., dissenting).

> Before the shift to "notice pleading" accomplished by the Federal Rules, motions to dismiss a complaint or to strike a defense were the principal tools by which factually insufficient claims or defenses could be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources. But with the advent of "notice pleading," the motion to dismiss seldom fulfills this function any more, and its place has been taken by the motion for summary judgment.

Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986).

Contrary to Rule 8(a) and the purposes of notice pleading, the Eleventh Circuit and the District Court accepted nothing as "true" regarding the repeated allegations concerning jurisdiction and waiver of immunity in Stark's Application. The District Court took the opportunity of the Government's motion to dismiss to summarily dispose of Stark's claims without any inquiry into the facts, including jurisdictional facts or facts relating to immunity. Following the principles set forth above, the District Court should have reserved determination of the government's sovereign immunity defense until after the parties had had an opportunity to develop the facts. The District Court's and Eleventh Circuit's placing an alleged "burden" on Stark in the pleading phase in response to the government's defense of sovereign immunity was contrary to the purposes of the Federal Rules and violated due process. App. 2, 7.

There appears to be no decision by the Court squarely addressing the standard to be applied to a motion to dismiss based upon sovereign immunity. However, this neglected question of procedure in cases

where the government raises a defense of sovereign immunity is one of substantial and continuing import. According to the Administrative Office of the U.S. Courts, there were 292,076 civil filings in U.S. district courts in 2017. *See* Administrative Office of the U.S. Courts, Federal Judicial Caseload Statistics 2017, http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2017. The United States was a defendant to 56,987—or 56 percent—of these filings. *Id*. Accepting that many of such filings are prisoner petitions and Social security filings, questions relating to sovereign immunity are nonetheless undoubtedly common in federal courts.

Adoption of a rule that, when confronted with a motion to dismiss based upon sovereign immunity, a plaintiff should be given some opportunity to secure and present evidence relating to any alleged waiver of sovereign immunity, would comport with due process of law. Adoption of such a rule would furthermore be consistent with other cases before the Court construing the waiver of immunity contained in § 10 of the APA, where the lower courts actually reached the merits of the question of waiver of sovereign immunity. For instance, in *Bowen*, the State of Massachusetts filed suit against the Secretary of Health and Human Services, requesting declaratory and injunctive relief regarding the Secretary's disallowance of certain reimbursements under the Medicaid program, and alleging that the government had waived its sovereign immunity under 5 U.S.C. § 702. 487 U.S. at 887. The district court proceeded to issue an opinion on the merits. *Id*. at 888. Similarly, in *Dep't of Army*, the respondent subcontractor sought an "equitable lien" on funds on a contract for the Department of the Army

which had not been paid to the prime contractor, predicating jurisdiction on the APA. 525 U.S. at 258. On the parties' cross-motions for summary judgment, the District Court held that the waiver of sovereign immunity provided by the APA did not apply to the respondent's claim. *Id*. at 259. Accordingly, in both *Bowen* and *Dep't of Army*, the courts below reached the merits of the respondents' defense of sovereign immunity.

Several of the Circuits have adopted standards similar to the proposed rule in determining whether plaintiffs with claims against foreign states or agents have sufficiently demonstrated applicability of an exception pursuant to the Foreign Sovereign Immunities Act ("FSIA") of 1976, 28 U.S.C. §§ 1602 *et seq*., sufficient to survive a motion to dismiss. The FSIA provides that "'a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States' except as provided in the Act." *Samantar v. Yousuf*, 560 U.S. 305, 313 (2010) (quoting 28 U.S.C. § 1604). The Act "establishes a comprehensive framework for determining whether a court in this country, state or federal, may exercise jurisdiction over a foreign state." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 610 (1992). "Under the FSIA, a foreign state is presumptively immune from suit unless a specific exception applies." *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 197 (2007) (citing 28 U.S.C. § 1604; *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993)).

On a motion to dismiss in the pleadings stage, several Circuits have held that a plaintiff should be given some opportunity to obtain and present evidence

regarding jurisdiction under the FSIA. *See Glob. Tech., Inc. v. Yubei (XinXiang) Power Steering Sys. Co.*, 807 F.3d 806, 813 (6th Cir. 2015) ("'[S]ince entitlement of a party to immunity from suit is such a critical preliminary determination, the parties have the responsibility, and must be afforded a fair opportunity, to define issues of fact and law, and to submit evidence necessary to the resolution of the issues'") (citing *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 451 (6th Cir. 1988)); *Box v. Dallas Mexican Consulate Gen.*, 487 F. App'x 880, 884 (5th Cir. 2012) (*per curiam*) ("[W]hen 'there is a factual question regarding a foreign sovereign's entitlement to immunity [under the FSIA], and thus a factual question regarding a district court's jurisdiction, the district court must give the plaintiff ample opportunity to secure and present evidence relevant to the existence of jurisdiction'") (quoting *Hansen v. PT Bank Negara Indon. (Persero), TBK*, 601 F.3d 1059, 1063–64 (10th Cir. 2010); citing *McAllister v. FDIC*, 87 F.3d 762, 766 (5th Cir. 1996)); *Reiss v. Societe Centrale Du Groupe Des Assurances Nationales*, 235 F.3d 738, 748 (2d Cir. 2000) ("We think it essential for the district court to afford the parties the opportunity to present evidentiary material at a hearing on the question of FSIA jurisdiction. The district court should afford broad latitude to both sides in this regard and resolve disputed factual matters by issuing findings of fact").

A district court's selection between the government's defense of sovereign immunity and a plaintiff's allegation of a waiver at the pleading stage simply cannot be reconciled with the requirements of due process. Adoption of a standard whereby questions of sovereign immunity are reserved for summary

judgment, or until after a plaintiff has been afforded an opportunity to secure and present evidence regarding an alleged waiver of immunity, would serve to preserve litigants' due process rights and would further the Federal Rules' policy favoring reaching the merits of disputes—including disputes relating to the existence of jurisdiction, or a defense.

As a subsidiary issue, the District Court's dismissal of Stark's Application on grounds that Stark had not, and could not, establish subject matter jurisdiction, also contravened due process--especially given the fact that Stark's Application had expressly alleged bases for the Court's jurisdiction. App. 7, 17, 19, 36. Subject matter jurisdiction is recognized as a court's authority "'to hear a given type of case…,'" *Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 638 (2009) (quoting *United States v. Morton*, 467 U.S. 822, 828 (1984)), and "'the extent to which a court can rule on the conduct of persons or the status of things,'" *id.* at 638 (quoting Black's Law Dictionary 870 (8th ed. 2004)). Subject matter jurisdiction limitations serve as a restriction on federal power, *see Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982), and to keep federal courts within the boundaries prescribed by the Constitution and Congress, *see Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999).

Pursuant to Rule 8(a), all that should have been required of Stark's Application was "a short and plain statement of the grounds for the court's jurisdiction . . ." Fed. R. Civ. P. 8(a). "The presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is

presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987) (quoting *Gully v. First National Bank,* 299 U.S. 109, 112–113 (1936)). As Justice Holmes observed almost a century ago, "when a suit is brought in a federal court and the very matter of the controversy is federal it cannot be dismissed for want of jurisdiction 'however wanting in merit' may be the averments intended to establish a federal right." *Hart v. B.F. Keith Vaudeville Exch*., 262 U.S. 271, 273-274 (1923) (citing *Equitable Life Assurance Society v. Brown*, 187 U.S. 308, 311 (1902); *Deming v. Carlisle Packing Co.*, 226 U.S. 102, 109 (1912); *Swafford v. Templeton*, 185 U.S. 487, 493 (1902); *St. Louis, Iron Mountain & Southern Ry. Co. v. McWhirter*, 229 U.S. 265, 275 (1913)).

Stark's Application alleged that the District Court possessed jurisdiction pursuant to the FAA, the APA, and 28 U.S.C. § 1331. App. 17, 19, 36. The Application further alleged that Stark had suffered actual injuries to his rights in violation of the Constitution, statutory law, and treaties of the United States. *Id*. at 20. Under Rule 8(a), nothing more should have been required of the Application. Nevertheless, the District Court and the Eleventh Circuit both required a greater burden from Stark at the pleading stage than the law did. App. 2, 7.

The judgment of the Court of Appeals should be reversed.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Anthony Lake
Counsel of Record
GILLEN WITHERS & LAKE LLC
400 Galleria Parkway
Suite 1920
Atlanta, GA 30339
(404) 842-9700
aclake@gwllawfirm.com

Counsel for Petitioner

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