No. 24-

In the Supreme Court of the United States

KINGDOM OF SPAIN, PETITIONER

v.

BLASKET RENEWABLE INVESTMENTS, LLC, *ET AL.*

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

PETITION FOR A WRIT OF CERTIORARI

Eamon P. Joyce
Simon Navarro
SIDLEY AUSTIN LLP
787 Seventh Avenue
New York, NY 10019
(212) 839-5300

Carter G. Phillips
Counsel of Record
Peter A. Bruland
Cody M. Akins
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
cphillips@sidley.com

Counsel for Petitioner

QUESTIONS PRESENTED

1. The Foreign Sovereign Immunities Act provides that "a foreign state shall be immune from the jurisdiction" of United States courts unless one of the Act's exceptions applies. 28 U.S.C. §1604. Under the FSIA's arbitration exception, "[a] foreign state shall not be immune" from a lawsuit to "confirm an award made pursuant to an agreement to arbitrate" "differences … between the parties." *Id.* §1605(a)(6).

The first question presented is:

Whether §1605(a)(6) allows United States courts to assert jurisdiction over a foreign sovereign without determining whether the sovereign consented to arbitrate differences between itself and the plaintiff.

2. *Forum non conveniens* permits federal courts to dismiss a case when the chosen forum is inappropriate. Here, European companies obtained arbitral awards against a European sovereign based on European conduct. But instead of asking European courts to confirm their awards—a process that implicates questions of European law—the companies sought confirmation here, requiring United States courts to decide those foreign-law questions.

The second question presented is:

Whether, in suits to confirm foreign arbitral awards, *forum non conveniens* dismissal: (i) is categorically unavailable, as the D.C. Circuit holds; (ii) is unavailable in at least some suits, as the Fourth Circuit holds; or (iii) depends on the facts of each case, as the Second and Ninth Circuits hold.

PARTIES TO THE PROCEEDING

Petitioner is the Kingdom of Spain. Spain was Appellee in No. 23-7038 below and Appellant in Nos. 23-7031 and 23-7032.

Respondents are Blasket Renewable Investments LLC (Appellant in No. 23-7038), NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. (Appellees in No. 23-7031), and 9REN Holding S.À.R.L. (Appellee in No. 23-7032).

RELATED PROCEEDINGS

NextEra Energy Global Holdings B.V. v. *Kingdom of Spain,* No. 19-cv-1618 (D.D.C. Feb. 15, 2023)

9REN Holding S.À.R.L. v. *Kingdom of Spain*, No. 19-cv-1871 (D.D.C. Feb. 15, 2023)

Blasket Renewable Invs., LLC v. *Kingdom of Spain*, No. 21-cv-3249 (D.D.C. Mar. 29, 2023)

NextEra Energy Global Holdings B.V. v. *Kingdom of Spain,* Nos. 23-7031, 23-7032, and 23-7038 (D.C. Cir. Aug. 16, 2024)

TABLE OF CONTENTS

TABLE OF CONTENTS—continued

TABLE OF CONTENTS—continued

TABLE OF CONTENTS—continued

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

STATUTES AND RULE

FOREIGN MATERIALS

TABLE OF AUTHORITIES—continued

OTHER AUTHORITIES

INTRODUCTION

This case raises two questions of critical importance to foreign sovereigns. The first question is whether United States courts may assert jurisdiction under the Foreign Sovereign Immunities Act's arbitration exception without deciding whether the sovereign consented to arbitrate with the plaintiff. The D.C. Circuit below said yes—breaking with two other circuits. The second question is whether district courts are categorically forbidden to consider *forum non conveniens* in cases brought to confirm foreign arbitral awards. The circuits are openly and intractably split over that question, and the conflict has recently deepened. This Court's guidance is badly needed.

1. This case is a last-ditch effort to end-run European law. Almost two decades ago, respondents and their predecessors—European energy companies—invested in Spain to take advantage of above-market electricity subsidies. When the global financial crisis forced much of Europe into austerity, the European Union pressed Spain to cut its spending. In response, Spain reformed its subsidies to control their cost. Respondents then filed arbitration claims against Spain under an international treaty. But when arbitral tribunals issued awards, respondents faced a dilemma. The natural place for European companies to confirm awards against a European sovereign based on European conduct would be European courts. Here, however, Europe's highest court and the European Commission have determined that the treaty provision respondents invoked does not permit intra-EU arbitration, that the subsidies underlying this case were illegal, and that awards like these are unenforceable.

To avoid defeat in Europe, respondents forum-shopped their award-confirmation cases to the United

States. But that meant clearing a new hurdle: the FSIA's arbitration exception. And as one of the district courts below correctly found, the exception doesn't apply here because the international treaty on which respondents relied contains no valid offer to arbitrate as to EU investors. In other words, Spain never consented to submit to arbitration disputes with respondents. On appeal, however, the D.C. Circuit held that this objection goes to the merits—not jurisdiction. In its view, all that mattered for jurisdictional purposes was that the treaty "arguably" contained an arbitration agreement as to *some* investors. App. 22a. (Never mind whether Spain consented to arbitrate with *these* particular investors.) The court also rejected Spain's *forum non conveniens* defense, citing circuit precedent that forecloses the doctrine in all foreign-arbitral-award enforcement cases.

2. The FSIA question warrants review. In the Second and Fifth Circuits, whether the sovereign consented to arbitrate with the plaintiff is a threshold jurisdictional question under the FSIA's arbitration exception. The D.C. Circuit alone disagrees, and its decision is wrong. The arbitration exception requires an "agreement with or for the benefit of a private party" to "submit to arbitration … differences … *between the parties*." §1605(a)(6) (emphasis added). Whether there is an agreement as to the plaintiff is thus a jurisdictional issue that courts must decide at the outset—not a merits issue to be punted to summary judgment. That distinction matters to foreign sovereigns, implicates reciprocity concerns for our own government, and was outcome-determinative below.

3. Whether *forum non conveniens* is categorically foreclosed in foreign-arbitral-award cases is independently certworthy. The Second and Ninth Circuits

would have considered that defense, but the D.C. Circuit expressly refused. Its rationale—that the doctrine is off-limits because foreign courts can't attach United States assets—is at odds with this Court's precedent *and* makes no sense. When a claimant wants to attach the defendant's assets, Blancoacre will do just as well as Whiteacre. To save district courts from becoming mired in foreign disputes that belong elsewhere, this Court should reject the D.C. Circuit's categorical ban. This quintessential case of forum shopping is the ideal vehicle for doing so.

The Court should grant review.

OPINIONS BELOW

The court of appeals' opinion (App. 1a–63a) is reported at 112 F.4th 1088. The district court's opinion in *Blasket Renewable Investments, LLC* v. *Kingdom of Spain* (App. 129a–149a) is reported at 665 F. Supp. 3d 1. The district court's opinion in *NextEra Energy Global Holdings B.V.* v. *Kingdom of Spain* (App. 64a–99a) is reported at 656 F. Supp. 3d 201. The district court's opinion in *9REN Holding S.À.R.L.* v. *Kingdom of Spain* (App. 100a–128a) is available at 2023 WL 20169333.

JURISDICTION

The D.C. Circuit issued its judgment on August 16, 2024, App. 1a, and denied a petition for rehearing en banc on December 2, 2024, App. 150a. This Court extended the petition deadline to May 1, 2025. The Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 1604 and 1605(a)(6) of Title 28 are reproduced in the Appendix.

STATEMENT

A. Legal background

1. Foreign sovereigns like Spain are "presumptively immune from the jurisdiction of United States courts." *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 355 (1993) (citing 28 U.S.C. §1604). The FSIA, which "carves out certain exceptions" to that rule, *Republic of Austria* v. *Altmann*, 541 U.S. 677, 691 (2004), is the "sole basis for obtaining jurisdiction over a foreign state," *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989). See 28 U.S.C. §§1605–07. "At the threshold of every action" against a foreign sovereign, a court "must satisfy itself that one of the [FSIA's] exceptions applies." *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 493–94 (1983). If not, the plaintiff is "barred from raising his claim in any court in the United States." *Id.* at 497.

This case is about the FSIA's arbitration exception. That provision abrogates immunity when an "action is brought" to "confirm an award made pursuant to" an "agreement made by the foreign state with or for the benefit of a private party to submit to arbitration … any differences … which may arise between the parties." 28 U.S.C. §1605(a)(6).

2. "Under the federal doctrine of *forum non conveniens*, when an alternative forum has jurisdiction" and "the chosen forum is inappropriate," a court may "dismiss the case" in the "exercise of its sound discretion." *Am. Dredging Co.* v. *Miller*, 510 U.S. 443, 447–48 (1994) (cleaned up). Factors favoring dismissal include the burden of "untangl[ing] problems" of foreign law and the "interest in having localized controversies decided at home." *Gulf Oil Corp.* v. *Gilbert*, 330

U.S. 501, 508–09 (1947). Courts may also consider forum shopping. See, *e.g.*, *Atl. Marine Const. Co.* v. *U.S. Dist. Ct.*, 571 U.S. 49, 65 (2013); *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 256 (1981); *Am. Dredging*, 510 U.S. at 463 (Kennedy, J., joined by Thomas, J., dissenting).

Forum non conveniens "resists formalization." *Koster* v. *(Am.) Lumbermans Mut. Cas. Co.*, 330 U.S. 518, 528 (1947). This Court has never limited the doctrine to particular classes of cases and has "repeatedly rejected the use of *per se* rules." *Am. Dredging*, 510 U.S. at 455. It is the doctrine's "very flexibility that makes it so valuable." *Piper Aircraft*, 454 U.S. at 250.

B. Factual and procedural background

1. European energy companies filed arbitration claims against Spain.

This case began amidst the Great Recession. After markets crashed in 2008, Europe teetered toward economic crisis. Greece faced default, Spain's unemployment rate hit 25%, and European governments asked the European Commission for help. *Blasket* J.A. 215. In exchange for emergency relief, EU regulators demanded reforms. *9REN* J.A. 127–28. Spain then agreed to pare back renewable-energy subsidies, which cost billions of euros each year and were pushing Spain's electrical system to "the brink of collapse." *Blasket* J.A. 135–36.

While Spain still guaranteed "reasonable rates of return," *id.* at 75–76, these reforms meant smaller profits for EU investors like respondents and their predecessors-in-interest. (Blasket, for example, complains about making only 7.4% profits, not the 11% envisioned pre-financial crisis. *Id.* at 167.) Disappointed by their purported losses, respondents filed

arbitrations claiming that Spain had violated the Energy Charter Treaty, a multilateral investment treaty whose signatories promise foreign investors "fair and equitable treatment." Energy Charter Treaty art. 10 (1994). The arbitral tribunals issued awards in their favor in 2019 and 2020.

2. The EU's highest court and executive determined that no arbitration agreement existed and that the awards are unenforceable.

Respondents faced two problems when they sought judicial confirmation of the awards.

First, the Court of Justice of the European Union—this Court's counterpart—has held that the Energy Charter Treaty's arbitration provision is "incompatible with EU Law." *Republic of Moldova* v. *Komstroy, LLC*, ECLI:EU:C:2021:655, ¶61; see also *Slovak Republic* v. *Achmea BV*, ECLI:EU:C:2018:158, ¶¶32–33, 41. As a result, that provision is not (and never was) an offer to arbitrate disputes between EU Member States like Spain and EU nationals like respondents. See *Komstroy*, ECLI:EU:C:2021:655, ¶66. The European Commission has recognized as much. Applying Court of Justice precedent, it recently confirmed that the Energy Charter Treaty contains "no agreement to arbitrate" between Spain and EU nationals like respondents. *Decision of the European Commission on the measure State aid SA.54155 (2021/NN) implemented by Spain — Arbitration award to Antin* ¶262 (Mar. 24, 2025); see *id.* ¶¶8, 15. The Commission concluded that the arbitral awards "cannot therefore have any effect [or] be enforced." *Id.* ¶11.

Second, the Commission also "determined that … award[s] like the one[s] here constitute 'State Aid,'

i.e., a public subsidy, that Spain may not pay absent the Commission's approval." EU Comm'n Br. 11. Were a court to issue a judgment executing the awards, Spain would be "violat[ing] its EU law obligations," *id.*, thereby exposing itself to EU sanctions. In fact, the Commission—the EU body with exclusive authority to administer state-aid law—recently ordered Spain to "ensure that no payment, implementation or execution, of [such awards] is otherwise effected." *Antin*, *supra*, ¶284.

3. Respondents asked United States courts to enforce the awards.

Knowing that any European court would reject these unlawful awards, respondents raced to the United States and asked the courts below to confirm them. To overcome Spain's sovereign immunity, the companies invoked the FSIA's arbitration exception and the Energy Charter Treaty's arbitration provision. *E.g.*, App. 71a. Citing the Court of Justice's *Komstroy* decision, Spain asserted that the Energy Charter Treaty contained no offer to arbitrate disputes with EU nationals.

a. The district court in *Blasket* found that no arbitration agreement existed between the parties, leaving the court without subject-matter jurisdiction. Relying on the Court of Justice's decision, it found that the Energy Charter Treaty's arbitration provision is "incompatible with EU law insofar as [it is] applied to disputes between an EU Member State and a national of another EU Member State." App. 133a. The court also found that EU law "preclude[d]" Spain from "entering into international agreements … inconsistent with [its EU treaty] obligations." App. 144a. Ultimately, the court held that, "[b]ecause there was no valid offer to arbitrate, there is no arbi-

tration agreement, which is required to establish subject matter jurisdiction" under the FSIA. App. 146a.

b. On materially identical facts, the district court in *NextEra* and *9REN* asserted jurisdiction and punted Spain's immunity objection to summary judgment. In its view, Spain's lack of "authority to agree" to arbitration was "not a challenge to the jurisdictional fact of that agreement's existence." App. 78a.; *accord* App. 112a. Rather, it involved "the merits of an award." App. 78a. The court also rejected Spain's *forum non conveniens* defense, explaining that circuit precedent forbade it to consider that issue. App. 118a.

4. The D.C. Circuit asserted jurisdiction without resolving Spain's immunity objection and rejected *forum non conveniens*.

The panel reversed *Blasket* and affirmed *NextEra* and *9REN* in relevant part. The panel found jurisdiction because Spain had "entered into an arbitration agreement"—the Energy Charter Treaty's arbitration provision—that was "for the benefit" of at least "*some* investors." App. 22a. The court deemed Spain's objection that it never consented to arbitrate disputes with respondents in particular a "merits question" that it need "not address." App. 26a. Citing circuit precedent, the panel also declined to consider *forum non conveniens*. App. 27a. The court later denied Spain's petition for rehearing en banc.

REASONS FOR GRANTING THE PETITION

1. The Court should resolve the circuit split over the FSIA's arbitration exception. In the Second and Fifth Circuits, whether the sovereign consented to arbitrate with the plaintiff is a threshold jurisdictional question. Only the D.C. Circuit has broken

ranks, deeming the issue a merits question. For foreign sovereigns, that distinction spells the difference between a quick immunity decision and a summary-judgment slog—and it implicates reciprocity concerns for our own government too. The D.C. Circuit is also wrong. Section 1605(a)(6) asks whether there is an "agreement with or for the benefit of a private party" to arbitrate "differences … between the parties." §1605(a)(6). That language requires courts to decide at the outset whether the sovereign consented to arbitrate with the plaintiff, and this case is the ideal vehicle for clarifying the jurisdictional analysis.

2. The Court should also grant the *forum non conveniens* question. The courts of appeals are divided over whether *forum non conveniens* is available in foreign-award-confirmation cases, and the conflict has recently spread. The D.C. Circuit has the wrong side of the split. It ignores this Court's guidance in *Piper Aircraft* by turning the prospect of a lesser recovery into a bar on *forum non conveniens* dismissal—the very sort of *per se* rule that this Court has long rejected. With the rapid growth of international arbitration and the thorny foreign-affairs questions posed by confirmation cases, the *forum non conveniens* question is now more important than ever. This case is an excellent vehicle for resolving it, and the Court's intervention is badly needed.

I. The Court should resolve the circuit split over the FSIA's arbitration exception.

A. The circuits have split over whether §1605(a)(6) requires courts to find that the sovereign consented to arbitrate with the plaintiff.

The courts of appeals have split 2–1 over the first question presented. In the Second and Fifth Circuits, whether the sovereign consented to arbitrate with the plaintiff is a threshold jurisdictional matter. The D.C. Circuit alone disagrees, deeming that question a merits issue to be hashed out on summary judgment. Only this Court can resolve the conflict, and further percolation is unlikely, since plaintiffs can always sue a foreign sovereign in the District of Columbia.

1. In the Second and Fifth Circuits, whether the sovereign consented to arbitrate with the plaintiff is a threshold jurisdictional question.

a. In *Cargill International S.A.* v. *M/T Pavel Dybenko*, the Second Circuit treated the question whether the sovereign consented to arbitrate with the plaintiff as part of the "initial determination" of "subject matter jurisdiction" under §1605(a)(6). 991 F.2d 1012, 1018 (1993).

Cargill was a shipping case involving three parties. A Dutch buyer purchased soybean oil from a Swiss seller. *Id.* at 1014. The seller, in turn, contracted with a Soviet shipper—a sovereign instrumentality—to deliver the oil. *Id.* When the oil arrived, the buyer found that it was contaminated. *Id.* at 1015. The buyer then sued the shipper in federal court, invoking §1605(a)(6) and relying on an arbitration clause in the shipping contract. *Id.*

The district court dismissed for lack of subject-matter jurisdiction. *Id.* at 1018. While the sovereign shipper had agreed to arbitrate with the seller, the *buyer* was not a party to the shipping contract and therefore not a party to the arbitration agreement. See *id.* at 1017; *Cargill Int'l S.A.* v. *M/T Pavel Dybenko*, 1992 WL 42194, at *5 (S.D.N.Y. Feb. 27, 1992). According to the district court, the jurisdictional inquiry ended there. The court thus "refused to consider" any "contractual arguments" about whether the buyer "was a third-party beneficiary of the arbitration clause." 991 F.2d at 1015, 1018.

The Second Circuit reversed, providing detailed instructions to guide the jurisdictional inquiry on remand. It first explained that the third-party beneficiary argument went to the "initial determination" of "subject matter jurisdiction" under §1605(a)(6). *Id.* at 1018. "If the alleged arbitration agreement exist[ed]"—that is, if the buyer was entitled to invoke the agreement—"it satisfie[d] the requirements for subject matter jurisdiction." *Id.* The court then outlined the proper analysis. To decide "whether subject matter jurisdiction existed," the district court must determine whether the arbitration agreement "was intended to benefit" the buyer. *Id.* at 1019. Only if the buyer was entitled to benefit from the agreement would it be "proper … to enforce the arbitration agreement against" the sovereign. *Id.* at 1020.

The Second Circuit did not deem it enough that the sovereign shipper had consented to arbitrate with *someone* (the seller). On that view, the Second Circuit could have resolved the FSIA question itself. Instead, it remanded for the district court to determine whether "the parties to th[e] contract intended to confer a benefit"—the right to "enforce the [arbitration]

agreement"—on the buyer. *Id.* at 1019. Put another way, the district court needed to decide, as part of its jurisdictional inquiry, whether the sovereign had consented to arbitrate with that particular plaintiff (the buyer). Only if the answer was yes could the plaintiff invoke the benefit conferred by the sovereign (the right to arbitrate).

b. The Fifth Circuit took an analogous approach in *Al-Qarqani* v. *Saudi Arabian Oil Co.*, declining to assert jurisdiction under §1605(a)(6) where "there exist[ed] no agreement *among th[e] parties* to arbitrate th[e] dispute." 19 F.4th 794, 802 (2021) (emphasis added), cert denied, 142 S. Ct. 2753 (2022) (Mem.).

Al-Qarqani was an oil-rights dispute involving Saudi Aramco, a sovereign instrumentality. *Id.* at 797. After arbitrators issued an $18 billion award, the plaintiffs sought to confirm the award in federal court, invoking §1605(a)(6). *Id.* On their telling, Saudi Aramco's predecessor-in-interest had agreed to arbitrate differences between itself and the plaintiffs' ancestors, creating a "valid arbitration agreement" that "b[ound] Saudi Aramco to arbitrate th[e] dispute." *Id.* at 801; *Al-Qarqani* v. *Arab Am. Oil Co.*, 2020 WL 6748031, at *3–4 (S.D. Tex. Nov. 17, 2020).

The Fifth Circuit held that §1605(a)(6) did not apply because "no such arbitration agreement exist[ed]." 19 F.4th at 801. Along the way, the court examined two agreements invoked by the plaintiffs and found that neither contained an "agreement among the parties to arbitrate." *Id.* at 802. Here too, the "jurisdictional analysis" did not end when the court determined that the sovereign's predecessor-in-interest had agreed to arbitrate with *someone*. See *id.* at 801. Instead, the court pressed on and determined that

there was "no agreement *among th[e] parties* to arbitrate … anything." *Id.* at 802 (emphasis added).

2. In the D.C. Circuit, whether the sovereign consented to arbitrate with the plaintiff is a merits question.

Only the D.C. Circuit treats the question whether the sovereign consented to arbitrate with the plaintiff as a "merits question," not a "jurisdictional question under the FSIA." App. 23a, 26a.

The jurisdictional analysis below proceeded in three steps. Step one: Spain "entered into an arbitration agreement"—the Treaty provision—by which it "consent[ed] to arbitrate investment disputes with the investors of at least *some* of the other signatory nations." Step two: "[t]hat agreement [wa]s 'for the benefit'" of at least "some investors." Step three: the agreement "therefore satisfie[d] the FSIA's arbitration exception," granting the district court "jurisdiction to enforce" awards against Spain. App. 22a, 26a (cleaned up).

The court expressly declined to address Spain's objection that the treaty "was made for the benefit of *some* investors—just not those within the European Union," such that Spain never consented to arbitrate with "EU nationals" like respondents. App. 22a. In the panel's view, that was a "merits" argument about the "*scope*" of the arbitration agreement, not "a jurisdictional question under the FSIA." App. 22a–23a.

3. The split is outcome-determinative, and there is no reason to expect further percolation.

a. The circuit conflict is outcome-determinative. Had this case arisen in the Second or Fifth Circuits, no court could have asserted jurisdiction under

§1605(a)(6) without resolving Spain's objection that it never agreed to arbitrate differences between itself and "these parties." *Al-Qarqani*, 19 F.4th at 802. Instead, the courts would have had to address that issue as part of their "initial determination." *Cargill*, 991 F.2d at 1018.

That would likely have ended this case. While the merits of Spain's objection are not before this Court, the only court below to reach the issue held that "no agreement to arbitrate ever existed." *Blasket*, 665 F. Supp. 3d at 14. The Court of Justice of the European Union has been clear on this point. In short: EU Law does not permit "a provision according to which a dispute between an investor of one Member State and another Member State" can be submitted to arbitration. *Komstroy*, EU:C:2021:655, ¶62. The European Commission shares that view, as do 26 EU Member States—including respondents' home countries. See E.C. C.A. Rehearing Br. 3; *Declaration on the Legal Consequences of the Judgment of the Court of Justice in* Komstroy (June 26, 2024), bit.ly/Komstroy_Declaration; see also App. 38a (noting that "the companies may struggle to enforce" their awards for this reason). In fact, the Netherlands—home to NextEra and to Blasket's predecessors-in-interest—weighed in below to say just that. See C.A. Br. 8. And the arbitral panels in *European Solar Farms A/S* v. *Kingdom of Spain*, ICSID Case No. ARB/18/45 at ¶257 (Oct. 11, 2024), and *Sapec, S.A.* v. *Kingdom of Spain*, ICSID Case No. ARB/19/23 at ¶266 (Oct. 11, 2024), found jurisdiction lacking on the same basis.

b. Further percolation is unlikely.

The Second and D.C. Circuits hear the overwhelming majority of award-confirmation actions in the United States. New York is "by far the most im-

portant hub for international arbitration in the U.S.," Andreas A. Frischknecht et al., *Enforcement of Foreign Arbitral Awards and Judgments in New York* 4 (2018), and Washington, D.C. is home to the International Center for Settlement of Investment Disputes, a leading arbitral forum. See ICSID, *Hearing Facilities*, bit.ly/ICSID_DC. Of the nearly 300 foreign-award-confirmation suits filed since 2020, most were filed in New York or D.C.

More importantly, the FSIA's venue provision states that a "civil action against a foreign state" may always be brought "in the United States District Court for the District of Columbia." 28 U.S.C. §1391(f)(4). Now that the D.C. Circuit has made it easy to survive a 12(b)(1) motion, future plaintiffs have no reason to roll the dice elsewhere. The United States recognized as much in another recent FSIA case arising out of the D.C. Circuit—explaining that §1391(f)(4) "reduces the prospect" of "further percolation." Invitation Br. 11, *Republic of Hungary* v. *Simon*, No. 18-1447 (U.S.).

* * *

Only this Court can resolve the circuit conflict, and there is no reason to wait. There are two possible positions; both are staked out. The en banc D.C. Circuit has denied rehearing, and the Second and Fifth Circuits show no sign of rethinking. And other courts are unlikely to weigh in. The Court should grant review.

B. The FSIA question is important and recurring.

1. The FSIA question matters to foreign sovereigns and the United States alike.

a. For a foreign sovereign dragged into our courts, much turns on whether an objection goes to jurisdiction or to the merits.

Start with the burdens of litigation. Federal courts "must typically decide" jurisdictional matters "at the outset of the case." *Bolivarian Republic of Venezuela v Helmerich & Payne Int'l Drilling Co.*, 581 U.S. 170, 179 (2017). So when a sovereign raises a meritorious immunity defense, treating that defense as jurisdictional will grant "protection from the inconvenience of suit." *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 479 (2003); see also *Helmerich*, 581 U.S. at 174 (calling this "foreign sovereign immunity's basic objective"). By contrast, asserting jurisdiction and then punting the defense to summary judgment will "embroil the foreign sovereign in an American lawsuit for an increased period of time." *Helmerich*, 581 U.S. at 183. Some confirmation cases might be straightforward, but many are not. *E.g.*, *Monegasque de Reassurances S.A.M.* v. *Nak Naftogaz of Ukraine*, 311 F.3d 488, 500 (2d Cir. 2002) (discussing "extensive discovery").

And then there are the appellate consequences. When a district court rejects a defense that is jurisdictional under the FSIA, "the losing sovereign nation can immediately appeal the decision as a collateral order." *Helmerich*, 581 U.S. at 185. But the sovereign "would not enjoy a right to take an immediate appeal" if the court rejected its defense on the *merits*. *Id.*; see *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978) (collateral-order doctrine applies to issues "completely separate from the merits").

The Court should grant review to clarify how district courts should treat objections like Spain's. As this Court has repeatedly explained, it is "imperative that jurisdictional requirements be explicit and un-

ambiguous." *Browder* v. *Dir., Dep't of Corr.*, 434 U.S. 257, 267 (1978). That is why this Court has previously granted review to clarify the jurisdictional analysis required under other provisions of the FSIA. *E.g.*, *Helmerich*, 581 U.S. at 177–78 (expropriation); *Permanent Mission of India to U.N.* v. *City of N.Y.*, 551 U.S. 193, 197–99 (2007) (immovable property). While "jurisdictional rules should be clear" throughout the law, *Lapides* v. *Bd. of Regents*, 535 U.S. 613, 621 (2002), "clarity is doubly important here where foreign nations and foreign lawyers" must navigate our legal system. *Helmerich*, 581 U.S. at 183.

b. The decision below also implicates reciprocity concerns for our own government. "Actions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States." *Verlinden*, 461 U.S. at 493. After all, the United States is involved in "about 1,000 cases in 100 courts around the world" at any given time. *Helmerich*, 581 U.S. at 183. As the Solicitor General has previously explained, "requiring a legal determination of immunity at the 'threshold' of the action … safeguard[s] the interests of the United States when it is sued" in those courts. U.S. Br. 8, *Bolivarian Republic of Venezuela* v. *Helmerich & Payne Int'l Drilling Co.*, No. 15-423 (U.S.) (citation omitted). If foreign courts followed the D.C. Circuit's logic, however, the United States might have to endure protracted summary-judgment proceedings even when it never consented to arbitrate with the plaintiff. This Court should grant review—or at least call for the views of the Solicitor General—in light of these sensitive diplomatic considerations. See, *e.g.*, CVSG, *Wye Oak Tech., Inc.* v. *Republic of Iraq*, No. 24-759 (Apr. 28, 2025).

2. Nor are respondents the only European investors trying to end-run European law. Spain is currently facing eleven other award-confirmation suits involving the same intra-EU-arbitration issue in the D.C. Circuit alone. See Spain C.A. Rehearing Br. Ex. 2. Other European sovereigns are in the same boat. *E.g.*, *CEF Energia B.V.* v. *Italian Republic*, No. 1:19-cv-3443 (D.D.C.); *Greentech Energy Sys. a/s* v. *Italian Republic*, No. 1:19-cv-3444 (D.D.C.); *MOL Hungarian Oil and Gas plc* v. *Republic of Croatia*, 1:23-cv-218 (D.D.C.); *Mercuria Energy Grp.* v. *Republic of Poland*, No. 1:23-cv-3572 (D.D.C.); *ACF Renewable Energy Ltd.* v. *Republic of Bulgaria*, No. 1:24-cv-1715 (D.D.C.). All of those cases implicate the objection that Spain raised below: that the Energy Charter Treaty contains no offer to arbitrate intra-EU disputes. The D.C. Circuit's rule—which treats that objection as a summary-judgment question—deprives sovereign defendants of an immunity decision "at the outset of the case." *Helmerich*, 581 U.S. at 179.

C. The decision below is wrong.

To assert jurisdiction under the FSIA's arbitration exception, a court must find "an agreement … to submit to arbitration … differences … between *the parties*." §1605(a)(6) (emphasis added). Unless the sovereign consented to arbitrate differences between itself and the plaintiff, there is no subject-matter jurisdiction under §1605(a)(6). Hornbook arbitration principles confirm this. See generally *Coinbase* v. *Suski*, 602 U.S. 143, 148 (2024) ("[T]he first question in any arbitration dispute must be: What have these parties agreed to?").

1. Section 1605(a)(6) doesn't apply unless the sovereign consented to arbitrate differences between itself and the plaintiff.

Section 1605(a)(6) does not permit courts to assert jurisdiction over a foreign sovereign unless the sovereign has consented to arbitrate "differences" that arise "between" itself and the plaintiff. That issue is thus a threshold jurisdictional question that courts must determine at the outset of a case.

a. Section 1605(a)(6) creates an exception to foreign sovereign immunity in cases brought "to confirm an award made pursuant to" an "agreement with or for the benefit of a private party … to submit to arbitration … differences which have arisen or which may arise between the parties." The key language is "differences … between the parties." That qualifying phrase explains what sort of arbitration agreement gives rise to subject-matter jurisdiction. It's not enough that the sovereign consented to "submit to arbitration … differences" with *someone*. (Section 1605(a)(6) does not say "open to one, open to all.") Instead, the sovereign must have agreed to arbitrate differences "between the parties"—which is to say: differences between itself and the plaintiff.

In practical terms, this requires a plaintiff to allege (and a court to find) two jurisdictional facts. First, an agreement must exist. In particular, §1605(a)(6) provides that the agreement must be "made by the foreign state with or for the benefit of a private party." Second, that agreement must submit to arbitration "differences … between the parties" to "the action." *Id.* If Investor A wants the court to confirm an arbitral award against Country B, she needs to establish that Country B consented to arbitrate "differences"

that arise "between" itself and Investor A. It doesn't suffice to allege that Country B agreed to arbitrate differences that arise with Investor C.

That doesn't turn second-order questions about an agreement's scope into first-order questions about subject-matter jurisdiction. Section 1605(a)(6) asks whether there is an "agreement … to submit to arbitration … differences … between the parties." (That is, whether the sovereign consented to arbitrate with the plaintiff.) "Such language would normally foresee a judicial decision about th[at] jurisdictional matter." *Helmerich*, 581 U.S. at 171. But Congress did not make foreign sovereign immunity turn on whether an agreement covers the particular "differences" involved in "the action." §1605(a)(6). Those are nonjurisdictional scope questions, and nothing in §1605(a)(6) requires courts to frontload them.

Nor does it matter what form an agreement takes. Whether the plaintiff relies on a contract-based agreement "with … a private party" or a treaty-based offer to arbitrate "for the benefit of a private party," §1605(a)(6)'s "between the parties" requirement remains the same. Only the sovereign and the private party may submit their *own* disputes to arbitration. And under §1605(a)(6), courts have jurisdiction only when the sovereign consented to arbitrate "differences … between" itself and the plaintiff.

All of that aligns with how this Court has interpreted neighboring provisions of the FSIA. Consider the expropriation exception, which allows United States courts to hear "any case … in which rights in property taken in violation of international law are in issue." §1605(a)(3). That provision doesn't require plaintiffs to "show as a *jurisdictional* matter" that they held title to specific property. *Helmerich*, 581

U.S. at 178. "But whether the rights asserted are rights of a certain kind, namely, rights in 'property taken in violation of international law,' is a jurisdictional matter that the court must typically decide at the outset of the case." *Id.* at 178–79. If that means "decid[ing] some, or all, of the merits issues, so be it." *Id.* at 178. Section 1605(a)(6) works the same way. It doesn't require plaintiffs to show that an arbitration agreement covers a specific dispute, but it *does* require them to show that the agreement covers "differences … between" the sovereign and themselves.

b. The D.C. Circuit did not address the statute's requirement that an agreement cover "differences … between the parties." §1605(a)(6). Instead, it thought that "the FSIA's arbitration exception" is "satisfie[d]" when a court finds an "agreement … 'for the benefit' of" a private party. App. 22a. Here, it reasoned, what mattered was that the Energy Charter Treaty shows Spain's agreement to arbitrate disputes "for the benefit" of at least "some investors." *Id.* But the D.C. Circuit never concluded that Spain had consented to arbitrate differences between itself and EU investors like respondents. That's like exercising diversity jurisdiction after finding that the plaintiff has met the amount-in-controversy requirement: it's necessary but not sufficient. Section 1605(a)(6) *also* requires courts to ask whether a sovereign agreed to arbitrate "differences … between" itself and the plaintiff.

2. Background arbitration principles confirm that the existence of an agreement is a threshold question.

It's not surprising that the existence of an agreement to arbitrate "differences … between the parties" is a threshold question under the FSIA. The same has long been a foundational tenet of domestic arbitration

law. Because "[a]rbitration is strictly a matter of consent," courts "must resolve" *whether* the parties "form[ed]" an arbitration agreement at all. *Granite Rock Co.* v. *Int'l Bhd. of Teamsters*, 561 U.S. 287, 299–300 (2010). See also *Raymond James Fin. Servs., Inc.* v. *Cary*, 709 F.3d 382, 386 (4th Cir. 2013) (whether plaintiff agreed to arbitration with defendant "relates to the *existence* of a contract to arbitrate, not the *scope* of that potential agreement").

Congress wrote the FSIA's arbitration exception "against th[is] backdrop." *McQuiggin* v. *Perkins*, 569 U.S. 383, 398 n.3 (2013). Just two years before Congress enacted §1605(a)(6), see Pub. L. No. 100-669, §2, 102 Stat. 3969 (1988), this Court unanimously reaffirmed that since "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit," the question "whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." *AT&T Techs., Inc.* v. *Commc'ns Workers of Am.*, 475 U.S. 643, 648–49 (1986). Nothing in the FSIA indicates that Congress intended to deviate from that background principle. To the contrary, this Court has already explained that international arbitration treaties are subject to the same principles as "ordinary arbitration contracts" and that, no less than a natural person's, a "sovereign's consent to arbitration is important." *BG Grp., PLC* v. *Republic of Argentina*, 572 U.S. 25, 41–43 (2014).

D. This case is an excellent vehicle.

This case is the ideal vehicle for clarifying the arbitration exception's jurisdictional inquiry. There are no preservation problems, alternative holdings, or factual disputes that would frustrate review. The FSIA question was fully briefed and squarely decided below. And the answer to that question could deter-

mine how long Spain remains "embroil[ed] … in an American lawsuit," *Helmerich*, 581 U.S. at 183—indeed, in numerous lawsuits. If this Court reverses, the lower courts would have to treat Spain's objection as "a jurisdictional matter" to be resolved as soon as "reasonably possible." *Helmerich*, 581 U.S. at 179. Those courts could then consider in the first instance whether the Energy Charter Treaty's arbitration provision reflects Spain's consent to arbitrate with EU investors like respondents.

II. The Court should also resolve the acknowledged circuit split over whether *forum non conveniens* is available in suits to confirm foreign arbitral awards.

The courts of appeals have openly split 2–1–1 over whether a *forum non conveniens* defense is available in cases brought to confirm foreign arbitral awards. The defense is fair game in the Second and Ninth Circuits, but is categorically prohibited in the D.C. Circuit. Meanwhile, the Fourth Circuit recently held that the defense is unavailable to private debtors, while suggesting that it would split the baby and apply the Second Circuit's rule when (as here) a sovereign seeks dismissal. The Second and D.C. Circuits have expressly rejected one another's rules, and only this Court can resolve the circuit conflict.

The *forum non conveniens* question is also exceptionally important, and this case is an ideal vehicle for addressing it. It's hard to imagine a more overt case of forum-shopping to avoid European courts than what happened here. Yet the D.C. Circuit's rule strips district courts of an important tool for avoiding difficult and sensitive foreign-relations concerns often posed by foreign-arbitral-award cases—threatening to ensnare them in conflicts with their foreign coun-

terparts. Had this case arisen in the Second Circuit, the district court would have considered Spain's robust *forum non conveniens* defense and determined whether this EU dispute between EU parties belongs in EU courts (notwithstanding respondents' efforts to avoid them). But because respondents sued in D.C., the district courts' hands were tied. This Court should restore to district courts their ordinary discretion to leave foreign disputes to foreign courts.

A. The circuits are openly and intractably split over the *forum non conveniens* question.

1. In the Second and Ninth Circuits, district courts exercise their ordinary discretion to consider *forum non conveniens* in foreign-arbitral-award cases.

a. The Second Circuit entertains *forum non conveniens* defenses in foreign-arbitral-award cases and has expressly rejected the D.C. Circuit's contrary rule.

i. The Second Circuit first confronted the issue in *Monegasque de Reassurances S.A.M.* v. *Nak Naftogaz of Ukraine*. After an insurer won an arbitral award against a Ukrainian instrumentality in a dispute over a Ukrainian gas pipeline, it asked the Southern District of New York to confirm the award. 311 F.3d at 491–92. Ukraine moved to dismiss on *forum non conveniens* grounds, arguing that its courts were the proper forum.

The Second Circuit agreed. Even though the insurer sought to enforce its award against Ukrainian assets in the United States, "Ukrainian law," the court observed, "provide[d] for the execution of judgments against government properties" in Ukraine. *Id.* at

499. The court then explained that litigation would be more convenient in Ukrainian courts, which could handle the necessary foreign discovery, better understood the issues governed by Ukrainian and Russian law, and had a special interest in resolving a quintessentially Ukrainian dispute. *Id.* at 500–01.

ii. The Second Circuit later revisited the issue and rejected the D.C. Circuit's rule. In *Figueiredo Ferraz e Engenharia de Projeto Ltda.* v. *Republic of Peru*, 665 F.3d 384 (2d Cir. 2011), Peru sought *forum non conveniens* dismissal of an award-confirmation proceeding. The district court denied that request, adopting the D.C. Circuit's view that foreign courts were inadequate alternatives because "only a United States court may attach the commercial property of a foreign nation located in the United States." *Id.* at 390 (quoting *TMR Energy Ltd.* v. *State Prop. Fund of Ukraine*, 411 F.3d 296, 303 (D.C. Cir. 2005)). The Second Circuit reversed. In doing so, the court "respectfully disagree[d]" with the D.C. Circuit, explaining that in confirmation suits, the adequacy of an alternative forum turns on "whether there are *some* assets of the defendant in the alternative forum, not whether the precise asset located here can be executed upon there." *Id.* at 391 (emphasis added). The court then held that the petition should have been dismissed for *forum non conveniens*. *Id.* at 392–93.

b. The Ninth Circuit has also recognized a *forum non conveniens* defense in the foreign-award-confirmation context. See *Melton* v. *Oy Nautor Ab*, 1998 WL 613798 (Sept. 4, 1998). After Melton obtained a Finnish arbitral award against a Finnish yacht manufacturer, he tried to collect in California. *Id.* at *1. The Ninth Circuit affirmed dismissal for *forum non conveniens*. *Id.* Since both parties were sub-

ject to Finnish courts' jurisdiction, there was an adequate alternative forum, even though Melton sought to enforce the award because assets were available in California. *Id.*; Reply Br. 19, *Melton* v. *Oy Nauter Ab* (No. 97-15395) (9th Cir.).

2. In the D.C. Circuit, district courts may never consider *forum non conveniens* in foreign-arbitral-award cases.

The D.C. Circuit has taken *forum non conveniens* off the table in foreign-award-confirmation cases—expressly rejecting the Second Circuit's approach in favor of a categorical bar. *TMR*, 411 F.3d at 303–04.

TMR, a Cypriot corporation, obtained a $36.7 million award against the State Property Fund of Ukraine (another Ukrainian instrumentality) in a Swedish arbitration. *Id.* at 298–99. When TMR requested confirmation here, the Fund objected that the lack of any connection to the United States made D.C. a *forum non conveniens*. *Id.* at 299.

The D.C. Circuit disagreed, holding *forum non conveniens* categorically unavailable in foreign-award-confirmation cases. Dismissal for *forum non conveniens* is inappropriate "if no other forum to which the plaintiff may repair can grant the relief it may obtain in the forum it chose." *Id.* at 303. And that's *always* the case in award-confirmation suits (reasoned the court) because "only a court of the United States … may attach the commercial property of a foreign nation located in the United States." *Id.* The court reached this result even though "TMR ha[d] already filed actions" "in the courts of … Ukraine," where the State Property Fund of Ukraine surely had property. *Id.* And even though, at the time of suit, the Fund

"ha[d] no assets in the United States." *Id.* "Because there is no other forum in which TMR could reach [the Fund]'s property, if any, in the United States," *forum non conveniens* was a nonstarter. *Id.* at 304.

The D.C. Circuit has repeatedly reaffirmed its approach. Asked to reconsider in light of the Second Circuit's express disagreement with *TMR*, see *supra* at 25, the D.C. Circuit doubled down. "*[F]orum non conveniens* is not available in proceedings to confirm a foreign arbitral award because only U.S. courts can attach foreign commercial assets found within the United States." *Stileks* v. *Republic of Moldova*, 985 F.3d 871, 876 n.1 (2021) (citing *TMR*, 411 F.3d at 303–04); see also *Tatneft* v. *Ukraine*, 21 F.4th 829, 840 (D.C. Cir. 2021), *rehearing en banc denied*, (D.C. Cir. Feb. 3, 2022).

3. In the Fourth Circuit, *forum non conveniens* is categorically unavailable in at least some foreign-arbitral-award cases.

The Fourth Circuit recently adopted the D.C. Circuit's rule in large part, holding that *forum non conveniens* does not apply in suits to confirm a foreign arbitral award against a non-sovereign defendant with United States assets. *Est. of Ke* v. *Yu*, 105 F.4th 648 (2024).

Like *TMR*, *Estate of Ke* had little connection to the United States. When Chinese investors disputed rights in a British Virgin Islands partnership formed to develop Chinese real estate, a Hong Kong arbitral panel applying Hong Kong law issued an award against Stephany Yu, who happened to move to Maryland mid-arbitration. *Id.* at 652; Appellant Br. at 7–8, *Est. of Ke v. Yu*, No. 23-1144 (4th Cir.). Yu paid

part of the award but refused to pay the rest. 105 F.4th at 652–53. When the Chinese creditor came to the United States to confirm the arbitral award, Yu objected that Hong Kong was the appropriate forum. *Id.* at 653, 655.

The Fourth Circuit rejected Yu's *forum non conveniens* defense. It held that "[t]he principle underlying" *TMR*—"that '*forum non conveniens* is not available in proceedings to confirm a foreign arbitral award because only U.S. courts can attach foreign commercial assets found within the United States'"—"naturally applie[d]" to Yu since she had "assets within the court's jurisdiction." *Id.* at 657 (quoting *Stileks*, 985 F.3d at 876 n.1). As in *TMR*, it did not matter to the Fourth Circuit that Yu *also* had substantial assets in Hong Kong. Appellant Br., *supra*, at 8. The type of proceeding alone meant "the defense of *forum non conveniens* could not apply." 105 F.4th at 657.

The Fourth Circuit recognized the split between the D.C. and Second Circuits. In doing so, it described the Second Circuit's rule as driven by "circumstances far different than those presented here"—which are precisely those presented in *this petition*—namely, efforts to "see[k] judgment against a foreign government in the United States." *Id.* at 656–57. The Fourth Circuit suggested that *forum non conveniens* should remain available in those circumstances, as the Second Circuit has held. That's because "enforcing an arbitral award against a foreign sovereign in the United States [is] a task raising the significant foreign policy question of whether a U.S. court can and should enter a judgment that places a demand on a foreign government." *Id.* at 657.

4. The split is outcome-determinative, and only this Court can resolve it.

a. The circuit split is outcome-determinative. Because the D.C. Circuit categorically bars "*forum non conveniens* in proceedings to confirm a foreign arbitral award," *Stileks*, 985 F.3d at 876 n.1, the courts below dismissed Spain's defense out of hand. Had this case arisen in the Second or Ninth Circuit, however, courts would have engaged in a full, fact-specific *forum non conveniens* analysis.

It's irrelevant (*contra* NextEra C.A. Rehearing Br. 16) that the cases in the circuit split did not involve the ICSID Convention. *E.g.*, *Figueiredo*, 665 F.3d at 388 (Panama Convention); *TMR*, 411 F.3d at 304 (New York Convention). While different treaties offer different defenses to award confirmation, the split involves an analytically distinct question: whether foreign courts are *per se* inadequate because they cannot attach U.S. property. That is a question of local procedure, see, *e.g.*, Fed. R. Civ. P. 69, and American *forum non conveniens* doctrine, see *Piper Aircraft*, 454 U.S. at 254 n.22, not international arbitration.

b. Only this Court can resolve the conflict. The split has existed for two decades, and it shows no signs of disappearing on its own. To the contrary, the D.C. Circuit has repeatedly reaffirmed its rule in the face of pleas to adopt the Second Circuit's logic, see *Stileks*, 985 F.3d at 876 n.1, and multiple petitions for en banc review, App. 150a; *supra* at 27. The Second Circuit has expressly considered the D.C. Circuit's reasoning and "respectfully disagree[d]." *Figueiredo*, 665 F.3d at 391. And now the Fourth Circuit has acknowledged the conflict, exacerbating it in cases involving private parties—while suggesting that the D.C. Circuit is even more of an outlier in

cases involving sovereigns. This Court's intervention is needed now more than ever.

B. The *forum non conveniens* question is important and recurring, and this case is an ideal vehicle.

1. The *forum non conveniens* question is important and recurring.

a. Whether *forum non conveniens* is available in award-confirmation cases raises important foreign-relations concerns. Many confirmation cases require courts to decide whether a sovereign is liable for the misconduct of its alleged instrumentality. *E.g.*, *Monegasque*, 311 F.3d at 500. Others raise questions about whether a foreign official could bind the foreign sovereign, *e.g.*, *Belize Soc. Dev. Ltd.* v. *Gov't of Belize*, 794 F.3d 99, 102–03 (D.C. Cir. 2015), or whether our courts can override foreign laws limiting the rate at which foreign sovereigns pay judgments, *Figueiredo*, 665 F.3d at 387–88. Answering those questions risks entangling United States courts in diplomatically sensitive issues.

This case is Exhibit A. Since the D.C. Circuit's decision below, the European Commission has definitively ordered that Spain "shall not pay" intra-EU arbitral awards arising from the energy subsidies because payment would constitute unlawful state aid under EU law. *Antin*, *supra*, ¶¶185, 284. Were the courts below to confirm the awards now, they would put Spain in a Catch-22—subjecting it to conflicting orders of coequal sovereign authorities. With the stakes that high, this Court should have the final word on whether district courts have the discretion to consider *forum non conveniens*.

b. The *forum non conveniens* question also arises frequently. International arbitration has exploded in popularity over the last 30 years. See Christopher A. Whytock, *Transnational Litigation in U.S. Courts*, 19 J. Empirical Legal Stud. 4, 25 fig. 3 (2022). For example, the International Chamber of Commerce International Court of Arbitration, one of the world's preeminent arbitral institutes, registered 870 new cases in 2023—nearly the highest in the institution's 100-year existence. *ICC Dispute Resolution Statistics: 2023* (June 24, 2024), bit.ly/ICC_Statistics.

These disputes are sure to wind their way to U.S. courts. New York City and Washington, D.C. are hubs for global trade, and many foreign entities, including foreign sovereigns, hold assets in the United States. Even if a foreign defendant does not hold property here, the Nation's unusually broad post-judgment discovery rules make it a desirable forum for plaintiffs looking to learn about the defendant's "assets abroad, even though plaintiffs may have to seek execution on those assets from a foreign court." *Amduso* v. *Republic of Sudan*, 288 F. Supp. 3d 90, 97 (D.D.C. 2017). For one reason or another, American courts are "extremely attractive to foreign plaintiffs." *Piper Aircraft*, 454 U.S. at 252. The data bear this out. A search of public legal databases for cases invoking the FSIA's arbitration exception or one of the major treaties (ICSID, New York Convention, and Panama Convention), turned up just 21 confirmation cases filed between 2000 and 2005, but nearly *300* filed from 2020 to April 2025. With courts confronting foreign-award-confirmation cases—and thus the *forum non conveniens* question—more often than ever, this Court should weigh in now.

2. This case is an ideal vehicle.

a. The *forum non conveniens* question is a pure legal issue that was squarely decided below and is cleanly presented here. It is also independently certworthy. Since courts may dismiss on *forum non conveniens* grounds without resolving jurisdictional objections, see *Sinochem Int'l Co.* v. *Malay. Int'l Shipping Corp.*, 549 U.S. 422, 425 (2007), the Court may grant the *forum non conveniens* question whether or not it grants the FSIA question (although it should grant both).

b. The issue is likely also outcome-determinative. While the merits of Spain's *forum non conveniens* defense are not before this Court, there are strong grounds for dismissal—so a decision for Spain could well bring this litigation to a close.

A district court not bound by the D.C. Circuit's rigid rule would find "there exists an alternative forum" for the claimants' confirmation proceedings. *Piper Aircraft*, 454 U.S. at 254 n.22. No one doubts that Spain is "amenable to process" or that its courts "permit litigation of th[is] subject matter." *Id.* And the adequate-forum analysis requires only that a party "*can bring* a claim in the alternate forum," not that it "will ultimately *prevail*." *Aenergy, S.A.* v. *Republic of Angola*, 123 F.4th 1351, 1359 (D.C. Cir. 2024) (emphasis added). So it is no answer that EU courts applying EU law to an EU dispute would disagree with respondents on the merits. The remaining factors favor dismissal too. With no discovery at issue, the private interests are a wash, see *Gilbert*, 330 U.S. at 508—particularly since a foreign plaintiff's choice of forum "deserves less deference," *Piper Aircraft*, 454 U.S. at 256. But the public-interest factors strongly favor Spain. Any court asked to confirm the awards will need to "untangle" questions of EU law that are best

left for EU courts. *Gilbert*, 330 U.S. at 509. Whatever "incremental" interest the United States might have in enforcing these awards "is simply not sufficient" to overcome European courts' "strong interest in this litigation." *Piper Aircraft*, 454 U.S. at 260–61.

C. The decision below is wrong.

This Court's decision in *Piper Aircraft* establishes two inviolable principles of *forum non conveniens*. First, categorical rules are inconsistent with the doctrine's hallmark flexibility. Second, the prospect of a lower recovery in the alternate forum does not bar dismissal. *Id.* at 247–50. The D.C. Circuit's approach violates both of these principles.

1. The D.C. Circuit's categorical rule cannot be squared with this Court's "repeate[d] reject[ion] … of *per se* rules" for *forum non conveniens*. *Am. Dredging Co.*, 510 U.S. at 455. From the beginning, this Court has been clear that "*forum non conveniens* … resists formalization" and instead "looks to the realities that make for doing justice." *Koster*, 330 U.S. at 528. It has therefore offered at most "mer[e] … illustrations" of how a particular set of facts "might" warrant dismissal, *Williams* v. *Green Bay & W.R. Co.*, 326 U.S. 549, 554–57 (1946), and eschewed "rigid rule[s] to govern discretion," *Piper Aircraft*, 454 U.S. at 249.

The D.C. Circuit failed to heed this instruction. Under its rule, *forum non conveniens* dismissal is barred in *every* case involving confirmation of a foreign arbitration award, *Stileks*, 985 F.3d at 876 n.1, forcing district courts to march onward even when a case cries out for dismissal. It doesn't matter whether the plaintiff chose our courts to "vex, harass, or oppress the defendant." *Gilbert*, 330 U.S. at 508. Or whether confirmation would undermine "the para-

mount interests of another sovereign," *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 723 (1996), as respondents plainly have attempted to do with respect to both the European Union and Spain itself. Likewise, it is of no concern whether confirmation will require "extensive discovery" and "trial" involving "witnesses … beyond the subpoena power of the district court" and "documents … in [a foreign] language." *Monegasque*, 311 F.3d at 500. Or whether the defendant actually has attachable assets in the United States. *TMR*, 411 F.3d at 303. Having placed "central emphasis"—indeed, dispositive emphasis—on a "single factor," the D.C. Circuit has abandoned "the very flexibility that makes" *forum non conveniens* "so valuable." *Piper Aircraft*, 454 U.S. 249–50.

2. In *Piper Aircraft*, this Court also ruled that the possibility that a plaintiff will recover less in a foreign forum cannot alone bar dismissal. *Id.* at 249, 255; see also *Aenergy*, 123 F.4th at 1359. Instead, district courts must weigh the factors bearing on private and public convenience "in exercise of a sound discretion." *Gilbert*, 330 U.S. at 508, 511. If those factors counsel abstention, the court should abstain even if the plaintiffs' "potential damages award may be smaller." *Piper Aircraft*, 454 U.S. at 255.

The D.C. Circuit's rule conflicts with this fundamental principle. Even if every plaintiff seeking to *confirm* an arbitral award (*i.e.*, reduce it to a judgment) also sought to *execute* that judgment by attaching the defendant's assets, there is nothing uniquely American about that remedy. Many foreign courts permit executing a judgment against the defendant's property. See, *e.g.*, Ley de Enjuiciamiento Civil [L.E. Civ.] [Code of Civil Procedure], art. 551(3) (Spain); Zivilprozessordnung [ZPO] [Code of Civil Procedure],

§ 803 (Germany). So while "[i]t is no doubt true that only a United States court may attach a defendant's particular assets located here," *Figueiredo*, 665 F.3d at 390, it does not follow that foreign fora are *per se* inadequate. If the defendant has property subject to the jurisdiction of the foreign court—even property less valuable than property here—then the foreign court is an adequate alternative. See *Piper Aircraft*, 454 U.S. at 254–55.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

Eamon P. Joyce
Simon Navarro
SIDLEY AUSTIN LLP
787 Seventh Avenue
New York, NY 10019
(212) 839-5300

Carter G. Phillips
Counsel of Record
Peter A. Bruland
Cody M. Akins
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
cphillips@sidley.com

May 1, 2025