No. 24-1130

In the
Supreme Court of the United States

KINGDOM OF SPAIN,

Petitioner,

v.

BLASKET RENEWABLE INVESTMENTS LLC, *ET AL.*

Respondents.

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

BRIEF OF THE REPUBLIC OF POLAND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Republic of Poland is a sovereign nation and international ally of the United States. Poland is a party to 36 active bilateral investment treaties, many of which provide for arbitration of claims between investors and contracting parties. Poland is also a member of the European Union and, under the principle of primacy of EU law, is bound by decisions of the Court of Justice of the European Union (CJEU) as the ultimate interpreter of EU law. Poland submits this brief to assist the Court in understanding how the decision below will subject the Republic and other EU Member States to burdensome litigation in connection with arbitration proceedings that are incompatible with EU law.

SUMMARY OF ARGUMENT

This case concerns forum shopping in an effort to enforce foreign arbitration awards that are contrary to the law of the European Union. In 2018 and again in 2021, the CJEU ruled that investor-state arbitration provisions under bilateral investment treaties or other international agreements are not applicable to disputes between an EU national and an EU Member State—often referred to as "intra-EU" arbitration—because such application would be incompatible with EU Law. *Republic of Moldova* v. *Komstroy*, LLC, ECLI:EU:C:2021:655, ¶¶ 64-66; see

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[1] No counsel for any party wrote any portion of this brief or made any contribution intended to fund its preparation or submission. No person or entity other than *amicus* or its counsel has made a monetary contribution to fund the preparation or submission of this brief. All parties received timely notice of the filing of this brief.

also *Slovak Republic* v. *Achmea BV*, ECLI:EU:C:2018: 158, ¶¶ 32-33, 41. In response to the first of these decisions, *Slovak Republic* v. *Achmea*, 23 EU Member State signed an agreement to terminate *all* intra-EU bilateral investment treaties because their arbitration clauses were incompatible with EU law.[2] And in response to the second decision, *Republic of Moldova* v. *Komstroy*, the EU and numerous EU Member States, including Poland, notified their withdrawal from the Energy Charter Treaty (ECT)—again, in large part because the arbitration clause in that treaty offended EU law.

Despite the *Achmea* and *Komstroy* decisions and EU Member States' withdrawal from these treaties, arbitral bodies continue to hear intra-EU claims brought under the treaties' arbitration clauses. Those arbitrations have embroiled EU Member States in costly arbitration and collateral proceedings, and there is little sign of relief on the horizon. Indeed, a leading arbitral institution—and one that has administrated a fifth of all ECT arbitrations—has now changed its rules to try to insulate these unlawful arbitration awards from collateral challenge.

It is against this backdrop that Respondents here sought to confirm their awards. The Republic believes that the district courts did not have jurisdiction to confirm those awards under the Foreign Sovereign Immunities Act (FSIA) because Respondents failed to demonstrate the existence of an agreement to

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[2] See Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union, Official J. of the E.U., L 169 (June 25, 2019), https://tinyurl.com/mun9u6p4.

arbitrate claims between themselves and Spain, as required by Section 1605(a)(6) of the FSIA. The courts below did not hold that Respondents *had* shown an agreement to arbitrate claims between themselves and Spain but, instead, that they did not have to show any such agreement involving Respondents themselves. That legal conclusion does not turn on any nuance of EU law. But this case raises important practical implications for EU Member States that weigh strongly in favor of granting the petition.

First, the decision below creates perverse litigation incentives that will burden EU Member States with multiple layers of wasteful litigation. By providing jurisdiction over intra-EU arbitration awards, the D.C. Circuit has opened the floodgates to confirmation proceedings that would be unlawful in the courts of any EU Member State, and that are premised on arbitration agreements that do not exist under EU law. This increases EU nationals' incentives to initiate intra-EU arbitration and will force EU Member States to expend enormous sums litigating arbitration proceedings, confirmation proceedings, award-annulment and other collateral proceedings. These harms will be multiplied across dozens of now-terminated intra-EU bilateral investment treaties, which arbitral tribunals are jockeying to keep alive notwithstanding their blanket termination.

Second, and relatedly, the D.C. Circuit's decision encourages multiple forms of harmful forum shopping. This case is emblematic of the first form: Respondents have forum-shopped their way to the United States to avoid a legal rule that would be outcome determinative in any EU court. That alone is

cause for concern. But the second form of forum shopping is even more troubling: faced with a potential loss of revenue from the decline of intra-EU arbitration, arbitral forums are now modifying their rules to circumvent EU law.

Aside from its practical implications for EU Member States, the D.C. Circuit's decision is wrong, in conflict with the decisions of other courts of appeals, and inconsistent with this Court's precedents. The Republic of Poland respectfully urges this Court to grant Spain's petition.

ARGUMENT

I. The D.C. Circuit's Decision Fosters Perverse Litigation Incentives

A. The Decision Below Incentivizes Multiple Rounds of Wasteful Litigation

Unless reversed by this Court, the D.C. Circuit's decision will require EU Member States to engage in multiple layers of needless litigation. The availability of a U.S. forum to confirm intra-EU arbitral awards will encourage EU nationals to pursue arbitration against EU Member States. EU Member States will be forced to counter those arbitrations through a variety of means—including collateral proceedings to enjoin arbitration and to annul arbitral awards—and will be required to defend themselves in award-confirmation proceedings in the United States, all in response to arbitrations that are unlawful under the CJEU's clear-cut decisions.

1. The D.C. Circuit's decision packed a one-two punch. First, in the face of the clear textual requirement that an arbitration agreement must "submit to arbitration … differences … *between the*

parties" to fall under the FSIA's arbitration exception, 28 U.S.C. § 1605(a)(6) (emphasis added), the D.C. Circuit held that Spain's ratification of the ECT itself "provided 'unconditional consent' to arbitrate investment disputes with the investors of *at least some* of the other signatory nations." Pet. App. 22a (emphasis added). And, because that "agreement is 'for the benefit' of the signatory's investors," the court concluded that it "satisfie[d] the FSIA's arbitration exception" and gave the district court "jurisdiction to enforce" the awards against Spain. Pet. App. 22a, 26a (cleaned up).

Even hobbled by that erroneous ruling, an EU Member State, one would think, could always move to dismiss an intra-EU award confirmation proceeding under the doctrine of *forum non conveniens*. And many district courts would likely accept that invitation given that, by definition, these disputes involve foreign parties on both sides and thorny questions of foreign law. But then came the D.C. Circuit's second blow: In addition to granting jurisdiction to confirm intra-EU awards, the Court invoked a *per se* rule prohibiting district courts from even considering the application of *forum non conveniens*. Pet. App. 27a. Thus, an EU national contemplating whether to bring intra-EU arbitration under the ECT can now do so with the knowledge that U.S. jurisdiction is available over any resulting award.

The first-order effects of these two holdings are obvious. Emboldened by the D.C. Circuit's decision, EU nationals will continue to file arbitration claims under the ECT against EU Member States. And experience suggests that there will be arbitral

tribunals—like the tribunals whose awards are at issue here—that will continue to find that they have jurisdiction to hear such claims despite the challenges posed by EU Member States under the CJEU's decisions in *Achmea* and *Komstroy*. EU Member States will be forced to litigate those proceedings and to seek anti-arbitration injunctions in the national courts of investors' home states. In cases where EU nationals prevail, they will now have a forum in the United States from which their cases cannot be dismissed to a more appropriate venue.

The second-order effects may be less obvious, but are no less consequential. Faced with the risk of confirmation in the United States, EU Member States will be forced to expend significant resources attempting to annul intra-EU arbitration awards that never should have issued. Even if they are successful, EU Member States will still face the risk of enforcement in the United States notwithstanding the awards' annulment. See, *e.g.*, *Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V.* v. *Pemex-Exploración Producción*, 832 F.3d 92, 107 (2d Cir. 2016) (exercising discretion to enforce annulled foreign arbitral award).

2. Poland's experience is instructive. In 2019, Mercuria Energy Group Ltd., an EU national, initiated arbitration against the Republic under the ECT and the rules of the Arbitration Institute of the Stockholm Chamber of Commerce. The Republic repeatedly objected to the tribunal's jurisdiction under EU law throughout the course of the arbitration proceedings. Nevertheless, on December 29, 2022, the tribunal rendered an award in Mercuria's favor. But the entire arbitration was unlawful under EU law. So,

on February 28, 2023, Poland had to initiate annulment proceedings in the Svea Court of Appeal, the intermediate appellate court with jurisdiction over the award. At the time, that Stockholm-based court had annulled—without exception—every post-*Achmea* intra-EU arbitration award brought before it.

Facing long odds in Sweden, Mercuria decided to try its luck in the United States. On November 30, 2023, Mercuria initiated confirmation proceedings in the United States District Court for the District of Columbia. ECF No. 1, *Mercuria Energy Grp. Ltd.* v. *Republic of Poland*, No. 1:23-cv-03572 (Nov. 30, 2023). After an initial round of motion-to-dismiss briefing, the district court eventually stayed the case in light of the Swedish annulment proceedings. But that stay came nearly *14 months* after the petition was filed. ECF No. 26, *Mercuria Energy Grp. Ltd.* v. *Republic of Poland*, No. 1:23-cv-03572 (Jan. 2, 2025).

Poland later prevailed before the Svea Court of Appeal, setting off a second round of motion-to-dismiss briefing in the district court. That motion—in response to which Mercuria argues that the court should *still* confirm the now-annulled award—is currently pending in the district court. The Republic is confident that it will ultimately prevail against Mercuria. Even so, Poland will have been required to defend itself in arbitration, award-annulment, and award-confirmation proceedings—none of which should ever have been initiated under the CJEU's decisions in *Achmea* and *Komstroy*. *Mercuria* is just one of many such examples—at least twelve district judges in the D.C. Circuit currently have one or more

intra-EU arbitration award cases pending before them.[3]

Against another EU national, Poland has been forced to seek anti-arbitration injunctive relief in collateral proceedings before the national courts of the investor's home state. In *Republic of Poland v. LC Corp B.V.*, a Dutch national, LC Corp, initiated arbitration proceedings under the Netherlands-Poland bilateral investment treaty, which had already been terminated in response to *Achmea* more than a year before the request for arbitration was filed. While the Republic defended itself in the arbitration, it also applied to the District Court of Amsterdam for an

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[3] *E.g.*, *InfraStructure Services Luxembourg SARL* v. *Kingdom of Spain*, No. 18-cv-1753-LLA-MAU; *Novenergia II-Energy & Env't (SCA)* v. *Kingdom of Spain,* No. 18-cv-01148-TSC; *CEF Energia B.V.* v. *Italian Republic*, No. 19-cv-3443-CKK; *RREEF Infrastructure (G.P.) Limited* v. *Kingdom of Spain*, No. 19-cv-03783-CJN; *Greentech Energy Sys. a/s* v. *Italian Republic*, No. 19-cv-3444-CKK; *Watkins Holdings S.R.L.* v. *Kingdom of Spain*, No. 20-cv-01081-BAH; *Infrared Env't Infrastructure GP Ltd.* v. *Kingdom of Spain*, No. 20-cv-00817-JDB; *Foresight Luxembourg Solar 1 S.A. R.L.* v. *Kingdom of Spain*, No. 20-cv-00925-TSC; *Cube Infrastructure Fund Sicav* v. *Kingdom of Spain*, No. 20-cv-01708-LLA-MAU; *BayWa R.E. AG* v. *Kingdom of Spain*, No. 22-cv-02403-APM; *Hydro Energy 1, S.A.R.L.* v. *Kingdom of Spain*, No. 21-cv-02463-RJL; *RWE Renewables GMBH* v. *Kingdom of Spain*, No. 21-cv-03232-JMC; *MOL Hungarian Oil and Gas plc* v. *Republic of Croatia*, No. 23-cv-218-RDM; *Swiss Renewable Power Partners S.A.R.L.* v. *Kingdom of Spain*, No. 23-cv-00512-RJL; *Mercuria Energy Grp.* v. *Republic of Poland*, No. 23-cv-3572-TNM; *ACF Renewable Energy Ltd.* v. *Republic of Bulgaria*, No. 24-cv-1715-DLF.

order requiring LC Corp to cooperate in terminating the arbitration proceedings. The district court initially denied Poland's request, but the Amsterdam Court of Appeal reversed. Noting that "LC Corp deliberately sought to circumvent the … system of legal protection" applicable to intra-EU investments by pursuing arbitration "incompatible with EU law," the Court of Appeal ordered LC Corp to cooperate in winding down the arbitration proceedings and declared that the arbitration and sunset clauses contained in the bilateral investment treaty had lapsed. *Republic of Poland* v. *LC Corp*, No. 200.328. 367/01, ¶¶ 4.11, 4.15 (Neth. Apr. 22, 2025).

3. As this Court has recognized, parties often choose arbitration because of the "lower costs" and "greater efficiency" associated with alternative dispute resolution. *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010). But the incentives created by the decision below turn those advantages on their head. Because the D.C. Circuit's decision fundamentally alters the risk calculus in favor of bringing unlawful intra-EU arbitration, EU nationals will continue to do so. EU Member States will thus be forced to fight a multi-front war—in arbitration, confirmation, annulment and other collateral proceedings—over claims that belong in EU Member States' national courts. See *European Comm'n* v. *European Food S.A.*, ECLI:EU:C:2022:50, ¶ 145.

Those indirect litigation-multiplying effects are in addition to the *direct* litigation-prolonging effects of the decision below. As Petitioner the Kingdom of Spain explains, because jurisdictional objections must generally be resolved at the outset of a case, treating

a meritorious sovereign immunity defense as jurisdictional grants sovereigns "protection from the inconvenience of suit." *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 479 (2003); see also Pet. 16. By contrast, deferring a decision on the defense until summary judgment will "embroil the foreign sovereign in an American lawsuit for an increased period of time." *Bolivarian Republic of Venezuela* v. *Helmerich & Payne Int'l Drilling Co.*, 581 U.S. 170, 183 (2017). That distinction is material, as some confirmation proceedings involve significant, burdensome discovery. *E.g.*, *Esso Exploration & Prod. Nigeria Ltd.* v. *Nigerian Nat'l Petroleum Corp.*, 40 F.4th 56, 69 (2d Cir. 2022) (discussing "extensive … discovery"). The appellate implications of the D.C. Circuit's decision likewise directly increase sovereigns' litigation burdens—while denial of a jurisdictional defense under the FSIA is immediately appealable, a denial of a defense on the merits is not. See *Helmerich*, 581 U.S. at 185; Pet. 16.

B. The Harms of the D.C. Circuit's Decision Will Be Multiplied Across Numerous Investment Treaties

Although this case arises out of an arbitration under the ECT, the litigation-multiplying effects of the decision below will be felt across numerous intra-EU investment treaties.

The D.C. Circuit articulated as a "limit[]" to its holding that "not every arbitration provision in an investment treaty represents a completed agreement 'for the benefit' of a private party." Pet. App. 25a (quoting 28 U.S.C. § 1605(a)(6)). That is because, the D.C. Circuit explained, "not all investment treaties supply the requisite state consent to arbitration";

some contain "a mere agreement to agree." *Id.* (cleaned up). That is true, as far as it goes—not *every* investment treaty's arbitration provision provides a complete agreement to arbitrate. But, as a leading investment arbitration treatise explains, "[i]n most modern investment protection treaties, contracting states expressly consent to the mandatory submission of certain investment disputes to arbitration." Borzu Sabahi et al., *Investor-State Arbitration* 315 (2d ed. 2019).

Numerous bilateral investment treaties among EU Member States fall into that category. For example, the bilateral investment treaty between the Netherlands and Poland provides that investor disputes shall "upon request of the investor be submitted to an arbitral tribunal." Netherlands-Poland BIT (1992), art. 8(2), https://tinyurl.com/4ysfkvht. The same is true of many other intra-EU bilateral investment treaties,[4] under which investors continue to bring arbitration proceedings even though *all* intra-EU bilateral investment treaties have been terminated. Under the decision below, those arbitration provisions would fall within the FSIA's arbitration exception because they were entered into

[4] See, *e.g.*, Latvia-Romania BIT (2001), art. 9(2) ("the investor may submit the dispute, at his choice, for settlement to [ICSID or an ad hoc arbitral tribunal]"), https://tinyurl.com/36m4kyyu; Estonia-Spain BIT (1997), art. 11(2) ("the dispute shall be submitted, at the choice of the investor, to [one of several arbitral bodies]"), https://tinyurl.com/54yv748n; Germany-Poland BIT (1989), art. 11(2) ("either of the parties to the dispute shall be entitled to appeal to an international arbitral tribunal"), https://tinyurl.com/yckckebk.

"for the benefit" of at least "*some* investors." Pet. App. 22a (emphasis added).

C. The Decision Below Encourages Multiple Forms of Forum Shopping

This case involves a textbook example of forum-shopping. Unable to enforce their unlawful arbitration awards in the courts of any EU Member State, Respondents forum-shopped their way to the United States. So far, at least, that gambit has paid off: whereas Respondents' enforcement actions would have been dead on arrival in any EU Member State's courts, the decision below provides Respondents with jurisdiction to enforce their awards.

The D.C. Circuit's decision will further incentivize forum shopping by EU nationals, as discussed above. But it will also incentivize efforts by arbitral institutions themselves to encourage arbitration that the CJEU's *Achmea* and *Komstroy* decisions would otherwise deter.

This concern is far from theoretical. For example, the Arbitration Institute of the Stockholm Chamber of Commerce ("SCC")—which has administrated a fifth of all ECT arbitrations to date—adopted a new forum-selection policy on October 16, 2024. See SCC Arbitration Institute, *SCC Policy: Deciding the Seat in Intra-EU Investment Arbitrations Administered under the SCC Rules* (Oct. 16, 2024), https://tinyurl.com/c8dfn642 (hereinafter "SCC Intra-EU Policy"). The policy modifies the SCC's practice under Article 25(1) of the SCC Rules, which empowers the SCC's board to decide the seat of arbitration where the parties have failed to reach agreement. The seat of arbitration is critical—it provides the *lex arbitri* of the proceedings and determines, among other things,

which country's laws govern challenges to arbitration awards. Whereas the SCC previously defaulted to selecting Stockholm as the seat, the new policy creates a special rule for intra-EU arbitrations:

> In investment treaty arbitrations between parties based in the EU, and/or a state that is a candidate or potential candidate for EU membership, the Board will not decide that Stockholm, or any other city, or any other judicial district within the EU, or within a state that is a candidate or potential candidate for EU membership, shall be the seat of arbitration. In such cases, the Board will decide on a seat located outside the EU and those states listed as candidates or potential candidates for EU membership

SCC Intra-EU Policy at 3-4.

The SCC's new policy is an attempt to end-run EU law. Before the policy change, an intra-EU dispute referred to the SCC for arbitration would have been seated in Stockholm. Any award arising from such arbitration would, therefore, have been subject to EU law and vulnerable to annulment under *Achmea* and *Komstroy*. That is precisely how Poland was able to annul the award in the *Mercuria* arbitration, which was seated in Stockholm. By requiring the SCC Board to assign a non-EU seat of arbitration, the SCC's new policy attempts to insulate these awards from EU law.

From the SCC's perspective, this rule change is simply business. EU Member States have terminated all intra-EU bilateral investment treaties, including their sunset provisions. See Agreement for the

Termination of Bilateral Investment Treaties between the Member States of the European Union, Official J. of the E.U., L 169 (June 25, 2019), https://tinyurl.com/mun9u6p4. But the SCC has declared that these terminated investment treaties "remain in force." SCC Intra-EU Policy at 1. The policy change is thus intended to serve "investors from EU jurisdictions [that] have continued to request investment arbitration against EU host states," *id.*, notwithstanding EU law.

The decision below encourages this type of behavior from arbitral bodies. In the absence of a U.S. forum for enforcement of unlawful intra-EU arbitration awards, investors would be discouraged to trigger intra-EU arbitrations; arbitral bodies would, therefore, have fewer incentives to compete for them. A receptive U.S. forum inverts those incentives, making it likelier that other arbitral bodies will soon follow suit in a race to flout EU law.

II. This Court Should Grant Certiorari to Reverse the D.C. Circuit's Aberrant Decision

Aside from the practical harms it creates, the D.C. Circuit's decision is wrong on questions of significant importance to foreign sovereigns. It is also inconsistent with decisions of other circuits and this Court.

1. The D.C. Circuit's interpretation of the FSIA's arbitration exception is insupportable. Section 1605(a)(6) requires that there be "an agreement to arbitrate," and that the agreement concern "differences … between the parties" to "the action." The D.C. Circuit elided the plain text of this jurisdictional requirement, concluding instead that "the FSIA's arbitration exception" is "satisfie[d]" when

the court finds an "agreement … 'for the benefit' of" a private party—here, "some investors" under the ECT. Pet. App. 22a. But the D.C. Circuit never concluded that Spain had agreed to arbitrate differences between itself and Respondents. Indeed, it didn't even conclude that Spain had agreed to arbitrate differences between itself and *any* EU national, since the signatory nations for whose benefit Spain entered the ECT include non-EU states.

As Petitioner the Kingdom of Spain points out, even outside the FSIA context, "[a]rbitration is strictly a matter of consent." Pet. 22 (quoting *Granite Rock Co.* v. *International Brotherhood of Teamsters*, 561 U.S. 287, 298 n.6 (2010)). Yet somehow in the sovereign context—where one would expect the standards to be at their strictest in light of the background principle of sovereign immunity[5]—the D.C. Circuit has concluded that it need not inquire whether there is consent *between the parties* to arbitration. Such reasoning would be puzzling to any non-U.S. sovereign all by itself, but the puzzlement is compounded by the facial inconsistency with the relevant statutory command: as already mentioned, for jurisdiction to exist under the FSIA's arbitration exception, an arbitration agreement must "submit to arbitration … differences … *between the parties*." 28 U.S.C. § 1605(a)(6) (emphasis added),

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[5] "We have frequently held, however, that a waiver of sovereign immunity is to be strictly construed, in terms of its scope, in favor of the sovereign. Such a waiver must also be 'unequivocally expressed' in the statutory text." *Department of the Army* v. *Blue Fox, Inc.*, 525 U.S. 255, 261 (1999) (citations omitted).

The D.C. Circuit's decision creates a circuit split with the Second and Fifth Circuits on a recurring question of exceeding importance to foreign sovereigns. As discussed above, deferring consideration of a foreign sovereign's immunity objection until summary judgment "embroil[s] the foreign sovereign in an American lawsuit for an increased period of time," *Helmerich*, 581 U.S. at 183, during which the sovereign will suffer the expense and distraction of litigation that may ultimately be barred by sovereign immunity. It also invites reciprocal treatment, risking that foreign sovereigns will "grant[] their courts permission to embroil the United States in 'expensive and difficult litigation, based on legally insufficient assertions that sovereign immunity should be vitiated.'" *Ibid.* (quoting Brief for United States as *Amicus Curiae* at 21-22). This is no small risk, as the United States is involved "[a]t any given time … in about 1,000 cases in 100 courts around the world." *Ibid.*

2. The D.C. Circuit's *per se* rule against the application of *forum non conveniens* is likewise deeply flawed and merits review. This case is a textbook candidate for dismissal under the doctrine of *forum non conveniens*: EU-based companies allege that an EU sovereign's modification of its own law violated a treaty to which the United States is not a party—and the EU sovereign's jurisdictional defense turns on questions of EU law over which the CJEU has long determined it has "exclusive jurisdiction." *European Comm'n* v. *Ireland*, ECLI:EU:C:2006:345, ¶ 123. But the court of appeals pretermitted any analysis of the doctrine here, citing a *per se* rule against application of *forum non conveniens* "in proceedings to confirm a foreign arbitral award because only U.S. courts can

attach foreign commercial assets found within the United States." Pet. App. 27a (quoting *LLC SPC Stileks* v. *Republic of Moldova*, 985 F.3d 871, 876 n.1 (D.C. Cir. 2021)).[6]

Though the D.C. Circuit was bound by *stare decisis* to apply that rule, it entrenches yet another circuit split—this one between the D.C. Circuit and the Second and Ninth Circuits, which recognize the doctrine of *forum non conveniens* in proceedings to confirm foreign arbitral awards. See Pet. 24-26. The decision below is also inconsistent with this Court's decisions, which have emphasized the fact-bound nature of *forum non conveniens* "and have repeatedly rejected the use of *per se* rules in applying the doctrine." *American Dredging Co.* v. *Miller*, 510 U.S. 443, 445 (1994) (collecting cases). This is precisely the type of question this Court routinely grants certiorari to resolve. Sup. Ct. R. 10(a), (c).

The D.C. Circuit's *per se* rule is also contrary to the aims of the FSIA. One important innovation of the

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[6] Another practical harm made likelier by the D.C. Circuit's decision is that EU Member States will be subject to conflicting legal obligations. The EU Commission has determined that payment of intra-EU arbitration awards arising from energy subsidies, like those at issue in the decision below, is unlawful state aid under EU law. See Pet. 6, 30. An order confirming such awards would put EU Member States in a difficult predicament: either pay the award and violate EU law, or try to find a way to comply with EU law (as Spain was recently ordered to do, see Pet. 7) by either disobeying a U.S. judgment or trying to find a way to retrieve the money paid because of a U.S. judgment. The possibility of putting foreign sovereigns in such a bind yet again highlights why Spain's petition is certworthy.

FSIA is the separation of jurisdiction over a foreign sovereign from attachment of the sovereign's assets. Congress viewed "[a]ttachments for jurisdictional purposes" as "giv[ing] rise to serious friction in United States' foreign relations," and thus believed that "[t]he elimination of attachment as a vehicle for commencing a lawsuit w[ould] ease the conduct of foreign relations by the United States." See H.R. Rep. No. 1487, 94th Cong., 2d Sess. 26-27 (1976). Congress viewed jurisdiction over sovereigns and attachment of their assets as separate potential affronts to sovereignty, and sought to decouple one from the other by subjecting them to separate tests contained in separate sections of the FSIA. See 18 U.S.C. §§ 1604-1605, 1609-1611.

The D.C. Circuit's *per se* rule undermines this policy goal. Under a flexible application of *forum non conveniens*, the cases least appropriate for adjudication in U.S. courts would be dismissed, sparing the foreign sovereign the indignity of U.S. jurisdiction over a case that should be adjudicated in a foreign forum. The D.C. Circuit's rigid rule, however, prevents those same cases from being transferred to a foreign forum, all in the name of subjecting the foreign sovereign's assets to attachment. The rule, in other words, keeps the cases least suited to be adjudicated in a U.S. court under U.S. jurisdiction so that there can be a chance at a second intrusion on sovereignty in the form of attachment.

The international discord fomented by the purported rules of law applied by the courts below should not be taken lightly. This Court—not lower courts—should decide whether such friction between

nations is truly necessary. And, for the reasons stated by Petitioner the Kingdom of Spain and in this *amicus* brief, it is not.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 2025