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 *AMICUS CURIAE* THE REPUBLIC OF BULGARIA IN SUPPORT OF PETITION

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STATEMENT OF INTEREST OF *AMICUS CURIAE* REPUBLIC OF BULGARIA[1]

The Republic of Bulgaria is a Member State of the European Union. Bulgaria has a compelling sovereign interest in this Court's resolution of both questions presented in the Petition for a Writ of Certiorari.

Like Spain, Bulgaria is currently the respondent in litigation in the D.C. District Court to recognize and enforce an international arbitration award (the "ACF Award") issued by a tribunal constituted under the auspices of the International Centre for Settlement of Investment Disputes ("ICSID") and arising from an arbitration commenced by a claimant from another EU Member State. *See ACF Renewable Energy Ltd. v. Republic of Bulgaria*, No. 24-cv-1715-DLF (D.D.C.). The claimant against Bulgaria, ACF, is an investor from the Republic of Malta. To commence the arbitration, ACF invoked the purported standing offer of arbitration in Article 26 of the Energy Charter Treaty ("ECT").

Bulgaria has moved to dismiss ACF's enforcement action on, *inter alia*, threshold grounds of foreign sovereign immunity and *forum non conveniens*. As Bulgaria has explained in the district court, and as confirmed by the Court of Justice of the European

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[1] No person other than *amicus curiae* or its counsel authored the brief in whole or in part. No person other than *amicus curiae* contributed monetarily to the preparation and submission of this brief. *Amicus* counsel provided timely notice to all counsel of record of Bulgaria's intent to file its brief.

Union (the "CJEU," essentially the Supreme Court of the EU), the supremacy of the EU's treaties—*i.e.*, the Treaty on the Functioning of the European Union and the Treaty on the European Union ("EU Treaties")—renders any provisions of another treaty between and among EU Member States that are incompatible with the EU Treaties inapplicable *ab initio* as from the relevant states' accession to the EU. Consequently, as between Bulgaria and Malta, ECT Article 26 was inapplicable *ab initio* from the time Bulgaria acceded to the EU in 2007. Since that time, there thus has been no standing offer of arbitration by Bulgaria to Maltese investors, like ACF, and no arbitration agreement has existed between Bulgaria and ACF. Absent an agreement to arbitrate, ACF lacks any basis to overcome Bulgaria's foreign sovereign immunity in U.S. courts. *See* 28 U.S.C. § 1605(a)(6).

ACF has argued, however, that based on the D.C. Circuit decision that is the subject of the Petition, Bulgaria's immunity defense is foreclosed, because its mere invocation of ECT Article 26 constitutes a "completed" arbitration agreement. *See NextEra Energy Glob. Holdings B.V. v. Kingdom of Spain*, 112 F.4th 1088, 1102 (D.C. Cir. 2024). This Court's review of the first Question Presented in the Petition thus would bring clarity for litigants like Bulgaria as to whether U.S. courts may exercise jurisdiction over award-enforcement actions even in circumstances where Bulgaria and other EU Member States all agree that no arbitration agreement exists.

Bulgaria also has argued that the *ACF* action should be dismissed under the doctrine of *forum non conveniens*, particularly given the dispositive EU-law questions implicated in intra-EU investment-treaty award confirmation proceedings. ACF, however, has pointed to the D.C. Circuit's blanket prohibition on invocation of the doctrine in award-enforcement actions—even though Bulgaria itself raised a valid *forum non conveniens* defense in an award-enforcement action in the Second Circuit. *See Zeevi Holdings Ltd. v. Republic of Bulgaria*, 494 F. App'x 110 (2d Cir. 2012).

Bulgaria, therefore, has an actual and immediate interest in this Court's review of the questions presented in the Petition. Preservation of Bulgaria's immunity and threshold defenses would spare Bulgaria from further unnecessary litigation, including the risk of enforcement of the award. If the district court enters judgment confirming the ACF Award, payment of the award pursuant to the court's order would place Bulgaria in violation of its binding obligations under the EU Treaties and EU law. *See European Commission Decision on Arbitration award to Antin* (Mar. 24, 2025) ("*Antin* Decision") ¶¶ 185, 200, 236 (concluding that payment of intra-EU investor-state award by Spain would be unlawful); *see also* Pet. 6-7. Moreover, Bulgaria could face similar future award-enforcement actions in U.S. courts for other currently pending intra-EU investment-treaty arbitrations. Absent this Court's intervention, Bulgaria could be put in an untenable legal position: adhere to a U.S. court order recognizing the ACF

Award in likely violation of the foundational EU Treaties and Bulgaria's obligations as an EU Member State, or risk the consequences of non-payment of a U.S. judgment.

Bulgaria respectfully requests that this Court grant the Petition on both questions presented, for the reasons stated below.

SUMMARY OF ARGUMENT

1. This Court should grant review of the Petition's first Question Presented. This question implicates an exceptionally important and recurring issue of sovereign immunity and the circumstances under which foreign sovereigns may be haled before U.S. courts in arbitration-award enforcement actions.

The D.C. Circuit's decision on this question risks creating significant friction in U.S. foreign relations. The potential for friction is particularly acute in the context of so-called "intra-EU" investment-treaty awards. Under the EU Treaties and EU law, investor-state arbitration provisions are not, and have never been, applicable as between EU Member States, as of the date of their accession to the EU. Yet, the D.C. Circuit's superficial threshold for demonstrating an agreement to arbitrate under the FSIA's arbitration exception—that is, simply "by producing copies" of a treaty containing "an arbitration provision," *NextEra*, 112 F.4th at 1104—subjects EU Member States to high-value litigation in U.S. courts for disputes with claimants they never agreed to arbitrate with and puts

those states at risk of violating either the foundational EU Treaties and EU law or a U.S. court order.

The D.C. Circuit's approach conflicts not only with the approach of other circuits (Pet. 10-15) but also with the settled understanding, in U.S. and international investment law, that investment treaties supply standing *offers* by states to investors to arbitrate, rather than accepted, completed arbitration agreements. The D.C. Circuit concluded that an arbitration agreement exists under § 1605(a)(6) simply where a treaty contains an arbitration provision (an *offer* to arbitrate) without any examination of whether the claimant itself may (and, thus, in fact, did) accept that offer. In doing so, the D.C. Circuit wrongly ignored traditional doctrines of contract formation and agency principles that this Court has instructed should determine the limited situations in which nonsignatories may invoke the benefits of an arbitration clause.

The D.C. Circuit also erroneously resurrected the nonfrivolous-argument standard in concluding that the ECT was "arguably" for the investors' benefit. *Cf. Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 581 U.S. 170, 187 (2017) (holding that "the nonfrivolous-argument standard is not consistent with the [FSIA]").

2. This Court should grant review of the second Question Presented to resolve a similarly significant question concerning the availability of the doctrine of *forum non conveniens* in international arbitration award-enforcement actions. A circuit split on this

question is widely acknowledged. Absent review by this Court, foreign sovereigns will continue to face inconsistent outcomes depending on the claimant's choice of forum—a particularly significant issue in the context of enforcing intra-EU investment-treaty awards.

REASONS FOR GRANTING THE PETITION

I. This Court Should Review the D.C. Circuit's Incorrect Reading of 28 U.S.C. § 1605(a)(6), Which Has Harmful and Recurrent Consequences for Foreign Sovereign Litigants

A. Foreign sovereigns are entitled to a thorough and conclusive determination of their immunity, including under § 1605(a)(6)

In affording foreign sovereigns presumptive immunity from suit in U.S. courts, the FSIA "both recognizes the absolute independence of every sovereign authority and helps to induce each nation state, as a matter of international comity, to respect the independence and dignity of every other." *Helmerich*, 581 U.S. at 179 (quotations and citation omitted). "[A]s a gesture of comity between the United States and other sovereigns," the FSIA gives "foreign states and their instrumentalities some protection from the inconvenience of suit" in U.S. courts. *Dole Food Co. v. Patrickson*, 538 U.S. 468, 479 (2003). These protections are reflected in the FSIA's grant of presumptive immunity from suit and attachment (and

limited exceptions thereto), 28 U.S.C. §§ 1604, 1605, 1609, 1610-1611, and in the exceptional procedural tools available to foreign sovereigns in litigation in U.S. courts.

Threshold review of the satisfaction of an exception to sovereign immunity follows directly from "foreign sovereign immunity's basic objective"—to "free a foreign sovereign from *suit*." *Helmerich*, 581 U.S. at 174. Indeed, in the context of jurisdictional objections under the FSIA's expropriation exception, this Court has found that in order to limit sovereigns' exposure to suit, courts "should normally resolve . . . factual disputes and reach a decision about immunity as near to the outset of the case as is reasonably possible." *Id.* Otherwise, leaving immunity unresolved while hearing the merits of a case "mean[s] increased delay, imposing increased burdens of time and expense upon the foreign nation." *Id.* at 185.

The importance of a foreign sovereign's entitlement to a threshold immunity determination also is reflected in the settled availability of the collateral order doctrine in FSIA cases. Foreign sovereigns have the unique ability to seek interlocutory appeal of an adverse immunity decision. *See, e.g.*, *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 443 (D.C. Cir. 1990). This procedural protection recognizes that "sovereign immunity is an immunity from trial and the attendant burdens of litigation, and not just a defense to liability on the merits." *Rush-Presbyterian-St. Luke's Med. Ctr. v. Hellenic Republic*, 877 F.2d 574, 576 (7th Cir. 1989).

An immunity determination in the context of enforcing foreign arbitral awards is no less significant. As courts have correctly recognized, even in the award-enforcement context, foreign sovereigns are entitled to a threshold determination of immunity and appellate review before the adjudication of any further defenses on the merits—and before the entry of an enforceable judgment against the foreign state and commencement of asset-attachment proceedings. *See Process & Indus. Devs. v. Fed. Republic of Nigeria*, 962 F.3d 576, 584-587 (D.C. Cir. 2020) ("*P&ID*") (foreign sovereigns entitled to resolution of "colorable immunity assertion" before being required to defend the merits). And although courts' review of arbitral awards under international enforcement treaties (such as the ICSID Convention, *see* 22 U.S.C. § 1650a) often affords significant deference to determinations of the arbitrators, it is well recognized that courts' determinations of whether the arbitration exception to immunity, § 1605(a)(6), is satisfied is a question for *de novo* review by the courts themselves. *See Chevron Corp. v. Republic of Ecuador*, 795 F.3d 200, 205 & n.3 (D.C. Cir. 2015) (the FSIA "requires" the "[c]ourt to satisfy itself" that a "valid arbitration agreement" exists "between" the foreign state and "the party challenging immunity").

B. The D.C. Circuit's interpretation of § 1605(a)(6) risks creating friction in foreign relations

1. The FSIA's arbitration exception to immunity from suit requires, in relevant part, an agreement to

arbitrate "made by the foreign state *with or for the benefit of a private party* to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not." 28 U.S.C. § 1605(a)(6) (emphasis added).

In the decision below, the D.C. Circuit held that the requirement of an agreement to arbitrate was satisfied where the claimant merely produced a copy of an investment treaty containing an "arbitration provision" that the claimant purported to invoke—in that case, ECT Article 26. *NextEra*, 112 F.4th at 1104. The D.C. Circuit rejected Spain's argument that the immunity determination under § 1605(a)(6) required consideration of whether *the claimants themselves* had any agreement with Spain vis-à-vis that arbitration "provision." *Id*. Rather, the D.C. Circuit took the idiosyncratic and erroneous view that the question of whether a specific "private party" (*i.e.*, an EU investor) is entitled to invoke "the benefit" of an arbitration agreement in litigation pursuant to § 1605(a)(6) is a non-jurisdictional question "regarding the scope" of an arbitration agreement and "not its existence." *Id.* at 1103. On this basis, the D.C. Circuit held that the issue of "which investors are covered" purportedly concerns the litigation's merits, not the U.S. court's jurisdiction under § 1605(a)(6). *Id.* at 1104.

2. In *NextEra*, the D.C. Circuit's failure to accord appropriate consideration to the threshold jurisdictional immunity issue is more than an "inconvenience"—it may dictate an outcome that

undermines the constitutional principles of the EU's legal system and the binding constitutional obligations Bulgaria, Spain, and other EU Member States agreed upon under the EU Treaties.

The CJEU has determined conclusively that investor-state dispute resolution provisions of investment treaties as between EU Member States, including ECT Article 26, are incompatible with the foundational EU Treaties and thus always have been inapplicable between and among EU Member States from the time they joined the EU. *See Republic of Moldova v. Komstroy LLC*, Case No. C-741/19, Judgment, ¶ 61-66 (CJEU Sept. 2, 2021) ("*Komstroy* Judgment") (so finding with respect to the ECT, and thus the ECT never contained an offer of arbitration by EU Member States that EU investors could accept); *Slovak Republic v. Achmea B.V.*, Case No. C-284/16, Judgment, ¶ 57-60 (CJEU Mar. 6, 2018) (similar with respect to intra-EU investment-treaty arbitration under bilateral investment treaties); *Republic of Poland v. PL Holdings Sàrl*, Case No. C-109/20, Judgment, ¶ 56 (CJEU Oct. 26, 2021) (precluding an EU Member State from concluding with an EU investor an *ad hoc* arbitration agreement replicating the provisions of an investment treaty).

As between an EU Member State, like Spain or Bulgaria, and an EU investor, such as NextEra or ACF, ECT Article 26 therefore has been inapplicable *ab initio* from the time the state joined the EU. Accordingly, there is not—and there never was—an offer to arbitrate by Spain (or by Bulgaria, since its EU

accession) under the ECT that an EU investor could accept. *Komstroy* Judgment ¶ 66. Consequently, the EU investors' purported consent to ICSID arbitration did not—and could not—form an agreement, and therefore there has never been an arbitration agreement by Spain "with or for the benefit of" those claimants. 28 U.S.C. § 1605(a)(6).

3. This Court has repeatedly recognized that a U.S. court's adjudication of claims against a co-equal foreign sovereign "raise[s] sensitive issues concerning the foreign relations of the United States." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493 (1983). This Court thus interprets the FSIA "to avoid producing friction in international relations or inviting reciprocal actions against the United States in foreign courts." *Republic of Hungary v. Simon*, 145 S. Ct. 480, 483 (2025).

The sensitivities in litigation involving foreign sovereigns are particularly heightened in actions to enforce foreign arbitral awards. This is because in such actions a foreign sovereign may face the prospect of hundreds of millions (or billions) of dollars of liability in U.S. court for a dispute that otherwise has no connection to the United States. In addition, the D.C. Circuit's mistaken decision below has a disparate effect on such award-confirmation actions against foreign states because "[v]enue is always proper in the District of Columbia for actions 'brought against a foreign state or political subdivision thereof.'" *Philipp v. Fed. Republic of Germany*, 925 F.3d 1349, 1358 (D.C. Cir. 2019) (quoting 28 U.S.C. § 1391(f)). For example,

since 2020, counsel has identified at least 65 award-enforcement actions initiated under § 1605(a)(6) against foreign sovereigns or their agencies or instrumentalities in the D.C. District Court alone.

For EU Member States in particular, the D.C. Circuit's decision carries significant risk of inserting into foreign relations the very friction the FSIA was designed to avoid. Multiple EU Member States face the prospect of a U.S. court order recognizing an intra-EU investment-treaty award that the CJEU and the European Commission, the principal executive body of the EU, have ordered them not to pay. *See European Commission v. United Kingdom*, Case No. C-516/22, Judgment, ¶¶ 67-88 (CJEU Mar. 14, 2024) (concluding that the UK Supreme Court's decision to enforce an intra-EU ICSID award violated the EU Treaties and EU law); *European Food v. European Commission*, Case Nos. T-624/15, T-694/15 and T-704/15, Judgment, ¶¶ 106, 215 (CJEU Oct. 2, 2024) (affirming that payment of an intra-EU ICSID investment-treaty award was unlawful and that any obligations under the ICSID Convention did not alter this result); *Kingdom of Spain v. AES Solar Energy Coöperatief U.A. and Ampere Equity Fund B.V.*, Case No. C/13/728512/HA ZA 23-64, Judgment, ¶ 7.23.3 (Amsterdam District Court Feb. 5, 2025) (requiring Spain to take steps "so that no actual payment" of an intra-EU investment-treaty award "is made," "and if payment is enforced in any way, to seek recovery of that payment"); *Antin* Decision ¶ 284 (ordering Spain to "ensure that no payment, implementation or execution" of an intra-EU investment-treaty award is

"effected"); *Republic of Poland v. LC Corp. B.V.*, Case No. 200.328.367/01, Judgment § 5 (Amsterdam Court of Appeal Apr. 22, 2025) (ordering Dutch claimant to withdraw within two weeks an investment-treaty arbitration against Poland on penalty of €100,000 for each day of delay, up to €10 million).

In arbitral award-enforcement actions such as this one, EU Member-State litigants thus face a heightened risk of being caught between violating, on the one hand, the foundational EU Treaties, EU law, and the CJEU's and European Commission's orders, and, on the other, violating a U.S. court order. This risk should not persist any longer without this Court's review.

C. The D.C. Circuit's interpretation of § 1605(a)(6) is wrong

In view of the sovereign-immunity implications, the import of the D.C. Circuit in award-enforcement actions against sovereigns, and the heightened risk of offending foreign relations in this circumstance, correct interpretation of § 1605(a)(6) is paramount. The D.C. Circuit's decision, however, rests upon several errors that only this Court can correct.

1. Contrary to the D.C. Circuit's ruling, an international investment treaty among foreign states is not an agreement to arbitrate with third-party nationals

The D.C. Circuit's decision turns on the erroneous conclusion that § 1605(a)(6) was satisfied because "Spain entered into an arbitration agreement—the ECT itself—that is arguably 'for [the] benefit'" of EU investors. *NextEra*, 112 F.4th at 1102. The D.C. Circuit reached this conclusion despite also recognizing that a multilateral "'investment treaty," such as the ECT, "is [] a contract between nations.'" *Id.* at 1101 (quoting *BG Grp., PLC v. Republic of Argentina*, 572 U.S. 25 (2014)). As the D.C. Circuit acknowledged, "[i]n itself, an investment treaty 'cannot constitute an agreement to arbitrate with an investor. How could it? No investor is a party to that Treaty.'" *Id.* (quoting *BG Grp.*, 572 U.S. at 50) (Roberts, C.J., dissenting)).

The undisputed notion that an investment treaty evinces only a member State's "unilateral offer to arbitrate" (*id.* at 1102), which qualifying investors may accept under certain circumstances, cannot be reconciled with the D.C. Circuit's misguided determination that § 1605(a)(6) was satisfied merely because Spain was party to the ECT. The ECT is not itself either an agreement to arbitrate with an investor, or "in favor" of an investor. Rather, the ECT is a bundle of bilateral treaty relations between pairs of the ECT contracting parties. *See, e.g.*, James Crawford, *Multilateral Rights and Obligations in*

International Law, Recueil des cours de l'Académie de droit international de La Haye 325, 343-344, 404-407 (2006) (describing that a multilateral treaty may create "bilateral obligations between the different parties concerning their mutual relations"). Each pair of bilateral treaty relations comprises an offer of arbitration by the relevant host ECT State to an investor of the respective other ECT State.

Such offers must be analyzed bilaterally as to the individual state parties (for example, as to Spain and the Netherlands, NextEra's home state). The D.C. Circuit, however, did not do that. By accepting at face value that § 1605(a)(6) was satisfied simply because Spain was party to the ECT, the D.C. Circuit abdicated its obligation to determine as to those parties which treaty (*i.e.*, contract) controlled and whether, based on the pertinent treaties, the ECT supplied an offer by Spain to arbitrate with EU investors. *Cf. Coinbase, Inc. v. Suski*, 602 U.S. 143, 149-150 (2024) (discussing a court's duty to consider multiple, conflicting agreements, "decide which contract governs," and thus determine "'whether there is an agreement to arbitrate'" among the parties) (citations omitted). Here, there was not even an offer by Spain for NextEra to accept, as Article 26 has been inapplicable *ab initio* as between Spain and any EU investors. As Bulgaria has explained in its own award-enforcement litigation in the D.C. District Court, there likewise was no offer to arbitrate by Bulgaria that ACF, a Maltese investor, could accept.

2. Whether a nonsignatory is entitled to arbitrate is a question of the *existence* of an agreement to arbitrate—not *scope*, as the D.C. Circuit incorrectly held

1. Even if the ECT were an agreement to arbitrate among the contracting states in favor of qualifying third-party investors (it is not), the D.C. Circuit erred in treating the question of which investors may accept an offer of arbitration under the ECT (or under any bilateral investment treaty between states) as an issue of an arbitration agreement's scope. *NextEra*'s analysis contrasts starkly with how other circuits have addressed this issue. As Spain explained (Pet. 10-13), the Second and Fifth Circuits have properly considered a nonsignatory's ability to compel arbitration or enforce an arbitral award in FSIA cases as a jurisdictional issue. Bulgaria underscores that this circuit split on an important and recurring question of sovereign immunity warrants this Court's review.

2. *NextEra*'s confused reasoning also diverges from how U.S. courts have traditionally assessed whether nonsignatories may invoke rights under an arbitration agreement.

Section 1605(a)(6) requires an arbitration agreement "with or for the benefit of a private party" to arbitrate "differences" "with respect to a defined legal relationship, whether contractual or not." The "defined legal relationship, whether contractual or not," necessarily includes the limited circumstances under which a nonsignatory may invoke or be bound

by an agreement to arbitrate. Those "traditional principles" include: "assumption, piercing the corporate veil, alter ego, incorporation by reference, *third-party beneficiary theories*, waiver and estoppel." *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 631 (2009) (quotations and citation omitted, emphasis added).

Section § 1605(a)(6)'s "with or for the benefit of a private party" language further confirms that the arbitration exception is most naturally read in accord with these traditional nonsignatory doctrines. Specifically, the "with" clause appears to cover signatories, and the "for the benefit" clause would encompass the nonsignatory doctrines.

Contrary to the D.C. Circuit's decision, courts considering whether a nonsignatory may invoke an arbitration clause or enforce an arbitration award routinely assess whether a nonsignatory litigant's right to arbitrate *exists* or whether the arbitration agreement was *formed* as to that nonsignatory. This contract-formation inquiry is not a question of the arbitration agreement's *scope*. *E.g.*, *Haliburton Energy Servs., Inc. v. Ironshore Specialty Ins. Co.*, 921 F.3d 522, 530, 537 (5th Cir. 2019) (analyzing "whether a non-signatory can compel arbitration pursuant to an arbitration clause" as a question of the "*existence of a valid arbitration clause* between *specific parties*," and not "whether a particular dispute falls within *the scope* of an arbitration provision" (emphasis added) (quotations and citation omitted)); *Raymond James Fin. Servs., Inc. v. Cary*, 709 F.3d 382, 383, 386 (4th

Cir. 2013) (characterizing the question of whether "individual investors seeking to arbitrate claims" could proceed to arbitration as "relat[ing] to the *existence* of a contract to arbitrate, not the *scope* of that potential agreement" (quotations and citations omitted)); *Goldman, Sachs & Co. v. City of Reno*, 747 F.3d 733, 738-739 & n.1, 742 (9th Cir. 2014) (assessing whether "the right" of a purported "third-party beneficiary" to "invoke arbitration" existed without applying "the presumption in favor of arbitrability," which governs "only where the scope of the agreement is ambiguous" (citation omitted)).

The above cases all involved instances in which a nonsignatory litigant—much like ACF or the EU investors in *NextEra*—attempted to invoke "the benefit" of an arbitration clause. The confused approach the D.C. Circuit adopted in *NextEra* under similar circumstances contradicts other courts' consistent and correct treatment of this issue as a matter of the *existence* of an arbitration agreement.

Courts addressing the reverse situation—*i.e.*, where a nonsignatory sought to resist a motion to compel arbitration or enforcement of an arbitration award—similarly express the inquiry as one of the *existence* of an arbitration agreement.

For instance, in *Kaplan v. First Options of Chicago, Inc.*, one defendant entity had signed the document "that contained an arbitration clause," and thus agreed to arbitration. 19 F.3d 1503, 1507 (3d Cir. 1994), *aff'd sub nom*, *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938 (1995). By contrast, the Kaplans

had not personally signed that document and argued that they were not bound to arbitrate. *Id.* at 1508, 1510. In the absence of an arbitration agreement, the Third Circuit thus analyzed whether "Mr. Kaplan was subject to binding arbitration as [the signatory entity's] alter ego" by exercising "*de novo* judicial review," ultimately directing the lower court to vacate the award against the Kaplans. 19 F.3d at 1512, 1520, 1523. However, the Third Circuit did not apply the presumption that "doubts about the intended *scope* of an agreement to arbitrate are resolved in favor of arbitration." *Id.* at 1512 (emphasis added, citation omitted). Other courts of appeal have applied the same approach in analogous circumstances. *E.g.*, *Various Insurers v. GE Int'l, Inc.*, 131 F.4th 1273, 1277 (11th Cir. 2025) (whether the relevant agreement's arbitration provision "binds" a purported "third-party beneficiary" concerned the issue of "whether there exists an agreement to arbitrate").

Significantly, courts in the FSIA context have likewise consistently analyzed a nonsignatory litigant's obligation to arbitrate as a jurisdictional question of existence. For example, in *Gater Assets Ltd. v. AO Moldovagaz*, 2 F.4th 42, 67-68 (2d Cir. 2021), the Second Circuit considered whether Moldova was "bound" to arbitrate as a "nonsignatory beneficiary" under "a theory of direct benefits estoppel." The court concluded that such a theory did not compel Moldova to arbitrate as a nonsignatory, and thus the arbitration clause did "not bind [Moldova] to arbitration or abrogate its immunity under 28 U.S.C. § 1605(a)(6)." *Id.* at 69. *See also First Inv. Corp.*

of Marshall Islands v. Fujian Mawei Shipbuilding, Ltd., 703 F.3d 742, 756 (5th Cir. 2012) (analyzing whether China was "bound to the arbitration agreement" based upon "an alter ego relationship" as a jurisdictional question under the FSIA). Even the D.C. Circuit has correctly analyzed "who is bound" by an arbitration agreement as a jurisdictional question under "the FSIA's arbitration exception." *TIG Ins. Co. v. Republic of Argentina*, 110 F.4th 221, 231-235 (D.C. Cir. 2024) (directing lower court to reevaluate foreign sovereign immunity by analyzing whether the defendant was "bound by the arbitration provision" under "successorship principles").

* * *

In sum, courts consistently undertake independent and *de novo* analyses of whether an arbitration agreement *exists* as to a nonsignatory. Other circuits apply this approach, including in the FSIA context, irrespective of whether the nonsignatory litigant seeks to invoke an arbitration agreement, avoid an action to compel arbitration, or enforce an arbitral award. *NextEra* overlooked ample jurisprudence involving whether an agreement to arbitrate *exists* as to a nonsignatory litigant—including the D.C. Circuit's own 2024 decision in *TIG*. *NextEra* is thus an asymmetric outlier on this fundamental question and requires this Court's correction.

3. In contravention of this Court's precedent in *Helmerich*, the D.C. Circuit erroneously applied the nonfrivolous-argument standard in assessing § 1605(a)(6)'s jurisdictional requirements

In *NextEra*, the D.C. Circuit repeatedly reasoned that § 1605(a)(6) authorizes jurisdiction in award-enforcement actions against foreign sovereigns irrespective of whether the arbitration exception's jurisdictional elements are satisfied "in fact," so long as these elements are at least "arguably" satisfied.

> [W]e need not and do not resolve whether Spain entered into separate arbitration agreements "with" private parties because we conclude that [Spain] entered into an arbitration agreement—the Energy Charter Treaty itself—that is *arguably* "for th[eir] benefit."

112 F.4th at 1102 (quoting § 1605(a)(6) (emphasis added)).

> For jurisdictional purposes, the FSIA's arbitration exception requires that the arbitral tribunal "*purported* to make an and award pursuant to the [treaty], *not* that *in fact* did so."

Id. at 1104 (quoting *LLC SPC Stileks v. Republic of Moldova*, 985 F.3d 871, 877-878 (D.C. Cir. 2021) (emphasis added)). In this analysis, the D.C. Circuit apparently resurrected the "nonfrivolous-argument"

jurisdictional test that this Court expressly abrogated in *Helmerich*, 581 U.S. at 186-187.

Helmerich held that jurisdiction exists under the FSIA only where "the facts . . . show (and *not just arguably show*)" that the elements of an immunity exception are satisfied. *Id.* at 187. As the Court explained in its unanimous opinion, application of the "nonfrivolous-argument standard" would "undermine" the "basic objective of our sovereign immunity doctrine," as reflected throughout the FSIA's "language, history, and structure." *Id.* at 181, 187. In this respect, *Helmerich* analogized the FSIA's jurisdictional elements to the "diversity of citizenship" requirement under 28 U.S.C. § 1332, and concluded that the FSIA's jurisdictional elements must be satisfied "in fact" and "not simply" alluded to be "arguably" established. *Id.* at 184.

Allowing the resurrection of the "nonfrivolous-argument" standard in § 1605(a)(6) cases risks producing the harmful results this Court warned against in *Helmerich*. In particular, such a lax standard could "embroil the foreign sovereign in an American lawsuit for an increased period of time," *id.* at 183, even where the foreign sovereign had not actually entered into any arbitration agreement "with or for the benefit" of the opposing litigant. 28 U.S.C. § 1605(a)(6).

Although *Helmerich* concerned the FSIA's expropriation exception to immunity from suit, § 1605(a)(3), its reasoning applies with equal force to all of the FSIA's immunity exceptions, including

§ 1605(a)(6). Indeed, the D.C. Circuit applied the *Helmerich* standard in *P&ID*, which involved a petition to confirm an international arbitration award against Nigeria. *See* 962 F.3d at 579. In *P&ID*, the D.C. Circuit relied on *Helmerich* and held that "disputed factual questions" under § 1605(a)(6) must be decided "'as near to the outset of the case as is reasonably possible'" to fulfill "'the basic objective' of foreign sovereign immunity." *Id.* at 584 (quoting *Helmerich*, 581 U.S. at 174). Other circuits have likewise applied the *Helmerich* standard in cases concerning the FSIA's "waiver" (28 U.S.C. § 1605(a)(1)) and "commercial activity" (28 U.S.C. § 1605(a)(2)) exceptions. *See, e.g.*, *MMA Consultants 1, Inc. v. Republic of Peru*, 719 F. App'x 47, 51 (2d Cir. 2017); *Sequeira v. Republic of Nicaragua*, 791 F. App'x 681, 681-682 (9th Cir. 2020).

Under *Helmerich*, the jurisdictional determination of whether a specific "private party"—*e.g.*, the EU investors who invested in Spain or Bulgaria—may invoke "the benefit" of ECT Article 26's arbitration clause must be established *in fact*. Accordingly, the D.C. Circuit had an obligation, which it failed to meet, to analyze *de novo* whether an arbitration agreement with Spain exists as to the nonsignatory EU investors (*see supra* § I.B.2), even if this "jurisdictional question" required the court to decide "decide some, or all, of the merits issues." *Helmerich*, 581 U.S. at 178.

II. This Court Should Review the D.C. Circuit's Anomalous and Inflexible Blanket Prohibition of the *Forum Non Conveniens* Defense in Actions to Confirm and Enforce Foreign Arbitral Awards

The second Question Presented in the Petition also concerns a significant, recurring issue that impacts threshold determinations as to the circumstances under which a foreign sovereign may be haled before U.S. courts: whether a *forum non conveniens* defense is available in actions to confirm and enforce arbitral awards.

1. The circuit split on this question is well recognized, alone justifying this Court's review. *See* Pet. 23-29. The D.C. Circuit is a stark outlier among the courts of appeal that have addressed this issue, creating a clear and intractable circuit split. Under the D.C. Circuit's bright-line approach, foreign sovereigns, such as Bulgaria and Spain, are precluded from *even raising* a meritorious *forum non conveniens* defense in such award-enforcement actions.

Bulgaria is particularly attuned to the potential consequences of this problematic circuit split given its own experience in award-enforcement proceedings in U.S. court. Take *Zeevi Holdings Ltd. v. Republic of Bulgaria*, No. 09-cv-8856, 2011 WL 1345155 (S.D.N.Y. Apr. 5, 2011), *aff'd* 494 F. App'x 110 (2d Cir. 2012). In *Zeevi*, an Israeli company sought to confirm a foreign arbitration award against Bulgaria. *See id.* at *1. The relevant agreement with an arbitration clause also contained a forum-selection clause providing that any

award-enforcement action against Bulgaria must occur in Bulgaria in accordance with Bulgarian law. *See id.* at *3. Bulgaria moved to dismiss the U.S. enforcement action for improper venue and *forum non conveniens*. The district court agreed with Bulgaria and dismissed the U.S. enforcement action in favor of the Bulgarian forum-selection clause. *See id.* at *28. Although *Zeevi* turned on the enforceability of the forum-selection clause, the district court reasoned that the "application of the doctrine of *forum non conveniens* to a petition to enforce a foreign arbitral award, applies with equal force to a court's enforcement of a forum selection clause." *Id.* at *10-11 (citing *Monegasque De Reassurances S.A.M. v. Nak Naftogaz of Ukraine*, 311 F.3d 488, 496-497 (2d Cir. 2002)); *see also* Pet. 24-25 (discussing *Monegasque*).

If the *Zeevi* claimants had brought their claim in the D.C. Circuit, it is unlikely Bulgaria could have successfully raised the forum-selection clause—the arrangement the parties to the agreement bargained for—in resisting enforcement. *See, e.g.*, *Deutsche Telekom AG v. Republic of India*, No. 21-cv-1070, 2024 WL 1299344, at *2 (D.D.C. Mar. 27, 2024) (rejecting India's *forum non conveniens* defense on basis of forum-selection clause because the D.C. "Circuit has squarely held that *forum non conveniens* is not available in proceedings to confirm a foreign arbitral award" (quotations and citation omitted)).

Foreign sovereigns should not face the possibility of such variable results dependent upon the claimants' choice of forum.

2. The FSIA's animating principles of comity, reciprocity, and reducing the burdens of litigation on foreign sovereigns weigh in favor of allowing Bulgaria, Spain, and other foreign sovereigns to raise the threshold doctrine of *forum non conveniens* in award-enforcement proceedings, contrary to the D.C. Circuit's rule. This is particularly so in the context of enforcing intra-EU investment-treaty awards, which implicates important and complex issues of the EU Treaties, EU law, and CJEU precedent. EU Member States have agreed that the CJEU is the exclusive final arbiter of questions concerning the EU Treaties and EU law. *See, e.g.*, Treaty on European Union art. 19, 2016 O.J. (C 202) 13. Thus, EU national courts and the CJEU are best positioned to address these intra-EU award-enforcement disputes—a factor that is critical in the *forum non conveniens* analysis. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 259-261 (1981) (finding that a district court's assessment that its unfamiliarity with the foreign law applicable to the case weighed in favor of dismissal on the basis of *forum non conveniens* to reasonable); *Sysco Mach. Corp. v. Cymtek Sols., Inc.*, 124 F.4th 32, 43 (1st Cir. 2024) (same).

Moreover, the D.C. Circuit's rule cannot be reconciled with this Court's precedents. This Court has "repeatedly rejected the use of *per se* rules in applying" the doctrine of *forum non conveniens*. *Am. Dredging Co. v. Miller*, 510 U.S. 443, 448 (1994); *see also Van Cauwenberghe v. Biard*, 486 U.S. 517, 529 (1988) (recognizing that courts are "accorded substantial flexibility in evaluating a *forum non*

conveniens motion" and "each case turns on its facts" (quotations and citation omitted)). At a minimum, foreign sovereigns should consistently be afforded the opportunity to raise a *forum non conveniens* defense, and the district courts should be empowered with the same discretion as in any other case to dismiss an action (or not) on those grounds. *Cf. Practical Concepts, Inc. v. Republic of Bolivia*, 811 F.2d 1543, 1551-1552 (D.C. Cir. 1987) (recognizing the importance that foreign sovereigns be heard on "all relevant legal arguments").

CONCLUSION

For the foregoing reasons, Spain's Petition should be granted.

Respectfully submitted,

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