No. 24-1130

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Respondents spend much of their briefs deep in the weeds of investment treaties and international law. That's an unusual choice in a case about subject-matter jurisdiction. The FSIA question is about the meaning of §1605(a)(6), so the language that Congress enacted might seem like a natural place to begin. Instead, respondents "[s]tart with the Energy Charter Treaty," NextEra 1, and then veer off onto ICSID and the New York Convention. None of that has any bearing on the question presented.

When respondents finally *do* get around to the FSIA, nothing they say makes this case any less certworthy. The split is real, and respondents don't deny that further percolation is unlikely. Nor do they dispute that the difference between a threshold jurisdictional determination and a summary-judgment slog is tremendously important to foreign sovereigns and the United States alike. As Spain's amici explain, blue-penciling the arbitration exception will have real diplomatic and political consequences, so it's imperative that this Court have the final word.

The Court should also grant the *forum non conveniens* question. Blasket concedes (at 29) that the circuits are split, and respondents scarcely defend the D.C. Circuit's rationale. Nor do respondents deny that taking *forum non conveniens* off the table in foreign-arbitral-award cases can promote forum-shopping, mire federal courts in difficult foreign-law questions, and subject sovereigns to inconsistent obligations. None of respondents' supposed vehicle problems poses an obstacle to review or counsels against resolving the acknowledged conflict.

I. The FSIA question warrants review.

A. The circuits are split, and further percolation is unlikely.

1. The D.C. Circuit split from the Second and Fifth Circuits by punting on whether Spain consented to arbitrate differences between itself and respondents —the parties to the case. Pet. 10–13. Instead of addressing Spain's arguments, NextEra and 9REN mostly attack strawmen. And while Blasket at least engages the petition, its objections can't make the split disappear.

D.C. Circuit. In the D.C. Circuit, the arbitration exception is "satisfie[d]" so long as the sovereign agreed to arbitrate "for the benefit" of *someone*, but not necessarily the party bringing the action. App. 22a. Whether the sovereign consented to arbitrate "differences … between the parties," §1605(a)(6), is not a jurisdictional question. Pet. 13.

Blasket concedes that the decision below "did not address" §1605(a)(6)'s "differences … between the parties" requirement, but it claims that the issue remains open because Spain raised it only "at oral argument." Blasket 14, 18. That's wrong. See *infra* 8. And it would also be news to the D.C. Circuit, where the sovereign in *Hulley Enterprises Ltd.* v. *Russian Federation*, 2025 WL 2216545 (Aug. 5, 2025), like Spain, recently claimed that §1605(a)(6) did not apply because there was no "'agreement to arbitrate' disputes 'between the parties.'" Appellant Br. 53; *see also* Appellant Supp. Br. 13 (court must decide whether agreement "contemplates arbitration of 'differences … between *the parties*' *to this specific case*."). The D.C. Circuit disagreed, finding that the decision be-

low "foreclose[d]" that objection as nonjurisdictional. 2025 WL 2216545, at *5.

Second Circuit. The D.C. Circuit's approach cannot be squared with *Cargill International S.A.* v. *M/T Pavel Dybenko*, 991 F.2d 1012 (CA2 1993). Pet. 10–12. The sovereign there consented to arbitrate differences between itself and *someone*—just not the plaintiff. If the D.C. Circuit is right, that "satisfie[d]" §1605(a)(6), App. 22a, and the Second Circuit should have asserted jurisdiction. Instead, it told the district court to determine whether the sovereign had "intended" the plaintiff to "enforce the agreement as a third-party beneficiary." 991 F.2d at 1019. (In other words: whether it had consented to arbitrate differences between itself and the plaintiff—the parties to the action.)

Respondents can't distinguish *Cargill*. Nothing turns on which prong of the "with or for the benefit" clause was at issue; what matters is whether satisfying that clause is all it takes to satisfy §1605(a)(6). *Contra* Blasket 16; NextEra 19. The D.C. Circuit says yes, but the Second Circuit demanded more. Nor does it matter whether *Cargill* "involve[d] a treaty" or a contract, NextEra 20; treaties *are* contracts, App. 19a.

Blasket's efforts to downplay *Cargill* also fail. *Cargill* wasn't a drive-by ruling, and the Second Circuit didn't "assume" anything. *Contra* Blasket 16. Whether there was "subject matter jurisdiction pursuant to FSIA §1605(a)(6)" was among the appellant's "issues presented for review." Appellant Br. 2 (cleaned up). Answering that question required the court to analyze the arbitration exception. (Blasket's references (at 15–16) to inadequate briefing are misleading. The issue "not adequately addressed" was whether the

agreement meant what the plaintiff claimed—not whether that question was jurisdictional. 991 F.2d at 1020.) And far from "dict[um]," Blasket 16, *Cargill*'s guidance to the district court offered a "clear statement" of the "approved procedure" on remand, which "must be regarded as the law of the circuit." *United States* v. *Oshatz*, 912 F.2d 534, 540 (CA2 1990); see also *Sevencan* v. *Herbert*, 316 F.3d 76, 84 n.4 (CA2 2002) (future panels are "bound" by statements "regarding further proceedings on remand"), *superseded by intervening decision*, 342 F.3d 69 (CA2 2003).

Olin Holdings Ltd. v. *Libya*, 73 F.4th 92 (CA2 2023), which doesn't even cite the FSIA, is irrelevant. *Contra* NextEra 19. The sovereign there objected to the investor's "cho[ice] to pursue [its] claims in another designated forum," not lack of subject-matter jurisdiction under §1605(a)(6). Appellant Br. 23.

Fifth Circuit. The decision below can't be squared with *Al-Qarqani* v. *Saudi Arabian Oil Co.*, 19 F.4th 794 (CA5 2021), either. Pet. 12–13. In the D.C. Circuit, arguments about "which investors" consented to arbitrate go to "the merits," not "jurisdiction." App. 23a, 26a. But *Al-Qarqani* ordered dismissal "for lack of jurisdiction" after finding "no agreement among *these parties*." 19 F.4th at 802 (emphasis added). The Fifth Circuit didn't rely on the absence of an agreement "with or for the benefit of" a private party. *Contra* Blasket 14. Instead, the jurisdictional defect was the absence of consent to arbitrate differences "among the parties." 19 F.4th at 802.

2. Respondents don't deny that the FSIA's venue provision makes further percolation unlikely. Pet. 15. Nor is it needed. *Contra* Blasket 17. This Court routinely grants FSIA cases with even shallower splits (or none). *E.g.*, Pet. 2, *Hungary* v. *Simon*, No. 23-867

(U.S.) (alleging 1-1 split); compare Pet. 22 n.9, *Opati* v. *Sudan*, No. 17-1268 (U.S.) (alleging 1-1 split in cursory footnote), with *Opati* U.S. Invitation Br. 15–16 n.6 ("no square disagreement exists").

B. The FSIA question is important and recurring.

Respondents don't dispute that the FSIA question matters tremendously to foreign sovereigns and the United States. Nor could they. The decision below will subject sovereigns to "significant, burdensome discovery," Poland Br. 10, while stripping away the "procedural protection" of interlocutory review, Bulgaria Br. 7. This "harms" foreign sovereigns "and their relations with the United States," Romania Br. 2, creating "the very friction the FSIA was designed to avoid," Bulgaria Br. 12. And it also raises reciprocity concerns for the United States. O.A. Tr. 26:3–7, *Bolivarian Republic of Venezuela* v. *Helmerich & Payne Int'l Drilling Co.*, 581 U.S. 170 (2016) (No. 15-423) (litigating "under 12(b)(1), as opposed to 12(b)(6)" "make[s] a difference" to "the United States"). Nor is the blast radius limited to a single treaty: "hundreds" of investment treaties will now satisfy §1605(a)(6) "in and of themselves." EC Br. 22.

While Blasket insists (at 27) that reversal would "change nothing on the ground," its own docket shows otherwise. On remand from the D.C. Circuit, the district court refused to order merits briefing and instead stayed the case pending this Court's review. If the Court reverses, Spain can renew its jurisdictional defense and receive a threshold immunity ruling before becoming "embroil[ed]" in further litigation. *Helmerich*, 581 U.S. at 183.

C. The decision below is wrong.

1. Courts may not assert jurisdiction over a foreign sovereign without determining whether the sovereign consented to arbitrate differences between itself and the plaintiff—the parties to the dispute. Pet. 18–22. The D.C. Circuit read that clause out of the statute, trampling its jurisdictional limitations and ignoring the bedrock principle that arbitration requires consent between the parties to the dispute.

2. Respondents have no sound answer.

a. NextEra and 9REN devote a single paragraph to Spain's textual arguments, declaring (at 16) that "whether there are 'differences … between the parties' is a scope question for the arbitral tribunal." In other words, they use a concept that's not in the statute to gouge out a provision that is. "That is no way to do statutory construction." *Borden* v. *United States*, 593 U.S. 420, 435 (2021). Nor are NextEra and 9REN correct (at 14–15) about how §1605(a)(6) applies to investment treaties. EC Br. 5–6; Bulgaria Br. 14–15. There can be no enforceable "agreement to arbitrate" absent an offer by the sovereign and acceptance by the party bringing the "action." §1605(a)(6).

b. Blasket at least tries (at 19–21) to offer a textual argument, but it is unavailing. Blasket begins—quite rightly—by observing that "the parties" must refer to some parties "previously specified by context." Blasket 20. But "'the foreign state' and the 'private party' 'with or for the benefit of' whom it contracted" aren't the "only" candidates. *Contra* Blasket 21. The more natural reading is that "the parties" are the parties whose "differences" led to the "action … brought" to "enforce" an agreement or "confirm" an

award. §1605(a)(6). Context supports this reading. Section 1605 governs "case[s]" brought in "court," and cases are brought by one party against another. That's why §1605(b)(1), which predated the arbitration exception, uses "the party" to refer to the plaintiff "bringing the suit." And only Spain's reading gives the phrase "differences … between the parties" any work to do. If Blasket is right and "the parties" just means the sovereign and the "private party," deleting that phrase wouldn't change the statute's meaning.

Blasket's remaining arguments fail. The threshold question is what Congress said about subject-matter jurisdiction, not what a treaty says about "enforcement." Blasket 22. As the United States explained below (at 16), that threshold inquiry is fully "consistent" with the New York and ICSID Conventions. *Contra* Blasket 22. But even if it weren't, rewriting statutes is Congress's job—not courts'.

D. This case is an ideal vehicle.

1. This case is an excellent vehicle for resolving the FSIA question. The D.C. Circuit squarely decided that question by punting Spain's immunity defense. If this Court reverses, the lower courts could not assert jurisdiction before addressing that objection.

2. Respondents' vehicle arguments don't wash.

a. Respondents chiefly argue that Spain is "foreordained" to lose on remand. Blasket 24; NextEra 22–28. But that's irrelevant to the threshold FSIA question, and respondents' claims ring hollow when the only court below to reach Spain's immunity defense *agreed* with Spain. App. 149a.

In all events, Spain's objections are hardly "late-breaking." *Contra* NextEra 22–25. When Spain

signed the Energy Charter Treaty, intra-EU arbitration was "never imagined or dreamed of." *Hans* v. *Louisiana*, 134 U.S. 1, 15 (1890); see *Comm'n* v. *Ireland*, 2006 E.C.R. I-04635, ¶¶132, 182 (confirming, shortly before respondents invested in Spain, that intra-EU arbitration violates EU law). And when this Court's EU counterpart held that the Treaty does not provide for intra-EU arbitration, Pet. 6, it was interpreting international treaties that long predated its decision. (Spain never delegated these issues, so courts must review them *de novo*, Pet. 21–22, not "defer" to arbitrators, Blasket 24–25.)

Nor is there jurisdiction under the FSIA's waiver exception. As the United States explained below (at 19–25), sovereigns don't waive immunity merely by joining the ICSID or New York Conventions. No binding D.C. Circuit precedent holds otherwise, and while respondents say they would win in the Second Circuit, NextEra 28, the D.C. Circuit just split from the Second on a related waiver question. See *Amaplat Mauritius Ltd.* v. *Zimbabwe Mining Dev. Corp.*, 143 F.4th 496, 503–04 (2025).

b. Blasket is also wrong (at 24) about preservation—which is probably why NextEra and 9REN skip that argument. The district court in *Blasket* held that §1605(a)(6) didn't apply because Spain could not (and did not) "offer to arbitrate *any* dispute with" respondents. App. 149a. Spain then quoted the "differences … between the parties" language on appeal and denied having "consent[ed]" to "arbitrate *anything* between [itself] and EU nationals." *Blasket* Spain Br. 27, 38. And at oral argument, Spain emphasized that it was "focusing on" §1605(a)(6)'s "differences … between the parties" clause, which refers to parties "before the U.S. court." *Blasket* O.A. Recording 26:10–27:16.

II. The *forum non conveniens* question warrants review.

Respondents don't seriously deny that the circuits disagree on whether *forum non conveniens* is available in foreign-arbitral-award cases. That acknowledged split is now deeper than it was the last time this Court confronted it, and none of the vehicle problems that precluded review then are present now.

A. The split is deeper than ever.

In the D.C. Circuit, district courts can never consider *forum non conveniens* in award-confirmation cases. Pet. 26. Blasket ventures (at 30) that the court might limit this rule to foreign sovereigns, but Spain *is* a foreign sovereign, so the point is irrelevant. Regardless, the Circuit's reasoning—that "only U.S. courts can attach" U.S. assets, *LLC SPC Stileks* v. *Moldova*, 985 F.3d 871, 876 n.1 (2021)—doesn't turn on the defendant's identity.

The Second Circuit expressly rejects the D.C. Circuit's rule. Pet. 24. Blasket retorts (at 29) that the Second Circuit hasn't recently affirmed a *forum non conveniens* dismissal, but that doesn't show the split is gone—just that defendants face an uphill battle. (Or that plaintiffs are suing in DC instead.) Anyhow, respondents don't dispute that enforcing these awards would subject Spain to inconsistent obligations. See Pet. 30. So even if the Second Circuit "*almost* categorically" bars *forum non conveniens*, Blasket 29, Spain would likely succeed where others have failed. Nor does it matter that the Second Circuit hasn't addressed *forum non conveniens* in an ICSID case. *Contra* NextEra 33–34. The split concerns whether foreign courts' inability to attach U.S. prop-

erty makes them per se inadequate. The answer to that question is not lurking in the ICSID Convention.

The Fourth Circuit recently weighed in, holding that *forum non conveniens* is unavailable in at least some foreign-arbitral-award cases. Pet. 27. Far from "declin[ing] to take sides," Blasket 32, *Estate of Ke* v. *Yu* squarely addressed the question presented here: "*forum non conveniens* c[an]not apply" to foreign award confirmation "because only U.S. courts can attach" U.S. assets. 105 F.4th 648, 656–57 (CA4 2024) (cleaned up).

B. The question is important, and this case is an excellent vehicle.

1. The availability of *forum non conveniens* matters to foreign sovereigns, see Bulgaria Br. 24–25, and categorically barring it risks "international discord," Poland Br. 18. The question is also cleanly presented, squarely decided, and likely dispositive here.

2. Respondents insist that *forum non conveniens* dismissal "would be error." NextEra 30. But that's a remand question, and the analysis hardly "disfavors" Spain. NextEra 31. As to alternative fora, Blasket itself declares (at 29) that respondents are "free to enforce" their awards in the United Kingdom. And respondents are wrong about the private- and public-interest factors. A "foreign plaintiff's choice" of forum "deserves" little deference. *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 256 (1981); *contra* Blasket 31. Likewise, European courts are equally familiar with the ICSID Convention as U.S. courts, NextEra 31, and more familiar with EU treaties and other "international law," Blasket 33. And any "incremental" American interest in encouraging arbitration, especially between foreigners and through award confir-

mation, is "insignificant," *Piper Aircraft*, 454 U.S. at 260–61; cf. *Badgerow* v. *Walters*, 596 U.S. 1, 18 (2022), since the UK is also an ICSID and New York Convention signatory and shares the same policy. *Contra* Blasket 33. Finally, that ICSID is "DC-based," NextEra 31, is irrelevant when there's no controversy between ICSID and Spain.

While the Court has twice declined to grant the *forum non conveniens* question, Blasket 29–30, this case lacks the vehicle defects that made prior cases unsuitable. Categorically barred or not, *forum non conveniens* was a nonstarter in *Tatneft* v. *Ukraine* because corruption undermined the claimant's "ability to obtain justice" in Ukraine. 301 F. Supp. 3d 175, 193–94 (D.D.C. 2018). Likewise, *Belize* was a poor vehicle because the sovereign lacked attachable assets in the only alternative forum. U.S. Br. 13–14, *Belize* v. *Belize Social Dev. Ltd.*, No. 15-830 (U.S.). Meanwhile, neither case involved transparent efforts (like those here) to avoid preordained results in an available, adequate forum.

C. The decision below is wrong.

1. The D.C. Circuit's rigid rule jettisons *forum non conveniens*' "hallmark flexibility" and ignores *Piper Aircraft*'s instruction that a lower potential recovery does not bar dismissal. It also fixates on the wrong question: claimants might have an interest in recovery, but they don't have an interest in recovering particular property located in the U.S. Pet. 33–35.

2. Unable to explain why adequacy depends on access to a specific *res*, respondents largely abandon the D.C. Circuit's rationale and attempt to defend its categorical rule on other grounds. None is sound.

Respondents insist that *forum non conveniens* would "undercut" the New York and ICSID Conventions. Blasket 35; see NextEra 34. But that doesn't justify the D.C. Circuit's rule, which applies to all treaties. Nor is it true of *these* treaties: Article III of the New York Convention directs enforcing courts to use local "rules of procedure," and Article 54(1) of the ICSID Convention preserves domestic procedural doctrines. That includes *forum non conveniens*. In all events, this Court can resolve the logically antecedent question presented and leave treaty-interpretation questions for remand.

Blasket also protests (at 34) that it might have to pursue a different "cause of action" abroad. Maybe so. But *forum non conveniens* asks whether a forum "permit[s] litigation of the subject matter of the dispute," not whether its causes of action mirror ours. *Piper Aircraft*, 454 U.S. at 254–55 n.22.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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