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

SUPPLEMENTAL BRIEF FOR PETITIONER

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INTRODUCTION

NextEra and 9REN may be the first parties ever to file a supplemental brief alerting this Court to the decision of an Australian trial court. That court's opinion was no reason to break new ground: it is irrelevant to whether this Court should grant cert. The FSIA question turns on the meaning of §1605(a)(6)—not "fundamental international law principles." Supp. Br. 2. Neither does the Australian court's interpretation of Australian law shed any light on the FSIA's differently worded waiver exception. And the trial court's opinion, which let respondents' claims proceed, hardly "confirms" that "there is no adequate alternative forum" for this case. *Contra id.* at 10.

Anyhow, if foreign law is fair game, respondents fail to mention that an Israeli court just declined to enforce an ICSID award against Spain on *forum non conveniens* grounds. The Israeli court did not deem *forum non conveniens* "unavailable" in "ICSID-award-enforcement" cases. *Compare id.* Nor did it fret (with respondents and the D.C. Circuit) that "only [Israeli] courts can attach assets located in [Israel]." *Id.*

Despite respondents' efforts to recycle arguments that Spain has already refuted, both questions presented warrant review. The circuits have split over the FSIA's jurisdictional requirements and the availability of *forum non conveniens*, those questions matter to foreign sovereigns, and this case remains an ideal vehicle. Nothing about an Australian lower court's decision applying Australian law shows otherwise. The Court should grant the petition.

I. Respondents' supplemental vehicle arguments are irrelevant and wrong.

A. Respondents' new "authority" has no bearing on this case. NextEra and 9REN's supplemental brief is

ostensibly about an Australian trial-court opinion applying Australian law. *See* Jason L. Pierce, *A Sketch of Australian Constitutional History*, 10 Green Bag 327, 344 (2007) (The "Federal Court of Australia" is a "court of first instance."). As that trial court recognized, Spain plans to appeal and will ultimately ask Australia's High Court to "reconsider" its holding that Spain waived immunity under section 10(2) of Australia's Foreign States Immunities Act of 1985. *Blasket Renewable Invs. LLC* v *Kingdom of Spain* [2025] FCA 1028 ¶4 (Austl.), bit.ly/Aus_Case. But none of that has anything to do with the questions presented here.

B. Still, respondents claim that the Australian trial court's "reasoning … helps show why" this case isn't certworthy. Supp. Br. 1. That is wrong at every turn.

1. This case is an ideal vehicle for resolving the FSIA question, and the trial court's opinion doesn't suggest otherwise.

According to respondents, the trial court's opinion shows that Spain is "bound by" the Energy Charter Treaty and its "ICSID Convention obligations." Supp. Br. 6. The problem, of course, is that respondents continue to ignore "two centuries of jurisprudence affirming the necessity of determining jurisdiction before proceeding to the merits." *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 98 (1998). "Federal courts are courts of limited jurisdiction, possessing only that power authorized by Constitution and statute." *Gunn* v. *Minton*, 568 U.S. 251, 256 (2013) (citation modified). And as respondents' own authority confirms, "the FSIA provides the sole basis for subject matter jurisdiction in cases brought to enforce ICSID awards." *Mobil Cerro Negro, Ltd.* v. *Bolivarian Republic of Venezuela*, 863 F.3d 96, 115 (2d Cir. 2017).

The decision below recognized this and purported to assert jurisdiction under the FSIA's arbitration exception. But it nullified that provision's "differences … between the parties" clause—an error that respondents cannot paper over through resort to "fundamental international law principles." Supp. Br. 2.

Respondents next insist that the trial court's opinion "reaffirms" that Spain "waived immunity" by joining the ICSID Convention. Supp. Br. 7. And with waiver waiting in the wings (they reason), there's no point granting the arbitration-exception question because a favorable ruling would not "resolve these cases in Spain's favor." *Id.* at 6. That's doubly wrong.

Start with the major premise. Contra respondents, the only court below to reach the issue held that "the waiver exception is inapplicable here." App. 149a. The United States agrees: "A foreign state does not waive sovereign immunity merely by becoming a party to the ICSID Convention …." U.S. C.A. Br. 19 (citation modified). And while the Second Circuit holds otherwise, see Supp. Br. 7, the D.C. Circuit has yet to weigh in, see App. 17a. In short, respondents' "waiver problem" is a mirage. *Contra* Supp. Br. 8.

Nor does it matter that waiver has been found under Australian law. Whatever the merits of those holdings under that foreign law, the statute enacted in Canberra uses different language from the waiver exception enacted by Congress. Compare Foreign State Immunities Act of 1985 (Cth) s 10(2) (Austl.) ("A foreign State may *submit to the jurisdiction* at any time, whether by agreement or otherwise …." (emphasis added)) with 28 U.S.C. §1605(a)(1) ("A foreign state shall not be immune … in any case … in which the foreign state has *waived its immunity* either explicitly or by implication." (emphasis added)).

So even if a sovereign "submit[ted] to" Australian jurisdiction by joining ICSID, it doesn't follow that the sovereign has "waived its immunity" under the FSIA.

More fundamentally, respondents' waiver argument offers no reason to deny review. "[T]his Court frequently grants interlocutory review on threshold sovereign-immunity issues," U.S. Invitation Br. 22, *Exxon Mobil Corp.* v. *Corporación Cimex, S.A. (Cuba)*, No. 24-699 (Aug. 27, 2025), even when a favorable decision would leave questions to resolve on remand. *E.g.*, *CC/Devas (Mauritius) Ltd.* v. *Antrix Corp.*, 145 S. Ct. 1572, 1582 (2025) (reversing personal-jurisdiction holding without deciding whether FSIA's arbitration exception applies); *Turkiye Halk Bankasi A.S.* v. *United States*, 598 U.S. 264, 281 (2023) (vacating and remanding for consideration of common-law-immunity claims). If this Court reverses the D.C. Circuit's arbitration-exception holding, respondents can renew their waiver arguments. But that's no reason for this Court to sit back while the decision below "harms" foreign sovereigns "and their relations with the United States." Romania Br. 2.

2. This case is also an ideal vehicle for resolving the *forum non conveniens* question.

Respondents insist that the Australian opinion "confirms" there is "no adequate alternative forum" for these cases. Supp. Br. 10. That is an odd takeaway from an opinion that allowed respondents' claims to proceed. Besides, if there's no adequate forum outside the United States, it's fair to ask why respondents sued Spain in Australia to begin with. Of course, to ask that question is to answer it. The notion that all non-U.S. fora are inadequate because only a United States court can attach U.S. property is indefensi-

ble. Hence why respondents have scarcely tried to defend the D.C. Circuit's rationale.

In all events, respondents fail to mention that an Israeli court recently declined to enforce an ICSID award against Spain on *forum non conveniens* grounds. See CivC (DC TA) 11552-02-23 Sun-Flower Olmeda GMBH & Co KG v. Kingdom of Spain, Nevo Legal Database (Isr.) (Aug. 25, 2025); *cf.* *Roper* v. *Simmons*, 543 U.S. 551, 627 (2005) (Scalia, J., dissenting) ("To invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is … sophistry."). That court evidently disagreed with respondents that "forum non conveniens is unavailable in ICSID-award-enforcement proceedings." Supp. Br. 10. Nor was it deterred by foreign courts' inability to attach Spain's Israeli assets.

II. Respondents' recycled arguments are improper and unsound.

Respondents eventually drop all pretense of "calling attention to new cases," S. Ct. R. 15.8, and resort to recycling arguments from their brief in opposition. Compare NextEra BIO 20–22 with Supp. Br. 8–9. This flouts the rule that "a supplemental brief shall be restricted to new matter." S. Ct. R. 15.8.

But even if respondents' quasi-sur-reply were proper, the arguments would still be unsound. The D.C. Circuit asserted jurisdiction after finding that Spain satisfied §1605(a)(6)'s "for the benefit" clause—never mind whether it also satisfied the "differences … between the parties" clause. That's like exercising diversity jurisdiction after finding complete diversity, without stopping to ask whether the plaintiff meets the amount-in-controversy requirement. Other circuits would never have punted on whether Spain con-

sented to arbitrate differences between itself and the plaintiffs. See Pet. 10–13; Reply 3–4. Instead of engaging Spain's arguments, however, respondents continue to attack strawmen. They chiefly object (at 9) that neither the Second Circuit nor the Fifth Circuit has addressed the FSIA's "for the benefit" clause in a case like this. Supp. Br. 9. Yet that's no answer at all: it's like responding to the amount-in-controversy problem by quibbling about complete diversity.

Nor is the FSIA question "myopic," Supp. Br. 7—at least not according to the sovereigns who have urged the Court to grant it. See EC Br. 5 (FSIA question is "of exceptional importance to the EU"); Bulgaria Br. 4 ("exceptionally important"); Poland Br. 16 ("question of exceeding importance to foreign sovereigns"); Romania Br. 4 ("enormously important"). See also U.S. Br. 21, *Bolivarian Republic of Venezuela* v. *Helmerich & Payne Int'l Drilling Co.*, No. 15-423 (U.S.) ("[E]nsuring that a substantive threshold determination is made about whether a plaintiff's allegations satisfy one of the statute's exceptions to immunity serves the 'reciprocal self-interest' of the United States."). That's probably why this case has drawn more cert-stage amicus support than the Court's last seven FSIA cases *combined*.

Finally, the Court should decline respondents' invitation to resolve their additional questions in the first instance. Supp. Br. 9–10. The D.C. Circuit did not decide "whether Spain ultimately entered into legally valid agreements with" respondents, and it "t[ook] no position on the ultimate enforceability of th[e] awards." App. 26a–27a. And only the Second Circuit has addressed whether a sovereign waives immunity simply by joining the ICSID Convention. See *id.* at 16a ("The waiver issue remains unsettled" in the D.C.

Circuit.) This Court should await "thorough lower court opinions" before addressing those questions itself. *Zivotofsky ex rel. Zivotofsky* v. *Clinton*, 566 U.S. 189, 201 (2012); *NCAA* v. *Smith*, 525 U.S. 459, 470 (1999) ("[W]e do not decide in the first instance issues not decided below").

CONCLUSION

The Court should grant the petition and decline to take up respondents' additional questions.

Respectfully submitted,

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