

No. 24-1130

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In the  
**Supreme Court of the United States**

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KINGDOM OF SPAIN,

*Petitioner,*

v.

BLASKET RENEWABLE INVESTMENTS, LLC, *et al.*,

*Respondents.*

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**On Petition for Writ of Certiorari  
to the United States Court of Appeals  
for the D.C. Circuit**

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**SUPPLEMENTAL BRIEF  
FOR RESPONDENT BLASKET  
RENEWABLE INVESTMENTS, LLC**

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Matthew S. Rozen  
Jeff Liu  
Aaron Hauptman  
GIBSON, DUNN &  
CRUTCHER LLP  
1700 M Street NW  
Washington, DC 20036

Matthew D. McGill  
*Counsel of Record*  
Alexander Kazam  
KING & SPALDING LLP  
1700 Pennsylvania Ave. NW  
Washington, DC 20006  
(202) 737-0500  
matthew.mcgill@kslaw.com

*Counsel for Respondent  
Basket Renewable Investments, LLC  
(Additional counsel listed on inside cover)*

June 8, 2026

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Michael S. Taintor  
KING & SPALDING LLP  
1290 Avenue of the Americas  
14th Floor  
New York, NY 10104

*Counsel for Respondent Blasket  
Renewable Investments, LLC*

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**SUPPLEMENTAL BRIEF FOR RESPONDENT  
BLASKET RENEWABLE INVESTMENTS, LLC  
INTRODUCTION**

The government’s brief correctly identifies several reasons why Spain’s petition should be denied. On the first question presented, regarding interpretation of the FSIA’s arbitration exception, the government agrees that Spain’s claim of a circuit split is “tenuous at best” and emphasizes that “Spain would likely not be entitled to relief even if that question were resolved in its favor.” U.S. Br. 15, 17. On the second question presented, the government notes that “it is unclear whether Spain’s *forum non conveniens* argument could prevail in any circuit.” *Id.* 19, 21. Basket agrees the petition should be denied for those reasons, among others identified in its prior briefing and below.

Basket submits this brief to make two points in response. First, on the merits of the FSIA question, the decision below is correct. The D.C. Circuit’s approach comports with the FSIA’s text, structure, and purpose, and the government’s policy concerns are overblown. Second, the shallow circuit split on *forum non conveniens* is inconsequential and does not warrant review.

**ARGUMENT**

**I. The D.C. Circuit’s Interpretation of the FSIA Arbitration Exception Is Correct.**

The D.C. Circuit’s unanimous holding that the arbitration exception applies to this case reflects a straightforward interpretation of the statutory text. Lacking textual support for its contrary position, the

government leans on extra-textual arguments based on a misplaced comparison to diversity jurisdiction, misguided analogies to domestic arbitration, and fanciful hypotheticals. Meanwhile, the government overlooks the drawbacks of Spain's position, which risks transforming numerous merits issues delegated by treaty to arbitral tribunals into questions of immunity for U.S. courts.

**A. The D.C. Circuit's Decision Is Faithful to Statutory Text, Purpose, and Structure.**

1. The FSIA's arbitration exception requires that, to find jurisdiction, a court must determine that "the foreign state" agreed "with or for the benefit of a private party" to arbitrate "differences" arising "between the parties." 28 U.S.C. § 1605(a)(6). If so, the court has jurisdiction over an action to "confirm an award made pursuant to such an agreement." *Id.* Because Spain signed the ECT, and the ECT contains an agreement "with or for the benefit of" private parties to arbitrate Spain's "differences" with those parties, a federal court has jurisdiction over an action to "confirm an award" against Spain "made pursuant to" the ECT. *Id.* Questions about whether arbitration was properly invoked at the outset—*e.g.*, by a proper party or over proper subject matter—will have been resolved by arbitrators and will be reviewed by the court under applicable treaty standards. The FSIA does not supplant those standards by requiring courts to reexamine those questions *de novo* as jurisdictional issues.

a. The government resists that straightforward conclusion, arguing that a federal court must always decide *de novo* whether the agreement at issue was

made “with or for the benefit of” *the plaintiff* before the court. U.S. Br. 9-10. The government starts, as Blasket does, with the requirement of “an agreement made by the foreign state with or for the benefit of *a private party*.” *Id.* 10 (emphasis in U.S. Br.). The government asserts, however, that “the most natural reading” of that phrase would replace “a private party” with “the FSIA plaintiff.” *Id.* (emphasis omitted). That reading is anything but “natural.” Congress easily could have written “the plaintiff” or even “the party bringing the suit,” as it did in neighboring subsections, 28 U.S.C. § 1605(b)(1), (c); *see id.* § 1361 (“the plaintiff”). Congress’s choice of the indefinite article—“*a private party*”—clearly indicates it did not intend to refer to *the* specific party before the court. *See Digital Realty Tr., Inc. v. Somers*, 583 U.S. 149, 161 (2018) (“When Congress includes particular language in one section of a statute but omits it in another, this Court presumes that Congress intended a difference in meaning.” (cleaned up)); *McFadden v. United States*, 576 U.S. 186, 191 (2015) (observing that an “indefinite article” refers to an “undetermined or unspecified particular” (quotation marks omitted)).

b. The government next turns to “surrounding text” (at 11) that requires that the agreement “with or for the benefit of *a private party*” be an agreement “to submit to arbitration all or any differences ... between *the parties* with respect to a defined legal relationship.” 28 U.S.C. § 1605(a)(6) (emphases added). The government agrees with Blasket that “the parties” refers to the two parties previously specified: “the foreign state” and “a private party.” U.S. Br. 11. Reading the statute backward instead of forward, however, the government argues that the only

“parties’ that have both a ‘defined legal relationship’ and ‘differences’ to be resolved *in the case* are the foreign state and the FSIA plaintiff.” *Id.* (emphasis added). Here again, the government edits the statute instead of interpreting it; “in the case” does not appear in § 1605(a)(6). To establish jurisdiction, it is enough that the foreign state agreed “to submit to arbitration” its “differences” with “a private party.” Any contention by the foreign state that it did not agree to arbitrate a specific dispute with a specific *FSIA plaintiff* is potentially a defense to enforcement under the treaties providing for such enforcement; it cannot defeat jurisdiction.

2. To prop up its weak textual arguments, the government invokes a supposed norm that “[j]urisdictional provisions generally turn on the status of the parties to the litigation.” U.S. Br. 10. The government tellingly cites only one example—the diversity statute. Many jurisdictional statutes do not turn on “the parties” at all, but on the law under which the suit arises. *E.g.*, 28 U.S.C. §§ 1331, 1334. Others depend on one party and on the rights in dispute. *E.g.*, *id.* §§ 1442(a), 1443. Indeed under the FSIA’s expropriation exception, 28 U.S.C. § 1605(a)(3), courts must find as “a jurisdictional matter” that “the rights asserted are rights of a certain kind, namely, rights in ‘property taken in violation of international law,’” but as Spain concedes, Pet. 20, the question of whether the *plaintiff* holds those rights goes to the merits, not jurisdiction. *Bolivarian Republic of Venezuela v. Helmerich & Payne Int’l Drilling Co.*, 581 U.S. 170, 174, 178-79 (2017). When Congress intends to base jurisdiction on facts about *both* parties, it speaks clearly. *E.g.*, 28 U.S.C. §§ 1332(a) (jurisdiction based

on whom a suit “is between”), 1348 (suits “by the United States” “against any national banking association”). Nor is it unheard of for a party’s right to invoke federal jurisdiction to turn on the status of *non*-parties. *E.g., id.* § 1332(d) (making jurisdiction over a plaintiff’s suit turn on status of absent class members, who are otherwise not considered parties for purposes of subject-matter jurisdiction).

The Constitution and federal law create jurisdiction under different conditions for different purposes. Diversity jurisdiction looks to both parties because it addresses concerns about bias in suits between local parties and outsiders by providing a neutral forum. The FSIA’s arbitration exception, by contrast, was enacted against the backdrop of an international arbitration system that already provides neutral forums—arbitral tribunals—governed by procedures states consented to by treaty.

### **B. The Government’s Policy Arguments Are Unavailing.**

Without a footing in the statute, the government pivots to policy objections. But its concerns are overwrought, and it ignores the more disruptive consequences that would flow from Spain’s position.

1. The government expresses concern that if federal courts do not treat Spain’s intra-EU argument as jurisdictional, “a national of a *non*-signatory country” might game the system. This hypothetical investor, the argument goes, could (1) sue in federal court to “compel[] arbitration” solely because the state agreed to arbitrate with *other* parties from signatory states (*e.g.*, Japan); and (2) win an award despite being

outside the treaty's coverage and return to federal court to confirm it, "again based solely on the hypothetical Japanese investor." U.S. Br. 11-12. This outlandish exercise in speculation, which tellingly has never materialized since the arbitration exception was enacted in 1988, misunderstands the differences between international and domestic arbitration and ignores key safeguards built into the international arbitration system.

a. The government's concern about a U.S. court erroneously compelling arbitration overlooks the fact that there is usually no need for investors to compel arbitration under investment treaties like the ECT. Domestically, such issues arise when one party initiates litigation and the other wants to arbitrate. In the international context, however, one may simply initiate arbitration with an appropriate tribunal and require the other party to respond. *E.g., Raytheon Co. v. Ashborn Agencies, Ltd.*, 372 F.3d 451, 452-53 (D.C. Cir. 2004) (dismissing petition to compel arbitration for lack of Article III standing, since arbitration could proceed *ex parte*). Accordingly, making covered-investor disputes jurisdictional under the FSIA would not meaningfully constrain errant arbitration at the front end.

b. There is also no risk of an investor winning an arbitral award—and obtaining confirmation—without having treaty coverage tested rigorously according to the procedures agreed to by the foreign state. In arbitrations like Blasket's, under UNCITRAL Rules and the New York Convention, the tribunal generally will hear challenges "to the existence or validity of the arbitration agreement." UNCITRAL Rules art. 23(1).

A party can then challenge the scope of the arbitration agreement as a defense to enforcement on the merits, first by seeking to “set aside” the award in the seat of arbitration and again where enforcement is sought. New York Convention art. V(1)(a), (c), (e). A U.S. court will decide that challenge *de novo* unless it is “clear and unmistakable” that the parties agreed to delegate the question of arbitrability to the arbitral tribunal. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (cleaned up). The court will have *jurisdiction* by virtue of the state’s agreement to arbitrate for the benefit of “a private party,” but the court will decide for itself what procedures the parties agreed upon for deciding arbitrability, and will decide the issue *de novo* unless it determines that the state chose to give the last word to the arbitral tribunal.

Similarly, the ICSID Convention offers numerous safeguards against potential gamesmanship. The Convention provides for robust screening of all scope disputes by a neutral, World-Bank affiliated international organization created for that purpose by the signatory states. ICSID Convention art. 36(3). The arbitral tribunal then adjudicates such disputes on the merits, subject to rigorous review via the Convention’s annulment process. *Id.* arts. 41(2), 52. To be sure, judicial review of ICSID awards is limited, but that is the tradeoff foreign states make when they sign the Convention, with its strong internal checks and streamlined enforcement process. Signatories accept a remote risk of an error that might otherwise have been corrected by a national court in exchange for predictability and credibility in international investment markets.

2. The greater risk arises from Spain's position, under which every spurious argument about treaty coverage could be relitigated as an immunity issue. Spain preemptively attempts to limit the damage by claiming its position would *not* require courts to review *de novo* other "second-order questions about an agreement's scope," such as whether the "differences" at issue concern a covered investment. Pet. 20. But states could easily reframe such "covered-investment" disputes as "covered-investor" disputes by claiming they agreed to arbitrate "with or for the benefit of" only investors who made certain kinds of investments. Elevating routine scope issues to jurisdictional rank would threaten the stability, predictability, and efficiency of the international arbitration system and upend the "administrative simplicity" of Congress's design. *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010).

The government downplays these dangers, emphasizing that "[e]ven in the domestic context, where Congress has expressed a national policy favoring arbitration," courts "resolve challenges to the validity of arbitration clauses." U.S. Br. 3, 12. But the implication that Congress has *not* expressed a strong "policy favoring arbitration" in the *international* context is incorrect. In fact, the "emphatic federal policy in favor of arbitral dispute resolution" "applies with special force in the field of international commerce," where "international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes" can "require ... enforc[ing]" arbitration agreements even when "a contrary result would be forthcoming in a domestic context." *Mitsubishi Motors*

*Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629-31 (1985). In any event, as discussed above, under the New York Convention, courts *do* resolve challenges to the validity of arbitration agreements except where the parties have unmistakably delegated the question to arbitrators. And under the ICSID Convention, the signatories expressly delegate all objections to the tribunal’s jurisdiction to ICSID tribunals. ICSID Convention art. 41(2).

3. The D.C. Circuit’s interpretation of the FSIA, not Spain’s, also best harmonizes the statute with international arbitration agreements and background contract-law principles. As Blasket explained, courts routinely hold that questions about who may benefit from arbitration agreements go to scope. Blasket BIO 23. The government does not disagree but says this case is different because it “involve[s] claims that allowing the non-signatories to invoke (or be bound by) the arbitration clauses would *ipso facto* render the clauses invalid.” U.S. Br. 13. Spain does not claim, however, that allowing an EU investor to invoke the ECT’s arbitration clause would render it invalid *in toto*. Spain has acknowledged that its agreement to arbitrate in the ECT is valid and binding with respect to non-EU investors. *See Blasket Renewable Invs., LLC v. Kingdom of Spain*, 2024 WL 4298808, at \*9 (D.D.C. Sept. 26, 2024) (noting that Spain “withdr[e]w its objection to the [tribunal’s] jurisdiction”).

And Spain’s objection that it “lacked legal capacity” to agree to arbitrate with EU investors is utterly incoherent. U.S. Br. 13. “Every State possesses capacity to conclude treaties.” Vienna Convention art. 6. And Spain does not dispute it had

capacity to agree to the ECT; thus Spain's agreement to arbitrate with Japanese investors is indisputably binding. Given that Spain does not "contend that the Treaty draws a distinction between EU and non-EU investors," U.S. Br. 18, that should be the end of its "capacity" defense. And that is why the government agrees that even if Spain prevailed on the question presented, "[t]he court of appeals on remand" would "be likely to reject Spain's reliance on EU law to justify its failure to honor the 'unconditional' promise" to arbitrate "reflected in the [ECT's] plain text." *Id.* 17 (quoting ECT art. 26(3)(a)).

That Spain and some amici now assert that "EU signatory states did not intend" the ECT to permit intra-EU arbitration does not create a jurisdictional issue. U.S. Br. 14. As an expression of intent at the time of treaty formation, the contention is risible; as the government observes, the ECT drafters could have included a disconnection clause if they intended to exempt intra-EU disputes, but instead even the EU itself signed the treaty without one. *Id.* 18. The government still frets that the FSIA would permit enforcement without a court "resolving for itself whether Spain's contention is in fact correct." *Id.* 14. But a party's claim of subjective intent generally cannot override its expressed intent in a contract—especially where, as here, that subjective intent is first discovered two decades after contracting. Pet. 6 (citing an EU court decision from 2018, twenty years after the ECT entered into force). Even taking Spain's late-blooming claim about its intent at face value, *all* questions about the scope of arbitration clauses are questions of the parties' intent. *BG Grp. plc v. Republic of Argentina*, 572 U.S. 25, 37 (2014). If a

court could take jurisdiction over an action to confirm an award only after “resolving for itself” every issue of the parties’ alleged intent, it would totally supplant the arbitral tribunal and nullify treaty standards governing award confirmation.

## II. The *Forum Non Conveniens* Issue Does Not Warrant the Court’s Review.

The shallow circuit split on the applicability of *forum non conveniens* to foreign-state arbitral award enforcement does not merit review—in this case or otherwise. Actions to confirm such awards continue to be brought in courts outside D.C., *Est. of Ke v. Yu*, 105 F.4th 648 (4th Cir. 2024), including against foreign states, *Esso Expl. & Prod. Nigeria Ltd. v. Nigerian Nat’l Petroleum Corp.*, 40 F.4th 56 (2d Cir. 2022). And *forum non conveniens* defenses to such actions continue to fail. The government characterizes the split as “important,” U.S. Br. 3, but it is more superficial than real, as the government itself implicitly acknowledges. *See id.* 21 (“[I]t is unclear whether Spain’s *forum non conveniens* argument could prevail in any circuit.”).

In *Esso*, for example, the Second Circuit rejected *forum non conveniens* based on “deference” owed to the plaintiff’s “choice of forum in the United States” and because of the “summary nature” of the confirmation proceeding. *Esso*, 40 F.4th at 71. It is unlikely that the factors applied in *Esso* will favor dismissal of any confirmation action against a foreign state because (1) U.S. “court congestion” is seldom prohibitive, (2) an international investor-state dispute is inherently not “localized,” (3) U.S. courts are familiar with treaty-based award confirmation standards, (4) juries are not

needed, and (5) confirmation rarely raises substantial questions of foreign law, particularly where states have signed the Vienna Convention (*see* art. 27), which limits domestic law-based objections to international treaty obligations. *See id.*; *Yu*, 105 F.4th at 656 (“[R]ecognizing and enforcing an arbitration award is not trying a case in the typical sense”). Where, as here, a state does rely heavily on internal law to avoid enforcement, *forum non conveniens* will not apply in any circuit for the very reason the government agrees it does not apply here: A respondent’s domestic courts will be unlikely to offer any relief. U.S. Br. 21-22.

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Matthew S. Rozen  
Jeff Liu  
Aaron Hauptman  
GIBSON, DUNN &  
CRUTCHER LLP  
1700 M Street NW  
Washington, DC 20036

Matthew D. McGill  
*Counsel of Record*  
Alexander Kazam  
KING & SPALDING LLP  
1700 Pennsylvania Ave. NW  
Washington, DC 20006  
(202) 737-0500  
matthew.mcgill@kslaw.com

Michael S. Taintor  
KING & SPALDING LLP  
1290 Avenue of the Americas  
14th Floor  
New York, NY 10104

*Counsel for Respondent*  
*Blasket Renewable Investments, LLC*

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