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

The United States largely confirms that the FSIA question warrants this Court's review. The government acknowledges that the decision below is in tension with other circuits' decisions and that further percolation is unlikely. It recognizes that the immunity question is tremendously important to foreign sovereigns, as reflected in the numerous amicus briefs from those sovereigns in support of Spain's petition. And it agrees that Spain is entitled to have a court "decide for itself de novo" whether a valid arbitration agreement exists. U.S. Br. 2.

Despite all that, the government's punchline is that review should be denied because Spain's underlying immunity defense might not prevail on remand. (Never mind that—as the government acknowledges—the *only* court to consider that defense de novo agreed with Spain and dismissed.) In short, the government asks this Court to leave in place a concededly wrong decision, consigning Spain and other foreign sovereigns to a concededly wrong jurisdictional inquiry that "will permit withdrawal of [their] sovereign immunity without a federal court's ever determining" whether they consented to arbitrate at all, *id.*—all based on two pages of analysis that breezes past Spain's lead argument below and ignores the rationale of the one court to evaluate Spain's immunity defense under the government's own standard.

The Court should decline that invitation. The government's vehicle objection is unsound, but even if the government were right, the Court should recognize that the petition more than satisfies the criteria for certiorari. That is especially so in light of the important foreign-relations implications of this case. While the Executive Branch is apparently content to

live with those implications for the time being, the federal judiciary may not be. The decision below both encourages more cross-border disputes to be filed in the United States and requires that they consume more judicial and party resources. That alone is a compelling reason for further review, notwithstanding the government's bottom-line suggestion.

The Court should also review the *forum non conveniens* question. Here too, the government concedes that the circuits are split, the issue is important, and the D.C. Circuit is wrong. Then, in the final paragraph of its brief, the government halfheartedly announces that the "current record" makes this a poor vehicle because it's "unclear" whether Spain has "attachable assets" in an adequate alternative forum. U.S. Br. 21–22. But it's hard to take that argument seriously when respondents haven't raised it—because all three are busy suing Spain elsewhere.

The Court should grant the petition, reverse the D.C. Circuit, and leave remand questions for remand.

I. The FSIA question warrants review.

A. The government all but concedes that the FSIA question is certworthy.

The government largely agrees with Spain. It joins Spain in arguing that the decision below is wrong and that respondents' efforts to defend it are unsound. It recognizes the "critical" stakes for foreign sovereigns—the difference between "de novo" review of jurisdictional issues and "highly deferentia[l]" review (or no review at all) of merits issues. U.S. Br. 2. And while the government tries to minimize the circuit split, it acknowledges the "tension" between the D.C. Circuit and the Second and Fifth Circuits. *Id.* at 16.

1. The government's efforts to downplay the conflict are unpersuasive. Far from offering "unelaborated assumptions," U.S. Br. 16, both the Second Circuit and the Fifth Circuit expressly treated consent questions as jurisdictional—precisely the opposite of what the D.C. Circuit did below.

Second Circuit. The government professes confusion over *Cargill*'s remand instructions to "tak[e] the plaintiff's allegations as true (instead of determining the actual facts)." U.S. Br. 15–16 (citing *Cargill Int'l S.A.* v. *M/T Pavel Dybenko*, 991 F.2d 1012 (2d Cir. 1993)). Yet that is exactly what the court would've said if it viewed the consent inquiry as jurisdictional. Cf. *In re Magnetic Audiotape Antitrust Litig.*, 334 F.3d 204, 206 (2d Cir. 2003) ("We credit a plaintiff's averments of jurisdictional facts as true."). This Court has since told district courts to "resolve relevant factual disputes" when FSIA questions "turn upon further factual development." *Bolivarian Republic of Venezuela* v. *Helmerich & Payne Int'l Drilling Co.*, 581 U.S. 170, 174 (2017). But nothing about the court's pre-*Helmerich* statements suggests that it viewed consent as anything other than jurisdictional.

Fifth Circuit. According to the government (at 15–16), any conflict between *Al-Qarqani* and the decision below is "tenuous at best" because the basis for the Fifth Circuit's decision is "unclear." U.S. Br. 15–16 (citing *Al-Qarqani* v. *Saudi Arabian Oil Co.*, 19 F.4th 794 (5th Cir. 2021)). Hardly. The Fifth Circuit held that §1605(a)(6) "d[id] not apply" because "there exist[ed] no agreement among the parties to arbitrate." 19 F.4th at 802. It did not reach that conclusion because "arbitration proceedings there had been a 'sham.'" U.S. Br. 16. Had it done so, the court would have affirmed the district court, which denied the pe-

tition on that very basis. See *Al-Qarqani* v. *Arab Am. Oil Co.*, 2020 WL 6748031, at *11 (S.D. Tex. Nov. 17, 2020) (citing New York Convention art. V(1)(d)). Instead, the Fifth Circuit vacated the judgment and ordered the case "dismissed for lack of jurisdiction." 19 F.4th at 802. The United States recognized as much in its amicus brief below. See U.S. C.A. Br. 13–14.

2. Eventually, the government changes tack and urges the Court to allow "further percolation." U.S. Br. 16. But it immediately concedes that venue rules make that "less likely." *Id.* The government is right: now that it is so easy to bypass sovereign immunity in the D.C. Circuit, why (absent malpractice) would an FSIA plaintiff file anywhere else?

B. This case is the ideal vehicle.

1. The government identifies no vehicle defects that would frustrate review. The FSIA question was squarely decided, is cleanly presented, and has been extensively briefed by the parties and amici. There are no factual disputes or alternative holdings. And the government evidently disagrees with most of respondents' vehicle objections. It doesn't think the arbitrators' decisions are "controlling." *Contra* Blasket Br. 24–25. It doesn't deny that Spain's arguments were pressed and passed on. *Contra* Blasket Br. 24. And it has always agreed with Spain that this case hinges on the FSIA's arbitration exception. See U.S. C.A. Br. 19–25 (waiver exception doesn't apply).

If anything, the invitation brief highlights what makes this case a compelling vehicle. As the government acknowledges (at 16–17), this is the first of "many cases arising out of the D.C. Circuit" involving the same issues. If the government is right, the decision below will warp the jurisdictional analysis in all

of those cases—"permit[ting] withdrawal of [foreign] sovereign immunity without a federal cour[t] ever" assessing immunity under the correct legal standard. U.S. Br. 2. The D.C. Circuit has already denied en banc review, and the government doesn't claim it will reconsider. And while the government offers vague generalities about "other investment treaties," U.S. Br. 16, it identifies no vehicle better positioned (let alone better briefed) than this one. In short: this case is likely the Court's best-ever opportunity to review an important issue that affects not only Spain but also every other EU Member State.

2. Despite all that, the government urges denial because "the courts below would likely" disagree with Spain "on remand." U.S. Br. 8, 17. That's a bold prediction, based purely on guesswork. Before the decision below took circuit precedent off the rails, the district court in *Blasket* analyzed Spain's immunity objections under the de novo standard the government now endorses. As the government quietly admits (at 6), that court agreed with Spain's defenses, found Spain immune, and dismissed. The government never engages the district court's rationale. Instead, it invites this Court to speculate about whose "view" the D.C. Circuit panel "appeared to favor." U.S. Br. 18. There is no basis for doing so. The panel took "no position on the ultimate enforceability of these awards," App. 27a, and the government overlooks the tea leaves that spoil its reading. See App. 38a (respondents "may struggle" because "treaty signers reject" their interpretation).

Regardless, the government's vehicle objection is a nonstarter. While this case would be certworthy in all events, the government's objection is also unsound and provides no basis to deny review.

a. The government's objection is immaterial.

This Court routinely dismisses bottomside predictions that the petitioner will lose on remand. Take *Barnes* v. *Felix*, where the respondents urged the Court to deny cert because the officer would ultimately win on qualified-immunity grounds. See BIO at 20–23, *Barnes* v. *Felix*, 605 U.S. 73 (2025) (No. 23-1239); *Barnes* v. *Felix*, 152 F.4th 669, 677 (5th Cir. 2025) (bearing this out). But the Court granted review anyway. It has done likewise despite similar predictions in the FSIA context. Compare BIO at 30, *Cassirer* v. *Thyssen-Bornemisza Collection Found.*, 596 U.S. 107 (2022) (No. 20-1566), with *Cassirer* v. *Thyssen-Bornemisza Collection Found.*, 142 S. Ct. 55 (2022) (mem.). And it takes the government's warnings with a grain of salt too. Compare, *e.g.*, U.S. BIO at 24, *United States ex rel. Polansky* v. *Exec. Health Res., Inc.*, 599 U.S. 419 (2023) (No. 21-1052), with *United States ex rel. Polansky* v. *Exec. Health Res., Inc.*, 142 S. Ct. 2834 (2022) (mem.). This case meets all the criteria for certworthiness, so speculation about remand is no reason to deny review.

b. The government's objection is also unsound.

The government assumes that the Vienna Convention on the Law of Treaties resolves this case, but the parties dispute that premise, and no court has squarely resolved it. Even on its own terms, however, the government's analysis fails to do business with the arguments that Spain and its amici raised below, let alone the overwhelming weight of authority that favors Spain's position.

i. Like respondents, the government begins in the weeds of international law. But that skips over the FSIA itself and the threshold questions under

§1605(a)(6). Spain briefed these issues extensively below, but the government engages none of its arguments. That alone should make the Court hesitate.

This case arises under the FSIA, not the Energy Charter Treaty or the Vienna Convention (neither of which the United States has joined). Under the FSIA, Spain's immunity turns on whether it formed an "agreement," as §1605(a)(6) uses that term. But the FSIA "provides no guidance on how covered agreements can be made." *TIG Ins. Co.* v. *Republic of Argentina*, 110 F.4th 221, 234 (D.C. Cir. 2024). So the D.C. Circuit has analogized to this Court's domestic-arbitration precedents and looked to "an external body of law." *Id.* (citation omitted).

What body of law should inform the §1605(a)(6) analysis? The Vienna Convention is unsurprisingly mum on that federal-courts question, and the government doesn't analyze it either. But the answer is obvious. When federal courts confront a contract-formation issue that involves an EU Member State and EU investors and stems from a dispute that arose in the EU and a treaty that governs "bilateral relationships between" EU Member States, E.C. Br. 6 (cleaned up), EU law is the natural place to turn. Cf. Vienna Convention art. 31(3)(c) (mandating consideration of international-law rules "applicable in the relations between the parties")

If the lower courts consult EU law on remand, this case will be over. EU law is "crystal clear" that Spain "did not—and could not—offer to arbitrate the disputes that led to the awards in these cases." E.C. Br. 11. (The government contests none of this—again parting ways with respondents.) And if "[n]o arbitration agreement was ever formed," then §1605(a)(6) doesn't apply. This was Spain's lead argument below,

e.g., C.A. Br. for Appellee 40–44 (No. 23-7038), yet the government offers no response.

ii. In all events, the government's international-law analysis fails on its own terms. The government begins (at 17) by plucking the phrase "unconditional consent" from the Energy Charter Treaty. It then brandishes the Vienna Convention and insists that Spain can't invoke "internal law" to justify "failure to perform" or to "invalidate its consent." U.S. Br. 17.

First some low-hanging fruit. No one is trying to justify nonperformance or invalidate consent: Spain, the EU, and its other Member States say there was never a valid agreement *ab initio*. If they are right about that first-order formation question, second-order performance questions never arise. Nor is Spain relying on "internal law." *Contra* U.S. Br. 18. As the Court of Justice has explained (and the district court in *Blasket* recognized, App. 143a), EU law "deriv[es] from an international agreement between the Member States," *Slovak Republic* v. *Achmea B.V.*, Case C-284/16, EU:C:2018:158, ¶ 41 (Mar. 6, 2018). *See also* Statute of the International Court of Justice, art. 38(1) (recognizing "international conventions, whether general or particular" as among the sources of international law). EU law thus is "public international law" that governs relationships "between all Member States." E.C. *Blasket* C.A. Br. 24.

Now turn to the text of the Energy Charter Treaty itself (the part the government omits). Article 26 governs "[d]isputes between a Contracting Party and an Investor of *another* Contracting Party relating to an Investment of the latter in the Area of the former" (emphasis added). In short, the investor bringing the claim must be from a Contracting Party other than the one it has sued. Meanwhile, "Contracting Party"

includes a "Regional Economic Integration Organisation" like the EU. Art. 1(2); *see also* Art. 1(3) (states may "transf[er] competence over certain matters" to a "Regional Economic Integration Organisation"). And with respect to such Organisations, "Area means the Areas of the member states." Art. 1(10). Thus, in an intra-EU dispute, the relevant Contracting Party on both sides is the EU itself; the investor is not from "another" Contracting Party as Article 26 requires. That makes sense: the Treaty was "an instrument of the EU's external energy policy," not an internal dispute-resolution mechanism. E.C. *Blasket* C.A. Br. 8.

Nor was there any need for a "disconnection clause." *Contra* U.S. Br. 18. When the EU joined the Treaty as the only Regional Economic Integration Organisation (after proposing that term), that made it clear that EU law governed relations between Member States. *See* E.C. *Blasket* C.A. Br. 18-19.

That is how the Energy Charter Treaty's EU signatories understand their agreement. See generally *Medellín* v. *Texas*, 552 U.S. 491, 507 (2008) (consulting "'postratification understanding' of signatory nations" as an "ai[d]" to treaty interpretation); Vienna Convention art. 31(3)(a) (mandating consideration of postratification agreements regarding treaty interpretation). The EU and 26 Member States have formally reaffirmed their "common understanding" that Article 26 of the Treaty "cannot and never could serve as a legal basis for intra-EU arbitration proceedings." E.C. Br. 11. (The government's brief omits this detail too.) Nor are they the only ones. The district court in *Blasket* shares Spain's view. So do the Court of Justice of the European Union and Germany's highest court. See Pet. 14; *Slovak Republic* v. *Achmea B.V.* Case I ZB 2/15, ¶ 32 (Oct. 31, 2018). The European

Commission agrees, as do the home countries of NextEra, 9REN, and Blasket's predecessors-in-interest, along with multiple arbitral panels. Pet. 14. That should make the Court pause before allowing the decision below to insulate an issue of such sweeping importance from de novo judicial review.

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

The government admits that the *forum non conveniens* question is certworthy: the circuits are split, the issue is important, and the decision below is wrong. See U.S. Br. 19–21. And while respondents spend pages insisting that Spain would lose on remand, the government conspicuously declines to join those arguments. The government does not claim that "the public and private interest factors … weigh against dismissal." NextEra Br. 31; Blasket Br. 32. Nor is it concerned that *forum non conveniens* dismissal might require respondents to "pursue a *different* action" abroad. Blasket Br. 34. And it evidently disagrees that *forum non conveniens* is inapplicable "in actions to enforce ICSID or New York Convention awards." NextEra Br. 34; Blasket Br. 35.

But the government's brief then pulls a rabbit out of its hat and presents a vehicle argument that respondents declined to raise. The government newly worries that "the record" is not "clear" as to Spain's "attachable assets" in "plausibly available" fora. U.S. Br.at 22; see *id.* at 21 (claiming it "unclear" whether Spain "could prevail" on remand "[a]t least on the current record"). So the Court should deny cert because Spain "might well" still lose after a favorable decision, at least "as the record now stands." *Id.* at 22. The idea seems to be that an otherwise certworthy question about the availability of a given defense

should be denied unless "the record" available at the cert stage "clear[ly]" establishes all factual predicates needed to prevail on that defense. *Id.*

The first problem with that argument is that this Court routinely decides such threshold questions—even when the "record" makes it "unclear" who will win on remand. *E.g.*, *Lucky Brand Dungarees, Inc.* v. *Marcel Fashions Grp.*, 590 U.S. 405, 410–11 (2020); *Dupree* v. *Younger*, 598 U.S. 729, 738 (2023).

Nor does the government say what record development it envisions. No better-developed factual record will arise from the D.C. Circuit, where *forum non conveniens* defenses are dead on arrival. And it doesn't suggest that the Court hold its breath for a petition from another circuit where such defenses can proceed. (Small wonder, given the venue rules and incentives that channel "cases against foreign states" to D.C. U.S. Br. 21.)

The government's fears are also baseless. The question is "whether a party can *bring* a claim in the alternate forum," not whether it will "ultimately *prevail*." *Aenergy, S.A.* v. *Republic of Angola*, 123 F.4th 1351, 1359 (D.C. Cir. 2024). So contra the government (at 22), the courts below will be free to consider dismissal to a European forum. And anyhow, the government's concerns about "unresolved factual issues" ring especially hollow when respondents—who are all currently suing Spain in Australia—profess no trouble finding a "non-European forum." U.S. Br. 4, 22; see NextEra Supp. Br. 1–3.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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