No. 15-1088

In the Supreme Court of the United States

THE REPUBLIC OF ECUADOR,
PETITIONER

v.

CHEVRON CORPORATION AND TEXACO PETROLEUM COMPANY, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

Chevron does not dispute the importance of who bears the burden of proving (or disproving) the facts supporting FSIA jurisdiction—an issue in *every* FSIA case—or the standard for reviewing non-Article III findings under the Act's arbitration exception. Nor does Chevron dispute that two-thirds of the Court's FSIA cases involved no circuit split, or that the circuits' burden-shifting rule rests entirely on a paragraph of legislative history—one that conflicts with the Act's text and this Court's holdings that the plaintiff must "carry throughout the litigation the burden of showing that he is properly in court." *McNutt*, 298 U.S. at 189. Further, Chevron does not deny that "a sovereign's consent to arbitration is important" (*BG Group*, 134 S. Ct. at 1212)—a point confirmed by Bolivia's brief, hundreds of similar treaties, and the withdrawal of many nations from BITs.

Rather, Chevron's opposition rests almost entirely on two waiver arguments—first, that Ecuador waived its challenge to the D.C. Circuit's determination that foreign sovereigns bear the ultimate burden of disproving jurisdictional facts; and second, that the petition fails to contest the D.C. Circuit's holding that the arbitrability of Chevron's claims was a nonjurisdictional fact. Both arguments are demonstrably false.

As to the first, Ecuador did not "concede" the "correctness" of the jurisdictional burden-shifting rule to which it objects. *United States* v. *Williams*, 504 U.S. 36, 44 (1992). As Ecuador stated in the very sentence of its brief quoted by Chevron: "*This Court* applies a burden-shifting analysis to determine whether an [FSIA] exception applies," under which "'the burden of persuasion rests with the foreign sovereign.'" C.A.

Br. 21 (quoting *Chabad*, 528 F.3d at 940) (emphasis added). Thus, Ecuador simply acknowledged that the burden-shifting rule was, as Chevron admits, "dictated by circuit precedent." Opp. 7. And this Court has refused to require "that a party demand overruling of a squarely applicable, recent circuit precedent." *Williams*, 504 U.S. at 44.

Moreover, Chevron ignores this Court's "traditional rule," which "precludes a grant of certiorari only when the question presented was not pressed or passed upon below"—and thus "permit[s] review of an issue not pressed so long as it has been passed upon." *Id.* at 41 (quotations omitted). The D.C. Circuit indisputably passed on the question here. Thus, review is proper.

Chevron also maintains that the petition does not challenge the D.C. Circuit's determination that whether Chevron's lawsuits are "investments" under the governing BIT is a nonjurisdictional fact. Opp. 12–13. Yet the question presented challenges the court's entire jurisdictional analysis. Pet. i ("[w]hether the D.C. Circuit erred in holding that there is FSIA jurisdiction over this suit"). Further, the body of the petition not only disapprovingly quotes (at 10) the statement that Chevron says it "ignores" (Opp. 13), but contests the court's view that arbitrability is not an FSIA "jurisdictional fact." *E.g.*, Pet. 19, 13. Not surprisingly, Chevron does not point to any meaningful difference between stating that arbitrability *is* "a jurisdictional fact" under the FSIA and stating that arbitrability *is not* merely a merits issue. Those points are flip sides of the same coin.

Indeed, the D.C. Circuit itself framed this very issue in "jurisdictional" terms elsewhere in its opinion.

Pet. 10a–11a. And Chevron does not claim to have been confused by the petition. In fact, Chevron's *own* question presented concedes that whether Chevron's arbitral claims "fall within the scope of the arbitration agreement" is before the Court. Opp. i.

In sum, Chevron does not seriously contend that the Court *should not* resolve the question presented, if preserved—just that the Court *cannot* do so here. But Chevron's waiver theories are unfounded. And given the importance of the question presented to investor-state arbitration and foreign states' willingness to enter into BITs, review is warranted. At a minimum, the Court should call for the views of the Solicitor General. *E.g.*, *Bolivarian Republic of Venezuela* v. *Helmerich & Payne Int'l Drilling Co.*, 136 S. Ct. 1242 (2016); *OBB Personenverkehr AG* v. *Sachs*, 134 S. Ct. 2328 (2014).

ARGUMENT

I. Ecuador did not waive its challenge to the D.C. Circuit's jurisdictional burden-shifting rule.

Unable to dispute the importance of who bears the burden of proof as to FSIA jurisdiction, Chevron suggests that Ecuador did not preserve this question. Opp. 1, 8–10. But even if subject-matter jurisdiction were waivable, Ecuador neither waived nor forfeited its jurisdictional challenge by submitting below to an analytical framework that Chevron admits was "dictated by circuit precedent." Opp. 7.

A. This Court's "traditional rule" "precludes a grant of certiorari only when the question presented was not pressed or passed upon below." *Williams*, 504 U.S. at 41 (quotations omitted). Courts can "pass

upon" an issue by acknowledging and applying a particular standard—as the D.C. Circuit did below. In *Williams*, the Tenth Circuit acknowledged and applied the relevant standard in a single paragraph. 899 F.2d 898, 900 (10th Cir. 1990). This Court in turn had "no doubt" that "the Tenth Circuit decided the crucial issue" by "[r]elying upon, and to some extent repeating, the reasoning of [an] earlier holding." 504 U.S. at 43 & n.4.

So too here. The D.C. Circuit "repeated" and "relied upon" its "earlier holding" in *Chabad*. See Pet. 6a–8a. As in *Williams*, therefore, the court "passed upon" the issue, permitting review on certiorari. Indeed, "the Court has never adhered[]" to a rule "limiting review to questions pressed by the litigants below." *Williams*, 504 U.S. at 42 n.2.

B. *Williams* expressly rejected "impos[ing], as an absolute condition to our granting certiorari upon an issue decided by a lower court, that a party demand overruling of a squarely applicable, recent circuit precedent." *Id.* at 44. Planting an impotent "flag" (Opp. 10) is unnecessary.

The government in *Williams* had "conceded * * * not that the responsibilities [circuit precedent] had imposed were proper, but merely that [an earlier panel] had imposed them," creating "binding precedent." 504 U.S. at 44. Likewise, the very sentence that Chevron quotes in asserting forfeiture demonstrates that Ecuador did not endorse *Chabad*'s burden-shifting framework, but rather acceded to the re-

ality that "[t]his Court [the D.C. Circuit] applies" it. Opp. 9 (quoting C.A. Br. 21).[1]

C. Chevron's waiver argument also fails for another reason—subject-matter jurisdiction objections are non-waivable. *E.g.*, *Clinton* v. *City of New York*, 524 U.S. 417, 428 (1998) ("the Government did not question the applicability of [a statutory] section" below, but "[b]ecause the argument poses a jurisdictional question * * * it is not waived"); *Gutierrez* v. *Waterman S.S. Corp.*, 373 U.S. 206, 209 (1963) (deciding jurisdiction where counsel "candidly admits failure to raise the point below").

Accordingly, there is no basis to Chevron's leading argument—that Ecuador "waived its argument about *how* a court should decide whether jurisdictional facts required by section 1605(a)(6) exist." Opp. 1. Ecuador did not, and indeed could not, waive that question. And since there is no serious debate that the question is important, the Court should decide it.

II. The petition challenges the entire jurisdictional analysis below, including the court's determination that arbitrability is a nonjurisdictional fact.

Chevron also insists that "Ecuador's petition ignores th[e] key holding below"—that "'[t]he dispute over whether [Chevron's breach-of-contract] lawsuits

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[1] The government was also a party in the earlier Tenth Circuit case that adopted the challenged rule, and had objected to it there. 504 U.S. at 44. But Ecuador could not have objected when the D.C. Circuit adopted its jurisdictional rule in *Chabad*, and *Williams* is "applicable to all parties" (*id.* at 45), not just those who were a party in the original case.

were 'investments' for purposes of the treaty is properly considered as part of review under the New York Convention'" rather than as an FSIA jurisdictional fact. Opp. 12–13 (quoting Pet. 10a). That is, Chevron says Ecuador has abandoned the contention that it has advanced, in Chevron's words, "in all of its many court challenges to this award." Opp. 11. Yet Chevron does not suggest that it misunderstood the petition. Nor could it, given Ecuador's question presented and the body of the petition. Indeed, Chevron's *own* question presented confirms that whether Chevron's arbitral claims "fall within the scope of the arbitration agreement" is before the Court. Opp. i.

A. Ecuador's question presented—"[w]hether the D.C. Circuit erred in holding that there is FSIA jurisdiction over this suit"—encompasses the entire jurisdictional analysis below, including the court's statement that arbitrability is a nonjurisdictional fact. If any doubt remained, the balance of the petition would dispel it. The petition not only disapprovingly quotes (at 10) the statement it supposedly "ignores" (Opp. 13), but repeatedly criticizes the court insofar as it failed to treat arbitrability as "a jurisdictional fact" under the FSIA. Pet. 19, 13; see Pet. 31 ("FSIA jurisdiction here turns on whether Chevron had an 'investment' under the BIT. If so, Chevron's notice of arbitration accepted Ecuador's offer to arbitrate. If not, there was no agreement, and thus no jurisdiction."); 34 ("the D.C. Circuit's conclusion that Ecuador agreed to arbitrate Chevron's claims turns the BIT's definition of 'investment' and its non-retroactivity provision upside down"); 3; 9–10; 28; 36.

Chevron's argument is thus a sleight of hand. Much as a glass can be "half empty" or "half full,"

stating that arbitrability is "a jurisdictional fact" under the FSIA and stating that arbitrability is *not* only a merits issue under the New York Convention are different ways of saying the same thing. Moreover, the D.C. Circuit itself spoke of this issue in jurisdictional terms, stating: "[T]o prevail on its *jurisdictional* argument, Ecuador would have to demonstrate by a preponderance of the evidence *that Chevron's suits were not 'investments' within the meaning of the BIT*." Pet. 10a–11a (emphasis added). And if, as the petition shows, the D.C. Circuit's jurisdictional analysis is wrong, its merits analysis is irrelevant.[2]

B. According to Chevron, the D.C. Circuit independently found (it was undisputed) that the Treaty and Chevron's notice of arbitration existed. Opp. 14–15. Thus, the argument goes, "because 'Ecuador does not dispute the existence of the BIT [or] Chevron's notice' of arbitration," the existence of an agreement to arbitrate "is equally undisputed." Opp. 11.

That assertion, however, assumes its own conclusion—that the mere existence of the BIT and notice of arbitration *in fact comprise* an agreement to arbitrate. They do not. The FSIA makes an *agreement* to arbitrate a jurisdictional prerequisite, so courts must find more than an *offer* to arbitrate before exercising jurisdiction. They must find that the offer and acceptance match.

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[2] The petition does not ignore the D.C. Circuit's nominally de novo analysis (Opp. 18), but rather explains (at 10–11) and attacks it—both for shifting the burden of proof to Ecuador, which infected the entire opinion, and for violating the presumption against retroactivity (at 16, 21, 31–34).

On its own, however, a BIT is simply "a standing offer" to arbitrate disputes with investors. Pet. 3a. That much *is* undisputed. Opp. 2; Pet. 6. Unless the offer "is accepted" on "the terms in which [it] [i]s made," it "imposes no obligation." *Eliason* v. *Henshaw*, 4 Wheat. 225, 228 (1819); see Z. Douglas, The International Law of Investment Claims 76 (2009) ("The undertaking to arbitrate in the investment treaty itself contains those terms on jurisdiction; the validity of the agreement to arbitrate is contingent upon the investor claimant's acceptance of them.").

The existence of a notice of arbitration is thus a necessary but insufficient element of the D.C. Circuit's conclusion that there is an "arbitration agreement between the parties" (Pet. 8a), satisfying the FSIA's jurisdictional requirement. The BIT offers to arbitrate only defined "investment dispute[s]." Pet. 110a–111a. Thus, a notice of arbitration that does not present such an "investment dispute" does not accept the BIT's offer on its terms—and therefore does not consummate an agreement to arbitrate.

C. The jurisdictional nature of arbitrability under the FSIA renders it irrelevant that parties can otherwise agree to arbitrate arbitrability under institutional rules. Opp. 2, 17–18. "[Arbitral] rules do not operate until a dispute is properly before an arbitral tribunal * * * . 'If the parties have not validly agreed to any arbitration agreement at all, then they also have necessarily not agreed to institutional arbitration rules.'" *BG Group*, 134 S. Ct. at 1223 (Roberts, C.J., dissenting) (quoting 1 G. Born, International Commercial Arbitration 870 (2009)). "In these circumstances, provisions in institutional rules cannot

confer any [such] authority upon an arbitral tribunal." *Ibid.*

Regardless, the arbitrators' purported authority is immaterial to whether there is federal subject-matter jurisdiction when Congress requires an agreement to arbitrate as a predicate jurisdictional fact. See *VRG Linhas Aerea S.A.* v. *MatlinPatterson Global Opportunities Partners II L.P.*, 717 F.3d 322, 325 n.2 (2d Cir. 2013) ("[Absent] any arbitration agreement," "'questions of arbitrability' could hardly have been clearly and unmistakably given over to an arbitrator."). By citing the UNCITRAL Rules only in *Part III* of its opinion—which addresses Ecuador's *merits-based* defenses to confirmation—the D.C. Circuit implicitly recognized as much. Pet. 14a.

D. Chevron's final putative roadblock to certiorari—its "alternative argument" that it need only "assert" rather than prove an agreement to arbitrate (Opp. 18–19)—conflicts with the Act's text. *Chabad* found that another FSIA exception presented two types of jurisdictional questions: (1) those that require proving "factual predicates" that "must * * * be resolved in the plaintiff's favor before the suit can proceed"; and (2) those that only "depend[] on the plaintiff's asserting a particular type of claim." 528 F.3d at 940–941. And as the court below recognized, proof of an agreement under the arbitration exception is of the former type—a predicate "jurisdictional fact[]." Pet. 6a. Unlike the requirement that the arbitral award "is *or may be* governed by a treaty" (§ 1605(a)(6) (emphasis added)), the requirement of an agreement to arbitrate is not satisfied merely by putting the existence of such an agreement in issue. Pet. 6a–7a & n.2. Thus, Chevron cannot reconcile its proposed "alterna-

tive" with the Act's text. Indeed, Chevron does not even try.

III. Chevron does not seriously dispute that the question presented is otherwise certworthy.

Once the smoke clears from Chevron's waiver arguments, nothing remains of its opposition.

A. Chevron says "the question presented has not occasioned a circuit split." Opp. 19–20. But that was true in eight of this Court's twelve FSIA cases, many of which presented "narrow" or non-recurring issues. Pet. 29 & nn.13–14, 30. Further, because every circuit applies the D.C. Circuit's jurisdictional burden-shifting rule, no further percolation is needed.

According to Chevron, the fact that this rule "applies everywhere" means "[p]laintiffs have no reason" to choose the District of Columbia. Opp. 20. But the D.C. Circuit, where venue is always proper (Pet. 30), *both* shifts the burden on jurisdiction to the foreign state *and* defers to non-Article III arbitrators as to the existence of an agreement to arbitrate. No sensible investor would neglect those advantages—which further confirms that no split is likely to develop.

B. Chevron outright ignores the conflict between the decision below and *McNutt*, *Kokkonen*, and *Cuno*. Pet. 14–18 & n.2. As to *Verlinden*, Chevron asserts that all twelve circuits adopted the burden-shifting rule "since *Verlinden* was decided." Opp. 21. That is incorrect. *Arango* v. *Guzman Travel Advisors Corp.*, 621 F.2d 1371, 1378 (5th Cir. 1980) (relying on the FSIA's House Report). More importantly, however, *no circuit* has attempted to reconcile shifting the jurisdictional burden with *Verlinden*, the FSIA's text, or this Court's holdings that plaintiffs bear the bur-

den of proving jurisdiction "throughout the litigation." *McNutt*, 298 U.S. at 189; see also *de Sanchez* v. *Banco Central de Nicaragua*, 515 F. Supp. 900, 903 (E.D. La. 1981) (the House Report "is in contrast to the usual rule" that "the plaintiff bears the burden of proving [subject matter jurisdiction]").

B. As to the conflict between the decision below and this Court's holdings that waivers of sovereign immunity are narrowly construed (Pet. 19–20), Chevron says this rule applies only to the United States (Opp. 21–22). But that is both incorrect and the antithesis of international comity. See *BG Group*, 134 S. Ct. at 1219–1220 (Roberts, C.J., dissenting); *Frolova* v. *Union of Soviet Socialist Republics*, 761 F.2d 370, 377 (7th Cir. 1985) ("Cases involving arbitration clauses illustrate that provisions allegedly waiving sovereign immunity are narrowly construed."); *Aquamar, S.A.* v. *Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279, 1292 (11th Cir. 1999) (a foreign sovereign "must give a 'clear, complete, unambiguous, and unmistakable' manifestation of [its] intent to waive its immunity" (citation omitted)). And if the question remained open, that would only strengthen the case for review.

Nor does Ecuador's reliance on waiver principles reflect a "basic misapprehension of how foreign sovereign immunity works." Opp. 22. Indeed, courts previously analyzed claims of jurisdiction based on alleged agreements to arbitrate under the waiver exception, construing such alleged implied waivers narrowly. *Frolova*, 761 F.2d at 377.

C. Chevron does not deny that this Court's precedents bar retroactively applying statutes and treaties, or that the BIT only "appl[ies] to investments

existing at the time of entry into force" or "made or acquired thereafter." Pet. 115a. The D.C. Circuit shoehorned Chevron's lawsuits into the BIT's definition of "investment" by determining that they were "continuations of [Chevron's pre-BIT] original investment," and that the BIT's non-retroactivity provision "applies only to 'investments' as defined by Article I, and *not* to the use of the term 'investments' within the [BIT's] definitional paragraph." Pet. 21 (quoting Pet. 11a–12a).

Chevron restates this conclusion (Opp. 22–23) but nowhere acknowledges the interpretive gymnastics required to reach it. Chevron also ignores the fact that, because "investment" is repeated twice in the same *sentence* of Article I, the "presumption that [it] is used to mean the same thing throughout" is "at its most vigorous." *Mohamad*, 132 S. Ct. at 1708.

CONCLUSION

The petition for certiorari should be granted. Alternatively, the Court should invite the views of the Solicitor General.

Respectfully submitted.

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