No. 16-135

IN THE

Supreme Court of the United States

GOVERNMENT OF BELIZE,
Petitioner,

v.

NEWCO LIMITED,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the lower courts properly refused to dismiss this New York Convention award-enforcement proceeding under the doctrine of *forum non conveniens* (a) where Belize offers no adequate alternative forum because the United States, as the site of the arbitration, is the only forum with primary jurisdiction over the award and (b) where the balance of the public and private interests counsel against dismissal because the parties formed a strong connection with the United States when they chose it as the site of the arbitration.

2. Whether the lower courts correctly rejected application of the public-policy defense to enforcement of a foreign arbitral award under Article V(2)(b) of the New York Convention where the party opposing enforcement failed to establish that enforcement would violate any "explicit" or "well-defined and dominant" public policy of the United States.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, Respondent Newco Limited states that it is a special-purpose entity formed to operate and improve Belize's international airport. Newco's shareholders are LCG Airport Holdings, LLC; 42 North Holdings Corp.; and Airport Holdings, LLC. No publicly held company owns 10% or more of its stock.

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BRIEF IN OPPOSITION

INTRODUCTION

The Government of Belize's petition for a writ of certiorari presents nothing worthy of this Court's attention. This case does not even implicate the questions it purports to raise. And the questions themselves do not require this Court's guidance to answer. The Court should deny review.

The Government of Belize's first question presented claims a circuit split on the adequate-alternative-forum prong of the *forum non conveniens* doctrine. But this case does not implicate that asserted division in authority. Even if the Government of Belize were correct that Belize could be an adequate alternative forum with respect to enforcement of an award made against Belize *outside* the United States, the arbitral award at issue here was made—by agreement of the parties—*inside* the

United States. Under the New York Convention, the courts of the United States therefore have primary jurisdiction over the award. Because the underlying award was not made in Belize, Belize is not capable of exercising primary jurisdiction over the award under the New York Convention and therefore cannot be an adequate alternative forum even under the Second Circuit's approach.

Moreover, the second step of the *forum non conveniens* analysis—balancing the private and public interests—also counsels dispositively against dismissal because the parties formed a strong connection with the United States when they chose it as the site of the arbitration. That fact eliminates any potential problems with foreign evidence and foreign law. The balance of the interests thus indisputably precludes *forum non conveniens* dismissal regardless of whether the D.C. Circuit erred in its adequate-forum analysis.

The Government of Belize's second question presented similarly offers nothing that warrants this Court's consideration. There is no disagreement among the circuits on the meaning or application of the public-policy defense to enforcement of a foreign arbitral award. Courts uniformly recognize that the public-policy defense requires an explicit or well-defined and dominant public policy of the country in which enforcement is sought. And the Government of Belize fails to identify any explicit or well-defined and dominant public policy of the United States—as opposed to a public policy of Belize—that would prevent enforcement of the award in this case. The outcome would be the same no matter which circuit decided the case.

The Government of Belize's petition in this case is foreclosed by this Court's precedent and fails to raise any issue that could merit review. The United States was the agreed-upon site of the arbitration in this case. That undisputed fact defeats any argument in favor of denying

the United States the power to enforce the award within its borders, and it renders this case an especially poor vehicle for reviewing the questions presented.

The petition should be denied.

STATEMENT

I. BACKGROUND

A. The Government of Belize's breach of contract and the resulting arbitral award against it

In 2002, Newco Limited and the Government of Belize entered into a 30-year Concession Agreement for Newco to operate and develop Belize's international airport. Pet. App. 2. The Concession Agreement included a dispute-resolution clause providing for arbitration of any controversy under the Concession Agreement under the UNCITRAL Arbitration Rules in Miami, Florida. *Id.* at 6.

The Government of Belize repudiated the Concession Agreement less than a year later. *Id.* at 2. Newco responded by invoking the Concession Agreement's arbitration provision, and the parties arbitrated the dispute in Miami. *Id.* at 2, 6. In 2008, the arbitral tribunal unanimously issued a final award (the "Award") in favor of Newco. *Id.* at 10. It concluded that the Government of Belize had breached the Concession Agreement and awarded Newco $4,259,832.81,[1] plus post-award interest. *Id.* at 6.

B. The Government of Belize's post-arbitration efforts to avoid the Award in Belize

The Government of Belize responded to the Award by writing to Newco and raising two new objections that Be-

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[1] All currency references are in U.S. dollars unless otherwise noted. Belize pegs its currency at a 2-to-1 ratio to U.S. dollars. See Central Bank of Belize, *Monetary Policy*, https://www.centralbank.org.bz/financial-system/monetary-policy.

lize had not presented in the arbitration: (1) notwithstanding that the Concession Agreement itself mandated payment in U.S. dollars,[2] the Award should have been expressed and made payable in Belize dollars to a bank account in Belize; and (2) Newco owed the Government of Belize approximately $2.7 million in unpaid income taxes (an amount slightly higher than the Award's $2.6 million principal damages component) that must be subtracted from the Award. Pet. App. 2. This was the first time that the Government of Belize had mentioned a tax bill, despite the fact that it ostensibly included amounts owed from 2003 to 2008. C.A. App. 298. Newco purportedly owed those taxes despite never earning any revenue because of the Government of Belize's swift termination of the Concession Agreement. *Id.* at 299. The Government of Belize also made this tax demand despite the Concession Agreement's express provision that "[t]he GOB shall grant NEWCO a ten (10) year tax holiday under the Fiscal Incentive Act and other applicable Belize laws." *Id.* at 91.

Newco filed this action in the U.S. District Court for the District of Columbia to confirm the Award under the New York Convention.[3] Pet. App. 2. The Government of Belize responded by initiating a lawsuit against Newco in Belize requesting a worldwide anti-suit injunction against Newco and declarations that (1) the Government of Belize was entitled to deduct its purported taxes and penalties from any payment of the Award; (2) the arbitral tribunal erred by awarding damages in U.S. dollars rather than Belize dollars; and (3) the arbitral tribunal erred by

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[2] See, *e.g.*, C.A. App. 86 (providing for Newco to make concession payments in U.S. dollars); *id.* at 84 (providing for establishment of aeronautical fees in U.S. dollars).

[3] The New York Convention is reproduced in the Petition Appendix at 11-22.

directing post-award interest to accrue from the date of the Award. C.A. App. 233-235. The first-instance court in Belize (known as the Supreme Court) entered the worldwide anti-suit injunction, specifically enjoining Newco's action in the U.S. District Court for the District of Columbia. Pet. App. 7. After obtaining that injunction, the Government of Belize then successfully sought a stay of this action in the district court during the pendency of the Belizean proceedings. *Ibid.*

The Belize Supreme Court issued its final opinion in 2013. *Ibid.* The court found that Newco's enforcement action in the United States was "well founded." *Ibid.* But it nevertheless declared that: (1) the Government of Belize was entitled to deduct from the Award the approximately $2.7 million in taxes Newco allegedly owed; (2) contrary to the text of the Award and the Concession Agreement, the Award was payable in Belize dollars in Belize; and (3) Newco was restrained from taking any further steps in its pending enforcement action in the United States. Pet. App. 57-58.

II. PROCEEDINGS BELOW

A. Proceedings in the district court

The district court lifted its stay following the end of the Belize litigation. C.A. App. 8. Newco filed a motion to confirm the award under the New York Convention, and the Government of Belize opposed confirmation on thirteen grounds. Pet. App. 5-6.

The district court confirmed the Award. *Id.* at 10. It recognized that because the Award "falls under the New York Convention," "a court may refuse to enforce an award 'only on the grounds set forth in Article V of the Convention.'" *Id.* at 7-9 (quoting *Belize Soc. Dev. Ltd.* v. *Gov't of Belize*, 668 F.3d 724, 727 (D.C. Cir. 2012)). After addressing the Government of Belize's primary argument in the district court—that the Panama Convention,

rather than the New York Convention, applied to this case—the district court summarily rejected the Government of Belize's "numerous * * * attenuated arguments * * * [including] comity, *forum non conveniens*, * * * and United States public policy" because "none of these arguments have merit." *Id.* at 10 n.4.

B. The court of appeals' decision

The court of appeals affirmed in an unpublished per curiam order. *Id.* at 3. It recognized that "[u]nder the Federal Arbitration Act, U.S. courts must enforce foreign arbitral awards unless they find 'one of the grounds for refusal or deferral of recognition or enforcement of the award specified in' * * * the New York Convention." *Ibid.* (quoting 9 U.S.C § 207). Although the court agreed that the New York Convention authorizes courts to "decline to enforce an arbitral award if 'enforcement of the award would be contrary to the public policy of that country,'" *ibid.* (quoting New York Convention, art. V(2)(b)), it rejected the Government of Belize's argument that enforcement should have been refused "based on an alleged public policy interest in international comity." *Ibid.* The court explained that "courts should rely on the public policy exception only 'in clear-cut cases' where 'enforcement would violate the forum state's most basic notions of morality and justice.'" *Ibid.* (quoting *TermoRio S.A. E.S.P.* v. *Electranta S.P.*, 487 F.3d 928, 938 (D.C. Cir. 2007)). Enforcement of the Award would violate no such policy here because "[b]y design, the New York Convention allows investors to choose to resolve disputes with states through neutral tribunals in neutral countries." *Id.* at 3-4. "Any public policy interest in 'international comity,' therefore, does not here override 'the emphatic federal policy in favor of arbitral dispute resolution.'" *Id.* at 4 (quoting *Belize Soc. Dev.*, 668 F.3d at 727).

Additionally, the court of appeals rejected the Government of Belize's *forum non conveniens* argument be-

cause it was "squarely foreclosed by our precedent." *Ibid.* The court explained that "*TMR Energy Ltd.* v. *State Property Fund of Ukraine*, 411 F.3d 296 (D.C. Cir. 2005), * * * held that the doctrine of *forum non conveniens* does not apply to actions in the United States to enforce arbitral awards against foreign nations." *Ibid.*

REASONS FOR DENYING THE PETITION

I. THE *FORUM NON CONVENIENS* QUESTION DOES NOT MERIT REVIEW BECAUSE THIS CASE DOES NOT IMPLICATE ANY CIRCUIT CONFLICT AND WAS CORRECTLY DECIDED

Certiorari should be denied on the *forum non conveniens* question because this case does not implicate the circuit conflict asserted. Even if the Government of Belize were correct that Belize could be an adequate alternative forum for enforcement of an arbitral award made against Belize *outside* the United States, it cannot—under the New York Convention—be an adequate alternative forum for testing the enforceability of the award in this case. That is because the United States was the site of the arbitration here and thus the primary jurisdiction under the New York Convention.

Moreover, even if Belize could be an adequate alternative forum in this case, the Government of Belize could not meet the second requirement of the *forum non conveniens* analysis—that the balance of the private and public interests weigh strongly in favor of dismissal. Again, because the parties agreed to arbitrate their disputes in the United States (and did, in fact, arbitrate in the United States), the United States has a strong connection to the case, and no compelling countervailing interests weigh in favor dismissal. For that reason, *forum non conveniens* could not apply here regardless of whether the D.C. Circuit correctly analyzed the adequate-forum prong of the test. At the very least, this fac-

tual setting provides an imperfect vehicle for review of the question presented. That the D.C. Circuit in fact got the adequate-forum analysis right is yet another reason to deny review.

A. *Forum non conveniens* does not apply in this case under any circuit's approach because the United States is the primary jurisdiction under the New York Convention

This case does not implicate any circuit conflict on the *forum non conveniens* question presented. *Forum non conveniens* entails a two-part analysis. "At the outset of any *forum non conveniens* inquiry, the court must determine whether there exists an alternative forum." *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 255 n.22 (1981). If such a forum exists, then the court decides whether "the private and public interest factors clearly point towards trial in the alternative forum." *Id.* at 255. The first question presented here addresses only the first step of that analysis.

1. The authorities to which the Government of Belize cites in connection with the asserted circuit split involve efforts to enforce in the United States an arbitral award made *outside* of the United States. See*, e.g.*, *Figueiredo Ferraz E Engenharia de Projeto Ltda.* v. *Republic of Peru*, 665 F.3d 384, 387 (2d Cir. 2011) (award made in Peru); *TMR Energy*, 411 F.3d at 299 (award made in Sweden); *In re Arbitration between Monegasque De Reassurances S.A.M.* v. *Nak Naftogaz of Ukraine*, 311 F.3d 488, 491 (2d Cir. 2002) (award made in the Russian Federation). This case, however, involves an arbitration award made in the United States. As a consequence, this case does not implicate the asserted conflict on when an adequate alternative forum exists.

"[T]he [New York] Convention mandates very different regimes for the review of arbitral awards (1) in the

state in which, or under the law of which, the award was made, [known as the 'primary jurisdiction'], and (2) in other states where recognition and enforcement are sought, [known as 'secondary jurisdictions']." *Yusuf Ahmed Alghanim & Sons* v. *Toys "R" Us, Inc.*, 126 F.3d 15, 23 (2d Cir. 1997). "Only a court in a country with primary jurisdiction over an arbitral award may annul that award. * * * [A] court in a country with secondary jurisdiction is limited to deciding whether the award may be enforced in that country." *Karaha Bodas Co.* v. *Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 287 (5th Cir. 2004); see New York Convention, art. V(1)(e) (authorizing courts to refuse recognition and enforcement if "[t]he award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made"). Courts in the primary jurisdiction also are "free to set aside or modify an award in accordance with its domestic arbitral law and its full panoply of express and implied grounds for relief." *Yusuf*, 126 F.3d at 23. By contrast, courts in secondary jurisdictions "may refuse to enforce the award only on the grounds explicitly set forth in Article V of the Convention." *Ibid.*

The United States is undisputedly the primary jurisdiction in this case because the arbitration took place in Miami under the procedural laws of the United States. Under the New York Convention, the primary jurisdiction is vested with unique powers and must be an available forum for enforcement, annulment, and amendment of an award made in the primary jurisdiction. As to the award at issue in this case, Belize is only a secondary jurisdiction. Under the terms of the New York Convention, the United States, as the primary jurisdiction, and Belize, as the secondary jurisdiction, are vastly different. A secondary jurisdiction simply cannot be an adequate al-

ternative forum for the primary jurisdiction. Consequently, under either the D.C. Circuit's or the Second Circuit's approach, Belize is not an adequate alternative forum to enforce the U.S.-rendered arbitral award in this case. The split is therefore not implicated on these facts.

2. Even if the Government of Belize could satisfy the initial adequate-alternative-forum requirement, it would still founder on the second step of the *forum non conveniens* analysis because the United States' status as the primary jurisdiction under the New York Convention precludes dismissal when the public and private interest factors are balanced.

The parties' agreement to arbitrate in the United States tips the public-interest factors—which "include the administrative difficulties associated with court congestion; the imposition of jury duty upon those whose community bears no relationship to the litigation; the local interest in resolving local disputes; and the problems implicated in the application of foreign law"—decisively against *forum non conveniens* dismissal. *Monegasque*, 311 F.3d at 500. The parties created a strong connection to the United States by agreeing to arbitrate here. Indeed, the Second Circuit has recognized the importance of the site of the arbitration to the public-interest analysis. See *ibid.* (holding that the public-interest factors weighed in favor of dismissal in part because "[t]he award itself was made by a court of arbitration in Moscow"). And because confirming the award neither requires a jury nor the application of foreign law, the only countervailing public interest is the minimal additional burden on the court system of resolving this dispute. The public-interest factors thus in no way "strongly favor[] dismissal." *Agudas Chasidei Chabad of U.S.* v. *Russian Fed'n*, 528 F.3d 934, 950 (D.C. Cir. 2008).

The private-interest factors further confirm that *forum non conveniens* does not apply here. These fac-

tors—which include "the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive"—do "not ordinarily weigh in favor of *forum non conveniens* dismissal in a summary proceeding to confirm an arbitration award." *Monegasque*, 311 F.3d at 500. And they certainly do not do so here. Indeed, because the United States was the site of the arbitration, the private-interest factors favor keeping the confirmation proceeding within that same jurisdiction. Accordingly, the private-interest factors also prohibit *forum non conveniens* dismissal.

Because "a balancing of private and public interest factors [does not] strongly favor[] dismissal," *forum non conveniens* would not apply even if Belize was an adequate alternative forum. *Agudas*, 528 F.3d at 950.

In sum, the split claimed in the first question presented is irrelevant to the resolution of this case, rendering this case an especially poor vehicle for addressing that issue.

B. The D.C. Circuit's decision in *TMR Energy* was correctly decided

1. Even if answering the question presented concerning the alternative-adequate-forum prong of *forum non conveniens* could affect this case, the D.C. Circuit's rule is the correct one. In *TMR Energy,* the D.C. Circuit affirmed the district court's refusal to dismiss a New York Convention award-enforcement proceeding under the doctrine of *forum non conveniens.* 411 F.3d at 298. The D.C. Circuit faithfully applied this Court's established two-prong *forum non conveniens* analysis—"(1) whether an adequate alternative forum for the dispute is

available, and if so, (2) whether a balancing of private and public interest factors strongly favors dismissal." *Agudas,* 528 F.3d at 950 (citing *Piper Aircraft*, 454 U.S. at 254 n.22).

The D.C. Circuit concluded that the adequate-forum prong of the analysis was dispositive because a foreign forum could not enforce an arbitral award in the United States. It recognized that "only a court of the United States (or of one of them) may attach the commercial property of a foreign nation located in the United States." *TMR Energy,* 411 F.3d at 303; see also 28 U.S.C. § 1610(a)(6) (allowing attachment of "property in the United States of a foreign state * * * used for a commercial activity * * * upon a judgment entered by *a court of the United States or of a State*" when the judgment is "based on an order confirming an arbitral award rendered against the foreign state") (emphasis added). Since only U.S. courts can enter a judgment that can be executed against a foreign state's assets within the United States, no adequate alternative forum existed to enforce the award in the United States, and dismissal based on *forum non conveniens* was thus inappropriate: "Because there is no other forum in which [the arbitral creditor] could reach [the arbitral debtor]'s property, if any, in the United States, we affirm the district court's refusal to dismiss this action based upon the doctrine of *forum non conveniens*." *TMR Energy,* 411 F.3d at 304.

The D.C. Circuit's decision properly recognized that an award-enforcement proceeding under the New York Convention presents only one issue—whether an award that has resolved the merits of the parties' dispute can be turned into a local judgment and then executed within the forum. See *ibid.*; *Karaha Bodas Co.* v. *Perusahaan Pertambangan Minyak Dan Gas Bumi Negara,* 335 F.3d 357, 372 n.59 (5th Cir. 2003) (the question in award-enforcement proceedings is whether "to enforce[], or re-

fuse[] to enforce, awards arbitrated elsewhere"). Because no other forum can turn an international arbitral award into a judgment *of a U.S. court* that can be executed against assets *in the United States,* no alternative adequate forum exists in the case.

The Government of Belize favors the decision of a divided panel of the Second Circuit in *Figueiredo*, 665 F.3d at 384, which held that the inability of a Peruvian court to enforce an arbitral award against U.S. assets did not render Peru an inadequate alternative forum. 665 F.3d at 390-391. But the *Figueiredo* majority missed the dispositive issue—whether an award-enforcement proceeding to recover against a sovereign's property *in the United States* could be asserted elsewhere. It cannot. And as this Court has explained, "dismissal [based on *forum non conveniens*] would not be appropriate where the alternative forum does not permit litigation of the subject matter of the dispute." *Piper Aircraft,* 454 U.S. at 254 n.22. Foreign courts cannot attach or otherwise obtain assets in the United States, and they thus do not "permit litigation of the subject matter of the dispute" when that subject matter is the enforcement of an arbitral award *in the United States*.[4]

2. The D.C. Circuit's decision in this case is also correct for the alternative reason that the doctrine of *forum non conveniens* simply does not apply in award-enforcement proceedings, a threshold issue that the courts below did not address. The express language in

[4] The wisdom of the D.C. Circuit's approach also undermines the Government of Belize's concern that its view will have an outsized impact because the District of Columbia is "the default venue for actions against foreign states." Pet. 38. Because the D.C. Circuit's rule is the correct one, that legal regime's becoming "the *de facto* law of the land in arbitration confirmation actions against foreign states" weighs *against* the need for this Court's review. *Ibid.*

Section 207 of the Federal Arbitration Act provides that a court "shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention." 9 U.S.C. § 207; see also *Lexecon Inc.* v. *Milberg Weiss Bershad Hynes & Lerach,* 523 U.S. 26, 35 (1998) (noting that the use "of the mandatory 'shall,' * * * normally creates an obligation impervious to judicial discretion"). Article V of the New York Convention lists seven grounds for refusing recognition and enforcement of an award, but the doctrine of *forum non conveniens* is not among them. See New York Convention, art. V. *Forum non conveniens* is thus not a proper basis for refusing enforcement of awards issued under the New York Convention.

Indeed, that is the position taken by the Restatement (Third) of International Commercial Arbitration (Tentative Draft No. 3, 2013) ("Rest. Int'l Comm. Arb."), which posits that a proceeding to "enforce a foreign Convention award is not subject to a stay or dismissal in favor of a foreign court on *forum non conveniens* grounds." Rest. Int'l Comm. Arb. § 4-29(a). And it is also the position taken by Judge Lynch in his dissent in *Figueiredo.* 665 F.3d at 399 (Lynch, J., dissenting) ("[T]he doctrine of *forum non conveniens* is not available at all in an action [to enforce a Convention award]."). The court of appeals' judgment can thus be affirmed on this alternative basis as well. At the very least this threshold issue on a question that the courts below have not addressed renders this case a poor vehicle for reviewing the question presented.

C. *TMR Energy* does not conflict with this Court's decisions

The Government of Belize asserts (at 21-27) that the D.C. Circuit's decision in *TMR Energy* conflicts with this Court's decisions in *Sinochem International Co.* v. *Ma-*

laysia International Shipping Corp., 549 U.S. 422 (2007), *Verlinden B.V.* v. *Central Bank of Nigeria,* 461 U.S. 480 (1983), *Piper Aircraft*, 454 U.S. 235, and *Continental Grain Co.* v. *Barge FBL-585,* 364 U.S. 19 (1960). It does not.

1. *Sinochem* did not involve a proceeding to enforce a foreign arbitral award against a foreign nation's assets in the United States. Rather, it was a lawsuit alleging negligent misrepresentation arising from statements made in China. 549 U.S. at 426. Nothing in *TMR Energy*—which is limited to an award-enforcement proceeding—conflicts with *Sinochem.*

The Government of Belize mistakenly suggests that the request in *Sinochem* by the plaintiff "that 'any assets of Sinochem be attached'" makes the case comparable to an award-enforcement proceeding. Pet. 21 (quoting Am. Compl., *Malay. Int'l Shipping Corp.* v. *Sinochem Int'l Co.,* No. 03-3771 (E.D. Pa. 2003), 2003 WL 23904713). As the *Sinochem* Court instructed, the outcome of a *forum non conveniens* challenge turns on the "gravamen" of the complaint, which, in *Sinochem,* was a negligent misrepresentation case for damages arising from events in China. The "gravamen" of the issue in *TMR Energy,* on the other hand, was a proceeding to enforce a foreign arbitral award against assets located in the United States. Indeed, the factors that supported *forum non conveniens* dismissal in *Sinochem*—difficult personal jurisdiction inquiries, the need for burdensome jurisdictional discovery, and a controversy that was "entirely foreign" where "the gravamen of [plaintiff's] complaint" concerned "an issue best left for determination by the Chinese courts," see 549 U.S. at 428, 435-436—are entirely absent in the award-enforcement context. In that context, the merits have already been resolved by an arbitral tribunal and the only issue is whether to convert an arbitral award into a local judgment. See *Figueiredo,* 665 F.3d at 405

(Lynch, J. dissenting) ("The merits of the underlying dispute have already been decided, and Figueiredo comes to us with the specific and narrow intent of enforcing its arbitration award against Peru's assets in the United States * * * .").

2. The Government of Belize also contends that "the D.C. Circuit's prohibition on *forum non conveniens*' applicability 'to actions in the United States to enforce arbitral awards against foreign nations' is inconsistent with this Court's recognition in *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 490 n.15 (1983) that the Foreign Sovereign Immunities Act [('FSIA')] 'does not appear to affect the traditional doctrine of *forum non conveniens*.'" Pet. 27. But the D.C. Circuit's approach is in fact entirely in line with the traditional doctrine of *forum non conveniens*.

The basis for the holding in *TMR Energy*—that foreign fora are inadequate in award-enforcement proceedings due to the territorial limitations on execution and attachment, 411 F.3d at 303—was well established before Congress enacted the FSIA. Indeed, as this Court has explained, the FSIA did not address the execution immunity of extraterritorial assets because U.S. courts "lack authority in the first place to execute against property in other countries." *Rep. of Arg.* v. *NML Capital, Ltd.*, 134 S. Ct. 2250, 2257 (2014). That same reasoning supported the Second Circuit's observation in *Fotochrome, Inc.* v. *Copal Co.*, 517 F.2d 512 (2d Cir. 1975), that "a foreign award can never be self-executing in the forum state but must be merged in a local judgment to be effective as a matter of domestic law." *Id.* at 519. This foundational principle that forms the core of *TMR Energy*'s holding is thus in complete harmony with *Verlinden* and the pre-FSIA caw law.

Importantly, *TMR Energy*'s holding does not extend outside of the narrow context of award-enforcement pro-

ceedings; *forum non conveniens* remains available in plenary lawsuits on the merits against foreign states. Indeed, the D.C. Circuit has affirmed dismissals of suits against foreign sovereigns on *forum non conveniens* grounds since its decision in *TMR Energy.* See *MBI Grp., Inc.* v. *Credit Foncier Du Cameroun,* 616 F.3d 568, 576 (D.C. Cir. 2010) (affirming *forum non conveniens* dismissal of action asserting tort and contract claims against Republic of Cameroon). The Government of Belize simply refuses to acknowledge the unique aspects of an award-enforcement proceeding that render *forum non conveniens* irrelevant.

3. There is also no tension between the D.C. Circuit's holding and this Court's decision in *Piper Aircraft*. *Piper Aircraft* established that "[t]he possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry." 454 U.S. at 247. *TMR Energy* did not hold otherwise. The D.C. Circuit's reasoning was not that the law in the foreign forum would be less favorable for enforcement and confirmation of the award. Rather, it was that "no other forum to which the plaintiff may repair can grant the relief it may obtain in the forum it chose," because "only a court of the United States (or of one of them) may attach the commercial property of a foreign nation located in the United States." *TMR Energy*, 411 F.3d at 303. *TMR Energy* cited this Court's opinion in *Piper Aircraft* for support, for there the Court recognized that "dismissal would not be appropriate where the alternative forum does not permit litigation of the subject matter of the dispute." 454 U.S. at 254 n.22. Because foreign forums cannot attach property located in the United States, they do not "permit litigation of the subject matter of the dispute" in cases seeking such attachment, and thus *forum non conveniens* cannot apply.

Additionally, the "practical problems" that sometimes arise in international litigation do not exist in cases seeking only enforcement of an arbitral award under the New York Convention. *Id.* at 251. In such cases, there is no need for "[c]hoice-of-law analysis," "interpret[ing] the law of foreign jurisdictions," or other "complex exercises in comparative law." *Ibid.* Instead, these cases are straightforward and require the enforcing court only to review the limited grounds for refusing to enforce the award under the New York Convention. See New York Convention, art. V. In short, the D.C. Circuit's approach is in keeping with both the letter and the spirit of *Piper Aircraft*.

4. Nor does the D.C. Circuit's decision conflict with this Court's decision in *Continental Grain*, a case addressing venue transfer under 28 U.S.C. § 1404(a). This Court has repeatedly held that the analysis governing statutory venue transfer is different from the *forum non conveniens* inquiry. See *Piper Aircraft*, 454 U.S. at 253 ("[Section] 1404(a) transfers are different than dismissals on the ground of *forum non conveniens.* * * * District courts were given more discretion to transfer under 1404(a) than they had to dismiss on grounds of *forum non conveniens.")*; *Norwood* v. *Kirkpatrick*, 349 U.S. 29, 32 (1955) (recognizing that Section 1404 "*revis[ed]*" "the existing law on *forum non conveniens*") (emphasis added).

Moreover, the rationale of *Continental Grain*, which concerned *in rem* claims in admiralty for damages resulting from a vessel's unseaworthiness, is irrelevant to *in personam* award-enforcement proceedings under the New York Convention. *Continental Grain* affirmed a statutory transfer where a vessel's owners (but not the vessel itself) were subject to suit in the transferee court. 364 U.S. at 20. While suits in admiralty must be brought against a vessel *in rem*, the Court permitted transfer as

"an alternative way of bringing the [vessel's] owner into court." *Id.* at 26. Since the owner was amenable to suit within the United States, the Court did not allow an admiralty law fiction—one meant to provide *some* U.S. forum—to prevent litigation of the merits in a more convenient district court. *Id.* at 23.

In this case, the only question remaining is Newco's entitlement to a local judgment that can be executed in the United States, a question that cannot be adjudicated elsewhere. The prejudgment attachment jurisdiction issues discussed in *Continental Grain* are absent in these proceedings to enforce an arbitral award under the New York Convention, where the merits have already been litigated in arbitration and the district court's *in personam* jurisdiction over the Government of Belize is undisputed.

II. THE PUBLIC-POLICY QUESTION DOES NOT MERIT REVIEW

The Government of Belize's second question presented also does not warrant this Court's review. There is no disagreement among the circuits regarding the application of Article V(2)(b) of the New York Convention. The lower courts properly applied the well-established, uniformly accepted standard, and the Government of Belize merely seeks to relitigate that case-specific determination. Under that standard, the Government of Belize has failed to articulate any "explicit" or "well-defined and dominant" United States public policy that would allow the district court to deny enforcement of the Award. Instead, the Government of Belize relies upon Belizean public policy, which is irrelevant under Article V(2)(b) in an award-enforcement proceeding in the United States. That dispositive flaw renders irrelevant the Government of Belize's purported split regarding whether such a "well-defined" and "dominant" United States public policy always triggers Article V(2)(b) or whether it must be balanced against countervailing policies in favor of arbi-

tration. Pet. 29-30. The Government of Belize cannot overcome the initial hurdle of demonstrating a cognizable U.S. public policy, and thus it could not prevail regardless of whether there is a second balancing step after that initial determination.

A. There is no circuit conflict on the well-established standard governing the public-policy defense to enforcement under the New York Convention

1. The circuits that have addressed the meaning of the public-policy defense in Article V(2)(b) agree that, in light of "[t]he general pro-enforcement bias informing the [C]onvention[,]" "[t]he public policy defense [in Article V(2)(b)] is to be 'construed narrowly to be applied only where enforcement would violate the forum state's most basic notions of morality and justice.'" *Karaha Bodas Co.,* 364 F.3d at 306 (quoting *M & C Corp.* v. *Erwin Behr GmbH & Co., KG,* 87 F.3d 844, 851 n.2 (6th Cir. 1996)); accord *Asignacion* v. *Rickmers Genoa Schiffahrtsgesellschaft MBH & CIE KG,* 783 F.3d 1010, 1016-1017 & n.27 (5th Cir. 2015), *cert. denied,* 136 S. Ct. 795 (2016); *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran* v. *Cubic Def. Sys., Inc.,* 665 F.3d 1091, 1096-1097 (9th Cir. 2011); *TermoRio S.A. E.S.P.* v. *Electranta S.P.,* 487 F.3d 928, 938 (D.C. Cir. 2007); *Admart AG* v. *Stephen & Mary Birch Found., Inc.,* 457 F.3d 302, 308 (3d Cir. 2006); *Slaney* v. *Int'l Amateur Athletic Fed'n,* 244 F.3d 580, 593 (7th Cir. 2001); *Parsons & Whittemore Overseas Co.* v. *Societe Generale De L'Industrie Du Papier (RAKTA),* 508 F.2d 969, 974 (2d Cir. 1974). That means that "arbitral awards are unenforceable on grounds that they are violative of public policy only when the award violates some explicit public policy that is well-defined and dominant . . . [which is] ascertained by reference to the laws and legal precedents" of the country where enforcement is sought rather than

"from general considerations of supposed public interests." *Indus. Risk Insurers* v. *M.A.N. Gutehoffnungshütte GmbH,* 141 F.3d 1434, 1445 (11th Cir. 1998) (quoting *Drummond Coal Co.* v. *United Mine Workers, Dist. 20,* 748 F.2d 1495, 1499 (11th Cir. 1984)).

2. The Government of Belize does not dispute that lower courts articulate a uniform and stringent standard for determining when a U.S. public policy potentially prohibits enforcement of a foreign arbitral award. See Pet. 30 n.12. It argues only that the D.C. Circuit's unpublished opinion below (and perhaps one Fifth Circuit opinion) applies an additional, "balancing" step to determine whether the U.S. public policy outweighs the U.S. policy favoring arbitration. Pet. 29-30. But even accepting *arguendo* petitioner's expansive reading of a single sentence from the decision below, the question of whether a balancing approach is appropriate is not implicated here because the D.C. Circuit squarely held that the Government of Belize failed to identify a cognizable public-policy interest in the first place. Pet. App. 3. Belize's public-policy challenge would thus fail even in circuits that do not employ a balancing approach.

B. The Government of Belize has not identified a well-defined and dominant public policy of the United States that precludes enforcement of the Award

1. Given the uniform standard for identifying a cognizable U.S. public policy, the petition presents no issue that warrants this Court's attention. The court of appeals squarely held that the Government of Belize's "alleged public policy interest" could not clear the high bar agreed upon by all circuits because enforcement would not "violate the most basic U.S. notions of morality and justice." Pet. App. 3. The Government of Belize seeks pure error correction of that holding. But there is no error. The Government of Belize attempts to conjure a

public-policy defense by pointing to the decision of the Belize Supreme Court recognizing the arbitral award in Belize subject to certain modifications and offsetting tax payments. That foreign ruling, however, does not purport to evince a public policy *of the United States*.

The New York Convention's public-policy defense is specific to each jurisdiction in which enforcement of an award is sought. See New York Convention, art. V(2)(b); Rest. Int'l Comm. Arb. § 4-18 cmt. e (Tentative Draft No. 2, 2012) ("The language of the Convention[] makes clear that the content of public policy is determined by the law of the jurisdiction where recognition or enforcement is sought."); see also *Yukos Capital S.A.R.L.* v. *Samaraneftegaz,* 592 F. App'x 8, 11 (2d Cir. 2014) ("Article V(2)(b) allows a court to refuse enforcement of an arbitration award where enforcement would violate *the forum state's* public policy.") (emphasis added); *Karaha Bodas Co.,* 364 F.3d at 306 (stating that Article V(2)(b) concerns "the forum state's most basic notions of morality and justice"). Accordingly, the sole issue is whether enforcement of the Award in the United States would violate a U.S. public policy.

2. The Belize Supreme Court's decision does not reflect any United States public policy under Article V(2)(b) of the New York Convention. That decision makes clear that its modification and partial enforcement of the Award in Belize was based purely on Belizean law and Belizean public policy. See, *e.g.*, Pet. App. 55 (Belize Supreme Court invoking "the public interest in Belize"). The Government of Belize nevertheless contends that, despite the forum-specific character of the public-policy defense, the Belize Supreme Court's decision bars enforcement within the U.S. under Article V(2)(b) because of international comity. Pet. 30-33. That argument—which has not been adopted by any court—is unavailing.

By its own terms, the doctrine of international comity cannot constitute a public policy within the meaning of Article V(2)(b). That doctrine does not impose an "absolute obligation" upon the United States to recognize foreign judgments, and considerations of comity "cannot be * * * defined and fixed." *Hilton* v. *Guyot,* 159 U.S. 113, 163-164 (1895). Rather, the doctrine is discretionary. As a result, a refusal to extend comity to a foreign award-enforcement proceeding does not implicate a well-defined U.S. public policy by "violat[ing] the [United States'] most basic notions of morality and justice." *Parsons,* 508 F.2d at 974.

In fact, the New York Convention and the U.S. implementing legislation, 9 U.S.C. § 207, do not permit the United States to refuse enforcement of an Award based on Belize's determination that enforcement of the Award within Belize would violate Belizean public policy. Section 207 commands that the district court "must enforce [a] [New York Convention] award unless it finds one of the grounds for refusal or deferral of enforcement specified in the Convention." *Karaha Bodas Co.,* 364 F.3d at 288. As international comity is not one of the seven exclusive defenses to enforcement specified in Article V, the doctrine may not be invoked to bar enforcement of a New York Convention award.

Indeed, deferring to the Belize Supreme Court's determination would do violence to the legal framework created by the New York Convention and the U.S. implementing legislation. That structure itself determines when deference to another court is appropriate in an award-enforcement proceeding. As explained above, the New York Convention recognizes two types of courts: courts of primary jurisdiction—the courts in the state in which or under the law of which the parties agreed to arbitrate—and courts of secondary jurisdiction—the courts of all other states in which enforcement of an award is

sought. See *supra* Section I.A. An arbitral award's validity is only subject to challenge in the courts of primary jurisdiction, and the domestic law of the primary jurisdiction provides the sole basis for setting aside, vacating, or modifying an arbitral award. *Yusuf,* 126 F.3d at 22-23 (noting that the New York Convention recognizes the primary jurisdiction's exclusive right "to set aside or modify an award in accordance with its domestic arbitral law and its full panoply of express and implied grounds for relief"). In contrast, "a court in a country with secondary jurisdiction is limited to deciding whether the award may be enforced in that country," *Karaha Bodas Co.,* 364 F.3d at 287, and "may refuse enforcement only on the grounds specified in Article V" of the New York Convention. *Id.* at 288; see also *Yusuf,* 126 F.3d at 23 ("[T]he Convention is * * * clear that when an action for enforcement is brought in a foreign state, the state may refuse to enforce the award only on the grounds explicitly set forth in Article V of the Convention.").

Belize is a secondary jurisdiction with respect to the Award, and as such, its determination of enforcement (or non-enforcement) does not affect enforcement in another jurisdiction. Only the judgment of a court of primary jurisdiction—here, the United States—is entitled to such deference. New York Convention, art. V(1)(e). The Government of Belize seeks to invert this structure and demand that a primary jurisdiction (the United States) defer to the determination of a second jurisdiction (Belize). That is contrary to both U.S. law and the New York Convention.

3. The Government of Belize also invokes Belize's interest in collecting taxes from Newco and the revenue rule to bolster its international comity argument, Pet. 31-33, but to no avail. Belizean tax policy is not a U.S. public policy and is thus irrelevant for purposes of enforcing the

Award under the New York Convention. See New York Convention, art. V(2)(b).

As for the revenue rule, that doctrine actually favors enforcement here. The revenue rule is implicated only when "the substance of the claim is, either directly or indirectly, one for tax revenues, such that the whole object of the suit is to collect tax for a foreign revenue, and that this will be the sole result of a decision in [favor] of the plaintiff." *European Cmty.* v. *RJR Nabisco, Inc.*, 355 F.3d 123, 131-132 (2d Cir. 2004) (quoting *Atty. Gen. of Canada* v. *R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 130 (2d Cir. 2001)), *reinstated on remand*, 424 F.3d 175, 182 (2d Cir. 2005); see also *Pasquantino* v. *United States*, 544 U.S. 349, 364 (2005) (explaining that cases applying the revenue rule had as their "main object * * * the collection of money that would pay foreign tax claims," and holding that the revenue rule did not apply to a criminal prosecution where the link to foreign tax collection was "incidental and attenuated at best").

The revenue rule does not counsel against enforcing the Award because this award-enforcement proceeding has nothing to do with tax collection. The Government of Belize's tax claims were not asserted in the underlying arbitration and had no bearing on it. Rather, they were first announced and asserted *after* the Award was issued. And, importantly, enforcement of the Award in no way affects what Belize does within its own borders to collect the taxes allegedly owed. Belize will have the same powers to enforce its tax laws after enforcement of the Award that it held before enforcement. Accordingly, there is no need "for the U.S. courts to disentangle themselves from these [Belizean] tax issues," Pet. 32, because they are not implicated in enforcing the Award.

Refusing enforcement based on Belize's tax claims, in contrast, would violate the revenue rule because it would inject the United States into the Belizean tax dispute.

That is why U.S. courts have rejected similar tax arguments in arbitral confirmation proceedings. The Southern District of New York rejected such an argument—that enforcement of an arbitral award should be refused because it "would give effect to [foreign] tax fraud"—in an opinion affirmed by the Second Circuit. *Yukos Capital S.A.R.L.* v. *OAO Samaraneftegaz*, 963 F. Supp. 2d 289, 298 (S.D.N.Y. 2013), *aff'd sub nom. Yukos Capital*, 592 F. App'x 8. The court explained that there was no applicable public policy against foreign tax fraud or in support of assisting foreign tax collection. *Id.* at 299-300; see also *Yukos Capital*, 592 F. App'x at 11 (reasoning that since Article V(2)(b) "calls for application of United States public policy, the district court was not required to defer to the Russian court's determination that enforcement would violate Russian public policy"). The revenue rule thus makes clear that the policy of the United States is to avoid accepting the invitations of foreign sovereigns to become involved in their tax disputes, and the way to do that here is to confirm the Award and leave the Belizean tax issues for Belizean courts.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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