No. 25-1093

In the

Supreme Court of the United States

RUSSIAN FEDERATION,

Petitioner,

v.

STABIL LLC, ET AL.,

Respondents.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Like the petition in *Kingdom of Spain* v. *Blasket Renewable Investments, LLC* (No. 24-1130), for which this Court has called for the views of the Solicitor General, this petition involves a circuit split that lies at the heart of the arbitration exception to sovereign immunity under the Foreign Sovereign Immunities Act (FSIA). The D.C. Circuit has departed from the Second and Fifth Circuits by failing to require courts to determine, as a jurisdictional matter, whether an agreement to arbitrate any differences "between the parties" was made. 28 U.S.C. 1605(a)(6). This fundamental question of contract formation has been improperly relegated to the merits stage by the D.C. Circuit, exposing foreign states to the indignity and burdens of merits litigation unnecessarily.

Notably, the respondents do not contest that this Court would benefit from granting this petition if it grants the petition in *Blasket*, a clear concession that reviewing both petitions together would be the optimal vehicle for answering the question presented. Rather, they downplay the significance of the circuit split by attempting to draw a distinction between private contracts and investment treaties, as did the respondents in *Blasket*. That argument is unsupported by the text of the arbitration exception. By its terms, the exception requires an agreement to arbitrate differences "between the parties," that is, between the foreign state and the parties invoking the purported arbitration agreement. There is no principled reason to apply the "between the parties" requirement differently in investment treaty cases.

The language "with or for the benefit of" does not signal a difference between private contracts and investment treaties. If there is no agreement "with or for the benefit of" the specific parties invoking the arbitration clause in a treaty, there can be no agreement to arbitrate any differences "between the parties" within the meaning of the arbitration exception. The parties whose differences are being submitted to arbitration are the foreign state and the specific investors, not the state parties to the treaty.

By treating the existence of an arbitration agreement "between the parties" as a merits question, the D.C. Circuit (unlike the Second and Fifth Circuits) allowed the respondents to bypass Russia's sovereign immunity simply by pointing to the existence of an arbitration clause, regardless of whether Russia ever consented to submit any differences between it and these specific respondents to arbitration at all. Given the District of Columbia's status as the default venue for actions against foreign states under the FSIA, no further percolation of this issue can be expected.

This Court's review is urgently needed.

ARGUMENT

I. The Circuit Split is Entrenched and Significant

The relevant analysis under the arbitration exception's text is the same here as it was in the cases in the Second and Fifth Circuits, that is, whether an agreement was made to arbitrate any differences "between the parties" to the dispute. The starkly

different approach taken by the D.C. Circuit must be rectified.

A. The Arbitration Exception Does Not Differentiate Between Private Contracts and Investment Treaties

1. The text of the FSIA dictates the jurisdictional inquiry that courts must undertake. The statute provides that a foreign state shall not be immune in an action to confirm an award rendered pursuant to "an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences * * * between the parties." 28 U.S.C. 1605(a)(6).

Circuits are split over whether an agreement to arbitrate between the parties must be found at the jurisdictional stage, or whether an agreement with or for the benefit of *any party* will suffice. In *Cargill Int'l S.A.* v. *M/T Pavel Dybenko*, an oil importer argued that it was an intended third-party beneficiary of an arbitration agreement made separately between an exporter and a shipper. 991 F.2d 1012, at 1014-15 (2d Cir. 1993). In other words, the importer argued that the arbitration agreement was made for its benefit, and thus an agreement existed between the shipper and the importer. Instead of finding that the existence of an agreement between the shipper and exporter sufficed to establish subject matter jurisdiction under the arbitration exception, the Second Circuit demanded more, holding that the district court had to determine whether the sovereign had "intended" for the importer to "enforce the agreement as a third-party beneficiary." *Id.* at 1019. Similarly, in *Al-*

Qarqani v. *Saudi Arabian Oil Co.*, the Fifth Circuit held that the arbitration exception requires the existence of an arbitration agreement between the parties to the dispute. 19 F.4th 794, 802 (2021).

The ultimate inquiry was the same in the court below: does an agreement to arbitrate anything at all exist between the parties to the dispute? While the Second and Fifth Circuits have held that this question must be answered at the jurisdictional stage, the D.C. Circuit held that it does not.

2. Like the respondents in *Blasket*, the respondents here shrug off the existence of a circuit split by attempting to differentiate between investment treaties and commercial contracts. Opp. Br. 13. That is a red herring. There is no principled reason why, under the text of the statute, that distinction matters.

The respondents suggest that the language "with or for the benefit of" indicates a dichotomy between commercial contracts ("with") and investment treaties ("for the benefit of"). In their view, courts correctly require an arbitration agreement "with or for the benefit of" the specific parties to the dispute in commercial contract cases, but may dramatically lower the bar in investment treaty cases by not requiring the parties invoking the arbitration agreement to show that they are parties "with or for the benefit of" whom the arbitration agreement was made. That is wrong. The respondents point to nothing in the text or history of the FSIA to suggest that Congress intended to differentiate between commercial contracts and investment treaties in that

manner. Indeed, as the respondents concede, a treaty is itself a contract. Opp. 13; see also Pet. 3, 40 (citing *ZF Auto. US, Inc.* v. *Luxshare, Ltd.*, 596 U.S. 619, 634 (2022)). The phrase "with or for the benefit of" must be read in context, namely in light of the subsequent phrase "between the parties." The respondents ignore the latter phrase entirely because they have no answer to the argument that the relevant agreement under the arbitration exception is an agreement to arbitrate differences "between the parties" to the dispute, not an agreement to arbitrate between sovereigns for the benefit of someone else. Identifying an agreement to arbitrate "between the parties" is not an atextual imposition. Opp. Br. 23. It is the inquiry the statute demands. The respondents' interpretation creates surplusage by rendering the language "between the parties" superfluous. See *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001) ("[A] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." (cleaned up)).

Moreover, whether an agreement was formed "with or for the benefit of" a third party is a relevant concept in both the commercial and investment treaty contexts. For instance, in *Cargill*, the court had to determine whether a party who was not a signatory to an arbitration clause in a charter party was nevertheless a third-party beneficiary of it. See, *e.g.*, *Cargill*, 991 F.2d at 1014-15; see also *Bridas S.A.P.I.C.* v. *Gov't of Turkm.*, 447 F.3d 411, 420 (5th Cir. 2006) (identifying third-party beneficiary status, among other theories, as a basis for invoking an arbitration agreement to which the party is not a

signatory). As the respondents admit, an arbitration provision in an investment treaty works much in the same way; it is an agreement "for the benefit of" third parties that can give rise to an agreement "with" those parties. Opp. Br. 21. The fact that investment treaties contain a "standing offer" to arbitrate, and do not themselves represent an agreement to arbitrate differences with anyone, supports Russia's position. To form an agreement to arbitrate "between the parties," courts must still determine whether these particular investors had the legal power to accept that standing offer—which, under basic contract formation principles, turns on whether the offer was directed at them. In none of the cases relied on by the respondents (at 15-16, 23) was it disputed that the parties to the dispute were investors at whom the standing offer was directed.

B. This Petition Is a Mirror Image of the Petition in *Blasket*, Not *Hulley*

In attempting to analogize this petition to the petition in *Russian Fed'n* v. *Hulley Enters. Ltd.* (No. 25-549), the respondents ignore the substantive similarities between this petition and the petition in *Blasket* and the distinct procedural posture in *Hulley*.

1. The respondents do not dispute that the instant petition presents the same legal question as *Blasket*. The split among circuits as to whether finding an agreement "between the parties" is necessary before stripping foreign states of their immunity under the FSIA creates exactly the type of legal inconsistency that Supreme Court review is designed to resolve. The amici support that has emerged from foreign states

and others for the petition in *Blasket* underscores the widespread interest in resolving that jurisdictional question. The fact that the same question has now arisen in the *Blasket* cases and in these cases (among others as indicated by the amici support in *Blasket*) shows the recurring nature and importance of this question, further demonstrating why Supreme Court review is necessary.

Nor do the respondents refute that this petition complements the petition in *Blasket* and that this Court would benefit from following its practice of granting petitions and aligning cases that present the same legal question in different contexts. Pet. 23-25; see, *e.g.*, *Learning Res., Inc.* v. *Trump*, Nos. 24-1287, 25-250 (Feb. 20, 2026), slip op. 4-5 (granting certiorari in separate cases involving identical questions of law in different procedural contexts); *ZF Automotive*, 596 U.S. at 623 (following same approach with petitions raising the same question in different factual contexts); *Gratz* v. *Bollinger*, 539 U.S. 244, 259-60 (2003) (similar). Therefore, the Court should grant this petition with *Blasket* to conduct a 360-degree review of the relevant issues from differing perspectives—a multilateral treaty implicating the legal authority to offer to arbitrate (consent) in *Blasket* and a bilateral treaty implicating the legal authority to accept the offer (assent) here.

2. Instead of addressing the interplay between this case and *Blasket*, the respondents rely on a hollow comparison with *Hulley*. The respondents leave out important procedural differences that explain why, unlike Russia's petition here and Spain's petition in

Blasket, the petition in *Hulley* was not cert-ready. Both in *NextEra Energy Glob. Holdings B.V.* v. *Kingdom of Spain*, 112 F.4th 1088 (2024) (the case from which Spain's petition in *Blasket* arises), and here, the D.C. Circuit issued final decisions on the application of the arbitration exception, leaving no remaining sovereign immunity issues for consideration by the district court on remand. In *Hulley*, by contrast, the D.C. Circuit did not reach a final decision regarding application of the arbitration exception because it held that one of Russia's contract arguments was jurisdictional and required further consideration by the district court on remand. *Hulley Enters.* v. *Russian Fed'n*, 149 F.4th 682, 690 (D.C. Cir. 2025); Br. in Opp. 18, *Russian Federation v. Hulley Enterprises Ltd., et al.*, (25-549). Thus, the denial of certiorari in *Hulley* has no bearing on this Court's decision here.

Lastly, contrary to the respondents' suggestion, deciding the question presented in Russia's petition would have significant precedential value. The question before this Court is not about the territorial scope of the Bilateral Investment Treaty, but about whether Russia's contract formation arguments have to be decided at the jurisdictional stage. That question does not depend on the treaty's text or the status of Crimea but on the text of the arbitration exception requiring an agreement "between the parties," so any decision will govern every future enforcement action in which a foreign sovereign challenges the existence of an arbitration agreement between the parties.

II. The Decision Below Is Wrong

The question before this Court is whether the existence of an arbitration agreement between the parties to the dispute must be determined as a jurisdictional matter under the FSIA's arbitration exception. Unlike the Second and Fifth Circuits, the D.C. Circuit declined to do so, reasoning that because Russia did not dispute that the treaty contained an arbitration agreement between the sovereign for the benefit of *some investors*, no further analysis was necessary. Pet. App. 17a-18a. As explained above, that analysis is wrong as a matter of statutory interpretation.

Additionally, the D.C. Circuit incorrectly viewed Russia's contract formation argument as one of "arbitrability," or "scope" of the arbitration provision under the Bilateral Investment Treaty. Contract formation is not a question of "arbitrability," but of whether an arbitration agreement "was ever concluded." *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440, 444 n.1 (2006). Formation of an agreement to arbitrate is always a threshold question for the courts. *Henry Schein, Inc.* v. *Archer & White Sales, Inc.*, 586 U.S. 63, 69 (2019) (holding that "whether a valid arbitration agreement exists" is a question for "the court [to] determine"); *Granite Rock Co.* v. *Int'l Bhd. of Teamsters*, 561 U.S. 287, 299-301 (2010).

The respondents do not dispute that Russia's arguments are about contract formation, but instead try to reframe the analysis into one of treaty interpretation. At this stage, Russia is not asking this

Court to interpret the treaty or make a determination as to whether the respondents are "covered by it." Opp. Br. 23. This Court need only decide whether the formation of an agreement to arbitrate between the parties must be decided by courts as a matter of their own subject matter jurisdiction under the FSIA.

Nor do arguments about the treaty governing the relevant arbitral regime fare any better. Congress' power to legislate federal subject matter jurisdiction cannot be constrained by treaty. See United States Amicus Br., *Blasket Renewable Invs., LLC v. Kingdom of Spain*, No. 23-7038, at 16 (D.C. Cir. Feb. 2, 2024) (ECF No. 2038663). In any case, the awards in both of these cases are governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3, popularly known as the New York Convention, which subjects enforcement of awards to challenge for the non-existence of a valid arbitration agreement under Article V. Thus, it is consistent with the applicable arbitral regime to make the existence of an agreement to arbitrate between the parties a basis for dismissal at the jurisdictional immunity stage. As this Court has recognized, merits and jurisdictional questions "will sometimes come intertwined" under the FSIA. *Bolivarian Republic of Venez.* v. *Helmerich & Payne Int'l Drilling Co.*, 581 U.S. 170, 178 (2017) ("*H&P*"). Still, courts must answer the question as a threshold jurisdictional matter to relieve the foreign state of the indignity and burdens of further litigation, even if in doing so the court "must inevitably decide some, or all, of the merits issues." *Ibid.*

III. It Would Be Proper, Alternatively, to Hold this Petition in Abeyance and GVR

It is undisputed that, if Spain's petition in *Blasket* were granted (as it should be), this Court's decision in *Blasket* would be dispositive of the question presented here. It would thus be proper, alternatively, to hold Russia's petition until this Court rules in *Blasket*.

This Court will hold petitions in abeyance and GVR "in light of a wide range of developments, including [its] own decisions." *Lawrence* v. *Chater*, 516 U.S. 163, 166 (1996); *Reed* v. *Goertz*, 598 U.S. 230, 259 (2023) (noting that the Court had GVR'd "no fewer than 33 cases" in a single day); *Greene* v. *Fisher*, 565 U.S. 34, 41 (2011). A GVR is appropriate, "depend[ing] on the equities of the case," when a decision of this Court "reveals a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration," and where "such a redetermination may determine the ultimate outcome of the litigation." *Lawrence*, 516 U.S. at 167–68. The possibility of an intervening decision by this Court in *Blasket* plainly satisfies that standard. The D.C. Circuit's decision below hinges on its precedent in *NextEra*, the very case from which Spain's petition arises in *Blasket*. A decision by this Court reversing, vacating or otherwise modifying *NextEra* would no doubt compel revisiting the D.C. Circuit's decision here.

The equities likewise favor a GVR. Reversal of *NextEra* could lead to dismissal of these enforcement actions on sovereign immunity grounds, obviating the need for Russia to defend the merits at all. The D.C.

Circuit denied Russia's motion to stay the mandate, leaving it to the district court to decide how to proceed. Russia's sovereign immunity could be irreparably harmed if it were forced to defend on the merits and this Court ultimately overrules *NextEra*. See *Republic of the Philippines* v. *Pimentel*, 553 U.S. 851, 865 (2008). A GVR would also advance this Court's interest in "alleviat[ing] the potential for unequal treatment that is inherent in [its] inability to grant plenary review of all pending cases raising similar issues," ensuring that Spain and Russia receive the same treatment under the FSIA. *Lawrence*, 516 U.S. at 167.

The respondents identify only a supposed interest in speedy recovery, though the Stabil Investors waited nearly three years after the award was rendered to file this action and proceedings to set aside the DTEK award are still ongoing in the Netherlands. Holding this petition pending *Blasket* would add marginal delay, if any, to an already extended process. In any case, award confirmation proceedings are indisputably subject to the FSIA's requirements when the defendant is a foreign state. A desire for speed does not outweigh the substantial interests implicated by Russia's sovereign immunity. See *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 493 (1983).

CONCLUSION

This petition should be granted, ideally with *Blasket*, or held in abeyance and GVR'd in light of *Blasket*.

Respectfully submitted,

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