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

SUPPLEMENTAL BRIEF FOR PETITIONER

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INTRODUCTION

In response to this Court's invitation in *Kingdom of Spain* v. *Blasket Renewable Invs. LLC* (No. 24-1130) ("*Blasket*"), the U.S. government submitted an amicus brief that does not address Russia's petition directly but agrees in substance with Russia's argument that the existence of a valid arbitration agreement between the actual parties to the dispute is an issue that must be resolved as a matter of jurisdictional immunity under the arbitration exception of the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. 1605(a)(6), and that therefore the D.C. Circuit's contrary decision in *NextEra Energy Glob. Holdings B.V.* v. *Kingdom of Spain*, 112 F.4th 1088 (D.C. Cir. 2024)—which controlled the decision below in this case—is wrong. U.S. Br. 2-3. Although the government did not recommend granting the petition in *Blasket*, it anticipated that other cases "arising out of the D.C. Circuit itself" could provide an opportunity to review that erroneous decision, "including under other investment treaties." *Id.* at 16. Russia's petition presents such an opportunity under the government's own criteria.

The government did not view *Blasket* as an appropriate vehicle for certiorari mainly because of the concern that Spain might not prevail on remand even if *NextEra* were reversed. Spain has argued that European Union (EU) law invalidated Spain's "unconditional consent" (or offer) to arbitrate with investors from other EU Member States under the multilateral Energy Charter Treaty, Dec. 17, 1994, 2080 U.N.T.S. 95. *Id.* at 2-3, 17. In the government's view, EU law is part of Spain's "internal law" and therefore cannot be invoked "to avoid a treaty obligation" as a matter of international law. *Id.* at 3. The government's concern—valid or not—does not apply to Russia's petition. Russia is not relying on its internal law, but rather on ordinary contract and treaty interpretation principles, to argue that it never consented (or offered) to arbitrate with respondents under the plain language of the Agreement Between the Government of the Russian Federation and the Cabinet of Ministers of Ukraine on the Encouragement and Mutual Protection of Investments, dated November 27, 1998 ("Bilateral Investment Treaty"), which by its very nature is intended to protect only foreign investments. Unlike respondents in *Blasket*, who undisputedly made foreign investments in Spain, respondents here are Ukrainian investors who made domestic investments in Ukraine. Therefore, Russia's offer to arbitrate could not extend to respondents, and respondents lacked the legal power to accept it.

Regardless, at this juncture, the critical question is not *who* is likely to prevail on the underlying question of whether an arbitration agreement exists between the parties to the dispute, but *when* that determination must be made. As the government explained, the text and purpose of Section 1605(a)(6) requires the court's independent determination that a valid arbitration agreement was formed "'with or for the benefit of' *the FSIA plaintiff*," rather than "some unrelated third party." *Id.* at 10. Requiring a court to make that determination at the outset is important because "Congress could not have wanted courts to exercise less oversight in cases *where the immunity of a foreign sovereign is at stake*." *Id.* at 3 (emphasis added). The D.C. Circuit's error in *NextEra* and below is thus consequential—regardless of whether a foreign state could ultimately prevail on its contract formation argument. Punting this issue to the merits stage rather than resolving it at the jurisdictional stage eviscerates the FSIA's grant of sovereign immunity by forcing foreign states to litigate what is statutorily a jurisdictional immunity defense together with all its merits defenses. It would also deny a foreign state the right to take an immediate, interlocutory appeal of that threshold jurisdictional immunity determination with the concomitant divestiture of a district court's jurisdiction to proceed with the merits, including execution of a potential judgment against state assets, pending that appeal. That result would subject foreign states to the very burdens and indignities of litigation the FSIA is designed to avoid, and would undermine the United States' reciprocal interest in ensuring that its own sovereign immunity is respected in foreign courts.

The government acknowledges that the D.C. Circuit's erroneous view diverges enough from other circuits that further percolation across circuits is unlikely. That is because actions to enforce foreign arbitral awards against foreign states must ordinarily be brought in the D.C. Circuit, and furthermore *NextEra* now favors plaintiffs. U.S. Br. 16; see also 28 U.S.C. 1391(f)(4). While the government suggests that further percolation within the D.C. Circuit may be possible, for instance in cases involving "other investment treaties," that too is now highly unlikely in light of the D.C. Circuit's decision here. Indeed, Russia argued to the D.C. Circuit that respondents' cases are distinguishable from *NextEra* for various reasons, not the least of which is that they arise under a different investment treaty that does not implicate the overlay of EU law. The court below rejected those arguments and doubled down on *NextEra*, leaving no doubt that the D.C. Circuit's error is entrenched.

Absent intervention by this Court now, the D.C. Circuit's erroneous decision in *NextEra* and this case will continue to deprive foreign states of the sovereign immunity afforded to them by Congress under the FSIA. In light of the government's brief, the Court should grant Russia's petition.

ARGUMENT

I. Russia's Petition Is a Proper Vehicle Under the U.S. Government's Own Criteria

The government agrees with Russia that *NextEra* "is incorrect." U.S. Br. 2. Consequently, the decision below, which relied on *NextEra*, is likewise incorrect. As explained by the government, courts must decide whether a valid arbitration agreement exists "with or for the benefit of" the private party invoking the purported arbitration agreement as a matter of *jurisdictional immunity*. The D.C. Circuit's erroneous decision to defer that question to the "merits" stage—which is not the case in other circuits—has immediate adverse consequences for foreign states, requiring this Court's review now.

Russia's petition is an ideal vehicle for this Court to resolve the emerging circuit split regarding the proper interpretation of the arbitration exception. Respondents' cases against Russia fit naturally into the government's anticipation that "cases arising out of the D.C. Circuit itself" could provide this Court with the opportunity to review the issue "under other investment treaties." U.S. Br. 16.[1]

Although delving into EU law would not be necessary for interpreting the arbitration exception, the government opines that Spain's petition may not be an ideal vehicle to address the threshold question. In the government's view, Spain is unlikely to prevail on its underlying contract formation argument on remand because Spain may not be able to invoke EU law as a basis for invaliding its "'unconditional' promise" to arbitrate "reflected in the [Energy Charter Treaty's] plain text." *Id.* at 17.[2]

The government's concern—valid or not—does not apply here. Russia is not relying on its own internal law to supposedly avoid an international obligation, but rather is arguing that, as a matter of basic

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[1] The government cites examples of other cases making their way through the D.C. Circuit, but those cases present the same concern raised by the government with respect to Spain's petition because they also raise the same EU law issue. U.S. Br. 17.

[2] It bears noting that the government's view that EU law is "internal law" is hotly contested by the European Union and EU Member States, and the only district court to have squarely decided the issue so far has ruled in favor of Spain—concluding that EU law is part of the governing "international law" under the Energy Charter Treaty. *Blasket Renewable Invs., LLC* v. *Kingdom of Spain*, 665 F. Supp. 3d 1, 11 (D.D.C. 2023).

contract law and treaty interpretation, no agreement to arbitrate could ever be formed between Russia and respondents. The plain language of the arbitration provision in the Bilateral Investment Treaty is clear: Russia and Ukraine consented (or offered) to arbitrate only with investors of the other Contracting Party who made investments in their respective territories, and thus, Ukrainian investors such as respondents, who invested in Ukraine, lacked legal power to accept an offer that was not directed to them. Pet. 25-27. Thus, a court on remand is likely to conclude that Russia never made an agreement to arbitrate with or for the benefit of respondents.

II. The D.C. Circuit's View of the FSIA's Arbitration Exception Has Sufficiently Diverged from Other Circuits to Necessitate Review Now

The government agrees with Russia's position that, contrary to the D.C. Circuit's view, the question of whether the parties to the dispute formed an agreement to arbitrate should be decided as a matter of *jurisdictional immunity* under the FSIA's arbitration exception, Section 1605(a)(6). The D.C. Circuit stands alone, and as the default venue for award enforcement actions against foreign states, its erroneous decision has immediate harmful consequences for foreign states facing award enforcement actions by plaintiffs with whom they never agreed to arbitrate.

1. In analyzing the text and purpose of the arbitration exception, the government explains that "the phrase 'an agreement made by the foreign state

with or for the benefit *of a private party*' is best read to mean an agreement with or for the benefit of *the FSIA plaintiff*—not some unrelated third party." *Id.* at 10. That, the government says, is the "most natural reading of a jurisdictional provision" like the arbitration exception, because these provisions "generally turn on the status of the parties to the litigation, not unrelated third parties." *Ibid.* And under the FSIA, a foreign state is presumptively immune from the jurisdiction of U.S. courts unless and until the plaintiff has conclusively satisfied the substantive requirements of an exception to sovereign immunity. *Bolivarian Republic of Venezuela* v. *Helmerich & Payne Int'l Drilling Co.*, 581 U.S. 170, 180 (2017) ("*H&P*"); *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 486-489 (1983).

The government recognizes that Spain's argument, like Russia's here, goes to the formation of an arbitration agreement between the parties to the dispute, and not to the "scope" of any agreement to arbitrate between the states in the applicable treaty. U.S. Br. 10. The government reinforces that point by explaining that, in ordinary cases between private parties, questions of contract formation are for courts to decide. *Id.* at 12 (citing, among others, *Granite Rock Co.* v. *International Brotherhood of Teamsters*, 561 U.S. 287, 298-299 (2010); *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440, 445 (2006); *Prima Paint Corp.* v. *Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 403-404 (1967)). That ordinary requirement is even more important in the FSIA context given that "the determination implicates foreign sovereign immunity and the court's jurisdiction." *Id.* at 13.

The government notes that the D.C. Circuit's reading of the arbitration exception is also "inconsistent with principles of contract law." U.S. Br. 13 (citing *BG Group, PLC* v. *Republic of Argentina*, 572 U.S. 25, 33-37 (2014)). Contracting States to a treaty, like parties to any contract, may circumscribe their consent (or offer) to arbitrate however they wish, and thus parties who are not intended beneficiaries of that offer may not validly accept it. Pet. 30 (citing decisions from the highest state courts and leading treatises on contract law). The government agrees with Russia that determining whether a party invoking that offer was actually an intended beneficiary under the plain language of the treaty is a *jurisdictional immunity* question. U.S. Br. 14.

The government disagrees with respondents in *Blasket* who, like respondents in this case, argue that the FSIA requires only a finding that an agreement to arbitrate exists for the benefit of some investors, regardless of whether those investors are parties to the dispute. Looking again to the text of the statute, the government's view is that it would be "strange—and at odds with the carefully crafted exceptions in the FSIA—for Congress to withdraw a foreign state's sovereign immunity from a suit brought by one party solely because that state would lack immunity from a suit brought by someone else." *Id.* at 10-11. If the mere finding that the foreign state agreed to arbitrate with or for the benefit of "*some* private party, somewhere" is enough to abrogate sovereign immunity, then even the national of a country that is not a signatory to a treaty could "maintain a suit in federal court to 'enforce' arbitrations at the outset of the dispute." *Id.*

at 11-12. The government's hypothetical echoes Russia's hypothetical that, under the D.C. Circuit's decision below, even a Ukrainian investor who invested in France would be able to overcome Russia's sovereign immunity to enforce an award rendered under the Bilateral Investment Treaty on the theory that Russia's conduct harmed its investments in France. Pet. 20. That cannot be right.

In short, the D.C. Circuit's erroneous decision should be reviewed and corrected.

2. The government nevertheless recommended denying the petition in *Blasket* because Spain may not ultimately prevail on its contract formation argument and therefore is supposedly "unlikely to obtain relief" even if the question of contract formation is decided at the jurisdictional stage. U.S. Br. 15. Furthermore, in the government's view, the emerging circuit split is too "shallow." *Ibid*. Neither rationale is availing where the "relief" at stake is jurisdictional immunity.

2.a. The upshot of declining to review the threshold question now is that it would deprive Russia and other foreign states of the right to litigate the existence of a relevant agreement to arbitrate as a question of jurisdictional immunity, and instead push that issue into the "merits" stage. Incorrectly deferring the question of contract formation to the "merits" stage irreparably harms foreign states litigating in U.S. courts. "[F]oreign sovereign immunity's basic objective" is "to free a foreign sovereign from suit." *H&P*, 581 U.S. at 174 (2017); see also *Process & Indus. Devs.* v. *Fed. Republic of Nigeria*, 962 F.3d 576, 584 (2020) ("P&ID"). This principle aligns with the broader objective of the FSIA to respect the "independence and dignity" of foreign states. *H&P*, 581 U.S. at 179; see also *P&ID*, 962 F.3d at 586. Assertions of sovereign immunity must be conclusively resolved before a foreign state is "required to address the merits at all," and an immediate, interlocutory appeal of a district court's denial of sovereign immunity—with the concurrent divestiture of the district court's jurisdiction to proceed any further pending the appeal—is an important part of the foreign sovereign's right to fully litigate its immunity defense. *H&P*, 581 U.S. at 171; *P&ID*, 962 F.3d at 586.

The timing of a court's analysis on the contract formation question thus affects every foreign state that finds itself defending against enforcement of an arbitral award in U.S. courts. Abrogating a foreign state's jurisdictional immunity before determining whether the party hailing the state into court formed an agreement to arbitrate with the state in the first place, as required by the arbitration exception, severely undermines the benefits of sovereign immunity. Thus, D.C. Circuit precedent eviscerates the FSIA's protections by deferring that sovereign immunity determination to the merits stage.

Speculations about likelihood of prevailing on the ultimate contract formation argument should not prevent this Court from aligning the D.C. Circuit with the text of the FSIA (and the other circuits) now. Again, *who* is likely to prevail on the contract formation question does not detract from needing to resolve the issue of *when* that question must be decided in this context. Holding that the existence of an agreement to arbitrate between the parties to the dispute must be decided as a matter of jurisdictional immunity will rehabilitate the right of foreign states to litigate that issue free from the burdens and indignities of needless "merits" litigation involving disputes they never agreed to arbitrate. Russia's jurisdictional objections require a fulsome analysis at the jurisdictional stage, regardless of its odds of success.

2.b. The government acknowledged that there is at least arguably some divergence between circuits as to whether courts must determine, as a threshold jurisdictional matter, that a foreign state formed an agreement to arbitrate with or for the benefit of the party invoking the arbitration clause. U.S. Br. 15-16. Under *Cargill Int'l S.A.* v. *M/T Pavel Dybenko*, 991 F.2d 1012 (2d Cir. 1993), and *Al-Qarqani* v. *Arab Am. Oil Co*, 19 F.4th 794 (5th Cir. 2021), plaintiffs cannot (or at least may not be able to) surpass the high bar of sovereign immunity without showing that the arbitration agreement applies to them. See Pet. 16-18.

Further percolation of this issue, both among the circuits and within the D.C. Circuit, is unlikely. As the government recognized, the D.C. Circuit is the default venue for civil actions against foreign states, making it the venue for nearly all award enforcement actions under the FSIA. U.S. Br. 16 (citing 28 U.S.C. 1391(f)(4)). Thus, the D.C. Circuit's divergence from other circuits in *NextEra* denies a foreign state's immunity defense under the arbitration exception before it even has a chance to assert it, and has profound negative effects on sovereign immunity with virtually no chance of other courts offering further analysis or alternative views.

Even given the opportunity to choose in which circuit to initiate an award enforcement action, no future award creditor would initiate an award enforcement action in any other circuit because the bar to surpass a foreign sovereign's immunity is lower after the D.C. Circuit's decisions in *NextEra* and this case. Despite the differences between *Blasket* and the present case, the D.C. Circuit still applied *NextEra*'s incorrect holding below, making any further percolation *within the D.C. Circuit* highly unlikely. This makes the D.C. Circuit an exponentially more attractive venue for parties seeking to enforce foreign arbitral awards against foreign states. Sovereign immunity is either respected, or it's not. And as demonstrated by the decision below, the D.C. Circuit will only continue to reaffirm *NextEra* under different treaties absent this Court's intervention.

Reviewing the D.C. Circuit's erroneous decision now would thus allow foreign states such as Russia to obtain relief by preserving their legitimate sovereign immunity defense.

CONCLUSION

This petition should be granted in light of the government's brief in *Blasket*.

Respectfully submitted,

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