No. 25-549

IN THE

Supreme Court of the United States

RUSSIAN FEDERATION,

Petitioner,

v.

HULLEY ENTERPRISES LTD., *et al.*,

Respondents.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Russia herein replies to the Brief in Opposition ("Opp.") filed by Respondents ("HVY").

Contrary to HVY's position, the Petition is not "premature." This Court often grants "interlocutory" review in cases involving threshold immunity questions, even if *other* immunity questions were remanded (as here).

HVY's focus on "issue preclusion" is also misplaced because the lower courts have not yet addressed it. Moreover, when "issue preclusion" is adjudicated below, the lower courts will need clear guidance from this Court as to which arguments are jurisdictional and which are not under the Foreign Sovereign Immunities Act ("FSIA"). *E.g.*, App.15a–16a (explaining that the "issue preclusion" analysis may apply differently to jurisdictional questions).

In addition, there is a clear split among the circuits. HVY also fail to identify any plausible reason why the FSIA would permit a plaintiff to invoke 28 U.S.C. §1605(a)(6) based on a treaty that authorizes *somebody else* to pursue investor-State dispute resolution ("ISDR").

Finally, HVY have caused the only actual "delay" in this case—*i.e.*, by fraudulently concealing the material evidence *for decades*. And most of HVY's concerns with "delay" are now moot, in any event, because the D.C. Circuit ordered the release of the mandate on December 11, 2025. Accordingly, the only question remaining is whether §1605(a)(6) was interpreted incorrectly. (It was.) All other concerns will be addressed by the District Court.

I. This Court frequently grants interlocutory review of "remand" decisions involving "immunity" defenses

1. According to HVY, "[t]he Petition is premature" because "[t]he D.C. Circuit *remanded* for further proceedings" to adjudicate a distinct FSIA question—*i.e.*, whether there was no arbitration agreement under §1605(a)(6) because Russia never ratified the Energy Charter Treaty ("ECT"). Opp.18; *see also* App.10a–13a. HVY suggest that Russia must first wait for a "final determination" resolving *all* FSIA issues because this Court supposedly does not review "interlocutory" orders. Opp.15, 20.

HVY are wrong. This Court often grants interlocutory review where the appellate court decided *some* "immunity" questions and remanded *others*.

For example, the appellate court in *Simon v. Republic of Hungary*, 77 F.4th 1077, 1118–19 (D.C. Cir. 2023), ruled that the "commercial-activity nexus" under 28 U.S.C. §1605(a)(3) could be satisfied if Hungary commingled "proceeds from illegally taken property with general accounts." Vacating in part, the D.C. Circuit "remand[ed] to the district court to make the factual findings" implicated by this theory. *Id.* This Court granted certiorari—even though factual aspects of Hungary's immunity defense were still being adjudicated—and rejected the "commingling theory." *Republic of Hungary v. Simon*, 604 U.S. 115, 139 (2025).

Similarly, in *Samantar v. Yousuf*, 560 U.S. 305, 310–11 (2010), the appellate court concluded that the FSIA did not cover the defendant, and thus

"remanded the case for … a determination of whether" he was "entitled to immunity under the common law." This Court granted review of the same FSIA question without waiting for any final determination of the other "immunity" defenses on remand. *Id.*

Indeed, there are many similar immunity precedents. *See, e.g.*, *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 396–97, 402–06 (1979) (reviewing whether "regional" legislators enjoyed "absolute immunity" for "legislative" conduct, even though the appellate court had "remanded for a hearing" on whether "the challenged conduct was legislative"); *Butz v. Economou*, 438 U.S. 478, 484–85 (1978) (reviewing the applicability of "absolute immunity," although the appellate court had remanded "for further proceedings" under the "qualified immunity" framework).

By contrast, none of the cases cited by HVY on this issue involved immunity—and some also involved an obsolete version of certiorari. *E.g.*, *Am. Constr. Co. v. Jacksonville, T. & K. W. R. Co.*, 148 U.S. 372, 381 (1893) (quoting the 1891 Evarts Act, whereunder reviewable decisions first needed to be "'made final in the Circuit Court'"). As the current statute provides, the writ of certiorari may be issued "*before or after* rendition of judgment." 28 U.S.C. §1254(1) (emphasis added).

The FSIA question presented here is not premature, therefore, and can be reviewed now irrespective of whether other, distinct immunity arguments were remanded.

2. HVY also assert that Russia's argument is "premature" because Russia will anyway be able to "re-submit its briefing" as to HVY's ineligibility to arbitrate under the ECT "when the District Court … turns to the Russian Federation's *merits* defenses." Opp.20. According to HVY, misclassifying Russia's argument—*i.e.*, as not implicating the FSIA's jurisdictional elements—will supposedly not impose any "extraordinary" burden on Russia. *Id.*

However, at the very end of their brief, HVY give the game away—revealing why much more is at stake than just the timing of briefing.

That is, HVY plan to argue that "in the merits phase" the district court must "*defer* to the Arbitral Tribunal" as to whether HVY were eligible to arbitrate. Opp.35 (emphasis added). In contrast, as the D.C. Circuit ruled here, at least the jurisdictional questions must be decided "*without deferring*" to the arbitrators. App.12a (emphasis added). In other words, HVY are candidly hoping that the *categorization* of Russia's argument will determine the *outcome*.[1]

3. Finally, even if HVY were to concede that Russia may ultimately obtain an independent and *de novo* decision about HVY's eligibility during the "merits"

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[1] To be sure, Russia disputes HVY's suggestion that "the UNCITRAL Rules" foreclose judicial review of arbitrators' rulings. Opp.35. Judge Katsas recently rejected the same UNCITRAL argument because India—like Russia here—identified "evidence that cut[] *against* an intent to delegate arbitrability exclusively" to arbitrators. *Deutsche Telekom, A.G. v. Republic of India*, 155 F.4th 694, 702 (D.C. Cir. 2025). The UNCITRAL issue was not yet addressed by the D.C. Circuit in Russia's case, however, so these risks remain.

phase, HVY's approach still would contradict this Court's sovereign-immunity precedents.

Specifically, if Russia's argument about HVY's eligibility is indeed jurisdictional under §1605(a)(6), then this challenge *must* be adjudicated at "the outset of the case" *before* Russia is subjected to the even more burdensome "merits phase." *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 581 U.S. 170, 178–79 (2017). Compelling Russia to litigate immunity and merits *together* contravenes "the FSIA's basic objectives," which include providing "immunity *from suit*." *Id.* (emphasis added).

II. The "issue preclusion" debate will be affected by this Court's interpretation of §1605(a)(6), and not the other way around

Confusingly, HVY suggest there is a "*second* question presented by this Petition," which is purportedly "whether the doctrine of issue preclusion bars" Russia from litigating the jurisdictional elements of §1605(a)(6) based on certain Dutch judgments. Opp.18 (emphasis added).

This is wrong. The complete phrase, of course, is "questions presented *for review*." Sup.Ct.R.14.1(a) (emphasis added). The so-called "second question" is not "presented" for this Court's review because, as HVY elsewhere concede, "the lower courts have not yet analyzed" any part of the issue-preclusion questions. Opp.18–19.

HVY further suggest: "If this Court were to grant the Petition now, in this interlocutory posture, it would do so without the benefit of the lower courts'

analysis" of "the doctrine of issue preclusion" based upon the rulings of the Dutch courts. *Id.*

HVY have this backward.

First, the D.C. Circuit delivered its *final word* on the single question presented here—*i.e.*, whether "Russia's argument that the Shareholders do not qualify" as "beneficiaries of the arbitration clause" is "jurisdictional" under the FSIA. App.13a–14a. Future litigation about issue preclusion will not affect that ruling.

On the contrary, the D.C. Circuit explained that *the inverse* is true—*i.e.*, that the jurisdictional character of FSIA elements might foreclose giving "preclusive effect to a foreign judgment" on specific questions. App.16a.

Second, as the D.C. Circuit observed, it is far from certain that the lower court will ever reach the question of issue preclusion. There are "numerous threshold issues" to resolve first including, without limitation, "whether principles of comity counsel in favor of recognizing the Dutch judgments" and "whether the Dutch proceedings were 'full and fair'" in view of HVY's fraudulent concealment of the evidence. *See* App.15a, 17a–18a.

This complex debate will entail factual disputes—*e.g.*, as to what happened in the Dutch litigation—as well as complex questions of sovereign-immunity law and Dutch law. *See, e.g.*, *Jurisdictional Immunities of the State* (*Germany v. Italy; Greece intervening)*, 2012 I.C.J. 99, 152 ¶¶ 130–131 (holding that Italy violated Germany's sovereign immunity by recognizing a Greek judgment); Restatement (Fourth) of Foreign Relations Law §487 ("A foreign judgment will not be

given greater preclusive effect in the United States than the judgment would be accorded in the state of origin.").

Accordingly, this Court's intervention is critically necessary to determine conclusively which questions are jurisdictional under §1605(a)(6). Only then will the lower courts be able to apply the correct standards to the underlying legal and factual questions implicated by "issue preclusion."

III. The circuits are split and the FSIA's venue provision will prevent further ventilation

1. The D.C. Circuit squarely held that HVY's eligibility as "proper beneficiaries of the arbitration clause" was "not jurisdictional" under §1605(a)(6). App.13a–14a.

HVY do not—and, indeed, cannot—dispute that the Second Circuit held the opposite: "[T]o determine whether subject matter jurisdiction existed, the district court ought to have determined whether ... the arbitration agreement ... was intended to benefit [the plaintiff]." *Cargill Int'l S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1019 (2d Cir. 1993).

HVY do suggest—wrongly—that *Al-Qarqani* supposedly "did not involve" any purported "third-party beneficiaries." Opp.27. According to HVY, the Fifth Circuit's ruling hinged on "the absence of *any* arbitration agreement" made "by the sovereign defendant." *Id.*

As Russia has shown, however, the district court and the Fifth Circuit both left that latter question undecided. Pet.17–18. The district court ruled that

the plaintiffs were not "entitle[d] … to utilize the third-party beneficiary doctrine" and declined to reach whether "Saudi Aramco [wa]s bound" under any relevant agreements. App.383a, 388a. The Fifth Circuit adopted this "quite accurate" analysis of the contractual questions and yet emphasized the *jurisdictional* nature of such analysis: "Because there exists no agreement *among the parties* to arbitrate, this FSIA exception does not apply." *Al-Qarqani v. Saudi Arabian Oil Co.*, 19 F.4th 794, 802 (5th Cir. 2021) (emphasis added).

Accordingly, there is an irreconcilable conflict about "beneficiary" arguments under §1605(a)(6).

2. HVY attempt to muddy the waters: "Neither the Second Circuit nor the Fifth Circuit … considered an *international treaty* between sovereigns …. Instead, those cases involved *private contracts* that were allegedly entered into between a sovereign instrumentality and a specific *private* party." Opp.26 (emphasis added).

This argument is wrong for three reasons.

First, it is a distinction without a difference: "'[A] *treaty is a contract*, though between nations.'" *ZF Automotive US, Inc. v. Luxshare, Ltd.*, 596 U.S. 619, 634 (2022) (citation omitted, emphasis added). Unsurprisingly, therefore, in many §1605(a)(6) cases involving international *treaties*, courts have cited precedents decided under *contracts* with private counterparties. *See, e.g.*, App.9a (citing *Belize Social Dev. Ltd. v. Government of Belize*, 794 F.3d 99, 102–03 (D.C. Cir. 2015)); *NextEra Energy Glob. Holdings B.V. v. Kingdom of Spain*, 112 F.4th 1088, 1101 (D.C. Cir. 2024) (same).

Indeed, HVY fail to provide any suggestion as to *why* the FSIA would classify treaties and contracts differently. Section 1605(a)(6) refers to an "agreement to arbitrate," which covers both categories.

Second, if this Court were to accept HVY's artificial distinction between treaties and contracts, there will likely *never* be an adequate split to trigger review because of the FSIA's venue provisions. In cases under treaties, the defendant will *always* be "a foreign state" itself and venue will *always* be proper in "the District of Columbia" under 28 U.S.C. §1391(f)(4).

To take advantage of the current *Blasket* precedent, therefore, plaintiffs will *always* bring treaty-based cases under §1391(f)(4). HVY's approach would thus obstruct further ventilation.

Third, HVY's reframing does not eliminate the split of authority anyway. Even if this Court must look exclusively at "treaty" cases for relevant conflicts, this Court should still grant review to resolve the D.C. Circuit's conflict with *ZF Automotive*, 596 U.S. at 634, and *Olin Holdings Ltd. v. State of Libya*, 73 F.4th 92 (2d Cir. 2023). Pet.19–20.

Similarly, yet another conflict is created by giving jurisdictional significance to concepts that are not referenced in §1605(a)(6), such as "scope" and "existence." *See* Opp.15, 28, 29. Whereas the D.C. Circuit—alone—holds that "beneficiary" status implicates the *scope* of the arbitration agreement, *Cargill* and many other authorities characterize "beneficiary" status as concerning whether "the alleged arbitration agreement *exists*" for that beneficiary. *Cargill*, 991 F.2d at 1018 (emphasis added); Pet.20–22.

IV. The decision below is wrong

HVY fail to engage with any of Russia's analysis concerning interpretation of §1605(a)(6).

1. HVY suggest that a "critical flaw" in Russia's argument is that "Congress *added* the key words 'or for the benefit of a private party'" when transplanting other phrases from the 1958 New York Convention. Opp.30.

Contrary to HVY's reframing, however, Russia's argument is *not* that the FSIA requires an "agreement '*with*' the private party." Opp.32 (emphasis added). Russia's argument, rather, is that HVY cannot invoke the "benefit" clause based upon an arbitration agreement made "for the benefit" *of somebody else*. Pet.24–27.

This was the Second Circuit's explicit holding in *Cargill*, 991 F.2d at 1019 (explaining that §1605(a)(6) is satisfied only where the foreign state "intended to confer a benefit" on the specific plaintiff (internal quotation marks and citation omitted)). Russia's interpretation also aligns with the precedents that Congress codified in 1988. Pet.24–27. Nothing in the text or history suggests that §1605(a)(6) unsettled that consistent understanding.

2. HVY also wrongly suggest that Russia somehow "waived" the argument that the latter clause of §1605(a)(6) means what it says—that the "agreement" must cover "'differences … *between* the parties'" based upon their "'defined legal relationship.'" Opp.32–33 (emphasis added).

But Russia made the same argument below: "The FSIA … explicitly requires an agreement to arbitrate 'differences which … may arise *between the parties* with respect to a *defined legal relationship*." Final Reply 9 (D.C. Cir. July 2, 2024) (Doc. #2062844) (emphasis in the original).

In any event, the *issue* of HVY's ineligibility was "properly presented" and litigants are not "limited to the precise arguments they made below." *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (internal quotation marks and citation omitted).

3. Finally, as to the "defined legal relationship" required by §1605(a)(6), HVY suggest they could "have made a devastating rejoinder" based on a purported stipulation under Article 26(5)(b) of the ECT. Opp. 32–33 & n.11.

The "devastating rejoinder" is wrong, however, because neither Article 26(5)(b) nor any other part of the ECT ever uses the phrase, "defined legal relationship."[2]

V. It was HVY, not Russia, who caused the "delay" in this case

The last point to address is HVY's concern about "yet more delay." Opp.3. HVY address "delay" from several different perspectives.

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[2] HVY are confusing Article I(3) and Article II(1) of the New York Convention, 21 U.S.T. 2517. The ECT arguably stipulates to fulfilment of the *former* clause, whereas §1605(a)(6) transplants the phrase "defined legal relationship" from the *latter* clause.

1. First, HVY contend that any "GVR" in Russia's case during the pendency of *Blasket* would not be appropriate. Opp.23–24. According to HVY, GVR would supposedly cause "additional delay" by preventing the D.C. Circuit from releasing the mandate. *Id.*

This concern is now moot. The mandate was issued and the district-court litigation has resumed. *See, e.g.*, Joint Mot. for an Expedited Order Granting a Preliminary Briefing Schedule (D.D.C. Dec. 15, 2025) (ECF 288). As HVY themselves argue, therefore, all concerns about purported "delay" should now be resolved by the District Court, which "is in the best position to manage its own proceedings." Opp.21.

In any event, as regards the advantages and disadvantages of GVR, Russia will address those concerns in the coming days in a separate Motion. That submission will also address the value of aligning consideration of Russia's Petition with Spain's petition in the *Blasket* case. *See, e.g.*, *ZF Automotive*, 596 U.S. at 623–24 (consolidating two cases where they "presented the same threshold legal question," and yet "their factual contexts differ[ed]" in useful respects).

2. Second, HVY also suggest that the FSIA's jurisdictional elements should be ignored on policy grounds. According to HVY, any further delays would "cause great disruption to the current treaty regimes." Opp.35.

Of course, such policy concerns should be resolved by the political branches and treaty negotiators (not by courts). Indeed, ISDR treaties are frequently renegotiated, as where the 2020 U.S.-Mexico-Canada

Agreement replaced the original NAFTA. *See, e.g.*, Pub. L. 116-113. Congress also has frequently amended the FSIA. *See, e.g.*, Pub. L. 106-386; Pub. L. 107-297; Pub. L. 110-301.

The proper course, therefore, is for this Court to interpret §1605(a)(6) as written.

3. Third, the only actual "delay" in this case was caused by HVY and not by Russia. *For decades*, HVY fraudulently concealed evidence about their "alter ego" relationship with the Russian Oligarchs. Pet.7–13.

Specifically, HVY told the arbitrators: "we have a valid trust instrument which in essence prohibits" the Russian Oligarchs "from interfering with the exercise of the voting rights.… [W]e have trustees who own the shares; they exercise the voting right in their discretion; nobody is entitled to tell them how to do that …." App.360a.

Those very same "trustees," however, promptly gave the "voting rights" *back to the Russian Oligarchs* in a secret document that HVY never disclosed to the arbitrators. App.390a–391a.

It is thus outrageous for HVY now to extol the purported rigor of "a ten-day hearing in The Hague" before "well-respected" international arbitrators. Opp.8,34. Through their fraud, HVY themselves rendered meaningless that ten-day hearing—and, indeed, the whole ten-year arbitration. If HVY truly "respected" the arbitrators, then HVY would have told them the whole truth and let them see the real evidence.

The FSIA requires *de novo* evaluation of that evidence in order to determine whether HVY were covered by any "agreement to arbitrate" in the first place. *See* Pet.7–13.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

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