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 DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Energy Charter Treaty ("ECT") is an international investment treaty. In Article 26, "each Contracting Party" gave "unconditional consent to the submission of a dispute to international arbitration" with "an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former."

The arbitration exception of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1605(a)(6), refers to "an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration," and it provides that a sovereign "shall not be immune" from an action "to confirm an award made pursuant to such an agreement to arbitrate."

This case is an action by respondents to confirm three Arbitral Awards that were made pursuant to Article 26 of the ECT. Petitioner claims that it is immune under the FSIA.

1. The first question presented is whether Article 26 of the ECT satisfies the FSIA's arbitration exception because it is "an agreement to arbitrate" that was "made by the foreign state . . . for the benefit of" private investors. 28 U.S.C. § 1605(a)(6).

2. The second question presented is whether the doctrine of issue preclusion bars petitioner from re-litigating whether respondents are "Investor[s] of another Contracting Party"—an issue that petitioner raised and lost in its failed attempt to persuade the Dutch courts to "set aside" the Awards.

RULE 29.6 DISCLOSURE

Respondents Hulley Enterprises Limited and Veteran Petroleum Limited are 100% owned by respondent Yukos Universal Limited, which in turn is 100% owned by GML Limited. GML Limited is 100% beneficially owned, through several trusts, by Palmus Trust Company Limited and Rysaffe Trustee Company (C.I.) Ltd. To the best of undersigned counsel's knowledge and belief, no parent company, subsidiary, or affiliate of Hulley Enterprises Limited, Yukos Universal Limited, or Veteran Petroleum Limited has any outstanding securities in the hands of the public.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes, Rules and Regulations

Other Authorities

INTRODUCTION

On the other side of the globe, the Russian Federation's armed forces continue to rain down missiles, drones, and bombs on Ukrainian cities, towns, and villages, systematically killing civilians in President Vladimir Putin's unprovoked war of aggression—a war roundly condemned by the civilized world as violating the most fundamental norms of international law. Meanwhile, in this Court, the Russian Federation's lawyers are seeking to further delay the efforts of respondents (the former majority shareholders of Yukos Oil) to confirm Arbitral Awards arising out of one of President Putin's earliest violations of international law: the 2003-2007 destruction of Yukos and the expropriation of respondents' investments in that company, which were flagrant breaches of the Russian Federation's commitments in the Energy Charter Treaty ("ECT"). The Petition should be denied.

The Petition is premature because it seeks review of a non-final interlocutory order. The lower courts have *not* yet decided whether the Russian Federation has sovereign immunity. The D.C. Circuit *vacated* the District Court's denial of the Russian Federation's motion to dismiss and *remanded* for further proceedings on sovereign immunity. This Court has long held that it "should not issue a writ of certiorari to review . . . an interlocutory order," from a federal court of appeals, "unless" this Court's review "is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *Am. Const. Co. v. Jacksonville, T. & K.W. Ry. Co.*, 148 U.S. 372, 384 (1893). Denying this Petition would not

result in either "extraordinary inconvenience" to the Russian Federation nor "embarrassment in the conduct" of this case. On the contrary, denying this Petition would permit the District Court to take up the other issues relating to sovereign immunity (not presented by this Petition) that were remanded to it by the D.C. Circuit. If the Russian Federation is still aggrieved by a *final* decision on sovereign immunity, then it will have the right to take another interlocutory appeal to the D.C. Circuit, followed (if appropriate) by another opportunity to seek certiorari review.

In addition to being premature, this Petition also fails to identify any conflict among the federal courts of appeals that would merit this Court's review. The question here was also presented by the petition filed in *Kingdom of Spain v. Blasket Renewable Investments LLC, et al.*, Case No. 24-1130 ("*Blasket*"). Here, as in *Blasket*, the D.C. Circuit held that the FSIA's arbitration exception is satisfied by the undisputed evidence that respondents' Arbitral Awards were rendered pursuant to the arbitration clause found in Article 26 of the ECT. That arbitration clause is the "agreement to arbitrate" that satisfies the FSIA. The Russian Federation, like Spain before it, attempts to conjure up a split in appellate authority on this question by citing two decisions from the Second and Fifth Circuits. But both of those cases were concerned with sovereigns' alleged *contracts* with *private parties*, rather than an international investment treaty, like the ECT, agreed to between sovereigns. There is *no* appellate authority holding that an international treaty's arbitration clause does

not qualify as an "agreement to arbitrate" that satisfies the FSIA's arbitration exception.

This Petition should not be held while this Court considers the *Blasket* petition. Here, unlike in *Blasket*, the D.C. Circuit remanded with instructions to the District Court to take up two *other* arguments relating to sovereign immunity. These further proceedings, in the District Court, will be necessary *regardless* of whatever action this Court eventually takes with regard to the *Blasket* case. It is high time for those further proceedings to begin. The District Court is fully capable of implementing any relevant guidance that may be given by this Court in the *Blasket* case, in the unlikely event that this Court were to grant the *Blasket* petition. But those proceedings in the District Court have not yet begun because the D.C. Circuit has not yet issued its mandate—apparently waiting for this Court's decision on this Petition. Holding this Petition would amount to a *de facto* stay of this long-delayed case, for no useful purpose.

This case is already very old. The Russian Federation's underlying violations of the ECT—its destruction of Yukos and expropriation of respondents' investments—occurred more than twenty years ago. The arbitrations commenced in 2005. This confirmation action was filed in 2014. There are no "extraordinary" circumstances, *Am. Const. Co.*, 148 U.S. at 384, that would justify the highly unusual step of creating yet more delay by granting or holding this premature Petition. This case belongs back in the District Court, where the D.C. Circuit will send it once this Petition is denied.

STATEMENT OF THE CASE

I. Legal and factual background

a. Russia destroys Yukos and expropriates respondents' investments

Twenty-two years ago, OAO Yukos Oil Company ("Yukos") was one of the largest oil-and-gas companies in the world. Respondents owned the majority of Yukos's shares.

Yukos's fortunes changed dramatically after its Chairman, Mikhail Khodorkovsky, openly criticized Vladimir Putin's regime in 2003. *See* ECF 2-1, at 277-90 (Final Arbitral Award ¶¶761-93).[1] The Kremlin promptly initiated a series of politically motivated attacks—arresting, charging, and convicting over 40 Yukos executives and employees—as part of a "ruthless campaign to destroy Yukos, appropriate its assets and eliminate Mr. Khodorkovsky as a political opponent." *Id.* ¶ 811.

The Russian Federation also concocted a "novel and arbitrary" tax theory as "a pretext" to do "whatever it deemed necessary to impose massive tax liabilities on Yukos" in excess of $24 billion. *Id.* ¶¶ 589, 627, 694. The Russian tax authorities rejected

[1] All citations in this brief to "ECF" are references to the District Court's docket in this case: *Hulley Enters. Ltd. et al. v. Russian Federation*, No. 14-cv-1996 (D.D.C.). All ECF citations refer to the page numbers given in the stamps applied by the ECF system at the top of the page.

Yukos's good-faith efforts to settle this dispute, *id.* ¶¶ 975-80, and instead used the tax assessment as a further pretext to "initiate[]" "bankruptcy proceedings" against Yukos in a "highly unusual manner," *id.* ¶ 1149. The authorities then abused those bankruptcy proceedings to seize "all of [Yukos's] remaining assets through a hasty and questionable liquidation process." *Id.* ¶ 1180. This was the "final act of the destruction of [Yukos] . . . and the expropriation of its assets for the sole benefit of the Russian State and State-owned companies[.]" *Id.*

b. The Energy Charter Treaty (ECT) protected respondents' investments

The Russian Federation's destruction of Yukos and expropriation of respondents' investments were flagrant violations of Russia's "treaty obligations under . . . the [ECT]," as the Arbitral Tribunal unanimously found. ECF 2-1 at 517-19, ¶¶ 1580 & 1585.

The ECT is an international treaty designed to create "a legal framework in order to promote long-term cooperation in the energy field." ECT, art. 2 (App. 207a). The ECT protects investments in the territory of a "Contracting Party" to the treaty (*e.g.*, Russia) by "Investors" (*e.g.*, respondents) incorporated in "other Contracting Parties" (*e.g.*, Cyprus). *Id.*, arts. 1(7), 10(1) & 26, App. 203a-204a, 242a.

In Article 13(1) of the ECT, each Contracting Party pledged that "Investments of Investors of a Contracting Party . . . shall not be nationalised [or] expropriated." App. 235a.

The ECT defines the key term "Investor," in Article 1(7), to include "a company or other organisation organized in accordance with the law applicable in [a] Contracting Party[.]" ECT art. 1(7) (App. 204a). Respondents were organized in accordance with the laws of Contracting Parties outside Russia.[2]

In Article 26, "each Contracting Party" gave "unconditional consent to the submission of a dispute to international arbitration" with "an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former." Art. 26(1) & (3)(a) (App. 242-243a).

The ECT permits investors who initiate arbitration to choose between several arbitration formats, including the one respondents chose here: arbitration "under the Arbitration Rules of the United Nations Commission on International Trade Law" (the "UNCITRAL Rules"). ECT art. 26(4)(b) (App. 245a). The 1976 UNCITRAL Rules provide comprehensive procedural rules for international arbitration proceedings. One critical feature of those rules is that they specifically authorize arbitral tribunals to resolve questions about the scope of their jurisdiction, rather than leaving those questions for a reviewing court to decide after the arbitration is finished. Article 23 provides that "[t]he arbitral tribunal shall have the power to rule on its own

[2] Respondents were organized under the laws of Cyprus (a Contracting Party) and the Isle of Man. The Isle of Man is a dependency of the British Crown, and the United Kingdom is a Contracting Party.

jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement." UNCITRAL Rules, art. 23(1). Doc. No. 2062842, ADD97.[3] The UNCITRAL Rules thus further protect investors by ensuring that questions about the parties' consent to arbitration are settled by neutral arbitrators well in advance of any litigation to enforce any resulting award.

The Russian Federation became a party to the ECT when the treaty was first opened for signature in 1994. The Deputy Chairman of the Russian Government signed the treaty on behalf of the Russian Federation. ECF 235-21; 235-22. That signature constituted an agreement by the Russian Federation to provisionally apply the treaty, as provided in Article 45(1). ECF 2-7, at 78.

The Russian Federation claims (on a variety of different and ever-shifting grounds) that the Deputy Chairman's signature did not bind the Russian Federation to provisionally apply the treaty's arbitration clause because (it contends) provisional application of those provisions would be inconsistent with Russian domestic law. The Russian Federation now says that its Deputy Chairman's signature was "not an offer to arbitrate 'with anybody or about anything.'" *Hulley Enters. Ltd. v. Russian Fed'n*, 149 F.4th 682, 689 (D.C. Cir. 2025) ("*Hulley II*") (App. 10a). However, that bundle of shifting arguments was remanded by the D.C. Circuit for further

[3] All citations in this brief to "Doc. No." are references to the D.C. Circuit's docket in this case: *Hulley Enters. Ltd. et al. v. Russian Federation*, No. 23-7174 (D.C. Cir.).

consideration by the District Court. *Id.* at App. 12a-13a. The Russian Federation has not sought this Court's review of these questions. In essence, the Russian Federation is asking this Court to assume, without deciding, that the Russian Federation agreed to the arbitration provisions contained in Article 26 of the ECT.

c. The Arbitral Tribunal awards more than $50 billion to respondents

In 2005, respondents initiated arbitration against the Russian Federation pursuant to Article 26 of the ECT. ECF 2-4, at 12-13 (Interim Award ¶ 4). The Russian Federation participated in the proceedings. A three-member Arbitral Tribunal was constituted. *Id.* ¶¶ 6-16. The Russian Federation sent a letter to the Arbitral Tribunal proposing The Hague as the seat of the arbitrations and stating that "[t]he Russian Federation . . . has reached the determination to accept the jurisdiction of this Arbitral Tribunal to determine its own jurisdiction." ECF 63-5, at 4.

In late 2008, the Arbitral Tribunal—composed of three well-respected international lawyers and jurists—held a ten-day hearing in The Hague on the Russian Federation's challenges to its jurisdiction. In 2009, the Arbitral Tribunal issued its Interim Awards, unanimously finding that respondents were qualified Investors eligible to invoke the Russian Federation's agreement to arbitrate contained in Article 26. ECF 2-4, at 156-58, ¶¶ 393-398; *id*. at 167-71, ¶¶ 429-435.

In its Final Awards, issued in 2014, the Arbitral Tribunal awarded respondents more than $50 billion in damages. ECF 2-1, at 584, ¶ 1827.

d. The Dutch courts refuse the Russian Federation's request to "set aside" the Arbitral Awards

In 2014, the Russian Federation filed suit in the Dutch courts (the seat of the arbitrations) asking for the Arbitral Awards to be "set aside" (i.e., annulled). The Russian Federation again repeated its argument that respondents were not "Investor[s] of another Contracting Party" eligible to invoke Article 26's arbitration agreement. In 2020, the Hague Court of Appeal rejected that argument, upon *de novo* review without deference to the findings of the Arbitral Tribunal, and unanimously denied the Russian Federation's request to set aside the Arbitral Awards. ECF 240-3, at 5-9, 13-14, ¶¶ 11, 14-21, 32-3.

The Russian Federation then initiated "cassation" proceedings in the Dutch Supreme Court. In late 2021, the Dutch Supreme Court unanimously affirmed the Court of Appeal, or else denied cassation, on all issues relevant here. As to the issue presented in this Petition, the Dutch Supreme Court held that there is "no reasonable doubt" that respondents qualify as "Investors of another Contracting Party" who were eligible to invoke ECT Article 26's arbitration agreement. ECF 240-5, at 28, ¶ 5.3.14.

The Russian Federation also pressed, in the Dutch courts, its argument that its Deputy Chairman's signature on the ECT was not actually an

agreement to provisionally apply the ECT's arbitration clause. The Dutch Court of Appeal thoroughly considered and rejected that argument, and the Dutch Supreme Court denied the Russian Federation's request for cassation to review that decision.

e. The Russian Federation refuses to pay these or any other arbitral awards or judgments against it

The Russian Federation did not pay the Arbitral Awards. On the contrary, the Russian Federation took the extraordinary step of amending its own Constitution in an attempt to thwart respondents from ever collecting on these Awards.[4]

Nor has the Russian Federation ever paid any other awards or judgments arising out of its repeated violations of international law. According to a July 2019 article in *Global Arbitration Review*, "Russia appears to have failed to honor all of the awards in the public domain that have been rendered against it." ECF 181-30, at 13, ¶ 18.

With considerable chutzpah, the Russian Federation now cites, on page 8 of its Petition, a judgment of the European Court of Human Rights

[4] ECF 181-8 (text of amendment); ECF 181-10 at 2-3 (Russian Senator stating that the amendment was a response to "the recent order of the Hague Court of Appeals mandating Russia to pay 50 billion dollars to the former shareholders of Yukos"); *id.* at 4 (President Putin: "I fully agree"); *see also* ECF 181-12 (BBC article: "The constitutional amendment is aimed at refusing the $50 bn payout awarded to the former YUKOS shareholders").

(ECtHR), in a case brought against it on behalf of Yukos shareholders. What the Russian Federation omits to note is that it has never paid a single Euro of the ECtHR's €1.8 billion judgment.[5]

The Council of Europe has repeatedly condemned the Russian Federation's refusal to pay this and 2,453 other judgments rendered against it by the ECtHR, totaling "over 2.2 billion Euros."[6]

II. The District Court's decision

Eleven years ago, respondents filed this action in the District Court, seeking a judgment confirming the Arbitral Awards so that respondents can enforce the Awards against non-immune Russian assets in this country.

This action is brought pursuant to the New York Convention.[7] Under the Convention's plain terms, the United States, as a Contracting State,

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[5] Final Judgment, *Case of OAO Neftyananya Kompaniya Yukos v. Russia,* App. No. 14902/04 (July 31, 2014), *available at* https://hudoc.echr.coe.int/eng?i=001-145730 (permanent link at https://archive.is/Q85Ki)

[6] Council of Europe, Press Release, *Council of Europe leaders profoundly concerned about Russia's non-execution of judgments of the European Court of Human Rights, including the non-payment of just satisfaction* (June 8, 2023), *available at* https://www.coe.int/en/web/portal/-/council-of-europe-leaders-profoundly-concerned-about-russia-s-non-execution-of-judgments-of-the-european-court-of-human-rights-including-the-non-payment-of-just-satisfactio (permanent link at https://archive.is/Q85Ki)

[7] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 (hereafter "New York Convention"). Doc. No. 2062842, ADD89.

"shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon."[8] Congress implemented the Convention in the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 201 *et seq*., and directed that a district court "shall confirm" an arbitral award to which the Convention applies "unless" the court "finds one of the grounds for refusal" that are "specified in" Article V of the Convention. 9 U.S.C. § 207.

The Russian Federation claimed sovereign immunity and moved to dismiss the case on that basis. Separately, the Russian Federation also filed another motion to dismiss based on *merits* defenses, i.e., based on the various "grounds for refusal" that are "specified" in Article V of the Convention. *Id.* The District Court promptly stayed the merits-based motion to dismiss. That stay, which was imposed more than 10 years ago, has never been lifted. Respondents have never had the opportunity to respond to those merits defenses.

The District Court also stayed its consideration of the Russian Federation's FSIA motion for six years (2016 to 2021) pending the resolution of the Dutch proceedings. After the Dutch Supreme Court's decision in late 2021, the District Court lifted that stay and received supplemental briefing in 2022.

The Russian Federation asked the District Court to order extensive discovery on its FSIA motion followed by "an evidentiary hearing and the

[8] *Id.* art. III.

opportunity to cross-examine four witnesses[.]" *Hulley Enters. Ltd. v. Russian Fed'n*, No. 14-cv-1996, 2023 WL 8005099, at *23 (D.D.C. Nov. 17, 2023) ("*Hulley I*"). The Russian Federation "assert[ed] that this discovery is critical to evaluating" its claim that respondents were not *really* eligible Investors of another Contracting Party but rather "should be deemed Russian nationals and ineligible to qualify as investors under the ECT." *Id.* These arguments had already been made to (and unanimously rejected by) first the Arbitral Tribunal and then the Dutch courts. *See id.* (noting that the witnesses in question had been "extensively cross-examined" in the arbitrations or else could have been called as witnesses there).

In November 2023—*nine years* after this case was filed, and nearly *twenty years* after respondents began the arbitrations—the District Court denied the Russian Federation's FSIA motion. The District Court concluded that the FSIA's arbitration exception applied to this case based on "[t]he terms of the ECT[.]" *Id.* at *13. The District Court denied the Russian Federation's first argument—that its Deputy Chairman's signature did not constitute an agreement to arbitrate with anyone, about anything—by deferring to the Arbitral Tribunal. *Id.* at *16-*20.

Relevant here, the District Court held that "further inquiry into the Russian Federation's allegations that Russian nationals exercised control in fact over the Shareholders and the corporate veil of the Shareholders should be pierced to treat them as Russian nationals may only be addressed at the enforcement [i.e., merits] stage of these proceedings." *Id.* at *23.

III. The D.C. Circuit's opinion

Rather than proceed in the District Court on its merits defenses under Article V of the New York Convention, the Russian Federation instead took an interlocutory appeal of the District Court's denial of its FSIA motion.

Before the D.C. Circuit, the Russian Federation argued that the District Court erred by deferring to the Arbitral Tribunal, and that the FSIA required the District Court to make independent determinations of all the issues raised by the Russian Federation in its FSIA motion to dismiss. *Hulley II*, 149 F.4th at 689 (App. 10a).

The D.C. Circuit agreed with the Russian Federation in part. As for the Russian Federation's argument that the Deputy Chairman's signature on the ECT was not an agreement to arbitrate with anyone, about anything, the D.C. Circuit held that "[t]his argument challenges the existence of an arbitration agreement and therefore relates to the jurisdictional question of whether Russia has sovereign immunity[.]" *Id.* Accordingly, the D.C. Circuit vacated the judgment and remanded to the District Court to "decide whether provisional application of the Treaty's arbitration clause is consistent with Russian law." *Id.* at 690 (App. 13a). The D.C. Circuit also directed the District Court to consider, in the first instance, respondents' argument that the doctrine of issue preclusion should be applied to bar the Russian Federation from re-litigating those issues already resolved (at the Russian Federation's

request) by the Dutch courts in the set-aside proceedings that the Russian Federation commenced in the Netherlands and litigated there for more than six years. *Id.* at 691-92 (App. 15a, 18a). The D.C. Circuit also directed the District Court to invite the Department of Justice to submit the views of the United States on the application of the doctrine of issue preclusion. *Id.* at 692 (App. 18a).

As for the first question presented in the current Petition, the D.C. Circuit held that "[w]hether the Shareholders are investors within the meaning of the arbitration clause 'is an argument regarding the *scope* of the Energy Charter Treaty, not its *existence*.'" *Id.* at 690 (App. 13a) (quoting *NextEra Energy Glob. Holdings B.V. v. Kingdom of Spain*, 112 F.4th 1088, 1103 (D.C. Cir. 2024) ("*Blasket*")). This argument, therefore, was "not jurisdictional, as the [D]istrict [C]ourt correctly held." *Id.* at 14a.

REASONS FOR DENYING THE PETITION

The Petition should be denied as premature because it is doubly interlocutory. There has been no final determination of Russia's claim to sovereign immunity; instead, the D.C. Circuit *remanded* for further proceedings. Nor has the District Court yet addressed the underlying issue—were respondents eligible Investors?—which it has promised to do when it takes up the long-stayed motion to dismiss based on the Article V "merits" defenses, in the "enforcement stage" of this action. *Hulley I*, 2023 WL 8005099, at *23. The only reason the District Court has not yet done so is because the Russian Federation elected not to proceed to the "enforcement stage" but instead took

an interlocutory appeal of the District Court's denial of its claim to sovereign immunity.

This Court has long held that "except in extraordinary cases, the writ [of certiorari] is not issued until final decree." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *see* Stephen M. Shapiro et al., Supreme Court Practice § 4.18 at 282-84 (10th ed. 2013) (hereafter "Shapiro") (collecting other cases). This is not an "extraordinary case" calling for this Court's premature review. On the contrary, this is a case that ought to be returned promptly to the District Court. In particular, the second question presented—whether the doctrine of issue preclusion bars the Russian Federation from re-litigating issues decided against it by the Dutch courts in the "set aside" litigation initiated by the Russian Federation—has not yet been analyzed by the courts below. The D.C. Circuit's interlocutory order remanded the case to the District Court with instructions to consider that question after inviting the United States' views. A review by this Court would be premature before that work has been done.

The Petition should not be held pending this Court's decision in the *Blasket* case. Regardless of what action this Court takes in *Blasket*, the next step in this case remains the same: a remand to the District Court for further proceedings on the Russian Federation's sovereign-immunity defense. The Petition gives no reason—none at all—why the District Court is not fully capable of applying

whatever guidance may issue from this Court in the event that the *Blasket* petition were to be granted.

Even if the Petition were not premature, it should also be denied because there are no "compelling reasons" for this Court to review the first question presented. S. Ct. R. 10. As the *Blasket* respondents ably explain in their oppositions to Spain's petition, there is no split in appellate authority. The Second Circuit and Fifth Circuit decisions, relied on by the Russian Federation here and by Spain in *Blasket*, arose in the very different context of *private contracts* that sovereigns allegedly entered into with *private parties*. There is no appellate authority that contradicts the D.C. Circuit's holding that an *international treaty's* arbitration clause qualifies as "an agreement made by the foreign state . . . for the benefit of a private party to submit to arbitration." 28 U.S.C. § 1605(a)(6).

The D.C. Circuit's rulings (in this case and in *Blasket*) are not only uncontradicted by any other appellate authority, they are also correct interpretations of the plain text of the FSIA's arbitration exception. A sovereign "shall not be immune" from an action "to confirm an award made pursuant to such an agreement to arbitrate." 28 U.S.C. § 1605(a)(6). Here, as in *Blasket*, there is no

dispute that the arbitral awards were "made pursuant to" Article 26 of the ECT.

I. The Petition should be denied because it is interlocutory and premature

The Petition is premature. The lower courts have not made a final ruling as to whether the Russian Federation has sovereign immunity from this action. Instead, the D.C. Circuit *remanded* for further proceedings on this issue. "[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court." *Bhd. of Locomotive Firemen & Enginemen v. Bangor & A. R. Co.*, 389 U.S. 327, 328 (1967) (per curiam). "The petition for a writ of certiorari" should therefore be "denied." *Id.*; *see also Mount Soledad Mem'l Ass'n v. Trunk*, 132 S. Ct. 2535, 2536 (2012) (Alito, J., statement respecting denial of certiorari) ("Because no final judgment has been rendered . . . I agree with the Court's decision to deny the petitions for certiorari."); *Wrotten v. New York*, 130 S. Ct. 2520, 2521 (2010) (Sotomayor, J., statement respecting denial of certiorari) ("In light of the procedural difficulties that arise from the interlocutory posture, I agree with the Court's decision to deny the petition for certiorari.").

The second question presented by this Petition is whether the doctrine of issue preclusion bars the Russian Federation from re-litigating the issue of whether respondents were eligible "Investors." At the Russian Federation's own initiative and request, the Dutch courts exhaustively considered this precise issue over the course of *six years* of litigation, on *de novo* review without any deference to the Arbitral

Tribunal. *Supra*, at 9. Respondents have preserved their argument that the doctrine of issue preclusion applies, but the lower courts have not yet analyzed that question. *Hulley II*, 149 F.4th at 691-92 (App. 15a, 18a.) 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—a textbook reason why this Court does not ordinarily grant review of interlocutory orders. *See Wrotten*, 130 S. Ct. at 2520 (agreeing with denial of certiorari in part because "in reviewing the case at this stage we would not have the benefit of the [lower] courts' full consideration").

"[T]his Court should not issue a writ of certiorari to review . . . an interlocutory order," from a federal court of appeals, "unless" this Court's review "is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *Am. Const. Co.*, 148 U.S. at 384; *see also* Shapiro § 4.18 at 282-84 (noting that writs to review interlocutory orders are typically granted only "if the lower court's decision is patently incorrect and the interlocutory decision, such as a preliminary injunction, will have immediate consequences for the petitioner"). The Russian Federation comes nowhere close to meeting that high standard—indeed, its Petition does not even acknowledge that standard.

On page 36 of the Petition, the Russian Federation asserts that this Court's intervention is needed now because "[t]he alternative would be multiple additional rounds of remand, *de novo* appeal under the FSIA, and further remand." But this "alternative" is present in *every* interlocutory case in

which this Court's review is sought. The "alternative" to this Court's review is always further proceedings on remand, which might be avoided if this Court were to grant interlocutory review. The Russian Federation is in effect asking this Court to overrule its longstanding rule, applied hundreds of times, that interlocutory orders are "not yet ripe for review[.]" *Bhd. of Locomotive Firemen*, 389 U.S. at 328.

Denial of the Petition will not impose anything approaching "extraordinary inconvenience" to the Russian Federation. *Am. Const. Co.*, 148 U.S. at 384. The Russian Federation already faces further proceedings in the District Court, on remand, regarding its sovereign immunity defense. Even if this Petition were *granted*, and even if this Court were to *reverse* the D.C. Circuit, the result would merely be that the Russian Federation would re-submit its briefing, to the District Court, regarding why it believes respondents are not eligible "Investors" under the ECT. *See Hulley I*, 2023 WL 8005099, at *23 (recounting the Russian Federation's prior submissions on this question). The Russian Federation will be required to re-submit this briefing in any event when the District Court, at long last, turns to the Russian Federation's *merits* defenses under Article V of the New York Convention, which defenses have now been stayed for more than ten years. *See id.* at *23 (holding that these arguments "may only be addressed at the enforcement [i.e., merits] stage of these proceedings").

The burden of having to re-submit briefing already submitted, on a topic that the Russian Federation itself admits will be decided during the

later merits phase, is hardly the stuff of "extraordinary inconvenience." *Am. Const. Co.*, 148 U.S. at 384.

II. The Court should not hold this case pending its decision on *Blasket*

On occasion this Court will "hold" a petition like this one pending a decision in some earlier-filed case presenting the same question—such as *Blasket*—and will then grant, vacate, and remand ("GVR") the held case for reconsideration by the appellate court, in a summary order following the merits disposition of the earlier case. *See* Shapiro § 5.9 at 340; *id.* § 5.12(b) at 346-50. The Court should not do this here, for two reasons: first, the current Petition is acting as a *de facto* stay of respondents' already long-delayed action, and that delay is causing prejudice; and second, the result of any GVR is fore-ordained—a remand to the District Court. The proper course is to deny the Petition outright, thereby returning the case to the District Court now. The District Court is in the best position to manage its own proceedings in such a way as to move forward now, with the issues already remanded to it, while also making provision to apply any guidance that might later issue from this Court in *Blasket*.

a. Holding this Petition would be a *de facto* stay, prejudicing respondents

The Petition is acting as a *de facto* stay. Although the D.C. Circuit's *opinion* remanded for further proceedings regarding sovereign immunity, the D.C. Circuit has not yet issued its *mandate*, which

means that "the district court lacks power to proceed."[9] The Russian Federation moved the D.C. Circuit to stay its mandate "pending" the "filing" of the Petition. Doc. No. 2134370, at 1. Respondents opposed. Doc. No. 2136375. The D.C. Circuit has not ruled on that motion; but neither has it issued the mandate.

A further *de facto* stay of this long-delayed action would prejudice respondents. It has been *eleven years* since respondents filed this case. The Russian Federation has made crystal clear that it will never pay the Arbitral Awards voluntarily. It even amended its own Constitution in an attempt to make respondents' collection more difficult. *Supra*, at 10. Where it is obvious "that a defendant will never pay" a money judgment, the plaintiff's economic loss, from further delay, is "irreparable[.]" *United States v. Askins & Miller Orthopaedics, P.A.*, 924 F.3d 1348, 1359-60 (11th Cir. 2019); *see also* Wright & Miller, 11A Fed. Prac. & Proc. Civ. § 2948.1 & n.7 (3d ed. 2023) (collecting cases holding that a plaintiff's economic loss constituted irreparable harm due to defendant's inability or refusal to pay damages).

In addition to the prejudice to respondents caused by the lost time-value of the unpaid Arbitral Awards, further delay is also prejudicial because of the sanctions imposed as a result of Russia's illegal

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[9] "Until the mandate issues . . . the case ordinarily remains within the jurisdiction of the court of appeals and the district court lacks power to proceed further with respect to the matters involved with the appeal." Wright & Miller, Federal Prac. & Procedure, *Issuance of Mandate*, 16AA Fed. Prac. & Proc. Juris. § 3987 (West 5th ed.).

war in Ukraine. Those sanctions are "increasingly compromising the Shareholders' ability to access Russian Federation assets in the United States," as the District Court found almost four years ago. *Hulley Enters. Ltd. v. Russian Fed'n*, No. 14-cv-1996, 2022 WL 1102200, at *9 (D.D.C. Apr. 13, 2022) (denying Russian Federation's motion for another stay). Further delay "would carry significant hardship for the Shareholders." *Id.*

b. A GVR for reconsideration would not be appropriate because the result in the D.C. Circuit is fore-ordained: a remand to the District Court

A GVR is only appropriate if it is done in order to "require such further proceedings to be had as may be just under the circumstances." 28 U.S.C. § 2106; *see Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (discussing situations in which GVR may be appropriate).

Even if this Court were to grant the *Blasket* petition and were then to agree with Spain on the merits, holding that the FSIA's arbitration exception requires a district court to make an independent determination of whether the investor is eligible to invoke the investment treaty's arbitration clause, there would still be no reason to remand this case *to the D.C. Circuit* for reconsideration. That is because the result in the D.C. Circuit, of such a remand, is fore-ordained. The result would be a remand for further proceedings in the District Court. There

simply are no "further proceedings to be had," 28 U.S.C. § 2106, in the D.C. Circuit at this time.

The District Court has not yet made an independent determination of whether respondents were eligible Investors under the ECT; instead, relying on binding D.C. Circuit precedent, the District Court held that this issue "may only be addressed at the enforcement [i.e., merits] stage of these proceedings." *Hulley I*, 2023 WL 8005099, at *23. (Those merits proceedings have not yet occurred because the Russian Federation elected not to proceed to the merits; instead, it took an interlocutory appeal of the denial of its sovereign-immunity defense.) The D.C. Circuit is highly unlikely to undertake its own independent determination of this issue in the first instance. *See Hulley II*, 149 F.4th at 691 (App. 15a) (declining "to address" respondents' arguments regarding issue preclusion "in the first instance"). A GVR and remand to the D.C. Circuit would therefore accomplish nothing but months of additional delay followed by an inconsequential road-bump: a one-sentence order from the D.C. Circuit again remanding this case to the District Court. It is the *District Court* and not the D.C. Circuit that should receive and apply any further guidance that may issue from this Court in *Blasket*.

Rather than hold this Petition, the Court should instead deny it outright, which will cause the D.C. Circuit to release its mandate. There is already much to be done on remand while this Court considers the *Blasket* petition: The District Court is instructed to "decide whether provisional application of the Treaty's arbitration clause is consistent with Russian

law," *id.*, App. 13a; to consider respondents' argument that the doctrine of issue preclusion bars the Russian Federation from re-litigating those issues already resolved (at the Russian Federation's request) by the Dutch courts, *id.* at App. 15a-16a; and to invite the Department of Justice to submit the views of the United States on the application of issue preclusion, *id.* at App. 18a.

While doing this work, the District Court will of course pay attention to this Court's consideration of the *Blasket* case. The District Court is in the best position to assess how and when to conduct whatever further proceedings may be necessary once this Court disposes of *Blasket*. An appellate court ought "not interfere with the trial court's exercise of its discretion to control its docket and dispatch its business . . . except upon the clearest showing" of "actual and substantial prejudice to the complaining litigant." *United States v. Microsoft Corp.*, 253 F.3d 34, 100 (D.C. Cir. 2001) (citation omitted). The Russian Federation has not articulated any specific prejudice that could possibly arise from the District Court being allowed to manage its own docket in this way.

III. There is no split in appellate authority

a. The D.C. Circuit's holding does not conflict with the Second Circuit and Fifth Circuit decisions

Even if the Petition were not denied as premature, it should also be denied for lack of any "compelling reasons" for this Court to grant review. S.

Ct. R. 10. Neither the Second Circuit nor the Fifth Circuit cases cited by the Russian Federation (and also cited by Spain, in its *Blasket* petition) considered an international treaty between sovereigns. *See Cargill Int'l S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012 (2d Cir. 1993); *Al-Qarqani v. Saudi Arabian Oil Co.*, 19 F.4th 794 (5th Cir. 2021). Instead, those cases involved *private contracts* that were allegedly entered into between a sovereign instrumentality and a specific *private* party. Therefore, neither *Cargill* nor *Al-Qarqani* addressed the questions presented by this Petition.

In *Cargill*, the plaintiff (CBV) was not a party to any arbitration agreement. Instead, it claimed to be a "third-party beneficiary" of an arbitration clause contained in its *affiliate's* private contract with a foreign sovereign entity. 991 F.2d at 1014-15, 1017-18. The district court wrongly held, in just one sentence, that the FSIA's arbitration exception was not satisfied because the arbitration clause was not governed by a treaty calling for the recognition of arbitral awards—a separate FSIA requirement not at issue here. *Cargill Int'l S.A. v. M/T Pavel Dybenko*, No. 90-cv-3176, 1992 WL 42194, at *5 (S.D.N.Y. Feb. 27, 1992). The Second Circuit reversed that decision and remanded with instructions for the district court to consider, on remand, the parties' other arguments as to whether CBV should be permitted to invoke the contract's arbitration clause. 991 F.2d at 1019-1020. "Because the parties ha[d] not adequately addressed this issue in their briefs," the Second Circuit chose to "leave the arguments to them and the district court." *Id.* at 1020. The Second Circuit did not address, and had no occasion to address, whether an arbitration

clause found in an international treaty like the ECT would satisfy the FSIA's arbitration exception.

An opinion arising from a case presenting very different facts (a sovereign's *private* contract with a different private party), and remanding because those facts and the law had not been "adequately addressed" in the appellate briefs, does not demonstrate a considered or entrenched split in authority meriting this Court's review.

The Fifth Circuit's decision in *Al-Qarqani* is even further afield from this case than *Cargill*. The *Al-Qarqani* case did not involve third-party beneficiaries at all. Instead, the problem for the award-creditor in that case was the absence of *any* arbitration agreement by the sovereign defendant (Saudi Aramco) with *anyone*. Neither the award-creditor nor Saudi Aramco had signed the contract containing the arbitration clause. *Al-Qarqani*, 19 F.4th at 801. The contract that Saudi Aramco *did* sign did "not so much as mention arbitration." *Id.* at 801-02. No investment treaty was at issue.

b. The D.C. Circuit's use of the word "arguably," in *dicta*, does not merit review

The Russian Federation claims on pages 22-23 of the Petition that the *Blasket* opinion's use of one word—"arguably"—conflicts with this Court's decision in *Helmerich*, which held that courts may only exercise jurisdiction over a foreign sovereign, under a *different* FSIA exception regarding expropriation, if the facts "do show (and not just

arguably show) a taking of property in violation of international law." *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 581 U.S. 170, 187 (2017). But *Helmerich* does not address the FSIA's arbitration exception and therefore does not create any conflict. "Each immunity exception [in the FSIA] should be interpreted according to the text Congress enacted." *CC/Devas (Mauritius) Ltd. v. Antrix Corp. Ltd.*, 605 U.S. 223, 235-36 (2025).

Spain didn't bother critiquing the *Blasket* opinion's word choice in the *Blasket* petition, and for good reason: The word "arguably" was *dicta* that did not matter to the outcome in *Blasket*. In its holding, the *Blasket* court assumed that Spain was correct that "the standing offer to arbitrate contained in Article 26 of the ECT does not extend to EU nationals like the [award-creditors]." 112 F.4th at 1103. The *Blasket* court correctly held that even on this assumption, the FSIA's arbitration exception was still satisfied because Spain's argument, about which claimants are entitled to invoke the ECT's arbitration clause, "is an argument regarding the *scope* of the Energy Charter Treaty, not its *existence*." *Id.*

"This Court . . . reviews judgments, not statements in opinions." *Black v. Cutter Lab'ys*, 351 U.S. 292, 297-98 (1956) (dismissing writ of certiorari, since upon review the "unnecessarily broad statements" in the opinion below were not "the ground on which the judgment rests"). Reviewing the *Blasket* court's use of the word "arguably" would be particularly inappropriate here, since in this case the D.C. Circuit did not even use that word.

c. None of the other cited authorities concerned the FSIA

None of the other appellate authorities cited in the Petition creates any conflict with the D.C. Circuit's holding below—for the simple reason that not one of the other cited cases concerned the FSIA. For example: on page 22 of the Petition the Russian Federation claims that the D.C. Circuit's opinion creates "confusion" by "incorrectly categorizing a litigant's ability to arbitrate as a 'scope' question—rather than as a 'formation' question, which is subject to different presumptions" in "domestic arbitration." But the Russian Federation *admits* that it is asking this Court to clear up this supposed confusion "irrespective of whether it has jurisdictional significance under the FSIA." Petition at 22. That is entirely inappropriate. The questions presented in this case relate solely to the jurisdictional inquiry required by the FSIA. This Court reviews *judgments*; it does not grant certiorari in order to clean up supposed "confusion" in *opinions*. *Black*, 351 U.S. at 297-98.

What the Petition assumes, by citing these non-FSIA decisions, is that the FSIA's arbitration exception simply imports, *sub silentio*, the doctrines developed outside the FSIA concerning the "presumptions" in domestic arbitrations. Petition at 22. But no appellate authority supports this assumption. And the FSIA's plain text refutes it.

IV. The D.C. Circuit's holding was correct

The D.C. Circuit correctly held, in *Blasket* and again in this case, that the ECT's arbitration clause, in Article 26, satisfies the FSIA's arbitration exception because it is "an agreement made by the foreign state . . . *for the benefit* of" private investors. 28 U.S.C. § 1605(a)(6) (emphasis added). "When a sovereign makes 'an agreement . . . to submit to arbitration' by entering an investment treaty with other sovereigns 'for the benefit of' a class of private investors," "the treaty . . . manifests the sovereign's consent to arbitrate." *Blasket*, 112 F.4th at 1102. This is the correct interpretation of Congress's intent based on the plain text of the FSIA. And it also makes good practical sense, as this case itself demonstrates.

a. The FSIA does not require an agreement "with" the private investor seeking confirmation

The Russian Federation is correct that the text of the FSIA's arbitration exception is "transplanted . . . *almost* verbatim" from Article II(1) of the New York Convention. Petition at 27-29 (emphasis added). The word "almost" indicates the critical flaw in the Russian Federation's argument: Congress *added* the key words "or for the benefit of a private party" to the Article II text that it copied. The chart below compares

the two texts, with similarities underlined and material differences *italicized*:

Article II(1) of the New York Convention	**FSIA's arbitration exception**
Each Contracting State shall recognize an agreement in writing *under which the parties undertake* to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.	(a) A foreign state shall not be immune . . . in any case-- (6) in which the action is brought, either to enforce an agreement *made by the foreign state with or for the benefit of a private party* to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate . . . .

Therefore, the FSIA's arbitration exception cannot be interpreted to always require an independent determination of a sovereign's agreement "with" the private party because that interpretation would render superfluous the text Congress added: "or for the benefit of a private party." By adding the words "or for the benefit of a private party" to text copied from Article II of the Convention, Congress demonstrated its intent to depart from the New York Convention in this regard. Although the Convention permits the district court to consider, at the *merits* phase, whether an agreement to arbitrate was formed *with* the private party, the FSIA is satisfied by the investment treaty standing alone. The treaty itself contains the agreement to arbitrate "for the benefit of" private investors.

The Russian Federation now argues that the remaining text in the FSIA arbitration exception—referring to "all or any differences which have arisen or which may arise between the parties" and to the parties' "defined legal relationship"—indicates that the district court must determine whether the foreign state entered into a separate agreement to arbitrate with the specific award-creditor. Petition 28-30. But neither the Russian Federation nor Spain briefed these arguments below,[10] so it is not "[r]emarkabl[e]" that the "D.C. Circuit never addressed" this additional FSIA text in its decisions. *Contra* Petition at 28. The Russian Federation has thus waived this argument. *See A. J. T. by & through A. T. v. Osseo Area Sch.,*

[10] *See* Brief in Opposition to Petition for Writ of Certiorari at 14-15, *Spain v. Blasket Renewable Invs., LLC*, (Aug. 14, 2025) (No. 24-1130).

Indep. Sch. Dist. No. 279, 605 U.S. 335, 350 (2025) ("As a general rule, . . . we do not decide issues that were not "resolved below . . .") (citation omitted).

If the Russian Federation had raised this argument below, respondents would have made a devastating rejoinder. The sovereigns that agreed to the ECT explicitly agreed that this additional text, (which is found in the New York Convention as well as the FSIA's arbitration exception), is satisfied in *every* case in which "[c]laims" are "submitted to arbitration hereunder." ECT Art. 26(5)(b) (App. 246a).[11] Therefore, since the Russian Federation agreed to provisionally apply Article 26, it also agreed that any arbitration convened pursuant to the ECT's Article 26 would also satisfy this additional text.

The Russian Federation also argues that the FSIA's "expropriation" and "waiver" exceptions prove that the investor's "eligibility" is a "jurisdictional" element. Petition at 26-27; 31-32. But as noted above, "[e]ach immunity exception should be interpreted according to the text Congress enacted." *CC/Devas*, 605 U.S. at 235-36. The Russian Federation provides no justification for using old caselaw about the FSIA's waiver exception, or other caselaw construing the

[11] The text of Article 26(5)(b) is: "Claims submitted to arbitration hereunder shall be considered to arise out of a commercial relationship or transaction for the purposes of article I of [the New York] Convention." This is a reference to Article I(3), which permits a state acceding to the Convention to "declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration." Doc. No. 2062842, ADD88.

expropriation exception, in order to alter the plain textual meaning of the arbitration exception.

b. The D.C. Circuit's decision is right as a matter of policy

The Russian Federation's Petition also demonstrates that its proposed interpretation of the FSIA's arbitration exception would impose extraordinary burdens on investors and federal courts. For example, the Russian Federation demands an evidentiary hearing in District Court to determine whether, *twenty-two years ago*, respondents (three companies then organized under the laws of the Isle of Man and Cyprus) were "merely 'alter egos'" of so-called "Russian Oligarchs," under principles of veil-piercing that the Russian Federation attempts to derive from customary international law. *See* Petition at 10-13; *supra*, at 13.

One glance at the voluminous history of this case proves just how burdensome this evidentiary hearing would be. In 2008, the Arbitral Tribunal held a ten-day hearing on this issue (among other threshold issues).[12] After the Arbitrations concluded, the Russian Federation then brought suit in the Dutch courts (the seat of the arbitrations) seeking to "set aside" the arbitral awards based on the same issue.

If the FSIA were now interpreted to require yet a *third* determination of this issue in a *de novo* evidentiary hearing in U.S. court, then the

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[12] *See* ECF 2-4 at 156-58, & 167-71.

consequences for investors would be dire. Investor-state arbitrations are increasingly common.[13] The United States is a crucial enforcement jurisdiction for the resulting arbitral awards. And the United States made a commitment, when acceding to the New York Convention, that United States courts "shall recognize arbitral awards as binding and enforce them,"[14] including awards rendered against sovereigns. If the FSIA's arbitration exception were interpreted to require investors to prove their eligibility yet again, in *de novo* evidentiary hearings in U.S. court *decades* after the underlying arbitrations, then investors would lose trust in the arbitration mechanisms of international investment treaties. That loss of trust would deter direct investment and cause great disruption to the current treaty regimes governing those investments.

It is entirely appropriate that this issue—were the investors eligible to invoke the treaty's arbitration agreement?—is instead considered as a potential *merits* defense to enforcement rather than as a threshold immunity issue. That is because in the merits phase, a district court will properly defer to the Arbitral Tribunal where—as here—the award-debtor authorized the arbitrators to decide this question under the UNCITRAL Rules. *See supra*, at 6-7.

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[13] About 80 new investor-state arbitrations are initiated each year. *See* United Nations Conference on Trade and Development, Investment Dispute Settlement Navigator Advanced Search, https://tinyurl.com/3uxexhhf (over 800 proceedings initiated since 2013).

[14] New York Convention, art. III. (Doc. No. 2062842, ADD89.)

No appellate court has ever held, in a case involving an arbitration conducted pursuant to an investment treaty, that the FSIA requires the district court to determine that the investor was eligible to invoke the treaty's arbitration clause. If this Court were to reverse the D.C. Circuit, the consequences would be extremely disruptive for investors; for the international direct-investment regime; and for the U.S. courts.

CONCLUSION

For the foregoing reasons, the Petition for a writ of certiorari should be denied.

Respectfully submitted,

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