No. 11-604

IN THE

Supreme Court of the United States

EM LTD. AND NML CAPITAL, LTD.,
Petitioners,

v.

REPUBLIC OF ARGENTINA AND
BANCO CENTRAL DE REPÚBLICA ARGENTINA,
Respondents.

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

BRIEF FOR THE CENTER FOR THE RULE OF LAW AS *AMICUS CURIAE* SUPPORTING THE PETITIONERS

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December 2011

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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INTEREST OF *AMICUS* [1]

The Center for the Rule of Law is a non-profit, educational institution of scholars and others interested in issues related to the rule of law. Issues of central concern to scholars at the Center include the preser-

[1] *Amicus curiae*, after giving timely notice to all parties to this case of its intent to file a brief in support of the Petition for Certiorari, has received and has filed with the Clerk of this Court written letters from all parties giving consent to the filing of this brief. This brief was not authored in whole or in part by counsel for any party, and monetary support for the preparation and submission of this brief has been provided entirely by *amicus curiae*, its members, and its counsel.

vation of rules protecting property, international adherence to established legal standards (including standards applicable to international finance and enforcement of obligations associated with international finance), and effective enforcement of legal process.

Affiliated scholars at the Center include long-time teachers and authors in the fields of legal process and international law (encompassing international finance and resolution of international investment disputes, among other subjects). These scholars and the Center have strong interests in promoting adherence to rules that preserve predictable determination and enforcement of legal rights, including those supporting effective operation of international markets. These interests are substantially affected by resolution of the question presented in the Petition to this Court respecting interpretation of the Foreign Sovereign Immunities Act in its application to satisfaction of valid U.S. court judgments against a defaulting foreign state.

SUMMARY OF ARGUMENT

Broadly put, the question before the Court in this case is whether a foreign central bank that is the alter ego of a foreign state is subject to the same rules respecting execution of judgments and attachment for execution as the foreign state or, instead, whether the state can both control the central bank and enjoy special immunities from execution and attachment for assets held in the bank's name. The narrow question of law, which turns on interpretation of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602 *et seq*. (FSIA), is whether an alter ego central bank retains special protections for assets held in its name even when its controlling foreign state has waived immunities from attachment and execution.

These are extremely important matters with effects that reach well beyond the contours of this litigation. Waivers of sovereign immunity, as a predicate to effective enforcement of legal rights, are essential to attract the investment capital that sustains government operation in many nations. If these waivers – and related contractual provisions that provide for enforcement of legal obligations – effectively can be defeated by a recalcitrant foreign debtor state, this could have a profound effect on international finance markets.

The matters at issue here are especially vital at a time when sovereign debt is nearing $44 trillion, anxieties about nations' willingness to meet debt obligations are escalating, and nations seek to finance an additional $4 to $5 trillion in government debt each year. Global financial markets have shown great sensitivity to threats to certainty and predictability respecting debt issues, and the question presented in the Petition has critical implications for the certainty and predictability of legal rules associated with international debt contracts.

The decision of the Second Circuit below, if permitted to stand, will impair certainty and predictability and reduce the enforceability of contractual undertakings. The decision turns on a construction of the FSIA that creates a highly ambiguous, evolving test for immunity from attachment or execution of judgments against funds held in the name of a central bank. The test requires prediction of what a court would find to be "normally understood" functions of central banks. The decision, however, does not reference any clear means of knowing what proportion of central banks must perform the particular functions, does not indicate whether the

test looks to the operation of central banks in the developed or developing world or both, does not explain what it means to be "normally understood," and expressly contemplates that this concept "is likely to change over time." *NML Capital, Ltd. v. Banco Central de la República Argentina*, 652 F.3d 172, 194 n.20 (2d Cir. 2011) ("*NML Capital, Ltd.*"). It is, in other words, both unclear and unstable.

Beyond its ambiguity, the test allows immunity from execution of judgments or from attachment of funds in aid of execution of judgments even where funds have been directed purposefully to evade responsibility for contractual agreements and to reduce or eliminate opportunities for satisfaction of judgments. The decision, thus, expands opportunity for behavior that subverts contracts and also increases the probability that foreign states will be able to direct funds under their control in ways that undermine the force of judgments from U.S. courts. These features threaten the security of investments of U.S. citizens (among others) and portend a significant, adverse potential impact on international investment markets.

Further, the case implicates – and the decision below is at odds with – central rule-of-law values protected by other decisions, especially this Court's decision in *First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) ("*Bancec*"). The decision of the Court of Appeals reduces certainty and predictability in international investment contracts by adopting a test that is unclear and difficult to apply, by adopting a test that facilitates conduct with the purpose and effect of undermining the security of guarantees in such contracts, and by embracing a legal interpretation

that conflicts with prior decisions, including this Court's decision in *Bancec*, *supra*. The Petition should be granted because the question presented is an issue of law that has not been settled and should be, because that question is unlikely to be resolved by any other court, and because the Petition seeks review of a decision that in significant respects conflicts with decisions of this Court and other circuits of the court of appeals.

ARGUMENT

I. REVIEW IS NEEDED TO RESTORE CERTAINTY AND SECURITY FOR INTERNATIONAL INVESTMENTS OF CRITICAL PUBLIC IMPORTANCE

A. Public Finance Depends on Certainty Respecting Debt Repayment

The context in which the issue presented in this case arises is critical to understanding its importance and the special need for this Court to address it. Governments around the world, including a very large proportion of advanced economies, borrow a considerable share of what they spend. The result is a current series of national debts that sum, on a global basis, to over $43.8 trillion. *See World Debt Comparison: The Global Debt Clock*, THE ECONOMIST, *available at* http://www.economist.com/content/global_debt_clock. Governments are borrowing at the (combined) rate of $4 to $5 trillion per year. *See* Daniel Fisher, *The Global Debt Bomb: How it Can Wreck Your Life*, FORBES, Feb. 8, 2010, *available at* http://www.forbes.com/forbes/2010/0208/debt-recession-worldwide-finances-global-debt-bomb.html. Many national governments (including the United States government) borrow between one-quarter and

forty percent of what they spend. *See*, *e.g.*, Congressional Budget Office, *Monthly Budget Review: Fiscal Year 2011* (Jun. 7, 2011), *available at* http://cbo.gov/ftpdocs/122xx/doc12229/2011_05_MBR.pdf; Organization for Economic Cooperation & Development, Country Statistical Profiles – 2011 Edition: Spain, *available at* http://stats.oecd.org/Index.aspx?DataSetCode=SNA_TABLE11.

Much of the capital lent to governments to support politically determined levels of spending comes from foreign investors. The United States, for example, borrows more than 50 percent of its support for federal government debt from abroad, *see* Justin Murray & Marc Labonte, *CRS Rep. RS22331 – Foreign Holdings of Federal Debt*, at 1-4 (Congressional Research Service, Mar. 2011). The international market for government debt is a substantial portion of the total market for nations' external debt, which now exceeds $65 trillion. *See*, *e.g.*, CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK (2011) ("CIA WORLD FACTBOOK"), *available at* https://www.cia.gov/library/publications/the-world-factbook/rankorder/2079rank.html (sum of individual nations' external debts); Michael Waibel, *Opening Pandora's Box: Sovereign Bonds in International Arbitration*, 101 AM. J. INT'L. L.711, 711-12 (2007) (putting the figure for external government debt at $30 trillion as of 2005).

Investors in international debt are sensitive to the certainty and predictability of legal regimes for enforcement of debt obligations, as investors generally are sensitive to certainty and predictability respecting legal regimes governing their investments. *See*, *e.g.*, INTERIM REPORT OF THE COMMITTEE ON CAPITAL MARKETS REGULATION, at xii (rev.

Dec. 5, 2006), *available at* http://tinyurl.com/yqdy8n (needless uncertainty will drive investors out of the market). Not surprisingly, investors are frequently skeptical of the reliability of a nation's own court system as a venue for enforcement of contractual debt obligations against the national government. For that reason, international debt instruments, such as the ones at issue in this case, typically specify that contract rights are enforceable in particular venues, under particular rules (such as the law of the State of New York or English law) that are thought to be relatively certain, predictable, and provide effective relief against contract breach. *See*, *e.g.*, Joseph Norton, *International Syndicated Lending: The Legal Context for Economic Development in Latin America*, 2 L. & BUS. REV. AM. 21, 59-61 (Summer 1996). In addition, international investment contracts often contain express waivers of sovereign immunity, further providing certainty of satisfaction in case of potential default.

Steps that make legal rules governing international investment contracts more certain and predictable are especially important when nations have substantial debt and significant gaps between revenue and spending. In such circumstances, any change in a nation's perceived ability or willingness to repay its debts will increase borrowing costs and reduce international liquidity, creating numerous problems for economic stability, growth, and development. *See*, *e.g.*, Carmen Reinhart & Kenneth Rogoff, *Growth in a Time of Debt*, 100 AM. ECON. REV. 573 (2010). Debt crises affect not only the nations whose borrowing is immediately at issue but broader economic fortunes of nations whose citizens and institutions have made investments or whose economies are connected to those of the borrowing

nation. *See*, *e.g.*, John Makin, *The Eurozone Crisis and the U.S. Economy: What Has Gone Wrong?*, ECON. OUTLOOK (Oct. 2011), *available at* http://www.aei.org/article/the-eurozone-crisis-and-the-us-economy-what-has-gone-wrong-outlook (focusing in part on effects of depressed rates of return on investment).

Currently, many nations (including many of the worlds' most developed economies) have high and rising debt-to-Gross Domestic Product ratios, with 35 nations as of 2010 in excess of 60 percent, the level many observers believe signals serious risk to the economy.[2] *See* CIA WORLD FACTBOOK, *supra*, *available at* https://www.cia.gov/library/publications/the-world-factbook/rankorder/2186rank.html. Greece effectively defaulted on a significant portion of its sovereign debt in 2011, and news reports have suggested possible default concerns for Italy, Ireland, Spain, Portugal, and other nations. *See*, *e.g.*, Art Patnaude & Serena Ruffoni, *Fitch: Greek Debt Deal a Default*, WALL ST. J. (Oct. 28, 2011), *available at* http://online.wsj.com/article/SB10001424052970203554104577003493756246110.html. This context raises the importance for this Court to address legal questions that affect the certainty and security of international investment.

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[2] This is the level that was required for admission to the Euro-zone and also the level recommended by the Pew Charitable Trusts and Peter G. Peterson Foundation as the appropriate goal for a healthy economy. *See* Pew-Peterson Commission on Budget Reform, *Red Ink Rising: A Call to Action to Stem the Rising Federal Debt* (Dec. 2009), *available at* http://budgetreform.org/sites/default/files/Red_Ink_Rising_hyperlinked.pdf.

B. The Second Circuit's Decision Undermines Certainty and Security of International Investments

The decision below held that funds in the name of a central bank that is so controlled by a foreign state as to be its alter ego, or that is used by the state in a way that makes treating it as separate from the state unjust, nonetheless enjoy special protections against execution and attachment to satisfy judgments against the state, even when the state waived its immunity, if the funds are used for "central banking functions as such functions are normally understood, irrespective of their 'commercial' nature." *NML Capital, Ltd.*, *supra*, at 194. The court below added:

> We recognize that there is no definitive list of activities "normally understood" to be central banking functions. Indeed, the definition of what constitutes a "central bank activity" is likely to change over time. However, as this case illustrates, even in unusual circumstances it is not difficult to tell whether a central bank is engaged in a function characteristic of central banks. If that were to change—or if the sphere of normally understood central bank activities were to significantly exceed Congress's understanding of those activities deserving of sovereign immunity—it is likely that Congress's interest in preserving the immunity of central bank property would change as well. In that instance, we have no doubt that Congress could and would "recalibrate" the FSIA's statutory scheme as necessary.

Id. at 194 n.20.

Apart from its inconsistency with prior decisions and the FSIA's text (matters addressed in Parts II and III below), the Second Circuit's test is problematic in two ways that undermine international investment. First, it leaves investors with little meaningful guidance; and, second, it increases opportunities for recalcitrant foreign states to avoid contractual obligations and judicial mandates.

Uncertainty from Unclarity. The Court of Appeals certainly was correct in saying that "there is no definitive list of activities 'normally understood' to be central banking functions." A look at even a small number of references reveals a large array of different activities that might or might not be considered "'normally understood' to be central banking functions," as these functions vary both from nation to nation and within a given nation over time. *See*, *e.g.*, WILLIAM GREIDER, SECRETS OF THE TEMPLE: HOW THE FEDERAL RESERVE RUNS THE COUNTRY 279-84 (1987); Douglas Arner, Michael Panton & Paul Lejot, *Central Banks and Central Bank Cooperation in the Global Financial System*, 23 PAC. MCGEORGE GLOBAL BUS. & DEVEL. L.J. 1, 2-4, 13-21 (2010); José Gabilondo, *Sending the Right Signals: Using Rent-Seeking Theory to Analyze the Cuban Central Bank*, 27 HOUSTON J. INT'L L. 483, 490-96, 516-517 (2005); Gyung-Ho Jeong, Gary Miller & Andrew Sobel, *Political Compromise and Bureaucratic Structure: The Political Origins of the Federal Reserve System*, 25 J. L. ECON. & ORG. 472, 491-94 (2010); Wen Li, *Book Review: Banking Laws in China*, 24 BANKING & FIN. L. REV. 623, 623-25 (2009).

Functions that might be within the Second Circuit's definition include regulating other banks, controlling the money supply, setting specific interest rates, providing special loan funds, approving foreign bank charters, and administering foreign exchange controls. Yet not all central banks perform these functions and not all of these functions are performed only by central banks. *See*, *e.g.*, John W. Head, *Getting Down to Basics: Strengthening Financial Systems in Developing Countries*, 18 TRANSNAT'L LAWYER 257, 260-67 (2005) (listing functions that should be delegated to an independent central bank and describing ways in which various national regimes depart from that model); Gabilondo, *supra* (describing Cuba's central banking regime); Li, *supra* (describing China's central banking regime). As one set of scholars put the point:

> Even today, the specific functions of central banks can vary greatly from country to country . . . . [T]he range of functions is largely dictated by the relationship between the central bank and its government's policy objectives.

Arner *et al.*, *supra*, at 2-3.

Not only is there no single, discrete set of functions that constitute "central banking functions", the Second Circuit's test also qualifies that metric with the proviso that the activities that qualify to insulate funds held by a central bank must be ones "normally understood" to be central banking functions. 652 F.3d at 194. The Court of Appeals decision does not say whether this means functions that most central banks perform, that all central banks perform, that only central banks perform, or something else. The decision does not say how many central banks must perform a function or which central banks must do

so: for example, in a case seeking execution against funds held in the name of a developed nation's central bank, does the Second Circuit's test refer to what is common among developed nations' central banks or among a broader set of central banks? Nor does the decision below explain how a court or anyone trying to anticipate the operation of this test will know what is "normally understood" – or even by whom it would be normally understood. This formulation increases uncertainty in enforcement of international investment contracts.

The test also suffers from ambiguity in another dimension: the Second Circuit anticipates that the meaning of the test, of what is normally understood as central banking functions, will "change over time." *NML Capital, Ltd.*, *supra*, at 194 n.20. The test is, thus, both unclear on its own terms and subject to the sort of unpredictable variation inherent in a standard that evolves over time but is not tethered to any discrete measure. It does not, for example, turn on how many central banks in specified nations perform the activities – something that could change over time but also could be anticipated.

The Court of Appeals takes solace from two thoughts: it is easy to tell what constitute normally understood central bank functions, even if it is not easy to define the concept; and if the courts get the application of the law wrong, Congress will simply "recalibrate" the FSIA. Neither of these notions ameliorates the problems with the court's test.

The idea that the test is easily applied though not easily articulated is false. The difficulty in saying which uses of bank funds are "normally understood" to be "central bank functions" comes from the absence of an agreed set of such tasks or a clear reference

point for deciding what should be in or out of the set. Functions that are assigned to central banks can be catalogued, but the Second Circuit has failed to identify a definitive list of items that fall within its test or provide a reasonably clear way for investors to predict what those will be.

The Court of Appeals' other safety valve for an ambiguous test is the appeal to congressional intervention to make things right if too many functions are protected by the court's test. This is too facile an excuse for a test that fails to alert those who must deal with the law how it will apply. Legislation is not an easy enterprise, and courts should not adopt rules that generate unnecessary uncertainty with the expectation that Congress will ride to the rescue if things go awry.

Uncertainty from Reduced Enforceability. In addition to its ambiguity, the Second Circuit's test makes international investment decisions less certain by increasing the opportunities for foreign states seeking to avoid debt obligations (including obligations confirmed by judicial decision) to move funds through the state's central bank operations without having to pay its creditors.

Plaintiffs-appellants in this case asserted that Argentina's use of BCRA directly undermined security and certainty with respect to investments in government debt instruments by minimizing options for satisfying judgments against Argentina. *NML Capital, Ltd.*, *supra*, 652 F.3d at 177-81; *EM Ltd. v. The Republic of Argentina*, 720 F. Supp. 2d 273, 276, 280-302 (S.D.N.Y. 2010) ("*EM Ltd.*"). The District Court found as a matter of fact that this was both the intent and effect of Argentina's conduct, and the Second Circuit did not disturb that finding. *See NML*

Capital, Ltd., *supra*, 652 F.3d at 193, 196; *EM Ltd.*, *supra*, 720 F. Supp. 2d at 300-02. The District Court put the matter succinctly:

> As we know, judgments are worthless without the ability to enforce them. Despite the commitment in the bonds that there could be judgments which "may be enforced," the Republic has done everything in its power to prevent such enforcement.

Id. at 279.

The Court of Appeals specifically endorsed the District Court's statement that Argentina had expressly consented to enforcement of its debt obligations while taking all possible measures to prevent effective enforcement – and to prevent satisfaction of federal court orders. *NML Capital, Ltd.*, *supra*, 652 F.3d at 196. To underline that point, the Court of Appeals stated: "We share the District Court's understandable irritation at the Republic's "willful defiance of [its] obligations to honor the judgments of a federal court." *Id*. at 196 (citation omitted; brackets in original). After reviewing Argentina's conduct and its effect on enforceability of legal undertakings and judicial commands, the District Court concluded that failing to treat the BCRA's funds held at the FRBNY as funds of the Republic of Argentina would work the very sort of "fraud or injustice" that supports treating the BCRA as the Republic's alter ego. *EM Ltd.*, *supra*, 720 F. Supp. 2d at 302.

Aside from the narrow legal conclusion respecting the bank's alter ego status, the broader point made by both the District Court and the Court of Appeals is that security and certainty respecting international investment contracts are undermined when means

for enforcing obligations contained in those contracts are diminished. If funds held by alter ego central banks are available to satisfy debt obligations of the controlling foreign state, this provides greater certainty that debt obligations and judgments enforcing them will be fulfilled. This is an especially important consideration in the United States, given the large volume of funds that are held in central bank accounts with the Federal Reserve Banks, and especially the Federal Reserve Bank of New York ("FRBNY"). *See*, *e.g.*, Board of Governors of the Federal Reserve System, *Federal Reserve Statistical Release H.4.1: Factors Affecting Reserve Balances* (Dec. 1, 2011), *available at* http://www.federalreserve.gov/re-leases/h41/current; *NML Capital, Ltd.*, *supra*, 652 F.3d at 177 n.7 ($3 trillion in Federal Reserve account holdings of foreign central bank funds as of 2009, mainly in FRBNY).

Need for Review. Without review by this Court, however, the Second Circuit's test, with its disincentives to investment in foreign state debt instruments, is likely to remain in place. That is because no other court in the United States, not bound by the Second Circuit's determination, is likely to have jurisdiction over a claim raising the question presented for review. Holdings of foreign funds in accounts maintained by central banks are overwhelmingly confined to the FRBNY. The importance of the issue, the broader implications of the issue for international investment, and the unlikelihood of its resolution without review by this Court all support grant of the Petition for Certiorari.

II. THE SECOND CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS OF THE COURT OF APPEALS

Beyond the ambiguity of the test it adopted and the negative effect on contractual certainty its test (if left in place) will generate, the Second Circuit's *NML* decision also will have a negative effect on certainty because it conflicts with decisions of this Court and other circuits of the Court of Appeals. This conflict is an independent reason to grant review.

The Bancec *Decision*. The most notable conflict is with this Court's decision in *First National City Bank v. Banco Para El Comercio Exterior de Cuba* ("*Bancec*"), *supra*. That decision addressed the question of when a state-owned bank with a "separate juridical status" should be treated as separate from the state and when it should be treated as if it were the state itself. The case involved claims and counter-claims between Bancec, a Cuban bank (separately constituted but owned by the government of Cuba), and Citibank, a privately owned American bank. The Cuban bank, Bancec, claimed that, having a separate corporate form and identify, it could not be held liable for actions of the Cuban government. Bancec asserted that the case was governed by FSIA and that under FSIA government instrumentalities with separate legal status could not be treated as if they were simply alter egos of the foreign state. *See Bancec*, *supra*, 462 U.S. at 619-21.

This Court rebuffed those assertions. The Court stated that FSIA, while providing the statutory basis for jurisdiction over foreign states and for determining the bounds of sovereign immunity accorded to them, did not override substantive rules respecting

liability or rules regarding the attribution of liability among entities, including state instrumentalities. *Id*. at 620-21. The Court also made clear that the matters left undisturbed by FSIA – and, thus, governed by other law – encompassed certain determinations courts must make "in deciding whether property in the United States of a foreign state is immune from attachment and execution." *Id*. at 620-21. These determinations include deciding

> ". . . whether property 'in the custody of' an agency or instrumentality is property 'of' the agency or instrumentality, whether property held by one agency should be deemed to be property of another, [and] whether property held by an agency is property of the foreign state."

Id. at 621 n.8 (quoting H.R. REP. NO. 94-1487, at 28 (1976), *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS, at 6627).

This Court's opinion in *Bancec* then turned to the alter ego issue. It analogized the matter to attribution of responsibility among other corporate entities with separate legal status. Under established law one such entity will be found to be the alter ego of another if the "entity is so extensively controlled by its owner that a relationship of principal and agent is created." 462 U.S. at 629. Additionally, the Court said, "our cases have long recognized 'the broader equitable principle that the doctrine of corporate entity, recognized generally and for most purposes, will not be regarded when to do so would work fraud or injustice.'" *Id*. (quoting *Taylor v. Standard Gas Co.*, 306 U.S. 307, 322 (1939)). Looking to those principles, the Court held that a state instrumentality with separate juridical status is deemed to be an alter ego of the state, and that each is to be regarded

as responsible for the other, when either of those findings is made. In the *Bancec* case, the Court found that it would be unjust to treat the state bank as independent of the state and held the bank responsible for the state's confiscation of Citibank property in Cuba. 462 U.S. at 632.

The Second Circuit's decision below elides *Bancec*'s holding that equitable principles, not FSIA, govern determinations on issues such as ownership of assets, especially when the relationship between a foreign state and state instrumentality is at issue. The Court of Appeals' decision resolves issues such as ownership of assets that are held in the central bank's name by reference to the wording of FSIA (and to inferences from its legislative history) rather than to other law. *NML Capital, Ltd.*, *supra*, at 188-89. It treats *Bancec* as irrelevant to determination whether a central bank enjoys a different immunity from attachment and execution than the foreign state, even where *Bancec*'s principles would conclude – as the District Court below did – that it would be unjust to treat the state and its instrumentality as distinguishable. *See id*. at 188 (plaintiffs cannot use "*Bancec* to turn assets that would otherwise be considered property of a central bank held for its own account into property of the Republic that is not entitled to immunity.")

Similarly, the Court of Appeals did not see *Bancec* as affecting decision whether Argentina's express waiver of immunity applied to BCRA. *Id*. at 195-96. Especially given the obvious significance of such waivers to investors seeking certainty that they will have access to remedies for potential default, that is a critical departure from *Bancec*'s instruction that the same rules should apply to states and alter ego

instrumentalities when it would be unjust to treat them differently. The Second Circuit's decision regards the appropriate construction of waivers as strictly a matter to be determined by interpretation of FSIA.

Yet, the decision in *Bancec* specifically rejected the argument that FSIA alone controlled all such aspects of decisions on immunity from liability, attachment, or execution. FSIA governs jurisdictional questions, but other law, including equitable precepts, determines other background issues. Although the specific provision of FSIA at issue in *Bancec* was different from the central bank provision in Section 1611(b), that distinction does not make a difference to the rule laid down in *Bancec*.

Conflicts with Other Circuits. Other Circuits of the Court of Appeals have required an analysis of alter ego status under *Bancec*'s equitable principles as a pre-condition to application of FSIA provisions when a question arises respecting attribution among states and state instrumentalities. For example, in *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 446-49 (D.C. Cir. 1990), the Court of Appeals for the D.C. Circuit remanded to the District Court for a determination whether *Bancec*'s tests were met before deciding whether FSIA provided immunity to suit.

Likewise, in *Transamerica Leasing v. La Republica de Venezuela*, 200 F.3d 843 (D.C. Cir. 2000) ("*Transamerica Leasing*"), that court stated that *Bancec*'s approach not only governed liability of a state instrumentality for the conduct of the state but also governed determination of when one was amenable to suit for the conduct of the other. *Id*. at 848. The *Transamerica Leasing* opinion extended *Bancec*'s

analysis to cover settings where the state and its instrumentality (or related instrumentalities) operated essentially as a single enterprise as well as where the state and instrumentality operated in a principal-agent relationship or where failure to treat the state and instrumentality interchangeably would produce unjust results. *Id*. at 848-54.

The Fifth Circuit similarly has declared its view that *Bancec*'s principles apply to determining whether an entity is to be treated as an alter ego of the state for purposes of applying FSIA provisions. *See*, *e.g.*, *Arriba Ltd. v. Petroleanos Mexicanos*, 962 F.2d 928, 933-34 (5th Cir. 1992); *Hester Int'l Corp. v. Federal Republic of Nigeria*, 879 F.2d 170, 176 (5th Cir. 1989). The same position has been adopted by the Ninth Circuit, *see Doe v. Holy See*, 557 F.3d 1066, 1078-79 (9th Cir. 2009), and the Eleventh Circuit, *see S & Davis Int'l, Inc. v. Republic of Yemen*, 218 F.3d 1292, 1298-99 (11th Cir. 2000). Although none of these cases involves the provision respecting central banks and monetary authorities at issue in this case – in large measure because those are entities operating almost exclusively within the Second Circuit's jurisdiction – the decision of the Second Circuit below conflicts with the approaches taken in all of these Circuits respecting the relation between FSIA and the principles announced by this Court in *Bancec*.

III. THE SECOND CIRCUIT'S DECISION MISCONSTRUES THE FOREIGN SOVEREIGN IMMUNITIES ACT

FSIA Structure and Issues. The Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602 *et seq*., grants immunity to foreign states from subjection to the jurisdiction of U.S. courts at both the federal and

state levels except under specified conditions. *Id*. at § 1604. FSIA § 1605 provides exceptions to the grant of immunity, most notably excepting suits arising out of foreign states' commercial activities (or conduct connected with those activities) and suits on matters as to which a foreign state has waived immunity. *Id*. at § 1605(a)(1), (a)(2). Section 1609 extends the immunity to "attachment arrest and execution;" § 1610 sets out exceptions to the immunity provided by § 1609; and § 1611 provides limited exceptions to the exceptions in § 1610 (restoring immunity in special circumstances).

As relevant here, § 1610 removes immunity from attachment and execution for a foreign state's property used in connection with a commercial activity when there has been a waiver of immunity or when the property for which attachment or execution is sought was "used for the commercial activity upon which the claim is based," *id*. at § 1610(a)(1), (a)(2). Additionally, although § 1603 defines foreign state to include the state's agencies and instrumentalities and § 1610(a) applies to these as well as foreign states themselves, § 1610(b) excepts a broader range of property of a state agency or instrumentality from immunity for these purposes, including all property used for commercial activity "regardless of whether the property is or was involved in the act upon which the claim is based."

Section 1611 restores immunity to the property "of a foreign central bank or monetary authority held for its own account." *Id*. at § 1611(b)(1). That immunity is vitiated, however, if the central bank "or its parent foreign government" has explicitly waived its immunity from attachment or execution. *Id.* The terms of § 1610(a)(1) and (a)(2) clearly remove

immunity for attachment and execution for the Republic of Argentina in this case. The only contest is whether § 1611 reverses that result with respect to funds of BCRA held at the FRBNY. The Second Circuit's affirmative answer to that question misread the law.

Ownership: Property "Of a Central Bank." Section 1611's protection for property "of a central bank held for its own account" incorporates two concepts that the Second Circuit does not interpret appropriately. One concept is that funds at issue are the property "of a foreign central bank."

That phrase directly implicates the sort of determination (assignment of property ownership) this Court's decision in *Bancec* said should be decided by reference to law outside of FSIA. The Second Circuit ignored that caution, trying to create meaning from inferences it drew from the words and legislative history of FSIA instead. *See NML Capital, Ltd.*, *supra*, 652 F.3d at 187-94. Its reading is a strained interpretation of FSIA, starting with creation of a strict division between the broad array of items covered by § 1610(a) (applicable to states including state instrumentalities, whether largely independent or not) and § 1610(b) (applicable only to state instrumentalities). This division would make a variety of provisions, respecting matters such as judgments confirming arbitral awards, inapplicable to state instrumentalities. No such strict separation can make sense of the law, much less give rise to the extended chain of reasoning by which the Court of Appeals concludes that *Bancec* can play no meaningful role.

Classification: Held "For its Own Account." The other concept, that property is held by a central bank "for its own account," should be, but was not, given

its ordinary meaning. Elsewhere, funds held by an individual or entity "for its own account" are funds used for the immediate benefit of the individual or entity, not for the benefit of a parent company or client or principal. *See*, *e.g.*, Will Bunting, *The Trouble with Investment Banking: Cluelessness, Not Greed*, 48 SAN DIEGO L. REV. 993, 1034-35 (2011) (explaining "Volcker Rule" regulating proprietary trading by banks); William Kessler, Note: *Whose Office Is This Anyway? A Look at the IRS's New Position on Offshore Lending*, 84 S. CALIF. L. REV. 1357, 1372-75 (2011) (explaining Internal Revenue Code proprietary trading safe harbor rules, Internal Revenue Code, 26 U.S.C. §864(b)(2)(A)(ii)). Disregarding the accepted meaning of these terms, the Second Circuit created an opaque and evolving test to determine when § 1611(b)(1) is satisfied in order to fit the court's reading of FSIA and selected phrases from its legislative history. *See NML Capital, Ltd.*, *supra*, 652 F.3d at 194. This approach distorts FSIA as well as reducing investor certainty and creating conflicts with prior law.

CONCLUSION

The Court should grant the Petition for a Writ of Certiorari to review the judgment of the Court of Appeals.

Respectfully submitted,

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December 2011