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

SUPPLEMENTAL BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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The government's attempt to rehabilitate the Second Circuit's analysis, which it concedes to have rested on legal error, only underscores the need for this Court's review. The government admits that the Second Circuit misinterpreted the FSIA in holding that most provisions of Section 1610 apply only to parent states. That belief was the foundation for the court's conclusion that Section 1611(b)(1) restores immunity to central banks that are alter egos of their sovereigns. The government also acknowledges that other courts of appeals have held that alter egos are bound by FSIA waivers in which they are not expressly named, but attempts to minimize this conflict of authority by erroneously claiming the Second Circuit's waiver holding was limited to Section 1611(b)(1). Further, the government nowhere disputes that the decision below—which creates a gaping loophole in the *Bancec* imputation principle that will enable foreign sovereigns to evade U.S. judgments by funneling assets through sham central banks—is unlikely to be reviewed in any other court of appeals. This Court's review is warranted.

ARGUMENT

I. THE GOVERNMENT CONCEDES THAT THE DECISION BELOW RESTED ON LEGAL ERROR AND DOES NOT DENY THAT IT IS UNLIKELY TO BE REVIEWED BY ANOTHER COURT OF APPEALS.

The government concedes that in holding that Section 1611(b)(1) restores immunity to alter-ego central banks, the Second Circuit misinterpreted the scope of neighboring Section 1610. U.S. Br. 10. The government also does not dispute that the question

whether Section 1611(b)(1) applies to alter-ego central banks is unlikely to arise in another circuit given the FRBNY's preeminent role as a depository for the assets of foreign central banks—a circumstance in which the government often has supported this Court's review. *See*, *e.g.*, Br. for the United States, *Quanta Computer, Inc. v. LG Elecs., Inc.*, 553 U.S. 617 (2008) (No. 06-937), 2007 WL 2425785. Instead, the government attempts to salvage the Second Circuit's admittedly flawed analysis with equally flawed arguments.

1. The government concedes that "the court of appeals erred to the extent it suggested that Section 1610(b) is the only subsection that governs attachment of property of agencies and instrumentalities." U.S. Br. 10. As petitioners have explained, that was the linchpin of the Second Circuit's statutory analysis. The court reasoned that because Section 1611(b)'s "notwithstanding" clause "refers to § 1610 in its entirety," and because every subsection of Section 1610 other than 1610(b) uses the term "foreign state" rather than "agency or instrumentality," Section 1611(b)(1) must confer immunity on central banks that are inseparable parts of their parent states in addition to those that are judicially separate. Pet. App. 32a–33a. If Section 1611(b)(1) did not encompass alter-ego central banks, the Second Circuit believed, the "notwithstanding" clause would have pointed only to Section 1610(b).

The government recognizes that this reasoning is mistaken, because the FSIA defines the term "foreign state" to include an "agency or instrumentality" of the parent state, and therefore every provision of Section 1610 applies to juridically separate agencies and instrumentalities. 28 U.S.C. § 1603(a). Congress thus needed to restore immunity to central banks "notwithstanding" *all* of Section 1610 to reach every circumstance in which an independent central

bank would otherwise lose immunity. As a result, no inference can be drawn from Section 1611(b)'s "notwithstanding" clause that Congress intended to restore immunity to alter-ego central banks as well.

Though it acknowledges the Second Circuit's error, the government claims that the court's "larger point stands." U.S. Br. 10. The government suggests that "had Congress intended to limit Section 1611(b)(1) to independent central banks, it would not have obscured that limitation by referencing generally to the entirety of Section 1610" in the opening clause of Section 1611(b). *Id*. This is merely a weaker version of the same legal reasoning that the government—on the same page—recognizes to be "err[or]." *Id.*

The government also entirely ignores that Section 1611(b) includes subsection (b)(2), which restores immunity for military property. Pet. 19. This further explains why the opening clause of Section 1611(b) refers to Section 1610 as a whole and to "the property of a foreign state" rather than only "the property of an agency or instrumentality." That broader scope was necessary to restore immunity to property "under the control of a military authority or defense agency" that is an arm of the state. 28 U.S.C. § 1611(b)(2).

The government argues that Section 1611(b)(1) does not explicitly advert to the *Bancec* veil-piercing principle. U.S. Br. 8. But no provision of the FSIA does so, yet the courts of appeals have long understood *Bancec* to apply to FSIA immunity determinations. *See* Pet. 6. That practice is consistent with this Court's reading of the FSIA's legislative history, in which Congress indicated that it did not intend to upset background principles of alter-ego imputation. *See First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 627–28 (1983). The

government's construction of Section 1611(b)(1) would eviscerate those principles by creating a capacious exception to the rule that an alter ego is accountable for its parent's actions. The government's current position, in fact, conflicts with its own argument in *Bancec* that the FSIA "does not resolve the question of when an allegedly separate entity can be equated with a foreign state" because "Congress expressly chose not to resolve the alter ego issue." Br. for the United States, 462 U.S. 611 (No. 81-984), 1982 U.S. S. Ct. Briefs LEXIS 822, at *22.

2. Aside from its mistaken textual inferences, the government relies on a misunderstanding of the historical backdrop of the FSIA. It claims, for instance, that the inclusion of "monetary authorit[ies]" in Section 1611(b)(1) shows that the provision was intended to apply to "departments of the central government"—evidently assuming that at the time of the FSIA's passage, monetary authorities were not juridically separate entities. U.S. Br. 9. That is not so. In 1976, four nations had established "monetary authorities" that were not central banks; each was established as a separate entity intended to be operated independently of the government.[1] In the years since, every newly established "monetary authority,"

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[1] *See* Charter of the Saudi Arabian Monetary Authority Issued by Royal Decree No. 23, arts. 3(b), 8 (1957), *available at* http://www.sama.gov.sa/sites/samaen/RulesRegulation/BankingSystem/Pages/BankingSystemFD01.aspx; Bermuda Monetary Authority Act 1969, Part II, *available at* http://www.bma.bm/legislation/BMA-act.asp; Monetary Authority of Singapore Act, Part II, § 3 (1971), *available at* http://www.mas.gov.sg/legislation_guidelines/mas_act/mas_act.html; Bahrain Monetary Agency Law of 1973, Decree No. 23 of 1973, arts. 1, 2, *available at* http://cbb.complinet.com/cbb/display/display.html?rbid=1554&element_id=5.

with one possible exception (Hong Kong), has been designed as a separate entity.[2]

The government similarly misconstrues the relevant history in relying on an article by petitioners' expert on central-bank independence for the proposition that in 1976, "most central banks in the world functioned as departments of ministries of finance." U.S. Br. 9, 14. The article does not suggest that those central banks lacked juridical separateness or that the stringent *Bancec* standard would have been satisfied.

The government's other arguments rely on questionable inferences from legislative history, building on the Second Circuit's counter-textual reasoning. *See* U.S. Br. 13–14. It places great weight, for example, on the State Department's interpretation of a similar provision in an *unenacted* bill. *Id.* at 13 (citing *Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the H. Comm. on the Judiciary*, 93d Cong., 1st Sess. 25 (1973)). But it cites no authority for the remarkable proposition that in enacting legislation Congress should be deemed to have adopted the State Department's views on different bills. In any event, the quoted statement merely tracks the language of the statute and does not address whether Section 1611(b)(1) applies to alter-ego central banks.

The government also points to a pre-FSIA letter from a State Department advisor to the Department of Justice that evidently was not even before Congress. U.S. Br. 14. The government neglects to men-

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[2] *See*, *e.g.*, Royal Monetary Authority of Bhutan, About RMA: General Information, *available at* http://www.rma.org.bt/; Maldives Monetary Authority Act 1981, ch. II, *available at* www.mma.gov.mv/laws/mmaact-english.pdf.

tion that the letter concluded that funds held by the central bank of Vietnam—which was not deemed to be the alter ego of its parent state—would not be subject to attachment under the restrictive theory of immunity because they were not being used for commercial activities. 1973 Dig. of U.S. Prac. Int'l Law 227. In this case, in contrast, the Second Circuit did not disturb the district court's finding that by investing the attached funds in interest-bearing U.S. securities, Argentina was using them for commercial activities. *See* Pet. App. 21a. It is telling that this is the strongest material that the government could muster to support its interpretation.

3. Finally, the government argues that allowing an immunity determination under Section 1611(b)(1) to turn on this Court's *Bancec* analysis would undermine "certainty and predictability." U.S. Br. 12; *see also id.* at 17. Yet the government would have the determination of whether funds were held "for [a central bank's] own account," 28 U.S.C. § 1611(b)(1), depend on a court's *post hoc* assessment of whether particular funds were being used for "activities 'normally understood' to be central banking functions"—a concept that the government does not even attempt to define and that the Second Circuit conceded "is likely to change over time." U.S. Br. at 10; *see* Pet. App. 45a n.20. That novel, atextual, and evolving standard would create far more legal uncertainty than a traditional alter-ego analysis, which, as this Court recognized in *Bancec*, is merely an "application of [an] internationally recognized equitable principle[]." 462 U.S. at 633.[3] Certainty and predictability

[3] The arbitrary nature of the standard devised by the Second Circuit and defended by the government only highlights that their interpretation of Section 1611(b)(1) reads out of the statute the "for its own account" requirement.

are weakened far more, and the rule of law is undermined, when an entity is allowed to shield its assets or conduct by funneling funds through a sham entity and when litigants are left with no clear rule about when courts will apply *Bancec*'s imputation principle.

The government also claims that petitioners "have not identified any instance in which property held by a country's central bank and used for central banking functions has been subject to execution or attachment to satisfy a judgment against a foreign state." U.S. Br. 15. But neither the government nor respondents have identified any case in which a court has barred attachment of an *alter-ego* central bank's property. Far from supporting the government's position, the dearth of similar cases demonstrates that the *Bancec* alter-ego standard will be satisfied only in extraordinary circumstances. That—and the fact that the FRBNY has seen no decline in deposits in the six years since petitioners levied their attachment—should assuage any concern that ruling for petitioners would deter foreign central banks from holding funds in the United States.

II. THE GOVERNMENT CONCEDES THAT OTHER CIRCUITS HAVE HELD THAT FSIA WAIVERS MUST BE IMPUTED TO ALTER EGOS.

The government acknowledges that the cases from other circuits cited by petitioners "suggest that one foreign sovereign entity's waiver may bind its alter egos." U.S. Br. 18. It nonetheless maintains that there is no conflict of authority because those cases arose under Sections 1605 or 1610 of the FSIA, which permit implicit waivers, while the Second Circuit's holding was limited to Section 1611(b)(1), which requires an explicit waiver.

That argument reflects a misunderstanding of the holding below. The Second Circuit did not rest its waiver holding on Section 1611(b)(1)'s requirement that a waiver be explicit—because Argentina's waiver of immunity is both explicit and comprehensive. *See* Pet. App. 46a–48a. Rather, the Second Circuit found—citing a case applying Section 1605—that Argentina's explicit waiver did not bind BCRA because *any* FSIA waiver must be "'clear and unambiguous.'" *Id.* at 48a (quoting *Carpenter v. Republic of Chile*, 610 F.3d 776, 779 (2d Cir. 2010) (per curiam)).

The reasoning and holding of the decision below therefore conflict with the decisions of other circuits holding that an FSIA waiver must be imputed to an alter ego regardless of whether the waiver names the alter ego. *See* Pet. 24–31. Those holdings follow from the *Bancec* principle that once an instrumentality has been determined to be an alter ego, whatever legal formalities delineate the subsidiary as a juridically separate entity from the parent state must be "disregarded." 462 U.S. at 633. The alter ego and its parent are "one and the same" such that the acts of the parent necessarily are the acts of the alter ego. *Carrier Corp. v. Outokumpu Oyj*, 673 F.3d 430, 451 (6th Cir. 2012) (internal quotation marks omitted).

The government's interpretation of Section 1611(b)(1)'s explicit-waiver requirement to foreclose alter-ego imputation would frustrate the FSIA's objectives beyond the central-bank context. Like Section 1611(b)(1), Section 1610(d)(1) of the FSIA requires a waiver of immunity from pre-judgment attachment to be "explicit[]." 28 U.S.C. § 1610(d)(1). As the government acknowledges, if this requirement were interpreted to mean that a parent's waiver does not bind its alter egos, a plaintiff could *never* secure pre-judgment attachment against a foreign government's alter-ego entities based on the parent's waiv-

er. *See* U.S. Br. 17 n.3. Under the government's position, therefore, foreign governments that have contractually waived immunity from attachment (as Argentina has done here) would be free to conduct business in the United States through alter-ego entities and then whisk their assets out of the country as soon as a lawsuit is filed, with U.S. courts powerless to freeze assets to satisfy any ensuing judgment. That result would undermine the purpose of Section 1610(d) "to prevent assets from being dissipated or removed from the jurisdiction in order to frustrate satisfaction of a judgment." H.R. Rep. No. 94-1487, at 25 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6629.

Most insidiously, the government's interpretation would enable a foreign sovereign, *after* entering into a waiver, to create new alter-ego entities that would be immune from attachment because they could not possibly have been named in the waiver. Such a tactic would especially benefit nations like Argentina that, after inducing investment through explicit immunity waivers, commit massive breaches of their contractual obligations and then conduct commercial activities in the United States without paying their debts.

III. THE GOVERNMENT'S DISAGREEMENT WITH THE DISTRICT COURT'S THOROUGH ALTER-EGO ANALYSIS DOES NOT POSE A BARRIER TO THIS COURT'S REVIEW OF THE QUESTION PRESENTED.

The government urges this Court to abstain from reviewing the Second Circuit's misinterpretation of the FSIA on the ground that the district court's alter-ego finding was flawed. U.S. Br. 20. The Second Circuit never reached that issue, and the government does not contend that this Court would be required to review the district court's alter-ego analysis

to resolve the question presented. Instead, the government argues that there is a "substantial possibility" that the Second Circuit would reverse the district court on the alter-ego finding, without citing a single word to that effect from the opinion below. *Id.*

The government's argument does not present any barrier to this Court's review of the question presented. Once establishing that Section 1611(b)(1) does not apply to alter-ego central banks or that a parent's FSIA waiver binds its alter egos, this Court would be free to remand to the Second Circuit to review the district court's alter-ego finding. This Court has ordered similar dispositions in recent FSIA decisions. *See*, *e.g.*, *Samantar v. Yousuf*, 130 S. Ct. 2278, 2292–93 (2010); *Republic of Austria v. Altmann*, 541 U.S. 677, 700–01 (2004).

In any event, it is the government's analysis, not the district court's alter-ego finding, that is flawed. The government never acknowledges the correct standard of review for the district court's *Bancec* finding made in the course of ruling on a motion for restraint of assets—abuse of discretion, with factual findings reviewed for clear error. Pet. App. 27a. Nor does the government give sufficient weight to the fact that the decision was issued on a pre-judgment motion seeking provisional relief to freeze assets before Argentina could remove them from the United States pending resolution of petitioners' underlying alter-ego complaint. All parties will have the opportunity to submit additional evidence related to the alter-ego question before the district court rules on whether petitioners can execute on the attached funds.

The government also understates the extraordinary control that the district court found Argentina to exert over BCRA by claiming that BCRA's "involvement" in paying Argentina's creditors was "not

unusual" because many central banks "perform payment functions" for their sovereigns. U.S. Br. 21. The "payment function" to which the government refers is merely the designation of a central bank as a "fiscal agent" to facilitate payments from the government's treasury to lenders such as the IMF. *EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 485 n.22 (2d Cir. 2007) (citing IMF Agreement, art. V, § 1, 29 U.S.T. 2203, 2210 (1976)). Here, however, the district court found, among other things, that Argentina had expropriated reserves in violation of BCRA's charter to pay off certain of the country's debts, not merely that BCRA had acted as a "fiscal agent."

The district court properly found that this pattern of conduct, which "demonstrated that the Republic could draw on the resources of BCRA at will," satisfied the *Bancec* veil-piercing standard. Pet. App. 109a. Indeed, the key indicia of an alter-ego relationship include the "intermingling of funds" between the parent and the subsidiary and the absence of arms-length transactions. *MAG Portfolio Consultant, GMBH v. Merlin Biomed Grp. LLC*, 268 F.3d 58, 63 (2d Cir. 2001).

The government quibbles with other aspects of the district court's analysis, suggesting that they "may also be problematic" on the ground that the district court may have given too much weight to certain admittedly relevant factors. U.S. Br. 21–22. But it ultimately identifies no error that would lead the Second Circuit to conclude that the district court abused its discretion.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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