No. 13-990

IN THE

Supreme Court of the United States

REPUBLIC OF ARGENTINA,

Petitioner,

v.

NML CAPITAL, LTD., *et al.*,

Respondents.

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

BRIEF OF *AMICUS CURIAE* CAJA DE VALORES, S.A. IN SUPPORT OF PETITIONER

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March 24, 2014

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

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INTEREST OF *AMICUS CURIAE* [1]

Caja de Valores, S.A. ("Caja") is a private financial institution based in Buenos Aires, Argentina. Caja is organized as a joint stock company under Argentine law and is authorized by Argentina's National Securities Commission under Argentine law 20.643 to operate as a securities depository. Caja provides custodial and clearing services to assist customers in the completion of domestic and international securities transactions, much like Caja's counterparts, the Depository Trust Company and Euroclear Bank SA/NV, do in the United States and Europe, respectively. Caja holds over US$65 billion in custodial assets and handles over seven million transactions per year. The Republic of Argentina (the "Republic") owns no shares in and has no control over Caja. Caja has no employees or offices in the United States. It is not a party to the proceedings below.

Caja has a substantial interest in this action because the unprecedented, extraterritorial injunctions affirmed by the Second Circuit impair third-party financial institutions that are involved in the processing of sovereign debt payments outside the territory of the United States. The injunctions disregard the strict territorial limits imposed by the Foreign Sovereign Immunities Act ("FSIA") and the well-established presumption against the extraterritorial application of federal law. Moreover,

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus curiae* or its counsel, make a monetary contribution to the preparation or submission of this brief. All counsel of record have consented to this filing through blanket consents filed with the Court. Counsel of record for all parties received notice of *amicus curiae*'s intention to file this brief at least ten days prior to the due date.

the injunctions threaten the integrity of international bond markets and fund transfer systems. Properly delimiting the global power of U.S. courts is vital to the financial institutions around the world that process sovereign debt payments and to the customers those financial institutions serve.

INTRODUCTION

Following the Republic of Argentina's historic default on its sovereign debt in 2001, the Republic restructured its debt through exchange offerings in 2005 and 2010. Most of the Republic's creditors participated in the exchange offerings, but a few creditors elected to sue on defaulted bonds governed by New York law.

On February 23, 2012, after years of litigation between the holdout creditors and the Republic, a New York district court issued an extraordinary injunction that sent shockwaves throughout international financial markets. The district court, apparently frustrated by the FSIA's statutory bar against attachment or execution on the Republic's property located outside the United States, granted the plaintiffs' request for an injunction requiring *pari passu* payments on the Republic's defaulted bonds before the Republic could make any payments, anywhere in the world, on its restructured debt. Thus, the injunction—by design and effect—restrained a foreign state's use of sovereign property located *outside* the United States, unless the foreign state transferred property also located *outside* the United States to holders of the defaulted debt. Lacking any territorial limit, the injunction purported to curb payments on bonds held outside the United States, denominated in foreign currency, and governed by foreign law. Further, this worldwide injunction bound

"all parties involved, directly or indirectly, in advising upon, preparing, processing, or facilitating any payment on the Exchange Bonds." Pet. App. 92. Innocent third-party financial institutions—some of whom have little or no connection to the United States—suddenly found themselves in the crosshairs of a U.S. judge sitting in New York.

The district court subsequently issued an amended order clarifying, among other things, that the injunction applies to a wide-range of third-party financial institutions, including "the clearing corporations and systems, depositaries, operators of clearing systems, and settlement agents for the Exchange Bonds." *Id*. at 122 ¶ 2(f).

On August 23, 2013, the Second Circuit broadly affirmed the amended injunction. *NML Capital, Ltd. v. Republic of Argentina*, 727 F.3d 230 (2d Cir. 2013). The panel stated that "[a]bsent further guidance from the Supreme Court" it remains convinced that the injunctive relief ordered by the district court is consistent with the FSIA. Pet. App. at 11. It also brushed aside concerns based on extraterritoriality, inter-national comity, and harm to third parties. The panel did, however, stay enforcement of the injunctions pending resolution of the Republic's petition to this Court.

ARGUMENT

I. THE INJUNCTIONS CONTRAVENE THE PRESUMPTION AGAINST EXTRATERRITORIALITY.

The Court should grant certiorari because the decision below disregards Supreme Court precedent on the presumption against extraterritoriality. In an eagerness to regulate conduct traditionally beyond the

reach of U.S. courts, the Second Circuit skirted the FSIA's territorial limits.

For over two hundred years, this Court has applied a presumption against the extraterritorial application of federal law. *See Rose v. Himley*, 8 U.S. (4 Cranch) 241, 279 (1808) ("the legislation of every country is territorial" and "the pacific rights of sovereignty must be exercised within the territory of the sovereign"). This presumption "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991).[2]

In recent opinions, this Court has reaffirmed the importance of the presumption against extraterritoriality. In *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 130 S. Ct. 2869 (2010), the Court limited the geographic reach of the Securities and Exchange Act of 1934, explaining that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none." *Id*. at 2878. The Court similarly applied the presumption against extraterritoriality to the Alien Tort Statute, a jurisdictional statute, in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013). Moreover, in January this Court cited *Kiobel* in a decision curtailing U.S. jurisdiction over a foreign party that was sued for extraterritorial conduct. *Daimler AG v. Bauman*, 134 S. Ct. 746, 762-63 (2014). The Court emphasized the "transnational context" of the litigation and admonished the Ninth

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[2] New York courts are in accord. *See Global Reins. Corp-U.S. Branch v. Equitas Ltd.*, 18 N.Y.3d 722, 735 (2012) ("The established presumption is, of course, against the extraterritorial operation of New York law.").

Circuit for paying "little heed to the risks to international comity" posed by its "expansive view" of general personal jurisdiction. *Id.*

Given the foreign policy concerns that underpin the presumption against extraterritoriality, the presumption should apply with special force in the context of the FSIA, which "provides the sole basis for obtaining jurisdiction over a foreign state in federal court," *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989), and "also provides the sole, comprehensive scheme for enforcing judgments against foreign sovereigns," *Af-Cap, Inc. v. Republic of Congo*, 462 F.3d 417, 428 (5th Cir. 2006) (citing 28 U.S.C. § 1609).

The FSIA contains no "clear indication" that a federal court may enjoin the conduct of a foreign sovereign outside the territory of the United States. *Morrison*, 130 S. Ct. at 2878. Indeed, the FSIA's asset execution provisions prohibit execution on sovereign assets outside U.S. borders. Section 1609 of the FSIA provides that "the property *in the United States* of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611." 28 U.S.C. § 1609 (emphasis added). Likewise, Section 1610 is limited to "property *in the United States* of a foreign state." *Id.* § 1610 (emphasis added). These specific references to "property in the United States" demonstrate Congress's unmistakable intent to apply the FSIA's asset execution provisions only within the territory of the United States, not extraterritorially.

The decision below also is irreconcilable with precedent from other circuits concerning the strictures of the FSIA. When the Seventh Circuit (correctly) held that "the FSIA did not purport to authorize execution

against a foreign sovereign's property . . . wherever that property is located around the world," it showed the prudence mandated by the presumption against extraterritoriality. *Autotech Techs. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 750 (7th Cir. 2007). The Seventh Circuit demanded "some hint from Congress before we felt justified in adopting such a breathtaking assertion of extraterritorial jurisdiction." *Id.* Other circuits similarly have recognized that, in certain cases, the FSIA creates a right without a remedy. *See FG Hemisphere Assocs., LLC v. Democratic Republic of Congo*, 637 F.3d 373, 377 (D.C. Cir. 2011); *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1128 (9th Cir. 2010); *Conn. Bank of Comm. v. Republic of Congo*, 309 F.3d 240, 252 (5th Cir. 2002).

Federal courts should not be permitted to circumvent the FSIA's express territorial limitations by resort to general injunctive power. Significantly, the Second Circuit itself recognized in a previous decision that "[t]he FSIA would become meaningless if courts could eviscerate its protections merely by denominating their restraints as injunctions against the negotiation or use of property rather than as attachments of that property." *S&S Machinery Co. v. Masinexportimport*, 706 F.2d 411, 418 (2d Cir. 1983). The U.S. Government has taken the position that where, as here, "judicial action constrains a foreign state's use of its property, § 1609's protections apply." Br. for the United States of America as *Amicus Curiae* in Support of Panel Rehearing and Rehearing En Banc at 7, *NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246 (2d Cir. 2012) (No. 12-105), 2012 WL 6777132 (citing *Af-Cap Inc. v. Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080 (9th Cir. 2007); *Walker Int'l Holdings Ltd. v. Republic of Congo*, 395 F.3d 229 (5th Cir. 2004);

Af-Cap Inc. v. Republic of Congo, 383 F.3d 361 (5th Cir. 2004)).[3]

This case illustrates why federal courts should exercise extreme caution when asserting their powers outside the borders of the United States over non-U.S. persons. The extraterritorial reach of the injunctions makes it "difficult to secure compliance" and "is fraught with possibilities of discord and conflict with the authorities of another country." *Vanity Fair Mills v. T. Eaton Co.*, 234 F.2d 633, 647 (2d Cir. 1956). *See also* Cert. Pet. at 37 ("Any sovereign would protest if a foreign court issued an extraterritorial order threatening its creditors and citizens and coercing it into turning over billions of dollars from its immune reserves."). As stated by the Ninth Circuit, "there *are* limits to the district court's reach, and those limits bec[o]me palpable when the court s[eeks] to extend its

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[3] In addition to the presumption against extraterritoriality, there is an equally well-settled judicial presumption that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); *cf. Kiobel*, 133 S. Ct. at 1673 (Breyer, J., concurring) ("[W]e should look to international jurisdictional norms to help determine the [Alien Tort Statute's] jurisdictional scope."). A recent articulation of international norms limits the ability of a domestic court to restrain the activities of a foreign sovereign outside the forum state's territorial jurisdiction. *See* United Nations Convention on Jurisdictional Immunities of States and Their Property, art. 19, G.A. Res. 59/38, U.N. Doc. A/RES/59/38 (Dec. 2, 2004) (permitting "post-judgment measures of constraint" only where (a) the state has expressly consented to such measures, (b) the state has allocated or earmarked property for the satisfaction of the judgment at issue, or (c) "the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is *in the territory of the State of the forum*" (emphasis added)).

arm into the territory of another nation and to impose discordant duties upon the subjects of that nation whose actions [are] solely within its own borders." *Reebok Int'l Ltd. v. McLaughlin*, 49 F.3d 1387, 1394 (9th Cir. 1995) (emphasis in original).

This Court should grant certiorari to clarify that U.S. courts may not enjoin a foreign sovereign's extraterritorial conduct, or restrain a foreign sovereign's use of its extraterritorial assets, without a "clear indication" that Congress has permitted such a remedy. *Morrison*, 130 S. Ct. at 2878.

II. THE INJUNCTIONS THREATEN TO DISRUPT INTERNATIONAL BOND MARKETS AND PAYMENT SYSTEMS.

The Court also should grant the petition because allowing the decision below to stand would undermine the efficient operation of international bond markets and payment systems.

When a country (or corporation) makes a bond payment, that entity does not, in most cases, simply mail a check to the beneficial holder of the bond. The payment typically travels through various intermediaries, including clearing houses and depositories such as Caja, before reaching its ultimate recipient. These intermediaries not only facilitate the transfer of funds around the world, but also eliminate the need for a buyer and seller of securities to physically exchange certificates. As a result, settlement risks are reduced. The safe, efficient functioning of international securities markets depends on clearing houses and other intermediaries.

The district court's injunctions—and the dangerous precedent they set—threaten the efficient operation of securities markets by imposing significant costs and

delays on international payment systems. As the Clearing House Association L.L.C. explained to the Second Circuit, "[p]ayment systems are designed to work automatically and quickly, but as a result of the [i]njunction . . . banks might be forced to hold many potentially unrelated transfers until the issue could be sorted out, delaying the payment process and undermining participants' and customers' expectations of real-time payment processing." Br. for *Amicus Curiae* The Clearing House Association L.L.C. in Support of Reversal at 21, *NML Capital, Ltd. v. Republic of Argentina*, 727 F.3d 230 (2d Cir. 2013) (No. 12-105), 2013 WL 100420. Compliance with the injunctions will be especially burdensome for financial institutions and customers that have little or no connection to the United States.

The absence of any territorial limitation in the wording of the injunctions also could subject financial institutions to competing claims in different jurisdictions. Steps required to comply with the U.S. injunctions may conflict with legal obligations under contracts or laws in other nations where the relevant transactions take place, resulting in ancillary litigation all over the world. Such litigation not only would increase the costs and decrease the efficiencies of payment systems, but also could deny due process of law if the financial institutions face double liability. *See W. Union Tel. Co. v. Pennsylvania*, 368 U.S. 71, 75 (1961); *cf. Reebok*, 49 F.3d at 1394-95 ("[W]e cannot arrogate to the federal courts the power to control the banking systems of other countries within their own territory."). In the aggregate, "[a] conflict of laws of this nature will impact the legal certainty underpinning the international bond markets and could cause a loss of confidence in the role of key market infrastructure providers." Ltr. from Euroclear

Bank SA/NV at 4, *NML Capital, Ltd. v. Republic of Argentina*, No. 12-105 (2d Cir. Jan. 10, 2013).

The disruption to financial markets caused by the injunctions is not limited to Argentina or this particular bond offering. The United States acknowledged below that the ruling "is likely to disrupt financial markets for a considerable period" and "undermines the orderly consensual restructuring process the United States has been at pains to foster for several decades" worldwide. Br. for United States of America as *Amicus Curiae* in Support of Reversal at 11, 18, *NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246 (2d Cir. 2012) (No. 12-105), 2012 WL 1150791. This Court's guidance is urgently needed to avoid unnecessary friction in international bond markets, and this case presents an excellent vehicle to resolve questions of substantial importance to the international community.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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MARCH 24, 2014