No. 24-668

IN THE

Supreme Court of the United States

THE REPUBLIC OF ARGENTINA,

Petitioner,

v.

ATTESTOR MASTER VALUE FUND LP, ET AL.,

Respondents.

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

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BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

When a foreign sovereign has waived immunity from attachment and execution, such as by contract, Section 1610(a)(1) of the Foreign Sovereign Immunities Act allows for the attachment of "[t]he property in the United States of [the] foreign state * * * used for a commercial activity in the United States." 28 U.S.C. § 1610(a)(1). In the decision below, the United States Court of Appeals for the Second Circuit held that contingent property interests that the Republic of Argentina held in certain bond collateral satisfied that standard because Argentina had twice altered or attempted to alter those interests in order to complete an exchange with holders of defaulted commercial bonds; the interests were located in the United States under traditional situs principles for intangible property; and Argentina had made the exchange offers in the United States.

The petition presents three questions under Section 1610(a)(1):

1. Whether a court must apply federal or state law to determine if a property interest is "in the United States."

2. Whether a property interest qualifies as "property * * * used for a commercial activity in the United States" merely because it is connected to a broader transaction that includes U.S. components.

3. Whether a property interest qualifies as "property * * * used for a commercial activity" where its commercial use is only aberrational or hypothetical.

CORPORATE DISCLOSURE STATEMENT

Respondent Attestor Master Value Fund LP has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Respondent Trinity Investments Limited has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Respondent Bybrook Capital Master Fund LP has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Respondent Bybrook Capital Hazelton Master Fund LP has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Respondent White Hawthorne, LLC has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Respondent White Hawthorne II, LLC has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Respondent Bison Bee LLC has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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INTRODUCTION

This case does not merit the Court's review. The court of appeals concluded that Argentina had twice used the contingent property interests it held in certain collateral to facilitate commercial-bond exchanges in the United States. Pet. App. 15a-23a, 26a. The court further held that the property interests were located in the United States under the common-law rules governing the situs of intangible property. *Id.* at 23a-26a. Based on those determinations, the court held that the property was not immune from attachment and execution under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1602 *et seq.*, because Argentina had contractually waived that immunity and the contingent interests were "[t]he property in the United States of a foreign state * * * used for a commercial activity in the United States," 28 U.S.C. § 1610(a)(1). Pet. App. 26a. All four jurists to consider this dispute have rejected Argentina's arguments, and no judge of the Second Circuit voted in favor of rehearing.

Argentina's petition presents three questions that are not implicated by the decision below, and Argentina waived its lead question presented by advancing the opposite position in the court of appeals. In reality, the court of appeals applied the same approach that other circuits have adopted in holding that Argentina's property interests were not immune from attachment and execution to satisfy valid U.S. judgments. At best, Argentina seeks review of a case-specific application of settled standards to the complex facts of this case, and its merits arguments largely ignore the court of appeals' careful analysis.

The Court should deny the petition.

STATEMENT

A. Factual Background

1. In the mid-1980s, Argentina defaulted on its foreign debts. *Capital Ventures Int'l v. Republic of Argentina*, 652 F.3d 266, 268 (2d Cir. 2011) ("*CVI III*"). To help the Argentine economy and other Latin American economies recover, the United States launched a debt-relief program known as the Brady Plan. Pet. App. 9a. Under the Brady Plan, Argentina exchanged nearly $30 billion in unsecured commercial bonds for collateralized bonds with a maturity date of March 2023—known informally as "Brady Bonds." *Ibid.*

Argentina issued two series of Brady Bonds. Pet. App. 10a. The first series was secured by U.S. Treasury bonds, while the second series was secured by Deutsche Mark-denominated bonds issued by a German development bank. *Ibid.* The court of appeals referred to the collateral for the first series as the "Dollar Collateral" and the collateral for the second series as the "DMK Collateral." *Ibid.*

The agreements governing the disposition of the Dollar Collateral and the DMK Collateral are called the Collateral Pledge Agreements. Pet. App. 10a. They are materially identical. *See id.* at 10a-11a & n.2, 13a n.4. They name the Federal Reserve Bank of New York ("N.Y. Fed") as the "collateral agent" for the bonds, with the responsibility of holding the collateral until it is paid out to bondholders or returned to Argentina. *See id.* at 10a-11a. The N.Y. Fed held the Dollar Collateral in an account at its own bank in New

York, while it held the DMK Collateral in its account at a bank in Germany.[1] *Id.* at 11a, 41a.

Under the Collateral Pledge Agreements, if Argentina failed to return the principal on the Brady Bonds to a bondholder at maturity, the bondholder had the right to demand the amount of collateral necessary for full repayment. *CVI III*, 652 F.3d at 268. At the same time, the agreements granted Argentina a contingent right in any leftover collateral once bondholders were fully repaid. *See* Pet. App. 11a, 13a-14a. The parties and the lower courts have referred to this contingent right as a "reversionary interest," and it is recognized as a form of property under New York law. *See id.* at 11a; *Capital Ventures Int'l v. Republic of Argentina*, 443 F.3d 214, 220 n.4 (2d Cir. 2006) ("*CVI I*").

The Collateral Pledge Agreements provided that Argentina could also invoke the reversionary interests before maturity in certain circumstances. In particular, if Argentina redeemed or exchanged some portion of the Brady Bonds before maturity, the reversionary interests entitled Argentina to any collateral not necessary to secure any remaining Brady Bonds. *See CVI I*, 443 F.3d at 217; Pet. App. 17a. For example, if before maturity Argentina had exchanged all of the outstanding Brady Bonds for newly issued bonds secured by other collateral, the N.Y. Fed would have been contractually obligated to return the Brady Bonds' collateral to Argentina.

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[1] The collateral securing the principal and the interest on the bonds was held in separate accounts, Pet. App. 41a, but that fact has no relevance to the petition. The collateral discussed here is the principal collateral.

2. In 1994, one year after Argentina issued the Brady Bonds, it issued a new series of bonds. *See* Pet. App. 9a; *CVI I*, 443 F.3d at 216-17. The documents governing the 1994 bonds expressly state that Argentina waives its sovereign immunity from attachment and execution in actions to enforce those bonds. Pet. App. 15a; *see Capital Ventures Int'l v. Republic of Argentina*, 2006 WL 1379607, at *1 (S.D.N.Y. May 18, 2006).

In 2001, Argentina defaulted on "roughly $80 to $100 billion of sovereign debt," *CVI III*, 652 F.3d at 268 (quotation omitted), including both the Brady Bonds and the 1994 bonds—"the largest default of a foreign state in history," *EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 466 n.2 (2d. Cir. 2007), cert. denied, 552 U.S. 818 (2007); *see* Pet. App. 9a. Four years later, in 2005, Argentina offered to exchange the defaulted Brady Bonds and other defaulted bonds for "proceeds of the collateral securing them plus new debt that Argentina would issue." Pet. App. 16a (quotation omitted). Under the design of that proposed exchange, Argentina was to exercise its reversionary interest in the Brady Bonds' collateral to obtain the proceeds of the collateral and then immediately pay those proceeds to the exchanging bondholders. *See id.* at 16a-17a.

But there was a problem with that plan. A risk existed that after Argentina obtained the proceeds, but before it paid exchanging bondholders, other creditors could attach the proceeds and prevent the completion of the exchange. Pet. App. 17a; *see CVI III*, 652 F.3d at 268. To avoid that risk, Argentina and the participating parties entered into an agreement, called the Continuation of Collateral Pledge

Agreement, that altered the reversionary interests by giving the exchanging creditors a continuing security interest in the collateral during the exchange, even after Argentina exercised the reversionary interests. Pet. App. 17a; *see CVI III*, 652 F.3d at 268-69. As a result, when the exchange ultimately took place, rights in the collateral proceeds did not revert to Argentina and so could not be attached by other creditors. Rather, the proceeds were transferred directly to bondholders. Pet. App. 17a.

That maneuver was successful. The exchange closed, *see CVI III*, 652 F.3d at 269, and Argentina was able to exchange $2.8 billion worth of Brady Bonds for new, non-defaulted debt, Pet. App. 17a.

3. Rather than participate in the 2005 exchange, Capital Ventures International (CVI)—a beneficial owner of the 1994 bonds—sued Argentina for breach of contract and sought to attach Argentina's reversionary interests in the Brady Bonds' collateral. *CVI I*, 443 F.3d at 216-18. The Second Circuit ultimately allowed CVI to attach the reversionary interests in all of the collateral that had not been liquidated in the 2005 exchange. *See CVI III*, 652 F.3d at 269.

In 2010, Argentina pursued another exchange for defaulted bonds, *NML Cap., Ltd. v. Republic of Argentina*, 699 F.3d 246, 252-53 (2d Cir. 2012), including approximately $100 million of Brady Bonds, *see CVI III*, 652 F.3d at 269. As with the 2005 exchange, Argentina needed to release the Brady Bonds' collateral to effectuate the exchange, so it sought a modification of CVI's attachment of the reversionary interests. Pet. App. 18a; *see CVI III*, 652 F.3d at 269. The Second Circuit rejected that request. *CVI III*, 652 F.3d at

270-74. As a result, Argentina was forced to withdraw its 2010 offer with respect to the Brady Bonds, although it completed the exchange with other defaulted bonds. *See* Pet. App. 18a; *NML Cap.*, 699 F.3d at 252-53.

CVI settled its claims against Argentina in 2016, and as a consequence its attachment of the reversionary interests was released. *See* Stipulation and Order, *Capital Ventures Int'l v. Republic of Argentina*, No. 5-cv-4085 (S.D.N.Y. Apr. 28, 2016), ECF 248.

B. District Court Proceedings

Respondents are beneficial owners of the defaulted 1994 bonds. Pet. App. 9a. At the time of the district court proceedings in this case, some respondents had obtained judgments against Argentina on those bonds, while others had filed claims but had not yet obtained judgments. *See ibid.*

To satisfy their existing and anticipated judgments, respondents moved the district court for an *ex parte* order of pre-judgment and post-judgment attachment of Argentina's reversionary interests under Federal Rules of Civil Procedure 64 and 69. Pet. App. 11a, 81a. Those rules incorporate "the law of the state where the court is located"—here, New York. Fed. R. Civ. P. 64(a); *see* Fed. R. Civ. P. 69(a)(1). Respondents therefore argued that under New York law, they had the right to attach and execute upon the reversionary interests to satisfy their judgments, as the Second Circuit had previously held in the *CVI* litigation.

The district court entered the order and instructed respondents to move to confirm the order, which they did. Pet. App. 66a, 88a-94a. Argentina filed a motion to vacate the order. *See id.* at 66a. Argentina argued

that under the language of a form document contained in an appendix to the Collateral Pledge Agreements, the reversionary interest was actually owned by Argentina's central bank, not Argentina itself, and so could not be attached to satisfy Argentina's judgments. *See id.* at 73a-74a. Argentina further argued that the reversionary interests were immune from attachment and execution under Section 1609 of the FSIA, which generally provides that "the property in the United States of a foreign state shall be immune from attachment * * * and execution except as provided in sections 1610 and 1611 of this chapter." *See id.* at 66a-67a.

The district court denied Argentina's motion to vacate and confirmed the attachment order. Pet. App. 62a. As to ownership of the reversionary interests, the court explained that the operative provisions of each Collateral Pledge Agreement repeatedly state that the reversionary interest belongs to Argentina, not its central bank, and that the language of the form document did not override the operative provisions. *Id.* at 74a-76a.

As to Argentina's FSIA argument, the district court held that the waiver exception to immunity from attachment and execution set out in Section 1610(a)(1) applied to the reversionary interests. Pet. App. 67a-73a. That exception provides:

> (a) The property in the United States of a foreign state * * * used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State * * * if—

> (1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication * * * .

28 U.S.C. § 1610(a)(1).

The district court held that this provision was satisfied because (i) it was uncontested that Argentina had waived its immunity from attachment and execution in the documents governing the 1994 bonds, Pet. App. 67a; (ii) the reversionary interests were "property in the United States" because under New York law, the situs of an intangible right is the location of the party with the obligation of performance, which was the N.Y. Fed, *id.* at 68a-69a; and (iii) the reversionary interests were property "used for a commercial activity in the United States" because "the pledge of the collateral was part of the transaction of issuing the Brady Bonds and the reversionary interest was, and still is, being used to secure Argentina's ability to recover remaining collateral after the outstanding Brady Bonds are paid," *id.* at 73a.

The district court later issued an amended order directing the N.Y. Fed to retain any Brady Bonds' collateral that remained after bondholders were repaid principal in March 2023. Pet. App. 57a-58a. Argentina noticed an appeal of the amended order.

After that appeal was docketed, Argentina revealed that more than €54 million of the DMK Collateral was held in the N.Y. Fed account in Germany. Pet. App. 11a-12a, 34a, 36a; *see* Joint Appendix, *Attestor Master Value Fund LP v. Republic of Argentina*, No. 22-2301 (2d Cir. Sep. 20, 2024), ECF 366 at 126. Respondents asked the district court to clarify that its

previous orders reached the reversionary interest in that collateral. Pet. App. 12a. At the same time, those respondents that had obtained final judgments against Argentina moved for a "turnover" order requiring the N.Y. Fed to deliver Argentina's reversionary interests in the collateral to them, citing a provision of New York law that allows a judgment creditor to obtain an order requiring a third party to furnish property of the judgment debtor to satisfy a judgment. *See* N.Y. C.P.L.R. § 5225(b); Pet. App. 12a, 26a, 43a.

Argentina opposed those requests. It argued that the N.Y. Fed lacked possession or custody of the reversionary interest in the DMK Collateral because the collateral was held in a N.Y. Fed account at another bank and that sovereign nations do not qualify as judgment debtors under New York law. *See* Pet. App. 43a-45a, 49a. Argentina also argued that its reversionary interest in the DMK Collateral did not fall under the immunity exception of Section 1610(a)(1) of the FSIA because it was not located in the United States or used for a commercial activity in the United States. *See id.* at 46a-49a.

The district court rejected Argentina's arguments. The court held that Argentina's reversionary interest in the DMK Collateral was covered by its previous attachment orders and was within the custody of the N.Y. Fed, and that a sovereign qualifies as a judgment debtor under New York law. Pet. App. 45a-46a, 49a-50a. With respect to the FSIA, the court again held that the reversionary interest was located in the United States because the N.Y. Fed bore the obligation of performance. *Id.* at 46a-47a. And the court held that the reversionary interest was property "used for a commercial activity in the United States" within

the meaning of Section 1610(a)(1) because Argentina was using the reversionary interest to "preserve the value of the collateral for Argentina" and "to provide Argentina the flexibility to use the DMK Collateral to restructure its debt," and that this "use takes place in the United States, where [the N.Y. Fed.], as garnishee, possesses the reversionary interest." *Id.* at 48a.

"In sum," the district court concluded, "the Republic issued debt instruments, pledged collateral to secure the instruments, and reserved its right to recover any excess pledged collateral." Pet. App. 48a. "This is prototypical commercial activity." *Id.* at 48a-49a; *see also id.* at 37a-39a. Argentina appealed that order as well.

The district court stayed its orders pending the appeals, which the Second Circuit consolidated. Pet. App. 8a, 12a. While the appeals were pending, the Brady Bonds matured. *Id.* at 12a. The N.Y. Fed used the proceeds of the Brady Bonds' collateral to pay the outstanding principal that Argentina owed holders of the Brady Bonds and retained the excess in its accounts in compliance with the district court's order. *Ibid.*

C. Decision Of The Court Of Appeals

The court of appeals affirmed the district court's orders in a unanimous opinion. Pet. App. 5a-31a.

1. The court of appeals first held that the reversionary interests in the Brady Bonds' collateral belonged to Argentina, not its central bank. Pet. App. 13a-14a. The court explained that each Collateral Pledge Agreement "repeatedly states that 'all rights' in the Collateral 'shall revert to Argentina'" upon a triggering event. *Id.* at 14a (quotation omitted). Al-

though Argentina had relied on language in a form notice in the agreements' appendices, which identified the central bank as the recipient of the collateral proceeds, the agreements provided that the actual notice "need only be 'substantially in the form'" of that document, which "leaves flexibility to alter the recipient of the funds from [the central bank] to Argentina." *Ibid.* (quotation omitted).[2]

2. The court of appeals next affirmed the district court's conclusion that Argentina's reversionary interests were not immune from attachment and execution under the FSIA because they fell within the waiver exception of Section 1610(a)(1). Pet. App. 15a-26a.

First, the court of appeals noted that "[t]here is no dispute that Argentina has waived its immunity" from attachment and execution "in connection with the [1994] bonds held by [respondents]." Pet. App. 15a. Argentina has not contested that waiver at any stage of the proceedings.

Second, the court of appeals held that Argentina had "used the reversionary interests [in the Brady Bonds' collateral] in commercial activity at least twice before their current attachment." Pet. App. 16a. Under circuit precedent, the court explained, to satisfy the commercial-use requirement, the sovereign must "actively utilize th[e] property in service of [a] commercial activity." *Ibid.* (quoting *Exp.-Imp. Bank of the Rep. of China v. Grenada*, 768 F.3d 75, 90 (2d Cir.

[2] Although the petition (incorrectly) states in passing that the Collateral Pledge Agreements "provide[] that any excess [collateral] is to be transferred to an account of the [central bank]," Pet. 6, the petition does not ultimately seek review of this holding of the court of appeals.

2014)) (emphasis omitted). Although "the property need not be actively utilized at the moment of attachment," "it 'must *have been used* for a commercial activity at the time the writ of attachment or execution is issued.'" *Ibid.* (quoting *Aurelius Cap. Partners, LP v. Republic of Argentina*, 584 F.3d 120, 130 (2d Cir. 2009), cert. denied, 559 U.S. 988 (2010)) (emphasis in decision below).

Applying that interpretation of Section 1610(a)(1), the court explained that in the 2005 exchange, Argentina had modified the reversionary interests to ensure that it could transfer the Brady Bonds' collateral proceeds to holders of Brady Bonds in exchange for accepting new debt. Pet. App. 16a-18a. The court further held that in the 2010 exchange, Argentina had sought to modify the reversionary interests again to facilitate the same type of transaction, although that effort was ultimately blocked by the courts. *Id.* at 18a. In short, "Argentina twice offered to alter or extinguish the reversionary interests to incentivize bondholders to participate in its exchange offers." *Ibid.* In that way, "Argentina used the reversionary interests in these transactions." *Ibid.*

The court of appeals then held that this use of the reversionary interests sufficed to show that they had been "used for a commercial activity" within the meaning of Section 1610(a)(1). Pet. App. 19a-23a. In line with the Third, Fifth, Ninth, and D.C. Circuits, the court "adopt[ed] a totality-of-the-circumstances" test to determine whether the predominant use of the property was commercial in nature, under which a court must "examine 'the uses of the property in the past as well as all facts related to its present use, with an eye towards determining whether the commercial

use of the property, if any, is so exceptional that it is an out of character use for that property.'" *Id.* at 20a-21a (quoting *TIG Ins. Co. v. Republic of Argentina*, 967 F.3d 778, 786 (D.C. Cir. 2020) (quoting *Af-Cap Inc. v. Republic of Congo*, 383 F.3d 361, 369 (5th Cir. 2004)), and citing *Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, 932 F.3d 126, 150 (3d Cir. 2019)). That "totality-of-the-circumstances inquiry," the court noted, "prevents a judgment creditor from attaching sovereign property by pointing to sporadic commercial uses inconsistent with the typical uses of the property." *Id.* at 21a. Applying that standard in light of Argentina's historical use of the reversionary interests to facilitate debt exchanges, the court concluded that "[u]nder the totality of the circumstances here, Argentina's uses of the reversionary interests have been commercial in nature." *Id.* at 23a.

Finally, the court of appeals held that the reversionary interest in the DMK Collateral met the United States-nexus requirement of Section 1610(a)(1). Pet. App. 23a-26a. The court stated that the nexus requirement contains two elements: "that the attached property be in the United States *and* that the use of the property in commercial activity occur in the United States." *Id.* at 24a. The court determined that both elements were met on the record here.

With respect to the location of the reversionary interest in the DMK Collateral, the court of appeals noted that "[t]he parties agree that the default rule is that the relevant location of intangible property is the situs of the property." Pet. App. 24a. It further explained that "[f]or a contractual right like the reversionary interests, the situs is the location of the party 'upon whom rests the obligation of performance'"—

here, the N.Y. Fed, which "is tasked with returning any excess Brady Collateral to Argentina upon the exercise of the reversionary interests." *Id.* at 24a-25a (quoting *ABKCO Indus., Inc. v. Apple Films, Inc.*, 39 N.Y.2d 670, 675 (N.Y. 1976)). The court rejected Argentina's argument that a New York law exception for formal paper writings applied. *Id.* at 25a-26a.

With respect to the location of the use of the reversionary interests in commercial activity, the court of appeals held that the commercial activity had occurred in the United States because "[b]oth the 2005 and 2010 exchange offers were made in the United States and registered with the Securities and Exchange Commission." Pet. App. 26a.

Accordingly, the court held that all of the requirements for the waiver exception to FSIA attachment and execution immunity were met and thus the reversionary interests were not immune. Pet. App. 26a.

3. The court of appeals held that the reversionary interests were subject to turnover under New York state law. Pet. App. 26a-28a. The court rejected Argentina's argument that the N.Y. Fed lacked possession or custody over the DMK Collateral held abroad in a N.Y. Fed account at another bank, explaining that Argentina was conflating the reversionary interests—contingent contractual rights to the collateral—with the collateral itself. *Id.* at 27a. The court also rejected Argentina's argument that a sovereign does not qualify as a "person" under the New York civil rules and therefore cannot be a "judgment debtor," noting that the argument would also mean that a sovereign could not be a judgment *creditor*, effectively foreclosing sovereigns from enforcing judgments in New York federal and state courts. *Id.* at 27a-28a.

4. Argentina petitioned for panel rehearing and rehearing *en banc*. The Second Circuit denied the petition without requesting a response and without any judge calling for a poll. *See* Pet. App. 4a.

REASONS FOR DENYING THE PETITION

The court of appeals correctly affirmed the district court's orders of attachment and turnover directed at Argentina's reversionary interests in the collateral supporting the Brady Bonds.

In its petition for a writ of certiorari, Argentina does not challenge the court of appeals' holdings that (i) the reversionary interests belong to Argentina, not its central bank; and (ii) the district court had authority under the Federal Rules and New York state law to order turnover of the reversionary interests. Nor does Argentina dispute that it waived immunity from attachment and execution in the documents governing the defaulted 1994 bonds that gave rise to respondents' actions.

Rather, Argentina exclusively challenges the court of appeals' holding that the reversionary interests in the Brady Bonds' collateral are "[t]he property in the United States of a foreign state * * * used for a commercial activity in the United States" under Section 1610(a)(1) of the FSIA. Pet. App. 15a-26a. In reaching that conclusion, the court of appeals determined that Argentina's reversionary interests had been "used for a commercial activity" because "Argentina twice offered to alter or extinguish the reversionary interests to incentivize bondholders to participate in its exchange offers." Pet. App. 18a. The court further concluded that the reversionary interest in the DMK Collateral was located in the United States and had

been used for commercial activity in the United States because common-law situs rules placed that interest in New York and the exchange offers had been made in the United States. Pet. App. 23a-26a.

Argentina raises three objections to the court of appeals' analysis: (i) that federal law, not state law, governs the question of whether the reversionary interest in the DMK Collateral was "in the United States," Pet. 9-18; (ii) that a mere connection to U.S.-based commercial transactions was insufficient for that reversionary interest to be "used for a commercial activity in the United States," Pet. 18-21; and (iii) that aberrational or hypothetical commercial uses of the reversionary interests in both the Dollar Collateral and the DMK Collateral were insufficient to deem the property "used for a commercial activity," Pet. 22-25. But Argentina expressly forfeited its lead argument below (which in any event is not outcome determinative here), and its other arguments do not challenge an actual holding of the court of appeals. Indeed, the court expressly adopted (or assumed) the very legal rules that Argentina favors.

Argentina thus ultimately objects to the court's application of those rules to the unique (and uniquely complex) factual situation here, involving the use of a contingent property interest to propose and consummate commercial-bond exchanges. Those challenges lack merit and do not at any rate present any question of general applicability warranting this Court's review.

This Court regularly denies petitions by foreign sovereigns where the ordinary criteria for certiorari are not met. *See, e.g.*, *Republic of Argentina v. Cap. Ventures Int'l*, 558 U.S. 938 (2009); *Ukraine v. PAO*

Tatneft, 143 S. Ct. 290 (2022); *Bolivarian Republic of Venezuela v. Crystallex Int'l Corp.*, 140 S. Ct. 2762 (2020); *Republic of Congo v. Af-Cap, Inc.*, 544 U.S. 962 (2005). That includes numerous petitions by Argentina, whose long history of debt defaults has made the country a frequent litigant and has yielded "many contributions to the law of foreign insolvency." *EM Ltd.*, 473 F.3d at 466 n.2. The Court should accordingly deny the petition.

A. The First Question Presented Was Waived And Is Not Outcome Determinative

Argentina's lead argument in its petition is that the court of appeals erred in applying New York state law, rather than federal law, to the question of the situs of Argentina's reversionary interest in the DMK Collateral. Pet. 9-17. But Argentina affirmatively waived that argument below by asserting—contrary to respondents' position—that state law, not federal law, applied; the court of appeals ruled that the answer would be the same under federal or state law; and the circuit conflict that Argentina posits is illusory.

1. The waiver exception to FSIA immunity from attachment and execution applies only to a sovereign's "property in the United States." 28 U.S.C. § 1610(a)(1). Although the location of tangible property is often self-evident, the situs of intangible property, like the reversionary interests here, can present more complex questions.

In the court of appeals, respondents argued that the situs of Argentina's reversionary interest in the DMK Collateral was New York because the N.Y. Fed

bore the burden of performing that obligation insofar as it was contractually required to transfer excess collateral to Argentina upon a triggering event. Brief for Plaintiffs-Appellees, *Attestor Master Value Fund LP v. Republic of Argentina*, No. 22-2301 (2d Cir. Sep. 19, 2024), ECF 333 at 31-41. Respondents' principal argument was that this traditional situs rule for intangible property was "part of the common-law backdrop against which Congress enacted the FSIA" and "[t]he FSIA thus incorporates the situs rule." *Id.* at 33 (internal quotation marks omitted). In the alternative, respondents argued that the situs rule would apply as a matter of New York law. *Id.* at 33-35. .. Argentina, however, argued the situs issue only "[u]nder New York law" and advanced no argument that federal law supplied the proper standard for determining whether property is located "in the United States." Brief of Defendant-Appellant, *Attestor Master Value Fund LP v. Republic of Argentina*, No. 22-2301 (2d Cir. Sep. 19, 2024), ECF 352 at 27-29; Reply Brief of Defendant-Appellant, *Attestor Master Value Fund LP v. Republic of Argentina*, No. 22-2301 (2d Cir. Sep. 20, 2024), ECF 369 at 17-19. Indeed, nowhere in its briefs below did Argentina mention the "holistic federal test" that it now advocates. Pet. 4.

In its petition in this Court, however, Argentina argues that the court of appeals erred by supposedly failing to apply a "federal test to determine the situs of the reversionary interest." Pet. 4, 9-18. Argentina waived its new argument below by affirmatively arguing in favor of a state-law standard even when respondents argued principally for a federal standard. That alone renders the issue unfit for further review.

2. At any rate, the choice-of-law question that Argentina presents was not actually decided below and would have no bearing on the outcome of this case. Consistent with Argentina's original position that state law applies, the court of appeals explained that it would "*assume* that New York law—not federal law—provides the relevant test for locating the situs of reversionary interests." Pet. App. 25a n.9 (emphasis added). The court further explained that it "need not resolve this question because the result is the same either way." *Ibid.* It concluded that under a "common sense appraisal of the requirements of justice and convenience,"—the standard that the Fifth Circuit employed in *Af-Cap, Inc. v. Republic of Congo*, 383 F.3d 361 (5th Cir. 2004)—it would hold that the situs of the reversionary interest was New York. *Ibid.* (quoting *Af-Cap*, 383 F.3d at 371).

Accordingly, the first question presented was not decided below, and resolution of the choice-of-law issue would have no impact on the outcome of this case.

3. To the extent that Argentina takes issue with the court of appeals' *application* of what Argentina calls the federal standard to the facts here, it seeks error correction that would shed little light on future cases involving different types of property interests. And the court of appeals' application was in any event correct. Argentina does not dispute that the traditional rule in the American legal system is that the situs of an intangible right like the reversionary interests is the location of the party who bears the obligation of performance. That rule is thus part of the common-law backdrop against which Congress enacted the FSIA, and nothing in the statute's text purports to displace it. *See Samantar v. Yousuf*, 560 U.S. 305, 320

(2010) (recognizing in FSIA context the "canon of construction that statutes should be interpreted consistently with the common law").

Argentina's alternative approach would sow needless confusion in FSIA cases. According to Argentina, instead of applying the traditional common-law situs rule, courts should balance every fact about a particular property interest to reach case-by-case determinations about whether the interest is located in the United States. *See* Pet. 13-15. On that view, in cases where the party that bears the obligation of performance has a "significantly limited" role in the overall transaction (however that is defined), a court should ignore the traditional rule and apply its own intuitive sense of the location of the property. That approach would be a recipe for costly litigation and considerable uncertainty over whether intangible assets are subject to attachment and execution. Absent any statutory language compelling that result, it is far more likely that Congress intended courts to apply settled background rules governing the situs of property interests.

Indeed, in *Af-Cap*—the only case that Argentina cites purportedly applying a federal standard to this question—the Fifth Circuit embraced a similar common-law rule (that "the situs of a debt obligation is the situs of the debtor"). 383 F.3d at 372. That rule was consistent with a "common sense appraisal of the requirements of justice and convenience" precisely because of its longstanding and widespread use. *Ibid.* So too here.

4. Even if the court of appeals had held that state law governs the situs question, that would not have generated a circuit conflict. In *Af-Cap*, the Fifth

Circuit did not directly confront the question whether federal or state law applied. The court noted that the debt-situs rule was "true in Texas, where this garnishment proceeding commenced," as well as "in other states." 383 F.3d at 371-72. While the court added that "we see nothing about the general rule regarding the situs of debt obligations that would frustrate the purpose of the FSIA," *id.* at 372, it did not specify whether it was applying state law subject to a conflict-preemption check or was instead applying a form of federal common law, *see id.* at 373 (discerning "no conflict between the application of this ordinary situs rule and the purposes and goals of the FSIA"). Accordingly, the Fifth Circuit has not clearly rendered the holding that Argentina attributes to it.

Argentina cites other decisions purportedly holding that "the FSIA demands holistic analysis," but those decisions addressed whether property was used for a commercial activity, *see* Pet. 17, not the situs of the property, and they employed the same totality-of-the-circumstances test for that question that the court of appeals applied here, *see* pp. 27-28, *infra*. There is no conflict.

5. In addition to the foregoing impediments to this Court's review of the first question presented, respondents have preserved two alternative grounds to affirm the judgment below that might render it unnecessary to reach the question presented.

First, Argentina forfeited the argument that the reversionary interest in the DMK Collateral is not located in the United States by failing to timely raise that question before the court of appeals. *See* Brief for Plaintiffs-Appellees, *Attestor Master Value Fund LP v. Republic of Argentina*, No. 22-2301 (2d Cir. Sep. 19,

2024), ECF 333 at 18, 31. Argentina also conceded in the district court that the situs of intangible property is the location of the party with the obligation of performance, contrary to its arguments on appeal. *See id.* at 32-33. Were this Court to grant review, respondents would raise those forfeitures as alternative grounds to affirm the judgment.

Second, respondents argued below that even if the reversionary interest was located abroad, that would not mean that it was immune from attachment and execution under the FSIA. Brief for Plaintiffs-Appellees, *Attestor Master Value Fund LP v. Republic of Argentina*, No. 22-2301 (2d Cir. Sep. 19, 2024), ECF 333 at 35. This Court has explained that "the text of [Section 1609 of the FSIA]"—the provision that confers presumptive immunity from attachment and execution, subject to the Section 1610 and 1611 exceptions—"immunizes only foreign-state property '*in the United States*,'" not property located outside the United States. *Republic of Argentina v. NML Cap., Ltd.*, 573 U.S. 134, 144 (2014) (quoting 28 U.S.C. § 1609) (emphasis in original). Under that plain-text construction of Section 1609, no property located abroad enjoys FSIA immunity from attachment and execution, and so the applicability of the waiver exception in Section 1610 is irrelevant.

B. The Second Question Presented Is Not Implicated By The Decision Below

Section 1610(a)(1)'s waiver exception from attachment and execution immunity applies only to "property . . . used for a commercial activity in the United States." In its second question presented, which again pertains only to the reversionary interest in the DMK Collateral, Argentina asks this Court to decide

"[w]hether property of a foreign sovereign was 'used for commercial activity in the United States' * * * if the property is only connected to a broader transaction that includes U.S. components." Pet. i (capitalization altered); *see id.* at 18-21. But the court of appeals did not hold that Section 1610(a)(1)'s standard is met if property was merely "connected to a broader transaction that includes U.S. components," so that question is not presented by this case.

1. Applying its settled precedent, the court of appeals rejected the view that a mere connection between the property and a U.S.-based commercial transaction is sufficient to satisfy Section 1610(a): "We have held that the word 'used' in the text of section 1610(a) 'require[s] *not merely that the property at issue relate to commercial activity in the United States*, but that the sovereign *actively utilize* that property in service of that commercial activity." Pet. App. 16a (quoting *Exp.-Imp. Bank*, 768 F.3d at 90) (emphases added). The court explained that this standard is consistent with "the approaches used by the Third, Fifth, and Ninth Circuits." *Id.* at 20a.[3]

Applying that uniform standard, the court of appeals held that Argentina had used the reversionary interest in the DMK Collateral for the commercial activity of conducting exchanges of ordinary bonds because "Argentina twice offered to alter or extinguish the reversionary interests to incentivize bondholders to participate in its exchange offers." Pet. App. 18a.

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[3] Argentina is therefore incorrect that the court of appeals did "not even mention" the "reasoning adopted by the Fifth and Ninth Circuits." Pet. 19; *see* Pet. App. 21a (favorably citing the Fifth Circuit's *Af-Cap* decision).

It further held that the use occurred in the United States because (i) the reversionary interest was located in the United States under the situs rule discussed above, and (ii) the commercial activity took place in the United States given that "the exchange offers were made in the United States and registered with the Securities and Exchange Commission." *Id.* at 23a-26a.

Accordingly, the second question presented is not implicated by the decision below. The court of appeals did not hold that a mere connection between the property and U.S.-based commercial activity is sufficient. At best, Argentina raises a case-specific objection to the court's conclusion that Argentina "actively utilized" the reversionary interest in the DMK Collateral in service of transactions in the United States. But that presents no question of general applicability warranting this Court's review.

2. At any rate, the court of appeals did not err. The petition advances a series of objections to the court's analysis, Pet. 18-21, but they all lack merit.

First, Argentina argues that the court of appeals "conflate[d] the use of the reversionary interest in the DMK Brady Collateral with the purported use of collateral in the 2005 and 2010 Exchange Offers writ large." Pet. 19-20. But the court did not "conflate" anything. As it explained, in both the 2005 and 2010 exchange offers, Argentina offered to exchange new debt for the Brady Bonds (among other defaulted bonds). Pet. App. 16a-18a. Those proposals required Argentina to alter its reversionary interests in the Brady Bonds' collateral to ensure that the exchange could go through. *Id.* at 17a-18a; *see* p. 4-6, *supra*.

That readily qualifies as the use of the reversionary interests for a commercial activity.

The fact that the exchanges also involved other bonds has no relevance. For example, if a judgment creditor sought to attach only a subset of inventory that a sovereign had offered in a commercial exchange, the fact that the creditor is not seeking to attach all of the inventory would make no difference as to whether the subset is property "used for a commercial activity."

Second, Argentina argues that the Second Circuit put a "gloss over the meaning of the word 'property'" in a way that conflicts with other circuits' holdings that Section 1610(a)(1) requires that the "property in question [be] put into action, put into service, availed or employed for a commercial activity, not in connection with a commercial activity or in relation to a commercial activity." Pet. 19 (quoting *Af-Cap Inc. v. Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1091 (9th Cir. 2007) ("*Chevron Overseas*")). It is not clear what "gloss" Argentina is referring to. And as explained above, the court of appeals rejected the view that a mere "connection" to a commercial activity in the United States was sufficient.

Third, Argentina contends that the court of appeals failed to explain why the reversionary interest in the DMK Collateral was property "used for a commercial activity in the United States." Pet. 19-21. It argues that the 2005 exchange required the bonds and proceeds to be "tendered through clearing systems in Europe or Argentina," and so their use did not occur in the United States. *Id.* at 20.

As the court of appeals explained, however, "Argentina's argument focuses on the wrong property interest." Pet. App. 24a. The interest is not the collateral itself (much less the bonds), but rather Argentina's reversionary interest in the collateral. That property interest is located in the United States under the traditional situs rule because the N.Y. Fed bore the obligation of performance. Argentina used that property interest by altering or proposing to alter the reversionary interest to ensure that the exchange could be completed. *Id.* at 16a-18a. And the relevant commercial activity "took place at least in part in the United States" because Argentina made the exchange offer in the United States and it registered the offer with a U.S. regulatory agency. *Id.* at 26a.

Argentina has pointed to nothing in that analysis that is incorrect, much less that warrants this Court's review. Argentina appears to suggest at one point that other circuits have considered a similar factual circumstance involving a reversionary interest in collateral held abroad and employed in a bond-exchange offer, *see* Pet. 20-21, but no other circuit has considered any remotely similar fact pattern. The only case that Argentina cites is the Ninth Circuit's decision in *Chevron Overseas*, *supra*, but that case concerned the lawfulness of garnishments and liens on intangible obligations of an energy company to a sovereign (such as royalties for the extraction of hydrocarbons) that had not been used for any commercial activity in the United States, 475 F.3d at 1084. That situation bears no resemblance to the facts of this case.

Finally, Argentina argues that "the 2010 Exchange Offer did not involve any Brady Bonds" and so the reversionary interest in the DMK Collateral "was

not used for commercial activity of any sort in 2010." Pet. 19-20. That omits that Argentina *sought* to include Brady Bonds in the 2010 exchange. Pet. App. 18a. As the court of appeals explained, Argentina "offered to alter its reversionary interests to include Brady Bond holders in the exchange," and even obtained approval to do so from a district court, but was ultimately blocked by the Second Circuit because of the preexisting attachment of the reversionary interest from the *CVI* litigation. *Ibid.* The offer itself, however, was commercial activity—just as if Argentina had made a formal offer to trade automobiles or stocks in a commercial exchange before being blocked by enforcement of a preexisting lien on the property.

C. The Third Question Presented Is Not Implicated By The Decision Below

As explained, Section 1610(a)(1) of the FSIA waives attachment and execution immunity only for sovereign property "used for a commercial activity." Argentina's third question presented asks "[w]hether aberrational or hypothetical commercial use is sufficient" under that language. Pet. i (capitalization altered); *see id.* at 22-25. As with the other issues that Argentina raises in the petition, however, that question is not implicated by the decision below.

1. The FSIA defines the "commercial character of an activity" by reference to the "nature" of the activity rather than its "purpose." 28 U.S.C. § 1603(d). As this Court held in *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992), the key question is "whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in trade and traffic or commerce," *id.* at 614 (quotation omitted).

Thus, where a foreign state "acts 'in the manner of a private player within'" a particular market, it engages in commercial activity. *Saudi Arabia v. Nelson*, 507 U.S. 349, 360 (1993) (quoting *Weltover*, 504 U.S. at 614); *see also ibid.* (describing the inquiry as "a question of behavior, not motivation").

Since *Weltover* and *Nelson*, the circuits have applied a totality-of-the-circumstances approach to determine whether a given property interest is "property * * * used for a commercial activity." *See* Pet. App. 20a (collecting cases); *see also infra.* That approach looks to "the uses of the property in the past as well as all facts related to its present use, with an eye toward determining whether the commercial use of the property, if any, is so exceptional that it is an out of character use for that property." Pet. App. 20a-21a (quoting *TIG Ins.*, 967 F.3d at 786). Although the property "need not be actively utilized *at the moment* of attachment," *id.* at 16a (emphasis added), it "must *have been used* for a commercial activity at th[at] time," *ibid.* (emphasis in original). The goal is to prevent both judgment creditors *and* sovereigns from leveraging "exceptional" uses in attachment disputes. *See id.* at 21a.

Argentina contends that, with respect to reversionary interests in both the Dollar Collateral and the DMK Collateral, the court of appeals "diverge[d] from other circuits' understanding of what qualifies as 'use'" by holding that aberrational or hypothetical uses are sufficient. Pet. 22. That is incorrect. The court of appeals adopted the same "totality-of-the-circumstances inquiry" that other circuits have applied. Pet. App. 21a. Invoking the same D.C. Circuit decision on which Argentina relies for the purported

conflict, *see* Pet. 22, the court noted that this approach forecloses using an "artificially narrow lens" that would "allow[] onetime or aberrational uses to dictate the fate of the property," Pet. App. 21a (quoting *TIG Ins.*, 967 F.3d at 786); *see also Bainbridge Fund Ltd. v. Republic of Argentina*, 102 F.4th 464, 469 (D.C. Cir. 2024) (same).

For that reason, this case presents no opportunity to address the question whether aberrational (much less hypothetical) uses of property are sufficient to satisfy Section 1610(a)(1). Indeed, no circuit has held that such uses would be sufficient, so that issue does not warrant this Court's review in any case.

2. Argentina essentially asks the Court to review the factbound question whether the uses of the reversionary interests that the court of appeals identified—invoking those interests to facilitate exchange offers with bondholders in 2005 and 2010—were aberrational, contrary to the determination of the court of appeals. Pet. 22-23. Particularly given the unique fact pattern here, reviewing that determination would not shed light on more frequently recurring fact patterns.

At any rate, the court of appeals did not err. Argentina claims that the court effectively held that aberrational uses suffice under Section 1610(a)(1) because "it cited only two purported instances of 'use' of the reversionary interest: the 2005 and 2010 Exchanges." Pet. 22. But that omits the critical fact: that the reversionary interests had never been used for any other, non-commercial activity. Indeed, as the district court explained, the whole purpose of the reversionary interests was to facilitate Argentina's ongoing administration of the bonds by giving Argentina

the flexibility to exchange or redeem bonds before maturity without losing the value of the collateral. Pet. App. 48a. The 2005 and 2010 exchanges were the specific instances in which Argentina exercised that general and exclusive commercial function of the reversionary interests.

Argentina has never explained how it used its reversionary interests—which were created and altered as part of Argentina's activity in the commercial-bond market—even once for anything *but* commercial activity. That distinguishes the present case from others cited in the petition where the default use of the property was non-commercial. *See, e.g.*, *Bainbridge Fund*, 102 F.4th at 468-70 (building primarily used to store diplomatic files).

Argentina also claims that the court of appeals found "that hypothetical—rather than active—use was sufficient under Section 1610(a)." Pet. 23. That is incorrect, and Argentina acknowledges that the Second Circuit has long held that hypothetical use is not sufficient. *See ibid.* (citing *Exp.-Imp. Bank*, 768 F.3d at 89-90; *Aurelius Cap. Partners*, 584 F.3d at 130-31; *EM Ltd.*, 473 F.3d at 484-85).

Argentina says that "the Second Circuit appears to have reversed course" from these repeated holdings because a reversionary interest "is nothing but a passive contractual right, the mere maintenance of which is not active 'use.'" Pet. 23-24. But the court of appeals did not hold that the "mere maintenance" of the reversionary interests qualified as "use." Rather, it held that "Argentina twice offered to alter or extinguish the reversionary interests to incentivize bondholders to participate in its exchange offers." Pet. App. 18a. Offering to modify or relinquish a property

interest as part of a commercial exchange naturally qualifies as the active use of that property interest in commercial activity.

Argentina also argues that in the exchanges it did not actually *exercise* the reversionary interest to obtain collateral. Pet. 24. But that is just a different use of the reversionary interest than what Argentina did here. To take an analogy, when a stock option is offered as part of a proposed commercial exchange, that qualifies as using the property interest for a commercial activity, even if the holder does not exercise the option.

Argentina again states that "[t]he 2010 Exchange was not even open to Brady bondholders." Pet. 24. But as noted above, Argentina attempted to use the reversionary interests in that transaction until it was blocked by a judicial order. *See* p. 5-6, *supra*; Pet. App. 18a.

Finally, Argentina raises the highly fact-specific objection that the reversionary interests used in the exchanges differed from the reversionary interests that respondents attached because different provisions of the Collateral Pledge Agreements govern the invocation of the reversionary interests in the exchange and maturity scenarios (Section 6.01 and Section 3.03(a)(ii) of the Collateral Pledge Agreement, respectively). Pet. 24-25. Argentina did not raise that argument in its merits briefs in the court of appeals, so it is forfeited. In addition, it turns on a question of state law—how to define the relevant property interest. And Argentina posits an intra-circuit conflict on that question that would not warrant this Court's review. *See id.* at 24 (citing *CVI III*, 652 F.3d at 270).

At any rate, Argentina is incorrect. The district court attached Argentina's reversionary interests *in their entirety*, not just Argentina's rights in the Section 3.03(a)(ii) maturity scenario. *See* Pet. App. 86a ("The Subject Property consists of Argentina's reversionary interest in all assets."); *see id.* at 36a, 43a, 46a-48a, 55a (Argentina's "reversionary interest," singular, was attached). The attachment below thus would have blocked a pre-maturity exchange, as in *CVI III*, 652 F.3d at 270-71.

Nor can the interests be divided in the manner that Argentina now proposes. Argentina's "reversionary interest" just refers to its right to have the collateral "revert to Argentina." *CVI I*, 443 F.3d at 220 n.4. Sections 3.03(a)(ii) and 6.01 merely specify different conditions under which the same collateral will revert to Argentina. When a single instrument delineates the scope of a party's right to property, as here, it is typically regarded as defining a single property interest. Argentina provides no cogent reason to conclude otherwise on this record—let alone a reason warranting this Court's review.

3. Finally, were this Court to grant review on this question, respondents would raise an alternative ground for affirmance: that, as the district court concluded, Argentina used the reversionary interests for commercial activity when it first issued the Brady Bonds in 1993 and throughout the life of the Brady Bonds because those interests continually gave Argentina flexibility to strategically manage its debt, a prototypical commercial activity. *See* Pet. App. 47a-48a, 72a-73a. Respondents raised that argument in the court of appeals and therefore have preserved it as an alternative basis to affirm the judgment. *See*

Brief for Plaintiffs-Appellees, *Attestor Master Value Fund LP v. Republic of Argentina*, No. 22-2301 (2d Cir. Sep. 19, 2024), ECF 331 at 38-51.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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