No. 24-668

IN THE

Supreme Court of the United States

THE REPUBLIC OF ARGENTINA,

Petitioner,

v.

ATTESTOR MASTER VALUE FUND LP, TRINITY INVESTMENTS LIMITED, BISON BEE LLC, BYBROOK CAPITAL MASTER FUND LP, BYBROOK CAPITAL HAZELTON MASTER FUND LP, WHITE HAWTHORNE, LC, WHITE HAWTHORNE II, LLC,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

Cases

Page

Other Authorities

ARGUMENT

The Second Circuit's decision affirming orders of attachment and turnover on roughly $300 million of excess proceeds from the liquidation of collateral securing USD and DMK Brady Bonds contravenes the FSIA and conflicts with decisions of other circuits. What is likely to "sow needless confusion in FSIA cases," Opp. 20, is to let stand the court of appeals' erroneous decision. The decision departed from generally accepted principles of sovereign immunity and significantly broadened the scope of permissible attachment under the FSIA.[1]

This case thus presents a clear opportunity for the Court to provide needed guidance on the application of Section 1610 of the FSIA. The questions presented in the petition implicate issues of comity and foreign relations, which are at their zenith where, as here, a U.S. court has ordered turnover of assets of a friendly sovereign nation neither located in the United States nor used for a commercial activity in the United States. And the questions arise in the context of the uniquely sovereign Brady Plan, and Argentina's participation in it pursuant to a Memorandum of Understanding with the United States Government. Pet. 2, 6. Accordingly, if the Court does not grant the petition outright it should call for the views of the Solicitor General on the important issues raised by the petition.

First, the Republic throughout this case has disputed that its purported interest in the DMK Brady Collateral,

1. Capitalized terms not defined have the same meaning as in the petition.

which sits in accounts in Europe, was somehow "in the United States," as required by Section 1610. The conclusion reached by the lower courts was based on a mechanical application of New York law consistently argued against by the Republic. Respondents are accordingly wrong that the Republic waived the argument that a holistic federal test should apply. And respondents' alternative argument—that property located outside the United States is nevertheless subject to attachment and execution—is antithetical to the text, structure, and history of the FSIA.

Second, the court of appeals failed to distinguish between the reversionary interest in the DMK Brady Collateral and reversionary interests in collateral related to other bond series. In observing that the 2005 Exchange "took place at least in part in the United States," Pet. App. 26a, the court of appeals collapsed the analysis of multiple property interests to wrongly conclude that the reversionary interest in the DMK Brady Collateral was used in the United States simply because of its connection to a broader transaction with some U.S. components.

Finally, respondents try to reverse the burden as to whether property was used for a commercial activity in the United States by arguing that the Republic failed to show non-commercial use of the property. That is backwards. And respondents acknowledge that the court of appeals held that the Republic planned to—but ultimately did not—use the interest in the 2010 Exchange. Such "attempted" (and ultimately unrealized) use, Opp. 31, is the definition of hypothetical and does not satisfy an immunity exception under the FSIA. Nor was the Republic's relinquishment of the interest in the 2005 Exchange active use.

I. A Holistic, Federal Test—As Articulated By The Fifth Circuit—Should Govern The Situs Determination For Intangible Property Under The FSIA, An Argument Not Waived By Petitioner

The first question presented by the petition merits this Court's review. Applying the wrong legal test, and breaking from the Fifth Circuit, the court of appeals permitted attachment and turnover of sovereign property located outside of the U.S. in direct contravention of the FSIA.

Respondents do not meaningfully contest the substance of petitioner's argument that the situs determination should be governed by a holistic, federal test. Opp. 17–22. Instead, citing no law, respondents argue that the Republic waived this argument. *Id.* 17–18. But the Republic has always maintained that the DMK Brady Collateral, and any Republic rights in it, were not located in the United States. *See* Brief of Def.-Appellant at 22–29, No. 22-2301 (2d Cir. Sept. 19, 2024), ECF No. 352; Reply Brief of Def.-Appellant at 13–19, No. 22-2301 (2d Cir. Sept. 20, 2024), ECF No. 369. Had the court of appeals applied a holistic analysis as suggested in the petition, it would have reached the same conclusion. *See* Pet. 13–15.

The Republic argued below that the situs analysis adopted by the lower courts was too narrow and failed to account for all of the aspects of the DMK Brady Collateral and associated transactions that were outside the U.S. *See* Brief of Def.-App. at 29, No. 22-2301 (2d Cir. Sept. 19, 2024), ECF No. 352 (arguing that it was "error for the district court to apply [New York law] and deem the relevant situs, or to find any 'use,' in New York" and citing

cases supporting that a holistic set of factors should be assessed in determining the situs of an intangible); *see also* Pet. for Reh'g of Def.-Appellant at 6–9 , No. 22-2301 (2d Cir. Sept. 4, 2024), ECF No. 328 (arguing that "relying on a single U.S. point of contact conflicts with the uniform precedent using a 'holistic' approach to whether property indeed is 'used for a commercial activity in the United States'"); Def.-Appellant Mot. to Stay at 17 (2d Cir. Oct. 8, 2024), ECF No. 375 (noting that the Republic's petition for a writ of certiorari would "clarify the situs requirements for attachment and execution under the FSIA").

Even if the argument were not raised in precisely these terms below, this Court is not barred from considering it. *See Lebron v. Nat'l R. R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (parties are not limited to precise arguments made below and even arguments not explicitly made until merits brief after grant of certiorari may be considered). This choice of law issue is, at most, "not a new claim, but a new argument to support what has been [petitioner's] consistent claim." *Id.*; *see also Yee v. City of Escondido*, 503 U.S. 519, 534–35 (1992) ("Once a federal claim is properly presented, a party can make any argument in support of that claim. . . . A litigant seeking review in this Court of a claim properly raised in the lower courts thus generally possesses the ability to frame the question to be decided in any way he chooses."). The court of appeals also clearly passed upon the argument by explicitly stating that it was assuming New York law applied to the situs question but noting the alternative approach taken by the Fifth Circuit. Pet. App. 25a; *see U.S. v. Williams*, 504 U.S. 36, 41 (1992) (Supreme Court may consider argument passed upon below even if not pressed).

Respondents also wrongly assert that the Republic "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." Opp. 19. But as pointed out in the petition, there is no such traditional, uniform rule and that is part of the problem. Pet. 16 (noting example of Michigan law, where situs of an intangible is the domicile of the owner). Thus, the decisions below create the risk of confusion, uncertainty, and costly litigation, *see id.*, resulting from different state laws compelling different outcomes for the same intangible interest of a sovereign. A holistic test that is uniform across the country should apply because any other outcome flouts the FSIA's goal of uniformity in the context of foreign judgment enforcement. *Id.* 16–18. Given that goal and the potential foreign relations consequences, the views of the Solicitor General on this issue are all the more important.

Respondents' alternative argument that sovereign property outside the United States has no protection at all from attachment and turnover orders by U.S. courts is flat wrong. The "general rule under the FSIA is that property of a foreign sovereign is immune from attachment and execution" unless an exception applies. *FG Hemisphere Assocs., LLC v. Republique du Congo*, 455 F.3d 575, 584 (5th Cir. 2006); *see also Rubin v. The Islamic Republic of Iran*, 637 F.3d 783, 800 (7th Cir. 2011) (immunity of foreign state property is assumed unless an exception applies). The FSIA makes no provision whatever for the execution of foreign state property located outside the United States. Respondents' arguments to the contrary fly in the face of the statute's plain language and structure and have been rejected repeatedly by the U.S. government, including in

filings before this Court. *See* Br. for the United States as *Amicus Curiae* at 11–15, *Clearstream Banking S.A. v. Peterson*, Nos. 17-1529, 17-1534 (U.S. Dec. 9, 2019).[2] That the text of the FSIA speaks only of property "in the United States" reflects well-understood limitations on the power of U.S. courts with respect to extraterritorial assets, not an intention to create a free-for-all on sovereign assets abroad. *See*, *e.g.*, *Republic of Argentina v. NML Cap., Ltd.*, 573 U.S. 134, 144–45 n.4 (2014) (noting that U.S. courts generally lack authority to execute on property outside the United States); *see also Levin v. Bank of N.Y.*, No. 09-cv-5900 (JPO), 2022 WL 523901, at *4 (S.D.N.Y. Feb. 21, 2022) (FSIA "does not permit executing against extraterritorial assets"); *Rubin v. Islamic Republic of Iran*, 830 F.3d 470, 475 (7th Cir. 2016) (identifying as one of the "basic criteria" for attachment that the sovereign property "be within the territorial jurisdiction of the district court"), *aff'd*, 583 U.S. 202 (2018); *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1130 (9th Cir. 2010) (property not in the U.S. is "immune from execution").

It strains credulity to suggest that in passing the FSIA, Congress intended to provide greater protection for sovereign assets located in the United States than for sovereign assets located elsewhere, including in the foreign sovereign's own territory. Basic principles of statutory interpretation counsel against reading the FSIA to have, without explicitly saying so, worked such a substantial change in pre-FSIA law. *See Sackett v. Env't*

2. *See also* Letter from the United States, *Bainbridge Fund Ltd. v. Republic of Argentina*, No. 16 Civ. 8605, ECF No. 162 (S.D.N.Y. Nov. 6, 2024); Br. for the United States as *Amicus Curiae* at 2–5 & 16–29, *Levin v. Bank of New York Mellon*, No. 22-624 (2d Cir. Nov. 10, 2022).

Prot. Agency, 598 U.S. 651, 677 (2023) ("Congress does not 'hide elephants in mouseholes'"); *see also Conn. Bank of Com. v. Republic of Congo*, 309 F.3d 240, 252 (5th Cir. 2002) (adoption by U.S. of restrictive theory of sovereign immunity in 1952 did "nothing to modify the complete immunity enjoyed by foreign sovereigns from execution against their property"); H.R. Rep. No. 1487, 94th Cong., 2d Sess. at 27 (1976) (prior to enactment of the FSIA, "property of foreign states [was] absolutely immune from execution"). In any event, even if the FSIA were held to leave open the possibility of execution of foreign state assets located abroad, the common law and principles of international law would prevent a U.S. court from ordering turnover of such property. *See Samantar v. Yousuf*, 560 U.S. 305, 311 (2010) (common law principles of sovereign immunity may apply where the FSIA does not); *Turkiye Halk Bankasi A.S. v. United States*, 598 U.S. 264, 280–81 (2023).

II. The DMK Brady Collateral Cannot Be Subject To Attachment Simply Based On An Indirect Nexus With The United States

The court of appeals' decision raises a second important federal question meriting this Court's review concerning Section 1610's mandate that to be subject to execution foreign state property must be used for a commercial activity in the United States. The court of appeals never analyzed whether the interest in the DMK Brady Collateral, specifically, was used for commercial activity in the U.S. Instead, the court simply held that because the 2005 Exchange, which involved multiple bond series with distinct sets of collateral, had U.S. components, all property related to that Exchange was

used for commercial activity in the U.S. That holding was wrong. The reversionary interest in the DMK Brady Collateral was never used for a commercial activity in the United States.

Respondents are wrong that the Republic's argument, Pet. 18–21, incorrectly focuses on the underlying collateral instead of the reversionary interest. Opp. 26. Rather, the Republic recognizes, as the lower courts did not, that the only relevant reversionary interest is in the DMK Brady Collateral as opposed to collateral for other Brady Bonds.[3] The only component of the 2005 Exchange that took place in the U.S. dealt with the USD Brady Bonds and accordingly only with the Republic's purported reversionary interest in that collateral. Pet. 20–21. The DMK Brady Bonds and any purported reversionary interest in collateral backing *those* bonds, standing alone, have nothing to do with the United States.

Respondents incorrectly claim that "[t]he fact that the exchanges also involved other bonds has no relevance." Opp. 25. Respondents analogize that "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.'" Opp. 25. This view is confused. Here, the point is that the relevant bond series affects whether the purported commercial activity was *in the United States*. Taking respondents' analogy, it plainly would make a difference to the FSIA analysis if some of the inventory was in the U.S.

3. The DMK Brady Collateral itself (and not any interest in it) is also what respondents seek to obtain. *See* Pet. 14 n.5.

and offered to a U.S. counterparty while other inventory was located abroad and offered only to counterparties abroad. The DMK Brady Bonds were never offered nor sold in the United States and were never registered under the U.S. Securities Act of 1933. Pet. 8, 14. But the court of appeals impermissibly collapsed the analysis, finding that, because the Exchange offer included U.S. Brady Bonds—which implicate only the reversionary interest in the USD Brady Collateral—the Exchange resulted in use of both the USD and DMK reversionary interests in the United States. Pet. App. 26a. That analysis was at odds with the approach taken by other courts of appeal and warrants this Court's review.

III. The FSIA Does Not Permit Hypothetical Or Aberrational Use To Defeat Execution Immunity

The petition's third question raises an important federal issue regarding what qualifies as "use" under Section 1610. The court of appeals' analysis broke with decisions of other circuits and its own precedent in finding Section 1610 satisfied by what were, at best, hypothetical or aberrational uses. *See* Pet. 22–24. The 2010 Exchange never included Brady Bonds and the 2005 Exchange relinquished the right to receive the excess collateral and therefore was not active use of that property.[4] The court

4. The Republic did not forfeit its argument that the lower courts erroneously conflated two separate reversionary interests. Opp. 31. The Republic has always argued that there was no "use" of the reversionary interest under Section 3.03 of the Collateral Pledge Agreements. *See* Brief of Def.-Appellant at 19–22, No. 22-2301 (2d Cir. Sept. 19, 2024), ECF No. 352; Pet. for Reh'g of Def.-Appellant at 12–14, No. 22-2301 (2d Cir. Sept. 4, 2024), ECF No. 328; Def.-Appellant Mot. to Stay at 10 (2d Cir. Oct. 8, 2024), ECF No. 375.

of appeals effectively permitted attachment and turnover based on the existence of a contractual right rather than any active use of that property interest.

Respondents contend that the Republic's argument that the 2010 Exchange did not constitute use of the reversionary interests given that it was not consummated "omits that Argentina *sought* to include Brady Bonds in the 2010 exchange." Opp. 27; *see also id.* 31. But that the Republic "sought" to use something and then did not is the definition of hypothetical use.

Respondents' argument that the reversionary interests in the Brady Collateral were never used for a non-commercial purpose, Opp. 30, gets the test backwards. The FSIA provides that courts only have authority to execute on sovereign property in the United States used for a commercial activity in the United States. That property has never been used at all—commercially or otherwise—does not mean that it meets an exception to execution immunity under the FSIA. In any event, the proceeds of the liquidated Brady Collateral are intended to go to the Republic's central bank to shore up its international reserves, in line with the purposes of the Brady Plan to help stabilize the economies of participating sovereign nations, including by improving their stores of foreign currency reserves. *See* Pet. 2.

Respondents' alternative argument that the Republic used its reversionary interests when it first issued the Brady Bonds and throughout the life of the bonds "because those interests continually gave Argentina flexibility to strategically manage its debt," Opp. 32, lacks merit. As described in the petition, the FSIA requires active use, and mere maintenance of a contractual right does not meet this bar. Pet. 23–24.

Respondents argue that guidance from this Court would not "shed light on more frequently recurring fact patterns." Opp. 29. But whether hypothetical or aberrational use is sufficient to permit attachment under the FSIA is a fundamental question. Failing to address the court of appeals' divergence from its prior precedent and other circuits risks confusion and uncertainty in FSIA cases generally, which implicate uniquely important concerns for the nation. *See*, *e.g.*, Br. for the United States as *Amicus Curiae* at 1, *Cassirer v. Thyssen-Bornemisza Collection Found.*, No. 20-1566 (U.S. Nov. 22, 2021) (U.S. government had a "substantial interest" in case and had thus participated at the Supreme Court's invitation because interpretation of the FSIA has "implications for the treatment of the United States in foreign courts and for its relations with other sovereigns").

CONCLUSION

For the reasons set forth above and in the petition, a writ of certiorari should be granted.

Respectfully submitted,

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