Nos. 17-1529, 17-1530, & 17-1534

IN THE

Supreme Court of the United States

CLEARSTREAM BANKING S.A.,

Petitioner,

v.

DEBORAH D. PETERSON, ET AL.,

Respondents.

BANCA UBAE, S.P.A.,

Petitioner,

v.

DEBORAH D. PETERSON, ET AL.,

Respondents.

BANK MARKAZI, THE CENTRAL BANK OF IRAN,

Petitioner,

v.

DEBORAH D. PETERSON, ET AL.,

Respondents.

On Petitions For Writs 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

Under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602–1611, a foreign state's property "in the United States" is immune from attachment and execution, except as set forth in several statutory exceptions.

Petitioners seek this Court's review on two questions:

1. Whether the court of appeals correctly held that the FSIA affords execution immunity only to assets located "in the United States."

2. Whether, instead of determining personal jurisdiction for the first time on appeal, a court of appeals may remand a case to the district court to decide the question of personal jurisdiction in the first instance.

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BRIEF IN OPPOSITION

Respondents Deborah Peterson et al. respectfully submit that the petitions for writs of certiorari filed by Clearstream Banking, S.A. ("Clearstream"), Banca UBAE, S.p.A. ("UBAE"), and Bank Markazi should be denied.

OPINIONS BELOW

The opinion of the court of appeals is reported at 876 F.3d 63 (2d Cir. 2017). Pet. App. 1a–77a.[1] The opinion of the district court is unreported but available at 2015 WL 731221 (S.D.N.Y. Feb. 20, 2015). Pet. App. 78a–105a.

JURISDICTION

The judgment of the court of appeals was entered on November 21, 2017. Petitions for panel rehearing and rehearing en banc were denied on February 7, 2018. Pet. App. 106a–07a; Bank Markazi Pet. App. 82a. Bank Markazi's petition for a writ of certiorari was filed on May 7, 2018, and the Clearstream and UBAE petitions for writs of certiorari were filed on May 8, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Petitioners ask this Court to grant certiorari to decide whether the execution immunity granted to certain "property in the United States" by the Foreign

[1] All citations to "Pet. App." refer to the Petition Appendix filed in *Clearstream Banking S.A.* v. *Peterson*, No. 17-1529 (U.S.).

Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1609, prohibits a court from ordering that a sovereign's property located outside the United States be brought into the United States. Review of that question would be premature. The district court has not yet issued such an order. Under the terms of the Second Circuit's remand, there are numerous threshold questions the district court must confront before it does so, including whether, if the assets were recalled to the United States, they would be immune from execution. If so, the Second Circuit has ruled that the assets should not be recalled. Petitioners' question presented thus is hypothetical and not yet ripe for review.

Moreover, the Second Circuit's decision, as far as it goes, plainly accords with the FSIA. The text of the FSIA states that immunity from execution extends only to a foreign sovereign's "property *in the United States*." 28 U.S.C. § 1609 (emphasis added). There is no circuit split on this issue, and for good reason: This Court resolved the issue just four years ago, in *Republic of Argentina* v. *NML Capital, Ltd.*, 134 S. Ct. 2250 (2014). There, the Court explained that "any sort of immunity defense made by a foreign sovereign in an American court must stand on the Act's text. Or it must fall." *Id.* at 2256. Confronting the question raised here, this Court held that the FSIA "immunizes only foreign-state property '*in the United States*.'" *Id.* at 2257. The Second Circuit's decision here was a straightforward application of *NML Capital*: Any claim for immunity must be based on the text of the FSIA, and the FSIA does not afford any immunity to foreign assets held outside of the United States. FSIA immunity from execution attaches to property only once it is in the United States.

As for the petition of UBAE, no basis exists for its request that this Court compel the Second Circuit to determine a question of personal jurisdiction in the first instance, without the benefit of the district court's fact-finding or legal consideration of the issue.

The petitions for writs of certiorari should be denied.

1. For years, foreign states enjoyed "virtually absolute immunity" from the jurisdiction of American courts. *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983). This jurisdictional immunity, however, was afforded strictly as "a matter of grace and comity," and "this Court consistently . . . deferred to the decisions of the political branches . . . on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities." *Ibid.*

During this period, there was no general legislation addressing foreign sovereign immunity. Instead, courts looked to the Executive Branch for guidance. *Verlinden*, 461 U.S. at 486–87. In 1952, the State Department embraced a "restrictive" theory of sovereign immunity, which shielded sovereigns from those suits that arise out of their public, non-commercial acts. *NML Capital*, 134 S. Ct. at 2255. The Executive, however, increasingly failed to provide courts with clear guidance. *See Verlinden*, 461 U.S. at 487–88.

In 1976, Congress intervened and enacted the FSIA, 28 U.S.C. §§ 1602–1611, which created a "comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state." *NML Capital*, 134 S. Ct. at 2255. "For the most part," the FSIA "codifie[d]" the Executive's restrictive theory, establishing various exceptions from immunity permitting particular types of suits. *Verlinden*, 461

U.S. at 488; *see also* 28 U.S.C. §§ 1604–1607. The FSIA also addressed immunity of foreign states' property from execution, which the statute made subject to an array of exceptions and exceptions from those exceptions. *See* 28 U.S.C. §§ 1609–1611. Section 1609, which is the only provision in the FSIA that accords sovereign assets immunity from execution, provides:

> [T]he 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 of this chapter.

Id. § 1609.

2. Respondents are hundreds of American victims—and the surviving family members and representatives of the victims—of the Iranian-sponsored 1983 bombing of the U.S. Marine barracks in Beirut, Lebanon. Pet. App. 5a, 57a, 108a–21a. "At approximately 6:25 a.m. Beirut time" on October 23, 1983, "a truck crashed through a barrier and a wall of sandbags, and entered the barracks"; after "reach[ing] the center of the barracks, the bomb in the truck detonated." *Bank Markazi* v. *Peterson*, 136 S. Ct. 1310, 1319 & n.6 (2016) (ellipses and brackets omitted). "As a result of the Marine barracks explosion, 241 servicemen were killed" and scores more injured. *Ibid.* "The United States has long recognized Iran's complicity in this attack," and as a result of this bombing, "Iran was placed on the U.S. list of state sponsors of terrorism on January 19, 1984." *Ibid*.

After the FSIA was amended to permit terrorism-based suits against foreign states designated as state sponsors of terrorism, respondents brought actions again Iran for this terror attack. Pet. App. 5a; *see also*

Bank Markazi, 136 S. Ct. at 1320. Respondent Deborah Peterson, for example, is the representative of the estate of her brother, Lance Cpl. James C. Knipple, who was killed in the Beirut bombing. Pet. App. 108a. In 2001, Peterson brought a wrongful-death action against Iran for its role in that attack. *Id.* at 79a; *Peterson* v. *Islamic Republic of Iran*, 264 F. Supp. 2d 46 (D.D.C. 2003). Hundreds of other similarly aggrieved families and survivors joined her in that action.

Although duly served, Iran refused to appear. The FSIA, however, does not permit courts to automatically enter default judgments against foreign states. *See* 28 U.S.C. § 1608(e). Instead, the claimants must establish their claims "by evidence satisfactory to the court." *Ibid.* The court in respondents' cases found that the plaintiffs had shown a "clear evidentiary basis" that Iran was liable for the terrorist attacks that harmed respondents and their families. *See Bank Markazi*, 136 S. Ct. at 1319. Respondents were awarded approximately $3.8 billion in compensatory damages. Pet. App. 5a. While Iran has never disputed the validity of these final judgments, it has refused to pay them, forcing plaintiffs to attempt to satisfy their judgments through asset seizures. *See*, *e.g.*, *Bank Markazi*, 136 S. Ct. at 1320.

3. Petitioner Bank Markazi is Iran's wholly owned central bank. Pet. App. 6a. Bank Markazi is owed $1.68 billion in bond proceeds that are recorded as a book entry credited to an account in Luxembourg controlled by petitioner Clearstream, a bank that provides bond-settlement services. *Id.* at 7a. That book entry reflects Bank Markazi's right to be paid the $1.68 billion by Clearstream. Bank Markazi first opened its Clearstream account in 1994. *Ibid*. In 2008, however, after the U.S. federal government

heightened its scrutiny of Iranian financial transactions, Bank Markazi attempted to conceal its interest in the bond proceeds. *Id.* at 7a–8a. Bank Markazi ceased dealing with Clearstream "directly and instead began doing so through an intermediary bank," petitioner UBAE, an Italian bank. *Id.* at 7a.[2] The enhanced federal government scrutiny of Iranian financial transactions also motivated Clearstream's June 2008 decision to block the account that UBAE held on behalf of Bank Markazi and transfer the balance and all future credits to Bank Markazi to a sundry blocked account. *Id.* at 7a–8a. The bond proceeds remain blocked to this day. *Id.* at 8a.

4. Respondents filed suit in the United States District Court for the Southern District of New York seeking turnover of $1.68 billion to satisfy the billions of dollars in judgments that Iran refuses to pay, specifically alleging that the "blocked sundry account" at Clearstream in Luxembourg reflected a balance of approximately $1.68 billion and that Clearstream held a corresponding amount of cash in an account in New York City. Pet. App. 12a. The district court held that the assets in New York did not belong to Bank Markazi, but to Clearstream; the district court determined that Bank Markazi's asset—the right to payment of $1.68 billion by Clearstream—was located in Luxembourg and that the "FSIA does not allow for attachment of property outside of the United States." *Id.* at 18a.

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[2] Clearstream since has paid a $152 million fine to settle its potential liability for violating sanctions against Iran in certain of its dealings with respect to Bank Markazi. Press Release, U.S. Treasury Dep't, *Treasury Department Reaches Landmark $152 Million Settlement with Clearstream Banking, S.A.* (Jan. 23, 2014), http://tinyurl.com/otdl4qg.

The Second Circuit affirmed in part and reversed in part. The court of appeals agreed that Bank Markazi's assets were located in Luxembourg, Pet. App. 37a–38a, but, the court held, that did not end the matter. Citing this Court's decision in *NML Capital*, which held that any claim of foreign sovereign immunity "must stand on the [FSIA's] text[,] [o]r it must fall," 134 S. Ct. at 2256, and the plain text of the FSIA, which accords immunity only to assets "in the United States," 28 U.S.C. § 1609, the court held that the FSIA offers no immunity for assets held outside the United States, Pet. App. 50a–51a. Because the assets enjoyed no immunity, the relevant question was whether the district court could order Clearstream to bring the assets to the United States, notwithstanding that they were located outside the territorial jurisdiction of the court.

Federal Rule of Civil Procedure 69(a)(1) instructs federal courts to follow state procedure when seeking to attach or execute on property. The Second Circuit thus looked to New York's C.P.L.R. § 5225(b), which provides that, if "it is shown that [a] judgment debtor is entitled to the possession of" property that is "not in the possession of [the] judgment debtor," "the court shall require" the "person in possession or custody of" that property "to deliver" that property "to a designated sheriff." *Ibid.*; *see also* Pet. App. 49a–50a. The court further looked to a decision of the New York Court of Appeals, *Koehler* v. *Bank of Bermuda Ltd.*, 911 N.E.2d 825 (N.Y. 2009), which held that, because N.Y. C.P.L.R. § 5225 contains no territorial restrictions, a court sitting in New York with personal jurisdiction over a person possessing the property of the judgment debtor may order the holder of the property to bring it into the state and turn it over to the

judgment creditor. Pet. App. 52a. Because the property of Bank Markazi held by Clearstream is in Luxembourg, the court reasoned, the FSIA provided no immunity against its transfer to the United States. *Id.* at 54a. But once in the United States, the court recognized, the FSIA's immunity would attach and would have to be overcome before turnover to plaintiffs. *Id.* at 59a.

The court therefore remanded the case back to the district court, instructing the lower court to "determine in the first instance whether it has personal jurisdiction over Clearstream." Pet. App. 58a. If so, the district court next "should determine if a barrier exists to an exercise of *in personam* jurisdiction to recall to New York State the right to payment held by Clearstream in Luxembourg, whether for reasons of, *inter alia*, state law, federal law, international comity, or for any other reason." *Ibid.* (footnotes omitted). The court further explained that any asset recalled to the United States would, upon being recalled, qualify as an asset "in the United States of a foreign state," and would thus be afforded execution immunity pursuant to Section 1609, unless one of the statutory exceptions to that provision applied. *Id.* at 59a (emphasis omitted). Accordingly, the court held that the assets "will not ultimately be subject to turnover . . . unless the district court concludes on remand that . . . the assets, were they to be recalled, would not be protected from turnover by execution immunity." *Id.* at 3a.

Petitioners Clearstream and Bank Markazi each sought rehearing on substantially the same grounds they raise here, namely that the FSIA affords execution immunity to assets held overseas. Petitioner UBAE argued that the district court and the Second Circuit should have resolved the question of personal

jurisdiction over UBAE before discussing the merits. Those petitions were denied on February 7, 2018, with the Second Circuit instructing the district court "to decide [UBAE's] personal jurisdiction issue in the first instance on remand." Pet. App. 107a. These petitions for writs of certiorari followed.

REASONS FOR DENYING THE PETITIONS

Review of the Second Circuit's decision would be premature because the question Bank Markazi and Clearstream present is not ripe for this Court's review. The Second Circuit ordered the district court on remand to consider a series of threshold questions, *all* of which must be resolved in respondents' favor before the assets can be transferred into the United States, including the all-important question whether the assets, if recalled to the United States, would be subject to execution under the FSIA. If the district court resolves that question, or any of the other threshold questions, in favor of petitioners, then the assets will not be recalled and there will be no need to answer petitioners' question in this case. There is no need for this Court to grant review of a case in such an interlocutory posture with months (if not years) of proceedings to come before any of the parties' substantial rights are affected. Petitioners' claim that they should be entitled to immediate review of the Second Circuit's denial of their claims of immunity falls flat because Iran's immunity from this suit long ago was abrogated and there now are valid judgments against it. Claims of immunity from execution are generally best reviewed only after the lower courts have passed on whether an asset actually is subject to execution.

Moreover, the Second Circuit's holding that Section 1609 of the FSIA does not apply to assets outside

of the United States is consistent with this Court's settled foreign sovereign immunity jurisprudence. This Court already has held that "the text of" the FSIA's grant of execution immunity "immunizes only foreign-state property '*in the United States*.'" *Republic of Argentina* v. *NML Capital, Ltd.*, 134 S. Ct. 2250, 2257 (2014). And since "any sort of immunity defense made by a foreign sovereign" must "stand" or "fall" on the FSIA's "text," *id.* at 2256, the FSIA's limitation of execution immunity to assets "in the United States" decides the question.

Nor is there any merit to petitioners' vague appeals to the pre-FSIA common law. This Court already rejected that argument in *NML Capital*, stating that the parties there had "cite[d] no case holding that, before the [FSIA], a foreign state's extraterritorial assets enjoyed absolute execution immunity." *NML Capital*, 134 S. Ct. at 2257. Petitioners *still* are unable to point to any such case.

Nor does the Second Circuit's decision create a circuit split for this Court to resolve. Bank Markazi recognizes that the circuits are not divided on the question. Bank Markazi Pet. 23. Clearstream points to *Rubin* v. *Islamic Republic of Iran*, 830 F.3d 470 (7th Cir. 2015), *aff'd*, 138 S. Ct. 816 (2018). But the Seventh Circuit there held only that the district court (applying Illinois law) had no means of reaching assets held in Iran by Iran's National Museum; in other words, the district court simply recognized that the assets at issue were not physically present within the court's forum. *Id.* at 476. It never considered whether the FSIA's execution immunity extended to assets held outside the United States by an entity subject to the court's personal jurisdiction.

Finally, UBAE's plea for this Court to mandate that the Second Circuit decide the issue of personal jurisdiction in the first instance and without the benefit of the district court's fact-finding does not warrant review. There is no circuit split. The fact that some courts of appeals have exercised discretion to decide issues of personal jurisdiction in the first instance does not even remotely suggest that the Second Circuit erred in exercising its own discretion to remand the issue for the district court's consideration in the first instance.

I. REVIEW AT THIS STAGE WOULD BE PREMATURE.

At this stage of the proceedings, this case would be a poor vehicle for review of the scope of the FSIA's grant of execution immunity. The Second Circuit has remanded the case to the district court to decide numerous threshold questions, such that the first question presented may never need to be addressed by *any* court, much less this Court.

A. There are several threshold questions the district court must address on remand.

Neither the Second Circuit nor the district court has ordered Clearstream to turn over assets held in Luxembourg to respondents, or even to recall them to the United States. Instead, the Second Circuit remanded the case back to the district court to allow it, "in the first instance," to determine whether it has personal jurisdiction over Clearstream and, if so, whether other reasons counsel against an order recalling the assets, such as state law, federal law, international comity, "or . . . any other reason." Pet.

App. 58a. The Second Circuit further instructed that, before recalling the assets, the district court must determine whether those assets would be protected by the FSIA's execution immunity if they were recalled to the United States. *See id*. at 3a. If so, the Second Circuit said the assets should not be recalled.

This Court generally does not review judgments when the case has been remanded for further proceedings in the lower courts and the issue posed in the petition can be raised after conclusion of those proceedings. When "the Court of Appeals [has] remanded the case," generally, "it is not yet ripe for review by this Court." *Bhd. of Locomotive Firemen & Enginemen* v. *Bangor & A. R.R. Co.*, 389 U.S. 327, 328 (1967) (per curiam); *see also Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) ("[E]xcept in extraordinary cases, the writ is not issued until final decree."); *Va. Military Inst*. v. *United States*, 508 U.S. 946 (1993) (Scalia, J., respecting denial of certiorari) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction. . . . Our action does not, of course, preclude [petitioner] from raising the same issues in a later petition, after final judgment has been rendered."); Robert Stern et al., *Supreme Court Practice* § 4.18, at 282 & n.71 (10th ed. 2013). This practice affords the Court the opportunity to examine cases on a full record, prevents unnecessary delays in the trial and appeals process, allows the Court to consider all of the issues raised by a single case or controversy at one time, and ensures that the question presented will in fact affect the final outcome of a case.

There is no sound reason to depart from that practice here. The denial of certiorari at this time would not preclude petitioners from raising the same issues

in a later petition, after the district court renders a final decision on remand, and the Second Circuit reviews those determinations. Moreover, the remand affords the district court the opportunity to assess in the first instance several threshold questions that must be answered in order to determine whether the question presented will impact that final outcome of this case.

The first threshold question the district court will have to consider on remand is whether it has personal jurisdiction over Clearstream. Pet. App. 58a. This is a critical threshold issue because under the New York Court of Appeals' decision in *Koehler* v. *Bank of Bermuda Ltd.*, a court may issue an order under New York C.P.L.R. § 5225 only to persons over whom the New York court has jurisdiction. 911 N.E.2d 825, 830–31 (N.Y. 2009).

The second threshold question, regarding other legal obstacles preventing turnover of the assets, concerns some of the very issues petitioners have referenced in their petitions. For instance, petitioners have argued that an order directing recall of assets held in Luxembourg would "increase[ ] the risk of international discord exponentially," Bank Markazi Pet. 19, and "put[ ] the United States in violation of international law," *id.* at 21. But the Second Circuit has specifically instructed the district court to consider objections regarding "international comity." Pet. App. 58a & n.23. If the district court agrees with petitioners that concerns of international law counsel against ordering the assets to be recalled, there will be no order recalling the assets to the United States, and no risk of international "discord."

Third, the Second Circuit instructed that the district court should not order Clearstream to return the

assets to New York unless "the assets, were they to be recalled, would not be protected from turnover by execution immunity." Pet. App. 3a. Thus, there is—in addition to the state, federal, and international law issues discussed above—still a threshold question of FSIA *immunity* to be decided. Contrary to petitioners' suggestions, the Second Circuit has not stripped international assets of execution immunity; rather, the court held that a foreign sovereign's assets receive the FSIA's full measure of execution immunity once they enter the United States. In the event the assets are relocated to the United States, respondents will have to demonstrate that an exception to Section 1609's grant of execution immunity applies.

While respondents believe, and will argue on remand, that there are no impediments to the issuance of a turnover order, and that any one of several exceptions to the FSIA's execution immunity would apply were the assets brought into the United States (including 28 U.S.C. § 1610(a)(7), (b)(3), and Section 201(a) of the Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, 116 Stat. 2322 ("TRIA") (codified at 28 U.S.C. § 1610 note)), the district court must decide these and other issues in the first instance. As long as these issues are live and before lower courts, there is no compelling reason for this Court to intervene now.

B. Denial of Iran's claim of execution immunity does not warrant immediate review.

Bank Markazi argues that this Court should grant immediate review because sovereign immunity includes "an entitlement not to be forced to litigate." Bank Markazi Pet. 31. But it is only *jurisdictional*

immunity—not immunity from execution—that protects sovereigns from the inconvenience of suit. Iran lost immunity from respondent's suit long ago and, under the statutory scheme governing execution against property to satisfy respondents' judgments, Bank Markazi can claim no more freedom from respondents' execution efforts than Iran itself. Bank Markazi thus has no "entitlement not to be forced" to litigate these issues on remand.

Jurisdictional immunity shields a party from the demands of litigation that it would otherwise not be forced to bear. *Mitchell* v. *Forsyth*, 472 U.S. 511, 526–27 (1985). Section 1604 of the FSIA provides this immunity from jurisdiction, thereby giving "foreign states and their instrumentalities some protection from the inconvenience of suit as a gesture of comity." *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 479 (2003).

But where, as here, immunity from suit has been overcome and only immunity from *execution* is claimed, there is no such urgency. By materially supporting acts of terrorism, the Islamic Republic of Iran has lost its jurisdictional immunity for cases arising from such conduct and judgments have been entered against it. *See* 28 U.S.C. § 1605A; *see also*, *e.g.*, *Peterson* v. *Islamic Republic of Iran*, 515 F. Supp. 2d 25 (D.D.C. 2007). Many courts "distinguish[ ] between claims of FSIA immunity from suit under Section 1604, denials of which are appealable collateral orders, and claims of FSIA immunity from attachment, denials of which are not appealable." *Blue Ridge Invs., L.L.C.* v. *Republic of Argentina*, 735 F.3d 72, 80 (2d Cir. 2013) (emphasis omitted). This is because a denial of execution immunity is a non-final order and does not otherwise implicate the "denial of an immun-

ity from the trial itself." *Kensington Int'l Ltd.* v. *Republic of Congo*, 461 F.3d 238, 240 (2d Cir. 2006). The decisions below also are non-final and do not implicate any freedom from trial because Iran has no such freedom in this case.

To the extent Bank Markazi is arguing that respondents' execution efforts implicate a freedom from litigation that it has separate from that of Iran, that contention, too, would fail. Congress has determined that the assets of all agencies and instrumentalities of a state sponsor of terrorism—including Bank Markazi—shall be subject to attachment and execution on the same terms as property belonging to the sovereign itself. *See* 28 U.S.C. § 1610(g); TRIA § 201(a) (codified at 28 U.S.C. § 1610 note); *Rubin* v. *Islamic Republic of Iran*, 138 S. Ct. 816, 824 (2018). If attachment and execution proceedings involving Bank Markazi's property subject Bank Markazi to any inconvenience of litigation, that is the result ordained by Congress when it enacted TRIA and Section 1610(g).

II. THE SECOND CIRCUIT'S DECISION IS A STRAIGHTFORWARD APPLICATION OF THIS COURT'S CONTROLLING PRECEDENT.

As even petitioners concede, *see* Bank Markazi Pet. 29, this Court has already stated that 28 U.S.C. § 1609 does not apply to assets outside of the United States, *see NML Capital*, 134 S. Ct. at 2257. There is no circuit split on that issue, and the Second Circuit's decision accords with the plain text of the statute. Petitioners' policy disagreements with Section 1609's text do not warrant review.

A. This Court already has held that FSIA execution immunity does not apply to assets located outside of the United States.

Section 1609 of the FSIA extends execution immunity only to foreign sovereign property that is "in the United States." 28 U.S.C. § 1609. This Court has made clear that the FSIA is the *only* source of sovereign immunity from American litigation; that is, its immunity framework is "comprehensive," *NML Capital*, 134 S. Ct. at 2255–56, and supersedes the "preexisting common law," *Samantar* v. *Yousuf*, 560 U.S. 305, 313 (2010). For that reason, "any sort of immunity defense made by a foreign sovereign in an American court must stand on the Act's text. Or it must fall." *NML Capital*, 134 S. Ct. at 2256.

In *NML Capital*, this Court considered whether the FSIA afforded sovereign immunity against post-judgment discovery demands regarding assets held overseas. In holding that the FSIA offered no such protection, the Court rejected Argentina's argument that the FSIA's silence on the issue meant that the pre-FSIA common law controlled and thereby afforded immunity from discovery. 134 S. Ct. at 2257. The Court reasoned, first, that there was no common-law authority suggesting that, prior to the FSIA, "a foreign state's extraterritorial assets enjoyed absolute execution immunity in United States courts." *Ibid.* The Court went further, though, pointing out that "even if Argentina were right about the scope of the common-law execution-immunity rule, then it would be obvious that the terms of § 1609 execution immunity are narrower, since the text of that provision immunizes only foreign-state property '*in the United States*.'" *Ibid.*

Contrary to Bank Markazi's contention (at 29), the question whether the FSIA's execution immunity applies to assets located outside the United States was briefed, considered, and resolved in *NML Capital*. Argentina argued that, before the FSIA, all foreign-state property was "accorded *absolute* execution immunity," and that the FSIA did not explicitly revoke that pre-existing immunity. *NML Capital*, 134 S. Ct. at 2257. The United States maintained that, although "[t]he FSIA provides that only foreign-state property that is . . . situated in the United States . . . is subject to execution," limiting immunity in accordance with Section 1609's plain language "would be irreconcilable with the principles of comity and reciprocity." Brief of the United States at 24–26, *Republic of Argentina* v. *NML Capital, Ltd.*, 134 S. Ct. 2250 (2014), No. 12-842, 2014 WL 827994. Respondents countered that the FSIA "extends attachment immunity *only* to certain property in the United States." Respondents' Brief at 20, *Republic of Argentina* v. *NML Capital*, 134 S. Ct. 2250 (2014), No. 12-842, 2014 WL 1260423; *see also id* at 46. This Court agreed, citing the plain text of the FSIA. *NML Capital*, 134 S. Ct. at 2257. Indeed, this was the first of Argentina's arguments that the Court rejected. And that interpretation of Section 1609's scope cannot be written off as mere dicta because it was a logically necessary step in this Court's conclusion that the respondents could pursue discovery concerning assets located outside of the United States.

Petitioners' remaining argument is simply that this Court's decision in *NML Capital* is "mistaken." Bank Markazi Pet. 2. That contention does not warrant review, particularly just four years after this Court squarely confronted and rejected the same arguments petitioners now advance.

B. The Second Circuit properly interpreted and applied the plain text of Section 1609.

Even if a second look at this issue were appropriate, the Second Circuit's decision, which did nothing more than adhere to the plain text of the FSIA, is consistent with this Court's interpretation of the FSIA and with the traditional tools of statutory construction.

1. Section 1609 never once mentions extraterritorial assets or makes any suggestion that sovereign immunity extends to such assets. There is a "presum[ption] that a legislature says in a statute what it means and means in a statute what it says there." *Carcieri* v. *Salazar*, 555 U.S. 379, 392 (2009). This Court therefore will not adopt a statutory construction with "no basis or referent in [the statute's] language." *Milner* v. *Dep't of the Navy*, 562 U.S. 562, 573 (2010). Petitioners' plea for an unspoken immunity for assets located outside the United States is just such a counter-textual construction.

Indeed, "the entire statutory text" of the FSIA confirms that construing it to accord immunity to overseas assets "is not the meaning that Congress enacted." *See Samantar*, 560 U.S. at 315. Rather, when read "as a whole," *see id.* at 319, the FSIA makes clear that had Congress sought to enlarge immunity in this way, it would have done so expressly in the FSIA's text.

The FSIA was meant to "clarify[ ] the rules that judges should apply in resolving sovereign immunity claims." *Samantar*, 560 U.S. at 322. Accordingly, when Congress granted immunity in the FSIA, it "careful[ly] calibrat[ed]" the scope of that immunity.

Id. at 319. Congress specified in detail the scope of execution immunity, *see* 28 U.S.C. § 1609, the exceptions to that immunity, *see id.* § 1610, and the exceptions from the exceptions, *see id.* § 1611. But nowhere in this statutory scheme did Congress suggest that extraterritorial assets also enjoyed execution immunity. Indeed, to suggest that there exists some unwritten immunity for such assets would invite the very legal uncertainty that pervaded immunity determinations prior to the FSIA's enactment and that the FSIA was enacted to eradicate. It would "hardly further[ ] Congress' purpose of" clarification to "lump . . . in" extraterritorial execution immunity "without so much as a word spelling out how and when" such an immunity would apply. *Samantar*, 560 U.S. at 322.

Acknowledging, as they must, the complete absence of *any* statutory text in their favor, petitioners suggest that this Court infer from the statutory silence a lack of congressional authorization to execute on assets located outside the United States. This argument fails first because the court of appeals below did not contemplate execution upon assets located outside the United States. Instead, the court simply recognized the state-law procedure allowing a court to direct an entity over which the court has personal jurisdiction to bring an asset—here, the right to payment held by Clearstream in Luxembourg—into the forum to facilitate the satisfaction of a judgment to the extent the FSIA permits. *See* Pet. App. 58a.

Moreover, petitioners' argument misapprehends the aim and operation of the FSIA. The FSIA does not "authorize" attachment procedures; the FSIA is comprehensive as to *immunity*, not to the mechanisms that may be exercised for attachment once the question of immunity is resolved. The FSIA plainly "does

not specify the circumstances and manner of attachment and execution proceedings." Pet. App. 48a. Instead, it is Federal Rule of Civil Procedure 69(a)(1) that provides that framework, instructing courts that "the procedure of the state where the court is located" governs the "enforce[ment]" of "money judgment[s]," both for "execution" and for "proceedings supplementary to and in aid of" execution. Nowhere does Rule 69 or the FSIA suggest that sovereigns are entitled to a special set of execution procedures, and nowhere are such rules prescribed. The ordinary state rules governing post-judgment turnover and execution therefore apply even in cases where the judgment debtor is a foreign state.

In this case, that means that New York law governs, and N.Y. C.P.L.R. § 5225(b) allows a court to command a person in possession of property in which the judgment debtor has an interest to bring that property to New York to facilitate collection. As the New York Court of Appeals has made clear, this provision applies even to parties that hold assets outside of New York. *See Koehler*, 911 N.E.2d at 831, 833. Accordingly, "a court sitting in New York with personal jurisdiction over a party may order that party to bring property" from another country "into the state" for execution. Pet. App. 52a. Contrary to petitioners' suggestion, this does not require an extraterritorial application of a court's power, but rather requires only that the court exercise its jurisdiction over the persons properly brought before it.[3]

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[3] Petitioners further contend that N.Y. C.P.L.R. § 5225(b) and *Koehler* do not apply here because Rule 69(a) incorporates only procedural, not substantive, law. *See*, *e.g.*, Clearstream Pet. 23.

Other provisions of the FSIA confirm that Congress "knows how to" carve out exceptions to the Federal Rules of Civil Procedure in cases involving foreign states. *See Samantar*, 560 U.S. at 317. For example, the FSIA provides special rules governing personal jurisdiction and service of process: Unlike a typical claim against a non-sovereign, in which a federal court borrows "state" law to determine whether personal jurisdiction exists, *see* Fed. R. Civ. P. 4(k)(1)(a), the FSIA automatically grants courts personal jurisdiction over a foreign state if an immunity exception applies, 28 U.S.C. § 1330(b). Similarly, contrary to the normal rules that govern service of process on a foreign defendant, *see* Fed. R. Civ. P. 4(f), (h)(2), the FSIA has its own provisions for service on a foreign sovereign, *see* 28 U.S.C. § 1608; Fed. R. Civ. P. 4(j)(1). But nowhere did Congress suggest it was prescribing special rules for executing a judgment separate from Rule 69(a)(1).

2. Eschewing the text and structure of the statute, petitioners' argument rests entirely on the premise that common-law immunity rules predating the FSIA govern the scope of FSIA immunity. They do not, and to the extent such common-law doctrines should even be considered, they contradict petitioners' position.

Even leaving aside the fact that petitioners never raised this argument before the Second Circuit, Section 5225 does nothing more than establish a procedure for execution and turnover. It is the FSIA alone that bestows substantive immunity rights, and Congress has not seen fit to extend execution immunity to assets located outside the United States. And of course, New York's prescription of execution procedures in Section 5225 and *Koehler* do not disturb that congressional decision.

There is no evidence of a pre-FSIA presumption that a foreign sovereign's assets outside of the United States were automatically and absolutely afforded immunity from execution by U.S. courts. As this Court stated in *NML Capital*, the parties had "cite[d] no case holding that, before the [FSIA], a foreign state's extraterritorial assets enjoyed absolute execution immunity in United States Courts." 134 S. Ct. at 2257. Petitioners have *still* been unable to find a single pre-FSIA case that even suggested that a foreign state's assets located outside the United States were protected by execution immunity. Instead, they argue that "the more persuasive explanation for the dearth of pre-FSIA precedent concerning the seizure of extraterritorial sovereign assets was that everyone understood that such assets were immune." Bank Markazi Pet. 30. To support this proposition, Bank Markazi points to a snippet of the FSIA's legislative history. *Id.* at 4, 15, 25 (citing H.R. Rep. No. 94-1487, at 27 (1976) for the proposition that Congress only "'partially lowered' the absolute immunity from execution that previously prevailed in U.S. courts" (alteration omitted)). But this Court in *NML Capital* squarely rejected precisely the argument that "Congress merely 'partially lowered the previously unconditional barrier to post-judgment relief.'" 134 S. Ct. at 2257.

And in any event, "after the enactment of the FSIA," the "determination of whether a foreign state is entitled to sovereign immunity" is determined by the FSIA alone, "not the pre-existing common law." *NML Capital*, 134 S. Ct. at 2256 (brackets omitted). The "canon of construction that statutes should be interpreted consistently with the common law," which petitioners have invoked here, "does not help [courts] decide the antecedent question": whether "Congress

intended the statute to govern a particular field." *Samantar*, 560 U.S. at 320.

Further, to the extent pre-FSIA common law could be relevant, it shows that foreign sovereigns could assert immunity over property only when they actually possessed the property at issue; where, as here, the property was held by a third party, foreign sovereigns could not assert immunity. In a case cited by Bank Markazi, *see* Bank Markazi Pet. 18, this Court detailed the long history of courts rejecting claims of immunity where the government "was not in possession of the [asset] at the time of [its] arrest," noting that "lower federal courts ha[d] consistently refused to allow claims of immunity based on title of the claimant foreign government without possession," *Republic of Mexico* v. *Hoffman*, 324 U.S. 30, 37–38 (1945). "[T]his distinction between possession and title" was "supported by the overwhelming weight of authority." *Id*. at 38. Thus, to the extent pre-FSIA common law can tell us anything, it is that the assets sought here—held overseas by a third-party non-sovereign (Clearstream)—would *never* have been entitled to immunity. Those foreign sovereigns that choose to relinquish control of their assets to a third party that is subject to personal jurisdiction in New York courts run the risk that one of those courts will order those assets brought into New York to facilitate execution.

C. There is no circuit split on petitioners' FSIA question.

Bank Markazi rightly does not even suggest the existence of a circuit split on the issue it presents. *See* Bank Markazi Pet. 23 (citing cases that grant certiorari "even absent a clear circuit conflict"). Clearstream, on the other hand, argues that the Second Cir-

cuit's decision is in tension with *Rubin* v. *Islamic Republic of Iran*, 830 F.3d 470 (7th Cir. 2015), *aff'd*, 138 S. Ct. 816 (2018). Clearstream Pet. 23–25. Clearstream is incorrect; there is no conflict.

As the Second Circuit recognized, *Rubin* involved a situation very different from this case. In *Rubin*, the Seventh Circuit did not reach questions concerning the scope of FSIA immunity because it held that assets owned and held by the Iranian National Museum in Iran were not subject to execution under Illinois law. *Rubin*, 830 F.3d at 476. That was because the assets were "no longer within the territorial jurisdiction of the district court." *Ibid.* And because plaintiffs in *Rubin* did not contend that the Iranian museum was subject to personal jurisdiction in Illinois, the Seventh Circuit never had to consider whether Illinois law allowed a court to order a person under its jurisdiction holding property for a judgment debtor to bring assets into the United States, which was the question the Second Circuit considered and settled New York case-law resolved. For the Seventh Circuit, it was sufficient to resolve the case before it to recognize that Iran's artifacts were "beyond the grasp of the federal courts." *Id.* at 475–76. In the case before the Second Circuit, by contrast, if there is personal jurisdiction over Clearstream, under New York law, Bank Markazi's assets are not "beyond the grasp" of the New York court because New York law allows that court to order the person under its jurisdiction to recall the assets to New York. Pet. App. 55a.

The pre-*NML* cases cited by Bank Markazi and Clearstream lend no support to petitioners' arguments. In each of those cases, the courts simply rejected the notion that the FSIA *itself* provided courts with the power to order attachment and execution of

a foreign sovereign's extraterritorial property. For instance, the Seventh Circuit has held that "[t]he FSIA did not purport to authorize execution against a foreign sovereign's" extraterritorial property. *Autotech Techs. LP* v. *Integral Research & Dev. Corp.*, 499 F.3d 737, 750 (7th Cir. 2007); *see also Richmark Corp.* v. *Timber Falling Consultants*, 959 F.2d 1468, 1477 (9th Cir. 1992) ("section 1610 does not empower United States courts to levy on assets located outside the United States"). That is correct as far as it goes: The FSIA does not provide courts with any *authority* or *power* of execution or attachment. *See* Pet. App. 48a; *Peterson* v. *Islamic Republic of Iran*, 627 F.3d 1117, 1131 (9th Cir. 2010) ("The FSIA does not provide methods for the enforcement of judgments against foreign states."). Instead, Rule 69 and state law provide those powers while the FSIA delineates the boundaries of *immunity* from those state-law powers of execution.

The cases cited by petitioners thus are easily reconciled with this Court's decision in *NML Capital* and the Second Circuit's straightforward application of that controlling precedent. And, as the Second Circuit held, to the extent those cases are in tension with *NML Capital*, they obviously are "of no help to the defendants." Pet. App. 53a.

D. Petitioners' claims of the decision's consequences are overblown.

Petitioners claim that the Second Circuit's decision will have widespread negative effects. *See*, *e.g.*, Bank Markazi Pet. 16–24. These same concerns were considered and rejected in *NML Capital*, where this Court held that such "apprehensions are better directed to that branch of government with authority to amend the [FSIA]—which, as it happens, is the same

branch that forced [federal courts'] retirement from the immunity-by-factor-balancing [more than] 40 years ago." 134 S. Ct. at 2258; *see also* Pet. App. 59a–60a n.24. This Court has made clear that courts are to apply the law as written, and it is for the political branches of government to address the foreign policy implications of the statutes they have created.

In any event, petitioners exaggerate the future impact of the Second Circuit's holding. For instance, petitioners claim that the Second Circuit's decision will "open the proverbial floodgates" to widespread efforts to use New York institutions to seize sovereign property located abroad. Clearstream Pet. 28. But even though *Koehler* has been the law in New York since 2009 and "there is nothing unique about New York law," Bank Markazi Pet. 16, the proverbial flood has yet to materialize. That may be because most foreign sovereigns do not disregard valid judgments entered against them.

Petitioners' claim that the Second Circuit's decision "puts the United States in violation of international law" rests on a similarly shaky foundation. Bank Markazi Pet. 21–23. Petitioners claim that the Second Circuit's decision is contrary to the U.N. Convention on Jurisdictional Immunities of States and Their Property, G.A. Res. 59/38 (Dec. 2, 2004). Even if this convention were possibly implicated—and it is not, because the Second Circuit's ruling contemplates an order directed at Clearstream, rather than Iran—not only has the United States never *signed* this convention (let alone *ratified* it), it has no effect at all because it has never garnered enough signatories to *enter into force*. It cannot be regarded as "international law" of any stripe. Petitioners' claim that the decision below violates international law thus falls flat.

III. THE SECOND CIRCUIT'S TREATMENT OF PERSONAL JURISDICTION DOES NOT CONFLICT WITH THE PRACTICE OF ANY OTHER COURT.

UBAE, separate from any of the arguments raised by Bank Markazi or Clearstream, has sought certiorari on the ground that the Second Circuit should have decided the question of personal jurisdiction over UBAE, rather than remand the issue for the district court first to consider. There is no split on this issue, and there is no other reason for this Court to review that commonplace exercise of discretion.

In general, "a federal appellate court does not consider an issue not passed upon below." *Exxon Shipping Co.* v. *Baker*, 554 U.S. 471, 487 (2008). This "general rule" is "essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues." *Singleton* v. *Wulff*, 428 U.S. 106, 120 (1976) (alterations omitted). The decision when to deviate from this rule is "left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." *Id.* at 121. For that reason, this Court has repeatedly declined to "stat[e] a general principle to contain appellate courts' discretion" in making that consideration. *Exxon*, 554 U.S. at 487.

This case represents an ordinary exercise of an appellate court's discretion to allow the district court to consider the question in the first instance. The cases UBAE cites as examples of an alleged circuit split merely demonstrate that courts exercise their discretion in different ways in different circumstances. *See*, *e.g.*, *Hendricks* v. *Bank of Am., N.A.*, 398 F.3d 1165, 1172 (9th Cir. 2005) (acknowledging that the panel

"may exercise" its power to decide personal jurisdiction in the first instance), *opinion amended and superseded*, 408 F.3d 1127 (9th Cir. 2005); *Walter* v. *Blue Cross & Blue Shield United of Wis.*, 181 F.3d 1198, 1202 (11th Cir. 1999) (exercising discretion to decide personal jurisdiction in the first instance "in the interest of judicial efficiency" and because "the record [was] complete").

No court has yet decided whether UBAE is subject to the personal jurisdiction of the district court, and the district court has been instructed to resolve that question "in the first instance on remand." Pet. App. 107a. The district court has not yet conducted fact-finding on the issue, and plaintiffs have not had the opportunity to take any jurisdictional discovery of UBAE's New York contacts. *See* C.A. App. 2226. If UBAE believes jurisdictional discovery is unnecessary, it can make that argument on remand. But review by this Court is wholly inappropriate to decide a question on which there is no circuit split and that is committed to the discretion of the appellate courts. There is simply no issue for this Court to review.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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