No. 17-1529

IN THE

Supreme Court of the United States

CLEARSTREAM BANKING S.A.,

Petitioner,

v.

DEBORAH D. PETERSON, *et al.*,

Respondents.

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

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF FOR PETITIONER

Petitioner Clearstream Banking S.A. ("Clearstream") respectfully submits this brief pursuant to Rule 15.8 in response to the Brief for the United States as Amicus Curiae filed on December 9, 2019.

The United States' brief is in harmony with the petition on every principal point but one. The United States agrees that the Second Circuit's "flawed" decision misinterpreted the Foreign Sovereign Immunities Act of 1976 ("FSIA"); misread this Court's decision in *Republic of Argentina v. NML Capital, Ltd.*, 573 U.S. 134 (2014); conflicts with the decisions of other courts of appeals; and raises serious foreign policy concerns. Accordingly, the United States recognizes that the decision likely warrants this Court's review. Nonetheless, it argues that the Court should deny certiorari because the petition is interlocutory.

That the Second Circuit's judgment is non-final is not disputed. Clearstream briefed this issue at some length in its petition and reply. Where non-final judgments of federal courts of appeals bear gravely on this nation's foreign policy and are fundamental to the further conduct of the case, this Court has previously granted certiorari to review them. Here, the risk of reciprocity by foreign sovereigns against U.S. sovereign assets and the potential prejudice to Clearstream, as well as to the sovereign states of Luxembourg and Iran, favor review at this time.

This case presents a fitting vehicle for review, as the decisive legal issue—whether extraterritorial foreign sovereign assets are subject to attachment and execution

in U.S. courts—is squarely presented.[1] Certiorari should be granted.

ARGUMENT

The United States and Clearstream agree that the Second Circuit's erroneous judgment rests principally on misinterpretations of the FSIA and this Court's decision in *Republic of Argentina v. NML Capital, Ltd.*, 573 U.S. 134 (2014). *See* U.S. Br. 11-15; Pet. 14, 16-19. They also concur that there is no basis to conclude that U.S. law provides less protection to a foreign sovereign's property located abroad than it does to a foreign sovereign's property located in the United States. *See* U.S. Br. 15; Pet. 14. In particular, the FSIA did not disturb the preexisting rule that U.S. courts cannot execute on foreign sovereign assets outside the United States. *See* U.S. Br. 11, 15; Pet. 14. Thus, Congress has provided no indication—in FSIA or elsewhere—that it has authorized any exception to the general prohibition against executing upon foreign sovereign assets located abroad. *See* U.S. Br. 15; Pet. 15.

Further, the United States, like Clearstream, recognizes the significant tension between the decision below and the decisions of "every court of appeals to have addressed the issue before the decision below," which all "treated the presence of the disputed sovereign property *in the United States* as a prerequisite to attachment or execution in U.S. courts." U.S. Br. 12-13 (emphasis in original); *see* Pet. 16, 23-26.

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1. The asset at issue is a "right to payment" located in Luxembourg. Pet. App. 41a.

The United States agrees that the decision below presents serious foreign policy concerns. U.S. Br. 20 (explaining that if "the district court were to issue an order restraining foreign sovereign property located abroad, such an order could in turn put U.S. property at risk"). The Second Circuit seemed to recognize as much by questioning whether its holding "further[ed] th[e] goal[s]" of the FSIA. Pet. App. 59a. Accordingly, the Second Circuit concluded that given the gravity of its decision and the "conundrum" posed by it, the "problem is one for the Supreme Court or the political branches . . . to resolve." Pet. App. 59a. The conundrum is no less vexing simply because there would be further proceedings in the lower courts if the petition is denied. Given that "[s]ome foreign states base their sovereign immunity decisions on reciprocity," U.S. Br. 20 (quoting *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 841 (D.C. Cir. 1984)), the decision below poses a present risk to U.S. sovereign property outside the United States. Pet. 4, 27.

Under these circumstances, it is no surprise that the United States—like the Second Circuit, *see* Pet. App. 59a—recognizes that the decision below "likely would warrant this Court's review," albeit with the qualification "in an appropriate case at an appropriate time." U.S. Br. 10.

Thus, the United States parts ways with Clearstream only as to whether the Court should review the question presented *at this time*. The United States argues that interlocutory review is "not warranted" because there are "unresolved issues for the district court to address on remand," and there is pending legislation in the United States Congress "that may bear on the proper disposition

of this case." U.S. Br. 15-16, 19. But neither of these circumstances should present an obstacle to granting the petition.

As to the interlocutory nature of the petition, the United States advances essentially the same arguments that respondents made in their brief in opposition, and to which Clearstream has replied. *See* Reply 3-5. The United States does not, however, speak to several of Clearstream's points on reply.

The United States' brief does not expressly confront, for example, the cases cited by Clearstream in which the Court has reviewed non-final judgments raising important issues concerning jurisdiction and the FSIA. Reply 3 (citing *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312 (2017); *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390 (2015)).

In *Sachs*, the United States argued that this Court's review was not warranted, including because the case was not an appropriate vehicle. The United States cited the "cursory and incomplete" analysis below of antecedent choice-of-law and state law issues, and the possibility of dismissal on alternative grounds such as *forum non conveniens* and international comity. *See* Brief for the United States as Amicus Curiae, *OBB Personenverkehr v. Sachs*, 136 S. Ct. 390 (2015) (No. 13-1067), 2014 WL 10463745, at *6, *16-18. This Court, however, granted certiorari. The Court likewise should grant certiorari here given the important legal question presented by the petition. *See* 17 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 4036 (3d ed. 1998) (explaining that this Court has, "[i]n a wide range of

cases," granted certiorari to review important legal issues "after a court of appeals has disposed of an appeal from a final judgment on terms that require further action in the district court").

Nor does the United States' brief address the possibility that the question presented will come back before this Court in this case after the issuance of a turnover order requiring Clearstream—a Luxembourgish company—to deliver the "right to payment" from Luxembourg to New York. In connection with parallel litigation ongoing in Luxembourg, *see, e.g.*, U.S. Br. 18 n.3, the same "right to payment" at issue here remains subject to seizure writs issued by the Luxembourg court. *See* Reply 4. A turnover order would, unless stayed, force Clearstream to choose between violating the order and violating those seizure writs. *See id.* And even if stayed, an order that potentially could subject a clearing organization to double liability—i.e., in both the United States and Luxembourg—of the magnitude at issue could significantly prejudice Clearstream. Likewise, the United States' brief does not mention the affront to Luxembourg of a turnover order directed at assets within its sovereign territory, whether or not the order is stayed. *See id.*

Far from counseling in favor of a delay in the inevitable review of the Second Circuit's holding, these factors illustrate the compelling reasons for reviewing the decision now.

Nor should certiorari be denied because of pending legislation that, if enacted into law, "may bear on the

proper disposition of this case." U.S. Br. 15-16, 19.[2] The legislation does not bear on the question presented in the petition and, instead, merely adds issues for the district court to address on remand. The legislation does not undo the substantial foreign policy concerns raised by the decision below, nor does it eliminate the potential prejudice faced by Clearstream, Luxembourg, and Iran if the Court decides not to review the Second Circuit's decision at this time.

CONCLUSION

For the foregoing reasons, and those set forth in Clearstream's petition and reply, the petition should be granted.

Respectfully Submitted,

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2. As of December 19, 2019, the referenced legislation—the National Defense Authorization Act for Fiscal Year 2020, S. 1790, 116th Cong. (2019)—had passed the House and Senate.