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

REPLY BRIEF FOR PETITIONER

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CORPORATE DISCLOSURE STATEMENT

The Rule 29.6 disclosure statement in the petition for a writ of certiorari remains accurate.

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The unprecedented decision below breaches fundamental limits on U.S. courts' jurisdiction. U.S. courts "generally lack authority . . . to execute against property in other countries." *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250, 2257 (2014). Neither the Foreign Sovereign Immunities Act ("FSIA"), which expressly provides that the jurisdiction of the United States is territorially limited, nor state law surmounts this limitation as to foreign sovereign assets.

Respondents' opposition largely disregards these points, and instead insists that the decision below is merely a "straightforward application" of *NML Capital*. That is false. *NML Capital* not only emphasized the limit on extraterritorial execution, but it also recognized that any execution against sovereign assets outside of the United States must be pursued in the foreign court in whose territorial jurisdiction the property is situated, if it is even "executable under the relevant jurisdiction's law." *NML Capital*, 134 S. Ct. at 2257.

Respondents also argue that the question presented is "not ripe" for review. As respondents all but concede, however, the petition squarely presents an important legal issue, the key facts have been established, and its disposition will either terminate or guide further proceedings. This Court has granted certiorari to review non-final judgments concerning issues of jurisdiction and the FSIA, and review of the judgment below is appropriate at this time.

Respondents are wrong that this Court should abstain from reviewing the Second Circuit's decision unless and until the district court orders Clearstream to deliver foreign sovereign property into the United States. By that time, substantial harm may have already been done to Clearstream, which potentially faces inconsistent legal obligations and multiple liability, and to two sovereigns (Luxembourg and Iran). Indeed, in finding that there was good cause to stay the mandate pending this Court's consideration of Clearstream's petition, the Second Circuit rejected a similar argument by respondents.

In its opinion below, the Second Circuit frankly acknowledged that its decision posed a "conundrum" for the Supreme Court or the political branches to resolve. This Court should accept the Second Circuit's invitation for review.

ARGUMENT

I. This Petition Presents an Optimal Vehicle for Immediate Review of the Second Circuit's Decision

The petition is a fitting vehicle for answering the important question whether foreign sovereign property situated outside the United States may be subject to execution in the United States. The critical factual issue—the situs of the property—has been conclusively established. And the legal issue presented by the petition is potentially dispositive of the litigation, and of future attempts by other plaintiffs to improperly enlarge the jurisdiction of U.S. courts.

Respondents argue that the Second Circuit's decision is "not ripe" for review because the case was remanded for further proceedings before the district court. Opp. 2, 11-14. Respondents are wrong.

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." 17 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 4036 (3d ed. 1998). Indeed, in recent years, this Court has reviewed non-final judgments raising important issues concerning jurisdiction and the FSIA. *See, e.g.*, *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312 (2017) (reviewing reversal of dismissal of FSIA action); *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390 (2015) (same).

Review is particularly appropriate here because the jurisdictional issue presented bears on the conduct of this nation's foreign affairs and is fundamental to the further conduct of the case. *See, e.g.*, *Forsyth v. City of Hammond*, 166 U.S. 506, 514 (1897) (reviewing a non-final judgment because "the question involved was one affecting the relations of this country to foreign nations, and therefore one whose prompt decision by this court was of importance"); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949) (reviewing non-final judgment on petition presenting a jurisdictional question that was "fundamental to the further conduct of the case").

Respondents contend that this Court's review should await the "conclusion" of the turnover proceeding against Clearstream. Opp. 12. By that time, however, significant prejudice may be suffered by Clearstream, Luxembourg, and Iran. The question presented will not be ripe again unless and until Clearstream is subject to an order to deliver Bank Markazi's "right to payment" from Luxembourg to the United States. Such an order would force Clearstream (a Luxembourgish entity) to make an impossible choice: disobey a U.S. court order or violate Luxembourg seizure writs imposed in connection with Luxembourg proceedings brought by other judgment creditors of Iran seeking to obtain the same assets, which may result in civil and criminal liability for Clearstream. In addition, the turnover order would result in a substantial and irreversible affront to the dignity and interests of Luxembourg and Iran, because it would amount to a seizure by the United States of Iranian sovereign assets located in Luxembourg and subject to active litigation in Luxembourg court over the very same assets.

Contrary to respondents' claim that denying certiorari may "preven[t] unnecessary delays in the trial and appeals process," Opp. 12, immediate review of the Second Circuit's decision should hasten the resolution of this action by obviating further proceedings below. *See Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1399 (2018) (explaining that the Court would address the question of whether the respondent was subject to liability under the Alien Tort Statute to potentially avoid "lengthy and costly litigation" on remand); Stephen M. Shapiro et al., *Supreme Court Practice* § 4.18, at 285 (10th ed. 2013) (among considerations for granting cer-

tiorari on interlocutory petitions is whether "Supreme Court intervention may serve to hasten or finally resolve the litigation"). Thus, this also counsels against deferring the determination of the question presented.

Respondents fail to acknowledge the Second Circuit's decision to stay its mandate during the pendency of Clearstream's petition, which further supports immediate review. The stay necessarily reflects the Second Circuit's determination that "there is good cause for a stay," Fed. R. App. P. 41, to allow this Court the opportunity to review and resolve Clearstream's petition before any lower court proceedings resume. The stay also eliminates any risk that lower court proceedings could moot the question presented during the pendency of this Court's review. *See Supreme Court Practice* § 4.18, at 285. Moreover, in its opinion below, the Second Circuit all but asked this Court to review its decision by acknowledging it created a "conundrum" for this Court to resolve. App. 59a.

II. The Decision Below Contravenes a Longstanding Limitation, Incorporated by the FSIA and Reaffirmed in *NML Capital*, Against Executing on Extraterritorial Foreign Sovereign Assets

Respondents erroneously contend that this Court's review is not warranted because the Second Circuit's decision is a "straightforward application" of *NML Capital*, and "accords with the plain text" of the FSIA. Opp. 16.

Respondents disregard *NML Capital*'s declaration that U.S. courts "generally lack authority . . . to execute against property in other countries," 134 S. Ct. at 2257, and respondents do not attempt to show that the FSIA creates an exception to this general rule. Pet. 11-15. The plain text of the statute's provision concerning territorial jurisdiction implies that the FSIA does not authorize any departure from the rule. The FSIA expressly confirms that the "jurisdiction of the United States" is territorially limited (Pet. 14 n.2 (quoting 28 U.S.C. § 1603(c))), and it is axiomatic that "[t]he jurisdiction of *courts* is a branch of that which is possessed by the nation as an independent sovereign power," *The Schooner Exchange v. McFaddon*, 11 U.S. 116, 136 (1812) (Marshall, C.J.).

Respondents also fail to acknowledge that in *NML Capital*, this Court contemplated that execution against foreign sovereign assets outside the United States, once identified, would occur in the courts of the country in which the assets are situated pursuant to the relevant jurisdiction's law. Pet. 16-17. The Second Circuit reached the same conclusion in *NML Capital*. *See EM Ltd. v. Republic of Argentina*, 695 F.3d 201, 206 (2d Cir. 2012) ("Because the Discovery Order grants NML discovery respecting foreign assets, any future attachment or collection proceeding would be conducted in a foreign court.").

Respondents wrongly suggest that in *NML Capital* the Court rejected the United States' argument that foreign sovereign assets overseas are not subject to execution by U.S. courts. Opp. 18; *see also* Pet. 14 (quoting United States' argument that the FSIA's "exclusive

focus on property located within the United States simply confirms the fundamental proposition that it would be unthinkable for a U.S. court . . . to presume to order the attachment of or execution against property of a foreign sovereign abroad"). Far from rejecting this argument, the Court relied on U.S. courts' lack of jurisdiction over foreign sovereign assets abroad to explain the lack of any "case holding that, before the Act, a foreign state's extraterritorial assets enjoyed absolute execution immunity in United States courts." 134 S. Ct. at 2257 ("[H]ow could the question ever have arisen?").

Under these circumstances, respondents' reliance on *NML Capital* as authority for an unprecedented order compelling a foreign intermediary to deliver foreign sovereign assets into the United States is entirely misplaced. *NML Capital* involved a "narrow" discovery dispute, 134 S. Ct. at 2255, and its reasoning addressing execution against foreign sovereign assets abroad supports pursuing those assets in the courts of the foreign countries in which they are situated, not U.S. courts.

Respondents insist that "the court of appeals below did not contemplate execution upon assets located outside the United States" because, under the Second Circuit's decision, the district court would first order Clearstream to deliver the assets into the United States. Opp. 20. But the Second Circuit expressly framed the issue before it as "whether the principal asset at issue, a right to payment held by Clearstream and located in Luxembourg, is subject to execution." App. 44a. In any event, it is well established that a

court "may not by indirection do that which [it] cannot do directly." Pet. 18-19 (quoting *Brown v. Alton Water Co.*, 222 U.S. 325, 331 (1912)).

III. The Decision Below Improperly Relied on a State Law Decision Not Involving Foreign Sovereign Assets to Circumvent the Territorial Limits to U.S. Courts' Jurisdiction Over Such Assets

Respondents also argue that execution pursuant to the Second Circuit's decision "requires only that the court exercise its jurisdiction over the persons properly brought before it." Opp. 21. But respondents do not identify any substantive federal law basis for seizing foreign sovereign assets outside the United States via the exercise of personal jurisdiction over a foreign financial intermediary.[1] Pet. 18-19.

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[1] In limited circumstances, courts exercise equitable powers to compel persons over whom they have jurisdiction to act extraterritorially. *See, e.g.*, *Steele v. Bulova Watch Co.*, 344 U.S. 280, 289 (1952) ("Where, as here, there can be no interference with the sovereignty of another nation, the District Court in exercising its equity powers may command persons properly before it to cease or perform acts outside its territorial jurisdiction."). But respondents have not cited any precedent—from before this nation's founding or otherwise—for exercising equitable powers to seize foreign sovereign assets situated in another country, and we are aware of none. *See, e.g.*, *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999) ("The Judiciary Act of 1789 conferred on the federal courts . . . an authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the Eng-

(….continued)

Instead, respondents invoke "state-law procedure," as incorporated by Rule 69(a)(1) of the Federal Rules of Civil Procedure. Opp. 20-21. Respondents do not dispute the primacy of federal interest and the premium on uniformity in the law governing U.S. courts' execution against foreign sovereign assets. Pet. 20-21. Nor do they dispute that Rule 69 can neither expand federal courts' jurisdiction nor alter substantive rights. Pet. 22-23.

Respondents argue that New York's turnover statute (C.P.L.R. § 5225) "does nothing more than establish a procedure for execution and turnover." Opp. 22 n.3. But compelling a foreign intermediary to deliver foreign sovereign property into the United States is not merely procedural. It implicates substantive rights. For example, before the Second Circuit determined that the right to payment is situated in Luxembourg and not New York, respondents argued that it was subject to a blocking order applicable to Iranian assets, and respondents likely would argue on remand that delivery into the United States affects Clearstream's rights and obligations under that blocking order. *See* Exec. Order No. 13,599, 77 Fed. Reg. 6659 (2012) (blocking "[a]ll property and interests in property of the Government of Iran, including the Central Bank of Iran, that are in the United States [or] that hereafter come within the United States . . . .").

(continued….)
lish Court of Chancery at the time of the separation of the two countries.") (quotation omitted).

Respondents fail to explain how state law, with or without Rule 69, could enlarge the jurisdiction of U.S. courts to reach foreign sovereign assets outside the United States. Respondents' reliance on state law is especially untenable given that the state court decision on which their argument rests, *Koehler v. Bank of Bermuda Ltd.*, 911 N.E.2d 825 (N.Y. 2009), did not involve foreign sovereign assets. Pet. 20.

IV. The Decision Below Is in Significant Tension with Decisions of Other Courts of Appeals

Respondents' attempt to reconcile the Second Circuit's decision with authority from other Circuits is unavailing. Opp. 24-26. Respondents strain to distinguish the Seventh Circuit's *Rubin* decision by suggesting that it did not rest on the FSIA. Respondents are incorrect. *Rubin* relied exclusively on FSIA cases (*NML Capital* and *Autotech Techs. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 750 (7th Cir. 2007)) to hold that the only foreign sovereign assets "even potentially subject to attachment and execution . . . must be within the territorial jurisdiction of the district court." *Rubin v. Islamic Republic of Iran*, 830 F.3d 470, 475 (7th Cir. 2016); *see* Pet. 24. Moreover, *Rubin* cited with approval *Autotech*'s holding that "the FSIA did not purport to authorize execution against a foreign sovereign's property, or that of its instrumentality, wherever that property is located around the world," which *Autotech* characterized as a "breathtaking" and impermissible "assertion of extraterritorial jurisdiction." 499 F.3d at 750.

Further, the Second Circuit itself acknowledged that *Rubin* "suggested the contrary conclusion" to that reached in the decision below. App. 54a. Similarly, *Rubin* has been interpreted as holding that a court "can only restrain assets of a foreign sovereign that are 'within [its] territorial jurisdiction,'" even when state law may otherwise permit restraint of property in the possession of a debtor over whom the court has personal jurisdiction. *See Leibovitch v. Islamic Republic of Iran*, 2018 WL 1072567, at *10 (N.D. Ill. Feb. 27, 2018).

V. The Second Circuit's Decision Raises Significant Foreign Policy Concerns that Justify Immediate Review

In the face of Clearstream's showing that the Second Circuit's decision below threatens international discord, Pet. 26-29, respondents suggest that a case-by-case comity analysis is sufficient to ameliorate that threat. Opp. 13. Respondents thus champion the same "immunity-by-factor-balancing" that they contend is prohibited. Opp. 27. Indeed, the ad hoc analysis called for by the Second Circuit's decision—with its eschewal of well-established categorical rules precluding the execution against extraterritorial foreign sovereign assets in favor of case-by-case determinations made by individual district judges—provides yet another important reason for this Court to grant review. *See NML Capital*, 134 S. Ct. at 2255 (noting that Congress "abated the bedlam" of the "executive-driven, factor-intensive, loosely common-law-based [pre-FSIA] immunity regime").

CONCLUSION

Clearstream respectfully submits that its petition should be granted.

Respectfully submitted,

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