No. 17-1530

In the Supreme Court of the United States

BANCA UBAE, S.P.A., PETITIONER

v.

DEBORAH D. PETERSON, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a court of appeals has discretion to remand a case to the district court to address questions of personal jurisdiction, rather than deciding those questions in the first instance on appeal.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. a. For much of the Nation's history, principles adopted by the Executive Branch determined the immunity of foreign states in civil suits in courts of the United States. See *Republic of Mexico* v. *Hoffman*, 324 U.S. 30, 34-36 (1945). Until 1952, the Executive Branch adhered to the "absolute" theory of sovereign immunity, under which foreign states could not be sued without their consent, and foreign sovereign property was entirely shielded from judicial seizure. See, *e.g.*, *Permanent Mission of India to the United Nations* v.

City of New York, 551 U.S. 193, 199 (2007); *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 486 (1983); *The Schooner Exch.* v. *McFaddon*, 11 U.S. (7 Cranch) 116, 144 (1812).

In 1952, the Executive Branch adopted the "restrictive" theory of foreign sovereign immunity, under which foreign states would be granted immunity from suit for their sovereign or public acts but not their private or commercial acts. *Permanent Mission of India*, 551 U.S. at 199 (citation omitted); see *Verlinden*, 461 U.S. at 487. Even after 1952, however, the "property of foreign states [remained] absolutely immune from execution." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 27 (1976); see, *e.g.*, *New York & Cuba Mail S.S. Co.* v. *Republic of Korea*, 132 F. Supp. 684, 685-686 (S.D.N.Y. 1955). Judgment creditors of a foreign state could look to the foreign state to satisfy the judgment but could not invoke the jurisdiction of U.S. courts to attach or execute against the state's property.

b. In 1976, Congress "codif[ied] the restrictive theory of sovereign immunity," *Samantar* v. *Yousuf*, 560 U.S. 305, 313 (2010), in the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. 1330, 1602 *et seq.* The FSIA governs foreign states' immunity from suit ("jurisdictional immunity"), as well as the immunity of foreign states' property in the United States from execution or attachment ("execution immunity").

For jurisdictional immunity, the FSIA provides that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter." 28 U.S.C. 1604. Section 1605A, which is known as the "terrorism exception," abrogates foreign sovereign

immunity for suits seeking money damages for "personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, [or] hostage taking," if the foreign state was designated "as a state sponsor of terrorism" by the Secretary of State "at the time the act * * * occurred" or "as a result of such act." 28 U.S.C. 1605A(a)(1) and (2)(A)(i)(I).[1]

For execution immunity, the FSIA provides that "the property in the United States of a foreign state" is "immune from attachment arrest and execution except as provided in sections 1610 and 1611." 28 U.S.C. 1609. Section 1610 contains two terrorism-related exceptions to execution immunity. The first exception provides that "[t]he property in the United States of a foreign state * * * used for a commercial activity in the United States, shall not be immune from" attachment or execution upon a judgment of a U.S. court, if "the judgment relates to a claim for which the foreign state is not immune" under the terrorism exception—*i.e.*, Section 1605A or its predecessor—"regardless of whether the property is or was involved with the act upon which the claim is based." 28 U.S.C. 1610(a)(7). The second exception permits attachment of, and execution against, the "property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity," and does not require that the property itself have been used for commercial activity. 28 U.S.C. 1610(b)(3).

Finally, the FSIA identifies certain types of foreign sovereign property that are immune from attachment

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[1] A prior version of this exception was codified at 28 U.S.C. 1605(a)(7) (2006); see National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, Div. A, Tit. X, § 1083, 122 Stat. 338.

and execution "[n]otwithstanding the provisions of [S]ection 1610," including the property "of a foreign central bank or monetary authority held for its own account." 28 U.S.C. 1611(a) and (b)(1).

c. Two additional provisions regarding execution of terrorism-related judgments are relevant to this case.

The Terrorism Risk Insurance Act of 2002 (TRIA), Pub. L. No. 107-297, 116 Stat. 2322, provides that, "in every case in which a person has obtained a judgment * * * for which a terrorist party is not immune" under the FSIA's terrorism exception, "the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment." § 201(a), 116 Stat. 2337; see § 201(d)(4), 116 Stat. 2340 (defining "terrorist party" to include state sponsors of terrorism). "Blocked assets" are assets that the United States has frozen or seized under certain sanctions regimes. See § 201(d)(2), 116 Stat. 2339. As relevant here, the President has blocked "[a]ll property and interests in property of the Government of Iran, including [Bank Markazi], that are in the United States, [or] that * * * come within the United States." Exec. Order No. 13,599, 3 C.F.R. 215 (2012 comp.).

The FSIA also permits a judgment creditor with a terrorism-related judgment against a foreign state to execute against the property of an agency or instrumentality of the foreign state, if that property otherwise comes within one of the exceptions to immunity in Section 1610. 28 U.S.C. 1610(g)(1); see *Rubin* v. *Islamic Republic of Iran*, 138 S. Ct. 816, 821-825 (2018).

2. In prior lawsuits, respondents—victims or representatives of victims—obtained default judgments to-

taling billions of dollars against Iran and Iran's Ministry of Intelligence and Security for Iran's complicity in the 1983 terrorist bombing of the U.S. Marine barracks in Beirut, Lebanon. Pet. App. 4a-5a. Those judgments rested on the FSIA's terrorism exception. *Id.* at 5a. The validity of the prior judgments is not at issue here.

Respondents registered their judgments in the Southern District of New York and, in December 2013, initiated this proceeding against Bank Markazi, the central bank of Iran. Pet. App. 5a-6a, 78a-79a. The action concerns $1.68 billion in bond proceeds allegedly owned by Bank Markazi. *Id.* at 80a. Respondents also named as defendants three financial institutions alleged to have played a role in processing the bond proceeds: JPMorgan Chase Bank, N.A., a bank headquartered in New York; Clearstream Banking, S.A., a Luxembourg bank; and petitioner—Banca UBAE, S.p.A., an Italian bank. *Id.* at 78a-79a.

Respondents allege that Bank Markazi was the beneficial owner of U.S.-dollar denominated bonds, which required bondholders to receive their interest and redemption payments in New York. Pet. App. 7a. Bank Markazi engaged Clearstream to receive those payments on its behalf. *Ibid.* Clearstream received the payments in an account at JPMorgan Chase in New York. *Ibid.* Clearstream then made corresponding credits to an account it maintained in Bank Markazi's name in Luxembourg. *Ibid.* In January 2008, "apparently because of increasing scrutiny of Iranian financial transactions, [Bank] Markazi stopped processing its bond proceeds through Clearstream directly and instead began doing so through" petitioner as "an intermediary bank." *Ibid.*; see *id.* at 85a. Thus, Clearstream began crediting the bond proceeds to

an account in petitioner's name in Luxembourg, for the ultimate benefit of Bank Markazi. *Id.* at 7a-8a.

"In June 2008, Clearstream notified [petitioner] that it had blocked [petitioner's account] and [had] transferred the balance of that account to a 'sundry blocked account.'" Pet. App. 8a (citation omitted); see C.A. J.A. 1365-1366 (letter from Clearstream to petitioner stating that "[i]f Clearstream processes transfers of cash and U.S. Persons are involved in such transactions, and if the transfer is for the beneficial ownership of an Iranian party, then Clearstream runs the risk of" violating U.S. sanctions). As of May 2013, Clearstream had credited the sundry blocked account with approximately $1.68 billion in bond proceeds. Pet. App. 86a.

Respondents seek to attach the $1.68 billion in assets reflected in the sundry blocked account and to execute on an unpaid portion of their prior judgments against those assets. Pet. App. 12a-13a. In particular, respondents seek an order under New York law requiring petitioner, JPMorgan Chase, Clearstream, and Bank Markazi to turn over the bond proceeds. *Ibid.*; cf. Fed. R. Civ. P. 69(a)(1) ("The procedure on execution [of a judgment] * * * must accord with the procedure of the state where the court is located, but a federal statute governs to the extent it applies."). New York law permits a judgment creditor to initiate a proceeding against a judgment debtor (or a third party in possession of the judgment debtor's assets), in which the court may order the judgment debtor (or third party) to turn over money or property in an amount sufficient to satisfy the unpaid judgment. N.Y. C.P.L.R. § 5225(a) and (b) (McKinney 2014).

3. In 2015, the district court dismissed the action. Pet. App. 78a-105a. The court determined that it "lack[ed] subject-matter jurisdiction" over the turnover claims

against Bank Markazi on sovereign immunity grounds. *Id.* at 103a. In the court's view, the bond proceeds at issue "are in Luxembourg," and "[t]he FSIA does not allow for attachment of property outside of the United States." *Ibid.* The court also determined that the turnover claims against petitioner, Clearstream, and JPMorgan Chase failed as "a matter of law" because there were "no asset[s] in [New York] to 'turn over.'" *Id.* at 94a; see *id.* at 102a, 104a. Finally, the court determined that certain non-turnover claims against petitioner, Clearstream, and Bank Markazi were barred by prior settlement agreements. See *id.* at 93a, 101a, 103a.

Petitioner had moved to dismiss for lack of personal jurisdiction, and the district court stated in its order that petitioner "did not transact business, have customers, advertise, solicit business, or market services in New York or anywhere else in the United States" as of the filing of the complaint. Pet. App. 87a; see C.A. J.A. 1568-1569, 1570. The court did not, however, expressly address its personal jurisdiction over petitioner.

4. The court of appeals affirmed in part, vacated in part, and remanded. Pet. App. 1a-63a.

a. As relevant here, petitioner argued on appeal that the district court correctly determined both (1) that the non-turnover claims against petitioner were barred by a prior settlement agreement, and (2) that the court lacked subject-matter jurisdiction over the turnover claims because the assets at issue were entitled to execution immunity. Pet. C.A. Br. 16-41. Petitioner also argued that the court of appeals could affirm the district court's decision on the "alternative basis" of "lack of personal jurisdiction." *Id.* at 42.

b. The court of appeals agreed with the district court that the assets that respondents seek to have turned

over are located in Luxembourg. Pet. App. 37a-41a. The court nonetheless determined that foreign sovereign immunity did not preclude the district court from ordering Clearstream to bring those assets from Luxembourg to New York. See *id.* at 44a-62a. In particular, the court of appeals concluded that foreign sovereign assets located outside the United States are not immune from attachment and execution in U.S. courts, and that "a court sitting in New York with personal jurisdiction over a non-sovereign third party" may order that party "to recall to New York extraterritorial assets." *Id.* at 54a. The court therefore vacated the district court's order dismissing the turnover claims as "premature[]" and remanded to the district court to address, among other things, "whether it has personal jurisdiction over Clearstream." *Id.* at 63a. Separately, the court of appeals vacated and remanded with respect to certain non-turnover claims, including claims against petitioner, that the district court had found to be barred by prior settlement agreements. *Id.* at 21a-37a, 62a-63a. The court of appeals did not address petitioner's alternative argument regarding personal jurisdiction.

c. The court of appeals denied a timely petition for rehearing on February 7, 2018. Pet. App. 106a-107a. Petitioner had argued in its rehearing petition that "the court overlooked [petitioner]'s dispositive personal jurisdiction argument." C.A. Pet. for Reh'g 1 (capitalization and emphasis omitted); see also *id.* at 4-5 (asserting that the court erred in "remanding the case for a merits determination" without first addressing the "threshold question" of personal jurisdiction). In denying rehearing, the court of appeals ordered the district court "to decide the personal jurisdiction issue in the first instance on remand." Pet. App. 107a.

DISCUSSION

Petitioner contends (Pet. 8-11) that the court of appeals erred in adjudicating the merits of certain claims against petitioner without first addressing the threshold question of personal jurisdiction. Petitioner further contends (Pet. 12-13) that the courts of appeals have adopted inconsistent approaches with respect to addressing questions of personal jurisdiction in the first instance on appeal—*i.e.*, when a party to the appeal raises the issue, but the district court did not previously address it. Neither contention warrants further review. The court of appeals' approach to personal jurisdiction in this case was an appropriate exercise of the court's discretion and does not conflict with any decision of this Court or another court of appeals. Accordingly, the petition for a writ of certiorari should be denied.

A. Personal jurisdiction is "'an essential element of the jurisdiction of a district . . . court,' without which the court is 'powerless to proceed to an adjudication.'" *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574, 584 (1999) (quoting *Employers Reinsurance Corp.* v. *Bryant*, 299 U.S. 374, 382 (1937)). For that reason, a district court ordinarily must satisfy itself that it has personal jurisdiction over a defendant before proceeding to adjudicate the merits of any claims against that defendant. See *ibid.*; see also, *e.g.*, *Sinochem Int'l Co.* v. *Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430-431 (2007) ("[A] federal court generally may not rule on the merits of a case without first determining that it has jurisdiction over the category of claim in suit (subject-matter jurisdiction) and the parties (personal jurisdiction).") (citing *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 93-102 (1998)); *Vermont Agency of Natural Res.* v. *United*

States ex rel. Stevens, 529 U.S. 765, 778 (2000) ("Questions of jurisdiction, of course, should be given priority —since if there is no jurisdiction there is no authority to sit in judgment of anything else."). Unlike subject-matter jurisdiction, however, a defendant may waive or forfeit an objection to the court's exercise of personal jurisdiction, thereby "effectively consenting to the court's exercise of adjudicatory authority." *Ruhrgas AG*, 526 U.S. at 584 (citing Fed. R. Civ. P. 12(h)(1) and *Insurance Corp. of Ir., Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982)).

Here, the district court determined that certain non-turnover claims against petitioner were barred by a release of liability in a prior settlement agreement—an issue that goes to the merits of the claims, see, *e.g.*, Fed. R. Civ. P. 8(c)(1) (listing "release" by settlement as an affirmative defense)—without expressly addressing petitioner's contention that the court lacked personal jurisdiction. See Pet. App. 81a, 100a-101a. In doing so, the court arguably failed to observe the principles set forth above.[2] In any event, however, the court of appeals vacated the district court's order dismissing those claims, see *id.* at 62a-63a, and remanded to the district court with instructions to "decide the personal jurisdiction issue," *id.* at 107a. The district court will therefore have an opportunity to satisfy itself that it has personal jurisdiction over petitioner before proceeding to address the merits of any claims against petitioner.

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[2] Petitioner acknowledges that it "consented in the settlement agreement to [the district court's] personal jurisdiction * * * for purposes of interpreting the agreement." Pet. 10. Express consent is a well-recognized basis for personal jurisdiction. See *Insurance Corp. of Ir.*, 456 U.S. at 703-704.

The district court also dismissed respondents' turnover claims—which seek an order under New York law requiring petitioner and its co-defendants to turn over foreign sovereign assets that the court found to be located in Luxembourg, see pp. 6-7, *supra*—for "lack[] [of] subject-matter jurisdiction," Pet. App. 81a, because the court concluded that the assets at issue are entitled to execution immunity in U.S. courts, see *id.* at 102a-103a & n.16. That aspect of the court's order did not even arguably run afoul of the principles set forth above. The court was under no obligation to address its personal jurisdiction over petitioner before addressing its subject-matter jurisdiction over the turnover claims. See *Sinochem Int'l Co.*, 549 U.S. at 431 ("Both *Steel Co.* and *Ruhrgas* recognized that a federal court has leeway 'to choose among threshold grounds for denying audience to a case on the merits.'") (citations omitted).

B. Petitioner does not identify any error in the decision below that warrants further review.

Petitioner principally contends (Pet. 10-11) that the court of appeals erred in remanding to the district court to address personal jurisdiction, rather than deciding the issue on appeal. But petitioner does not identify any decision of this Court—or, indeed, any sound principle of appellate review—that would have *obligated* the court of appeals to decide a potentially fact-intensive question that is ordinarily the province of the district court in the first instance. "The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." *Singleton* v. *Wulff*, 428 U.S. 106, 121 (1976).

The court of appeals permissibly exercised that discretion in this case; at a minimum, its case-specific decision to remand does not warrant this Court's review.

The two decisions of this Court that petitioner cites (Pet. 10-11) are not to the contrary. Those decisions merely concluded that a remand was unwarranted on the facts of those cases, not that a remand was beyond the discretionary authority of the reviewing court. See *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 565 (2001) (declining to remand where the defendant already "had ample opportunity to develop a record" on an issue); *Greater New Orleans Broad. Ass'n* v. *United States*, 527 U.S. 173, 189 n.6 (1999) (similar).

Petitioner asserts (Pet. i, 4, 6-7, 10-12, 14) that the factual record on personal jurisdiction is already complete, thus leaving only a legal determination that the court of appeals could have made just as easily as the district court. But the lower courts did not endorse that assertion, and respondents disputed it below. See Resp'ts C.A. Resp. to Pet. for Reh'g 13 (arguing that discovery is required). Petitioner also asserts (Pet. 14-15) that the decision below unnecessarily prolongs the litigation. But granting the petition for a writ of certiorari would not solve that putative problem. Petitioner nowhere suggests that this Court should decide the personal-jurisdiction issue in the first instance. Cf. *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view."). Indeed, the question presented asks this Court to decide only whether "a federal appellate court" must in some circumstances address personal jurisdiction rather than remanding on the issue—not whether petitioner is actually subject to the personal jurisdiction of the district court. Pet. i; cf. *Yee* v. *City of Escondido*, 503 U.S. 519, 535 (1992) (noting

that, under Rule 14.1(a) of the Rules of this Court, the Court "ordinarily do[es] not consider questions outside those presented in the petition").

C. The decision below does not conflict with the decision of any other court of appeals on this point. Petitioner argues that the courts of appeals "follow inconsistent approaches to resolving the question of whether to decide personal jurisdiction on appeal when the lower court is presented with the issue but declines to address it." Pet. 12 (emphasis omitted). But petitioner does not identify any substantial division of authority, nor does petitioner demonstrate that a panel in another circuit would have been compelled to proceed differently in similar circumstances.

Petitioner argues, for example, that the Ninth and Eleventh Circuits have adopted a "principle that personal jurisdiction must be decided as a threshold matter on appeal." Pet. 12 & n.2. The decisions petitioner relies on, however, do not support that argument. In each one, the court of appeals decided to address on appeal a personal jurisdiction issue that the district court had not previously considered, but neither decision contains any suggestion that the reviewing court viewed itself as lacking the discretion to instead remand on that issue. See *Hendricks* v. *Bank of Am., N.A.*, 398 F.3d 1165, 1171-1172 (9th Cir.) (deciding that a question of personal jurisdiction was "amenable to appellate review" in an appeal from a preliminary injunction), amended, 408 F.3d 1127 (9th Cir. 2005); *Walter* v. *Blue Cross & Blue Shield United of Wis.*, 181 F.3d 1198, 1202 (11th Cir. 1999) (electing to "decide the [personal jurisdiction] issue * * * instead of remanding it for decision by the district court," where both parties urged the court of appeals to do so "in the interest of judicial efficiency and

to avoid further delay"). And given the discretionary nature of the judgment a court of appeals makes when deciding whether to remand on an issue the district court has not addressed, it is no surprise that courts may reach different results in different cases. See, *e.g.*, Pet. 13 n.4.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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