No. 06-1576

In the Supreme Court of the United States

EM LTD. AND NML CAPITAL, LTD.,
Petitioners,

v.

REPUBLIC OF ARGENTINA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Respondents do not defend critical portions of the reasoning of the court of appeals; instead, they try to substitute other rationales – *not* accepted by the court of appeals – to reach the same results. And respondents do not respond to critical arguments made in the petition for a writ of certiorari; instead, they respond to various arguments petitioners are *not* making, and various caricatures of the arguments petitioners *are* making.

There is a reason for such obfuscation. Only by complicating this case can respondents hope to obscure the fundamental strength of petitioners' position. When Argentina designated billions of dollars of assets around the world for use in repaying Argentina's debt to the IMF, it *used* those assets for the commercial purpose of repaying one loan and made those same assets available to repay other valid loans Argentina would prefer not to pay. The nominal ownership of those assets by the Central Bank was no more of an obstacle to petitioners' attachment of those assets than it was to their use for payment of a debt Argentina – not the Central Bank – owed to the IMF. And, although petitioners maintained below and still maintain in this Court that there are enough facts in the record to *allow* the attachments, they maintained below and still maintain in this Court that *disallowing* the attachments is improper and a denial of due process if the disallowance rests on *factual* determinations on matters as to which petitioners were denied discovery.

1. To resolve the question whether the assets petitioners attached fell under the FSIA's definition of "property" of a foreign state, 28 U.S.C. § 1610(a), (d), the Second Circuit understandably did not rely on any conclusions about Argentine law, the Uniform Commercial Code, banking law, or unusual provisions of New York law. Rather, its conclusion was based on two paragraphs of analysis (Pet. App. 21a-22a) that expressed unfounded worry over the implications of petitioners' position and applied principles of corporate law by analogy.

Respondents' obfuscatory tactic – relying on many sources of law that played no role in the Second Circuit's reasoning and shed no useful light on the FSIA's definition of property (BCRA Br. in Opp. 13-18) – reveals the weakness of the reasoning the Second Circuit *did* apply. Nowhere did the Second Circuit answer – nor can any source of law respondents cite answer – petitioner's simple point that, by *borrowing* several billion dollars from its Central Bank and making them available to pay one preferred creditor *of Argentina*, Argentina had to have made those assets its "property" under the FSIA, even if it directed the Central Bank to pay the preferred creditor directly rather than send the borrowed money to the government to send to the IMF.[1] Nowhere did the Second Circuit answer – nor can any source of law respondents cite answer – the question how it can possibly be that assets sufficiently controlled by Argentina to pay Argentina's preferred creditor can be considered "assets in which the judgment debtor has no interest" (Pet. App. 22a n.13 (internal quotation marks omitted)) when disfavored creditors seek to attach the same assets. Instead, the Second Circuit blessed a shell game, in which Argentina by decree tells the Central Bank to pay one creditor yet Argentina disclaims any attachable interest in the same assets when different creditors seek to invoke legal process against them. This will not do: "The attachment was not aimed at central bank reserves general-

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[1] BCRA asserts that only if there was an "appropriation" of its assets by Argentina could this Court resolve the first question presented in petitioners' favor or reach the other questions presented. BRCA Br. in Opp. i. Assets *borrowed* from someone else, however, are just as subject to attachment as assets taken from someone else. See N.Y. C.P.L.R. § 5201(b) ("A money judgment may be enforced against any property which could be assigned or transferred, whether it consists of a present or future right or interest and whether or not it is vested * * *."). It was only after petitioners attached the FRBNY funds that Argentina revealed that it had purported to commit to repay the Central Bank for funds used to pay the IMF. See Pet. App. 143a-148a (Resolution No. 49). Thus, if Argentina's commitment is a real one (a subject on which petitioners have not been allowed discovery), the funds were borrowed rather than appropriated, but either way they were diverted from Central Bank uses to use for repayment of *Argentina's* debt to the IMF.

ly, just funds that were to be used for debt repayment. These funds * * * were in the process of being withdrawn – the question was who should have them, the IMF or private creditors." Hal S. Scott, *Sovereign Debt Default: Cry for the United States, Not Argentina*, Washington Legal Foundation, Working Paper Series No. 140, at 30 (Sept. 2006), available at http://atfa.org/resources/scott_wp.pdf.

The Second Circuit *acknowledged* that a mere shareholder cannot transfer or assign a corporation's properties and rights or apply the corporation's funds to the shareholder's debts. Pet. App. 22a. Yet Argentina *did* transfer assets held in the Central Bank's name to the IMF and apply those assets to Argentina's debts. How? By borrowing those assets and promising to repay them. Pet. App. 143a-148a (Resolution No. 49). The Second Circuit simply ignored Resolution No. 49 and reached the exact opposite conclusion from the one dictated by the very principles of corporate law it cited.

To accept the Second Circuit's reasoning (or the rationales respondents seek to substitute for that reasoning) would be to open a gaping loophole in the protections Congress intended to give creditors. All a nation needs to do to keep its assets from being attachable is leave those assets in someone else's hands until the moment those assets are transferred to a third party in furtherance of the nation's purposes, and then disclaim that "ownership" of the assets ever passed to the nation. Whether to allow such a loophole to be created depends on whether it is consistent with the policies and purposes of the FSIA, not on esoteric debates about the content of manipulable foreign law. The Second Circuit's creation of such a loophole gives rise to an issue of exceptional importance meriting this Court's review.[2]

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[2] See also Pet. App. 104a (remarks of Judge Griesa: "There's not a whimper of an idea that the Republic might pay the judgments which they really should pay."); Scott, *supra*, at 42-43 ("*Don't cry for Argentina*. It was able to restructure $80 billion of debt with a massive haircut and ignore the $30 billion still owed to non-tendering bondholders – with impunity. Argentina returned to the bond markets, continued to attract foreign investment, and

2. The Second Circuit held that borrowing from and repaying the IMF is not a "commercial activity." Pet. App. 30a-35a. As the petition carefully explained (at 16-22), the Second Circuit's error – and its means of placing itself in conflict with this Court's decision in *Republic of Argentina* v. *Weltover*, 504 U.S. 607, 614 (1992), and decisions of other courts – was to conduct its analysis at the wrong level of generality. *With no explanation of any kind*, the court merely *assumed* that the characteristics of IMF loans were relevant instead of analyzing – as required by *Weltover*, 504 U.S. at 614 – the "*type* of actions" of which IMF loans are just one example.

The Central Bank glibly responds that "the 'level of generality' applied is a completely subjective categorization" and that "[c]onflict here apparently is in the eye of the beholder." BCRA Br. in Opp. 22. But the courts do not lack for guidance on the level of generality at which this analysis should be conducted. As the petition explained (at 21), the House Report lists "borrowing of money" *simpliciter* as a commercial activity and further indicates that loans from a "public lending institution located in the United States" are included. Congress's intent that "commercial activity" include borrowing and repayment of loans extended by public lending institutions such as the IMF is confirmed by other evidence in the legislative history, including Congress's decisions to nix as "inappropriate" a proposed "public debt" provision and to include in 28 U.S.C. § 1611(a) an exception to the attachment rules limited to funds *disbursed to* foreign states by certain designated organizations (including the IMF). See Pet. 16-17, 20-21. The appropriate level of generality is thus *not* left to subjective assessment or the eye of the beholder, and the Second Circuit simply got it wrong.[3]

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avoided creditor sanctions. Under this scenario, why would any country repay its debt?").

[3] Respondents repeat the Second Circuit's mistake by focusing at length on the special characteristics of IMF loans. BCRA Br. in Opp. 24-25.

Respondents try to negate the crystal-clear legislative history by quoting the House Report's observation that "a foreign state's mere participation in a foreign assistance program administered by the Agency for International Development (AID) is an activity whose essential nature is public or governmental, and it would not itself constitute a commercial activity." BCRA Br. in Opp. 26 (quoting H.R. REP. 94-1487, at 16, *reprinted in* 1976 USCCAN at 6615). But there is no inconsistency whatever between that statement and the categorical rule, stated on the very same page, that all borrowing is commercial. Assistance by AID "may be furnished on a grant basis or on such terms, including cash, credit, or other terms of repayment * * * as may be determined to be best suited to the achievement of the purposes of this chapter." 22 U.S.C. § 2395(a). Because participation in a foreign assistance program administered by AID can take forms other than loans, it is unquestionably true that "*mere* participation" – the phrase used in the House Report – is not enough to bring the participant within any exception for commercial activities.

Respondents' other arguments are mere makeweights. Respondents ascribe significance to the fact that petitioners cite decisions construing the phrase "commercial activity" in 28 U.S.C. § 1605 rather than the same phrase in *id*. § 1610. BCRA Br. in Opp. 22-23. But no court has *ever* suggested that an activity deemed "commercial" for one section can be deemed noncommercial for the other. The difference between the sections is that one rests jurisdiction on an act performed "in connection with" a commercial activity and the other rests the power to attach on a determination that an asset was "used for" such an activity. Petitioners must – and do – meet the "used for" test (see Pet. 22-25; point 3, *infra*), but the question whether the activity of borrowing and repaying loans is commercial does not have different answers for purposes of the two different sections of the FSIA. And respondents argue that this Court's holding in *Weltover* "rested on the fact that the bonds were 'garden-variety debt instruments.'" BCRA Br. in Opp. 24 (quoting 504 U.S. at 615). But the Court's language shows that it did not rest

its holding on the garden-variety nature of the debt. It said only, "The commercial character of the [bonds] is *confirmed by*" their garden-variety nature. 504 U.S. at 615 (emphasis added).

3. Respondents insist – in their argument heading, and in two lengthy paragraphs of argument – that petitioners have argued "that assets that *could be* used for commercial activity were so used" and that "'used for' commercial activity * * * mean[s] 'potentially used for' commercial activity." BCRA Br. in Opp. 18, 21 (capitalization altered, emphasis added). But that is a caricature of petitioners' position. *Never* have petitioners argued that mere potential availability of an asset for a commercial activity makes it an asset "used for a commercial activity" within the meaning of 28 U.S.C. § 1610(a). What petitioners *have* argued is that *designation* of an asset to be used for loan repayment constitutes use of that asset for a commercial activity. Any other holding would preclude all attachments of money, including money on deposit in a foreign nation's accounts at *private* commercial banks in the United States, because treating the *completion* of payment of money (rather than the earmarking of the money *for* payment) as the only relevant "use" would guarantee that the money has left the sovereign's control before it can be attached. Notably, respondents do not deny that the Second Circuit's cramped understanding of "use" would lead to that absurd result.

Notwithstanding respondents' pejorative (and colorful) reference to "ripping out of context a phrase in the Fifth Circuit's opinion in *Af-Cap*" (BCRA Br. in Opp. 19), the question of how to determine what money has been "used for" *before* it leaves the sovereign's hands is exactly the central problem that the Fifth Circuit addressed in *Af-Cap, Inc.* v. *Republic of Congo*, 383 F.3d 361, 370 (5th Cir.), on rehearing, 389 F.3d 503 (5th Cir. 2004), cert. denied, 544 U.S. 962 (2005). The court did not merely state once, in isolation, that the tax and royalty obligations at issue in that case were used for a commercial activity because they were "not cordoned off for use of the Congo in its sovereign capacity." 383 F.3d at 370. The Fifth Circuit also re-

peated that what is protected is *only* "funds so central to a nation's operations as a sovereign that uses thereof would interrupt the public acts of this foreign state." *Id*. at 371 (internal quotation marks and brackets omitted). And it also emphasized that "evidence of contemplated commercial use would greatly aid a court in making a determination of the general commercial or non-commercial nature of particular property." *Id*. at 370 n.11. The Fifth Circuit used a number of different verbal formulations but came back repeatedly to its central holding that designating assets for commercial purposes, so that their use for commercial purposes would not interrupt the sovereign's public acts, constitutes using those assets for commercial purposes. The Second Circuit's holding is in square conflict with that holding of the Fifth Circuit.

There remains the argument that the Unrestricted Reserves were a massive, undifferentiated pot of money, from which the Second Circuit concluded (Pet. App. 37a) that their designation for use in repaying the IMF was not specific enough to constitute use of them. See BCRA Br. in Opp. 20. The Fifth Circuit certainly would *not* have arrived at the same result. The reason is not *just* that Argentina could have cordoned off particular assets for sovereign use but failed to do so. The reason is *also* that designation of *all* the Unrestricted Reserves for repayment of a loan constituted use of them within the contemplation of *Af-Cap*, and that designating those funds for loan repayment proved that they were not so central to Argentina's operations as a sovereign that uses of them would interrupt Argentina's public acts. *Every* formulation the Fifth Circuit used – not just its "cordoned off" formulation – indicates that the Fifth Circuit would have treated as a "use" Argentina's designation of Unrestricted Reserves as earmarked for loan repayment. The circuit conflict on this question is palpable, and respondents can try to escape it only by mischaracterizing both petitioners' argument and the Fifth Circuit's central holding in *Af-Cap*.

4. Even respondents admit that discovery "of specific facts crucial to the immunity determination" is required by other cir-

cuits. Argentina Br. in Opp. 16 (quoting *Af-Cap Inc.* v. *Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1096 (9th Cir. 2007)). Even they admit that post-judgment discovery must be allowed under other circuits' case law when it goes "directly to a central fact necessary to the immunity inquiry: whether the property at issue was used for commercial activity in the United States." *Id*. at 15 n.5 (citing *Conn. Bank of Commerce* v. *Republic of Congo*, 309 F.3d 240, 251 (5th Cir. 2002)). Those standards would not have required discovery if the courts below had accepted petitioners' theory of the case, under which Argentina's borrowing of Central Bank funds to repay the IMF amounted to use of all of the Unrestricted Reserves for a commercial activity. But the court of appeals' theory of the case instead deemed crucial the absence of "evidence" of ownership transfer or use of the FRBNY funds. See Pet. 29. To adopt a legal theory that makes such evidence crucial, and deny petitioners discovery to find such evidence, is a denial of due process and creates multiple circuit splits.

Argentina seeks to evade that conclusion by characterizing as a run-of-the-mill "discovery dispute[]" petitioners' contention it was entitled to some discovery. Argentina Br. in Opp. 12. That characterization is mere wordplay. Petitioners are not asking this Court to micromanage the underlying litigation but instead to vindicate their due process and FSIA rights to show that the FRBNY funds are attachable assets of Argentina.

Argentina also falsely asserts that petitioners disavowed any need for discovery. Argentina Br. in Opp. 8, 9 (citing Pet. App. 62a). The very appendix page cited shows the exact opposite. Counsel for EM stated to the district judge (Pet. App. 62a (emphasis added)):

> [S]hould you feel that there are – that you can't confirm it now, perhaps because there are some factual issues about some of the statements made by Argentina, then we should be entitled to discovery to learn more about the effect of the decree, the central bank functions, what Argentina plans to

> do with additional freely available reserves as they come up, the purposes of the funds.
>
> * * * * *
>
> They have made certain factual statements in their declarations with which we completely disagree * * *. If you would like to later, we can talk about the specific discovery issues, but we don't think discovery is needed in order to *confirm* the attachments at this time.

5. Respondents finally seek to defend the judgment below on a ground that the Second Circuit did not reach and that is not raised by the certiorari petition. BCRA Br. in Opp. 26-27. Respondents argue that the FRBNY funds are immune from attachment because they are "held for" the Central Bank's "own account" within the meaning of 28 U.S.C. § 1611(b)(1).

It is certainly open to a respondent to *argue* alternative grounds in support of a judgment below, but this Court has discretion whether to reach those issues or leave them to the lower courts on remand. See, *e.g.*, *Gonzales* v. *Duenas-Alvarez*, 127 S. Ct. 815, 823 (2007); *National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 469-470 (1999); *Roberts* v. *Galen of Va., Inc.*, 525 U.S. 249, 253-254 (1999) (per curiam). Here, it would make sense to grant certiorari and resolve the questions presented by the petition. Only if this Court resolves in petitioners' favor the question whether the FRBNY funds were property of Argentina used for a commercial activity will there be a remand. A holding by this Court favorable to petitioners on that question would severely undermine any basis for concluding that those funds were held by the Central Bank "for its own account."[4]

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[4] Section 1611(b)(1) immunity "applies to * * * funds used or held in connection with central banking activities, *as distinguished from funds used solely to finance the commercial transactions of other entities or of foreign states*." H.R. REP. 94-1487, at 31, *reprinted in* 1976 USCCAN at 6630 (emphasis added). To resolve in petitioners' favor the questions presented by the petition would place the FRBNY funds in the category the House Report described as the *opposite* of funds held for a central bank's own account.

This is not, then, a case where "the decision below is correct regardless of how the Court resolves the questions presented." ROBERT L. STERN ET AL., SUPREME COURT PRACTICE § 6.37(a), at 457 (8th ed. 2002).

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 2007