No. 11-604

In the Supreme Court of the United States

EM LTD., ET AL., PETITIONERS

v.

REPUBLIC OF ARGENTINA, 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 the immunity conferred by Section 1611(b)(1) of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1611(b)(1), which protects from execution or attachment "the property * * * of a foreign central bank or monetary authority held for its own account," applies to property held by a central bank that is an "alter ego" of its parent foreign government under *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983).

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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. The United States has long recognized that foreign sovereigns are generally immune from suit in our courts. See *The Schooner Exch.* v. *McFaddon*, 11 U.S. (7 Cranch) 116, 137 (1812). For much of this Nation's history, the Executive followed a theory of absolute immunity, "under which 'a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign.'" *Permanent Mission of India to the United Nations* v. *City of N.Y.*, 551 U.S. 193, 199 (2007). This

absolute immunity extended to the property of foreign sovereigns, shielding it from judicial seizure. See, *e.g.*, *The Schooner Exch.*, 11 U.S. (7 Cranch) at 144.

In 1952, the State Department adopted the "restrictive" theory of foreign sovereign immunity, under which foreign states would be granted immunity from suit only for their sovereign or public acts, and not for their commercial acts. See *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 698 (1976) (plurality opinion). With respect to post-judgment enforcement, however, the "traditional view" continued to be that "the property of foreign states [was] absolutely immune from execution." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 27 (1976) (*House Report*).

In 1976, Congress enacted the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. 1330, 1602 *et seq.*, which largely codified the restrictive theory of foreign sovereign immunity. The FSIA provides that a foreign state is "immune from the jurisdiction of the courts," 28 U.S.C. 1604; see 28 U.S.C. 1330, unless a specific statutory exception to immunity applies, see 28 U.S.C. 1605-1607 (2006 & Supp. IV 2010). The FSIA also addresses the circumstances in which foreign-state property is subject to execution, establishing a presumption that foreign state property is immune from attachment or execution in aid of a judgment. 28 U.S.C. 1609. Section 1610 sets forth limited exceptions to the general rule of immunity.

Section 1611 sets forth a special rule governing the property of foreign central banks and monetary authorities. As relevant here, Section 1611(b)(1) provides that "[n]otwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if—(1) the prop-

erty is that of a foreign central bank or monetary authority held for its own account." 28 U.S.C. 1611(b)(1). That immunity does not apply if the central bank or monetary authority, "or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution." *Ibid*.

2. In 2001, the Republic of Argentina (Argentina) "declared a temporary moratorium on principal and interest payments on more than $80 billion of public external debt." Pet. App. 4a-5a. Petitioners are holders of debt instruments on which Argentina defaulted. In a Fiscal Agency Agreement governing the debt instruments, Argentina waived its sovereign immunity from suit as to any claims arising from those instruments. *Id.* at 5a n.3; see 28 U.S.C. 1605(a)(1). Petitioners subsequently obtained judgments against Argentina in the combined amount of approximately $2.4 billion. See Pet. App. 6a-7a.

In an earlier action, petitioners sought to enforce the judgments by attaching funds held in an account at the Federal Reserve Bank of New York in the name of Argentina's central bank, Banco Central de Republica Argentina (BCRA). See Pet. App. 7a. Petitioners argued that because the President of Argentina had issued two decrees that authorized the use of funds in BCRA's account to pay debts owed by Argentina to the International Monetary Fund (IMF), Argentina had an attachable interest in all of the funds in the account.

The district court refused attachment, and the Second Circuit affirmed. See *EM Ltd.* v. *Republic of Argentina*, 473 F.3d 463 (2007), cert. denied, 552 U.S. 818 (2007). The court of appeals held that the presidential decrees "merely reflect[ed] [Argentina's] ability to exert control" over BCRA. *Id.* at 475. The court also ob-

served that petitioners had not argued that BCRA's separate juridical status should be disregarded. See *ibid.* This Court denied review. *EM Ltd.* v. *Republic of Argentina*, 552 U.S. 818 (2007).

3. a. While that action was pending, petitioners filed this suit against Argentina and BCRA—the respondents before this Court—seeking a judicial declaration that BCRA is the alter ego of Argentina for purposes of the FSIA, as well as a money judgment against BCRA for amounts owed to petitioners as a result of Argentina's default. See Pet. App. 17a-18a, 94a. Petitioners sought to attach or execute against approximately $100 million held in BCRA's account with the Federal Reserve Bank of New York. *Id.* at 116a-117a.

b. The district court held that BCRA is an alter ego of Argentina; that the funds in the BCRA account at the Federal Reserve Bank of New York should be treated as funds of Argentina; and that those funds are subject to attachment to satisfy the judgment against Argentina. Pet. App. 55a, 107a-118a.

In holding that BCRA is an alter ego of Argentina, the district court stated that under *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) (*Bancec*), the presumption that an instrumentality of a foreign government is to be accorded "separate legal status" may be disregarded if the instrumentality is extensively controlled by the foreign government and giving effect to the entities' independent legal status would work fraud or injustice. Pet. App. 104a-106a (citing *Bancec*, 462 U.S. at 629). The district court concluded that BCRA's separate juridical status should be disregarded based on, among other things, Argentina's use of BCRA's accumulated reserves to pay Argentina's debt to the IMF, and the Argentine Presi-

dent's removal of BCRA's governor for disagreeing with a plan to use central-bank reserves to repay certain government debt. *Id.* at 73a-85a. The district court concluded that although Argentina "did not manage the day-to-day operations of BCRA," BCRA was an alter ego of Argentina because the central bank carried out large-scale monetary operations "at the behest" of Argentina in order to serve Argentina's economic interests. *Id.* at 107a; *id.* at 107a-112a.

Based on its alter-ego determination, the district court held that the funds in BCRA's account were not entitled to immunity from execution under Section 1611(b)(1). The court reasoned that because "the funds in [BCRA's] account were in reality the funds of [Argentina], * * * it would be entirely anomalous to hold that the funds belonged to BCRA and were 'held for its own account'" within the meaning of Section 1611(b)(1). Pet. App. 116a.

4. The court of appeals reversed. Pet. App. 1a-52a. The court held that "the plain language, history, and structure of [Section] 1611(b)(1) immunizes property of a foreign central bank or monetary authority held for its own account without regard to whether the bank or authority is independent from its parent state pursuant to *Bancec*." *Id.* at 31a. The court therefore found it unnecessary to decide whether BCRA is an alter ego of Argentina.

The court explained that Section 1611(b)(1)'s text does not suggest that the immunity of central-bank property turns on the bank's independence: the "only qualification for immunity" required by Section 1611(b)(1) is that the property of a central bank must be "'held for its own account.'" Pet. App. 32a. The court also observed that the statutory language indicates that

"Congress recognized that the property of a central bank * * * might *also* be the property of that central bank's parent state." *Ibid.* The FSIA's legislative history reinforced that conclusion, the court held, because the *House Report* referred interchangeably to "funds of a foreign central bank or monetary authority" and to "reserves of foreign states," thereby indicating that Congress believed that central bank property could be the property of a foreign state and yet retain immunity under 28 U.S.C. 1611(b)(1). Pet. App. 33a-34a (citation omitted).

That understanding, the court emphasized, is consistent with the historical context at the time of Section 1611(b)(1)'s enactment. In 1976, the court concluded, central banks were commonly subject to extensive control by their parent governments. Pet. App. 35a. Given that Congress enacted Section 1611(b)(1) in order to ensure that foreign central banks would not be "discourage[d]" from depositing their reserves in the United States, *id.* at 36a (quoting *House Report* 31), the court reasoned that "it makes no sense to assume that Congress would enact a statute * * * which failed to immunize a significant portion of the central bank reserves in the United States at that time." *Id.* at 35a-36a (internal quotation marks and citations omitted).

The court of appeals next determined that the funds in BCRA's account at the Federal Reserve Bank of New York are "held for its own account" within the meaning of Section 1611(b)(1). Pet. App. 37a-46a. The court rejected petitioners' argument that central-bank funds are held for the bank's own account only if they are held for the bank's "*own* profit or advantage." *Id.* at 41a (internal quotation marks and citation omitted). Given that central banks traditionally perform sovereign monetary

functions such as monitoring the stability of a country's currency and holding its reserves, "divid[ing] the interest of the central bank from that of the state it serves" would be impossible. *Ibid.* The court therefore held that funds held in an account in the name of a central bank or monetary authority are presumed to be immune from attachment, and that the presumption can be rebutted by showing that the "funds are not being used for central banking functions as such functions are normally understood." *Id.* at 44a-45a. Because BCRA used the funds in its account to "facilitate the regulation of the peso" and to regulate the level of Argentine dollar-denominated reserves, the court concluded that the funds were used for "paradigmatic central banking functions." *Id.* at 46a.

Finally, the court of appeals held that Argentina had not "explicitly waived * * * immunity from attachment" for BCRA's property within the meaning of Section 1611(b)(1). Pet. App. 47a-48a. Although Argentina had waived immunity for "[Argentina] or any of its revenues, assets or property," its waiver did not mention "BCRA in particular, much less BCRA's reserves at" the Federal Reserve Bank of New York. *Id.* at 48a.

DISCUSSION

Petitioners challenge the court of appeals' holding that the funds of a foreign central bank held for its own account at the Federal Reserve Bank of New York are immune from execution or attachment under Section 1611(b)(1) whether or not the central bank is independent of its parent foreign state, as well as the court's conclusion that Argentina did not waive the immunity of BCRA's property. The court of appeals' decision is correct and does not conflict with any decision of this Court

or any other court of appeals. In addition, petitioners may receive little benefit even if the Court were to grant review and rule in their favor, because the district court's alter-ego analysis was flawed, and the correctness of its decision would remain to be resolved on remand. The petition for a writ of certiorari should therefore be denied.

I. THE COURT OF APPEALS CORRECTLY HELD THAT THE FUNDS IN BCRA'S ACCOUNT AT THE FEDERAL RESERVE BANK OF NEW YORK ARE IMMUNE FROM ATTACHMENT OR EXECUTION UNDER 28 U.S.C. 1611(b)(1)

A. The court of appeals correctly held that under Section 1611(b)(1), the funds of a foreign central bank held for its own account are immune from attachment or execution without regard to whether the central bank is an alter ego of its parent government under *Bancec*. That conclusion is supported by the text, purpose, and legislative history of Section 1611(b)(1), as well as the historical context in which the provision was enacted.

1. The text of Section 1611(b)(1) does not make central bank independence a condition of immunity. Section 1611(b)(1) provides that "[n]otwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution if—(1) the property is that of a foreign central bank or monetary authority held for its own account." 28 U.S.C. 1611(b)(1). On its face, Section 1611(b)(1) renders central bank property immune whether or not the bank is independent: the provision does not mention the existence of any particular relationship between the central bank and its parent state.

Section 1611(b)(1) also makes clear that central-bank property is immune regardless of whether it could be deemed to be the property of the foreign state under an alter ego theory. The provision states that "*the property of a foreign state* shall be immune * * * if * * * *the property is that of a foreign central bank* or monetary authority held for its own account." Section 1611(b)(1) thus presupposes that the property "of a foreign central bank" might *also* be the property "of a foreign state"—a term that includes the parent foreign government itself, as well as the state's agencies and instrumentalities. 28 U.S.C. 1603(a). As a result, even if petitioners are correct that "alter egos share property ownership as well as legal identity" and a court could "properly regard [BCRA's] assets as [Argentina's] property," Reply Br. 6 (citation omitted), that conclusion would not suggest that the funds fall outside the immunity conferred by Section 1611(b)(1).

Section 1611(b)(1)'s application to "monetary authorit[ies]" as well as "central bank[s]" reinforces the conclusion that immunity does not depend on the independence of the central bank. At the time of the FSIA's enactment, monetary functions were often performed by departments of the central government, rather than by independent agencies or instrumentalities. See Alex Cukierman, *Central Bank Independence and Monetary Policymaking Institutions—Past, Present and Future*, 24 Eur. J. Pol. Econ. 722, 722 (2008) (Cukierman); Pet. App. 35a. Section 1611(b)(1)'s dual focus on central banks and monetary authorities thus indicates that Congress intended for immunity to apply based on the functions performed by the entity holding the property, rather than on the independence of that entity or its precise relationship to its parent foreign state.

Section 1611(b)(1)'s application "[n]otwithstanding the provisions of section 1610" is further evidence that Section 1611(b)(1)'s application does not turn on the independence of the central bank. Section 1610 specifies the circumstances in which the property of a foreign state or that of its agencies and instrumentalities is subject to execution. The property of a foreign state may be executed upon as set forth in Section 1610(a), while the property of an agency or instrumentality is subject to execution in the circumstances set forth in Section 1610(b) in addition to those listed in Section 1610(a). Although, as petitioners contend (Pet. 17-19), the court of appeals erred to the extent it suggested that Section 1610(b) is the only subsection that governs the attachment of property of agencies and instrumentalities, Pet. App. 33a, the court's larger point stands. Congress demonstrated in Section 1610 that it is capable of distinguishing between the property of a foreign state and that of foreign instrumentalities. Had Congress intended to limit Section 1611(b)(1) to independent central banks, it would not have obscured that limitation by referring generally to the entirety of Section 1610—including its application to the property of the foreign state itself—or by referring to the property "of a foreign central bank" as the property "of a foreign state." 28 U.S.C. 1611(b)(1).

As the court of appeals recognized, Section 1611(b)(1) imposes only one prerequisite for immunity of central bank property: the property must be "held" for the central bank's "own account." Pet. App. 32a. That requirement limits immunity to funds "used or held in connection with central banking activities," rather than those "used solely to finance the commercial transactions of other entities or of foreign states." *House*

Report 31. Central banks perform a number of sovereign monetary functions, including holding a foreign state's reserves, issuing currency, administering reserves in depository institutions, and setting monetary policy. See Paul L. Lee, *Central Banks and Sovereign Immunity*, 41 Colum. J. Transnat'l L. 327, 352-353 (2003). Funds used for those purposes are immune from execution under Section 1611(b)(1). Pet. App. 45a.

Petitioners argue (Pet. 15-16) that assets "held for [the central bank's] *own* account," 28 U.S.C. 1611(b)(1) (emphasis added), are limited to those over which the central bank has exclusive ownership. That argument is refuted by Congress's express statement that the property may be both that of the central bank and that of the foreign state itself. *Ibid.* And to the extent that petitioners contend that the funds must be used only to further the independent interests of the central bank, rather than the broader interests of its parent foreign government, the court of appeals correctly rejected that argument. Pet. App. 40a-42a. A central bank implements monetary policy for the benefit of the foreign state as a whole, and it is unclear what standards a court would employ to distinguish between a central bank's "own" interests and those of its parent state for these purposes.[1] *Id.* at 42a.

[1] Petitioners observe (Reply Br. 8) that Section 1611(b)(2) immunizes certain property that is "under the control of a military authority or defense agency," and argue that Congress would have employed the same language in Section 1611(b)(1) had it meant to encompass property of a foreign state. Section 1611(b)(2) raises no such inference. That provision is designed to provide broad protection to all property over which a military agency or a "civilian defense organization" has "authority over disposition and use" or "physical control," in order to ensure similarly broad reciprocal protections for "military property of the United States abroad." *House Report* 31.

2. Construing Section 1611(b)(1) to require only that the property in question be held for the central bank's own account, regardless of the central bank's degree of independence from its parent foreign state, furthers the provision's purposes. Many central banks maintain extensive portions of their countries' reserves in the United States in dollar-denominated assets, and Congress was concerned that permitting attachment and execution against those assets could discourage "deposit of foreign funds in the United States." *House Report* 31. In addition, because foreign reserves are, in a general sense, the property of the foreign state, and because central banks and their parent states may use the property for core sovereign monetary functions, permitting execution "could cause significant foreign relations problems." *Ibid.* These concerns are implicated whenever a plaintiff attempts to execute against central-bank property used for sovereign purposes, regardless of the central bank's degree of independence from its parent government.

Petitioners' view, moreover, would undermine the certainty and predictability fostered by Section 1611(b)(1) by rendering immunity contingent on a court's *post hoc* finding that the central bank was sufficiently independent from its parent government at the relevant time. The outcome of the alter-ego analysis may be difficult for foreign central banks to predict—a concern that is aptly illustrated by this case, as the district court incorrectly viewed certain customary central banking practices as evidence that BCRA functioned as Argentina's alter ego. See Part III, *infra*. Construing Section 1611(b)(1) to turn on central-bank independence could therefore prompt foreign governments to withdraw their reserves from the United States, which in

turn would have an adverse impact on the United States economy and financial system.

3. The FSIA's legislative history reinforces the conclusion that Section 1611(b)(1) does not require central bank independence or distinguish between the property of the central bank and its parent government. The *House Report*, in discussing Section 1611(b)(1), explains that its purpose is to protect "funds of a foreign central bank * * * deposited in the United States," because "execution against the *reserves of foreign states*" could have adverse consequences for the United States. *House Report* 31 (emphasis added). By referring to foreign reserves as both the property "of a foreign state" and the funds "of a foreign central bank," Congress confirmed its understanding that assets could be regarded as central-bank property even though they also constitute the property of the foreign state.

That understanding was shared by the State Department. In 1973, the House of Representatives considered a provision materially indistinguishable from Section 1611(b)(1) in an unenacted predecessor to the FSIA. H.R. 3493, 93d Cong., 1st Sess. § 1. State Department Acting Legal Adviser Charles Brower testified that the purpose of the provision was to prevent attachment or execution against the "*property of foreign states*, even if [the property] relate[s] to the commercial activities of a foreign state and would otherwise come within the scope of 1610." *Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the H. Comm. on the Judiciary*, 93d Cong., 1st Sess. 25 (1973) (emphasis added).

Indeed, shortly before enactment of the FSIA, the State Department had recognized the immunity of foreign reserve assets that, though they were held by a

central bank, were under the direction and control of the foreign state. See 1973 Dig. of U.S. Prac. Int'l Law 227-228 (describing July 24, 1973, letter from Acting Legal Adviser to Department of Justice, requesting the filing of a suggestion of immunity in *Battery Steamship Corp.* v. *Republic of Viet-Nam*, No. C-72-1440 (N.D. Cal.)). The State Department explained that the plaintiff sought to attach funds that were "deposited to the account" of the "central bank of Viet-Nam." *Id.* at 227. Because the funds "represent[ed] foreign exchange reserves of the Republic of Viet-Nam" and were used by the Republic to pay its debts to other governments, the State Department concluded that the funds were used "for the performance of the functions of the National Bank of Viet-Nam as a central bank," and "[a]ccordingly" recognized "the claim of the Republic of Viet-Nam for immunity of the funds of the [central bank] of Viet-Nam * * * from attachment." *Ibid.* The Acting Legal Adviser also indicated that the State Department's determination was consistent with Section 1611(b)(1)'s unenacted predecessor, which was pending before Congress at the time.

4. Finally, the "alter ego" inquiry proposed by petitioners is particularly anomalous in light of "the historical backdrop against which the FSIA was passed." Pet. App. 35a. At the time of the FSIA's enactment, "most central banks in the world functioned as departments of ministries of finance," *ibid.*—and such departments were generally not completely independent from the government itself. See *id.* at 35a-37a; Cukierman 722. When Congress passed the FSIA, therefore, "it had no reason to believe that foreign central banks and monetary authorities would be independent of their parent states." Pet. App. 35a.

B. As petitioners acknowledge (Pet. 20, 22), the court of appeals' decision does not conflict with any decision of this Court or any other court of appeals.

Petitioners contend, however, that the decision warrants further review because it will "accord unintended and unjustifiable protection to the assets of malfeasant sovereigns and * * * inject enormous uncertainty into" the FSIA. Pet. 22. Petitioners are incorrect. Rather than departing from settled principles, the court of appeals confirmed the State Department's understanding that central-bank property used for central banking functions is entitled to immunity. See pp. 13-14, *supra*; see also Ernest T. Patrikis, *Foreign Central Bank Property: Immunity from Attachment in the United States*, 1982 U. Ill. L. Rev. 265, 272, 286 (1982). Indeed, petitioners have not identified any instance in which property held by a country's central bank and used for central banking functions has been subject to execution or attachment to satisfy a judgment against a foreign state. In light of this tradition of according broad immunity to central-bank property, petitioners' assertion that the court of appeals' decision will have adverse effects is wholly speculative.[2]

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[2] In asserting that foreign states will "smuggle" their assets into central bank accounts in order to defeat execution (Pet. 21), petitioners give short shrift to Section 1611(b)(1)'s requirement that the property of the foreign central bank must be "held for its own account." Central-bank property is not immune if the plaintiff demonstrates "with specificity that the funds are not being used for central banking functions as such functions are normally understood." Pet. App. 45a. Petitioners contend (Pet. 21) that this standard will "deprive those victimized by foreign nations of just recoveries," but they provide no basis for so assuming. Should petitioners' prediction come to pass in a future case, the affected parties may seek the Court's review.

II. A FOREIGN STATE'S WAIVER OF IMMUNITY FOR FOREIGN-STATE PROPERTY DOES NOT WAIVE THE IMMUNITY OF CENTRAL-BANK FUNDS UNDER SECTION 1611(b)(1)

A. The court of appeals also correctly held that a general waiver of immunity by a foreign state does not waive immunity for funds held by its central bank and used for central banking activities. Under Section 1611(b)(1), the property of a foreign central bank or monetary authority held for its own account is immune from execution or attachment "unless such bank or authority, or its parent foreign government, has explicitly waived its immunity." 28 U.S.C. 1611(b)(1). As the court of appeals recognized, although Argentina had waived its right to assert immunity "for [Argentina] or any of its revenues, assets or property," Argentina has never explicitly waived the immunity of BCRA's property. See Pet. App. 48a. Petitioners do not contend otherwise. See Pet. 24. Rather, they argue that the district court's alter-ego finding necessitates that Argentina's waiver of its immunity be imputed to BCRA's property. Pet. 24-25. Petitioners are incorrect.

Section 1611(b)(1) expressly contemplates that a "parent foreign government" may waive the immunity of its central bank's property, but the provision requires that the waiver be "explicit[]." 28 U.S.C. 1611(b)(1). That requirement distinguishes Section 1611(b)(1) from the FSIA's provisions governing waiver of immunity from jurisdiction and from post-judgment attachment and execution against sovereign property. Those provisions permit a foreign state to waive immunity *implicitly*, such as by appearing in an action without asserting immunity. See 28 U.S.C. 1605(a)(1); 28 U.S.C. 1610(a)(1); *House Report* 18. Thus, in the context of

immunity under Sections 1605(a)(1) and 1610(a)(1), a foreign sovereign faces the possibility that a court may conclude that the state's conduct should be retrospectively interpreted as an implicit waiver of immunity.

By contrast, Section 1611(b)(1)'s requirement of an explicit waiver reflects Congress's conclusion that in the context of central-bank assets used for central banking functions, uncertainty about the possibility of being held to have implicitly waived immunity could discourage foreign states from placing their reserves in the United States and result in adverse foreign relations consequences.[3] See *House Report* 31 ("If execution could be levied on such funds without an explicit waiver, deposit of foreign funds in the United States might be discouraged."). Petitioners' argument that immunity for central-bank funds should be deemed to have been waived based on a judicial finding that the bank is not sufficiently independent is therefore inconsistent with both the textual requirement that the waiver for such funds be explicit and the congressional purpose of protecting the certainty surrounding sovereign central-bank transactions in the United States.

Petitioners argue, however, that *Bancec*, *supra*, requires a court to "impute a sovereign's waiver of immunity with respect to execution of judgments to its alter ego instrumentalities." Pet. 25. Petitioners rely on *Bancec*'s statement that when "a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created . . . *one may be held*

[3] That conclusion is underscored by Section 1610(d)(1), the only other FSIA provision that requires an explicit waiver, which applies to the immunity of foreign-state property from pre-judgment attachment. Pre-judgment attachment may be accomplished with little notice and may have significant foreign-relations implications. See *House Report* 30.

liable for the actions of the other." Pet. 24 (quoting *Bancec*, 462 U.S. at 629) (emphasis in petition). *Bancec* has no bearing on the adequacy of a waiver under Section 1611(b)(1). In *Bancec*, this Court held that the separate juridical status of Bancec, a foreign state instrumentality that had brought an action against Citibank, should not be given effect. After filing its complaint, Bancec was dissolved, making the Republic of Cuba "the real beneficiary" of the action. 462 U.S. at 632-633. The Court held that Citibank could set off the value of assets seized by the Republic of Cuba against its claimed liability to Bancec because it would be unjust to allow the Republic of Cuba to invoke the separate juridical status of Bancec to avoid "answering for the seizure of Citibank's assets." *Id.* at 632. The *Bancec* Court's conclusion that in certain circumstances "equitable principles" may justify holding a state instrumentality *liable* for the actions taken by its parent government does not imply anything about the circumstances in which a parent government's waiver of its own immunity should be imputed to an agency or instrumentality. Nor, in particular, does *Bancec* suggest that Section 1611(b)(1)'s requirement of an explicit waiver could be satisfied by the existence of alter-ego situations.

B. The court of appeals' waiver holding does not conflict with the decision of any other court of appeals. The decisions on which petitioners rely (Pet. 24-31) do not concern Section 1611(b)(1) or a foreign central bank or monetary authority. Rather, to the extent those decisions suggest that one foreign sovereign entity's waiver may bind its alter egos, they concern waivers under Sections 1605(a)(1) or 1610(a)(1), which permit implicit

waivers. They are therefore inapposite here.[4] See, *e.g.*, *S & Davis Int'l, Inc.* v. *Republic of Yemen*, 218 F.3d 1292, 1298-1301 (11th Cir. 2000) (considering whether an instrumentality had "implicitly" waived the foreign state's immunity under Section 1605(a)(1) by agreeing to arbitrate, and concluding that no waiver occurred); *Chuidian* v. *Philippine Nat'l Bank*, 912 F.2d 1095, 1103-1105 (9th Cir. 1990) (holding that one instrumentality could not implicitly waive the immunity from suit of a "juridically separate" instrumentality, without considering whether the outcome would change if the entities were not juridically separate), abrogated on other grounds, *Samantar* v. *Yousuf*, 130 S. Ct. 2278 (2010); *Hercaire Int'l, Inc.* v. *Argentina*, 821 F.2d 559, 564 (11th Cir. 1987) (stating that the scope of a waiver of immunity for purposes of Section 1610(a)(1) and (b)(1) turned on an instrumentality's "separate juridical existence," but finding that entities were independent).

In any event, because the question whether Argentina's waiver of its own immunity is sufficient to waive the immunity of funds held by BCRA is governed by Section 1611(b)(1), this case does not present a vehicle to consider more generally when a foreign state's waiver of immunity can be imputed to its instrumentality for purposes of the FSIA's other waiver provisions. Nor does this case present an occasion to consider the situations in which commercial activity by an agency or instrumentality that has been determined to be an "alter

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[4] Petitioners also rely (Pet. 27-28) on decisions suggesting that the commercial activity of an instrumentality may be sufficient to render the foreign state itself amenable to suit under Section 1605(a)(2)'s commercial activities exception. See, *e.g.*, *Hester Int'l Corp.* v. *Federal Republic of Nigeria*, 879 F.2d 170 (5th Cir. 1989). Those decisions are similarly inapposite.

ego" of the foreign state may be "imputed to the sovereign" itself (Pet. 28).

III. THIS COURT'S REVIEW IS ALSO UNWARRANTED BECAUSE THE DISTRICT COURT'S ALTER-EGO ANALYSIS WAS FLAWED

Petitioners' arguments concerning both questions presented are premised on the assumption that the district court correctly held that BCRA is not juridically separate from Argentina. See, *e.g.*, Pet. i; see *Bancec*, 462 U.S. at 629. Because the court of appeals correctly concluded that the BCRA funds at issue are immune under Section 1611(b)(1) whether or not BCRA is Argentina's alter ego, the court had no occasion to "reach the question of whether the District Court correctly determined that [Argentina's] control of BCRA was sufficient to disregard the presumption of juridical separateness." Pet. App. 50a n.24. If the Court were to grant certiorari and rule in petitioners' favor, the alter-ego question would remain to be resolved on remand from this Court. Because the district court's alter-ego ruling suffers from significant flaws, there is a substantial possibility that petitioners would gain little practical benefit even if the Court were to grant review and rule in their favor.

In concluding that BCRA is an alter ego of Argentina despite the district court's conclusion that Argentina "did not manage the day-to-day operations of BCRA," Pet. App. 107a, the district court relied heavily on BCRA's involvement in repaying Argentina's debts to the IMF, *id.* at 108a. The court appears to have concluded that Argentina's repaying the IMF in preference to its other creditors was unjust, and that BCRA's involvement demonstrated that the bank is controlled by Argentina. *Id.* at 109a-111a. But Argentina's decision

to pay the IMF before its other creditors is consistent with the longstanding policy of the United States and the other sovereign members of the IMF to recognize the IMF's preferred creditor status. In order to protect the funds of its member states—including the funds invested by the United States—the IMF rightly expects to be paid even when other creditors are not. Int'l Monetary Fund, *Financial Risk in the Fund and the Level of Precautionary Balances* 4 (2004).

BCRA's involvement in Argentina's payment to the IMF, moreover, was not unusual, as even central banks that are relatively independent commonly perform payment functions for their governments. See *EM Ltd.* v. *Republic of Argentina*, 473 F.3d 463, 485 n.22 (2d Cir.), cert. denied, 552 U.S. 818 (2007). Indeed, the IMF encouraged Argentina to repay its loans using its reserves held by BCRA. Argentina's decision to do so is therefore not indicative of the sort of extensive control—or of fraud and injustice—that concerned this Court in *Bancec*. See 462 U.S. at 629, 632.

Other aspects of the district court's analysis may also be problematic. For instance, the court relied on Argentina's involvement in BCRA's decision to increase its U.S. dollar reserves, Pet. App. 108a, but such coordination is not invariably evidence of an alter ego relationship. Neither is the fact that a foreign central bank's dollar purchases are intended to serve the interests of the foreign state, *ibid.*, or that the central bank paid creditors other than the IMF, *id.* at 109a. Whether these actions evidence a principal-agent relationship—or simply the consultation that may be expected between a foreign government and its central bank—may depend on the circumstances, see *Bancec*, 462 U.S. at 629, but the district court appears to have viewed these factors

as per se evidence of pervasive control giving rise to alter-ego status. Pet. App. 108a-109a. Because the district court's alter-ego analysis was flawed and the court of appeals did not pass on that aspect of the district court's decision, petitioners might ultimately receive little benefit even if the Court were to grant review and rule in their favor.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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