No. 08-1467

In The
Supreme Court of the United States

NICOLAS CARRANZA,

Petitioner,

v.

ANA PATRICIA CHAVEZ, CECILIA SANTOS, JOSE FRANCISCO CALDERON, ERLINDA FRANCO, DANIEL ALVARADO

Respondents.

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

REPLY BRIEF OF PETITIONER

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Respondents' Brief in Opposition ("Br. in Opp.") misstates facts and law.

1. Rule 10 comprises precisely this petition.

The Sixth Circuit cannot be said to have "properly stated [the] rule of law" enunciated in *F. Hoffmann-LaRoche v. Empagram*, 542 U.S. 155 (2004), and *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). Rather, its decision conflicts with those manifestly relevant decisions by this Court, impelling the granting of a writ pursuant to. Sup. Ct. R. 10(4). *Contra* Br. in Opp. 3-5.

2. Petitioner may assert the Amnesty Law and still plead Respondents' failure to exhaust local remedies.

It was undisputed at trial that the allegations against Petitioner fell within the class of crimes covered by El Salvador's Amnesty Law. Appendix ("App.") 87a-88a. The Salvadoran Supreme Court has inferred the discretion to entertain certain claims within the law's ambit. Nonetheless, Respondents made no attempt to pursue any of their claims before a Salvadoran court. El Salvador is entitled to regulate and provide redress for its own controversies no less than were the foreign countries subject of *Hoffmann*'s proscription against the "legal imperialism" inherent in undermining a foreign country's antitrust regulation by imposing American requirements on conduct with exclusively foreign repercussions. *See Hoffman*, 542 U.S. at 169.

Respondents mislead when they characterize this case as a claim by United States citizens against a United States citizen. See Br. in Opp. 7. At the time of the acts alleged by Respondents, over 20 years before the claims were filed, none of the parties was a United States citizen.

Petitioner never conceded the issue of exhaustion of remedies, *contra* Br. in Opp. 7, but only acknowledged in an earlier appellate brief the trial court's finding that the Amnesty Law granted absolute immunity. App. 87a.

3. Petitioner has no burden to prove the trial court's lack of jurisdiction.

Respondents claim Petitioner failed to meet his burden of proof as to his "affirmative defense" of entitlement to the protections of the Amnesty Law. *See* Br. in Opp. 9-10. In truth, he was prevented by the trial court from presenting evidence to amplify his challenge to the court's jurisdiction when the court refused to hear Dr. Galindo on the law's meaning and provenance. App. 37a.

A federal court's subject matter jurisdiction is not presumed and the burden of establishing it "rests with the party asserting jurisdiction." *Kokkonen v. Guardian Life Insurance Co.*, 511 U.S. 375, 377 (1994), *quoting McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 183-83 (1936). Consequently, the trial court's refusal to hear Dr. Galindo precluded satisfaction of Respondents' burden to establish jurisdiction.

Dr. Galindo's testimony on the law was not, in fact, an "[in]appropriate subject for expert testimony." Br. in Opp. at 11. The Sixth Circuit has more than once affirmed such testimony before a judge alone. *See Johnson v. Ventra Group*, 191 F.3d 732, 742 (6th Cir. 1999).

None the cases cited by Respondents, *see* Br. in Opp. 9-10, remotely touched on foreign amnesties, conflict of laws or comity. *Dixon v. United States*, 458 U.S. 1, 8 (2006), *Crawford-El v. Britton*, 523 U.S. 574, 587 (1998), and *Harlow v. Fitzgerald*, 457 U.S. 800, 811-13 (1982) discuss affirmative defenses available to victims of duress, prison guards, and White House advisers, respectively.

4. The trial court's exercise of jurisdiction is subject to review de novo.

The threshold issue before the trial court, whether the jurisdiction of ATCA and TVPA properly extended to this case, is subject to review *de novo*. *See, e.g., Taveras v. Taveraz*, 477 F.3d 767, 771 (6th Cir. 2007). *Contra* Br. in Opp. 2. The discrete issue of whether or not the Amnesty Law deserved deference as a matter of comity presents only once jurisdiction is affirmed. Nonetheless, the trial court amply abused its discretion in denying comity – by finding "no conflict," App. 36a, between domestic law and the Amnesty Law after refusing to hear the only evidence proffered as to the Amnesty Law's meaning, the testimony of Dr. Galindo, and by ignoring the proscriptions of *Hoffmann* and *Sosa*.

5. Considerations of comity do not turn on a person's inability to obey the law of two countries.

All considerations of comity are not, in fact, presaged upon a circumstance where a person's compliance with the laws of two jurisdictions is impossible. *Contra* Br. in Opp. 12. *Hilton v. Guyot*, 159 U.S. 113, 164 (1895) mentions no such requirement when it describes comity as the "recognition which one nation allows... to the legislative, judicial or executive acts of another."

The lower courts and Respondents, *see* App. 14a, Br. in Opp. 12, both cite *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993), to say that any consideration of comity requires a "true conflict" or that a person subject to the laws of two jurisdictions be unable to comply with both. *Hartford* so defines a "true conflict," but also states that "international comity would not counsel against exercising jurisdiction in the circumstances alleged here." *Id.* at 798-800. Consequently, its requirement of a "true conflict" for application of comity sounds in *dictum* rendering it less than binding. Moreover, the decision's ambit does not extend to considerations of comity as to all foreign laws. *Hartford* entailed divergent restrictions on commercial conduct in Britain and the United States and addressed the application of comity to the discrepancy inherent therein. *Hartford* arguably appertains to the application of comity to laws enjoining people by prohibiting certain conduct. The Amnesty Law, however, only enjoins courts by mandating certain protections for people.

A law enjoining only courts is not susceptible to an analysis of whether a person can comply with it-compliance with such a law is the province of a court. Such a law however, should be susceptible to an analysis of whether a court can reconcile its obligations thereunder with those created by another law. In fact, one of the cases cited by Respondents, *In re Maxwell Communication Corp.*, 93 F.3d 1036 (2d Cir. 1996), *see* Br. in Opp. 4, considered discrepancies between American and British bankruptcy laws and found the laws to be in conflict as "it is impossible to distribute the debtor's assets in a manner consistent with both rules." *Id.* at 1050. Even if jurisdiction could be found notwithstanding the prudential considerations of *Hoffmann* and *Sosa*, the ATCA and TVPA, as read by the lower courts, would certainly conflict with the Amnesty Law since the parties' rights could not be determined in a manner consistent with both countries' laws.

6. Extraterritorial application of the Amnesty Law does not require an express reflection of such intent within the Amnesty Law.

A law enjoining only courts cannot mandate any extraterritorial effect. No sovereign can dictate the judicial conduct of another. The insistence of the lower courts and Respondents upon an expression of such intent in the Amnesty Law, *see* App. 14a, Br. in Opp. 13, is mistaken. The case cited, *BMW Stores v. Peugeot*, 860 F.2d 212 (6th Cir. 1988), entailed a

Kentucky law enjoining people by forbidding certain conduct. *Id.* at 213.[1]

7. The proscriptions of Hoffmann and Sosa should have precluded the trial court's jurisdiction.

The expressly extraterritorial intent of the ATCA and TVPA does not diminish *Hoffmann*'s pertinence. *Contra* Br. in Opp. 8-9. *Hoffmann* dealt with the Foreign Trade Antitrust Improvements Act ("FTAIA") which contains an express limitation of its application overseas. Nonetheless, *Hoffmann* relies on broader principles such as the *Restatement Third of Foreign Relations Law of the United States* which proscribe extraterritorial proscriptive jurisdiction and whose pertinence is not limited to the FTAIA.

Moreover, the legislative history of the TVPA reveals Congress's intent that the TVPA not overbear a foreign amnesty since "immunity from suit" is one of the bases specified for tolling the law's 10 year statute of limitations. S. Rep. No. 102-249, at 10-11.

The lower courts and Respondents fail even to mention *Sosa*'s specific admonition against exercising ATCA or TVPA jurisdiction in contravention of the reconciliation of a foreign internal conflict. *See Sosa*, 542 U.S. at 733 n.21.

[1] It bears noting that the only authority cited by the *BMW* court for its ruling was *American Jurisprudence*. *Id.* at 215 n.1.

8. Petitioner seeks judicial notice only of official documents, not "internet documents."

Every one of the documents subject of Petitioner's request for judicial notice is an official publication of either the United States or the Salvadoran government. *Contra* Br. in Opp. 17. Citations to web references are offered for the convenience of the reader.

9. The silence of the Department of State at this juncture should not prejudice this petition.

The silence of the State Department, *see* Br. in Opp. 2, does not undo its deep involvement with the formulation of the Amnesty Law and its earlier pronouncements of the law's criticality to El Salvador's peace. Rather, the silence implies a continuation of its position that the Amnesty Law was a prerequisite to ending El Salvador's civil war. As the product of an extensive undertaking by a political branch, the Amnesty Law should have been spared the trial court's intrusion. *See First Natl. City Bank v. Banco Nacl. de Cuba*, 406 U.S. 759, 766 (1972).

10. The prudential concerns precluding the exercise of ATCA and TVPA jurisdiction are not limited to circumstances auguring the complete collapse of a foreign nation.

Respondents deride as a "parade of horribles," *see* Br. in Opp. 14, Petitioner's description of the practical consequences of the lower courts' decision. El Salvador's civil war, however, was certifiably horrible. The alternative to the integrity of the Amnesty Law as a pivotal bulwark against armed conflict would, in fact, appear to be horrible. Moreover, no authority suggests that the prudential concerns of *Hoffmann* and *Sosa* or the considerations of comity are implicated only in the most extreme circumstance when a court's action is perceived as likely to destroy another country.[2]

[2] The lower courts aside, no court has specifically ruled that the Amnesty Law does not preclude jurisdiction under the ATCA or TVPA. Of the earlier decisions cited by Respondents on ATCA or TVPA claims arising from El Salvador's civil war, see Br. in Opp. 15-16, only one, *Doe v. Saravia*, 348 F. Supp. 2d 1112, 1153 (E.D. Cal. 2004), mentions the Amnesty Law. That decision, the product of a default judgment, mentions the law in a discussion of exhaustion of local remedies flawed by the court's unawareness of the Salvadoran Supreme Court's inference of the discretion to consider limited cases arising from the civil war.

CONCLUSION

Respondents' Brief in Opposition offers no good reason to deny the petition.

Respectfully submitted,

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