No. 07-615

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In The

Supreme Court of the United States

MINISTRY OF DEFENSE AND SUPPORT
FOR THE ARMED FORCES OF THE
ISLAMIC REPUBLIC OF IRAN,

Petitioner,

v.

DARIUSH ELAHI,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Has Petitioner presented any compelling reasons to grant its petition where the Ninth Circuit's opinion below addresses a unique set of facts that does not implicate any significant area of controversy involving foreign sovereign immunity, raises no important question of law appropriate for Supreme Court review, and is not in conflict with a decision of this Court or a court of appeals?

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Dariush Elahi, respectfully opposes the petition for writ of certiorari of the Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran ("MOD") because the decision below of the Ninth Circuit raises no important question of law appropriate for Supreme Court review, is consistent with the decisions of other circuit courts, and, in any event, was correctly decided. In sum, the petition is nothing more than a classic request for error correction that satisfies none of the criteria governing review by this Court. See Sup.Ct.R. 10. Accordingly, certiorari should be denied.

STATEMENT OF THE CASE

Elahi's Judgment Against Iran and MOIS

On October 23, 1990, Cyrus Elahi, a United States national, was assassinated by agents of the Islamic Republic of Iran ("Iran") and the Iranian Ministry of Information and Security ("MOIS"). *Elahi v. Islamic Republic of Iran,* 124 F. Supp.2d 97, 99, 105 (D.D.C. 2000). Cyrus Elahi was targeted by Iran for this act of state sponsored terrorism because he had become a vocal and effective advocate for a "free and democratic Iran" and, as a consequence, represented a threat to the Iranian clerical regime. *Id.* at 103.

In order to obtain redress for the brutal murder of Cyrus Elahi and in furtherance of the goals of the

United States government to combat and eliminate international terrorism, Dariush Elahi, a naturalized United States citizen and administrator of his brother's estate, filed suit against Iran in the United States District Court for the District of Columbia. 124 F. Supp.2d at 99. Suit was filed pursuant to the Antiterrorism and Effective Death Penalty Act of 1996, P.L. 104-132, Tit. II, §221(a), 110 Stat. 1241, codified at 28 U.S.C. § 1605 *et seq.* ("Antiterrorism Act"). The Act creates an exception to foreign sovereign immunity under the Foreign Sovereign Immunities Act ("FSIA") and authorizes a judicial forum against state sponsors of terrorism, such as Iran. See 28 U.S.C. § 1605(a)(7).[1] Both Iran and the MOIS were properly served pursuant to the statute. Neither party entered an appearance or responded to the lawsuit, however. *Id.*

Prior to obtaining a judgment for damages against Iran and MOIS, Dariush Elahi, over the course of a two-day hearing, presented evidence satisfactory to the district court establishing the liability of Iran and MOIS for the murder of Cyrus Elahi. 124 F. Supp.2d at 100.[2] After hearing this

[1] Iran has been designated a state sponsor of terrorism by the United States Department of State. See 49 Fed. Reg. 47702 (Dec. 6, 1984).

[2] Before a court may enter a default judgment against a foreign state, the FSIA requires that the plaintiff "establish [] his claim or right to relief by evidence that is satisfactory to the Court." 28 U.S.C. § 1608(e).

(Continued on following page)

evidence, the court "engaged in a systematic review of the evidence . . . and the legal issues raised" and issued a detailed opinion setting forth the basis for its ruling that both Iran and MOIS were responsible for the assassination of Cyrus Elahi. *Id.* The district court entered a judgment on December 20, 2000 in favor of Dariush Elahi against Iran and MOIS, jointly and severally, for $11,740,035 in compensatory damages and against MOIS for $300,000,000 in punitive damages. *Id.* at 115.

Elahi's Attachment of the Cubic Judgment

Subsequently, on November 1, 2001, Dariush Elahi registered his judgment in the United States District Court for the Southern District of California and filed a notice of lien in the amount of his compensatory damages award against any distribution of a judgment in favor of MOD. App. 86. That judgment ("the Cubic judgment") confirms an International Chamber of Commerce ("ICC") arbitration award in favor of MOD and against Cubic Defense Systems, Inc. ("Cubic") for approximately $2.8 million. *Ministry of Defense and Support for the Armed Forces of the*

The evidence presented at the court hearing in Mr. Elahi's case included testimony by experts on Iran's support of international terrorism and information from the French judicial authorities, who investigated Cyrus Elahi's assassination and obtained the conviction of several Iranian nationals for having engaged in the conspiracy to assassinate Cyrus Elahi and others. 124 F. Supp.2d at 101-105.

Islamic Republic of Iran v. Cubic Defense Systems, Inc. (*"MOD v. Cubic"*), 29 F. Supp.2d 1168 (S.D. Cal. 1998).

The dispute that resulted in the Cubic judgment arose out of two contracts entered into in October, 1977 by Cubic and MOD's predecessor. The contracts involved Cubic's sale and service of an Air Combat Maneuvering Range ("ACMR") for use by the Iranian Air Force. *MOD v. Cubic*, 29 F. Supp. at 1170. MOD made a partial payment on the ACMR, but following the Iranian revolution in 1979, the delivery of the ACMR to MOD did not take place for reasons disputed by MOD and Cubic. In 1991, MOD filed a request for arbitration against Cubic with the ICC. Following the submissions of the parties, the ICC issued a final award in favor of MOD and against Cubic. In June, 1998, MOD filed a petition in the U.S. District Court of the Southern District of California to confirm the ICC award. On December 7, 1998, the district court granted MOD's petition and confirmed the award. *Id.* at 1174.

Both Cubic and MOD took cross-appeals of the district court's order. These appeals presently are pending before the Ninth Circuit. In the interim, Cubic has posted a bond to secure the judgment against it. App. 83.

On September 13, 2002, MOD filed in the district court for the Southern District of California a "Motion for a Judicial Determination that Its Judgment Against Cubic Defense Systems Is Immune from

Attachment or Execution by Dariush Elahi." App. 86. On November 26, 2002, the district court denied MOD's motion and upheld the validity of Mr. Elahi's lien. See *MOD v. Cubic,* 236 F. Supp.2d 1140 (S.D. Cal. 2002), reprinted at App. 81.

Ninth Circuit's First Decision and Supreme Court Remand

Subsequently, MOD appealed to the Ninth Circuit Court of Appeals the district court's ruling denying MOD's motion. On October 7, 2004, the court of appeals affirmed the district court's decision that the Cubic judgment is subject to attachment by Mr. Elahi. *Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Systems, Inc.*, 385 F.3d 1206 (9th Cir. 2004), reprinted at App. 38. The Ninth Circuit concluded that the Cubic judgment was subject to attachment by Mr. Elahi pursuant to Section 1610(b)(2) of the FSIA, 28 U.S.C. § 1610(b)(2). This statutory provision allows for the attachment of property of an "agency or instrumentality of a foreign state . . . engaged in commercial activity in the United States" where the claim is one for which the agency or instrumentality is not immune by virtue of certain statutory provisions, including FSIA Section 1605(a)(7), the statutory provision pursuant to which Mr. Elahi obtained his judgment. App. 64-65.

MOD appealed to the United States Supreme Court, which granted *certiorari* on the limited question of whether MOD constituted an agency or instrumentality of a foreign state, rather than a foreign state itself. See *Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Elahi*, 546 U.S. 450, 126 S.Ct. 1193, 1194 (2006) (*per curiam*). Finding that the Ninth Circuit had not specifically determined that MOD was an agency or instrumentality of Iran, the Supreme Court remanded the matter for further consideration. 126 S.Ct. at 1195.

Ninth Circuit's Second Decision on Remand

On remand, the Ninth Circuit requested two rounds of supplemental briefing and permitted the United States to appear as *amicus curiae*. This supplemental briefing addressed two additional issues that had not been considered by the Ninth Circuit in its earlier opinion. App. 9-10.

The first issue concerned the effect of Mr. Elahi's receipt of approximately $2.3 million from the United States Treasury in partial satisfaction of his compensatory damages award against Iran and MOIS. Mr. Elahi became eligible for this payment pursuant to an amendment to the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 2002(a)(2)(D) (as amended by the Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, § 201(c)(4), 116 Stat. 2322, 2337). This

amendment directed the Secretary of the Treasury to make pro rata, partial payments of compensatory damage awards to certain judgment creditors of Iran who had filed suit before October 28, 2000 based on claims of state-sponsored terrorism. This category of judgment creditors included Mr. Elahi. App. 11-12. In receiving partial payment of his compensatory damage award, the statute required that Mr. Elahi agree to relinquish, *inter alia*, his right to "execute against or attach property that is at issue in claims against the United States before an international tribunal." See App. 10.

In the Ninth Circuit remand proceedings, both MOD and the United States argued that by accepting partial payment from the Secretary of Treasury, Mr. Elahi had waived his right to attach the Cubic judgment because the judgment purportedly is "at issue" in Claim B/61 brought by Iran against the United States before the Iran-U.S. Claims Tribunal (the "Tribunal") in the Hague. The Tribunal was created by mutual agreement of Iran and the United States as part of the Algiers Accords.[3] The Tribunal has

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[3] The Algiers Accords, which were signed on January 19, 1981, resolved various disputes between Iran and the United States, including the release of the American hostages at the U.S. Embassy in Tehran. The main commitments of the Algiers Accords were (1) the release by Iran of the American hostages and (2) the agreement by the United States to "restore the financial position of Iran, in so far as possible, to that which existed prior to November 14, 1979." App. 13, n. 4, quoting

(Continued on following page)

jurisdiction only over claims brought against the United States or Iran and counterclaims arising from the same transactions. App. 7.[4] In Claim B/61, Iran asserts that the United States violated the Algiers Accords by failing to restore certain frozen Iranian assets. App. 13.

The second additional issue involved Mr. Elahi's right to attach the Cubic judgment under Section 201(a) of the Terrorism Risk Insurance Act ("TRIA").[5] This statutory provision authorizes persons, like Mr. Elahi, with judgments "against a terrorist party," like Iran, to attach the "blocked assets" of that party. The statute defines the term "blocked asset," in relevant part, as being "any asset seized or frozen by the United States . . . under sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. §§ 1701; 1702)." TRIA § 201(d)(2)(A). Both MOD and the United States argued that the Cubic

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General Declaration, General Principles, A at 1, available at http://www.iusct.org/general-declaration.pdf.

[4] Specifically, the Tribunal hears the following disputes: (1) claims brought by nationals of one state against the government of the other, and related counterclaims; (2) intergovernmental claims arising out of contracts for the purchase and sale of goods and services; and (3) intergovernmental claims regarding the interpretation of the Algiers Accords. App. 7.

[5] In the earlier Ninth Circuit proceedings, Mr. Elahi had argued that he had the right to attach the Cubic judgment pursuant to Section 201(a) of the TRIA. In its first decision, the circuit court did not consider this argument due to its determination that the Cubic judgment was subject to attachment pursuant to Section 1610(b)(2) of the FSIA. App. 66.

judgment did not constitute a "blocked asset" under this definition.

On May 30, 2007, the Ninth Circuit issued its opinion in the case and upheld the validity of Mr. Elahi's lien. In doing so, the appeals court first held that Mr. Elahi had not relinquished his right to attach the Cubic judgment by receiving funds from the U.S. Treasury because the judgment was not "at issue" in claims before an international tribunal. See App. 11-14. The Ninth Circuit reasoned that the Cubic judgment is not "at issue" in the Iran-U.S. Claims Tribunal by contrasting Cubic's contractual obligations to MOD, which were the subject of the ICC arbitration proceeding (and the subsequent district court judgment), and the United States' obligations to Iran, which are in the process of being addressed by the Tribunal. In doing so, the Ninth Circuit distinguished several decisions from other circuits involving attempts by the Hegna family, who are judgment creditors of Iran, to attach specific Iranian diplomatic or consular real properties, which indisputably are the subject of pending claims before the Tribunal. App. 14, n. 6 (citing the *Hegna* cases).

The Ninth Circuit next held that the Cubic judgment is subject to attachment under Section 201(a) of the TRIA. See App. 15-20. The appeals court determined that the Cubic judgment is a "blocked asset," which may be attached under the TRIA because "it represents Iran's interest in an asset" that was frozen by the United States in 1979 and never has been unblocked. See App. 20. The Ninth Circuit

expressly distinguished two cases involving Iranian property that entered the United States after the signing of the Algiers Accords in 1981 and after the U.S. government ceased its blocking of Iranian assets. App. 4 (citing *Bank of New York v. Rubin*, 2006 U.S. Dist. LEXIS 10215 (S.D.N.Y. Mar. 15, 2006); *Weinstein v. Islamic Republic of Iran*, 299 F. Supp.2d 63 (E.D.N.Y. 2004)).[6]

Circuit Judge Raymond C. Fisher dissented from the panel's holding only with respect to whether Mr. Elahi had relinquished his right to attach the Cubic judgment. See App. 28-37. In his dissent, Judge Fisher expressed his view that the Cubic judgment is "at issue" before the Iran-U.S. Claims Tribunal because "the Tribunal must determine the effect of the judgment on the amount of liability owed by the United States" (App. 32) and, hence, that Mr. Elahi had waived his right to attach the judgment. See App. 37.

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[6] The appeals court further found that because there was no evidence that MOD is a separately constituted "legal entity" distinct from the Iranian state, MOD should be deemed an inherent part of the state of Iran. App. 25. Hence, the court ruled that the Cubic judgment was not subject to attachment under Section 1610(b) of the FSIA as being property of an "agency or instrumentality" of a foreign state. The court also determined that the Cubic judgment was not "used for a commercial activity in the United States" and, hence, is not subject to attachment under Section 1610(a) of the FSIA. See App. 27-28.

Following the issuance of the Ninth Circuit's decision, MOD filed a petition for rehearing and rehearing *en banc*, which was denied by the court on July 17, 2007 in an order that also made some minor amendments to its earlier opinion. App. 4. On November 9, 2007, MOD filed its petition for writ of certiorari requesting that this Court grant review.

REASONS FOR DENYING WRIT

I. THIS CASE ADDRESSES A UNIQUE SET OF FACTS AND DOES NOT INVOLVE ANY MAJOR AREA OF CONTROVERSY UNDER THE FSIA.

Contrary to the argument of MOD, the Ninth Circuit's decision does not implicate to any degree "a major outstanding area of controversy in the application of foreign sovereign immunities." Petition at 13. MOD notes in its petition that a number of claimants have obtained judgments under FSIA Section 1605(a)(7) against state sponsors of terrorism (Petition at 15), but none of the other cases cited by MOD deal with circumstances similar to those addressed in the Ninth Circuit's opinion.

Rather, in this case, the Ninth Circuit dealt with a unique set of facts involving Mr. Elahi's attachment of a U.S. court judgment arising from a commercial transaction between MOD and a U.S. corporation. Whether this property, i.e., the Cubic judgment, is "at issue" before the Iran-U.S. Claims Tribunal is not a

matter of general applicability involving sovereign immunity. MOD has pointed to no similar case in which there is a dispute as to whether a U.S. court judgment in its favor is "at issue" before the Tribunal. Likewise, whether the Cubic judgment is subject to attachment as a "blocked asset" under the TRIA arises out of a specific set of circumstances which, again, do not broadly implicate foreign relations concerns. As far as Mr. Elahi is aware, there is no other judgment that MOD has obtained in a U.S. court that might be subject to attachment by a judgment creditor of Iran. In short, none of the issues dealt with by the Ninth Circuit are issues of general applicability under the FSIA.[7]

Just because the petitioner in this case is the ministry of defense of a foreign state does not automatically mean that the matter involves "significant foreign relations issues" (Petition at 16), which would warrant review by this Court. If it did, every time the ministry of a foreign state or a foreign state, itself, were involved in legal proceedings in circuit courts, this Court would be compelled to grant review of the

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[7] Although this Court recently has addressed issues involving the interpretation and application of the FSIA with respect to the appropriate standard for review of remand orders, *Powerex Corp. v. Reliant Energy Services, Inc.*, 127 S.Ct. 2411 (2007), and the immunity from property tax disputes of diplomatic buildings, *Permanent Mission of India to the United Nations v. City of New York*, 127 S.Ct. 2352 (2007), the Ninth Circuit's decision in this case does not raise similar issues of general application under the FSIA.

lower court decision. Even a cursory review of this Court's rulings denying certiorari confirms that a lower court decision involving a foreign state or a foreign ministry does not always merit or warrant Supreme Court review.[8]

II. THE NINTH CIRCUIT'S HOLDING THAT THE CUBIC JUDGMENT IS NOT "AT ISSUE" IN THE U.S.-IRAN CLAIMS TRIBUNAL DOES NOT CONFLICT WITH ANY RULINGS OF OTHER CIRCUITS, AND, IN ANY EVENT, IS CORRECT.

A. The Ninth Circuit's Ruling Is Not in "Manifest Conflict" with the Rulings of Other Circuit Courts.

In its Petition, MOD erroneously asserts that the Ninth Circuit's decision is in "manifest conflict" with the rulings of "at least four other circuits." Petition at 22. The cases cited by MOD all involve attempts by the Hegna family, who are judgment creditors of Iran,

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[8] See, e.g., *McDonnell Douglas Corp. v. Islamic Republic of Iran*, 474 U.S. 948 (1985); *McKesson HBOC, Inc. v. Islamic Republic of Iran*, 123 S.Ct. 341 (2002); *Maritime Int'l Nominees Establishment v. Republic of Guinea*, 464 U.S. 815 (1983); *Joseph v. Office of the Counselor Gen.*, 485 U.S. 905 (1988); *Maritime Int'l Nominees Establishment v. Republic of Guinea*, 464 U.S. 815 (1983); *Sun v. Taiwan*, 531 U.S. 979 (2002); *Jackson v. People's Republic of China*, 480 U.S. 917 (1987); *Texas Trading v. Nigeria*, 454 U.S. 1148 (1982).

to attach Iranian diplomatic and consular properties.[9] In each of these cases, which are all related and involve the same type of legal issues, the appeals court concluded that because Iran had filed claims against the United States in the Tribunal alleging that the U.S. had unlawfully "fail[ed] to grant Iran custody of its diplomatic and consular properties in the United States," the diplomatic property the Hegna family sought to attach was "at issue" before the Tribunal. See, e.g., *Hegna*, 376 F.3d at 435.

That the status and custody of Iranian diplomatic and consular properties may be "at issue" before the Tribunal certainly does not entail that the Cubic judgment enforcing an ICC arbitration award similarly is "at issue." The Cubic judgment, which enforces a commercial arbitration award, has none of the attributes of diplomatic or consular properties of the government of Iran. The two types of properties are totally separate and distinct.

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[9] See *Hegna v. Islamic Republic of Iran,* 380 F.3d 1000 (7th Cir. 2004) (holding that two condominium units that had served as Iranian consular residences was property "at issue before the tribunal"); *Hegna v. Islamic Republic of Iran*, 376 F.3d 226 (4th Cir. 2004), 235 (4th Cir. 2004) (former Iranian diplomatic properties were "at issue" before the claims tribunal); *Hegna v. Islamic Republic of Iran*, 402 F.3d 97 (2d Cir. 2005); *Hegna v. Islamic Republic of Iran*, 376 F.3d 485, 492-93 (5th Cir. 2004). Because of the inter-related nature of these decisions, it is overstating to claim, as MOD does in its petition, that the Ninth Circuit's ruling conflicts with decisions of *four* circuits.

Moreover, contrary to MOD's contentions (Petition at 23), the Ninth Circuit did not utilize a different definition of the term "at issue" than the circuit court decisions involving the Hegna family. For example, in *Hegna v. Islamic Republic of Iran*, 376 F.3d 485, 492 (5th Cir. 2004), the Fifth Circuit relied upon the definition of the term "at issue" as set forth in BLACK'S LAW DICTIONARY (8th ed. 2004) as being "under dispute" or "in question." This is the very same definition utilized by the Ninth Circuit in its analysis as to whether the Cubic judgment is at issue before the Tribunal. Like the Fifth Circuit in *Hegna*, the Ninth Circuit looked to the definition of "at issue" in BLACK'S LAW DICTIONARY and correctly concluded that the term "clearly means only those [properties] disputed before the Tribunal." App. 14, n. 7.

In sum, the Ninth Circuit's decision affirming Mr. Elahi's lien in no respect is in conflict with the decisions of those other circuit courts that have held that diplomatic and consular property are "at issue" before the Tribunal. MOD simply is attempting to create a split in the circuits where none exists. Because the Ninth Circuit's decision creates no conflict in the circuits, the ruling presents no issue that is worthy of Supreme Court review. At best, MOD is seeking error correction, and as set forth below, there is no error here.

B. The Ninth Circuit Correctly Held that the Cubic Judgment Is Not "At Issue" in the Tribunal Simply Because the United States May Obtain a Monetary Benefit.

MOD argues in its petition, as it did before the Ninth Circuit, that the Cubic judgment is "at issue" before the Tribunal because if "the Cubic judgment is repatriated to Iran, the United States stands to gain a benefit." Petition at 19. In a footnote to its pleadings in the Tribunal, Iran has stated its intention to "offset the proceeds from the ICC award (and, now, the Cubic judgment) from any potential liability that the United States has with respect to" Iran's Tribunal claims. Petition at 18-19.[10]

That the proceeds MOD expects to receive from the Cubic judgment may offset the amount the United States may owe Iran in the Claims Tribunal in Case B/61 does not render the Cubic judgment "at issue" in the Tribunal proceedings. As the Ninth Circuit panel noted, the plain meaning of the term "at issue" is "under dispute" or "in question." See App. 14, n. 7 (quoting BLACK'S LAW DICTIONARY (8th ed.

[10] MOD's Petition at 19 states that the United States has acknowledged that "the awards due from Cubic under the ICC Award. . . . would be 'recouped from the remedies sought against the United States in case B61'." U.S. Rebuttal, Case B/61, at 24-25, n. 32 (filed Sept. 1, 2003). The U.S. Rebuttal referenced by MOD is not part of the record in this case, nor is it publicly available. Pleadings before the Tribunal are not publicly filed.

2004)). The Cubic judgment is neither "under dispute" nor "in question" in proceedings before the Tribunal, and MOD has not argued to the contrary.

Moreover, as the Ninth Circuit also noted, "the Tribunal has no jurisdiction over claims against private parties," and hence, MOD's claim against Cubic could not be brought in the Tribunal or be at issue there. See App. 13-14. Indeed, in January, 1982, MOD filed a claim against Cubic with the Iran-U.S. Claims Tribunal, and in April, 1987 the Tribunal issued an order stating that it had no jurisdiction over the matter. *MOD v. Cubic*, 29 F. Supp.2d at 1170.[11] Following the Tribunal ruling, MOD filed with the ICC its demand for arbitration against Cubic. Accordingly, the Ninth Circuit correctly found that "[h]aving arbitrated this dispute before the ICC and secured a judgment against Cubic for its breach, Iran has fully adjudicated its claim against Cubic," and hence, "the Cubic judgment is not 'at issue' before the Claims Tribunal." See App. 13-14. As the Ninth Circuit pointed out, MOD's interpretation of the definition of what may be "at issue" before the Tribunal "would embrace both properties as to which any

[11] The district court's finding cited above was based upon MOD's statement in its Petition for Order Confirming Foreign Arbitration Award that it had filed a claim against Cubic Defense Systems, Inc. at the Iran-U.S. Claims Tribunal, but that "[o]n or about April 28, 1987, the Tribunal issued an order stating its lack of jurisdiction to hear the matter." See Decl. of Mina Almassi, Case No. 98-1165, Docket No. 1, ¶IX, at 4 (filed June 25, 1998).

dispute already has been resolved and those currently contested. 'At issue' clearly means only those disputed before the Tribunal." See App. 14, n. 7.[12]

C. The Ninth Circuit's Ruling Was Not Predicated Upon Any "False Premises."

In seeking review by this Court, MOD asserts that the Ninth Circuit's opinion was premised on the "false assumption" that in proceedings before the Iran-U.S. Claims Tribunal, Iran conceded that the Cubic judgment was not relevant or "not at issue" before the Tribunal. Petition at 16. MOD's argument is predicated upon a misreading of the appeals court's opinion.

Rather than proceeding upon any "false assumption" about what Iran asserted to the Tribunal, the Ninth Circuit correctly found that in filings with the Tribunal, Iran argued that the "subject matter of this case [Iran's claims against the United States in Case B/61]" is "at variance with the ICC [International

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[12] MOD also contends that the Ninth Circuit's decision raises "significant foreign relations concerns," but the only potential concern for the United States is a monetary one. If Cubic satisfies the judgment against it by paying Mr. Elahi, rather than MOD, Iran will not voluntarily offset the amount that it claims against the United States in Case B/61 by the amount of the Cubic judgment. Such a purely monetary concern cannot be said, as MOD asserts, to raise "sensitive issues concerning the foreign relations of the United States." Petition at 20, quoting *Verlinden B. V. v. Central Bank of Nigeria*, 461 U.S. 480, 493 (1983).

Chamber of Commerce] action" against Cubic. App. 12. As Iran explained in its briefing to the Tribunal in Case B/61:

> The ICC proceeding . . . cannot have *res judicata* effect on the present case. This is because the present [claim before the Hague] lack three identities (identity of object, identity of parties, and identity of subject matter) required for that purpose . . . The opposing party in this case is, obviously not a U.S. private company, but the United States government. The subject matter of this Case, *at variance with the ICC action,* is the losses suffered by Iran as a result of the United States' non-export of Iranian properties.

App. 91 (emphasis added).

MOD does not dispute that Iran made this argument to the Tribunal and took the position that the contract claim against Cubic is distinct from Iran's claims against the United States presently pending before the Tribunal. It was this "concession" by Iran that the Ninth Circuit found persuasive in deciding that "the Cubic judgment itself already adjudicated in the ICC action is not 'at issue' in Iran's claim" against the United States in the Tribunal. See App. 12-13. Hence, rather than predicating its ruling upon any "false premises," the Ninth Circuit relied upon Iran's specific statements to the Tribunal, and the appeals court correctly determined that there is a clear distinction between Iran's Tribunal claim in Case B/61 that the U.S. has violated the Algiers Accords and

MOD's contract claim against Cubic, which forms the basis for the Cubic judgment.

III. THE NINTH CIRCUIT'S RULING THAT THE CUBIC JUDGMENT IS A "BLOCKED ASSET" DOES NOT CONFLICT WITH OTHER COURT DECISIONS AND, IN ANY EVENT, IS CORRECT.

A. The Ninth Circuit's Decision Is Not in Conflict with Other Decisions Addressing the Term "Blocked Assets."

Contrary to MOD's arguments (Petition at 26-29), the Ninth Circuit's ruling that the Cubic judgment is a "blocked asset" subject to attachment under the TRIA does not conflict with decisions of other courts that have addressed the meaning of the term. Those court decisions dealt with property of a completely different nature than a federal court judgment, i.e., the Cubic judgment, that is the subject of this case.

MOD's petition seeks to portray the Ninth Circuit's decision as endorsing a broad construction of the term "blocked assets," while other courts have taken a "narrow construction" of the language. Petition at 29. Again, MOD is attempting to create a conflict in the courts where none exists. In its opinion, the Ninth Circuit clearly recognized that the definition of "blocked asset" is that contained in the TRIA itself, as meaning "any asset seized or frozen by the United States . . . under §§ 202 and 203 of the

International Emergency Economic Powers Act (50 U.S.C. §§ 1701, 1702)." TRIA § 201(d)(2)(A). See App. 16-17. The cases cited in MOD's petition at 27-29 all utilize the same definition of the term. See *Bank of New York v. Rubin*, 484 F.3d 149, 150 (2d Cir. 2007); *Weinstein v. Islamic Republic of Iran*, 299 F. Supp.2d 63, 65 (E.D.N.Y. 2004); *Hegna v. Islamic Republic of Iran*, 376 F.3d 485, 493 n. 32 (5th Cir. 2004); *Weininger v. Castro*, 462 F. Supp.2d 457, 480 (S.D.N.Y. 2006); *Rubin v. Islamic Republic of Iran*, 456 F. Supp.2d 228, 235 (D. Mass. 2006); *Smith v. Fed. Reserve Bank of N.Y.*, 346 F.3d 264, 269 (2d Cir. 2003).

As the cases cited by MOD highlight, the determination of whether certain property constitutes a "blocked asset" as that term is defined by the TRIA is an extremely fact specific one which requires the application of a complex web of regulations and executive orders governing the status of property of foreign states designated by the U.S. as state sponsors of terrorism. The legal analysis turns not only on the nature of the assets, but also on when and how the underlying property interests arose and the specific regulatory regime applicable to the terrorist state, which differs depending upon the country involved. Accordingly, the lower court decisions discussed by MOD (Petition at 26-29) reach varying results based upon their own specific set of facts and circumstances, rather than upon any disagreement as to the proper construction of the term "blocked assets," such as would warrant this Court's review.

For example, MOD cites to two cases in which the courts ruled that the TRIA did not permit the attachment of Iranian property because the assets at issue, i.e., bank accounts, did not fall within TRIA's definition of "blocked assets." Petition at 27-29, citing *Weinstein v. The Islamic Republic of Iran*, 299 F. Supp.2d 63 (E.D.N.Y. 2004); *Bank of New York v. Rubin*, 484 F.3d 149 (2nd Cir. 2007), aff'g, 2006 U.S. Dist. LEXIS 10215 (S.D.N.Y. Mar. 15, 2006). The bank accounts consisted of monies that Iran had transferred into the United States after January 19, 1981, the date the United States and Iran entered into the Algiers Accords. As the courts explained, Iranian property that has come within the jurisdiction of the United States after January 19, 1981 is regulated by a general license, but is not subject to U.S. blocking prohibitions. *Weinstein,* 299 F. Supp.2d at 67, citing Executive Order 12282, "Revocation of Prohibitions Against Transactions Involving Iran," 46 Fed. Reg. 7925 (Jan. 19, 1981); 31 C.F.R. § 535.579; *Bank of New York v. Rubin*, 2006 U.S. Dist. LEXIS 10215, *12 ("any funds that came into the Bank after that date [January 19, 1981] were therefore not blocked."), *aff'd,* 484 F.3d 149 (2nd Cir. 2007).[13] Thus,

[13] Property within the United States prior to January 19, 1981, however, remains subject to blocking regulations that have been in place since November, 1979. See *Rubin*, 2006 U.S. Dist. LEXIS 10215, *9 ("Although property entering the United States after January 19, 1981 was not blocked, the blocking provision of § 535.201 was never repealed.").

in both *Weinstein* and *Rubin*, the courts concluded that the Iranian property was not blocked.

The Ninth Circuit's opinion below did not disagree with the legal analysis in either the *Weinstein* or *Bank of New York* decision. Rather, because the Ninth Circuit determined that Iran's interest in the ACRM arose prior to January 19, 1981, the court merely concluded that "the reasoning in those cases [cited by MOD] is inapplicable here." App. 4. Hence, contrary to MOD's contention, the Ninth Circuit's ruling creates no conflict with the decisions in *Bank of New York* and *Weinstein* as to the construction of the term "blocked assets."

MOD's attempt to create a circuit court conflict by citing the Fifth Circuit's decision in *Hegna v. Islamic Republic of Iran*, 376 F.3d 485 (5th Cir. 2004), similarly, is misplaced. Indeed, in *Hegna*, the Fifth Circuit found that the real property that had served as the residence of the general counsel of Iran is a "blocked asset," but is exempt from attachment under the TRIA because it constitutes property "subject to the Vienna convention on . . . consular relations" and was "used exclusively for diplomatic or consular purposes." 376 F.3d at 93-494, quoting TRIA § 201(d)(2)(B)(ii). There is no question that the property at issue in this case (the Cubic judgment) is not diplomatic or consular property, and there is nothing in the Fifth Circuit's *Hegna* decision to indicate that the Fifth Circuit was utilizing a "limited definition of 'blocked assets'" (Petition at 29) as MOD would have this Court believe. Hence, the Fifth Circuit's decision

is not in any manner "in tension" with the Ninth Circuit's holding.

MOD's citation to *Rubin v. Islamic Republic of Iran*, 456 F. Supp.2d 228, 236 (D. Mass. 2006) and *Weininger v. Castro*, 462 F. Supp.2d 457 (S.D.N.Y. 2006), also fails to support MOD's argument that other courts have adopted a narrower construction of the term "blocked assets" than that of the Ninth Circuit. Indeed, in *Rubin,* the district court concluded that the property in question (Iranian antiquities) "remained blocked" under executive order, and in *Weininger*, the court found there was "no dispute" that the property in question (third party bank accounts) fell within the definition of being a blocked asset.

Finally, although MOD's petition at 26 asserts that the Ninth Circuit's decision is in "substantial tension" with the ruling of the Second Circuit in *Smith v. Fed. Reserve Bank of N.Y.*, 346 F.3d 264, 272 (2d Cir. 2003), such is not the case. In *Smith*, the Second Circuit found there to be "no dispute that the Iraqi assets at issue were 'blocked funds' within the meaning of TRIA 201(a)" and, hence, the decision neither considered nor discussed the appropriate definition of the term "blocked assets."[14] Accordingly,

[14] Rather, the decision addressed the separate and unrelated issue of whether the president could confiscate the "blocked" Iraqi assets and transfer them to the newly-constituted government of Iraq. *Smith*, 346 F.3d at 272.

there can be no conflict or "tension" between the Second Circuit's ruling and the Ninth Circuit's decision below.

In short, the Ninth Circuit's ruling presents no conflict in the courts with respect to the application of the TRIA's definition of "blocked assets." In its petition, MOD merely is asking for error correction, and as set forth below, there is no error in the Ninth Circuit's ruling that the Cubic judgment is a "blocked asset" subject to attachment under Section 201(a) of the TRIA.

B. The Ninth Circuit Correctly Ruled that the Cubic Judgment Is a "Blocked Asset."

In its opinion, the Ninth Circuit unanimously concluded that the Cubic judgment constituted a "blocked asset" under the TRIA because it represents "Iran's interest in an asset" seized or frozen by the United States when following the Iranian hostage in November, 1979, President Carter exercised his authority under the International Emergency Economic Powers Act ("IEEPA") to freeze Iranian assets in the United States. App. 20.[15]

MOD's petition takes issue with the Ninth Circuit's conclusion because MOD argues that "[t]he

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[15] Circuit Judge Fisher did not disagree with the majority on the issue of whether the Cubic judgment constituted a "blocked asset." App. 28.

property being attached here is not the military equipment (the air combat maneuvering range) that was the subject of the underlying transaction between Cubic and MOD; rather, it is MOD's judgment against Cubic, which confirmed an arbitration award for breach of contract." Petition at 25 (emphasis in original). MOD's present argument, however, ignores the position it advanced before the Ninth Circuit that the Cubic judgment represents the "liquidation of a monetary amount of a military asset manufactured by Cubic and owned by MOD." Brief of Appellant at 31, *Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Elahi,* No. 03-55015, filed April 10, 2003. Just because MOD's interest in the blocked military asset, i.e., the ACMR, was liquidated to a monetary amount, first, as a commercial arbitration award and, subsequently, as a federal court judgment does not mean that MOD's interest became unblocked.

President Carter's blocking order of November, 1979 remains in effect, and MOD's interest in the ACMR, now reduced to a monetary judgment, remains frozen. Although following the release of the American hostages, the United States unblocked certain Iranian assets and lifted the trade embargo, these actions did not unblock MOD's interests in the ACMR. As the Ninth Circuit explained in its opinion:

> . . . military goods such as the ACMR remained blocked. See 22 U.S.C. §§ 2751 et seq.; Exec. Order No. 12,1270, 44 Fed. Reg. 65729 (Nov. 14, 1979); Notice of President, 70

> Fed. Reg. 9039 (Nov. 9, 2005); International Traffic in Arms Regulations, 22 C.F.R. §§ 120-30; Office of Foreign Assets Control, Dep't. of Treas., Foreign Assets Control Regulations for Exporters and Importers 23 (2007) ("Certain assets related to these claims remain blocked in the United States and consist mainly of military and dual-use property").

App. 3.

Hence, the Cubic judgment, which represents the "liquidation of a monetary amount" of a blocked military asset (Brief of Appellant at 31, *supra*), likewise, remains blocked, notwithstanding the executive orders cited in MOD's petition.

C. The Ninth Circuit's Recent Decision Does Not Conflict with Its Prior Opinion.

Finally, MOD's petition at 23 accuses the Ninth Circuit of flip-flopping by holding that the Cubic judgment is a "blocked asset" subject to attachment when the court purportedly reached "the opposite conclusion in its earlier ruling." MOD's argument is without merit and is based upon a misreading of the Ninth Circuit opinions in this case.

In its ruling of October 7, 2004, which was vacated and remanded by this Court, the Ninth Circuit panel stated that "MOD's interest in the Cubic judgment 'arose' on December 7, 1998, when the district court confirmed the ICC award against

Cubic." App. at 76, citing *Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Systems, Inc.*, 29 F. Supp.2d 1168 (S.D. Cal. 1998). The circuit court's statement does not mention the term "blocked asset," nor did the court in its first opinion address Mr. Elahi's right to attach the Cubic judgment under the TRIA.[16] That issue was addressed only on remand. Hence, the Ninth Circuit did not engage in any flip-flopping whatsoever when in its second opinion, the appeals court held that the Cubic judgment is a "blocked asset" under the TRIA subject to attachment by Mr. Elahi.

IV. THE NINTH CIRCUIT'S DECISION DOES NOT UNDERMINE U.S. FOREIGN POLICY

As a final argument, MOD posits that "the Ninth Circuit's judgment, if left unreviewed, will vastly complicate the United States' foreign policy interests in regards to the Islamic Republic of Iran and compromise this country's obligations under the Algiers Accords." Petition at 30. Such speculation by MOD does not constitute a legitimate basis for this Court to grant review of the Ninth Circuit's decision, especially where, as set forth in Section I, *supra*, any potential effect of the appeals court's ruling on U.S.

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[16] As noted *supra*, n. 5, Mr. Elahi made the argument to the appeals court, but the court did not need to address attachment under the TRIA because the Court ruled that the Cubic judgment was subject to attachment on other grounds.

foreign policy would be particularly attenuated because the ruling below is a narrow one and the issue addressed, i.e., attachment of a U.S. federal court judgment in favor of the ministry of a terrorist nation by a judgment creditor of the terrorist state, is highly unlikely to recur in the future.

In proceedings before the Ninth Circuit, both MOD and the United States as *amicus curiae*, had occasion to address any foreign policy implications of the issues raised by Mr. Elahi's attachment of the Cubic judgment. There is no reason to believe, and MOD has offered none, that the Ninth Circuit failed to take into account any potential foreign policy implications of its decision. By granting the United States' motion to intervene as an *amicus curiae* and permitting the U.S. government to file briefs and to participate in oral argument, the Ninth Circuit evidenced its sensitivity to potential foreign policy concerns. MOD takes issue with the outcome of the Ninth Circuit's proceedings, but disagreement with the court's decision does not mean that U.S. foreign policy will be compromised by the appeals court ruling.

MOD's professed concern about the foreign policy ramifications of the Ninth Circuit's decision is at base nothing more than attack upon the very purpose and reason that Congress enacted the Antiterrorism Act allowing victims of state-sponsored terrorism to pursue court actions in the United States to obtain redress for terrorist acts. Mr. Elahi respectfully submits that this Court should not allow MOD to

place another roadblock in Mr. Elahi's attempt to obtain justice and some financial recompense against those who ordered the assassination of his brother for advocating democratic freedoms in Iran.

Indeed, to the extent that this Court may take into account the implications of the Ninth Circuit's decision and its impact upon the foreign relations of the United States, all of the policy reasons counsel in favor of denying certiorari. Congress' very purpose in passing the Antiterrorism Act was to allow victims of state sponsored terrorism or their relatives to obtain compensation for the wrongs perpetrated by terrorist states and, as a result, to deter terrorist nations in the future from engaging in and sponsoring terrorist acts. See *Elahi,* 124 F. Supp.2d at 113 ("One of the main purposes of the Antiterrorism Act is to provide victims of state sponsored terrorism (or . . . the next of kin and personal representative) 'an important economic and financial weapon against these outlaw states.' ").

The need to deter international terrorism by rogue nations like Iran is as true today as it was in 1996, when Congress passed the Antiterrorism Act, and in December 2000, when Mr. Elahi obtained his district court judgment against Iran. According to the Department of State's most recent report on global terrorism, "Iran remained the most active state sponsor of terrorism. Its Islamic Revolutionary Guard Corps (IRGC) and Ministry of Intelligence and Security (MOIS) were directly involved in the planning and support of terrorist acts and continued to

exhort a variety of groups . . . to use terrorism to pursue their goals." United States Department of State, 2006 Country Reports on Terrorism (April 2007).

To accept the arguments of MOD and to allow MOD's money judgment against Cubic to be exempt from attachment under the TRIA would render hollow the judgment that Dariush Elahi obtained against Iran for the brutal assassination of his brother, and would frustrate the laudable goals of the Antiterrorism Act and of U.S. foreign policy in combating Iran's continuing support of terrorism.

CONCLUSION

MOD has failed to present any compelling reason for this Court to grant its petition. Therefore, Mr. Elahi respectfully requests that the petition be denied.

Respectfully submitted,

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