No. 16-334

IN THE
Supreme Court of the United States

BANK MELLI,

Petitioner,

v.

MICHAEL BENNETT, *et al.*,

Respondents.

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

REPLY FOR PETITIONER

JEFFREY A. LAMKEN
Counsel of Record
ROBERT K. KRY
MICHELLE J. PARTHUM
MOLOLAMKEN LLP
The Watergate, Suite 660
600 New Hampshire Ave., N.W.
Washington, D.C. 20037
(202) 556-2000
jlamken@mololamken.com

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

NO. 16-334

BANK MELLI,

Petitioner,

v.

MICHAEL BENNETT, *et al.*,

Respondents.

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

---

REPLY FOR PETITIONER

The circuit conflicts presented by the petition could hardly be starker. On the first question presented, the Ninth Circuit held that § 1610(g) is a "freestanding provision for attaching and executing against assets." Pet. App. 13a. The Seventh Circuit held that it "is *not* a freestanding * * * exception." *Rubin* v. *Islamic Republic of Iran*, 830 F.3d 470, 474 (7th Cir. 2016) (emphasis added). On the second question, the Ninth Circuit held that "state law" determines the requisite property interest under TRIA and § 1610(g) and that "outright ownership * * * is not required." Pet. App. 22a-23a. The D.C. Circuit has held that "[f]ederal law * * * is controlling" and that it requires "ownership." *Heiser* v. *Islamic Republic of Iran*, 735 F.3d 934, 940-941 (D.C. Cir. 2013). On both

questions, moreover, the Ninth Circuit rejected the settled positions of the United States. Pet. 28-30.

Despite respondents' efforts to downplay the conflicts, they are undeniable. Respondents' half-hearted attempts to contest the issues' importance and to manufacture vehicle problems lack merit. The petition should be granted.

I. THE NINTH CIRCUIT'S HOLDING THAT § 1610(g) IS A FREESTANDING EXCEPTION TO SOVEREIGN IMMUNITY WARRANTS REVIEW

A. The Ninth Circuit's Decision Directly Conflicts with the Seventh Circuit's Decision in *Rubin*

1. The square conflict between the Ninth Circuit's decision below and the Seventh Circuit's decision in *Rubin* v. *Islamic Republic of Iran*, 830 F.3d 470 (7th Cir. 2016), is unmistakable. The Ninth Circuit held that § 1610(g) is "a freestanding provision for attaching and executing against assets of a foreign state." Pet. App. 13a. The Seventh Circuit held that § 1610(g) "is *not* a freestanding terrorism exception to execution immunity." 830 F.3d at 474 (emphasis added). Eliminating any doubt, the Seventh Circuit expressly "disagree[d] with the Ninth Circuit's interpretation of subsection (g)," describing it as an "implausibl[e]," "highly strained" interpretation that "makes no sense." *Id.* at 486-487. The conflict is obvious.

Respondents assert that there is no "true conflict" because the assets in *Rubin* were "not blocked by any executive order." Br. in Opp. 19-20. While the absence of a blocking order was dispositive of the Seventh Circuit's *TRIA* analysis, 830 F.3d at 487-489, it was irrelevant to the court's analysis of § 1610(g), *id.* at 481-487. Unlike TRIA, § 1610(g) does not require that assets be blocked.

It is therefore no surprise that the Seventh Circuit's § 1610(g) analysis did not turn on that issue.

Nor is there any merit to respondents' argument that "the *Rubin* majority's view on § 1610*(f)* is only *dicta* that had no bearing on the actual outcome of the case." Br. in Opp. 21 (emphasis added). The question presented here concerns the circuits' conflicting interpretations of § 1610*(g)*, not § 1610*(f)*. And the Seventh Circuit's interpretation of § 1610*(g)* clearly determined the outcome in that case. 830 F.3d at 487. The Seventh Circuit addressed § 1610(f) only to explain why the Ninth Circuit's construction of § 1610(g)—that the phrase "as provided in this section" refers to § 1610(f)—was implausible. *Id.* at 487-488. Section 1610(f) has been "inoperative from the start," so Congress could not have meant to refer to that provision. *Rubin*, 830 F.3d at 487. If it had, "execution 'as provided in this section' would mean no execution at all." *Ibid.*

2. Respondents describe the conflict as "shallow and immature," asserting that "only two circuits have considered § 1610(g)'s status as a freestanding exception." Br. in Opp. 25-26. That is incorrect. Two more circuits recently weighed in, deepening the conflict. See *Weinstein* v. *Islamic Republic of Iran*, 831 F.3d 470, 483 (D.C. Cir. 2016) (characterizing § 1610(g) as "strip[ping] execution immunity from *all* property of a defendant sovereign" for terrorism judgments); *Kirschenbaum* v. *650 Fifth Ave.*, 830 F.3d 107, 123 (2d Cir. 2016) (same in dicta). Although the absence of any meaningful analysis in those cases diminishes their persuasive value, those decisions confirm that the issue is recurring and important.

Respondents, moreover, barely even mention the position of the United States. The United States has rejected the Ninth Circuit's interpretation of § 1610(g) in four

briefs filed across three circuits. Pet. 28. The court below acknowledged that "the United States * * * disagrees with our interpretation." Pet. App. 18a n.7. The Ninth Circuit's rejection of the government's settled position on an issue with significant foreign relations implications underscores the need for review.

Tellingly, while respondents try to downplay the conflict, the plaintiffs seeking review in *Rubin* take the opposite view. "The gap between these conflicting interpretations of section 1610(g)," they urge, "is vast, and should be resolved now." Pet. in *Rubin* v. *Islamic Republic of Iran*, No. 16-534, at 21-22 (filed Oct. 17, 2016). "The proper construction of section 1610(g) was thoroughly considered in both courts," and "[t]he Ninth Circuit issued three decisions on the question, eliciting a dissenting opinion in two of them." *Id.* at 22. The Ninth Circuit is now "joined by the District of Columbia and Second Circuits," while "[t]he Executive Branch supports the Seventh Circuit's *Rubin* decision." *Ibid.* The issue is therefore "ripe for [this Court's] review." *Ibid.* All those observations are equally true here.

3. Although the § 1610(g) question is presented both in this case and in *Rubin*, this case also presents a circuit conflict on another important question: whether TRIA and § 1610(g) require ownership as a matter of federal law. Pet. 23-27. Granting review in this case would enable the Court to resolve both conflicts.

To the extent the Court is inclined to grant review in *Rubin*, it should also grant review in this case and consolidate the cases for argument. That approach would enable the Court to consider § 1610(g) across different settings and ensure consistent dispositions. At a minimum, the Court should hold this petition pending its disposition of *Rubin*. Finally, the Court may wish to invite the Solic-

itor General to express the views of the United States in both cases, as it has done in similar cases. Pet. 30.

B. The Asserted Alternative Grounds for Attachment Do Not Weigh Against Review

Respondents contend that other statutes may ultimately provide an alternative basis for attaching the assets. Br. in Opp. 21-23. Those arguments provide no reason to deny review.

1. Respondents' reliance on § 1610(f) as an alternative basis for attachment (Br. in Opp. 21-22) is wrong. Section 1610(f) was rendered inoperative the day it was enacted by a blanket presidential waiver. Pet. 6-7; 63 Fed. Reg. 59,201 (Oct. 21, 1998); *Rubin*, 830 F.3d at 487. Respondents cannot execute under a provision that has no effect.

Respondents assert that the presidential waiver was superseded by § 1610(g)(2). Br. in Opp. 21-22. But that provision is facially irrelevant. Section 1610(g)(2) is entitled "*United States* sovereign immunity inapplicable." 28 U.S.C. § 1610(g)(2) (emphasis added). It states that property shall not be immune from execution upon a terrorism judgment "*because the property is regulated by the United States Government* by reason of [economic sanctions statutes]." *Ibid.* (emphasis added). The provision has nothing to do with *foreign* sovereign immunity at all; it addresses the distinct problem of *U.S. government* immunity, which had formerly posed an obstacle to execution where the U.S. government had seized, blocked, or otherwise regulated foreign assets. See H.R. Rep. No. 110-477, at 1002 (2007) (provision seeks to ensure that blocked assets are not unattachable "due to the sovereign immunity *of the United States*" (emphasis added)); Jennifer K. Elsea, Congressional Research Service, *Suits*

Against Terrorist States by Victims of Terrorism 57-58 & n.221 (Aug. 8, 2008).

2. Nor does the potential for attachment under TRIA render § 1610(g) academic. Br. in Opp. 22. By its terms, TRIA applies only to "blocked assets." 28 U.S.C. § 1610 note § 201(a). Whether assets become or remain blocked depends on the vagaries of Executive Branch policy. Within the past year alone, the Executive Branch has released a vast array of formerly blocked Iranian assets in connection with the Joint Comprehensive Plan of Action that lifted various sanctions against Iran. See Executive Order No. 13,716, 81 Fed. Reg. 3,693 (Jan. 16, 2016); *Kirschenbaum*, 830 F.3d at 120-121 (describing orders). Whether the funds at issue will remain blocked is thus speculative.

3. The commercial activity exceptions in § 1610(a) and (b) are likewise unavailing. Br. in Opp. 22-23. For one thing, respondents waived any reliance on § 1610(b) by not timely raising that provision below. See Pet. 14 n.2. For another, § 1610(b)(3) applies only to judgments on terrorism claims *against an agency or instrumentality* and thus does not apply where, as here, the judgment stems from a claim against the foreign state itself. See 28 U.S.C. § 1610(b)(3). Finally, both provisions apply only to commercial activity *in the United States*. See 28 U.S.C. § 1610(a) (property "used for a commercial activity *in the United States*" (emphasis added)); *id.* § 1610(b) (property of "an agency or instrumentality of a foreign state engaged in commercial activity *in the United States*" (emphasis added)). The complaint does not allege that Bank Melli engaged in *any* commercial activity in the United States, much less that Bank Melli used the specific funds in the Visa account for such an activity. C.A. E.R. 57-79. To the contrary, the funds relate to "the use of Visa cred-

it cards *in Iran*." Pet. App. 9a (emphasis added); see C.A. E.R. 47 ¶6.

Respondents do not even contend that the commercial activity exceptions would provide an alternative ground for decision at this stage. Rather, they assert that "Bank Melli may raise factual disputes as to the nature and location of its commercial activities" and that those issues "must be remanded for final determination by the district court following discovery." Br. in Opp. 23. A purported alternative ground for overcoming immunity that might or might not emerge only after years of discovery and other proceedings is no basis for refusing to review the Ninth Circuit's erroneous interpretation of § 1610(g) now.

C. The Ninth Circuit's Decision Is Incorrect

Respondents' arguments on the merits likewise fail. Respondents urge that "[n]othing in the text of § 1610(g)" imposes the "additional burden" of proving that one of § 1610's immunity exceptions applies. Br. in Opp. 24. But the phrase "as provided in this section" does precisely that: Section 1610(g) states that assets are subject to execution "as provided in this section, regardless of" the five *Bancec* factors that might otherwise preclude execution even if the assets were not immune. 28 U.S.C. § 1610(g)(1). Respondents offer no plausible alternative explanation for the phrase. They claim it means that, "just like the other provisions of § 1610, § 1610(g) also serves to strip the assets of terrorist states and their instrumentalities of the immunity they would otherwise enjoy." Br. in Opp. 25. But that defies English usage. The statute says "as provided in this section," not "just like other provisions in this section."

Respondents thus resort to legislative history. Br. in Opp. 24-25. But "[w]hen the words of a statute are unambiguous, * * * [the] 'judicial inquiry is complete,'" even

if "legislative history points to a different result." *Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 254 (1992). That some legislators may have thought they were enacting a "simple ownership" test (Br. in Opp. 24-25) does not mean there is any language in the statute that plausibly supports that result. Nor does Bank Melli's interpretation "fl[y] in the face of Congress' stated purpose to enhance the enforcement rights of terror victims." Br. in Opp. 24. Everyone agrees that §1610(g) expands plaintiffs' rights; the question is how far Congress went. And it "frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez* v. *United States*, 480 U.S. 522, 526 (1987).

II. THE NINTH CIRCUIT'S INTERPRETATION OF THE OWNERSHIP REQUIREMENT WARRANTS REVIEW

The second question presented likewise warrants review. Respondents admit that the circuits are divided over whether federal or state law determines whether a sovereign's interest in property is sufficient for the property to be "assets of" or "property of" the sovereign under TRIA and §1610(g). Br. in Opp. 30 (urging that "every * * * court (with the single exception of *Heiser*)" has applied "state law"). The Ninth Circuit held below that courts should "look to state law." Pet. App. 22a. The Second Circuit agrees. See *Calderon-Cardona* v. *Bank of N.Y. Mellon*, 770 F.3d 993, 1000-1002 (2d Cir. 2014) (looking to "state law"). But in the D.C. Circuit, "[f]ederal law * * * is controlling." *Heiser* v. *Islamic Republic of Iran*, 735 F.3d 934, 940 (D.C. Cir. 2013).

Respondents claim there is "no division of authority" because the Ninth Circuit stated that it would reach the same result even under federal law. Br. in Opp. 27. Far from obviating the conflict, that holding compounds it.

Heiser did not merely hold that federal law governs; it also held that federal law requires *ownership*: The plaintiffs "could not attach the contested accounts under either [TRIA] or § 1610(g) without an Iranian *ownership interest*." 735 F.3d at 941 (emphasis added); see also *ibid.* ("Iran does not *own* the contested accounts." (emphasis added)); *ibid.* (denying attachment "because Iran lacked an *ownership interest*" (emphasis added)). The United States has similarly urged in at least *seven cases* that TRIA and § 1610(g) require ownership. See Pet. 28-29.[1]

The Ninth Circuit rejected that position here. Bank Melli does not *own* the funds in the Visa account, beneficially or otherwise. At most, it has an *interest* in them because Visa owes Bank Melli money. That is all the complaint alleges: The funds are "'due and owing by contract to Bank Melli.'" Pet. App. 82a (quoting Compl. ¶16). That Bank Melli is *owed* funds does not mean it *owns* them. See, *e.g.*, *United States* v. *Rodrigues*, 159 F.3d 439, 448 (9th Cir. 1998) ("The evidence did not establish that [the defendant] *owned* the refunds; rather, it was *owed* them." (emphasis added)), amended, 170 F.3d 881 (9th Cir. 1999).

The Ninth Circuit did not dispute any of those facts. It held that "Bank Melli has an *interest* in the blocked assets" because "Visa and Franklin *owe* money to Bank Melli." Pet. App. 24a (emphasis added). Bank Melli, it explained, is the "*intended contractual beneficiary* of the

---

[1] Respondents point to a passage from *Heiser* stating that "'Iranian entities were [neither] the originators of the funds transfers . . . [n]or were they the ultimate beneficiaries.'" Br. in Opp. 28 (quoting 735 F.3d at 936). But that quotation comes from the court's description of the "breadth of the blocking regulations" at issue—it does not limit the court's holding that the statutes require *ownership*. 735 F.3d at 936, 940-941.

contested funds." *Ibid.* (emphasis added). Nowhere did the court hold that Bank Melli *owned* the assets, beneficially or otherwise. To the contrary, it ruled that "immediate and outright ownership of assets is not required." *Id.* at 23a.

Contrary to respondents' claim, therefore, the petition does not merely seek review of "the application of particular facts under the *Heiser* standard." Br. in Opp. 27. The circuits fundamentally disagree about *what the governing standard is*. The D.C. Circuit requires ownership; the Ninth Circuit does not. Respondents urge that Bank Melli had a "contractual right" to receive payment. *Id.* at 29. In the D.C. Circuit, that interest is not enough—the statute requires *ownership*.

Respondents accuse Bank Melli of arguing that property must be "physically in [the sovereign's] hands." Br. in Opp. 29. That is not correct. The statute requires *ownership*, not possession. Respondents' assertion that a sovereign could "open a bank account in its own name * * * and never have to worry that terror victims could reach those funds," *ibid.*, is thus unfounded. A party that deposits its money in a bank account *owns* the funds, even if it does not possess them. The problem here is that Bank Melli *neither owns nor possesses* the assets.

Respondents finally contend that Federal Rule of Civil Procedure 69 supports reliance on state law. Br. in Opp. 29-30. But Rule 69 states that execution proceedings "must accord with the procedure of the state where the court is located, *but a federal statute governs to the extent it applies*." Fed. R. Civ. P. 69(a)(1) (emphasis added). Here, federal statutes *do* apply—namely, TRIA and § 1610(g). The question is what those statutes require when they limit execution to "assets of" or "property of" the sovereign. Rule 69 adds nothing to that analysis.

III. THE CASE'S INTERLOCUTORY POSTURE DOES NOT COUNSEL A DIFFERENT RESULT

Finally, there is no merit to respondents' suggestion that the Court should deny review because the decision below is interlocutory. Br. in Opp. 17-19. It is well-established that a case may be "reviewed despite its interlocutory status" where, as here, "there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari." S. Shapiro *et al.*, *Supreme Court Practice* § 4.18, at 283 (10th ed. 2013).

Prompt review is particularly important given the immunity issues at stake. Review of the Ninth Circuit's decision should not await the end of the case when that ruling has the effect of stripping immunity from assets now. See *Pearson* v. *Callahan*, 555 U.S. 223, 232 (2009) (noting "'the importance of resolving immunity questions at the earliest possible stage in litigation'"). Consistent with those principles, this Court routinely reviews interlocutory orders denying claims of sovereign immunity. See, *e.g.*, *Republic of Austria* v. *Altmann*, 541 U.S. 677, 680 (2004) (reviewing denial of motion to dismiss based on sovereign immunity); *Republic of Iraq* v. *Beaty*, 556 U.S. 848, 855 (2009) (similar).

The questions presented are clear-cut issues of law that will not be refined or informed by further proceedings. By contrast, resolution of the issues now could restore the assets' immunity and draw these proceedings to a close. Review of these important immunity questions is therefore warranted at this time.

CONCLUSION

The petition should be granted.

Respectfully submitted.

JEFFREY A. LAMKEN
Counsel of Record
ROBERT K. KRY
MICHELLE J. PARTHUM
MOLOLAMKEN LLP
The Watergate, Suite 660
600 New Hampshire Ave., N.W.
Washington, D.C. 20037
(202) 556-2000
jlamken@mololamken.com

Counsel for Petitioner

NOVEMBER 2016