No. 16-334

In the Supreme Court of the United States

BANK MELLI, PETITIONER

v.

MICHAEL BENNETT, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

Under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1602 *et seq.*, the property of a foreign state and its agencies or instrumentalities is generally immune from attachment or execution, except as provided in 28 U.S.C. 1610 and 1611. Section 1610(a) provides that a foreign state's property "used for a commercial activity in the United States" is not immune in certain circumstances. 28 U.S.C. 1610(a). And Section 1610(g) provides that the property of a foreign state against which a judgment is rendered in certain terrorism-related cases, and the property of its agencies or instrumentalities, is subject to attachment "as provided in this section," regardless of five factors. 28 U.S.C. 1610(g)(1). The questions presented are:

1. Whether 28 U.S.C. 1610(g) creates a freestanding exception to attachment immunity, or instead simply abrogates distinctions between a foreign state and its agencies and instrumentalities for purposes of attachment, while still requiring a judgment creditor to proceed "as provided in this section," such as under 28 U.S.C. 1610(a).

2. Whether 28 U.S.C. 1610(g), and another statute authorizing attachment by certain terrorism victims, Section 201(a) of the Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, 116 Stat. 2337, require that the judgment debtor or its agency or instrumentality own the targeted assets, and if so whether ownership status is determined using state or federal law.

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INTEREST OF THE UNITED STATES

This brief is filed in response to the Court's order inviting the Acting Solicitor General to express the views of the United States. In the view of the United States, the first question presented is worthy of this Court's review but should be resolved in *Rubin* v. *Islamic Republic of Iran*, No. 16-534. This petition should be held pending final disposition of *Rubin*. The petition should be denied as to the second question presented.

STATEMENT

Respondents Visa, Inc. (Visa) and Franklin Resources, Inc. (Franklin) brought this interpleader action in response to the individual respondents' efforts to enforce a judgment against the Islamic Republic of Iran by attaching assets in Visa's and Franklin's possession. Pet. App. 9a. Petitioner Bank Melli filed a motion to dismiss, arguing that the assets were immune from attachment and execution under the Foreign Sovereign

Immunities Act of 1976 (FSIA), 28 U.S.C. 1602 *et seq*. The district court denied the motion, but certified the order for interlocutory appeal. The court of appeals affirmed. Pet. App. 1a-26a.

1. The FSIA provides that, subject to certain international agreements, the property in the United States of a foreign state, and its agencies or instrumentalities, "shall be immune from attachment arrest and execution," except as provided in 28 U.S.C. 1610 and 1611. 28 U.S.C. 1609; see 28 U.S.C. 1603(a) (defining "foreign state"). Section 1611 is not at issue here.

a. Subsections (a) and (b) of Section 1610 create exceptions for property with a commercial nexus. Subsection (a) provides that a foreign state's property "used for a commercial activity in the United States" is not immune from attachment if additional criteria are satisfied. 28 U.S.C. 1610(a).[1] Subsection (b) creates an additional exception for the property of an agency or instrumentality. 28 U.S.C. 1610(b). Unlike property covered by subsection (a)—which must *itself* be used in commercial activity—subsection (b) abrogates attachment immunity for any property "of an agency or instrumentality" if the agency or instrumentality is "engaged in commercial activity in the United States" and additional criteria are satisfied. *Ibid.*

Pursuant to the additional criteria in both provisions, property with the requisite commercial nexus is not immune from attachment if (among other things) the judgment that the plaintiff is seeking to enforce relates to a claim for which the entity "is not immune under section 1605A or section 1605(a)(7) (as such section was in effect on January 27, 2008)." 28 U.S.C. 1610(a)(7); see 28 U.S.C.

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[1] This brief uses the term "attachment" to refer to attachment, arrest, and execution.

1610(b)(3) (similar). The referenced provisions are known as the "terrorism exception" to a foreign sovereign's immunity to suit.

The terrorism exception was originally codified at 28 U.S.C. 1605(a)(7). See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221(a)(1)(C), 110 Stat. 1241. Section 1605(a)(7) provided that designated state sponsors of terrorism would not be immune from suits seeking money damages for personal injury or death "caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support" for such acts. 28 U.S.C. 1605(a)(7) (2006). On January 28, 2008, Congress repealed that provision and replaced it with 28 U.S.C. 1605A. See National Defense Authorization Act for Fiscal Year 2008 (NDAA), Pub. L. No. 110-181, § 1083(a)(1) and (b)(1), 122 Stat. 338-341. Among other things, Section 1605A expressly creates a private right of action for certain injuries caused by designated state sponsors of terrorism. 28 U.S.C. 1605A.[2]

Accordingly, if a party obtains a money judgment under the current or former terrorism exception, that judgment creditor may be able to enforce the judgment by attaching property with the requisite commercial nexus under 28 U.S.C. 1610(a)(7) or (b)(3).

b. When Congress updated the terrorism exception in 2008, it also added subsection (g) to 28 U.S.C. 1610.

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[2] The statute allowed plaintiffs with pending cases under Section 1605(a)(7) to convert their actions, in certain circumstances, to suits under Section 1605A. NDAA § 1083(c)(2), 122 Stat. 342-343.

NDAA § 1083(b)(3)(D), 122 Stat. 341-342. Subsection (g) provides:

> [T]he property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment *as provided in this section*, regardless of [five specified factors].

28 U.S.C. 1610(g)(1) (emphasis added).

The five factors listed in subsection (g)(1) almost perfectly parallel the factors that some courts have considered when a party seeks to satisfy a judgment against a foreign state by attaching property belonging not to the state itself, but to an agency or instrumentality. In *First National City Bank* v. *Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983) (*Bancec*), this Court recognized a general presumption that courts should respect the separate legal status of a state's agencies and instrumentalities. *Id.* at 626-628. A foreign state's judgment creditor therefore generally cannot satisfy that judgment by attaching the property of an agency or instrumentality. That presumption may be overcome as appropriate under the totality of the circumstances, however, if the instrumentality is "so extensively controlled by its owner that a relationship of principal and agent is created," or if recognizing the entity's separate juridical status would "'work fraud or injustice.'" *Id.* at 629 (quoting *Taylor* v. *Standard Gas Co.*, 306 U.S. 307, 322 (1939)); see *id.* at 633. Some courts have identified "*Bancec* factors" to consider in making that determination. See, *e.g.*, *Walter Fuller*

Aircraft Sales, Inc. v. *Republic of the Philippines*, 965 F.2d 1375, 1380 n.7 (5th Cir. 1992). Subsection (g) thus establishes that courts need not engage in a *Bancec* analysis in enforcement proceedings in covered terrorism cases.

c. Subsection (f) of Section 1610 creates a mechanism for attaching property in certain terrorism cases, but that mechanism has never been operative. 28 U.S.C. 1610(f). Paragraph (f)(1) provides that certain assets blocked under various sanctions programs are subject to attachment or execution "of any judgment relating to a claim for which a foreign state (including any agency or instrumentality o[f] such state) claiming such property is not immune" under the terrorism exception. 28 U.S.C. 1610(f)(1). Paragraph (f)(2) provides that the State and Treasury Departments "should make every effort" to assist terrorism judgment creditors in identifying attachable property. 28 U.S.C. 1610(f)(2). Paragraph (f)(3) provides, however, that the President may waive "any provision of paragraph (1) in the interest of national security." 28 U.S.C. 1610(f)(3). Invoking that authority, the President waived paragraph (f)(1) before it ever went into effect. See 65 Fed. Reg. 66,483 (Oct. 28, 2000); see also 63 Fed. Reg. 59,201 (Oct. 21, 1998) (superseded waiver of predecessor statute).

2. One additional provision is relevant to understanding the context of this case: The Terrorism Risk Insurance Act of 2002 (TRIA), Pub. L. No. 107-297, § 201(a), 116 Stat. 2337 (28 U.S.C. 1610 note), permits attachment of certain blocked assets in terrorism cases. It provides that "[n]otwithstanding any other provision of law," a person who has obtained a judgment against a "terrorist party" under the terrorism exception may

attach "the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party)" to the extent of any compensatory damages. *Ibid.* The term "terrorist party" includes a designated state sponsor of terrorism. § 201(d)(4), 116 Stat. 2340. TRIA defines "blocked assets" to include assets "seized or frozen by the United States" under the Trading with the Enemy Act, 50 U.S.C. 4301 *et seq.*, or the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1701-1702. TRIA § 201(d)(2), 116 Stat. 2338-2339. When applicable, TRIA thus authorizes attachment of the blocked assets of a foreign state or its agencies or instrumentalities, without regard to *Bancec* and without requiring a nexus to commercial activity.

3. The individual respondents in this case are approximately 90 individuals (the Judgment Creditors) who obtained large damage awards against Iran under the terrorism exception to the FSIA. Pet. App. 8a. They did so in four underlying lawsuits. See *Acosta* v. *Islamic Republic of Iran*, 574 F. Supp. 2d 15 (D.D.C. 2008); *Estate of Heiser* v. *Islamic Republic of Iran*, 659 F. Supp. 2d 20 (D.D.C. 2009); *Bennett* v. *Islamic Republic of Iran*, 507 F. Supp. 2d 117 (D.D.C. 2007); *Greenbaum* v. *Islamic Republic of Iran*, 451 F. Supp. 2d 90 (D.D.C. 2006).

The *Bennett* plaintiffs subsequently filed an action in the Northern District of California, where they sought to satisfy part of their judgment against Iran by executing upon assets held by Visa and Franklin. Pet. App. 9a. Visa and Franklin owe approximately $17.6 million to petitioner Bank Melli, allegedly because of "a commercial relationship that involves the use of Visa credit cards in Iran." *Ibid.* Bank Melli is an instrumentality

of Iran. *Ibid.* "Visa and Franklin have not turned the funds over to Bank Melli," however, "because the funds are blocked" by virtue of Executive Orders issued under IEEPA. *Ibid.*

Visa and Franklin responded by filing this interpleader action. The named defendants included Bank Melli, the *Bennett* plaintiffs, and the *Acosta*, *Heiser*, and *Greenbaum* plaintiffs. Pet. App. 9a. Bank Melli filed a motion to dismiss, arguing that (1) the assets are immune from attachment under the FSIA, and neither TRIA nor Section 1610(g) abrogates that immunity; (2) the assets are not the "assets of" or "property of" Bank Melli within the meaning of those provisions, because Bank Melli does not own the funds outright; (3) applying TRIA or Section 1610(g) here would be unconstitutionally retroactive; and (4) the case should be dismissed under Federal Rule of Civil Procedure 19, on the theory that Iran is a required party that cannot be joined. Pet. App. 43a.

The district court denied the motion, but certified its order for interlocutory appeal. Pet. App. 81a-104a. First, the court held that both Section 1610(g) and TRIA permit the Judgment Creditors to satisfy their judgments against Iran by attaching the Bank Melli assets, without regard to the *Bancec* presumption. *Id.* at 85a-87a. Second, the court held that the assets were the "assets of" and "property of" Bank Melli. *Id.* at 97a-99a. Relying on *Peterson* v. *Islamic Republic of Iran*, 627 F.3d 1117 (9th Cir. 2010), the court explained that Federal Rule of Civil Procedure 69(a)(1) provides for state law to govern the enforcement of FSIA judgments and, under California law, a debt owed to a judgment debtor is itself attachable. Pet. App. 97a-99a. The court

also rejected petitioner's arguments regarding retroactivity and Rule 19. *Id.* at 87a-97a, 100a-103a.

4. a. The court of appeals affirmed, although it revised its opinion twice in response to petitions for rehearing and a brief filed by the United States as amicus curiae. Pet. App. 1a-26a, 35a-59a, 67a-80a.[3]

First, the court of appeals concluded that TRIA abrogates Bank Melli's attachment immunity because the assets are blocked. Pet. App. 10a-12a. Second, the court concluded that Section 1610(g) also abrogates Bank Melli's attachment immunity. The court "h[e]ld that subsection (g) contains a freestanding provision for attaching and executing against assets of a foreign state or its agencies or instrumentalities," and thus a creditor seeking to enforce a judgment under the terrorism exception need not show that "some other part of § 1610 provides for attachment and execution." *Id.* at 13a. The court acknowledged that subsection (g) requires that an attachment proceed "as provided in this section." *Id.* at 14a. But the court reasoned that that reference is to the "procedures contained in § 1610(f)." *Ibid.* The court recognized that subsection (f) did not actually authorize any attachment, due to the President's waiver of its attachment provisions in paragraph (f)(1). *Id.* at 15a n.5. The court stated, however, that paragraph (f)(2) was

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[3] The first amended opinion substantially revised the discussion of whether Section 1610(g) is a freestanding exception to attachment immunity, and in particular interpreted the phrase "as provided in this section" to refer solely to subsection (f). Pet. App. 47a-48a. It also substantially revised the discussion of whether this case involves the "assets of" and "property of" Bank Melli within the meaning of TRIA and Section 1610(g). See *id.* at 54a-56a. The second amended opinion added a lengthy footnote to the discussion of subsection (g). See *id.* at 15a n.5.

still in force, the waiver was not reflective of congressional intent, and "the blinders-on, technical focus of this argument loses sight of Congress' main aim, which is for private plaintiffs who suffered torture and obtained tort judgments to get their money from terrorist states." *Ibid.*[4]

Third, the court of appeals held that the funds are the "assets of" and "property of" Bank Melli, within the meaning of TRIA and Section 1610(g). Pet. App. 21a-24a. The court stated that, under *Peterson*, it "look[s] to state law to determine the ownership of assets in this context." *Id.* at 22a. And it concluded that, under California law, Bank Melli "has a contractual right to obtain payments from Visa and Franklin," "those assets are property of Bank Melli," and they "may be assigned to judgment creditors." *Id.* at 22a-23a. The court added that, "even if federal law should govern this question," the outcome would be the same because "[f]ederal law and California law are aligned." *Id.* at 23a.

The court of appeals also rejected Bank Melli's arguments regarding retroactivity and Rule 19. Pet. App. 20a-21a, 24a-26a.

b. Senior District Judge Benson, sitting by designation, issued an opinion concurring in part and dissenting in part, in which he disagreed with the majority's interpretation of Section 1610(g) as a freestanding exception to attachment immunity. Pet. App. 27a-34a. He nevertheless concluded that the attachment could proceed under subsection (g) on the facts of this case, because Bank Melli's property had the requisite commercial

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[4] The court of appeals acknowledged that this holding diverged from what the United States had argued in its amicus brief. Pet. App. 18a n.7.

nexus to satisfy the exception in subsection (b)(3). *Id.* at 29a-30a.

DISCUSSION

Petitioner asks this Court to decide (Pet. i) whether Section 1610(g) creates a freestanding exception to attachment immunity under the FSIA. That question is worthy of this Court's review. The court of appeals' holding that it does create a freestanding exception is wrong, conflicts with *Rubin* v. *Islamic Republic of Iran*, 830 F.3d 470 (7th Cir. 2016), petition for cert. pending, No. 16-534 (filed Oct. 27, 2016), and raises an important and recurring issue of federal law. *Rubin* is a better vehicle for resolving that question, however, because *Rubin* involves a final judgment and the question is squarely presented there. This case, by contrast, is interlocutory and there may be multiple alternative bases for attaching the property at issue. The Court accordingly should grant certiorari on this question in *Rubin*, and hold this petition pending the outcome of that case.

Petitioner also asks this Court to decide (Pet. i) whether state or federal law applies when deciding whether "assets constitute 'property of' or 'assets of' [a] sovereign under TRIA and § 1610(g), and whether those provisions require that the sovereign *own* the property in question." That is really two questions, rather than one, and neither warrants review here. The court of appeals' decision is ambiguous in several important respects, and it is not clear that the court actually resolved the issues on which petitioner seeks certiorari. And while a conflict exists between the Second and D.C. Circuits on whether state or federal law determines "ownership" in this context, both bodies of law will often lead to the same result. Indeed, this case would be a poor vehicle for resolving that question, because the court of

appeals concluded that the result would be the same here under both state and federal law.

I. WHETHER SECTION 1610(g) CREATES A FREESTANDING EXCEPTION TO ATTACHMENT IMMUNITY WARRANTS THIS COURT'S REVIEW, BUT THE COURT SHOULD RESOLVE THAT QUESTION IN *RUBIN*

A. The Decision Below Incorrectly Interprets Section 1610(g)

1. Subsection (g) provides that "the property of a foreign state" against which a judgment has been entered under Section 1605A, "and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly" in such an entity, "is subject to attachment in aid of execution, and execution, upon that judgment *as provided in this section*, regardless of" the *Bancec* factors discussed above. 28 U.S.C. 1610(g)(1) (emphasis added). Subsection (g) thus sets aside the need for a *Bancec* inquiry in certain cases involving the terrorism exception. When a plaintiff obtains a Section 1605A judgment, the plaintiff can attempt to execute against the property of the foreign state itself or an agency or instrumentality, without regard to the *Bancec* factors. That significantly expands the universe of assets potentially available in such cases. But by its terms, the plaintiff still must proceed "as provided in this section." *Ibid.* That is, the creditor must also satisfy one of the exceptions to attachment immunity "as provided in" Section 1610. Congress thus did not take the further step of creating a freestanding exception to attachment immunity that would override the carefully crafted exceptions to immunity elsewhere in Section 1610. See *Rubin*, 830 F.3d at 474.

2. The court of appeals' alternative view would render much of the relevant provisions insignificant or superfluous.

a. First, subsection (g)'s statement that property may be attached "as provided in this section" would be essentially meaningless, because the statute would function the same way with or without it. The court of appeals appeared to recognize that the phrase must refer to some other part of Section 1610, and concluded that it "refer[s] to procedures contained in § 1610(f)." Pet. App. 14a. But as the Seventh Circuit explained in *Rubin*, "it would be very odd" for Congress to refer to subsection (f) in that way. 830 F.3d at 484. Congress would not be expected to say "this section" when it really meant "the preceding subsection." Cf. *NLRB* v. *SW Gen., Inc.*, 137 S. Ct. 929, 938-939 (2017).

Moreover, even on its own terms, the Ninth Circuit's interpretation would not support attachment. Paragraph (f)(1) could theoretically allow the attachment of certain blocked assets—but the President exercised his statutory authority to waive paragraph (f)(1) before it went into effect. See *Rubin*, 830 F.3d at 486-487. Subsection (f) thus has been "inoperative from the start," and "does not allow *any* form of execution." *Id.* at 487. Accordingly, if subsection (g) referred solely to subsection (f), it "would mean no execution at all." *Ibid.*[5]

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[5] The court of appeals noted that paragraph (f)(2) has not been waived. See Pet. App. 14a-15a & n.5. But that paragraph does not save the Ninth Circuit's interpretation, because it does not provide for attachment (or even create procedures for attachment); it provides that the State and Treasury Departments "should make every effort" to assist terrorism judgment creditors in identifying attachable property. 28 U.S.C. 1610(f)(2).

b. Second, the court of appeals' interpretation of subsection (g) would render subsection (a)(7) largely irrelevant. See *Rubin*, 830 F.3d at 484. Subsection (a)(7) provides that a foreign state's property used in commercial activity is not immune from attachment if the plaintiff is enforcing a judgment that "relates to a claim for which the foreign state is not immune under section 1605A or section 1605(a)(7) (as such section was in effect on January 27, 2008)." 28 U.S.C. 1610(a)(7). Section 1605A is the current version of the terrorism exception. See p. 3, *supra*. Subsections (a)(7) and (g) thus work together to enable holders of terrorism-related judgments to pursue property used in commercial activity (via subsection (a)(7)), and to do so whether that property is owned by the foreign state or by its agencies or instrumentalities, without need for a *Bancec* inquiry (via subsection (g)).

The court of appeals' interpretation of subsection (g), however, would make the two provisions work at cross-purposes by enabling Section 1605A creditors to evade subsection (a)(7)'s key limitation. Subsection (a)(7) allows a Section 1605A judgment creditor to pursue property only if it is used in commercial activity—but those same creditors could pursue property without that limitation simply by invoking subsection (g). For those creditors, subsection (a)(7) and its limitations would be superfluous.

Even worse, the court of appeals' interpretation would have made subsection (a)(7) entirely irrelevant when it was adopted. The very same statute—the 2008 NDAA—both amended subsection (a)(7) to refer to Section 1605A and enacted subsection (g). NDAA § 1083(b)(3)(A) and (D), 122 Stat. 341. And at the time, subsection (a)(7) referred *solely* to judgment creditors

under Section 1605A. § 1083(b)(3)(A), 122 Stat. 341.[6] Thus, under the court's interpretation, subsection (g)'s enactment rendered subsection (a)(7) completely pointless—even though Congress was making substantive changes to subsection (a)(7) at the very same time.

B. The Decision Below Conflicts With *Rubin*

1. The Ninth Circuit's decision here conflicts with *Rubin*. The Ninth Circuit held below that subsection (g) "contains a freestanding provision for attaching and executing against assets of a foreign state or its agencies or instrumentalities." Pet. App. 13a. On that view, persons with a judgment against a foreign state under Section 1605A need not demonstrate any nexus between the property of the foreign state (or its agency or instrumentality) and commercial activity before proceeding to execution. The Seventh Circuit reached the opposite result in *Rubin*, while acknowledging the split in authority. 830 F.3d at 487 ("[W]e disagree with the Ninth Circuit's interpretation of subsection (g)."). And Iran, owner of the artifacts at issue in *Rubin*, acknowledges the split as well and agrees that the question warrants certiorari. See Iran Mem. in Response at 14-17, *Rubin*, *supra* (No. 16-534).

The Ninth Circuit's conclusion that the assets were attachable under subsection (g) is a holding, notwithstanding the court's conclusion that they are also attachable under TRIA. See Pet. App. 10a-12a. An alternative holding is still binding precedent. See *Woods* v.

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[6] Congress only later restored the reference to the prior version of the terrorism exception, Section 1605(a)(7). See Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, § 502(e)(1)(A), 126 Stat. 1260.

Interstate Realty Co., 337 U.S. 535, 537 (1949); *Operating Eng'rs Pension Trust* v. *Charles Minor Equip. Rental, Inc.*, 766 F.2d 1301, 1304 (9th Cir. 1985). Moreover, the court's Section 1610(g) analysis—which prompted a dissent solely on that issue, see Pet. App. 27a-34a (Benson, J., concurring in part and dissenting in part)—gave the court's judgment a broader scope: It permitted the district court on remand to consider attachment under TRIA *and* Section 1610(g). TRIA permits creditors to recover only up to the amount of their compensatory damages, see § 201(a), 116 Stat. 2337, and only so long as the relevant assets remain "blocked," see *Ministry of Defense & Support for the Armed Forces of the Islamic Republic of Iran* v. *Elahi*, 556 U.S. 366, 369 (2009). Section 1610(g) contains neither limitation. Accordingly, there is a direct conflict on this question.

Respondents nonetheless contend (Joint Br. in Opp. 19-20) that there is no direct conflict because this case involves blocked assets, whereas *Rubin* does not. The Ninth Circuit's broad holding forecloses that view, however, because there is no suggestion that its interpretation of the reach of subsection (g) is applicable only to blocked assets. See Pet. App. 13a ("We hold that subsection (g) contains a freestanding provision for attaching and executing against assets of a foreign state or its agencies or instrumentalities."). Respondents also point to paragraph (g)(2), which renders the *United States'* own sovereign immunity inapplicable when assets are blocked. See 28 U.S.C. 1610(g)(2). But that does not suggest that subsection (g)'s provisions concerning *foreign state* immunity are inapplicable when assets are not blocked. And the Ninth Circuit never even mentioned paragraph (g)(2). Pet. App. 12a-20a.

Unless this Court intervenes, the circuit conflict will likely persist. The court of appeals denied en banc review here, even after soliciting (and receiving) from the United States an amicus brief arguing that the panel's interpretation of Section 1610(g) was wrong. Pet. App. 2a-3a. And although the court denied rehearing en banc before the Seventh Circuit decided *Rubin* and created the circuit conflict, the Seventh Circuit's analysis was similar to the analysis the parties and the United States had already presented to the Ninth Circuit in this case. It is thus unlikely that the Ninth Circuit would grant en banc review in a future case to adopt the Seventh Circuit's position. The Seventh Circuit also declined to grant en banc review in *Rubin*. 830 F.3d at 487 n.6.

C. The Question Presented Is Important

The meaning of Section 1610(g) is a pure question of statutory interpretation that has divided the circuits and that implicates foreign affairs. The court of appeals' interpretation of subsection (g) significantly broadens its scope by denying attachment immunity for property without any need for a nexus to commercial activity. Congress has carefully crafted exceptions in the FSIA relating to state sponsors of terrorism, and they should not be subject to unwarranted judicial expansion.

The interpretation of subsection (g) may have little practical impact in many cases involving enforcement of judgments obtained under the terrorism exception, because such creditors may be able to attach blocked property under TRIA (as the individual respondents seek to do here), without regard to the interpretation of subsection (g). The interpretation of subsection (g) is critical, however, when the assets at issue do not meet TRIA's specialized definition of "blocked property." § 201(d)(2), 116 Stat. 2338. For example, TRIA would

not govern attachment involving judgments against Sudan, because Sudan's assets are no longer blocked for purposes of TRIA, see, *e.g.*, *Harrison* v. *Republic of Sudan*, No. 13-cv-3127, 2017 WL 946422, at *3 (S.D.N.Y. Feb. 10, 2017), or judgments against Iran where the creditor seeks to attach assets that (like the assets at issue in *Rubin*) were unblocked by the Algiers Accords, Jan. 19, 1981, 20 I.L.M. 224. The court of appeals' rule would create an exception to immunity for all such unblocked property, even when it lacks any nexus to commercial activity.

D. The Court Should Grant The *Rubin* Petition And Hold This Case Pending The Outcome Of That Decision

Rubin is a better vehicle than this case for this Court's plenary review. *Rubin* arises from a final judgment, and if the Court denies review on the second question presented in that case, the *Rubin* petitioners' ability to attach the assets at issue will stand or fall on the interpretation of subsection (g). It is undisputed that the assets are Iran's property, and there would be final determinations that they are not attachable under subsection (a)'s commercial-activity exception or under TRIA. That case also demonstrates the impact of attaching assets that the foreign sovereign has not used in commercial activity and that are not blocked, and thus are not attachable under subsection (a) or TRIA. The plaintiffs seek to attach what Iran describes as "irreplaceable artifacts of [its] cultural heritage," which it loaned to an American university for academic study. Iran Mem. in Response at 26, *Rubin*, *supra* (No. 16-534).

By contrast, this case presents several complicating factors. First, it is interlocutory. The district court denied a motion to dismiss but certified the decision for interlocutory review, and the court of appeals affirmed.

Pet. App. 3a, 103a. Ordinarily, an interlocutory posture "itself alone furnishe[s] sufficient ground for the denial" of a petition. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see, *e.g.*, *Abbott* v. *Veasey*, 137 S. Ct. 612, 613 (2017) (Roberts, C.J., respecting the denial of certiorari).

Second, in part because of the interlocutory posture, it is unclear whether the interpretation of subsection (g) will ultimately make a practical difference here. The court of appeals held that respondents could attach the assets under TRIA. Pet. App. 10a-12a. And although the panel's interpretation of subsection (g) gives a broader scope to the judgment, see pp. 14-15, *supra*, as a practical matter TRIA will likely resolve the case on remand unless there is some change in circumstances. For subsection (g) to have practical importance, the disputed assets would need to become unblocked, or respondents would have to find enough Iranian assets to satisfy their sizable compensatory damage awards (which dwarf the estimated $17.6 million in property at issue here) and then seek to satisfy their punitive damage awards, which may be enforced under the FSIA but not TRIA.[7]

Third, respondents here may raise alternate grounds for affirming the Ninth Circuit's judgment. See Joint

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[7] The compensatory awards were about $290 million for the *Heiser* plaintiffs, $85 million for the *Acosta* plaintiffs, $12.5 million for the *Bennett* plaintiffs, and $20 million for the *Greenbaum* plaintiffs. See *Estate of Heiser* v. *Islamic Republic of Iran*, 659 F. Supp. 2d 20, 23, 31 (D.D.C. 2009); *Acosta* v. *Islamic Republic of Iran*, 574 F. Supp. 2d 15, 31 (D.D.C. 2008); *Bennett* v. *Islamic Republic of Iran*, 507 F. Supp. 2d 117, 130 (D.D.C. 2007); *Greenbaum* v. *Islamic Republic of Iran*, 451 F. Supp. 2d 90, 105, 108 (D.D.C. 2006).

Br. in Opp. 22 (arguing that the assets are independently attachable under subsections (a)(7) and (b)(3)); see also Pet. App. 27a (Benson, J., concurring in part and dissenting in part) (concluding that the assets would be attachable by virtue of subsection (b)(3)). Those issues could be a distraction in the briefing and argument, and could interfere with the Court's ability to resolve the question on which the circuits are divided. The appropriate course is accordingly for the Court to grant the petition in *Rubin*, and to hold the petition here for its decision in that case.

II. THIS COURT SHOULD NOT GRANT REVIEW ON THE SECOND QUESTION PRESENTED REGARDING OWNERSHIP UNDER TRIA AND SECTION 1610(g)

TRIA applies to the "assets of" a terrorist party or its agency/instrumentality, TRIA § 201(a), and Section 1610(g) applies to the "property of" a foreign state or its agency/instrumentality. In seeking this Court's review to consider how to interpret those provisions, petitioner is actually seeking review of two distinct questions: whether these statutes require "ownership" or some lesser interest in property, and whether the relevant interest is determined under state or federal law. Neither question warrants this Court's review here.

A. 1. Insofar as the question is whether TRIA and Section 1610(g) have an "ownership" requirement, the United States agrees with petitioner that they do. See Gov't C.A. Br. 14-17; see also Pet. 29 (collecting citations to United States briefs taking this position). But the court of appeals does not appear to have rejected such a requirement. Indeed, in part of its opinion, the court appears to have assumed that both statutes require ownership. See Pet. App. 22a ("Like most courts,

we look to state law to determine the ownership of assets in this context.").

Petitioner's contrary understanding of the Ninth Circuit's opinion appears to rest on petitioner's position that it could not have an ownership interest in funds that are owed to it, but that have not yet been paid. That seems to be a fact-bound argument that the court of appeals misapplied California law (or failed to properly understand the federal common law of property) on the facts of this case. Such fact-based disputes are not a basis for certiorari.

2. There is no clear split among the courts of appeals on this issue. The D.C. Circuit has concluded that both TRIA and Section 1610(g) require ownership. *Heiser* v. *Islamic Republic of Iran*, 735 F.3d 934, 938-940 (2013). No court of appeals has squarely held to the contrary. In *Calderon-Cardona* v. *Bank of N.Y. Mellon*, 770 F.3d 993 (2014), cert. denied, 136 S. Ct. 893 (2016), the Second Circuit concluded that Congress "has not defined the type of property interests" subject to attachment under Section 1610(g), and the court ultimately looked to state law. *Id.* at 1000-1001. But as the court understood state law, only one entity could have *any* property interest in the asset at issue (midstream electronic funds transfers). *Id.* at 1001-1002. The court thus did not need to confront the question whether an interest less than ownership would have sufficed under Section 1610(g). See *Hausler* v. *JP Morgan Chase Bank, N.A.*, 770 F.3d 207, 211-212 (2d Cir. 2014) (per curiam) (following *Calderon-Cardona* in a TRIA case involving midstream electronic funds transfers), cert. denied, 136 S. Ct. 893 (2016).

B. The Court's review also is not warranted to consider whether a court should apply state or federal law in determining any ownership interest.

1. The Second and D.C. Circuits appear to have split on that question. Compare *Calderon-Cardona*, 770 F.3d at 1000-1001, and *Hausler*, 770 F.3d at 211-212, with *Heiser*, 735 F.3d at 940-941. That conflict does not make any practical difference, however, unless state property law and federal common law lead to different results, and they often will not. For example, although the Second and D.C. Circuits were ostensibly applying different bodies of law, they came to the same conclusion that downstream entities have no attachable interest in midstream electronic fund transfers. See *Calderon-Cardona*, 770 F.3d at 1001-1002 (applying U.C.C. Article 4-A as a matter of state law); *Heiser*, 735 F.3d at 940-941 (looking to U.C.C. Article 4-A to supply a rule of decision for federal common law).

The same is true in this case. The court of appeals concluded that it would reach the same result regardless of whether state or federal law applied, because the two are "aligned" here. Pet. App. 23a. Accordingly, unless this Court were prepared to review not only the question of which body of law applied, but also the court of appeals' predicate understanding of California property law and federal common law, *and* the Court found a meaningful difference between the two here—case and fact-specific inquiries not worthy of certiorari—there would be no basis to set aside the judgment of the court of appeals and no need to decide the issue on which the circuits are divided.

C. Finally, this case would be a poor vehicle for resolving the question because petitioner elides the im-

portant issue of exactly what the court of appeals understood the targeted property to be. Although the opinion is ambiguous, it can fairly be read to conceive of the targeted property as the right of Bank Melli to receive payment from Visa/Franklin (an asset Bank Melli almost surely owns under any relevant law), as distinguished from the Visa/Franklin account itself. See Pet. App. 22a-23a ("Bank Melli has a contractual right to obtain payments from Visa and Franklin. Under California law, those assets are property of Bank Melli and may be assigned to judgment creditors."). That ambiguity counsels denial of certiorari in its own right, particularly given this case's interlocutory posture, because the issue may be clarified (and mooted) on remand.[8] Furthermore, if the asset at issue is understood to be the right to receive payment (as opposed to ownership of the funds themselves), it is particularly doubtful that state and federal law would differ as to whether Bank Melli owned that asset.

[8] The resolution of this ambiguity may have implications for other issues in the case, including whether the property is located in the district for purposes of attachment.

CONCLUSION

The petition for a writ of certiorari should be held pending the disposition of *Rubin* v. *Islamic Republic of Iran*, No. 16-534, and then disposed of accordingly.

Respectfully submitted.

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