No. 07-615

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

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

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Despite Respondent's argument in his Brief in Opposition ["Op. Cert."], the petition raises extraordinary questions of statutory construction, resulting in schisms of interpretation and application in the lower courts and causing substantial confusion in the conduct of U.S. foreign policy. Two distinct set of questions are raised here in relation to the 2000 Victims of Trafficking and Violence Protection Act (VTVPA) and the 2002 Terrorism Risk Insurance Act (TRIA), which even Respondent concedes, Op. Cert. 14, 21, 28-31, have been widely-litigated and implicate significant foreign policy concerns. These issues are worthy of this Court's consideration, either by way of summary disposition or grant of plenary review.

1. Whether Respondent had relinquished his right to attach the Cubic judgment, under the VTVPA and TRIA, by receiving U.S. Treasury payments in partial satisfaction of his default judgment, turns on whether the Cubic judgment is "at issue in claims against the United States before an international tribunal." TRIA, § 201(c)(4); Pet. App. 117. The panel majority and dissent sharply disagreed about the gloss to be given to the phrase "at issue," and its application to proceedings at the Iran-U.S. Claims Tribunal in The Hague. Pet. App. 11-15 & n.7, 31-37.

a. The circuit conflict Petitioner earlier discussed, Pet. 21-23, concerns the appropriate construction of the "at issue" provision. This split is not of Petitioner's fanciful creation; it was acknowledged by both the panel majority and dissent here. Pet. App. 14-

15 nn.6&7, 31-333 & n.7. Despite Respondent's contention, Op. Cert. 15, the court below most certainly did not adopt the Fifth Circuit's construction of "at issue" in *Hegna v. Islamic Republic of Iran*, 376 F.3d 485 (5th Cir. 2004), as covering a "broader swath of conflict." Id. at 492. The Ninth Circuit, instead, noted that "[t]he dissent reads Congress's choice of the phrase 'at issue' as cutting a broader swath than the phrase 'the subject of' resolved claims. However, that distinction is untenable." Pet. App. 15 n.7. There should be no doubt that the Ninth Circuit employed a narrowing construction of TRIA's "at issue" provision, in order to hold that the Cubic judgment was somehow not implicated in a claim against the United States at the Iran Claims Tribunal.

b. Respondent also asserts that because the Claims Tribunal has no jurisdiction over private parties, the Cubic judgment could never be "at issue" there. Op. Cert. 17. This misconstrues the Claims Tribunal's jurisdiction, and would have serious ramifications for the operation of that institution. The jurisdictional basis for the Islamic Republic of Iran's dispute with the United States in Case B/61, as concerning the Cubic judgment, is the United States' non-compliance with paragraphs 9 and 17 of the General Declaration of the Algiers Accords, Jan. 19, 1981, Iran-U.S., 20 I.L.M. 224, 227-28 (1981). Such disputes are clearly within the Tribunal's jurisdiction. See Claims Settlement Declaration, art. II, paras 2 & 3, reprinted in 20 I.L.M. at 231.

Because the court below misunderstood this aspect of the Tribunal's jurisdiction, and the nature of

the United States' obligations under the Algiers Accords, its and Respondent's (see Op. Cert. 19) ostensible reliance on Petitioner's statements at the Tribunal concerning the res judicata effect of the earlier Cubic arbitration are unavailing. As already discussed, see Pet. 18, Petitioner's position has been entirely consistent, given the different character of the proceedings before the Tribunal and the International Chamber of Commerce. Judge Fisher was thus quite right in observing below, see Pet. App. 37, that Petitioner made no "concession" here.

c. Respondent's contentions are also contradicted by long-standing policy positions of the U.S. government, see President Clinton's May 1996 Message to Congress (fully cited at Pet. 17), by the previous decision of the Iran Claims Tribunal in the B/66 Award (see Pet. 18), by the submission of the United States in a memorial filed in the B/61 Case (see Pet. 19), and by the position of the government in the proceedings below, see Brief for the U.S. as Amicus Curiae Supporting Rehearing, at 12-13 (9th Cir. filed June 19, 2007) ["U.S. Reh'g Br."]. It bears repeating, as Judge Fisher observed below in dissent, that because the Cubic judgment arises from the same transaction or contract that is the basis of Iran's claim against the United States for violation of the Algiers Accords, the U.S. is entitled to use the Cubic judgment as a set-off against any such award, and so the "effect of the Cubic judgment on the financial liability of the United States will be raised and adjudicated; that is sufficient to put the property 'in question'," and thus, "at issue." Pet. App. 32 & n.2.

2. Petitioner acknowledges that whether certain foreign-owned properties in the United States are "blocked assets," under TRIA, § 201(d)(2)(A); App. 118, is a complex inquiry.[1] But it is not a legally standardless one, as Respondent seems to suggest. Other circuits have given a narrowing construction to the TRIA's designation of "blocked assets," which is consistent with the weighty consequences that follow from such a finding. See *Bank of New York*, 484 F.3d at 150; *Hegna*, 376 F.3d at 493 n.32.

Contrary to Respondent's suggestion, Op. Cert. 25-28, Petitioner has been entirely consistent concerning the legal character of the Cubic judgment. Petitioner did previously argue that it qualified as a military asset under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1611(b)(2) ("property is, or is intended to be, used in connection with a military activity and . . . . is of a military character. . . ."). That is an entirely different inquiry from whether Petitioner had a

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[1] On October 25, 2007, the Ministry of Defense and Armed Forces Logistics (MODAFL) was listed by the Department of State, under Executive Order 13382, as having engaged in activities relating to the proliferation of weapons of mass destruction. See U.S. Treasury Press Release, http://www.treasury.gov/press/releases/hp644.htm. It is not evident whether this designation was intended to affect Petitioner, and it is not clear, pursuant to the regulations issued for this sanction program, if this development has any bearing on whether the Cubic judgment is a blocked asset. See 31 C.F.R. § 539.101 et seq. (2005); *Bank of New York v. Rubin*, 484 F.3d 149, 150-51 (2d Cir. 2007) (views of the U.S. sought).

possessory interest in the judgment, see *Smith v. Fed. Reserve Bank of N.Y.*, 346 F.3d 264, 272 (2d Cir. 2003), such as to trigger a blocking order before January 19, 1981. As to that question, the Ninth Circuit had previously ruled that the Cubic judgment was not a "blocked asset," because Petitioner only acquired an interest in it after that date. See Pet. App. 55 & 76. Respondent offers no sensible explanation for the Ninth Circuit's change of heart on this point, save that the panel's earlier ruling was in relation to Stephen Flatow (another party seeking attachment of the Cubic judgment), and not Elahi.

3. Virtually elided from Respondent's discussion is that this matter has been before this Court previously, where it was the subject of an RVSG order, a strong filing was made by the United States, and a per curiam reversal followed. See 546 U.S. 450 (2006). On remand from this Court, the Ninth Circuit panel (Betty B. Fletcher, J., writing) persisted in making a ruling that was contrary to the position taken by the United States in a decision that the U.S. government, in an amicus brief filed in support of rehearing, characterized as "expos[ing] the United States to hundreds of millions of dollars of claims by Iran . . . . and concerns relations between the United States and Iran." U.S. Reh'g Br., at 1-2. For Respondent to suggest now that this matter does not implicate any significant foreign relations issues and does not undermine U.S. foreign policy, Op. Cert. 12-13, 28-31, is disingenuous at best. Respondent asserts, Op. Cert. 18 n.12, that just because the United States may be liable to Iran for the funds that Elahi proposes to

attach here, it is a "purely monetary concern," that fails to "raise 'sensitive issues concerning the foreign relations of the United States'," id. (quoting *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493 (1983)). This is insensible to the realities of U.S. foreign policy, especially in the context of the complex political, military, diplomatic and financial relationship between the United States and the Islamic Republic of Iran.

This Court need not take Petitioner's word on the foreign policy significance of this case; it should request the views of the Solicitor General, as it did in the earlier incarnation of this matter. See 544 U.S. 998 (2005).

CONCLUSION

The petition ought to be granted.

Respectfully submitted,

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