No. 14-770

IN THE
Supreme Court of the United States

BANK MARKAZI,
THE CENTRAL BANK OF IRAN,
Petitioner,

v.

DEBORAH D. PETERSON, *et al.*,
Respondents.

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

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF FOR PETITIONER

Neither respondents nor the United States denies that Section 8772 singles out this one case—the "proceedings in the United States District Court for the Southern District of New York in Peterson et al. v. Islamic Republic of Iran et al., Case No. 10 Civ. 4518 (BSJ) (GWG)"—for radically different treatment while expressly disclaiming any effect on "any [other] proceedings." 22 U.S.C. § 8772(b), (c)(1). "In order to ensure that Iran is held accountable for paying the judgments," moreover, the statute directs that nearly $2 billion in assets be paid over to plaintiffs subject only to makeweight findings that Bank Markazi has a beneficial interest in them and that no one else does. *Id.* § 8772(a)(1), (2). Congress's attempt to dic-

tate the outcome of this litigation by changing the law solely for purposes of this one case presents an ideal opportunity to reaffirm and clarify the scope of *United States* v. *Klein*, 80 U.S. 128 (1872)—a decision critical to protecting the judicial function of deciding particular cases and controversies from legislative usurpation. None of the government's arguments supports denial of review.

I. THIS CASE PRESENTS IMPORTANT AND UNRESOLVED SEPARATION OF POWERS QUESTIONS

This case raises important and unanswered questions about *Klein*'s scope: whether Congress can legislatively dictate the outcome of a pending judicial proceeding so long as it reserves nominal or collateral issues for judicial determination; and whether Congress violates the separation of powers by amending the law solely for purposes of one case. The government's efforts to marginalize those important questions are unpersuasive.

A. The government does not dispute that § 8772 left no meaningful questions for judicial determination. Nor does it deny that the Second Circuit upheld the statute despite assuming that it had precisely that effect. Pet. App. 10a. Indeed, the government *endorses* the court of appeals' rationale, urging that "this Court has never suggested that whether there is a 'serious question' about how a statute applies to the facts before a court is the test for determining whether the statute invades the court's Article III functions." U.S. Br. 16.

The breathtaking consequences of the government's theory underscore the need for this Court's intervention. On the government's view, Congress could enact a statute directing a court to award Jones $35,000 for being run over by a postal truck, so long as the court first made a statutorily required finding that the postal truck had

wheels or that the sky is blue. If that is the only constraint *Klein* places on Congress's power to dictate the outcome of a case, the decision is a dead letter—and with it any notion of an independent judiciary.

The government finds no support for its theory in this Court's cases. It insists that *Robertson* v. *Seattle Audubon Society*, 503 U.S. 429 (1992), "did not examine whether compliance with the new standards [Congress established] presented a 'serious question.'" U.S. Br. 17. But in fact *Robertson* rejected a *Klein* challenge only because the statute there "expressly reserved judgment upon 'the legal and factual adequacy' of the administrative documents" and "expressly provided for *judicial* determination of the lawfulness of * * * sales." 503 U.S. at 438-439. Nothing in the opinion suggests that the Court viewed those findings as makeweights.

The government's interpretation of *Klein* divests that decision of all force. The Second Circuit's holding adopting that theory warrants this Court's review.

B. The government also does not dispute that this case squarely presents whether Congress can change the law solely for purposes of a single pending case. The government acknowledges that "*Robertson* declined to address the question whether 'even a change in law, prospectively applied, would be unconstitutional if the change swept no more broadly, or little more broadly, than the range of applications at issue in [a] pending case[ ].'" U.S. Br. 17 (quoting 503 U.S. at 441). And it cannot deny that § 8772 is precisely such a statute. This case thus squarely presents that issue for review.[1]

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[1] Despite acknowledging that *Robertson* reserved decision on this issue, the government elsewhere repeats respondents' error of asserting that *Robertson* actually decided it. *Robertson*, the govern-

The government urges that this Court already decided the issue in *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. 421 (1856). U.S. Br. 17-18. That is wrong. For one thing, the government cannot explain why the Court would have "declined to address" the issue in *Robertson* if it had already settled the issue in *Wheeling Bridge*—a decision *Robertson* cited multiple times. 503 U.S. at 436, 441. This Court is surely the best judge of whether its own precedents have resolved an issue. That *Robertson* clearly deemed the question open renders the government's reading of *Wheeling Bridge* implausible.

That reading is not just implausible but wrong. In *Wheeling Bridge*, the Court had decreed a bridge an obstruction to navigation, and Congress sought to preserve the bridge by declaring it a federal post-road. 59 U.S. at 429. Critical to the Court's decision upholding that statute was that the case concerned *prospective relief* on a matter of public rights. *Id.* at 431-432. The Court made clear that, "if the remedy in this case had been an action at law, and a judgment rendered in favor of the plaintiff for damages, the right to these would have passed beyond the reach of the power of congress." *Id.* at 431.

The government insists that *Wheeling Bridge* shows that "legislation designed to alter governing law in a single case does not offend separation-of-powers principles."

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ment claims, "explained that *Klein* does not apply when Congress 'amend[s] applicable law' by 'replac[ing] the legal standards underlying' pending litigation, as opposed to directing the disposition of cases under existing law." U.S. Br. 12 (citations omitted). *Robertson* said no such thing. The first quotation comes from a sentence describing the rule applied by the *court of appeals*, which this Court *expressly declined to address*. 503 U.S. at 441. And the second comes from a passage describing only the effect of the statute, not the scope of *Klein*. *Id.* at 437.

U.S. Br. 17. But it ignores this Court's rationale. *Wheeling Bridge* defines the scope of Congress's power to alter a prospective decree—not its power to change the outcome of cases generally. That is how this Court has always understood the decision. See *Miller* v. *French*, 530 U.S. 327, 345-346 (2000) (explaining that *Wheeling Bridge* upheld the statute because "the decree * * * provided for prospective relief" rather than an "award[ ] [of] money damages in an action at law"); *The Clinton Bridge*, 77 U.S. 454, 463 (1870) ("very different considerations" are presented by an "action * * * at common law for damages"). *Wheeling Bridge* is thus inapposite here. This case involves an effort to force one party to pay other parties large sums of money as compensation for past injuries, not the modification of prospective relief.

Even apart from that distinction, *Wheeling Bridge* does not support what Congress did here. The statute in *Wheeling Bridge* did not change the law solely for purposes of one case. To be sure, the statute targeted *one bridge*. But the change it made—designating the bridge a federal post-road—would have applied equally in *any other litigation concerning that bridge*. *Wheeling Bridge* might resemble this case more closely if Congress had passed a statute deeming the bridge a federal post-road solely for purposes of one pending judicial proceeding. But the Court has never upheld *that* sort of legislation.

That is no small difference. Congress can unquestionably enact legislation directed to a specific problem, party, or property. See *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 239 n.9 (1995). What Congress may not do is change the law solely for purposes of one *case*. There is no meaningful difference between directing a court to decide a case a particular way and changing the law solely

for purposes of that one case. If Congress does either, it is exercising a judicial rather than legislative function.

II. THE GOVERNMENT'S SOLE PURPORTED VEHICLE PROBLEM IS NOT A BASIS FOR DENYING REVIEW

While respondents tossed out a slew of supposed vehicle defects, the government identifies only one: that "Section 8772 pertains to the rules governing execution against a foreign state's property in satisfaction of a judgment against the foreign state." U.S. Br. 18. That context is no impediment to review.

Nothing in the court of appeals' analysis turned on Bank Markazi's sovereign status. The court ruled against Bank Markazi based on its understanding of *Klein* as a general matter, not any holding that *Klein* applies differently to sovereign entities. Pet. App. 7a-10a. Bank Markazi's status is irrelevant to the court of appeals' rationale and therefore need not be considered by this Court in reviewing it. The importance of the broad legal rule announced below, moreover, in no way depends on the context in which it arose.

In any event, the government fails to show that Bank Markazi's sovereign status has any impact on the *Klein* analysis. The government urges that "*[i]mmunity determinations* were historically made by the Executive on a case-by-case basis." U.S. Br. 18 (emphasis added). That might be a valid argument if § 8772 merely abrogated immunity. But that is not the only thing the statute does. As the government acknowledges, the statute *also* "preempts otherwise applicable state law" by altering substantive property rights under the Uniform Com-

mercial Code. *Id.* at 13-14. There is no similar tradition of case-by-case preemption of state property law.[2]

The government next invokes the claims-settlement authority recognized in cases such as *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981)—namely, the power to "renounce or extinguish claims *of United States nationals* against foreign governments in return for lump-sum payments or the establishment of arbitration procedures." *Id.* at 679 (emphasis added). But directing a court to rule *against* a foreign sovereign notwithstanding otherwise applicable law cannot remotely be characterized as an exercise of that authority. Cf. *Medellín* v. *Texas*, 552 U.S. 491, 531 (2008) (noting that the "claims-settlement cases involve a narrow set of circumstances"). And regardless, the government makes no effort to show that the political branches historically exercised claims-settlement authority by directing the outcome of *particular cases*. The executive order in *Dames & Moore*, for example, "'suspended' *all* 'claims which may be presented to the * * * [Iran-United States Claims] Tribunal.'" 453 U.S. at 666 (emphasis added). It did not direct the outcome of a single pending case.

Finally, the government points to "various blocking statutes that enable the President to block foreign-state assets." U.S. Br. 19. But those too are irrelevant. Block-

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[2] Even with respect to immunity, § 8772's validity is doubtful. The government cites *Roeder* v. *Islamic Republic of Iran*, 333 F.3d 228 (D.C. Cir. 2003), cert. denied, 542 U.S. 915 (2004), as an example of a case-specific revocation of immunity. U.S. Br. 18-19. But *Roeder* expressly noted that "it is open to question whether Congress may dictate the outcome of a particular judicial proceeding" and refrained from deciding "whether the amendments, relating as they did specifically to a pending action, violated separation-of-powers principles by impermissibly directing the result of pending litigation." 333 F.3d at 237-238 & n.5.

ing assets is a far cry from expropriating them. See 50 U.S.C. §1702(a)(1)(C) (authorizing confiscation of assets *only* "when the United States is engaged in *armed hostilities* or has been *attacked* by a foreign country or foreign nationals" (emphasis added)). And the government identifies no historical practice of exercising blocking authority by directing the outcome of a particular case. Merely promulgating blocking orders that "could have a dispositive impact on one (or more) pending cases" (U.S. Br. 19) is not the same as dictating the outcome of a single pending case.

The government thus fails to show that this case is unique in any way relevant to the *Klein* analysis. Congress violated the separation of powers by directing the outcome of a single pending case—suspending the Uniform Commercial Code for this case alone so that the court would order one party to pay other parties large sums of money. That is a paradigmatic *Klein* violation, and that is no less true merely because Bank Markazi happens to be a foreign central bank.

III. THE DECISION BELOW HAS IMPORTANT INTERNATIONAL RAMIFICATIONS

The government does not even attempt to defend the Second Circuit's rationale for finding no violation of the Treaty of Amity. And its remaining efforts to downplay this case's international consequences are unpersuasive.

A. The Treaty of Amity expressly prohibits "unreasonable or discriminatory measures that would impair [the] legally acquired rights and interests" of Iranian "nationals and companies." Treaty of Amity, Economic Relations, and Consular Rights, U.S.-Iran, art. IV.1, Aug. 15, 1955, 8 U.S.T. 899, 903. The court below held that §8772 is consistent with the Treaty because it supposedly "contains no country-based discrimination." Pet. App.

7a. The government does not even attempt to defend that rationale. The statute expressly applies only to assets in which "Iran" has a beneficial interest, and its avowed purpose is "to ensure that Iran is held accountable for paying the judgments." 22 U.S.C. § 8772(a)(2).

Instead, the government offers a brand new theory: It contends that state-owned entities like Bank Markazi are not "companies" within the meaning of the Treaty. U.S. Br. 21-23. That never-before-adopted theory defies both the text and the drafting history of the Treaty.

Nothing in the Treaty's text excludes state-owned entities from its protections. Article III.1 defines "companies" broadly as "corporations, partnerships, companies and other associations, whether or not with limited liability and whether or not for pecuniary profit." 8 U.S.T. at 902. Nothing in that language distinguishes between publicly and privately owned entities. The government seeks support from the reference to "government agencies and instrumentalities" in Article XI. *Id.* at 908-909. But Article XI's use of that more specific term sheds no light on whether "government agencies and instrumentalities" can also be "companies" when established as separate juridical entities. In fact, Article XI.4 specifically refers to "corporations [and] associations" that are "publicly owned or controlled." *Id.* at 909. That provision confirms that "corporations" and "associations"—which Article III.1 defines to be "companies" subject to the Treaty's protections—include publicly owned entities. *Id.* at 902.

Most importantly, the government overlooks unequivocal drafting history. During negotiations, Iranian delegates sought to limit the Treaty to privately owned companies. Observing that the "definition of 'companies' given [in Article III.1] applied to [the] entire treaty and

that other rights and privileges conferred on 'companies' * * * are significant," they "asked that [the] [U.S. State] Department reconsider [the] Iranian request to limit [the] treaty definition to *'privately-owned and managed' companies*." Telegram No. 1176 from U.S. Embassy in Tehran to U.S. Secretary of State, U.S. Dep't of State Control No. 11,890, at 1 (Nov. 27, 1954) (emphasis added). The United States refused, opining that "[t]o define companies for all treaty purposes as private companies establishes [a] precedent of questionable effect on [the] interests [of] both countries [in] view [of the] trend [in] many countries toward state enterprises." Telegram No. 1174 from U.S. Dep't of State to U.S. Embassy in Tehran 1 (Dec. 13, 1954).[3]

The government's efforts to downplay this case's importance thus contradict its own position during treaty negotiations. Bank Markazi is a distinct legal entity under Iranian law and is treated as a "joint stock compan[y]" for most purposes. C.A. App. 1340. The Treaty thus protects Bank Markazi from discriminatory measures even though the bank is publicly owned. Even if the point were debatable, that would not diminish the case's importance. The International Court of Justice has jurisdiction to resolve such disputes. Pet. 27. The prospect that the decision below may expose the United States to nearly $2 billion in liability before an international tribunal underscores the need for this Court's review.

B. Finally, the government asserts that the decision below does not undermine the United States' reputation as a safe custodian for financial reserves and foreign investment because § 8772 is a "narrowly tailored provi-

[3] These documents are available to be lodged pursuant to this Court's Rule 32.3.

sion" that targeted "assets beneficially owned by the central bank of a state sponsor of terrorism * * * that were being held in the United States in violation of U.S. sanctions laws and regulations." U.S. Br. 23. That argument fails on multiple levels.

First, the alleged "violation[s] of U.S. sanctions laws and regulations" were never adjudicated: Clearstream settled that case without "admi[tting] * * * any allegation" and "solely for the purpose of settling this matter without a final agency finding that a violation has occurred." Settlement Agreement ¶18 (Jan. 22, 2014), http://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20140123_clearstream_settle.pdf. Nor does Bank Markazi's status as the Central Bank of Iran diminish the case's importance. Bank Markazi still had a reasonable expectation that plaintiffs' claims would be adjudicated according to the rule of law, including the ordinarily applicable principles of the Uniform Commercial Code, separate juridical status, and central bank immunity. Finally, §8772's "narrowly tailored" nature is precisely what makes the statute objectionable. It sends the message to the world community that Congress will not hesitate to direct courts to rule against disfavored financial institutions if it does not like how the cases would come out under generally applicable law.

The reliability of a legal regime depends on whether it follows the rule of law not merely for politically popular litigants but for unpopular ones as well. (It is no coincidence that *Klein* involved Confederate sympathizers.) If Congress can change the law to dictate the outcome in this case, it can do so in any other case as well, depending on which way the political winds blow. The broad principle announced by the court of appeals opens the door to statutes that decree outcomes in any number of cases.

Notwithstanding the government's assurances, therefore, the decision below sets a bad precedent that substantially impairs the United States' reputation abroad.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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