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

JOINT BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Section 1610(g) of the Foreign Sovereign Immunities Act of 1976 ("FSIA"), Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended at 28 U.S.C. §§ 1602 *et seq.*), 28 U.S.C. § 1610(g), enacted as part of the "terrorism exceptions" to foreign sovereign immunity, requires victims of state-sponsored terrorism to prove that property of an instrumentality of a terrorist state is subject to an additional, commercial exception to foreign sovereign immunity before they can execute on such property to satisfy their terrorism judgments.

2. Whether blocked cash 100% beneficially owned by an instrumentality of a terrorist state constitutes the "property of" or "assets of" the sovereign under § 1610(g) or the Terrorism Risk Insurance Act of 2002 ("TRIA"), Pub. L. No. 107-297, § 201, 116 Stat. 2322, 2337 (reproduced at 28 U.S.C. § 1610 note), respectively.

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BRIEF IN OPPOSITION

Respondents Michael Bennett, et al. respectfully submit that the petition for a writ of certiorari filed by Bank Melli should be denied.

OPINIONS BELOW

The opinion of the court of appeals is reported at 825 F.3d 949 (9th Cir. 2016). Pet. App. 1a-34a. The prior, superseded opinions of the court of appeals are reported at 817 F.3d 1131 (9th Cir. 2016), Pet. App. 35a-66a, and 799 F.3d 1281 (9th Cir. 2015), Pet. App. 67a-80a. The district court's opinion is reported at 927 F. Supp. 2d 833 (N.D. Cal. 2013). Pet. App. 81a-104a.

JURISDICTION

The opinion of the court of appeals was entered on June 14, 2016. *Id.* at 1a-34a. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

PRELIMINARY STATEMENT

This Court should deny certiorari because the decision below is interlocutory and there are no true circuit splits on the questions presented. Petitioner asks this Court to grant certiorari from an interlocutory denial of a motion to dismiss where no final decree has been entered. It requests this extraordinary relief notwithstanding that, even under petitioner's interpretation of § 1610(g), respondents still would be entitled under § 1610(g)

to execute upon the property at issue. This fact decisively distinguishes this case from *Rubin v. Islamic Republic of Iran*, 830 F.3d 470 (7th Cir. 2016), and obviates any purported split between the Ninth and Seventh Circuits. Moreover, the case presents a fully sufficient alternative ground—execution pursuant to TRIA—to reach the same result.

Petitioner cannot escape that result by raising a false conflict between the decision below and *Heiser v. Islamic Republic of Iran*, 735 F.3d 934 (D.C. Cir. 2013), a case that petitioner contends requires application of a federal ownership test to determine whether property of a terrorist state instrumentality is subject to execution. The Ninth Circuit applied *both* state and federal tests of ownership and, expressly following *Heiser's* analysis, concluded that, under both state and federal law, petitioner's 100% beneficial ownership interest in the property at issue was sufficient to support execution under the FSIA. No court has held to the contrary.

The petition for a writ of certiorari should be denied.

I. STATUTORY FRAMEWORK

A. The Original FSIA

Originally enacted in 1976, the FSIA defines the scope of immunity enjoyed by a "foreign state," which Congress has defined to include an "agency or instrumentality" of a foreign state. 28 U.S.C. § 1603(a). The FSIA defines the immunity of such

entities by specifying the extent to which (i) a foreign state may be subject to suit in federal and state courts, *see id.* §§ 1604-1607, and (ii) its property may be subject to attachment and execution, *see id.* §§ 1609-1611.

The statute's original exceptions largely "codif[ied] the restrictive theory of sovereign immunity," under which a foreign state's immunity is retained in suits involving its sovereign or public acts but abrogated in suits arising from its commercial activities. *Samantar v. Yousuf*, 560 U.S. 305, 313 (2010); *see*, *e.g.*, 28 U.S.C. § 1605(a)(2), (3) and (b). Under the FSIA as originally enacted, all foreign states retained immunity from suit for non-commercial torts committed outside the United States. *See id.* § 1605(a)(5) (exception to immunity for torts "in the United States").

The "restrictive theory" of foreign sovereign immunity was mirrored in the FSIA's attachment and execution provisions, *id.* §§ 1609-1611, which, as originally enacted, generally only modified a foreign state's traditional immunity from execution against its property for property related to "commercial activity" in the United States. *See Connecticut Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 252 (5th Cir. 2002) ("For both immunity from jurisdiction and immunity from attachment, 'commercial activity' generally constitutes the touchstone of the immunity determination.").

Thus, § 1610(a) authorizes execution against the U.S. property of a foreign state in certain circum-

stances if the property is "used for a commercial activity in the United States." 28 U.S.C. § 1610(a). Section 1610(b), authorizes execution against the U.S. property of a foreign state's "agency or instrumentality . . . engaged in commercial activity in the United States" in certain circumstances, regardless of whether the property itself is used for commercial activity. *Id.* § 1610(b).

As enacted in 1976, the FSIA did not address "the attribution of liability among instrumentalities of a foreign state." *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba ("Bancec")*, 462 U.S. 611, 620 (1983). In the absence of a statutory rule, this Court in *Bancec* concluded that, in litigation permitted by the FSIA, "duly created instrumentalities of a foreign state are to be accorded a presumption of independent status." *Id.* at 627. Thus, a plaintiff who obtains a money judgment against a foreign state normally must collect that judgment from the assets of the foreign state itself and not from "assets of [its] instrumentality." *Id.* at 627-28.

B. The Terrorism Exceptions to Foreign Sovereign Immunity

In 1996, Congress enacted the first of the so-called "terrorism exceptions" to foreign sovereign immunity in § 1605(a)(7) of the FSIA. That provision abrogated jurisdictional immunity from claims seeking money damages for "personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, [or] hostage tak-

ing," if the foreign state was designated "as a state sponsor of terrorism" by the Secretary of State "at the time the act occurred" or later "as a result of such act." 28 U.S.C. § 1605(a)(l); 1605A(a)(2)(A)(i)(I).

However, in the absence of a federal enforcement mechanism, victims who obtained a judgment against a foreign state under § 1605(a)(7)'s terrorism exception faced "a number of practical, legal, and political obstacles" that "made it all but impossible . . . to enforce" their judgments. *In re Islamic Republic of Iran Terrorism Litigation,* 659 F. Supp. 2d 31, 49 (D.D.C. 2009). State sponsors of terrorism often have little property in the United States, and what property is here typically is blocked under Executive Branch sanctions programs. *Id.* at 52; *see, e.g.*, International Emergency Economic Powers Act ("IEEPA"), Pub. L. No. 95-223, § 202, 91 Stat. 1626; Trading with the Enemy Act ("TWEA"), Pub. L. No. 103-236, § 525(b)(1), 108 Stat. 474. Blocking broadly prohibits transactions in property without Executive Branch authorization. *See, e.g.*, Exec. Order No. 13,382, § 1(a), 3 C.F.R. § 170 (2005 Comp.). As a result, victims with judgments under the FSIA's terrorism exception often were unable to execute against property owned by the foreign state. *See* Jennifer K. Elsea, Cong. Research Serv., RL31258, *Suits Against Terrorist States by Victims of Terrorism* 7-9 (2008) ("*Suits Against Terrorist States"*).

Congress has addressed that issue in a series of statutes. In 1998, Congress authorized execution against foreign-state property upon "any judgment

relating to a claim for which a foreign state (including any agency or instrumentality of such state) claiming such property is not immune under section 1605(a)(7)['s]" terrorism exception to immunity. 28 U.S.C. § 1610(f)(1)(A). Congress authorized such execution "[n]otwithstanding any other provision of law, including" IEEPA, TWEA, and related sanctions programs, *id.,* but authorized the President to "waive the [new] requirements . . . in the interest of national security," *id.* § 1610 note (Supp. IV 1998). The President signed the legislation and, on the same day, waived its requirements. Presidential Determination No. 99-1, 3 C.F.R. § 302 (1998 Comp.).

In 2000, Congress enacted a statute authorizing compensation for specific judgment creditors of terrorist states; slightly modified the existing provision (§ 1610(f)) authorizing execution against blocked assets; and codified the President's waiver authority at § 1610(f)(3). Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 2002(a)-(c) and (f), 114 Stat. 1541-1543. The President signed the legislation and, on the same day, again waived operation of § 1610(f)(1)(A). Presidential Determination No. 2001-03, 3 C.F.R. §405 (2000 Comp.).

In 2002, in an apparent reaction to the presidential waiver, Congress yet again authorized execution on blocked assets in TRIA § 201, one of the provisions at issue here. In TRIA, Congress granted the President only limited waiver authority and, for the first time, separately addressed execution

against the "blocked assets of any agency or instrumentality of [a] terrorist party." 28 U.S.C. § 1610 note (a). Section 201(b) authorizes the President to waive § 201's requirements but only "on an asset-by-asset basis" and only in response to a court order directing execution against or attachment of certain diplomatic or consular property subject to international treaties protecting it from attachment. *Id.* at 1. Absent such a waiver, § 201(a) provides:

> Notwithstanding any other provision of law, . . . in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, or for which a terrorist party is not immune under [28 U.S.C.] section 1605A or 1605(a)(7) . . . , the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.

Id.

In 2008, Congress further augmented the terrorism exceptions to foreign sovereign immunity in the National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083(a), (b)(1)(A)(iii) and (3)(D), 122 Stat. 338-341. That revision replaced § 1605(a)(7) with the new § 1605A, which, like § 1605(a)(7), abrogates sover-

eign immunity from damages suits for terrorist acts, 28 U.S.C. § 1605A(a) (Supp. II 2008), but also creates an express cause of action for personal injury or death caused by terrorist acts for which the foreign state lacks immunity, *id.* § 1605A(c) (Supp. II 2008).

Importantly for purposes of the instant petition, the 2008 amendment also added a new exception to immunity from execution on § 1605A judgments, § 1610(g), which provides in relevant part:

> (1) In general.—Subject to paragraph (3), the 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 factors corresponding to factors considered by courts in applying the *Bancec* presumption].
>
> (2) United States sovereign immunity inapplicable.—Any property of a foreign state, or agency or instrumentality of a foreign state, to which paragraph (1) applies shall not be immune from attachment in aid of execution, or execution, upon a judgment entered under section 1605A because the property is regulated by the United States Government

> by reason of action taken against that foreign state under [TWEA or IEEPA].

II. PROCEEDINGS BELOW

A. Proceedings in the District Court

Respondents are 90 United States citizens or representatives of their estates who hold unsatisfied money judgments entered against the Islamic Republic of Iran ("Iran") pursuant to the FSIA's terrorism exceptions, 28 U.S.C. §§ 1605A and 1605(a)(7), in the aggregate amount of nearly $1 billion for death and grievous injury suffered as a result of Iran-sponsored acts of terrorism in the United States and abroad. Pet. App. 8a. These attacks include the 1990 assassination of a rabbi and mass shooting in New York City, the 1996 Khobar Towers bombing in Saudi Arabia that killed 19 United States servicemen, a 2001 suicide bombing in downtown Jerusalem, and a 2002 bombing of a cafeteria at the Hebrew University of Jerusalem. *Id.*

Respondents, in four separate actions commenced in the District of Columbia, proved in each of their respective cases by "evidence satisfactory to the court," as required by 28 U.S.C. § 1608(e), that Iran was liable for the terrorist attacks that injured them or took the lives of their loved ones and obtained money judgments under § 1605A or the former § 1605(a)(7).[1] Iran, although it does not

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[1] *See Acosta v. Islamic Republic of Iran*, 574 F. Supp. 2d 15 (D.D.C. 2008); *Estate of Heiser v. Islamic Republic of Iran*,

dispute the validity of the judgments against it, refuses to satisfy them.

Petitioner Bank Melli is Iran's largest bank and owned 100% by the Government of Iran. Pet. App. 8a. Bank Melli is the 100% beneficial owner of the approximately $18 million in blocked funds (the "Blocked Assets") that are the subject of the underlying interpleader action. *Id.* On October 25, 2007, the United States Department of the Treasury, Office of Foreign Assets Control ("OFAC"), acting pursuant to Executive Order 13,382 of June 28, 2005, issued pursuant to IEEPA, added Bank Melli to the list of Specially Designated Nationals subject to sanctions by reason of Bank Melli's role in Iran's systematic proliferation of weapons of mass destruction. *Id.* at 9a. As a result of that designation, all of Bank Melli's assets in the United States became blocked as a matter of law. *Id.*; *see* 72 Fed. Reg. 63520, 62521 (Nov. 5, 2007) (adding Bank Melli to list of entities sanctioned under Executive Order 13,382). All of Bank Melli's assets in the United States are also blocked pursuant to Executive Order 13,599 of February 5, 2012 ("Blocking Property of the Government of Iran and Iranian Financial Institutions"), issued pursuant to IEEPA.

Prior to the deposit of the Blocked Assets into the registry of the district court, Visa Inc. ("Visa") held

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466 F. Supp. 2d 229 (D.D.C. 2006); *Greenbaum v. Islamic Republic of Iran*, 451 F. Supp. 2d 90 (D.D.C. 2006); *Bennett v. Islamic Republic of Iran*, 507 F. Supp. 2d 117 (D.D.C. 2007).

these funds in a Franklin Resources Inc. ("Franklin") mutual fund in the Northern District of California. Pet. App. 9a, 81a n.1, 84a. It is undisputed that the Blocked Assets are due and owing from Visa to Bank Melli based on commercial activities of Bank Melli, but could not be paid to Bank Melli by Visa due to the OFAC blocking regulations promulgated pursuant to Executive Orders of the President. *Id.* at 30a.

On December 2, 2011, the Bennett respondents filed a complaint against Visa and Franklin, seeking turnover of the Blocked Assets to satisfy their judgment against Iran. *Id.* at 84a. Visa and Franklin thereafter filed a third-party interpleader complaint, naming all of the respondents and Bank Melli as third-party defendants and seeking a determination of the rights to the Blocked Assets and a discharge of Visa and Franklin. *Id.* at 43a, 84a. When Bank Melli failed to answer the third-party complaint, the district court entered a default against Bank Melli on April 26, 2012, and the Blocked Assets were deposited into the district court registry. *Id.* at 84a.

On July 5, 2012, on consent of all parties, the district court vacated the default judgment against Bank Melli. *Id.* Bank Melli thereupon moved to dismiss all claims. *Id.*

The district court denied Bank Melli's motion to dismiss. The district court held that both § 1610(g) and TRIA expressly subject property of an instrumentality of a terrorist state to execution in satis-

faction of a judgment rendered against the state itself and, citing the Second Circuit's decision in *Weinstein v. Islamic Republic of Iran*, 609 F.3d 43 (2d Cir. 2010), *cert. denied, sub. nom. Bank Melli New York Representative Office v. Weinstein*, 133 S. Ct. 21 (2012), concluded that both statutes permit execution upon the Blocked Assets. Pet. App. 86a-87a.

The district court also refuted Bank Melli's argument that the Blocked Assets, which are undeniably due and owing to Bank Melli under a commercial contract, are somehow not the "assets of" or "property of" Bank Melli. *Id.* at 97a-99a. Following *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1130 (9th Cir. 2010), the district court held that enforcement of FSIA-based judgments are governed by state law and, under the law of California, funds due and owing to a judgment debtor are clearly subject to execution by its creditors. *Id.* 98a-99a.[2] The district court certified its order for interlocutory appeal. *Id.* at 103a-104a, 103a n.15.

[2] The district court likewise rejected Bank Melli's arguments that application of §1610(g) or TRIA to the Blocked Assets would be impermissibly retroactive and that Federal Rule of Civil Procedure 19 required dismissal. *Id.* at 94a, 97a, 103a. Although Bank Melli raised these issues on appeal, it does not seek review on these issues in this Court.

B. The Court of Appeals' Decisions

The Ninth Circuit unanimously affirmed three times in a series of amended decisions.[3] In its last opinion, the court of appeals once again affirmed the district court's determination that *both* TRIA § 201(a) and § 1610(g) permit respondents to execute on the Blocked Assets. *Id.* at 10a-20a. As to TRIA, the unanimous court stated:

> [W]e agree with the Second Circuit . . . that it is 'clear beyond cavil that Section 201(a) of the TRIA provides courts with subject matter jurisdiction over post-judgment execution and attachment proceedings against property held in the hands of an instrumentality of the judgment debtor, even if the instrumentality is not itself named in the judgment.'

Id. at 11a (quoting *Weinstein*, 609 F.3d at 50). The majority opinion further held that § 1610(g) is a freestanding provision that, in the specific context of enforcing terrorism judgments rendered under § 1605A, "was meant [by Congress] to allow attachment and execution with respect to *any property whatsoever* of the foreign state or its instrumentality." *Id.* at 18a (emphasis added).

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[3] On a petition for rehearing, the court of appeals withdrew its original affirmance of the district court (*id.* at 67a-80a) and replaced it with a new opinion (*id.* at 35a-66a), which was in turn amended on a petition for rehearing and replaced with a third affirmance, the opinion from which Bank Melli now seeks a writ of certiorari. *Id.* at 1a-34a.

In so holding, the court unanimously rejected Bank Melli's contention that the Blocked Assets, funds admittedly due and owing to petitioner, were not the "property of" or "assets of" Bank Melli for the purposes of § 1610(g) and TRIA, respectively. Like the district court and virtually all other courts to have visited this issue, the Ninth Circuit looked first to applicable state law, here the law of California. *Id.* at 22a. Under the law of California, it is beyond dispute that a judgment creditor may attach and execute upon a debt owed by a third party to the judgment debtor. *Id.* (citing *Peterson*, 627 F.3d at 1130-31; Cal Civ. Proc. Code §§ 482.080(a)(2), 680.310, 708.210, 708.510(a)).

Importantly for purposes of the instant petition, the Ninth Circuit also held that the Blocked Assets also were the property or assets "of" Bank Melli under federal law:

> But even if federal law should govern this question, *see Heiser v. Islamic Republic of Iran*, 735 F.3d 934, 940 (D.C. Cir. 2013) (creating federal rule of decision to interpret ownership requirements in FSIA, based in part on U.C.C. Article 4A and common law principles), Bank Melli would not succeed. Federal law and California law are aligned.

Id. at 23a. In support of that holding, the court cited the "expansive wording" of § 1610(g) and TRIA. *Id.* It then distinguished *Heiser* on the grounds that the Iranian entities there were not the ultimate beneficiaries of the assets at issue.

"By contrast, here, Bank Melli *is* the ultimate beneficiary; Visa and Franklin owe money to Bank Melli for services rendered pursuant to an agreement between them. Accordingly, Bank Melli has an interest in the blocked assets." *Id.* at 24a (emphasis in original). The Ninth Circuit therefore concluded that, "[e]ven if federal law applies, under the *Heiser* court's rationale, attachment and execution are allowed here because Bank Melli is the intended contractual beneficiary of the contested funds." *Id.*

The majority below dismantled Bank Melli's attempt to make § 1610(g) subservient to the "commercial activity" exceptions of § 1610(a) and (b) with a meticulous demonstration that Bank Melli's restrictive reading violates tenets of statutory construction and defies the clear intent of Congress to enhance the rights of terror victims to recover from *any* assets of instrumentalities of terrorist states. The majority opinion started with the observation that § 1610(g) expressly "applies *only* to 'certain actions,' specifically, judgments '*entered under section 1605A*.'" *Id.* at 13a (quoting 28 U.S.C. § 1610(g) (emphasis in original)). It then noted that such claims arise solely for personal injury and death caused by acts of terrorism that, by definition, do not involve commercial activity within the meaning of § 1610(a) or (b). Applying the basic rule of statutory interpretation that the specific governs the general, the majority concluded that the specific provision, § 1610(g), which applies solely to a limited class of terrorism claims, controls

over the more general provisions of § 1610(a) and (b). *Id.* at 14a (citing *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384-85 (1992)).

The majority further found that § 1610(g)'s words "as provided in this section" refer to § 1610(f), which, like § 1610(g), permits satisfaction of terrorism judgments from assets otherwise immune from execution. *Id.* at 14a. The court disposed of Bank Melli's argument that the partial presidential waiver in 2000 somehow rendered § 1610(f) irrelevant by noting that, regardless of the partial waiver, § 1610(f) remained the law when Congress enacted § 1610(g) in 2008 and, in any event, "[a] partial waiver does not reflect congressional intent; if anything, it demonstrates presidential disagreement with congressional intent." *Id.* at 15a n.5. The court therefore concluded that, "[i]n light of Congress' mandate to the executive branch to assist in the collection of judgments in [terrorism] cases, 28 U.S.C. § 1610(f), we cannot impute to Congress an empty statutory gesture." *Id.* at 14a.

Finally, the majority looked to the legislative history of § 1610(g), which demonstrated Congress' intent to allow execution on "any property whatsoever of the foreign state or its instrumentality" to satisfy judgments for state-sponsored terrorism. *Id.* at 18a. "As Senator Lautenberg [a chief sponsor of § 1610(g)] put it, the bill was meant 'to facilitate victims' collection of their damages from state sponsors of terrorism.' . . . Our interpretation more fully furthers that fundamental aim." *Id.* (internal citation omitted).

Although Judge Benson dissented from the majority's reading of § 1610(g), he joined in the court's conclusion that the Blocked Assets are subject to execution under that provision, finding that "judgment creditors relying on § 1610(g) are able to proceed, regardless of Bank Melli's sovereign immunity, because the judgment creditors have sufficiently alleged Bank Melli is engaged in commerce in the United States within the meaning of § 1610(b)(3) of FSIA." *Id.* at 27a.

REASONS FOR DENYING THE PETITION

I. THE INTERLOCUTORY DECISION BELOW IS NOT RIPE FOR REVIEW

The petition should be denied because the case comes to this Court in an interlocutory posture and is not ripe for review. This judgment enforcement proceeding has been stalled at the pleading stage since 2011; Bank Melli has not answered, and no final decree has been entered. Review on a writ of certiorari is particularly inappropriate here because, as shown in Points II and III, *infra*, the district court can render final judgment in favor of respondents on grounds that do not implicate the purported circuit splits cited in the petition.

"[T]his court should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Constr. Co. v. Jacksonville, Tampa & Key W.*

Ry. Co., 148 U.S. 372, 384 (1893). Certiorari jurisdiction is "to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision. . . . And, except in extraordinary cases, the writ is not issued until final decree." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). The lack of finality in the order below may "of itself alone" furnish "sufficient ground for the denial of the application." *Id.*; *see also Mount Soledad Mem'l Ass'n v. Trunk*, 132 S. Ct. 2535 (2012) (Alito, J., concurring); *Virginia Military Inst. v. United States*, 113 S. Ct. 2431 (1993) (Scalia, J., respecting the denial of certiorari) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction."); *and see generally* S. Shapiro, et al., *Supreme Court Practice* § 4.18, pp. 282-86 (10th ed. 2013).

This is not an extraordinary case where denial of certiorari will create extreme inconvenience or embarrassment or fundamentally alter the further conduct of the case. To the contrary, denial of certiorari will allow remand of this long-delayed case to the district court, where Bank Melli will at last be required to present any factual defense to respondents' claims, and the district court may then render final judgment in respondents' favor on grounds separate from or in addition to the legal bases challenged in the petition. Thus, regardless of whether § 1610(g) is a freestanding exception to execution immunity, the court may well determine that the Blocked Assets are also subject to execu-

tion pursuant to other subsections of § 1610, including §§ (a), (b) and (f), not to mention TRIA § 201(a), which is itself a part of § 1610. *See* Point II A, *infra*. And regardless of whether state or federal law defines the property interest to be attached, the district court, as did the court of appeals, should conclude that the Blocked Assets constitute property subject to execution pursuant to either or both § 1610(g) and TRIA under both state and federal law or under federal law alone. *See* Point III, *infra*.

The possible resolution of the case on alternative grounds is a substantial reason to deny certiorari review of an interlocutory order. *See Cal. Bldg. Indus. Ass'n v. City of San Jose*, 136 S. Ct. 928, 929 (2016) (Thomas, J., concurring in the denial of certiorari) (case did not "present an opportunity to resolve . . . conflict" among lower courts because there were "threshold questions . . . that might preclude us from reaching the [constitutional] question"); *see also* Shapiro, et al., *supra*, §§ 4.4(e), (f), (g), at 248-49.

II. THE NINTH CIRCUIT'S INTERPRETATION OF § 1610(g) DOES NOT WARRANT REVIEW

A. The Ninth Circuit's Decision Does Not Present a True Conflict with the Seventh Circuit's Decision in *Rubin*

Bank Melli's claim that there is a division of authority between the decision below and the Sev-

enth Circuit's decision in *Rubin* is incorrect because the Blocked Assets here, in contrast to the property at issue in *Rubin*, are, in fact, *blocked* by executive orders of the President of the United States issued pursuant to IEEPA. As such, they are expressly stripped of execution immunity by §§ 1610(g)(1) and (2), § 201 of TRIA, as well as by § 1610(f). This critical fact readily distinguishes this case from *Rubin* and renders *Rubin*'s holding irrelevant to the fate of Bank Melli's Blocked Assets.

In *Rubin*, plaintiffs with terrorism judgments against Iran sought to execute against antiquities owned by Iran that were on loan to a university and museum. Following discovery, the district court granted summary judgment for defendants. *Rubin v. Islamic Republic of Iran*, 33 F. Supp. 3d 1003 (N.D. Ill. 2014). Central to the Seventh Circuit's affirmance of that judgment was its determination that the antiquities were not blocked by any executive order. Indeed, the Seventh Circuit found that the property at issue had been *un*blocked by Executive Order No. 12,281 in 1981, and that the antiquities were specifically exempted from blocking by Executive Order 13,599, one of the two executive orders that currently block Bank Melli's Blocked Assets. *Rubin*, 830 F.3d at 488. Because the property was not blocked, the court held it was not subject to execution under TRIA. *Id.* at 488-89. And because, after conducting discovery, the plaintiffs did not contend that Iran used the antiquities in the United States for a commercial activity, the

court further held that the property was not subject to execution under § 1610(a) and, hence, could not be reached by § 1610(g). *Id.* at 481, 487.

While the majority opinion in *Rubin* disagreed with the Ninth Circuit's reading of the interplay between §§ 1610(f) and (g) (*id.* at 486), that disagreement does not constitute a holding of *Rubin*. Rather, the *Rubin* majority's view on § 1610(f) is only *dicta* that had no bearing on the actual outcome of the case. By its terms, § 1610(f) could never apply to Iran's antiquities because they are not "property with respect to which financial transactions are prohibited or regulated pursuant to . . . sections 202 and 203 of [IEEPA] . . . , or any other proclamation, order, regulation, or license issued pursuant thereto," as required by § 1610(f). 28 U.S.C. § 1610(f)(1)(A).

In contrast, Bank Melli's Blocked Assets are subject to two executive orders issued pursuant to IEEPA. Because the Blocked Assets are blocked pursuant to IEEPA, Congress has stripped those assets of execution immunity under § 1610(f). For the reasons identified by the Ninth Circuit (Pet. App. 15a n.5), it is no answer for Bank Melli to protest that § 1610(f) is a dead letter because President Clinton issued a partial waiver of that subsection in 2000. As the Ninth Circuit observed, § 1610(f) remained the law when § 1610(g) was enacted in 2008 and stands as a clear expression of Congress' intent to remove immunity of all assets of instrumentalities of terrorist states in order to satisfy judgments rendered under § 1605A. Indeed,

§ 1610(g)(2) mandates that a presidential waiver cannot shield blocked property from execution under § 1610(g)(1), stating that such property "shall not be immune from attachment in aid of execution, or execution . . . because the property is regulated by the United States Government by reason of action taken against that foreign state under . . . [IEEPA]." 28 U.S.C. § 1610(g)(2). Section 1610(g)(2), a provision nowhere mentioned in Bank Melli's petition, thus provides that the Executive Branch cannot limit § 1610(g)(1)'s reach by exercising its control—as it did with the partial waiver of § 1610(f)—over property subject to IEEPA restrictions.

The Blocked Assets are also subject to execution under TRIA § 201. The Seventh Circuit held that TRIA did not permit execution upon the antiquities at issue in *Rubin*, because those assets were not blocked. *Rubin* 830 F.3d at 487-89. Precisely the opposite is true here. It follows that TRIA by itself provides a separate and fully sufficient basis to permit respondents to execute on Bank Melli's Blocked Assets. Moreover, even under Bank Melli's theory that the words "as provided for in this section" in § 1610(g) require recourse to another applicable provision of § 1610, TRIA, which is part of § 1610, is just such a provision.

Finally, even under Bank Melli and the Seventh Circuit's construction of § 1610(g), the Blocked Assets still would be subject to execution under § 1610(a) and (b). The Blocked Assets unquestionably relate to commercial activity in the United

States by Bank Melli: *i.e.*, its contractual commercial relationship with Visa in the United States with respect to Visa credit card transactions. Pet. 9. As Judge Benson found, respondents may proceed to execute on the Blocked Assets pursuant to § 1610(b)(3) based on Bank Melli's commercial activities. Pet. App. 34a. And because § 1610(g) treats the property of a foreign state's instrumentality as the property of the state itself for purposes of judgments under § 1605A, respondents may also proceed under § 1610(a)(7). In its *amicus* brief in the Ninth Circuit, the United States agreed that respondents may well be entitled to execute on the Blocked Assets under either or both § 1610(a)(7) or (b). *See* U.S. Br. in *Bennett v. Islamic Republic of Iran*, No. 13-15442, at 11-12 (9th Cir. Filed Oct. 23 2015) (ECF No. 82) ("U.S. Br."). While Bank Melli may raise factual disputes as to the nature and location of its commercial activities, those are issues that must be remanded for final determination by the district court following discovery.

B. The Ninth Circuit's Decision Is Correct

The Ninth Circuit correctly held that § 1610(g) is a freestanding exception to execution immunity that does not incorporate § 1610(a) or (b)'s commercial use or activity requirements. That holding is firmly grounded in the plain language of the statute, which requires respondents to show only that the Blocked Assets are "property of an agency or instrumentality of . . . a state" "against which a judgment is entered under section 1605A" and

nothing more. Nothing in the text of § 1610(g), an integral element of terrorism exceptions to the FSIA, imposes on terror victims the additional burden of proving that such property was "used for a commercial activity in the United States" (§ 1610(a)), that the instrumentality of the foreign state was "engaged in commercial activity in the United States" (§ 1610(b)), or that any non-terrorism exception to foreign sovereign immunity applies. As the Ninth Circuit recognized, Bank Melli's (and now the Seventh Circuit's) construction of § 1610(g) would impermissibly read limitations into § 1610(g) that Congress did not write. Pet. App. 16a (citing *United States v. Temple*, 105 U.S. 97, 99 (1881) (the court has "no right to insert words and phrases, so as to incorporate in the statute a new and distinct provision")).

Bank Melli and the Seventh Circuit's construction of § 1610(g) also flies in the face of Congress' stated purpose to enhance the enforcement rights of terror victims. Neither Bank Melli's petition nor the Seventh Circuit in *Rubin* even mention § 1610(g)'s legislative history. In contrast, the Ninth Circuit took due note of Congress' expressed intent to "allow[] attachment of the assets of a state sponsor of terrorism to be made upon the satisfaction of a '*simple ownership' test*," (*Id.* at 18a (quoting 154 Cong. Rec. S54-01 (Jan. 22, 2008) (statement of Sen. Lautenberg) (emphasis added)), and "*to subject any property interest in which the foreign state enjoys a beneficial ownership to attachment and execution*." *Id.* at 18a-19a (quoting

H.R. Rep. No. 11-447, at 1001 (2007) (Conf. Rep.) (emphasis added)).

Bank Melli and the Seventh Circuit's reliance on the words "as provided in this section" to undo the simple ownership test that Congress intended is also misplaced because it ignores the critical function of § 1610 within the structure of the FSIA as a whole. Section 1609 sets the general rule for the immunity from attachment and execution of property of a foreign state: "[T]he property in the United States of a foreign state shall be immune from attachment arrest and execution *except as provided* in sections 1610 and 1611 of this chapter." (Emphasis added.) Accordingly, the words "as provided in this section" in § 1610(g) do not, as Bank Melli assumes and the Seventh Circuit held, refer to any particular *subsections* of § 1610, but rather refer to § 1610 *as a whole* and make explicit 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 by virtue of § 1609.

C. Any Purported "Split" Between the Ninth and Seventh Circuits Is Immature and Unworthy of Review

Even assuming *arguendo* a split between the Ninth and the Seventh Circuits, such a split is shallow and immature. The purported circuit split on which Bank Melli relies is barely three months old, and as yet only two circuits have considered § 1610(g)'s status as a freestanding exception to the

immunity of foreign sovereign property. Moreover, no circuit court has yet grappled with the issues presented in this case concerning the interplay of § 1610(g) with TRIA § 201, and the impact of § 1610(g)(2) on the execution against assets blocked pursuant to IEEPA. It follows that the illusory "split" between the Ninth and Seventh Circuits relied upon by Bank Melli presents an immature and unformed issue that should not compel this Court's attention. *See* E. Magnuson & D. Herr, *Federal Appeals: Jurisdiction & Practice* § 12.4, pp. 628-29 (2016 ed.).

III. THE NINTH CIRCUIT'S DETERMINATION THAT THE BLOCKED ASSETS ARE ASSETS OR PROPERTY "OF" BANK MELLI DOES NOT PRESENT A CIRCUIT SPLIT

Petitioner strains to manufacture a split between the Ninth and D.C. Circuits on the issue of whether the Blocked Assets are assets or property "of" Bank Melli under § 1610(g) and TRIA. The reason for that effort is apparent: if the Blocked Assets are assets of Bank Melli, those assets are indisputably subject to execution under TRIA, and the case is over.

But there is no split here. The Ninth Circuit decided this case, in the alternative, under *both* state and federal law. Further, its decision on this issue is consistent with *Heiser's* holding that a beneficial ownership interest in property is a basis for execution.

A. There Is No Split Between the Ninth and D.C. Circuits

There is no division of authority on this issue because the Ninth Circuit employed *Heiser*'s own analysis to determine that the Blocked Assets are subject to execution under both § 1610(g) and TRIA. The Ninth Circuit acknowledged *Heiser* "creat[ed a] federal rule of decision to determine ownership requirements in FSIA, based in part on U.C.C. Article 4A and common law principles," but found that even under that standard, Bank Melli could not avoid execution because "[f]ederal law and California law are aligned." Pet. App. 23a. Under these circumstances, petitioner seeks this Court's review of the application of particular facts under the *Heiser* standard and review is unwarranted.

Petitioner distorts *Heiser*'s holding by suggesting that *Heiser* requires "immediate and outright ownership of assets" by a foreign state instrumentality for execution. Pet. 26.[4] As the Ninth Circuit noted, however, the *Heiser* court refused to permit execu-

[4] Bank Melli also distorts the position of the United States on this issue. While petitioner quotes the United States' statement that "TRIA and section 1610(g) only authorize plaintiffs to attach assets that are 'owned' by the relevant foreign state (or its agency or instrumentality)," (Pet. 29 (citing U.S. Br. at 2-3)), Bank Melli fails to include the United States' subsequent statement that it "takes no position on whether ownership is to be determined using . . . federal law [to be filled in by the judiciary], or if state law may instead provide that definition." U.S. Br. at 18, n.4.

tion upon the mid-stream electronic funds transfers at issue there because "Iranian entities were [neither] the originators of the funds transfers . . . [n]or were they the ultimate beneficiaries." *Heiser*, 735 F. 3d at 936 (footnote omitted). Here, in stark contrast and as the Ninth Circuit noted, Bank Melli *is* the ultimate beneficiary of the Blocked Assets. Pet. App. 24a. Indeed, with the Blocked Assets now deposited in the registry of the district court, Bank Melli is the *only* possible party with any ownership interest in the Blocked Assets. In short, this case is not only distinguishable from *Heiser*, but *Heiser*'s reasoning compels the Ninth Circuit's conclusion that the Blocked Assets are subject to execution.

The Ninth Circuit's decision is also consistent with the broad language and remedial intent of § 1610(g) and TRIA. The Ninth Circuit recognized that "Congress . . . . used expansive wording to suggest that immediate and outright ownership of assets is not required." Pet. App. 23a. As this Court has held in other contexts, "[w]hen Congress so broadly uses the term 'property,' we recognize . . . that the Legislature aims to reach every species of right or interest protected by law and having an exchangeable value." *Drye v. U.S.*, 528 U.S. 49, 56 (1999) (quotation marks and citations omitted). Even the *Heiser* court noted that "'[a] House report addressing § 1610(g) states that the section was intended to let [judgment creditors] attach assets in which foreign states have beneficial owner-

ship.'" *Heiser*, 735 F. 3d at 938 (citing H.R. Rep. No. 110-477, at 1001 (2007) (Conf. Rep.)).

Bank Melli has just such beneficial ownership of the Blocked Assets. While Bank Melli argues that it could not walk into Visa's office and take the $18 million at issue, it admits in the very next sentence that it has a contractual right to those funds. Pet. 26-27. That contractual right is precisely the property interest that is subject to execution. Bank Melli seems to be arguing that its property can only be subject to FSIA execution if it is physically in Bank Melli's hands. That extreme interpretation of § 1610(g) and TRIA would mean that any state sponsor of terrorism or its instrumentality could immunize its property in the United States by simply parking that property with a third party. Under Bank Melli's theory, it could open a bank account in its own name at the Bank of America and never have to worry that terror victims could reach those funds because Bank Melli would not have "immediate and outright ownership of the assets." Bank Melli's theory is absurd on its face and, if adopted, would render § 1610(g) and TRIA virtually meaningless.

B. The Ninth Circuit's Decision Is Correct

This Court's review also is not warranted because the Ninth Circuit's reference to state law was correct. Neither § 1610(g) nor TRIA define the property interest required to render an asset attachable by a judgment creditor. Because this is an enforcement proceeding, Federal Rule of Civil

Procedure 69 mandates that courts apply state law. Fed. R. Civ. P. 69(a)(1) (enforcement proceedings are governed by the law of the "state where the court is located, but a federal statute governs to the extent it applies"). This Court has held that "[p]roperty interests are created and defined by state law." *Butner v. U.S.*, 440 U.S. 48, 55 (1979). The Ninth Circuit therefore properly referred to state law, as has every other court (with the single exception of *Heiser*) to have reviewed the ownership of assets in the FSIA context. *See Calderon-Cardona v. Bank of New York Mellon*, 770 F.3d 993, 1001 (2d Cir. 2014), *cert. denied* 136 S. Ct. 893 (2016) (holding that because "Congress has not defined the type of property interests that may be subject to attachment under FSIA § 1610(g), . . . FSIA § 1610(g) does not preempt state law applicable to the execution of judgments in this case . . . [and] we must look to state law to define the 'rights the judgment debtor has in the property the creditor seeks to reach'"); *see also Walker Int'l Holdings, Ltd. v. Republic of Congo*, 415 F.3d 413, 416 (5th Cir. 2005) (applying Texas enforcement law in FSIA garnishment case); *Hegna v. Islamic Republic of Iran*, 380 F.3d 1000, 1007 (7th Cir. 2004) (applying Illinois law to determine validity of lien); *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70, 83 (2d Cir. 2002) (applying New York law "to determine what assets are 'subject to enforcement, and thus available to judgment creditors' ").

It follows that the Ninth Circuit was correct in looking to state law to determine whether the Blocked Assets were subject to execution. Its determination that California law permits execution on funds owed to a judgment debtor is utterly uncontroversial and does not merit this Court's review.

IV. THE PETITION DOES NOT PRESENT IMPORTANT QUESTIONS WARRANTING REVIEW

There is no issue of exceptional importance presented by the petition and certiorari should be denied.

First, Bank Melli's selective reference to pages in the United States's *amicus* brief before the Ninth Circuit fails to recognize that the United States expressly stated that, based on the allegations in the third-party complaint, the Blocked Assets at issue here were subject to execution under § 1610(b)(3) and (potentially) under § 1610(a)(7) as well. *See* U.S. Br. at 11-12. Thus, although the United States took the position that § 1610(g) was not a freestanding exception to execution immunity, it nevertheless agreed with respondents' position and the Ninth Circuit's ultimate conclusion that respondents' rights to execute on the Blocked Assets should be resolved on the merits. *Id.* This case can and should be remanded to the district court where, as the United States has recognized, it can be resolved on legal grounds other than or in addition to § 1610(g).

Bank Melli's suggestion that the Ninth Circuit's decision somehow offends the Treaty of Amity is without merit. The United States has never expressed the view that the Ninth Circuit's interpretation of § 1610(g) violates the United States' obligations under the Treaty of Amity.[5] In fact, the only other circuit court to examine this claim rejected it, *see Weinstein*, 609 F.3d at 53, and this Court has already denied certiorari to review a final judgment rejecting Bank Melli's claim. *See Bank Melli New York Representative Office v. Weinstein*, 133 S. Ct. 21 (2012); *see also Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 185-86 (1982) (holding that substantively identical provisions in a number of Friendship, Commerce, and Navigation treaties are designed "to give corporations of each signatory legal status in the territory of the other party, and to allow them to conduct business in the other country on a comparable basis with domestic firms").

Second, Bank Melli's argument that the Ninth Circuit's decision makes "a substantial break from

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[5] In its *amicus* brief in this case, the United States expressed no view on Bank Melli's Treaty of Amity argument. In *Weinstein*, Bank Melli raised an identical argument in support of its position that the Second Circuit's interpretation of TRIA § 201(a) conflicted with the United States' obligations under the Treaty of Amity. There, the United States rejected Bank Melli's interpretation of the Treaty: "The court of appeals' reading of TRIA Section 201(a) does not deprive petitioner of legal status within the United States, and it does not conflict with the Treaty of Amity." U.S. Br. in *Bank Melli Iran N.Y. Representative Office v. Weinstein*, No. 10-947, at 15-16 (S. Ct. Filed May 24, 2012).

traditional immunity principles" (Pet. 30-31) ignores that (a) Congress, not the Ninth Circuit, has rewritten the "traditional" scope of sovereign immunity by enactment of the terrorism exceptions in the FSIA, and (b) even under Bank Melli's version of "traditional" immunity principles, the Blocked Assets still would be subject to execution. Over the last twenty years, Congress has repeatedly cut back the execution immunity of the property of terrorist states and their instrumentalities such that today *all* their blocked property is subject to execution to pay terrorism-based judgments regardless of whether the property is related to commercial activity. More fundamentally, Bank Melli's argument fails because the Blocked Assets here *are* commercial property, and Bank Melli does not argue otherwise. Accordingly, even if, as Bank Melli contends, it is inappropriate to allow execution pursuant to § 1610(g) on non-commercial assets, such as the antiquities at issue in *Rubin*, that is not an issue presented here. The Blocked Assets are funds due and owing to Bank Melli pursuant to its commercial relationship with Visa. They are not non-commercial assets relating to a strictly sovereign activity conducted by Iran. Under any interpretation of the FSIA, such assets are subject to execution under § 1610(g), which was enacted by Congress to allow terrorism victims to execute on assets owned by terrorist state instrumentalities upon satisfaction of a "simple ownership" test. 154 Cong. Rec. S54-01 (Jan. 22, 2008).

Finally, Bank Melli's prediction that the Ninth Circuit's holding on § 1610(g) and TRIA's ownership requirement could somehow have unspecified adverse consequences is without substance. In making this argument, Bank Melli clings to the falsehood that the Ninth Circuit held that ownership was not required under TRIA or § 1610(g) when it, in fact, recognized that beneficial ownership *was* required and then determined that Bank Melli owned the right to receive the Blocked Assets under both state and federal law. Pet. App. 21a-24a. Bank Melli cannot refute the correctness of the Ninth Circuit's determination by pressing the spurious notion that it does not own funds that are due and owing to it pursuant to a contractual relationship. The right to receive property from a third-party is a property right in itself. It follows that the parade of horribles Bank Melli posits (but does not substantiate) simply does not exist. It is, indeed, telling that Bank Melli fails to even articulate an ownership test that it would have this Court adopt that would *not* include its right to receive the Blocked Assets. This is not an important question of federal law that needs to be resolved.

CONCLUSION

The petition for a writ of certiorari should be denied.

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Respectfully submitted,

/s/_____

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