No.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) ("*Bancec*"), this Court held that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." *Id.* at 626-627. Section 1610(g) of the Foreign Sovereign Immunities Act provides that, for terrorism judgments, "property of a foreign state" and "property of an agency or instrumentality of such a state" are subject to "execution * * * *as provided in this section*, regardless of" five factors associated with *Bancec*. 28 U.S.C. §1610(g) (emphasis added). The Terrorism Risk Insurance Act ("TRIA") provides that "blocked assets of [a] terrorist party" are subject to execution to satisfy terrorism judgments. 28 U.S.C. §1610 note §201(a). The questions presented are:

1. Whether §1610(g) establishes a freestanding exception to sovereign immunity, as the Ninth Circuit held below, or instead merely supersedes *Bancec*'s presumption of separate status while still requiring a plaintiff to satisfy the criteria for overcoming immunity elsewhere in §1610, as the Seventh Circuit has held and the United States has repeatedly urged.

2. Whether a court should apply federal or state law to determine whether assets constitute "property of" or "assets of" the sovereign under TRIA and §1610(g), and whether those provisions require that the sovereign *own* the property in question, as the D.C. Circuit has held and the United States has repeatedly urged, contrary to the decision below.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Bank Melli was a third-party defendant in the district court and appellant in the court of appeals.

Respondents Michael Bennett and Linda Bennett, individually and as co-administrators of the Estate of Marla Ann Bennett, were plaintiffs in the district court and appellees in the court of appeals.

Respondents Carlos Acosta, Maria Acosta, Irving Franklin, Estate of Irma Franklin, Libby Kahane, Estate of Sonya Kahane, Cipporah Kaplan, Tova Ettinger, Baruch Kahane, Ethel Griffin as administrator of Binyamin Kahane's Estate, Rabbi Norman Kahane, and Estate of Meir Kahane were third-party defendants and counterclaimants in the district court and appellees in the court of appeals.

Respondents Steven Greenbaum, Alan Hayman, Shirlee Hayman, and Estate of Judith Greenbaum were third-party defendants and counterclaimants in the district court and appellees in the court of appeals.

Respondents Estate of Michael Heiser, Gary Heiser, Francis Heiser, Estate of Leland Timothy Haun, Ibis S. Haun, Milagritos Perez-Dalis, Senator Haun, Estate of Justin R. Wood, Richard W. Wood, Kathleen M. Wood, Shawn M. Wood, Estate of Earl F. Cartrette, Jr., Denise M. Eichstaedt, Anthony W. Cartrette, Lewis W. Cartrette, Estate of Brian McVeigh, Sandra M. Wetmore, James V. Wetmore, Estate of Millard D. Campbell, Marie R. Campbell, Bessie A. Campbell, Estate of Kevin J. Johnson, Shyrl L. Johnson, Che G. Colson, Kevin Johnson, Nicholas A. Johnson, Laura E. Johnson, Bruce Johnson, Estate of Joseph E. Rimkus, Bridget Brooks, James R. Rimkus, Anne M. Rimkus, Estate of Brent E. Marthaler, Katie L. Marthaler, Sharon Marthaler, Her-

man C. Marthaler, Matthew Marthaler, Kirk Marthaler, Estate of Thanh Van Nguyen, Christopher R. Nguyen, Estate of Joshua E. Woody, Dawn Woody, Bernadine R. Beekman, George M. Beekman, Tracy M. Smith, Jonica L. Woody, Timothy Woody, Estate of Peter J. Morgera, Michael Morgera, Thomas Morgera, Estate of Kendall Kitson, Jr., Nancy R. Kitson, Kendall K. Kitson, Steven K. Kitson, Nancy A. Kitson, Estate of Christopher Adams, Catherine Adams, John E. Adams, Patrick D. Adams, Michael T. Adams, Daniel Adams, Mary Young, Elizabeth Wolf, William Adams, Estate of Christopher Lester, Cecil H. Lester, Judy Lester, Cecil H. Lester, Jr., Jessica F. Lester, Estate of Jeremy A. Taylor, Lawrence E. Taylor, Vickie L. Taylor, Starlina D. Taylor, Estate of Patrick P. Fennig, Thadeus C. Fennig, Catherine Fennig, Paul D. Fennig, and Mark Fennig were third-party defendants and counterclaimants in the district court and appellees in the court of appeals.

Respondents Visa Inc. and Franklin Resources, Inc. were defendants and third-party plaintiffs in the district court and appellees in the court of appeals.

The United States was a third-party defendant in the district court.

The Islamic Republic of Iran and the Iranian Ministry of Information and Security were defendants in the district court.

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PETITION FOR A WRIT OF CERTIORARI

Bank Melli respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

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

STATEMENT OF JURISDICTION

The court of appeals entered judgment on June 14, 2016. App., *infra*, 1a-34a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§1602 *et seq.*; and the Terrorism Risk Insurance Act of 2002, 28 U.S.C. §1610 note; are set forth in the Appendix (App., *infra*, 107a-132a).

PRELIMINARY STATEMENT

The Ninth Circuit's decision in this case construes §1610(g) of the Foreign Sovereign Immunities Act as a freestanding exception to sovereign immunity. Under that provision, the Ninth Circuit ruled, plaintiffs can execute terrorism judgments against sovereign property whether or not the property falls within any of the Act's traditional exceptions to immunity. A month after the Ninth Circuit issued its decision, the Seventh Circuit expressly "disagree[d] with the Ninth Circuit's interpretation of subsection (g)," describing it as a "highly strained interpretation" that "makes no sense." *Rubin* v. *Islamic Republic of Iran*, — F.3d —, 2016 WL 3903409, at *12-13 (7th Cir. July 19, 2016). The United States likewise "disagrees with [the Ninth Circuit's] interpretation," as the Ninth Circuit acknowledged below and as multiple amicus filings make clear. App., *infra*, 18a n.7. This case thus presents a square and acknowledged circuit conflict over an important question affecting foreign relations in which the Ninth Circuit rejected the repeatedly expressed position of the Executive Branch.

The Ninth Circuit's decision also creates a conflict on another important issue with international ramifications. The court held that, in determining whether a respondent has a sufficient property interest to permit execution under §1610(g) or the Terrorism Risk Insurance Act, courts should look to *state* rather than federal law. Applying that rule, it held that California law permits execution even if the debtor has no ownership interest. That

ruling conflicts with the D.C. Circuit's decision in *Heiser* v. *Islamic Republic of Iran*, 735 F.3d 934 (D.C. Cir. 2013), which held that *federal* law controls and that federal law requires ownership of the property—an interpretation the United States has repeatedly urged as well. That conflict likewise warrants review.

STATEMENT

I. STATUTORY FRAMEWORK

A. The Foreign Sovereign Immunities Act

1. For most of this Nation's history, foreign sovereigns were completely immune from suit. See *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983). In 1952, however, the State Department adopted the "restrictive theory" of immunity, which denies immunity to a state's "strictly commercial" acts. See *id.* at 486-487. Two decades later, Congress enacted 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.*), which largely codifies that restrictive theory. See H.R. Rep. No. 94-1487, at 7 (1976).

The FSIA addresses both the immunity of foreign sovereigns from suit and the immunity of sovereign property from attachment and execution. With respect to immunity from suit, the FSIA preserves the general rule that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States." 28 U.S.C. § 1604. Section 1605 then lists carefully circumscribed exceptions to that jurisdictional immunity. *Id.* § 1605. Under the Act's "commercial activity" exception, for example, a foreign sovereign is not immune from an action "based upon a commercial activity carried on in the United States by the foreign state." *Id.* § 1605(a)(2).

The FSIA separately addresses the immunity of sovereign property from attachment and execution. Before the FSIA's enactment, sovereign property "enjoy[ed] absolute immunity from execution," even under the restrictive theory of immunity. H.R. Rep. No. 94-1487, at 8. Plaintiffs who obtained judgments against foreign sovereigns thus had to rely on sovereign grace for their satisfaction. *Ibid.* The FSIA retains the general rule that "property in the United States of a foreign state [or agency or instrumentality] shall be immune from attachment arrest and execution." 28 U.S.C. § 1609. But the Act provides limited exceptions in § 1610.

Section 1610(a) provides that sovereign property is subject to execution if the property is "used for a commercial activity in the United States" and one of certain other conditions applies. 28 U.S.C. § 1610(a). For example, under § 1610(a)(2), a sovereign's commercial property is subject to execution if the property "is or was used for the commercial activity upon which the claim is based." *Id.* § 1610(a)(2). Section 1610(b) provides additional exceptions for property of sovereign agencies or instrumentalities such as government corporations. Such property is subject to execution if the agency or instrumentality is "engaged in commercial activity in the United States" and another listed condition applies. *Id.* § 1610(b). Thus, consistent with the restrictive theory of immunity, both § 1610(a) and § 1610(b) require *commercial activity*.

2. As a general matter, the FSIA does not address when a sovereign's agencies or instrumentalities may be held liable for judgments against the sovereign itself. This Court resolved that issue in *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) ("*Bancec*"). *Bancec* explained that the FSIA "was not intended to affect the substantive law de-

termining the liability of a foreign state or instrumentality, or the attribution of liability among instrumentalities of a foreign state." *Id.* at 620. Instead, such matters are governed by substantive international and federal common law. *Id.* at 626-627. Applying that substantive law, the Court held that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." *Ibid.*

Bancec identified two limited exceptions to that presumption of separate treatment: first, where the sovereign and instrumentality are alter egos; and second, where the sovereign abuses the corporate form to "'work fraud or injustice.'" 462 U.S. at 629-630. In the wake of *Bancec*, some courts developed five "factors" to determine whether that presumption of separate status was overcome. See, *e.g.*, *Flatow* v. *Islamic Republic of Iran*, 308 F.3d 1065, 1071 n.9 (9th Cir. 2002).

B. The Terrorism Amendments to the FSIA

Over the last two decades, Congress has repeatedly amended the FSIA in connection with terrorism claims.

1. In 1996, Congress enacted a new exception to jurisdictional immunity for terrorism claims. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221, 110 Stat. 1214, 1241 (formerly codified at 28 U.S.C. § 1605(a)(7)). That exception permits suits against certain sovereigns for acts of terrorism or material support for such acts. 28 U.S.C. § 1605A(a).

The 1996 amendments also created new exceptions to attachment and execution immunity for judgments in terrorism cases. Section 1610(a)(7) provides that a foreign sovereign's property "used for a commercial activity in the United States" is subject to execution to satisfy a terrorism judgment "regardless of whether the property

is or was involved with the act upon which the claim is based." 28 U.S.C. § 1610(a)(7). Section 1610(b)(3) likewise provides that property of a foreign sovereign agency or instrumentality "engaged in commercial activity in the United States" is subject to execution to satisfy a terrorism judgment against it "regardless of whether the property is or was involved in the act upon which the claim is based." *Id.* § 1610(b)(3).

2. Two years later, Congress added another exception for assets the Executive Branch had "blocked" under economic sanctions statutes. See Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, § 117, 112 Stat. 2681, 2681-491 (1998). Codified as § 1610(f)(1), it provides:

> Notwithstanding any other provision of law, * * * any property with respect to which financial transactions are prohibited or regulated pursuant to [various statutes] shall be subject to execution or attachment in aid of 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 section 1605(a)(7) * * * .

28 U.S.C. § 1610(f)(1)(A). Subsection (f)(2) provides that the "Secretary of the Treasury and the Secretary of State should make every effort to fully, promptly, and effectively assist any judgment creditor * * * in identifying, locating, and executing against the property" of a foreign state to satisfy a terrorism judgment. *Id.* § 1610(f)(2)(A).

Congress authorized the President to waive the execution mechanism in subsection (f)(1) "in the interest of national security." Pub. L. No. 105-277, § 117(d), 112 Stat. at 2681-492. The President immediately issued a

blanket waiver, finding that the provision "would impede [his] ability * * * to conduct foreign policy in the interest of national security." 63 Fed. Reg. 59,201 (Oct. 21, 1998).

In 2000, Congress repealed the provision authorizing that waiver. See Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 2002(f)(2), 114 Stat. 1464, 1543. Following Executive Branch opposition, however, a new waiver provision was added to the bill before its enactment. See *id.* § 2002(f)(1)(B), 114 Stat. at 1543 (codified at 28 U.S.C. § 1610(f)(3)). The President then promptly issued another blanket waiver under that new provision. 65 Fed. Reg. 66,483 (Oct. 28, 2000).

3. In 2002, Congress enacted § 201 of 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). As amended, § 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 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 * * * .

28 U.S.C. § 1610 note § 201(a).

4. In 2008, Congress again amended the FSIA's terrorism provisions. See National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083, 122 Stat. 3, 338. That statute revised § 1605(a)(7)'s exception to jurisdictional immunity and recodified it as § 1605A. See 28 U.S.C. § 1605A.

The 2008 amendments also added a new provision addressing execution, codified as 28 U.S.C. § 1610(g). That provision states:

> [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—*
>
> (A) the level of economic control over the property by the government of the foreign state;
>
> (B) whether the profits of the property go to that government;
>
> (C) the degree to which officials of that government manage the property or otherwise control its daily affairs;
>
> (D) whether that government is the sole beneficiary in interest of the property; or
>
> (E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

28 U.S.C. § 1610(g)(1) (emphasis added). The five factors in paragraphs (A) through (E) are the same five "*Bancec* factors" that some courts had used to determine whether a plaintiff had overcome *Bancec*'s presumption of separate status. See, *e.g.*, *Flatow*, 308 F.3d at 1071 n.9.

II. PROCEEDINGS BELOW

A. Proceedings in the District Court

Petitioner Bank Melli is an Iranian commercial bank whose stock is currently wholly owned by the Iranian government. App., *infra*, 8a. Respondents are four groups of plaintiffs who hold default judgments against Iran for terrorist attacks by organizations that allegedly received financial or other support from the Iranian government. *Ibid.* "Bank Melli was not named as a defendant in any of the four cases * * * and was not itself alleged to have been involved in the underlying terrorist events." *Id.* at 8a-9a.

In December 2011, one group of plaintiffs sought to satisfy their default judgment against Iran by executing against approximately $17.6 million in funds held by Visa Inc. in a Franklin Resources Inc. mutual fund. App., *infra*, 9a, 81a n.1, 84a. Those funds relate to an arrangement between Visa and Bank Melli under which Bank Melli agreed to honor Visa cards at its branches in Iran. *Id.* at 9a. Visa has been unable to pay the funds to Bank Melli due to various sanctions orders, including an October 2007 order that blocked Bank Melli's property interests in the United States because of its banking activities in Iran. *Ibid.* The complaint alleges that the funds in the Visa account are "'due and owing by contract to Bank Melli pursuant to a commercial relationship with [Visa].'" *Id.* at 82a (quoting Compl. ¶16). The complaint does not allege that Bank Melli *owns* the funds—only that it is "'ow[ed]'" the funds. *Ibid.* Visa and Franklin responded to the suit by filing an interpleader complaint against Bank Melli and other parties with potential claims to the assets. *Id.* at 9a.

The district court denied Bank Melli's motion to dismiss. App., *infra*, 81a-104a. The court did not dispute

that Bank Melli is juridically distinct from the Iranian government. Rejecting Bank Melli's contrary arguments, however, the court held that TRIA and § 1610(g) permit plaintiffs to satisfy their judgments against Iran by executing against assets of Bank Melli. *Id.* at 85a-87a.

The district court further held that both § 1610(g) and TRIA apply even though the complaint does not allege that Bank Melli actually owns the assets at issue. App., *infra*, 97a-99a. The court acknowledged that, "[f]or TRIA or section 1610(g) to apply, the funds at issue must be 'assets of' or 'property of' Bank Melli." *Id.* at 97a. And it agreed that the complaint alleged only that the funds "are 'due and owing by contract to Bank Melli,' not that Bank Melli 'owns' them." *Ibid.* But the court deemed that distinction immaterial because "California enforcement law authorizes a court to 'order the judgment debtor to assign to the judgment creditor . . . all or part of a right to payment due or to become due.'" *Id.* at 97a-99a.[1]

Acknowledging "substantial ground for difference of opinion," the court certified its order for interlocutory appeal. App., *infra*, 103a-104a & n.15.

B. The Court of Appeals' Decisions

The Ninth Circuit affirmed. App., *infra*, 67a-80a. It then withdrew that opinion on rehearing and replaced it with a new opinion. *Id.* at 35a-66a. On further rehearing, the court withdrew that opinion as well and replaced it with yet another one. *Id.* at 1a-34a.

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[1] The district court also held that applying TRIA and § 1610(g) here would not be impermissibly retroactive, App., *infra*, 87a-97a, and that Federal Rule of Civil Procedure 19 did not require dismissal, *id.* at 100a-103a. Those rulings, and the corresponding rulings of the court of appeals, *id.* at 20a-21a, 24a-26a, are not at issue in this petition.

1. In its first opinion, the court of appeals rejected Bank Melli's argument that neither TRIA nor § 1610(g) abrogates the immunity of the assets at issue. App., *infra*, 72a-75a. Bank Melli urged that § 1610(g) is not a freestanding exception to immunity. *Id.* at 74a. By its terms, the provision permits execution against assets of a sovereign or its agencies or instrumentalities to satisfy terrorism judgments "*as provided in this section*, regardless of" the five *Bancec* factors. 28 U.S.C. § 1610(g)(1) (emphasis added). The statute thus allows execution against instrumentality assets to satisfy debts of the sovereign notwithstanding *Bancec*'s usual presumption of separate status. But as Bank Melli explained, that is all the provision does: Section 1610(g) does not eliminate the need to meet one of the Act's criteria for overcoming *immunity* elsewhere in § 1610. It simply allows execution "as provided in" § 1610 "regardless of" the five *Bancec* factors that might otherwise preclude execution. The Ninth Circuit rejected that interpretation, asserting that it would "render section 1610(g) a nullity" because other provisions of the FSIA already permit attachment of instrumentality assets. App., *infra*, 74a-75a.

The Ninth Circuit also rejected the argument that Bank Melli did not have a sufficient property interest in the assets to permit execution. App., *infra*, 79a-80a. Section 1610(g) applies only to "property of" the sovereign, 28 U.S.C. § 1610(g)(1), and TRIA applies only to "assets of" the sovereign, 28 U.S.C. § 1610 note § 201(a). Bank Melli urged that those provisions require *ownership* of the assets and thus do not apply here: Bank Melli does not *own* the funds in the Visa account; Visa merely *owes* money to Bank Melli. The Ninth Circuit disagreed, holding that, "under California law, money 'owed to'

Bank Melli may be assigned to judgment creditors." App., *infra*, 80a.

2. After Bank Melli sought rehearing, the Ninth Circuit withdrew its original opinion and filed an amended opinion, over a partial dissent by Judge Benson. App., *infra*, 35a-66a. In seeking rehearing, Bank Melli urged that the Ninth Circuit's constructions of TRIA and § 1610(g) contradicted the positions of the United States. C.A. Dkt. 74, at 1. The court invited the United States to submit an amicus brief "addressing whether rehearing on the proper interpretation of section 1610(g) is warranted." C.A. Dkt. 75, at 3.

The United States filed a brief agreeing with Bank Melli's position. "The plain text of section 1610(g)," it urged, "makes clear that its specified property is 'subject to attachment . . . *as provided in this section*.'" C.A. Dkt. 82, at 8. Section 1610(g) thus "plainly incorporates by reference the other requirements for attaching foreign state property provided under 1610." *Ibid.* The United States also sua sponte urged the court to grant rehearing on whether § 1610(g) and TRIA allow execution against assets that the sovereign or its agency or instrumentality does not own. On that issue, the United States agreed with Bank Melli that TRIA and § 1610(g) apply only where the sovereign actually *owns* the property at issue. *Id.* at 14.

In response, the Ninth Circuit withdrew its original opinion and filed a new one, adhering to its original conclusions while supplying new rationales. The court reaffirmed its holding that "subsection (g) contains a freestanding provision for attaching and executing against assets of a foreign state or its agencies or instrumentalities." App., *infra*, 46a. The court acknowledged that § 1610(g) permits attachment only "'as provided in this

section.'" *Id.* at 47a. But the court posited that, "[w]hen subsection (g) refers to attachment and execution of the judgment 'as provided in this section,' it is referring to procedures contained in § 1610(f)"—a theory no party had advanced. *Ibid.* The court claimed support from two Seventh Circuit decisions, *Wyatt* v. *Syrian Arab Republic*, 800 F.3d 331 (7th Cir. 2015), cert. denied, 136 S. Ct. 1721 (2016); and *Gates* v. *Syrian Arab Republic*, 755 F.3d 568 (7th Cir. 2014). App., *infra*, 49a-50a.

The Ninth Circuit likewise adhered to its prior ruling that TRIA and § 1610(g) are not limited to assets owned by the sovereign. App., *infra*, 54a-56a. Although Bank Melli urged that TRIA and § 1610(g) both require ownership as a matter of federal law, the court held that it would "look to state law to determine the ownership of assets in this context." *Id.* at 54a. "California law authorizes a court to order a judgment debtor to assign to the judgment creditor a right to payments that are due or will become due," so "[u]nder California law, those assets are property of Bank Melli and may be assigned to judgment creditors." *Id.* at 55a.

The Ninth Circuit acknowledged that, in *Heiser* v. *Islamic Republic of Iran*, 735 F.3d 934 (D.C. Cir. 2013), the D.C. Circuit held that "federal law * * * govern[s] this question." App., *infra*, 55a. But the court deemed that holding immaterial because "Federal law and California law are aligned." *Ibid.* The court identified no language in TRIA or § 1610(g) that permits execution absent ownership. But it pointed to the allegedly "expansive wording" of the statutes. *Id.* at 55a-56a.

Judge Benson dissented in part, opining that "the majority erred in finding § 1610(g) to be a freestanding immunity exception." App., *infra*, 59a. He agreed with Bank Melli and the United States that "the language 'as

provided in this section' requires a judgment creditor to find an existing mechanism of attachment under § 1610." *Id.* at 61a. Interpreting § 1610(g) as a freestanding immunity exception, Judge Benson urged, would have "unjustified and unfortunate result[s]" because it would allow plaintiffs to seize sovereign property without regard to its commercial status. *Id.* at 64a-66a. Judge Benson noted that, in *Rubin* v. *Islamic Republic of Iran*, No. 14-1935 (7th Cir.)—a case then pending before the Seventh Circuit—the plaintiffs were relying on the same mistaken interpretation of § 1610(g) to try to seize ancient Persian artifacts that Iran had loaned to museums for academic study. App., *infra*, 65a.[2]

3. Bank Melli again sought rehearing, and the Ninth Circuit issued yet another opinion. App., *infra*, 1a-34a. In seeking rehearing, Bank Melli explained that the majority's theory—that § 1610(g)'s reference to execution "as provided in this section" "refer[s] to procedures contained in § 1610(f)"—was implausible: The President's blanket waiver had rendered § 1610(f)'s execution mechanism inoperative the day it was enacted, a fact of which the court was apparently unaware. C.A. Dkt. 93, at 9-11. It made no sense to construe the phrase "as provided in this section" as a reference to a provision that was not operative when Congress enacted § 1610(g) and has never been operative.

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[2] Judge Benson opined that the Visa funds could be attached under the commercial activity exception in § 1610(b)(3). App., *infra*, 61a-62a. The majority never endorsed that analysis. As Bank Melli explained below, plaintiffs waived any reliance on § 1610(b)(3) by not invoking the provision. C.A. Dkt. 88, at 1-3. Besides, the provision applies only to "commercial activity *in the United States*" and thus excludes Bank Melli's Visa program in Iran. *Id.* at 3-4.

The Ninth Circuit's third opinion responded that, although the President had waived the execution mechanism in § 1610(f)*(1)*, "[s]everal other parts of subsection (f) * * * have always remained fully enforced." App., *infra*, 15a n.5. The court did not identify the "[s]everal other parts" it had in mind. The only other paragraphs in subsection (f) are (f)(2) and (f)(3), neither of which provides for execution at all. Paragraph (f)(2) merely encourages federal agencies to assist plaintiffs in identifying, locating, and executing against assets. And paragraph (f)(3) merely sets forth the President's authority to waive the execution mechanism in subsection (f)(1).

The court also stated that, "regardless of the partial waiver, all of subsection (f) remains the law," and the waiver simply "demonstrates presidential disagreement with congressional intent." App., *infra*, 15a n.5. The court described Bank Melli's position as a "blinders-on, technical" argument that "loses sight of Congress' main aim"—to allow terrorism plaintiffs "to get their money from terrorist states." *Ibid.*

The Ninth Circuit also added a new footnote "acknowledg[ing] that the United States, appearing as amicus curiae, disagrees with our interpretation." App., *infra*, 18a n.7. The court asserted that it was "not required to defer to the government's view," because it was engaging in a "routine exercise of statutory interpretation." *Ibid.* The Executive Branch had "approved the building blocks of the statutory criteria" by, among other things, "sign[ing] the legislation that became § 1610(g)." *Ibid.*[3]

Having twice granted rehearing and modified its opinions, the Ninth Circuit announced that no further rehear-

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[3] The Ninth Circuit adhered to its prior ruling that TRIA and § 1610(g) do not require ownership. App., *infra*, 21a-24a.

ing petitions would be allowed. App., *infra*, 3a. Judge Benson again dissented from the court's interpretation of § 1610(g). *Id.* at 27a-34a. The Ninth Circuit stayed the mandate pending this Court's review. *Id.* at 105a-106a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit held below that § 1610(g) of the FSIA is a freestanding exception to immunity—that it permits execution against sovereign property without regard to any of the Act's traditional limitations. That holding squarely conflicts with the Seventh Circuit's decision in *Rubin* v. *Islamic Republic of Iran*, — F.3d —, 2016 WL 3903409 (7th Cir. July 19, 2016), which holds that "[s]ection 1610(g) is not itself an exception to execution immunity for terrorism-related judgments." *Id.* at *13. The Seventh Circuit expressly "disagree[d] with the Ninth Circuit's interpretation of subsection (g)" in this case, finding the Ninth Circuit's reading an "implausibl[e]," "highly strained" interpretation that "makes no sense." *Id.* at *12-13. Section 1610(g), the Seventh Circuit observed, merely "abrogates the *Bancec* rule for terrorism-related judgments," allowing plaintiffs to pursue assets of separate agencies and instrumentalities to satisfy the sovereign's debts. *Ibid.* But a plaintiff must still "satisfy an exception to execution immunity found elsewhere in § 1610." *Ibid.*

The Ninth Circuit's decision also creates a conflict with the D.C. Circuit on the second question presented. TRIA and § 1610(g) apply only to "property of" or "assets of" the foreign sovereign. According to the Ninth Circuit, the scope of those provisions is a question of state rather than federal law. And because California law allows creditors to execute against funds even absent an ownership interest, the court held, those provisions do as well. That holding conflicts with the D.C. Circuit's deci-

sion in *Heiser* v. *Islamic Republic of Iran*, 735 F.3d 934 (D.C. Cir. 2013), which held that federal rather than state law governs, and that federal law requires *ownership* of the property.

Both conflicts are important. The Ninth Circuit "acknowledge[d] that the United States * * * disagrees with [its] interpretation" of § 1610(g). App., *infra*, 18a n.7. In fact, the United States has advocated against the Ninth Circuit's interpretation in multiple circuits. The United States has also repeatedly rejected the Ninth Circuit's view that TRIA and § 1610(g) permit execution even where the sovereign does not own the assets. The Ninth Circuit's rejection of the Executive Branch's longstanding positions on two issues implicating foreign relations underscores the need for this Court's review—particularly because the decision places the United States in violation of its solemn treaty obligations.

The decision below has far-reaching consequences. The Ninth Circuit's mistaken interpretation of § 1610(g) allows execution without regard to any of the FSIA's traditional criteria—including the settled limitation to commercial activity. The consequences are well illustrated by the facts in *Rubin*, where plaintiffs sought to invoke § 1610(g) to seize ancient Persian artifacts that Iran had loaned to American museums for academic study. The Ninth Circuit's holding that neither TRIA nor § 1610(g) requires ownership has similarly broad ramifications: It allows attachment of a wide variety of property interests that may adversely affect third parties' rights. Both holdings warrant this Court's review.

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

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

The circuit conflict could not be more clear. In this case, the Ninth Circuit held that § 1610(g) is "a freestanding provision for attaching and executing against assets of a foreign state or its agencies or instrumentalities." App., *infra*, 13a. Only a month later, the Seventh Circuit expressly rejected that interpretation of § 1610(g) in *Rubin* v. *Islamic Republic of Iran*, — F.3d —, 2016 WL 3903409 (7th Cir. July 19, 2016), holding that § 1610(g) "is *not* a freestanding terrorism exception to execution immunity." *Id.* at *2 (emphasis added).

In *Rubin*, plaintiffs with default judgments against Iran sought to execute against ancient Persian artifacts at the University of Chicago and the Field Museum of Natural History, most of which Iran had loaned to the museums for academic study. 2016 WL 3903409, at *1-2. Like the plaintiffs here, the *Rubin* plaintiffs argued that § 1610(g) is a "freestanding exception to execution immunity for terrorism-related judgments" that "makes *all* Iranian assets available for execution without proof of a nexus to commercial activity." *Id.* at *8.

The Seventh Circuit rejected that interpretation. By its terms, the court explained, § 1610(g) "is not a freestanding terrorism exception to execution immunity." 2016 WL 3903409, at *2. Section 1610(g) declares that certain assets of a sovereign and its agencies or instrumentalities are subject to execution "as provided in this section, regardless of" the five *Bancec* factors. 18 U.S.C. § 1610(g)(1). That language "lifts the *Bancec* rule for holders of terrorism-related judgments, allowing attach-

ment in aid of execution 'as provided in this section' without regard to the presumption of separateness." 2016 WL 3903409, at *2. But the statute merely renders such assets subject to "'execution . . . *as provided in this section*.'" *Id.* at *10. "The highlighted phrase makes very little sense—indeed, is entirely superfluous—if subsection (g) is itself a freestanding exception to execution immunity." *Ibid.*

Plaintiffs' interpretation "also creates superfluities in other parts of the statute." 2016 WL 3903409, at *10. Sections 1610(a)(7) and (b)(3) already provide for execution of terrorism judgments in cases of commercial activity. But "[i]f subsection (g) paves a dedicated lane for all execution actions by victims of state-sponsored terrorism, then § 1610(a)(7) and (b)(3) serve no purpose at all." *Ibid.* That result is particularly improbable because Congress amended §§ 1610(a)(7) and (b)(3) at the same time it enacted § 1610(g)—amendments that would have been pointless if plaintiffs' construction of § 1610(g) were correct. *Id.* at *10 n.5.

The Seventh Circuit discussed the Ninth Circuit's rationale for its contrary ruling at length. The Ninth Circuit, it observed, "purported to explain away the 'as provided in this section' language in subsection (g) by interpreting it to apply only to § 1610(f)." 2016 WL 3903409, at *12. The court rejected that reading as a "highly strained interpretation" because it "implausibly reads the word 'section' as '*sub*section,' so the phrase 'as provided in this section' actually means 'as provided in *sub*section (f).'" *Ibid.*

"Second, and importantly, § 1610(f) *never became operative*." 2016 WL 3903409, at *13. As a result, the provision "does not allow *any* form of execution." *Ibid.* "It therefore makes no sense to say, as the *Bennett* majority

does, that the phrase 'as provided in this section' in subsection (g) refers only to subsection (f), an inoperative part of the statute. If that were the case, then execution 'as provided in this section' would mean no execution at all." *Ibid.*

For those reasons, the Seventh Circuit "disagree[d] with the Ninth Circuit's interpretation of subsection (g)." 2016 WL 3903409, at *13. The court noted that the Ninth Circuit, in reaching its contrary view, had relied on two earlier Seventh Circuit cases. *Ibid.* Those cases, the Seventh Circuit explained, merely "assume[ ] rather than decide[ ] the crucial antecedent question—that is, whether § 1610(g) is itself a freestanding exception to execution immunity." *Id.* at *11. "To the extent that [those cases] can be read as holding that § 1610(g) is a freestanding exception to execution immunity for terrorism-related judgments," it held, "they are overruled." *Id.* at *13. Because the decision "overrule[d] circuit precedent and create[d] a conflict with the Ninth Circuit," the panel circulated the opinion to all active judges, a majority of whom did not vote to rehear the case en banc. *Id.* at *13 n.6.

The conflict between the Seventh Circuit's decision in *Rubin* and the Ninth Circuit's decision below thus could not be more clear. One decision holds that § 1610(g) is "a freestanding provision for attaching and executing against assets" for terrorism-related judgments, App., *infra*, 13a; the other holds that "subsection (g) * * * is *not* a freestanding terrorism exception to execution immunity," *Rubin*, 2016 WL 3903409, at *2 (emphasis added). The Seventh Circuit expressly "disagree[d] with the Ninth Circuit's interpretation"; expressly rejected the Ninth Circuit's rationale; and circulated its opinion internally for an en banc poll precisely because it was "creat[ing] a conflict with the Ninth Circuit." 2016 WL

3903409, at *12-13 & n.6. A more stark and unambiguous circuit conflict is hard to imagine.[4]

The legal issue was thoroughly addressed by both courts of appeals. It spawned three different opinions in the Ninth Circuit. That court addressed the issue at length and refused to change course despite Judge Benson's dissent and the amicus filing by the United States. The Seventh Circuit circulated its opinion internally for en banc review, generating only a solitary dissenting vote to rehear the case. *Rubin*, 2016 WL 3903409, at *13 n.6. The legal issue has thus been thoroughly considered by both courts and is ripe for this Court's review.

B. The Ninth Circuit's Decision Is Incorrect

The Ninth Circuit's decision is also incorrect, for reasons well explained by the Seventh Circuit. Section 1610(g) permits creditors to execute terrorism judgments against the assets of a foreign sovereign *or* the assets of its agencies or instrumentalities "*as provided in this section*, regardless of" the five *Bancec* factors. 28 U.S.C. § 1610(g)(1) (emphasis added). By its plain terms, that language merely eliminates the five *Bancec* factors as a barrier to recovery. It is not naturally read as a freestanding exception to immunity. If Congress had intended to create a freestanding immunity exception, it would have said that such assets are subject to execution,

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[4] In addition, two other circuits have recently described § 1610(g) as a freestanding immunity exception without any analysis of the "as provided in this section" language. See *Weinstein* v. *Islamic Republic of Iran*, — F.3d —, 2016 WL 4087940, at *8 (D.C. Cir. Aug. 2, 2016) (petition for rehearing pending) (characterizing § 1610(g) as "strip[ping] execution immunity from *all* property of a defendant sovereign" for terrorism judgments); *Kirschenbaum* v. *650 Fifth Ave.*, — F.3d —, 2016 WL 3916001, at *6 (2d Cir. July 20, 2016) (petition for rehearing pending) (same in dicta).

period—not that they are subject to execution "as provided in this section, regardless of" *Bancec*.

The Ninth Circuit failed to provide any plausible account for Congress's inclusion of the phrase "as provided in this section." The court held that, "[w]hen subsection (g) refers to attachment and execution of the judgment 'as provided in this section,' it is referring to procedures contained in § 1610(f)." App., *infra*, 14a. But, as the Seventh Circuit explained, that is an "implausibl[e]," "highly strained" interpretation that "makes no sense." *Rubin*, 2016 WL 3903409, at *12-13. Section 1610(g) refers to "this *section*," not any particular *sub*section. 28 U.S.C. § 1610(g)(1) (emphasis added). And regardless, because the President waived § 1610(f)'s execution mechanism the day it was enacted, "execution 'as provided in this section' would mean no execution at all." *Rubin*, 2016 WL 3903409, at *13.

The Ninth Circuit offered three arguments in response, but none withstands scrutiny. The court first asserted that, although the President waived the execution mechanism in § 1610(f)*(1)*, "[s]everal other parts of subsection (f) * * * have always remained fully enforced." App., *infra*, 15a n.5. While the court did not identify the "[s]everal other parts" it had in mind, the only other provisions in subsection (f)—paragraphs (f)(2) and (f)(3)—do not contain any mechanisms for execution. Paragraph (f)(2) merely encourages federal agencies to assist plaintiffs in identifying, locating, and executing against assets. And paragraph (f)(3) sets forth the President's authority to waive the execution mechanism in subsection (f)(1). It strains credulity to suggest that, when Congress provided for "execution * * * as provided in this section, regardless of" the five *Bancec* factors, the "section" Con-

gress had in mind was two paragraphs that do not set forth any execution mechanism at all.

Second, the Ninth Circuit urged that, "regardless of the partial waiver, all of subsection (f) remains the law," and the waiver merely "demonstrates presidential disagreement with congressional intent." App., *infra*, 15a n.5. But the point here is not that the Court should follow the President's intent rather than Congress's. The point is simply that it is implausible to infer that *Congress* intended the phrase "as provided in this section" to refer to a provision that was not operative when Congress enacted § 1610(g) and has never been operative. Under the Ninth Circuit's interpretation, "execution 'as provided in this section' would mean no execution at all." *Rubin*, 2016 WL 3903409, at *13. That makes no sense.

Finally, the Ninth Circuit accused Bank Melli of advocating a "blinders-on, technical" approach that "loses sight of Congress' main aim" to allow terrorism plaintiffs "to get their money from terrorist states." App., *infra*, 15a n.5. That "plaintiffs should win" rule of construction defies settled principles. This Court has admonished that "no legislation pursues its purposes at all costs," and that it "frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987). The Ninth Circuit's atextual interpretation ignores that principle.

II. The Ninth Circuit's Interpretation Of The Ownership Requirement Warrants Review

The Ninth Circuit's ruling on the ownership issue likewise warrants review. TRIA and § 1610(g) permit execution only against "assets of" or "property of" the sovereign. 28 U.S.C. § 1610(g)(1); 28 U.S.C. § 1610 note § 201(a). The Ninth Circuit held that those provisions

should be interpreted according to *state* rather than federal law, and that plaintiffs could seize the funds that Visa owes Bank Melli because California law would permit them to do that. App., *infra*, 21a-24a. That holding conflicts with a decision of the D.C. Circuit.

A. The Ninth Circuit's Decision Conflicts with the D.C. Circuit's Decision in *Heiser*

In *Heiser* v. *Islamic Republic of Iran*, 735 F.3d 934 (D.C. Cir. 2013), plaintiffs with a default judgment against Iran sought to attach certain electronic funds transfers that had been blocked under various sanctions programs. *Id.* at 935. Iranian banks, although neither the originators nor the beneficiaries of the transfers, had a "contingent future possessory interest" because the recipients maintained their accounts at those banks. *Id.* at 936-937. The question was whether the funds were subject to attachment and execution under TRIA or § 1610(g).

The D.C. Circuit held that they were not. Those statutes, the court observed, apply only to "the 'property' or 'blocked assets' *of* Iran." 735 F.3d at 938. And this Court has "defin[ed] 'of' in various statutes as requiring ownership." *Ibid.* (citing *Bd. of Trs. of Leland Stanford Junior Univ.* v. *Roche Molecular Sys., Inc.*, 563 U.S. 776 (2011)). "Nothing in the legislative histories of [TRIA] § 201 or § 1610(g) suggests that Congress intended judgment creditors of foreign states to be able to attach property those states do not own." *Ibid.* Dispensing with an ownership requirement also "risks punishing innocent third parties": The owner "could, and very well might, be an innocent person who then unjustly bears the costs" of execution. *Id.* at 939.

In reaching that conclusion, the D.C. Circuit refused to adopt state law as the governing standard: "Federal law, specifically § 201 and § 1610(g), is controlling. The

question is the content of this federal law." 735 F.3d at 940. Adopting a uniform federal standard, the court held that plaintiffs could not attach the funds because "Iran does not *own* the contested accounts." *Id.* at 940-941 (emphasis added). "[P]laintiffs could not attach the contested accounts under either § 201 or § 1610(g) without an Iranian *ownership interest* in the accounts," and "because Iran lacked an *ownership* interest," the court denied the attachments. *Id.* at 941 (emphasis added).

The Ninth Circuit took the opposite approach here. Courts, it held, should "look to *state law* to determine the ownership of assets in this context." App., *infra*, 22a (emphasis added). And because "California law authorizes a court to order a judgment debtor to assign to the judgment creditor a right to payments that are due," the Ninth Circuit stated, "th[e] assets are property of Bank Melli and may be assigned to judgment creditors." *Id.* at 22a-23a.

In *Calderon-Cardona* v. *Bank of New York Mellon*, 770 F.3d 993, 1000-1001 (2d Cir. 2014), cert. denied, 136 S. Ct. 893 (2016), the Second Circuit likewise looked to state rather than federal law. That case involved another effort to execute against electronic funds transfers. *Id.* at 995-996. The court acknowledged that "[w]hether attachment of the EFTs under § 1610(g) is possible turns * * * on whether [they] are 'property of' [the foreign state]." *Id.* at 1000. In the Second Circuit's view, "§ 1610(g) is silent as to what interest in property the foreign state * * * must have." *Id.* at 1001. The court therefore "look[ed] to state law." *Id.* at 1001-1002; see also *Hausler* v. *JP Morgan Chase Bank, N.A.*, 770 F.3d 207, 211-212 (2d Cir. 2014) (reaffirming *Calderon-Cardona*), cert. denied, 136 S. Ct. 893 (2016).

The conflict between *Heiser* on the one hand, and *Calderon-Cardona* and the decision below on the other, is not only square but openly acknowledged. The Ninth Circuit observed below that the D.C. Circuit took a contrary approach in *Heiser* by "creating [a] federal rule of decision." App., *infra*, 23a. There is thus an acknowledged circuit conflict over whether federal or state law determines whether a sovereign has a sufficient interest in property to permit attachment under TRIA or § 1610(g).

Perhaps seeking to avoid review, the Ninth Circuit opined that the distinction was immaterial in this case. "[E]ven if federal law should govern this question," the court asserted, "Bank Melli would not succeed." App., *infra*, 23a. According to the Ninth Circuit, the "expansive wording" of TRIA and § 1610(g) "suggest[s] that immediate and outright ownership of assets is not required," even under federal law. *Ibid.* Bank Melli's mere status as an "intended contractual beneficiary of the contested funds" was enough. *Id.* at 23a-24a.

Far from reconciling the conflict with *Heiser*, that holding compounds it. *Heiser* held, not only that federal law governs, but that federal law requires *ownership*: The plaintiffs "could not attach the contested accounts under either § 201 or § 1610(g) without an Iranian *ownership interest* in the accounts." 735 F.3d at 941 (emphasis added). That holding was the opposite of the Ninth Circuit's ruling here that "immediate and outright ownership of assets is not required" and that Bank Melli's mere status as an "intended contractual beneficiary" was sufficient. App., *infra*, 23a-24a.

The fact that Visa *owes* money to Bank Melli does not mean that Bank Melli *owns* the funds. Bank Melli's staff could not simply walk into Visa's offices, take the money, and leave. And if Visa refused to pay, that would at most

be a breach of contract, not theft. By holding that Bank Melli's status as a mere "intended contractual beneficiary" is sufficient even absent ownership of the funds, the Ninth Circuit created yet another conflict with the D.C. Circuit's decision in *Heiser*.

B. The Ninth Circuit's Decision Is Incorrect

The Ninth Circuit's decision is also wrong. *Heiser* properly held that the meaning of "assets of" and "property of" in TRIA and §1610(g) is a question of federal rather than state law. "'[I]n the absence of a plain indication to the contrary, . . . Congress when it enacts a statute is not making the application of the federal act dependent on state law.'" *Miss. Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30, 43 (1989). Rather, "federal statutes are generally intended to have uniform nationwide application." *Ibid.* State law may *create* the property interest that satisfies the federal statutory requirement. Cf. *Phillips* v. *Wash. Legal Found.*, 524 U.S. 156, 164 (1998) (property interests typically defined by state law). But TRIA and §1610(g) require, as a matter of *federal* law, that the requisite interest exist.

Heiser also correctly identified the content of that federal standard. TRIA and §1610(g) apply only to "assets of" or "property of" the sovereign. 28 U.S.C. §1610(g)(1); 28 U.S.C. §1610 note §201(a). As this Court has explained, "'the use of the word "of" denotes ownership.'" *Bd. of Trs. of Leland Stanford Junior Univ.* v. *Roche Molecular Sys., Inc.*, 563 U.S. 776, 788 (2011) (quoting *Poe* v. *Seaborn*, 282 U.S. 101, 109 (1930)). Ownership is thus what TRIA and §1610(g) require. Although the Ninth Circuit pointed to "expansive wording" in other parts of the statutes, App., *infra*, 23a, none of the language addresses the type of property interest required. In that respect too, the Ninth Circuit erred.

III. THE QUESTIONS PRESENTED ARE IMPORTANT

Both conflicts are important and warrant review.

A. The Ninth Circuit Rejected the United States' Position on Issues with Important Foreign Relations Implications

In construing § 1610(g) as a freestanding exception to immunity, the Ninth Circuit "acknowledge[d] that the United States * * * disagrees with our interpretation." App., *infra*, 18a n.7. The United States explained in its amicus brief below that "section 1610(g) is not a freestanding exception to immunity that can be invoked independent of the rest of section 1610." C.A. Dkt. 82, at 8. Rather, "a plaintiff seeking execution must * * * proceed under one or more of the exceptions to immunity separately set out in section 1610." *Id.* at 1-2. Section 1610(g) merely "overrides various legal principles that might otherwise require respect for an entity's separate juridical status." *Id.* at 9.

The United States has taken that same position in at least three other cases as well. See U.S. Br. in *Hegna* v. *Islamic Republic of Iran*, No. 11-1582, at 19 (2d Cir. filed Nov. 4, 2011) ("Section 1610(g) by its terms is not an independent exception to execution immunity."); U.S. Br. in *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran* v. *Frym*, No. 13-57182, at 29 (9th Cir. filed July 3, 2014) (similar); U.S. Br. in *Rubin* v. *Islamic Republic of Iran*, No. 14-1935, at 23 (7th Cir. filed Nov. 3, 2014) (similar). The Ninth Circuit's interpretation of § 1610(g) is thus an express departure from the position of the United States.

The Ninth Circuit departed from the position of the United States on the ownership requirement as well. As the United States explained below, "TRIA and section 1610(g) only authorize plaintiffs to attach assets that are

'owned' by the relevant foreign state (or its agency or instrumentality)." C.A. Dkt. 82, at 2-3. "[T]he mere fact that state law authorizes attachment is insufficient" because "federal law has an affirmative requirement that the assets actually be *owned* by the debtor state or instrumentality." *Id.* at 17.

The United States has taken that same position in at least a half-dozen other cases. See U.S. Br. in *Rubin* v. *Islamic Republic of Iran*, No. 11-2144, at 13 (1st Cir. filed June 7, 2012) (TRIA applies only to "assets owned by the relevant terrorist party"); U.S. Br. in *JPMorgan Chase Bank, N.A.* v. *Hausler*, No. 12-1264, at 15 (2d Cir. filed July 9, 2012) (similar); U.S. Br. in *Calderon-Cardona* v. *Bank of N.Y. Mellon*, No. 12-75, at 16, 24 (2d Cir. filed Sept. 21, 2012) (similar for TRIA and § 1610(g)); U.S. Br. in *Heiser* v. *Islamic Republic of Iran*, No. 12-7101, at 2 (D.C. Cir. filed Mar. 11, 2013) (similar); U.S. Br. in *Villoldo* v. *Ruz*, No. 15-1808, at 15 (1st Cir. filed Dec. 24, 2015) (similar); U.S. Br. in *Weinstein* v. *Islamic Republic of Iran*, No. 14-7193, at 14 (D.C. Cir. filed Dec. 29, 2015) (similar).

The Ninth Circuit opined that it was "not required to defer to the government's view" because, among other things, the President "signed the legislation." App., *infra*, 18a n.7. That makes no sense. The Executive's role in enacting the statute only underscores that courts should give due consideration to its interpretation. See *Republic of Austria* v. *Altmann*, 541 U.S. 677, 701 (2004) (Executive's interpretation of the FSIA "of considerable interest to the Court" even absent special deference).

In any event, whether or not the Ninth Circuit should have *deferred* to the Executive's interpretation, the mere fact that the Ninth Circuit *rejected* that interpretation underscores the need for review. This Court often grants

certiorari due to a case's impact on the Government's conduct of the Nation's foreign relations. See, *e.g.*, *Christopher* v. *Harbury*, 536 U.S. 403, 412 (2002) (citing "importance of th[e] issue to the Government in its conduct of the Nation's foreign affairs"); S. Shapiro *et al.*, *Supreme Court Practice* § 4.13, at 270-271 (10th ed. 2013).

That impact is particularly serious here given the United States' treaty obligations. The Treaty of Amity between the United States and Iran requires the United States to respect the juridical status of Iranian companies and to refrain from treatment that is unreasonable, discriminatory, or in violation of international law. See Treaty of Amity, Economic Relations, and Consular Rights, U.S.-Iran, arts. III-IV, Aug. 15, 1955, 8 U.S.T. 899, 902-904. By construing TRIA and § 1610(g) to permit execution against the assets at issue without regard to traditional immunity principles or Bank Melli's status as an entity juridically separate from the Iranian government, the Ninth Circuit put the United States in violation of those solemn obligations. Cf. App., *infra*, 19a-20a.

At a minimum, the Court should invite the Solicitor General to express the views of the United States. This Court routinely seeks the views of the Executive Branch when a case affects foreign relations. See, *e.g.*, *Bank Markazi* v. *Peterson*, 135 S. Ct. 1753 (2015); *Rubin* v. *Islamic Republic of Iran*, 132 S. Ct. 1619 (2012); *Bank Melli Iran N.Y. Representative Office* v. *Weinstein*, 131 S. Ct. 3012 (2011). It should do likewise here.

B. The Ninth Circuit's Erroneous Interpretation of § 1610(g) Is a Substantial Departure from Traditional Immunity Principles

The Ninth Circuit's misinterpretation of § 1610(g) is also important for another reason: It represents a sub-

stantial break from traditional immunity principles long reflected in domestic and international law.

The restrictive theory denies immunity only to a state's "strictly commercial" acts. *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 486-487 (1983). Congress was well aware of that limitation when it enacted the FSIA. The Act's findings and statement of purpose recite that, "[u]nder international law, states are not immune from the jurisdiction of foreign courts insofar as their *commercial activities* are concerned, and their *commercial property* may be levied upon for the satisfaction of judgments rendered against them in connection with their *commercial activities*." 28 U.S.C. § 1602 (emphasis added). The Act's exceptions are thus limited to property "used for a *commercial activity* in the United States," 28 U.S.C. § 1610(a) (emphasis added), or property of a sovereign instrumentality "engaged in *commercial activity* in the United States," *id.* § 1610(b) (emphasis added).

That restriction reflects not just domestic tradition but international norms as well. The FSIA distinguished between commercial and non-commercial property because that distinction was the rule "[u]nder international law." 28 U.S.C. § 1602; see also H.R. Rep. No. 94-1487, at 7 (1976) (bill sought to "codify the so-called 'restrictive' principle of sovereign immunity, *as presently recognized in international law*" (emphasis added)). That distinction remains the prevailing international rule today. See, *e.g.*, United Nations Convention on Jurisdictional Immunities of States and Their Property, G.A. Res. 59/38, art. 19(c), U.N. Doc. A/RES/59/38 (Dec. 2, 2004) (immunity from execution inapplicable to property "specifically in use or intended for use by the State for other than government non-commercial purposes").

The Ninth Circuit's decision places the Nation's laws in conflict with that traditional distinction. Under the Ninth Circuit's ruling, sovereign property may be seized to satisfy a terrorism judgment without regard to its non-commercial character. Courts should not lightly presume that Congress intended such a dramatic departure from past practice and international law.

The far-reaching consequences of the Ninth Circuit's approach are illustrated by the facts in *Rubin*. The plaintiffs there invoked the same mistaken interpretation of § 1610(g) to try to execute against ancient Persian artifacts that Iran had loaned to American museums for academic study. 2016 WL 3903409, at *1-2. Assets like those have never traditionally been subject to execution. But under the Ninth Circuit's interpretation, they are fair game. As the dissent warned below, that would be an "unjustified and unfortunate result." App., *infra*, 33a.[5]

C. The Ninth Circuit's Ruling on the Ownership Issue Presents Significant Practical Problems

The Ninth Circuit's holding that TRIA and § 1610(g) apply whenever state law permits execution, even when the sovereign does not own the property, also threatens far-reaching consequences. Under that holding, a plaintiff's ability to seize property depends entirely on the vagaries of state law, which often permits execution

[5] The interlocutory nature of the Ninth Circuit's judgment does not weigh against review. To be sure, the Ninth Circuit's denial of the motion to dismiss the TRIA claim means that litigation over that claim may continue regardless of how this Court interprets § 1610(g). App., *infra*, 10a-12a. But a case may be "reviewed despite its interlocutory status" where "there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari." S. Shapiro *et al.*, *Supreme Court Practice* § 4.18, at 283 (10th ed. 2013). That is the situation here.

based on interests short of ownership. As the D.C. Circuit explained in *Heiser*, moreover, dispensing with an ownership requirement also "risks punishing innocent third parties" because the actual owner could be "an innocent person who then unjustly bears the costs" of execution. 735 F.3d at 939.

That approach also risks serious practical problems. For example, plaintiffs routinely invoke expansive interpretations of TRIA and § 1610(g) to seize electronic funds transfers, whether or not the sovereign owns the funds.[6] And in the recent *Bank Markazi* case, the plaintiffs invoked the same broad interpretation of TRIA to seize intangible security entitlements without regard to ownership. See *Peterson* v. *Islamic Republic of Iran*, 758 F.3d 185, 189 (2d Cir. 2014) (declining to address issue in light of special legislation directing outcome of case), aff'd *sub nom. Bank Markazi* v. *Peterson*, 136 S. Ct. 1310 (2016).

Under the Ninth Circuit's approach, all those disputes—often with significant international ramifications—would be resolved under a patchwork of disparate state laws. Plaintiffs would be allowed to seize assets whenever state law says they can, even if the sovereign does not own the assets. That approach threatens not only unfairness to third parties but also serious disruption to the Nation's financial markets. For that reason too, the Ninth Circuit's decision warrants review.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[6] See, *e.g.*, *Heiser*, 735 F.3d at 935; *Calderon-Cardona*, 770 F.3d at 995-996; *Hausler*, 770 F.3d at 210-211; *Gates*, 755 F.3d at 574.

Respectfully submitted.

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SEPTEMBER 2016

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DOCKET NOS. 13-15442, 13-16100

MICHAEL BENNETT; LINDA BENNETT,
AS CO-ADMINISTRATORS OF THE ESTATE OF
MARIA ANN BENNETT,

Plaintiffs-Appellees,

v.

THE ISLAMIC REPUBLIC OF IRAN,

Defendant,

v.

VISA INC.; FRANKLIN RESOURCES, INC.,

Defendants-third-party-plaintiffs–Appellees,

v.

GREENBERG AND ACOSTA JUDGMENT CREDITORS,

Plaintiff-third-party-defendant–Appellee,

HEISER JUDGMENT CREDITORS,

Plaintiff-fourth-party-defendant–Appellee,

v.

BANK MELLI,

Plaintiff-third-party-defendant–Appellant.

ORDER AND AMENDED OPINION

June 14, 2016

Appeals from the United States District Court
for the Northern District of California
Charles R. Breyer, Senior District Judge, Presiding

Argued and Submitted
April 15, 2015—San Francisco, California

Before: Sidney R. Thomas,* and Susan P. Graber, Circuit Judges, and Dee V. Benson,** Senior District Judge.

Order;
Opinion by Judge Graber;
Partial Concurrence and Partial Dissent by
Judge Benson

ORDER

The opinion and partial dissent filed February 22, 2016, and reported at 817 F.3d 1131, are amended by the opinion and partial dissent filed concurrently with this order.

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* Chief Judge Thomas was drawn to replace Judge Kozinski. He has read the briefs, reviewed the record, and listened to the audio-recording of oral argument held on April 15, 2015.

** The Honorable Dee V. Benson, Senior District Judge for the U.S. District Court for the District of Utah, sitting by designation.

With these amendments, Judges Thomas and Graber have voted to deny Appellant's petition for panel rehearing and petition for rehearing en banc. Judge Benson has voted to grant the petition for panel rehearing and has recommended granting the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it.

Appellant's petition for panel rehearing and petition for rehearing en banc are **DENIED**. No further petitions for panel rehearing or for rehearing en banc may be filed.

OPINION

GRABER, Circuit Judge:

Approximately 90 United States citizens (or the representatives of their estates) are attempting to collect on unsatisfied money judgments that they hold against the Islamic Republic of Iran for deaths and injuries suffered in terrorist attacks sponsored by Iran. The assets that are the subject of this interpleader action are monies contractually owed to Bank Melli by Visa Inc. and Franklin Resources Inc. ("Franklin"). Bank Melli is an instrumentality of Iran. It asserts that Plaintiffs cannot execute on the assets (1) because Bank Melli enjoys sovereign immunity under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), (2) because the relevant statutory exceptions to sovereign immunity may not be applied retroactively, (3) because the blocked assets are not property of Bank Melli, and (4) because Bank Melli is a required party that cannot be joined, thus requiring dismissal under Federal Rule of Civil Procedure 19. We disagree and, accordingly, affirm the judgment of the district court.

BACKGROUND LEGAL PRINCIPLES

The jurisdiction of the United States over persons and property within its territory "is susceptible of no limitation not imposed by itself." *Schooner Exch.* v. *McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812). Accordingly, foreign sovereign immunity is "a matter of grace and comity rather than a constitutional requirement." *Republic of Austria* v. *Altmann*, 541 U.S. 677, 689 (2004). Courts consistently "defer[ ] to the decisions of the political branches" on whether to take actions against foreign sovereigns and their instrumentalities. *Id.* (quoting *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983)).

The FSIA, 28 U.S.C. §§1330, 1602-1611, establishes a default rule that foreign states are immune from suit in United States courts. *Id.* at §1604. Congress enacted the statute to provide a "comprehensive . . . 'set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities.' " *Altmann*, 541 U.S. at 691 (quoting *Verlinden B.V.*, 461 U.S. at 488). The FSIA provides the exclusive vehicle for subject matter jurisdiction in all civil actions against foreign state defendants. *Bank Markazi* v. *Peterson*, 136 S. Ct. 1310, 1317 n.1 (2016); *OBB Personenverkehr AG* v. *Sachs*, 136 S. Ct. 390, 393 (2015); *Flatow* v. *Islamic Republic of Iran*, 308 F.3d 1065, 1069 (9th Cir. 2002).

The FSIA includes many exceptions to its general rule of immunity. 28 U.S.C. §§1605-1607. Relevant here, in 1996, Congress added a new exception, stripping a foreign state of its sovereign immunity when (1) the United States officially designates the foreign state a state sponsor of terrorism and (2) the foreign state is sued "for personal injury or death that was caused by an act of tor-

ture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act." *Id.* at § 1605A.

Iran was designated a terrorist party pursuant to section 6(j) of the Export Administration Act of 1979, 50 U.S.C. app. § 2405(j) (effective Jan. 19, 1984). *Peterson* v. *Islamic Republic of Iran*, 627 F.3d 1117, 1123 (9th Cir. 2010); *Weinstein* v. *Islamic Republic of Iran*, 609 F.3d 43, 48 (2d Cir. 2010). That designation means that Iran is not entitled to sovereign immunity for claims under § 1605A.

Separately, the FSIA addresses the immunity of sovereign property from execution and attachment. Subject to enumerated exceptions, a foreign state's property in the United States is immune from attachment and execution. 28 U.S.C. § 1609.

In *First National City Bank* v. *Banco Para el Comercio Exterior de Cuba ("Bancec")*, 462 U.S. 611, 620-621 (1983), the Supreme Court concluded that the FSIA did *not* control whether and to what extent *instrumentalities* could be held liable for the debts of their sovereigns. Applying international law and federal common law, the Court held that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." *Id.* at 626-627. That rule, referred to as the "*Bancec* presumption," may be overcome only in limited circumstances. *Id.* at 628-634. The federal courts later described five "*Bancec* factors" that may be considered in determining whether the presumption has been over-

come in any given case. *E.g., Flatow*, 308 F.3d at 1071 n.9.[1]

Even after Congress added § 1605(a)(7) (now § 1605A) to the FSIA in 1996, successful plaintiffs struggled to enforce judgments against Iran when they were harmed by its terrorist activities. See, *e.g.*, *In re Islamic Republic of Iran Terrorism Litig.*, 659 F. Supp. 2d 31, 49-58 (D.D.C. 2009) (describing "The Never-Ending Struggle to Enforce Judgments Against Iran"). Once again, Congress responded by enacting new statutes, this time designed to facilitate the satisfaction of such judgments by expanding successful plaintiffs' ability to attach and execute on the property of agencies and instrumentalities of terrorist states. *Bank Markazi*, 136 S. Ct. at 1318.

First, in 2002, Congress enacted the Terrorism Risk Insurance Act of 2002 ("TRIA"), Pub. L. No. 107-297, 116 Stat. 2322. Section 201(a) of the TRIA provides:

> Notwithstanding any other provision of law, and except as provided in subsection (b) [of this note, pertaining to Presidential waiver], in every case in which a person has obtained a judgment against a

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[1] The five factors are:

(1) the level of economic control by the government;

(2) whether the entity's profits go to the government;

(3) the degree to which government officials manage the entity or otherwise have a hand in its daily affairs;

(4) whether the government is the real beneficiary of the entity's conduct; and

(5) whether adherence to separate identities would entitle the foreign state to benefits in United States courts while avoiding its obligations.

Flatow, 308 F.3d at 1071 n.9 (quoting *Walter Fuller Aircraft Sales, Inc.* v. *Republic of the Philippines*, 965 F.2d 1375, 1380 n.7 (5th Cir. 1992)).

> terrorist party on a claim based upon an act of terrorism, or for which a terrorist party is not immune under section 1605A or 1605(a)(7) . . . , the blocked assets[2] 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.

TRIA §201(a) was codified as a statutory note to 28 U.S.C. §1610 on "Treatment of Terrorist Assets."

Second, in 2008, Congress amended the FSIA as part of the National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, §1083, 122 Stat. 3, 338. Among other changes, Congress added a new subsection to the FSIA, which provides in part that

> 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 [the same five factors described by the federal courts as the "*Bancec* factors"].

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[2] "Blocked assets" refers to "any asset seized by the Executive Branch pursuant to either the Trading With the Enemy Act or the International Emergency Economic Powers Act. See TRIA §201(d)(2)." *Bank Markazi*, 135 S. Ct. at 1318 (citations omitted).

28 U.S.C. § 1610(g)(1); see also *Bank Markazi*, 136 S. Ct. at 1318 n.2. For ease of reference, we refer to this section as "FSIA § 1610(g)."

FACTUAL AND PROCEDURAL HISTORY

Four groups of individuals sued the Islamic Republic of Iran for damages arising from deaths and injuries suffered in terrorist attacks sponsored by Iran; in each case, a final money judgment was entered in favor of the plaintiffs and against Iran. In *Estate of Heiser* v. *Islamic Republic of Iran*, 659 F. Supp. 2d 20 (D.D.C. 2009), and *Estate of Heiser* v. *Islamic Republic of Iran*, 466 F. Supp. 2d 229 (D.D.C. 2006), the plaintiffs secured judgments for more than $590 million for the 1996 bombing of the Khobar Towers in Saudi Arabia. In *Acosta* v. *Islamic Republic of Iran*, 574 F. Supp. 2d 15 (D.D.C. 2008), the plaintiffs received a judgment of more than $350 million because of a 1990 mass shooting. In *Bennett* v. *Islamic Republic of Iran*, 507 F. Supp. 2d 117 (D.D.C. 2007), the plaintiffs obtained a judgment for damages of nearly $13 million for Iran's role in the 2002 bombing of a cafeteria at Hebrew University in Jerusalem. And in *Greenbaum* v. *Islamic Republic of Iran*, 451 F. Supp. 2d 90 (D.D.C. 2006), the plaintiffs were awarded almost $20 million for damages suffered as a result of the bombing of a Jerusalem restaurant in 2001. Collectively, the judgments total nearly $1 billion. Although all the judgments were taken by default, it is undisputed that all are valid final judgments and that Iran owes the amounts of those judgments to the respective plaintiffs.

Bank Melli, Iran's largest financial institution, is wholly owned by the government of Iran. It is undisputed that Bank Melli qualifies as an instrumentality of Iran under the FSIA. Bank Melli was not named as a defendant in any of the four cases described above and was not

itself alleged to have been involved in the underlying terrorist events. On October 25, 2007, the United States Department of the Treasury, Office of Foreign Assets Control exercised its authority under Executive Order No. 13,382, 70 Fed. Reg. 38,567 (June 28, 2005), to block Bank Melli's assets in the United States because of its involvement in Iran's nuclear and missile industries. Bank Melli's assets also are blocked pursuant to a 2012 Executive Order blocking the property of Iran and of Iranian financial institutions. Exec. Order No. 13,599, 77 Fed. Reg. 6659 (Feb. 8, 2012).[3]

Visa and Franklin owe about $17.6 million to Bank Melli pursuant to a commercial relationship that involves the use of Visa credit cards in Iran. Visa and Franklin have not turned the funds over to Bank Melli only because the funds are blocked. The *Bennett* judgment creditors filed a complaint against Visa and Franklin, seeking to attach and execute against the blocked assets. Visa and Franklin responded by initiating this interpleader action, naming as defendants Bank Melli and the three other sets of judgment creditors. Visa and Franklin sought a determination of the rights to the blocked assets in their possession and a discharge of Visa and Franklin with regard to those assets. After Bank Melli entered its appearance, it moved to dismiss the action.

Bank Melli made four arguments for dismissal, each of which the district court rejected. The court held: (1) TRIA §201(a) and FSIA §1610(g) enable the judgment creditors to attach the monies owed to Bank Melli; (2) TRIA §201(a) and FSIA §1610(g) do not impose retroactive liability; (3) the blocked assets constitute proper-

[3] The recent lifting of a portion of the sanctions imposed on Iran does not render this interpleader action moot, nor does it affect our analysis of the issues raised here.

ty of Bank Melli; and (4) Bank Melli was not a required party under Federal Rule of Civil Procedure 19. *Bennett* v. *Islamic Republic of Iran*, 927 F. Supp. 2d 833 (N.D. Cal. 2013). The district court denied the motion to dismiss and certified the order for interlocutory appeal under 28 U.S.C. §1292(b). *Bennett*, 927 F. Supp. 2d at 845-846.

STANDARD OF REVIEW

We review *de novo*: questions of statutory construction, *Miranda* v. *Anchondo*, 684 F.3d 844, 849 (9th Cir. 2012); a district court's ruling on a motion to dismiss for failure to state a claim or for lack of subject matter jurisdiction, *Colony Cove Props., LLC* v. *City of Carson*, 640 F.3d 948, 955 (9th Cir. 2011); the question whether a statute may be applied retroactively, *Scott* v. *Boos*, 215 F.3d 940, 942 (9th Cir. 2000); and legal determinations underlying a district court's decision whether an action can proceed in the absence of a required party under Rule 19, *Kescoli* v. *Babbitt*, 101 F.3d 1304, 1309 (9th Cir. 1996).

DISCUSSION

A. TRIA §201(a) and FSIA §1610(g) permit attachment and execution of the monies owed to Bank Melli.

1. *TRIA §201(a)*

We hold that TRIA §201(a) permits judgment creditors to attach assets held by the instrumentalities of state sponsors of terrorism. As always, when interpreting a statute, we begin with its text. *Metro One Telecomms., Inc.* v. *Comm'r*, 704 F.3d 1057, 1061 (9th Cir. 2012). Section 201(a) of the TRIA applies "[n]otwithstanding *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 ter-

rorist party is not immune under section 1605A or 1605(a)(7)," and "in order to satisfy such judgment to the extent of *any* compensatory damages for which such terrorist party has been adjudged liable." TRIA §201(a) (emphases added). The statute provides that, in cases such as this one, "the blocked assets of [the] 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." *Id.* (emphasis added). This wording demonstrates that Congress knew that the blocked assets of an instrumentality might otherwise have been excluded from the phrase "blocked assets of [the] terrorist party" and that Congress acted to ensure that, instead, the instrumentality's blocked assets were included. Cf. *Alejandre* v. *Telefonica Larga Distancia de P.R., Inc.*, 183 F.3d 1277, 1287, 1288 n.25 (11th Cir. 1999) (stating that a proposed amendment to the FSIA that would have applied to property that "belongs to an *agency or instrumentality* of a foreign state" demonstrated that Congress "knows how to express clearly an intent to make instrumentalities substantively liable for the debts of their related foreign governments" (internal quotation marks omitted)). Accordingly, we agree with the Second Circuit when it held 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." *Weinstein*, 609 F.3d at 50.

Bank Melli disputes this reading of §201(a), arguing instead that it applies only to instrumentalities that are alter egos of the state; that is, Bank Melli argues that the *Bancec* presumption against the attachment of assets

held by state instrumentalities applies. Bank Melli reasons that, because "including" is a term of illustration, the words that follow are merely an example of the main preceding principle. That observation is true but is of no assistance to Bank Melli. By listing "the blocked assets of any . . . instrumentality of that terrorist party" as a specific example of assets that are "subject to execution or attachment . . . in order to satisfy" a money judgment obtained under § 1605A or § 1605(a)(7), Congress clearly instructed courts to allow the instrumentality's blocked assets to be reached. Congress also instructed courts to allow these assets to be reached "[n]otwithstanding any other provision of law"—that is, regardless of the usual fiction embodied in *Bancec*. Congress purposely overrode the *Bancec* presumption in this context and abrogated attachment immunity with respect to the blocked assets of instrumentalities of designated state sponsors of terrorism. Section 201(a) permits the judgment creditors to attach the assets of an instrumentality of a state sponsor of terrorism. Accordingly, the blocked assets of Bank Melli that are at issue in this case may be attached.

2. *FSIA § 1610(g)*

FSIA § 1610(g) allows attachment of and execution against property held by a foreign terrorist state's instrumentality "that is a separate juridical entity," "regardless of" five factors. As noted above, those enumerated factors are the same five factors identified by the federal courts as the "*Bancec* factors" that may be used to decide whether an instrumentality is an alter ego under *Bancec*. *E.g.*, *Flatow*, 308 F.3d at 1071-1072, 1071 n.9. It is clear from the text of the statute that Congress was referring to, and abrogating, not just the presumption of separate juridical status, but also *Bancec* specifi-

cally. Therefore, §1610(g) also permits attachment in this case.

But Bank Melli contends that, because §1610(g) makes assets subject to attachment and execution only "as provided in this section," it is not an independent exception to the immunity granted by 28 U.S.C. §1609. Bank Melli reasons that subsection (g) applies only if some other part of §1610 provides for attachment and execution. Bank Melli argues that its assets cannot be attached or executed upon because the assets at issue in this case were not "used for a commercial activity in the United States," a requirement in §1610(a), and Bank Melli has not itself "engaged in commercial activity in the United States," a requirement in §1610(b). We are not persuaded.

We hold that subsection (g) contains a freestanding provision for attaching and executing against assets of a foreign state or its agencies or instrumentalities. Subsection (g) covers a different subject than §1610(a) through (e): by its express terms, it applies *only* to "certain actions," specifically, judgments "entered *under section 1605A*." (Emphasis added.) In turn, §1605A revokes sovereign immunity for damages claims against a foreign state for personal injury or death caused by "torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support" for such an act. By definition, such claims do not arise from commercial activity; they arise from acts of torture (and the like). Section 1610(g) requires only that a judgment under §1605A have been rendered against the foreign state; in that event, both the property of the foreign state *and* the property of an agency or instrumentality of that state are subject to attachment and execution. See *Peterson*, 627 F.3d at 1123 n.2 (stating that §1610(g) "expanded the

category of foreign sovereign property that can be attached; judgment creditors can now reach any U.S. property in which Iran has any interest, whereas before they could reach only property belonging to Iran"). To the extent that subsection (g) is inconsistent with subsection (a) or (b), subsection (g) governs because the particular (judgments entered under §1605A) controls over the general (all judgments entered after a certain date). *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 384-385 (1992).

When subsection (g) refers to attachment and execution of the judgment "as provided in this section," it is referring to procedures contained in §1610(f).[4] Section 1610(f), like §1610(g), relates to judgments obtained under §1605A and its predecessor, §1605(a)(7). Subsection (f)(1)(A) permits attachment and execution of property that might otherwise be blocked; subsection (f)(1)(B) prohibits attachment or execution against property of a foreign state that it expropriated from a natural person; and subsection (f)(2)(A) provides that the Secretary of State and Secretary of Treasury will make every effort to assist a court or creditor in locating property awarded pursuant to §1605A. In light of Congress' mandate to the executive branch to assist in the collection of judgments in such cases, 28 U.S.C. §1610(f), we cannot impute to Congress an empty statutory gesture. See *Gates* v. *Syrian Arab Republic*, 755 F.3d 568, 576 (7th Cir. 2014) (stating that Congress intended the 2008 amendments to the FSIA "to make it easier for terrorism vic-

[4] When Congress enacted subsection (g), subsection (f) already was in place. Subsection (g) was added to the statute in 2008. Pub. L. No. 110-181, div. A, tit. X, §1083(b)(3), 122 Stat. 3, 341 (2008). Subsection (f) was enacted in 1998. Pub. L. No. 105-277, §101(h), 112 Stat. 2681-491 (1998).

tims to obtain judgments and to attach assets").[5] Given both the text of the statute and Congress' intention to make it easier for victims of terrorism to recover judgments, we hold that § 1610(g) is a freestanding provision for attaching and executing against assets to satisfy a money judgment premised on a foreign state's act of terrorism.

Bank Melli argues, and our colleague agrees, that our reading of § 1610(g) renders § 1610(a)(7) and (b)(3) superfluous.[6] But the tension works in the opposite direction.

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[5] In its Petition for Rehearing or Rehearing En Banc, Bank Melli argues that our reading of the statute must be wrong because, in 2000, President Clinton waived the enforcement of § 1610(f)(1); it reasons that "as provided in this section" therefore cannot refer to § 1610(f). That argument fails for at least three reasons. *First*, only subsection (f)(1) is not being enforced. Pres. Determ. No. 2001-03, 65 Fed. Reg. 66,483 (Oct. 28, 2000). Several other parts of subsection (f)—described in text—have always remained fully enforced, so subsection (g) refers, at a minimum, to the enforced portions. *Second*, our search is only for congressional intent when subsection (g) was enacted. A partial waiver does not reflect congressional intent; if anything, it demonstrates presidential disagreement with congressional intent. And non-enforcement by the executive branch does not equal repeal by Congress; regardless of the partial waiver, all of subsection (f) remains the law. *Third*, 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.

[6] Our colleague gives two other reasons for disagreeing with us on this point. The first is that § 1610(b)(3) does not require property "to be involved in terrorism to abrogate attachment immunity." Partial dissent at 36. We do not suggest to the contrary. The other reason is that it would be "an unjustified and unfortunate result," *id.* at 38, to allow attachment and execution of non-commercial property, such as museum artifacts belonging to Iran. But it is not our province to decide whether the policy choices embodied in a statute are wise or unwise; our task is, rather, to discern congressional intent. *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U.S. 421, 423 (1952).

If § 1610(g) is interpreted to require that, to be subject to attachment and execution, property must be used by the foreign state for a "commercial activity," § 1610(a), or that the instrumentality must be "engaged in commercial activity in the United States," § 1610(b), then we would have to read into § 1610(g) a limitation that Congress did not insert. See *United States* v. *Temple*, 105 U.S. (9 Otto) 97, 99 (1881) (holding that the court has "no right to insert words and phrases, so as to incorporate in the statute a new and distinct provision"). Section 1610(g)(1) provides that "*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, . . . is subject to attachment in aid of execution, and execution." (Emphases added.) Thus, Congress did not limit the type of property subject to attachment and execution under § 1610(g) to property connected to commercial activity in the United States. The only requirement is that property be "the property of" the foreign state or its instrumentality.

Two Seventh Circuit cases support our conclusion in this regard. In *Wyatt* v. *Syrian Arab Republic*, 800 F.3d 331, 343 (7th Cir. 2015), cert. denied, 136 S. Ct. 1721 (2016), the court held that the plaintiffs need not comply with § 1608(e) when proceeding under § 1610(g). The court noted that § 1608(e) is part of a "more general process" applicable to "suits other than those for state-sponsored terrorism, such as more ordinary contract or tort cases arising out of a foreign state's commercial activities." *Id.* at 333. Section 1610(g), the court noted, "contains provisions specific to claims for state-sponsored terrorism." *Id.* Those specific provisions allow plaintiffs with a judgment against a state sponsor of terrorism, obtained pursuant to § 1605A, to attach and execute the

judgment against property of the foreign state and against property of any agency and instrumentality of the state. *Id.* The other provisions of § 1610, contained in subsections (a) through (c), establish a general process for judgments against a foreign state not necessarily resting on state-sponsored terrorism. *Id.*

Similarly, the court held in *Gates* that a plaintiff proceeding under § 1610(g) need not comply with § 1610(c). The court wrote in part:

> Sections 1610(a) and (b) are available to satisfy a wide variety of judgments, but they allow attachment of only specific categories of assets to satisfy those judgments. See, *e.g.*, § 1610(a) (allowing attachment of foreign state property located in the United States and used for commercial activity there); § 1610(b) (allowing attachment of property of foreign state agency or instrumentality engaged in United States commercial activity).
>
> By contrast, §1610(g) is available only to holders of judgments under the § 1605A exception for state-sponsored terrorism, but it allows attachment of a much broader range of assets to satisfy those judgments.

Gates, 755 F.3d at 576.

Regardless of canons of construction—such as the principle that a specific statute takes precedence over a general one—our ultimate search is for congressional intent. *Chickasaw Nation* v. *United States*, 534 U.S. 84, 94 (2001). And it is quite clear that Congress meant to expand successful plaintiffs' options for collecting judgments against state sponsors of terrorism.

We acknowledge that § 1610 as a whole is ambiguous.[7] In that circumstance, we may consider legislative history. *Id.* at 91-92; *United States* v. *Pub. Utils. Comm'n*, 345 U.S. 295, 315 (1953). That history suggests that § 1610(g) was meant to allow attachment and execution with respect to any property whatsoever of the foreign state or its instrumentality. Senator Lautenberg, one of the sponsors of the bill that became § 1610(g), stated that the provision would "allow[] attachment of the assets of a state sponsor of terrorism to be made upon the satisfaction of a 'simple ownership' test." 154 Cong. Rec. S54-01 (Jan. 22, 2008) (statement of Sen. Lautenberg). The House Conference Report for a substantially similar earlier version of the bill noted that the provision "would . . . expand the ability of claimants to seek recourse against the property of that foreign state," in part "by permitting any property in which the foreign state has a beneficial

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[7] We also acknowledge that the United States, appearing as amicus curiae, disagrees with our interpretation. We are not required to defer to the government's view because, in deciding this case, we "are not being asked to supplant a foreign policy decision of the political branches with the courts' own unmoored determination." *Zivotofsky ex rel. Zivotofsky* v. *Clinton*, 132 S. Ct. 1421, 1427 (2012). To the contrary, the executive branch has approved the building blocks of the statutory criteria for execution on the property in question, which we are applying in a routine exercise of statutory interpretation. The President signed the legislation that became § 1610(g), Pub. L. No. 110-181, President Bush Signs the National Defense Authorization Act for Fiscal Year 2008, 2008 U.S.C.C.A.N. S3 (Jan. 28, 2008); the President has not sought to waive enforcement as was done with respect to § 1610(f)(1); the Secretary of State listed Iran as a terrorist state, 49 Fed. Reg. 2836-02 (Jan. 23, 1984); and the President imposed monetary sanctions on Iran, Exec. Order No. 13,599, 77 Fed. Reg. 6659 (Feb. 5, 2012). And, finally, in "[e]nacting the FSIA in 1976, Congress transferred from the Executive to the courts the principal responsibility for determining a foreign state's amenability to suit." *Bank Markazi*, 136 S. Ct. at 1329.

ownership to be subject to execution of that judgment." H.R. Rep. No. 11-447, at 1001 (2007) (Conf. Rep.). The bill, it continued, "is written to subject any property interest in which the foreign state enjoys a beneficial ownership to attachment and execution." *Id.* We have already noted that the basic purpose of adding § 1610(g) was to enable plaintiffs who have established a foreign state's liability under § 1605A and its predecessor, for terrorist acts, to collect on their judgments. As Senator Lautenberg put it, the bill was meant "to facilitate victims' collection of their damages from state sponsors of terrorism." 154 Cong. Rec. S54-01 (Jan. 22, 2008) (statement of Sen. Lautenberg). Our interpretation of § 1610(g) more fully furthers that fundamental aim.

Bank Melli also makes three other arguments regarding § 1610(g). We can dispose of those arguments easily.

(1) The district court's failure to discuss expressly whether to grant Bank Melli discretionary relief under the "innocent party" provision of § 1610(g)(3) does not mean that the court failed to consider whether that provision applied. Bank Melli made its § 1610(g)(3) argument to the district court, and we presume that the court understood its authority but declined to exercise discretion in Bank Melli's favor. Cf. *United States* v. *Davis*, 264 F.3d 813, 816-817 (9th Cir. 2001) (so holding in the context of a district court's silence regarding a requested downward departure under the United States Sentencing Guidelines).

(2) There is no conflict between § 1610(g) and the 1955 Treaty of Amity between the United States and Iran, which requires that the United States respect the juridical status of Iranian companies, protect their property in accordance with international law, and not discriminate against them. Treaty of Amity, Economic Relations and

Consular Rights Between the United States of America and Iran, Aug. 15, 1955, 8 U.S.T. 899, 902-903. As the Second Circuit held, that treaty provision is intended simply to ensure that foreign corporations are on equal footing with domestic corporations. *Weinstein*, 609 F.3d at 53. Even if the two provisions were inconsistent, when a treaty and a later-enacted federal statute conflict, the subsequent statute controls to the extent of the conflict. *Breard* v. *Greene*, 523 U.S. 371, 376 (1998) (*per curiam*).

(3) Allowing the Heiser plaintiffs to obtain relief under § 1610(g) by converting their § 1605(a)(7) judgment to a § 1605A judgment does not violate separation of powers principles. Bank Melli's reliance on *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995), is misplaced. There, the court held that Congress could not require federal courts to reopen final judgments. But here, the judgment was not reopened. Instead, the Heiser plaintiffs have a new collection tool; they can enforce their final judgment against Iran by attaching and executing on the property of Iran's instrumentality. In essence, the statute gives *more* effect to the final judgment, rather than attempting to revise or rescind that judgment.

B. The statutes do not impermissibly impose retroactive liability.

Bank Melli next argues that the judgment creditors cannot use TRIA § 201(a) or FSIA § 1610(g) because the terrorist acts that underlie the judgments occurred before the enactment of those statutes. The general default rule is that a law that increases substantive liability for past conduct does not operate retroactively. *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 280 (1994).

But the statutes do not impose new liability on Iran. Section 1605(a)(7) was in effect at the time of the terrorist acts in question. Rather, the statutes simply permit

additional methods of collection. See *id.* at 275 (noting that the default rule does not apply to rules of procedure because of "diminished reliance interests").

Even if TRIA § 201(a) and FSIA § 1610(g) are viewed as imposing new liability retroactively, the default rule is different for statutes that govern foreign sovereign immunity. In *Altmann*, 541 U.S. at 692, the Supreme Court concluded that the *Landgraf* presumption does not apply to such statutes. To the contrary, when it comes to sovereign immunity for both foreign states and their agencies and instrumentalities, there is a presumption in *favor* of retroactivity "absent contraindications" from Congress. *Id.* at 696.

Here, there are no such contraindications. In fact, the opposite is true. The purpose of the statutes at issue was to enable not just future litigants, but also current judgment creditors to collect on the final judgments that they already held—which, as a matter of logic, arose from past acts. Congress chose to make TRIA § 201(a) applicable in "*every* case in which a person *has obtained* a judgment" under either the former statute, § 1605(a)(7), or the current statute, § 1605A. TRIA § 201(a) (emphases added). Similarly, Congress chose to make § 1610(g) applicable to all judgments entered under § 1605A. Accordingly, these statutes apply even if they are seen as imposing liability retroactively, because Congress so intended.

C. The blocked assets are property of Bank Melli.

Bank Melli also contends that TRIA § 201(a) and FSIA § 1610(g) do not permit attachment of the assets here because Visa and Franklin own the blocked assets; Bank Melli does not. Under TRIA § 201(a), to be subject to execution or attachment, the blocked assets must be "assets of" the instrumentality. Similarly, § 1610(g) applies to "the property of" the instrumentality.

Like most courts, we look to state law to determine the ownership of assets in this context. *Peterson*, 627 F.3d at 1130-1131; see also *Calderon-Cardona* v. *Bank of N.Y. Mellon*, 770 F.3d 993, 1000-1001 (2d Cir. 2014) (looking to New York law to determine what type of interest rendered property attachable under § 1610(g)), cert. denied, 136 S. Ct. 893 (2016); *Walker Int'l Holdings, Ltd.* v. *Republic of Congo*, 415 F.3d 413, 415 (5th Cir. 2005) (applying Texas law to determine attorney fees award in FSIA action); *Hegna* v. *Islamic Republic of Iran*, 380 F.3d 1000, 1007 (7th Cir. 2004) (applying Illinois law to decide whether property interest was open to challenge in action under FSIA); *Karaha Bodas Co.* v. *Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina")*, 313 F.3d 70, 83 (2d Cir. 2002) (applying New York law to determine what actions are subject to enforcement and available to judgment creditors). Here, California law applies. As we held in *Peterson*, California law authorizes a court to order a judgment debtor to assign to the judgment creditor a right to payments that are due or will become due, even if the right is conditioned on future developments. 627 F.3d at 1130-1131; Cal. Civ. Proc. Code § 482.080(a)(2) (providing that a court may order a defendant subject to a writ of attachment to turn over either "evidence of title to property of or a debt owed to the defendant"); *id.* at § 680.310 ("'Property' includes real and personal property and any interest therein."); *id.* at § 708.210 (permitting a judgment creditor to bring an action against a third party to whom the judgment debtor owes money "to have the interest or debt applied to the satisfaction of the money judgment"); *id.* at § 708.510(a) (authorizing a court to "order the judgment debtor to assign to the judgment creditor . . . all or part of a right to payment due"). That is precisely the situation in the present case: 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.

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.

First, we note that Congress has used expansive wording to suggest that immediate and outright ownership of assets is not required. In the TRIA, Congress provided that "[n]othing in this subsection shall bar . . . enforcement of any judgment to which this subsection applies . . . against assets otherwise available under this section *or under any other provision of law*." TRIA § 201(d)(4) (emphasis added). In FSIA § 1610(g), Congress specified that "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." (Emphases added.) Thus, interests held by the instrumentality of a terrorist state, as is the case here, are subject to attachment under federal law.

Second, in *Heiser*, only foreign nationals, and not a foreign country, had an interest in the blocked funds held by intermediary banks. "Iranian entities were not the originators of the funds transfers. Nor were they the ultimate beneficiaries." *Heiser*, 735 F.3d at 936 (footnote

omitted). 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.

In summary, California law applies. Under California law, money owed to Bank Melli may be assigned to judgment creditors. Even 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.

D. Because Bank Melli does not enjoy sovereign immunity, Rule 19 presents no barrier.

Finally, Bank Melli relies on Federal Rule of Civil Procedure 19 to support its request for dismissal. That rule provides that a person must be joined as a party if the person "claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may . . . impair or impede the person's ability to protect the interest." Fed. R. Civ. P. 19(a). And, if the "person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Fed. R. Civ. P. 19(b).

Bank Melli argues that this case must be dismissed because it is a required party that cannot be joined and, further, that the action cannot proceed without it "in equity and good conscience." But, because TRIA § 201(a) and FSIA § 1610(g) confer jurisdiction by creating exceptions to sovereign immunity, Bank Melli *can* be joined in this action. Thus it does not matter whether Bank Melli is otherwise a required party under Rule 19(a); dismissal is not required. See 28 U.S.C. § 1330 (providing jurisdic-

tion over a foreign state or its instrumentality when it is not entitled to immunity); *Weinstein*, 609 F.3d at 49-50 (holding that TRIA § 201(a) removes jurisdictional immunity, as well as immunity from attachment and execution).[8]

According to Bank Melli, *Republic of the Philippines* v. *Pimentel*, 553 U.S. 851 (2008), requires dismissal. We disagree. A class of victims of human rights abuses in the Republic of the Philippines won a $2 billion default judgment against the Estate of Ferdinand Marcos, the former president of that country. *Id.* at 857-858. The class attempted to enforce the judgment by attaching assets owed to Merrill Lynch by a bank incorporated by Marcos personally. *Id.* at 858. The Philippines claimed ownership of the bank, and therefore the disputed assets, because the bank had been incorporated through a misuse of public office. *Id.* The Philippines also claimed immunity from the suit. *Id.* Merrill Lynch initiated an interpleader action naming, among other parties, the Republic of the Philippines and one of its agencies. *Id.* at 845-855. The Supreme Court held that the case should be dismissed because "it was improper [for the district court] to issue a definitive holding regarding a nonfrivolous, substantive claim made by an absent, required entity

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[8] Bank Melli's citations to *Ministry of Defense & Support for Armed Forces of Islamic Republic of Iran* v. *Cubic Defense Systems, Inc.*, 385 F.3d 1206 (9th Cir. 2004), vacated and remanded on other grounds *sub nom. Ministry of Def. & Support for Armed Forces of Islamic Republic of Iran* v. *Elahi*, 546 U.S. 450 (2006) (per curiam); and *Peterson* v. *Islamic Republic of Iran*, 627 F.3d 1117 (9th Cir. 2010), are inapposite. Neither of those cases addressed the question whether TRIA § 201(a) or FSIA § 1610(g) confers jurisdiction when property owned by a terrorist state's instrumentality is subject to execution in satisfaction of judgments entered against that terrorist state.

that was entitled by its sovereign status to immunity from suit." *Id.* at 868.

This case plainly is distinguishable. In *Pimentel*, the Republic was a required party that could not be joined because of sovereign immunity. Here, Bank Melli does not enjoy sovereign immunity, so it can be joined as a party, whether or not it is a required party. Unlike the Republic in *Pimentel*, therefore, Bank Melli is able to adjudicate its claim to the contested assets.

CONCLUSION

We hold: (1) TRIA § 201(a) and FSIA § 1610(g) authorize attachment and execution of the monies owed to Bank Melli. (2) Those statutes do not impose liability retroactively but, even if they are viewed as doing so, *Altmann* establishes a presumption in favor of retroactivity for statutes governing sovereign immunity, which is not rebutted here. (3) California law governs the ownership question; the blocked assets are property of Bank Melli under principles of California law and, thus, are subject to attachment and execution under TRIA § 201(a) and FSIA § 1610(g). The same result would obtain even if federal law governed. (4) Because Bank Melli can be joined in this action, the dismissal provision of Federal Rule of Civil Procedure 19 does not apply.

AFFIRMED.

BENSON, Senior District Judge, concurring in part and dissenting in part:

I concur with the majority that § 201(a) of the Terrorism Risk Insurance Act ("TRIA") and § 1610 of the Foreign Sovereign Immunities Act ("FSIA") permit the judgment creditors in this case to attach and execute against monies owed to Bank Melli. However, I respectfully believe the majority erred in finding § 1610(g) to be a freestanding immunity exception under FSIA. In my view, 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.

FSIA contains "extensive procedural protections for foreign sovereigns in United States courts." *Wyatt* v. *Syrian Arab Republic*, 800 F.3d 331, 333 (7th Cir. 2015). Specifically, § 1609 of FSIA provides a general presumption that property of a foreign state and the property of an instrumentality or agency of a foreign state is immune from execution and attachment in United States courts. See 28 U.S.C. § 1609; 28 U.S.C. § 1603(a). In turn, § 1610 provides a series of exceptions to this general rule.

Prior to 2008, § 1610 provided different rules for attachment immunity depending on whether the party was seeking immunity as the foreign state or as an agency or instrumentality of a foreign state. Regarding foreign states, § 1610(a) denied immunity where: (1) a judgment creditor obtained a judgment against the foreign state; (2) the property of the foreign state is located in the United States; (3) the property is used for "a commercial activity" in the United States; and (4) one of § 1610(a)'s seven avenues for abrogating immunity applied. See 28 U.S.C. § 1610(a). Similarly, with respect to agencies and

instrumentalities, § 1610(b) denied immunity where: (1) a judgment creditor obtained a judgment against an agency or instrumentality of foreign state; (2) the agency or instrumentality is engaged in commercial activity in the United States; (3) the property of the agency or instrumentality is located in the United States; and (4) one of § 1610(b)'s three avenues for abrogating immunity applied. See 28 U.S.C. § 1610(b).

Prior to 2008, the judgment creditors in this case would have been required to obtain a judgment against Bank Melli to utilize the immunity waiver provisions under § 1610(b) to attach Bank Melli's property.

In 2008, Congress amended FSIA, adding § 1610(g) and § 1605A. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083, 122 Stat. 3, 338 (2008). The purpose of the amendments was to relax the protections of § 1610 in cases of state sponsored terrorism to "make it easier for terrorism victims to obtain judgments and to attach assets." *Gates* v. *Syrian Arab Republic*, 755 F.3d 568, 576 (7th Cir. 2014); *In re Islamic Republic of Iran Terrorism Litig.*, 659 F. Supp. 2d 31, 62 (D.D.C. 2009) (noting, "these latest additions to . . . FSIA demonstrate that Congress remains focused on eliminating those barriers that have made it nearly impossible for plaintiffs in these actions to execute civil judgments against Iran or other state sponsors of terrorism").

Under § 1610(g), if a judgment creditor obtains a judgment under § 1605A, the property of the foreign state and "the property of an agency or instrumentality of such a state, including property that is a separate juridical entity . . . is subject to attachment . . . and execution, upon that judgment *as provided in this section*, regardless" of five factors. 28 U.S.C. § 1610(g)(1) (emphasis added). The five factors enumerated in § 1610(g)(A)

through (E) reflect the *Bancec* presumption, which requires this Court to treat government entities established as separate juridical entities distinct from their sovereigns. See *First Nat'l City Bank* v. *Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 620-621 (1983); *Flatow* v. *Islamic Republic of Iran*, 308 F.3d 1065, 1071 n.9 (9th Cir. 2009) (outlining the *Bancec* factors (citing *Walter Fuller Aircraft Sales, Inc.* v. *Republic of the Philippines*, 965 F.2d 1375, 1380 n.7 (5th Cir. 1992))).

Section 1610(g) leads to two straightforward conclusions under FSIA. First, if a party obtains a § 1605A judgment against a state sponsor of terror, the *Bancec* presumption is eliminated, which permits a court to attach and execute against the property of the agency or instrumentality to satisfy the judgments against the foreign state. See *Estate of Heiser* v. *Islamic Republic of Iran*, 885 F. Supp. 2d 429, 442 (D.D.C. 2012) ("Section § 1610(g) subparagraphs (A)-(E) explicitly prohibit consideration of each of the five *Bancec* factors."), aff'd *sub nom. Heiser* v. *Islamic Republic of Iran*, 735 F.3d 934 (D.C. Cir. 2013). Second, the language "as provided in this section" requires a judgment creditor to find an existing mechanism of attachment under § 1610. Section 1610(g) does not create a new avenue for attachment under FSIA; rather, § 1610(g) broadens the force of § 1610's existing avenues for attachment by eliminating the legal fiction that Bank Melli is a separate juridical entity from Iran.

In this case, judgment creditors relying on § 1610(g) may proceed to attach Bank Melli's property because Bank Melli's property is not immune from attachment by virtue of § 1610(b)(3). Section 1610(b)(3) eliminates attachment immunity if an agency or instrumentality is "engaged in commercial activity in the United States"

and "the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605A of this chapter . . . regardless of whether the property is or was involved in the act upon which the claim is based." 28 U.S.C. §1610(b)(3). The judgment creditors can attach Bank Melli's property because: (1) the judgment creditors have obtained a judgment against Iran pursuant to §1605A; (2) §1610(g) eliminates the *Bancec* presumption, allowing this Court to attach and execute against Bank Melli's assets to satisfy the judgment against Iran; and (3) the judgment creditors have sufficiently ple[d] that Bank Melli is engaged in commercial activity in the United States.

Section 1603(c) of FSIA defines commercial activity as: "either a regular course of commercial conduct *or* a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. §1603(c) (emphasis added). Bank Melli entered into a contract with an American company to provide an American company a commercial service. [ER, p. 82-83, ¶2; ER, p. 64, ¶16 ("Visa holds the Blocked Assets, funds due and owing by contract to Bank Melli pursuant to a commercial relationship with that bank . . . ").] At this stage in the litigation, the Court can conclude that the judgment creditors relying on §1610(g) have sufficiently alleged Bank Melli is engaged in commercial activity in the United States.

The majority disagrees with the aforementioned interpretation and concludes that §1610(g) creates a free-standing immunity exception under FSIA. The majority believes a §1605A judgment creditor may attach Bank Melli's property regardless of any commercial component

under § 1610(a) or § 1610(b). In my view, respectfully, the majority misses the mark in three important respects.

First, the majority erroneously finds that § 1610(g) is a freestanding exception to immunity by concluding:

> Subsection (g) covers a different subject than § 1610(a) through (e): by its express terms, it applies *only* to 'certain actions,' specifically, judgments 'entered under section 1605A.' (Emphasis added.) In turn, § 1605A revokes sovereign immunity for damages claims against a foreign state for personal injury or death caused by 'torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support' for such an act. By definition, such claims do not arise from commercial activity; they arise from acts of torture (and the like).

[Maj. Op., p. 17.] In doing so, the majority misinterprets the operation of § 1610(a) and (b) waivers in the context of § 1605A judgments. Under § 1610(b)(3), a judgment creditor can attach property where the instrumentality is engaged in commercial activity in the United States. Furthermore, § 1610(b)(3) provides that attachment immunity is eliminated "*regardless* of whether the property is or was involved with the act upon which the claim is based." 28 U.S.C. § 1610(b)(3) (emphasis added). Therefore, a § 1605A judgment allows a judgment creditor to get immunity waived for *any* property where the instrumentality is engaged in commerce in the United States, regardless whether the property was involved in the actions that gave rise to the § 1605A waiver of immunity against the foreign state. Therefore, Bank Melli's property does not need to be involved in terrorism to abrogate attachment immunity under § 1610(b)(3).

Second, the majority concludes that the "as provided in this section" language found in § 1610(g) refers to the procedural aspects of § 1610, namely § 1610(f). Fair enough. But, the majority's conclusion does not mean the language "as provided in this section" refers *only* to § 1610(f). Indeed, the majority's piecemeal reading of § 1610(g) renders other portions of § 1610 inoperable. "It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001)). This Court should adopt the interpretation of § 1610 that "'gives effect to every clause and word.'" *Marx* v. *Gen. Revenue Corp.*, ___ U.S. ___, 133 S. Ct. 1166, 1177 (2013) (citing *Microsoft Corp.* v. *i4i Ltd. P'ship*, 564 U.S. 91 (2011)).

The majority ignores the avenues for exemption under § 1610(a)(7) and § 1610(b)(3). Section 1610(a)(7) and § 1610(b)(3) provide immunity, in addition to requiring some interplay with commerce, where "the judgment relates to a claim for which the foreign state is not immune under section 1605A . . . ." If a § 1605A judgment creditor can waive attachment immunity under § 1610(g) without proving the property is used in commerce or the instrumentality is engaged in commerce in the United States, § 1610(a)(7) and § 1610(b)(3) are rendered superfluous and obsolete. Conversely, recognizing § 1610(g)'s limited purpose was to eliminate the *Bancec* presumption ensures this Court gives effect to every clause and word in § 1610 while honoring the purpose of the 2008 FSIA amendments.

Finally, the majority's holding ignores the practical limitation the commerce requirement places on § 1605A

judgments. Reading § 1610(g) as a freestanding immunity exception does not just relax FSIA in the context of terrorism—it eliminates any immunity protection under FSIA for state sponsors of terror and their instrumentalities. For example, in *Rubin* v. *Islamic Republic of Iran*, American citizens sued and obtained default judgments against Iran for injuries and losses that arose out of a suicide bombing carried out by Hamas in Israel. 33 F. Supp. 3d 1003, 1006 (N.D. Ill. 2014). The *Rubin* plaintiffs sought to "attach and execute on numerous ancient Persian artifacts" in possession of two museums in the United States to satisfy their default judgments against Iran. *Id.* Like the judgment creditors in this case, the *Rubin* plaintiffs argued that § 1610(g) is a freestanding immunity exception and, therefore, the plaintiffs may attach Iran's artifacts to satisfy their judgments. *Id.* at 1013.

The court disagreed, finding: "The plain language indicates that Section 1610(g) is not a separate basis of attachment, but rather qualifies the previous subsections." *Id.* The court concluded, "the purpose of Section 1610(g) is to counteract the Supreme Court's decision in *Bancec*, and to allow execution against the assets of separate juridical entities regardless of the protections *Bancec* may have offered." *Id.* Currently, the *Rubin* case is pending appeal in the Seventh Circuit. *Rubin* v. *Islamic Republic of Iran*, 33 F. Supp. 3d 1003 (N.D. Ill. 2014), appeal docketed, No. 14-1935 (7th Cir. Apr. 25, 2014).

Surely this Court's holding will be argued as precedent to allow the *Rubin* plaintiffs to seize Persian artifacts to be auctioned off to satisfy the *Rubin* plaintiffs' default judgments. This would be an unjustified and unfortunate result. When Congress amended FSIA, the intention was to eliminate the *Bancec* presumption and relax the rigidity of § 1610 to make it easier for victims of

terrorism to satisfy judgments against state sponsors of terror. Congress did not, however, intend to open the floodgates and allow terrorism plaintiffs to attach any and all Iranian property in the United States. Rather, Congress intended the commerce limitation to remain in place.[1] If a foreign state is designated as a state sponsor of terror, the state and the instrumentalities and agencies of the state lose the privilege of doing business in the United States without running the risk of property being seized to satisfy judgments.

In sum, I would require judgment creditors relying on § 1610(g) to satisfy one of § 1610's existing avenues for abrogating attachment immunity. In this case, the judgment creditors have done that. The judgment creditors have sufficiently alleged Bank Melli is engaged in commerce in the United States within the meaning of § 1610(b)(3).

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[1] TRIA § 201 similarly contains a limitation on attachment and execution. TRIA § 201 requires attachable assets to be defined as "blocked assets." Section 201(d)(2)(A) defines a "blocked asset" as any asset "seized or frozen by the United States under section 5(b) of the Trading With the Enemy Act (50 U.S.C. App. 5(b)) or under sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701; 1702)."

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DOCKET NOS. 13-15442, 13-16100

MICHAEL BENNETT; LINDA BENNETT,
AS CO-ADMINISTRATORS OF THE ESTATE OF
MARIA ANN BENNETT,

Plaintiffs-Appellees,

v.

THE ISLAMIC REPUBLIC OF IRAN,

Defendant,

v.

VISA INC.; FRANKLIN RESOURCES, INC.,

Defendants-third-party-plaintiffs–Appellees,

v.

GREENBERG AND ACOSTA JUDGMENT CREDITORS,

Plaintiff-third-party-defendant–Appellee,

HEISER JUDGMENT CREDITORS,

Plaintiff-fourth-party-defendant–Appellee,

v.

BANK MELLI,

Plaintiff-third-party-defendant–Appellant.

ORDER AND AMENDED OPINION

February 22, 2016

Appeals from the United States District Court
for the Northern District of California
Charles R. Breyer, Senior District Judge, Presiding

Argued and Submitted
April 15, 2015—San Francisco, California

Before: Sidney R. Thomas,* and Susan P. Graber, Circuit Judges, and Dee V. Benson,** Senior District Judge.

Opinion by Judge Graber;
Partial Concurrence and Partial Dissent by
Judge Benson

ORDER

The opinion filed August 26, 2015, and reported at 799 F.3d 1281, is withdrawn. Because the court's opinion is withdrawn, Appellant Bank Melli's petition for panel rehearing and petition for rehearing en banc is moot. A superseding opinion will be filed concurrently with this

* Chief Judge Thomas was drawn to replace Judge Kozinski. He has read the briefs, reviewed the record, and listened to the audio-recording of oral argument held on April 15, 2015.

** The Honorable Dee V. Benson, Senior District Judge for the U.S. District Court for the District of Utah, sitting by designation.

order. Further petitions for rehearing and petitions for rehearing en banc may be filed.

OPINION

GRABER, Circuit Judge:

Approximately 90 United States citizens (or the representatives of their estates) are attempting to collect on unsatisfied money judgments that they hold against the Islamic Republic of Iran for deaths and injuries suffered in terrorist attacks sponsored by Iran. The assets that are the subject of this interpleader action are monies contractually owed to Bank Melli by Visa Inc. and Franklin Resources Inc. ("Franklin"). Bank Melli is an instrumentality of Iran. It asserts that Plaintiffs cannot execute on the assets (1) because Bank Melli enjoys sovereign immunity under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), (2) because the relevant statutory exceptions to sovereign immunity may not be applied retroactively, (3) because the blocked assets are not property of Bank Melli, and (4) because Bank Melli is a required party that cannot be joined, thus requiring dismissal under Federal Rule of Civil Procedure 19. We disagree and, accordingly, affirm the judgment of the district court.

BACKGROUND LEGAL PRINCIPLES

The jurisdiction of the United States over persons and property within its territory "is susceptible of no limitation not imposed by itself." *Schooner Exch.* v. *McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812). Accordingly, foreign sovereign immunity is "a matter of grace and comity rather than a constitutional requirement." *Republic of Austria* v. *Altmann*, 541 U.S. 677, 689 (2004). Courts consistently "defer[ ] to the decisions of the political branches" on whether to take actions against foreign sovereigns and their instrumentalities. *Id.* (quoting *Ver-*

linden B.V. v. *Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983)).

The FSIA, 28 U.S.C. §§1330, 1602-1611, establishes a default rule that foreign states are immune from suit in United States courts. *Id.* at §1604. Congress enacted the statute to provide a "comprehensive ... 'set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities.'" *Altmann*, 541 U.S. at 691 (quoting *Verlinden B.V.*, 461 U.S. at 488). The FSIA provides the exclusive vehicle for subject matter jurisdiction in all civil actions against foreign state defendants. *OBB Personenverkehr AG* v. *Sachs*, 136 S. Ct. 390, 393 (2015); *Flatow* v. *Islamic Republic of Iran*, 308 F.3d 1065, 1069 (9th Cir. 2002).

The FSIA includes many exceptions to its general rule of immunity. 28 U.S.C. §§1605-1607. Relevant here, in 1996, Congress added a new exception, stripping a foreign state of its sovereign immunity when (1) the United States officially designates the foreign state a state sponsor of terrorism and (2) the foreign state is sued "for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act." 28 U.S.C. §1605.

Iran was designated a terrorist party pursuant to section 6(j) of the Export Administration Act of 1979, 50 U.S.C. app. §2405(j) (effective Jan. 19, 1984). *Peterson* v. *Islamic Republic of Iran*, 627 F.3d 1117, 1123 (9th Cir. 2010); *Weinstein* v. *Islamic Republic of Iran*, 609 F.3d 43, 48 (2d Cir. 2010). That designation means that Iran is not entitled to sovereign immunity for claims under §1605A.

Separately, the FSIA addresses the immunity of sovereign property from execution and attachment. Subject to enumerated exceptions, a foreign state's property in the United States is immune from attachment and execution. 28 U.S.C. § 1609.

In *First National City Bank* v. *Banco Para el Comercio Exterior de Cuba ("Bancec")*, 462 U.S. 611, 620-621 (1983), the Supreme Court concluded that the FSIA did *not* control whether and to what extent *instrumentalities* could be held liable for the debts of their sovereigns. Applying international law and federal common law, the Court held that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." *Id.* at 626-627. That rule, referred to as the "*Bancec* presumption," may be overcome only in limited circumstances. *Id.* at 628-634. The federal courts later described five "*Bancec* factors" that may be considered in determining whether the presumption has been overcome in any given case. *E.g.*, *Flatow*, 308 F.3d at 1071 n.9.[1]

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[1] The five factors are:

(1) the level of economic control by the government;

(2) whether the entity's profits go to the government;

(3) the degree to which government officials manage the entity or otherwise have a hand in its daily affairs;

(4) whether the government is the real beneficiary of the entity's conduct; and

(5) whether adherence to separate identities would entitle the foreign state to benefits in United States courts while avoiding its obligations.

Flatow, 308 F.3d at 1071 n.9 (quoting *Walter Fuller Aircraft Sales, Inc.* v. *Republic of the Philippines*, 965 F.2d 1375, 1380 n.7 (5th Cir. 1992)).

Even after Congress added § 1605(a)(7) (now § 1605A) to the FSIA in 1996, successful plaintiffs struggled to enforce judgments against Iran when they were harmed by its terrorist activities. See, *e.g.*, *In re Islamic Republic of Iran Terrorism Litig.*, 659 F. Supp. 2d 31, 49-58 (D.D.C. 2009) (describing "The Never-Ending Struggle to Enforce Judgments Against Iran"). Once again, Congress responded by enacting new statutes, this time designed to facilitate the satisfaction of such judgments by expanding successful plaintiffs' ability to attach and execute on the property of agencies and instrumentalities of terrorist states.

First, in 2002 Congress enacted the Terrorism Risk Insurance Act of 2002 ("TRIA"), Pub. L. No. 107-297, 116 Stat. 2322. Section 201(a) of the TRIA provides:

> Notwithstanding any other provision of law, and except as provided in subsection (b) [of this note, pertaining to Presidential waiver], 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 section 1605A or 1605(a)(7) . . . , the blocked assets[2] 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.

TRIA § 201(a) was codified as a statutory note to 28 U.S.C. § 1610 on "Treatment of Terrorist Assets."

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[2] The term "blocked assets" refers generally to assets that have been seized or frozen by the United States. TRIA § 201(d)(2)(A).

Second, in 2008, Congress amended the FSIA as part of the National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083, 122 Stat. 3, 338. Among other changes, Congress added a new subsection to the FSIA, which provides in part that

> 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 [the same five factors described by the federal courts as the "*Bancec* factors"].

28 U.S.C. § 1610(g)(1). For ease of reference, we refer to this section as "FSIA § 1610(g)."

FACTUAL AND PROCEDURAL HISTORY

Four groups of individuals sued the Islamic Republic of Iran for damages arising from deaths and injuries suffered in terrorist attacks sponsored by Iran; in each case, a final money judgment was entered in favor of the plaintiffs and against Iran. In *Estate of Heiser* v. *Islamic Republic of Iran*, 659 F. Supp. 2d 20 (D.D.C. 2009), and *Estate of Heiser* v. *Islamic Republic of Iran*, 466 F. Supp. 2d 229 (D.D.C. 2006), the plaintiffs secured judgments for more than $590 million for the 1996 bombing of the Khobar Towers in Saudi Arabia. In *Acosta* v. *Islamic Republic of Iran*, 574 F. Supp. 2d 15 (D.D.C. 2008), the plaintiffs received a judgment of more than $350 million because of a 1990 mass shooting. In *Bennett* v. *Islamic Republic of Iran*, 507 F. Supp. 2d 117 (D.D.C. 2007), the plaintiffs obtained a judgment for damages of nearly $13 million for Iran's role in the 2002 bombing of a cafeteria

at Hebrew University in Jerusalem. And in *Greenbaum* v. *Islamic Republic of Iran*, 451 F. Supp. 2d 90 (D.D.C. 2006), the plaintiffs were awarded almost $20 million for damages suffered as a result of the bombing of a Jerusalem restaurant in 2001. Collectively, the judgments total nearly $1 billion. Although all the judgments were taken by default, it is undisputed that all are valid final judgments and that Iran owes the amounts of those judgments to the respective plaintiffs.

Bank Melli, Iran's largest financial institution, is wholly owned by the government of Iran. It is undisputed that Bank Melli qualifies as an instrumentality of Iran under the FSIA. Bank Melli was not named as a defendant in any of the four cases described above and was not itself alleged to have been involved in the underlying terrorist events. On October 25, 2007, the United States Department of the Treasury, Office of Foreign Assets Control exercised its authority under Executive Order No. 13,382, 70 Fed. Reg. 38,567 (June 28, 2005), to block Bank Melli's assets in the United States because of its involvement in Iran's nuclear and missile industries. Bank Melli's assets also are blocked pursuant to a 2012 Executive Order blocking the property of Iran and of Iranian financial institutions. Executive Order No. 13,599, 77 Fed. Reg. 6659 (Feb. 8, 2012).[3]

Visa and Franklin owe about $17.6 million to Bank Melli pursuant to a commercial relationship that involves the use of Visa credit cards in Iran. Visa and Franklin have not turned the funds over to Bank Melli only because the funds are blocked. The *Bennett* judgment creditors filed a complaint against Visa and Franklin,

[3] The recent lifting of a portion of the sanctions imposed on Iran does not render this interpleader action moot, nor does it affect our analysis of the issues raised here.

seeking to attach and execute against the blocked assets. Visa and Franklin responded by initiating this interpleader action, naming as defendants Bank Melli and the three other sets of judgment creditors. Visa and Franklin sought a determination of the rights to the blocked assets in their possession and a discharge of Visa and Franklin with regard to those assets. After Bank Melli entered its appearance, it moved to dismiss the action.

Bank Melli made four arguments for dismissal, each of which the district court rejected. The court held: (1) TRIA §201(a) and FSIA §1610(g) enable the judgment creditors to attach the monies owed to Bank Melli; (2) TRIA §201(a) and FSIA §1610(g) do not impose retroactive liability; (3) the blocked assets constitute property of Bank Melli; and (4) Bank Melli was not a required party under Federal Rule of Civil Procedure 19. *Bennett* v. *Islamic Republic of Iran*, 927 F. Supp. 2d 833 (N.D. Cal. 2013). The district court denied the motion to dismiss and certified the order for interlocutory appeal under 28 U.S.C. §1292(b). *Bennett*, 927 F. Supp. 2d at 845-846.

STANDARD OF REVIEW

We review *de novo*: questions of statutory construction, *Miranda* v. *Anchondo*, 684 F.3d 844, 849 (9th Cir. 2012); a district court's ruling on a motion to dismiss for failure to state a claim or for lack of subject matter jurisdiction, *Colony Cove Props., LLC* v. *City of Carson*, 640 F.3d 948, 955 (9th Cir. 2011); the question whether a statute may be applied retroactively, *Scott* v. *Boos*, 215 F.3d 940, 942 (9th Cir. 2000); and legal determinations underlying a district court's decision whether an action can proceed in the absence of a required party under Rule 19, *Kescoli* v. *Babbitt*, 101 F.3d 1304, 1309 (9th Cir. 1996).

DISCUSSION

A. TRIA §201(a) and FSIA §1610(g) permit attachment and execution of the monies owed to Bank Melli.

1. *TRIA §201(a)*

We hold that TRIA §201(a) permits judgment creditors to attach assets held by the instrumentalities of state sponsors of terrorism. As always, when interpreting a statute, we begin with its text. *Metro One Telecomms., Inc.* v. *Comm'r*, 704 F.3d 1057, 1061 (9th Cir. 2012). Section 201(a) of the TRIA applies "[n]otwithstanding *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 section 1605A or 1605(a)(7)," and "in order to satisfy such judgment to the extent of *any* compensatory damages for which such terrorist party has been adjudged liable." TRIA §201(a) (emphases added). The statute provides that, in cases such as this one, "the blocked assets of [the] 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." *Id.* (emphasis added). This wording demonstrates that Congress knew that the blocked assets of an instrumentality might otherwise have been excluded from the phrase "blocked assets of [the] terrorist party" and that Congress acted to ensure that, instead, the instrumentality's blocked assets were included. Cf. *Alejandre* v. *Telefonica Larga Distancia de P.R., Inc.* 183 F.3d 1277, 1287-1288, 1287 n.25 (11th Cir. 1999) (stating that a proposed amendment to the FSIA that would have applied to property that "belongs to an *agency or instrumentality* of a foreign state" demonstrated that Congress "knows how to ex-

press clearly an intent to make instrumentalities substantively liable for the debts of their related foreign governments" (internal quotation marks omitted)). Accordingly, we agree with the Second Circuit when it held 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." *Weinstein*, 609 F.3d at 50.

Bank Melli disputes this reading of § 201(a), arguing instead that it applies only to instrumentalities that are alter egos of the state; that is, Bank Melli argues that the *Bancec* presumption against the attachment of assets held by state instrumentalities applies. Bank Melli reasons that, because "including" is a term of illustration, the words that follow are merely an example of the main preceding principle. That observation is true but is of no assistance to Bank Melli. By listing "the blocked assets of any . . . instrumentality of that terrorist party" as a specific example of assets that are "subject to execution or attachment . . . in order to satisfy" a money judgment obtained under § 1605A or 1605(a)(7), Congress clearly instructed courts to allow the instrumentality's blocked assets to be reached. Congress also instructed courts to allow these assets to be reached "[n]otwithstanding any other provision of law"—that is, regardless of the usual fiction embodied in *Bancec*. Congress purposely overrode the *Bancec* presumption in this context and abrogated attachment immunity with respect to the blocked assets of instrumentalities of designated state sponsors of terrorism. Section 201(a) permits the judgment creditors to attach the assets of an instrumentality of a state

sponsor of terrorism. Accordingly, the blocked assets of Bank Melli that are at issue in this case may be attached.

2. *FSIA §1610(g)*

FSIA §1610(g) allows attachment of and execution against property held by a foreign terrorist state's instrumentality "that is a separate juridical entity," "regardless of" five factors. As noted above, those enumerated factors are the same five factors identified by the federal courts as the "*Bancec* factors" that may be used to decide whether an instrumentality is an alter ego under *Bancec*. *E.g.*, *Flatow*, 308 F.3d at 1071-1072, 1071 n.9. It is clear from the text of the statute that Congress was referring to, and abrogating, not just the presumption of separate juridical status, but also *Bancec* specifically. Therefore, §1610(g) also permits attachment in this case.

But Bank Melli contends that, because §1610(g) makes assets subject to attachment and execution only "as provided in this section," it is not an independent exception to the immunity granted by 28 U.S.C. §1609. Bank Melli reasons that subsection (g) applies only if some other part of §1610 provides for attachment and execution. Bank Melli argues that its assets cannot be attached or executed upon because the assets at issue in this case were not "used for a commercial activity in the United States," a requirement in §1610(a), and Bank Melli has not itself "engaged in commercial activity in the United States," a requirement in §1610(b). We are not persuaded.

We hold that subsection (g) contains a freestanding provision for attaching and executing against assets of a foreign state or its agencies or instrumentalities. Subsection (g) covers a different subject than §1610(a) through (e): by its express terms, it applies *only* to "cer-

tain actions," specifically, judgments "entered *under section 1605A*." (Emphasis added.) In turn, §1605A revokes sovereign immunity for damages claims against a foreign state for personal injury or death caused by "torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support" for such an act. By definition, such claims do not arise from commercial activity; they arise from acts of torture (and the like). Section 1610(g) requires only that a judgment under §1605A have been rendered against the foreign state; in that event, both the property of the foreign state *and* the property of an agency or instrumentality of that state are subject to attachment and execution. See *Peterson*, 627 F.3d at 1123 n.2 (stating that §1610(g) "expanded the category of foreign sovereign property that can be attached; judgment creditors can now reach any U.S. property in which Iran has any interest, whereas before they could reach only property belonging to Iran"). To the extent that subsection (g) is inconsistent with subsection (a) or (b), subsection (g) governs because the particular (judgments entered under §1605A) controls over the general (all judgments entered after a certain date). *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 384-385 (1992).

When subsection (g) refers to attachment and execution of the judgment "as provided in this section," it is referring to procedures contained in §1610(f).[4] Section 1610(f), like §1610(g), relates to judgments obtained un-

[4] When Congress enacted subsection (g), subsection (f) already was in place. Subsection (g) was added to the statute in 2008. Pub. L. No. 110-181, div. A, tit. X, §1083(b)(3), 122 Stat. 3, 341 (2008). Subsection (f) was enacted in 1990, when the exceptions to the FSIA were first codified. Pub. L. No. 101-650, tit. III, §325(b)(9), 104 Stat. 5089, 5121 (1990).

der § 1605A and its predecessor, § 1605(a)(7). Subsection (f)(1)(A) permits attachment and execution of property that might otherwise be blocked; subsection (f)(1)(B) prohibits attachment or execution against property of a foreign state that it expropriated from a natural person; and subsection (f)(2)(A) provides that the Secretary of State and Secretary of Treasury will make every effort to assist a court or creditor in locating property awarded pursuant to § 1605A. In light of Congress' mandate to the executive branch to assist in the collection of judgments in such cases, 28 U.S.C. § 1610(f), we cannot impute to Congress an empty statutory gesture. See *Gates* v. *Syrian Arab Republic*, 755 F.3d 568, 576 (7th Cir. 2014) (stating that Congress intended the 2008 amendments to the FSIA "to make it easier for terrorism victims to obtain judgments and to attach assets"). Given both the text of the statute and Congress' intention to make it easier for victims of terrorism to recover judgments, we hold that § 1610(g) is a freestanding provision for attaching and executing against assets to satisfy a money judgment premised on a foreign state's act of terrorism.

Bank Melli argues, and our colleague agrees, that our reading of § 1610(g) renders § 1610(a)(7) and (b)(3) superfluous.[5] But the tension works in the opposite direction.

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[5] Our colleague gives two other reasons for disagreeing with us on this point. The first is that § 1610(b)(3) does not require property "to be involved in terrorism to abrogate attachment immunity under § 1610(b)(3)." (Partial dissent at 33.) We do not suggest to the contrary. The other reason is that it would be "an unjustified and unfortunate result," *id.* at 9, to allow attachment and execution of noncommercial property, such as museum artifacts belonging to Iran. But it is not our province to decide whether the policy choices embodied in a statute are wise or unwise; our task is, rather, to discern

If § 1610(g) is interpreted to require that, to be subject to attachment and execution, property must be used by the foreign state for a "commercial activity," § 1610(a), or that the instrumentality must be "engaged in commercial activity in the United States," § 1610(b), then we would have to read into § 1610(g) a limitation that Congress did not insert. See *United States* v. *Temple*, 105 U.S. (9 Otto) 97, 99 (1881) (holding that the court has "no right to insert words and phrases, so as to incorporate in the statute a new and distinct provision"). Section 1610(g)(1) provides that "*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, . . . is subject to attachment in aid of execution, and execution." (Emphases added.) Thus, Congress did not limit the type of property subject to attachment and execution under § 1610(g) to property connected to commercial activity in the United States. The only requirement is that property be "the property of" the foreign state or its instrumentality.

Two Seventh Circuit cases support our conclusion in this regard. In *Wyatt* v. *Syrian Arab Republic*, 800 F.3d 331, 343 (7th Cir. 2015), the court held that the plaintiffs need not comply with § 1608(e) when proceeding under § 1610(g). The court noted that § 1608(e) is part of a "more general process" applicable to "suits other than those for state-sponsored terrorism, such as more ordinary contract or tort cases arising out of a foreign state's commercial activities." *Id.* at 333. Section 1610(g), the court noted, "contains provisions specific to claims for state-sponsored terrorism." *Id.* Those specific provisions allow plaintiffs with a judgment against a state

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congressional intent. *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U.S. 421, 423 (1952).

sponsor of terrorism, obtained pursuant to § 1605A, to attach and execute the judgment against property of the foreign state and against property of any agency and instrumentality of the state. *Id.* The other provisions of § 1610, contained in subsections (a) through (c), establish a general process for judgments against a foreign state not necessarily resting on state-sponsored terrorism. *Id.*

Similarly, the court held in *Gates* that a plaintiff proceeding under § 1610(g) need not comply with § 1610(c). The court wrote in part:

> Sections 1610(a) and (b) are available to satisfy a wide variety of judgments, but they allow attachment of only specific categories of assets to satisfy those judgments. See, *e.g.*, § 1610(a) (allowing attachment of foreign state property located in the United States and used for commercial activity there); § 1610(b) (allowing attachment of property of foreign state agency or instrumentality engaged in United States commercial activity).
>
> By contrast, § 1610(g) is available only to holders of judgments under the § 1605A exception for state-sponsored terrorism, but it allows attachment of a much broader range of assets to satisfy those judgments.

Gates, 755 F.3d at 576.

Regardless of canons of construction—such as the principle that a specific statute takes precedence over a general one—our ultimate search is for congressional intent. *Chickasaw Nation* v. *United States*, 534 U.S. 84, 94 (2001). And it is quite clear that Congress meant to expand successful plaintiffs' options for collecting judgments against state sponsors of terrorism.

We acknowledge that § 1610 as a whole is ambiguous. In that circumstance, we may consider legislative history. *Id.* at 91-92; *United States* v. *Pub. Utils. Comm'n*, 345 U.S. 295, 315 (1953). That history suggests that § 1610(g) was meant to allow attachment and execution with respect to any property whatsoever of the foreign state or its instrumentality. Senator Lautenberg, one of the sponsors of the bill that became § 1610(g), stated that the provision would "allow[ ] attachment of the assets of a state sponsor of terrorism to be made upon the satisfaction of a 'simple ownership' test." 154 Cong. Rec. S54-01 (Jan. 22, 2008) (statement of Sen. Lautenberg). The House Conference Report for a substantially similar earlier version of the bill noted that the provision "would . . . expand the ability of claimants to seek recourse against the property of that foreign state," in part "by permitting any property in which the foreign state has a beneficial ownership to be subject to execution of that judgment." H.R. Rep. No. 11-447, at 1001 (2007) (Conf. Rep.). The bill, it continued, "is written to subject any property interest in which the foreign state enjoys a beneficial ownership to attachment and execution." *Id.* We have already noted that the basic purpose of adding § 1610(g) was to enable plaintiffs who have established a foreign state's liability under § 1605A and its predecessor, for terrorist acts, to collect on their judgments. As Senator Lautenberg put it, the bill was meant "to facilitate victims' collection of their damages from state sponsors of terrorism." 154 Cong. Rec. S54-01 (Jan. 22, 2008) (statement of Sen. Lautenberg). Our interpretation of § 1610(g) more fully furthers that fundamental aim.

Bank Melli also makes three other arguments regarding § 1610(g). We can dispose of those arguments easily.

(1) The district court's failure to discuss expressly whether to grant Bank Melli discretionary relief under the "innocent party" provision of § 1610(g)(3) does not mean that the court failed to consider whether that provision applied. Bank Melli made its § 1610(g)(3) argument to the district court, and we presume that the court understood its authority but declined to exercise discretion in Bank Melli's favor. Cf. *United States* v. *Davis*, 264 F.3d 813, 816-817 (9th Cir. 2001) (so holding in the context of a district court's silence regarding a requested downward departure under the Sentencing Guidelines).

(2) There is no conflict between § 1610(g) and the 1955 Treaty of Amity between the United States and Iran, which requires that the United States respect the juridical status of Iranian companies, protect their property in accordance with international law, and not discriminate against them. Treaty of Amity, Economic Relations and Consular Rights Between the United States of America and Iran, Aug. 15, 1955, 8 U.S.T. 899, 902-903. As the Second Circuit held, that treaty provision is intended simply to ensure that foreign corporations are on equal footing with domestic corporations. *Weinstein*, 609 F.3d at 53. Even if the two provisions were inconsistent, when a treaty and a later-enacted federal statute conflict, the subsequent statute controls to the extent of the conflict. *Breard* v. *Greene*, 523 U.S. 371, 376 (1998) (*per curiam*).

(3) Allowing the *Heiser* plaintiffs to obtain relief under § 1610(g) by converting their § 1605(a)(7) judgment to a § 1605A judgment does not violate separation of powers principles. Bank Melli's reliance on *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995), is misplaced. There, the court held that Congress could not require federal courts to reopen final judgments. But here, the judgment was not reopened. Instead, the Heiser plaintiffs

have a new collection tool; they can enforce their final judgment against Iran by attaching and executing on the property of Iran's instrumentality. In essence, the statute gives *more* effect to the final judgment, rather than attempting to revise or rescind that judgment.

B. The statutes do not impermissibly impose retroactive liability.

Bank Melli next argues that the judgment creditors cannot use TRIA § 201(a) or FSIA § 1610(g) because the terrorist acts that underlie the judgments occurred before the enactment of those statutes. The general default rule is that a law that increases substantive liability for past conduct does not operate retroactively. *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 280 (1994).

But the statutes do not impose new liability on Iran. Section 1605(a)(7) was in effect at the time of the terrorist acts in question. Rather, the statutes simply permit additional methods of collection. See *id.* at 275 (noting that the default rule does not apply to rules of procedure because of "diminished reliance interests").

Even if TRIA § 201(a) and FSIA § 1610(g) are viewed as imposing new liability retroactively, the default rule is different for statutes that govern foreign sovereign immunity. In *Altmann*, 541 U.S. at 692, the Supreme Court concluded that the *Landgraf* presumption does not apply to such statutes. To the contrary, when it comes to sovereign immunity for both foreign states and their agencies and instrumentalities, there is a presumption in *favor* of retroactivity "absent contraindications" from Congress. *Id.* at 696.

Here, there are no such contraindications. In fact, the opposite is true. The purpose of the statutes at issue was to enable not just future litigants, but also current judgment creditors to collect on the final judgments that they

already held—which, as a matter of logic, arose from past acts. Congress chose to make TRIA § 201(a) applicable in "*every* case in which a person *has obtained* a judgment" under either the former statute, § 1605(a)(7), or the current statute, § 1605A. TRIA § 201(a) (emphases added). Similarly, Congress chose to make § 1610(g) applicable to all judgments entered under § 1605A. Accordingly, these statutes apply even if they are seen as imposing liability retroactively, because Congress so intended.

C. The blocked assets are property of Bank Melli.

Bank Melli also contends that TRIA § 201(a) and FSIA § 1610(g) do not permit attachment of the assets here because Visa and Franklin own the blocked assets; Bank Melli does not. Under TRIA § 201(a), to be subject to execution or attachment, the blocked assets must be "assets of" the instrumentality. Similarly, § 1610(g) applies to "the property of" the instrumentality.

Like most courts, we look to state law to determine the ownership of assets in this context. *Peterson*, 627 F.3d at 1130-1131; see also *Calderon-Cardona* v. *Bank of N.Y. Mellon*, 770 F.3d 993, 1000-1001 (2d Cir. 2014) (looking to New York law to determine what type of interest rendered property attachable under § 1610(g)), cert. denied, 136 S. Ct. 893 (2016); *Walker Int'l Holdings, Ltd.* v. *Republic of Congo*, 415 F.3d 413, 415 (5th Cir. 2005) (applying Texas law to determine attorney fees award in FSIA action); *Hegna* v. *Islamic Republic of Iran*, 380 F.3d 1000, 1007 (7th Cir. 2004) (applying Illinois law to decide whether property interest was open to challenge in action under FSIA); *Karaha Bodas Co.* v. *Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* ("*Pertamina*"), 313 F.3d 70, 83 (2d Cir. 2002) (applying New York law to determine what actions are subject to enforcement and available to judgment creditors). Here,

California law applies. As we held in *Peterson*, California law authorizes a court to order a judgment debtor to assign to the judgment creditor a right to payments that are due or will become due, even if the right is conditioned on future developments. 627 F.3d at 1130-1131; Cal. Civ. Proc. Code §482.080(a)(2) (providing that a court may order a defendant subject to a writ of attachment to turn over either "evidence of title to property of or a debt owed to the defendant"); *id.* at §680.310 ("'Property' includes real and personal property and any interest therein."); *id.* at §708.210 (permitting a judgment creditor to bring an action against a third party to whom the judgment debtor owes money "to have the interest or debt applied to the satisfaction of the money judgment"); *id.* at §708.510(a) (authorizing a court to "order the judgment debtor to assign to the judgment creditor . . . all or part of a right to payment due"). That is precisely the situation in the present case: 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.

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.

First, we note that Congress has used expansive wording to suggest that immediate and outright ownership of assets is not required. In the TRIA, Congress provided that "[n]othing in this subsection shall bar . . . enforcement of any judgment to which this subsection applies . . .

against assets otherwise available under this section *or under any other provision of law*." TRIA § 201(d)(4) (emphasis added). In § 1610(g), Congress specified that "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." (Emphases added.) Thus, interests held by the instrumentality of a terrorist state, as is the case here, are subject to attachment under federal law.

Second, in *Heiser*, only foreign nationals, and not a foreign country, had an interest in the blocked funds held by intermediary banks. "Iranian entities were not the originators of the funds transfers. Nor were they the ultimate beneficiaries." *Heiser*, 735 F.3d at 936 (footnote omitted). 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.

In summary, California law applies. Under California law, money owed to Bank Melli may be assigned to judgment creditors. Even 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.

D. Because Bank Melli does not enjoy sovereign immunity, Rule 19 presents no barrier.

Finally, Bank Melli relies on Federal Rule of Civil Procedure 19 to support its request for dismissal. That rule provides that a person must be joined as a party if

the person "claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may . . . impair or impede the person's ability to protect the interest." Fed. R. Civ. P. 19(a). And, if the "person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Fed. R. Civ. P. 19(b).

Bank Melli argues that this case must be dismissed because it is a required party that cannot be joined and, further, that the action cannot proceed without it "in equity and good conscience." But, because TRIA § 201(a) and FSIA § 1610(g) confer jurisdiction by creating exceptions to sovereign immunity, Bank Melli *can* be joined in this action. Thus it does not matter whether Bank Melli is otherwise a required party under Rule 19(a); dismissal is not required.

According to Bank Melli, *Republic of the Philippines* v. *Pimentel*, 553 U.S. 851 (2008), requires dismissal. We disagree. A class of victims of human rights abuses in the Republic of the Philippines won a $2 billion default judgment against the Estate of Ferdinand Marcos, the former president of that country. *Id.* at 857-858. The class attempted to enforce the judgment by attaching assets owed to Merrill Lynch by a bank incorporated by Marcos personally. *Id.* at 858. The Philippines claimed ownership of the bank, and therefore the disputed assets, because the bank had been incorporated through a misuse of public office. *Id.* The Philippines also claimed immunity from the suit. *Id.* Merrill Lynch initiated an interpleader action naming, among other parties, the Republic of the Philippines and one of its agencies. *Id.* at 845-855. The Supreme Court held that the case should be dis-

missed because "it was improper [for the district court] to issue a definitive holding regarding a nonfrivolous, substantive claim made by an absent, required entity that was entitled by its sovereign status to immunity from suit." *Id.* at 868.

This case plainly is distinguishable. In *Pimentel*, the Republic was a required party that could not be joined because of sovereign immunity. Here, Bank Melli does not enjoy sovereign immunity, so it can be joined as a party, whether or not it is a required party. Unlike the Republic in *Pimentel*, therefore, Bank Melli is able to adjudicate its claim to the contested assets.

CONCLUSION

We hold: (1) TRIA § 201(a) and FSIA § 1610(g) authorize attachment and execution of the monies owed to Bank Melli. (2) Those statutes do not impose liability retroactively but, even if they are viewed as doing so, *Altmann* establishes a presumption in favor of retroactivity for statutes governing sovereign immunity, which is not rebutted here. (3) California law governs the ownership question; the blocked assets are property of Bank Melli under principles of California law and, thus, are subject to attachment and execution under TRIA § 201(a) and FSIA § 1610(g). The same result would obtain even if federal law governed. (4) Because Bank Melli can be joined in this action, the dismissal provision of Federal Rule of Civil Procedure 19 does not apply.

AFFIRMED.

BENSON, Senior District Judge, concurring in part and dissenting in part:

I concur with the majority that § 201(a) of the Terrorism Risk Insurance Act ("TRIA") and § 1610 of the Foreign Sovereign Immunities Act ("FSIA") permit the judgment creditors in this case to attach and execute against monies owed to Bank Melli. However, I respectfully believe the majority erred in finding § 1610(g) to be a freestanding immunity exception under FSIA. In my view, 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.

FSIA contains "extensive procedural protections for foreign sovereigns in United States courts." *Wyatt* v. *Syrian Arab Republic*, 800 F.3d 331, 333 (7th Cir. 2015). Specifically, § 1609 of FSIA provides a general presumption that property of a foreign state and the property of an instrumentality or agency of a foreign state is immune from execution and attachment in United States courts. See 28 U.S.C. § 1609; 28 U.S.C. § 1603(a). In turn, § 1610 provides a series of exceptions to this general rule.

Prior to 2008, § 1610 provided different rules for attachment immunity depending on whether the party was seeking immunity as the foreign state or as an agency or instrumentality of a foreign state. Regarding foreign states, § 1610(a) denied immunity where: (1) a judgment creditor obtained a judgment against the foreign state; (2) the property of the foreign state is located in the United States; (3) the property is used for "a commercial activity" in the United States; and (4) one of § 1610(a)'s seven avenues for abrogating immunity applied. See 28 U.S.C. § 1610(a). Similarly, with respect to agencies and

instrumentalities, § 1610(b) denied immunity where: (1) a judgment creditor obtained a judgment against an agency or instrumentality of foreign state; (2) the agency or instrumentality is engaged in commercial activity in the United States; (3) the property of the agency or instrumentality is located in the United States; and (4) one of § 1610(b)'s three avenues for abrogating immunity applied. See 28 U.S.C. § 1610(b).

Prior to 2008, the judgment creditors in this case would have been required to obtain a judgment against Bank Melli to utilize the immunity waiver provisions under § 1610(b) to attach Bank Melli's property.

In 2008, Congress amended FSIA, adding § 1610(g) and § 1605A. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083, 122 Stat. 3, 338 (2008). The purpose of the amendments was to relax the protections of § 1610 in cases of state sponsored terrorism to "make it easier for terrorism victims to obtain judgments and to attach assets." *Gates* v. *Syrian Arab Republic*, 755 F.3d 568, 576 (7th Cir. 2014); *In re Islamic Republic of Iran Terrorism Litig.*, 659 F. Supp. 2d 31, 62 (D.D.C. 2009) (noting, "these latest additions to . . . FSIA demonstrate that Congress remains focused on eliminating those barriers that have made it nearly impossible for plaintiffs in these actions to execute civil judgments against Iran or other state sponsors of terrorism").

Under § 1610(g), if a judgment creditor obtains a judgment under § 1605A, the property of the foreign state and "the property of an agency or instrumentality of such a state, including property that is a separate juridical entity . . . is subject to attachment . . . and execution, upon that judgment *as provided in this section*, regardless" of five factors. 28 U.S.C. § 1610(g)(1) (emphasis added). The five factors enumerated in § 1610(g)(A)

through (E) reflect the *Bancec* presumption, which requires this Court to treat government entities established as separate juridical entities distinct from their sovereigns. See *First Nat'l City Bank* v. *Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 620-621 (1983); *Flatow* v. *Islamic Republic of Iran*, 308 F.3d 1065, 1071 n.9 (9th Cir. 2009) (outlining the *Bancec* factors (citing *Walter Fuller Aircraft Sales, Inc.* v. *Republic of the Philippines*, 965 F.2d 1375, 1380 n.7 (5th Cir. 1992))).

Section 1610(g) leads to two straightforward conclusions under FSIA. First, if a party obtains a §1605A judgment against a state sponsor of terror, the *Bancec* presumption is eliminated, which permits a court to attach and execute against the property of the agency or instrumentality to satisfy the judgments against the foreign state. See *Estate of Heiser* v. *Islamic Republic of Iran*, 885 F. Supp. 2d 429, 442 (D.D.C. 2012) ("Section §1610(g) subparagraphs (A)-(E) explicitly prohibit consideration of each of the five *Bancec* factors."), aff'd *sub nom. Heiser* v. *Islamic Republic of Iran*, 735 F.3d 934 (D.C. Cir. 2013). Second, the language "as provided in this section" requires a judgment creditor to find an existing mechanism of attachment under §1610. Section 1610(g) does not create a new avenue for attachment under FSIA; rather, §1610(g) broadens the force of §1610's existing avenues for attachment by eliminating the legal fiction that Bank Melli is a separate juridical entity from Iran.

In this case, judgment creditors relying on §1610(g) may proceed to attach Bank Melli's property because Bank Melli's property is not immune from attachment by virtue of §1610(b)(3). Section 1610(b)(3) eliminates attachment immunity if an agency or instrumentality is "engaged in commercial activity in the United States"

and "the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605A of this chapter . . . regardless of whether the property is or was involved in the act upon which the claim is based." 28 U.S.C. §1610(b)(3). The judgment creditors can attach Bank Melli's property because: (1) the judgment creditors have obtained a judgment against Iran pursuant to §1605A; (2) §1610(g) eliminates the *Bancec* presumption, allowing this Court to attach and execute against Bank Melli's assets to satisfy the judgment against Iran; and (3) the judgment creditors have sufficiently ple[d] that Bank Melli is engaged in commercial activity in the United States.

Section 1603(c) of FSIA defines commercial activity as: "either a regular course of commercial conduct *or* a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. §1603(c) (emphasis added). Bank Melli entered into a contract with an American company to provide an American company a commercial service. At this stage in the litigation, the Court can conclude that the judgment creditors relying on §1610(g) have sufficiently alleged Bank Melli is engaged in commercial activity in the United States.

The majority disagrees with the aforementioned interpretation and concludes that §1610(g) creates a freestanding immunity exception under FSIA. The majority believes a §1605A judgment creditor may attach Bank Melli's property regardless of any commercial component under §1610(a) or §1610(b). In my view, respectfully, the majority misses the mark in three important respects.

First, the majority erroneously finds that § 1610(g) is a freestanding exception to immunity by concluding:

> Subsection (g) covers a different subject than § 1610(a) through (e): by its express terms, it applies *only* to 'certain actions,' specifically, judgments 'entered under section 1605A.' (Emphasis added.) In turn, § 1605A revokes sovereign immunity for damages claims against a foreign state for personal injury or death caused by 'torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support' for such an act. By definition, such claims do not arise from commercial activity; they arise from acts of torture (and the like).

[Maj. Op., p. 16.] In doing so, the majority misinterprets the operation of § 1610(a) and (b) waivers in the context of § 1605A judgments. Under § 1610(b)(3), a judgment creditor can attach property where the instrumentality is engaged in commercial activity in the United States. Furthermore, § 1610(b)(3) provides that attachment immunity is eliminated "*regardless* of whether the property is or was involved with the act upon which the claim is based." 28 U.S.C. § 1610(b)(3) (emphasis added). Therefore, a § 1605A judgment allows a judgment creditor to get immunity waived for *any* property where the instrumentality is engaged in commerce in the United States, regardless whether the property was involved in the actions that gave rise to the § 1605A waiver of immunity against the foreign state. Therefore, Bank Melli's property does not need to be involved in terrorism to abrogate attachment immunity under § 1610(b)(3).

Second, the majority concludes that the "as provided in this section" language found in § 1610(g) refers to the procedural aspects of § 1610, namely § 1610(f). Fair

enough. But, the majority's conclusion does not mean the language "as provided in this section" refers *only* to §1610(f). Indeed, the majority's piecemeal reading of §1610(g) renders other portions of §1610 inoperable. "It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001)). This Court should adopt the interpretation of §1610 that "'gives effect to every clause and word.'" *Marx* v. *Gen. Revenue Corp.*, ___U.S.___, 133 S. Ct. 1166, 1177 (2013) (citing *Microsoft Corp.* v. *i4i Ltd. P'ship*, 564 U.S. 91 (2011)).

The majority ignores the avenues for exemption under §1610(a)(7) and §1610(b)(3). Section 1610(a)(7) and §1610(b)(3) provide immunity, in addition to requiring some interplay with commerce, where "the judgment relates to a claim for which the foreign state is not immune under section 1605A . . . ." If a §1605A judgment creditor can waive attachment immunity under §1610(g) without proving the property is used in commerce or the instrumentality is engaged in commerce in the United States, §1610(a)(7) and §1610(b)(3) are rendered superfluous and obsolete. Conversely, recognizing §1610(g)'s limited purpose was to eliminate the *Bancec* presumption ensures this Court gives effect to every clause and word in §1610 while honoring the purpose of the 2008 FSIA amendments.

Finally, the majority's holding ignores the practical limitation the commerce requirement places on §1605A judgments. Reading §1610(g) as a freestanding immunity exception does not just relax FSIA in the context of terrorism—it eliminates any immunity protection under

FSIA for state sponsors of terror and their instrumentalities. For example, in *Rubin* v. *Islamic Republic of Iran*, American citizens sued and obtained default judgments against Iran for injuries and losses that arose out of a suicide bombing carried out by Hamas in Israel. 33 F. Supp. 3d 1003, 1006 (N.D. Ill. 2014). The *Rubin* plaintiffs sought to "attach and execute on numerous ancient Persian artifacts" in possession of two museums in the United States to satisfy their default judgments against Iran. *Id.* Like the judgment creditors in this case, the *Rubin* plaintiffs argued that § 1610(g) is a freestanding immunity exception and, therefore, the plaintiffs may attach Iran's artifacts to satisfy their judgments. *Id.* at 1013.

The court disagreed, finding: "The plain language indicates that Section 1610(g) is not a separate basis of attachment, but rather qualifies the previous subsections." *Id.* The court concluded, "the purpose of Section 1610(g) is to counteract the Supreme Court's decision in *Bancec*, and to allow execution against the assets of separate juridical entities regardless of the protections *Bancec* may have offered." *Id.* Currently, the *Rubin* case is pending appeal in the Seventh Circuit. *Rubin* v. *Islamic Republic of Iran*, 33 F. Supp. 3d 1003 (N.D. Ill. 2014), appeal docketed, No. 14-1935 (7th Cir. Apr. 25, 2014).

Surely this Court's holding will be argued as precedent to allow the *Rubin* plaintiffs to seize Persian artifacts to be auctioned off to satisfy the *Rubin* plaintiffs' default judgments. This would be an unjustified and unfortunate result. When Congress amended FSIA, the intention was to eliminate the *Bancec* presumption and relax the rigidity of § 1610 to make it easier for victims of terrorism to satisfy judgments against state sponsors of terror. Congress did not, however, intend to open the floodgates and allow terrorism plaintiffs to attach any

and all Iranian property in the United States. Rather, Congress intended the commerce limitation to remain in place.[1] If a foreign state is designated as a state sponsor of terror, the state and the instrumentalities and agencies of the state lose the privilege of doing business in the United States without running the risk of property being seized to satisfy judgments.

In sum, I would require judgment creditors relying on § 1610(g) to satisfy one of § 1610's existing avenues for abrogating attachment immunity. In this case, the judgment creditors have done that. The judgment creditors have sufficiently alleged Bank Melli is engaged in commerce in the United States within the meaning of § 1610(b)(3).

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[1] TRIA § 201 similarly contains a limitation on attachment and execution. TRIA § 201 requires attachable assets to be defined as "blocked assets." Section 201(d)(2)(A) defines a "blocked asset" as any asset "seized or frozen by the United States under section 5(b) of the Trading With the Enemy Act (50 U.S.C. App. 5(b)) or under sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701; 1702)."

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DOCKET NOS. 13-15442, 13-16100

MICHAEL BENNETT; LINDA BENNETT,
AS CO-ADMINISTRATORS OF THE ESTATE OF
MARIA ANN BENNETT,

Plaintiffs-Appellees,

v.

THE ISLAMIC REPUBLIC OF IRAN,

Defendant,

v.

VISA INC.; FRANKLIN RESOURCES, INC.,

Defendants-third-party-plaintiffs–Appellees,

v.

GREENBERG AND ACOSTA JUDGMENT CREDITORS,

Plaintiff-third-party-defendant–Appellee,

HEISER JUDGMENT CREDITORS,

Plaintiff-fourth-party-defendant–Appellee,

v.

BANK MELLI,

Plaintiff-third-party-defendant–Appellant.

OPINION

August 26, 2015

Appeals from the United States District Court
for the Northern District of California
Charles R. Breyer, Senior District Judge, Presiding

Argued and Submitted
April 15, 2015—San Francisco, California

Before: Alex Kozinski and Susan P. Graber, Circuit Judges, and Dee V. Benson,* Senior District Judge.

Opinion by Judge Kozinski

KOZINSKI, Circuit Judge:

Congress has enacted two statutes to help victims of terrorism collect on money judgments against the foreign states responsible for sponsoring the attacks. We consider whether victims can collect from an instrumentality of a state that has sponsored terrorism when the instrumentality is a separate juridical entity that wasn't a party to the underlying lawsuit.

I. Background

The Foreign Sovereign Immunities Act (FSIA) is the sole basis for jurisdiction over foreign states in U.S.

* The Honorable Dee V. Benson, Senior District Judge for the U.S. District Court for the District of Utah, sitting by designation.

courts. 28 U.S.C. §1330. Under the FSIA, foreign sovereigns are generally immune from jurisdiction, except for a few carefully delineated exceptions. One such exception is for claims arising out of acts of state-sponsored terrorism. See *id.* at §1605A.

Four groups of individuals—the Bennett, Greenbaum, Acosta and Heiser creditors—hold separate judgments obtained in U.S. courts against the Republic of Iran, based on various terrorist attacks that occurred between 1990 and 2002. The Bennett creditors are owed almost $13 million in damages for Iran's role in the 2002 bombing of a cafeteria at Hebrew University in Jerusalem. The Greenbaum creditors are owed almost $20 million for a 2001 bombing of a Jerusalem restaurant. The Acosta creditors are owed over $350 million for Iran's part in a 1990 mass shooting. And, finally, the Heiser creditors are owed over $590 million for the 1996 bombing of the Khobar Towers in Saudi Arabia. All judgments were by default, but no one disputes that they are valid and that all four sets of creditors are owed money by Iran.

However, winning a money judgment against a foreign state isn't the end of the story, because sovereign immunity separately protects the assets of a foreign sovereign from attachment. For years, the state-sponsored terrorism exception to the FSIA created an anomaly—it abrogated a foreign sovereign's immunity from judgment, but not its immunity from collection. Terrorism victims therefore had a right without a meaningful remedy.

Congress subsequently enacted two statutes closing this loophole: section 201(a) of the Terrorism Risk Insurance Act (TRIA) and 28 U.S.C. §1610(g). Section 201 was enacted to "deal comprehensively with the problem of enforcement of judgments rendered on behalf of victims of terrorism . . . by enabling them to satisfy such

judgments through the attachment of blocked assets of terrorist parties." H.R. Rep. No. 107-779, at 27 (2002) (Conf. Rep). "Blocked assets" are those that have been seized or frozen by the federal government. The TRIA provides that "the blocked assets of [a] terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution." Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, §201(a), 116 Stat. 2322, 2337 (codified at 28 U.S.C. §1610 Note "Satisfaction of Judgments from Blocked Assets of Terrorists, Terrorist Organizations, and State Sponsors of Terrorism").

Section 1610(g), enacted in 2008 as an amendment to the FSIA, extended the TRIA's abrogation of asset immunity to funds that were not blocked. It provides that "the property of a foreign state against which a judgment is entered under [this statute], 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 . . . upon that judgment as provided in this section." 28 U.S.C. §1610(g).

These two statutes give creditors a theoretical avenue to collect on the judgments they've obtained. But, of course, they have to find the money first—and Iranian assets within the United States are notoriously hard to come by. An opportunity arose in 2007, when the Department of Treasury issued a blocking order prohibiting certain Iranian assets in the United States from being transferred back to Iran. That blocking order was based on Iran's illicit nuclear program, not its state-sponsored terrorism. Nonetheless, it meant that various financial institutions had money owed to Iran sitting in accounts

within the United States. The creditors here saw a rare chance to collect on their judgments and filed a complaint seeking access to $17.6 million in blocked assets held by Visa and Franklin[1] but owed to Bank Melli—Iran's national bank. Fearing they might be liable to Bank Melli if they simply handed the money over to the creditors, Visa and Franklin responded by filing a third-party complaint to interplead Bank Melli and obtain final resolution of who was entitled to the funds. Visa and Franklin deposited the funds into the district court's registry. Bank Melli made an appearance and moved to dismiss. The district court denied that motion but certified its order for interlocutory appeal under 28 U.S.C. § 1292(b). We review *de novo*. See *Colony Cove Props., LLC* v. *City of Carson*, 640 F.3d 948, 955 (9th Cir. 2011).

II. Discussion

Bank Melli makes four distinct arguments as to why the creditors shouldn't be able to collect from the funds held by Visa and Franklin. First, it argues that the assets are protected by sovereign immunity notwithstanding the TRIA and section 1610(g), because those statutes waive sovereign immunity only for the "terrorist party"—Iran—and Bank Melli is a separate juridical entity from Iran. Second, it asserts that Federal Rule of Civil Procedure 19 requires dismissal of this entire action, because Bank Melli is an indispensable party that cannot be joined. Third, it argues that applying the TRIA and section 1610(g) to the judgments at issue here would be impermissibly retroactive, because the creditors obtained their judgments against Iran before the statutes' enact-

[1] Visa allegedly owes Bank Melli the money for the bank's facilitation of Visa cards in Iran. When the blocking order was issued, Visa invested the assets owed to Bank Melli in a mutual fund held by Franklin, an investment company.

ment. And, finally, Bank Melli claims that the frozen assets aren't subject to the TRIA or section 1610(g) because those statutes extend only to assets "owned" by the foreign entity. Because the assets here are technically in the possession of Visa and Franklin, Bank Melli argues that they aren't yet "owned" by Bank Melli.

1. *Foreign Sovereign Immunity*

Bank Melli argues that the TRIA and section 1610(g) do not abrogate the asset immunity of all of a terrorist state's instrumentalities, only those that are alter egos of the state. For this proposition, Bank Melli relies principally on the Supreme Court's holding in *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba* ("*Bancec*"), that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." 462 U.S. 611, 626-627 (1983). Under *Bancec*, the only conditions under which an instrumentality may be equated with the sovereign are (1) when it is "so extensively controlled by its owner that a relationship of principal and agent is created" or (2) when failure to regard them as equivalent "would work fraud or injustice." *Id.* at 629 (internal quotation marks omitted). Bank Melli contends that the TRIA and section 1610(g) incorporate *Bancec*'s distinction between instrumentalities that are separate juridical entities and those that are alter egos, and abrogates immunity only as to those instrumentalities that, unlike Bank Melli, fall within *Bancec*'s two exceptions.

We cannot reconcile Bank Melli's argument with the plain text of either statute. Section 201(a) of the TRIA specifically states that "the blocked assets of [a] terrorist party (*including* the blocked assets of *any agency or instrumentality* of that terrorist party) shall be subject to execution." §201(a) (emphasis added). Bank Melli ar-

gues that the parenthetical phrase is merely illustrative and does not purport to expand the meaning of "terrorist party" beyond *Bancec*. But we must assume Congress meant what it said when it used the term "*any* agency or instrumentality." See *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997). "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *Id.* (quoting *Webster's Third New International Dictionary* 97 (1976)). Because "Congress did not add any language limiting the breadth of that word," we must read the statute as referring to all instrumentalities. *Id.*

Furthermore, Bank Melli's interpretation "flouts the rule that a statute should be construed so that effect is given to all its provisions, [and] no part will be inoperative or superfluous." *Clark* v. *Rameker*, 134 S. Ct. 2242, 2248 (2014) (internal quotation marks omitted). Because an alter ego under *Bancec* is the terrorist party, there would be no need for Congress to separately provide for attachment against instrumentalities unless it sought to extend coverage to those instrumentalities that *cannot* be equated with the terrorist party itself.

We therefore 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." *Weinstein* v. *Islamic Republic of Iran*, 609 F.3d 43, 50 (2d Cir. 2010).

Congress spoke even more clearly in section 1610(g). Section 1610(g) allows attachment against property held by an instrumentality "that is a separate juridical entity," "regardless of" the five factors that several courts—

including ours—have considered when deciding whether an instrumentality is an alter ego under *Bancec*. See *Flatow* v. *Islamic Republic of Iran*, 308 F.3d 1065, 1071-1072 & n.9 (9th Cir. 2002). By specifically referencing—and disavowing—*Bancec*'s test, section 1610(g) makes unmistakably clear that whether or not an instrumentality is an alter ego is irrelevant to determining whether its assets are attachable.

Bank Melli argues that section 1610(g) doesn't permit attachment because the 1955 Treaty of Amity between the U.S. and Iran requires that Iranian companies "have their juridical status recognized," prohibits "unreasonable or discriminatory measures" against them and requires that their property be protected in accordance with international law. Treaty of Amity, Economic Relations and Consular Rights Between the United States of America and Iran, Aug. 15, 1955, 8 U.S.T. 899, 902-903. But we cannot read a 60-year-old treaty provision as barring application of the plain text of a later-enacted federal law. See *Breard* v. *Greene*, 523 U.S. 371, 376 (1998) (*per curiam*). In any event, there's nothing unreasonable, discriminatory or in violation of international law about waiving sovereign immunity for terrorism-based judgments. Bank Melli's assets aren't subject to attachment because it's an Iranian company, but because it's an instrumentality of a state that has sponsored terrorism.

Finally, Bank Melli reads section 1610(g)—which allows attachment in aid of execution upon judgments "as provided in this section"—to mean that attachment immunity is abrogated only if some other provision of section 1610 independently authorizes the attachment. But the other provisions of section 1610 that abrogate attachment immunity already apply to instrumentalities with separate juridical status. See 28 U.S.C. §1610(a)

(abrogating attachment immunity of property of a foreign state when the property is "used for commercial activity in the United States"); *id.* (defining "foreign state" by reference to section 1603(a), which states that a "foreign state" includes an instrumentality "which is a separate legal person"); *id.* at § 1610(b) (abrogating attachment immunity of an instrumentality "engaged in commercial activity in the United States"). And the plain text of section 1610(g) requires only that the foreign *state* be subject to a section 1605A judgment before the property of an instrumentality becomes available for collection. *Id.* at § 1610(g) (subjecting to attachment "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" (emphasis added)). Thus, reading section 1610(g) to require attachment immunity to be grounded in some other subsection of section 1610 would render section 1610(g) a nullity.

In short, both the TRIA and section 1610(g) provide independently sufficient grounds for abrogating Bank Melli's asset immunity for terrorism-based judgments.

2. *Rule 19*

Federal Rule of Civil Procedure 19 requires that a person be joined if he "claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may . . . impair or impede the person's ability to protect the interest[ ] or . . . leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest." Fed. R. Civ. P. 19(a). "If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." *Id.* at 19(b).

Bank Melli argues that this case must be dismissed because it is an indispensable party to the lawsuit that cannot be joined, and the action cannot "in equity and good conscience" proceed without it. According to Bank Melli, the case is controlled by the Supreme Court's holding in *Republic of Philippines* v. *Pimentel*, that when "sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign." 553 U.S. 851, 867 (2008).

Pimentel is inapposite. In *Pimentel*, the judgment at issue wasn't against the sovereign—the Republic of Philippines—but rather against the estate of its former dictator, Ferdinand Marcos. The Philippines asserted a right to certain of Marcos's assets being held in the United States, out of which various creditors were trying to satisfy their judgments *against Marcos*. No one disputed that the Philippines was a required party, because—as a type of creditor itself—it clearly had a legal interest in how the funds were disposed of. Nor was there a dispute that the Philippines was sovereignly immune and therefore couldn't be joined.

Here, by contrast, the sovereign is a judgment debtor, not a creditor. Iran has already had a full and fair opportunity to assert its interests in court. It is undisputed that Iran owes money to the creditors and that the money held by Visa and Franklin is owed to Iran. Iran, therefore, has no further interests to assert. Nor does Bank Melli have an independent interest to assert: Because its attachment immunity with respect to the funds held by Visa and Franklin is abrogated by the TRIA and section 1610(g), Bank Melli *is* Iran for the limited purposes of this interpleader action. This is solely a collection proceeding, and a judgment debtor isn't generally

considered an indispensable party to an action to enforce its debts. See *Restatement (Second) of Judgments* § 8 (1982) (suggesting courts may enforce attachment of property absent the judgment debtor because he "may make an appearance to contest the court's jurisdiction over the property without thereby submitting to the jurisdiction of the court"); cf. Cal. Civ. Proc. Code § 708.220 ("judgment debtor . . . [is] not an indispensable party" to an enforcement proceeding). Therefore, none of Rule 19(a)'s prerequisites for dismissal has been met: The court can "accord complete relief among existing parties"; Bank Melli's ability to protect its interests isn't impaired; and there's no "substantial risk of an existing party incurring double, multiple, or otherwise inconsistent obligations." Fed. R. Civ. P. 19(a).

Even if that were not so, Rule 19(a) is inapposite because Bank Melli *can* be joined in this action. Unlike the Philippines in *Pimentel*, Bank Melli is not protected by sovereign immunity in this proceeding, because, as discussed above, Congress has abrogated the immunity of instrumentalities of terrorist parties in collection actions.

Finally, to hold, as Bank Melli urges, that Rule 19 requires dismissal in this case would effectively eviscerate section 201 of the TRIA and section 1610(g). A collection action against a state inherently involves attempting to obtain funds owned by an entity capable of asserting sovereign immunity. If dismissal is required every time such an entity sets forth a "non-frivolous" argument as to why it shouldn't have to pay, collection will be impossible as a practical matter. Nothing in *Pimentel* or Rule 19 dictates such an absurd result.

3. *Retroactivity*

Bank Melli next argues that the creditors cannot use the TRIA and section 1610(g) to collect on their judg-

ments because those judgments predated the enactment of the two collection statutes. When, as here, Congress has not explicitly provided for a statute's retroactive effect, we must ask whether retroactive application "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 280 (1994). Bank Melli argues that if the TRIA and section 1610(g) permit attachment of its assets, it "would go from having no liability for [conduct predating the statutes'] enactment to being liable for the entirety of the resulting judgments."

But the TRIA and section 1610(g) do not impose retroactive *liability* on Iran—they merely provide a means of *collection* for judgments where liability has already been established. Iran was liable for its terrorism-related conduct long before the TRIA and section 1610(g) were enacted. Iran's liability results from the former 28 U.S.C. §1605(a)(7) (now section 1605A), which permitted U.S. citizen terrorism victims to bring suit against Iran in federal court. That statute was in force at the time of Iran's unlawful conduct. The TRIA and section 1610(g) do not attach any additional penalty to that conduct—they only create an avenue for creditors to obtain money they are already owed.

Bank Melli's real argument, therefore, must be that, even though Iran knew its conduct was unlawful and subject to liability in U.S. courts at the time it sponsored the relevant terrorist attacks, it did not know that victims would have the precise avenue for collection they now have. That hardly implicates the central concern of *Landgraf*: that the conduct a defendant engaged in was innocent at the time it occurred. Here, Iran knew it was violating the law and that it could be liable; it just be-

lieved that the procedures that existed when it acted would be insufficient to permit victims to collect on their judgments. There is no permissible reliance interest in the inadequacy of enforcement procedures. Iran assumed the risk that the money it owed in damages based on its sponsorship of terrorism would eventually be collected upon. Indeed, it's clear that the TRIA and section 1610(g) were designed precisely to provide an avenue to recovery for existing claimants with judgments against terrorist states. See *Estate of Heiser* v. *Islamic Republic of Iran*, 807 F. Supp. 2d 9, 26 (D.D.C. 2011). To say that all terrorist attacks prior to the enactment of the collection statutes cannot result in collectible judgments finds no basis in the Supreme Court's retroactivity cases and runs counter to Congress's clear intent.

4. *Ownership of the Assets*

Bank Melli argues that the TRIA and section 1610(g) apply only to assets "owned" by Bank Melli and—while it concedes it has a 100% beneficial interest in the assets held by Visa and Franklin—it claims it doesn't "own" them yet because the funds have been blocked.

But there's more to ownership than physical possession. The question of how to determine the funds' ownership is controlled by our holding in *Peterson* v. *Islamic Republic of Iran*, 627 F.3d 1117, 1130 (9th Cir. 2010). There, we noted that "[e]nforcement proceedings in federal district court are governed by the law of the state in which the court sits" unless a federal statute dictates otherwise. *Id.* We held that the "FSIA does not provide methods for the enforcement of judgments against foreign states, only that those judgments may not be enforced by resort to immune property." We therefore concluded that "California law on the enforcement of judgments applies." *Id.* Finally, we noted that "California

enforcement law authorizes a court to 'order the judgment debtor to assign to the judgment creditor . . . all or part of *a right to payment due or to become due*, whether or not the right is conditioned on future developments.'" *Id.* at 1130-1131 (quoting Cal. Civ. Proc. Code § 708.510(a)) (emphasis added).

Those holdings collectively dispose of Bank Melli's argument here. Because the FSIA doesn't provide a method for enforcement, California law applies to this proceeding and, under California law, money "owed to" Bank Melli may be assigned to judgment creditors. The fact that Bank Melli is not yet in physical possession of the funds is immaterial.

* * * * *

Bank Melli has set forth numerous creative arguments as to why it shouldn't be liable for Iran's debt. But this is an arena in which Congress has spoken with unmistakable clarity. Section 201 of the TRIA and 28 U.S.C. § 1610(g) permit victims of terrorism to collect money they're owed from instrumentalities of the state that sponsored the attacks. Nothing in the text of the FSIA, Rule 19 or the Supreme Court's retroactivity cases compels a different result. The district court correctly denied Bank Melli's motion to dismiss.

AFFIRMED.

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

DOCKET NO. 3:11-CV-05807 (CRB)

MICHAEL BENNETT, *et al.*,
Plaintiffs,

v.

THE ISLAMIC REPUBLIC OF IRAN, *et al.*,
Defendants.

ORDER DENYING MOTION TO DISMISS

February 28, 2013

This case involves an Iranian instrumentality that seeks to avoid payment to American victims of Iranian terrorist acts. Specifically, four groups of judgment creditors ("Plaintiffs") who hold judgments against Iran seek to recover assets ("the Blocked Assets") held by Third Party Plaintiffs Visa and Franklin.[1] Those assets are owed to an Iranian instrumentality, Bank Melli, but have been blocked by executive orders issued by the President of the United States and blocking regulations issued by the United States Department of the Treasury,

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[1] Visa is a financial services company that had a commercial relationship with Third Party Defendant Bank Melli. Compl. (dkt. 16) ¶ 16. A Franklin subsidiary distributed shares in the mutual fund in which the Blocked Assets were invested. *Id.* ¶ 18.

Office of Foreign Assets Control ("OFAC"). Visa and Franklin brought this interpleader action "to obtain a determination as to which [of the groups of judgment creditors], if any, has priority with respect to those assets to satisfy their judgments or their claims." Compl. ¶4. Bank Melli has appeared in the case, and now moves to dismiss it in its entirety. See generally MTD (dkt. 112).

I. BACKGROUND

A. Bank Melli and the Blocked Assets

Bank Melli is Iran's largest financial institution. MTD at 2. Its stock is wholly owned by the Iranian government. *Id.* The Blocked Assets at issue in this case are "funds due and owing by contract to Bank Melli pursuant to a commercial relationship with [Visa]." Compl. ¶16. In 1984, the United States designated Iran a terrorist party pursuant to section 6(j) of the Export Administration Act of 1797, and, pursuant to the International Emergency Economic Powers Act, the President directed that "all property and interests in property in the United States of persons and entities listed in the order or subsequently listed are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in." *Id.* ¶17. The United States added Bank Melli to the list, freezing its assets, in October 2007, upon finding that from 2002 to 2006, Bank Melli had "facilitated numerous purchases of sensitive materials for Iran's nuclear and missile programs," "provided a range of financial services on behalf of Iran's nuclear and missile industries," and "employed deceptive banking practices to obscure its involvement from the international banking system." *Id.*; *Fact Sheet: Designation of Iranian Entities and Individuals for Proliferation Activities and Support for Terrorism*, U.S. Dep't of the Treasury Press Ctr. (Oct. 25,

2007), http://www.treasury.gov/press-center/press-releases/pages/hp644.aspx (hereinafter "10/25/07 Fact Sheet").

Visa and Franklin claim no ownership interest in the Blocked Assets and "only continue[ ] to hold them because, pursuant to OFAC regulations, the assets cannot be released to Bank Melli or to anyone else without a license from OFAC or an appropriate court order." Compl. ¶ 18.[2]

B. Procedural History

Plaintiffs are four groups of individuals (the Bennett Plaintiffs, the Greenbaum Plaintiffs, the Acosta Plaintiffs, and the Heiser Plaintiffs) who obtained default judgments against the government of Iran. See MTD at 2. The Bennett Plaintiffs sued Iran over the July 31, 2002 bombing of a cafeteria at Hebrew University in Jerusalem. MTD at 3 n.2. On August 30, 2007, they obtained a default judgment of almost $13 million under 28 U.S.C. § 1605(a)(7). *Id.* The Greenbaum Plaintiffs sued Iran over the August 9, 2001 bombing of a Jerusalem restaurant. *Id.* On August 10, 2006, they obtained a default judgment of almost $20 million under 28 U.S.C. § 1605(a)(7). *Id.* The Acosta Plaintiffs sued Iran over the November 5, 1990 shooting of various individuals, including U.S. Postal Officer Carlos Acosta. *Id.* On August 26, 2008, they obtained a default judgment exceeding $350 million under 28 U.S.C. § 1605A. *Id.* The Heiser Plaintiffs sued Iran over the June 25, 1996 bombing of the Khobar Towers in Saudi Arabia. *Id.* On December 22, 2006, they obtained a default judgment of over $254 million under 28 U.S.C. § 1605(a)(7); on September 30, 2009,

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[2] Bank Melli does not dispute this, arguing that "[i]f this Court rules in favor of Bank Melli, the assets will go back to Visa and Franklin." Opp'n to Discharge Mot. (dkt. 119) at 2-3.

they obtained a further default judgment of almost $337 million under 28 U.S.C. § 1605A. *Id.* Bank Melli is not named as a party to any of the judgments and is not alleged to have been involved in any of the events underlying them. *Id.* at 4.

On December 2, 2011, the Bennett Plaintiffs filed a complaint against Visa and Franklin, seeking to execute against the Blocked Assets in order to satisfy their judgment. *Id.* On February 3, 2012, Visa and Franklin filed their Third Party Complaint in the nature of an interpleader, naming as defendants Bank Melli and other third-party defendants with potential claims to the Blocked Assets. See generally Compl. Visa and Franklin subsequently deposited the assets into this Court's registry. See dkts. 88-89.

On April 26, 2012, the Clerk entered a default against Bank Melli. See dkt. 79. On June 12, 2012, however, Bank Melli entered its appearance, see dkt. 96, and on July 5, 2012, this Court entered a stipulated order vacating the default, see dkt. 109. Bank Melli then moved to dismiss the case. See generally MTD.

The Court discharged Visa and Franklin at the November 16, 2012 hearing, and heard preliminary argument on the merits of Bank Melli's motion to dismiss. The parties each filed supplemental briefs, see Bank Melli Br. (dkt. 124); Pls. Br. (dkt. 125), and then, on December 13, 2012, participated in a second and more fulsome hearing on the motion to dismiss. See Mins. (dkt. 127). The Court then took the motion under submission.

II. DISCUSSION

Bank Melli's motion makes four arguments for dismissal: (A) that under *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) ("*Bancec*"), it cannot be held liable for Iran's debts;

(B) that the statutes on which Plaintiffs rely to pursue the Blocked Assets, the Terrorism Risk Insurance Act of 2002 (TRIA), Pub. L. No. 107-297, §201(a), 116 Stat. 2322, 2337 (hereinafter "TRIA"), and the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §1610(g) (hereinafter "section 1610(g)"), do not apply retroactively; (C) that TRIA and section 1610(g) only apply where the assets at issue are "assets of" and "property of" Bank Melli, allegations that are missing here; and (D) that Federal Rule of Civil Procedure 19 requires dismissal. See generally MTD. This Order addresses each argument in turn.

A. *Bancec*

Bank Melli argues first that it cannot be held liable for the debts of Iran, because, although it is an instrumentality of Iran, it is juridically distinct. See MTD at 6. No doubt, the Supreme Court held in *Bancec*, 462 U.S. at 626-627, that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." In addition, the Treaty of Amity between the United States and Iran states that "[c]ompanies constituted under the applicable laws" of each country must "have their juridical status recognized within the territories of the other." Treaty of Amity, Economic Relations, and Consular Rights, U.S.-Iran, Art. III ¶1, Aug. 15, 1955, 8 U.S.T. 899.[3]

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[3] But see *Weinstein* v. *Islamic Rep. of Iran*, 609 F.3d 43, 53 (2d Cir. 2010), cert. denied, 133 S. Ct. 21 (June 25, 2012) (explaining that the Supreme Court found in *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176 (1982), that this language is found in a number of treaties, and was not designed to give separate juridical status to instrumentalities).

However, two statutes permit judgment creditors to execute on Blocked Assets in this context, abrogating *Bancec* as to terrorism-based judgments against foreign state sponsors of terrorism. Section 1610(g)[4] states that "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 . . . *is subject to attachment in aid of execution, and execution, upon that judgment*." TRIA[5] similarly 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 section 1605(a)(7) of title 28 United States Code, 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.

Neither of these statutes is the least bit ambiguous—both allow for attaching the blocked assets of a terrorist instrumentality.[6] The Court therefore agrees with the Second Circuit's holding in *Weinstein* that the statutes' plain language defeats Bank Melli's argument. 609 F.3d at 49 ("If this did not constitute an independent grant of jurisdiction over the agencies and instrumentalities, the parenthetical would be a nullity.").

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[4] Emphasis added.

[5] Emphasis added.

[6] Bank Melli makes various arguments for a strained interpretation of this language in which instrumentalities' assets are not subject to attachment, including relying on cases decided before these statutes were enacted; the Court rejects such arguments as unpersuasive.

Incidentally, the Second Circuit went on to explain that its interpretation was also supported by a floor statement by one of TRIA's sponsors.[7] *Id.* at 50. Bank Melli mischaracterizes *Weinstein* as having "based its holding on" that legislative history—not so. See Reply (dkt. 117) at 6; *Weinstein*, 609 F.3d at 50 ("even if, contrary to fact, there were an ambiguity here, it would be resolved in plaintiff's favor by the legislative history"). Bank Melli then makes much of the fact that Senator Harkin's words "were never uttered on the Senate floor" but were added to the congressional record after the vote. See Reply at 6-7. As Plaintiffs note, "Senators can, and routinely do, revise and extend their on-floor remarks for inclusion in the Congressional Record." Pls.' Opp'n to MTD (dkt. 115) at 9 n.7. Regardless of the weight to which the floor statement is entitled, however, the plain language of the statutes is unambiguous and dispositive. The Court therefore rejects this argument for dismissal.

B. Retroactivity

Bank Melli next argues that, even if the statutes mean what the Court understands them to mean, they cannot be applied to this case without rendering them impermissibly retroactive. MTD at 15-17. A statute "is retroactive if it alters the legal consequences of acts completed before its effective date." *Chang* v. *United States*, 327 F.3d 911, 920 (9th Cir. 2003) (citing *Miller* v. *Florida*, 482 U.S. 423, 430 (1987)). To determine whether a statute is

[7] That statement included the language: "for purposes of enforcing a judgment against a terrorist state, title II does not recognize any juridical distinction between a terrorist state and its agencies or instrumentalities." 148 Cong. Rec. S11524-01 (daily ed. Nov. 19, 2002) (statement of Sen. Harkin).

retroactive, courts apply the two-part test set out in *Landgraf* v. *USI Film Products*, 511 U.S. 244, 280 (1994).

"First, courts must 'determine whether Congress has expressly prescribed the statute's proper reach,'" in which case the language used by Congress controls. See *Ctr. For Biological Diversity* v. *U.S. Dep't of Agric.*, 626 F.3d 1113, 1117 (9th Cir. 2010) (quoting *Landgraf*, 511 U.S. at 280). The Court rejects Plaintiffs' argument that TRIA's plain language expresses Congress' intent that it apply retroactively. See Pls. Br. at 4. Plaintiffs note that Section 201 of TRIA states that it applies "in every case" in which a person "has obtained a judgment" against a terrorist party . . . and renders the terrorist party's blocked assets subject to execution to the extent of any compensatory damages for which the terrorist party "has been adjudged liable." *Id.* While that language might support Plaintiffs' interpretation, it falls quite short of an "'unambiguous directive' or 'express command' that the statute . . . be applied retroactively." See *Ctr. for Biological Diversity*, 626 F.3d at 1118 (quoting *Martin* v. *Hadix*, 527 U.S. 343, 354 (1999)).

Second, under *Landgraf*, "absent such express language, courts must 'determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.'" *Id.* at 1117 (quoting *Landgraf*, 511 U.S. at 280). If a statute would operate retroactively at step two, it does not apply. *Id.* Bank Melli states, and Plaintiffs do not dispute, that at the time of the conduct underlying Plaintiffs' judgments, Bank Melli's assets could not have been seized to satisfy Iranian government debts. MTD at 15. Accordingly, Bank Melli contends, seizing Bank Melli's assets

now to satisfy a judgment based on "conduct that occurred before Congress enacted [the laws] would clearly 'increase [Bank Melli's] liability for past conduct.'" *Id.* at 16. Although this argument holds some initial appeal, the Court finds that it falters under close scrutiny, for two alternative reasons.

1. *Bank Melli's Conduct Post-TRIA*

Bank Melli's argument depends upon a simplified narrative in which the only significant events, for example, in the case of the Bennett Plaintiffs, are: (1) the bombing at Hebrew University, in July 2002; (2) TRIA's enactment, in November 2002; and (3) the Bennett Plaintiffs' default judgment against Iran, in August 2007. Such a narrative enables Bank Melli to argue that, as a statute's retroactivity turns on "when the primary conduct at issue in the suit took place," the primary conduct at issue here is the bombing. See MTD at 16 (citing *Scott* v. *Boos*, 215 F.3d 940, 949 (9th Cir. 2000)). But Bank Melli's narrative omits an additional event of great significance: the freezing of Bank Melli's assets in October 2007 in light of OFAC's findings that, from 2002 to 2006, "Bank Melli . . . provided a range of financial services on behalf of Iran's nuclear and missile industries." See 10/25/07 Fact Sheet. Plaintiffs therefore argue that, because "the illicit conduct underlying the blocking of Bank Melli's property and subjecting such property to execution in satisfaction of judgments against Iran[ ] occurred years *after* TRIA's enactment," Bank Melli should have understood that "its nefarious conduct could and would result in its U.S. property being blocked and executed against pursuant to TRIA." Pls.' Opp'n to MTD at 16.

Bank Melli responds that "later secondary conduct—even if wrongful—does not eliminate a statute's retroactive effect." Bank Melli Br. at 2. In support of this as-

sertion, Bank Melli relies on three cases, *Johnson* v. *United States*, 529 U.S. 694 (2000), *Vartelas* v. *Holder*, 132 S. Ct. 1479 (2012), and *Tyson* v. *Holder*, 670 F.3d 1015 (9th Cir. 2012). See Reply at 11; Bank Melli Br. at 2-3. None apply here.

In *Johnson*, 529 U.S. at 697-698, Congress had enacted a statute authorizing a court to impose an additional term of supervised release if a defendant violated conditions of his initial release; the defendant had been convicted before Congress enacted the statute, but he violated the conditions of his release after Congress enacted the statute. Johnson appealed his sentence, arguing that applying the new statute to him violated the *Ex Post Facto* Clause. *Id.* at 698. The Sixth Circuit found that the application of the statute was not retroactive, because it punished Johnson's violations of the conditions of supervised release, which occurred after the statute was amended. *Id.* at 698-699. The Supreme Court disagreed, concluding that the "postrevocation penalties relate to the original offense," and that "to sentence Johnson to a further term of supervised release under [the statute] would be to apply this section retroactively." *Id.* at 701.

Importantly, the Court's conclusion in *Johnson* was driven by "the serious constitutional questions that would be raised by construing revocation and reimprisonment as punishment for the violation of the conditions of supervised release." *Id.* at 700. The Court noted that conduct violating supervised release need not be criminal and need only be found by a judge under a preponderance of the evidence standard; in addition, where the conduct is criminal, it could form the basis for a separate prosecution, which would trigger double jeopardy concerns. *Id.* It is for those reasons that the Court "attribute[d] postrevocation penalties to the original convic-

tion." *Id.* at 701. None of those reasons are present here: proof beyond a reasonable doubt, double jeopardy, and the myriad of weighty constitutional issues that surround criminal sentencing have no bearing on this civil matter.

Vartelas and *Tyson*, though not criminal cases, are similarly inapposite.[8]

In *Vartelas*, 132 S. Ct. at 1485, a legal permanent resident had pled guilty to conspiracy to make or possess counterfeit securities in 1994, for which he received a short sentence. He traveled regularly thereafter to visit his aging parents in Greece, but in 2003, he was stopped upon his return and an immigration officer classified him as an alien seeking admission under the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), a statute enacted in 1996. *Id.* at 1483, 1485. The Second Circuit rejected Vartelas's argument that IIRIRA operated prospectively. *Id.* at 1486. The Supreme Court disagreed, holding that neither Vartelas's sentence nor the immigration law in effect in 1994 prevented Vartelas from visiting his parents in Greece, and so applying IIRIRA to him attached "'a new disability' to conduct over and done well before the provision's enactment." *Id.* at 1487. As in *Johnson*, the Court's conclusion was based on the principle that it was unfair to attach additional penalties to the original crime. Rejecting the government's argument that "the relevant event" was Vartelas's

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[8] The case law has long recognized a relationship between criminal and immigration cases. See *Bridges* v. *Wixon*, 326 U.S. 135, 154 (1945) ("Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted.").

"post-IIRIRA act of returning to the United States," *id.* at 1488, the Court held that Vartelas's "past misconduct . . . not present travel, is the wrongful activity Congress targeted," *id.* at 1489.

In so holding, the Court drew a sharp distinction between cases in which the subsequent act was illegal and/or dangerous, and those in which the subsequent act was "innocent." See *id.* at 1489-1490. Thus it distinguished Racketeer Influenced and Corrupt Organizations Act (RICO) prosecutions that encompassed pre-enactment conduct, because "those prosecutions depended on criminal activity . . . occurring *after* the provision's effective date," as opposed to IIRIRA, which does not. *Id.* at 1489. And it distinguished *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30 (2006), in which the Court held that an IIRIRA provision, providing that an alien who reenters the country after having been removed can be removed again under the same removal order, could be applied to an alien who returned illegally before IIRIRA's enactment. *Id.* The Court explained that it was an "'alien's choice *to continue his illegal presence . . . after* the effective date of the new la[w],'" and "'not a past act that he is helpless to undo'" that subjected him to the new law. *Id.* (quoting *Fernandez-Vargas*, 548 U.S. at 44). The Court contrasted the alien in *Fernandez-Vargas* with Vartelas, whom it "several times stressed, *engaged in no criminal activity* after IIRIRA's passage." *Id.* (emphasis added). The Court likewise distinguished cases dealing with laws that prevent felons from possessing firearms, laws that prevent persons convicted of sex crimes against minors from working in jobs involving contact with minors, and laws that prevent a person who has been adjudicated as mentally defective from possessing guns; those laws "target a present danger," while

"[t]he act of flying to Greece" did not make Vartelas "hazardous." *Id.*; *id.* at n.7. Deeming Vartelas's travel and return "innocent" acts that "involved no criminal infraction," the Court concluded that applying IIRIRA to bar Vartelas from traveling abroad "rested not on any continuing criminal activity, but on a single crime committed years before IIRIRA's enactment." *Id.* at 1490. Bank Melli cannot argue that its assistance in Iran's nuclear proliferation efforts is either an "innocent act," akin to visiting one's elderly parents in Greece, or something Bank Melli was "helpless to undo." The Court's concerns in *Vartelas* are absent here.

Moreover, *Tyson* is analogous to *Vartelas*. In *Tyson*, 670 F.3d at 1017, a lawful permanent resident was convicted in 1980 of importing heroin, following her consent to a bench trial with stipulated facts and testimony. Twenty-four years later, she left the United States and was denied re-entry. *Id.* She sought a waiver of inadmissibility under former §212(c), which had been repealed in 1996. *Id.* In so doing, she relied on *INS* v. *St. Cyr.*, 533 U.S. 289 (2001), in which the Supreme Court had held that §212(c) relief remained available to aliens who entered plea bargains with the expectation that they would remain eligible for a waiver. *Id.* The Ninth Circuit concluded that Tyson was entitled to invoke *St. Cyr.* *Id.* at 1020. The court explained that applying the repeal of §212(c) to Tyson would impose "an impermissible retroactive effect on aliens . . . who in reliance on the possibility of discretionary relief, agreed to a stipulated facts trial." *Id.* at 1022.

Tyson turned on a lawful permanent resident's settled expectations about the impact of a criminal conviction. See *id.* at 1021-1022. In light of *St. Cyr.*, it is no surprise that the court found it unfair to prevent Tyson from ap-

plying for a §212(c) waiver. And, consistent with *Vartelas*, it is no surprise that the court would not wish to add to the consequences of Tyson's original conviction by denying her re-entry based only on the innocuous act of travel. See *id.* at 1021 (identifying the only two consequences of Tyson's stipulated facts trial in 1980).

All three of Bank Melli's cases therefore involve, and reject, attempts to attach extra penalties to an individual's original criminal conviction based on subsequent innocuous or non-criminal behavior. That is not this case. This case involves, instead: (1) terrorist act(s) by the government of Iran; (2) the enactment of TRIA, which did not make Bank Melli's assets subject to attachment for Iranian debts, but should have put Bank Melli on notice of that possibility; and (3) default judgment(s) against Iran; *followed by* (4) Bank Melli's support for Iran's nuclear and missile industries; and (5) this government's resulting decision to freeze Bank Melli's assets. There is no original criminal conviction against Bank Melli. Bank Melli's assets are subject to attachment in this case because of Bank Melli's own actions, post-TRIA, in supporting Iran's nuclear and missile industries. Those actions are not innocuous or harmless. Accordingly, the Court rejects Bank Melli's retroactivity argument.

2. *Post-Judgment Enforcement Action*

In the alternative, Bank Melli's retroactivity argument fails because Bank Melli misconstrues what TRIA does. Bank Melli argues that Plaintiffs seek to use TRIA to make it liable for something for which it was not liable pre-TRIA. MTD at 15. In both motion hearings and in its supplemental briefing, Bank Melli has maintained that liability and collectability are interchangeable concepts; that is, that collecting money from Bank Melli in connection with Iran's actions is the equivalent of holding Bank

Melli liable for Iran's actions. See, *e.g.*, Bank Melli Br. at 3-4 (citing snippets from various cases using terms like "liability for a money judgment"). The Court disagrees. This case is not about holding Bank Melli liable for Iran's actions, it is simply about collecting money from Iran, wherever that money can be found.[9]

Neither TRIA nor section 1610(g) speak of shifting liability from a terrorist party to its instrumentality. Both speak of attaching an instrumentality's assets in aid of executing a judgment against a terrorist party. See section 1610(g) (stating that "the property of an . . . instrumentality of such a state . . . is subject to attachment in aid of execution, and execution, upon that judgment"); TRIA (stating that "(. . . the blocked assets of any . . . instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution in order to satisfy such judgment"). These laws "merely provide[ ] an exception to foreign sovereign immunity from execution for assets of . . . instrumentalities of foreign sovereign terrorist parties in the *post-judgment* context of execution and attachment proceedings to satisfy judgments against such foreign sovereign terrorist parties 'for which there was original jurisdiction under the FSIA.'" Pls.' Opp'n to MTD at 13 (citing *Bennett, et al.*, v. *Islamic Rep. of Iran, et al.,* No. 11-80065, 2011 WL 3157089, at *5 (N.D. Cal. July 26, 2011)).

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[9] By way of analogy, it is as if, after Plaintiffs had obtained their default judgments against Iran, Iran had gone out and purchased Bank Melli. Like shares in Bank Melli, the law recognizes the Blocked Assets as assets of Iran, to which Iran's judgment creditors are entitled. Cf. Pls. Br. at 3-4 ("Iran's *liability* for the amounts owed under the Judgments remains the same; the scope of the assets subject to execution in satisfaction of the Judgments, however, has increased.").

Bank Melli's argument to the contrary presupposes that *Bancec*, 462 U.S. at 626-627, which held that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such," stands for an immutable principle of law. But Congress created the presumption of separateness in the first place, see *Bancec*, 462 U.S. at 627 (in enacting FSIA, "Congress clearly expressed its intention that duly created instrumentalities of a foreign state are to be accorded a presumption of independent status"), and it had the power to revoke that presumption. As discussed above, Congress revoked that presumption in this context through TRIA and section 1610(g). See *Estate of Heiser* v. *Islamic Rep. of Iran*, 807 F. Supp. 2d 9, 15 (D.D.C. 2011) (section 1610(g) abrogates *Bancec* in the context of terrorism-related judgments); *Weinstein*, 609 F.3d at 51 (TRIA overrides presumption of separateness in *Bancec*).

Thus in *Weinstein*, 609 F.3d at 50, where (as here) plaintiffs sought to recover assets from Bank Melli to satisfy a judgment against Iran, the Second Circuit rejected Bank Melli's argument[10] that the court should "read the TRIA as applying, prospectively, only to judgments rendered final after the TRIA's enactment, and thus not to" judgments pre-dating TRIA. The Second Circuit explained that "[t]he effect of the TRIA . . . was simply to render a judgment more readily enforceable against a related third party. The judgment itself was in no way

[10] As counsel for Bank Melli candidly conceded at the motion hearing, Bank Melli did not make a retroactivity argument in *Weinstein*, and so the Second Circuit did not squarely address that issue. Nonetheless, Bank Melli argued there that TRIA violated the separation of powers doctrine, and, in connection with that argument, that TRIA should only be applied prospectively. *Id.*

tampered with." *Id.* at 51. Here, too, the Court is not altering the judgment against Iran in order to hold Bank Melli liable; it is allowing Iran's judgment creditors to recover from Iran's instrumentality because that instrumentality is no longer presumed to be separate from Iran.[11] The Court therefore also rejects Bank Melli's retroactivity argument because TRIA relates to collectability, not liability.

C. "Assets of" Bank Melli

Bank Melli also urges dismissal because, it argues, it does not actually own the Blocked Assets. See MTD at 18-20. For TRIA or section 1610(g) to apply, the funds at issue must be "assets of" or "property of" Bank Melli. See TRIA; section 1610(g)(1); *Calderon-Cardona* v. *JPMorgan Chase Bank, N.A.*, 867 F. Supp. 2d 389, 400 (S.D.N.Y. 2011) ("For the accounts at respondent banks to be attachable, then, North Korea or one of its agencies or instrumentalities must actually *own* it."). In the Complaint, however, Plaintiffs allege only that the Blocked Assets are "due and owing by contract to Bank Melli," not that Bank Melli "owns" them. See Compl. ¶16.

No matter. As Plaintiffs note in their briefing, Federal Rule of Civil Procedure 69 provides that enforcement proceedings in federal courts are governed by the law of

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[11] That this case is not about Bank Melli's liability is further supported by the case law on joinder (discussed below). Where plaintiffs have secured default judgments against Iran, its instrumentalities need not even be served with post-judgment motions, which suggests that collecting assets from those instrumentalities is not about the instrumentalities' liability. See *Peterson* v. *Islamic Rep. of Iran*, 627 F.3d 1117, 1130 (9th Cir. 2010) ("[s]ervice of post-judgment motions is not required"); *Estate of Heiser*, 807 F. Supp. 2d at 23 ("Congress did not [intend] to require service of garnishment writs on agencies or instrumentalities of foreign states responsible for acts of state-sponsored terrorism").

the state in which the Court sits, although a federal statute governs if applicable. Pls.' Opp'n to MTD at 19; Fed. R. Civ. P. 69(a)(1). The Ninth Circuit explained in *Peterson*, 627 F.3d at 1130, that "[t]he FSIA does not provide methods for the enforcement of judgments against foreign states, only that those judgments may not be enforced by resort to immune property . . . . Therefore, California law on the enforcement of judgments applies to this suit insofar as it does not conflict with the FSIA."[12]

California law treats the Blocked Assets as subject to execution. In California, all property of a judgment debtor, regardless of the type of interest, is subject to enforcement of a money judgment. See Cal. Civ. Proc. Code §§ 680.310 ("'Property' includes real and personal

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[12] Neither party has argued that federal law conflicts with state law in this case, or preempts it, as some courts have concluded. See, *e.g.*, *Hausler* v. *JPMorgan Chase Bank*, 845 F. Supp. 2d 553, 563 (S.D.N.Y. 2012) ("the use of state property law to dictate the range of assets that are executable under the TRIA would generate absurd results"); cf. *Calderon-Cardona*, 867 F. Supp. 2d at 399-405 (applying state law "because [TRIA] provides no guidance for determining which blocked assets are 'of that terrorist party,'" but discussing federal law "for the sake of argument"). Bank Melli's argument on this subject is based, instead, on language from a variety of cases, and from a couple of amicus briefs, supporting the uncontroversial point that having an interest in property is not necessarily the same thing as owning property. See MTD at 19-20. Nonetheless, the Court is aware of no federal law that would alter its conclusion. Certainly, Bank Melli does not cite to any authority, federal or otherwise, holding that a party's 100% beneficial interest in an asset, or a vested right to receive a sum certain that has been reduced to cash, does not constitute an "asset of" that party. Moreover, the cases dealing with entitlement to mid-stream electronic fund transfers are distinguishable on their facts. See, *e.g.*, *Estate of Heiser* v. *Islamic Rep. of Iran*, No. 00-2329, 01-2104, 2012 WL 3776705, at *16 (D.D.C. Aug. 31, 2012) (describing "Iran's indefinite, ephemeral interest" in blocked EFTs).

property and any interest therein."), 695.010(a) ("Except as otherwise provided by law, all property of the judgment debtor is subject to enforcement of a money judgment."), 699.710 (all property subject to enforcement of money judgment also subject to levy). This includes property of a judgment debtor that is held by a third party. See *id.* at § 708.210 ("If a third person has possession or control of property in which the judgment debtor has an interest or is indebted to the judgment debtor, the judgment creditor may bring an action against the third person"). Thus, in *Peterson*, 627 F.3d at 1130-1131 (quoting Cal. Civ. Proc. Code § 708.510(a)), the court noted that "California enforcement law authorizes a court to 'order the judgment debtor to assign to the judgment creditor . . . all or part of a right to payment due or to become due, whether or not the right is conditioned on future developments.'"

Here, there is no dispute that Bank Melli has a 100% beneficial interest in the Blocked Assets, and that the Blocked Assets are already "due and owing" to Bank Melli from Visa. See Compl. ¶ 16. Those funds—in an amount certain—have been deposited into the Court's registry. See dkts. 88-89. Visa has disclaimed any beneficial ownership interest in the Blocked Assets, explaining that it only continued to hold them because the assets were blocked. See Compl. ¶ 18; Pls.' Opp'n to MTD at 21 ("[B]ut for the fact that such funds are blocked, Bank Melli would be entitled to payment of those funds today."). Under such circumstances, the Court concludes that the Blocked Assets are "assets of" or "property of" Bank Melli. The Court therefore rejects this argument for dismissal.

D. Rule 19[13]

Finally, Bank Melli argues that it is a required party that cannot be joined due to its sovereign immunity. MTD at 20-22. Bank Melli's argument relies almost entirely on *Republic of Philippines* v. *Pimentel*, 553 U.S.

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[13] Rule 19 provides, in part:

(a) *Persons Required to Be Joined if Feasible.*

(1) *Required Party.* A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:

(A) in that person's absence, the court cannot accord complete relief among existing parties; or

(B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:

(i) as a practical matter impair or impede the person's ability to protect the interest; or

(ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest . . . .

(b) *When Joinder Is Not Feasible.* If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:

(1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;

(2) the extent to which any prejudice could be lessened or avoided by:

(A) protective provisions in the judgment;

(B) shaping the relief; or

(C) other measures;

(3) whether a judgment rendered in the person's absence could be adequate; and

(4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

Fed. R. Civ. P. 19(a)-(b).

851 (2008). *Pimentel*, 553 U.S. at 854-858, involved an interpleader action in which human rights victims who had obtained a judgment against Ferdinand Marcos sought to attach property held by a bank. Two of the entities in the suit, the Republic of the Philippines and the Philippine Presidential Commission on Good Governance ("the Commission"), invoked sovereign immunity, and were dismissed; however, the district court allowed the action to proceed. *Id.* The Ninth Circuit held that dismissal of the interpleader suit was not necessary because, although the Philippines and the Commission were "necessary parties" under Rule 19, their claim had so little merit that the interpleader action could proceed without them. *Id.* at 860. The Supreme Court reversed, explaining that the Court of Appeals had not given the necessary weight to the absent entities' assertion of sovereign immunity: "where sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign." *Id.* at 864-867. Bank Melli argues that, as in *Pimentel*, it is a foreign sovereign not amenable to suit, and so the Court must dismiss. See MTD at 21-22.

Bank Melli assumes that it is a required party. It is not. Bank Melli is a mere instrumentality of Iran, and as such its presence is not central to this case. That conclusion is supported by *Estate of Heiser*, 807 F. Supp. 2d at 12, in which victims of state-sponsored terrorism sought to direct Sprint to turn over funds owed to the Telecommunication Infrastructure Company of Iran ("TIC"), an instrumentality of Iran. Sprint argued that it should be permitted to interplead TIC into the proceeding. *Id.* at 23. The court explained that "Congress did not [intend] to require service of garnishment writs on agencies or in-

strumentalities of foreign states responsible for acts of state-sponsored terrorism" and that, accordingly, "TIC [was] not a necessary party to [the] action under applicable law."[14] *Id*; cf. *Peterson*, 627 F.3d at 1130 (under FSIA, plaintiff need not serve post-judgment motions on foreign state). Here, the Blocked Assets are owed to an instrumentality of judgment debtor Iran; such property is therefore stripped of immunity and subject to execution *as a matter of law*. See TRIA; section 1610(g). Bank Melli has failed to demonstrate either that "in [its] absence, the court cannot accord complete relief among existing parties" or that "disposing of the action in [its] absence may (i) . . . impair or impede [its] ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations." See Fed. R. Civ. P. 19(a).

This case is therefore distinguishable from *Pimentel*, where there was no dispute that the Philippines and the Commission were required parties. See 553 U.S. at 863 ("[t]he application of subdivision (a) of Rule 19 is not contested"). The dispute in *Pimentel* centered on Rule 19(b), "whether the action may proceed without the Republic and the Commission, given that the Rule requires them to be parties." *Id*. at 864. Because this Court finds that Bank Melli is not a required party, it need not reach Rule 19(b), and the question of whether Bank Melli can be joined. The Court notes, however, that, unlike in *Pimentel*, 553 U.S. at 865, where "[i]mmunity . . . [was] uncontested," here there are two applicable statutory exceptions to immunity, which alleviate any concerns about

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[14] The court added that Sprint had also not established a risk of being subjected to double liability over the funds, but that was not the basis for its conclusion that TIC was not a necessary party. See *id*. at 23-24.

prejudice to Bank Melli or about the adequacy of a judgment rendered in Bank Melli's absence. See TRIA; section 1610(g); see also *Weinstein*, 609 F.3d at 50 ("[W]e find it 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."). Bank Melli's response, that the exceptions to immunity pertain to the property, and not to Bank Melli, see Bank Melli Br. at 7, only reinforces the Court's conclusion that the statutory scheme is not about Bank Melli's liability, but about Plaintiffs' ability to collect from Iran. This case could proceed without Bank Melli.

Because Bank Melli is not a required party that cannot be joined under Rule 19, the Court rejects this argument for dismissal as well.

III. CONCLUSION

For the foregoing reasons, the Court DENIES Bank Melli's Motion to Dismiss. The Court further finds that the standards of 28 U.S.C. § 1292(b) have been met,[15] and CERTIFIES this Order for interlocutory appeal.

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[15] Specifically, the Court finds that the issues raised by Bank Melli in favor of dismissal are controlling issues of law, and could "materially affect the outcome of the litigation in the district court." *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1026 (9th Cir. 1982). If Bank Melli is correct that *Bancec* applies, or that the statutes are impermissibly retroactive, or that Plaintiffs have not adequately alleged that the assets are Bank Melli's property, or that it is a required party that cannot be joined, Bank Melli is entitled to dismissal. Moreover, in light of the paucity of authority on these issues, particularly as to TRIA, there is substantial ground for difference of opinion. See 28 U.S.C. § 1292(b); *Levine* v. *United Healthcare Corp.*, 285 F. Supp. 2d 552, 560 (N.J. 2003) ("[T]he issue on this motion is whether there

IT IS SO ORDERED.

Dated: February 28, 2013

CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE

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is substantial ground for debate on this issue and this Court finds that the question involved here is admittedly complicated and sufficiently close that reasonable minds could disagree with this Court's conclusion."). Finally, "an immediate appeal from the order may materially advance the ultimate termination of the litigation," 28 U.S.C. § 1292(b), as it "would conserve judicial resources and spare the parties from possibly needless expense if it should turn out that this Court's rulings are reversed," *APCC Servs.* v. *Sprint*, 297 F. Supp. 2d 90, 1000 (D.D.C. 2003).

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DOCKET NOS. 13-15442, 13-16100

MICHAEL BENNETT; LINDA BENNETT,
AS CO-ADMINISTRATORS OF THE ESTATE OF
MARIA ANN BENNETT,

Plaintiffs-Appellees,

v.

THE ISLAMIC REPUBLIC OF IRAN,

Defendant,

v.

VISA INC.; FRANKLIN RESOURCES, INC.,

Defendants-third-party-plaintiffs–Appellees,

v.

GREENBERG AND ACOSTA JUDGMENT CREDITORS,

Plaintiff-third-party-defendant–Appellee,

HEISER JUDGMENT CREDITORS,

Plaintiff-fourth-party-defendant–Appellee,

v.

BANK MELLI,

Plaintiff-third-party-defendant–Appellant.

ORDER

July 5, 2016

Appeals from the United States District Court
for the Northern District of California, San Francisco

Before: THOMAS, Chief Judge, GRABER, Circuit Judge, and BENSON,* Senior District Judge.

Bank Melli's motion to stay the mandate pending the filing of a petition for a writ of certiorari is GRANTED. Fed. R. App. P. 41(d)(2). The mandate is ordered stayed for ninety days from the filing date of this order pending the filing of a petition for writ of certiorari in the United States Supreme Court. In the event that the petition for writ of certiorari is timely filed, the stay shall continue until final disposition by the Supreme Court.

* The Honorable Dee V. Benson, Senior United States District Judge for the District of Utah, sitting by designation.

APPENDIX F

RELEVANT STATUTORY PROVISIONS

1. The Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891, as amended and codified at 28 U.S.C. §§ 1602 *et seq.*, provides:

§ 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

§ 1603. Definitions

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

§ 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a

foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

(7) Repealed.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: *Provided*, That—

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may in-

clude costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in section 31301 of title 46. Such action shall be brought, heard, and determined in accordance with the provisions of chapter 313 of title 46 and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

(e), (f) Repealed.

(g) LIMITATION ON DISCOVERY.—

(1) IN GENERAL.—(A) Subject to paragraph (2), if an action is filed that would otherwise be barred by section 1604, but for section 1605A, the court, upon request of the Attorney General, shall stay any request, demand, or order for discovery on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action, until such time as

the Attorney General advises the court that such request, demand, or order will no longer so interfere.

(B) A stay under this paragraph shall be in effect during the 12-month period beginning on the date on which the court issues the order to stay discovery. The court shall renew the order to stay discovery for additional 12-month periods upon motion by the United States if the Attorney General certifies that discovery would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action.

(2) SUNSET.—(A) Subject to subparagraph (B), no stay shall be granted or continued in effect under paragraph (1) after the date that is 10 years after the date on which the incident that gave rise to the cause of action occurred.

(B) After the period referred to in subparagraph (A), the court, upon request of the Attorney General, may stay any request, demand, or order for discovery on the United States that the court finds a substantial likelihood would—

(i) create a serious threat of death or serious bodily injury to any person;

(ii) adversely affect the ability of the United States to work in cooperation with foreign and international law enforcement agencies in investigating violations of United States law; or

(iii) obstruct the criminal case related to the incident that gave rise to the cause of action or undermine the potential for a conviction in such case.

(3) EVALUATION OF EVIDENCE.—The court's evaluation of any request for a stay under this subsection

filed by the Attorney General shall be conducted ex parte and in camera.

(4) BAR ON MOTIONS TO DISMISS.—A stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

(5) CONSTRUCTION.—Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States.

§ 1605A. Terrorism exception to the jurisdictional immunity of a foreign state

(a) IN GENERAL.—

(1) NO IMMUNITY.—A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

(2) CLAIM HEARD.—The court shall hear a claim under this section if—

(A)(i)(I) the foreign state was designated as a state sponsor of terrorism at the time the act described in paragraph (1) occurred, or was so designated as a result of such act, and, subject to subclause (II), either remains so designated when the claim is filed under this section or was so designat-

ed within the 6-month period before the claim is filed under this section; or

(II) in the case of an action that is refiled under this section by reason of section 1083(c)(2)(A) of the National Defense Authorization Act for Fiscal Year 2008 or is filed under this section by reason of section 1083(c)(3) of that Act, the foreign state was designated as a state sponsor of terrorism when the original action or the related action under section 1605(a)(7) (as in effect before the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) was filed;

(ii) the claimant or the victim was, at the time the act described in paragraph (1) occurred—

(I) a national of the United States;

(II) a member of the armed forces; or

(III) otherwise an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment; and

(iii) in a case in which the act occurred in the foreign state against which the claim has been brought, the claimant has afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration; or

(B) the act described in paragraph (1) is related to Case Number 1:00CV03110 (EGS) in the United States District Court for the District of Columbia.

(b) LIMITATIONS.—An action may be brought or maintained under this section if the action is commenced, or a related action was commenced under section 1605(a)(7) (before the date of the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) not later than the latter of—

(1) 10 years after April 24, 1996; or

(2) 10 years after the date on which the cause of action arose.

(c) PRIVATE RIGHT OF ACTION.—A foreign state that is or was a state sponsor of terrorism as described in subsection (a)(2)(A)(i), and any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, shall be liable to—

(1) a national of the United States,

(2) a member of the armed forces,

(3) an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment, or

(4) the legal representative of a person described in paragraph (1), (2), or (3),

for personal injury or death caused by acts described in subsection (a)(1) of that foreign state, or of an official, employee, or agent of that foreign state, for which the courts of the United States may maintain jurisdiction under this section for money damages. In any such action, damages may include economic damages, solatium, pain and suffering, and punitive damages. In any such action,

a foreign state shall be vicariously liable for the acts of its officials, employees, or agents.

(d) ADDITIONAL DAMAGES.—After an action has been brought under subsection (c), actions may also be brought for reasonably foreseeable property loss, whether insured or uninsured, third party liability, and loss claims under life and property insurance policies, by reason of the same acts on which the action under subsection (c) is based.

(e) SPECIAL MASTERS.—

(1) IN GENERAL.—The courts of the United States may appoint special masters to hear damage claims brought under this section.

(2) TRANSFER OF FUNDS.—The Attorney General shall transfer, from funds available for the program under section 1404C of the Victims of Crime Act of 1984 (42 U.S.C. 10603c), to the Administrator of the United States district court in which any case is pending which has been brought or maintained under this section such funds as may be required to cover the costs of special masters appointed under paragraph (1). Any amount paid in compensation to any such special master shall constitute an item of court costs.

(f) APPEAL.—In an action brought under this section, appeals from orders not conclusively ending the litigation may only be taken pursuant to section 1292(b) of this title.

(g) PROPERTY DISPOSITION.—

(1) IN GENERAL.—In every action filed in a United States district court in which jurisdiction is alleged under this section, the filing of a notice of pending action pursuant to this section, to which is attached a copy of the complaint filed in the action, shall have the

effect of establishing a lien of lis pendens upon any real property or tangible personal property that is—

(A) subject to attachment in aid of execution, or execution, under section 1610;

(B) located within that judicial district; and

(C) titled in the name of any defendant, or titled in the name of any entity controlled by any defendant if such notice contains a statement listing such controlled entity.

(2) NOTICE.—A notice of pending action pursuant to this section shall be filed by the clerk of the district court in the same manner as any pending action and shall be indexed by listing as defendants all named defendants and all entities listed as controlled by any defendant.

(3) ENFORCEABILITY.—Liens established by reason of this subsection shall be enforceable as provided in chapter 111 of this title.

(h) DEFINITIONS.—For purposes of this section—

(1) the term "aircraft sabotage" has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation;

(2) the term "hostage taking" has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages;

(3) the term "material support or resources" has the meaning given that term in section 2339A of title 18;

(4) the term "armed forces" has the meaning given that term in section 101 of title 10;

(5) the term "national of the United States" has the meaning given that term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22));

(6) the term "state sponsor of terrorism" means a country the government of which the Secretary of State has determined, for purposes of section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)), section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371), section 40 of the Arms Export Control Act (22 U.S.C. 2780), or any other provision of law, is a government that has repeatedly provided support for acts of international terrorism; and

(7) the terms "torture" and "extrajudicial killing" have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991 (28 U.S.C. 1350 note).

§ 1606. Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

§ 1607. Counterclaims

In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim—

(a) for which a foreign state would not be entitled to immunity under section 1605 or 1605A of this chapter had such claim been brought in a separate action against the foreign state; or

(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

§ 1608. Service; time to answer; default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to

the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state—

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made—

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant es-

tablishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

§ 1609. Immunity from attachment and execution of property of a foreign state

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the 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.

§ 1610. Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property—

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: *Provided*, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment, or

(6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement, or

(7) the judgment 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), regardless of whether the property is or was involved with the act upon which the claim is based.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a) (2), (3), or (5) or 1605(b) of this chapter, regardless of whether the property is or was involved in the act upon which the claim is based, or

(3) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605A of this chapter or section 1605(a)(7) of this chapter (as such section was in effect on January 27, 2008), regardless of whether the property is or was involved in the act upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if—

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwith-

standing any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

(e) The vessels of a foreign state shall not be immune from arrest in rem, interlocutory sale, and execution in actions brought to foreclose a preferred mortgage as provided in section 1605(d).

(f)(1)(A) Notwithstanding any other provision of law, including but not limited to section 208(f) of the Foreign Missions Act (22 U.S.C. 4308(f)), and except as provided in subparagraph (B), any property with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the Trading with the Enemy Act (50 U.S.C. App. 5(b)), section 620(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2370(a)), sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701-1702), or any other proclamation, order, regulation, or license issued pursuant thereto, shall be subject to execution or attachment in aid of execution of 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) (as in effect before the enactment of section 1605A) or section 1605A.

(B) Subparagraph (A) shall not apply if, at the time the property is expropriated or seized by the foreign state, the property has been held in title by a natural person or, if held in trust, has been held for the benefit of a natural person or persons.

(2)(A) At the request of any party in whose favor a judgment has been issued with respect to a claim for which the foreign state is not immune under section 1605(a)(7) (as in effect before the enactment of section 1605A) or section 1605A, the Secretary of the Treasury and the Secretary of State should make every effort to fully, promptly, and effectively assist any judgment creditor or any court that has issued any such judgment in identifying, locating, and executing against the property of that foreign state or any agency or instrumentality of such state.

(B) In providing such assistance, the Secretaries—

(i) may provide such information to the court under seal; and

(ii) should make every effort to provide the information in a manner sufficient to allow the court to direct the United States Marshall's office to promptly and effectively execute against that property.

(3) WAIVER.—The President may waive any provision of paragraph (1) in the interest of national security.

(g) PROPERTY IN CERTAIN ACTIONS.—

(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—

(A) the level of economic control over the property by the government of the foreign state;

(B) whether the profits of the property go to that government;

(C) the degree to which officials of that government manage the property or otherwise control its daily affairs;

(D) whether that government is the sole beneficiary in interest of the property; or

(E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

(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 the Trading With the Enemy Act or the International Emergency Economic Powers Act.

(3) THIRD-PARTY JOINT PROPERTY HOLDERS.—Nothing in this subsection shall be construed to supersede the authority of a court to prevent appropriately the impairment of an interest held by a person who is not liable in the action giving rise to a judgment in property subject to attachment in aid of execution, or execution, upon such judgment.

§ 1611. Certain types of property immune from execution

(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the

privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if—

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver; or

(2) the property is, or is intended to be, used in connection with a military activity and

(A) is of a military character, or

(B) is under the control of a military authority or defense agency.

(c) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution in an action brought under section 302 of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 to the extent that the property is a facility or installation used by an accredited diplomatic mission for official purposes.

2. Section 201 of the Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, 116 Stat. 2322, 2337, as amended and reproduced at 28 U.S.C. § 1610 note, provides:

(a) IN GENERAL.—Notwithstanding any other provision of law, and except as provided in subsection (b) [of this note], 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 section 1605A or 1605(a)(7) (as such section was in effect on January 27, 2008) of title 28, United States Code, 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.

(b) PRESIDENTIAL WAIVER.—

(1) IN GENERAL.—Subject to paragraph (2), upon determining on an asset-by-asset basis that a waiver is necessary in the national security interest, the President may waive the requirements of subsection (a) [of this note] in connection with (and prior to the enforcement of) any judicial order directing attachment in aid of execution or execution against any property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations.

(2) EXCEPTION.—A waiver under this subsection shall not apply to—

(A) property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations that has been used by the United States for any nondiplomatic purpose (in-

cluding use as rental property), or the proceeds of such use; or

(B) the proceeds of any sale or transfer for value to a third party of any asset subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations.

(d) DEFINITIONS.—In this section [this note] the following definitions shall apply:

(1) ACT OF TERRORISM.—The term "act of terrorism" means—

(A) any act or event certified under section 102(1) [Pub. L. 107-297, Title I, § 102(1), Nov. 26, 2002, 116 Stat. 2323, which is set out in a note under 15 U.S.C.A. § 6701]; or

(B) to the extent not covered by subparagraph (A), any terrorist activity (as defined in section 212(a)(3)(B)(iii) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(B)(iii))).

(2) BLOCKED ASSET.—The term "blocked asset" means—

(A) any asset seized or frozen by the United States under section 5(b) of the Trading With the Enemy Act (50 U.S.C. App. 5(b)) or under sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701; 1702); and

(B) does not include property that—

(i) is subject to a license issued by the United States Government for final payment, transfer, or disposition by or to a person subject to the jurisdiction of the United States in connection with a transaction for which the issuance of such license has been specifically required by statute

other than the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) or the United Nations Participation Act of 1945 (22 U.S.C. 287 *et seq.*); or

(ii) in the case of property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations, or that enjoys equivalent privileges and immunities under the law of the United States, is being used exclusively for diplomatic or consular purposes.

(3) CERTAIN PROPERTY.—The term "property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations" and the term "asset subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations" mean any property or asset, respectively, the attachment in aid of execution or execution of which would result in a violation of an obligation of the United States under the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations, as the case may be.

(4) TERRORIST PARTY.—The term "terrorist party" means a terrorist, a terrorist organization (as defined in section 212(a)(3)(B)(vi) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(B)(vi))), or a foreign state designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371).