No. 16-334

IN THE
Supreme Court of the United States

BANK MELLI,

Petitioner,

v.

MICHAEL BENNETT, *et al.*,

Respondents.

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

SUPPLEMENTAL BRIEF FOR RESPONDENTS

JAMES L. BERNARD
Counsel of Record
CURTIS C. MECHLING
PATRICK N. PETROCELLI
STROOCK & STROOCK & LAVAN LLP
180 Maiden Lane
New York, NY 10038
(212) 806-5400
jbernard@stroock.com

Counsel for Greenbaum and Acosta Respondents

MATTHEW D. MCGILL
MICHAEL R. HUSTON
LOCHLAN F. SHELFER
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Bennett Respondents

THOMAS FORTUNE FAY
FAY LAW GROUP, P.A.
777 6th Street N.W., Suite 410
Washington, D.C. 20001
(202) 602-4100

JANE CAROL NORMAN
BOND & NORMAN LAW, PC
777 6th Street N.W., Suite 410
Washington, D.C. 20001
(202) 602-4100

Counsel for Bennett Respondents

DALE K. CATHELL
DLA Piper LLP (US)
6225 Smith Avenue
Baltimore, MD 21209
(410) 580-3000

COURTNEY GILLIGAN SALESKI
DLA Piper LLP (US)
500 Eighth Street, N.W.
Washington, D.C. 20004
(202) 799-4000

Counsel for Heiser Respondents

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SUPPLEMENTAL BRIEF FOR RESPONDENTS

Respondents respectfully submit this supplemental brief pursuant to this Court's Rule 15.8 to respond to the invited brief of the United States.

This petition should not be held for *Rubin* v. *Islamic Republic of Iran*, No. 16-534, as suggested by the United States. Instead, this petition should be denied now. Even if this Court is inclined to review whether 28 U.S.C. § 1610(g)(1) is a freestanding exception to a foreign sovereign's immunity, respondents' judgment here from the Ninth Circuit is supported by a fully independent ground—the Terrorism Risk Insurance Act of 2002 ("TRIA"), Pub. L. No. 107-297, § 201(a), 116 Stat. 2337 (28 U.S.C. § 1610 (note)), *see* Pet App. 10a–12a—that is not worthy of review, as the United States agrees. *See* Br. of United States 19–22. In fact, respondents' judgment also is supported by yet-another ground that the Ninth Circuit did not have occasion to reach—the commercial-activity exception to foreign sovereign immunity in 28 U.S.C. § 1610(b)(3)—as Judge Benson described in his concurrence. *See* Pet. App. 30a.

The independent bases for affirmance, combined with the interlocutory posture of this case, make it inappropriate to hold this petition with a view to granting it, vacating, and remanding after *Rubin* is decided. Here, the Ninth Circuit's alternative holding under TRIA means that any decision in *Rubin* would not affect the Ninth Circuit's judgment affirming the denial of Bank Melli's motion to dismiss. Thus, vacatur of that judgment—the "V" in "GVR"—would not be proper even if *Rubin* were decided in favor of Iran and

Bank Melli. As the Court has explained, a GVR is "potentially appropriate" only where there is a "reasonable probability" that reconsideration of an issue would "determine the ultimate outcome of the litigation." *Lawrence ex rel. Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996). The Ninth Circuit's TRIA holding forecloses any such "probability" here. Moreover, the interlocutory posture of the case means that the lower courts will be able to apply any ruling from this Court in *Rubin* without the necessity of a GVR. Holding this petition thus would do nothing except impose yet more delay on respondents' efforts to collect on their damage awards won as victims of Iranian-sponsored terrorism. And respondents have already waited decades for justice. Those "equities of the case" make a GVR here "inappropriate." *Id.* at 168. The petition should be denied—not held pending *Rubin*.

In the alternative, this Court should grant review of the question presented concerning Section 1610(g)(1) in *both* this petition and *Rubin*. Respondents here, as terrorism-related judgment-holders who will continue a multi-year effort to locate and attach Iran's assets, have a significant interest in the outcome of that question—as significant as the petitioners in *Rubin*. If this Court is inclined to review Section 1610(g)(1) and is unwilling to deny this petition now, then respondents deserve an opportunity to be heard on the merits, rather than held on the sidelines.

I. THE PETITION SHOULD BE DENIED

A. The United States Agrees That Bank Melli's Second Question Presented Does Not Warrant This Court's Review

The United States correctly explains why the second question presented in the petition—which, as the

United States notes, is really two questions—is not worthy of review. *See* Br. of United States 19–22. The purported splits claimed by petitioner are either artificial or lack practical importance.

First, the Ninth Circuit did not disagree with any other court about whether, in an attachment action by terrorism-related judgment-holders like respondents, TRIA and Section 1610(g)(1) require that the assets be owned by the terrorist party or its instrumentality. *See* Pet. App. 22a ("Like most courts, we look to state law to determine the ownership of assets in this context."), 23a (under California's definition of "Property," the assets here are "property of Bank Melli"). "There is no clear split among the courts of appeals on this issue." Br. of United States 20. Instead Bank Melli merely presents a factbound argument that the Ninth Circuit misapplied property law when it concluded that the assets seized by respondents are owned by Bank Melli. *Ibid.*

Second, although the circuits have disagreed about whether state or federal law determines the question of ownership of the property, "[t]hat conflict does not make any practical difference … unless state property law and federal common law lead to different results, and they often will not." Br. of United States 21. *See* Stephen M. Shapiro et al., *Supreme Court Practice* 249 (10th ed. 2013) ("If the resolution of a clear conflict is irrelevant to the ultimate outcome of the case before the Court, certiorari may be denied." (citing *Sommerville* v. *United States*, 376 U.S. 909 (1964)). The question makes no difference here: The Ninth Circuit correctly concluded that Bank Melli owns the assets under either state or federal law. Pet. App. 23a ("even if federal law should govern this question, *see Heiser* v. *Islamic Republic of Iran*, 735 F.3d

934, 940 (D.C. Cir. 2013) … , Bank Melli would not succeed" because "[f]ederal law and California law are aligned"). The United States concurs. Br. of United States 22 ("the right of Bank Melli to receive payment from Visa/Franklin" is "an asset Bank Melli almost surely owns under any relevant law"). The funds here are due directly to Iran's instrumentality Bank Melli and so are quite unlike the funds in *Heiser*, which were owned by foreign nationals rather than the foreign state itself, *see* 735 F.3d at 936.

B. This Court Should Not Hold Bank Melli's Petition For *Rubin*, But Should Deny Certiorari Now

This Court should also now deny review of Bank Melli's first question presented; it should not hold the case pending disposition of *Rubin* as suggested by the United States. Even if this Court is inclined to review whether Section 1610(g)(1) is a freestanding exception to immunity, then it should grant the first question presented in *Rubin* but should still deny this petition.

1. This Court generally does not grant review of a question when there is an independent ground for the judgment below. *See*, *e.g.*, *The Monrosa* v. *Carbon Black Export, Inc*., 359 U.S. 180, 184 (1959) (dismissing certiorari as improvidently granted because of alternative grounds for affirming the court of appeals); *Supreme Court Practice* 248–49 (discussing cases). Here, respondents' judgment from the Ninth Circuit is supported by at least three alternative bases. First, the Ninth Circuit held that regardless of the meaning of Section 1610(g)(1), TRIA § 201(a) provides a fully independent ground for denying Bank Melli's motion to dismiss. *See* Pet. App. 10a–12a; Br. of United States 18. In addition, the Ninth Circuit has not yet addressed respondents' alternative arguments that

Bank Melli's assets are attachable under the commercial-activity exceptions. *See* C.A. Dkt. 37 at 27–28; C.A. Dkt. 85 at 6–9; C.A. Dkt. 95 at 6–10. Judge Benson, in his concurrence, agreed that the assets are attachable under Section 1610(b)(3), and he would have ruled for respondents because they "sufficiently alleged Bank Melli is engaged in commerce in the United States." Pet. App. 34a. And because Section 1610(g) treats the property of a foreign state's instrumentality as the property of the state itself for purposes of judgments under Section 1605A, respondents can also attach the assets here under Section 1610(a)(7).

Because the judgment of the court of appeals—affirming the denial of Bank Melli's motion to dismiss—will stand whatever the outcome of any further review by this Court of the question concerning Section 1610(g)(1), certiorari is not warranted.

2. For the same reason, it would not be appropriate to hold this petition possibly to grant, vacate, and remand after *Rubin* is decided. Even if the Court were to grant *Rubin* and agree entirely with the position advocated by Iran, that holding would have no impact at all on respondents' *judgment* here from the court of appeals, and there accordingly would be no legal basis for this Court to vacate that judgment. This is especially true here where the interlocutory posture of this litigation will afford ample opportunities to the courts below to apply any holding this Court reaches in *Rubin* in later stages of the litigation.

A GVR is "potentially appropriate" only when there is "a reasonable probability that the decision below rests upon a premise" that the lower court might reconsider in light of an intervening development (such as a new decision from this Court), and also

"where it appears that such a redetermination *may determine the ultimate outcome of the litigation*." *Lawrence*, 516 U.S. at 167 (emphasis added). But here, regardless of how the Court might rule regarding Section 1610(g)(1) in *Rubin*, that ruling would have no impact on the ultimate outcome of this litigation, because respondents can attach Bank Melli's blocked assets under TRIA.

In *Wellons* v. *Hall*, 558 U.S. 220 (2010), four Justices argued that this Court has no power to GVR where "the decision below does *not* 'rest upon' the objectionable faulty premise, but is independently supported by other grounds—so that redetermination of the faulty ground will assuredly *not* 'determine the ultimate outcome of the litigation.'" *Id.* at 227 (Scalia, J., dissenting, joined by Thomas, J.) (citing *Lawrence*, 516 U.S. at 167 (Scalia, J., dissenting)); *see also id.* at 228–29 (Alito, J., dissenting, joined by Roberts, C.J.) (arguing that the Court cannot GVR where the court of appeals' judgment "plainly rests on two independent grounds" and there is no basis for reconsideration of the second ground). The majority in *Wellons* did not disagree with the premise—that a GVR requires "at least" a reasonable probability that the ultimate outcome may change, *id.* at 225 (majority op., per curiam)—the Court simply "[could not] be sure that [the lower court's] reasoning really was independent of the … error," *id.* at 224.

Here, the Court *can* be sure that the Ninth Circuit's reasoning regarding TRIA was independent of its view of Section 1610(g)(1): The Ninth Circuit treated the two bases for attachment as distinct, *see* Pet. App. 10a–12a; the United States agrees that TRIA was an "alternative holding," Br. of United States 14; and even Bank Melli acknowledges that

"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)," Pet. 32 n.5. To GVR this case would represent an inappropriate expansion of that practice beyond the limits set out in *Lawrence*.[1]

3. A hold for *Rubin* is unwarranted for the additional reason that it is unnecessary to obtain whatever "potential benefits of further consideration by the lower court" might exist. *Lawrence*, 516 U.S. at 168. As the United States explains (at 17–18), this case comes to the Court in an interlocutory posture. Discovery has not yet taken place, and Bank Melli has not even answered respondents' complaint. *See* Pet. App. 9a. Because proceedings in this action still are at a preliminary stage, if this Court adopted Iran's view of Section 1610(g)(1) in *Rubin*, Bank Melli would have ample time to invoke that ruling in further proceedings in this case in the lower courts. Thus, Bank Melli would suffer no unfair prejudice from a denial of its petition as opposed to a hold.

Respondents, on the other hand, *would* be prejudiced if this petition were held pending *Rubin*. Respondents suffered their injuries from terrorist attacks decades ago, including the 1996 bombing of the Khobar Towers in Saudi Arabia, a 1990 mass shooting

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[1] The United States says (at 15) that the Ninth Circuit's Section 1610(g) analysis "gave the court's judgment a broader scope" because "[i]t permitted the district court on remand to consider attachment under TRIA *and* Section 1610(g)." But the "scope" of the Ninth Circuit's judgment was to affirm the order of the district court denying Bank Melli's motion to dismiss. *See* Pet. App. 3a. TRIA and Section 1610(g) were both independent parts of the *reasoning* supporting that judgment, but they did not change the relief that was denied to Bank Melli.

in New York City, a 2001 bombing at a Jerusalem restaurant, and a 2002 bombing of the Hebrew University in Jerusalem, all of which were sponsored by Bank Melli's principal, Iran. Pet. App. 8a. Respondents won judgments against Iran as early as 2006 and have been trying ever since to collect on those judgments. *Ibid.* If the Court holds this case pending *Rubin*, then respondents will be forced to wait many months longer, even though the delay will not alter their entitlement to move forward against Iran's assets under TRIA and the commercial-activity exceptions.

In the unique circumstances of this case—where the petition seeks review of an interlocutory ruling resting on multiple independent grounds, only one of which would be reviewed by the Court—the potential benefits of a hold are speculative and insubstantial, and thus cannot justify the certain prejudice that respondents will suffer from further delay in their effort to move this litigation toward a just conclusion. *Cf. Lawrence*, 516 U.S. at 168.

II. IN THE ALTERNATIVE, THE COURT SHOULD GRANT REVIEW OF SECTION 1610(g)(1) IN BOTH THIS CASE AND *RUBIN*

If this Court is inclined to review the scope of Section 1610(g)(1) and unwilling to deny this petition now, then the Court should grant both *Rubin* and this petition on that question.

Granting only *Rubin* and holding this case, as suggested by the United States, would deprive respondents of the opportunity to participate as a party in the Court's consideration of the scope of Section 1610(g)(1). But respondents have a substantial inter-

est in defending and preserving the Ninth Circuit's decision because although the assets at issue here are blocked, respondents face many more years of attempting to satisfy their judgments against Iran, including through unblocked assets. Respondents thus desire an opportunity to participate fully as parties and to present their own arguments regarding the correct interpretation of Section 1610(g)(1).

Iran, Bank Melli's principal, agrees that if the Court is inclined to grant review in *Rubin*, then it should "grant both petitions and consolidate the cases for argument." Iran's Mem. in Response 2, *Rubin* v. *Islamic Rep. of Iran*, No. 16-534 (Nov. 2016). Iran and Bank Melli do not argue that this case would be a worse vehicle than *Rubin* to evaluate the meaning of Section 1610(g)(1). Limiting certiorari to Bank Melli's first question presented would largely alleviate the potential vehicle problems discussed by the United States, which arise principally from the fact that, as noted above, respondents' judgment here is independently justified by an application of TRIA that does not itself warrant this Court's review.

This Court may also benefit from considering Section 1610(g)(1) in the factual context of this case—where respondents are pursuing funds in an account due to Iran's instrumentality—rather than solely on the extraordinary facts of *Rubin*, which involves an attempt to attach antiquities that have been in museums for decades. Among the respondents in *Rubin* are the museums, who strenuously object to the attachment of artifacts in their care for the educational benefit of the public. The targets of the attachment actions here, by contrast, are banks that simply need to know where to send certain funds. If this Court de-

sires to review how Section 1610(g)(1) functions in attachment actions, then it should have before it a case like this one with a more typical fact pattern.

This Court frequently consolidates cases that present the same issue. *See*, *e.g.*, *Granholm* v. *Heald*, 544 U.S. 460, 465 (2005) (consolidating separate petitions for writs of certiorari to Second and Sixth Circuits); *Emp. Div., Dep't of Human Res.* v. *Smith,* 485 U.S. 660, 663, n.4 (1988) ("Raising identical legal issues and presenting almost identical facts, these two cases proceeded in tandem … They were consolidated upon order of this Court … "). Thus, if the Court would like to review the Section 1610(g)(1) issue and it is not inclined to deny this petition in full, then respondents would acquiesce to certiorari limited to Bank Melli's first question presented.

CONCLUSION

The petition for a writ of certiorari should be denied. If the Court is disinclined to deny the petition, respondents acquiesce to a grant of certiorari limited to the first question presented in the petition.

Respectfully submitted.

THOMAS FORTUNE FAY
FAY LAW GROUP, P.A.
777 6th Street N.W., Suite 410
Washington, D.C. 20001
(202) 602-4100

JANE CAROL NORMAN
BOND & NORMAN LAW, PC
777 6th Street N.W., Suite 410
Washington, D.C. 20001
(202) 602-4100

Counsel for Bennett Respondents

JAMES L. BERNARD
Counsel of Record
CURTIS C. MECHLING
PATRICK N. PETROCELLI
STROOCK & STROOCK & LAVAN LLP
180 Maiden Lane
New York, NY 10038
(212) 806-5400
jbernard@stroock.com

Counsel for Greenbaum and Acosta Respondents

MATTHEW D. MCGILL
MICHAEL R. HUSTON
LOCHLAN F. SHELFER
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

DALE K. CATHELL
DLA Piper LLP (US)
6225 Smith Avenue
Baltimore, MD 21209
(410) 580-3000

COURTNEY GILLIGAN SALESKI
DLA Piper LLP (US)
500 Eighth Street, N.W.
Washington, D.C. 20004
(202) 799-4000

Counsel for Heiser Respondents

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