No. 16-334

IN THE
Supreme Court of the United States

BANK MELLI,

Petitioner,

v.

MICHAEL BENNETT, *et al.*,

Respondents.

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

SUPPLEMENTAL BRIEF FOR PETITIONER

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The government agrees that the Ninth Circuit's interpretation of 28 U.S.C. §1610(g) is erroneous; that it conflicts with the Seventh Circuit's construction in *Rubin* v. *Islamic Republic of Iran*, 830 F.3d 470 (7th Cir. 2016); and that the circuit conflict is important and warrants this Court's review. The only point of contention is whether this Court should resolve the circuit conflict in this case, or in *Rubin*.

Contrary to the government's assertions, this case presents the better vehicle for review. The Ninth Circuit's decision below did not merely misinterpret §1610(g) as a freestanding immunity exception. It also misconstrued TRIA's and §1610(g)'s "assets of" and "property of" requirements to allow execution whenever

state law would permit execution, whether or not the sovereign *owns* the property. The correctness of that approach is another important issue that has divided the courts of appeals. Accordingly, the Court should grant review in this case—or in both cases—to ensure that both issues are resolved.[1]

I. THE NINTH CIRCUIT'S ERRONEOUS INTERPRETATION OF § 1610(g) SHOULD BE REVIEWED IN THIS CASE

The government agrees that the Ninth Circuit's decision in this case "incorrectly interprets Section 1610(g)," leaving "much of the relevant provisions insignificant or superfluous." U.S. Br. 11-12. In particular, the decision renders the key statutory phrase "as provided in this section" "essentially meaningless." *Id.* at 12. And it renders Congress's contemporaneous amendment to § 1610(a)(7) "completely pointless." *Id.* at 13-14.

The government further agrees that "[t]he Ninth Circuit's decision here conflicts with *Rubin*." U.S. Br. 14. And it acknowledges that the circuit conflict is "[i]mportant." *Id.* at 16. Among other things, the Ninth Circuit's decision "significantly broadens [§ 1610(g)'s] scope by denying attachment immunity for property without any need for a nexus to commercial activity." *Ibid.*

There is thus no dispute that the first question presented is important and warrants this Court's review. The only dispute concerns whether this case or *Rubin* is the better vehicle. The government suggests that the Court should grant review in *Rubin* and hold this case pending its disposition of *Rubin*. But the government's reasons for preferring *Rubin* neither support that pref-

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[1] We agree with the government that, in the event the Court does not grant the petition in this case at this time, the Court should at least hold the petition pending its disposition of *Rubin*. U.S. Br. 19.

erence nor make this case an inappropriate vehicle. And this case offers one important advantage over *Rubin*: It would also allow the Court to address the separate circuit conflict over the ownership requirement in TRIA and § 1610(g). See Pet. 23-33; pp. 4-10, *infra*.

The government's primary basis for preferring *Rubin* is that *Rubin* involves a final judgment whereas this case is interlocutory. U.S. Br. 17-18. But the government does not deny that this Court routinely grants review of interlocutory rulings where a case squarely presents a legal issue otherwise worthy of review—particularly in the field of sovereign immunity, where courts are supposed to address such issues at the earliest possible stage. See Cert. Reply 11 (collecting cases). Indeed, this Court decided a sovereign immunity case in that posture just a few weeks ago. See *Bolivarian Republic of Venezuela* v. *Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1318, 1324 (2017) (reviewing denial of motion to dismiss and emphasizing that "a court should decide the foreign sovereign's immunity defense '[a]t the threshold' of the action").

The government urges that it is "unclear" whether the Ninth Circuit's interpretation of § 1610(g) will ultimately make a difference in this case because the assets might later prove to be attachable on other grounds. U.S. Br. 18. But Bank Melli has already explained why the other statutes on which plaintiffs rely are not alternative grounds for affirmance. Cert. Reply 6-7. At most, those other theories are issues for resolution during further proceedings on remand. They will not in any way impair this Court's review of the Ninth Circuit's erroneous ruling on the scope of § 1610(g)—a ruling that will fundamentally affect the course of proceedings in this case. See S. Shapiro *et al.*, *Supreme Court Practice* § 4.18, at

283 (10th ed. 2013) (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").

II. The Ninth Circuit's Ruling On The Ownership Requirement Warrants Review

While this case is a more than adequate vehicle for deciding whether § 1610(g) provides a freestanding exception to immunity, it also offers one key advantage over *Rubin*: It presents a second important circuit conflict over TRIA and § 1610(g)'s ownership requirement. The government agrees that, because both TRIA and § 1610(g) are limited to "assets of" or "property of" the foreign sovereign, the statutes apply only to property *owned* by the sovereign. U.S. Br. 19. The Ninth Circuit's decision below cannot be reconciled with that rule. The government's reasons for resisting review of that issue do not withstand scrutiny.

A. The Government Admits That the Circuits Are Divided Over Whether Federal or State Law Determines the Requisite Property Interest

The government concedes that the courts of appeals are divided over whether the "assets of" and "property of" requirements under TRIA and § 1610(g) must be determined as a matter of federal or state law: "The Second and D.C. Circuits appear to have split on that question." U.S. Br. 21. The D.C. Circuit held in *Heiser* v. *Islamic Republic of Iran*, 735 F.3d 934 (D.C. Cir. 2013), that "[f]ederal law * * * is controlling." *Id.* at 940. In the Second Circuit, by contrast, "state law" governs. *Calderon-Cardona* v. *Bank of N.Y. Mellon*, 770 F.3d 993, 1001 (2d Cir. 2014); see also *Hausler* v. *JP Morgan Chase Bank, N.A.*, 770 F.3d 207, 211-212 (2d Cir. 2014) (same). The decision below deepens that conflict: Citing *Calde-*

ron-Cardona, the Ninth Circuit expressly "look[ed] to state law." Pet. App. 22a.

The government downplays the importance of that circuit conflict on the theory that federal and state law will "often" produce the same result. U.S. Br. 21. But the fact that two bodies of law might *sometimes* align in no way undermines the importance of deciding which law governs. The government does not contend that federal and state law will *always* or even *usually* align—just that they "often" will. That fainthearted prediction in no way diminishes the importance of this issue.

This Court regularly grants review to decide whether federal or state law applies to an issue without regard to whether the two bodies of law will "often" produce the same result. See, *e.g.*, *Miree* v. *DeKalb Cnty.*, 433 U.S. 25, 26 (1977) (certiorari granted to "consider whether federal or state law should have been applied" to claims over air crash); *Oregon ex rel. State Land Bd.* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363, 366 (1977) (certiorari granted to resolve whether federal or state law governs ownership of riverbeds under navigable rivers). The reason for that approach is obvious: Whether federal or state law applies is an important threshold legal question regardless of the results those laws may happen to generate in a particular case.

The government offers two examples where federal and state law have allegedly produced the same result under TRIA and §1610(g). U.S. Br. 21. But those examples prove nothing. Even if federal and state law were totally uncorrelated, they could still produce the same results 50% of the time. Picking discrete examples where federal and state law happen to coincide is like appealing to the stopped clock that is accurate twice a day: It

proves nothing about the importance of the issue in the mine run of cases.

Moreover, the government's second example does not support its claim. The government insists that the Ninth Circuit's decision below proves that federal and state law would reach the same result on these facts. U.S. Br. 21. But the Ninth Circuit allowed attachment here only because it erroneously construed federal law not to impose an ownership requirement at all—contrary to the express holding of *Heiser*. See Pet. App. 23a-24a (allowing attachment merely because "Bank Melli is the intended contractual beneficiary of the contested funds"); pp. 6-8, *infra*. Thus, far from providing an example where federal and state law align, this case illustrates the potentially dramatic consequences of that threshold choice-of-law determination.

B. The Circuits Are Divided Over Whether Federal Law Requires Ownership

The Ninth Circuit's decision also conflicts with the D.C. Circuit's position on what *federal law* requires. As the government observes, "[t]he D.C. Circuit has concluded that both TRIA and Section 1610(g) require ownership." U.S. Br. 20 (citing *Heiser*, 735 F.3d at 938-940). The government expressly "agrees" with that interpretation. *Id.* at 19. It asserts, however, that the Ninth Circuit "does not appear to have rejected such a requirement." *Ibid.* That is incorrect.

1. The Ninth Circuit's decision plainly does not rest on a determination that Bank Melli *owns* the funds in the Visa account. To the contrary, the court stated that, "[e]ven if federal law applies, * * * attachment and execution are allowed here because Bank Melli is the *intended contractual beneficiary* of the contested funds." Pet. App. 24a (emphasis added). Being the "intended contrac-

tual beneficiary" of property clearly is not the same as *owning* the property. Moreover, the Ninth Circuit held that attachment was permitted under *state* law because California entitles a judgment creditor to assignment of funds *owed* to the debtor—not because Bank Melli *owns* the funds. *Id.* at 22a-23a. The Ninth Circuit's assertion that "Federal law and California law are aligned" thus suggests, if anything, that the court believed that federal law (like state law) imposes no ownership requirement, and instead allows seizure of funds *owed* to the sovereign even if the sovereign does not *own* them. *Id.* at 23a.

The government's sole basis for reading the Ninth Circuit's opinion differently is the court's statement that, "'[l]ike most courts, we look to state law to determine the ownership of assets in this context.'" U.S. Br. 19-20 (quoting Pet. App. 22a). But that statement appears in the portion of the opinion addressing *which law governs*—not the portion addressing what federal or state law actually requires. When it came to addressing the actual requirements of federal law, the Ninth Circuit clearly concluded that merely being *owed* the money was sufficient. See Pet. App. 24a (relying on Bank Melli's status as the "intended contractual beneficiary of the contested funds"). The Ninth Circuit's decision cannot reasonably be read as holding that Bank Melli *owns* the funds in the Visa account.

The Ninth Circuit's basis for decision is especially apparent given the briefing below. In the court of appeals, the parties debated at length whether federal or state law governed and, if federal law applied, whether *Heiser*'s ownership standard was the correct rule. See, *e.g.*, Bank Melli C.A. Br. 56-59. Had the Ninth Circuit intended to hold that Bank Melli *owned* the funds in the Visa account,

it would have said so. The absence of any such statement in the opinion speaks volumes.

The Ninth Circuit did not hold that Bank Melli owns the funds in the Visa account because there is no plausible basis for such a holding. The mere fact that Visa *owes* money to Bank Melli does not mean that Bank Melli *owns* the funds. See Pet. 26-27; Cert. Reply 8-10. The Ninth Circuit's holding that plaintiffs may nonetheless attach those funds creates an unavoidable and intractable conflict with *Heiser*.

2. The government finally attempts to recharacterize the Ninth Circuit's rationale. According to the government, "[a]lthough the opinion is ambiguous, it can fairly be read to conceive of the targeted property as the *right of Bank Melli to receive payment* from Visa/Franklin * * * as distinguished from the Visa/Franklin account itself." U.S. Br. 22 (emphasis added). That theory is unsupported by any language in the opinion and ignores the procedural posture of the case.

The only language the government points to in the Ninth Circuit's opinion is the statement "'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.'" U.S. Br. 22 (quoting Pet. App. 22a-23a). But the reference to "those assets"—not "that asset"—makes clear that the "property" the Ninth Circuit was referring to was the *funds themselves*, not some intangible right to receive payment. The government's revisionist theory lacks any foundation in the language of the opinion.

The procedural posture of this case likewise forecloses the government's reinterpretation of the opinion. This case is an *interpleader proceeding* in which Visa and

Franklin deposited *specific funds* into the district court's registry and asked the court to direct the disposition of *those assets*. Pet. App. 9a, 84a. The question before the Ninth Circuit was whether *those funds* could be attached to satisfy plaintiffs' judgments—not whether plaintiffs could attach a wholly distinct intangible right to receive payment. See *State Farm Fire & Cas. Co.* v. *Tashire*, 386 U.S. 523, 534-535 (1967) (in interpleader action, "the fund itself is the target of the claimants" and "marks the outer limits of the controversy").

The government concedes, moreover, that deeming the relevant property to be Bank Melli's intangible right to receive payment, rather than the interpleaded funds themselves, would raise serious questions about the district court's territorial jurisdiction. U.S. Br. 22 n.8 (noting issue over "whether the property is located in the district for purposes of attachment"); compare, *e.g.*, *Severnoe Sec. Corp.* v. *London & Lancashire Ins. Co.*, 255 N.Y. 120, 123 (1931) (holding that "[t]he situs of intangibles * * * is for some purposes, the domicile of the creditor; for others, the domicile or place of business of the debtor * * * ; for others, any place where the debtor can be found"), with *Peterson* v. *Islamic Republic of Iran*, 627 F.3d 1117, 1131 (9th Cir. 2010) (situs of intangible is location of the debtor). The Ninth Circuit's failure to grapple with those substantial issues only underscores what is obvious from the face of the opinion: The Ninth Circuit was adjudicating the status of the interpleaded funds in the Visa account, not some intangible right to receive payment that was never interpleaded in this case.[2]

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[2] Moreover, plaintiffs' Ninth Circuit brief never argued that the property at issue was Bank Melli's intangible right to receive payment, rather than the funds that Visa and Franklin interpleaded. Plaintiffs argued only that Bank Melli was the "sole beneficial owner"

The government's attempts to inject ambiguity into the Ninth Circuit's opinion thus defy the Ninth Circuit's actual rationale. The Ninth Circuit allowed plaintiffs to attach *the funds* in the Visa account because *California law* does not require ownership and, in the Ninth Circuit's mistaken view, federal law should not require ownership either. That holding conflicts directly with the D.C. Circuit's decision in *Heiser*. That conflict concerns the immunity of foreign sovereigns and thus raises important issues no less pressing than the question for which the government recommends review.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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of the interpleaded funds and that plaintiffs could attach the funds because California law would permit them to do so. Plaintiffs C.A. Br. 40-46. For that reason too, the government's reinterpretation of the Ninth Circuit's opinion is implausible.