No. 10-947

IN THE

Supreme Court of the United States

BANK MELLI IRAN
NEW YORK REPRESENTATIVE OFFICE,

Petitioner,

v.

SUSAN WEINSTEIN, ET AL.,

Respondents.

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

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Pursuant to Supreme Court Rule 15(2)[1] Respondent Jennifer Weinstein Hazi[2] respectfully notes the following misstatements of fact and law contained in the "Questions Presented" section of the instant Petition:

First, the argument (which is presented by Petitioner as if it were an established fact) that the holding of this Court in *First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 626-627 (1983) ("*Bancec*") that foreign "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such" is "reflected in numerous treaties that require the United States to recognize the juridical status of foreign entities" (Petition at (i)) is incorrect. As the Second Circuit correctly held in the decision below, in reliance on this Court's ruling in *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176 (1982), the treaty provisions at issue are not intended to give separate juridical status to instrumentalities of foreign states but only "to give corporations of each

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[1] Specifically, the provision that: "[T]he brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted. Counsel ... have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition." Supreme Court Rule 15(2).

[2] As explained below, Jennifer Weinstein Hazi is the sole respondent to this Petition.

signatory legal status in the territory of the other party, and to allow them to conduct business in the other country on a comparable basis with domestic firms." *Id.* at 185-86.

Therefore, the phrase contained in the first question presented, "applicable treaty provisions," improperly assumes one of the very questions in dispute, i.e. whether these treaty provisions are indeed applicable. Thus, the first question presented actually contains *two* questions.

Second, the argument (again, stated as a fact) contained in the second question presented, that Congress "retroactively revis[ed] the parties bound by a judgment" is without basis. Section 201 of the Terrorism Risk Insurance Act ("TRIA") does not change the parties bound by a judgment; it merely renders judgments against a foreign state-sponsor of terrorism enforceable against agencies and instrumentalities of the foreign state in certain circumstances.

Nor is TRIA being applied to Petitioner "retroactively"; Petitioner became subject to the provisions of TRIA only many years after its passage and only as the result of Petitioner's own post-TRIA elective conduct.

PARTIES TO THE PROCEEDINGS BELOW

Pursuant to Supreme Court Rule 15(2)[3] Respondent Jennifer Weinstein Hazi respectfully notes that the information contained in the "Parties to the Proceedings Below" section of the instant Petition is inaccurate.

The enforcement proceedings in the district court against Petitioner's property were brought by Respondent Jennifer Weinstein Hazi only, and Respondent Jennifer Weinstein Hazi was the sole respondent in the court of appeals.

Though the names Susan Weinstein, Jeffrey A. Miller, Joseph Weinstein and David Weinstein have appeared in the captions in this matter as a technical matter (because the proceeding in the district court was brought under the caption of the Weinsteins' underlying judgment against Iran) in fact Susan Weinstein, Jeffrey A. Miller, Joseph Weinstein and David Weinstein have not sought any relief against the Petitioner and were not respondents in the court of appeals.

Accordingly, Jennifer Weinstein Hazi is the only proper respondent to this Petition.

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[3] Specifically, the provision that: "[T]he brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted. Counsel . . . have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition." Supreme Court Rule 15(2).

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STATEMENT OF THE CASE

While the Petitioner's "Preliminary Statement" and "Statement" provide a somewhat useful recitation of much of the factual, procedural and statutory background to this Petition, they suffer from various substantive misstatements and omissions that the Respondent will address below.

First, the Petition misstates the holding of this Court in *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) ("*Bancec*") in two respects. Contrary to Petitioner's claim, this Court's holding that foreign "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such" (*id.* at 626-627) was not based solely, or even primarily, on international practice, but rather on the legislative history and language of the Foreign Sovereign Immunities Act ("FSIA"). *See id.* at 627 (In enacting the FSIA "Congress clearly expressed its intention that duly created instrumentalities of a foreign state are to be accorded a presumption of independent status."). This point is highly significant, because what Congress gave in the FSIA it can take away in the Terrorism Risk Insurance Act ("TRIA").

Additionally, the Petition omits this Court's express holding in *Bancec* that "courts in the United States *and abroad*, have recognized that an incorporated entity . . . is not to be regarded as legally separate from its owners in all circum-

stances." *Id.* at 630 (emphasis added) (footnote omitted). In support of this conclusion, the Supreme Court cited and quoted at length a decision of the International Court of Justice:

> In *Case Concerning The Barcelona Traction, Light & Power Co.*, 1970 I.C.J. 3, the International Court of Justice acknowledged that, *as a matter of international law, the separate status of an incorporated entity may be disregarded* in certain exceptional circumstances:
>
> > ". . . [T]he law has recognized that the independent existence of the legal entity cannot be treated as an absolute. It is in this context that the process of 'lifting the corporate veil' or 'disregarding the legal entity' has been found justified and equitable in certain circumstances or for certain purposes. The wealth of practice already accumulated on the subject in municipal law indicates that the veil is lifted, for instance, to prevent misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance, to protect third persons such as a creditor or purchaser, or to prevent the evasion of legal requirements or of obligations.
> >
> > * * *
> >
> > In accordance with the principle expounded above, the process of lifting the veil, being an exceptional one admitted by municipal law in respect of an institution

> of its own making, *is equally admissible to play a similar role in international law. . . .*" *Id.*, at 38-39.

Bancec at 630 n. 20 (emphasis added).

This holding (which was omitted from the Petition) is extremely salient here because it collapses Petitioner's entire argument that TRIA conflicts with international law.

Second, the Petition ignores the legislative record, which clearly and indisputably shows that in enacting TRIA Congress intended to permit victims of terrorism holding judgments against foreign state-sponsors of terrorism to enforce those judgments against the blocked assets of the agencies and instrumentalities of such foreign states and (2) that TRIA's provisions apply to existing judgments.

Senator Harkin, a sponsor of TRIA, explained as follows while addressing the conference report accompanying TRIA:

> The purpose of title II is to deal comprehensively with the problem of enforcement of judgments issued to victims of terrorism in any U.S. court by enabling them to satisfy such judgments from the frozen assets of terrorist parties. *As the conference committee stated, this title establishes, once and for all, that such judgments are to be enforced against any assets available in the U.S., and that the executive branch has no statutory authority to defeat such enforcement under standard judi-*

> *cial processes, except as expressly provided in this act.*
>
> Title II expressly addresses three particular issues which have vexed victims of terrorism in this context. First, *there has been a dispute over the availability of "agency and instrumentality" assets to satisfy judgments against a terrorist state itself. Let there be no doubt on this point.* Title II operates to strip a terrorist state of its immunity from execution or attachment in aid of execution by *making the blocked assets of that terrorist state, including the blocked assets of any of its agencies or instrumentalities, available for attachment and/or execution of a judgment issued against that terrorist state.* Thus, 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, at S11528 (Nov. 19, 2002) (statement of Sen. Harkin) (emphasis added).

Congress' intent as to the assets covered by TRIA can and should be understood from this statement. *See e.g., Bowsher v. Merck & Co.*, 460 U.S. 824, 832-33 (1983) (sponsor's statement was "authoritative guide" to statute's construction).

Thus, TRIA operates to pierce the corporate veil between foreign state sponsors of terrorism and their agencies and instrumentalities, and to render the latter liable for judgments entered against the

former. In other words, TRIA is simply a statutory reverse veil-piercing provision. *See*, *generally*, 1 Fletcher Cyc. Corp. § 41.70.

In light of this legislative history (not to mention the express language of TRIA itself) it is unsurprising that every court to have considered the issue has held that TRIA permits execution against the assets of agencies and instrumentalities of foreign state judgment debtors. *See e.g,. Weininger v. Castro*, 462 F.Supp.2d 457, 482-488 (S.D.N.Y. 2006) (Finding, after detailed analysis, that Congress intended TRIA to override *Bancec* presumption) and *Levin v. Bank of New York*, 2011 WL 812032 (S.D.N.Y. 2011) (Ordering turnover of assets of Iranian agencies under TRIA, in satisfaction of judgment against Iran). *No* court has held otherwise.

Moreover, the Executive Branch, which has traditionally acted as "the number one adversary" (*In re Islamic Republic of Iran Terrorism Litig.*, 659 F.Supp.2d 3, 126 (D.D.C. 2009)) of American terrorism victims seeking to enforce judgments against Iran, has never asserted that TRIA does not permit the enforcement of such judgments against the assets of Iran's agencies and instrumentalities nor opposed such enforcement.

To the contrary, the Executive Branch has affirmatively *facilitated* the satisfaction of judgments against Iran from the assets of Iranian agencies and instrumentalities. For example, in *Bank of New York v. Rubin*, American terrorism victims

holding a judgment against Iran brought turnover proceedings under TRIA against funds belonging to Petitioner Bank Melli, and to two other Iranian-owned banks, Bank Sepah and Bank Saderat, held by the Bank of New York. The district court denied the request on the grounds—asserted both by Petitioner Bank Melli and the Executive Branch—that the Iranian banks' funds were not "blocked assets" within the meaning of TRIA. *Bank of New York v. Rubin*, 2006 WL 633315 (S.D.N.Y. 2006). During the pendency of an appeal of that decision, the United States Attorney notified the Second Circuit—at his own initiative—that Bank Sepah's assets in the United States had been blocked as a result of its designation as a proliferator of weapons of mass destruction. Accordingly, the Second Circuit vacated and remanded:

> The *government, which entered this case as amicus curiae in support of Bank Melli*, notified the Court prior to oral argument that the Department of the Treasury has recently frozen the assets of interpleader-defendant Bank Sepah Iran ... [W]e vacate ... and remand so that the district court may determine whether the Rubin defendants may now attach Bank Sepah's assets deposited in the registry of the district court.

Bank of New York v. Rubin, 484 F.3d 149, 150-151 (2nd Cir. 2007) (emphasis added).

On remand, the district court granted the motion for turnover of the Bank Sepah funds pursuant to TRIA, in satisfaction of the judgment creditors' judg-

ment against Iran, after *the Executive Branch reiterated* its position. *Bank of New York v. Rubin*, 2007 WL 2044581 (S.D.N.Y. 2007).

It is not surprising, therefore, that the Executive Branch declined to become involved in the instant matter – the government simply does not agree with Petitioner's position.

Third, the Petition omits clear indications in the legislative record that Congress intended that TRIA's provisions would be applied to *existing* judgments. As TRIA's sponsor, Senator Harkin, explained:

> Incredibly, since 1996 American victims of state-sponsored terrorism have been actively encouraged to seek redress and compensation in our federal courts. These long-suffering American families have complied with all requirements of existing U.S. law and *many have actually won court-ordered judgments*, only to be denied any compensation and what little justice they seek in a court of law. . . .
>
> With the passage of this new legislation, the Congress is requiring that this misguided policy be abandoned.

148 Cong. Rec. S11524, at S11527 (Nov. 19, 2002) (statement of Sen. Harkin) (emphasis added).

Senator Harkin specifically identified one of these "long-suffering American families" as the family of "Charles Hegna [ ] who was tortured and killed in 1984 by Iranian-backed hijackers." *Id.* at S11526. The Hegnas were one of the families that had already "won court-ordered judgments" to

whom Senator Harkin was referring. *See Hegna v. Islamic Republic of Iran*, No. 1:00CV00716 (D.D.C. Feb. 7, 2002) (amended order and judgment).

It is clear, then, that Congress intended TRIA to apply to existing judgments. Only by omitting this legislative history is Petitioner able to claim that the Second Circuit improperly applied TRIA retroactively, i.e. to existing judgments.[4+6]

Fourth, Petitioner's claim (presented as a fact) that Article III.1 of the 1955 Treaty of Amity, Economic Relations, and Consular Rights between the United States and Iran ("Treaty of Amity") guarantees the separate juridical status of Iranian corporations and so prohibits the reverse veil-piercing permitted by TRIA, conflicts directly with the precedent of this Court. Article III(1) of the Treaty of Amity provides that:

> Companies constituted under the applicable laws and regulations of either High Contracting Party shall have their juridical status recognized within the territories of the other High Contracting Party. It is understood, however, that recognition of juridical status does not of itself confer rights upon companies to engage in the activities for which they are organized. As used in the present Treaty, "companies" means corpora-

[4] In any event, as discussed *infra*, Petitioner's "retroactivity" argument fails because it became subject to TRIA only some five years after its passage, when its assets were blocked in 2007 as the result of its own post-TRIA conduct.

> tions, partnerships, companies and other associations, whether or not with limited liability and whether or not for pecuniary profit.

Treaty of Amity, § III(1).

The Treaty of Amity is one of approximately 20 friendship, commerce, navigation ("FCN") treaties negotiated by the United States following World War II. Significantly, most if not all of these FNC treaties contain provisions substantively identical to Article III(1). *See e.g.* Japan – U.S. FNC Treaty, 4 U.S.T. 2063, T.I.A.S. No. 2863 (1953), Article XXII(3) ("Companies constituted under the applicable laws and regulations within the territories of either Party shall be deemed companies thereof and shall have their juridical status recognized within the territories of the other Party."); Germany – U.S. FNC Treaty, 7 U.S.T. 1839, T.I.A.S. No. 3593 (1954), Article XXV(5) ("Companies constituted under the applicable laws and regulations within the territories of either Party shall be deemed companies thereof and shall have their juridical status recognized within the territories of the other Party."); Korea – U.S. FNC Treaty, 8 U.S.T. 2217, T.I.A.S. No. 3947 (1956), Article XXII(3) ("Companies constituted under the applicable laws and regulations within the territories of either Party shall be deemed companies thereof and shall have their juridical status recognized within the territories of the other Party."); Israel – U.S. FNC Treaty, 5 U.S.T. 550, T.I.A.S. No. 2948 (1951), Article XXII(3) ("Companies constituted under the applicable laws and regulations within

the territories of either Party shall be deemed companies thereof and shall have their juridical status recognized within the territories of the other Party."); Greece – U.S. FNC Treaty, 5 U.S.T. 1829, T.I.A.S. No. 3057 (1951), Article XXIV(3) ("Companies constituted under the applicable laws and regulations within the territories of either Party shall be deemed companies thereof and shall have their juridical status recognized within the territories of the other Party."); France – U.S. Treaty, 11 U.S.T. 2398, T.I.A.S. No. 4625 (1959) Article XXIV(5) ("Companies constituted under the applicable laws and regulations within the territories of either High Contracting Party shall be deemed companies thereof and shall have their juridical status recognized within the territories of the other High Contracting Party."); Netherlands – U.S. FNC Treaty, 8 U.S.T. 2043, T.I.A.S. No. 3942 (1956), Article XXIII(3) ("Companies constituted under the applicable laws and regulations within the territories of either Party shall be deemed companies thereof and shall have their juridical status recognized within the territories of the other Party."); Pakistan – U.S. FNC Treaty, 12 U.S.T. 110, T.I.A.S. No. 4683 (1959), Article XXI(3) ("Companies constituted under the applicable laws and regulations within the territories of either Party shall be deemed companies thereof and shall have their juridical status recognized within the territories of the other Party.").

As this Court has explained in detail, the purpose and function of these FNC corporate provi-

sions was *not* to prevent veil-piercing where appropriate, but rather simply to ensure that companies registered in one state would be *recognized* as legal persons in the other state:

> The Friendship, Commerce and Navigation Treaty between Japan and the United States is but one of a series of similar commercial agreements negotiated after World War II. *The primary purpose of the corporation provisions of the Treaties was to give corporations of each signatory legal status in the territory of the other party, and to allow them to conduct business in the other country on a comparable basis with domestic firms.* Although the United States negotiated commercial treaties as early as 1778, and thereafter throughout the 19th century and early 20th century, these early commercial treaties were primarily concerned with the trade and shipping rights of individuals. *Until the 20th century, international commerce was much more an individual than a corporate affair.*
>
> As corporate involvement in international trade expanded in this century, old commercial treaties became outmoded. Because "corporation[s] can have no legal existence out of the boundaries of the sovereignty by which [they are] created," *Bank of Augusta v. Earle*, 13 Pet. (38 U.S.) 519, 588, 10 L.Ed. 274 (1839), it became necessary to negotiate new treaties granting corporations legal status

> and the right to function abroad. A series of Treaties negotiated before World War II gave corporations legal status and access to foreign courts, but it was not until the postwar Friendship, Commerce and Navigation Treaties that United States corporations gained the right to conduct business in other countries. *The purpose of the Treaties was not to give foreign corporations greater rights than domestic companies, but instead to assure them the right to conduct business on an equal basis without suffering discrimination based on their alienage.*

Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 185-188 (1982) (emphasis added) (footnotes omitted).

Thus, Article III.1 of our Treaty of Amity with Iran—and the parallel provisions in the other FNC treaties cited above—have nothing whatsoever to do with veil-piercing, and are intended merely "to give corporations of each signatory legal status in the territory of the other party, and to allow them to conduct business in the other country on a comparable basis with domestic firms." *Sumitomo*, 457 U.S. at 186.

Needless to say, domestic firms are subject to having their corporate veils pierced in United States courts, where appropriate under governing case law or statute. Therefore, the corporate veils of companies registered in Iran (and in any of the other foreign states party to FNC treaties with the United States) can also be pierced, and nothing in any Treaty of Amity provides to the contrary.

Furthermore, Petitioner's misconstruction of Article III.1 is demonstrated by its very text, which defines "companies" as including "corporations, partnerships, companies and other associations, whether or not with limited liability . . ." *Id.* By including partnerships and entities without limited liability – i.e. entities which in many jurisdictions lack any "corporate veil" shielding the owners from the liability of the entity and vice versa – this definition makes clear that Article III.1 has nothing to do with, much less operates to bar, veil-piercing.

Fifth, Petitioner's claim that the Second Circuit's construction of TRIA created a "conflict" with other circuits is highly misleading at best, since the cases cited by Petitioner as evidence of this putative "conflict" were not construing TRIA at all, but rather § 1610(f)(1)(A) of the FSIA.

These two provisions differ substantively. TRIA § 201 refers to "the *blocked assets* of that terrorist party [against which the judgment was entered] (including the *blocked assets* of any agency or instrumentality of that terrorist party)," while FSIA § 1610(f)(1)(A) governs enforcement of judgments on "a *claim* for which a foreign state (including any agency or instrumentality of such state) . . . is not immune under section 1605(a)(7)." 28 U.S.C. § 1610(f)(1)(A).

Clearly, therefore, § 1610(f)(1)(A) does nothing more than allow the enforcement of a judgment *entered against* an agency or instrumentality of a state-sponsor of terrorism on a *claim* under FSIA

§ 1607 *against that agency or instrumentality*, whereas TRIA's text permits enforcement of a *judgment* entered against the foreign state *only*, from the "assets of any agency or instrumentality" of the foreign state.

Thus, no conflict between the circuits exists.

ARGUMENT

The instant Petition should be denied because the decision below was correct, neither decided an important question of federal law that has not been, but should be, settled by this Court nor decided such a question in conflict with relevant decisions of this Court, and did not create any circuit conflict.

I. The Finding that TRIA Does Not Conflict with the Treaty of Amity Is Correct and Does Not Warrant Certiorari Review

As discussed *supra*, Petitioner's claim that TRIA conflicts with Article III.1 of the Treaty of Amity because that provision purportedly prohibits piercing the corporate veil is soundly refuted by this Court's decision in *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176 (1982) and by the fact that Article III.1 applies by its own terms to "partnerships . . . and other associations, whether or not with limited liability" (*id.*)—i.e. to entities which do not have any juridical status separate from their partners, members and/or owners.

Moreover, if Petitioner's construction of Article III.1 were correct, the courts of the United States would be prohibited from piercing the corporate veils of any company registered in Japan, Germany, Korea, France, Israel, the Netherlands, Pakistan, Greece or any of the other numerous foreign states party to an FNC Treaty containing a provision substantively similar to Article III.1 of the

FNC Treaty with Iran. Plainly, such an outcome would not only be absurd and unprecedented, but would render foreign corporations and their owners free to abuse the corporate form in the United States to the detriment of American suppliers, creditors and investors, which in turn would wreak severe havoc with commerce between the United States and those countries.

Notably, the Executive Branch declined the invitation of the district court to submit a statement of interest in this case—which it surely would have done if it believed that a violation of a treaty provision was at issue.

Therefore, the Second Circuit's ruling on this point was clearly correct and does not warrant certiorari review.

II. Alternatively, the Finding that TRIA Overrides the Treaty of Amity Is Correct and Does Not Warrant Certiorari Review

Because TRIA clearly does not conflict with the Treaty of Amity, this Court does not need to examine Petitioner's claim that the Second Circuit's alternative finding that TRIA would trump the Treaty of Amity if such a conflict existed.

In any case, the Second Circuit's alternative holding that TRIA trumps the Treaty of Amity was correct and does not warrant certiorari review. That holding was based on TRIA's "Notwithstanding any other provision of law" language.

A treaty is a "law." Treaties are the "supreme law of the land" U.S. Const. Art. VI, sec. 2. A treaty is "to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision." *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 10 (1936). *See also Washington State Charterboat Ass'n v. Baldrige*, 702 F.2d 820, 823 (9th Cir. 1983) (holding that the phrase "any other applicable law" includes treaties); *Gorton v. American Cyanamid Co.*, 533 N.W.2d 746, 751 (Wis. 1995) ("Obviously, federal law includes the United States Constitution and all of the federal statutes and treaties promulgated by Congress.").

Here, again, it is worth noting that the Executive Branch did not come to the defense of the Treaty of Amity.

III. The Finding that TRIA Overrides the *Bancec* Presumption Is Correct and Does Not Warrant Certiorari Review

The Second Circuit's holding that TRIA overrides *Bancec* presents no grounds for review by this Court.

Bancec expressly held that under both U.S. and international law corporate form could—and should—be disregarded when it would otherwise "work . . . injustice," when it is "interposed to defeat legislative policies," when "the notion of legal entity is used to defeat public convenience" and then it would "prevent the evasion of legal

requirements or of obligations." *Id.* at 629-630 (citations omitted).

Congress was therefore perfectly within its rights to determine that use of the corporate form to prevent American victims of terrorism from enforcing their unsatisfied judgments against the blocked assets of agencies and instrumentalities of the state-sponsors of terrorism who harmed them would "work . . . injustice," "defeat legislative policies," "defeat public convenience" and "prevent the evasion of legal requirements or of obligations"—and to enact TRIA as a remedy.

In other words, TRIA did nothing more than codify the exception to the presumption of separateness recognized in *Bancec*, and apply it to a certain set of circumstances.

The Petitioner may *disagree* with Congress' considered judgment—reflected in TRIA—that it would be unjust to allow deadbeat foreign state-sponsors of terrorism to hide their U.S.-based assets behind the corporate form, beyond the reach of the American victims of those foreign states, but there is no basis whatsoever for its claim that Congress somehow acted against the letter or spirit of *Bancec* or international law. On the contrary, the narrow exception to the presumption of separateness codified in TRIA—which is limited to a very special set of cases involving great injustice—squares perfectly with both *Bancec* or international law.

Petitioner argues, engaging in rather exhaustive verbal gymnastics, that the term "including" used in TRIA was not actually meant to "include" agency and instrumentality assets in those assets subject to execution in satisfaction of judgments against the foreign state itself.

But Congress' use of the word "including" simply reflects the fact that a corporation is nothing more than "an artificial being, invisible, intangible, and existing only in contemplation of law" (*Bancec* at 629, citation omitted) and that property held in the name of a corporation ultimately and actually (notwithstanding the legal fiction of corporate form) belongs to the owner of the corporation.

Moreover, the legislative history, quoted at length above, clearly shows that Congress intended TRIA to render agency and instrumentality assets subject to execution in satisfaction of judgments against the foreign state itself. *See* 148 Cong. Rec. at S11528 (TRIA "*does not recognize any juridical distinction between a terrorist state and its agencies or instrumentalities*"); *Weininger v. Castro*, 462 F.Supp.2d 457, 482-488 (S.D.N.Y. 2006) (Legislative history proves that Congress intended TRIA to override *Bancec* presumption).

In light of the language of the statute and this legislative history, Petitioner's argument that Congress intended TRIA to apply to agency and instrumentality assets *only* when a *court* finds that a *Bancec* exception should be applied (which has *never* happened in respect to any terrorism judg-

ment and, indeed, rarely if ever happens at all) is stretched far past the bounds of any reasonable rules of construction.

Also, as discussed above, the Executive Branch—which has actively and vigorously opposed enforcement of terrorism judgments whenever it believed that such enforcement was improper, as the Petition itself repeatedly emphasizes—not only declined an invitation to support Petitioner's position on this issue, but actively *facilitated* execution of judgments against Iran from assets of Iranian agencies and instrumentalities under TRIA. *See Bank of New York v. Rubin*, 484 F.3d 149, 150-151 (2nd Cir. 2007); *Bank of New York v. Rubin*, 2007 WL 2044581 (S.D.N.Y. 2007).

Petitioner's claim that the Second Circuit's construction of TRIA created a conflict with other circuits is completely meritless. The other cases cited by Petitioner did not address TRIA but FSIA § 1610(f)(1)(A). As discussed *supra*, the text of § 1610(f)(1)(A) merely allows the enforcement of a judgment *entered against* an agency or instrumentality from certain of its assets, while TRIA's text permits enforcement of a judgment entered against the foreign state, from the "assets of any agency or instrumentality" of the foreign state.

Indeed, the very claim now made by Petitioner has been examined and rejected—for reasons that should be endorsed by this Court—by the lower federal courts:

The Court notes that the Eleventh Circuit has rejected the argument that § 1610(f)(1)-(A), a provision of the FSIA worded similarly to TRIA § 201(a), legislatively overruled *Bancec's* presumption of separate juridical status for liability purposes. However, while similar, TRIA § 201(a) is worded differently from § 1610(f)(1)(A) and, as indicated, is supported by legislative history suggesting an intent to override the *Bancec* presumption of independent status for the agencies and instrumentalities of terrorist parties. . . .

Alejandre held that [§ 1610(f)(1)(A)] did not override the *Bancec* presumption of separate juridical status for liability purposes. *See* 183 F.3d at 1287. Instead, the effect of § 1610(f)(1)(A) was merely to allow plaintiffs to execute upon property claimed by the foreign government without first obtaining a license from the CACR. *Id.* However, in reaching this conclusion, the Circuit Court noted,

> Congress has previously demonstrated in the FSIA context that it knows how to express clearly an intent to make instrumentalities substantively liable for the debts of their related foreign governments. *Absent such a clear expression*, which does not appear in section 1610(f)(1)(A), we see no reason to interpret that section as contravening Congress' original understanding that the FSIA "[is] not intended to affect the substantive

> law determining the liability of a foreign state or instrumentality, or the attribution of liability among instrumentalities of a foreign state."

Id. at 1287-88 (emphasis added) (quoting *Banco*, 462 U.S. at 620, 103 S.Ct. 2591). *See also Flatow v. Islamic Republic of Iran*, 308 F.3d at 1071 n. 10 (agreeing with *Alejandre* analysis).

In contrast, in the plain language of TRIA and its legislative history there *is* such a clear expression to make the instrumentalities substantively liable for the debts of their related foreign governments, in certain circumstances . . . TRIA . . . expressly provides that where a judgment against a terrorist party exists, not only its assets, but the assets of its agencies and instrumentalities can be used to satisfy the judgment. In contrast, § 1610(f)(1)(A) states that if a creditor seeks to execute on assets claimed by an agency or instrumentality of a foreign state, that agency or instrumentality must already not be "immune under § 1605(a)(7)." 28 U.S.C. § 1610(f)(1)(A).

Further support for this interpretation is gleaned from a comparison provided by the court in *Alejandre*. There, the court noted that in 1988, a bill was introduced in the House of Representatives that would have amended § 1610(a) to deprive a foreign state's U.S. property of immunity from exe-

> cution if "the property belongs to an agency or instrumentality of a foreign state engaged in a commercial activity in the United States and the judgment relates to a claim for which the foreign state is not immune from jurisdiction by virtue of section 1605 or 1607." *See Alejandre*, 183 F.3d at 1287 n.25 (quoting H.R. Res. 3763, 100th Cong. § 3(1)(D) (1988), 134 Cong. Rec. H6484-01) (emphasis added). TRIA's language is similar and operates to make the agency or instrumentality of a terrorist party liable for judgments against the terrorist party itself. Finally, a clear expression of such congressional intent consistent with this reading is found in the statement of Senator Harkin on the Senate floor, as quoted above.
>
> Thus, this Court finds that TRIA allows for execution of the blocked assets of "juridically separate" entities to satisfy a judgment against a designated terrorist party, as defined by TRIA, when such entities are agencies or instrumentalities of that terrorist party.

Weininger, 462 F.Supp.2d 457 at 486-487.

Thus, no conflict between the circuits exists.

Finally, Petitioner's arguments on this score ignore Article XI.4 of the Treaty of Amity, which provides in relevant part that:

> No enterprise of either High Contracting Party, including corporations . . . which is

> publicly owned or controlled shall, if it engages in commercial, industrial, shipping or other business activities within the territories of the other High Contracting Party, claim or enjoy, either for itself or for its property, immunity therein from taxation, suit, execution of judgment or other liability to which privately owned and controlled enterprises are subject therein.

Treaty of Amity at Article XI.4

Article XI.4 deprives the instant Petitioner of the protections of the FSIA and places it exactly on par with any other non-governmental owned—i.e. private—corporation. *See Harris Corp. v. National Iranian Radio and Television*, 691 F.2d 1344, 1350 (11th Cir. 1982) (Finding that Article XI.4 of the Treaty of Amity stripped Petitioner Bank Melli of the protections of the FSIA).

As noted *supra*, this Court's holding in *Bancec* was based primarily on the language and legislative history of the FSIA. *Id.* at 627 (In the FSIA "Congress clearly expressed its intention that duly created instrumentalities of a foreign state are to be accorded a presumption of independent status."). Since Article XI.4 removes the Petitioner from the ambit of the FSIA, the *Bancec* presumption does not apply to it in the first place. Notably, the Petitioner failed to alert the Court to either Article IX.4 or the decision against it in *Harris*.

IV. The Holding That Respondent May Enforce Her Pre-TRIA Judgment Against the Assets of Petitioner Was Correct, Does Not Conflict with *Plaut* and Does Not Warrant Certiorari Review

Petitioner's assertion that certiorari review is required because the Second Circuit improperly applied TRIA "retroactively" and "reopened" Respondent's judgment in violation of *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995) is without merit.

In enacting TRIA, Congress did not "reopen" the Respondent's judgment in any manner. In TRIA, Congress did nothing more than eliminate the presumption of separateness between a foreign state and its agencies and instrumentalities which Congress itself created in the first place. *See Bancec* at 627 (Noting that in enacting the FSIA "Congress clearly expressed its intention that duly created instrumentalities of a foreign state are to be accorded a presumption of independent status.").

Nor does TRIA change the identity of the parties "bound" by the judgment, as Petitioner claims. There is a fundamental difference between being *bound* by a judgment and being *liable* for paying that judgment. For example, the parties to a judgment are bound by the judgment (e.g., for purposes of res judicata and merger, etc.) but a third party—who is no way "bound" by the judgment—may nonetheless be liable to pay the judgment under veil-piercing or alter ego rules. As shown *supra*, TRIA creates a statutory reverse veil-piercing rule.

Nothing in *Plaut* prevents Congress from extending the liability imposed on Iran by Respondent's judgment to agencies and instrumentalities of Iran. Indeed, the Financial Institutions Reform, Recovery and Enforcement Act and ERISA contain similar "liability shifting" provisions, which have repeatedly been found constitutional. *See e.g. Branch v. U.S.*, 69 F.3d 1571, 1582 (Fed.Cir. 1995); *Meriden Trust and Safe Deposit Co. v. F.D.I.C.*, 62 F.3d 449 (2nd Cir. 1995).

Furthermore, the effect of TRIA on the instant Petitioner resulted from its malevolent conduct *after* the passage of TRIA in 2002, which led to its assets being blocked in 2007. Prior to that time, Petitioner was not subject to TRIA at all. *See Weinstein v. Islamic Republic of Iran*, 299 F.Supp.2d 63, (E.D.N.Y. 2004) (holding that instant Petitioner is not subject to TRIA because its assets were not blocked).

Prospective legislation, i.e. that governing future conduct, does not run afoul of *Plaut*. *See e.g. Eco Mfg. LLC. v. Honeywell Intern., Inc.*, 357 F.3d 649, 652 (7th Cir. 2003) ("Changing the rules governing future behavior . . . is a prospective application. Honeywell does not want damages or any other remedy on account of conduct that predated Pub. L. 105-330. It wants prospective relief. Applying the 1998 law to Eco's conduct in 2003 and beyond is entirely prospective."). *See also, generally, Miller v. French*, 530 U.S. 327 (2000).

Since—in respect to the instant Petitioner specifically—TRIA's application is entirely *prospective*, this Court need not even address Petitioner's arguments in this regard.

Finally, Petitioner's claim that "the TRIA contains no hint of any intent to reach prior judgments" (*id.* at 32) is incorrect. As shown above, the legislative history shows clearly that Congress intended TRIA to reach existing judgments. *See* 148 Cong. Rec. at S11536-S11527 (referencing the *Hegna* judgment creditors and other families already holding judgments against Iran).

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, New York
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