No. 10-947 JAN 18 2011

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

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 foreign "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." *Id.* at 626-627. That principle is also reflected in numerous treaties that require the United States to recognize the juridical status of foreign entities. In the decision below, the Second Circuit held that a judgment-creditor of Iran could execute against assets of an Iranian bank that is juridically separate from the Iranian government, even though the bank was not a party to the judgment and has no relation to the events underlying it. The court reached that conclusion by construing a parenthetical reference in the Terrorism Risk Insurance Act of 2002 ("TRIA"), Pub. L. No. 107-297, 116 Stat. 2322, to override *Bancec*. The court then applied its interpretation retroactively to the already final pre-TRIA judgment in this case. The questions presented are:

1. Whether the TRIA overrides this Court's holding in *Bancec* and applicable treaty provisions by authorizing creditors of a foreign sovereign to execute against assets of the sovereign's juridically distinct instrumentalities.

2. Whether Congress violated *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), by retroactively revising the parties bound by a judgment that was already final when the statute was enacted.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Bank Melli Iran (identified in the captions throughout this case as "Bank Melli Iran New York Representative Office") was a respondent in the district court and appellant in the court of appeals.

Respondents Susan Weinstein, Individually, as Co-Administrator of the Estate of Ira William Weinstein, and as Natural Guardian of Plaintiff David Weinstein; Jeffrey A. Miller, as Co-Administrator of the Estate of Ira William Weinstein; Joseph Weinstein; David Weinstein; and Jennifer Weinstein Hazi were plaintiffs in the district court and appellees in the court of appeals.

Bank of New York was a plaintiff in the district court.

The Islamic Republic of Iran, the Iranian Ministry of Information and Security, Ayatollah Ali Hoseini Khamenei, Ali Akbar Hashemi-Rafsanjani, and Ali Fallahian-Khuzestani were defendants in the district court.

Bank Saderat Iran, New York Representative Office and Bank Sepah Iran, New York Representative Office were respondents in the district court.

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PETITION FOR A WRIT OF CERTIORARI

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

OPINIONS BELOW

The court of appeals' opinion (App., *infra*, 1a-23a) is published at 609 F.3d 43 (2d Cir. 2010). The district court's opinion (App., *infra*, 24a-37a) is published at 624 F. Supp. 2d 272 (E.D.N.Y. 2009).

STATEMENT OF JURISDICTION

The court of appeals entered judgment on June 15, 2010, App., *infra*, 1a-23a, and denied rehearing on September 20, 2010, *id.* at 38a-39a. On December 8, 2010, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to January 18, 2011. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND TREATY PROVISIONS INVOLVED

Relevant provisions of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602 *et seq.* (2006); the Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, tit. II, 116 Stat. 2322, 2337; the National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083, 122 Stat. 3, 338; and the Treaty of Amity, Economic Relations, and Consular Rights, U.S.-Iran, Aug. 15, 1955, 8 U.S.T. 899; are set forth in the Appendix (App., *infra*, 40a-80a).

PRELIMINARY STATEMENT

In *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) ("*Bancec*"), this Court held that foreign "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." *Id.* at 626-627. Despite *Bancec*'s settled rule, the Second Circuit in this case allowed a judgment-creditor of Iran to execute against assets of an Iranian bank that was not a party to the judgment and has no relation to the events underlying it. The court reached that result by construing a parenthetical reference in a 2002 amendment to the Foreign Sovereign Immunities Act to override *Bancec*.

That decision warrants review. *Bancec*'s holding reflects fundamental principles of international law and express provisions of numerous treaties. Courts should not lightly presume that Congress intends a radical departure from the Nation's obligations. The Second Circuit's decision, moreover, conflicts with decisions of the Eleventh and Ninth Circuits construing predecessor statutes.

The Second Circuit compounded its error by applying its interpretation retroactively to expand a judgment that was already final on direct review when the amendment

was enacted. This Court held in *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), that Congress may not revise final judgments. But the Second Circuit held *Plaut* inapplicable because, in its view, altering the *parties against whom a judgment may be enforced* does not amount to revising the judgment itself. That novel distinction is a serious inroad on *Plaut* and warrants review in its own right. At a minimum, given the important foreign-relations issues at stake and the Executive Branch's prior stated concerns, the Court should invite the Solicitor General to express the views of the United States on both questions presented.

STATEMENT

I. STATUTORY FRAMEWORK

A. The Foreign Sovereign Immunities Act

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 that recognized limited exceptions. 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. §§ 1330, 1602 *et seq.*), to codify those exceptions.

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. A "foreign state" for those purposes includes any "agency or instrumentality of a foreign state," *i.e.*, any "separate legal person, corporate or otherwise," that 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."

Id. § 1603(a)-(b). Section 1605 then lists the carefully circumscribed exceptions to immunity. *Id.* § 1605.

The FSIA also addresses the immunity of sovereign property from attachment or execution to satisfy a judgment. Generally, "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. Section 1610 lists narrow exceptions, which differ depending on whether property is owned by a sovereign or an instrumentality. *Id.* § 1610(a)-(b).

B. This Court's Decision in *Bancec*

Shortly after the FSIA's enactment, this Court decided *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) ("*Bancec*"). That case concerned whether a bank owned by the Cuban government was necessarily liable for claims against Cuba itself. The Court answered that question in the negative: "[G]overnment instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." *Id.* at 626-627.

The Court explained that the FSIA does not govern the question. That statute, it held, "was 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." 462 U.S. at 620. Instead, such matters depend on substantive principles "common to both international law and federal common law." *Id.* at 622-623.

Those principles, the Court held, require that separate juridical status be respected. "Increasingly during this century," the Court noted, "governments throughout the world have established separately constituted legal entities to perform a variety of tasks." 462 U.S. at 624.

"Freely ignoring the separate status of [those] instrumentalities" would "frustrate[]" the "efforts of sovereign nations to structure their governmental activities in a manner deemed necessary to promote economic development and efficient administration." *Id.* at 626. "Due respect for the actions taken by foreign sovereigns and for principles of comity between nations" mandate that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." *Id.* at 626-627.

Invoking "internationally recognized equitable principles," the Court recognized two narrow exceptions. 462 U.S. at 628-634. First, "where a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created"—*i.e.*, where the sovereign and instrumentality are *alter egos*—"one may be held liable for the actions of the other." *Id.* at 629. Second, an instrumentality's status may be disregarded where the corporate form is abused to "'work fraud or injustice.'" *Id.* at 629-630. Otherwise, the "separate juridical status of a government instrumentality" may not be "disregarded." *Id.* at 633.

Although *Bancec* did not discuss the point, juridical status is also protected by express treaty provisions. The United States has negotiated several Friendship, Commerce, and Navigation treaties that require signatories to respect the "juridical status" of the other state's entities. See *Sumitomo Shoji Am., Inc.* v. *Avagliano*, 457 U.S. 176, 180-182 & nn.6-7, 185-186 & n.13 (1982); Herman Walker, Jr., *Provisions on Companies in United States Commercial Treaties*, 50 Am. J. Int'l L. 373, 379-381 (1956). Among them is the 1955 Treaty of Amity between the United States and Iran. See Treaty of Amity, Economic Relations, and Consular Rights, U.S.-Iran,

Aug. 15, 1955, 8 U.S.T. 899; U.S. Dep't of State, *Treaties in Force* 130 (2010). Article III.1 of that Treaty requires "[c]ompanies constituted under the applicable laws" of either country to "have their juridical status recognized within the territories of the other." 8 U.S.T. at 902. Article IV.1 requires each country to "refrain from applying unreasonable or discriminatory measures that would impair" those entities' rights. *Id.* at 903.

C. The Terrorism Amendments to the FSIA

Historically, there was no exception to immunity for terrorism-related claims. In 1996, however, Congress apparently concluded that international terrorism could appropriately be addressed through private civil litigation against foreign governments, and created a novel exception for terrorism-related claims. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221, 110 Stat. 1214, 1241. That exception, formerly codified at 28 U.S.C. § 1605(a)(7),[1] exempts claims "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(a)(7). The exception applies only if the Executive Branch designated the foreign government a "state sponsor of terrorism" prior to, or as a result of, the act at issue. *Id.* § 1605(a)(7)(A).

In the years since, scores of suits have been filed. Typically, the sovereign does not appear, and plaintiffs are awarded default judgments for tens or hundreds of millions of dollars. See Jennifer K. Elsea, Congressional

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[1] As explained below, p. 9, *infra*, the exception was amended and recodified in 2008 at 28 U.S.C. § 1605A. Except for references to that provision and to 28 U.S.C. § 1610(g), citations to the FSIA throughout the petition are to the prior version applicable in this case.

Research Service, *Suits Against Terrorist States by Victims of Terrorism* 67 & app. A, at 69-74 (Aug. 8, 2008) (listing judgments). More than $14 billion in judgments is now outstanding. *Id.* at 74. Plaintiffs, however, have faced difficulty collecting, and Congress has responded by repeatedly amending the FSIA's exceptions to immunity from attachment and execution—often over the Executive Branch's strong objections. See *id.* at 5-68.

The 1996 amendments created new exceptions. A foreign state's property "used for a commercial activity in the United States" is not immune from execution if "the judgment relates to a claim for which the foreign state is not immune under section 1605(a)(7) [*i.e.*, the terrorism exception], 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). A similar exception applies to "property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States." *Id.* § 1610(b)(2).

In 1998, Congress added another exception for assets the Executive Branch had blocked (*i.e.*, frozen) or otherwise regulated 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). That amendment added Section 1610(f) to the FSIA, which 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 of

> such state) claiming such property is not immune under section 1605(a)(7).

28 U.S.C. § 1610(f)(1)(A). The statute, however, authorized the President to waive its provisions "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, stating that the statute "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 provided for payment of certain judgments out of taxpayer and other funds. See Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 2002, 114 Stat. 1464, 1541. That amendment also repealed the provision authorizing the President to waive Section 1610(f). *Id.* § 2002(f)(2), 114 Stat. at 1543. Following Executive Branch opposition, however, a new waiver provision was added to the bill, *id.* § 2002(f)(1)(B), 114 Stat. at 1543 (codified at 28 U.S.C. § 1610(f)(3)), which the President again promptly invoked, 65 Fed. Reg. 66,483 (Oct. 28, 2000).

In 2002, Congress responded to those presidential waivers by enacting the provision applicable here, Section 201(a) of the Terrorism Risk Insurance Act of 2002 ("TRIA"), Pub. L. No. 107-297, § 201(a), 116 Stat. 2322, 2337 (reproduced at 28 U.S.C. § 1610 note). That statute sought to "build[] upon and extend[] the principles in section 1610(f)(1)" and to "eliminate[] the effect of any [prior] Presidential waiver." H.R. Conf. Rep. No. 107-779, at 27 (2002). To that end, it 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 to the extent of any compensatory damages for which such terrorist party has been adjudged liable.

Pub. L. No. 107-297, § 201(a), 116 Stat. at 2337. The TRIA includes only limited presidential waiver authority for certain diplomatic and consular property, which must be exercised on an asset-by-asset basis. *Id.* § 201(b), 116 Stat. at 2337.

In 2008, Congress amended the FSIA yet again. See National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083, 122 Stat. 3, 338. That amendment revised Section 1605(a)(7)'s terrorism exception and recodified it as Section 1605A. See 28 U.S.C. § 1605A. It also added Section 1610(g), which provides that "property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of" five specific factors some courts had associated with *Bancec*. *Id.* § 1610(g)(1). The provision clarifies, however, that it does not "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." *Id.* § 1610(g)(3).

II. PROCEEDINGS BELOW

A. The Underlying Suit Against Iran

This case concerns an attempt to seize the assets of petitioner Bank Melli Iran to satisfy a 2002 judgment against the Iranian government. Founded in 1928, Bank Melli is Iran's largest financial institution. See Bank Melli Iran, *2007 Annual Report* 13, http://www.bmi.ir/Fa/uploadedFiles/FinanceReportFiles/2009_12_21/222__03e11da898pdf; Bank Melli Iran, *Concise History of Bank Melli Iran*, http://www.bmi.ir/En/BMIHistory.aspx?smnuid=10011. With more than 43,000 employees at 3,300 branches, the bank "handles a larger share of project and trade financing" than any other Iranian bank, as well as a "considerable share of private sector deposits." *Annual Report*, *supra*, at 13. Bank Melli also provides "foreign exchange payment services to industrialists and entrepreneurs" and operates several foreign branches. *Id.* at 14, 46-48. Although Bank Melli's stock is currently wholly owned by the Iranian government, the bank is separately incorporated, with its own share capital and board of directors. See *id.* at 5, 42.

The allegations that produced the judgment in this case have nothing to do with Bank Melli. Rather, plaintiffs are relatives and administrators of the estate of Ira Weinstein, an American killed in Jerusalem in a 1996 Hamas suicide bombing. App., *infra*, 2a. Plaintiffs sued Iran, its Ministry of Information and Security, and three officials in the District Court for the District of Columbia, claiming they had provided support to Hamas. See *Weinstein* v. *Islamic Republic of Iran*, 184 F. Supp. 2d 13, 15, 19 (D.D.C. 2002). Plaintiffs invoked the FSIA's terrorism exception, Iran having been designated a state sponsor in 1984. *Id.* at 20.

None of the defendants entered an appearance. 184 F. Supp. 2d at 16. Consequently, on February 6, 2002, after finding that plaintiffs had made out a *prima facie* case, the district court entered a default judgment for $33 million in compensatory damages and, against the Ministry, $150 million in punitive damages. *Id.* at 16, 22-26. That judgment became final one month later when the time to appeal expired. Fed. R. App. P. 4(a)(1)(A).

B. Proceedings in the District Court

1. In October 2002, plaintiffs registered their judgment in the Eastern District of New York. App., *infra*, 3a. When Congress enacted the TRIA the next month, plaintiffs sought to satisfy the judgment by attaching accounts at the Bank of New York held by three Iranian banks, including Bank Melli. See *Weinstein* v. *Islamic Republic of Iran*, 299 F. Supp. 2d 63, 63-65 (E.D.N.Y. 2004). The United States submitted a statement of interest. It noted a question as to "whether the *Bancec* doctrine still applies under [the] TRIA" so as to preclude Bank Melli's assets from being used to satisfy the judgment. Dist. Ct. Dkt. #19, at 27 (Mar. 7, 2003). But it advised that there was no need to resolve that issue because the accounts were not "blocked assets" subject to attachment under the TRIA. *Id.* at 15-27. The district court agreed, 299 F. Supp. 2d at 74-76, and plaintiffs' appeal was dismissed for default, No. 04-1205-cv (2d Cir. Feb. 4, 2005).

2. Several years later, as part of the U.S. government's ongoing campaign of economic sanctions against Iran, the Treasury Department's Office of Foreign Assets Control ("OFAC") froze the assets of more than two dozen Iranian individuals and entities, including Bank Melli. See U.S. Dep't of Treasury, *Recent OFAC Actions* (Oct. 25, 2007), http://www.treasury.gov/resource-center/

sanctions/OFAC-Enforcement/Pages/20071025.aspx. OFAC accused Bank Melli, essentially, of providing routine banking services such as "opening letters of credit and maintaining accounts" to entities suspected of involvement in Iran's nuclear and missile industries. See U.S. Dep't of Treasury, *Fact Sheet: Designation of Iranian Entities and Individuals for Proliferation Activities and Support for Terrorism* (Oct. 25, 2007), http://www.treasury.gov/press-center/press-releases/Pages/hp644.aspx. OFAC also claimed that the bank had engaged in "deceptive banking practices" by not having its name listed on certain transactions. *Ibid.* OFAC did not accuse Bank Melli of participating in terrorist acts, providing support to Hamas, or having any other connection to the bombing that killed Mr. Weinstein.

Bank Melli publicly denounced OFAC's accusations. It stated that it had "continuously given the transparency of its operations priority" and had "always remained stringently compliant with the regulatory requirements in [Iran] as well as in foreign countries where it has become widely known and respected worldwide as a law abiding financial institution." *Announcement by Bank Melli Iran*, http://www.bmi.ir/Fa/DynamicPage.aspx?id=20. It noted that it had never "previously been the target of allegations remotely similar to those recently announced by the U.S. Treasury," which had "fail[ed] [to] cite or provide any evidence." *Ibid.*

3. Following OFAC's action, one of the Weinstein plaintiffs, Jennifer Weinstein Hazi, again sought to satisfy the 2002 default judgment, this time by attaching and selling real property Bank Melli owned in Forest Hills, Queens, New York. App., *infra*, 3a, 24a-25a. Hazi moved to appoint a receiver, while Bank Melli moved to dismiss. *Ibid.* Bank Melli argued, among other things, that it was

not a party to the underlying judgment against Iran and that, as a juridically distinct entity, it could not be held liable for Iranian debts under *Bancec* and the Treaty of Amity. *Id.* at 27a-28a. The United States advised the court that it would "continue to monitor the litigation" but declined to "make a submission at th[at] time." Dist. Ct. Dkt. #64, at 1 (Mar. 13, 2008).

The district court rejected Bank Melli's arguments. App., *infra*, 24a-37a. "[T]he plain language and legislative history of TRIA § 201(a)," it held, "demonstrate a clear expression to make agencies and instrumentalities substantively liable for the debts of their related foreign governments, overriding the *Bancec* presumption of independent status." *Id.* at 30a. To the extent the Treaty of Amity applied, the statute "'trump[ed]'" that Treaty too. *Id.* at 29a. Accordingly, the court granted Hazi's motion and denied Bank Melli's, but stayed proceedings pending appeal. *Id.* at 37a.

C. The Court of Appeals' Decision

The Second Circuit affirmed. App., *infra*, 1a-23a.

1. The court of appeals held that Bank Melli was liable for the judgment against Iran notwithstanding *Bancec* and the Treaty of Amity. The court conceded that "Bank Melli was not itself a defendant in the underlying action." App., *infra*, 6a. But it rejected Bank Melli's argument that the TRIA does not authorize jurisdiction "when the instrumentality was not itself a party to the underlying tort action that gave rise to judgment." *Id.* at 7a. Rather, in the court of appeals' view, "the TRIA * * * overr[o]de the Supreme Court's reading in [*Bancec*] that 'duly created instrumentalities of a foreign state are to be accorded a presumption of independent status.'" *Id.* at 12a (quoting 462 U.S. at 627).

The court of appeals thought its interpretation compelled by the TRIA's "plain language." App., *infra*, 8a. Congress, in seeking to make blocked assets available to plaintiffs, had provided that "the blocked assets of th[e] terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment." Pub. L. No. 107-297, § 201(a), 116 Stat. at 2337. Pointing to the statute's "parenthetical language," the court asserted that "parties whose blocked assets are subject to execution or attachment * * * include not only the terrorist party but also 'any agency or instrumentality of that terrorist party.'" App., *infra*, 8a. The court also claimed support from one senator's floor statement that the statute "'does not recognize any juridical distinction between a terrorist state and its agencies or instrumentalities.'" *Id.* at 9a-10a (quoting 148 Cong. Rec. S11,528 (Nov. 19, 2002) (Sen. Harkin)). The court thus found it "clear beyond cavil" that the TRIA applies "even if the instrumentality is not itself named in the judgment." *Id.* at 10a.

The court of appeals acknowledged that the Treaty of Amity requires the United States to recognize the "'juridical status'" of Iranian entities. App., *infra*, 15a-16a (quoting 8 U.S.T. at 902). But it claimed that this provision was "designed, not to give separate juridical status to instrumentalities of the sovereign entity, but simply '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.'" *Id.* at 16a. "[E]ven assuming, *arguendo*, that there were a conflict between the two," the court continued, "the TRIA would have to be read to abrogate that portion of the Treaty." *Id.* at 17a.

2. The Second Circuit also rejected Bank Melli's argument that, even if the TRIA abrogated *Bancec* and the Treaty of Amity, it should not be applied retroactively to hold Bank Melli liable for a judgment that was already final on direct review when the TRIA was enacted. The court acknowledged that the underlying judgment was entered in February 2002, almost a year before the TRIA was enacted. App., *infra*, 10a-11a. It also recognized that, under *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), Congress may not "require[ ] federal courts retroactively to reopen final money judgments." *Id.* at 11a.

The court of appeals ruled, however, that "no such revision of the 2002 judgment" occurred here. App., *infra*, 12a. "[T]he judgment itself," the court claimed, "is unaffected." *Ibid.* Rather, the TRIA simply "render[ed] a judgment more readily enforceable against a related third party." *Ibid.* The court noted that, "even under *Bancec*, the presumption [of separate status] could be overcome" in some circumstances—although it did not suggest such circumstances existed here. *Ibid.* Instead, the court held that retroactive application was permissible because "[t]he judgment itself was in no way tampered with, and separation of powers was thus in no way offended." *Ibid.*[2]

3. The court of appeals denied rehearing on September 20, 2010. App., *infra*, 38a-39a. On December 8, 2010,

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[2] The court of appeals also rejected Bank Melli's claims that the TRIA's delegation of authority to the Executive Branch violated separation of powers; that execution would violate the 1980 Algiers Accords; and that execution would constitute a taking under the Fifth Amendment and the Treaty of Amity. App., *infra*, 12a-15a, 18a-22a.

Justice Ginsburg extended the time to file this petition to January 18, 2011.[3]

REASONS FOR GRANTING THE PETITION

The Second Circuit held below that Congress, through a parenthetical reference in an amendment to the Foreign Sovereign Immunities Act ("FSIA"), repudiated this Court's foundational holding in *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) ("*Bancec*"), that juridically distinct instrumentalities ordinarily are not liable for their sovereign's debts. That decision warrants review. As *Bancec* explained, juridical status is a matter of considerable importance to the Nation's foreign relations. *Bancec*'s holding reflects bedrock principles of international law—and the express terms of numerous treaties. The Executive Branch, moreover, has repeatedly underscored the importance of adhering to those principles even in the context of relations as strained as those with Iran.

While the case's importance to foreign relations is reason enough to grant review, the decision below also conflicts with decisions of the Eleventh and Ninth Circuits. In *Alejandre* v. *Telefonica Larga Distancia de Puerto Rico, Inc.*, 183 F.3d 1277 (11th Cir. 1999), the Eleventh Circuit construed comparable language in the TRIA's predecessor *not* to supersede *Bancec*. The Ninth Circuit followed that decision in *Flatow* v. *Islamic Republic of Iran*, 308 F.3d 1065 (9th Cir. 2002).

The Second Circuit's decision to apply the TRIA to alter the scope of a judgment that was already final when

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[3] Although the district court has authorized the receiver to sell the Forest Hills property, Dist. Ct. Dkt. #108 (Nov. 22, 2010), the disposition of any proceeds has been stayed pending this Court's review, Dist. Ct. Dkt. unnumbered entry after #109 (Jan. 3, 2011).

the statute was enacted also merits review. The court of appeals held that, even though *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), prohibits Congress from revising final judgments, Congress is free to revise the *parties against whom* a judgment may be enforced. That is a substantial and unfounded inroad on *Plaut*. Given the weighty separation-of-powers principles at stake, the Court should grant review on that issue too.

I. THE SECOND CIRCUIT'S HOLDING THAT THE TRIA SUPERSEDES *BANCEC* AND THE TREATY OF AMITY WARRANTS REVIEW

In *Bancec*, this Court held that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." 462 U.S. at 626-627. By allowing creditors of Iran to enforce a judgment against a juridically distinct Iranian bank, the Second Circuit departed from that principle, needlessly drawing an Act of Congress into conflict with international law, treaty obligations, and this Court's precedents. The broad ramifications of that holding for the Nation's foreign relations are sufficient reason alone to grant the petition. But the decision also conflicts with decisions of two other circuits.

A. The Second Circuit's Decision Is a Matter of Substantial Importance to the Nation's Foreign Relations

1. As this Court has long made clear, "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray* v. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); see also *F. Hoffmann-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155, 164 (2004). Similarly, "'[a] treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the

part of Congress has been clearly expressed.'" *Trans World Airlines, Inc.* v. *Franklin Mint Corp.*, 466 U.S. 243, 252 (1984). Those canons reflect the basic notion that judicial constructions that draw domestic law into conflict with international obligations are matters of grave concern.

Those same considerations justify this Court's intervention where lower courts fail to respect the canons. This Court has consistently recognized that a case's impact on the Nation's foreign relations is grounds for review. See, *e.g.*, *Christopher* v. *Harbury*, 536 U.S. 403, 412 (2002) (granting review because of the "importance of th[e] issue to the Government in its conduct of the Nation's foreign affairs"); *JPMorgan Chase Bank* v. *Traffic Stream (BVI) Infrastructure Ltd.*, 536 U.S. 88, 91 (2002) (case "implicate[d] serious issues of foreign relations"); *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 407 (1964) (issues "bear importantly on the conduct of the country's foreign relations"); *Kolovrat* v. *Oregon*, 366 U.S. 187, 191 (1961) ("important rights asserted in reliance upon federal treaty obligations"). The Second Circuit's conclusion that Congress repudiated *Bancec* implicates those weighty concerns.

As *Bancec* explained, the presumption of separate juridical status derives from "international law," "[d]ue respect for the actions taken by foreign sovereigns," and "comity between nations." 462 U.S. at 623, 626-627. "Freely ignoring the separate status of government instrumentalities would result in substantial uncertainty over whether an instrumentality's assets would be diverted to satisfy a claim against the sovereign," which may cause others to "hesitate before extending credit." *Id.* at 626. "As a result, the efforts of sovereign nations to structure their governmental activities in a manner

deemed necessary to promote economic development and efficient administration would surely be frustrated." *Ibid.* The United States' own interests would suffer as well: "'If U.S. law did not respect the separate juridical identities of different agencies or instrumentalities, it might encourage foreign jurisdictions to disregard the juridical divisions between different U.S. corporations or between a U.S. corporation and its independent subsidiary.'" *Id.* at 628 (quoting H.R. Rep. No. 94-1487, at 29-30 (1976)).

Those principles are especially important where, as here, a treaty requires the United States to respect juridical status. See Treaty of Amity, Economic Relations, and Consular Rights, U.S.-Iran, art. III.1, Aug. 15, 1955, 8 U.S.T. 899, 902. Repudiation of the "solemn engagement[]" of a treaty is grave cause for alarm. See *Tucker* v. *Alexandroff*, 183 U.S. 424, 437 (1902). As the court below noted, moreover, the Treaty of Amity's "juridical status" provision "is 'substantively identical' to a provision in a number of Friendship, Commerce, and Navigation ('FCN') treaties negotiated by the U.S." App., *infra*, 16a; see pp. 5-6, *supra*. The court's holding that such treaties are either irrelevant to, or superseded by, a statute that allegedly strips instrumentalities of their juridical status is thus a matter of serious concern to the Nation's relations with many countries. Cf. *Sumitomo Shoji Am., Inc.* v. *Avagliano*, 457 U.S. 176, 182 n.7 (1982) (question concerning Friendship, Commerce, and Navigation treaty was "clearly of widespread importance" because "treaty provisions similar to that invoked by [petitioner] are in effect with many other countries").

2. The Executive Branch has repeatedly stressed the need to adhere to *Bancec*. For example, when Congress proposed in 1999 to amend Section 1610(f) to provide

that "all [blocked] assets of any agency or instrumentality of a foreign state shall be treated as assets of that foreign state," H.R. 3485, 106th Cong. § 1(c) (Nov. 18, 1999) (adding 28 U.S.C. § 1610(f)(4)), the State, Treasury, and Defense Departments submitted a joint statement expressing grave concerns. See *Justice for Victims of Terrorism Act: Hearing on H.R. 3485 Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 106th Cong. 48-54 (Apr. 13, 2000) ("Joint Statement"). The proposal, they warned, was "fundamentally flawed" and would "seriously damag[e] * * * important U.S. interests." *Id.* at 48.

The agencies explained that, by "direct[ing] courts to ignore the separate legal status of states and their agencies and instrumentalities," the proposal would "overturn[ ] Supreme Court precedent and basic principles of corporate law and international practice." Joint Statement 49. That would set a "dangerous precedent" for American instrumentalities. *Ibid.* Even though the bill was "limited * * * to terrorism-list states and their majority owned entities," the proposal could "create the perception that the United States is unreliable as a location for banking or investment." *Id.* at 53. Moreover, "if the United States were to 'pierce the corporate veil' in this manner, there could well be similar actions in foreign countries." *Ibid.* "U.S. citizens, corporations, the United States government, and taxpayers have far more money invested abroad than those of any other country, and thus have more to lose if investment protections such as those provided by the presumption of separate status [are] eroded." *Id.* at 54 (emphasis omitted). Finally, "disregarding separate legal personality * * * could possibly lead to substantial U.S. taxpayer liability for takings claims * * * before international [tribunals]." *Ibid.*;

see also *Terrorism: Victims' Access to Terrorist Assets: Hearing Before the S. Comm. on the Judiciary*, S. Hr'g No. 106-941, at 21-39 (Oct. 27, 1999) (Treasury Department expressing similar concerns).

Congress omitted the objectionable provision from the bill ultimately enacted in 2000. See Pub. L. No. 106-386, § 2002, 114 Stat. 1464, 1541 (2000). But the Second Circuit has now construed an ambiguous parenthetical in the TRIA to do precisely what Congress refused to do in that earlier statute. The court's decision thus directly implicates all the Executive Branch's stated concerns.

3. The Executive Branch has also repeatedly expressed more general concerns about using blocked assets to pay private plaintiffs. When Congress initially tried to make those assets available, the President twice waived the provision, concluding that it "would impede [his] ability * * * to conduct foreign policy in the interest of national security." 63 Fed. Reg. 59,201 (Oct. 21, 1998); 65 Fed. Reg. 66,483 (Oct. 28, 2000). Using blocked assets to pay plaintiffs, he explained, would "effectively eliminate" an "important source of leverage" in negotiations with accused terrorist states; "seriously affect [the United States'] ability to enter into global claims settlements"; and threaten liability for U.S. taxpayers where assets were also subject to international arbitrations. 1998 Pub. Papers 1843, 1847 (Oct. 23, 1998).

The Executive Branch has voiced similar concerns ever since. In 2002, the State Department told Congress that "[t]he Administration opposes the use of blocked assets * * * to satisfy judgments." U.S. Dep't of State, *Letter to Congressional Leadership* (June 12, 2002), http://www.state.gov/s/l/38649.htm. Using such assets to pay plaintiffs, it explained, would "preclude their use to pressure regimes to improve their policies on terrorism, risk

taxpayer liability for third-party claims against the assets, eliminate their availability to satisfy current U.S. Government claims (currently more than $2 billion), and put at risk diplomatic property." *Ibid.* Reiterating that opposition later that year, the President urged that using blocked assets to pay judgments infringed on "the prerogatives of the President in the area of foreign affairs." 2002 Pub. Papers 1697, 1699 (Sept. 30, 2002).

The State Department has voiced similar concerns with specific reference to Iranian assets. "Virtually all of the Iranian blocked property that has been the subject of attachments," it noted, "is the subject of claims against the U.S. government before the Iran-United States Claims Tribunal in The Hague, where we will have to account for it." *Benefits for U.S. Victims of International Terrorism: Hearing Before the S. Comm. on Foreign Relations*, S. Hr'g No. 108-214, at 8 (July 17, 2003). "And when the time comes for the United States to demand from Iran or other states reimbursement for the amounts it has paid on their behalf, it will no doubt be confronted with offsetting claims to cover judgments against the United States rendered in other national courts." *Ibid.* Using blocked assets to pay plaintiffs also "undermines the President's ability to use [them] in the broader interest of the nation" as a "powerful foreign policy tool." *Ibid.* Ultimately, "[u]sing blocked assets to pay claims and judgments will not deter terrorism, but will reduce the incentive that blocking property provides to end support for terrorism." *Ibid.*; cf. 43 Weekly Comp. Pres. Doc. 1641, 1642 (Dec. 28, 2007) (amendments would be "viewed with alarm by the international community and would invite reciprocal action").

By making the blocked assets of juridically distinct instrumentalities like Bank Melli available to satisfy judg-

ments against their sovereigns, the Second Circuit has greatly expanded the range of blocked assets subject to execution. The decision thus implicates all the Executive Branch's foregoing concerns as well.[4]

4. Those concerns remain vital today. The President has recently questioned the wisdom of "[m]any years of refusing to engage Iran" and proposed "offer[ing] Iran a pathway to a better future." *National Security Strategy* 26 (May 2010); see also *Remarks to the United Nations General Assembly*, 2010 Daily Comp. Pres. Doc. 786, at 2 (Sept. 23, 2010) ("The United States and the international community seek a resolution to our differences with Iran, and the door remains open to diplomacy should Iran choose to walk through it."). Other nations have already been removed from the list of state sponsors. See 69 Fed. Reg. 61,702 (Oct. 7, 2004) (Iraq); 71 Fed. Reg.

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[4] As noted above, p. 9, *supra*, Congress recently added another provision authorizing execution against instrumentality assets in some circumstances. See 28 U.S.C. § 1610(g). But that provision applies only to judgments entered under new Section 1605A; it does not affect the billions of dollars of judgments like this one entered under prior law. See *id.* § 1610(g)(1); cf. *In re Islamic Republic of Iran Terrorism Litig.*, 659 F. Supp. 2d 31, 67 (D.D.C. 2009) (noting that many plaintiffs failed to re-file). Moreover, although Section 1610(g) bars courts from considering five specific factors bearing on juridical status, the existence of a treaty requiring the recognition of an instrumentality's juridical status is not among them. See 28 U.S.C. § 1610(g)(1); cf. *Bennett* v. *Islamic Republic of Iran*, 604 F. Supp. 2d 152, 162 (D.D.C. 2009) (construing provision not to abrogate treaty), aff'd, 618 F.3d 19 (D.C. Cir. 2010). Finally, Section 1610(g) includes an exemption for third parties that may encompass instrumentalities. See Jennifer K. Elsea, Congressional Research Service, *Suits Against Terrorist States by Victims of Terrorism* 57 (Aug. 8, 2008) (discussing 28 U.S.C. § 1610(g)(3)). The Second Circuit's construction of the TRIA is thus important even to judgments entered under Section 1605A.

39,696 (June 30, 2006) (Libya); 73 Fed. Reg. 63,540 (Oct. 11, 2008) (North Korea).

The decision below distorts the range of foreign policy options available to the President. By allowing plaintiffs to seize assets of Iranian banks and other instrumentalities in violation of international law, the decision essentially allows litigants to perpetuate a privately administered sanctions regime regardless of more nuanced approaches the President may wish to take. This Court is already familiar with the complications that arose from claims against Iraq following removal of that country's designation. See *Republic of Iraq* v. *Beaty*, 129 S. Ct. 2183 (2009). The consequences are no less serious here.

Those concerns are more than sufficient reason to grant the petition. At a minimum, given the foreign relations issues at stake and the Administration's statements emphasizing the issue's importance, the Court should invite the Solicitor General to express the views of the United States, as it has done in similar cases involving Iran and other countries. See, *e.g.*, *Ministry of Def. & Support for Armed Forces of Islamic Republic of Iran* v. *Elahi*, 552 U.S. 1176 (2008); *Holy See* v. *Doe*, 130 S. Ct. 659 (2009); *Fed. Ins. Co.* v. *Kingdom of Saudi Arabia*, 129 S. Ct. 1400 (2009); *Permanent Mission of India to United Nations* v. *City of New York*, 549 U.S. 807 (2006).

B. The Decision Below Conflicts with Decisions of the Eleventh and Ninth Circuits

Review is also warranted by the conflict among the circuits on this issue.

1. In *Alejandre* v. *Telefonica Larga Distancia de Puerto Rico, Inc.*, 183 F.3d 1277 (11th Cir. 1999), the Eleventh Circuit refused to allow execution against assets of a Cuban telephone company to satisfy a judgment

against Cuba. The plaintiffs there relied on the 1998 version of the blocked-assets provision, which contained virtually identical parenthetical language: "'Notwithstanding any other provision of law,'" it declared, "'any property with respect to which financial transactions are prohibited or regulated * * * 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).'" *Id.* at 1287 (quoting 28 U.S.C. § 1610(f)(1)(A)) (emphasis added).

Despite the express parenthetical "including any agency or instrumentality," the Eleventh Circuit held that this provision was "not a sufficient basis for overcoming the presumption of separate juridical status." 183 F.3d at 1286. Congress, it concluded, had not "overrid[den] the *Bancec* presumption of separate juridical status by making instrumentalities responsible for the debts of their related terrorist-sponsoring governments." *Id.* at 1287. Citing an earlier, failed proposal, the court observed that Congress "knows how to express clearly an intent to make instrumentalities substantively liable for the debts of their related foreign governments." *Ibid.* But "[a]bsent such a clear expression, which does not appear in section 1610(f)(1)(A)," the court saw "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 1287-1288 (quoting *Bancec*, 462 U.S. at 620).

2. The Ninth Circuit followed *Alejandre* in *Flatow* v. *Islamic Republic of Iran*, 308 F.3d 1065 (9th Cir. 2002). The plaintiff there sought to collect a judgment against

Iran from an Iranian bank. He argued that the "amendments to Section 1605(a)(7) of the FSIA were intended to alter the application of *Bancec*'s presumption of separate juridical entity status for foreign instrumentalities." *Id.* at 1071 n.10. The Ninth Circuit sought the views of the United States. *Ibid.* Citing *Alejandre*, among other cases, the government responded that "the amendments to the FSIA did not alter the *Bancec* presumption." *Ibid.*; see U.S. Br. as *Amicus Curiae* in No. 00-56446, at 17-20 (9th Cir. filed Apr. 2002). The Ninth Circuit thus rejected the plaintiff's claim. 308 F.3d at 1071 n.10.

3. By contrast, the Second Circuit held here that the FSIA's blocked-assets provision *does* override *Bancec*'s presumption, finding it "clear beyond cavil" that the statute applies "even if the instrumentality is not itself named in the judgment." App., *infra*, 10a. In its view, the statute "overr[o]de the Supreme Court's reading in [*Bancec*] that 'duly created instrumentalities of a foreign state are to be accorded a presumption of independent status.'" *Id.* at 12a (quoting 462 U.S. at 627).

To be sure, the Second Circuit was construing the version of the blocked-assets provision enacted in 2002, while *Alejandre* and *Flatow* construed earlier provisions. But the slight textual differences do not justify contrary constructions. The language of the provisions is strikingly similar. Compare 28 U.S.C. § 1610(f)(1)(A) (quoted at pp. 7-8, *supra*) with Pub. L. No. 107-297, § 201(a), 116 Stat. 2322, 2337 (2002) (quoted at pp. 8-9, *supra*). Moreover, the textual features of the TRIA that the Second Circuit relied on—the parenthetical "including * * * any agency or instrumentality" and the prefatory clause "[n]otwithstanding any other provision of law," App., *infra*, 8a-9a—appear in both provisions.

The TRIA's legislative history confirms that the new provision was modeled on the earlier one construed in *Alejandre*. See H.R. Conf. Rep. No. 107-779, at 27 (2002). The amendment's essential purpose was simply to make blocked assets *of the judgment-debtor* available after the President repeatedly waived the prior provision—not to depart from fundamental principles of international law. See *ibid.*; *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran* v. *Elahi*, 129 S. Ct. 1732, 1744 (2009); pp. 7-9, *supra*.

C. The Second Circuit's Decision Is Incorrect

Finally, the Second Circuit's decision is incorrect. The court needlessly construed an ambiguous statute to conflict with both the international-law principles recognized in *Bancec* and express treaty provisions.

1. Fundamental canons require statutes to be construed, whenever possible, not to contravene international law. See *Charming Betsy*, 6 U.S. at 118; *Hoffmann-La Roche*, 542 U.S. at 164. Nothing in the TRIA clearly indicates any intent to override *Bancec*'s holding that, consistent with international law, separate juridical status ordinarily must be respected.

The TRIA provides that "the blocked assets of th[e] terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment." Pub. L. No. 107-297, § 201(a), 116 Stat. at 2337. By its terms, that provision does not state that a separate instrumentality's assets may be used to satisfy judgments against the sovereign. Rather, it simply indicates that there are circumstances in which the *sovereign's* blocked assets "includ[e]" assets of instrumentalities. "To 'include' is to 'contain' or 'comprise as part of a whole,'" *Chickasaw Nation* v. *United States*, 534 U.S. 84, 89 (2001); "including" is not a "word

of enlargement," *Montello Salt Co.* v. *Utah*, 221 U.S. 452, 466 (1911). Thus, a reasonable—indeed, the most natural—interpretation of the parenthetical is merely that an instrumentality's assets are not immune when they are "includ[ed]" in the sovereign's assets—for example, because the two are *alter egos*. See *Bancec*, 462 U.S. at 628-630. Had Congress wanted to authorize execution against instrumentality assets regardless of *Bancec*, it would have phrased the statute more broadly to cover assets of a terrorist party "and," or "as well as," instrumentality assets. Instead, Congress used language of inclusion that merely acknowledges *Bancec* and its customary exceptions. The Second Circuit effectively read the statute to reach "blocked assets of any agency or instrumentality *regardless of Bancec*." But the more reasonable interpretation is that it reaches "blocked assets of any agency or instrumentality *where permitted by Bancec*."

Congress, moreover, modeled this provision on an earlier provision of the FSIA. See H.R. Conf. Rep. No. 107-779, at 27. That statute addresses immunity, not attribution of liability between sovereigns and their instrumentalities. See *Bancec*, 462 U.S. at 619-621; *Alejandre*, 183 F.3d at 1287-1288; *Flatow*, 308 F.3d at 1071 n.10. Given that history, it is particularly unlikely that Congress intended an oblique parenthetical to effect a radical departure from international-law principles of substantive liability. As this Court has explained, Congress does not usually "hide elephants in mouseholes." *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). The suggestion that Congress repudiated this Court's precedent and flouted international law by means of an ambiguous parenthetical flies in the face of that principle.

The Second Circuit claimed support from a single floor statement by Senator Harkin. App., *infra*, 9a-10a. But

"remarks of a single legislator, even the sponsor, are not controlling." *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 311 (1979). "There is no basis either in law or in reality for th[e] naive belief" that "what is said by a single person in a floor debate * * * represents the view of Congress as a whole." *Zedner* v. *United States*, 547 U.S. 489, 510 (2006) (Scalia, J., concurring in judgment). Here, moreover, there is every reason to doubt Senator Harkin's views: That same floor statement is unambiguously contrary to the statute in other respects. See *Weinstein* v. *Islamic Republic of Iran*, 299 F. Supp. 2d 63, 71-76 (E.D.N.Y. 2004) (rejecting Senator Harkin's claim that "the term 'blocked asset' includes any asset 'regulated' by the Treasury Department" because "the seemingly clear statutory text does not reasonably allow that broader interpretation"); U.S. Statement of Interest, Dist. Ct. Dkt. #19, at 21-23 (Mar. 7, 2003) (same). Senator Harkin's assertion notwithstanding, the statute's text is at worst ambiguous with respect to juridical status. The *Charming Betsy* canon requires that ambiguity to be resolved in a manner consistent with—not in contravention of—*Bancec* and international law.

2. The Treaty of Amity—which requires the United States and Iran to respect the juridical status of each other's entities—reinforces that conclusion. The Second Circuit claimed that the Treaty was "designed, not to give separate juridical status to instrumentalities of the sovereign entity, but simply '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.'" App., *infra*, 16a. But the Treaty unambiguously requires the United States to uphold the "juridical status" of Iranian "[c]ompanies," a term it defines broadly and without dis-

tinction between public and private entities. See Art. III.1, 8 U.S.T. at 902 ("corporations, partnerships, companies and other associations, whether or not with limited liability and whether or not for pecuniary profit"). *Bancec* itself relied heavily on private corporate law. See 462 U.S. at 623-630. The Second Circuit's decision, moreover, does *not* permit Iranian companies to conduct business "'on a comparable basis with domestic firms.'" App., *infra*, 16a. Instead, it singles out Iranian instrumentalities for discriminatory, automatic veil-piercing to which neither U.S. instrumentalities, nor those of most other countries, are subject. See, *e.g.*, *Fed. Hous. Admin.* v. *Burr*, 309 U.S. 242, 250-251 (1940).

The Second Circuit's alternative holding that the TRIA "abrogate[s]" the Treaty (App., *infra*, 17a) defies the canon that statutes must not be construed to abrogate treaties "'unless such purpose on the part of Congress has been clearly expressed.'" *Trans World Airlines*, 466 U.S. at 252. The court's interpretation of the TRIA is not the only reasonable one; the statute is at worst ambiguous. Under this Court's precedent, that ambiguity must be resolved in favor of upholding solemn treaty obligations.

II. THE SECOND CIRCUIT'S RETROACTIVE APPLICATION OF ITS CONSTRUCTION ALSO WARRANTS REVIEW

Even if the TRIA could be read to override *Bancec*, the Second Circuit's holding that the statute can be applied retroactively to expand an already final judgment to reach additional entities creates a new and dangerous exception to *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995). The Second Circuit's decision on that issue also merits review.

A. The Decision Below Conflicts with *Plaut*

In *Plaut*, this Court held that "[t]he Constitution's separation of legislative and judicial powers denies [Congress] the authority * * * to reopen final judgments entered before [a statute's] enactment." 514 U.S. at 240. "Article III," the Court explained, "establishes a 'judicial department' with the 'province and duty * * * to say what the law is' in particular cases and controversies." *Id.* at 218 (quoting *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). That provision "gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them." *Id.* at 218-219. "By retroactively commanding the federal courts to reopen final judgments, Congress * * * violate[s] this fundamental principle." *Id.* at 219.

The Second Circuit's decision cannot be reconciled with *Plaut*. The court acknowledged that the judgment here became final almost a year before the TRIA's enactment. App., *infra*, 10a-11a. But it refused to apply *Plaut* on the ground that Congress had merely revised the *parties against whom* that judgment may be enforced. The TRIA "render[ed] [the] judgment more readily enforceable against a related third party," but "[t]he judgment itself was in no way tampered with, and separation of powers was thus in no way offended." *Id.* at 12a.

That attempt to avoid *Plaut* does not withstand scrutiny. The identity of the parties bound is a fundamental attribute of any judgment. Judgments name the parties against whom they are entered. See Fed. R. Civ. P. Forms 70, 71. They do so because "'[i]t is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party.'" *Taylor* v. *Sturgell*, 553 U.S. 880, 884 (2008); see also *Restatement (Second) of Judgments* §§ 17, 34 (1982). Ar-

guing that one does not "revise" a judgment by changing the parties liable to pay it is like arguing that one does not amend a complaint by changing the defendants. That clearly is not the law. Cf. Fed. R. Civ. P. 15(c)(1)(C); *Delay* v. *Gordon*, 475 F.3d 1039, 1045-1046 (9th Cir. 2007).

The Second Circuit's holding also defies *Plaut*'s rationale. *Plaut* was based on the principle that legislative revision of a judgment amounts to usurpation of a judicial function. See 514 U.S. at 218-225. But awarding relief *against particular parties* is no less a component of that function than any other. The court's disregard for *Plaut* is even more striking because the TRIA contains no hint of any intent to reach prior judgments. The provision's inapplicability thus should have been apparent even from more pedestrian non-retroactivity principles. See *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 280 (1994).

B. The Issue Is Important

The separation-of-powers principle at stake is important. As *Plaut* noted, legislative revision of final judgments "offends a postulate of Article III" that is "deeply rooted in our law." 514 U.S. at 218. The power to alter the parties bound by a judgment is the power to create liability where there was none; the power to replace a judgment-proof debtor with a solvent one or vice versa. This Court routinely grants review, even absent a circuit conflict, where similarly important separation-of-powers principles are at stake. See, *e.g.*, *Free Enter. Fund* v. *Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010). "[T]he doctrine of separation of powers is a structural safeguard * * * establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict." *Plaut*, 514 U.S. at 239 (emphasis omitted). Pre-

serving that safeguard requires vigilant intervention when lower courts stray from the Constitution's design.

In the terrorism-litigation context, moreover, Congress has a history of testing constitutional bounds. The 2008 amendments to the FSIA allowed plaintiffs who had already litigated to final judgment to re-file their claims under the new statute. See Pub. L. No. 110-181, § 1083(c)(2), 122 Stat. 3, 342 (2008). As many have noted, that provision raises serious *Plaut* issues. See *In re Islamic Republic of Iran Terrorism Litig.*, 659 F. Supp. 2d 31, 68-69 (D.D.C. 2009) (noting "a legitimate question of whether this enactment offends deeply entrenched constitutional principles" but ultimately upholding it); Elsea, *supra*, at 61 (provision "may be vulnerable to invalidation"). Similarly, after plaintiffs from the Iran hostage crisis sought to repudiate the Algiers Accords and sue Iran, Congress intervened by enacting a provision purporting to waive Iran's immunity in that one case—going so far as to identify the case by docket number in the U.S. Code. See 28 U.S.C. § 1605(a)(7)(A) (now codified at 28 U.S.C. § 1605A(a)(2)(B)); *Roeder* v. *Islamic Republic of Iran*, 333 F.3d 228, 237 n.5 (D.C. Cir. 2003) (noting *Plaut* issue). However much Congress may desire to accommodate plaintiffs in lawsuits against certain governments, its actions remain subject to constitutional limitations. The court of appeals' failure to enforce those limitations here warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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