No. 10-947 MAY 24 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

REPLY FOR PETITIONER

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PARTIES TO THE PROCEEDINGS BELOW

Susan Weinstein, Jeffrey A. Miller, Joseph Weinstein, and David Weinstein were designated appellees by the court of appeals, see Pet. App. 1a & n.1, and no motion to amend the caption to remove them was ever filed. Those parties are thus technically respondents under this Court's Rule 12.6. As the brief in opposition notes (at iii), and as the petition made clear (at 12), the motion to appoint a receiver that led to the judgment under review was brought solely by respondent Jennifer Weinstein Hazi.

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REPLY FOR PETITIONER

Respondent does not dispute that, under this Court's decision in *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) ("*Bancec*"), "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." *Id.* at 626-627. She does not dispute that the Executive Branch has repeatedly stressed the importance of that settled holding to the Nation's foreign relations. Pet. 19-21. Nor does she deny that the Second Circuit construed a parenthetical reference in the Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, §201(a), 116 Stat. 2322, 2337, to overturn that holding.

Those undisputed facts alone justify this Court's review. The decision below construed an ambiguous statu-

tory parenthetical to contravene international legal principles of critical importance to the Executive Branch. It did so in contravention of an express treaty provision, exposing the United States to liability in international tribunals. And it did so retroactively, expanding the scope of an already-final judgment. The Court should accordingly grant the petition. At a minimum, it should invite the Solicitor General to express the views of the United States.

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

A. The *Bancec* Issue Is Important

1. Although respondent does not deny that the decision below construed the TRIA to overturn *Bancec*, she attempts to downplay its significance for the Nation's foreign relations. *Bancec*'s holding that juridically distinct instrumentalities generally cannot be held liable for their sovereign's debts, she asserts, "was not based solely, or even primarily, on international practice, but rather on the legislative history and language" of the FSIA. Br. in Opp. 1, 24. That is incorrect. *Bancec* specifically held that the FSIA "was *not* intended to affect the *substantive law determining the liability* of a foreign state or instrumentality." 462 U.S. at 620 (emphasis added). Rather, "the principles governing th[e] case [we]re common to both international law and federal common law" that Congress chose not to disturb. *Id.* at 623; see also *id.* at 624-626 (looking to practice by "governments throughout the world"); *id.* at 626-627 (invoking "[d]ue respect for the actions taken by foreign sovereigns and for principles of comity between nations").

Bancec briefly mentioned the FSIA's legislative history, but only to "buttress[ ]" the conclusion it drew from

international law. See 462 U.S. at 627-628. And that legislative history emphasized the issue's importance to foreign relations, warning that, "'[i]f 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.'" *Id.* at 628 (quoting H.R. Rep. No. 94-1487, at 29-30 (1976)). That history thus underscores, rather than diminishes, the need for review.

2. Respondent also denies any conflict with international law because *Bancec* allows an instrumentality's corporate veil to be pierced in certain circumstances—a holding the petition acknowledged, Pet. 5, despite respondent's claims to the contrary, Br. in Opp. 1-3. The TRIA, respondent asserts, "did nothing more than codify th[at] exception * * * and apply it to a certain set of circumstances." *Id.* at 18.

That argument is baseless. *Bancec* recognized only two exceptions that warrant veil-piercing: where the sovereign and instrumentality are *alter egos*, and where the corporate form is abused to work a fraud or injustice. See 462 U.S. at 628-634. Those are narrow exceptions—even the footnote respondent quotes states that "'separate status * * * may be disregarded in *certain exceptional circumstances*.'" Br. in Opp. 2 (emphasis added). The Second Circuit never found those exceptions applicable here, and plainly they are not: A foreign nation's alleged support of terrorism, unrelated to any abuse of the corporate form, is not the sort of "injustice" to which *Bancec*'s exception applies. See *Alejandre* v. *Telefonica Larga Distancia de Puerto Rico, Inc.*, 183 F.3d 1277, 1286-1287 (11th Cir. 1999). Besides, respondent never explains why the gravity of alleged actions by *Iran* justifies disregarding the corporate form of an *Iranian bank*

with no connection to those actions—an instrumentality held liable solely because of an unrelated dispute over the transparency of its banking practices. See Pet. 11-12.[1]

Respondent's argument boils down to the claim that, because *Bancec* acknowledged two narrow, internationally recognized exceptions to the presumption of separate juridical status, courts are free to create whatever additional exceptions they please, however unrelated they might be to any abuse of the corporate form. That extraordinary reading of *Bancec* would render the case's presumption a dead letter—and only underscores the need for review.

B. The Conflict with the Treaty Is Important

The importance of the decision below is enhanced by its impact on the Nation's treaty obligations. The Treaty of Amity—and more than a dozen others like it, Br. in Opp. 9-10—provides that "[c]ompanies constituted under the applicable laws" of each signatory must "have their juridical status recognized within the territories of the other." Treaty of Amity, Economic Relations, and Consular Rights, U.S.-Iran, art. III.1, Aug. 15, 1955, 8 U.S.T. 899, 902. By singling out Iranian companies for liability for acts of their sovereign in which they played no role, the decision below flouts that obligation.

1. Respondent contends that, under *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176 (1982), the Treaty "ha[s] nothing whatsoever to do with veil-piercing, and [was] intended merely 'to give corporations of each signa-

[1] Respondent's claim that the TRIA merely "codif[ied]" a *Bancec* exception is also hard to square with her admission that *no* court has *ever* found that "a *Bancec* exception should be applied * * * to any terrorism judgment" and that application of *Bancec*'s exceptions "rarely if ever happens at all." Br. in Opp. 18-20.

tory 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.'" Br. in Opp. 8-12, 15-16 (quoting 457 U.S. at 186). But *Sumitomo* nowhere says the Treaty has "nothing whatsoever to do with veil-piercing." To the contrary, disregarding an entity's corporate form absent any traditional ground for doing so is the antithesis of respecting its "legal status." 457 U.S. at 186.

Indeed, *Sumitomo* emphasizes the obligation to treat foreign companies "on a comparable basis with domestic firms." 457 U.S. at 186. The Second Circuit's decision, however, singles out Iranian companies for *discriminatory* veil-piercing in circumstances where a domestic corporation's legal status would be respected. Pet. 30. The conflict with the Treaty is thus inescapable.[2]

2. Respondent urges (at 23-24) that Article XI.4 of the Treaty bars foreign instrumentalities "engage[d] in commercial, industrial, shipping or other business activities" from claiming "*immunity* * * * from * * * execution of judgment or other liability to which privately owned and controlled enterprises are subject." 8 U.S.T. at 909 (emphasis added). But Bank Melli is not claiming "immunity." It seeks only not to be held liable for another entity's debts. *Bancec* and the Treaty of Amity prohibit—as a matter of substantive international law, see 462

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[2] Respondent argues that, because the Treaty's protections extend to partnerships and other entities without limited liability, the Treaty has "nothing to do with * * * veil-piercing." Br. in Opp. 13. But Article III.1 requires signatories to respect the "juridical status" of various types of entities. For some, that status includes limited liability; for others, it does not. What Article III.1 prohibits is singling out foreign entities for veil-piercing where a comparable domestic entity's juridical status would be respected.

U.S. at 623—holding Bank Melli liable for its sovereign's debts. Bank Melli thus has no need to claim any "immunity" that would shield assets from its *own* creditors. See *Flatow* v. *Islamic Republic of Iran*, 308 F.3d 1065, 1071 n.10 (9th Cir. 2002).

Besides, Article XI.4 subjects foreign instrumentalities only to remedies "to which *privately* owned and controlled enterprises are subject." 8 U.S.T. at 909 (emphasis added). No law allows *private* corporations to be held liable for their affiliates' debts in these circumstances. Respondent's theory again boils down to the claim that, because "domestic firms are subject to having their corporate veils pierced" in *some* circumstances, Br. in Opp. 12, foreign instrumentalities can have their veils pierced in *any* circumstance—whether or not traditional grounds for veil-piercing exist, and whether or not the veil-piercing reflects evenhanded treatment of domestic and foreign entities. That theory renders the Treaty's protections a nullity.

3. Finally, respondent invokes the Second Circuit's alternative holding that the TRIA "trumps" the Treaty, pointing to the TRIA's "[n]otwithstanding any other provision of law" language. Br. in Opp. 16-17. But nothing in that "notwithstanding" clause requires courts to construe ambiguous statutory language to override the Nation's solemn treaty obligations. See Pet. 30. The court's unwarranted abrogation of those obligations is alone sufficient to justify review.

C. The Executive Branch Has a Strong Interest in This Case

Respondent does not deny that the Executive Branch has repeatedly urged the importance of adhering to *Bancec*, even in terrorism cases. Pet. 19-21. Nor does she deny the Executive's repeated warnings against us-

ing blocked assets to pay terrorism judgments. *Id.* at 21-23. Those Executive policies reflect, not only the intrinsic importance of international law, but also the practical reality that violations could subject the United States to liability in international tribunals. See *id.* at 19-23.

Attempting to downplay those concerns, respondent equates the government's decision at the district-court level not to "make a submission *at th[at] time*," Dist. Ct. Dkt. #64, at 1 (Mar. 13, 2008) (emphasis added), with substantive disagreement with Bank Melli's position. Br. in Opp. 7. But courts "are not mind readers" and "cannot discern whether the State Department's decision not to intervene is an implicit endorsement, an objection, or simple indifference." *Alperin* v. *Vatican Bank*, 410 F.3d 532, 556 (9th Cir. 2005). The government's filing decisions are "informed by a variety of intricate diplomatic and political considerations that make this sort of inferential reasoning by courts a perilous enterprise." *In re Assicurazioni Generali S.p.A. Holocaust Ins. Litig.*, 340 F. Supp. 2d 494, 506 (S.D.N.Y. 2004), *aff'd*, 592 F.3d 113 (2d Cir. 2010).

Respondent's suggestion (at 5-7, 20) that the Executive Branch "actively *facilitated* execution of judgments" against an instrumentality in *Bank of New York* v. *Rubin*, 484 F.3d 149 (2d Cir. 2007), is also meritless. The government initially opposed execution in that case because the accounts at issue were not "blocked assets." U.S. Br. as *Amicus Curiae* in No. 06-1606 (2d Cir. Aug. 22, 2006). When OFAC subsequently blocked some of the assets, the government simply notified the court of that fact and advised that, "*should the Court conclude* that the Rubins may now attach [those] assets under [the] TRIA, the funds may be distributed without a license from OFAC." U.S. 28(j) Letter in No. 06-1606 (2d

Cir. Jan. 11, 2007) (emphasis added). The letter submitted on remand likewise simply noted that the assets remained blocked and advised that the government "ha[d] nothing further to add." U.S. Letter in No. 05 Civ. 4926 (S.D.N.Y. June 8, 2007). Neither submission took any position on whether the court should allow execution, and neither alluded to—much less weighed in on—*Bancec*'s applicability. By contrast, in an earlier stage of *this* case, the government specifically noted an issue as to "whether the *Bancec* doctrine still applies under [the] TRIA." Dist. Ct. Dkt. #19, at 27 (Mar. 7, 2003).

In any event, respondent's repeated speculation about the United States's views (at 5-7, 16, 17, 20) only underscores the need to obtain those views. This Court should do what it has done in numerous similar cases by calling for the views of the Solicitor General. See Pet. 24; *e.g.*, *Republica Bolivariana de Venezuela* v. *DRFP LLC*, No. 10-1144 (May 16, 2011). Where the Executive Branch is uniquely positioned to gauge the importance of a case to the Nation's foreign relations, the government's views should be sought, rather than guessed at.

D. The Circuit Conflict Also Warrants Review

While the case's foreign-relations implications alone justify review, respondent also fails to reconcile the conflict with the Eleventh and Ninth Circuit decisions in *Alejandre* and *Flatow*. See Pet. 24-27. Respondent cannot refute that the TRIA's text is readily susceptible to an interpretation consistent with *Bancec*. While the court below read the parenthetical phrase "(including the blocked assets of any agency or instrumentality of that terrorist party)" to mean that sovereign assets subject to execution "include" instrumentality assets *notwithstanding Bancec*, it is no less reasonable to read that phrase to mean that those assets "include" instrumentality assets

when permitted by Bancec. See *id.* at 27-28. Despite accusing Bank Melli of "verbal gymnastics," Br. in Opp. 19, respondent nowhere explains why that construction is unreasonable. Nor does she deny that any ambiguity must be construed, if possible, to harmonize the statute with international law.

Construing virtually indistinguishable parenthetical language in TRIA § 201(a)'s predecessor, the Eleventh and Ninth Circuits found no clear mandate to disregard *Bancec*. See Pet. 24-26. The court below reached the opposite conclusion. Any slight textual differences between the post-2002 version of the statute (Pet. 8-9) and its predecessor (Pet. 7-8) are immaterial.

Nor can the legislative history reconcile the conflict. See Br. in Opp. 3-4, 19, 23. A single legislator's floor statement is a poor guide to a statute's meaning in the best of circumstances. See Pet. 28-29. And here it is particularly unreliable, given that it unambiguously contradicts the statute in another respect. *Id.* at 29. Whatever weight floor statements should receive in other contexts, they cannot justify reading an ambiguous statute to contravene international law. Cf. *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 37 (1992).

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

The Second Circuit's application of the TRIA to an already-final judgment independently warrants review. None of respondent's attempts to reconcile that holding with *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), withstands scrutiny.

1. Respondent denies that Congress modified a final judgment in violation of *Plaut*, urging that "[t]here is a fundamental difference between being *bound* by a judg-

ment and being *liable* for paying that judgment." Br. in Opp. 25. While there may be a number of ways in which a party can be "bound" by a money judgment, surely being bound to *pay it* is the most critical. The judiciary's "power, not merely to rule on cases, but to *decide* them," *Plaut*, 514 U.S. at 218-219, obviously includes the power to decide *who* must pay *what amount* to *whom*. The Second Circuit's holding that Congress can retroactively revise the parties liable to pay a judgment licenses Congress to invade that judicial power and creates an enormous loophole in *Plaut*. It would allow Congress to reopen any number of final judgments years after the fact, so long as Congress purported only to revise the parties who must pay.[3]

2. Respondent also argues that the TRIA's application here is not retroactive because, even though the judgment became final before the TRIA's enactment, Bank Melli did not become liable until OFAC blocked its assets on unrelated grounds in 2007. Br. in Opp. 26-27. But the Second Circuit did not rely on that theory; this Court thus would not have to reach it; and it lacks merit in any event.

Legislation is retroactive when "the new provision attaches new legal consequences to events completed before its enactment." *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 269-270 (1994). That is what the TRIA does here. The judgment respondent seeks to enforce stems from allegedly tortious acts committed before the TRIA was enacted. Bank Melli had no notice that it could be

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[3] Respondent cites two bank insolvency cases. Br. in Opp. 26. Both, however, involved liabilities that arose *after* the challenged statute was enacted. See *Branch* v. *United States*, 69 F.3d 1571, 1574 (Fed. Cir. 1995); *Meriden Trust & Safe Deposit Co.* v. *FDIC*, 62 F.3d 449, 451 (2d Cir. 1995). Neither involved a *Plaut* issue.

held liable when the default judgment was entered. And it had no opportunity to contest plaintiffs' claims. It makes no difference that the unrelated event invoked to justify executing the judgment against Bank Melli (the blocking of its assets) occurred later. On any reasonable view, the "events" to which "new legal consequences" are being "attache[d]" here are the entry of, and conduct underlying, the judgment—not Bank Melli's unrelated banking practices.

In *Johnson* v. *United States*, 529 U.S. 694 (2000), this Court rejected an argument comparable to respondent's. There, Congress had enacted a statute authorizing a district court to impose an additional term of supervised release if a defendant violated conditions of his initial release. The defendant had been convicted before Congress enacted that statute, but violated his conditions afterward. *Id.* at 697-698. The court of appeals held that the statute was not being applied retroactively because it merely punished "'new offenses,'" but this Court disagreed: "Since postrevocation penalties *relate to the original offense*, to sentence [the defendant] to a further term of supervised release under [the new statute] would be to apply this section retroactively * * * ." *Id.* at 698-701 (emphasis added). So too here: The TRIA attaches new legal consequences, for a different party, to prior conduct.

3. Finally, respondent contends that Congress intended the TRIA to apply retroactively because Senator Harkin stated his desire to compensate plaintiffs who already had judgments. Br. in Opp. 7-8, 27. But those comments related to the TRIA generally, not the parenthetical language at issue here. See 148 Cong. Rec. S11,526-27 (Nov. 19, 2002). That Senator Harkin wanted to make sovereigns' *own* blocked assets available to sat-

isfy prior judgments does not prove Congress wanted to make *other* parties retroactively liable too. In any event, the suggestion that Congress *intended* to reopen prior judgments makes this one more example of its conscious disregard for *Plaut* in this area. See Pet. 33. That too underscores the need for review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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