No. 14-770

IN THE

Supreme Court of the United States

BANK MARKAZI, AKA THE CENTRAL BANK OF IRAN,
Petitioner,

v.

DEBORAH PETERSON, ET AL.,
Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Section 502 of the Iran Threat Reduction and Syria Human Rights Act, 22 U.S.C. § 8772, violates the constitutional separation of powers because it amends existing law applicable to a particular pending case.

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BRIEF IN OPPOSITION

Respondents Deborah Peterson et al. respectfully submit that the petition for a writ of certiorari filed by Bank Markazi, the Central Bank of Iran, should be denied.

OPINIONS BELOW

The opinion of the court of appeals is reported at 758 F.3d 185 (2d Cir. 2014). Pet. App. 1a-12a. The unpublished opinions and orders of the district court are reproduced in the Appendix. *Id*. at 13a-127a.

JURISDICTION

The judgment of the court of appeals was entered on July 9, 2014. A petition for rehearing en banc was denied on September 29, 2014. Pet. App. 128a. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Petitioner asks this Court to grant certiorari in this case to decide whether the separation-of-powers principle enunciated in *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872), permits Congress to "fundamentally change[] the governing law" applicable to a pending case. Pet. 10. But the Court long ago answered this very question, unambiguously holding that the separation of powers does not prevent Congress from "'amend[ing] applicable law.'" *Miller* v. *French*, 530 U.S. 327, 349 (2000) (quoting *Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429, 441 (1992)). Petitioner would replace this longstanding line of authority, which is uniformly observed and applied in the courts of appeals, with an amorphous standard that delves into the significance of the questions left for judicial determination and the number of cases to

which the statute applies. Yet petitioner does not even attempt to provide the "special justification" that would be required to rewrite constitutional law in this area. *Arizona* v. *Rumsey*, 467 U.S. 203, 212 (1984). Moreover, it seeks such relief in a case that does not actually raise the question petitioner presents and includes a fully sufficient alternative ground for reaching the same result.

The petition for a writ of certiorari should be denied.

1. Respondents are more than 1,300 Americans who are victims of terrorist attacks sponsored by the government of Iran, or surviving family members and representatives of victims of those attacks. Those terrorist attacks include the 1983 Beirut Marine Barracks Bombing, in which suicide bombers detonated a truck bomb and unleashed "the largest non-nuclear explosion that had ever been detonated on the face of the earth," killing 241 American servicemen, and wounding dozens more. *Peterson* v. *Islamic Republic of Iran*, 264 F. Supp. 2d 46, 56 (D.D.C. 2003). They also include the 1996 bombing of the Khobar Towers in Saudi Arabia, where U.S. Air Force personnel were housed. *Estate of Heiser* v. *Islamic Republic of Iran*, 807 F. Supp. 2d 9, 11 (D.D.C. 2011). That attack killed nineteen servicemen and wounded hundreds more in an explosion that was even larger than the Beirut Bombing. And, they include several other bombings, an assassination, and a kidnaping—all sponsored by the government of Iran.

Among the servicemen killed in the Beirut Marine Barracks Bombing was Lance Cpl. James C. Knipple of Alexandria, Virginia, who was 20 years old when he was murdered. His sister, Deborah

Peterson, is the personal representative of his estate. In 2001, Peterson brought a wrongful death action against the Islamic Republic of Iran and the Iranian Ministry of Information and Security for their roles in masterminding and perpetrating the Beirut Marine Barracks Bombing. She was joined in that action by hundreds of other similarly aggrieved families and survivors.

The plaintiffs in the *Peterson* actions obtained jurisdiction over Iran and its ministry under the Foreign Sovereign Immunities Act ("FSIA"), which withdraws the immunity from jurisdiction conferred by Section 1604 of the Act in certain circumstances where "money damages are sought against a foreign state for personal injury or death that was caused by an act of . . . extrajudicial killing." *See* 28 U.S.C. § 1605A(a)(1) (formerly codified at 28 U.S.C. § 1605(a)(7)).

Although duly served, Iran refused to appear. Nevertheless, the *Peterson* plaintiffs proved by "clear and convincing evidence" that Iran was liable for these attacks. *See*, *e.g.*, *Peterson*, 264 F. Supp. 2d at 48. Other respondents similarly proved that Iran was liable for the terrorist attacks that injured them or took the lives of their loved ones.[1] Respondents

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[1] *Estate of Brown* v. *Islamic Republic of Iran*, 872 F. Supp. 2d 37 (D.D.C. 2012); *Estate of Bland* v. *Islamic Republic of Iran*, 831 F. Supp. 2d 150 (D.D.C. 2011); *Murphy* v. *Islamic Republic of Iran*, 740 F. Supp. 2d 51 (D.D.C. 2010); *Acosta* v. *Islamic Republic of Iran*, 574 F. Supp. 2d 15 (D.D.C. 2008); *Beer* v. *Islamic Republic of Iran*, 574 F. Supp. 2d 1 (D.D.C. 2008); *Kirschenbaum* v. *Islamic Republic of Iran*, 572 F. Supp. 2d 200 (D.D.C. 2008); *Levin* v. *Islamic Republic of Iran*, 529 F. Supp. 2d 1 (D.D.C. 2007); *Valore* v. *Islamic Republic of Iran*, 478 F. Supp. 2d 101 (D.D.C. 2007); *Estate of Heiser* v. *Islamic Republic of Iran*, 466 F. Supp. 2d 229 (D.D.C. 2006); *Greenbaum* v.

each were awarded judgments against Iran, and, in the aggregate, those judgments direct Iran to pay billions of dollars in damages. Pet. App. 2a. Iran, though it does not dispute the validity of the judgments, refuses to satisfy them.

2. Petitioner Bank Markazi is Iran's central bank and is entirely owned by the Iranian Government. Pet. App. 2a. Bank Markazi held "at least a 'beneficial interest'" in almost $2 billion in an account at Citibank in New York (the "Iranian Assets").[2] *Ibid.*

In 2008, the *Peterson* plaintiffs learned of the Iranian Assets at Citibank in New York and sought restraints on those assets from the U.S. District Court for the Southern District of New York. Pet. App. 3a. The district court restrained those assets, and in 2010 the *Peterson* plaintiffs commenced an action seeking turnover of the Iranian Assets. *Id*. at 12a-14a, 62a-63a.[3]

Islamic Republic of Iran, 451 F. Supp. 2d 90 (D.D.C. 2006); *Campuzano* v. *Islamic Republic of Iran*, 281 F. Supp. 2d 258 (D.D.C. 2003); Pet. App. 16a.

[2] To conceal its interest in the funds in the Citibank account, Bank Markazi's interest ran through a chain of middlemen: The account at Citibank is an omnibus account for Clearstream Bank, S.A., a Luxembourg-based financial intermediary, which maintains the account for, among others, the Italian bank Banca UBAE S.p.A., "whose customer, in turn, is Bank Markazi." Pet. App. 2a. Clearstream since has paid $152 million to settle its potential liability for violating sanctions against Iran in its dealings with Bank Markazi. Press Release, U.S. Treasury Dep't, Treasury Department Reaches Landmark $152 Million Settlement with Clearstream Banking, S.A. (Jan. 23, 2014).

[3] After the *Peterson* plaintiffs obtained restraints on the Iranian Assets, other respondents in this Court who also had terrorism-related judgments against Iran served Citibank or Clearstream with similar restraining notices that asserted a

While that litigation was proceeding in the district court, President Obama issued an Executive Order blocking all assets of Iran and its agencies and instrumentalities (including Bank Markazi) "that are in the United States." Exec. Order No. 13,599, 77 Fed. Reg. 6659, 6659 (Feb. 5, 2012). The President stated that the Order was designed to combat "the deceptive practices of the Central Bank of Iran and other Iranian banks to conceal transactions of sanctioned parties." *Ibid.* Citibank accordingly placed the Iranian Assets in a segregated account as required by regulations of the Department of Treasury's Office of Foreign Assets Control. Pet. App. 64a.

Years before, Congress had passed the Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, 116 Stat. 2322 ("TRIA"), which, in certain circumstances, displaced the FSIA provisions that accord a limited immunity against attachment and execution on the property of foreign sovereigns in the United States, *see* 28 U.S.C. §§ 1609-1611. Whereas Section 1609 of the FSIA states that, subject to certain exceptions, "the property in the United States of a foreign state shall be immune from attachment arrest and execution," 28 U.S.C. § 1609, the TRIA provides that "[n]otwith-standing any other provision of law" plaintiffs who have "obtained a judgment against a terrorist party on a claim based upon an act of ter-

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potential claim on the Iranian Assets. The district court authorized Citibank to file and serve interpleader petitions on those respondents. Pet. App. 15a. Still other respondents were added by motions to intervene or by agreements with the other plaintiffs. Pet. App. 15a-19a. Respondents then reached an agreement amongst themselves as to their respective claims of priority to and interests in the Iranian Assets, and the distribution of any recovery. Pet. App. 54a.

rorism" can execute that judgment against "the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party)." TRIA § 201(a), 116 Stat. at 2337 (codified at 28 U.S.C. § 1610 note). With Executive Order 13,599 blocking the Iranian Assets, respondents sought summary judgment on their claim for turnover under the TRIA. Pet. App. 3a.

While that motion was pending before the district court, the Iran Threat Reduction and Syria Human Rights Act of 2012 was enacted. Pub. L. No. 112-158, 126 Stat. 1214. Section 8711 of the Act explains that it was enacted to sanction Iran in order to compel it to abandon its efforts to obtain a nuclear weapon and "other threatening activities." 22 U.S.C. § 8711. Section 8772 provides that "the financial assets that are identified in and the subject of proceedings in" this case "shall be subject to execution . . . in order to satisfy any judgment . . . against Iran for damages for personal injury or death caused by an act of . . . extrajudicial killing," provided that the court "determine[s]" both that (1) "Iran holds equitable title to, or the beneficial interest in, the assets," and (2) "no other person possesses a constitutionally protected interest in the[m]." *Id.* § 8772(a)(1), (a)(2), (b). Section 8772 further defines "Iran" to include "the central bank or monetary authority . . . and any agency or instrumentality" of Iran. *Id.* § 8772(d)(3).

The district court granted summary judgment to respondents. It found that "[t]here simply is no other possible owner of the interests here other than Bank Markazi," and therefore concluded that Section 8772 made the assets available for execution. Pet. App. 113a. The district court held that Section 8772 does not violate separation of powers because it "merely 'chang[es] the law applicable to pending cases;' it

does not 'usurp[] the adjudicative function assigned to the federal courts[.]'" *Id*. at 115a (quoting *Axel Johnson, Inc*. v. *Arthur Andersen & Co.*, 6 F.3d 78, 81 (2d Cir. 1993)). Further, the court observed that the statute did not "dictate specific factual findings," as Bank Markazi had argued, but rather "requires the Court to make determinations regarding (1) whether and to what extent Iran has a beneficial or equitable interest in the assets at issue, and (2) whether constitutionally-protected interest holders other than Iran are present." *Id*. at 114a-15a (emphasis omitted). Accordingly, the court ordered Citibank to turn over the Iranian Assets. *Id*. at 22a-26a.[4]

3. The Second Circuit unanimously affirmed. Pet. App. 1a-12a. The court of appeals rejected Bank Markazi's argument that Section 8772 unconstitutionally invaded the Article III judicial function "by compelling the courts to reach a predetermined result in this case." *Id.* at 7a. It held that *Klein* and its progeny illustrate that, while "Congress may not usurp the adjudicative function assigned to the federal courts," it "may change the law applicable to pending cases, even when the result under the revised law is clear." *Id.* at 8a (internal quotation marks and brackets omitted). The court held that the statute "does not compel judicial findings under

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[4] The district court ordered the establishment of a qualified settlement trust under 26 U.S.C. § 468B to receive and hold the Iranian Assets pending the final disposition of the litigation and further order of the court concerning distribution of the Iranian Assets. *Peterson* v. *Islamic Republic of Iran*, No. 10 Civ. 4518 (S.D.N.Y. July 9, 2013), ECF Nos. 460, 461 (orders establishing qualified settlement trust). The Iranian Assets now reside in that trust under the supervision of the court-appointed trustee.

old law; rather, it changes the law applicable to this case . . . [and] explicitly leaves the determination of certain facts to the courts." *Id.* at 9a.

The court analogized Section 8772 to the statute upheld by this Court against a similar challenge in *Robertson* v. *Seattle Audubon Society*, 503 U.S. 429 (1992). Just as the statute in *Robertson* was permissible because it "'affected the adjudication of the cases" but "did so by effectively modifying the provisions at issue in those cases,' not by compelling findings or results under those provisions," Section 8772 "does not compel judicial findings under old law; rather, it changes the law applicable to this case." Pet. App. 8a-9a (quoting *Robertson*, 503 U.S. at 440).

The panel and the en banc court denied rehearing without recorded dissent. Pet. App. 128a.

REASONS FOR DENYING THE PETITION

The Second Circuit's decision upholding Section 8772 is consistent with this Court's settled separation-of-powers jurisprudence. Those decisions make clear that, although Congress may not "prescribe rules of decision to the Judicial Department," *United States* v. *Klein*, 80 U.S. (13 Wall.) 128, 146 (1872), this "prohibition does not take hold when Congress amends applicable law." *Miller* v. *French*, 530 U.S. 327, 349 (2000) (internal quotation marks and brackets omitted). There is no doubt that Section 8772 "amend[s] applicable law"; petitioner freely admits that, as to the Iranian Assets, "§ 8772 fundamentally changes the governing law." Pet. 10. Under *Miller*—which petitioner does not cite, though it is this Court's most recent pronouncement in this area—Section 8772 therefore does not violate the constitutional separation of powers.

Petitioner offers no plausible basis for reconsidering this settled line of authority, which has been consistently and uniformly applied by the lower courts. Instead, it simply urges this Court to adopt a different standard, under which a change in applicable law would violate the constitutional separation of powers if the change appears to apply only in a single case or leaves the judiciary without "meaningful" issues to decide. But no court of appeals has adopted either of these standards, and this Court's authority forecloses them.

Moreover, even if there were a reason to revisit the *Klein* line of decisions—and there is not—this case would be a singularly poor vehicle for doing so. The very question petitioner asks this Court to decide—whether a change in applicable law that "effectively directs a particular result" in a case violates the constitutional separation of powers (Pet. i)—was not presented in this case. As the district court concluded, Section 8772 left "frankly plenty for th[e] Court to adjudicate," "requir[ing] the Court to make determinations regarding" the ownership of the assets and whether any other person has an interest in them. Pet. App. 115a. And, while petitioner urges the Court to grant certiorari to address whether a statute *ever* may violate *Klein* where it amends applicable law—a question expressly reserved in *Robertson*—that question was neither squarely raised nor addressed below. Accordingly, as in *Robertson* itself, this case is an inadequate vehicle to address that question.

But even if petitioner's questions were properly before the Court, foreign sovereign immunity—which Bank Markazi asserted below and which Section 8772 changed as to Iran and its instrumentalities—would be the wrong context in which to consider

them. At least until enactment of the FSIA, sovereign immunity in judicial proceedings *always* had been subject to ad hoc determination by the political branches. So even if it were possible that a change in applicable law in certain contexts could violate the separation of powers, it likely would not do so in the area of foreign sovereign immunity. Review of the decision below thus would be unlikely to provide answers to any uncertainty concerning the scope of this Court's decision in *Klein*. Indeed, even a decision in Petitioner's favor would not change the ultimate result, because the TRIA still would mandate turnover of the Iranian Assets.

I. THE COURTS OF APPEALS UNIVERSALLY CONSTRUE THE *KLEIN-ROBERTSON* LINE OF CASES TO PERMIT CONGRESS TO AMEND THE LAW APPLICABLE TO PENDING CASES.

1. The principle of separation of powers on which petitioner relies has its roots in this Court's 1871 decision in *Klein*. In *Klein*, the Court reviewed a statute through which Congress had provided that a presidential pardon was not admissible in evidence to support the right of a claimant to recover the value of property seized during the Civil War. 80 U.S. (13 Wall.) at 143. Congress had further provided that when any pardon recited disloyalty by the claimant, and the claimant had failed to contest that assertion, the pardon would be conclusive evidence of the claimant's disloyalty and the court would be deprived of jurisdiction. *Id*. at 143-44.

The claimant in *Klein* had prevailed in the Court of Claims under previously applicable law, which provided that a pardon satisfied the claimant's burden of proving that he had not aided the Confederacy. This Court invalidated the statute that purport-

ed to change this result, concluding that it was unconstitutional because it impermissibly "prescribe[d] rules of decision to the Judicial Department of the government in cases pending before it." 80 U.S. (13 Wall.) at 146. In so doing, the Court contrasted those situations where an "arbitrary rule of decision was prescribed" to the courts with the permissible circumstances in which "the court was left to apply its ordinary rules to the new circumstances created by [an] act." *Id*. at 146-47.

This Court has subsequently explained that, "[w]hatever the precise scope of *Klein*, . . . its prohibition does not take hold when Congress amend[s] applicable law." *Miller* v. *French*, 530 U.S. 327, 349 (2000) (alterations in original; internal quotation marks omitted). In *Robertson* v. *Seattle Audubon Society*, 503 U.S. 429 (1992), for example, the Court rejected a separation-of-powers challenge to a statute that deemed compliance with newly promulgated restrictions on forest harvesting sufficient to establish compliance with the laws at issue in two pending suits challenging harvesting of the spotted owl's habitat. *Id*. at 441. The Court held that the newly enacted statute "compelled changes in law, not findings or results under old law," and thus did not implicate *Klein*'s prohibition on congressional rules of decision in pending cases. *Id.* at 438.

Similarly, in *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), the Court rejected a *Klein*-based challenge to a statute that retroactively altered the statute of limitations in cases pending at the time this Court decided *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350 (1991), which had held that the statute of limitations for federal securities fraud claims is one year after discovery of the facts constituting the violation and three years

after the violation. *Plaut*, 514 U.S. at 213-14. The newly enacted statute provided for the application of the pre-*Lampf* statute of limitations in cases pending at the time *Lampf* was decided (even if the case had already been closed) and the application of the *Lampf* standard in subsequently filed cases. *Id.* at 214-15. Notwithstanding Congress's retroactive change in the law applicable in pending (and already closed) cases, the Court held that the statute did not, for that reason, violate the separation of powers because it "indisputably . . . set out substantive legal standards for the Judiciary to apply, and in that sense change[d] the law (even if solely retroactively)." *Id.* at 218; *see also Miller*, 530 U.S. at 349 (rejecting a *Klein*-based challenge to a statute that established new legal standards to be applied to pending injunctions regarding prison conditions).[5]

Under this precedent, the constitutional line is clear. If a statute merely "compel[s] changes in law," *Robertson*, 503 U.S. at 438, it is within Congress's legislative authority. If, on the other hand, it dictates "findings or results under old law," *ibid.*, then Congress has "passed the limit which separates the legislative from the judicial power." *Klein*, 80 U.S. (13 Wall.) at 147.[6]

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[5] Although the Court in *Plaut* concluded that the statute was consistent with the rule articulated in *Klein*, the Court nevertheless held that it contravened Article III of the Constitution by "retroactively commanding the federal courts to reopen final judgments." *Plaut*, 514 U.S. at 219. Petitioners do not raise such an argument here.

[6] The Court also substantially clarified *Klein*'s limited reach in *United States* v. *Sioux Nation of Indians*, 448 U.S. 371 (1980), which explained that the statute in *Klein* was "unconstitutional in two respects: First, it prescribed a rule of decision in a case pending before the courts, and did so in a manner that required the courts to decide a controversy in the Government's

2. The courts of appeals have consistently understood the *Klein-Robertson* line of cases to make precisely this distinction. In *Apache Survival Coalition* v. *United States*, 21 F.3d 895 (9th Cir. 1994), for example, the Court upheld a statute that declared that particular telescopes that were to be built on an Arizona mountain satisfied all environmental statutory requirements. *Id.* at 902, 914. The Court explained that the law, by suspending the environmental requirements for the telescopes, "substituted preexisting legal standards that governed a particular project . . . with the new standards," rather than "directing particular applications under either the old or new standards." *Id*. at 901-02 (internal quotation marks omitted)*; see also Cobell* v. *Norton*, 392 F.3d 461, 467 (D.C. Cir. 2004) (upholding statute that "*chang*[*ed*] the substantive law" rather than merely "direct[ing] the courts how to *interpret* or apply pre-existing law"). Indeed, in *Biodiversity Associates* v. *Cables*, 357 F.3d 1152 (10th Cir. 2004), the court of appeals made clear that the critical issue was whether the statute amended law, explaining that "[b]ecause" the statute at issue "did amend applicable law, the *Klein* principle does not apply here." *Id.* at 1171 (internal quotation marks and brackets omitted)*; see also Ecology Ctr.* v. *Castaneda*, 426 F.3d 1144, 1149 (9th Cir. 2005) (upholding statute under *Robertson* because it "does not impermissibly direct findings *without changing underlying law*") (emphasis added).

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favor." *Id.* at 404. This was particularly unfair because, as the *Klein* Court put it, it would "allow[] one party to the controversy to decide it in its own favor[.]" *Klein*, 80 U.S. at 146. Second, the statute in *Klein* was "liable to just exception as impairing the effect of a pardon, and thus infringing the constitutional power of the Executive." *Sioux Nation*, 448 U.S. at 404-05 (internal quotation marks omitted).

Given the exceedingly narrow scope of *Klein*, it is no surprise that "in almost 140 years, the only case to strike down a law explicitly on *Klein* grounds was *Klein* itself; every *Klein*-based challenge to federal legislation has, quite appropriately, failed." Howard M. Wasserman, *The Irrepressible Myth of* Klein, 79 U. Cin. L. Rev. 53, 55 (2010); *see also Alliance for the Wild Rockies* v. *Salazar*, 672 F.3d 1170, 1173 (9th Cir. 2012) ("*Klein,* however, has remained an isolated Supreme Court application of the separation-of-powers doctrine to strike down a statute that dictated the result in pending litigation.").[7]

3. Petitioner claims that courts are nonetheless confused regarding the proper application of *Klein*, but its claim rests primarily on citations indicating only that the line between cases that compel a result under existing law, and those that enact a new standard governing the case, is not always clear. Pe-

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[7] Petitioner notes that in *Kumar* v. *Republic of Sudan*, No. 2:10cv171, 2011 WL 4369122, at *11 (E.D. Va. Sept. 19, 2011), a district court found that Congress "disregarded the separation of powers" in part of its expansion of the FSIA's terrorism provision. Pet. 24-25. But that case presented a different question—*i.e.*, whether the statute contravened *Plaut*, 514 U.S. 211, by reopening a final judgment. On appeal, the Fourth Circuit reversed, concluding that *Plaut* was not implicated in that case. *Clodfelter* v. *Republic of Sudan*, 720 F.3d 199, 207 (4th Cir. 2013). Neither court considered a *Klein* challenge. The brief of the United States in the Fourth Circuit, however, aptly stated the guiding separation-of-powers principle that controls this case: "Congress may change substantive law and even require courts to 'apply that [new] law in reviewing judgments still on appeal that were rendered before the law was enacted' and 'alter the outcome accordingly.' Thus changes in substantive law and the application of such changes to pending cases pose no separation of powers problem." Brief for United States as Intervenor, *Clodfelter*, 720 F.3d 199 (No. 11-2118), 2013 WL 1232670, at *15, (quoting *Plaut*, 514 U.S. at 226) (alteration in original; citations omitted).

titioner invokes the vacated panel decision in *Benjamin* v. *Jacobson*, 124 F.3d 162 (2d Cir. 1997), *vacated*, 172 F.3d 144 (2d Cir. 1999) (en banc), for example, to support the assertion that proper application of *Klein* is "'a vexed question.'" Pet. 18 (quoting *Benjamin*, 124 F.3d at 174). But (before it was vacated) *Benjamin* unambiguously held that "if legislation can be characterized as changing the underlying law rather than as prescribing a different outcome under the pre-existing law, it will not violate the separation-of-powers principle formulated in *Klein*." *Benjamin*, 124 F.3d at 174. The panel decision in *Benjamin* simply concluded that "[t]he distinction" between these two things—changing the law, versus simply dictating a result under existing law—"may in some cases be hard to discern." *Ibid*.[8]

Regardless of whether there is confusion over when a statute *changes* law, there is no confusion over whether a statute that *does* change law violates *Klein*. Courts have universally held that it does not. *See also Janko* v. *Gates*, 741 F.3d 136, 146 (D.C. Cir. 2014) (describing *Klein* as "a bit of a constitutional Sphinx," but explaining that it "applies where the Congress prescribes the outcome of pending litigation by means other than amending the applicable law") (citations and emphasis omitted).

The Seventh Circuit's statement in *Lindh* v. *Murphy*, 96 F.3d 856 (7th Cir. 1996) (en banc), *rev'd on other grounds*, 521 U.S. 320 (1997), that Congress "cannot tell courts how to decide a particular case," does not reflect a different approach to applying *Klein*, much less form one side of a hardened circuit split. *Id.* at 872. In upholding AEDPA's limitation of

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[8] The en banc Second Circuit found that the *Klein* challenge had not been renewed in the en banc hearing and therefore was no longer before the court. *Benjamin*, 172 F.3d at 159.

federal court habeas review to decisions that were "contrary to, or involved an unreasonable application of, clearly established Federal law," the *Lindh* court rejected the notion that it was unconstitutional to "require[] anything less than plenary review of all contentions based on federal law." *Id.* at 871. Instead, the court explained that "Congress cannot tell courts how to decide a particular case, but it may make rules that affect classes of cases." *Id*. at 872. As a result, "Congress cannot say that a court must award Jones $35,000 for being run over by a postal truck." *Ibid*. Of course, that statement is fully consistent with the unanimous approach of federal appellate courts that Congress may change the law applicable to a pending case, but may not direct the federal court how to resolve the case. And nine years later, the Seventh Circuit made precisely that point in *City of Chicago* v. *United States Department of Treasury*, 423 F.3d 777 (7th Cir. 2005), holding it "unnecessary to address the City's *Klein* challenge" because the statute at issue "amounts to a substantive change in the underlying law." *Id.* at 783-84. No court of appeals has staked out a contrary approach. And under the test prevailing throughout the courts of appeals, there is no separation-of-powers problem here because petitioner acknowledges that Section 8772 "changes the governing law." Pet. 10.

4. Petitioner also suggests that this Court should grant review because *Robertson* "left open" the question of whether "'a change in law, prospectively applied, would be unconstitutional if the change swept no more broadly, or little more broadly, than the range of applications at issue in the pending cases.'" Pet. 17-19 (quoting *Robertson*, 503 U.S. at 441). But the fact that this Court declined to answer a question not properly before it does not suggest that the question is certworthy. Indeed, the reason-

ing of *Robertson* itself makes the answer at least to the separation-of-powers question clear. *Robertson* rests its constitutional holding firmly on the ground that that statute at issue "compelled changes in law, not findings or results under old law." *Robertson*, 503 U.S. at 438. And the fact that it applied to (indeed, apparently was enacted to resolve) only two pending cases did not matter. *Ibid.*

And whatever uncertainty remained after *Robertson* should have been resolved by this Court's decision in *Plaut*. There, the majority opinion explicitly rejected the concurrence's suggestion that the constitutionality of a statute should turn on whether it "appl[ies] to a limited number of individuals." 514 U.S. at 241 (Breyer, J., concurring). The majority stated that "[i]t makes no difference whatever to th[e] separation-of-powers violation that it is in gross rather than particularized." *Id.* at 239 (majority opinion). "Even laws that impose a duty or liability upon a single individual or firm are not on that account invalid," the majority explained. *Id.* at 239 n.9. This was demonstrated not least by the "extensive jurisprudence" on the Bill of Attainder Clause, "including cases which say that it requires not merely singling out but also *punishment* and a case which says that Congress may legislate a legitimate class of one," none of which would be relevant if laws focused on a particular case violated the separation of powers. *Ibid.* (citations and quotation marks omitted).

And not surprisingly, since *Plaut*, courts of appeals routinely have rejected separation-of-powers challenges premised on the assertion that a statute targets specific pending litigation. As the Tenth Circuit put it, "the sheer specificity" of a statute does not "take[] it beyond the realm of Congress's legislative powers." *Biodiversity Assocs.*, 357 F.3d at 1161. It is "up to Congress to determine how specific it may deem it 'necessary and proper' for the laws to be."

Ibid.; *see Nat'l Coal. to Save Our Mall* v. *Norton*, 269 F.3d 1092, 1097 (D.C. Cir. 2001) ("[W]e see no reason why the specificity should suddenly become fatal merely because there happened to be a pending lawsuit.").

5. At bottom, petitioner's argument is that *Klein* should not turn on whether a statute amends substantive law at all, but on other considerations—the number and importance of the issues that remain for the court to adjudicate, and the number of cases to which the statute applies. For example, petitioner proposes that the constitutionality of an act of Congress should turn on whether the statute "left anything meaningful for the court to decide" or merely "requir[ed] findings on collateral uncontested issues." Pet. 19-21 (internal quotation marks omitted). It further argues that "it offends basic norms of legislative and adjudicative process for Congress to change the governing law solely for purposes of one case, and solely to benefit the preferred litigant." *Id.* at 22.

But courts uniformly have concluded that *Klein* has no application where Congress has changed the governing law applicable to a pending case, and petitioner offers no case even remotely suggesting that the applicability of *Klein* turns on its suggested considerations of the "meaningful[ness]" of the issues to be decided, or the narrowness or breadth of the statute's application. *Klein* itself certainly does not suggest that it turned on such considerations. And, indeed, the reasoning of *Robertson* and *Plaut* preclude assigning weight to either of petitioner's proposed factors. As the court of appeals recognized, the statute in *Robertson* "was specifically enacted to resolve two pending cases, and the Supreme Court found no constitutional violation." Pet. App. 10a. And this Court in *Plaut* stated plainly that "laws that impose a . . . liability upon a single individual or firm are not on that account invalid." 514 U.S. at 239 n.9; *see*

also Apache, 21 F.3d at 902 (upholding statute under which "the requirements of section 7 of the Endangered Species Act shall be deemed satisfied as to the issuance of a Special Use Authorization" for three identified telescopes) (internal quotation marks omitted).

In short, there is a significant, uncontroverted line of cases, from this Court and the courts of appeals, holding that the constitutional separation of powers is not offended when a statute amends existing law. Petitioner readily acknowledges that is what Section 8772 does, but it offers no basis for reconsidering the conclusion that follows that the statute does not violate the separation of powers.

II. THIS CASE IS A POOR VEHICLE TO ADDRESS THE CONTINUED VIABILITY OF THIS COURT'S PRECEDENT.

Even if reconsideration of the unbroken line of cases applying the *Klein* rule were warranted, for multiple reasons, this case would be a uniquely poor vehicle for performing that examination. Perhaps most importantly, petitioner's own question presented—"[w]hether § 8772—a statute that effectively directs a particular result in a single pending case—violates the separation of powers"—assumes that Section 8772 in fact dictates the result of the case below. But the district court specifically and properly disagreed with this characterization, as Section 8772 left issues for the court to adjudicate.

And beyond this barrier to reaching the question presented, the purportedly "open question" that petitioner asks this Court to resolve—whether "a change in law, prospectively applied, would be unconstitutional if the change swept no more broadly, or little more broadly, than the range of applications at issue in the pending cases," Pet. 17 (internal quotation

marks omitted)—was neither squarely presented to, nor decided by, the court of appeals. The same considerations that led this Court to decline to answer that question in *Robertson* thus apply with equal force here.

Moreover, the general question of Congress's power to amend law pertaining to a particular case need not—and likely would not—be reached here because this case involves the scope of foreign sovereign immunity from execution, an arena in which the political branches have uniquely broad powers. Whether Congress may permissibly withdraw sovereign immunity from a particular sovereign in particular circumstances does not resolve the broader question of whether Congress may dictate the result of, for example, an ordinary state law tort claim.

Finally, in light of its application of Section 8772, the court of appeals found it unnecessary to reach the claim that the TRIA also mandated turnover. Pet. App. 5a-6a. Yet, because the Iranian Assets are blocked under Executive Order 13,599, Iran remains a state sponsor of terrorism, and Bank Markazi is an agency of Iran, the TRIA commanded turnover no less than Section 8772. Even if Section 8772 were invalidated, then, the courts below would reach precisely the same result under the TRIA.

1. In the district court, as here, petitioner argued that Section 8772 "effectively dictated specific factual findings in connection with a specific litigation—invading the province of the courts." Pet. App. 114a. The district court disagreed, concluding that "[t]he statute does not itself 'find' turnover required; such determination is specifically left to the Court." *Id*. at 114a-15a. In particular, the district court held that it was required to "make determinations regarding (1) whether and to what extent Iran has a beneficial or equitable interest in the assets at issue, and

(2) whether constitutionally-protected interest holders *other than* Iran are present." *Id*. at 115a. The Court further explained that "[t]hese determinations are not mere fig leaves; it is quite possible that the Court could have found that defendants raised a triable issue as to whether the Blocked Assets were owned by Iran, or that Clearstream and/or UBAE have some form of beneficial or equitable interest." *Ibid*. Indeed, the ownership of the Assets was disputed in the district court, with Clearstream arguing that Section 8772 did not permit turnover because it was the sole owner of the blocked assets. *Id*. at 35a-40a. In short, the court held, "[t]here is frankly plenty for this Court to adjudicate." *Id*. at 115a.

Petitioner now asserts that "there was never any serious question" that Section 8772 was satisfied. Pet. 20. While the court of appeals did not dispute that premise, neither did it adopt it. Petitioner claims the Second Circuit "held § 8772 constitutional *even if*, as Bank Markazi contended, it left no meaningful role to the courts." *Ibid*. Yet the court of appeals, block-quoting the statute, observed that "§ 8772 explicitly leaves the determination of certain facts to the courts." Pet. App. 9a. And its observation that it would be "unusual for there to be more than one likely outcome when Congress changes the law for a pending case with a developed factual record," (as Congress had done with the statute at issue in *Robertson*), *id*. at 10a, hardly constitutes a holding that Section 8772 would be "constitutional even if . . . it left no meaningful role for the courts." Pet. 20 (emphasis omitted). That outcome-determinative facts are undisputed, or beyond dispute, does not make a court's adjudication and finding of those facts not "meaningful." *Ibid*.; *see Pope* v. *United States*, 323 U.S. 1, 11 (1944) (a statute does not violate the *Klein* principle just because it renders a plaintiff's claim "uncontested or incontestable" and makes "the

amount recoverable depend[] upon a mathematical computation"); *Ecology Ctr.*, 426 F.3d at 1150 (statute did not violate separation of powers even though the district court had already made the requisite findings before the statute was passed). In any event, the explicit contrary conclusion of the district court—which was most familiar with the evidence and arguments regarding ownership and other interests in the Iranian Assets and found "plenty . . . to adjudicate" (Pet. App. 115a)—suggests that the question of whether a statute may direct that the result of a pending case turn on undisputed facts may not even be presented here. This case, accordingly, is a uniquely poor vehicle for this Court to consider the question the petition advances.

2. In *Robertson*, the court of appeals had held that the statute at issue "was unconstitutional under *Klein* because it directed decisions in pending cases without amending any law." *Robertson*, 503 U.S. at 441. This Court reversed, concluding that the statute at issue *did* amend existing law, and that it thus did not need to consider whether the statute would have been unconstitutional if it had not done so. *Ibid*. An *amicus* had invited the Court to consider the further and distinct question of whether changes in law that are particularly narrow in application could be unconstitutional, but this Court declined to consider the question because the "alternative theory was neither raised below nor squarely considered by the Court of Appeals, nor was it advanced by respondents in this Court." *Ibid*.

Petitioner similarly did not squarely raise this issue in the court of appeals. Petitioner's principal *Klein* argument below was that Section 8772 unconstitutionally tried to "predetermine the results in a[] given case." Br. 49. Its support for this argument was that "Section 8772 nominally required the District Court to make only two 'determinations'" and

that Congress made "crystal clear its intent to determine the outcome of this action in Plaintiffs' favor." *Id*. at 51. Petitioner thus did not focus on whether Section 8772 was unconstitutional because it "swept no more broadly, or little more broadly, than the range of applications at issue in the pending cases"; it contended that the statute was unconstitutional because it effectively dictated the result of the cases within its sweep. *Compare Robertson*, 503 U.S. at 441, *with* Br. 51. Indeed, Petitioner's district court briefing included no mention of this allegedly "open question," and its court of appeals briefing on the merits included no more regarding this than a quotation without argument in a footnote in the reply brief. Reply 19 n.8.

The Second Circuit accordingly did not recite, much less address, the "open question" petitioner now asks this Court to answer. Instead, it applied well-established law to uphold the statute because it "does not usurp the judicial function; rather, it retroactively changes the law applicable in this case, a permissible exercise of legislative authority." Pet. App. 8a. Just as this Court declined to address the question in *Robertson* because it was not squarely raised and addressed below, the Court should decline to grant certiorari to answer the question identified in *Robertson* here.

3. This case also presents a poor vehicle to consider the application of *Klein* because it arises in the context of congressionally conferred sovereign immunity from attachment, which has long been within the power of the political branches to grant or deny. "[F]oreign sovereign immunity is a matter of grace and comity on the part of the United States," *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983), and "may be withdrawn," *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283, 353 (1822) (Story, J.). Indeed, prior to enactment of the

FSIA, immunity was accorded on an ad hoc basis by the judicial branch, typically on the suggestion of the State Department. Consistent with this Court's direction that "[i]t is . . . not for the courts to deny an immunity which our government has seen fit to allow," *Republic of Mexico* v. *Hoffman*, 324 U.S. 30, 35 (1945), U.S. courts generally accepted the State Department's suggestions as "conclusive." *Ex parte Republic of Peru*, 318 U.S. 578, 589 (1943); *see generally Samantar* v. *Yousuf*, 130 S. Ct. 2278, 2284-85 (2010) (summarizing history). At the same time, this Court emphasized that "[i]t is . . . not for the courts . . . to allow an immunity on new grounds which the government has not seen fit to recognize." *Hoffman*, 324 U.S. at 35. Accordingly, prior to the FSIA's enactment, courts rejected claims of immunity from hostile nations upon suggestion of the State Department. *See*, *e.g.*, *Bernstein* v. *N. V. Nederlandsche-Amerikaansche, Stoomvaart-Maatschappij*, 210 F.2d 375, 375-76 (2d Cir. 1954) (relieving American courts "from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials") (quoting Press Release, Dep't of State, Jurisdiction of United States Courts Re Suits for Identifiable Property Involved in Nazi Forced Transfers (Apr. 27, 1949)).

Congress enacted the FSIA to address "inconsistent application of sovereign immunity," and to install a "comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities." *Verlinden*, 461 U.S. at 488. But nothing in the constitutional structure required that result. *Id.* at 486 (sovereign immunity is "not a restriction imposed by the Constitution"). Sovereign immunity has always been applied according to rules set by the political branches, and that the inherent power to regulate immunity resides

there provides another basis to affirm the judgment below even if the *Klein* approach were to be reconsidered in other cases.[9]

4. The Second Circuit also did not consider—because it had no need to reach—the alternative basis that supported the requirement of turnover: that the TRIA, even before Section 8772 changed the law applicable in these circumstances, made turnover appropriate. Pet. App. 5a ("We need not resolve this dispute under the TRIA, however, as Congress has changed the law governing this case by enacting 22 U.S.C. § 8772.").

The TRIA provides that "[n]otwithstanding 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, . . . 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." The Iranian Assets unquestionably are blocked by President Obama's Executive Order. Accordingly, as the district court recognized, the question is simply whether those assets are "assets of" petitioner. Pet. App. 113a.

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[9] Petitioner asserts that this case is a particularly good vehicle to consider applicability of *Klein* because it involves "paradigmatic private rights." Pet. 31a-32a. But that is far from clear given that Iran's "private rights" here depend on a claim of foreign sovereign immunity. In any event, even if the Court credits Petitioner's assertion that this case does not have the *additional* vehicle problem of occurring in a context where the courts of appeals are not even sure *Klein* is applicable, that does not ameliorate any of the serious vehicle problems the case does have or suggest that there is any confusion over the scope of *Klein* in cases involving "private rights." *See*, *e.g.*, *Plaut*, 514 U.S. 211.

There is no doubt that petitioner is the beneficial owner of the Iranian Assets. *See* Pet. App. 113a ("Bank Markazi has repeatedly insisted that it is the sole beneficial owner of the Blocked Assets."). Accordingly, there can be no serious dispute that the Iranian Assets also are "assets of" petitioner for purposes of the TRIA. *See* TRIA § 201(a).[10] And while assets belonging to central banks generally are immune from execution, *see* 28 U.S.C. § 1611(b), the TRIA's explicit statement that it applies "[n]otwithstanding any other provision of law" renders that provision of the FSIA unavailable to petitioner. *See*, *e.g.*, *Weininger* v. *Castro*, 462 F. Supp. 2d 457, 498-99 (S.D.N.Y. 2006) (recognizing that TRIA's later-enacted "notwithstanding clause" overrides Section 1611's earlier-enacted clause conferring immunity "notwithstanding the provisions of Section 1610").

Thus, even if this Court were to intervene to invalidate Section 8772, the same outcome would ensue, as the district court already determined that the Iranian Assets are assets of Bank Markazi subject to execution under the TRIA. Review of the decision below thus is unlikely to mitigate—much less resolve—the various policy concerns that petitioner invokes and which are addressed substantively below.

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[10] Petitioner argued below that beneficial ownership was not sufficient to make the Assets that the President blocked "assets of" Bank Markazi, but cases that interpret the President's authority to block assets make clear that beneficial ownership is a sufficient interest. *Holy Land Found. for Relief & Dev.* v. *Ashcroft*, 333 F.3d 156, 162-63 (D.C. Cir. 2003); *Global Relief Found., Inc.* v. *O'Neill*, 315 F.3d 748, 751 (7th Cir. 2002).

III. THE INTERNATIONAL RELATIONS CONCERNS MANUFACTURED BY PETITIONERS ARE MAKEWEIGHT.

Petitioner dedicates significant attention to the "important international ramifications" that it claims result from the decision of the court of appeals. Of course, the scope of *Klein* has no international ramifications; petitioner's argument instead is that this particular *application* of *Klein* has international ramifications.

But Petitioner's invocation of supposed national interests of the United States in denying respondents recovery against the Iranian Assets is entirely unpersuasive. Although the Attorney General was not invited to contribute his views in the lower courts, *see* 28 U.S.C. § 2403(a); Fed. R. Civ. P. 5.1, there is no reason to believe the Executive Branch has any foreign relations concerns about the decision here. In fact, the President both signed Section 8772 into law and blocked the Iranian Assets by executive order, deeply undermining petitioner's suggestion that the Executive would view the statute as an unwarranted intrusion into the Executive's authority over foreign affairs. Indeed, it is clear that the Executive Branch played a significant role in facilitating the access of victims like respondents to the assets of government sponsors of terrorism, Pet. App. 69a-71a, which is precisely what governing law requires, 28 U.S.C. § 1610(f)(2)(A). Section 8772 thus is not an intrusion into the political branches' control over foreign affairs; it is an exercise of that power—here to withdraw sovereign immunity from certain assets of a particularly hostile sovereign.[11]

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[11] Petitioner's failure to notify the Attorney General of its assertion of unconstitutionality in the lower courts is not a reason to call for the Solicitor General's views on this petition. The

Finally, petitioner's assertion that certiorari is proper because Section 8772 would bring the United States into violation of the Treaty of Amity cannot be sustained. The Treaty of Amity, as its name reflects, purported to establish "firm and enduring peace and sincere friendship between the United States of America and Iran." Treaty of Amity, U.S.-Iran, art. I, Aug. 15, 1955, 8 U.S.T. 899. It is ironic indeed for petitioner to invoke a treaty designed to promote "peace" as a defense against compensating the victims of its parent state's own acts of terrorism.

In any event, the Second Circuit carefully considered, and rejected, each of petitioner's claims that the Treaty of Amity was abrogated by Section 8772. *See* Pet. App. 6a-7a ("In any event, we see no conflict between § 8772 and the Treaty of Amity."). Moreover, it is well-established "that an Act of Congress . . . is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null." *Breard* v. *Greene*, 523 U.S. 371, 376 (1998) (alteration in original; internal quotation marks omitted). Accordingly, this Court has not hesitated to apply statutes even where those statutes abrogate an earlier-entered treaty. *See*, *e.g.*, *Whitney* v. *Robertson*, 124 U.S. 190 (1888). The mere assertion—rejected by the court of appeals—that Section 8772 abrogates the Treaty of Amity simply is not a compelling reason to grant certiorari.

Solicitor General, of course, has an obligation, in all but the rarest of cases, to defend the constitutionality of acts of Congress. Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation, 43 Op. Att'y Gen. 275 (1980). And as demonstrated above, there is at least a reasonable basis on which the Solicitor General could—and therefore must—defend Section 8772 here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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