Nos. 17-1529 & 17-1534

IN THE

Supreme Court of the United States

CLEARSTREAM BANKING S.A.,

Petitioner,

v.

DEBORAH D. PETERSON, ET AL.,

Respondents.

BANK MARKAZI, THE CENTRAL BANK OF IRAN,

Petitioner,

v.

DEBORAH D. PETERSON, ET AL.,

Respondents.

On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Second Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENTS

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SUPPLEMENTAL BRIEF

Pursuant to Supreme Court Rule 15.8, respondents Deborah Peterson et al. respectfully submit this supplemental brief responding to the United States' brief of December 20, 2019, suggesting that the Court grant the petitions for writs of certiorari filed by Clearstream Banking S.A. and Bank Markazi, vacate the decision below, and remand in light of intervening legislation.

In the invitation brief of the United States filed on December 9, 2019 (more than a year after this Court's invitation), the Solicitor General argued that "[t]he petitions for writs of certiorari should be denied" because, among other reasons, these cases are "the subject of pending legislation that may bear on the proper disposition of the case." U.S. Br. 19. To no one's surprise, that legislation was enacted on December 20. Within *minutes* of the legislation's signature by the President on the evening of December 20, the Solicitor General filed a new brief on behalf of the United States urging the Court not to deny the petitions, but instead to grant them, vacate the decision below, and remand for further consideration in view of the new legislation. U.S. Supp. Br. 4-5.

This Court should reject the new suggestion of the United States. The legislation does not in any way call into question the correctness of the decision below; instead, it provides an independent ground for affirming its judgment. And because, as petitioner Bank Markazi observes, the new legislation does not bear on the question presented, *see* Bank Markazi Supp. Br. 6, vacating the decision below would serve

only to impede the development of the law in an important area. The petitions should be denied. If the United States wants to undo the decision below, it should urge review en banc or by this Court in an appropriate case. It should not urge distortion of the GVR procedure to achieve its policy aims.

1. On the evening of December 20, 2019, the President signed into law the National Defense Authorization Act for Fiscal Year 2020 ("2020 NDAA"), which includes the amendment identified by the United States in its invitation brief. 2020 NDAA, S. 1790, 116th Cong. § 1226. Specifically, the 2020 NDAA amends 22 U.S.C. § 8772—the statute this Court upheld in *Bank Markazi* v. *Peterson*, 136 S. Ct. 1310 (2016)—to provide that "notwithstanding any other provision of law, including any provision of law relating to sovereign immunity," specified assets (including those that are the subject of this litigation) "shall be subject" to a court order "directing that the asset be brought to the State in which the court is located and subsequently to execution or attachment in aid of execution." 22 U.S.C. § 8772(a); 2020 NDAA, § 1226. Those specified assets, the legislation continues, "shall be subject to execution or attachment in aid of execution … without regard to concerns relating to international comity." 22 U.S.C. § 8772(a); 2020 NDAA, § 1226. As this Court held in *Bank Markazi*, a statute of this sort is a valid exercise of Congress's "substantial authority regarding foreign affairs." 136 S. Ct. at 1328.

The relevant amendments to Section 8772 are shown below, with removed text stricken and new text underlined:

(a) INTERESTS IN BLOCKED ASSETS

(1) IN GENERAL Subject to paragraph (2), notwithstanding any other provision of law, including any provision of law relating to sovereign immunity, and preempting any inconsistent provision of State law, a financial asset that is—

(A) held ~~in the United States~~ by or for a foreign securities intermediary doing business in the United States;

(B) a blocked asset (whether or not subsequently unblocked), or an asset that would be blocked if the asset were located in the United States, that is property described in subsection (b); and

(C) equal in value to a financial asset of Iran, including an asset of the central bank or monetary authority of the Government of Iran or any agency or instrumentality of that Government, that such foreign securities intermediary or a related intermediary holds abroad,

shall be subject to execution or attachment in aid of execution, or to an order directing that the asset be brought to the State in which the court is located and subsequently to execution or attachment in aid of execution, in order to satisfy any judgment to the extent of any compensatory damages awarded against Iran for damages for personal injury or death caused by an act of torture, extrajudicial killing, aircraft sabotage,

> or hostage-taking, or the provision of material support or resources for such an act, without regard to concerns relating to international comity.

....

(b) FINANCIAL ASSETS DESCRIBED

The financial assets described in this section are the financial assets ~~that are identified~~ that are—

> (1) identified in and the subject of proceedings in the United States District Court for the Southern District of New York in *Peterson et al. v. Islamic Republic of Iran et al.*, Case No. 10 Civ. 4518 (BSJ) (GWG), that were restrained by restraining notices and levies secured by the plaintiffs in those proceedings, as modified by court order dated June 27, 2008, and extended by court orders dated June 23, 2009, May 10, 2010, and June 11, 2010, so long as such assets remain restrained by court order~~.~~ and
>
> (2) identified in and the subject of proceedings in the United States District Court for the Southern District of New York in *Peterson et al. v. Islamic Republic of Iran et al.*, Case No. 13 Civ. 9195 (LAP).

* * *

These amendments appear to render irrelevant the objections to the turnover order that petitioners have advanced under the Foreign Sovereign Immunities Act ("FSIA"). Bank Markazi had argued that assets it holds outside the United States were protected by "common-law immunity," which "flows directly

from the FSIA." Bank Markazi Pet. 2, 15. And Clearstream had contended that the FSIA "incorporated[] the general principle that, absent an indication from Congress, U.S. courts lack authority to execute on sovereign assets outside the United States." Clearstream Pet. 14. But the newly enacted statute expressly permits turnover "notwithstanding any other provision of law, including any provision of law relating to sovereign immunity." 22 U.S.C. § 8772(a)(1).

Thus, the questions presented in these petitions—which ask whether federal law confers execution immunity on sovereign assets located outside of the United States—are not currently at issue. Congress has made clear that the assets in this litigation are subject to turnover and are not protected by sovereign immunity or any other federal law, a clear alternative ground supporting the Second Circuit's judgment. And this Court generally does not grant review of a question when there is an independent ground for the judgment below. *See*, *e.g.*, *The Monrosa* v. *Carbon Black Export, Inc*., 359 U.S. 180, 184 (1959) (dismissing certiorari as improvidently granted because of alternative grounds for affirming the court of appeals); Stephen M. Shapiro et al., *Supreme Court Practice* 248-49 (10th ed. 2013) (discussing cases).

2. The United States agrees that the passage of the 2020 NDAA makes this case an inappropriate vehicle for review of Clearstream's and Bank Markazi's questions presented. U.S. Supp. Br. 4. Though, just days ago, he concluded that this was a reason to deny the petitions, U.S. Br. 19-21, the Solicitor General now urges this Court to take the unusual step of granting certiorari, vacating the decision below, and remanding in light of the new legislation. U.S. Supp.

Br. 4-5. This Court should decline that invitation for two reasons.

First, the 2020 NDAA does not suggest any error in the Second Circuit's judgment or its reasoning. The GVR procedure is ordinarily reserved for those cases "[w]here intervening developments … reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation." *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) (per curiam). Indeed, in each of the cases cited by the United States on this point, *see* U.S. Supp. Br. 5 n.3, the intervening legislation expressly protected from disclosure documents that had been ordered produced in Freedom of Information Act litigation, contrary to what the lower courts had ruled, *see Dep't of Def.* v. *ACLU*, 558 U.S. 1042 (2009) (granting, vacating, and remanding in light of the Department of Homeland Security Appropriations Act, 2010, Pub. L. No. 111-83, § 565, 123 Stat. 2142); *Dep't of Justice* v. *City of Chicago*, 537 U.S. 1229 (2003) (granting, vacating, and remanding in light of the Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7, § 644, 117 Stat. 11); *Bureau of Econ. Analysis* v. *Long*, 454 U.S. 934 (1981) (granting, vacating, and remanding in light of the Economic Tax Recovery Act of 1981, Pub. L. No. 97-34, § 701, 95 Stat. 172). In each of these instances, Congress changed the law applicable to the pending case in a way such that, had the lower court considered the issue alongside the new legislation, the lower court likely would have reached a different result.

But where legislation creates an independent ground *supporting* the judgment below, GVR is inappropriate. In *Wellons* v. *Hall*, 558 U.S. 220 (2010), four justices stated the view that the Court should not GVR where the decision below "is independently supported by other grounds—so that redetermination of the faulty ground will assuredly *not* 'determine the ultimate outcome of the litigation.'" *Id.* at 227 (Scalia, J., dissenting); *see also id.* at 228-29 (Alito, J., dissenting).[1]

In accordance with that view, in *Bank Melli* v. *Bennett*, 138 S. Ct. 1260 (2018) (mem.), where the judgment of the Ninth Circuit concerning a seizure of assets of an instrumentality of Iran rested on two independent grounds, after this Court held the petition (at the United States' urging, *see* U.S. Br. 19, *Bank Melli* v. *Bennett*, 138 S. Ct. 1260 (No. 16-334)), pending disposition of this Court's decision in *Rubin* v. *Islamic Republic of Iran*, 138 S. Ct. 816 (2018), and after *Rubin* had abrogated one ground for the decision below, this Court nevertheless *denied* the petition, 138 S. Ct. 1260.

Indeed, the case for denial is even stronger here than in *Bank Melli* because, here, the 2020 NDAA does not undermine *anything* in the decision below. The purpose of the GVR procedure is to "assist[] the court below by flagging a particular issue that it does not appear to have fully considered." *Lawrence*, 516 U.S. at 167. But the 2020 NDAA does not displace the

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[1] The majority in *Wellons* did not disagree with this point, instead arguing that the Court could not "be sure that [the lower court's] reasoning really was independent of the … error." *Wellons*, 558 U.S. at 224.

reasoning of the Second Circuit that the FSIA provides no immunity from execution for assets outside of the United States. Bank Markazi agrees, acknowledging that the 2020 NDAA "has no bearing on the question the Second Circuit actually decided." Bank Markazi Supp. Br. 6. Instead, the 2020 NDAA creates an *independent and alternative basis* for executing against the assets in question here. The 2020 NDAA therefore does not give rise to a "reasonable probability" that the Second Circuit's decision rested on a "premise that the lower court would *reject* if given the opportunity for further consideration." *Lawrence*, 516 U.S. at 167 (emphasis added).

Second, a GVR for reconsideration in light of the 2020 NDAA would be inappropriate because the Second Circuit is unlikely to have any opportunity to reconsider the questions presented by the petitions in this case. Rather, the first questions on remand would be whether the 2020 NDAA applies to the claims here, and whether there are any other constitutional or jurisdictional obstacles to execution. Only in the unlikely event that the 2020 NDAA is held to be inapplicable or invalid would the courts below have cause to re-engage with the questions presented here. A GVR thus would serve only to impair the development of the law in an important field. The United States has stated its disagreement with the Second Circuit's holding that the FSIA does not protect assets outside of the United States from execution, *see* U.S. Br. 11-15, but the way to advance its position is by seeking further review of that rule in an appropriate case. Federal policy is not properly vindicated by urging this Court to tear down precedential decisions of the courts of appeals without any adjudication of error.

* * *

The United States urged this Court to deny review because of the existence of pending legislation. U.S. Br. 19. That legislation has been signed into law, and review is now clearly inappropriate. The 2020 NDAA creates an alternative ground for turnover of the assets in question. It provides no basis for vacatur of the decision below. The petitions should be denied.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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