No. 17-1534

IN THE

Supreme Court of the United States

BANK MARKAZI,
THE CENTRAL BANK OF IRAN,

Petitioner,

v.

DEBORAH D. PETERSON, *et al.*,

Respondents.

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

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SUPPLEMENTAL BRIEF FOR PETITIONER

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TABLE OF CONTENTS

	Page
I. The Government Agrees That the Decision Below Is Erroneous and Has Serious Foreign Relations Implications	2
II. The Court Should Review This Case Now Rather Than Later	3
A. The Case's Interlocutory Posture Is No Bar to Review	3
B. Immunity Favors Prompt Review	5
III. Congress's Latest Unconstitutional Attempt To Dictate Outcomes in This Litigation Is No Reason To Deny Review	6
A. Bank Markazi Has Substantial Constitutional Challenges to the New Statute	7
B. Disputes over the New Statute's Constitutionality Are No Reason To Delay Review	9
Conclusion	11

TABLE OF AUTHORITIES

Page(s)

CASES

Bank Markazi v. *Peterson*,
136 S. Ct. 1310 (2016) 7, 8, 10

Caperton v. *A.T. Massey Coal Co.*,
556 U.S. 868 (2009) 8

Carpenter v. *Wabash Ry. Co.*,
309 U.S. 23 (1940) 10

Certain Iranian Assets (*Iran* v. *U.S.*),
No. 164 (I.C.J. filed June 14, 2016) 10

Certain Iranian Assets (Iran v. *U.S.)*,
No. 164, Judgment on Preliminary
Objections (I.C.J. Feb. 13, 2019) 11

D.C. Fed'n of Civic Assn's v. *Volpe*,
459 F.2d 1231 (D.C. Cir. 1971) 8

DCP Farms v. *Yeutter*,
957 F.2d 1183 (5th Cir. 1992) 8

Frontera Res. Azerbaijan Corp. v. *State
Oil Co. of Azerbaijan Republic*,
582 F.3d 393 (2d Cir. 2009) 8

GSS Grp. Ltd. v. *Nat'l Port Auth.*,
680 F.3d 805 (D.C. Cir. 2012) 8

Koniag, Inc. v. *Andrus*,
580 F.2d 601 (D.C. Cir. 1978) 8

Land v. *Dollar*, 330 U.S. 731 (1947) 3

Marshall v. *Jerrico, Inc.*,
446 U.S. 238 (1980) 7

Pearson v. *Callahan*, 555 U.S. 223 (2009) 5, 6

TABLE OF AUTHORITIES—Continued

Page(s)

Persinger v. *Islamic Republic of Iran*, 729 F.2d 835 (D.C. Cir. 1984) 3

Pillsbury Co. v. *FTC*, 354 F.2d 952 (5th Cir. 1966) 8

Republic of Argentina v. *NML Capital, Ltd.*, 573 U.S. 134 (2014) 2

Stephens v. *Nat'l Distillers & Chem. Corp.*, 69 F.3d 1226 (2d Cir. 1995) 5

Tumey v. *Ohio*, 273 U.S. 510 (1927) 8

Ward v. *Village of Monroeville*, 409 U.S. 57 (1972) 7

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. art. III 9

Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, 126 Stat. 1214 (codified at 22 U.S.C. § 8772) 7, 10

§ 502, 126 Stat. at 1258 7

§ 502(a)(1), 126 Stat. at 1258 10

National Defense Authorization Act for Fiscal Year 2020, H. Conf. Rep. No. 116-333 (Dec. 9, 2019), reprinted in 165 Cong. Rec. H9389 (Dec. 9, 2019) .... *passim*

Sec. 1226, § 502(a)(1) 7

Sec. 1226, § 502(b)(2) 7

TABLE OF AUTHORITIES—Continued

Page(s)

TREATY PROVISIONS

Treaty of Amity, Economic Relations, and Consular Rights, U.S.-Iran, Aug. 15, 1955, 8 U.S.T. 899 .... 10, 11

Art. III, 8 U.S.T. at 902-903 10

Art. IV, 8 U.S.T. at 903-904 10

OTHER AUTHORITIES

Certain Iranian Assets (*Iran* v. *U.S.*), No. 164, Application Instituting Proceedings (I.C.J. filed June 14, 2016) 11

Michael R. Pompeo, Sec'y of State, U.S. Dep't of State, *Remarks to the Media* (Oct. 3, 2018), https://www.state.gov/remarks-to-the-media-3 11

Stephen M. Shapiro *et al.*, *Supreme Court Practice* (10th ed. 2013) 3, 4

Ingrid Wuerth, *The Due Process and Other Constitutional Rights of Foreign Nations*, 88 Fordham L. Rev. 633 (2019) 9

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SUPPLEMENTAL BRIEF FOR PETITIONER

The government admits that the decision below is "flawed." U.S. Br. 11. It recognizes that the decision "implicates important foreign-policy interests" and "put[s] U.S. property at risk." *Id.* at 20. It concedes that the issues "likely would warrant this Court's review" at some point. *Id.* at 10. It offers only reasons for delay.

Those reasons are unconvincing. While the government emphasizes the case's interlocutory posture, this Court routinely reviews interlocutory decisions, especially in the immunity context. There are persuasive reasons to do so here. The unprecedented legal rule adopted below will have major foreign policy ramifications—including a real threat of reciprocal measures by

foreign states—regardless of how this particular case might eventually be resolved. The government's proposal for delay also cannot be reconciled with this Court's repeated instructions to resolve claims of sovereign immunity at the earliest possible stage of proceedings.

Nor does Congress's latest attempt to dictate outcomes in this litigation warrant denial of the petition. That new statute clearly does not render this case moot: Bank Markazi has substantial constitutional challenges. The mere possibility that plaintiffs may assert a claim under the new statute on remand does not diminish the importance of reviewing the broad question of immunity the Second Circuit actually decided.

I. THE GOVERNMENT AGREES THAT THE DECISION BELOW IS ERRONEOUS AND HAS SERIOUS FOREIGN RELATIONS IMPLICATIONS

The government agrees with Bank Markazi that the decision below is "flawed." U.S. Br. 11, 15. It recognizes that "every court of appeals to have addressed the issue before the decision below had treated the presence of the disputed foreign sovereign property *in the United States* as a prerequisite to attachment or execution in U.S. courts." *Id.* at 12. It recognizes that, contrary to the decision below, this Court's decision in *Republic of Argentina* v. *NML Capital, Ltd.*, 573 U.S. 134 (2014), does not justify a different conclusion. U.S. Br. 13-15. And it agrees that, again contrary to the decision below, "[i]t is unlikely that Congress, in providing for only limited inroads on execution immunity for certain foreign sovereign property in the United States, intended to subject foreign sovereign property *abroad* to the kind of turnover order contemplated here." *Id.* at 15 (citation omitted).

The government also concurs with Bank Markazi that "the decision below implicates important foreign-policy

interests of the United States." U.S. Br. 20. The government acknowledges that "'[s]ome foreign states base their sovereign immunity decisions on reciprocity.'" *Ibid.* (quoting *Persinger* v. *Islamic Republic of Iran*, 729 F.2d 835, 841 (D.C. Cir. 1984), cert. denied, 469 U.S. 881 (1984)). The decision below could therefore "put U.S. property at risk." *Ibid.*

The government thus agrees with Bank Markazi that, so far as both the merits and the importance of the issues are concerned, the decision below "likely would warrant this Court's review." U.S. Br. 10. Its *sole grounds* for opposing the petition are the case's interlocutory posture and new legislation. Those procedural objections are misplaced for reasons explained below. But they should not obscure the fact that the government agrees with Bank Markazi that all *substantive* considerations favor review.

II. The Court Should Review This Case Now Rather Than Later

The government urges that the case is interlocutory. On remand, it notes, Bank Markazi could prevail based on international comity, the state-law "separate entity" rule, or lack of personal jurisdiction over Clearstream. U.S. Br. 16-19. That argument is unpersuasive.

A. The Case's Interlocutory Posture Is No Bar to Review

The government nowhere denies the well-settled principle that a case may be "reviewed despite its interlocutory status" where "there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari." Stephen M. Shapiro *et al.*, *Supreme Court Practice* § 4.18, at 283 (10th ed. 2013); *e.g.*, *Land* v.

Dollar, 330 U.S. 731, 734 n.2 (1947). That principle applies squarely here. This case clearly presents an "important and clear-cut issue of law * * * that would otherwise qualify as a basis for certiorari": whether foreign sovereign assets outside the United States are immune from execution. The government's admission that the Second Circuit's ruling "likely would warrant this Court's review" in another case is effectively a concession that this component of the standard is met. U.S. Br. 10.

The Second Circuit's ruling is also "fundamental to the further conduct of the case." Shapiro *et al.*, *supra*, § 4.18, at 283. If that ruling is wrong, there may be no need to address *any* issues on remand, apart from Bank Markazi's constitutional challenges to any claims plaintiffs may assert under the new statute. Conversely, if the ruling is correct, Bank Markazi's constitutional challenges may be irrelevant. The Second Circuit's ruling will thus dramatically affect what issues get litigated on remand.

The government's arguments about the case's interlocutory posture also ignore its concessions of importance. The government concedes that "the decision below implicates important foreign-policy interests" and "put[s] U.S. property at risk," particularly because "[s]ome foreign states base their sovereign immunity decisions on reciprocity." U.S. Br. 20. Those concerns have nothing to do with how the *specific claims against Bank Markazi* are resolved. They stem from the Second Circuit's *legal ruling*. That ruling will remain on the books and invite reciprocal action by other states even if Bank Markazi prevails on comity or state-law grounds.

To avoid those reciprocal actions, the Court should review this case now. The possibility that Bank Markazi might prevail on other grounds on remand would only

further delay the Court's consideration of this important foreign relations issue, increasing the risk of reciprocal treatment for U.S. property. Other countries have no reason to wait before following the Second Circuit's lead. The Court should address the issue without delay.

B. Immunity Favors Prompt Review

The government also ignores the immunity-related reasons for prompt review. This Court has emphasized "the importance of resolving immunity questions at the earliest possible stage in litigation." *Pearson* v. *Callahan*, 555 U.S. 223, 232 (2009). That priority is particularly urgent here because the Second Circuit may order the assets brought to the United States before this Court has another opportunity to review the case. Pet. App. 52a. That transfer might strip immunity to which the assets are otherwise entitled. Pet. 32 & n.10. At a minimum, that exercise of dominion over sovereign assets for a lengthy period would itself be a serious infringement of immunity. See *Stephens* v. *Nat'l Distillers & Chem. Corp.*, 69 F.3d 1226, 1229-1230 (2d Cir. 1995) (prohibiting order that would "force [the] foreign sovereign * * * to place some of [its] assets in the hands of the United States courts for an indefinite period").

The government acknowledges that the court of appeals ordered "a 'two-step process' * * * on remand, *first* 'recalling the asset at issue' and *then* 'proceeding with a traditional FSIA analysis.'" U.S. Br. 16 (emphasis added); see Pet. App. 52a. It asserts that "[e]lsewhere * * * the court appeared to leave open the possibility" of addressing threshold issues *before* recalling the assets. U.S. Br. 16. The passage the government invokes is unsupportive. See Pet. App. 55a. Regardless, the government concedes that the opinion as a whole "leaves unclear" how the remand will unfold. U.S. Br. 17. Con-

signing Bank Markazi to an unknown process on remand that may or may not involve transferring $1.68 billion of its foreign currency reserves to the United States and holding them there for years while the parties litigate the case is not consistent with this Court's mandate to "resolv[e] immunity questions at the earliest possible stage." *Pearson*, 555 U.S. at 232.

The government does not deny that this Court routinely grants review of sovereign immunity questions arising from *denials of motions to dismiss*—the quintessential interlocutory posture. Cert. Reply 3 (collecting cases). It offers no reason why interlocutory review is any less appropriate here. The Second Circuit erroneously decided an important question of federal law with serious foreign relations implications. That question will not be any more squarely presented than it is now.

III. CONGRESS'S LATEST UNCONSTITUTIONAL ATTEMPT TO DICTATE OUTCOMES IN THIS LITIGATION IS NO REASON TO DENY REVIEW

The government finally points to Congress's inclusion of a rider in recent defense appropriations legislation that seeks to direct the outcome of this dispute. See National Defense Authorization Act for Fiscal Year 2020 ("NDAA"), § 1226, H. Conf. Rep. No. 116-333 (Dec. 9, 2019), reprinted in 165 Cong. Rec. H9389, H9515 (Dec. 9, 2019) (passed both Houses of Congress and awaiting the President's signature as of the printing of this brief); U.S. Br. 19-20. That constitutionally dubious legislation is a matter for remand and has no bearing on the question the Second Circuit actually decided.

A. Bank Markazi Has Substantial Constitutional Challenges to the New Statute

NDAA § 1226 clearly does not render this dispute moot. Bank Markazi has substantial grounds for challenging the statute's constitutionality.

Congress's new legislation is obviously inspired by this Court's decision in *Bank Markazi* v. *Peterson*, 136 S. Ct. 1310 (2016)—it is an amendment to the very statute this Court upheld in that case. See NDAA § 1226 (amending Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, § 502, 126 Stat. 1214, 1258). Just like the prior statute, the new legislation changes the law for this case alone, identified by docket number in the statutory text. See NDAA sec. 1226, § 502(b)(2) (limiting application to assets "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)"). Just like the prior statute, the new one alters not only immunity but also substantive law—both by incorporating the prior statute's case-specific preemption provision and modifications to the Uniform Commercial Code, and by adding a new case-specific mandate to disregard any "concerns relating to international comity." *Id.* § 502(a)(1).

That statute violates basic due process principles. The plaintiffs in this case are seeking to have property of their opponent in litigation handed over to them. Bank Markazi is entitled to have a court, not Congress, decide the winner of that dispute. One of the fundamental requirements of due process is a "neutral and detached" decisionmaker. *Ward* v. *Village of Monroeville*, 409 U.S. 57, 61-62 (1972); see also *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 242 (1980) ("The Due Process Clause entitles a

person to an impartial and disinterested tribunal * * * ."); *Caperton* v. *A.T. Massey Coal Co.*, 556 U.S. 868, 881-887 (2009); *Tumey* v. *Ohio*, 273 U.S. 510, 523, 531-534 (1927). Where Congress intervenes to direct the outcome of a specific pending case, the "decisionmaker" is no longer the court, but Congress itself. And Congress hardly qualifies as "neutral and detached."

Courts of appeals have found due process violations from congressional interference far less egregious than what happened here. In *Pillsbury Co.* v. *FTC*, 354 F.2d 952 (5th Cir. 1966), for example, the Fifth Circuit found a due process violation where Members of Congress asked probing questions and made forceful comments to agency officials at a committee hearing about a pending case. *Id.* at 963-965. The "right to the appearance of impartiality," the court held, "cannot be maintained unless those who exercise the judicial function are free from powerful external influences." *Id.* at 964; see also *DCP Farms* v. *Yeutter*, 957 F.2d 1183, 1187-1188 (5th Cir. 1992); *Koniag, Inc.* v. *Andrus*, 580 F.2d 601, 610-611 (D.C. Cir. 1978); *D.C. Fed'n of Civic Assn's* v. *Volpe*, 459 F.2d 1231, 1245-1248 (D.C. Cir. 1971). If Congress violates due process merely by pressuring adjudicators through pointed commentary, it plainly does so by legislatively directing a court to reach a desired result in a specific pending case.

This Court rejected a constitutional challenge in its earlier *Bank Markazi* decision. 136 S. Ct. at 1329. But that case concerned only a separation-of-powers claim. *Ibid.* Those structural constraints are not the only constitutional principles at stake. Bank Markazi, a juridically separate instrumentality, is entitled to due process protections. See *GSS Grp. Ltd.* v. *Nat'l Port Auth.*, 680 F.3d 805, 813-819 (D.C. Cir. 2012); *Frontera Res. Azerbaijan Corp.* v. *State Oil Co. of Azerbaijan Republic*, 582

F.3d 393, 400-401 (2d Cir. 2009). The statute's blatant violation of those principles is no less aggravated merely because the statute might comply with Article III's structural mandates. See Ingrid Wuerth, *The Due Process and Other Constitutional Rights of Foreign Nations*, 88 Fordham L. Rev. 633, 652 (2019) ("Although Bank Markazi styled the argument in separation of powers terms, which is how the Court evaluated it, the argument could also have sounded in due process."). This Court's earlier decision thus in no way precludes Bank Markazi from pursuing due process or other constitutional claims in the courts below.

B. Disputes over the New Statute's Constitutionality Are No Reason To Delay Review

Given those grave constitutional doubts, NDAA § 1226 does not diminish the need for review of the important immunity question the Second Circuit actually decided. The Court should grant review of that decision and leave consideration of Bank Markazi's constitutional challenges to the new statute for the lower courts to address on remand if necessary.

The existence of such potential issues for remand does not weigh against review. If this Court grants review and reverses the Second Circuit's interpretation of generally applicable immunity law, plaintiffs can pursue a claim under NDAA § 1226 on remand. If this Court grants review and affirms, plaintiffs may not need to invoke the new statute. At worst, NDAA § 1226 is simply one more reason why, absent this Court's review, the case might be decided on other grounds. That possibility is no reason to deny the petition. See pp. 3-5, *supra*. Adding one more potential ground for resolution on remand does not undermine the importance of the Second Circuit's ruling or the need for prompt review.

This is not a situation in which Congress has changed the law the court of appeals actually applied, requiring this Court to apply the new law on review. Cf. *Carpenter* v. *Wabash Ry. Co.*, 309 U.S. 23, 27 (1940) (granting review and applying new statute enacted while petition for certiorari was pending). NDAA § 1226 does not modify the common law immunity principles for extraterritorial assets that the Second Circuit applied (or declined to apply) below. Instead, it creates a *new* execution mechanism that applies *without regard* to immunity. See Pub. L. No. 112-158, § 502(a)(1), 126 Stat. at 1258, as incorporated by NDAA § 1226 (creating new execution mechanism applicable "notwithstanding any other provision of law, including any provision of law relating to sovereign immunity"). Plaintiffs may be entitled to assert a claim under that new execution mechanism on remand. But the statute does not deprive this Court of authority to interpret the common law immunity principles the Second Circuit actually addressed.

Finally, there is at least one important reason why Congress's enactment of NDAA § 1226 *favors* review. The United States and Iran are currently litigating proceedings before the International Court of Justice over the United States' violations of the Treaty of Amity, Economic Relations, and Consular Rights, U.S.-Iran, Aug. 15, 1955, 8 U.S.T. 899. See *Certain Iranian Assets (Iran* v. *U.S.)*, No. 164 (I.C.J. filed June 14, 2016). That Treaty required the United States to respect the juridical status of Iranian entities like Bank Markazi, to provide them with equal access to courts and administrative agencies, to refrain from applying unreasonable or discriminatory measures, and to protect their property as required by international law. *Id.* arts. III, IV, 8 U.S.T. at 902-904. The statute at issue in the prior *Bank Mar-*

kazi case is a major focus of Iran's claims before the ICJ. See *Certain Iranian Assets (Iran* v. *U.S.)*, No. 164, Application Instituting Proceedings ¶¶21-23, 27, 30, 32 (I.C.J. filed June 14, 2016); see also *Certain Iranian Assets (Iran* v. *U.S.)*, No. 164, Judgment on Preliminary Objections ¶¶81-97 (I.C.J. Feb. 13, 2019) ("ICJ Judgment") (rejecting the United States' jurisdictional objection that Bank Markazi is not protected by the Treaty).[1]

NDAA §1226 violates all those same Treaty provisions. A denial of Bank Markazi's petition could invite the inference that this Court denied review because Congress enacted NDAA §1226—a ruling that would expose the United States to additional liability in the ICJ proceedings. Far from obviating the need for review, therefore, NDAA §1226 only underscores the importance of weighing in on the important question the Second Circuit actually decided.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[1] Last year, the United States announced its intent to withdraw from the Treaty of Amity. See Michael R. Pompeo, Sec'y of State, U.S. Dep't of State, *Remarks to the Media* (Oct. 3, 2018), https://www.state.gov/remarks-to-the-media-3. At a minimum, however, both the Second Circuit's decision and the restraints on the assets to which NDAA §1226 relates predate the United States' withdrawal. The ICJ has already ruled that "the denunciation of the Treaty announced by the United States on 3 October 2018 has no effect on the jurisdiction of the Court in the present case." ICJ Judgment ¶30.

Respectfully submitted.

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