No. 18-1039

IN THE
Supreme Court of the United States

JEREMY LEVIN AND DR. LUCILLE LEVIN,
Petitioners,
v.
JPMORGAN CHASE BANK, N.A.
Respondent.

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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March 11, 2019

QUESTION PRESENTED

In *Calderon-Cardona v. Bank of New York Mellon*, 770 F.3d 993, 1002 (2d Cir. 2014), *cert. denied*, 136 S. Ct. 893 (2016), and *Hausler v. JPMorgan Chase Bank, N.A.*, 770 F.3d 207, 212 (2d Cir. 2014), *cert. denied sub nom. Hausler v. JPMorgan Chase Bank, N.A.*, 136 S. Ct. 893 (2016), the Second Circuit collectively held that a blocked wire transfer, also known as an electronic funds transfer ("EFT"), is subject to execution under § 201 of the Terrorism Risk Insurance Act of 2002 ("TRIA") or § 1610(g) of the Foreign Sovereign Immunities Act ("FSIA") "***only*** where either the state itself or any agency or instrumentality thereof (such as a state-owned financial institution) transmitted the EFT ***directly*** to the bank where the EFT is held pursuant to the block," *Calderon-Cardona*, 770 F.3d at 1002 (emphasis added). In light of that holding, the question presented is as follows:

Are the proceeds of a blocked wire transfer subject to execution under either TRIA § 201(a) or FSIA § 1610(g) when the entity that transmitted the EFT directly to the bank that blocked it is neither the foreign state against which a judgment is sought to be enforced nor an agency or instrumentality thereof, and even though the direct transmitter is a correspondent bank for an originator that is itself an agency or instrumentality of the foreign state?

CORPORATE DISCLOSURE STATEMENT

In accordance with United States Supreme Court Rule 29.6, respondent JPMorgan Chase Bank, N.A., by its attorneys, Katsky Korins LLP, states that it is a wholly owned subsidiary of JPMorgan Chase & Co., a publicly held corporation. No other publicly held corporation owns 10% or more of its stock.

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INTRODUCTION

Respondent JPMorgan Chase Bank, N.A. ("JPMorgan") respectfully submits that the petition for writ of certiorari filed by petitioners Jeremy Levin and Dr. Lucille Levin (the "Levins" or "Petitioners") should be denied on any one of multiple grounds. First, the Second Circuit's decision below, like the authorities – *Calderon-Cardona a*nd *Hausler* – on which it rests, is not in conflict with a decision of any other circuit court, including the D.C. Circuit's decision in *Heiser v. Islamic Republic of Iran*, 735 F.3d 934 (D.C. Cir. 2013). Like *Calderon-Cardona* and *Hausler*, *Heiser* held that Article 4-A of the Uniform Commercial Code ("U.C.C.") applies to determine whether a foreign state, or an agency or instrumentality thereof, has a property interest in a blocked EFT that renders the blocked funds subject to execution under TRIA § 201(a) or FSIA § 1610(g). No other federal circuit court has ruled on that specific issue – namely, which participant in a wire transfer chain has a property interest in a blocked EFT under TRIA § 201(a) or FSIA § 1610(g) for purposes of enforcing a judgment against a foreign state.

Second, the Second Circuit's decision below was correctly decided and does not warrant further review. The Second Circuit, like the district court, properly applied *Calderon-Cardona* and *Hausler* to conclude that the blocked EFT that Petitioners sought to attach is immune from execution under TRIA § 201(a) or FSIA § 1610(g) because the entity that transmitted the EFT directly to the bank that blocked it – JPMorgan – was neither the judgment

debtor – the Islamic Republic of Iran ("Iran") – nor an agency or instrumentality thereof.

Finally, none of the other arguments advanced by Petitioners in their petition – that TRIA § 201(a) preempts state law, rendering U.C.C. Article 4-A inapplicable to the issue of who owns a blocked EFT for judgment enforcement purposes; that if U.C.C. Article 4-A does apply, its subrogation provisions grant an ownership interest in the blocked EFT at issue to the originator of the EFT, an Iranian bank; and that the decision below will promote money laundering by terrorist states such as Iran – were raised and vetted below. They accordingly neither warrant nor are appropriate for this Court's review.

OPINION BELOW

The Second Circuit's summary order is unreported but is available at 2018 WL 4901585 (2d Cir. 2018). (Pet. App. 1-13) The district court's order (Pet. App. 14-23) is also unreported but is available at 2017 WL 4863094 (S.D.N.Y. Oct. 27, 2017).

JURISDICTION

The Second Circuit's summary order and judgment was entered on October 9, 2018. (Pet. App. 1) The court denied a petition for a rehearing and rehearing *en banc* on November 16, 2018 (Pet. App. 24-25), and issued its mandate on November 26, 2018. The petition for a writ of certiorari was filed on February 14, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

1. Section 201(a) of TRIA provides that, "in every case in which a person has obtained a judgment against a terrorist party on a claim based on an act of terrorism, or for which a terrorist party is not immune under section 1605A or 1605(a)7)" of the FSIA, the "blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution in order to satisfy any such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable." TRIA defines the term "blocked asset" as "any asset seized or frozen by the United States" under specified provisions of the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-1706, or section 5(b) of the Trading With the Enemy Act (50 U.S.C. § 4305). TRIA § 201(d)(2)(A). TRIA defines "terrorist party" to include "a foreign state designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 App. U.S.C. 2405(j)) . . . ."

Pub. L. No. 107-297, 116 Stat. 2333 (reprinted following 28 U.S.C. 1610).

2. Section 1610(g) of the FSIA provides that the "property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical

entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section . . . ."

3. An EFT (electronic funds transfer) is a payment method by which a bank's customer can electronically transfer money from one bank to another. An EFT typically involves five participants: (1) the originator, (2) the originator's bank, (3) the intermediary bank, (4) the beneficiary's bank, and (5) the beneficiary. An EFT involves a series of payment orders, and corresponding debits and credits, along the five-participant chain, commencing with a debit to the originator's account and ending with a credit to the beneficiary's account. Article 4-A of the U.C.C. defines the rights and obligations of the participants involved in an EFT.

B. Factual and Procedural History

In February 2008, the United States District Court for the District of Columbia entered judgment in Petitioners' favor, and against Iran, under what was then § 1605(a)(7) of the FSIA (which has since been repealed and replaced by FSIA § 1605A). The judgment was in the amount of $28,807,019, part of which, as alleged by Petitioners, remains unsatisfied. On April 20, 2009, Petitioners registered their judgment with the United States District Court for the Southern District of New York. (Pet. App. 3-4)

Shortly thereafter, on June 26, 2009, Petitioners commenced this judgment enforcement action in the Southern District of New York. (Pet. App. 4, 15) Since that time, Petitioners have

periodically served JPMorgan and other banks with subpoenas or discovery requests seeking to identify blocked assets that were blocked pursuant to sanctions regulations, administered by the Office of Foreign Assets Control ("OFAC") of the United States Treasury Department, that apply specifically to Iran or otherwise encompass transactions involving Iran or its agencies or instrumentalities. Petitioners' objective in seeking such discovery is to identify blocked assets that may be subject to execution under TRIA § 201(a) or FSIA § 1610(g) to help enforce their judgment against Iran.

On January 12, 2017, in response to Petitioners' then-most recent discovery requests, JPMorgan disclosed to Petitioners the blocked asset that was the subject of the decision below – a blocked account containing the proceeds of an EFT that JPMorgan blocked under 31 C.F.R. Parts 560, 561 and 594 due to the participation in the wire transfer chain of Bank Saderat, a Tehran-based bank that is on OFAC's list of Specially Designated Nations ("SDN") and is an agency or instrumentality of Iran (the "Saderat Account"). (Pet. App. 6, 16) Bank Saderat was the originator of the EFT, and Lloyds Bank plc ("Lloyds Bank"), a U.K. bank headquartered in London, was the originator's bank in its capacity as correspondent bank for Bank Saderat. It is undisputed that Lloyds Bank was the entity that directly transmitted the EFT to JPMorgan, which blocked the transfer, and that Lloyds is not an agency or instrumentality of Iran. (Pet. App. 10, 21)

On June 20, 2017, Petitioners moved under Fed. R. Civ. P. 15(d) for leave to supplement their complaint to seek the turnover of the Saderat Account and a separate account not at issue on this petition. (Pet. App. 14, 16-17) As to the Saderat Account, the district court denied the motion, holding that supplementation would be futile because the account is not the property of Bank Saderat and is therefore not subject to execution under TRIA § 201(a) or FSIA § 1610(g). (Pet. App. 19) The court reached that conclusion through its straightforward adherence to *Calderon-Cardona* and *Hausler*. "The blocked EFT in question," the court wrote, "was transmitted to JPMCB [JPMorgan] directly by Lloyd's Bank. Under established Second Circuit law, the EFT is thus considered property of Lloyd's Bank, which is not an agent or instrumentality of Iran; consequently, the EFT cannot be attached under TRIA." (Pet. App. 21)

The district court also rejected Petitioners' "attempt," in the court's words, "to sidestep *Hausler*'s rule based on the fact that Bank Saderat used Lloyd's Bank as a 'correspondent bank' rather than an 'intermediatry [sic] bank.' (Pet. App. 21-22) "[T]his is a distinction without a difference," the court concluded, "at least as it relates to the Second Circuit's rule in *Hausler*." Citing to the district court's decision in *Doe v. Ejercito De Liberacion Nacional*, No. 15 Civ. 8652, 2017 WL 59193, at *1-3 (S.D.N.Y. Feb. 14, 2017), *aff'd sub nom Doe v. JPMorgan Chase Bank, N.A.*, 899 F.3d 152 (2d Cir.

2018),[1] the court stated that "even where an EFT is transferred to a blocking bank by a 'correspondent bank,' the transferred asset is considered the 'sole property' of the correspondent bank, rather than the 'principal' bank (i.e., Bank Saderat). [Citing *Doe*.] Therefore, the EFT is not attachable unless the correspondent bank is itself a terrorist state or an agent or instrumentality thereof." (Pet. App. 22) Because Lloyds Bank does not meet any of those criteria, the court concluded, "the Saderat Account is not attachable, and supplementation would be futile as to that asset." (Pet. App. 22)

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[1] In *Doe*, the Second Circuit affirmed the district court's denial of a motion by a judgment creditor of two sanctioned terrorist organizations for the turnover of separate blocked EFTs as to which the correspondent banks (Credit Suisse AG and AHLI United Bank UK PLC) that transmitted the EFTs to the blocking bank (JPMorgan) disclaimed an interest in the blocked funds. As it did in the case at hand, the Second Circuit based its decision on *Calderon-Cardona* and *Hausler*, holding that the blocked accounts were immune from execution – even though the terrorist organizations were on OFAC's list of Specially Designated Global Terrorists ("SDGT") – because "no SDGT transmitted any of the blocked EFTs directly to a blocking bank." *Doe v. JPMorgan Chase Bank, N.A.*, 899 F.3d 152, 157 (2d Cir. 2018). The Second Circuit declined to depart from *Calderon-Cardona* and *Hausler* based on the correspondent banks' having disclaimed an interest in the blocked EFTs, since the sanctions regulations at issue – the Global Terrorism Sanctions Regulations, 31 C.F.R. Part 594 – bar the transfer of blocked assets without an OFAC license and render any unlicensed transfer "null and void." 31 C.F.R. § 594.202(a). The banks' disclaimers, accordingly, could not effect "a transfer 'back up the chain' to an originating SDGT." *Doe*, 899 F.3d at 157.

On appeal, the Second Circuit affirmed, adhering to the same reasoning employed by the district court. It stated:

> The Saderat Account falls squarely within the holding of these cases [i.e., *Calderon-Cardona* and *Hausler*]. Here, as in *Hausler*, 'it is undisputed that no [terrorist entity] transmitted any of the blocked EFTs in this case directly to a blocking bank.' [Citing *Hausler*, 770 F.3d at 212] Instead, the Saderat Account funds were transmitted directly to JPMCB by Lloyds Bank. The Levins nowhere assert that Lloyds constitutes an 'agency or instrumentality' of Iran. Because the EFT was not transferred directly to JPMCB by a foreign state or an agency or instrumentality of a foreign state, it [the Saderat Account] was not 'property of' a foreign state or an agency or instrumentality of such a state, and thus not attachable under FSIA or TRIA. [Pet. App. 10]

The Second Circuit went on to reject the Levins' "principal[]" contention "that ownership of the Saderat Account at the time of blocking is a disputed question of fact," stating that under *Calderon-Cardona* and *Hausler*, "ownership of an EFT blocked by a New York bank depends ***entirely*** on the identity of the immediate transferor to that bank." (Pet. App. 10-11) (emphasis added).

Finally, like the district court, the Second Circuit rejected Petitioners' argument that the

alleged distinction between a correspondent bank and an intermediary bank distinguished this case from *Hausler* and *Calderon-Cardona*, stating: "Nor can we diverge from that result" – that the Saderat Account is immune from execution – "based on the Levins' purported distinction between the 'intermediary bank' at issue in *Calderon-Cardona* and *Hausler* and the 'correspondent bank' relationship at issue here." (Pet. App. 11) The court stated that "our precedents interpreting N.Y. U.C.C. Article 4 render the asserted distinction irrelevant," and that the district court "properly held" just that. *Id*. The court concluded that "[r]egardless of the particular relationship between the immediate transferor of the funds and the entity that held title to those funds at the beginning of the transaction, the ownership of blocked EFT funds is clearly assigned by *Calderon-Cardona* and *Hausler*." (Pet. App. 11-12) The court added that its then-recent decision in *Doe*, whose "sequence of events" was "highly analogous" to that in this case, "further bolsters our conclusion that the funds blocked by JPMCB are not attachable."[2] (Pet. App. 12)

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[2] Petitioners state in their petition that the Second Circuit failed to address U.C.C. § 4-A-501, which allows parties to alter by contract the rights and obligations they would otherwise have under Article 4-A. (Pet. at 33) But while the Second Circuit did not refer to § 4-A-501 per se, it addressed that provision's principle in confirming that only the immediate transferor of an EFT to the blocking bank has a property interest in the blocked funds, regardless of the transferor's contractual relationship with the originator.

Petitioners also contend that the "Second Circuit ignored the money laundering implications and the (continued…)

On October 23, 2018, Petitioners moved for panel rehearing or a rehearing *en banc*. By Order entered on November 16, 2018, the Second Circuit denied that motion. (Pet. App. 24-25)

REASONS FOR DENYING THE PETITION

JPMorgan and other banks holding assets blocked under sanctions regulations sympathize with terrorist victims and recognize the challenges they face in collecting on judgments against terrorist states or organizations. JPMorgan does not profit off of funds blocked under OFAC sanctions and has no desire to impede the Levins' or any other victims' judgment enforcement efforts. But JPMorgan, which must comply with myriad sanctions regulations administered by OFAC, cannot knowingly assent to the turnover of a blocked asset – like the Saderat Account – that is immune from execution under governing law. By doing so, it would subject itself not just to admonishment from OFAC, but also to the risk of double liability created by competing claims to the same asset by other persons or entities that, as has happened before, may later seek to invalidate the turnover.

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undermining of United States' policy against terrorist financing" in ruling as it did. (Pet. at 13) But as discussed further below, any "money laundering implications" of an adherence to *Calderon-Cardona* and *Hausler* were not raised with the district court, whose decision therefore did not address them. Nor were they raised on appeal. Petitioners' opening brief on appeal, though not part of the Petition Appendix, referred to money laundering once, in the final sentence of the brief. Petitioners' reply brief did not refer to it at all.

JPMorgan must, in short, follow the law, and the virtue of *Calderon-Cardona* and *Hausler* is that they resolved the uncertainty that had until then characterized the law on ownership of blocked EFTs in the Second circuit, within which the vast majority of blocked EFTs are held. Indeed, *Calderon-Cardona* and *Hausler* established, and their progeny – *Doe* and the decision below – reaffirmed, a rule of decision that gives parties clear guidance and dispels the very "confusion and controversy" that Petitioners wrongly contend still exists in the Second Circuit. (Pet. at 26) The circuit and district court decisions below rest on a straightforward application of *Calderon-Cardona* and *Hausler*, and JPMorgan opposes Petitioners' petition not to thwart their enforcement efforts, but out of deference to the principles that guide this Court in determining when to grant certiorari. This case is simply not an appropriate vehicle to address the question presented by this case: there is no split between or among the circuits on that question, the Second Circuit's decision below was correctly decided, and none of the other arguments advanced by Petitioners were raised or vetted below.

I. There Is No Circuit Conflict Between the Second Circuit and D.C. Circuit

Petitioners contend that the Second Circuit's decision below – and the *Calderon-Cardona* and *Hausler* decisions that informed it – conflict with the D.C. Circuit's decision in *Heiser*, 735 F.3d at 934. That is wrong. The Second Circuit and D.C. Circuit have both held the exact same thing: that for a blocked EFT to be subject to execution under TRIA §

201(a) or FSIA § 1610(g), it must be owned by a judgment debtor or an instrumentality thereof, and that the question of ownership is governed by U.C.C. Article 4-A.

The Second Circuit in *Calderon-Cardona* and *Hausler* (the latter of which followed the former by four days) and the D.C. Circuit in *Heiser* were the first and still only Circuit courts to address the overarching question of whether a judgment debtor must own a blocked EFT before it can be attached by creditors under TRIA § 201 or FSIA § 1610(g). Both Circuits held that the statutory language subjecting property "of" the judgment debtor to attachment requires that the judgment debtor own a blocked EFT, and both rejected the argument by judgment creditor-plaintiffs – the same argument that Petitioners in effect advance here – that the mere association between a blocked EFT and the judgment debtor is sufficient to render the asset attachable. *See Heiser*, 735 F.3d at 938; *Calderon-Cardona*, 770 F.3d at 1000.

On that core issue, then, the Second Circuit and the D.C. Circuit are in full accord. The D.C. Circuit in *Heiser* expressly agreed with the district court's holding in *Calderon-Cardona* that an ownership interest is required to support attachment and disagreed with the district court decisions in the S.D.N.Y. that had ruled otherwise. *See Heiser*, 735 F.3d at 937 n.5 ("The district court's holding that § 201 and § 1610(g) require Iran to own the contested accounts accords with *Calderon-Cardona v. JPMorgan Chase Bank, N.A.*, 867 F. Supp. 2d 389, 403-07 (S.D.N.Y 2011)."). The Second Circuit, by

affirming the district court's holding in *Calderon-Cardona* and overruling the district court decisions holding to the contrary, reached the same result as the D.C. Circuit, thereby avoiding a circuit split.[3]

Moreover, the Second Circuit and D.C. Circuit not only agreed that a judgment debtor must own a blocked EFT before it may be attached, but they also turned to state property law – specifically, U.C.C. Article 4-A – to determine which participant in a wire transfer chain owns a blocked EFT. *See Heiser*, 735 F.3d at 940; *Calderon-Cardona*, 770 F.3d at 1001-02 (applying Article 4-A in context of FSIA § 1610(g)); *Hausler*, 770 F.3d at 212 (applying Article 4-A in context of TRIA § 201(a)). All three decisions also cite the same seminal Second Circuit decision interpreting U.C.C. Article 4-A: *Shipping Corp. of India Ltd v. Jaldhi Overseas Pte Ltd.*, 585 F.3d 58, 71 (2d Cir. 2009), which holds that "EFTs are neither the property of the originator nor the beneficiary while briefly in the possession of an intermediary bank." *See Calderon-Cardona*, 770 F.3d at 1001; *Heiser*, 735 F.3d at 941; *Hausler*, 770 F.3d at 212. The *Jaldhi* court reached that conclusion based on

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[3] The same cases that *Calderon-Cardona* and *Hausler* overruled are among those on which Petitioners rely in arguing, in effect, that a judgment debtor or an agency or instrumentality thereof need not own a blocked EFT for the EFT to be attachable under TRIA or the FSIA. *See* Petition at 21-23, quoting *Levin v. Bank of New York Mellon*, 2013 WL 5312502 (S.D.N.Y. Sept. 23, 2013); *Hausler v. JPMorgan Chase Bank, N.A.*, 845 F. Supp. 2d 553 (S.D.N.Y. 2012), *rev'd and remanded sub nom. Hausler v. JP Morgan Chase Bank, N.A.*, 770 F.3d 207 (2d Cir. 2014).

U.C.C. § 4-A-503, which enables a court to "restrain . . . an originator's bank from executing the payment order of the originator," and comment 4 to § 4-A-502, which states that "a creditor of the *originator* can levy on the account of the originator in the originator's bank *before the funds transfer is initiated*. . . . The creditor of the originator *cannot reach any other funds because no property of the originator is being transferred*." *Jaldhi*, 585 F.3d at 70 (emphasis in *Jaldhi*).

Petitioners nonetheless contend that the Second Circuit's decisions conflict with *Heiser* because, they say, *Heiser* "recognized that federal law as enacted in TRIA preempts any other federal law to the contrary and state law." (Pet. at 20) In fact, the *Heiser* court said just the opposite, rejecting the argument that "federal law preempts this Uniform Commercial Code provision [i.e., Article 4-A]," 735 F.3d at 940, and stating that while Article 4-A "does not apply of its own force . . . it is not correct to treat this as an issue of preemption" (*id.*). Instead, the D.C. Circuit, after finding no preemption, applied Article 4-A as a matter of federal common law, holding that "Article 4A is a proper federal rule of decision for applying the ownership requirements of § 201 and § 1610(g)." *Id.* at 940-41. The Second Circuit, meanwhile, reached the same conclusion using only slightly different reasoning. It too concluded, like the D.C. Circuit, that FSIA § 1610(g) and TRIA § 201(a) do not preempt state law, but it turned directly to state law – U.C.C. Article 4-A – to fill in the gaps in the federal statutes left by their lack of a definition of property.

Calderon-Cardona, 770 F.3d at 1000; *Hausler*, 770 F.3d at 212.

Both Circuits arrived at the same place precisely because federal common law and state law each apply Article 4-A to the question of ownership of a blocked EFT. Indeed, as the D.C. Circuit noted, U.C.C. Article 4-A "has been adopted by all fifty states and the District of Columbia." *Heiser*, 735 F.3d at 940. Because Article 4-A is the law in every state and is the appropriate federal common law rule of decision, there is no risk that the choice of state or federal common law will make a difference in the outcome of future judgment enforcement proceedings under TRIA § 201(a) or FSIA § 1610(g). That fact reinforces the absence of a split between the Second Circuit and the D.C. Circuit for this Court to resolve.

In their last attempt to create a circuit split, Petitioners contend that *Heiser* "affirmed the district court's finding 'that claims on an interrupted funds transfer *ultimately belong to the originator*, not the beneficiary or its bank.'" (Pet. at 29, citing *Heiser*, 735 F.3d at 941) (emphasis in original). "Thus," Petitioners further contend, "had the Levins' blocked asset, originating with Saderat, been in a D.C. bank rather than New York, the Levins would have been entitled to collect it to satisfy their TRIA judgment." *Id.* Both of those contentions, however, are misguided. The *Heiser* court did not render the affirmance that Petitioners claim it did, having made the statement quoted above in *dictum* as part of its observation regarding the potential effect of the U.C.C.'s subrogation provisions when those provisions apply – as was not the case in *Heiser*.

Heiser, 735 F.3d at 941. Because Iran was the beneficiary, not the originator, of the EFT at issue in *Heiser*, and because no party contended that the U.C.C.'s subrogation provisions applied, the *Heiser* court's brief discussion of an originator's possible subrogation claim to a blocked EFT was not necessary to the court's holding. It was simply *dicta*, and *dicta* does not create a circuit split. *E.g.*, 6 Bus. & Com. Litig. Fed. Cts. § 61:14 (Factors Guiding the Court in the Exercise of Its Certiorari Jurisdiction) ("The conflict in decisions must be 'real' or 'intolerable' (i.e., a square conflict in the courts' holdings) and not 'merely an inconsistency in dicta or in the general principles utilized.'" (quoting Shapiro, Geller, Bishop, Hartnett & Himmelfarb, Supreme Court Practice 241 (10th ed.))

Nor, in all events, did the D.C. Circuit conclude that an originator necessarily possesses an ownership interest in a blocked EFT. The court discussed Article 4-A's subrogation provisions only to show that, even if those provisions had applied, they would not have given the *beneficiary* a property interest in the blocked EFT. *Heiser*, 735 F.3d at 941. Because the rights of originators were not at issue in *Heiser*, the D.C. Circuit never addressed the complexities of the U.C.C.'s subrogation provisions or whether those provisions could have given the originator of the EFT in *Heiser* an ownership interest in the blocked funds sufficient to make them attachable. And in this case, too, neither the Second Circuit nor the district court ever addressed those matters because the Levins never argued that the U.C.C.'s subrogation provisions applied, having focused instead on the alleged distinction between an

intermediary bank and a correspondent bank. So the question of whether Bank Saderat had subrogation rights to the Saderat Account was never litigated or determined, and it is not for this Court to make that determination in the first instance.[4]

Finally, Petitioners, acknowledging that the Seventh Circuit has never ruled on the question presented, cite to the decision by the Northern District of Illinois in *Gates v. Syrian Arab Republic*, 11 C 8715, 2014 WL 5784859 (N.D. Ill. Nov. 6, 2014), as being "in conflict with the Second Circuit." (Pet. at 30) But *Gates* is of little relevance to Petitioners' petition, and not only because, as a district court decision, it does not create a circuit split. *Gates*, which involved litigation between two competing

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[4] Whether an originator has subrogation rights in a given case is a fact-intensive inquiry, and it is far from certain, contrary to what Petitioners contend, that Bank Saderat "will eventually be entitled to [a] refund payment from Lloyds after the Saderat Asset is unfrozen and Lloyds is credited for a refund of the EFT from Respondent JPMorgan." (Pet. at 33) U.C.C. § 4-A-402(5) states that if a fund transfer is not completed and funds cannot be returned by the intermediary bank, then "the first sender in the funds transfer that issued an instruction requiring routing through that intermediary bank" has a subrogation right. In the ordinary course, however, an originator does not direct the use of a particular intermediary bank to process its wire transaction, and therefore has no subrogation right under § 4-A-402(5). *E.g.*, *Consub Delaware L.L.C. v. Schahin Eugenharia Limitada*, 676 F. Supp. 2d 162, 168 (S.D.N.Y. 2009) (holding that an originator had no attachable property interest in a blocked EFT because the U.C.C.'s subrogation provision only "creates rights in those originators that specifically designate the intermediary bank to be used in the transfer").

groups of judgment creditors of Syria for the same blocked EFT, denied the motion by one of those groups under Fed. R. Civ. P. 60(b) to reconsider a prior order, holding that the movants had "waived their right to bring this Rule 60(b) motion by not addressing these issues on their direct appeal." *Gates*, 2014 WL 5784859, at *2. That holding rendered the rest of the decision *dicta*, and no court has since cited *Gates* as authority for the proposition that a blocked EFT may be attached under TRIA § 201 or FSIA § 1610(g) even though the entity that directly transmitted the EFT to the bank that blocked it is not an agency or instrumentality of the judgment debtor.

But even if *Gates*' ruling on the question of who owned the blocked EFT at issue were not *dicta*, *Gates* would not conflict with *Calderon-Cardona* or *Hausler* – even though, as the Second Circuit later ruled in *Doe*, *Gates* was wrongly decided. The *Gates* court agreed with the Second Circuit that a blocked EFT must be owned by a judgment debtor to be subject to execution, and it applied U.C.C. Article 4-A to the question of whether the blocked EFT at issue was the property of the Syrian instrumentality (Banque Centrale de Syrie) that had been both the originator and beneficiary of the EFT. The *Gates* court acknowledged, moreover, that the originator's bank – Commerzbank, which is not an agency or instrumentality of Syria – "would have a claim against the intermediary bank under the Second Circuit's interpretation of the U.C.C." *Id.* at *3. It departed, however, from *Calderon-Cardona* and *Hausler* based mainly on Commerzbank's having "disclaimed any interest in those [the blocked]

funds." *Id.* But that ruling was clear legal error because, as the Second Circuit later stated in *Doe*, it did not "account[] for the applicable OFAC regulations which unambiguously prohibit unlicensed transfers of blocked assets."[5] *Doe*, 899 F.3d at 158. (The majority in *Doe* disagreed with the dissent for that same reason. *Id.* at 158 n.6.) *Gates*, in short, deviated from *Calderon-Cardona* and *Hausler* for erroneous reasons inapplicable here, but otherwise concurred with those decisions' core holdings. It lends no support to Petitioners' position.

In sum, the Second Circuit and the D.C. Circuit are in full accord on the question of which party to a blocked EFT owns the blocked funds for judgment enforcement purposes under TRIA § 201(a) and FSIA § 1610(g). Both Circuits hold that a blocked EFT is subject to execution only if it is property of the judgment debtor or an agency or instrumentality thereof; that property ownership

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[5] The global terrorism sanctions regulation at issue in *Doe*, 31 C.F.R. § 594.202(a), also applies to Syria and Iran, both of which OFAC deems global terrorists. The pertinent sanctions regulation specific to Iran, 31 C.F.R. § 560.212(a), is substantively identical, stating that "[a]ny transfer after the effective date that is in violation of any provision of this part or of any regulation, order, directive, ruling, instruction, or license issued pursuant to this part, and that involves any property or interest in property blocked pursuant to § 560.211, is null and void and shall not be the basis for the assertion or recognition of any interest in or right, remedy, power, or privilege with respect to such property or property interests."

must be determined by applying U.C.C. Article 4-A; and that, under the U.C.C., as interpreted by the Second Circuit's decision in *Jaldhi*, neither the originator nor the beneficiary owns an EFT that has been blocked mid-stream. There is accordingly no conflict requiring this Court's review, and neither *Gates* nor the *Heiser* court's *dicta* about the Article 4-A's subrogation provisions affect that conclusion.

II. The Second Circuit's Decision, as a Straightforward Application of *Calderon-Cardona* and *Hausler*, Was Correctly Decided and Does Not Warrant Further Review

The petition should be denied for the additional reason that the Second Circuit correctly decided this case, making further review unwarranted. The Second Circuit simply adhered to *Calderon-Cardona* and *Hausler*, basing its decision on the undisputed fact that "'no [terrorist entity] transmitted any of the blocked EFTs in this case directly to a blocking bank.'" (Pet. App. 10 (*citing Hausler*, 770 F.3d at 212)) And it rejected Petitioners' sole argument for distinguishing this case from *Calderon-Cardona* and *Hausler* – the purported distinction between a correspondent bank and an intermediary bank – as "irrelevant" under U.C.C. Article 4-A because "ownership of an EFT blocked by a New York bank depends ***entirely*** on the identity of the immediate transferor to that bank." (Pet. App. 11 (citing *Calderon-Cardona*, 770 F.3d at 1002) (emphasis added) The Second Circuit's rulings were consistent with, and compelled by, governing law as established by *Calderon-Cardona* and *Hausler* four years earlier.

Seeming to recognize that fact, Petitioners effectively seek this Court's review of *Calderon-Cardona* and *Hausler* more than of the decision below. But this Court denied the petitions for writs of certiorari in *Calderon-Cardona* and *Hausler*, and no developments since then warrant a revisiting of the Court's decisions – which is what the present petition invites. *Calderon-Cardona* and *Hausler* correctly concluded, at bottom, that whether a blocked EFT is attachable under TRIA § 201(a) or FSIA § 1610(g) turns on whether the asset is the "property of" the judgment debtor, or an agency or instrumentality thereof, under U.C.C. rules governing the ownership of blocked EFTs. That conclusion accords with this Court's holding that where property is at issue – as it is with § 201(a) and § 1610(g) – the statutory term "of" connotes ownership, not mere association. *See Bd. of Trustees of the Leland Stanford Junior Univ. v. Roche Molecular Sys., Inc.*, 563 U.S. 776, 787 (2011).

That conclusion further accords with the fundamental principal that "[o]nly property owned by a judgment debtor is subject to execution to satisfy a judgment." 30 Am. Jur. 2d Executions & Enforcements of Judgments § 120. The D.C. Circuit likewise emphasized that principle in *Heiser*. *See Heiser*, 735 F.3d at 938 ("With respect to § 201 and § 1610(g), plaintiffs' interpretation conflicts with the established principle that 'a judgment creditor cannot acquire more property rights in a property than those already held by the judgment debtor.'") (quoting 50 C.J.S. Judgments § 787 (2013)). The *Gates* court, too, agreed "that it is absolutely necessary to ensure that judgments are paid with

property of terrorist states." *Gates*, 2014 WL 5784859, at *3.

Petitioners do not enunciate the federal rule of law they believe should replace U.C.C. Article 4-A for purposes of determining ownership of a blocked EFT. But their citation to, for example, the district court's overruled decision in *Hausler* suggests that they advocate a rule by which any blocked EFT is subject to execution so long as it is associated, however tenuously, with the terrorist state against which a judgment is being enforced. But any such rule, which the Second Circuit and D.C. Circuit rejected, would give rise to a substantial risk that assets belonging to innocent third parties would be attached. That is not the intent of TRIA § 201(a) or FSIA § 1610(g). *See Heiser*, 735 F.3d at 939-40. ("Adopting plaintiffs' interpretation of § 201 and § 1610(g) risks punishing innocent third parties . . . If potentially innocent parties pay plaintiffs' judgment, then the punitive purpose of the provisions is not served."); *Gates*, 2014 WL 5784859, at *3 (citing *Heiser* and reaffirming that "[t]he purpose [of TRIA and the FSIA] is not to compensate those [terrorist] victims at the expense of innocent parties.").

Finally, *Calderon-Cardona* and *Hausler* correctly conclude that insofar as FSIA § 1610(g) and TRIA § 201(a) do not define what constitutes an attachable ownership interest in a blocked EFT, neither statute preempts state property law, which must instead be invoked to fill in the statutory gaps. When, as here, federal law does not provide substantive property law, federal courts apply

relevant state property law. *E.g., Stern v. Marshall*, 564 U.S. 462, 493 (2011). The application of state property law is particularly appropriate in judgment enforcement proceedings, like this one, seeking the turnover of blocked EFTs, since both state law and federal common law look to U.C.C. Article 4-A to determine which participant in a wire transfer chain has an ownership interest in a blocked EFT.

In sum, the Second Circuit's decision below, compelled by *Calderon-Cardona* and *Hausler* and consistent with *Heiser*, was correct and does not warrant further review.

III. Petitioners' Remaining Arguments Were Not Raised or Vetted Below and Provide No Basis for this Court's Review

Aside from their arguments that a circuit split exists and that the decision below was wrongly decided, Petitioners advance what appear to be three other grounds in support of the petition, the first two of which have already been addressed: that TRIA § 201(a) preempts state law, rendering U.C.C. Article 4-A inapplicable to the issue of who owns a blocked EFT for judgment enforcement purposes; that if Article 4-A does apply, its subrogation provisions grant an ownership interest in the Saderat Account to Bank Saderat, as the originator of the EFT underlying the account; and that *Calderon-Cardona*, *Hausler* and the decision below promote money laundering by terrorist states. None of those arguments, however, were raised and vetted below, and none have merit in any event.

As to Petitioners' contention that TRIA § 201(a) and FSIA § 1610(g) preempt state law and "any other federal law to the contrary" (Pet. at 20), the Second Circuit did not conduct an independent preemption analysis in the decision below. Nor did it have occasion to do so, since Petitioners' focus was not on whether the federal statutes preempt U.C.C. Article 4-A, but on whether Bank Saderat had an ownership interest under Article 4-A in the Saderat Account. In its decision below, the Second Circuit simply repeated the analysis that the *Calderon-Cardona* and *Hausler* court had employed to conclude that, insofar as TRIA and the FSIA do not define the types of property interests that are subject to attachment, state law on property rights – and specifically, as to blocked EFTs, U.C.C. Article 4-A – applies to fill in the gaps. (Pet. App. 8-9) The Second Circuit's affirmation of an analysis in prior decisions in which certiorari was denied does not warrant the Court's review now.[6]

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[6] In their effort to portray as a minority view the Second Circuit's implicit rejection of the argument that TRIA preempts state law, Petitioners assert, erroneously, that "[a] number of district courts, a dissent in a recent Second Circuit case [*Doe*], and the D.C. Circuit have recognized that federal law as enacted in TRIA preempts . . . state law." (Pet. at 20) In fact, the *Heiser* court, as noted, stated that "it is not correct to treat this" – the application of U.C.C. Article 4-A – "as an issue of preemption" (*Heiser*, 735 F.3d at 940); the dissent in Doe likewise applied Article 4-A and never discussed preemption; and the two S.D.N.Y. decisions – in *Hausler* and in *Levin*, 2013 WL 5312502, at *6 – that did rule that state law was preempted were overturned by *Calderon-Cardona* and *Hausler*.

As to Petitioners' argument that Article 4-A's subrogation provisions render Bank Saderat the owner of the Saderat Account as the originator of the EFT underlying the account, Petitioners, as noted, never made that argument in the courts below. Neither court, accordingly, ever addressed the issue, as the decisions below reflect. Whether Bank Saderat had subrogation rights, moreover, involves a fact-intensive inquiry that had to have been fleshed out in discovery before the district court could have ruled on the issue. It is not for this Court to conduct that inquiry in the first instance.

Finally, Petitioners contend that the Second Circuit's decision below and in *Calderon-Cardona* and *Hausler* "facilitat[e] the transfer of terrorist funds into the U.S. banking system by creating a readily available loophole for money laundering by terrorist states, using foreign agents, correspondent banks, and EFTs." (Pet. at 18) But Petitioners never made or sought to prove that argument below, and neither the Second Circuit nor the district court ever addressed it. For that reason alone, the argument is no basis for this Court's review.

But even on the merits, Petitioners' unproven claim that the Second Circuit's decisions promote money laundering falters on closer scrutiny. Those decisions have no bearing on when or whether EFTs will be blocked, so they themselves will not facilitate money laundering by terrorist states or other terrorist organizations. Whether EFTs are blocked depends on whether they come within the realm of one or more sanctions regulations, and those regulations, and the effectiveness with which they

are enforced, dictate the extent to which terrorist entities can successfully engage in money laundering.

The Second Circuit's decisions address the very different question of whether an EFT, *once blocked*, is subject to turnover to a judgment creditor to satisfy a judgment against a terrorist entity. Once wired funds are blocked, they cannot be returned to the terrorist entity unless OFAC issues a license allowing them to be. Yet that, predictably, is a rare event generally warranted only if and when the entity has been removed from the SDN list. It is, in short, logically improbable that judicial decisions bearing on when an already-blocked EFT may be turned over to judgment creditors such as Petitioners will promote money laundering. And a rule that ensures that only blocked assets of a terrorist entity be used to satisfy a judgment will serve the punitive objectives of TRIA § 201(a) and FSIA § 1610(g) far better than a rule that allows the assets of innocent third parties to be used to reduce judgment debtors' liability. *E.g.*, *Heiser*, 735 F.3d at 940 ("To the extent innocent parties pay some of a terrorist state's judgment debt, the terrorist state's liability is ultimately reduced. Congress could not have intended such a result.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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