No. 19-807

IN THE

Supreme Court of the United States

BANK MELLI,

Petitioner,

v.

MICHAEL BENNETT, *et al.*,

Respondents.

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

REPLY FOR PETITIONER

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REPLY FOR PETITIONER

The circuit conflict could hardly be starker. The D.C. Circuit has squarely held—consistent with the Executive Branch's longstanding position—that plaintiffs cannot attach assets under TRIA "without an * * * *ownership interest*." *Heiser* v. *Islamic Republic of Iran*, 735 F.3d 934, 941 (D.C. Cir. 2013) (emphasis added). By contrast, the Ninth Circuit held below that "immediate and outright ownership of assets is *not required*" and that "'ownership' facts" are "*not material*." Pet. App. 3a, 48a (emphasis added). Respondents' attempts to obscure or downplay that conflict lack merit—as do their efforts to manufacture a vehicle defect where none exists.

As for the second question presented, respondents do not dispute that the decision below departs from this

Court's holding in *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) ("*Bancec*"), that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." *Id.* at 626-627. Nor do they deny the importance of that presumption to the Nation's foreign affairs. The Ninth Circuit's interpretation of an oblique parenthetical to repudiate that principle similarly justifies this Court's review.

I. THE NINTH CIRCUIT'S REJECTION OF TRIA'S OWNERSHIP REQUIREMENT WARRANTS REVIEW

The Ninth Circuit's holding conflicts with the positions of the D.C. Circuit and the Executive Branch on an important question of federal law. Respondents' efforts to avoid that conflict are unavailing.

A. The Ninth Circuit Permits Execution Absent Ownership

Respondents now concede that the Terrorism Risk Insurance Act requires ownership. See Br. in Opp. 10-11. Their opposition thus hinges on the theory that the Ninth Circuit did not actually dispense with that requirement. But the Ninth Circuit's decisions speak for themselves.

In its earlier opinion, the Ninth Circuit expressly rejected an ownership requirement. "Congress," it held, "has used expansive wording to suggest that *immediate and outright ownership of assets is not required*." Pet. App. 48a (emphasis added). The court deemed the funds subject to execution, not because Bank Melli *owned* them, but because Bank Melli had a "contractual *right to obtain payments* from Visa and Franklin" and was "the *intended contractual beneficiary* of the contested funds." *Id.* at 47a-49a (emphasis added).

Any doubt was resolved by the Ninth Circuit's most recent decision. There, the court refused to consider Bank Melli's evidence about "whether it 'owns' the funds," including "two of Visa's regulatory filings list[ing] Visa as 'owner' of the funds." Pet. App. 3a. Those "'ownership' facts," the court held, were "not material." *Ibid.*

The Ninth Circuit could not have required ownership because the facts did not show it. "An entitlement or right to receive is an interest distinct from ownership." *United States* v. *Rodrigues*, 159 F.3d 439, 448 (9th Cir. 1998). But an "entitlement or right to receive" is at most what Bank Melli had here—as the Ninth Circuit acknowledged. Pet. App. 47a-48a (citing Bank Melli's "contractual right to obtain payments").

The Ninth Circuit's references to the funds as "property of Bank Melli" or "Bank Melli's property" are beside the point. Br. in Opp. 12 (emphasis omitted). No one disputes that TRIA applies only to "property of" the respondent—that is what the statute says. TRIA § 201(a). The question on which the circuits are divided is whether that "property of" requirement demands *ownership*. The Ninth Circuit held that it does not.[1]

B. The Ninth Circuit's Decision Conflicts with the D.C. Circuit's Decision in *Heiser* and the Executive Branch's Settled Interpretation

The conflict between the decision below and the D.C. Circuit's decision in *Heiser* v. *Islamic Republic of Iran*, 735 F.3d 934 (D.C. Cir. 2013), is unmistakable. The D.C.

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[1] The Ninth Circuit's statement that the court "look[s] to state law to determine the ownership of assets in this context," Pet. App. 47a, is similarly irrelevant. That statement appeared in the portion of the opinion addressing whether federal or state law governs—not the portion addressing what federal or state law actually requires.

Circuit held that "plaintiffs could not attach the contested accounts under [TRIA] without an Iranian *ownership interest* in the accounts." 735 F.3d at 941 (emphasis added). "[B]ecause Iran lacked an ownership interest," TRIA did not apply. *Ibid.* The court below, by contrast, held that ownership is *not* required. Pet. App. 3a, 48a.

Respondents urge that, unlike the Iranian banks in *Heiser*, Bank Melli has more than a mere "contingent future possessory interest." Br. in Opp. 14-15. That argument misses the point. *Heiser* held that TRIA requires *ownership* as opposed to some lesser property interest: "[P]laintiffs could not attach the contested accounts under [TRIA] without an Iranian *ownership interest* in the accounts." 735 F.3d at 941 (emphasis added). That standard was not met in *Heiser* because the banks had a mere "contingent future possessory interest[ ]." *Id.* at 940. *Heiser* did not hold that a "contingent future possessory interest" is the *only* sort of interest that falls short of ownership. Nor did it purport to enumerate the entire range of property interests that fail to meet the ownership standard. Bank Melli's mere "right to receive" payment is just one more example of "an interest distinct from ownership." *Rodrigues*, 159 F.3d at 448. Under *Heiser*'s clear holding, that *non-ownership* interest is not enough.

Respondents argue that the Ninth Circuit's reliance on California law harmonizes this case with *Heiser*. Br. in Opp. 16. But the Ninth Circuit did not hold that California law makes Bank Melli the *owner* of Visa's money. It relied on the fact that "California law authorizes a court to order a judgment debtor to assign to the judgment creditor a right to payments that are due or will become due, even if the right is conditioned on future developments"—a standard that has nothing to do with

ownership. Pet. App. 47a. *Heiser* requires ownership; the Ninth Circuit does not.[2]

While the conflict with the D.C. Circuit alone warrants review, the Ninth Circuit's holding also conflicts with the longstanding interpretation of the Executive Branch. Respondents do not dispute that the Executive Branch interprets TRIA to apply only to assets the judgment debtor actually owns. Pet. 18-19 (citing eight different submissions). Nor do they dispute that the Executive Branch has opposed using blocked assets to pay private plaintiffs because of the severe foreign relations consequences. *Id.* at 19-20. Their only response is that the Ninth Circuit did not dispense with an ownership requirement. Br. in Opp. 18. As already shown, it did.

C. This Is an Appropriate Case for Review

Respondents assert that the Ninth Circuit's alternative holding renders the question presented "moot." Br. in Opp. 19. But as Bank Melli demonstrated, this Court has repeatedly granted certiorari despite narrow or factbound alternative holdings that appeared designed to avoid this Court's review. Pet. 24.

That is the situation here. Respondents claim that "no reasonable fact finder could conclude that Visa owns assets * * * when Visa itself identified those assets as 'Bank Melli funds.'" Br. in Opp. 20. But respondents gloss over the fact that, in those very same reports, Visa identified the "Owner" of the assets as "Visa International Service Association." Pet. App. 133a, 137a. While

[2] California law does not permit execution against payments owed to a judgment debtor on the theory that "those assets belong to the judgment debtor." Br. in Opp. 16. It authorizes the assignment of debts owed to a judgment debtor *without regard* to who owns the funds. Cal. Civ. Proc. Code § 708.510(a). Neither of respondents' California cases says otherwise. Br. in Opp. 16.

those arguably conflicting descriptions may *create* a genuine issue of fact, the notion that no reasonable factfinder could find that Visa is the owner of the funds, when Visa itself repeatedly told the federal government that it *is* the "Owner," is absurd. This is precisely the sort of makeweight alternative holding that does not impede this Court's review.

Respondents also invoke the *district court's* reliance on Bank Melli's purported admissions about the status of the assets and on Visa's disclaimer of ownership. Br. in Opp. 20-21. Neither is a valid basis for summary judgment.[3] In any case, the Ninth Circuit did not rely on either theory. Erroneous district court reasoning on issues the court of appeals did not address is no impediment to review. The *Ninth Circuit's decision* is the one that conflicts with the D.C. Circuit's precedent and the Executive Branch's position, and which presents an important issue for this Court's review.

Finally, respondents offer up a slew of arguments that *neither* the court of appeals *nor* the district court relied on, including the convoluted theory that the district court's discharge order in favor of Visa is "law of the case" on the merits of the TRIA issue; that denying execution would unfairly burden Visa with custody of its

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[3] The admissions argument rests on tendentious readings of statements that had nothing to do with ownership. See, *e.g.*, Br. in Opp. 20 (quoting Bank Melli's argument in support of a stay pending appeal that, if the funds were disbursed, "as a practical matter Bank Melli will never be able to recover them"). The disclaimer argument rests on the mistaken theory that Visa can unilaterally make Bank Melli the owner of funds simply by announcing its own litigating position. Respondents never claimed that the admissions or disclaimer were binding. At most, they are merely more pieces of evidence for a summary judgment record that already includes Visa's multiple admissions of ownership. Pet. App. 133a, 137a.

own money; and that ownership of the assets somehow changed when Visa liquidated its holdings and wired the proceeds to the court's registry. Br. in Opp. 21-23. None of those arguments has any merit—which is why the courts below did not adopt them. Those theories would not obstruct this Court's review of the important legal question the Ninth Circuit actually decided.[4]

II. THE NINTH CIRCUIT'S HOLDING THAT TRIA ABROGATES SEPARATE STATUS WARRANTS REVIEW

The Ninth Circuit's abrogation of the presumption of separate status similarly warrants this Court's review.

A. The Ninth Circuit's Decision Conflicts with *Bancec* and the Treaty of Amity

Respondents do not dispute this Court's holding in *Bancec* that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." *First Nat'l City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 626-627 (1983). They do not deny that abrogating that presumption is an important issue with grave foreign relations implications. Pet. 25-28. Their only response is that Congress *intended* those consequences by "abrogat[ing] the *Bancec* presumption" in TRIA. Br. in Opp. 24. Far from diminishing the need for review, that argument only underscores the importance of the issue.

Nor can respondents avoid the conflict with the Treaty of Amity, Economic Relations, and Consular Rights,

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[4] Respondents are also simply wrong when they claim that Bank Melli did not appeal the discharge order. Br. in Opp. 21-22. Bank Melli expressly challenged that order on appeal by disputing the district court's jurisdiction over the interpleader proceeding. C.A. Br. 42-43; C.A. Reply 2-3.

U.S.-Iran, Aug. 15, 1955, 8 U.S.T. 899. Tellingly, their first response is that, "even assuming the [Ninth Circuit's] interpretation of TRIA conflicts with the Treaty of Amity, TRIA prevails." Br. in Opp. 29-30. But that conflict with treaty obligations only emphasizes the importance of the issue for review.

Respondents deny any conflict on the theory that a "federal law that applies equally to all agencies or instrumentalities of terrorist parties" cannot "constitute[ ] disrespect to Bank Melli's juridical status." Br. in Opp. 30. That argument ignores the text and structure of the Treaty. Article IV.1 contains a separate prohibition against "discriminatory measures that would impair [the] legally acquired rights and interests" of Iranian companies. Art. IV.1, 8 U.S.T. at 903. Article III.1 contains no similar non-discrimination language. It guarantees that Iranian companies "shall have their juridical status recognized"—without regard to discrimination. Art. III.1, 8 U.S.T. at 902.

Even if the Treaty prohibited only discriminatory measures, TRIA would still qualify. TRIA violates the Treaty because it treats Iranian companies less favorably than United States companies, even if it also singles out other disfavored regimes for similar treatment. And even if TRIA on its face were generally applicable, the only reason the statute applies is that the President issued blocking orders targeting Iranian companies. See, *e.g.*, Blocking Property of the Government of Iran and Iranian Financial Institutions, 77 Fed. Reg. 6659, 6659-6660, §§ 1(a), 7(d) (Feb. 5, 2012) (blocking "[a]ll property and interests in property of the Government of Iran," defined as "the Government of Iran [and] any political subdivision, agency, or instrumentality thereof"). There is no getting around the fact that Bank Melli has been

singled out for discriminatory veil-piercing precisely because of its Iranian status.

Finally, while respondents point to the United States' recent withdrawal from the Treaty, Br. in Opp. 31, they do not deny that the United States is a party to ongoing proceedings in the International Court of Justice over the very Treaty violations at issue, Pet. 31. Nor do they deny that the ICJ has already ruled that the United States' subsequent withdrawal from the Treaty does not divest it of jurisdiction. *Id.* at 32. Respondents' only rejoinder is that Congress *intended* those serious results. Br. in Opp. 32-33. Once again, that argument does not address the *importance* of the issues. Where a court of appeals has construed a federal statute to conflict with treaty obligations, international law, and this Court's precedents, the issue's importance does not turn on whether Congress had power to achieve those drastic results. Respondents conflate arguments on the merits with the separate question of importance.

B. The Ninth Circuit's Decision Is Incorrect

Respondents cannot deny the longstanding principles that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains," *Murray* v. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804), and that "[a] treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed," *Trans World Airlines, Inc.* v. *Franklin Mint Corp.*, 466 U.S. 243, 252 (1984). They argue only that there is "no ambiguity" in the statute and that "Congress's clearly articulated intent" was to abrogate *Bancec*. Br. in Opp. 29, 32. Respondents cannot meet that demanding standard.

Respondents try to obscure ambiguity by rewriting the statute. TRIA does *not* say that "'the blocked assets of that terrorist party' *or* 'the blocked assets of any agency or instrumentality of that terrorist party'" are subject to execution. Br. in Opp. 25 (emphasis added). Nor did Congress "*provid[e] that* 'the blocked assets of that terrorist party' include[] 'the blocked assets of any agency or instrumentality of that terrorist party.'" *Id.* at 27 (emphasis added). Rather, Congress identified the assets subject to execution as "the blocked assets *of that terrorist party*" and then merely added the parenthetical clause "(*including* the blocked assets of any agency or instrumentality of that terrorist party)." TRIA §201(a) (emphasis added). Most naturally read, that clause simply clarifies that instrumentality assets are subject to execution when they are "includ[ed]" within the alleged terrorist party's own assets. The clause is illustrative, not expansive. It does not enlarge the statute *beyond* "blocked assets of that terrorist party." At the very least, that is one reasonable construction, which is fatal to the clear statement rule respondents purport to embrace.

Respondents cannot avoid that result by pointing to Congress's use of the word "any." Br. in Opp. 25-26. The word "any" has an "expansive meaning" but not a "transformative" one—it "can broaden to the maximum, but never change in the least, the clear meaning of the phrase selected." *Freeman* v. *Quicken Loans, Inc.*, 566 U.S. 624, 635 (2012). Respondents' construction runs afoul of that principle because it reads the phrase "any agency or instrumentality" to include entities that are *not* within the scope of the term "terrorist party." That is precisely the sort of "transformative" interpretation *Freeman* forbids. A statute that regulates "stockbrokers (including any trainee)" does not apply to trainee *dentists*

just because Congress used the word "any." The "including" clause is still bounded by the term it modifies.

Respondents fare even worse relying on TRIA's "[n]otwithstanding any other provision of law" clause. Br. in Opp. 26. The function of such a *non obstante* clause is merely "to specify the degree to which a new statute was meant to repeal older, potentially conflicting statutes in the same field." *PLIVA, Inc.* v. *Mensing*, 564 U.S. 604, 621-622 (2011) (plurality). A *non obstante* clause cannot expand the scope of the statute beyond its *own* terms.

TRIA applies to "the blocked assets of that terrorist party," and the parenthetical "including" clause is most naturally read as clarifying or illustrating rather than expanding that category. Respondents certainly have not shown that the statute *unambiguously forecloses* that interpretation. The Ninth Circuit improperly construed the statute to violate international law and solemn treaty obligations without any clear indication of Congress's intent.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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