Nos. 17-1529 and 17-1534

In the Supreme Court of the United States

CLEARSTREAM BANKING S.A., PETITIONER

v.

DEBORAH D. PETERSON, ET AL.

BANK MARKAZI, AKA THE CENTRAL BANK OF IRAN, PETITIONER

v.

DEBORAH PETERSON, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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On December 9, 2019, the United States submitted its brief in the above-captioned cases in response to the Court's order inviting the Solicitor General to express the views of the United States. The United States submits this supplemental brief to apprise the Court that, on December 20, 2019, the President signed into law the National Defense Authorization Act for Fiscal Year 2020 (NDAA), Pub. L. No. 116-__ (S. 1790). That law

contains a provision that bears on the question presented here. In the view of the United States, it would be appropriate to grant these two certiorari petitions, vacate the judgment below, and remand for further consideration in light of the NDAA.

1. Respondents obtained default judgments totaling billions of dollars against Iran and Iran's Ministry of Intelligence and Security for Iran's complicity in the 1983 terrorist bombing of the U.S. Marine barracks in Beirut, Lebanon. See U.S. Amicus Br. 5-7; Pet. App. 4a-5a.[1] This litigation concerns respondents' efforts to execute their prior judgments against approximately $1.68 billion in bond proceeds that the lower courts held to be located in an account in Luxembourg maintained by petitioner Clearstream Banking, S.A., for the ultimate benefit of petitioner Bank Markazi, the Central Bank of Iran. Pet. App. 7a, 12a-13a. Respondents seek an order requiring petitioners and other financial institutions to turn over the bond proceeds pursuant to a New York law, N.Y. C.P.L.R. § 5225 (McKinney 2014), which provides the procedure for post-judgment execution in federal courts located in New York by virtue of Federal Rule of Civil Procedure 69(a)(1).

The court of appeals held that this Court's decision in *Republic of Argentina* v. *NML Capital, Ltd.*, 573 U.S. 134 (2014), compelled the conclusion that the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1330, 1602 *et seq.*, "supersede[d]" any immunity that foreign sovereign property located outside the United States may have enjoyed before the enactment of the FSIA or independent of the FSIA, Pet. App. 48a; see *id.* at 48a-49a, 52a-58a, 63a. The court also understood New

[1] All petition appendix citations are to the appendix to the petition for a writ of certiorari in No. 17-1529.

York law and *NML Capital*, taken together, to "authorize a court sitting in New York with personal jurisdiction over a non-sovereign third party to recall to New York extraterritorial assets owned by a foreign sovereign." *Id.* at 54a. But the court did not actually order the turnover of any foreign sovereign property. Instead, it remanded the case to the district court to consider certain unresolved issues that might preclude such an order in the circumstances of this case. *Id.* at 58a.

2. In its brief filed on December 9, 2019, the United States argued that the decision below is flawed but that certiorari was not warranted because of the unresolved issues to be addressed by the district court on remand, including personal jurisdiction over petitioner Clearstream. U.S. Amicus Br. 11-19. The United States also noted, however, that, certain then-pending legislation, if enacted into law, could bear on the proper disposition of this case. See *id.* at 19-20. On December 20, 2019, the relevant provision became law as Section 1226 of the NDAA. Section 1226 of the NDAA amends Section 502 of the Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, 126 Stat. 1258 (22 U.S.C. 8772). As amended, 22 U.S.C. 8772 now provides that, "notwithstanding any other provision of law, including any provision of law relating to sovereign immunity, and preempting any inconsistent provision of State law," a specified "financial asset" that meets certain criteria "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, * * * without regard to concerns relating to international comity," in order to satisfy a terrorism-related judgment for compensatory damages against Iran.

22 U.S.C. 8772(a)(1).[2] To come within the ambit of that provision, the "financial asset" must be "held by or for a foreign securities intermediary doing business in the United States," it must be either an asset "blocked" under U.S. sanctions law "or an asset that would be blocked if the asset were located in the United States," and it must be "equal in value to a financial asset of Iran * * * that such foreign securities intermediary or a related intermediary holds abroad." 22 U.S.C. 8772(a)(1)(A)-(C). Before those provisions may be invoked, a court must determine that Iran "holds equitable title to, or the beneficial interest in," the financial assets and that no other person holds a constitutionally protected interest in the assets. 22 U.S.C. 8772(a)(2).

The amended statute specifically provides that the "financial assets" subject to those provisions include the assets that are "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)." 22 U.S.C. 8772(b)(2). The petitions in these cases arise from the district-court proceedings identified in 22 U.S.C. 8772(b)(2), as amended. See Pet. App. 78a. Thus, it appears that the bond proceeds at issue here are "financial assets" within the meaning of Section 8772(b)(2).

3. It now would be appropriate to grant the certiorari petitions, vacate the judgment below, and remand to the court of appeals for further consideration in light of the

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[2] All citations to 22 U.S.C. 8772 in this brief refer to the version of the statute as amended by the NDAA. This Court considered the pre-amendment version of Section 8772 in *Bank Markazi* v. *Peterson*, 136 S. Ct. 1310 (2016).

NDAA.[3] If the court determines that Section 8772 applies to the bond proceeds at issue here and that Section 8772 permits a turnover order, "notwithstanding any other provision of law," 22 U.S.C. 8772(a)(1), that specific law would supply the rule of decision concerning immunity in this case, and there would be no occasion to address whether the assets would otherwise enjoy execution immunity while located abroad. Some of the issues the court of appeals ordered to be resolved by the district court on remand are also addressed by Section 8772. Compare, *e.g.*, Pet. App. 58a (directing the district court to consider issues of international comity), with 22 U.S.C. 8772(a)(1) (providing for an order to be issued "without regard to concerns relating to international comity").

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For the foregoing reasons, the petitions for writs of certiorari should be granted, the judgment below should be vacated, and the cases should be remanded for further consideration in light of Section 1226 of the National Defense Authorization Act for Fiscal Year 2020.

Respectfully submitted.

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DECEMBER 2019

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[3] This Court has granted, vacated, and remanded on a number of occasions in light of intervening legislation. See *Department of Defense* v. *American Civil Liberties Union*, 558 U.S. 1042 (2009); *Department of Justice* v. *City of Chicago*, 537 U.S. 1229 (2003); *Bureau of Econ. Analysis* v. *Long*, 454 U.S. 934 (1981); see also *Lawrence* v. *Chater*, 516 U.S. 163, 166-167 (1996) (per curiam) (explaining that this Court has granted, vacated, and remanded for a "wide range of developments," including "new federal statutes").