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

REPLY FOR PETITIONER

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REPLY FOR PETITIONER

Respondents nowhere suggest that the immunity regime adopted below is even remotely rational. While the FSIA sharply limits execution against sovereign property *within* the United States, the court of appeals held that it places no restrictions whatsoever on execution against property *outside* the United States—and in fact *eliminates* any common-law immunity that would otherwise apply. That makes no sense. It is precisely backwards: Seizing property outside the United States is a far greater affront to sovereign dignity, on far less justification, than executing against property here.

The threat to the Nation's foreign relations is obvious. Declaring open season on sovereign assets around the globe draws the Nation into acrimonious disputes. And it incites retaliation by other countries.

Respondents oppose review because the case is interlocutory. But this Court routinely reviews decisions in precisely this posture where the question is fundamental to further proceedings in the case. The reasons for doing so here are particularly compelling given the immunity issues at stake.

The Court should grant the petition. At a minimum, it should invite the Solicitor General to express the views of the United States, so the Executive Branch can address whether these weighty foreign relations issues warrant review.

I. REVIEW IS APPROPRIATE NOW

Respondents urge the Court to deny review because the district court will consider additional issues on remand, such as personal jurisdiction over Clearstream, international comity, and the immunity of the assets once brought to the United States. Br. in Opp. 11-12. Those matters are no reason to deny review.

A. It is well-settled 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); see, *e.g.*, *Land* v. *Dollar*, 330 U.S. 731, 734 n.2 (1947) (granting interlocutory review where question was "'fundamental to the further conduct of the case'"). That is the situation here.

The Second Circuit decided a clear-cut question of federal law: whether a foreign sovereign's assets abroad are entitled to immunity. That issue is not merely "fundamental" to further proceedings; it will determine whether the case proceeds at all. If this Court reverses, there would be no need to litigate *any* further issues, avoiding years of litigation.

B. Prompt review is particularly important given the immunity issues at stake. This Court has stressed "'the importance of resolving immunity questions at the earliest possible stage in litigation.'" *Pearson* v. *Callahan*, 555 U.S. 223, 232 (2009). The Court routinely grants review in immunity disputes even at an interlocutory stage. See, *e.g.*, *Bolivarian Republic of Venezuela* v. *Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1318, 1324 (2017) (reviewing denial of motion to dismiss and emphasizing that "a court should decide the foreign sovereign's immunity defense '[a]t the threshold' of the action"); *Republic of Iraq* v. *Beaty*, 556 U.S. 848, 855 (2009) (same posture); *Republic of Austria* v. *Altmann*, 541 U.S. 677, 681 (2004) (same).

Respondents protest that this case concerns execution immunity, not jurisdictional immunity that "protects sovereigns from the inconvenience of suit." Br. in Opp. 14-15. But the issue here is not mere "inconvenience of suit"; it is the immunity of sovereign assets from judicial seizure. Bank Markazi's assets at Clearstream have now been restrained for years, and will remain so as long as the parties are litigating this case. See Pet. App. 62a; C.A. Confid. App. 73, 592, 949; N.Y. C.P.L.R. §5232(a). That ongoing restraint of Bank Markazi's property is itself a denial of the property's immunity. See *NML Capital, Ltd.* v. *Republic of Argentina*, 699 F.3d 246, 262 (2d Cir. 2012) ("seizure and control over specific prop-

erty" violates immunity); *S & S Mach. Co.* v. *Masinexportimport*, 706 F.2d 411, 418 (2d Cir. 1983) (same for injunction restraining use of property).

Courts have held that decisions erroneously denying immunity to sovereign property give rise to such irreparable harm as to justify immediate review under the collateral order doctrine. See *Rubin* v. *Islamic Republic of Iran*, 637 F.3d 783, 790 (7th Cir. 2011) ("There is no reason the collateral-order doctrine should apply any differently in cases raising the attachment immunity of foreign-state property under § 1609 than in cases raising foreign-state jurisdictional immunity under § 1604."); *FG Hemisphere Assocs.* v. *République du Congo*, 455 F.3d 575, 584 (5th Cir. 2006) (similar). Respondents claim that some cases go the other way. Br. in Opp. 15-16. But the question here is not the scope of the collateral order doctrine. It is whether this Court should exercise its undoubted discretion to review an interlocutory court of appeals decision—something it does quite often. That some courts deem the sovereign interests so compelling as to satisfy the stringent collateral order doctrine confirms that the posture of this case poses no barrier to review.

C. The threat that Bank Markazi's assets may be transferred to the United States makes prompt review even more essential. Forcibly transferring a sovereign's assets to another country is a grave infringement of immunity. See, *e.g.*, *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"). That is particularly true here, given that the transfer could fundamentally alter the immunity analysis under TRIA. Pet. 32 &

n.10. Respondents make no representation that they will refrain from seeking a transfer of the assets while Bank Markazi pursues any future appeal or certiorari petition. Plaintiffs have opposed stays in similar cases.[1] Those uncertainties confirm the need for prompt review.

Proceedings on remand will not sharpen the issues or inform this Court's review. And the Court will have to confront the Second Circuit's groundbreaking theory someday. Deferring review will thus impose delay only for delay's sake.

II. THE QUESTION PRESENTED IS IMPORTANT

Respondents do not dispute that dozens of States have turnover statutes just like New York's. Pet. 16-18. Nor do they deny the serious foreign relations consequences at stake. *Id.* at 18-21. And they cannot contest that the decision below is directly contrary to the views of the Executive Branch. *Id.* at 23-24. To the extent respondents address the issue's importance, their arguments fail.

A. Respondents assert that the decision below is consistent with the pre-*NML* case law cited in the petition (at 13-14 & n.2) because those cases held only that the FSIA does not *authorize* seizure of assets abroad, not that such assets are *immune*. Br. in Opp. 25-26. But the cases could hardly be clearer. Many of them expressly speak in terms of immunity. See, *e.g.*, *Peterson* v. *Islamic Republic of Iran*, 627 F.3d 1117, 1131-1132 (9th Cir. 2010) (assets outside the United States are "immune

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[1] See, *e.g.*, *Vera* v. *Republic of Cuba*, No. 12 Civ. 1596, 2017 WL 4350568, at *2 (S.D.N.Y. May 25, 2017) (denying stay of distribution pending potential appeal); *Ministry of Def. & Support for Armed Forces of Islamic Republic of Iran* v. *Cubic Def. Sys., Inc.*, 984 F. Supp. 2d 1070, 1098 (S.D. Cal. 2013) (granting stay over plaintiffs' opposition); *Hausler* v. *JPMorgan Chase Bank, N.A.*, No. 09 Civ. 10289, Dkt. 496 at 3 (S.D.N.Y. Jan. 12, 2012) (same).

from execution"). Even those that refer to the FSIA as not "authorizing" execution against extraterritorial assets necessarily address immunity: As respondents acknowledge, the FSIA does not affirmatively authorize *any* execution; it addresses *only* immunity. Br. in Opp. 20-21. There is nothing else those cases could mean.

Respondents' reading of those cases would certainly surprise the Second Circuit. The court below expressly acknowledged the "many cases cited * * * for the proposition that a foreign sovereign's extraterritorial assets are absolutely immune from execution," Pet. App. 46a; the "many judicial decisions suggesting as much," *id.* at 38a, and the "decades of pre-existing sovereign immunity common law" to the same effect, *id.* at 2a. The court thought that *NML* superseded those earlier cases. *Id.* at 46a. But it had no doubts about what the cases said.

B. Respondents fare no better with international law. They do not dispute that the U.N. Convention on Jurisdictional Immunities of States and Their Property, G.A. Res. 59/38 (Dec. 2, 2004), imposes an express territorial limitation on attachment and execution. *Id.* art. 19(c). They urge that the United States is not a signatory and that the treaty has not yet entered into force.[2] But this Court has already recognized that the Convention reflects "basic principles of international law," wholly apart from any treaty obligations. *Helmerich*, 137 S. Ct. at 1320. The Convention's territorial limitation is hardly

[2] With 28 signatories and 22 ratifying states so far, the treaty is only a few ratifications short of the 30 necessary for entry into force. See Art. 30(1), G.A. Res. 59/38; United Nations Treaty Collection, *Status of Treaties* ch. III, No. 13, https://treaties.un.org/Pages/ParticipationStatus.aspx.

novel: The same rule appears in earlier sources that respondents do not even address. Pet. 21-22 n.6.[3]

Respondents do not deny the potential for claims in international tribunals. Pet. 22-23. Nor do they address the canon against construing statutes in a way that violates international law—a principle the decision below flouts. *Id.* at 28-29.

C. It is no answer to claim that the "proverbial flood has yet to materialize." Br. in Opp. 27. The ink on the decision below is not even dry. Nor are the ramifications merely a problem for Congress to address. *Id.* at 26-27. The passage from *NML* that respondents cite notes only that Congress can amend a statute if it does not like the consequences of this Court's faithful interpretation of it. See *Republic of Argentina* v. *NML Capital, Ltd.*, 134 S. Ct. 2250, 2258 (2014). That principle has no bearing on the importance of this Court's review where a court of appeals has *misconstrued* a statute in a way that threatens serious harm.

Respondents protest that there is no circuit conflict. Br. in Opp. 24-26. But this Court's language in *NML* makes it all but certain that no conflict will emerge. Pet. 31. There is thus no reason to defer review to allow additional courts of appeals to weigh in. Those courts could do only what the Second Circuit did here: declare that the issue is one for this Court to resolve. Pet. App. 52a.

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[3] Respondents urge that the turnover order is directed to Clearstream rather than Iran. Br. in Opp. 27. But the Convention applies broadly to "property of a State," regardless of the custodian. Art. 19, G.A. Res. 59/38; see also, *e.g.*, *Alcom Ltd.* v. *Republic of Colombia*, [1984] 1 A.C. 580, 599 (H.L.) (England) (holding that international law prohibited attachments directed at third-party financial institutions holding sovereign funds).

At a minimum, the Court should call for the Solicitor General to express the views of the United States, as it has done in similar cases. Pet. 24. The Executive Branch is far better positioned than the Court or the parties to opine on the foreign relations implications of the decision below—and on whether those implications warrant review now despite respondents' contrary arguments.

III. THE SECOND CIRCUIT'S DECISION IS INCORRECT

Respondents' defense on the merits is weaker still. The Second Circuit's decision produces an incoherent regime unconnected to any plausible legislative purpose. Nothing in the statute compels that result.

A. The FSIA imposes sharp limits on the restraint of sovereign property within the United States. Under the decision below, however, sovereign immunity imposes *no limits at all* on the restraint of property *outside* the United States. That is absurd. Pet. 24-25. Respondents do not claim otherwise. They point to the text of the statute and this Court's opinion in *NML*. Br. in Opp. 17-20. But they offer no plausible account of any rational purpose Congress might have been trying to accomplish with such an incoherent, upside-down immunity regime.

The Second Circuit's construction divorces the Act's execution immunity rules from the restrictive theory Congress sought to adopt. Pet. 25-26. It defies the settled relationship between jurisdictional and execution immunity. *Id.* at 26. And it attributes to Congress a dramatic break from prior law without a trace of evidence that Congress intended such a change. *Id.* at 27-29. Respondents do not address any of those points.

Nothing in the FSIA compels respondents' interpretation. Section 1609 states that a sovereign's "property in the United States" is presumptively immune. But it says

nothing one way or the other about property *outside* the United States. A perfectly reasonable construction of that text is that Congress was legislating with domestic concerns in mind, creating a new set of rules for "property in the United States" while leaving existing law for assets abroad untouched. Pet. 26-27.

That construction explains why Congress used the phrase "property in the United States" in both the provision granting immunity and the one listing exceptions. Pet. 26-27 & n.8. It reflects the same method of analysis this Court applied to the immunity of foreign officials in *Samantar* v. *Yousuf*, 560 U.S. 305 (2010). Pet. 27. And it produces a rational immunity regime that fits comfortably within Congress's broader goals.

B. *NML* does not compel a contrary result. This Court is not bound by prior statements concerning a matter not at issue in the case, not fully briefed, and not necessary to the decision. Pet. 30. So it is here.

Respondents do not deny that *NML* involved immunity from discovery rather than execution. They claim the issue was nonetheless "briefed" and "considered" there. Br. in Opp. 18. Tellingly, they cite only a single passage from the government's amicus brief and one sentence and paragraph from the respondent's brief—hardly robust submissions conducive to careful analysis. *Ibid.* And while respondents assert that the Court's discussion was "a logically necessary step in [its] conclusion," *ibid.*, *NML* rested on alternative grounds, Pet. 29.

Critically, respondents nowhere dispute that *NML* rests on a mistaken premise. Pet. 30. This Court assumed that the common law was *silent* on the immunity of extraterritorial assets because the issue could not have arisen. 134 S. Ct. at 2257. In fact, for nearly 150 years,

courts had been allowing plaintiffs to seize extraterritorial assets of *non-sovereign* respondents by exercising *in personam* jurisdiction over their custodians. Pet. 16-18, 30. The complete absence of any comparable history with respect to *sovereign* assets confirms that everyone understood such assets were immune—just like domestic assets.

C. Respondents offer two alternative theories for denying immunity here. Neither theory was asserted below, and neither has anything to do with the rationale the court of appeals adopted. The arguments thus do not diminish in the least the need for this Court's review. But they are meritless in any event.

First, respondents claim that the decision below "d[oes] not contemplate execution upon assets located outside the United States" but instead merely orders assets brought *here* for execution. Br. in Opp. 20. The immunity of sovereign property, however, includes immunity from arrest and attachment, not just execution. See 28 U.S.C. §1609 ("attachment[,] arrest and execution"); *NML*, 699 F.3d at 262 ("seizure and control over specific property"); *Stephens*, 69 F.3d at 1229-1230 (prohibiting order requiring sovereign "to place some of [its] assets in the hands of the United States courts"); *S & S Mach.*, 706 F.2d at 418 (prohibiting "injunctions against the negotiation or use of property"). Forcibly transferring sovereign assets to a new jurisdiction infringes immunity regardless of where execution takes place.[4]

[4] Even if immunity applied only to execution, that would not justify the decision below. If assets overseas are immune from execution, a court could hardly order them moved somewhere else for the sole purpose of making them subject to execution—any more than it could order a sovereign to use its embassy bank accounts for commercial activities for the sole purpose of making them subject to exe-

Respondents also assert that common-law immunity applies only to assets in the sovereign's possession. Br. in Opp. 24. But that argument misreads precedent. *Republic of Mexico* v. *Hoffman*, 324 U.S. 30 (1945), concerned jurisdictional immunity from suit, not immunity from execution. *Id.* at 33-34. Common-law execution immunity applied even to property held by a third party. See, *e.g.*, *Dexter & Carpenter* v. *Kunglig Jarnvagsstyrelsen*, 43 F.2d 705, 706, 708 (2d Cir. 1930) (funds held by third-party bank); see also p. 7, n.3, *supra*.[5]

Congress clearly understood that to be the common-law rule when it codified the presumption of immunity in §1609. That provision indisputably applies to sovereign property held by a third party. See *Odyssey Marine Expl., Inc.* v. *Unidentified Shipwrecked Vessel*, 657 F.3d 1159, 1179 (11th Cir. 2011) ("FSIA immunity applies regardless of whether the property of a foreign sovereign is in that sovereign's possession at the time of arrest."). The Court need look no further than its decision last Term in *Rubin* v. *Islamic Republic of Iran*, 138 S. Ct. 816 (2018), recognizing the immunity of ancient Persian artifacts even though they had been held for 80 years by the University of Chicago. *Id.* at 821, 827. The assets here are no less immune.

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cution. The Second Circuit unsurprisingly did not base its ruling on such an evasion of immunity rules.

[5] At the time *Hoffman* was decided, courts permitted prejudgment attachment as a means of establishing jurisdiction over claims against a sovereign. See H.R. Rep. No. 94-1487, at 26 (1976). "Even in such cases, however, * * * property attached for jurisdictional purposes cannot be retained to satisfy a judgment because * * * the property of a foreign sovereign is immune from execution." *Ibid.* Cases like *Hoffman* thus shed no light on execution immunity.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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