No. 16-534

IN THE
Supreme Court of the United States

JENNY RUBIN, *et al.*,
Petitioners,

v.

ISLAMIC REPUBLIC OF IRAN, *et al.*,
Respondents.

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

MEMORANDUM IN RESPONSE FOR RESPONDENT ISLAMIC REPUBLIC OF IRAN

JEFFREY A. LAMKEN
Counsel of Record
ROBERT K. KRY
MICHELLE J. PARTHUM
MOLOLAMKEN LLP
The Watergate, Suite 660
600 New Hampshire Ave., N.W.
Washington, D.C. 20037
(202) 556-2000
jlamken@mololamken.com

Counsel for Respondent Islamic Republic of Iran

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

QUESTIONS PRESENTED

In *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) ("*Bancec*"), this Court held that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." *Id.* at 626-627. Section 1610(g) of the Foreign Sovereign Immunities Act provides that, for terrorism judgments, "property of a foreign state" and "property of an agency or instrumentality of such a state" are subject to "execution * * * *as provided in this section*, regardless of" five factors associated with *Bancec*. 28 U.S.C. § 1610(g) (emphasis added). Section 1610(a) denies immunity to certain "property in the United States of a foreign state * * * used for a commercial activity in the United States." *Id.* § 1610(a). The questions presented are:

1. Whether § 1610(g) establishes a freestanding exception to sovereign immunity, as the Ninth Circuit has held, or instead merely supersedes *Bancec*'s presumption of separate status while still requiring a plaintiff to satisfy the criteria for overcoming immunity elsewhere in § 1610, as the Seventh Circuit held below and the United States has repeatedly urged.

2. Whether the Seventh Circuit correctly held, consistent with every other court of appeals that has addressed the issue, that § 1610(a) denies immunity only where property is used for a commercial activity in the United States by the sovereign itself, and not merely by a third party.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

NO. 16-534

JENNY RUBIN, *et al.*,

Petitioners,

v.

ISLAMIC REPUBLIC OF IRAN, *et al.*,

Respondents.

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

---

MEMORANDUM IN RESPONSE FOR RESPONDENT ISLAMIC REPUBLIC OF IRAN

Respondent Islamic Republic of Iran agrees with petitioners that there is a conflict in the circuits on the first question presented. Iran also agrees that the question is important. In *Bank Melli* v. *Bennett*, No. 16-334 (petition filed Sept. 12, 2016), Bank Melli—an instrumentality of the Islamic Republic of Iran—has sought review of a Ninth Circuit decision addressing that same question. In that case, the Ninth Circuit ruled that § 1610(g) is a free-standing exception to immunity. In this case, the Seventh Circuit expressly rejected that conclusion, ruling that § 1610(g) merely supersedes the *Bancec* presumption, allowing execution against assets under the FSIA's

existing immunity exceptions without regard to an entity's separate status.

The petition in this case and the petition in *Bank Melli* thus present the same important question. *Bank Melli*, however, also raises a second question on which the circuits are divided—whether TRIA and §1610(g) impose an ownership requirement. Accordingly, the Court should grant review in *Bank Melli* and hold this case pending its disposition of that case. Alternatively, the Court should grant both petitions and consolidate the cases for argument. Finally, the Court may also wish to invite the Solicitor General to express the views of the United States in both cases.

The second question presented in this case, by contrast, does not warrant review. Petitioners urge that the FSIA's "commercial activity" exception to execution immunity applies whenever property is used in the United States for a commercial activity, regardless of who uses the property. But the Seventh Circuit, like every other circuit that has addressed the issue, has come to the opposite conclusion—that the exception applies only to property used for a commercial activity in the United States *by the foreign state*. Petitioners dispute the Seventh Circuit's construction of the cases it relied on. But any ambiguity is beside the point: It is uncontested that *no* circuit has adopted petitioners' construction. Besides, this case is a poor vehicle. As the court of appeals recognized, petitioners would likely lose even under their own interpretation. Accordingly, the Court should deny review of the second question presented.

STATEMENT

I. STATUTORY FRAMEWORK

A. The Foreign Sovereign Immunities Act

For most of this Nation's history, foreign sovereigns were completely immune from suit. See *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983). In 1952, however, the State Department adopted the "restrictive theory" of immunity, which denies immunity to a state's "strictly commercial" acts. See *id.* at 486-487. Two decades later, Congress enacted the Foreign Sovereign Immunities Act of 1976 ("FSIA"), Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended at 28 U.S.C. §§ 1602 *et seq.*), which largely codifies that restrictive theory. As the Act's findings and declaration of purpose explain, "[u]nder international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities." 28 U.S.C. § 1602.

1. The FSIA addresses both the immunity of foreign sovereigns from suit and the immunity of sovereign property from attachment and execution. With respect to immunity from suit, the FSIA preserves the general rule that "a foreign state [or agency or instrumentality] shall be immune from the jurisdiction of the courts of the United States and of the States." 28 U.S.C. § 1604. Section 1605 then lists carefully circumscribed exceptions to that jurisdictional immunity. *Id.* § 1605. For example, under the Act's "commercial activity" exception, a foreign sovereign is not immune from an action "based upon a commercial activity carried on in the United States by the foreign state." *Id.* § 1605(a)(2).

The FSIA separately addresses the immunity of sovereign property from attachment and execution. Before the FSIA's enactment, sovereign property "enjoy[ed] absolute immunity from execution," even under the restrictive theory of immunity. H.R. Rep. No. 94-1487, at 8 (1976). Plaintiffs who obtained judgments against foreign sovereigns thus had to rely on sovereign grace for their satisfaction. *Ibid.* The FSIA retains the general rule that "property in the United States of a foreign state [or agency or instrumentality] shall be immune from attachment arrest and execution." 28 U.S.C. § 1609. But the Act provides limited exceptions in § 1610.

Section 1610(a) provides that "[t]he property in the United States of a foreign state * * * used for a commercial activity in the United States" is not immune from execution if one of certain additional conditions set forth in that section applies. 28 U.S.C. § 1610(a). Under § 1610(a)(2), for example, property of a foreign state used for a commercial activity in the United States is subject to execution if the property "is or was used for the commercial activity upon which the claim is based." *Id.* § 1610(a)(2). Section 1610(b) provides additional exceptions for property of sovereign agencies or instrumentalities. Such property is subject to execution if the agency or instrumentality is "engaged in commercial activity in the United States" and one of certain additional conditions applies. *Id.* § 1610(b). Thus, consistent with the restrictive theory, both § 1610(a) and § 1610(b) require commercial activity.

2. As a general matter, the FSIA does not address when a sovereign's agencies or instrumentalities may be held liable for judgments against the sovereign itself. This Court resolved that issue in *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462

U.S. 611 (1983) ("*Bancec*"). *Bancec* explained that the FSIA "was not intended to affect the substantive law determining the liability of a foreign state or instrumentality, or the attribution of liability among instrumentalities of a foreign state." *Id.* at 620. Instead, such matters are governed by substantive international and federal common law. *Id.* at 626-627. Applying that substantive law, the Court held that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." *Ibid.*

Bancec identified two limited exceptions to that presumption of separate treatment: first, where the sovereign and instrumentality are alter egos; and second, where the sovereign abuses the corporate form to "'work fraud or injustice.'" 462 U.S. at 629-630. In the wake of *Bancec*, some courts developed five "factors" to determine whether *Bancec*'s presumption of separate status has been overcome. See, *e.g.*, *Flatow* v. *Islamic Republic of Iran*, 308 F.3d 1065, 1071 n.9 (9th Cir. 2002).

B. The Terrorism Amendments to the FSIA

Over the last two decades, Congress has repeatedly amended the FSIA in connection with terrorism claims.

1. In 1996, Congress enacted a new exception to jurisdictional immunity for terrorism claims. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221(a), 110 Stat. 1214, 1241 (formerly codified at 28 U.S.C. § 1605(a)(7)). That exception denied immunity for suits against certain sovereigns for acts of terrorism or material support for such acts. *Ibid.*

The 1996 amendments also created new exceptions to attachment and execution immunity for judgments in terrorism cases. Section 1610(a)(7) provides that "[t]he property in the United States of a foreign state * * * used

for a commercial activity in the United States" is subject to execution to satisfy a terrorism judgment, "regardless of whether the property is or was involved with the act upon which the claim is based." 28 U.S.C. § 1610(a)(7). Section 1610(b)(3) provides a similar exception for agencies and instrumentalities. *Id.* § 1610(b)(3).

2. Two years later, Congress added another exception for assets the Executive Branch had "blocked" under economic sanctions statutes. See Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, § 117, 112 Stat. 2681, 2681-491 (1998). Codified as § 1610(f)(1), it provides:

> Notwithstanding any other provision of law, * * * any property with respect to which financial transactions are prohibited or regulated pursuant to [various statutes] shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state (including any agency or instrumentality o[f] such state) claiming such property is not immune under section 1605(a)(7) * * * .

28 U.S.C. § 1610(f)(1)(A).

Congress authorized the President to waive the execution mechanism in subsection (f)(1) "in the interest of national security." Pub. L. No. 105-277, § 117(d), 112 Stat. at 2681-492. The President immediately issued a blanket waiver, finding that the provision "would impede [his] ability * * * to conduct foreign policy in the interest of national security." 63 Fed. Reg. 59,201 (Oct. 21, 1998).

In 2000, Congress repealed the provision authorizing that waiver. See Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 2002(f)(2), 114 Stat. 1464, 1543. In light of Executive Branch opposition

to the provision's elimination, however, Congress added a new waiver provision to the bill before its enactment. See *id.* § 2002(f)(1)(B), 114 Stat. at 1543 (codified at 28 U.S.C. § 1610(f)(3)). The President then promptly issued another blanket waiver under that new provision. 65 Fed. Reg. 66,483 (Oct. 28, 2000).

3. In 2002, Congress enacted § 201 of the Terrorism Risk Insurance Act of 2002 ("TRIA"), Pub. L. No. 107-297, § 201, 116 Stat. 2322, 2337 (reproduced at 28 U.S.C. § 1610 note). As amended, § 201(a) provides:

> Notwithstanding any other provision of law, * * * in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, or for which a terrorist party is not immune under section 1605A or 1605(a)(7) * * * , 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 such judgment * * * .

28 U.S.C. § 1610 note § 201(a).

4. In 2008, Congress again amended the FSIA's terrorism provisions. See National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083, 122 Stat. 3, 338. That statute revised § 1605(a)(7)'s exception to jurisdictional immunity and recodified it as § 1605A. See 28 U.S.C. § 1605A. The statute also amended the execution immunity exceptions in § 1610(a)(7) and (b)(3) to permit execution of § 1605A judgments under those provisions. See Pub. L. No. 110-181, § 1083(b)(3)(A)-(B), 122 Stat. 3, 341 (2008), amended by Pub. L. No. 112-158, § 502(e)(1), 126 Stat. 1214, 1260 (2012).

Finally, the 2008 amendments added a new provision addressing execution, codified as 28 U.S.C. § 1610(g). That provision states:

> [T]he 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, regardless of*—
>
> (A) the level of economic control over the property by the government of the foreign state;
>
> (B) whether the profits of the property go to that government;
>
> (C) the degree to which officials of that government manage the property or otherwise control its daily affairs;
>
> (D) whether that government is the sole beneficiary in interest of the property; or
>
> (E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

28 U.S.C. § 1610(g)(1) (emphasis added). The five factors in paragraphs (A) through (E) are the same five "*Bancec* factors" that some courts had used to determine whether a plaintiff had overcome *Bancec*'s presumption of separate status. See, *e.g.*, *Flatow*, 308 F.3d at 1071 n.9.

II. PROCEEDINGS BELOW

Petitioners are American citizens injured in a 1997 terrorist attack in Jerusalem. Pet. App. 5a. They filed suit against the Islamic Republic of Iran, alleging that it had provided support to Hamas, the organization that carried out the attack. *Id.* at 5a-6a. In 2003, they obtained a default judgment against Iran. *Id.* at 6a.

A. Proceedings in the District Court

Petitioners commenced this enforcement action in an effort to collect on that default judgment. They sought to execute against four collections of ancient Persian artifacts in the possession of the Oriental Institute of the University of Chicago and the Field Museum of Natural History. Pet. App. 6a.

The Persepolis Collection consists of approximately 30,000 clay tablets and fragments "containing some of the oldest writings in the world." Pet. App. 4a-5a. In 1937, Iran loaned that collection to the Oriental Institute for research, translation, and cataloguing. *Ibid.* The Chogha Mish Collection consists of clay seal impressions that Iran excavated from the ancient Chogha Mish settlement in the 1960s and then loaned to the Oriental Institute for academic study. *Id.* at 5a. The Herzfeld Collection includes approximately 1200 prehistoric artifacts purchased by the Field Museum in 1945 from Dr. Ernst Herzfeld, a German archaeologist who worked in Persia. *Ibid.* And the Oriental Institute Collection contains Persian artifacts donated by Iran and other donors. *Ibid.*[1]

---

[1] The Chogha Mish artifacts were returned to Iran following the district court's decision and the denial of a stay pending appeal, and Iran has disclaimed any ownership of the Herzfeld and Oriental Institute Collections. Pet. App. 8a-10a. Consequently, only the Persepolis Collection remains at issue in this litigation. *Id.* at 10a.

The district court granted summary judgment to Iran and the museums. Pet. App. 43a-71a. The court first held that petitioners could not attach the antiquities under the commercial activity exception of § 1610(a). *Id.* at 50a-57a. Petitioners claimed that that exception applied because the *museums* had allegedly used the artifacts for commercial purposes. *Id.* at 51a. But the court held that § 1610(a) "requires the commercial activity to be conducted *by the sovereign*." *Id.* at 57a (emphasis added). Petitioners did not contend that *Iran* made any commercial use of the artifacts. *Id.* at 51a. Given that holding, the court did not reach Iran's alternative argument that "the acts performed by the Institute in the course of studying and displaying the artifacts [did not] constitute 'commercial activity.'" *Id.* at 51a, 57a n.10.

The district court also held that petitioners could not execute against the antiquities under § 1610(g). Pet. App. 57a-62a. "Section 1610(g)," the court held, "is not a separate basis of attachment." *Id.* at 61a. Rather, "the purpose of Section 1610(g) is to counteract the Supreme Court's decision in *Bancec*, and to allow execution against the assets of separate juridical entities regardless of the protections *Bancec* may have offered." *Id.* at 62a. Because § 1610(g) was not an independent exception to immunity, the provision "d[id] not subject the collections in question to attachment and execution." *Ibid.*[2]

[2] The district court also held that petitioners could not attach the antiquities under TRIA because the antiquities were not "blocked assets." Pet. App. 62a-70a. The Seventh Circuit agreed, *id.* at 35a-38a, and petitioners do not challenge that ruling.

B. The Court of Appeals' Decision

The Seventh Circuit affirmed. Pet. App. 1a-42a.

1. The court of appeals first rejected petitioners' claim that the artifacts were subject to execution under § 1610(a). The parties disputed both whether "*a third party's* commercial use of the property triggers § 1610(a)" and whether "the University's academic study of the Persepolis Collection counts as a commercial use." Pet. App. 16a. The court was "skeptical that academic study qualifies as a commercial use." *Ibid.* But it declined to reach that issue because it agreed with Iran that only the *sovereign's* commercial use matters. *Id.* at 16a-21a.

On that issue, the court noted, "[t]he United States has weighed in as an amicus curiae on the side of the interpretation urged by Iran and the University—namely, that the exception in § 1610(a) applies *only* when the foreign sovereign itself (not a third party) uses the property for a commercial activity." Pet. App. 16a. Three other circuits, the court observed, have agreed with that position. *Id.* at 16a-17a. That interpretation also accords with the FSIA's declaration of purpose, which states that sovereigns "'are not immune from the jurisdiction of foreign courts insofar as *their* commercial activities are concerned, and *their* commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with *their* commercial activities.'" *Id.* at 17a (quoting 28 U.S.C. § 1602) (emphasis in opinion). The court thus "join[ed] the emerging consensus of [its] sister circuits" and held that "§ 1610(a) applies only when *the foreign state itself* has used its property for a commercial activity in the United States." *Id.* at 20a.

2. The court of appeals also rejected petitioners' contention that the artifacts were subject to execution under § 1610(g). Petitioners argued that §1610(g) was "a free-

standing exception to execution immunity for terrorism-related judgments." Pet. App. 22a. Iran and the museums, by contrast, urged that the provision merely "abrogat[ed] the *Bancec* doctrine for § 1605A judgments" and was "not itself an exception to execution immunity." *Ibid.* Once again, "[t]he United States support[ed] this interpretation and join[ed] Iran and the University in urging [the court] to adopt it." *Ibid.*

The court agreed with that interpretation. By its plain terms, the court observed, "subsection (g) permits a terrorism victim who wins a § 1605A judgment to execute on the property of the foreign state *and* the property of its agency or instrumentality '*as provided in this section*' but '*regardless of*' the five [*Bancec*] factors." Pet. App. 25a (quoting 28 U.S.C. § 1610(g)(1)) (emphasis in opinion). As the court noted, the phrase "as provided in this section" "makes very little sense—indeed, is entirely superfluous—if subsection (g) is itself a freestanding exception to execution immunity." *Id.* at 27a. Petitioners' interpretation thus "violates the 'cardinal principle' that a statute should be interpreted to avoid superfluity." *Ibid.*

Petitioners' interpretation also "creates superfluities in other parts of the statute." Pet. App. 27a. Subsections 1610(a)(7) and (b)(3) already provide for execution of terrorism judgments where certain commercial activity requirements are met. *Id.* at 27a-28a (citing 28 U.S.C. § 1610(a)(7), (b)(3)). "If subsection (g) paves a dedicated lane for all execution actions by victims of state-sponsored terrorism, then § 1610(a)(7) and (b)(3) serve no purpose at all." *Id.* at 27a-28a. That result is particularly improbable because Congress amended § 1610(a)(7) and (b)(3) at the same time it enacted § 1610(g) in 2008—amendments that would have been pointless if petitioners' construction of § 1610(g) were correct. *Id.* at 28a n.5.

The Seventh Circuit noted that the Ninth Circuit had reached a contrary result in *Bennett* v. *Islamic Republic of Iran*, 825 F.3d 949 (9th Cir. 2016). Pet. App. 32a-33a. The Ninth Circuit, it observed, "purported to explain away the 'as provided in this section' language in subsection (g) by interpreting it to apply only to § 1610(f)." *Id.* at 33a. The Seventh Circuit rejected that construction as a "highly strained interpretation" because "it implausibly reads the word 'section' as '*sub*section,' so the phrase 'as provided in this section' actually means 'as provided in *sub*section (f).'" *Ibid.*

"Second, and importantly," the court added, "§ 1610(f) *never became operative*"—the President issued a blanket waiver the day it was enacted. Pet. App. 33a. As a result, § 1610(f) "does not allow *any* form of execution." *Id.* at 34a. "It therefore makes no sense to say, as the *Bennett* majority does, that the phrase 'as provided in this section' in subsection (g) refers only to subsection (f), an inoperative part of the statute. If that were the case, then execution 'as provided in this section' would mean no execution at all." *Ibid.*

For those reasons, the Seventh Circuit "disagree[d] with the Ninth Circuit's interpretation of subsection (g)." Pet. App. 34a. The court noted that the Ninth Circuit, in reaching its contrary view, had relied on two earlier Seventh Circuit cases. *Ibid.* Those cases, the Seventh Circuit explained, merely "assume[ ] rather than decide[ ] the crucial antecedent question—that is, whether § 1610(g) is itself a freestanding exception to execution immunity." *Id.* at 30a. "To the extent that [those cases] can be read as holding that § 1610(g) is a freestanding exception to execution immunity for terrorism-related judgments," the court held, "they are overruled." *Id.* at 34a-35a.

Because the court's decision "overrule[d] circuit precedent and create[d] a conflict with the Ninth Circuit," the panel circulated its opinion to all active judges, several of whom were recused. Pet. App. 35a n.6. A majority of the court did not vote to rehear the case en banc. *Ibid.* Judge Hamilton dissented. *Id.* at 39a-42a.

ARGUMENT

Respondent agrees that the proper interpretation of § 1610(g) is an important question that has divided the courts of appeals. That question is pending in both this case and in *Bank Melli* v. *Bennett*, No. 16-334 (petition filed Sept. 12, 2016). The petition in *Bennett*, moreover, raises a second important question on which the circuits are also divided. Accordingly, the Court should grant review in that case and hold this case pending its disposition of that case. Alternatively, if the Court is inclined to grant review in this case, it should grant both petitions and consolidate the cases for argument.

By contrast, the second question presented in this case, concerning the proper construction of § 1610(a), does not warrant review. Four circuits now agree that § 1610(a) requires commercial activity by the sovereign, not merely by third parties. Petitioners identify no court that has ever adopted their interpretation. And this case is a poor vehicle for addressing the issue because petitioners would not prevail even under their own mistaken interpretation.

I. THE PROPER CONSTRUCTION OF § 1610(g) IS AN IMPORTANT QUESTION THAT HAS DIVIDED THE COURTS OF APPEALS

A. The Circuits Are Divided

1. As the petition correctly explains, the circuits are divided over the proper construction of § 1610(g). The

conflict could not be starker. The Seventh Circuit held below that §1610(g) "is *not* a freestanding terrorism exception to execution immunity." Pet. App. 4a (emphasis added). Just a month earlier, however, the Ninth Circuit reached the opposite conclusion, holding that "§1610(g) *is* a freestanding provision for attaching and executing against assets." *Bennett* v. *Islamic Republic of Iran*, 825 F.3d 949, 960 (9th Cir. 2016) (emphasis added). The question was thoroughly considered in both circuits: It generated three different opinions in the Ninth Circuit (two with dissents), as well as a dissent from denial of rehearing en banc in the Seventh Circuit. Pet. 22.

Two other circuits have also recently agreed with the Ninth Circuit's position, albeit with no analysis. See *Weinstein* v. *Islamic Republic of Iran*, 831 F.3d 470, 483 (D.C. Cir. 2016); *Kirschenbaum* v. *650 Fifth Ave.*, 830 F.3d 107, 123 (2d Cir. 2016). By contrast, the Executive Branch has repeatedly agreed with the Seventh Circuit's position, filing amicus briefs advocating that interpretation in this case, in *Bank Melli*, and in two other cases. See C.A. Dkt. 54, at 23 (filed Nov. 3, 2014); U.S. Br. in *Bennett* v. *Islamic Republic of Iran*, No. 13-15442, at 8 (9th Cir. filed Oct. 23, 2015); U.S. Br. in *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran* v. *Frym*, No. 13-57182, at 29 (9th Cir. filed July 3, 2014); U.S. Br. in *Hegna* v. *Islamic Republic of Iran*, No. 11-1582, at 19 (2d Cir. filed Nov. 4, 2011). The Ninth Circuit "acknowledge[d] that the United States * * * disagrees with [its] interpretation." *Bennett*, 825 F.3d at 961 n.7.

Iran thus agrees with petitioners that "[t]he issue is ripe for Supreme Court review." Pet. 22. The same issue is also pending in *Bank Melli* v. *Bennett*, No. 16-334 (petition filed Sept. 12, 2016), in which Bank Melli—an in-

strumentality of the Islamic Republic of Iran—seeks review of the Ninth Circuit's decision on the other side of the circuit conflict.

2. Unlike this case, however, *Bank Melli* also presents a second important question on which the circuits are also divided. As the petition in *Bank Melli* explains, TRIA permits execution against blocked "assets of" the sovereign, 28 U.S.C. §1610 note §201(a), and §1610(g) permits execution against "property of" the sovereign, 28 U.S.C. §1610(g)(1). The circuits are divided over the proper construction of that language. The Ninth Circuit held in *Bank Melli* that state rather than federal law determines whether a sovereign's interest in property is sufficient to permit execution, and that state law may permit execution even if the sovereign does not *own* the property. See *Bennett*, 825 F.3d at 963-964. The Second Circuit agrees that state law applies. See *Calderon-Cardona* v. *Bank of N.Y. Mellon*, 770 F.3d 993, 1000-1002 (2d Cir. 2014), cert. denied, 136 S. Ct. 893 (2016). By contrast, in *Heiser* v. *Islamic Republic of Iran*, 735 F.3d 934 (D.C. Cir. 2013), the D.C. Circuit held that federal law governs that issue and that federal law requires ownership. *Id.* at 938-941. The Executive Branch agrees that the statutes require ownership. See Pet. in No. 16-334, at 29.

Granting review in *Bank Melli* would thus enable the Court to resolve not only the circuit conflict over §1610(g), but also that separate conflict over the ownership requirement. Alternatively, if the Court is inclined to grant review in this case, it should also grant review in *Bank Melli* as well and consolidate the two cases for argument. Granting review in both cases would enable the Court to consider the issue in multiple factual settings and would ensure consistent dispositions.

Finally, the Court may also wish to invite the Solicitor General to express the views of the United States in both cases. The Court has taken that approach in several similar cases. See, *e.g.*, *Bank Markazi* v. *Peterson*, 135 S. Ct. 1753 (2015); *Rubin* v. *Islamic Republic of Iran*, 132 S. Ct. 1619 (2012); *Bank Melli Iran N.Y. Representative Office* v. *Weinstein*, 131 S. Ct. 3012 (2011). The Court should consider the same approach here.

B. The Seventh Circuit's Decision Is Correct

On the merits, the decision below is correct.

1. Section 1610(g) permits creditors to execute terrorism judgments against the assets of a foreign sovereign *or* the assets of its agencies or instrumentalities "*as provided in this section*, regardless of" the five *Bancec* factors. 28 U.S.C. § 1610(g)(1) (emphasis added). By its plain terms, that language merely eliminates the five *Bancec* factors as a barrier to recovery. It is not naturally read as a freestanding exception to immunity. If Congress had intended to create a freestanding immunity exception, it would have said that such assets are subject to execution, period—not that they are subject to execution "as provided in this section, regardless of" *Bancec*.

The Ninth Circuit provided no plausible account for Congress's inclusion of the phrase "as provided in this section." The court held that, "[w]hen subsection (g) refers to attachment and execution of the judgment 'as provided in this section,' it is referring to procedures contained in § 1610(f)." *Bennett*, 825 F.3d at 959. But, as the Seventh Circuit explained below, that is an "implausibl[e]," "highly strained" interpretation that "makes no sense." Pet. App. 33a-34a. Section 1610(g) refers to "this *section*," not any particular *sub*section. 28 U.S.C. § 1610(g)(1) (emphasis added). And because the President waived § 1610(f)'s execution mechanism the day it

was enacted, it makes no sense to read "as provided in this section" to refer to § 1610(f). If that were the case, "execution 'as provided in this section' would mean no execution at all." Pet. App. 34a.

As the court below explained, moreover, the Ninth Circuit's interpretation also "creates superfluities in other parts of the statute." Pet. App. 27a. Subsections 1610(a)(7) and (b)(3) already provide for execution of terrorism judgments entered under § 1605A where certain commercial activity requirements are met. 28 U.S.C. § 1610(a)(7), (b)(3). Those exceptions would be superfluous if §1610(g) were a freestanding immunity exception that allowed execution of all terrorism judgments without regard to any commercial activity.

2. None of petitioners' responses has any merit. For example, petitioners deny that their interpretation of § 1610(g) renders § 1610(a)(7) and (b)(3) superfluous. Section 1610(g), they urge, permits execution only of judgments entered under the *current* terrorism exception codified at § 1605A, while § 1610(a)(7) and (b)(3) also permit execution of judgments entered under the *pre-2008* exception formerly codified at § 1605(a)(7). Pet. 27. As a result, petitioners contend, § 1610(a)(7) and (b)(3) retain independent force. *Ibid.*

That argument misses the point. At the same time Congress enacted § 1605A and § 1610(g) in 2008, it amended § 1610(a)(7) and (b)(3) to provide that those exceptions apply to judgments entered under the new terrorism exception in § 1605A. See Pub. L. No. 110-181, § 1083(b)(3)(A)-(B), 122 Stat. 3, 341 (2008). That *amendment* would have been entirely unnecessary under petitioners' construction of § 1610(g): There would be no reason to make § 1605A judgments enforceable under § 1610(a)(7) and (b)(3) in cases where certain commercial

activity requirements were met, if such judgments were enforceable in *every* case under § 1610(g) regardless.[3]

Alternatively, petitioners urge that § 1610(g) must be a freestanding immunity exception because it applies to both "property of a foreign state" *and* "property of an agency or instrumentality * * * , including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity." 28 U.S.C. § 1610(g)(1). According to petitioners, some of that language would be unnecessary if the statute merely abrogated *Bancec*'s presumption of separate status. Pet. 26-27. Had that been Congress's intent, they assert, the statute could have referred simply to separate juridical entities. *Ibid.*

That argument does not support petitioners' construction. Congress's evident intent in enacting § 1610(g) was to ensure that property otherwise subject to execution would be available to satisfy a terrorism judgment, whether owned by the state itself or by an agency or instrumentality, including a juridically separate one. In other words, property owned by a juridically separate agency or instrumentality should be treated the same way as property owned by any other agency or instru-

---

[3] Indeed, when Congress enacted § 1610(g) in 2008, it *deleted* the references to § 1605(a)(7) from § 1610(a)(7) and (b)(3), replacing them with references to § 1605A. See Pub. L. No. 110-181, § 1083(b)(3)(A)-(B), 122 Stat. 3, 341 (2008). It was not until 2012 that Congress restored the references to § 1605(a)(7) in those provisions so plaintiffs could execute either old judgments obtained under § 1605(a)(7) or new judgments obtained under § 1605A. See Pub. L. No. 112-158, § 502(e)(1), 126 Stat. 1214, 1260 (2012). Petitioners' reasoning is thus incorrect even on its own terms: Under their construction of § 1610(g), § 1610(a)(7) and (b)(3) would have been wholly superfluous for the entire period from 2008 to 2012. The subsequent 2012 amendment sheds no light on Congress's intent in 2008.

mentality, which should be treated the same way as property owned by the state itself. Section 1610(g)'s phrasing is a reasonable way to express that concept. That Congress could have accomplished the same result in different ways or with fewer words does not make its chosen approach superfluous.

In any event, petitioners' argument does not remedy the basic flaw in their position. Whatever Congress's reason for referring in § 1610(g) to "property of a foreign state" or "property of an agency or instrumentality" that is not juridically separate, the fact remains that § 1610(g) permits execution against such property only "*as provided in this section*." 28 U.S.C. § 1610(g)(1) (emphasis added). Petitioners still have not offered any plausible explanation for that critical language.

The dramatic consequences of petitioners' interpretation are reason enough to reject it. On petitioners' theory, § 1610(g) imposes no limitations at all on the types of property subject to execution—indeed, their interpretation would seemingly cover not only ancient cultural artifacts of the sort at issue here, but even diplomatic property whose attachment would violate the Nation's treaty obligations. See Vienna Convention on Diplomatic Relations, art. 22.3, Apr. 18, 1961, 23 U.S.T. 3227, 3238. Notably, when Congress has created freestanding immunity exceptions for terrorism judgments in other statutes, it has been careful to exempt diplomatic property. See 28 U.S.C. § 1610 note § 201(d)(2)(B)(ii) (TRIA exemption for diplomatic property). The absence of any similar exception in § 1610(g) confirms that the provision was not intended to establish a new blanket immunity exception for terrorism judgments, but instead to accomplish the more modest goal of abrogating *Bancec*'s presumption of separate status in terrorism cases.

II. THE SECOND QUESTION PRESENTED DOES NOT WARRANT REVIEW

The Court should deny review of the second question presented. There is no circuit conflict, the Seventh Circuit's decision is correct, and the petition identifies no other basis for review.

A. There Is No Circuit Conflict over the Proper Interpretation of § 1610(a)

Petitioners' second question presented concerns the proper construction of § 1610(a). The Seventh Circuit held that § 1610(a) deprives sovereign property of immunity only where the property is used for a commercial activity in the United States *by the foreign sovereign*. Pet. App. 20a. Petitioners contend that commercial use *by anyone* will suffice. Pet. 32-35. There is no circuit conflict over that question. The petition does not contend otherwise. Rather, as the Seventh Circuit noted, every circuit to have addressed the issue has agreed with its interpretation: Section 1610(a) "applies only when *the foreign state itself* has used its property for a commercial activity in the United States; the actions of third parties are irrelevant." Pet. App. 20a.

In *Connecticut Bank of Commerce* v. *Republic of Congo*, 309 F.3d 240 (5th Cir. 2002), for example, the Fifth Circuit held that "what matters under [§ 1610(a)] is how the *foreign state* uses the property, not how private parties may have used the property." *Id.* at 256 n.5. The court quoted authority holding that "the foreign state's use of the property for commercial activity is necessary for § 1610(a) to apply." *Ibid.* And it refused to allow "a private party's commercial use of the property to count for § 1610(a)." *Ibid.*

The Ninth Circuit agreed with that approach in *Af-Cap, Inc.* v. *Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080 (9th Cir. 2007). The court quoted the Fifth Circuit's reasoning from *Connecticut Bank of Commerce*. *Id.* at 1090-1091. And it emphasized that "allow[ing] a private party's commercial use of the property to waive a foreign sovereign's immunity would not only frustrate 'one of the principal goals of the FSIA' * * * but would also effectively eviscerate the protections of the FSIA by essentially placing the power to waive the foreign sovereign's immunity in the hands of private parties." *Id.* at 1091.

Finally, the Second Circuit joined that consensus in *Aurelius Capital Partners, L.P.* v. *Republic of Argentina*, 584 F.3d 120 (2d Cir. 2009). The court held that "the funds *in the hands of the Republic* must have been 'used for a commercial activity.'" *Id.* at 131. "The commercial activities of the private corporations who managed these assets are irrelevant to this inquiry." *Ibid.*

The United States agrees with that interpretation. "Section 1610(a)," it explained below, "should be read as reaching only property that is used by the foreign state itself for commercial activity; third-party acts are irrelevant." C.A. Dkt. 54, at 17 (filed Nov. 3, 2014).

Petitioners assert that "none of the courts claimed to be part of this 'consensus' dealt with the issue." Pet. 36. That argument ignores the clear text of the decisions, which plainly requires that *the foreign sovereign itself* use the property for a commercial activity. Even if petitioners' argument had merit, moreover, it would not be grounds for review. Whether the circuit tally on this issue is 4-0 or merely 1-0, the fact remains that no circuit has ever adopted petitioners' interpretation. There is no plausible basis for review.

B. The Seventh Circuit's Decision Is Correct

The Seventh Circuit's interpretation of § 1610(a) is also correct. Section 1610(a) by its terms applies only to "[t]he property in the United States *of a foreign state* * * * used for a commercial activity in the United States." 28 U.S.C. § 1610(a) (emphasis added). Read in isolation, that provision is potentially ambiguous as to whether it refers to usage by the foreign state that owns the property or usage by any party at all. But the Act's broader text, structure, and history eliminate any doubt.

First, the Seventh Circuit properly looked to the FSIA's statutory declaration of purpose. Pet. App. 17a. That provision makes clear that the exceptions to immunity depend on commercial activity *of the sovereign itself*. It states: "Under international law, states are not immune from the jurisdiction of foreign courts insofar as *their* commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with *their* commercial activities." 28 U.S.C. § 1602 (emphasis added). Petitioners' construction of § 1610(a) puts the provision at war with the statute's explicitly stated purpose.

The Seventh Circuit's interpretation also respects the Act's history. The FSIA sought to "codify the so-called 'restrictive' principle of sovereign immunity, as presently recognized in international law." H.R. Rep. No. 94-1487, at 7 (1976). Under that theory, immunity depends on acts *of the sovereign*, not third parties. See *ibid.* ("[I]mmunity of a foreign state is 'restricted' to suits involving a *foreign state's* public acts * * * and does not extend to suits based on *its* commercial or private acts * * * ." (emphasis added)); *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 487 (1983) (restrictive theory denies immunity for "cases arising out of a *foreign state's* strictly

commercial acts" (emphasis added)). That remains true today. See United Nations Convention on Jurisdictional Immunities of States and Their Property, G.A. Res. 59/38, art. 19(c), U.N. Doc. A/RES/59/38 (Dec. 2, 2004) (immunity inapplicable to property "specifically in use or intended for use *by the State* for other than government non-commercial purposes" (emphasis added)). Construing § 1610(a) to turn on the commercial activities of *third parties* would be a dramatic departure from the traditional restrictive theory.[4]

The FSIA's structure confirms the Seventh Circuit's interpretation. As the Seventh Circuit observed, the Act's *jurisdictional* exception for commercial activity applies to "commercial activity carried on in the United States *by the foreign state*." 28 U.S.C. § 1605(a)(2) (emphasis added). The exception thus expressly requires activity by the sovereign itself. Construing § 1610(a) to omit that requirement would render the Act's execution exception broader than its jurisdictional counterpart. That result would defy the general scheme of the FSIA, in which the execution exceptions are "narrower" than the jurisdictional exceptions. *Republic of Argentina* v. *NML Capital, Ltd.*, 134 S. Ct. 2250, 2256 (2014).

---

[4] For that reason, petitioners' reliance on *Cassirer* v. *Kingdom of Spain*, 616 F.3d 1019 (9th Cir. 2010), cert. denied, 564 U.S. 1037 (2011), is misplaced. Pet. 34. *Cassirer* held that the FSIA's expropriation exception applies whether or not the respondent is the state that expropriated the property. *Id.* at 1031-1032. But the court was careful to note that, even as so construed, the exception applies only to property used "'in connection with a commercial activity carried on in the United States *by the foreign state*.'" *Id.* at 1027, 1031 (quoting 28 U.S.C. § 1605(a)(3)) (emphasis added). The court's interpretation was therefore fully consistent with the restrictive theory and its requirement of commercial activity *by the sovereign itself*.

Moreover, § 1610(b) provides for execution against property of sovereign *agencies or instrumentalities* where the "agency or instrumentality * * * [is] engaged in commercial activity in the United States." 28 U.S.C. § 1610(b). That provision too focuses on activity *of the sovereign entity*, not third parties. Construing § 1610(a) to extend to commercial uses by third parties would render the provisions for execution against property of the foreign state itself more expansive in that respect than the provision for execution against property of agencies and instrumentalities. That too would be contrary to the Act's general scheme, in which the immunity exceptions for the sovereign itself are narrower than the exceptions for agencies and instrumentalities. See *De Letelier* v. *Republic of Chile*, 748 F.2d 790, 799 (2d Cir. 1984) ("Congress sharply restricted immunity from execution against agencies and instrumentalities, but was more cautious when lifting immunity from execution against property owned by the State itself.").

Finally, petitioners' construction would produce absurd results. On their theory, sovereign property would lose its immunity if an authorized possessor of the property put it to an unauthorized commercial use. Indeed, sovereign property would lose its immunity even if it were stolen and put to commercial use by thieves. It is inconceivable that Congress intended those results.

C. This Case Is a Poor Vehicle for Addressing the Issue

Finally, this case is an unsuitable vehicle for resolving the proper interpretation of § 1610(a) because petitioners would not prevail even under their own interpretation. As Iran and the museums have urged from the outset of this case, the antiquities at issue are not being used for commercial activity by *any* party, because the museums'

academic study of the artifacts does not qualify as a commercial use. Pet. App. 16a, 51a, 57a n.10. Accordingly, whether a third party's commercial use is sufficient under the statute is beside the point: It would not change the outcome in this case.

The FSIA defines "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act." 28 U.S.C. § 1603(d). The museums' academic study of irreplaceable artifacts of Iran's cultural heritage does not fall within that definition. See, *e.g.*, United Nations Convention on Jurisdictional Immunities of States and Their Property, G.A. Res. 59/38, art. 21(d), U.N. Doc. A/RES/59/38 (Dec. 2, 2004) (citing "property forming part of the cultural heritage of the State * * * and not placed or intended to be placed on sale" as an example of non-commercial property immune from attachment).

The court of appeals, while not ultimately resolving the issue, was "skeptical that academic study qualifies as a commercial use." Pet. App. 16a. The court was right to be skeptical: The museums' academic study of cultural artifacts is not "commercial activity" in any sense. As a result, petitioners' dispute over the proper interpretation of § 1610(a) is (likewise) wholly academic.

CONCLUSION

With respect to the first question presented, if the Court is inclined to grant the petition, it should also grant the petition in *Bank Melli* v. *Bennett*, No. 16-334, and consolidate the cases for argument. With respect to the second question presented, the petition should be denied.

Respectfully submitted.

JEFFREY A. LAMKEN
Counsel of Record
ROBERT K. KRY
MICHELLE J. PARTHUM
MOLOLAMKEN LLP
The Watergate, Suite 660
600 New Hampshire Ave., N.W.
Washington, D.C. 20037
(202) 556-2000
jlamken@mololamken.com

Counsel for Respondent
Islamic Republic of Iran

NOVEMBER 2016