No. 18-1039

# In The
# Supreme Court of the United States

JEREMY LEVIN AND DR. LUCILLE LEVIN,

*Petitioners,*

vs.

JPMORGAN CHASE BANK, N.A.,

*Respondent.*

**On Petition For A Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Second Circuit**

## REPLY BRIEF FOR PETITIONERS

SUZELLE M. SMITH
*Counsel of Record*
DON HOWARTH
HOWARTH & SMITH
523 West Sixth Street, Suite 728
Los Angeles, California 90014
Telephone: (213) 955-9400
Facsimile: (213) 622-0791
E-Mail: ssmith@howarth-smith.com

*Counsel for Petitioners*
*Jeremy Levin and Dr. Lucille Levin*

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

Page

TABLE OF CONTENTS ..... i

TABLE OF AUTHORITIES ..... ii

ARGUMENT ..... 2

I. There is a Split of Authority Between the Second and D.C. Circuits as to the Ownership of Blocked EFTs ..... 2

II. This Court Has Jurisdiction to Review All Petitioners' Arguments ..... 7

III. EFT Ownership Is A Recurring Legal Issue That Should Be Clarified by This Court ..... 11

CONCLUSION ..... 12

## TABLE OF AUTHORITIES

Page

CASES

*Calderon-Cardona v. Bank of New York Mellon*, 770 F.3d 993 (2d Cir. 2014) ............................*passim*

*D.C. v. Heller*, 554 U.S. 570 (2008)...............................7

*Doe v. JPMorgan Chase Bank, N.A.*, 899 F.3d 152 (2d Cir. 2018) .....................................................1

*Estate of Heiser v. Islamic Republic of Iran*, 885 F. Supp. 2d 429 (D.D.C. 2012) ..................................5

*Gates v. Syrian Arab Republic*, 11 C 8715, 2014 WL 5784859 (N.D. Ill. Nov. 6, 2014)..........................6

*Hausler v. JP Morgan Chase Bank, N.A.*, 770 F.3d 207 (2d Cir. 2014) ..................................*passim*

*Heiser v. Islamic Republic of Iran*, 735 F.3d 934 (D.C. Cir. 2013) ........................................ 2, 3, 4, 5, 6

*Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Grp.*, 219 F. Supp. 2d 20 (D.D.C. 2002) ................6, 7

*Parker v. D.C.*, 478 F.3d 370 (D.C. Cir. 2007)................7

*Peterson v. Islamic Republic of Iran*, 876 F.3d 63 (2d Cir. 2017) ............................................................1

*Richmond Screw Anchor Co. v. United States*, 275 U.S. 331 (1928) ..................................................7

*Rose v. Hartford Underwriters Ins. Co.*, 203 F.3d 417 (6th Cir. 2000).....................................................9

*Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44 (1996) ....... 3, 6

TABLE OF AUTHORITIES – Continued

Page

*Sonoma Cty. Ass'n of Retired Employees v. Sonoma Cty.*, 708 F.3d 1109 (9th Cir. 2013)............................9

*Vera v. Republic of Cuba*, No. 12 CIV. 1596 (AKH), 2015 WL 13657629 (S.D.N.Y. May 8, 2015).............1

STATUTES AND REGULATIONS

31 C.F.R. § 501.801(b)................................................11

Foreign Sovereign Immunities Act, 28 U.S.C. § 1610.................................................................2, 4, 5

Terrorism Risk Insurance Act, Pub. L. No. 107-297, 116 Stat. 2322 (Nov. 26, 2002), codified as amended at 28 U.S.C. § 1610 note (2012).......*passim*

U.C.C. Art. 4A/N.Y. U.C.C. Art. 4-A..................2, 4, 6, 8

U.C.C. § 4A/N.Y. U.C.C. Law § 4-A...............................3

U.C.C. § 4A-402/N.Y. U.C.C. Law § 4-A-402 ...........8, 12

U.C.C. § 4A-501/N.Y. U.C.C. Law § 4-A-501 ..............12

Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act § 311 (2001), codified at 31 U.S.C. § 5318A .......................................10

OTHER AUTHORITIES

Press Release, U.S. Dept. Treas., Fact Sheet: New Sanctions on Iran (Nov. 21, 2011), https://www.treasury.gov/press-center/press-releases/Pages/tg1367.aspx ..........................................................10

Respondent JPMorgan Chase Bank, N.A. ("JPMorgan") allegedly, but not actually, a neutral party in interpleader to Petitioners Jeremy Levin and Dr. Lucille Levin's (the "Levins") turnover action for partial satisfaction of their terrorism judgment against the Islamic State of Iran ("Iran"), opposes the filing of a supplemental complaint seeking to attach funds in a blocked account held by JPMorgan ("Saderat Account") and originating with Iran's largest national bank and U.S. government-sanctioned entity, Bank Saderat ("Saderat"). JPMorgan claims that because Saderat directed its contractual agent and regular correspondent bank, Lloyds Bank Plc ("Lloyds"), to send Saderat's funds to New York by electronic fund transfer ("EFT"), the funds are property of Lloyds as a matter of law, and Petitioners should not be permitted to file their complaint because supplementation would be "futile." In similar cases, instead of neutrally standing by, JPMorgan urges a position antithetical to terrorism victims.[1]

JPMorgan's opposition rests on mischaracterizations of the law, the record below, and the Levins' petition. It attempts to narrow the reasoning and holding of the opinion below, in which the Second Circuit expanded *Calderon-Cardona*, 770 F.3d 993 and *Hausler*, 770 F.3d 207, and to diminish the practical impact and

[1] *See, e.g.*, *Peterson v. Islamic Republic of Iran*, 876 F.3d 63, 73 (2d Cir. 2017) (petitions for writ of certiorari pending before this Court); *Doe v. JPMorgan Chase Bank, N.A.*, 899 F.3d 152 (2d Cir. 2018); *Hausler v. JP Morgan Chase Bank, N.A.*, 770 F.3d 207 (2d Cir. 2014); *Calderon-Cardona v. Bank of New York Mellon*, 770 F.3d 993 (2d Cir. 2014); *Vera v. Republic of Cuba*, No. 12 CIV. 1596 (AKH), 2015 WL 13657629, at *1 (S.D.N.Y. May 8, 2015).

application of the rule announced in *Heiser v. Islamic Republic of Iran*, 735 F.3d 934, 940-41 (D.C. Cir. 2013), ignoring the genuine conflicts between the Second Circuit and D.C. Circuit's decisions.

The fact is that in D.C., the Levins could collect on the Saderat Asset and in New York they cannot. *Compare id. with* Pet. App. 14-23. This is an important conflict with immense practical effect on thousands of victims of state-sponsored terrorism, and this Court should consider and resolve this question of federal law without further delay. Real victims are suffering while the Second Circuit denies their right to present the evidence that blocked EFTs are property of Iran, and its agents, under the Terrorism Risk Insurance Act ("TRIA").

## ARGUMENT

### I. There is a Split of Authority Between the Second and D.C. Circuits as to the Ownership of Blocked EFTs

JPMorgan asserts: "[t]he Second Circuit and D.C. Circuit have both held the exact same thing: that for a blocked EFT to be subject to execution under TRIA § 201(a) or FSIA § 1610(g), it must be owned by a judgment debtor or an instrumentality thereof, and that the question of ownership is governed by U.C.C. Article 4-A."[2] This is patently false. In its opinion below,

[2] Opp. at 11-12.

*Calderon-Cardona*, and *Hausler*, the Second Circuit held that state law is the rule of decision for interpretation of property ownership under TRIA. Pet. App. at 8-9 (applying N.Y. U.C.C. § 4-A). Further, the Second Circuit held that under the U.C.C., EFTs are property of only the entity transferring the EFT into the frozen account, regardless of the circumstances. *Id.* at 9-11. In contrast, the D.C. Circuit held that federal common law governs the interpretation of property ownership under TRIA. *Heiser*, 735 F.3d at 938-39. The D.C. Circuit states, in contradiction to the Second Circuit, that federal, not state, law places ownership in the originator of an EFT. *Id.* at 941.

To discourage and delay this Court from reviewing the Second Circuit rule, JPMorgan attempts to minimize the conflict with the D.C. Circuit rule because it is against JPMorgan's economic interest to have TRIA properly enforced. It states: "the *Heiser* court's brief discussion of an originator's possible subrogation claim to a blocked EFT was not necessary to the court's holding. It was simply *dicta*, and *dicta* does not create a circuit split."[3] While this is not dicta, Respondent cites no controlling legal authority for its proposition, referring only to a practice guide. Controlling caselaw is to the contrary. *See Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 66-67 (1996) ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound.").

[3] Opp. at 16.

Further, the *Heiser* court's opinion states that "this provision [Article 4A of the U.C.C.] means that claims on an interrupted funds transfer ultimately belong to the originator, not the beneficiary or its bank," is not mere obiter dictum, as JPMorgan claims, but is essential to the holding that Iran had no interest in the blocked EFT under those facts. 735 F.3d at 941. To determine whether Iran possessed an ownership interest in the EFT in *Heiser*, the D.C. Circuit adopted a federal rule of property ownership regarding blocked EFTs and TRIA judgments and applied that rule to find the EFT in question was not property of Iran, based on the fact that Iran and its banks did not originate the EFT. *Id.* It stated: "ownership of the contested accounts should be governed by a federal rule of decision because the Foreign Sovereign Immunities Act, which includes both [TRIA] § 201 and § 1610(g), preempts state law," and applied Article 4A "as a *federal* rule of decision." *Id.* at 937 (emphasis added); *see also id.* at 940-41 ("To be clear, we do not hold that the District's or any state's version of Article 4A applies of its own force. Rather, we hold that Article 4A is a proper federal rule of decision for applying the ownership requirements of § 201 and § 1610(g)."). JPMorgan characterized this: "[T]he Second Circuit and D.C. Circuit . . . *turned to state property law*. . . ."[4] This is misleading, at best – the Second Circuit held that TRIA does not preempt state property law, and the D.C. Circuit expressly held that it does, and that federal law applies. Pet. App. at 8-9; *Heiser*, 735 F.3d at 937. Some overlap in their

[4] Opp. at 13 (emphasis added).

findings does not change the fact that the express language of *Heiser*, *Calderon-Cardona*, and *Hausler* shows that the decisions of the D.C. and Second Circuits are in direct conflict. *See, e.g.*, *Heiser*, 735 F.3d at 937 (TRIA applies over state law);[5] *Hausler*, 770 F.3d at 211-12 ("The district court denied the motion, holding that TRIA preempted state law . . . the District Court is REVERSED. . . .").

Although the D.C. and Second Circuits both concluded, under their facts, that the terrorist entity did not "own" the EFTs for purposes of TRIA, they adopted differing rules of ownership that will lead to divergent outcomes, depending upon in which federal circuit the asset is found. *Heiser* states that under federal law: "claims on an interrupted funds transfer ultimately belong to the originator,"[6] under which the Saderat

---

[5] JPMorgan claims that *Heiser* did not recognize TRIA preemption of state law. Opp. at 14. However, *Heiser* states: "Federal law, specifically [TRIA] § 201 and § 1610(g), is controlling." 735 F.3d at 940.

[6] 735 F.3d at 941. JPMorgan claims that "Nor . . . did the D.C. Circuit conclude that an originator necessarily possesses an ownership interest in a blocked EFT." Opp. at 16. This statement conflicts with the express language of the D.C. Circuit. *Heiser*, 735 F.3d at 941. Respondent further asserts that "the D.C. Circuit never addressed the complexities of the U.C.C.'s subrogation provisions," ignoring the fact that the District of D.C. discussed the subrogation provisions in-depth, which discussion the D.C. Circuit adopted. *See Estate of Heiser v. Islamic Republic of Iran*, 885 F. Supp. 2d 429, 448 (D.D.C. 2012), *aff'd sub nom. Heiser*, 735 F.3d 934 (discussing requirements of and limitations on the subrogation provision as applicable to originators and their banks, stating "the originator and the originator's banks have claims to an interrupted EFT. . . ."); *Heiser*, 735 F.3d at 941 ("*As the district*

Account is property of Iran and subject to attachment by the Levins, while the Second Circuit held that "'the only entity with a property interest in the stopped EFT is the entity that passed the EFT on to the bank where it presently rests,'"[7] under which the Saderat Account is property of Lloyds and not attachable. This critical difference of law mandates inconsistent rulings among federal circuits,[8] and it underscores the conflict that these divergent rules of law from different circuits create as to the identical language of U.C.C. Article 4A and N.Y. U.C.C. Article 4-A.

The D.C. Circuit's discussion of the originator's subrogation claim was not dicta, but essential reasoning which directly supports the court's holding, binding on future panels of the D.C. Circuit and district court. *See Seminole Tribe*, 517 U.S. at 66-67; *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Grp.*, 219 F. Supp. 2d 20,

---

*court explained*, this [subrogation] provision means that claims on an interrupted funds transfer ultimately belong to the originator.") (emphasis added).

[7] *Hausler*, 770 F.3d at 212 (quoting *Calderon-Cardona*, 770 F.3d at 1002).

[8] JPMorgan also attacks the validity of *Gates v. Syrian Arab Republic*, 11 C 8715, 2014 WL 5784859 (N.D. Ill. Nov. 6, 2014) as being "of little relevance to Petitioner's petition, . . . not only because, as a district court decision, it does not create a circuit split . . . [but also because its] holding that the movants had 'waived their right to bring this Rule 60(b) motion by not addressing these issues on their direct appeal.' . . . rendered the rest of the decision *dicta*. . . ." Opp. at 17-18. The Levins do not cite *Gates* to prove a circuit split, but to show that the ownership rules for blocked EFTs are unclear for and applied inconsistently by federal courts across the board, warranting review by this Court.

31-32 (D.D.C. 2002) ("[T]hese conclusions are not dicta, but are central to the D.C. Circuit's reasoning and holding. In order to determine what rights Cummock possessed, the Court reasoned that Cummock must have at least as many rights as the public. . . ."); *Parker v. D.C.*, 478 F.3d 370, 396 n.16 (D.C. Cir. 2007), *aff'd sub nom. D.C. v. Heller*, 554 U.S. 570 (2008) ("[D]ictum refers to reasoning that does not support the holding of a case. We think all of our reasoning . . . directly supports our holding."); *see also Richmond Screw Anchor Co. v. United States*, 275 U.S. 331, 340 (1928) ("It does not make a reason given for a conclusion in a case obiter dictum, because it is only one of two reasons for the same conclusion.").

## II. This Court Has Jurisdiction to Review All Petitioners' Arguments

JPMorgan claims this Court should deny the Levins' petition because "[n]one of those arguments [of TRIA preemption, U.C.C. subrogation, or promoting money laundering by terrorist states], however, were raised and vetted below," therefore, there is "no basis for this Court's review."[9] JPMorgan cites no basis whatsoever for its stated limitation on this Court's authority. But in any event, the Levins raise no issues which were not raised below.

For example, JPMorgan states: "the Second Circuit did not conduct an independent preemption analysis in the decision below. Nor did it have occasion to do so,

[9] Opp. at 24-25.

since Petitioners' focus was not on whether the federal statutes preempt U.C.C. Article 4-A, but on whether Bank Saderat had an ownership interest under Article 4-A in the Saderat Account."[10] However, the Levins raised preemption, including the preemption language of TRIA § 201, arguing: "The District Court's Order Allows Terrorists to Circumvent the Law and Is Contrary to TRIA's Notwithstanding Language." Opening Brief for Plaintiffs-Appellants at 43, *Levin v. JPMorgan Chase Bank, N.A.*, No. 17-3854 (2d Cir. Mar. 7, 2018).

Also incorrect is JPMorgan's assertion that "Petitioners . . . never made that argument [that Article 4-A's subrogation provisions render Saderat the owner of the Saderat Account as originator of the EFT] in the courts below."[11] For example, Petitioners cited U.C.C. section 4-A-402 in their petition for rehearing making that exact argument, stating: "the result of the blocking of the Bank Saderat Iranian Asset by [OFAC], is that eventually the money in dollars will be returned by JPMorgan Chase to Lloyds. . . . UCC § 4-A-402. Lloyds does not own that money. . . . Bank Saderat owns the money. Therefore, it will be returned to Bank Saderat. . . ." Plaintiffs-Appellants' Petition for Panel Rehearing or Rehearing *En Banc* at 17 n.1, *Levin v. JPMorgan Chase Bank, N.A.*, No. 17-3854 (2d Cir. Oct. 23, 2018). Furthermore, Petitioners did assert below the legal position that the Second Circuit was misinterpreting the U.C.C. *Id.* at 22-25.

---

[10] *Id.* at 24.

[11] *Id.* at 25.

JPMorgan's assertion that "[w]hether Bank Saderat had subrogation rights, moreover, involves a fact-intensive inquiry that had to have been fleshed out in discovery before the district court could have ruled on the issue," is grounds for this Court granting the petition. The Second Circuit held that no facts about actual ownership could support leave to supplement the complaint to add the asset because Lloyds made the transfer. Pet. App. 10-11. This new law is contrary to the law of other circuits. *See Rose v. Hartford Underwriters Ins. Co.*, 203 F.3d 417, 421 (6th Cir. 2000) ("[A] proposed amendment is futile only if it could not withstand a Rule 12(b)(6) motion to dismiss."); *Sonoma Cty. Ass'n of Retired Employees v. Sonoma Cty.*, 708 F.3d 1109, 1118 (9th Cir. 2013). The Levins do not ask this Court to act as factfinder, but to review and reverse the erroneous Second Circuit opinions, clarifying that federal law governs TRIA ownership and that it is not dispositive as a matter of law that the bank transferring an EFT to a New York bank is not a terrorist entity or literal division thereof, where the terrorist entity is the originator of those funds and it alleged the transferring entity is an agency under TRIA.

Finally, JPMorgan claims "Petitioners never made or sought to prove that argument [that the Second Circuit's decisions facilitate money laundering by terrorists] below . . . [and f]or that reason alone, the argument is no basis for this Court's review."[12] Elsewhere in its opposition, JPMorgan acknowledges that the

---

[12] Opp. at 25.

Levins raised their money laundering argument before: "Petitioners' opening brief on appeal . . . referred to money laundering. . . . Petitioner's reply brief did not refer to it at all."[13] This is partially true – Petitioners raised the issue of money laundering in their opening brief and petition for rehearing, and also in their reply brief: "Neither *Calderon-Cardona* nor *Hausler* hold that 'correspondent' banks, acting as agents for terrorist states, can create safe harbors for money laundering." Plaintiffs' Reply in Support of Motion for Leave to File Supplemental Complaint at 3, *Levin v. Bank of New York*, No. 09 CV 5900 (S.D.N.Y. July 12, 2017). This again is not a novel argument. It is also self-evident that a rule which undermines the application of TRIA by excluding EFTs from collection is contrary to one of the purposes of the Iran sanctions and U.S. anti-terrorism laws, namely to deter money laundering. Press Release, U.S. Dept. Treas., Fact Sheet: New Sanctions on Iran (Nov. 21, 2011), https://www.treasury.gov/press-center/press-releases/Pages/tg1367.aspx (Iran is a "jurisdiction of 'primary money laundering concern' under section 311 of the USA PATRIOT Act.").

JPMorgan's claim that decisions allowing subrogation of blocked assets to terrorist entities "will not facilitate money laundering by terrorist states or other terrorist organizations,"[14] defies common sense. To remove the consequences of law is to facilitate the crime – any claim that removing the deterrent to terrorist

[13] Opp. at 10 n.2.

[14] Opp. at 25.

money laundering will not alter the cost-benefit analysis with regard to that crime, resulting in an increase in money laundering, is akin to arguing that criminal penalties have no effect and should be abolished. JPMorgan also claims that blocked funds "cannot be returned to the terrorist entity unless OFAC issues a license allowing them to be."[15] It cites nothing in support of this proposition. The logic here is that if the money belongs to Lloyds, OFAC should allow JPMorgan to return it to Lloyds. *See* 31 C.F.R. § 501.801(b). Once returned, there is nothing preventing Lloyds from placing those dollars into Saderat's London account, pursuant to contract. Pet. at 9-10, 33-35.

### III. EFT Ownership Is A Recurring Legal Issue That Should Be Clarified by This Court

JPMorgan asserts that review is not warranted because "Petitioners effectively seek this Court's review of *Calderon-Cardona* and *Hausler* more than of the decision below. But this Court denied the petitions for writs of certiorari in *Calderon-Cardona* and *Hausler*, and no developments since then warrant a revising of the Court's decisions. . . ."[16] This is not true. In its opinion below, the Second Circuit expanded *Calderon-Cardona* and *Hausler* by holding that, as a matter of law, EFTs which are not directly transferred by terrorist entities are immune to attachment by victims of terrorism in satisfaction of TRIA judgments, even where

[15] Opp. at 26.

[16] Opp. at 21.

the parties have alleged contractual variation of the default ownership rules under U.C.C. section 4A-501, and where the section 4A-402 subrogation provision will lead to refund of the asset to the terrorist party. That the issue of EFT ownership continues to arise years after *Calderon-Cardona* and *Hausler* were published indicates that the law requires clarification from this Court. The effect of clarification from this Court as to this important question of law would be that victims and banking institutions would no longer have to litigate this issue in the courts of appeals.

## CONCLUSION

The petition should be granted.

Respectfully submitted,

SUZELLE M. SMITH
*Counsel of Record*
DON HOWARTH
HOWARTH & SMITH
523 West Sixth Street, Suite 728
Los Angeles, California 90014
Telephone: (213) 955-9400
Facsimile: (213) 622-0791
E-Mail: ssmith@howarth-smith.com

*Counsel for Petitioners*
*Jeremy Levin and Dr. Lucille Levin*