No. 23-568

IN THE

Supreme Court of the United States

ROBERT BARTLETT, *et al.*,
Petitioners,

v.

DR. MUHAMMAD BAASIRI AND JAMMAL TRUST BANK SAL,
Respondents.

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

BRIEF OF INVESTOR CHOICE ADVOCATES NETWORK AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Investor Choice Advocates Network ("ICAN") is a nonprofit, public interest organization that advocates for expanding access to markets for underrepresented investors and entrepreneurs who do not share the same power and influence as those with more assets and resources. ICAN has no parent corporation, and no publicly held company has a 10% or greater ownership in ICAN.

SUMMARY OF ARGUMENT

In *Bartlett v. Baasiri*, 81 F.4th 28 (2d Cir. 2023), the Second Circuit held that immunity under the Foreign Sovereign Immunities Act (the "FSIA")[2] may attach when a defendant becomes an instrumentality of a foreign sovereign after a suit is filed. The Second Circuit's holding undermines the uniformity, clarity, and ease of application established by the time-of-filing rule created in *Dole Food Co. v. Patrickson,* 538 U.S. 468 (2003), while simultaneously promoting gamesmanship, waste, and post-filing manipulation by litigants. The Second Circuit's rule also is inconsistent with Congress's intent when passing the FSIA. Accordingly, the Court should grant the Petition for a Writ of Certiorari ("Petition"), reverse the Second Circuit's decision, and

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[1] No counsel for a party authored this brief in whole or in part, nor has such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus or its counsel made a monetary contribution to this brief's preparation or submission. Both parties were given advance notice of this submission.

[2] Pub. L. No. 94-583, 90 Stat. 2891 (codified at 28 U.S.C. §§ 1330, 1391(f), 1441(d), 1602-11).

reaffirm that the time-of-filing rule set forth in *Dole* applies even to post-filing nationalization.

Time-of-filing rules exist because facts supporting jurisdiction are subject to change, and therefore such rules provide stability and certainty. Time-of-filing rules have been adopted in connection with a wide array of jurisdictional issues, including determining the existence of diversity jurisdiction and personal jurisdiction, precisely because they are uniform and easy to apply. In fact, this Court adopted a time-of-filing rule in *Dole* because it explicitly recognized that the FSIA's foreign instrumentality inquiry was jurisdictional (or at least analogous to a jurisdictional doctrine). Thus, the same judicial policies that support time-of-filing rules in other jurisdictional contexts also support applying the rule in *Dole* to cases that involve post-filing nationalization.

Abandoning *Dole*'s time-of-filing rule, as the Second Circuit did, would encourage gamesmanship by foreign business entities and sovereigns. The Second Circuit's rule would allow foreign businesses throughout the world to opt out of litigation in U.S. Courts through post-filing manipulation. This flexibility would, in turn, incentivize foreign governments to consider pending litigation when evaluating privatization and nationalization decisions. As a result, American businesses who deal with foreign entities would face uncertainty. The Second Circuit's decision also may discourage economically rational privatization decisions by foreign entities.

Although the FSIA contains exceptions, for example in connection with commercial activity carried out in the United States, these exceptions are narrow and far

from guaranteed. The Court should not view these exceptions as a safety valve for the Second Circuit's ruling.

A time-of-filing rule is consistent with Congress's intent when passing the FSIA, as indicated by the statute's legislative history. Congress's concerns when passing the FSIA were: (1) protecting the expectations of American citizens doing business with foreign entities; and (2) creating predictability by taking away the foreign instrumentality determination from the executive branch and foreign sovereigns. A time-of-filing rule better serves both of these concerns than the Second Circuit's rule.

First, Congress and President Ford were aware that U.S. persons were increasingly coming into contact with foreign entities. This level of international economic integration has only increased, and has reached even small American businesses. A time-of-filing rule ensures that Americans may continue to engage in international business transactions while knowing that they can rely on the American legal system.

Second, the FSIA's legislative history reflects that one of the statute's principal purposes was making sure that foreign instrumentality status was determined only on legal—not political—grounds. Under the pre-FSIA regime, foreign sovereigns and the U.S. State Department essentially controlled whether Americans could seek redress in U.S. courts. By passing the FSIA, Congress aimed to reduce the power foreign sovereigns wielded over U.S. legal proceedings. The Second Circuit's decision effectively reinstates the old, politically-centered regime. Americans and American enterprises stand to lose in a game where the ability to sway the decision-making of foreign sovereigns matters more than persuading an American judge or jury. American small businesses

stand to lose the most because they have less ability to influence foreign governments' decision-making.

ARGUMENT

I. APPLYING THE *DOLE* RULE TO POST-FILING NATIONALIZATION CASES PROMOTES UNIFORMITY, CLARITY, AND EASE OF APPLICATION, WHILE DISREGARDING THE *DOLE* RULE IN SUCH CASES INVITES GAMESMANSHIP, WASTE, AND POST-FILING MANIPULATION.

A. The Time-of-Filing Rule Set Forth in *Dole* Promotes Uniformity, Clarity, and Ease of Application.

In *Dole Food Co. v. Patrickson*, this Court held that "instrumentality status [under the FSIA] is determined at the time of the filing of the complaint." 538 U.S. 468, 480 (2003). This rule "is consistent with the 'longstanding principle that the jurisdiction of the Court depends upon the state of things at the time of the action brought.'" *Id.* at 478 (quoting *Keene Corp. v. United States*, 508 U.S. 200, 207 (1993)); *see also Mollan v. Torrance*, 9 Wheat. 537, 539, 6 L. Ed. 154 (1824). The rule in *Dole* is animated by the same judicial policies that support time-of-filing rules for other jurisdictional doctrines—uniformity, clarity, and ease of application. Maintaining a time-of-filing rule for post-filing nationalizations reinforces these foundational judicial policies.

Time-of-filing rules exist "precisely because the facts determining jurisdiction are subject to change, and because constant litigation in response to that change would be wasteful." *Grupo Dataflux v. Atlas Glob. Grp., L.P.*, 541 U.S. 567, 580 (2004). As a matter of judicial policy, time-of-filing rules are preferred to "later-in-

time" rules because they "provide[] maximum stability and certainty to the viability of the action and minimize[] repeated challenges to the court's [jurisdiction] and the expenditure of resources that entails." 13E Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 3608 (3d ed.). Such rules also "offer[] a uniform test that is relatively easy to apply," whereas "[o]ther tests present potential problems of abuse or difficulties of interpretation and application." *Id.*; *see also Saadeh v. Farouki*, 107 F.3d 52, 57 (D.C. Cir. 1997).

Given these advantages, time-of-filing rules have been adopted in connection with other jurisdictional doctrines, including determining the existence of diversity jurisdiction, *Iowa Tribe of Kansas and Nebraska v. Salazar*, 607 F.3d 1225, 1233 (10th Cir. 2010) ("The time-of-filing rule is a judge-made doctrine, supported in the diversity context by sound policy considerations."), and personal jurisdiction, *Allen v. Russian Fed'n*, 522 F. Supp. 2d 167, 194 (D.D.C. 2007) ("[P]ersonal jurisdiction contacts are determined at the time the initial complaint is filed, and that does not change even when an amended complaint is filed."). *Accord Bauman v. DaimlerChrysler Corp.*, 644 F.3d 909, 913 n.7 (9th Cir. 2011) ("[G]eneral jurisdiction is determined at the time the suit was filed"*), rev'd on other grounds*, *Daimler AG v. Bauman*, 571 U.S. 117 (2014). Indeed, the judicial policy considerations animating time-of-filing rules are reflected in Federal Rule of Civil Procedure 3, which specifies that the filing of a complaint "commence[s]" the lawsuit.

In *Dole*, this Court adopted a time-of-filing rule because it determined that the FSIA's foreign instrumentality inquiry was jurisdictional—or at least analogous to a determination of jurisdiction. *Dole Food Co.*, 538 U.S. at 478. Hence, the same judicial

policies that animate time-of-filing rules in other jurisdictional contexts also militate in favor of a time-of-filing rule in the FSIA context, including in cases involving post-filing nationalization. Granting the Petition and clearly applying *Dole* to post-filing nationalizations would provide certainty, clarity, and ease of application for Americans who find themselves litigating against foreign entities with whom they did business—or against whom a foreign entity committed a tort.

B. Disregard of the *Dole* Rule Invites Gamesmanship, Waste, and Post-Filing Manipulation That Will Discourage Americans From Engaging in Otherwise Rational Business Transactions.

Conversely, abandoning *Dole's* time-of-filing rule would encourage gamesmanship by foreign businesses and sovereigns. U.S. persons would be at the mercy of foreign enterprises and sovereigns, who will no doubt quickly realize that, should the Second Circuit's post-filing rule apply, foreign companies can opt out of U.S. legal proceedings unilaterally at any time during a lawsuit through gamesmanship and manipulation. This prospect, in turn, would squander legal resources and have a chilling effect on commerce by: (1) incentivizing foreign governments to consider pending American litigation when deciding on privatization or other transactions affecting the status of an entity as a "foreign state" or "instrumentality," 28 U.S.C. § 1603(a)–(b); and (2) subjecting American businesses who deal with foreign entities to the uncertainty created by foreign governments' manipulations. The gamesmanship and waste that inevitably would result from these outcomes could be easily avoided by enforcing *Dole*'s time-of-filing rule. *See Grupo Dataflux*, 541 U.S at 580; *see also*

Scott Dodson & Philip A. Pucillo, *Joint and Several Jurisdiction*, 65 Duke L.J. 1323, 1348 (2016) ("The time-of-filing rule protects against gamesmanship . . . and waste . . . while promoting uniformity, clarity, and ease of application.").

Courts have repeatedly recognized that post-filing rules in FSIA cases encourage "maneuvering by foreign sovereigns," particularly in the context of the FSIA's commercial use exception. *TIG Ins. Co. v. Republic of Argentina*, 967 F.3d 778, 785 (D.C. Cir. 2020). In *TIG*, the D.C. Circuit held that determining whether a property is "used for a commercial activity" under the FSIA should be evaluated at the time of filing. *Id.* at 782–85. The alternative would leave "room for manipulation" by "allow[ing] parties to avoid execution by freezing assets or otherwise ceasing commercial use." *Id.* (quoting *Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, 932 F.3d 126, 150 (3d Cir. 2019)); *see also Af-Cap Inc. v. Republic of Congo*, 383 F.3d 361, 369 n.8 (5th Cir. 2004) ("[I]t would be appropriate for a court to consider whether the use of the property in question was being manipulated by a sovereign nation to avoid being subject to garnishment under the FSIA.").

The same concerns apply to manipulation of an entity's status as an instrumentality of a foreign state. History shows that, if given the opportunity, foreign regimes will manipulate the nationalization process to obtain political or jurisdictional leverage. *See Shoham v. Islamic Republic of Iran*, No. 12-cv-508 (RCL), 2017 WL 2399454, at *8 (D.D.C. June 1, 2017) ("In 2009, Iran announced a program to privatize Bank Saderat, but that process has been a sham because the bank is still controlled by the government."); *see also* U.S. Dep't of State, 2021 Investment Climate Statements: Russia (2021), https://www.state.gov/reports/2021-investment-

climate-statements/russia/ (providing recent examples of the Russian government engaging in "questionable" nationalizations and sham privatizations).

The Second Circuit's decision may discourage even economically rational privatization decisions by foreign entities. A sovereign may decide to forego privatization for the duration of litigation in American courts to avoid losing sovereign immunity. *Cf. Freeport-McMoRan, Inc. v. K N Energy, Inc.*, 498 U.S. 426, 428 (1991) (explaining, in the context of diversity jurisdiction, that a later-in-time rule "could well have the effect of deterring normal business transactions during the pendency of what might be lengthy litigation").

Although the FSIA contains exceptions, including for actions that are "based upon a commercial activity carried on in the United States by the foreign state," 28 U.S.C. § 1605(a)(2), these "exceptions are few and 'narrowly drawn.'" *Rubin v. Islamic Republic of Iran*, 830 F.3d 470, 480 (7th Cir. 2016) (citation omitted). They also involve a complex and fact-intensive burden shifting inquiry. For example, in *Wye Oak Technology, Inc. v. Republic of Iraq*, an American defense contractor entered into a broker services agreement with the Iraqi Ministry of Defense. 24 F.4th 686, 692 (D.C. Cir. 2022). When Iraq failed to pay the contractor's invoices, the contractor filed suit in a federal district court. *Id.* at 692–93. After a bench trial, the district court held that it had subject matter jurisdiction under the FSIA's commercial activity exception because a substantial amount of work in connection with the broker services agreement occurred in the United States. *Id.* at 694–95. But the D.C. Circuit reversed, holding that the district court could not base its finding on actions taken *by the plaintiff-contractor* to satisfy the contract. *Id.* at 702. Instead, the D.C.

Circuit remanded for a determination of whether *Iraq itself* performed any acts in the United States and completely disregarded the "various acts" that the contractor had undertaken, "including its alleged creation of computer programming software, contacts with agents of foreign nations, and provision of accounting services." *Id.* at 694. The *Wye Oak* case demonstrates that the Second Circuit's decision in *Bartlett* poses great risks, despite the commercial activity exception.

Foreign governments should not be permitted to engage in manipulation to protect the interests of their companies in U.S. litigation. As this Court previously explained in the context of the FSIA's retroactive application, "the principal purpose of foreign sovereign immunity has never been to permit foreign states and their instrumentalities *to shape their conduct in reliance on the promise of future immunity from suit in United States courts*." *Republic of Austria v. Altmann*, 541 U.S. 677, 696 (2004) (emphasis added). And while "current political realities and relationships" obviously are relevant to the FSIA, *id*., so too are the FSIA's "principal purposes: clarifying the rules that judges should apply in resolving sovereign immunity claims and eliminating political participation in the resolution of such claims," *id.* at 699. Indefinitely extending the timeline for sovereign-status determination undermines both of these purposes by incentivizing manipulation, political gamesmanship, and waste of judicial resources. Accordingly, the Court should grant the Petition, reverse the Second Circuit's decision, and apply *Dole*'s time-of-filing rule to post-filing nationalizations.

II. THE *DOLE* TIME-OF-FILING RULE FURTHERS CONGRESS'S INTENT IN PASSING THE FSIA.

Congress's concerns when passing the FSIA reflect the judicial policy behind time-of-filing rules. Two of Congress's principal aims with the FSIA were to: (1) protect the expectations of American citizens increasingly doing business with foreign entities; and (2) create predictability by removing the foreign instrumentality determination from the ambit of the executive branch and foreign sovereigns. Both of these apprehensions would be best-addressed by granting the Petition and preserving *Dole*'s time-of-filing rule, including for post-filing nationalizations.

A. The Time-of-Filing Rule Protects The Expectations of U.S. Persons That Engage With Foreign Entities, Particularly Those Who Operate Small Businesses.

When passing the FSIA, Congress determined that legislation was necessary to ensure that Americans "will have access to the courts in order to resolve ordinary legal disputes." H.R. Rep. No. 94-1487, at 6 (1976), *reprinted in* 1976 U.S.C.C.A.N, 6604, 6605. Upon signing the FSIA into law, President Ford recognized that the FSIA's principal purpose was to inform American citizens "when the courts are available to redress legal grievances," given that "private citizens increasingly come into contact with foreign government activities." Statement by President Gerald R. Ford on Signing H.R. 11315 into Law (October 22, 1976).

Congress and President Ford were acutely aware that U.S. persons were increasingly coming into contact with foreign entities. This contact has only multiplied in the intervening years. Both imports and exports have

increased dramatically over the last forty years, with exports growing from $275 billion to $2,089 trillion and imports growing from $299 billion to $3,969 trillion. *U.S. International Trade in Goods and Services, October 2023*, Bureau of Econ. Analysis, U.S. Dep't of Commerce (Dec. 6, 2023), https://www.bea.gov/data/intl-trade-investment/international-trade-goods-and-services. Over the same period, the level of U.S. direct investment abroad skyrocketed from $207 billion to $6.58 trillion on a historical-cost basis. *Direct Investment by Country and Industry, 2022*, Bureau of Econ. Analysis, U.S. Dep't of Commerce (Aug. 18, 2023), https://www.bea.gov/data/intl-trade-investment/direct-investment-country-and-industry.

Small businesses are "on the front lines of this new wave of globalization." Lael Brainard, *U.S. Trade Policy and Small Business*, Brookings Inst. (June 13, 2007), https://www.brookings.edu/articles/u-s-trade-policy-and-small-business/. In "the high tech, high speed, highly global economy of today," entrepreneurs identify international opportunities early in their growth cycle. *Id.*

U.S. small businesses make up 97% of American companies engaged in export. John G. Murphy, *We Can't Stand Still: How America's Small Businesses Benefit from Trade*, U.S. Chamber of Commerce (October 21, 2022), https://www.uschamber.com/international/we-cant-stand-still-how-americas-small-businesses-benefit-from-trade. And the U.S. government has further encouraged U.S. small businesses to globalize. The 2023 National Export Strategy specifically provides resources for small businesses owned by minority and underserved populations to engage on a global level. *See* Trade Promotion Coordinating Comm., *2023 National Export Strategy*, Int'l Trade Admin 18, U.S. Dep't of Commerce (2023), https://www.trade.gov/sites/default/files/2023-06/National-Export-Strategy-2023.pdf.

The time-of-filing rule ensures that U.S. persons—including small businesses—can continue to engage in international transactions and with multinational enterprises, while knowing they can rely on the protections of the American legal system. A contrary rule would upset the expectations of the 1.3 million small businesses engaged in export and thereby result in adverse effects and externalities on billions of dollars of international trade and foreign investments. U.S. Small Bus. Admin., Press Release 23-13, *SBA Research Sheds New Light on Small Business Exporters* (March 14, 2023), https://www.sba.gov/article/2023/mar/14/sba-research-sheds-new-light-small-business-exporters#. By contrast, this Court has held that foreign states do not have reliance and due process interests under the FSIA. *Altmann*, 541 U.S. at 696. Thus, the time-of-filing rule is necessary to protect American businesses engaged in global transactions, but would not upset any expectations or justifiable reliance interests of foreign governments.

B. The Time-of-Filing Rule Ensures Immunity Decisions Under The FSIA Are Legal, Not Political, Determinations.

The time-of-filing rule also furthers Congress's objective to ensure that FSIA immunity decisions are based on legal considerations, and not subject to "the potential sensitivity of actions against foreign states." H.R. Rep. 94-1487, at 13, 32, *reprinted in* 1976 U.S.C.C.A.N at 6611, 6631.

"A principal purpose" of the FSIA is "assuring litigants" that decisions concerning foreign instrumentality status "are made on purely legal grounds and under procedures that insure due process." H.R. Rep. No. 94-1487 at 7, *reprinted in* 1976 U.S.C.C.A.N at 6606. The Congressional Record also noted that

"under current U.S. practice, the foregoing principles are not consistently applied. When a foreign state wishes to assert Immunity, it will often ask the State Department to decide the issue. And it may bring diplomatic influences to bear, thereby converting an ordinary lawsuit into a diplomatic irritant." 112 Cong. Rec. H11583 (daily ed. Sept. 29, 1976) (statement of Representative George E. Danielson). The Committee on the Judiciary observed that under the then-existing Tate Letter regime, foreign sovereigns and the U.S. State Department—often weighing political considerations—effectively controlled whether U.S. persons could seek redress in U.S. courts. "From a foreign relations standpoint, the initiative is left to the foreign state. The foreign state chooses which sovereign immunity determinations it will leave to the courts, and which it will take to the State Department. The foreign state also decides when it will attempt to exert diplomatic influences, thereby making it more difficult for the State Department to apply the Tate letter criteria." H.R. Rep. No. 94-1487 at 8, *reprinted in* 1976 U.S.C.C.A.N at 6607.

By passing the FSIA, Congress aimed to reduce the power foreign sovereigns wielded over U.S. legal proceedings. The Second Circuit's decision turns back the clock. A "*Bartlett* rule" would mean—as the Tate Letter process did—that "[a] private party who deals with a foreign government entity cannot be certain that his legal dispute with a foreign state will not be decided on the basis of nonlegal considerations. . . ." H.R. Rep. No. 94-1487 at 9, *reprinted in* 1976 U.S.C.C.A.N at 6607. Political, not legal, considerations would once again be paramount.

Congress intended the FSIA to create a level playing field. But should the Second Circuit's decision stand,

the game would be rigged in favor of foreign private enterprises. The "*Bartlett* rule" playbook would be both predictable and troubling. Litigate as long as possible; and, if faced with adverse rulings or problematic facts, persuade the foreign government to nationalize the defendant-company in order to obtain dismissal. The nationalization need not last longer than it takes to obtain dismissal and need not be a significant change in corporate structure:

> What has been privatized can be renationalized. Suppose that confronted with an unexpected demand for a jury trial a privatized defendant owned 49 percent by the government asks the government to repurchase 2 percent of the shares from the private stockholders; conversely, suppose that a defendant 51 percent owned by its government decides when it is sued that it would prefer a jury trial and so it asks its government to sell 2 percent of the shares from the government's holding, which the government could then repurchase after the suit was over.

Olympia Express, *Inc. v. Linee Aeree Italiane, S.P.A.*, 509 F.3d 347, 351 (7th Cir. 2007).

The Second Circuit's holding encourages gamesmanship by foreign private enterprises and foreign sovereigns. Americans and American enterprises stand to lose in a game where the ability to sway the decision-making of foreign sovereigns matters more than persuading an American judge or jury. The problem will be most acute for small businesses, which make up 97% of the American companies engaged in exports, but which typically have less access to levers of power and influence, particularly in foreign countries.

CONCLUSION

Dole's time-of-filing rule creates predictability and uniformity, preserves the settled expectations of those engaging with foreign entities, and ensures that immunity decisions will be made on the basis of tried legal principles, not the whims of foreign governments. The Second Circuit's decision upsets all of the important interests protected by *Dole*'s time-of-filing rule. Accordingly, the Court should grant the Petition, reverse the Second Circuit's decision, and apply *Dole*'s time-of-filing rule to post-filing nationalizations.

Respectfully submitted,

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