No. 23-568

IN THE
Supreme Court of the United States

ROBERT BARTLETT, ET AL.,
Petitioners,

v.

MUHAMMAD BAASIRI, ET AL.,
Respondents.

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

BRIEF FOR PROFESSOR WILLIAM S. DODGE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

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INTRODUCTION AND SUMMARY OF ARGUMENT

The court of appeals held below that the Foreign Sovereign Immunities Act of 1976 (FSIA), Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended in scattered sections of 28 U.S.C.), affords immunity to an entity that becomes a foreign-state instrumentality in the middle of litigation. As petitioners explain (Pet. 13-14), that holding is irreconcilable with decisions of the D.C. and Seventh Circuits. See *TIG Ins. Co.* v. *Republic of Argentina*, 967 F.3d 778, 782-785 (D.C. Cir. 2020); *Olympia Express, Inc.* v. *Linee Aeree It., S.p.A.*, 509 F.3d 347, 349-350 (7th Cir. 2007). It is also in significant tension with this Court's decision in *Dole Food Co.* v. *Patrickson*, 538 U.S. 468 (2003), which

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[1] Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus* and his counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for the parties received timely notice of the intent to file this brief pursuant to this Court's Rule 37.2.

held that instrumentality status is determined as of the time suit is filed, rather than the time of the relevant conduct. *Id.* at 478-480; see Pet. 11-19. And *amicus* agrees with petitioners (Pet. 24-29) that the question presented is important—not least because the decision below offers a roadmap to foreign states who wish to shield important entities from troublesome litigation in U.S. courts.

Amicus writes to emphasize the legal error of the court of appeals' holding. The court relied on the FSIA's structure, purpose, and history, but it erred in its analysis of each. The court also relied on an *amicus* brief filed by the United States, but the government's arguments lack merit as well.

First, the FSIA's structure strongly supports petitioners. As this Court recognized in *Dole Food Co.*, the FSIA ties immunity to the federal courts' jurisdiction, thus implicating general background principles of subject-matter jurisdiction. One such principle is dispositive here: that when a federal court's jurisdiction depends on the parties' character, it is generally determined by the state of things at the time of filing. See, *e.g.*, *Grupo Dataflux* v. *Atlas Glob. Grp.*, 541 U.S. 567, 570 (2004); *Conolly* v. *Taylor*, 27 U.S. (2 Pet.) 556, 565 (1829) (Marshall, C.J.). For instance, it is settled law that the existence of diversity jurisdiction over a suit is determined by the citizenship of the parties at the time of filing. Not only does the FSIA lack a clear statement departing from these fundamental principles, its text explicitly links foreign sovereign immunity with diversity-jurisdiction principles. Just as a mid-suit change in a party's citizenship does not divest a federal court of jurisdiction, neither does a change in a defendant's foreign-state instrumentality status.

Second, the FSIA's purpose likewise supports petitioners. The FSIA was enacted to bring clarity and predictability to this area of the law, but the rule adopted below would create instability. The FSIA was also intended to make immunity decisions less intertwined with foreign diplomatic relations, but the rule adopted below threatens that purpose, too. Considerations of comity are not helpful here because the United States is already an outlier in its approach to instrumentality immunity. And most notably, the court of appeals' holding creates an enormous opportunity for gamesmanship. Foreign states have taken efforts in the past to manipulate the status of their officials and property in an effort to achieve immunity under U.S. law amid ongoing litigation, so there is little reason to think that they will not try to exploit the opportunity for maneuvering that the court of appeals' interpretation of the FSIA would permit.

Third, the court of appeals' invocation of pre-FSIA history was misplaced. The sole opinion of this Court on which the court of appeals relied did not speak at all to the question presented. And the court of appeals identified no relevant practice or precedent in the 50 years preceding the FSIA's enactment; given the rapid change in the common law of foreign sovereign immunity during this era, the absence of such authority belies the notion that the rule below is well established.

In addition to the United States' arguments adopted by the court of appeals, the government raised several additional related arguments that were not adopted below. Those arguments are similarly unpersuasive and do not support the judgment below.

This Court should grant review.

ARGUMENT

This question presented is one of statutory interpretation. The relevant provision of the FSIA defines an "'agency or instrumentality of a foreign state'" to be an entity "which *is* a separate legal person," 28 U.S.C. § 1603(b)(1) (emphasis added); "which *is* an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest *is* owned by a foreign state or political subdivision thereof," *id.* § 1603(b)(2) (emphasis added); and "which *is* neither a citizen of a State of the United States . . . nor created under the laws of any third country," *id.* § 1603(b)(3) (emphasis added). As the court of appeals correctly recognized, the question is whether the present-tense verb "is" refers fixedly to the time of filing—*i.e.*, the initial moment at which the court's subject-matter jurisdiction is invoked—or mandates an ongoing inquiry into a defendant's instrumentality status. See Pet. App. 27a-28a.

Influenced by an *amicus* brief filed by the United States, the court of appeals concluded that "the present tense reflects the FSIA's concern with 'current political realities and relationships' and its aim that 'foreign states and their instrumentalities' be given 'some *present* protection from the inconvenience of suit as a gesture of comity.'" Pet. App. 28a (quoting C.A. Doc. 133, at 11 (June 20, 2023) (U.S. C.A. Br.)). The court believed that its conclusion was dictated by the FSIA's "structure, purpose, and history." *Id.* at 31a. But the court erred in its analysis of each. Nor do any of the United States' arguments support the judgment below.

I. THE COURT OF APPEALS ERRED IN ITS ANALYSIS OF THE FSIA'S STRUCTURE, PURPOSE, AND HISTORY.

A. The Decision Below Is Not Supported by the FSIA's Structure.

The court of appeals' analysis of the FSIA's structure went as follows. First, the court observed that when the FSIA affords immunity, that immunity is "not only from judgments," but also "from the 'expense, intrusiveness, and hassle of litigation altogether.'" Pet. App. 28a (quoting *Beierwaltes* v. *L'Office Federale de la Culture de la Confederation Suisse*, 999 F.3d 808, 817 (2d Cir. 2021)). The court next remarked that it "s[aw] no reason why that protection should apply only if the defendant had sovereign status from the beginning of the suit." *Ibid.* The court then asserted that "[t]he fact that a defendant acquired instrumentality status after the suit began will not ordinarily justify subjecting a foreign sovereign to the 'inconvenience of suit.'" *Ibid.* (quoting *Republic of Austria* v. *Altmann*, 541 U.S. 677, 696 (2004)).

It is difficult to see how the FSIA's structure plays any role in this analysis, which appears to rely solely on the Act's purpose and to assume the answer to the question presented. A correct structural analysis supports petitioners' view of the statute.

1. The key structural component of the FSIA is its tying of substantive immunity to subject-matter jurisdiction. As this Court explained just last Term, 28 U.S.C. § 1604—the FSIA's operative provision granting immunity to foreign states—and § 1330(a)—the provision of the FSIA granting district courts original jurisdiction over actions against foreign states—"work in tandem."

Türkiye Halk Bankasi A.S. v. *United States*, 598 U.S. 264, 276 (2023) (*Halkbank*) (quoting *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989)); see also *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 493-494 (1983). The Act's enacted statement of purpose refers to "immunity from the *jurisdiction*" of our country's courts, 28 U.S.C. § 1602 (emphasis added), as does the Act's operative provision, *id.* § 1604 (subject to exceptions, "a foreign state shall be immune from the *jurisdiction* of the courts of the United States and of the States" (emphasis added)). The FSIA's structure thus supports the application of general principles of subject-matter jurisdiction in interpreting the Act's immunity provisions.

The relevant principle here is a well-settled one: "[i]t has long been the case that 'the jurisdiction of the court depends upon the state of things at the time of the action brought.'" *Grupo Dataflux* v. *Atlas Glob. Grp.*, 541 U.S. 567, 570 (2004) (quoting *Mollan* v. *Torrance*, 22 U.S. (9 Wheat.) 537, 539 (1824) (Marshall, C.J.)). And though that principle has most often been applied in determining a federal court's diversity jurisdiction, this Court has expressed the rule more generally, stating that "jurisdiction *depending on the condition of the party* is governed by that condition, as it was at the commencement of the suit." *Conolly* v. *Taylor*, 27 U.S. (2 Pet.) 556, 565 (1829) (Marshall, C.J.) (emphasis added); see, *e.g.*, *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Found.*, 484 U.S. 49, 69 (1987) (Scalia, J., concurring in part and concurring in the judgment) ("Subject-matter jurisdiction 'depends on the state of things at the time of the action brought'; if it existed when the suit was brought, 'subsequent events' cannot 'ous[t]' the court of jurisdiction." (alteration in

original) (quoting *Mollan*, 22 U.S. (9 Wheat.) at 539)); *Anderson* v. *Watts*, 138 U.S. 694, 702-703 (1891) ("[T]he inquiry is determined by the condition of the parties at the commencement of the suit."). In other words, in a jurisdictional provision—and thus in Section 1603(b) as well—"use of the present tense ordinarily refers to the time the suit is filed, not the time the court rules." *TIG Ins. Co.* v. *Republic of Argentina*, 967 F.3d 778, 783 (D.C. Cir. 2020); see *Keene Corp.* v. *United States*, 508 U.S. 200, 207 (1993).

These principles formed "the background against which Congress legislated" when it enacted the FSIA and chose to tie immunity to subject-matter jurisdiction. Thus, the time-of-filing rule is "the default rule[] [Congress] is presumed to have incorporated, absent an indication to the contrary in the statute itself." *University of Tex. Sw. Med. Ctr.* v. *Nassar*, 570 U.S. 338, 347 (2013); see also, *e.g.*, *Community for Creative Non-Violence* v. *Reid*, 490 U.S. 730, 739-740 (1989) (clear statement necessary before interpreting statute to depart from background principles). Section 1603(b) contains no clear statement indicating that when a defendant entity becomes a foreign instrumentality during litigation, a court loses subject-matter jurisdiction over the suit. Accordingly, in such a case, the court retains its jurisdiction. And since no other provision of the FSIA affords immunity in this circumstance, there is no basis for dismissal.

2. That the FSIA's operation should align with that of other subject-matter-jurisdictional rules is confirmed by its relationship with 28 U.S.C. § 1332, the statute governing the federal courts' diversity jurisdiction.

Section 1332 is relevant in two ways. First, the FSIA's definition of a foreign agency or instrumentality expressly

cross-references Section 1332. Under Section 1603(b), an entity qualifies as a foreign agency or instrumentality entitled to immunity only if it is not "a citizen of a State of the United States as defined in [S]ection 1332 (c) and (e)." *Id.* § 1603(b)(3). Section 1332(c) is an all-purpose jurisdictional statute that generally deems a corporation to be a citizen of the State in which it is incorporated and of the State in which it has its principal place of business. *Id.* § 1332(c).[2]

Second, Section 1332(a)(4) was added by the FSIA itself. See FSIA § 3, 90 Stat. at 2891. That provision governs jurisdiction over suits in which a foreign state or instrumentality is the *plaintiff*. It states that federal district courts have jurisdiction (assuming the amount-in-controversy requirement is met) over suits involving "a foreign state, defined in [Section] 1603(a)"—*i.e.*, including a foreign instrumentality—"as plaintiff and citizens of a State or of different States" as defendant(s). 28 U.S.C. § 1332(a)(4).

As noted, citizenship under Section 1332(c) is indisputably determined as of the time of filing, as is the existence of diversity jurisdiction under Section 1332(a). See *Grupo Dataflux*, 541 U.S. at 570-572; see also, *e.g.*, *Bearbones, Inc.* v. *Peerless Indem. Ins. Co.*, 936 F.3d 12, 15-16 (1st Cir. 2019). That ought to dispose of the question presented here. It would be highly anomalous for the FSIA to consider a foreign entity's domestic-State citizenship (under Section 1603(b)(3)) as of the time of filing but its foreign-state ownership (under Section 1603(b)(2)) as of

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[2] Section 1332(e) simply defines "'State[]'" to include Puerto Rico, the District of Columbia, and other territories. 28 U.S.C. § 1332(e).

the time of a motion to dismiss. It would be similarly bizarre if a change in instrumentality status were irrelevant when the instrumentality is the plaintiff but dispositive when the instrumentality is the defendant. See *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 478 (2003). Yet those are the results under the court of appeals' interpretation of the FSIA. Applying the time-of-filing rule to each prong of Section 1603(b)'s definition, by contrast, brings harmony to the statute. And it is all the more reason to demand an explicit statement departing from the default rule before interpreting the FSIA and its related provisions in such an incoherent manner.

3. This observation about the applicability of general subject-matter-jurisdictional principles to the FSIA is what drove this Court's conclusion in *Dole Food* that Section 1603(b)(2)'s plain text, "because it is expressed in the present tense, requires that instrumentality status be determined at the time suit is filed." 538 U.S. at 478. In ruling that the state of things at the time of filing is conclusively determinative of jurisdiction (and hence immunity) under the FSIA, the Court invoked the "'longstanding principle that the jurisdiction of the Court depends upon the state of things at the time of the action brought.'" *Ibid.* (some internal quotation marks omitted) (quoting *Keene Corp.*, 508 U.S. at 207). The principles applied in *Dole Food* apply here as well and warrant reversal of the decision below.[3]

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[3] The United States attempts (C.A. Br. 5-10) to disentangle the FSIA's grant of immunity from the question of subject-matter jurisdiction, presumably in an effort to avoid this Court's decisions holding that subject-matter jurisdiction depending on the parties' character

B. The Decision Below Is Not Supported by the FSIA's Purpose.

The court of appeals next asserted that its reading "dovetails with the purposes of foreign sovereign immunity." Pet. App. 29a. The relevant purpose, the court stated, is to provide "'protection from the inconvenience of suit as a gesture of comity between the United States and other sovereigns,'" and the court believed that accomplishing this purpose requires a "focus[] on 'current political realities.'" *Ibid.* (first quoting *Dole Food*, 538 U.S. at 479; and then quoting *Altmann*, 541 U.S. at 696). This analysis is unpersuasive.

1. For starters, the court of appeals' invocation of purpose was questionable. As this Court has explained, "any sort of immunity defense made by a foreign sovereign in an American court must stand on the Act's text" or "it must fall." *Republic of Argentina* v. *NML Cap., Ltd.*, 573 U.S. 134, 141-142 (2014). The assumption that the FSIA has a single purpose—to provide immunity to foreign states and their agencies and instrumentalities—also ignores the Act's numerous exceptions to immunity. See 28 U.S.C. §§ 1605-1605B. "No statute pursues a single policy at all costs," and courts are "not free to rewrite this statute (or any other) as if it did." *Bartenwerfer* v. *Buckley*, 598 U.S. 69, 81 (2023).

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is generally determined once and for all by the state of things at the time of filing. But the United States' arguments fly in the teeth of this Court's recent reiteration that the FSIA's immunity provisions work "'in tandem'" with 28 U.S.C. § 1330(a)'s grant of subject-matter jurisdiction and that these provisions "must" be read together. *Halkbank*, 598 U.S. at 276 (quoting *Amerada Hess*, 488 U.S. at 434).

2. In any case, consideration of the FSIA's purposes supports petitioners here. Most fundamentally, allowing a defendant to escape the jurisdiction of U.S. courts by becoming a foreign instrumentality in the middle of litigation would undermine the Act by creating an escape hatch for foreign corporate defendants—one with obvious potential for gamesmanship. But "[a] time-of-filing rule avoids such gamesmanship by ensuring that post-filing maneuvering by foreign sovereigns will not affect the result." *TIG Ins.*, 967 F.3d at 785.

The court of appeals itself recognized that this sort of gamesmanship is a "real concern[]." Pet. App. 35a. But it shrugged off the implications of its ruling by simply observing that "[t]hose concerns are absent in this case," in which "[i]t was the U.S. designation of [respondent Jammal Trust Bank (JTB)] as a terrorist organization, not any attempt by Lebanon to avoid this lawsuit, that forced the bank into liquidation and public receivership." *Id.* at 36a. That point provides little comfort. The court of appeals identified nothing in the FSIA's text that would distinguish cases in which post-suit instrumentality status is gained by strategic maneuvering from those in which it is gained through happenstance. The ruling below applies just the same to entities nationalized purely for the purpose of achieving FSIA immunity.

For its part, the United States remarks (C.A. Br. 20 n.5) that gamesmanship is no concern given the lack of past cases "in which a foreign state has made an entity an agency or instrumentality in order to manipulate the courts' ability to adjudicate a suit against the entity." This assertion similarly fails to assuage the serious gamesmanship concerns. First, the United States' factual assertion

is dubious. In *TIG Insurance*, for example, the Republic of Argentina attempted to shield its property by withdrawing it from the commercial market as soon as a plaintiff tried to attach it to satisfy a judgment. 967 F.3d at 780; see 28 U.S.C. § 1609 (a foreign state's property in the United States is generally immune from attachment); *id.* § 1610(a) (providing exceptions for property "used for a commercial activity in the United States"); Pet. App. 35a-36a (discussing *TIG Insurance*). If foreign sovereigns have attempted, after filing of federal suit, to manipulate their property to avoid satisfying judgments, it is not difficult to imagine that they might nationalize an entity—a step that, for FSIA immunity purposes, requires only the purchase of a majority of an entity's shares, see 28 U.S.C. § 1603(b)—to shield important entities from litigation altogether.

Moreover, there is additional cause for concern about gamesmanship going forward. To be sure, the court of appeals was correct that the nationalization of JTB in this case does not appear to be an attempt to evade the jurisdiction of U.S. courts. But the decision below provides a roadmap for foreign states with important entities embroiled in U.S. litigation to make such a gambit. Indeed, in related contexts, foreign states have done just that.

Consider, for instance, the curious elevation of Mohammed bin Salman to the position of prime minister of the Kingdom of Saudi Arabia. In a maneuver many international observers believe to be a "legal ruse," the Kingdom of Saudi Arabia modified its governmental structure in November 2022 to appoint bin Salman as prime minister, apparently in an effort to gain head-of-state immunity

that would defeat ongoing litigation.[4] See *Samantar* v. *Yousuf*, 560 U.S. 305, 321-322 (2010); see also, *e.g.*, *Arrest Warrant of 11 Apr. 2000* (*Dem. Rep. Congo* v. *Belgium*), 2002 I.C.J. 3, 20-21 (Feb. 14) (heads of state, heads of government, and ministers of foreign affairs enjoy immunity from the jurisdiction of foreign states). Bin Salman had been sued for his role in the murder and dismemberment of Jamal Khashoggi, and he was appointed as prime minister of Saudi Arabia "[s]ix days before the government's statement of interest was due." *Cengiz* v. *bin Salman*, No. 20-cv-3009, 2022 WL 17475400, at *4 (D.D.C. Dec. 6, 2022). Acceding to the United States' suggestion of immunity, the district court concluded that the promotion earned bin Salman dismissal under common-law immunity principles despite the "suspicious timing" and "other anomalies" of his appointment. *Id.* at *5.

Indeed, under the loophole in the FSIA created by the court of appeals, foreign states can shield entities from litigation with no permanent effects. For instance, suppose a foreign corporation is embroiled in troublesome litigation in the United States. Under the rule adopted by the court of appeals, a foreign state wishing to shield that entity from the litigation can purchase—by forced sale or otherwise—a majority of the corporation's shares, thus ending the suit immediately under the FSIA. See 28 U.S.C. § 1603(b)(2). And once the suit is dismissed, the foreign state can simply return those shares to their

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[4] *Saudi Arabia: Biden Administration's Attempt to Grant Immunity to Mohammed Bin Salman Is a Deep Betrayal*, Amnesty Int'l (Nov. 18, 2022), https://www.amnesty.org/en/latest/news/2022/11/saudi-arabia-biden-administrations-attempt-to-grant-immunity-to-mohammed-bin-salman-is-a-deep-betrayal (quoting Agnès Callamard, Sec'y Gen., Amnesty Int'l).

previous owners, restoring the status quo ante. As the Seventh Circuit has recognized, "[w]hat has been privatized can be renationalized," *Olympia Express, Inc.* v. *Linee Aeree It., S.p.A.*, 509 F.3d 347, 351 (2007), and the opposite is true as well. This scheme would place decisions about amenability of foreign corporations to suit in U.S. courts squarely in the hands of those corporations' governments, "invit[ing] strategic maneuvering." *Ibid.* That cannot be what Congress intended.[5]

3. The court of appeals also placed heavy reliance on the notion of "comity," but consideration of comity is particularly misplaced when it comes to the FSIA's treatment of instrumentalities. That is because the FSIA is an outlier in its approach to instrumentality immunity. Most other nations grant immunity to foreign-state instrumentalities based not on the instrumentality's *ownership* but instead on whether the relevant conduct involved an exercise of sovereign authority on the state's behalf. See David P. Stewart, *The UN Convention on Jurisdictional Immunities of States and Their Property*, 99 Am. J. Int'l L. 194, 195-196 (2005) (explaining that the United Nations' convention on state immunity shields instrumentalities only "to the extent that they are entitled to perform *and are actually performing* acts in the exercise of sovereign

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[5] Even if an entity would not be entitled to *immunity* under the FSIA because one of the Act's exceptions applied, see 28 U.S.C. §§ 1605-1605B, manipulating the entity's instrumentality status would still provide certain procedural protections. For instance, the FSIA provides certain protections against punitive damages for permissible suits against foreign states and instrumentalities. See *id.* § 1606. And foreign states and instrumentalities can avoid state-court jury trials by removing suits to federal court, where jury trials are unavailable. See *id.* § 1441(d); *Olympia Express*, 509 F.3d at 348-349.

authority of the State" (emphasis added) (quoting United Nations Convention on Jurisdictional Immunities of States and Their Property, G.A. Res. 59/38, art. 2, ¶ 1(b)(iii) (Dec. 2, 2004))). Congress's decision to grant immunity to foreign corporations 51% owned by the state—even when not exercising sovereign power—was an extension of immunity beyond the principles that foreign courts would apply to U.S. corporations. So even if notions of comity could ever overcome the answer dictated by the FSIA's text and structure, they warrant little consideration here.

C. The Decision Below Is Not Supported by History.

1. The court of appeals' historical analysis consisted of its observation that, "[i]n the pre-FSIA world, a defendant who gained foreign sovereign immunity after a suit was filed had to be dismissed from the case." Pet. App. 30a. The support for that proposition came entirely from this Court's two-page decision in *Oliver American Trading Co.* v. *Government of the United States of Mexico*, 264 U.S. 440 (1924), which, in the court of appeals' view, "illustrates the need for immunity to reflect the latest political developments," Pet. App. 30a.

Oliver American Trading Co., however, stands for no such thing. That case involved a suit against the United States of Mexico, which "had not been recognized by our government" when the case was filed. 264 U.S. at 442.[6]

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[6] The suit also named as a defendant National Railways of Mexico, which was "merely a name for the system of railroads controlled and operated by the Mexican government" rather than a separate agency or instrumentality of Mexico. *Oliver Am. Trading Co.*, 264 U.S. at 442.

Prior to the entry of judgment, "Mexico was duly recognized by the United States and diplomatic relations between the two governments were resumed"; on that basis, the district court concluded that Mexico was immune from suit and dismissed the case. *Ibid.* The plaintiff sought this Court's review "under a statute authorizing such direct review of decisions that 'present the question of jurisdiction of the District Court as a federal court.'" Pet. App. 30a (quoting *Oliver Am. Trading Co.*, 264 U.S. at 442).

The sole issue decided by this Court was whether the district court's dismissal was truly jurisdictional—*i.e.*, whether there was "in controversy the power of the court, as defined or limited by the Constitution or statutes of the United States, to hear and determine the cause." *Oliver Am. Trading Co.*, 264 U.S. at 442. The Court concluded that the immunity question was not purely jurisdictional, noting that "the question of jurisdiction to be decided turns upon matters of general law applicable alike to actions brought in other tribunals." *Ibid.*; see also *id.* at 442-443 ("The question of sovereign immunity is such a question of general law, applicable as fully to suits in the state courts as to those prosecuted in the courts of the United States.").

It is difficult to understand the court of appeals' reliance on *Oliver American Trading Co.* This Court's decision said not a word about whether Mexico should be immune from suit given its post-filing recognition by the U.S. executive branch and instead simply observed that, in the pre-FSIA world, immunity decisions did not

implicate federal courts' Article III power.[7] This Court did not state or even suggest that post-filing changes in sovereign recognition must be respected for immunity purposes.

For its part, the United States relies on *Oliver American Trading Co.* to prove that "before the FSIA's enactment, a foreign state's immunity from suit did not implicate the district courts' subject-matter jurisdiction." C.A. Br. 8. It is unclear whether the decision really held that, but it is even less clear why it matters. Under the FSIA, it is undoubtedly true that a foreign state's immunity *does* implicate the district court's subject-matter jurisdiction. See 28 U.S.C. §§ 1330(a), 1604; *Halkbank*, 598 U.S. at 276.

2. In any event, this pre-FSIA history sheds little light on the question presented here. For starters, while it is true to some extent that the FSIA "codified the preexisting common law," Pet. App. 30a (citing *Samantar*, 560 U.S. at 319-320), the relevant source of law Congress codified was "the *restrictive theory* of sovereign immunity, which Congress recognized as consistent with *extant* international law," *Samantar*, 560 U.S. at 319-320 (emphasis added). The common law of foreign sovereign immunity underwent a sea change in the more than half-century between this Court's decision in *Oliver American Trading Co.* and the enactment of the FSIA. See, *e.g.*, *Altmann*, 541 U.S. at 690-691 (discussing the 1952 "Tate Letter," which effected a fundamental change in national

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[7] Because the FSIA is a "statute[] of the United States" that "define[s] or limit[s]" the "power of the court," *Oliver Am. Trading Co.*, 264 U.S. at 442, the case would likely have come out differently had it arisen after the FSIA's enactment.

policy toward foreign sovereign immunity). Given the shifting nature of the common law of foreign sovereign immunity throughout most of the twentieth century, little can be derived from 1920s practice.

3. If anything, the relevant history reflects Congress's desire, in enacting the FSIA and establishing rules governing the amenability of foreign states and instrumentalities to suit in U.S. courts, to eliminate the role of the executive branch and associated machinations of foreign governments. As this Court has described, in the decades prior to the FSIA's enactment, the state of foreign sovereign immunity was one of "disarray," *Altmann*, 541 U.S. at 690, and "bedlam," *NML Cap.*, 573 U.S. at 141. "[S]overeign immunity determinations were made in two different branches, subject to a variety of factors, sometimes including diplomatic considerations," and "[n]ot surprisingly, the governing standards were neither clear nor uniformly applied." *Verlinden*, 461 U.S. at 488. The FSIA was enacted to bring predictability and remove the need for ad hoc determinations based on foreign policy. But if instrumentality status—and thus immunity—is subject to ongoing review throughout the life of a suit, "[t]he timing of foreign governments' decisions on whether and when to privatize their instrumentalities would be affected, creating a complication in these governments' decision-making process that could be an irritant in their relations with the United States." *Olympia Express*, 509 F.3d at 352.

II. THE UNITED STATES' OTHER ARGUMENTS ARE UNCONVINCING.

Many of the United States' arguments were adopted by the court of appeals and are discussed above. The United States' other arguments likewise lack merit.

A. The United States attempts (C.A. Br. 17-18) to glean a relevant principle from the decision on remand in *Oliver American Trading Co.* After this Court held that the appeal from the district court's determination of Mexico's immunity belonged in the court of appeals, the Second Circuit affirmed the dismissal on immunity grounds. See *Oliver Am. Trading Co.* v. *Government of the U.S. of Mex.*, 5 F.2d 659, 666-667 (2d Cir. 1924). In the United States' view, that decision "supports a construction of the [FSIA] that extends immunity to entities that become foreign-state agencies or instrumentalities during litigation." C.A. Br. 18.

This is a stretch. The court of appeals' determination that Mexico was immune followed a lengthy analysis (true to the approach of the era) of the common law of foreign sovereign immunity. *Oliver Am. Trading Co.*, 5 F.2d at 661-665. As explained above, the state of the common law as of the 1920s is of quite little value in interpreting the FSIA's text. See pp. 17-18, *supra*. And in any event, the Second Circuit's exposition of the subject did not touch on the possible distinction between pre-suit recognition and post-suit recognition. See *Oliver Am. Trading Co.*, 5 F.2d at 661-665.

B. The United States also argues (C.A. Br. 18-19) that affording FSIA immunity to entities that become foreign instrumentalities during litigation is "consistent with customary international law." *Id.* at 18. But the United

States is conspicuously unable to assert that any norm of customary international law *requires* immunity under these circumstances. Nor could there be any such norm, because the general approach to foreign sovereign immunity in other countries is not to afford immunity to instrumentalities *at all* unless they are exercising the state's sovereign authority. As noted above, the FSIA's approach—granting immunity to state-owned entities even when not exercising sovereign power—is an outlier. See pp. 14-15, *supra*; see also Ferdinand Mesch, Legislative Note, *Jurisdictional Immunities of Foreign States*, 23 DePaul L. Rev. 1225, 1236 (1974) (analyzing the draft FSIA before enactment and finding the Act's definition of foreign state "noteworthy" because, prior to the FSIA, "a political unit of a state generally ha[d] not been given immunity").[8]

Instead, the United States appears motivated by a concern that the FSIA might not afford immunity to a foreign state *itself* that achieves that "status" during litigation. See C.A. Br. 18-19 ("Construing the FSIA to have [petitioners' favored] result with respect to agencies or instrumentalities would appear to require a similar application to foreign states themselves . . . ."). But for several reasons, that concern is misplaced.

For starters, it is far from obvious that the rule advocated by petitioners would apply to foreign states themselves, as distinguished from their instrumentalities. The

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[8] It is thus no surprise that even the United States does not assert that the court of appeals' interpretation of the FSIA is required to avoid violating international law. See *Samantar*, 560 U.S. at 305 n.14 (citing *Murray* v. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)).

question presented here turns on the meaning of Section 1603(b) and its use of the verb "is"; that provision defines "'agency or instrumentality of a foreign state'" but not "foreign state" itself. 28 U.S.C. § 1603(b).[9]

Nor is there reason to think that Congress was concerned about the very unusual situation in which a defendant in U.S. litigation *becomes a foreign state* during the pendency of suit. True, that appears to have been the case in *Oliver American Trading Co.*, decided almost 50 years prior to the FSIA's enactment. See 264 U.S. at 442. But the United State provides no more recent example. Far more pressing—and realistic—is the concern that a foreign state could shield its corporations from troubling litigation simply by nationalizing them after suit is initiated. It makes far more sense to interpret the FSIA with that concern in mind.

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[9] The definition of "'foreign state'" is in Section 1603(a), which provides only the circular point that "[a] 'foreign state' . . . includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b)." 28 U.S.C. § 1603(a).

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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