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

BRIEF FOR RESPONDENTS IN OPPOSITION

DAVID B. RIVKIN, JR.
Counsel of Record
MARK W. DELAQUIL
KRISTIN A. SHAPIRO
BAKER & HOSTETLER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 861-1731
drivkin@bakerlaw.com

Counsel for Respondents

QUESTION PRESENTED

Whether respondents should be precluded on remand from asserting immunity from suit pursuant to 28 U.S.C. § 1604 of the Foreign Sovereign Immunities Act because the events they contend make them instrumentalities of Lebanon occurred after this lawsuit was filed, but long before any final judgment will be entered.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases:

Statutes:

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–36a) is reported at 81 F. 4th 28. The order of the district court (Pet. App. 37a–65a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 2023. The petition for a writ of certiorari was filed on November 22, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

In addition to 28 U.S.C. § 1603(b), contained in the petition for a writ of certiorari, respondents identify 28 U.S.C. § 1604: "Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter."

STATEMENT

The Foreign Sovereign Immunities Act (FSIA) provides that any entity that "is" an "agency or instrumentality of a foreign state" "shall be immune from the jurisdiction of the courts of the United States and of the States" absent certain narrow exceptions. 28 U.S.C. §§ 1603(b), 1604. The Second Circuit held that respondents are not precluded from asserting such immunity simply because the events they contend make them instrumentalities of Lebanon occurred af-

ter petitioners filed their complaint. Having so determined, the Second Circuit accordingly remanded for the district court to determine, in the first instance, whether respondents are current instrumentalities of Lebanon.

The Court should decline petitioners' request for interlocutory review of that decision. The Second Circuit's decision faithfully applied the text of the FSIA, Supreme Court precedent, and longstanding sovereign immunity principles. Nor is there any reason to rush to consider the question presented on an interlocutory basis without a complete record. As the United States explained in an amicus brief submitted below, cases raising the question presented are "extremely rare" and—contrary to petitioners' assertion of a circuit split—"the courts of appeals appear not to have had an opportunity to consider the immunity of an entity whose instrumentality status arose after the commencement of litigation" for many decades. U.S. COA Amicus Br. 16 n.4, 20 n.5. The petition for a writ of certiorari should be denied.

1. On January 1, 2019, petitioners sued eleven Lebanese banks, including respondent Jammal Trust Bank (JTB), in the United States District Court for the Eastern District of New York for allegedly providing financial services to Hezbollah. Pet. App. 23a. A few months later, the United States Department of the Treasury designated JTB a Specially Designated Global Terrorist. *Id.*

In September 2019, Lebanon's central bank froze JTB's deposits and began the liquidation process,

which remains ongoing. *Id.* Respondent Dr. Muhammad Baasiri was appointed as the central bank's liquidator.[1] *Id.* Pursuant to Lebanese law, Dr. Baasiri has been liquidating JTB "under the supervision and control" of the central bank and JTB's former assets are now owned by the central bank. COA App. 957–63. Lebanese law requires the National Institute for the Guarantee of Deposit (NIGD)—essentially, the Lebanese FDIC—to guarantee deposits up to a certain amount. *Id.* After JTB's assets are liquidated and its obligations are satisfied, any surplus must be returned to NIGD to repay its guarantee. Thus, any amount recovered by petitioners—and amounts spent defending this suit—would reduce the amount repaid to NIGD.

2. Dr. Baasiri and JTB jointly moved to substitute Dr. Baasiri for JTB as a party or in the alternative to intervene. Pet. App. 37a. They also jointly moved to dismiss based on petitioners' lack of standing (Pet. App. 49a–53a) and on sovereign immunity under the FSIA, 28 U.S.C. § 1604 (Pet. App. 53a–57a).

The district court granted the motion to intervene but denied the motion to substitute, arguing that "[r]emoving JTB from this case would needlessly complicate discovery." Pet. App. 41a. The district court also denied the motion to dismiss. Pet. App. 48a–57a. As to standing, the court held that JTB's insolvency

---

[1] The central bank subsequently appointed Mr. Carl Abdo Ayoub as liquidator on October 1, 2023, following Dr. Baasiri's resignation. This substitution does not affect the merits of the petition and, for ease of reference, this brief will simply refer to Dr. Baasiri.

did not render plaintiffs' injuries non-redressable because the court must assume that any monetary judgment would be satisfied. Pet. App. 51a. As to sovereign immunity, the court determined that *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003), requires "district courts to evaluate instrumentality status at the time a lawsuit is filed," whereas "JTB is only alleged to have come under government control many months after this lawsuit was filed." Pet. App. 54a. In light of that holding, the district court did not decide whether JTB "is now an instrumentality of a foreign state under the FSIA." Pet. App. 27a.

3. Dr. Baasiri and JTB brought an interlocutory appeal of the district court's denial of the motion to dismiss based on sovereign immunity and the denial of the motion to substitute, which is bound up with the denial of sovereign immunity. After oral argument, the Second Circuit invited the Department of State to file an amicus brief expressing the views of the United States.

The Department of State and Department of Justice filed an amicus brief expressing the views of the United States. The brief explained that "*Dole Food's* central holding is that the FSIA's definition of agency or instrumentality reflects foreign sovereign immunity's focus on the present sovereign status of an entity," and "[a]pplying the FSIA's immunity principles to an entity that acquires [instrumentality status] after suit is filed is fully consistent with that holding." U.S. COA Amicus Br. 5. The brief also noted that "[s]ince *Dole Food*, the courts of appeals appear not to have had an opportunity to consider the immunity of

an entity whose instrumentality status arose after the commencement of litigation," *id.* at 16 n.4. Although "[t]he existing court of appeals precedent" is therefore "of limited use," the brief explained that "[i]nterpreting the FSIA's immunity provisions to give effect to the emergence of sovereign status that occurs during the pendency of a suit is in keeping" with the text of the FSIA and "foreign sovereign immunity principles as they existed under the preexisting immunity regime," *id.* at 6–19 & n.4.

The United States amicus brief explained that, on remand, the district court "will need to determine whether JTB became an agency or instrumentality of Lebanon, within the meaning of § 1603(b), as a result of its liquidation." *Id.* at 19–20. "That inquiry will in part require an interpretation of Lebanese law," as to which "[t]he United States takes no position." *Id.*

The United States amicus brief further noted that "[a]lthough suits against entities that acquire instrumentality status after litigation is commenced implicate important interests of the United States, they are also extremely rare." *Id.* at 20 n.5. And "[t]he United States is aware of no case 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." *Id.*

4. The Second Circuit vacated the district court's denial of the motion to dismiss. The Second Circuit explained that the "structure, purpose and history" of the FSIA all supported respondents' interpretation of the statute. Pet. App. 31a. It then rejected petitioners' argument that *Dole Food* nonetheless compelled a

contrary interpretation. *Id.* at 31a–35a. Unlike *Dole Food*, which concerned an entity that was indirectly owned by a sovereign at the time of the alleged wrongdoing but had lost sovereign status before the case was filed, "[t]he situation here is flipped: The defendant claims to have gained sovereign status after filing." *Id.* at 32a. Applying the "logic of *Dole Food*," the court held that the decision "supports the mirror-image outcome: Although pre-suit sovereign immunity cannot be retained by a no-longer-sovereign defendant, sovereign status acquired post-filing can confer immunity." *Id.* at 32a.

The Second Circuit therefore vacated the order of the district court denying the motion to dismiss and remanded "for the district court to determine whether JTB is now" an instrumentality of Lebanon. *Id.* at 36a. In light of its holding, the Second Circuit declined to reach respondents' "alternative argument that the district court erred in not substituting Baasiri for JTB." *Id.*

On remand, the district court issued an order inviting supplemental briefs on the question of whether JTB is now an instrumentality of Lebanon. In lieu of filing such briefs, petitioners and respondents jointly filed a motion to stay district court proceedings against respondents pending resolution of this petition, which the district court granted.

ARGUMENT

I. The Interlocutory Posture of this Case Presents a Poor Vehicle to Consider the Question Presented

The interlocutory posture of this appeal makes it a poor vehicle to consider the question presented. *Nat'l Football League v. Ninth Inning, Inc.*, 141 S. Ct. 56, 57 (2020) (Kavanaugh, J., respecting denial of certiorari) ("the interlocutory posture is a factor counseling against this Court's review at this time"); *Abbott v. Veasey*, 580 U.S. 1104 (2017) (Roberts, C.J., respecting denial of certiorari) (same); *Wrotten v. New York*, 560 U.S. 959 (2010) (Sotomayor, J., respecting denial of certiorari) (same).

The opinion below merely vacates the district court's denial of a motion to dismiss based on sovereign immunity. The opinion does not address whether JTB "is now such an instrumentality," Pet. App. 36a, a fact which will be subject to further briefing. At a minimum, the district court's determination will contextualize the question presented and, if decided in petitioners' favor, could obviate the need for review.

This Court has recognized that "review of a nonfinal order may induce inconvenience, litigation costs, and delay in determining ultimate justice." Stephen M. Shapiro *et al.*, Supreme Court Practice Ch. 2.3, at 2-15 (11th ed. 2019) (citing *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148, 152–53 (1964)). This concern is particularly apparent here, where the question whether JTB is an instrumentality of Lebanon has not even been decided. Piecemeal review of just one component of

the sovereign immunity inquiry could entail additional proceedings before this Court on those other questions. By contrast, reviewing the question presented on appeal from a final judgment would permit consolidation of related questions and unnecessary duplication of proceedings.

There also is no reason to rush to review the question presented on an interlocutory basis. As noted below, *infra* § III, suits against entities that acquire instrumentality status after filing are incredibly rare, so it is not as if there are a large number of pending cases—or even any other cases—that would benefit from the Court's hasty resolution of the question presented. And if petitioners are found to be correct in their contention that respondents are not an instrumentality of Lebanon, there would be no need for the Court's intervention.

In short, this is not one of the rare cases that merits review in this Court on an interlocutory basis. *See* Shapiro Ch. 4.18, at 4-55 ("[E]xcept in extraordinary cases, the writ is not issued until final decree." (quoting *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916)).

II. The Decision Below Is Correct and Does Not Conflict with Supreme Court or Other Circuit Precedent

FSIA provides that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States" absent certain exceptions, 28 U.S.C. § 1604, and it extends that immunity to any

entity that "is" an "agency or instrumentality of a foreign state," *id.* § 1603(b). The decision below correctly held that, in light of this statutory text, Supreme Court precedent, and longstanding sovereign immunity principles, an entity who acquires instrumentality status after filing "is" an "agency or instrumentality of a foreign state." Pet. App. 24a–31a. Petitioners are wrong that this decision disregards Supreme Court precedent and creates a circuit conflict.

A. The Second Circuit Faithfully Applied Supreme Court Precedent

As the Second Circuit explained, "[w]ith structure, purpose and history arrayed against them," petitioners hang their hat on the argument that one statement in *Dole Food* "forecloses changes in [instrumentality] status after filing." Pet. App. 31a. But, "[r]ead in context, the statement in *Dole Food* does not support [petitioners'] position." *Id.* at 33a.

Dole Food considered whether entities which claimed to be instrumentalities of Israel "as of the time the alleged tort occurred … can claim instrumentality status" under 28 U.S.C. § 1603(b)(2) for purposes of removal under 28 U.S.C. § 1441(d) even though "[a]ny relationship recognized under FSIA between [the entities] and Israel had been severed before suit was commenced." 538 U.S. at 469, 480. This Court explained that the "the plain text of [section 1603(b)(2)], because it is expressed in the present tense, requires that instrumentality status be determined at the time suit is filed" and not before. *Id.* at 478. The Court further emphasized that "[c]onstruing

section 1603(b) so that the present tense has real significance 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.* (quotation marks omitted).

Dole Food simply holds that FSIA does not prevent courts from asserting jurisdiction over entities which have *lost* instrumentality status *before* suit is filed. As the Second Circuit explained, Pet. App. 32a, the decision does not consider whether an entity which *gains* instrumentality status *after* suit is filed may assert immunity.

Petitioners emphasize (Pet. 12) the general principle that jurisdiction is determined at the time a suit is filed. But petitioners fail to grapple with the fact that "the FSIA is not simply a jurisdictional statute concerning access to the federal courts but a codification of the standards governing foreign sovereign immunity as an aspect of *substantive* federal law." *Republic of Austria v. Altmann*, 541 U.S. 677, 695 (2004) (cleaned up); *see also* Pet. App. 30a n.4 ("*Oliver* [*American Trading Co. v. United States of Mexico*, 264 U.S. 440 (1924)] demonstrates that immunity and jurisdiction did not necessarily rise and fall together in the pre-FSIA regime."). There is therefore no tension between determining jurisdiction at the time of filing and the proposition that immunity might arise after filing.

To the contrary, the proposition that immunity might arise after filing is well-grounded in FSIA's codification of the "restrictive theory" of sovereign im-

munity. *Altmann*, 541 U.S. at 691. That theory affords robust immunity "with regard to sovereign or public acts (jure imperii) of a state," *id.* at 690 (quotation marks omitted), and protects sovereigns from the "inconvenience of suit as a gesture of comity," *id.* at 696 (quotation marks omitted). Failing to provide such immunity solely based on the fortuitous timing of a plaintiff's suit cannot be reconciled with these principles.

In *Republic of Iraq v. Beaty*, moreover, this Court held that, after a 2003 presidential designation rendered a FSIA exemption inapplicable to a lawsuit against Iraq, "[a]t that point, immunity kicked back in and the [pending] cases ought to have been dismissed." 556 U.S. 848, 865 (2009). Even petitioners concede (Pet. 23) that, in light of the post-filing events in *Beaty*, the FSIA "statute providing jurisdiction in that suit (28 U.S.C. § 1605(a)(7)) ceased to apply to the defendant altogether" and thus dismissal based on those post-filing events was appropriate.

Petitioners argue that *"Beaty* says nothing about whether the use of the present tense in § 1603(b)(2) means instrumentality status is determined at the time of filing or some later time." *Id.* But, read together, sections 1604 and 1603(b)(2) provide that any entity that "is" an "agency or instrumentality of a foreign state" "shall be immune from the jurisdiction of the courts of the United States and of the States." Petitioners' argument that the "present tense" in section 1603 means that current instrumentalities are precluded from asserting immunity merely because they were not instrumentalities in the past makes no

sense—the present tense of the statutory text supports the opposite conclusion.

More fundamentally, *Beaty* shows that immunity can "kick in" even after suit is filed, as "[f]oreign sovereign immunity reflects current political realities and relationships." 556 at 864 (cleaned up). In this case, the present instrumentality status of respondents means that the costs of defending this suit and any relief afforded petitioners would come from the pockets of Lebanon. *See* pp. 3–4, *supra*. The United States amicus brief below explained that, as a diplomatic matter, the "current political realities" of such circumstances "implicate important interests of the United States" and warrant sovereign immunity. U.S. COA Amicus Br. 20 n.5.

B. The Purported Circuit Conflict Is Nonexistent

Petitioners are likewise wrong that the Second Circuit's decision creates a circuit conflict. As the United States amicus brief below explained, "[s]ince *Dole Food*, the courts of appeals appear not to have had an opportunity to consider the immunity of an entity whose instrumentality status arose after the commencement of litigation." U.S. COA Amicus Br. 16 n.4.

Petitioners primarily rely on the D.C. Circuit's decision in *TIG Ins. Co. v. Republic of Argentina*, 967 F.3d 778 (D.C. Cir. 2020), and the Seventh Circuit's decision in *Olympia Exp., Inc. v. Linee Aeree Italiane, S.P.A.*, 509 F.3d 347 (7th Cir. 2007), but neither deci-

sion addresses whether an entity who gains instrumentality status after filing may assert immunity from suit pursuant to 28 U.S.C. § 1604.

There are two types of immunity under the FSIA: jurisdictional immunity, governed by 28 U.S.C. § 1604, and execution immunity, governed by 28 U.S.C. §§ 1609–11. The statutory subsections governing jurisdictional immunity and execution immunity are not parallel, such that satisfaction of FSIA exceptions under one type of immunity controls disposition of the other. In relevant part, *TIG* addressed execution immunity under 28 U.S.C. §§ 1609–11, not jurisdictional immunity under 28 U.S.C. § 1604, which is at issue in this case.

In *TIG*, the appellant "sought to satisfy a long-pending judgment by attaching a building that the Republic of Argentina listed for sale in the District of Columbia." *TIG*, 967 F.3d at 780. TIG filed an emergency motion for attachment and writ of execution, arguing that Argentina's act of listing the property satisfied the exception to attachment immunity for property "used for a commercial activity in the United States." 28 U.S.C. § 1610(a). Argentina immediately removed the property from the market and argued that the exception was thus no longer applicable. *TIG*, 967 F.3d at 780. The case therefore turned on Argentina's contention that section 1610's statutory phrase "used for a commercial activity" meant that the property "must be in use for a commercial purpose at the time a writ of attachment and execution issues." *Id.* at 782.

Following that discussion, in a three-sentence paragraph, the TIG court merely cited *Dole Food* in support of its conclusion that "even were we to accept Argentina's contention that the text implicitly references current use, Argentina does not support its further contention that what counts as the present time for purposes of that assessment is the moment the court would issue its writ." *Id.* at 783. Simply put, *TIG* addressed a materially different provision of FSIA and sheds no light on the question presented.

Petitioners' reliance on *Olympia* for its claim of a circuit split fares no better. *Olympia* addressed the impact on a removed case when an entity loses instrumentality status. Specifically, after a state case against an Italian entity was removed to federal court, "the Italian government sold its majority shareholding in Alitalia, and the plaintiffs—four years into the case—demanded a jury." *Olympia*, 509 F.3d at 348. "The district court thought that Alitalia's conversion changed the jurisdictional basis of the suit from foreign sovereign immunity to diversity of citizenship," rendering FSIA's limitation of jury trials inapplicable. *Id.* at 349. Citing *Dole Food*, however, the Seventh Circuit explained that jurisdiction is determined at the time of filing and thus the "jurisdictional basis [was] not changed" to diversity of citizenship. *Id.* *Olympia*'s holding regarding the impact of losing instrumentality status likewise sheds no light on the question presented.

Plaintiffs briefly cite (Pet. 14) *Yousuf v. Samantar*, 552 F.3d 371 (4th Cir. 2009), and *USX Corp. v. Adri-*

atic Insurance Co., 345 F.3d 190 (3d Cir. 2003), in support of their purported circuit conflict. But *Yousuf* merely held that "even if an individual foreign official could be an 'agency or instrumentality under the FSIA,' sovereign immunity would be available only if the individual were still an 'agency or instrumentality' at the time of suit" and could not be asserted by an individual who was "no longer a Somali government official at the time the plaintiffs brought this action." 552 F.3d at 383. Conversely, *USX* held that an entity who gains instrumentality status prior to filing could assert sovereign immunity, even if it was not an instrumentality at the time of the allegedly unlawful conduct. 345 F.3d at 208 n.16. Like *TIG* and *Olympia*, *Yousuf* and *USX* say nothing about whether an entity who gains instrumentality status after a suit is filed is precluded from asserting sovereign immunity.

The only circuit precedent that comes close to addressing the question presented is entirely favorable to the respondents' position. In *Zuza v. Office of the High Representative*, 857 F.3d 935 (D.C. Cir. 2017), the D.C. Circuit held that immunity under the International Organizations Immunities Act (IOIA) "does not operate only at a lawsuit's outset; it compels prompt dismissal even when it attaches mid-litigation." *Id.* at 938. The D.C. Circuit explained that this conclusion is consistent with the fact that "other forms of immunity acquired *pendente lite* mandate dismissal of a validly commenced lawsuit." *Id.* (collecting cases); *see, e.g.*, *Abdulaziz v. Metro. Dade Cty.*, 741 F.2d 1328, 1329–30 (11th Cir. 1984) ("[D]iplomatic immunity ... serves as a defense to suits already commenced."). While *Zuza* concerned

immunity under the IOIA rather than the FSIA, the IOIA affords international organizations "the same immunity from suit ... as is enjoyed by foreign governments" under the FSIA. 22 U.S.C. § 288a(b).

III. The Question Presented Does Not Merit Review

Finally, petitioners and their amici are wrong that the question presented is sufficiently important that it merits the extraordinary assertion of the Court's certiorari jurisdiction over an interlocutory appeal. "[S]uits against entities that acquire instrumentality status after litigation is commenced" are "extremely rare." U.S. COA Amicus Br. 20 n.5. As demonstrated by the dearth of applicable circuit precedent, *see* § II, *supra*, the question presented perhaps affects a handful of cases over the course of a century.

Petitioners and their amici argue that the decision below "creates a roadmap for foreign states that wish to help their preferred private corporations evade U.S. jurisdiction," particularly with respect to the financing of terrorism. Pet. 25. But the United States explained below that it "is aware of *no case* in which a foreign state has made an entity an agency or instrumentality in order to manipulate the courts." U.S. COA Amicus Br. 20 n.5 (emphasis added). And existing doctrines already restrict such gamesmanship. For example, courts may disregard sham transactions in determining instrumentality status. *See EM Ltd. v. Banco Cent. De La Republica Argentina*, 800 F.3d 78, 95 (2d Cir. 2015). FSIA's commercial activity (28 U.S.C. § 1610) and international terrorism (*id.*

§ 1605B) exceptions also provide relevant restrictions, as do the serious sanctions imposed on state sponsors of terrorism. Petitioners' and amici's hyperbolic fearmongering that the decision below will lead to manipulation is untethered from reality.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

DAVID B. RIVKIN, JR.
Counsel of Record
MARK W. DELAQUIL
KRISTIN A. SHAPIRO
BAKER & HOSTETLER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 861-1731
drivkin@bakerlaw.com

Counsel for Petitioners

MARCH 2024