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

REPLY BRIEF FOR PETITIONERS

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The decision below is contrary to this Court's precedent in *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003), and decisions from other Circuits. It also provides a roadmap for foreign states to insulate their preferred industries or corporations from civil suits in the United States by simply nationalizing them or placing them under state-directed insolvency, even if only on paper and temporarily.

This Court should make clear to lower courts that *Dole Food* remains good law and thereby resolve this circuit split.

I. The Second Circuit's Remand of a Factual Determination Irrelevant to the Legal Question Is Not a Sound Basis to Deny Certiorari.

Respondents Dr. Muhammad Baasiri and Jammal Trust Bank's (JTB) primary argument is that "[t]he interlocutory posture of this appeal makes it a poor vehicle to consider the question presented." Opp. 7. What they mean is that the Second Circuit remanded the case to the district court to consider a single factual issue *unrelated* to the legal question the Second Circuit decided. Its holding was that "[i]mmunity under the Foreign Sovereign Immunities Act [FSIA], 28 U.S.C. § 1604, may attach when a defendant becomes an instrumentality of a foreign sovereign after a suit is filed"—it only remanded "for the district court to determine whether JTB is now such an instrumentality" given its status as a private bank undergoing state-supervised liquidation. Pet. App. 36a. That factual determination does nothing to change the question before this Court—whether its decision in *Dole Food* means what it says, or whether courts may set it aside because "opinions are not statutes." Pet. App. 33a.

Nor do Respondents explain how resolution of the factual issue on remand to the district court would affect the legal question before the Court, except to assert, without elaboration, that "the district court's determination will contextualize the question presented." Opp. 7. But the Second Circuit did not need or rely on that "contextualization" to reach its decision setting aside or rewriting *Dole Food*—in fact, as the Circuit noted, it was not an issue for the district court either, which chose not to reach it. Pet. App. 27a n.2.

Unlike Respondents' cited cases, this is *not* a case from a state court (where interlocutory review is not permissible) or one lacking the lower court's "full consideration" of the relevant issue, as in *Wrotten v. New York*, 560 U.S. 959, 960, 130 S. Ct. 2520, 2520 (2010), nor was the question on certiorari here "remanded for further consideration," as in *Abbott v. Veasey*, 580 U.S. 1104, 1105, 137 S. Ct. 612, 613 (2017), nor was dismissal reversed, as in *NFL v. Ninth Inning, Inc.*, 141 S. Ct. 56, 57 (2020). There cannot be "consolidation of related questions" or a risk of "duplication of proceedings" as Respondents imagine, Opp. 8, because the issue on remand is unrelated to the Circuit's *Dole Food* holding which was *not* remanded, and is thus settled law in the Circuit. The district court's resolution of the narrow factual question remanded to it, if appealed, will not implicate the ongoing validity of *Dole Food*.

Nonetheless, if it facilitates this Court's review of this important question, Petitioners will stipulate that JTB is currently an instrumentality, aside from the timing issue present in this petition, if the Court grants the petition for certiorari—no matter what the result. Thus, there will be no "[p]iecemeal review" or

"additional proceedings" if this Court grants certiorari, as Respondents threaten. Opp. 7-8.

II. The Decision Below Conflicts with This Court's Precedents.

Respondents argue that "*Dole Food* simply holds that FSIA does not prevent courts from asserting jurisdiction over entities which have *lost* instrumentality status *before* suit is filed." Opp. 10. But this Court's "holding" in *Dole Food* is explicit: "we hold . . . that instrumentality status is determined at the time of the filing of the complaint." 538 U.S. at 480. That holding has been consistently applied by many courts since, including the Second Circuit, which *previously* characterized *Dole Food* as "holding unequivocally that an entity's status as an instrumentality of a foreign state should be 'determined at the time of the filing of the complaint.'" *Abrams v. Societe Nationale des Chemins de Fer Francais,* 389 F.3d 61, 64 (2d Cir. 2004) (quoting *Dole Food*, 538 U.S. at 480).

Respondents concede that this Court held in *Dole Food* that the "present tense" language in § 1603 means instrumentality status is determined "at the time of the action brought," Opp. 10 (quoting 538 U.S. at 478), but appear to read into that holding a silent addendum—"or any time thereafter if the entity *gains* instrumentality status." This reading finds no support in *Dole Food*, which cites the "'longstanding principle' that 'the jurisdiction of the Court depends upon the state of things at the time of the action brought.'" 538 U.S. at 478 (quoting *Keene Corp.* v. *United States*, 508 U.S. 200, 207 (1993)), nor is it consistent with this Court's subsequent holding that the time of filing rule applies "whether destruction or perfection of jurisdiction is at issue," *Grupo Dataflux v. Atlas Glob. Grp.,*

L.P., 541 U.S. 567, 580 (2004). Indeed, neither the Second Circuit nor Respondents provided a case interpreting *Dole Food* or the FSIA to fit their erroneous reading of either.

They argue instead that the time of filing rule recited in *Dole Food* works differently than in the jurisdictional context because the FSIA is more than just a jurisdictional statute—even though *Dole Food* makes no mention of that novel construction. Respondents' entire support for this argument is a single line from *Republic of Austria v. Altmann*, 541 U.S. 677 (2004): "'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.'" Opp. 10 (quoting *Altmann*, 541 U.S. at 695). From this line, Respondents conclude, "[t]here is therefore no tension between determining jurisdiction at the time of filing and the proposition that immunity might arise after filing." *Ibid.*

Respondents do not actually cite any "substantive federal law" in support of their position, only "principles" such as "regard to sovereign or public acts" and "comity." *Id.* at 11. Neither of these principles relate to the timing issues relevant here, nor do Respondents explain how they might.[1] In any event, the line they cite from *Altmann* only stands for the proposition that the FSIA relates, *in addition* to jurisdictional issues, to the "substantive rights of the parties as well," which had implications for the statute's retroactivity under *Landgraf v. USI Film Products*, 511 U.S. 244 (1994). *Altmann*, 541 U.S. at 695. *Altmann* does not even so

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[1] As Professor Dodge explains, reliance on "comity" is out of step with interpreting the FSIA. Dodge Br. 14-15.

much as hint at excluding "longstanding principles" of jurisdiction from the FSIA.

Respondents also cite the Second Circuit's observation in the decision below that *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." Opp. 10 (quoting Pet. App. 30a n.4). But *Oliver* is a century-old case that has no bearing on whether § 1604 is a jurisdictional provision, or whether a change in immunity status implicates issues that override jurisdictional principles in a way that favors Respondents. It only addressed whether "[t]he question of sovereign immunity" fell within a federal court's constitutional power to hear, finding it did not. *Id.* at 442-43. *See also* Dodge Br. 16-17.

In support of their reading of the FSIA, Respondents offer no additional cases to those cited by the Second Circuit, which Petitioners addressed in their prior brief. Pet. 21-23. None of these cases involve the FSIA at all except *Republic of Iraq v. Beaty*, 556 U.S. 848 (2009), which does not involve a change in the defendant's status.

Of course, § 1604, incorporating the definitions in § 1603, *is* a jurisdictional section (even Respondents concede that §§ 1603 and 1604 must be "read together," Opp. 11). It says so: "a foreign state shall be immune from the jurisdiction of the courts of the United States." As this Court explained: "Foreign sovereign immunity is jurisdictional [under 1604] because explicit statutory language makes it so." *Bolivarian Republic of Venez. v. Helmerich & Payne Int'l Drilling Co.*, 581 U.S. 170, 177 (2017) (citing 28 U.S.C. §§ 1604 and 1605). Thus, "[c]onstruing § 1603(b) so that the

present tense has real significance is consistent with" the time of filing rule, as this Court explained in *Dole Food*, 538 U.S. at 478.

Indeed, as Professor Dodge explained in his *amicus* brief in support of certiorari, the structure of the FSIA supports this commonsense analysis. *See* Dodge Br. 7-9. The FSIA relates closely to the diversity jurisdiction statute, 28 U.S.C. § 1332. That section is incorporated by reference in § 1603(b)—the provision at issue here—to determine whether a potential instrumentality "is" a citizen of a U.S. state. Determining citizenship under § 1332 is clearly done at the time of filing, and not later. *See Grupo Dataflux,* 541 U.S. at 580. There is no reason why the determination of whether an entity "is" an organ of or majority owned by a foreign state should employ an opposing interpretative principle. This Court rejected a similar argument suggesting that "the FSIA's scope awkwardly flip-flops" back and forth "in sequential provisions" in *Turkiye Halk Bankasi A.S. v. United States*, concluding that "Congress did not write such a mangled statute." 598 U.S. 264, 143 S. Ct. 940, 949 (2023).

The FSIA also added § 1332(a)(4) to the diversity jurisdiction statute by granting district courts original jurisdiction over suits brought by foreign states as plaintiffs. Indeed, in the decision below, the Second Circuit suggested the time of filing rule operates differently when "determining diversity jurisdiction where the sovereign was a plaintiff" under § 1332(a)(4) than doing so in a "diversity jurisdiction suit brought *against* a foreign state under 28 U.S.C. § 1330 . . . ." Pet. App. 34a & n.6 (discussing *European Cmty. v. RJR Nabisco, Inc.*, 764 F.3d 129, 143 n.15 (2d Cir. 2014), *rev'd on other grounds*, 579 U.S. 325 (2016)).

Again, the Second Circuit offered no reason why the FSIA would operate in such an inconsistent manner.

III. The Decision Below Creates a Circuit Split.

As Petitioners demonstrated, Pet. 11-19, the Second Circuit's decision conflicts at least with the post-*Dole Food* decisions *TIG Insurance Co. v. Republic of Argentina*, 967 F.3d 778 (D.C. Cir. 2020) and *Olympia Express, Inc. v. Linee Aeree Italiane, S.P.A.*, 509 F.3d 347 (7th Cir. 2007) (along with any number of sovereign immunity cases recognizing *Dole Food*'s time-of-filing holding). The decision below would also conflict with *In re Chase & Sanborn Corp.*, 835 F.2d 1341 (11th Cir. 1988), *rev'd on other grounds*, 492 U.S. 33 (1989)), in which the Eleventh Circuit held that the "FSIA is inapplicable" where "the suit to recover [certain] transfers occurred before [defendant] was nationalized." 835 F.2d at 1347.

The Second Circuit itself appeared to acknowledge the circuit split it has created. It granted that *TIG Insurance* supported Petitioners' argument but decided that the "better" argument was that "[t]he most natural reading of the statute is one that gives foreign sovereigns immunity even when they gain their sovereign status mid-suit." Pet. App. 28a. Indeed, the Second Circuit acknowledged that *TIG Insurance* is an "example" of the "real concerns" Petitioners raised "that allowing post-filing changes in sovereign status will encourage gamesmanship"—it simply concluded that "[t]hose concerns are absent *in this case*." Pet. App. 35a-36a (emphasis added).[2]

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[2] As Petitioners noted, the FSIA does not contain a "manipulation" exception for otherwise legal nationalizations. Pet. 27.

As to *Olympia Express*, the Second Circuit acknowledged that it "reject[ed] [the] reasoning" of *Matton v. British Airways Board, Inc.*, No. 85-cv-1268, 1988 U.S. Dist. LEXIS 11869 (S.D.N.Y. Oct. 27, 1988), a case which it cited with approval. Pet. App. 29a n.3. It cited *Olympia Express* with a "but see" signal, leaving it as a contrary authority. *Ibid.*

Nonetheless, Respondents argue that there is no split. First, they argue that *TIG Insurance* is distinguishable because it relates to "execution immunity . . . not jurisdictional immunity," Opp. 13—but it is jurisdictional principles that they have argued should not be read into §§ 1603 and 1604. That is, it is Respondents that insist there is something about "immunity," separate from jurisdiction, that raises an unwritten "currentness" requirement to the FSIA. But *TIG Insurance* rejected an attempt to repair *immunity* post-filing to avoid enforcement, explicitly citing *Dole Food*.

In fact, Argentina made the precise opposite argument in *TIG Insurance* that Respondents do here—that the court should not have applied jurisdictional principles to its immunity from enforcement. The D.C. Circuit disagreed:

> Argentina replies that these examples generally involve jurisdictional requirements, and execution immunity is not jurisdictional in this circuit. But nothing about that distinction supports adopting an unfamiliar time-of-writ rule for assessing commercial use.

TIG Ins., 967 F.3d at 783 (citation omitted).

Also like Respondents, Argentina argued unsuccessfully that "what counts as the present time for

purposes of that assessment is the moment the court would issue its writ." *Ibid.* Instead, the *TIG Insurance* court explained, "[a] statute's use of the present tense ordinarily refers to the time the suit is filed, not the time the court rules," citing *Dole Food*. *Ibid.* Thus, Argentina's post-filing attempt to acquire immunity had no effect on the court's enforcement power.

As for *Olympia Express*, Respondents argue that it is inapposite because there the defendant lost its instrumentality status post-removal, rather than gained it. But the decision is clear that it is premised on the time of filing rule's rejection of post-filing changes, not precisely *what* changed post-filing—that is, "a subsequent change in the defendant's status" does not change a Court's jurisdiction. 509 F.3d at 350.

As Petitioners explained, Pet. 13-14, *Olympia Express* specifically rejected the argument, pushed by Respondents and the decision below, that *Dole Food* is limited to its precise facts. Judge Posner explained that even though *Dole Food* involved a pre-filing change in status,

> the Court based its decision on the familiar rule—emphatically reaffirmed after *Dole*, in *Grupo Dataflux*—that jurisdiction is determined by the facts that exist when the suit is filed. It would be a big surprise to discover that the Court has changed its mind and now thinks that jurisdiction under the Foreign Sovereign Immunities Act is determined when a party demands a jury trial—in this case, demands it years after the suit was first removed to federal district court under section 1441(d).

509 F.3d at 349 (citations omitted).

IV. The Decision Below Presents "an Important Question of Federal Law."

Respondents argue that cases involving entities acquiring instrumentality status post-filing are simply too "rare" and thus there is no "rush" to review the decision below. Opp. 2. They are wrong on both counts.

Post-filing changes in the status of an instrumentality have occurred in numerous cases, including *Olympia Express* and *RJR Nabisco*. Defendants have attempted to assert sovereign immunity based on post-filing changes in their status in *TIG Insurance* and *In re Chase & Sanborn*. And in the briefing below, JTB relied on the post-filing nationalizations that occurred in *Wolf v. Banco Nacional de Mexico, S.A.*, 739 F.2d 1458 (9th Cir. 1984), and *Callejo v. Bancomer, S.A.*, 764 F.2d 1101 (5th Cir. 1985). It has also arisen among the district courts. *See, e.g.*, *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06-md-1775 (JG) (VVP), 2008 U.S. Dist. LEXIS 107882, at *189-92 & n.35 (E.D.N.Y. Sep. 26, 2008) (rejecting effect of post-filing nationalization under *Dole Food*); *Biton v. Palestinian Interim Self-Government Auth.*, 510 F. Supp. 2d 144, 147 (D.D.C. 2007) (post-filing acquisition of autonomy not a basis for immunity given *Dole Food*).[3]

The Court should review this issue now because it will almost certainly create future uncertainty about *Dole Food*'s continuing validity. Furthermore, it may not be easily reviewable again in the Second Circuit

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[3] The United States asserted 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." U.S. Br. 16 n.4. While not entirely accurate, that is more a reflection of how clear litigants and courts found *Dole Food*'s holding.

where *Bartlett* is settled law. This is particularly troublesome because of the central role the Second Circuit plays in reviewing commercial matters given New York's dominant place in the nation's financial services and foreign trade sectors. Indeed, five sets of *amici* have urged this Court to grant certiorari here, including a consortium of American small businesses that have warned that "gamesmanship and waste . . . inevitably would result" if the decision below is left in place. Investor Choice Advocates Network (ICAN) Br. 6. A group of former American national security officials have also warned that the decision below may "jeopardize national security" by hampering civil forfeiture actions or the deterrent effect of private litigation. Former Nat'l Security Officials Br. 3, 15-22.

Respondents argue these issues will not arise because "courts may disregard sham transactions in determining instrumentality status," Opp. 16—but even temporary nationalizations taken to avoid litigation, such as purchases of 51% of a private corporation's shares, are still (presumptively) legal. Judge Posner, in finding that the rule Respondents urge "would invite strategic maneuvering" (a warning they call "hyperbolic fearmongering," Opp. 17), noted that "[w]hat has been privatized can be renationalized," *Olympia Express*, 509 F.3d at 351—the inverse is just as true.

Respondents also argue that the FSIA's commercial activities and terrorism exceptions will protect victims of commercial torts or terror financing, such as that engaged in by JTB. Opp. 16-17. But the commercial activity exception is narrowly drawn, *see* ICAN Br. 8, and the terrorism exception only applies to the four designated state sponsors of terrorism, 28 U.S.C. § 1605A(a)(2)(A)(i)(I), of which Lebanon is not one.

V. CONCLUSION

Certiorari should be granted.

Respectfully submitted,

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