No. 26-

IN THE

# Supreme Court of the United States

FIONA HAVLISH, *et al.*,

*Petitioners,*

*v.*

THE TALIBAN, *et al.*,

*Respondents.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

## PETITION FOR A WRIT OF CERTIORARI AND APPENDIX VOLUME I OF II


DAVID A. BARRETT
BOIES SCHILLER FLEXNER LLP
55 Hudson Yards
New York, NY 10001

LEE S. WOLOSKY
ERICA L. ROSS
WILLKIE FARR & GALLAGHER LLP
1875 K Street, NW
Washington, DC 20006

IAN HEATH GERSHENGORN
JENNER & BLOCK LLP
1099 New York Avenue, NW, Suite 900
Washington, DC 20001

STUART H. SINGER
*Counsel of Record*
ERIC PALMER
BOIES SCHILLER FLEXNER LLP
401 East Las Olas Boulevard, Suite 1200
Fort Lauderdale, FL 33301
(954) 356-0011
ssinger@bsfllp.com

DOUGLASS A. MITCHELL
MITCHELL ALLYN, LTD.
1000 North Green Valley Parkway, Suite 440-575
Henderson, NV 89074

*(Additional Counsel Listed on Inside Cover)*


August 31, 2026


121272

COUNSEL PRESS
A Proceed Service
The Appellate Experts®
(800) 274-3321 • (800) 359-6859

Dennis G. Pantazis
Timothy B. Fleming
Wiggins Childs Pantazis
Fisher Goldfarb, PLLC
301 19th Street
North Birmingham, AL 35203

Andrianna D. Kastanek
Jenner & Block LLP
353 North Clark Street
Chicago, IL 60654

Benjamin D. Alter
Jenner & Block LLP
1155 Avenue of the Americas
New York, NY 10036

*Counsel for Petitioners Fiona Havlish, et al., Plaintiffs-Appellants Second Circuit Case No. 23-258*

John Thornton
Orlando do Campo
do Campo & Thornton, P.A.
150 S.E. 2nd Avenue,
Suite 602
Miami, FL 33131

*Counsel for Petitioners John Does 1 through 7, Plaintiffs-Appellants in Second Circuit Case No. 23-263*

Jim Beasley, Jr.
The Beasley Firm, LLC
1125 Walnut Street
Philadelphia, PA 19107

*Counsel for Petitioners Raymond Anthony Smith, et al., Plaintiffs-Appellants in Second Circuit Case No. 23-304*

Richard Klingler
Ellis George LLP
3503 Connecticut Avenue, N.W.,
Suite 185
Washington, DC 20008

Carter G. Phillips
Sidley Austin LLP
1501 K Street N.W.
Washington, DC 20005

Sean P. Carter
Cozen O'Connor
1650 Market Street
Philadelphia, PA 19103

*Counsel for Petitioners Federal Insurance Co., et al., Plaintiffs-Appellants in Second Circuit Case No. 23-346*

## QUESTION PRESENTED

Section 201(a) of the Terrorism Risk Insurance Act of 2002 ("TRIA") provides that

> Notwithstanding any other provision of law, . . . in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism . . . the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution.

The Second Circuit held—over strong dissents at both the panel and en banc stages—that assets are subject to execution by terrorism victims only if the assets' owner was an agency or instrumentality of a terrorist party at the time the assets were blocked. This rule ignores the plain language of the statute and protects billions of dollars of Taliban assets from execution by the families of victims of 9/11 and other notorious terrorist attacks.

These cases thus present the following question:

Under the Terrorism Risk Insurance Act, does a plaintiff's right to execute on blocked assets depend on whether the assets' owner was a terrorist party or its agency or instrumentality at the time the assets were blocked?

## PARTIES TO THE PROCEEDING

Petitioners are families of victims of terrorist acts, including the terrorism that occurred on September 11, 2001, as well as insurers that incurred billions of dollars in losses as a result of the September 11th attacks, who collectively hold multibillion dollar judgments against, among others, the Taliban. Petitioners, all of whom were plaintiffs in the district court and appellants in the court of appeals, are listed in Appendix G.

Respondents are the Taliban (also known as the Islamic Emirate of Afghanistan), and the Federal Reserve Bank of New York ("FRBNY"), which is sued nominally as holder of the assets at issue. Both the Taliban and the FRBNY were defendants in the district court and appellees in the court of appeals.

A number of defendants named in the complaint were not parties to the Second Circuit appeal, and are listed in Appendix H. In addition, a number of plaintiffs-appellants in the lower courts may file separate petitions and are listed as respondents in Appendix H.

## CORPORATE DISCLOSURE STATEMENT

All petitioners who were plaintiffs in the *Havlish*, *Smith*, and *Doe* actions are private individuals. The *Federal Insurance* petitioners state as follows:

Petitioners Federal Insurance Company, Pacific Indemnity Company, Chubb Custom Insurance Company, Chubb Indemnity Insurance Company, Chubb Insurance Company of Canada, Chubb Insurance Company of New Jersey, Great Northern Insurance Company, and Vigilant Insurance Company are members of the Chubb Group of Insurance Companies. Chubb Limited is the ultimate parent of these subsidiaries and the only entity within the Chubb Group of Insurance Companies that is traded on any public exchange. Chubb Limited trades on the New York Stock Exchange under the symbol CB. No publicly held corporation owns 10% or more of the stock of Chubb Limited.

Petitioner TIG Insurance Company is a member of the Fairfax Financial Group. Applicant's parent organization, Fairfax Financial Holdings Ltd., is publicly traded on the Toronto Stock Exchange and owns more than 10% of TIG Insurance Company's stock. No publicly held corporation owns 10% or more of the stock of Fairfax Financial Holdings Ltd.

## RELATED PROCEEDINGS

*Ashton v. Al Qaeda Islamic Army*, No. 23-444, U.S. Court of Appeals for the Second Circuit (April 10, 2026).

*Federal Insurance Co. v. Al Qaida*, No. 23-346, U.S. Court of Appeals for the Second Circuit (April 10, 2026).

*Fiona Havlish v. The Taliban, and Federal Reserve Bank of New York*, No. 23-258, U.S. Court of Appeals for the Second Circuit (April 10, 2026).

*John Does 1 through 7 v. The Taliban*, No. 23-263, U.S. Court of Appeals for the Second Circuit (April 10, 2026).

*Owens v. Taliban*, No. 23-354, U.S. Court of Appeals for the Second Circuit (April 10, 2026).

*Owens v. Taliban*, No. 23-797, U.S. Court of Appeals for the Second Circuit (April 10, 2026).

*Smith v. The Islamic Emirate of Afghanistan*, No. 23-304, U.S. Court of Appeals for the Second Circuit (April 10, 2026).

*Ashton v. Al Qaeda Islamic*, No. 02-cv-06977, U.S. District Court for the Southern District of New York (February 21, 2023).

*Fiona Havlish, et al. v. Federal Reserve Bank of New York,* No. 03-cv-09848, U.S. District Court for the Southern District of New York (February 21, 2023).

*Federal Insurance Co. v. Al Qaida*, No. 03-cv-06978, U.S. District Court for the Southern District of New York (February 21, 2023).

*In re Terrorist Attacks on September 11, 2001*, No. 03-md-01570, U.S. District Court for the Southern District of New York (February 21, 2023).

*John Does 1 through 7 v. The Taliban* and *Federal Reserve Bank of New York*, No. 1:20-mc-00740, U.S. District Court for the Southern District of New York (February 21, 2023).

*Owens v. Taliban*, No. 22-cv-01949, U.S. District Court for the Southern District of New York (February 24, 2023).

*Smith v. The Islamic Emirate of Afghanistan*, No. 01-cv-10132, U.S. District Court for the Southern District of New York (February 21, 2023).

## TABLE OF CONTENTS

*Page*

QUESTION PRESENTED ..... i

PARTIES TO THE PROCEEDING ..... ii

CORPORATE DISCLOSURE STATEMENT ..... iii

RELATED PROCEEDINGS ..... iv

TABLE OF CONTENTS ..... vi

TABLE OF APPENDICES ..... ix

TABLE OF CITED AUTHORITIES ..... xii

PETITION FOR WRIT OF CERTIORARI ..... 1

OPINIONS BELOW ..... 1

JURISDICTIONAL STATEMENT ..... 1

CONSTITUTIONAL AND STATUTORY PROVISIONS ..... 1

INTRODUCTION ..... 2

STATEMENT OF THE CASE ..... 6

A. The Taliban's U.S. Assets Were Blocked Because the Taliban's Support of Al Qaeda Led to the 9/11 Attacks ..... 6

*Table of Contents*

*Page*

B. Congress Enacted TRIA to Ensure Terror Victims Can Enforce Judgments against Those Responsible for 9/11 and Other Terrorist Attacks .....8

C. In August 2021, the Taliban Regained Control of Afghanistan and DAB, and Petitioners Sought to Attach and Execute on the DAB Assets .....9

D. The Statutes at Issue and Decisions Below.....11

REASONS FOR GRANTING THE PETITION.....16

I. The Second Circuit's Decision Conflicts with Decisions of the Ninth and Eleventh Circuits.....16

II. The Second Circuit's Decision Is Inconsistent with the Text of TRIA, Background Common-Law Principles, and the Statutory Scheme Created by Congress.....21

A. The Second Circuit's Interpretation of TRIA Is Inconsistent with the Plain Language of the Statute.....21

*Table of Contents*

*Page*

B. The Second Circuit's Interpretation of TRIA Is Inconsistent with Common-Law Judgment Execution Principles and Precedent Interpreting the FSIA's "Agency or Instrumentality" Provision. . . . . .25

C. The Second Circuit's Interpretation of TRIA Undermines the Statutory Scheme Enacted by Congress. . . . . .28

CONCLUSION . . . . . .31

## TABLE OF APPENDICES

*Page*

### APPENDIX VOLUME I OF II

APPENDIX A — JUDGMENT AND OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED AUGUST 26, 2025 .....1a

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING REHEARING EN BANC, FILED MARCH 19, 2026 .....79a

APPENDIX C — AMENDED ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED APRIL 3, 2026.....119a

APPENDIX D — MEMORANDUM DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED FEBRUARY 21, 2023.....121a

APPENDIX E — REPORT & RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED AUGUST 26, 2022 .....161a

*Table of Appendices*

*Page*

APPENDIX F — RELEVANT STATUTORY PROVISIONS . . . . . .215a

Terrorism Risk Insurance Act of 2002 . . . . . .215a

Foreign Sovereign Immunities Act . . . . . .219a

APPENDIX G — LIST OF PETITIONERS . . . . . .252a

Plaintiffs-Appellants in Havlish et al., No. 23-258 (2d Cir.) . . . . . .252a

Plaintiffs-Appellants in John Does 1–7, No. 23-263 (2d Cir.) . . . . . .256a

Plaintiffs-Appellants in Smith et al., No. 23- 304 (2d Cir.) . . . . . .256a

Plaintiffs-Appellants in Federal Insurance Co., et al., No. 23-346 (2d Cir.) . . . . . .257a

**APPENDIX VOLUME II OF II**

APPENDIX H — LIST OF RESPONDENTS . . . 258a

Plaintiffs-Appellants in Ashton, et al., No. 23-444 (2d Cir.) . . . . . 258a

Plaintiffs-Appellants in Owens, et al., Nos. 23-354, 23-797 (2d Cir.) . . . . . .389a

*Table of Appendices*

*Page*

Defendants-Appellees in Havlish, et al., No. 23-258 (2d Cir.) . . . . . .395a

Garnishee-Interested-Party-Appellee in Havlish, et al., No. 23-258 (2d Cir.) . . . . . .395a

Persons identified in the Second Circuit docket as defendants in the district court, but not participating in the Second Circuit appeal or in this Petition . . . . . .396a

## TABLE OF CITED AUTHORITIES

*Page*

**CASES**

*Astoria Fed. Sav. & Loan Ass'n v. Solimino*,
501 U.S. 104 (1991) . . . . . .26

*Aurelius Cap. Partners, LP v.
Republic of Argentina*,
584 F.3d 120 (2d Cir. 2009) . . . . . .27

*Bank Markazi v. Peterson*,
578 U.S. 212 (2016) . . . . . .28

*Bartlett v. Baasiri*,
81 F.4th 28 (2d Cir. 2023). . . . . .27

*Bennett v. Islamic Republic of Iran*,
618 F.3d 19 (D.C. Cir. 2010) . . . . . .24

*Bennett v. Islamic Republic of Iran*,
778 F. App'x 541 (9th Cir. 2019) . . . . . .18, 19

*Bennett v. Islamic Republic of Iran*,
825 F.3d 949 (9th Cir. 2016). . . . . .18, 19, 28

*Caballero v. Fuerzas Armadas
Revolucionarias de Colombia*,
945 F.3d 1270 (10th Cir. 2019). . . . . .20

*Cisneros v. Alpine Ridge Grp.*,
508 U.S. 10 (1993) . . . . . .23

*Page*

*Dole Food v. Patrickson*,
538 U.S. 468 (2003). . . . . 17, 22, 27, 28

*Est. of Levin v. Wells Fargo Bank, N.A.*,
45 F.4th 416 (D.C. Cir. 2022) . . . . . .29

*Exxon Mobil Corporation v.*
*Corporación Cimex, S.A. (Cuba)*,
146 S. Ct. 1909 (2026). . . . . .30

*Fuld v. Palestine Liberation Organization*,
145 S. Ct. 2090 (2025) . . . . . .30

*Gwaltney of Smithfield, Ltd. v.*
*Chesapeake Bay Found., Inc.*,
484 U.S. 49 (1987). . . . . .24

*Heiser v. Islamic Republic of Iran*,
735 F.3d 934 (D.C. Cir. 2013). . . . . .29

*Hewitt v. United States*,
606 U.S. 419 (2025). . . . . .24

*Kirschenbaum v.*
*650 Fifth Avenue & Related Props.*,
830 F.3d 107 (2d Cir. 2016) . . . . . 12, 14, 17, 18

*Marron v. Moros*,
2024 WL 4434196 (S.D. Fla. Oct. 7, 2024). . . . . .19

*Page*

*Minerva Surgical, Inc. v. Hologic, Inc.*,
594 U.S. 559 (2021) . . . . . 25-26

*Stansell v. Revolutionary Armed Forces of Colombia* ("*Stansell I*"),
704 F.3d 910 (11th Cir. 2013) . . . . . 18

*Stansell v. Revolutionary Armed Forces of Colombia* ("*Stansell II*"),
771 F.3d 713 (11th Cir. 2014) . . . . . 18, 20

*Stansell v. Revolutionary Armed Forces of Colombia* ("*Stansell III*"),
45 F.4th 1340 (11th Cir. 2022) . . . . . 18, 22

*TIG Ins. Co. v. Republic of Argentina*,
967 F.3d 778 (D.C. Cir. 2020) . . . . . 27

*United States ex rel. I.R.S. v. McDermott*,
507 U.S. 447 (1993) . . . . . 26

*Weinstein v. Islamic Republic of Iran*,
609 F.3d 43 (2d Cir. 2010) . . . . . 28

**STATUTES**

28 U.S.C. § 1254(1) . . . . . 1

28 U.S.C. § 1330 . . . . . 2

*Page*

28 U.S.C. §§ 1602–11 . . . . . .2

28 U.S.C. § 1603(b)(2) . . . . . .27

28 U.S.C. § 1605A(a)(2)(A)(i). . . . . .24

28 U.S.C. § 1610 . . . . . .1, 16

*Foreign Sovereign Immunities Act*,
Pub. L. No. 94-583, 90 Stat. 2891 (1976) . . . . . .2

*Terrorism Risk Insurance Act of 2002*,
Pub. L. No. 107-297, § 201(a), 116 Stat. 2322
(2002) . . . . . .1-6, 8-9, 11-31

**LEGISLATIVE MATERIALS**

148 Cong. Rec. 16,397 (2002) . . . . . .9

148 Cong. Rec. 23,122 (2002) . . . . . .9

148 Cong. Rec. S11524 (Nov. 19, 2002) . . . . . .28

H. Doc. No. 106-268 (2000). . . . . .7

H. Doc. No. 107-16 (2001) . . . . . .7

H.R. 3210, 107th Cong. (2001) . . . . . .8

H.R. Rep. No. 107-779 (2002). . . . . .9

*Page*

**EXECUTIVE ORDERS**

Exec. Order No. 13,129
64 Fed. Reg. 36,759 (July 4, 1999) . . . . . .7

Exec. Order No. 13,224
66 Fed. Reg. 49,079 (Sept. 23, 2001). . . . . .8

Exec. Order No. 13,268
67 Fed. Reg. 44,751 (July 2, 2002) . . . . . .8

Exec. Order No. 14,064
87 Fed. Reg. 8,391 (Feb. 11, 2022) . . . . . .3

**RULES**

Fed. R. Civ. P. 69(a)(1). . . . . .19

Federal Reserve Rule 25B. . . . . .10

**REGULATIONS**

31 C.F.R. § 594.201(a) . . . . . .8

31 C.F.R. § 594.310 . . . . . .8

*Page*

**OTHER AUTHORITIES**

Amanda Macias, *Secretary of State Blinken calls Taliban 'the de facto government of Afghanistan'*, CNBC (last updated Mon. Sept. 13, 2021), https://tinyurl.com/5hafxbzr . . . . . .11

*Background Press Call by Senior Administration Officials on U.S. Support for the People of Afghanistan*, White House (Feb. 11, 2022), https://perma.cc/YQG8-7CXG . . . . . .3

Bas Aarts, Oxford Modern English Grammar (2011) . . . . . .23

Oxford Dictionary of English Grammar (2014) . . . . . .23

Restatement (First) of Judgments (1942) . . . . . .26

U.S. Dep't of State, *U.S. Relations With Afghanistan* (Aug. 15, 2022), https://2021-2025.state.gov/u-s-relations-with-afghanistan/ . . . . . .11

## PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

## OPINIONS BELOW

The opinions of the Second Circuit directly at issue in this appeal are published at 152 F.4th 339 and 170 F.4th 100 and are reproduced at App. 1a and App. 79a, respectively. The district court opinion is published at 657 F.Supp.3d 311 and is reproduced at App. 175a. The magistrate judge's opinion is unpublished, but can be found at 2022 WL 4643442 (S.D.N.Y. Aug. 26, 2022) and is reproduced at App. 121a.

## JURISDICTIONAL STATEMENT

The Second Circuit's decision affirming the district court's judgment that denied Petitioners' turnover motions was entered on August 26, 2025. Petitioners' timely filed Petition for Panel Rehearing or Rehearing En Banc was denied on April 3, 2026, and on March 19, 2026, respectively. Justice Sotomayor granted Petitioners' motion to extend the time to file the petition to August 31, 2026. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

Pub. L. No. 107-297, § 201(a), 116 Stat. 2322, 2337–40 (2002) (codified as amended 28 U.S.C. § 1610 note)

(Terrorism Risk Insurance Act of 2002), is reproduced in relevant part at App. 215a.

Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified at 28 U.S.C. §§ 1330, 1602–11) (Foreign Sovereign Immunities Act) is reproduced in relevant part at App. 219a.

## INTRODUCTION[1]

In these cases, the Second Circuit denied thousands of 9/11 victims—who hold outstanding judgments against the Taliban for tens of billions of dollars—access to $3.5 billion in frozen funds located in New York City that belong to a bank that is indisputably controlled by the Taliban. It did so over sharp dissents at the panel and en banc stages, and in contravention of its own precedent and that of two other circuits.

In reaching this result, the panel effectively rewrote the plain text of the Terrorism Risk Insurance Act ("TRIA"), a key federal statute enacted in the wake of 9/11 to ensure that terrorism judgments would be enforced against the perpetrators. Because the court of appeals has blocked recovery for victims of the worst terrorist attacks in United States history in conflict with Congress's clearly stated intent, this Court should grant review and reverse the decision below.

TRIA expressly provides that "*in every case* in which a person has obtained a judgment against a terrorist

1. Throughout this Petition, unless otherwise indicated, all emphases are added and all internal citations and quotations are omitted.

party on a claim based on an act of terrorism," the "*blocked assets* of that "terrorist party" (or its agency or instrumentality) "*shall be subject to execution*." Here, Petitioners sought to satisfy outstanding multi-billion-dollar judgments against the Taliban by executing on blocked funds held at the Federal Reserve Bank of New York ("FRBNY") on account for Da Afghanistan Bank ("DAB"). Just months after the Taliban seized control of Afghanistan in August 2021, President Biden blocked $7 billion in DAB funds held at FRBNY,[2] and ordered that $3.5 billion of those $7 billion would be "subject to ongoing litigation by U.S. victims of terrorism."[3]

Petitioners are four groups of plaintiffs—termed the "Judgment Plaintiffs" in the panel opinion below—who were injured by the Taliban's acts of terrorism and attempted to execute on these DAB assets. Under TRIA's plain language, the right outcome is obvious. There is no dispute that the Taliban controlled DAB at the time when the victims sought to satisfy their judgments against the Taliban, and that the assets in question were "blocked" within the meaning of TRIA.

But notwithstanding TRIA's clear language, the Second Circuit nonetheless held that DAB's assets were not subject to execution.[4] To reach this result, the panel

2. Exec. Order No. 14,064, 87 Fed. Reg. 8,391 (Feb. 11, 2022).

3. *Background Press Call by Senior Administration Officials on U.S. Support for the People of Afghanistan*, White House (Feb. 11, 2022), https://perma.cc/YQG8-7CXG.

4. In addition to the TRIA ruling for which Petitioners seek review here, the Second Circuit panel also ruled that the claim for prejudgment attachment asserted by a group of plaintiffs (called

added a new requirement—which has no basis in the statutory text—under which the asset holder's status as an agency or instrumentality of a terrorist party must be assessed as of *the time the assets were initially blocked*. The panel proceeded to apply this new rule without allowing Petitioners any opportunity to develop a factual record and erroneously concluded that the DAB funds were not subject to execution under TRIA because President Biden blocked those assets before, rather than after, the Taliban seized control of DAB.

The panel recognized that even if DAB were entitled to immunity under the Foreign Sovereign Immunities Act ("FSIA") as Afghanistan's central bank, that did not preclude the Petitioners from executing on DAB's assets because TRIA authorizes plaintiffs to enforce judgments based on an act of terrorism "[n]otwithstanding any other provision of law," TRIA § 201(a), language that "supersedes" any immunity that might be granted by the FSIA. App. 7a–8a, 42a.

But the panel nonetheless held that the Petitioners were not entitled to execute against DAB's assets because DAB was not an "agency or instrumentality" of the Taliban *at the time* its assets were blocked. Under this atextual and unprecedented "blocking date" rule, an entity's status as a terrorist party or an agency or instrumentality is evaluated as of the time when the asset was first blocked by the Executive. This rule is an outlier, followed by no

---

the "Pre-Judgment Plaintiffs" by the Second Circuit) was barred by the FSIA. *See* App. 6a–7a. That ruling is not the subject of this petition, which is filed only with respect to the Second Circuit's TRIA ruling. The Pre-Judgment Plaintiffs may separately petition this Court for certiorari.

other circuit. And it conflicts with the text of TRIA and decisions from the Ninth and Eleventh Circuits, which recognize that blocked assets of terrorist parties are subject to execution regardless of when they were blocked.

Under the panel's rule, if an asset is blocked, but transferred only thereafter to a terrorist group such as the Taliban, Hezbollah or the Iranian Revolutionary Guard Corps—and unlike the after-acquired assets of *any other judgment debtor*—then that asset is not subject to execution under TRIA. In other words, the panel's rule affords greater protection to blocked assets held by terrorist groups than the law otherwise provides for the assets of ordinary judgment debtors.

Applying its newly minted rule for the first time, and rather than remanding for the development of a suitable factual record, the panel reached out to hold that Petitioners could not execute on DAB's assets because the Treasury blocked the assets on August 15, 2021, but the Taliban supposedly did not take control of DAB until eight days later. As a result, notwithstanding TRIA's clear language and intent, U.S. terror victims and their family members are forever barred from executing on the Taliban's DAB assets—even though the assets are held in the FRBNY, only a few blocks from Ground Zero.

The panel's ruling prompted a sharp dissent from Judge Sullivan, and he and four other judges dissented from the denial of rehearing en banc in two opinions. Judge Sullivan, joined by Chief Judge Livingston and Judges Bianco and Park, decried the "panel opinion's pretzel logic, disregard of precedent, and indifference to text and purpose" of the statutes. App. 94a. Judge Menashi

dissented separately, concluding that "the panel opinion ignored the statutory command that sovereign immunity and the execution of judgments must reflect current political realities," while "pretend[ing]" that DAB is an instrumentality of Afghanistan rather than the Taliban. App. 118a.[5]

The Second Circuit's decision ignores the plain language of the statute and conflicts with decisions of the Ninth and Eleventh Circuits on matters of extraordinary importance to the Nation's ongoing battle against terrorism. With billions of dollars at stake, the decision below denied relief to thousands of victims of the worst terrorist attack in the nation's history—the very people Congress enacted TRIA for. The Court should grant certiorari to preserve the political branches' emphatic commitment to fighting terrorism and compensating its victims.

## STATEMENT OF THE CASE

### A. The Taliban's U.S. Assets Were Blocked Because the Taliban's Support of Al Qaeda Led to the 9/11 Attacks.

The Taliban is a religious fundamentalist terror group founded in southern Afghanistan. By 1996, it had

5. Judge Menashi dissented separately because he agreed in part with the panel's interpretation of the FSIA. App. 95a, 117a. As noted, the panel's interpretation of the FSIA is not challenged in this Petition, as it is relevant only to the claims of the Pre-Judgment Plaintiffs, who may file separate petitions. *See supra* at 4 n.4.

taken control of the capital city of Kabul (including DAB, the central bank) and established a theocratic regime. The Taliban provided a safe harbor and support to other terrorists from around the world, including Osama bin Laden and his al-Qaeda organization, which relied on the Taliban's protection in Afghanistan to set up training camps and recruit fighters. Over the next five years, al Qaeda used this safe haven to plan, finance, and carry out terrorist attacks against U.S. interests. *See* App. 10a.

In 1999, President Clinton declared the Taliban an "unusual and extraordinary threat to the national security and foreign policy of the United States." Exec. Order No. 13,129 § 1, 64 Fed. Reg. 36,759 (July 4, 1999). Exercising authority under the International Emergency Economic Powers Act ("IEEPA"), he blocked all Taliban property subject to U.S. jurisdiction, as well as the property of any entity "owned or controlled by" the Taliban. *Id.* Shortly thereafter, understanding DAB to be a terrorist financing threat, the Executive Branch added DAB to the list of entities whose property was blocked under the 1999 order. H. Doc. No. 106-268, at 4 (2000); H. Doc. No. 107-16, at 4 (2001). At least twice before 9/11, President Clinton warned Congress that DAB was "controlled by the Taliban." *Id.* Then, as now, the United States did not recognize the Taliban as a legitimate government yet acknowledged that the Taliban controlled the Afghan state and its institutions, including DAB, its central bank.

On September 11, 2001, the political branches' worst fears about the Taliban's control over Afghan institutions and territory came true. Implementing a plan for which they had trained in Afghanistan under the Taliban's

protection, al-Qaeda operatives deployed hijacked airliners to murder thousands of Americans in the worst attack in our Nation's history.

Policymakers reacted swiftly. They initiated a military campaign to dislodge the Taliban from Afghanistan. Aiming to cripple the Taliban and al Qaeda financially, on September 23, 2001, President Bush blocked all property in the United States in which certain identified terrorists had an interest. Exec. Order No. 13,224 § 1, 66 Fed. Reg. 49,079 (Sept. 23, 2001). Nine months later, when President Clinton's 1999 Taliban-specific blocking order expired, President Bush transitioned the Taliban to the list of persons blocked under Executive Order 13,224, thereby designating the Taliban a "Specially Designated Global Terrorist" organization ("SDGT"). Exec. Order No. 13,268 § 1, 67 Fed. Reg. 44,751 (July 2, 2002); 31 C.F.R. §§ 594.201(a), 594.310. The Taliban remains an SDGT to this day.

### B. Congress Enacted TRIA to Ensure Terror Victims Can Enforce Judgments against Those Responsible for 9/11 and Other Terrorist Attacks.

It was in this context—less than two months after 9/11, with smoke still rising from Ground Zero and the Taliban still controlling DAB—that Congress began the process of enacting TRIA, with the specific purpose of facilitating financial recovery for terrorism victims generally and 9/11 victims specifically. TRIA was introduced on November 1, 2001, and signed into law on November 26, 2002. H.R. 3210, 107th Cong. (2001) (enacted); Pub. L. No. 107-297. The legislation's sponsors understood that, for many years, terrorism judgments had been an empty letter,

rendered unenforceable and virtually meaningless by Executive Branch resistance and foreign sovereign immunity doctrines. Congress crafted § 201(a) of TRIA to override legal roadblocks that historically had foreclosed recovery.

Senator Tom Harkin, a TRIA sponsor, explained that § 201(a) would "deal comprehensively with the problem of enforcement of judgments issued to victims of terrorism in any U.S. court by enabling them to satisfy such judgments from the frozen assets of terrorist parties." 148 Cong. Rec. 23,122 (2002). The conference committee report echoed this theme. *See* H.R. Rep. No. 107-779, at 27 (2002) (Conf. Rep.) ("It is the intent of the Conferees that [§] 201 establish that such judgments are to be enforced.").

In addition, TRIA's supporters specifically cited then-pending 9/11 litigation—including the *Havlish* and *Smith* actions at issue here—and made clear they wanted the plaintiffs to be able to enforce their judgments. 148 Cong. Rec. 16,397 (2002) ("[T]housands of Americans . . . have joined the class action lawsuit [initially filed in *Havlish*] aimed at recovering and undermining the ability of these groups to perpetuate their acts of evil.") (statement of Rep. Vito Fossella).

### C. In August 2021, the Taliban Regained Control of Afghanistan and DAB, and Petitioners Sought to Attach and Execute on the DAB Assets.

After the United States and its allies invaded Afghanistan in 2001, a legitimate civilian government regained control over much of the country. Over the twenty years that followed, the United States and the Afghan

government struggled to defeat the Taliban. But by the end of the first Trump administration, the United States agreed to a full military withdrawal in a February 2020 deal with the Taliban. Amidst Taliban territorial gains, President Biden announced in April 2021 that the United States and its allies would depart by autumn 2021. Taliban forces began a sweeping advance that captured much of the country's territory, and despite stiff resistance in some areas, Afghan military forces steadily deteriorated as the Taliban advanced.

In August 2021, as the United States was withdrawing from Afghanistan, the former government of Afghanistan collapsed, and its leaders fled. The Taliban retook physical and operational control of Afghan institutions, including DAB, and installed its own officials as the controlling officers of DAB. App. 10a–12a. At that time, DAB held assets at the FRBNY worth approximately $7 billion.

The Second Circuit panel concluded that the Taliban seized "de facto control over most of Afghanistan" after an offensive that culminated in the capture of Kabul on August 15, 2021. App. 11a. Without input from the parties, or the benefit of factual development below, the panel concluded that the U.S. Treasury exercised its authority under Federal Reserve Rule 25B to deny the Taliban access to the DAB funds that were held at the FRBNY the next day. *See id.* Before the Taliban seized control over Afghanistan, "many senior DAB officials—including its Acting Governor—either left Afghanistan or went into hiding." *Id.* The panel also concluded, on its own, that the Taliban did not take control until it appointed "a new Acting Governor on August 23, 2021" and installed "individuals designated as terrorists by the Department

of the Treasury[]" as "DAB's First Deputy Governor and Second Deputy Governor." App. 11a–12a. From their "position of de facto control over both Afghanistan and DAB, the Taliban demanded immediate receipt of the approximately $7 billion in DAB assets held in the FRBNY." App. 12a. The Executive Branch did not accede to this request and continued to block those assets. *Id.*

The Taliban continues to exercise complete control of DAB to this day. Not only does the Taliban control DAB, but as the magistrate judge below found, "the Taliban is using their control of DAB to advance their aims." App. 203a.

As of this filing, the Executive Branch "has not yet made a decision as to whether to recognize the Taliban or any other entity as the Government of Afghanistan," *see* U.S. Dep't of State, *U.S. Relations With Afghanistan* (Aug. 15, 2022), https://2021-2025.state.gov/u-s-relations-with-afghanistan/, but acknowledges that the Taliban has seized power in Afghanistan. The Secretary of State has called the Taliban the "*de facto* government of Afghanistan."[6]

### D. The Statutes at Issue and Decisions Below

As relevant here, Section 201(a) of TRIA provides that

> Notwithstanding any other provision of law, . . . *in every case* in which a person has obtained

6. Amanda Macias, *Secretary of State Blinken calls Taliban 'the de facto government of Afghanistan'*, CNBC (last updated Mon. Sept. 13, 2021), https://tinyurl.com/5hafxbzr.

> a *judgment against a terrorist party* on a claim based upon an act of terrorism, . . . the blocked assets of that terrorist party (including *the blocked assets of any agency or instrumentality of that terrorist party*) *shall be subject to execution.*

***District Court Decision.*** After the Taliban seized control of DAB in August 2021, Petitioners moved to secure the DAB assets. As noted, the express terms of TRIA make the blocked assets of a terrorist party's agency or instrumentality subject to execution, "[n]otwithstanding any other provision of law." TRIA § 201(a). DAB had become the Taliban's agency or instrumentality by August 15, 2021. The Taliban is indisputably a "terrorist party" against whom the Petitioners have judgments; DAB is controlled and directed by the Taliban, which under Second Circuit law (and that of other Circuits) plainly makes it an agency or instrumentality of the Taliban. *See Kirschenbaum v. 650 Fifth Avenue & Related Props.*, 830 F.3d 107, 135 (2d Cir. 2016). And the assets at issue are blocked by Presidential decree pursuant to IEEPA and belong to DAB.

Beginning in late August 2021, Petitioners began issuing writs of execution against the DAB assets and in March 2022, they began filing turnover motions. App. 130a–31a. The district court (Daniels, J.) denied Petitioners' turnover and attachment motions, holding that DAB enjoyed jurisdictional immunity under the FSIA as Afghanistan's central bank. The court concluded that TRIA overcomes a foreign sovereign's execution immunity but not its jurisdictional immunity. App. 134a–35a, 145a. In the alternative, the court held that finding DAB to be a Taliban instrumentality would intrude on the President's

constitutional power to recognize foreign governments. App. 149a–50a.

***Second Circuit Panel Decision.*** The Second Circuit decision was rendered in seven appeals, five of which were consolidated by the court, and two of which were heard in tandem. This petition is filed jointly by appellants in four of those appeals, who were termed the "Judgment Plaintiffs" by the Second Circuit. The *Havlish* and *Smith* plaintiffs in two of the appeals are estates and family members of Americans killed on 9/11. The *Federal Insurance* parties are insurance companies that incurred billions of dollars in losses by paying claims arising from the 9/11 attacks. The *Doe* plaintiffs are civilian contractors injured in a 2016 suicide bomb attack in Afghanistan committed by the Taliban and others. These groups filed suit against the Taliban—in some cases, decades ago—and they hold final judgments for damages totaling some $17 billion.

In its decision, the panel first addressed jurisdictional immunity under the FSIA. It concluded that even though the "State of Afghanistan" was effectively destroyed by the Taliban, it nonetheless qualifies as a "foreign state" under the FSIA because "the Executive Branch continues to afford formal recognition to the *state* of Afghanistan, even as it denies formal recognition of any *government* thereof." App. 28a (emphasis in original). That was sufficient to defeat the claims of the "Pre-Judgment Plaintiffs" (who may separately petition this Court), because they lacked final judgments and thus could not rely on TRIA as superseding sovereign immunity.

For Petitioners' claims, the panel rejected the district court's conclusion that TRIA does not override jurisdictional immunity under the FSIA, holding that

TRIA is an exception to both jurisdictional and execution immunity under the FSIA and "plainly provided the District Court with subject matter jurisdiction." App. 45a.

The panel nevertheless affirmed. It did so by manufacturing a rule announced "for the first time" in this case—even though Petitioners had no opportunity to brief this issue, or to address it at oral argument. App. 8a. In the panel's view, the determinative issue was whether, at the time the DAB assets were first blocked on August 15, 2021, DAB was "an agency or instrumentality" of the Taliban. Contrary to the Second Circuit's own prior precedent in *Kirschenbaum*—and without reference to the text of the statute—the panel held that "[a]n entity's 'agency or instrumentality' status under [TRIA] is to be assessed as of the date that the assets at issue were blocked" rather than when turnover proceedings were commenced. App. 56a–57a; *contra Kirschenbaum*, 830 F.3d at 136 (right to turnover based on whether an individual or entity was a terrorist party "at the time Plaintiffs' complaints [for turnover] were filed"—which in this case was several months after the Taliban seized DAB).

The panel then applied its new "blocking date" requirement in the first instance, based on its own fact-finding, with no input from Petitioners, to conclude that when the assets were blocked on August 15, 2021, the Taliban did not yet control DAB, so that the assets were therefore unavailable for execution. App. 54a–55a. In making this determination, the panel relied on factual material outside the record, which Petitioners had no opportunity to dispute in briefing or oral argument. Nor did the panel remand to allow Petitioners to develop a factual record (which Petitioners requested in their rehearing petition), even though ample evidence demonstrates that

the Taliban controlled DAB before the government took any action to freeze the assets.

Judge Sullivan dissented, criticizing the panel's blocking-date rule as "an extratextual limitation on plaintiffs' ability to enforce judgments against terrorist parties." App. 75a. As he explained, "[t]his conclusion is unsupported by any legal authority" and is "at odds with the text and purpose of TRIA" as well as the accepted "approach to determining immunity from execution, which looks to conditions at the time the writ of execution is issued." App. 59a. He also faulted the panel for taking it upon itself to invent this rule "[e]ven though this issue was never considered by the district court, briefed by the parties, or discussed at oral argument." App. 58a. Judge Sullivan would have "easily conclude[d] that DAB was an agency or instrumentality of the Taliban." App. 77a.

***Second Circuit En Banc Opinions***. Petitioners filed a joint petition for panel rehearing and rehearing en banc, raising the same arguments as this Petition. Nearly five months later, the Second Circuit denied the petition in all respects, filing four separate opinions. In a one paragraph statement, panel members Cabranes and Calabresi said they "stand by" the Majority Opinion. App. 118a. Judge Nardini, joined by Judge Lohier, agreed with denial of rehearing en banc. App. 81a.

Judge Sullivan, now joined by Chief Judge Livingston and Judges Bianco and Park, reiterated his forceful critique of the panel's misinterpretation of TRIA. As he explained, the panel's ruling "sidestepped the TRIA's text, its purpose, and our own caselaw to conclude that the victims could not recover because the assets did not belong to the Taliban when the government froze them—

even though they did when the victims sought turnover." App. 82a. The panel's "extra-textual limits on the reach of TRIA . . . foil that statute's purpose and have no mooring in any text or authority beyond the panel's own vague sense of good policy." App. 92a.

In a separate dissent, Judge Menashi agreed that the panel "erred in holding that the status of an entity as an agency or instrumentality of a terrorist party under the TRIA must be determined as of the time the assets were blocked." App. 114a. As he explained, "[t]he statute straightforwardly provides that assets shall be available to satisfy a judgment against a terrorist party if the assets are 'blocked' and are 'of th[e] terrorist party.' There are no additional requirements." App. 115a (quoting 28 U.S.C. § 1610 note).

## REASONS FOR GRANTING THE PETITION

### I. The Second Circuit's Decision Conflicts with Decisions of the Ninth and Eleventh Circuits.

The Second Circuit's ruling that an entity's status as a terrorist party must "be assessed as of the date that the assets at issue were blocked" has no basis in the text of TRIA and conflicts with the decisions of every other circuit to consider when status as a terrorist party should be assessed under TRIA. *See* App. 56a–57a. As Judge Sullivan explained, the panel's ruling "imposes an extratextual limitation on plaintiffs' ability to enforce judgments against terrorist parties." App. 75a. Nothing in "the plain text of TRIA confine[s] its applicability to assets that belonged to the terrorist party (or its agency or instrumentality) at the time those assets were blocked." *Id.*

The Second Circuit is the only circuit to have imposed a timing limit on recovery based on when the Executive Branch first blocked the asset. Under the approaches of the Ninth and Eleventh Circuits, blocked assets that belong to a terrorist party are subject to execution, regardless of when they were blocked. Under the approach of these circuits, the result below would have been different: It is undisputed that DAB was under total control of the Taliban when execution was sought, and so had this case been brought in any other circuit, its blocked assets would have been subject to execution. Review by this Court is necessary to resolve the conflict created by the Second Circuit's newly minted "blocking date" rule and to establish a uniform rule for TRIA actions nationwide.

To understand this split of authority, one must begin with the Second Circuit's prior decision in *Kirschenbaum*, which other courts of appeals analyzed in their decisions regarding timing determinations under TRIA. Prior to the decision below, the Second Circuit had interpreted TRIA to adopt a "time of filing" standard for assessing an entity's status as an "agency or instrumentality" of a terrorist party. This standard asked whether an individual or entity was "sufficiently owned, controlled, or directed" by a terrorist party at "the time [p]laintiffs' complaints [for turnover] were filed." *Kirschenbaum v. 650 Fifth Avenue & Related Props.*, 830 F.3d 107, 136 (2d Cir. 2016) (citing *Dole Food v. Patrickson*, 538 U.S. 468, 478–79 (2003)).[7]

7. As Petitioners argued in seeking rehearing en banc, under *Kirschenbaum*'s time-of-filing rule, DAB clearly qualified as an agency or instrumentality of the Taliban because Petitioners' complaints for attachment and turnover were filed in 2022, many months after the Taliban took over DAB. Although conflicting rulings within the same circuit do not independently justify granting

In *Stansell v. Revolutionary Armed Forces of Colombia*, 45 F.4th 1340 (11th Cir. 2022) (*Stansell III*),[8] the Eleventh Circuit rejected *Kirschenbaum*'s approach and held that an individual or entity qualifies as an agency or instrumentality of a terrorist party if it "'is *or was ever*'" sufficiently owned, controlled, directed, or otherwise involved with the activities of a terrorist party. *Id.* at 1350 (quoting *Stansell II*, 771 F.3d at 724 n.6 (2014)). The Eleventh Circuit rejected *Kirschenbaum* for failing to recognize that an individual or entity can qualify as an agency or instrumentality based entirely on "past involvement or association with a terrorist party." *Stansell III*, 45 F.4th at 1350.

In *Bennett v. Islamic Republic of Iran*, 825 F.3d 949, 963 (9th Cir. 2016), *abrogated on other grounds by Rubin v. Islamic Republic of Iran*, 583 U.S. 202 (2018)), and *Bennett v. Islamic Republic of Iran*, 778 F. App'x 541, 543 (9th Cir. 2019), the Ninth Circuit applied still another approach. It held that, "for blocked assets to be subject to execution or attachment under § 201(a) of [TRIA], 'the blocked assets must be 'assets of' the instrumentality" when execution is sought, meaning when writs are issued

---

certiorari, the Second Circuit's deviation from its own precedent (without any warning to the parties or opportunity to submit additional briefing) further demonstrates the need for review by this Court to establish a clear and uniform rule for TRIA cases nationwide.

8. *Stansell III* was the third of a series of appeals decided by the Eleventh Circuit in cases concerning alleged assets of agencies or instrumentalities of the FARC. *See Stansell v. Revolutionary Armed Forces of Colombia*, 704 F.3d 910 (11th Cir. 2013) (*Stansell I*); *Stansell v. Revolutionary Armed Forces of Colombia*, 771 F.3d 713 (11th Cir. 2014) (*Stansell II*).

pursuant to Federal Rule of Civil Procedure 69(a)(1). *Bennett*, 825 F. 3d at 963. Applying that rule on remand, the court held that funds Visa held on account for Bank Melli—an instrumentality of Iran—were subject to execution because they presently were Bank Melli's property. *Bennett*, 778 F. App'x at 543 ("[T]he blocked assets in dispute *are* property of Bank Melli and so may be assigned to judgment creditors." (quoting *Bennett*, 825 F.3d at 963–64)). The same approach—which is focused on an entity's status at the time of execution, rather than the time of filing or blocking—was proposed by the dissenters below. *See* App. 93a, 95a–96a.

The Second Circuit's new "time of blocking" rule conflicts with the Eleventh and Ninth Circuits. Under the Eleventh Circuit's standard, courts do not assess agency-or-instrumentality status at any specific moment in time, such as when blocking occurred, the complaint was filed, or the writ was served. Instead, "[a] third party who provides material support to a terrorist *at any point in time* constitutes an agency or instrumentality, even if they purportedly stopped aiding the terrorist." *Marron v. Moros*, 2024 WL 4434196, at *3 (S.D. Fla. Oct. 7, 2024). Under the Ninth Circuit's approach, by contrast, whether "the blocked assets in dispute *are* property" of a terrorist party or its agency or instrumentality is the key question, not whether they *were* property of a terrorist affiliate when they were initially blocked. *Bennett*, 778 F. App'x at 543.

Beyond that, the Eleventh Circuit has consistently affirmed that "TRIA execution requires two *separate* determinations regarding the property being executed: (i) that the asset is blocked; and (ii) that the owner of the

asset is an agency or instrumentality of the judgment debtor." *Stansell II*, 771 F.3d at 726. On that issue, the Tenth Circuit has reached the same result. *See Caballero v. Fuerzas Armadas Revolucionarias de Colombia*, 945 F.3d 1270, 1275–76 (10th Cir. 2019) (treating "blocked asset" and "agency or instrumentality" as distinct elements). On this basis, the Eleventh Circuit has rejected the notion that assessments of agency-or-instrumentality status are connected with the requirement that assets must be blocked: "A third party's assets must be blocked under the TRIA when the motion for a writ of garnishment is filed, and when the writ is issued[,] . . . [b]ut that does not mean that agency/instrumentality status must be determined as of that point in time." *Stansell III*, 45 F.4th at 1350 (citing *Stansell II*, 771 F.3d at 748).

Thus, there is a clear and stark conflict between the Second Circuit's "blocking date" rule and the approaches followed by the Ninth and Eleventh Circuits. Neither the Ninth Circuit nor the Eleventh Circuit impose the strained, backward-looking snapshot requirement the Second Circuit invented. Given the exceptional importance of the question presented to the Nation's struggle against terrorism and to thousands of victims who were denied relief by the panel's decision, the case for this Court's review is clear.

## II. The Second Circuit's Decision Is Inconsistent with the Text of TRIA, Background Common-Law Principles, and the Statutory Scheme Created by Congress.

### A. The Second Circuit's Interpretation of TRIA Is Inconsistent with the Plain Language of the Statute.

The Second Circuit's "blocking date" rule is indefensible as a reading of TRIA's text. The panel itself conceded that it created this rule without regard to the statutory text, which it erroneously read as providing "no guidance" on the "date of assessment" of terrorist-party status. App. 52a. But as both the en banc dissenters and other circuits have recognized, "the unambiguous language of the statute makes clear that as long as (1) the assets are blocked, and (2) they belong to a terrorist party or its agency or instrumentality, those assets can be used to satisfy a judgment against the terrorist party." App. 75a. This is true regardless of whether the assets belonged to an entity that already qualified as a terrorist party's "agency or instrumentality" when the assets were first blocked.

TRIA provides that "*in every case* in which a person has obtained a judgment against a terrorist party on a claim based on an act of terrorism," "the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution." *See supra* at 12–13. Nothing in this provision suggests that an asset must *already* belong to a terrorist party (or its agency or instrumentality) at

the time the asset was "blocked" for those assets to be "subject to execution." By holding otherwise, the panel effectively added words to the statute and disregarded other key features of the text.

First, the phrase "*in every case*" indicates that the status of a terrorist party is assessed in the context of an ongoing "case." That language links an asset's status as being "subject to execution" to the "case" in which a person seeks to enforce "a judgment against a terrorist party on a claim based on an act of terrorism." This indicates that whether an asset is "subject to execution" depends on whether the asset was "blocked" and "of" a terrorist party at the time execution is sought, not when the asset was initially blocked by the Executive Branch. Thus, the phrase "the blocked assets of that terrorist party" must be interpreted to refer to assets that were blocked at any prior point in time, so long as they remain blocked when execution is sought.

Second, the statute speaks in the present tense. It applies to the "blocked assets of"—naturally read as currently belonging to—the terrorist party in question. This reading is confirmed by the present-tense use of the verb "shall be," which strongly indicates that the assessment of whether "blocked assets" belong to a terrorist party or its agency or instrumentality must be conducted in the present, at the time when execution is sought.[9] *Cf. Dole*, 538 U.S. at 469 (under the FSIA

9. The Eleventh Circuit has said that in TRIA, "the word 'shall' is used in its usual 'mandatory' legal sense" rather than as a "future tense modal verb" or a "present tense expression." *Stansell III*, 45 F.4th at 1351. This remark follows linguists who treat "shall be" as a tenseless verb. Other linguists treat "shall be" as present tense

"instrumentality status [must] be determined at the time suit is filed" because the statute "is expressed in the present tense").

Third, the "notwithstanding" clause of TRIA confirms that Congress intended for TRIA to have the broadest possible reach "[n]otwithstanding any provision of law." *See Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 18 (1993) (noting this Court has regularly interpreted "notwithstanding" provisions broadly "to supersede all other laws"). This phrase indicates a clear intent to override artificial barriers to recovery in terrorism cases. As Judge Sullivan explained in dissent, "it strains credulity to suggest that Congress"—in a statute meant to "ensure that the maximum assets are available to victims of terrorism"—would have "intended to create roadblocks preventing victims of terrorism from accessing the assets of terrorist organizations." App. 77a.

Thus, the language of TRIA should be read to require that an "asset" must be both "blocked" and belong to an "agency or instrumentality" of a terrorist party in the present, at the point in time when a court must determine whether the asset is "subject to execution." The Second Circuit's "blocking date" rule does violence to the text of TRIA.

---

because it is "unmarked" as to tense and "can embrace any time that does not exclude the speaker's time." *See* Oxford Dictionary of English Grammar 378–80, 415 (2d ed. 2014). But on either view, the Second Circuit's interpretation is inconsistent with the language of TRIA. Linguists who treat "shall" as tenseless agree that it refers to what must occur now and in the indefinite future—not what occurred in the past. *See* Bas Aarts, Oxford Modern English Grammar 250–53, 287–88 (2011) (explaining that "shall" has no "past tense forms" and that "should" usually functions as the "past tense of shall").

The panel's justifications for its attempt to effectively rewrite TRIA are meritless.

For one, despite its assertion that the text provides "no guidance" on the "date of assessment" of terrorist-party status, App. 52a, the panel nonetheless suggested that, as a matter of text, "blocked assets are not 'of' a terrorist party if those assets did not belong to either the terrorist party, or an entity then operating as an agency or instrumentality of the terrorist party, as of the date that the assets were blocked." App. 53a. But as Judge Menashi explained in dissent, "assets that yesterday were not 'of' a terrorist party might today be 'of' a terrorist party if the owner has become an agency or instrumentality of a terrorist party." App. 115a. In other words, the panel assumed that the phrase "blocked assets of a terrorist party" means "assets that belonged to a terrorist party *when they were blocked*." But that phrase is more readily interpreted to mean "blocked assets that *presently* belong to a terrorist party or its agency or instrumentality."

Congress "of course 'could have phrased its requirement in language that looked to the past.'" *Hewitt v. United States*, 606 U.S. 419, 431 (2025) (quoting *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 57 (1987)). For example, in 28 U.S.C. § 1605A(a)(2)(A)(i), Congress chose language that squarely focuses on the state of affairs "at the time the [terrorist] act . . . occurred." But in TRIA, Congress "did not choose this readily available option.'" *Hewitt*, 606 U.S. at 431. Thus, the "'most natural reading' is to construe the statute in the present . . . tense." *Bennett v. Islamic Republic of Iran*, 618 F.3d 19, 25 (D.C. Cir. 2010) (Garland, J., concurring) (quoting *Gwaltney*, 484 U.S. at 57).

Apart from this unsupported textual argument, the panel asserted that its reading was consistent with TRIA's purpose because "[i]f an entity becomes an agency or instrumentality of a terrorist party *after* that entity's property is blocked, those assets cannot have been used to further the mission of the terrorist party." App. 53a (emphasis in original). But "nothing in the text of TRIA limits its scope to assets actively employed to fund a terrorist campaign." App. 93a (Sullivan, J., dissenting from denial of reh'g en banc).

Just as any judgment may be executed against property that a judgment debtor first acquires years after the judgment was entered, it is irrational to assume that Congress—in a statute designed to maximize accountability for terrorism and deprive terrorists of assets—would not have intended the same result when a terrorist party acquires new assets. Even if the majority's policy argument had any merit, the panel was not entitled to ignore the plain text of the statute.

### B. The Second Circuit's Interpretation of TRIA Is Inconsistent with Common-Law Judgment Execution Principles and Precedent Interpreting the FSIA's "Agency or Instrumentality" Provision.

The panel's "blocking date" rule is also at odds with general principles of judgment-enforcement law and precedent interpreting the FSIA's "agency or instrumentality" provision. "Congress legislate[s] against a background of common-law adjudicatory principles, and it expect[s] those principles to apply except when a statutory purpose to the contrary is evident." *Minerva*

*Surgical, Inc. v. Hologic*, Inc., 594 U.S. 559 (2021) (quoting *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991)). Thus, as a statute that creates rights to enforce judgments, TRIA should be interpreted against the backdrop of common-law principles of judgment enforcement. But the panel's blocking date requirement has no basis in common law or otherwise and conflicts with basic principles of judgment-execution law.

For one, under general common-law principles, a judgment "imposes upon the defendant an obligation to pay a sum of money to the plaintiff" that "can be enforced by the seizure . . . of any personal property of the defendant, then owned or thereafter acquired by him, which is subject to execution." Restatement (First) of Judgments 1 Intro. Note (1942).[10]

The panel's "blocking date" rule conflicts with this principle. Under the after-acquired property principle, a judgment creditor is entitled to execute on a judgment debtor's after-acquired assets regardless of when the judgment debtor acquired those assets. But under the panel's rule, if the after-acquired assets were blocked before they were acquired by the terrorist party, those assets are immune from execution. The panel's rule perversely provides more protection to blocked assets acquired by terrorist parties than the general principles of judgment-execution law provide for ordinary judgment debtors.

---

10. This Court has recognized the validity of this principle. *See, e.g.*, *United States by United States ex rel. I.R.S. v. McDermott*, 507 U.S. 447, 452 (1993) (a judgment lien ordinarily attaches to property at the "instant" when the judgment debtor "acquired the property").

Finally, the panel's "blocking date" rule is inconsistent with this Court's precedent concerning the appropriate time for determining whether an entity is an agency or instrumentality of a foreign state under the FSIA. This Court has held that, at least initially, "instrumentality status is determined at the time of the filing of the complaint" under the FSIA's definition of "agency or instrumentality." *Dole*, 538 U.S. at 481 (interpreting 28 U.S.C. § 1603(b)(2) in the removal context). Like TRIA, the FSIA's provision "is expressed in the present tense," which "requires that instrumentality status be determined at the time suit is filed." *Id.* at 478. To the extent courts have deviated from *Dole*'s "time of filing" approach, it has only been to hold that, after a suit is filed, immunity should be assessed based on "*current* political realities and relationships"—precisely the type of facts on the ground the panel majority ignored here. *See Bartlett v. Baasiri*, 81 F.4th 28, 33 (2d Cir. 2023) (holding that "sovereign status acquired post-filing can confer immunity").

In interpreting other provisions of the FSIA, courts have likewise focused on "the time the writ of attachment or execution is issued." *Aurelius Cap. Partners, LP v. Republic of Argentina*, 584 F.3d 120, 130 (2d Cir. 2009) (interpreting the FSIA's commercial activity exception); *TIG Ins. Co. v. Republic of Argentina*, 967 F.3d 778, 785–88 (D.C. Cir. 2020) (evaluating "uses of the property in the past as well as all facts related to its present use" in applying the commercial activity exception).

Moreover, interpreting TRIA "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*." *Dole*, 538 U.S. at 469. This is because "TRIA provides courts with subject-matter jurisdiction over post-judgment execution and attachment proceedings against property held in the hands of an instrumentality of the judgment-debtor, even if the instrumentality is not itself named in the judgment." *Bennett*, 825 F.3d at 958 (quoting *Weinstein v. Islamic Republic of Iran*, 609 F.3d 43, 50 (2d Cir. 2010)).

### C. The Second Circuit's Interpretation of TRIA Undermines the Statutory Scheme Enacted by Congress.

The Second Circuit's interpretation upends the operation of the statute and undermines Congress's objectives in enacting TRIA, leaving thousands of terror victims with no relief and jeopardizing future efforts to hold terrorists accountable through litigation.

As this Court has recognized, Plaintiffs with judgments against terrorist groups and state sponsors of terrorism "have often faced practical and legal difficulties at the enforcement stage." *Bank Markazi v. Peterson*, 578 U.S. 212, 216–17 (2016). In enacting TRIA, Congress sought to establish "once and for all" that judgments against terrorist parties "are to be enforced against *any assets available in the U.S.*, and that the executive branch has no statutory authority to defeat such enforcement under standard judicial processes, except as expressly provided in this act." 148 Cong. Rec. S11524, at S11528 (Nov. 19, 2002) (statement of Sen. Harkin).

TRIA—passed in the wake of September 11, with *these particular victims* in mind—reflects Congress's attempt to design a statutory scheme that ensures the

blocked assets of terrorists go to compensate their victims and to "hold terrorist parties accountable by subjecting their assets to attachment," notwithstanding any other law. *Est. of Levin v. Wells Fargo Bank, N.A.*, 45 F.4th 416, 425 (D.C. Cir. 2022) (Pillard, J., concurring). The Second Circuit's rule undermines that scheme in two distinct ways.

First, the panel's interpretation will prevent victims of terrorism from executing on assets in a variety of other circumstances. In this case, the Panel denied execution because it found that the assets were blocked before DAB fell under the control of a terrorist party and became its agency and instrumentality. But the Second Circuit's rule will apply in other circumstances as well, such as when blocked assets are illicitly transferred to a terrorist party or its agency or instrumentality, or a person or entity whose assets are already blocked later becomes an agency or instrumentality of a terrorist party by other means.

Second, the panel's decision "effectively returned to the Executive Branch the sort of discretionary power over the assets that the TRIA aimed to eliminate" by "limiting the reach of the TRIA to assets that belonged to terrorists before the Executive Branch blocked the assets." App. 116a (Menashi, J., dissenting from denial of reh'g en banc). Among other reasons, Congress enacted TRIA to ensure that blocked assets would be used to pay victims "whether or not the executive agreed." *Heiser v. Islamic Republic of Iran*, 735 F.3d 934, 939 (D.C. Cir. 2013). Before TRIA's enactment, "the President was statutorily authorized to prevent the attachment of the blocked property of foreign states, and he often did so." App. 115a. TRIA eliminated that waiver authority in cases covered by the statute.

The panel's rule confers on the Executive a new power to remove assets from the reach of TRIA, in plain contravention of the statutory design Congress adopted. But as this Court recently explained, "Congress does not ordinarily enact self-defeating statutes." *Exxon Mobil Corporation v. Corporación Cimex, S.A. (Cuba)*, 146 S. Ct. 1909, 1919 (2026). By reading an artificial and wholly atextual limitation into TRIA, the Second Circuit's decision does just that.

The practical importance of this case cannot be overstated. As this Court reaffirmed in *Fuld v. Palestine Liberation Organization*, 145 S. Ct. 2090 (2025), Congress has established a comprehensive civil litigation framework to "halt, deter, and disrupt" international terrorism. *Id.* at 2107. This framework advances the federal government's "exceedingly compelling interest . . . in providing a forum for American victims to hold the perpetrators of such acts accountable," *id.* at 2109, "an urgent objective of the highest order," *id.* at 2107. TRIA is an essential part of that framework because judgments against terrorists without the ability to enforce them makes a mockery of "accountab[ility]."

The Second Circuit's "blocking-date" rule cripples Congress' "comprehensive" framework. By limiting TRIA execution only to assets that already belonged to a terrorist party when they were blocked, the rule shrinks an already-restricted pool of assets available to satisfy judgments in the 9/11 and other terrorist attacks. The rule insidiously creates an artificial loophole that wholly insulates subsequently acquired terrorist assets from execution. And the rule contravenes Congressional policy by effectively returning "to the Executive Branch the

sort of discretionary power over the assets that the TRIA aimed to eliminate." App. 116a (Menashi, J., dissenting from denial of reh'g en banc).

The Second Circuit's artificial, atextual restriction on TRIA subverts Congress' goal to make civil litigation a potent weapon against terrorism. Given the Nation's profound commitment to the struggle against terrorism, the exceptional importance of these cases is as clear as the circuit split created by the Second Circuit's misreading of TRIA.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

August 31, 2026

Respectfully submitted,

David A. Barrett
Boies Schiller Flexner LLP
55 Hudson Yards
New York, NY 10001

Lee S. Wolosky
Erica L. Ross
Willkie Farr & Gallagher LLP
1875 K Street, NW
Washington, DC 20006

Stuart H. Singer
*Counsel of Record*
Eric Palmer
Boies Schiller Flexner LLP
401 East Las Olas Boulevard, Suite 1200
Fort Lauderdale, FL 33301
(954) 356-0011
ssinger@bsfllp.com

Douglass A. Mitchell
Mitchell Allyn, Ltd.
1000 North Green Valley Parkway, Suite 440-575
Henderson, NV 89074

Ian Heath Gershengorn
Jenner & Block LLP
1099 New York Avenue, NW,
Suite 900
Washington, DC 20001

Dennis G. Pantazis
Timothy B. Fleming
Wiggins Childs Pantazis
Fisher Goldfarb, PLLC
301 19th Street
North Birmingham, AL 35203

Andrianna D. Kastanek
Jenner & Block LLP
353 North Clark Street
Chicago, IL 60654

Benjamin D. Alter
Jenner & Block LLP
1155 Avenue of the Americas
New York, NY 10036

*Counsel for Petitioners Fiona Havlish, et al., Plaintiffs-Appellants Second Circuit Case No. 23-258*

John Thornton
Orlando do Campo
do Campo & Thornton, P.A.
150 S.E. 2nd Avenue,
Suite 602
Miami, FL 33131

*Counsel for Petitioners John Does 1 through 7, Plaintiffs-Appellants in Second Circuit Case No. 23-263*

Jim Beasley, Jr.
The Beasley Firm, LLC
1125 Walnut Street
Philadelphia, PA 19107

*Counsel for Petitioners Raymond Anthony Smith, et al., Plaintiffs-Appellants in Second Circuit Case No. 23-304*

Richard Klingler
Ellis George LLP
3503 Connecticut Avenue, N.W.,
Suite 185
Washington, DC 20008

Sean P. Carter
Cozen O'Connor
1650 Market Street
Philadelphia, PA 19103

Carter G. Phillips
Sidley Austin LLP
1501 K Street N.W.
Washington, DC 20005

*Counsel for Petitioners Federal Insurance Co., et al., Plaintiffs-Appellants in Second Circuit Case No. 23-346*

# APPENDIX

## TABLE OF APPENDICES

*Page*

### APPENDIX VOLUME I OF II

APPENDIX A — JUDGMENT AND OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED AUGUST 26, 2025 .....1a

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING REHEARING EN BANC, FILED MARCH 19, 2026 .....79a

APPENDIX C — AMENDED ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED APRIL 3, 2026.....119a

APPENDIX D — MEMORANDUM DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED FEBRUARY 21, 2023.....121a

APPENDIX E — REPORT & RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED AUGUST 26, 2022 .....161a

*Table of Appendices*

*Page*

APPENDIX F — RELEVANT STATUTORY PROVISIONS . . . . . .215a

Terrorism Risk Insurance Act of 2002 . . . . . .215a

Foreign Sovereign Immunities Act . . . . . .219a

APPENDIX G — LIST OF PETITIONERS . . . . . .252a

Plaintiffs-Appellants in Havlish et al., No. 23-258 (2d Cir.) . . . . . .252a

Plaintiffs-Appellants in John Does 1–7, No. 23-263 (2d Cir.) . . . . . .256a

Plaintiffs-Appellants in Smith et al., No. 23- 304 (2d Cir.) . . . . . .256a

Plaintiffs-Appellants in Federal Insurance Co., et al., No. 23-346 (2d Cir.) . . . . . .257a

**APPENDIX VOLUME II OF II**

APPENDIX H — LIST OF RESPONDENTS . . . 258a

Plaintiffs-Appellants in Ashton, et al., No. 23-444 (2d Cir.) . . . . . 258a

Plaintiffs-Appellants in Owens, et al., Nos. 23-354, 23-797 (2d Cir.) . . . . . .389a

*Table of Appendices*

*Page*

Defendants-Appellees in Havlish, et al., No. 23-258 (2d Cir.) . . . . . 395a

Garnishee-Interested-Party-Appellee in Havlish, et al., No. 23-258 (2d Cir.) . . . . . 395a

Persons identified in the Second Circuit docket as defendants in the district court, but not participating in the Second Circuit appeal or in this Petition . . . . . 396a

**APPENDIX A — JUDGMENT AND OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED AUGUST 26, 2025**

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 26th day of August, two thousand twenty-five.

Before: Guido Calabresi,
José A. Cabranes,
Richard J. Sullivan,
*Circuit Judges.*

Docket Nos. 23-258(L), 23-263(Con),
23-304(Con), 23-346(Con), 23-444(Con)

FIONA HAVLISH, *et al.*, JOHN DOES 1 THROUGH 7, FEDERAL INSURANCE CO., *et al.*, RAYMOND ANTHONY SMITH, *et al.*, KATHLEEN ASHTON, *et al.*,

*Plaintiffs-Appellants,*

v.

THE TALIBAN,

*Defendant-Appellee,*

FEDERAL RESERVE BANK OF NEW YORK,

*Garnishee-Interested-Party-Appellee.*

*Appendix A*

**JUDGMENT**

The appeals in the above captioned cases from an order of the United States District Court for the Southern District of New York were argued on the district court's record and the parties' briefs.

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the district court's order denying Judgment Plaintiffs' turnover motions is AFFIRMED.

For the Court:
Catherine O'Hagan Wolfe,
Clerk of Court

/s/ Catherine O'Hagan Wolfe

*Appendix A*

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AUGUST TERM 2024

No. 23-258-cv (L)
No. 23-263-cv (CON)
No. 23-304-cv (CON)
No. 23-346-cv (CON)
No. 23-444-cv (CON)

FIONA HAVLISH, *et al.*, JOHN DOES 1 THROUGH 7, FEDERAL INSURANCE CO., *et al.*, RAYMOND ANTHONY SMITH, *et al.*, KATHLEEN ASHTON, *et al.*,

*Plaintiffs-Appellants,*

v.

THE TALIBAN,

*Defendant-Appellee,*

FEDERAL RESERVE BANK OF NEW YORK,

*Garnishee-Interested-Party-Appellee,*[1]

On Appeal from the United States District Court
for the Southern District of New York

1. The Clerk of Court is directed to amend the official caption as shown above.

*Appendix A*

No. 23-354-cv (L)
No. 23-797-cv (C)

ESTATE OF JESSE NATHANAEL ALIGANGA, *et al.*, RIZWAN KHALIQ, *et al.*, JAMES OWENS, *et al.*,

*Plaintiffs-Appellants,*

v.

TALIBAN, AKA THE ISLAMIC EMIRATE OF AFGHANISTAN,

*Defendant-Appellee.*

On Appeal from the United States District Court for the Southern District of New York

Argued October 9, 2024
Decided August 26, 2025

Before: Calabresi, Cabranes, and Sullivan, *Circuit Judges*.

We consider here claims brought by two different sets of plaintiffs. The first set of plaintiffs, the Pre-Judgment Plaintiffs, sought confirmation of a pre-judgment attachment order concerning "blocked" funds held by the Afghan central bank (Da Afghanistan Bank, or "DAB") at the Federal Reserve Bank of New York (the "FRBNY"). Pre-Judgment Plaintiffs did so to preserve their chance to collect on a potential future judgment in their lawsuit against the Taliban for its alleged role in the East Africa embassy bombings of August 7, 1998. The United States District Court for the Southern District of New York

(Valerie E. Caproni, *Judge*) denied their motion in an Opinion and Order dated February 24, 2023.

The second set of plaintiffs (comprising four groups of judgment creditors), the Judgment Plaintiffs, moved for turnover of those same "blocked" funds held by DAB at the FRBNY to satisfy judgments they held against the Taliban stemming, primarily, from the terrorist attacks of September 11, 2001. The United States District Court for the Southern District of New York (George B. Daniels, *Judge*) denied their motion in a Memorandum Decision and Order dated February 21, 2023.

There are two principal questions before us. The first is whether the Afghan central bank, DAB, is immune from attachment under the Foreign Sovereign Immunities Act (the "FSIA"), 28 U.S.C. §§ 1602-1611. If it is, then Pre-Judgment Plaintiffs' pre-judgment attachment order as to its assets must fail.

The second question is whether § 201 of the Terrorism Risk Insurance Act of 2002 (the "TRIA") applies to blocked assets in DAB's name held at the FRBNY. To do so, the TRIA would need to (1) abrogate any immunity afforded to DAB by the FSIA *and* (2) have each of its statutory prerequisites satisfied. If the TRIA does not so apply, Judgment Plaintiffs' turnover motions as to DAB's assets, likewise, must fail.

Judge Sullivan concurs in part and dissents in part.

*Appendix A*

JOSÉ A. CABRANES, *Circuit Judge*:

We consider here claims brought by two different sets of plaintiffs. The first set of plaintiffs, the Pre-Judgment Plaintiffs, sought confirmation of a pre-judgment attachment order concerning "blocked" funds held by the Afghan central bank (Da Afghanistan Bank, or "DAB") at the Federal Reserve Bank of New York (the "FRBNY"). Pre-Judgment Plaintiffs did so to preserve their chance to collect on a potential future judgment in their lawsuit against the Taliban for its alleged role in the East Africa embassy bombings of August 7, 1998. The United States District Court for the Southern District of New York (Valerie E. Caproni, *Judge*, hereinafter District Court [VEC]) denied their motion in an Opinion and Order dated February 24, 2023.

The second set of plaintiffs (comprising four groups of judgment creditors), the Judgment Plaintiffs, moved for turnover of those same "blocked" funds held by DAB at the FRBNY to satisfy judgments they held against the Taliban stemming, primarily, from the terrorist attacks of September 11, 2001. The United States District Court for the Southern District of New York (George B. Daniels, *Judge*, hereinafter District Court [GBD]) denied their motion in a Memorandum Decision and Order dated February 21, 2023.

There are two principal questions before us. The first is whether the Afghan central bank, DAB, is immune from attachment under the Foreign Sovereign Immunities Act (the "FSIA"), 28 U.S.C. §§ 1602-1611. If it is, then Pre-

Judgment Plaintiffs' pre-judgment attachment order as to its assets must fail.

The second question is whether § 201 of the Terrorism Risk Insurance Act of 2002 (the "TRIA") applies to blocked assets in DAB's name held at the FRBNY. To do so, the TRIA would need to (1) abrogate any immunity afforded to DAB by the FSIA *and* (2) have each of its statutory prerequisites satisfied. If the TRIA does not so apply, Judgment Plaintiffs' turnover motions as to DAB's assets, likewise, must fail.

We answer the question of whether DAB is immune from attachment under the FSIA in the affirmative. DAB is the agency or instrumentality of the foreign state of Afghanistan, which itself continues to be recognized as an independent state by the Executive Branch of the United States. This makes DAB itself a "foreign state" pursuant to § 1603(a) and (b) of the FSIA and imbues it with attachment and execution immunity under § 1609. Moreover, none of the exceptions to attachment and execution immunity in § 1610 pertain.

We therefore **AFFIRM** the order of the District Court (VEC) denying Pre-Judgment Plaintiffs' motion to confirm the pre-judgment attachment order on the basis that DAB's funds are immune from attachment under the FSIA.

We answer the question of whether § 201 of the TRIA applies to blocked assets in DAB's name held at the FRBNY in the negative. Although we conclude that the

TRIA abrogates any immunity afforded to DAB under the FSIA, we find that at least one of the TRIA's statutory prerequisites is not satisfied—to wit, we find that DAB is not an agency or instrumentality of a terrorist party as required by the TRIA.

Consistent with our precedent, we evaluate the meaning of an "agency or instrumentality" under the TRIA differently from that same term's meaning under the FSIA. Similarly, we hold for the first time that the date at which we must determine an entity's agency or instrumentality status is different under the TRIA than it is under the FSIA. Specifically, an entity's agency or instrumentality status under § 201 of the TRIA must be determined as of the date that the assets sought in the turnover motion were blocked. Applying our TRIAbased definition of agency or instrumentality to DAB as of August 15, 2021—the date its FRBNY-held funds were blocked—we conclude that DAB is not an agency or instrumentality of the Taliban for purposes of the TRIA.

Accordingly, we likewise **AFFIRM** the order of the District Court (GBD) denying Judgment Plaintiffs' turnover motions. While we hold, contrary to the District Court, that the TRIA abrogates immunity granted to DAB by the FSIA and independently establishes subject matter jurisdiction, we agree that Judgment Plaintiffs fail to satisfy the TRIA's requirement that the blocked assets be either the assets of the terrorist party or the assets of the terrorist party's agency or instrumentality.

*Appendix A*

## I. BACKGROUND

Today we decide two matters arising from a related set of facts. The first case is brought by plaintiffs (the "Pre-Judgment Plaintiffs") seeking pre-judgment attachment for damages they allege the Taliban has caused. The second case is brought by plaintiffs (the "Judgment Plaintiffs") seeking to satisfy judgments they hold against the Taliban for its role in various terrorist attacks. Both sets of plaintiffs target blocked funds of Da Afghanistan Bank ("DAB"), the central bank of the independent state of Afghanistan, that are held at the Federal Reserve Bank of New York (the "FRBNY").

### A. Factual Background

These cases emerge from the atrocities committed by al-Qaeda—with support from the Afghan Taliban (the "Taliban")—on August 7, 1998, and September 11, 2001.[2]

On August 7, 1998, al-Qaeda perpetrated simultaneous suicide bombings at the U.S. embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania. These embassy bombings killed over two hundred individuals and injured several thousand others. On September 11, 2001, al-Qaeda hijacked several passenger aircraft, flying them into the twin towers of the World Trade Center in New York, NY, the Pentagon in Washington, D.C., and an open field in

2. They also include a suicide bomb attack perpetrated by the Taliban on January 4, 2016. *See* Judgment Plaintiffs' Appendix ("Judgment App'x") at 326.

Somerset County, PA. These aircraft hijackings killed several thousand individuals and injured many others.

The Taliban provided considerable support to al-Qaeda in both sets of devastating terrorist attacks. This includes the Taliban's provision to al-Qaeda of a "base of operations, training bases, and safe haven."[3] Indeed, the historical record reveals "that the [United States Government] believed that the Taliban had the capacity to shut down Al Qaeda operations in Afghanistan but refused to do so."[4] Because of the Taliban's role in al-Qaeda's terrorist attacks and the ongoing threat it posed to the United States and U.S. nationals, the United States designated the Taliban as a Specially Designated Global Terrorist (an "SDGT") in July 2002.[5] To this day, the Taliban remains an SDGT.

The Taliban first rose to power in Afghanistan in 1996 and ruled until 2001, when the United States headed a coalition force that invaded Afghanistan and removed the Taliban from its position of de facto control. Though stripped of power, the Taliban maintained an insurgency in Afghanistan for the next two decades. Following an agreement that the United States formed with the Taliban in 2020 to withdraw U.S. troops from Afghanistan, and the subsequent withdrawal of those troops in the summer of 2021, the Taliban insurgency mounted an offensive which

---

3. Judgment App'x 256.

4. *Id.* at 516.

5. Exec. Order No. 13,268, 67 Fed. Reg. 44751 (July 2, 2002); *see also* Exec. Order No. 13,224, 66 Fed. Reg. 49079 (Sep. 23, 2001).

culminated in the capture of Afghanistan's capital, Kabul, on August 15, 2021. As a result, the Taliban once more seized de facto control over most of Afghanistan—but not formal authority, as no country has recognized the Taliban as Afghanistan's legitimate government.

That same day—August 15, 2021—the U.S. Treasury Department blocked all assets held in the Federal Reserve Bank of New York (the "FRBNY") by the central bank of Afghanistan, Da Afghanistan Bank ("DAB").[6] By the time the Taliban was ousted (if only temporarily) in 2001, DAB had just $90,000 in foreign exchange reserves.[7] That sum swelled to over $10 billion in assets as of June 21, 2021,[8] consisting primarily of foreign exchange funds provided by international donors—such as the United States and other Western countries. The majority of DAB's assets—totaling approximately $7 billion—were held in the FRBNY.[9]

As the Taliban seized control over Afghanistan, many senior DAB officials—including its Acting Governor—either left Afghanistan or went into hiding. The Taliban proceeded to fill those leadership positions, which included

---

6. Clayton Thomas, CONG. RSCH. SERV., *Taliban Government in Afghanistan: Background and Issues for Congress* 39 (2021).

7. *Id.* at 38.

8. *Id.*

9. Clayton Thomas, CONG. RSCH. SERV., *Taliban Government in Afghanistan: Background and Issues for Congress* 38-39 (2021).

appointing a new Acting Governor on August 23, 2021.[10] The Taliban also appears to have installed individuals designated as terrorists by the Department of the Treasury's Office of Foreign Assets Control ("OFAC") as DAB's First Deputy Governor and Second Deputy Governor.[11] There is little question that the Taliban has attained de facto control over DAB; as former Treasury Department and National Security Council official Adam Smith testified before the U.S. Senate Committee on Banking, Housing, and Urban Affairs on October 5, 2021, DAB "is now under control of the Taliban."[12] From its position of de facto control over both Afghanistan and DAB, the Taliban demanded immediate receipt of the approximately $7 billion in DAB assets held in the FRBNY.

The United States did not accede to the Taliban's request. On February 11, 2022, then-President Joe Biden issued an Executive Order titled "Protecting Certain Property of Da Afghanistan Bank for the Benefit of the People of Afghanistan" (the "Executive Order").[13] The Executive Order asserted that Afghanistan was experiencing a "widespread humanitarian crisis" which, combined with "the potential for a deepening economic collapse in Afghanistan," constituted "an unusual and

---

10. The new Acting Governor, Haji Mohammed Idris, was reported to be a "Taliban loyalist." Pre-Judgment Plaintiffs' Appendix ("Pre-Judgment App'x") at 338.

11. Pre-Judgment App'x 340-54.

12. *Id.* at 363.

13. Exec. Order No. 14,064, 87 Fed. Reg. 8391 (Feb. 11, 2022).

extraordinary threat to the national security and foreign policy of the United States."[14] It proclaimed a "national emergency" to address the threat and asserted that preserving the U.S.-held assets of DAB—which it defined as the "Central Bank of Afghanistan"—was "of the utmost importance to addressing this national emergency and the welfare of the people of Afghanistan."[15] Accordingly, the Executive Order formally blocked DAB's property in the United States and ordered that the property be transferred "into a consolidated account held at the [FRBNY]."[16] The Executive Order authorized the Secretary of the Treasury to "take such actions . . . as may be necessary to carry out the purposes of this order."[17]

Later that day and pursuant to the authority granted by the Executive Order, OFAC issued a license (the "OFAC License") directing the FRBNY to transfer $3.5 billion to a separate blocked account.[18] The OFAC License set forth that the $3.5 billion could be transferred from the account "for the benefit of the people of Afghanistan" provided that the transfer was initiated by "individual(s) certified by the Secretary of State pursuant to Section 25B of the Federal Reserve Act."[19]

---

14. *Id.*

15. *Id.* at 8391-92.

16. *Id.* at 8391.

17. *Id.* at 8392.

18. Pre-Judgment App'x 297.

19. *Id.* at 298. Section 25B(3) of the Federal Reserve Act provides that the certified individual must be "a representative of

The Secretary of State has since certified two individuals as accredited representatives of Afghanistan, giving them joint control over the $3.5 billion that was transferred to a blocked account pursuant to the OFAC License.[20] These accredited representatives founded the Fund for the Afghan People (the "Afghan Fund") and transferred the $3.5 billion to an account at the Bank of International Settlements in Switzerland.[21]

The United States has represented that this approach enables the "$3.5 billion of Afghan central bank reserves to be used for the benefit of the people of Afghanistan while keeping them out of the hands of the Taliban and other malign actors."[22] While the United States recognizes

---

such foreign state who is recognized by the Secretary of State as being the accredited representative of such foreign state." *See* 12 U.S.C. § 632.

20. Press Release, U.S. Dep't of the Treasury, Joint Statement by U.S. Treasury and State Department: The United States and Partners Announce Establishment of Fund for the People of Afghanistan (Sep. 14, 2022), https://home.treasury.gov/news/press-releases/jy0947 [https://perma.cc/952K-6TEY].

21. *Id.* As of December 31, 2024, the Afghan Fund's assets totaled $3.94 billion. Gene Aloise, SIGAR Quarterly Report to the United States Congress, 45 (Jan. 30, 2025), https://www.sigar.mil/Portals/147/Files/Reports/Quarterly-Reports/2025-01-30qr.pdf [https://perma.cc/2KBA-2K9Z]. As of January 30, 2025, the Afghan Fund "ha[d] not yet made any disbursements to entities on behalf of Afghanistan." *Id.*

22. Press Release, U.S. Dep't of the Treasury, Joint Statement by U.S. Treasury and State Department: The United States and

these reserves as funds belonging to DAB, and in the long run envisions retuning these funds to DAB, it has "made clear that [it] will not support the return of these funds until DAB" meets three criteria, one of which concerns demonstrating independence from the Taliban.[23]

DAB's remaining U.S.-held assets—totaling approximately $3.5 billion—continue to reside at the FRBNY.[24] These assets lie at the crux of the instant litigation.

### B. Procedural Background

We have before us two separate cases, each with its own set of Plaintiffs-Appellants.

The set of plaintiffs in the first case comprises victims of al-Qaeda's suicide bombings at the U.S. embassies on August 7, 1998 (the "Pre-Judgment Plaintiffs"). The set of plaintiffs in the second case comprises primarily victims

---

Partners Announce Establishment of Fund for the People of Afghanistan (Sep. 14, 2022), https://home.treasury.gov/news/press-releases/jy0947 [https://perma.cc/952K-6TEY].

23. *Id.* These three requirements are that DAB: "(1) Demonstrates its independence from political influence and interference; (2) Demonstrates it has instituted adequate anti-money laundering and countering-the-financing-ofterrorism (AML/CFT) controls; and (3) Completes a third-party needs assessment and onboards a reputable third-party monitor." *Id.*

24. Martin A. Weiss, Clayton Thomas, & Jennifer K. Elsea, CONG. RSCH. SERV., *Afghanistan Central Bank Reserves* 1 (2023).

of al-Qaeda's aircraft hijackings on September 11, 2001 (the "Judgment Plaintiffs").[25]

### 1. Pre-Judgment Plaintiffs

On March 8, 2022, Pre-Judgment Plaintiffs filed a complaint against the Taliban, alleging that it was directly and proximately liable for the embassy attacks and seeking compensatory damages.[26] That same day, Pre-Judgment Plaintiffs also filed an *ex parte* emergency motion to attach DAB's funds held at the FRBNY, alleging that those funds belonged to the Taliban.

The District Court (VEC) granted Pre-Judgment Plaintiffs' motion to attach on March 21, 2022, and issued its opinion regarding the same on April 11, 2022. Pre-Judgment Plaintiffs moved to confirm the order of attachment on May 2, 2022. In an Opinion and Order issued on February 24, 2023, the District Court declined to confirm its attachment order, finding that since DAB is the central bank of Afghanistan, its funds are immune from attachment under the FSIA. It therefore denied Pre-Judgment Plaintiffs' motion to confirm and vacated its own order of March 21, 2022 (in which it had granted *ex parte* emergency attachment). The District Court subsequently denied Pre-Judgment Plaintiffs' motion to stay its decision

25. Judgment Plaintiffs also include victims of the Taliban's suicide bomb attack on January 4, 2016.

26. While Pre-Judgment Plaintiffs initially filed their complaint on March 8, 2022, they modified it on March 9, 2022, after incurring a filing error.

denying confirmation of its pre-judgment attachment order. Pre-Judgment Plaintiffs timely appealed from the District Court's order denying their motion to confirm the *ex parte* attachment order and vacating the attachment.

**2. Judgment Plaintiffs**

Judgment Plaintiffs comprise four groups of judgment creditors who hold judgments against the Taliban for its role in terrorist attacks.[27] They seek to satisfy their judgments against the Taliban with the blocked DAB funds held at the FRBNY. On August 26, 2022, a magistrate judge recommended denying these turnover motions for three reasons: (1) DAB is immune to the district court's jurisdiction, (2) the district court is constitutionally restrained from finding that the TRIA mandates authorization of the turnover, and (3) the TRIA requires a consent-based agency relationship between DAB and the Taliban, which was lacking. Judgment Plaintiffs filed objections to the magistrate judge's Report and Recommendation on November 10, 2022. On February 21, 2023, the District Court (GBD) denied Judgment Plaintiffs' turnover motions, adopting the first two of the

27. There is also a fifth group of plaintiffs-appellants: plaintiffs in Kathleen Ashton, et al. ("Ashton Plaintiffs"). Ashton Plaintiffs seek attachment, whereas Judgment Plaintiffs seek turnover. However, their arguments against the District Court (GBD)'s order largely overlap with those of Judgment Plaintiffs. Indeed, Ashton Plaintiffs note their agreement with Judgment Plaintiffs on "th[e] threshold legal issues." Ashton Plaintiffs' Br. at 3; *see also id.* at 17. Ashton Plaintiffs' remaining arguments as to the distribution of DAB's funds are mooted by our judgment.

magistrate judge's three reasons for denial. Judgment Plaintiffs timely appealed from the District Court's order.

## II. DISCUSSION

"We review the district court's ruling on a request for an order of attachment for abuse of discretion."[28] We likewise review "a denial of a . . . turnover order for abuse of discretion."[29] The district court abuses its discretion if it commits an error of law, such as in its application of the FSIA or the TRIA.[30] "We review *de novo* a district court's legal conclusions under the FSIA, including whether a foreign state or its property is or is not shielded by immunity."[31] A district court's legal conclusions under the TRIA are likewise subject to our *de novo* review.

We have jurisdiction over Pre-Judgment Plaintiffs' appeal under 28 U.S.C. § 1291 and the collateral-order doctrine. As instructed by the Supreme Court, district court orders denying security are immediately appealable pursuant to the collateral-order doctrine.[32]

---

28. *Aurelius Capital Partners, LP v. Republic of Argentina*, 584 F.3d 120, 129 (2d Cir. 2009).

29. *Mohammad Ladjevardian, Laina Corp. v. Republic of Argentina*, 663 F. App'x 77, 79 (2d Cir. 2016).

30. *EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 472 (2d Cir. 2007).

31. *Kirschenbaum v. 650 Fifth Ave. & Related Props.*, 830 F.3d 107, 122 (2d Cir. 2016).

32. *See Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 543, 546-47, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949); *Swift & Co. Packers*

We have jurisdiction over Judgment Plaintiffs' appeal under 28 U.S.C. § 1291, as the District Court (GBD)'s Memorandum Decision and Order denying their motions for turnover was a final order.

### A. The District Court (VEC) Was Permitted to Address the Applicability of Attachment Immunity *Sua Sponte*

Pre-Judgment Plaintiffs contend that the District Court (VEC) erred when it addressed the applicability of an attachment immunity provision in the FSIA—namely, 28 U.S.C. § 1611(b)—*sua sponte*.[33] We disagree.

Section 1611(b) sets forth that "[n]otwithstanding the provisions of section 1610 of this chapter, the property of a foreign state *shall* be immune from attachment and from execution" provided certain conditions pertain.[34] We have previously determined that nearly identical language in the FSIA "places no limit on the district court's authority to recognize execution immunity."[35] We have further

---

*v. Compania Colombiana Del Caribe, S.A.*, 339 U.S. 684, 689, 70 S. Ct. 861, 94 L. Ed. 1206 (1950).

33. Pre-Judgment Plaintiffs' Br. at 35-41.

34. 28 U.S.C. § 1611(b) (emphasis added).

35. *Walters v. Indus. and Com. Bank of China, Ltd.*, 651 F.3d 280, 291 (2d Cir. 2011). The language to which we referred was section 1609's statement that "the property in the United States of a foreign state shall be immune from attachment[,] arrest[,] and execution except as provided in sections 1610 and 1611 of this chapter." 28 U.S.C. § 1609.

concluded that "the statute's use of the mandatory form—providing that such property 'shall be immune' from execution absent a statutory exception—signals that, at least where there is no dispute that the targeted property is owned by a foreign sovereign, execution immunity inures in the property itself and applies without regard to how the issue is raised."[36] These basic principles weigh heavily in favor of finding that district courts possess the authority to review attachment (and execution) immunity *sua sponte*.

Pre-Judgment Plaintiffs argue otherwise. In the main, they assert that an exception to the district court's authority to exercise its *sua sponte* review of immunity arises when "the sovereign status of the property at issue is disputed."[37] It is true that we have stopped short of expressly holding that a district court may consider attachment and execution immunity *sua sponte* in the face of a disputed foreign sovereign.[38] But in doing so, we explicitly left that issue open to be resolved another day.[39]

That day is upon us. Pre-Judgment Plaintiffs dispute whether DAB's assets are the property of a foreign

---

36. *Id.* at 291. The District Court (VEC) thus correctly noted that we have "signaled that Section 1611's use of the term 'shall' indicates that execution immunity inures in property that belongs to a foreign sovereign." *Owens v. Taliban*, No. 22-cv-1949, 2023 U.S. Dist. LEXIS 31225, 2023 WL 2214887, at *5 (S.D.N.Y. Feb. 24, 2023).

37. Pre-Judgment Plaintiffs' Br. at 35-36.

38. *Walters*, 651 F.3d at 293-94.

39. *Id.* at 294 n.11.

sovereign,[40] and thus we must determine whether a district court may consider the attachment immunity and execution immunity of those assets *sua sponte*.

We conclude that it may. We see no good reason to foreclose disputed sovereign assets from a court's *sua sponte* consideration of attachment or execution immunity. "Both the Supreme Court and the Second Circuit have long held that courts may dismiss actions on their own motion in a broad range of circumstances where they are not explicitly authorized to do so by statute or rule"[41] and we "identify no doctrinal bar to a district court's applying execution immunity on its own initiative consistent with the terms of the FSIA."[42] We add to that only to note that we likewise identify no doctrinal bar to a district court's *sua sponte* application of attachment or execution immunity even when the sovereign status of the property at issue is disputed.

### B. As an Agency or Instrumentality of a Foreign State to Which No Enumerated Exceptions Apply, DAB Is Entitled to Execution Immunity Under the Foreign Sovereign Immunities Act

We next turn to the matter of whether DAB qualifies for execution immunity under the Foreign Sovereign Immunities Act (the "FSIA"). The FSIA is a statute containing "a comprehensive set of legal standards

40. Pre-Judgment Plaintiffs' Br. at 35.

41. *Snider v. Melindez*, 199 F.3d 108, 112 (2d Cir. 1999).

42. *Walters*, 651 F.3d at 293.

governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies or instrumentalities."[43] "[T]he FSIA imposes a bright-line rule: foreign states and their instrumentalities are immune from suit unless one of the Act's enumerated exceptions applies."[44]

The FSIA was enacted in 1976 with the purpose of "codify[ing] the restrictive theory of sovereign immunity" presented in the Tate Letter.[45] In 1952, motivated by the "widespread and increasing practice on the part of governments of engaging in commercial activities,"[46] Acting Legal Advisor Jack Tate of "the State Department announced the 'restrictive' theory of foreign sovereign immunity, under which immunity was typically afforded in cases involving a foreign state's public acts, but not its strictly commercial acts."[47] However, during the following

---

43. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488, 103 S. Ct. 1962, 76 L. Ed. 2d 81 (1983).

44. *CC/Devas (Mauritius) Ltd. v. Antrix Corp. Ltd.*, 605 U.S. 223, 145 S. Ct. 1572, 1578, 221 L. Ed. 2d 867 (2025).

45. *Samantar v. Yousuf*, 560 U.S. 305, 319, 130 S. Ct. 2278, 176 L. Ed. 2d 1047 (2010); *see also Bartlett v. Baasiri*, 81 F.4th 28, 31-32 (2d Cir. 2023).

46. *See* Letter from Acting Legal Adviser Jack B. Tate to Acting Attorney General Philip B. Perlman (May 19, 1952), *reprinted in Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 711-715, 96 S. Ct. 1854, 48 L. Ed. 2d 301 (1976).

47. *Turkiye Halk Bankasi A.S. v. United States*, 598 U.S. 264, 271, 143 S. Ct. 940, 215 L. Ed. 2d 242 (2023).

decades, "[d]ebates over the degree of immunity foreign sovereigns should enjoy in this Nation's courts followed."[48] Accordingly, the FSIA was introduced to "standardize the judicial process with respect to immunity for foreign sovereign entities in civil cases."[49]

Importantly, while the FSIA "defin[es] the circumstances in which foreign states are immune from suit," the FSIA emphatically does *not* charge the Judiciary with the threshold power to determine whether the basic legal existence of a foreign state is *recognized*, especially in contravention of the Executive.[50] The FSIA neither defines what a foreign state is nor provides the Judiciary with a statutory scheme to determine the "qualifications for statehood or [whether] a particular regime is the effective government of a state."[51]

Indeed, thirty-nine years after the FSIA was enacted, the Supreme Court held in *Zivotofsky ex rel. Zivotofsky v. Kerry* that it is the "exclusive power of the President to control recognition determinations, including formal statements by the Executive Branch acknowledging the

---

48. *Republic of Hungary v. Simon*, 604 U.S. 115, 119, 145 S. Ct. 480, 221 L. Ed. 2d 1 (2025).

49. *Turkiye Halk Bankasi*, 598 U.S. at 272.

50. *Id.* at 274 (internal quotation marks and citation omitted) (emphasis omitted).

51. *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 11, 135 S. Ct. 2076, 192 L. Ed. 2d 83 (2015) (internal quotation marks and citation omitted).

legitimacy of a state or government."[52] Critically, the *Zivotofsky* Court explained that "[l]egal consequences follow formal recognition," including the "benefit [of] sovereign immunity when [recognized sovereigns] are sued."[53] And sovereign immunity is only of moment in the context of the FSIA, as both the Supreme Court[54] and the FSIA itself[55] have made plain. As a result, while the FSIA's reach is a "pure question of statutory construction" that is "well within the province of the Judiciary," the FSIA must be interpreted in a manner consistent with

---

52. *Id.* at 32. Some international-law scholars distinguish between the recognition of states and the recognition of governments. *See* Ian Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 134-156 (9th ed. 2019). *Zivotofsky* appears to hold that the President's exclusive power extends to both.

53. *Id.* at 11.

54. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434, 109 S. Ct. 683, 102 L. Ed. 2d 818 (1989) ("We think that the text and structure of the FSIA demonstrate Congress' intention that the FSIA be the sole basis for obtaining jurisdiction over a foreign state in our courts."). One can read this holding as suggesting that while the FSIA is the means by which we answer the question of whether a foreign state is entitled to sovereign immunity, the more basic question of whether a foreign state is legally recognized at all is assessed prior to, and independently of, the FSIA's framework. To analogize to mathematics or programming, a foreign state is an "input" used to generate results from the FSIA function, rather than an "output" of that function.

55. *See* 28 U.S.C. § 1602 ("Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.").

the Constitutional authority of the Executive to legally recognize the existence of foreign states.[56]

We return, then, to the FSIA. The FSIA contemplates two types of immunity that can apply to the political subdivisions or agencies and instrumentalities of foreign states: jurisdictional immunity (or immunity from suit) and execution immunity (or immunity from attachment of property).

These two different types of immunity are covered in two different parts of the FSIA. 28 U.S.C. § 1604 sets forth that "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."[57] 28 U.S.C. § 1609 sets forth that "the property in the United States of a foreign state shall be immune from attachment[,] arrest[,] and execution except as provided in sections 1610 and 1611 of this chapter."[58]

While both types of immunity turn on whether the relevant entity is a political subdivision or an agency or instrumentality of a foreign state, "the FSIA's provisions governing jurisdictional immunity, on the one hand, and

---

56. *Republic of Austria v. Altmann*, 541 U.S. 677, 701, 124 S. Ct. 2240, 159 L. Ed. 2d 1 (2004) (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446, 448, 107 S. Ct. 1207, 94 L. Ed. 2d 434 (1987)); *see also* 28 U.S.C. § 1602.

57. 28 U.S.C. § 1604.

58. *Id.* § 1609.

execution immunity, on the other, operate independently."[59] In other words, exceptions to jurisdictional immunity do not compel a finding that execution immunity has also been abrogated, or vice versa.[60] This can also be seen from the fact that "the execution immunity afforded sovereign property is broader than the jurisdictional immunity afforded the sovereign itself."[61] This "special protection afforded to the property of a foreign sovereign"[62] derives from the fact that "at the time the FSIA was passed, the international community viewed execution against a foreign state's property as a greater affront to its sovereignty than merely permitting jurisdiction over the merits of an action."[63]

Here, the District Court (VEC) determined that DAB was entitled to execution immunity, and did not assess whether jurisdictional immunity applied. For DAB's assets held in the FRBNY to receive execution immunity under section 1609, DAB must be "a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b)" such that DAB itself qualifies as a "foreign state."[64]

---

59. *Walters v. Indus. and Com. Bank of China, Ltd.*, 651 F.3d 280, 288 (2d Cir. 2011).

60. *Id.* at 289.

61. *Id.*

62. *Id.*

63. *Id.* (quoting *Conn. Bank of Com. v. Republic of Congo*, 309 F.3d 240, 255-56 (5th Cir. 2002)).

64. 28 U.S.C. § 1603(a). It is therefore the case that, under the FSIA, the definition of "foreign state" expands beyond foreign

Because DAB is an agency or instrumentality of the State of Afghanistan, which is itself recognized as a foreign state by the Executive, and because we find that no exceptions to immunity apply, we hold that DAB's assets held in the FRBNY are entitled to execution immunity under the FSIA.

### 1. Afghanistan Is a Foreign State for the Purposes of the FSIA

As DAB—a central bank—is not itself a foreign state, for it to be considered a "foreign state" under the FSIA it must either be the political subdivision or the agency or instrumentality of a foreign state.[65] In this case, the relevant foreign state is the independent state of Afghanistan.

As stated earlier, the FSIA does not define what a foreign state is. It merely provides that the category of "foreign state" is capacious enough to capture the undefined state's political subdivisions and agencies or instrumentalities. The FSIA's silence on this threshold issue makes sense. As the Supreme Court explained in *Zivotofsky*, it is the power of the Executive to legally determine whether "a particular entity possesses the qualifications for statehood or that a particular regime

---

states (*i.e.*, foreign countries) themselves. Foreign states are "foreign states" under the FSIA, but so too are their political subdivisions and their agencies or instrumentalities.

65. *Id.*

is the effective government of a state," including for the purposes of sovereign immunity.[66]

The question of whether Afghanistan qualifies as a foreign state for the purposes of our FSIA analysis is not close. We find that the Executive Branch continues to afford formal recognition to the *state* of Afghanistan, even as it denies formal recognition of any *government* thereof. This is seen most plainly by reviewing the U.S. Department of State's "Fact Sheet" detailing the entities that the United States recognizes as "independent states," where that term is defined as "a people politically organized into a sovereign state with a definite territory recognized as independent by the [United States]."[67] One need only turn to the very top of the alphabetically arranged table of 197 independent states to find the state of Afghanistan counted among their ranks. This table was last updated in March 2025—well after Kabul fell to the Taliban. Consequently, while the *Taliban* is not a formally recognized *government, Afghanistan* continues to be a formally recognized *state*. With this determination by the Executive in hand, we are bound to acknowledge that Afghanistan is a foreign state for the purpose of our analysis of DAB under the FSIA.

---

66. *Zivotofsky*, 576 U.S. at 11 (internal quotation marks and citation omitted).

67. U.S. Department of State, *Fact Sheet: Independent States in the World*, Bureau of Intelligence and Research (Mar. 12, 2025), https://www.state.gov/independent-states-in-the-world [https://perma.cc/XX9Q-KGPA]; *see also* Letter from the United States, 22-cv-1949, ECF No. 81 at 2 (Feb. 24, 2023) (in which the Department of Justice confirms that the official position of the United States is that DAB is the central bank of the State of Afghanistan).

Notably, Pre-Judgment Plaintiffs contend in a footnote in their brief that there is "good reason to conclude that Afghanistan no longer qualifies as a 'foreign state' for purposes of the FSIA."[68] But their reasoning relies entirely on the definition of statehood found in the Third Restatement of Foreign Relations Law of the United States—a definition which our Court has turned to only in the absence of formal recognition by the Executive Branch.[69] In such cases, we will only find a not-formally recognized state to qualify as a foreign state for purposes of the FSIA if it (1) "has a defined territory and a permanent population" that is (2) "under the control of its own government" and that (3) "engages in, or has the

---

68. Pre-Judgment Plaintiffs' Br. at 57 n.6.

69. The Third Restatement identifies a two-step test for determining whether a foreign state legally exists for purposes of further analysis of the relevant state under the FSIA.

First—and in complete consonance with the Supreme Court's later analysis in *Zivotofsky*—we are to look to the Executive Branch. A President's determination that a state is a foreign state is "binding on . . . the courts." Restatement (Third) of the Foreign Relations Law of the United States § 204(a) (1987). If the Executive so determines, we have our answer, and do not proceed to the second step.

Rather, we only move to step two—application of the Third Restatement's definition of statehood—"[i]n the absence of a Presidential decision." *Id.* At that point, we would decide for ourselves "whether to treat an entity as a state" by applying the definition we have adopted for a foreign state. *Id.*

This approach is consistent with that described in the Fourth Restatement, which sets forth that "[w]hether a particular party is a 'state' under the [FSIA] . . . is a question of statutory interpretation, informed by the views of the executive branch." Restatement (Fourth) of the Foreign Relations Law of the United States § 452(a) (2018).

capacity to engage in, formal relations with other such entities."[70]

For example, in *Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria*, which was decided before *Zivotofsky*, we went beyond the explicit directives of the FSIA to evaluate whether the Palestinian Liberation Organization (the "PLO") was a foreign state entitled to immunity.[71] There, we were not able to rely on an express determination from the Executive Branch; the United States had "not recognized the PLO" or "extended it formal diplomatic recognition."[72] We thus proceeded to apply the Third Restatement to assess whether the PLO met the definition of a "state," and determined that it did not.

That same logic does not apply here. Here, we *do* have a determination from the Executive Branch: the United States continues to recognize Afghanistan as an independent state.[73] We can—and indeed *must*—rely upon

---

70. *Nat'l Petrochemical Co. of Iran v. M/T Stolt Sheaf*, 860 F.2d 551, 553-554 (2d Cir. 1988) (quoting Restatement (Third) of the Foreign Relations Law of the United States § 201 (1987)).

71. *Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria*, 937 F.2d 44 (2d Cir. 1991).

72. *Id.* at 48-49.

73. *See ante* note 67.

the Executive's recognition of Afghanistan's statehood. This is our clear directive from *Zivotofsky*.[74]

Finally, we emphasize, consistent with the FSIA's statutory scheme, that the question of whether the Executive has recognized the legal existence of a state is distinct from questions regarding which entities and activities of a foreign state enjoy sovereign immunity. Our more recent decision in *Kirschenbaum v. 650 Fifth Avenue & Related Properties* is instructive as to this distinction.[75] In *Kirschenbaum*, we inquired into whether a particular foundation and New York partnership with a relation to the state of Iran "bore traditional attributes of statehood (or otherwise qualified as a subdivision, agency, or instrumentality)."[76] Such a determination is undoubtedly the province of the Judiciary, to be evaluated according to the FSIA's text—and not by any proclamation of the Executive. Accordingly, we properly determined that while the Executive had issued an order that broadly defined "the 'Government of Iran' to include 'any person owned or controlled by, or acting for or on behalf of, the Government

74. In addition, as we explain in *ante* note 69, the very source of law upon which we based our "foreign state" analysis in *Klinghoffer*—the Third Restatement—makes plain that "a court will decide whether to treat an entity as a state" only "[i]n the absence of a Presidential decision." Restatement (Third) of the Foreign Relations Law of the United States § 204 (1987).

75. 830 F.3d 107 (2d Cir. 2016).

76. *Id.* at 125.

of Iran,'"[77] the Judiciary was not permitted to rely on that definition to "*expand* sovereign statehood under the FSIA for a single 'foreign state.'"[78] However, we did not apply the Third Restatement's definition to determine whether Iran, *itself*, was a foreign state. Instead, implicitly relying on the Executive's formal recognition, we observed that Iran "certainly is" a foreign state.[79]

By contrast, Pre-Judgment Plaintiffs argue that in this highly unusual case, the Court should effectively withdraw the Executive's legal recognition of the state of Afghanistan based on the Court's own analysis of the changing use of force and territorial integrity of a region. Such an approach is inconsistent with the FSIA and this Court's precedents and contradicts the Supreme Court's clear direction in *Zivotofsky*. Accordingly, we proceed to analyze whether DAB is a political subdivision or an agency or instrumentality of the foreign state of Afghanistan under the FSIA.

### 2. DAB, as the Agency or Instrumentality of the State of Afghanistan, Is a "Foreign State" Under the FSIA

Having determined that Afghanistan is a foreign state under the FSIA, we proceed to consider whether DAB is its political subdivision or its agency or instrumentality. If it is, then DAB would also be considered a "foreign

77. *Id.* at 124 (quoting Exec. Order No. 13,599, 77 Fed. Reg. 6659 (Feb. 5, 2012)).

78. *Id.* at 125 (emphasis added).

79. *Id.*

state" for purposes of the FSIA.[80] Both district courts below found that DAB was an agency or instrumentality of Afghanistan and, therefore, was a "foreign state" for purposes of the FSIA.[81] We agree.

Returning to the statute, we assess whether DAB is either (1) a political subdivision of Afghanistan or (2) an agency or instrumentality of Afghanistan.

While the FSIA fails to define the term "political subdivision," we have previously held that an entity is a political subdivision of a foreign state when its core functions are predominantly governmental rather than commercial.[82] This is known as the "core functions test."[83]

---

80. *See* 28 U.S.C. § 1603(a) ("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).").

81. *Owens v. Taliban*, No. 22-cv-1949, 2023 U.S. Dist. LEXIS 31225, 2023 WL 2214887, at *5 (S.D.N.Y. Feb. 24, 2023) (recognizing "DAB's status as Afghanistan's central bank, and, therefore, its status as a sovereign's agency or instrumentality whose assets are afforded immunity from attachment under the FSIA"); *In re Terrorist Attacks on September 11, 2001*, 657 F. Supp. 3d 311, 326 (S.D.N.Y. 2023) ("Therefore, as a central bank, DAB is the instrumentality of the foreign state of Afghanistan.").

82. *Garb v. Republic of Poland*, 440 F.3d 579, 590-96 (2d Cir. 2006); *see also id.* at 599-600 (Straub, J., dissenting) ("The majority chooses the narrower core functions test, holding that *any* government entity whose core functions are governmental rather than commercial is by definition a political subdivision rather than an agency or instrumentality.").

83. *See Schansman v. Sberbank of Russia PJSC*, 128 F.4th 70, 77 (2d Cir. 2025) (noting our articulation of "the core functions test" in *Garb*).

The FSIA draws clearer lines for us to follow in determining which entities are agencies or instrumentalities of foreign states. It sets forth that:

> An "agency or instrumentality of a foreign state" means any entity—(1) which is a separate legal person, corporate or otherwise, and (2) 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, and (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.[84]

Particularly relevant to our present inquiry is the fact that DAB is the central bank of the state of Afghanistan.[85] We have consistently recognized that central banks qualify as agencies or instrumentalities of foreign states under the FSIA.[86] Indeed, we have previously gone so far

---

84. 28 U.S.C. § 1603(b).

85. Afghanistan Bank Law, art. 1.1 (Dec. 17, 2003), https://dab.gov.af/sites/default/files/2018-12/DABLaw1English_2.pdf [https://perma.cc/L2TR-Y5Z9] (setting forth that "Da Afghanistan Bank is the central bank of Afghanistan").

86. *See, e.g., S & S Mach. Co. v. Masinexportimport*, 706 F.2d 411, 414 (2d Cir. 1983) (holding that "[s]tate-owned central banks indisputably are included in the § 1603(b) definition" of an agency or instrumentality); *EM Ltd. v. Republic of Argentina*, 473 F.3d

as to assert that central banks are "the paradigm of a state agency or instrumentality," noting that "the House Report . . . specifically identified state central banks . . . in its discussion of qualifying entities for purposes of § 1603(b)."[87] Accordingly, from the outset, it appears probable that DAB, as the central bank of the state of Afghanistan, is its agency or instrumentality. For that reason, we will first assess whether DAB is an agency or instrumentality of Afghanistan before considering whether it is a political subdivision of Afghanistan.

Pre-Judgment Plaintiffs argue that it is not. Specifically, they contend that DAB is not an agency or instrumentality of Afghanistan because it does not satisfy the criteria set forth in 28 U.S.C. § 1603(b)(2).[88] To satisfy this subsection, an entity must either (1) be "an organ of a foreign state or political subdivision thereof" or (2) have

---

463, 472 (2d Cir. 2007) (citing the aforementioned holding in *S & S Mach.*); *Chettri v. Nepal Rastra Bank*, 834 F.3d 50, 55 (2d Cir. 2016) (noting that plaintiffsappellants "do not dispute the district court's determination that . . . Rastra Bank[, the central bank of Nepal,] is an agency or instrumentality of a foreign state"); *Daou v. BLC Bank, S.A.L.*, 42 F.4th 120, 133 (2d Cir. 2022) (noting that plaintiffs-appellants concede "that BDL, as the central bank of Lebanon, is an agency or instrumentality of the Lebanese state").

87. *S & S Mach. Co.*, 706 F.2d at 414; *see also* H.R. Rep. No. 1487, 94th Cong., 2d Sess. 15-16, *reprinted in* 1976 U.S. Code Cong. & Ad. News 6604, 6614 ("[A]s a general matter, entities which meet the definition of an agency or instrumentality of a foreign state could assume a variety of forms, including . . . a central bank . . . .").

88. Pre-Judgment Plaintiffs' Br. at 55.

the "majority of [its] shares or other ownership interest . . . owned by a foreign state or political subdivision thereof."[89]

Pre-Judgment Plaintiffs argue that because "DAB is supposed to be 'entirely independent'" under "the Afghanistan banking law that originally created [it]," the second part of section 1603(b)(2) is inapplicable.[90] We disagree.

First, we note that the Afghanistan banking law referenced by Pre-Judgment Plaintiffs helpfully establishes the other two criteria that an entity must satisfy to be considered an agency or instrumentality under the FSIA: that the entity is "a separate legal person, corporate or otherwise" and that the entity "is neither a citizen of a State of the United States . . . nor created under the laws of any third country.[91]

Contrary to Pre-Judgment Plaintiffs' position, it also satisfies the contested criteria—namely, the second part

89. 28 U.S.C. § 1603(b)(2).

90. Pre-Judgment Plaintiffs' Br. at 55.

91. 28 U.S.C. § 1603(b)(1) and (b)(3). Article 1.1 of the Afghanistan Bank Law establishes DAB as "the central bank of Afghanistan" and Article 1.2 establishes that DAB "is a juridical person with full capacity under the law." Afghanistan Bank Law, art. 1.1-1.2 (Dec. 17, 2003), https://dab.gov.af/sites/default/files/2018-12/DABLaw1English_2.pdf [https://perma.cc/L2TR-Y5Z9]. Accordingly, DAB is a "separate legal person" under section 1603(b)(1) and is "neither a citizen of the United States . . . nor created under the laws of any third country" under section 1603(b)(3).

of section 1603(b)(2), which requires that a majority of the entity's "shares or other ownership interest is owned by a foreign state or political subdivision thereof."[92]

Pre-Judgment Plaintiffs correctly observe that the Afghanistan banking law vests DAB with substantial autonomy.[93] But they mistakenly conclude from that premise that Afghanistan does not hold the majority of DAB's ownership interest. Significantly, the Afghanistan banking law sets forth the "[t]he capital of Da Afghanistan Bank shall belong to the State [of Afghanistan]."[94] And indeed, a study analyzing the structure of central banks finds that DAB is subject to "100% state ownership."[95]

Accordingly, DAB—a juridical person created under the laws of Afghanistan that is 100% owned by Afghanistan—meets each of the three requirements set

---

92. 28 U.S.C. § 1603(b)(2). Accordingly, as 28 U.S.C. § 1603(b)(2) sets forth a disjunctive test, we do not need to consider whether DAB is also properly considered an "organ" of Afghanistan under the first part of that subsection.

93. *See* Afghanistan Bank Law, art. 3 (Dec. 17, 2003), https://dab.gov.af/sites/default/files/2018-12/DABLaw1English_2.pdf [https://perma.cc/L2TR-Y5Z9].

94. *Id.* at art. 27.2. The banking law further sets forth that "Da Afghanistan Bank shall establish and maintain the international reserves of Afghanistan." Art. 72.1.

95. *See* Jan Weidner, The Organisation and Structure of Central Banks, Dissertation, Appendix Central Bank Handbook 192 (2017), https://dnb.info/1138787981/34 [https://perma.cc/P5TN-UZBY].

forth in section 1603(b).[96] It is therefore an agency or instrumentality of Afghanistan under the FSIA.[97]

### 3. DAB Has Execution Immunity Under the FSIA

To conclude our FSIA analysis, we turn to 28 U.S.C. §§ 1609-1611 to determine if DAB's FRBNY-held assets are afforded execution immunity.

28 U.S.C. § 1609 states in relevant part that "the property in the United States of a foreign state shall be immune from attachment[,] arrest[,] and execution except as provided in sections 1610 and 1611 of this chapter."[98] None of the exceptions in section 1610 apply to DAB or the independent state of Afghanistan, and Pre-Judgment Plaintiffs do not argue otherwise.[99]

---

96. There is therefore no need to assess whether DAB also qualifies as a political subdivision of Afghanistan, and we make no determinations on that front.

97. We agree with Pre-Judgment Plaintiffs that the Judiciary cannot rely on an articulation by the Executive to resolve the matter of agencies or instrumentalities under the FSIA. *See* Pre-Judgment Plaintiffs' Br. at 42, 47-48. But as both courts below noted, and as we hold today, DAB unquestionably meets the FSIA's definition of agency or instrumentality by virtue of being Afghanistan's state-owned central bank.

98. 28 U.S.C. § 1609.

99. Section 1610 contains various exceptions to a foreign state's immunity from attachment or execution, but none apply to the case at hand. *See* 28 U.S.C. § 1610.

Section 1611 provides exceptions that, in effect, counteract the exceptions to immunity contained in section 1610: In other words, some of what section 1610 lays bare, section 1611 recloaks in immunity. As none of section 1610's exceptions apply, we need not reach section 1611.[100] Accordingly, we conclude that the FSIA also vests DAB with execution immunity.

### C. The Terrorism Risk Insurance Act Abrogates Jurisdictional and Execution Immunity Afforded an Entity Under the Foreign Sovereign Immunities Act, but it Does Not Apply to This Case Because DAB Is Not an Agency or Instrumentality of the Taliban Under the TRIA

Having found that DAB has execution immunity under the FSIA, and assuming, *arguendo*, that DAB is also entitled to jurisdictional immunity under the FSIA (as was determined by the District Court [GBD]), we must now consider whether those grants of immunity withstand another statute: the Terrorism Risk Insurance Act of 2002 (the "TRIA"). If either or both survive the TRIA, and if jurisdictional immunity inures to DAB's benefit, then we lack subject matter jurisdiction to consider Judgment Plaintiffs' case, as the court below held. If neither survives, then we must move on to consider whether the TRIA applies to the facts before us.

---

100. So, while we agree with the District Court (VEC) that DAB has execution immunity under the FSIA, we do not reach section 1611(b)(1) to make this determination; instead, we rely on section 1609. *See Owens v. Taliban*, No. 22-cv-1949, 2023 U.S. Dist. LEXIS 31225, 2023 WL 2214887, at *5-6 (S.D.N.Y. Feb. 24, 2023).

*Appendix A*

**1. The TRIA Abrogates Jurisdictional and Execution Immunity and Independently Provides Subject Matter Jurisdiction**

Congress enacted the TRIA in 2002. Section 201(a) of the TRIA sets forth that:

> Notwithstanding any other provision of law, and except as provided in subsection (b), in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, or for which a terrorist party is not immune under section 1605(a)(7) of title 28, United States Code, the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.[101]

The first clause of the statute—which provides that the TRIA applies "[n]otwithstanding any other provision of law"—carries great weight in our analysis of how the TRIA interacts with the FSIA. The Supreme Court has observed that "notwithstanding" clauses, like the one contained in the TRIA, have generally been "interpreted . . . to supersede all other laws," and that to

101. Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, § 201(a), 116 Stat. 2337, 2337-40, *as amended*, Pub. L. No. 112-158, 126 Stat. 1214, 1260 (*codified at* note following 28 U.S.C. § 1610).

provide a "clearer statement [of a drafter's intent that they so supersede] is difficult to imagine."[102] Indeed, the Supreme Court has spoken in such terms of the TRIA's own "notwithstanding" clause.[103]

Our own, earlier consideration of the TRIA's "notwithstanding" clause had been to the same effect. We noted that it is a "broad provision"[104] that overcomes any other provision of the law that "conflicts with [the] TRIA."[105]

The question, then, is whether the immunity provisions in the FSIA conflict with the TRIA. If they do, those immunity provisions are rendered inoperative in the face of the TRIA.

The District Court (GBD) analyzed this question, finding that while the FSIA conflicted with the TRIA with respect to execution immunity, it did not with respect

---

102. *Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 18, 113 S. Ct. 1898, 123 L. Ed. 2d 572 (1993) (internal quotation marks and citation omitted).

103. *Bank Markazi v. Peterson*, 578 U.S. 212, 217 n.2, 136 S. Ct. 1310, 194 L. Ed. 2d 463 (2016) (identifying that the TRIA "take[s] precedence over 'any other provision of law'" and, therefore, is not limited by "the FSIA's central-bank immunity provision").

104. *Peterson v. Islamic Republic of Iran*, 758 F.3d 185, 190 n.2 (2d Cir. 2014), *aff'd sub nom. Bank Markazi v. Peterson*, 578 U.S. 212, 136 S. Ct. 1310, 194 L. Ed. 2d 463 (2016).

105. *Smith ex rel. Estate of Smith v. Fed. Rsrv. Bank of N.Y.*, 346 F.3d 264, 271 (2d Cir. 2003).

to jurisdictional immunity.[106] We agree with its first assessment, but differ on the second.

First, we pause to observe that there can be no doubt that the FSIA's execution immunity provisions are superseded by the TRIA. The Supreme Court has already held that "the FSIA's central-bank immunity provision," which provides for execution immunity under §§ 1609 and 1611(b)(1), does not "limit[] . . . the TRIA."[107] Binding Supreme Court precedent thus holds that the TRIA supersedes the FSIA's grant of execution immunity.

The tougher question is whether the TRIA also overrides any jurisdictional immunity that might be granted by the FSIA under § 1604. The District Court (GBD) determined that it does not, because no conflict exists between the FSIA and the TRIA as to jurisdictional immunity.[108] This is so because, according to the

---

106. *In re Terrorist Attacks on September 11, 2001*, 657 F. Supp. 3d 311, 328-29 (S.D.N.Y. 2023).

107. *Bank Markazi v. Peterson*, 578 U.S. 212, 217 n.2, 136 S. Ct. 1310, 194 L. Ed. 2d 463 (2016). The Supreme Court explained that Congress enacted the TRIA "[t]o lessen . . . enforcement difficulties," with one of those difficulties being the execution immunity granted property of foreign central banks under section 1611(b)(1). *Id.* at 217. Unsurprisingly, a sister Circuit has likewise noted that "§ 201(a) of the TRIA supersedes" § 1609 of the FSIA. *Greenbaum v. Islamic Republic of Iran*, 67 F.4th 428, 432, 461 U.S. App. D.C. 32 (D.C. Cir. 2023).

108. *In re Terrorist Attacks on September 11, 2001*, 657 F. Supp. 3d 311, 328-329 (S.D.N.Y. 2023).

District Court, the TRIA is an execution statute, not a jurisdictional statute.[109] The District Court reasoned that the language of the TRIA closely resembled "the other execution immunity language in the FSIA, distinguishing it from the FSIA's language abrogating jurisdictional immunity" and, moreover, that TRIA § 201(a) exists as a note within 28 U.S.C. § 1610, which is the section of the FSIA governing exceptions to execution immunity.[110]

However well-reasoned the District Court (GBD)'s analysis may be, we find that it is foreclosed by our decision in *Weinstein v. Islamic Republic of Iran*.[111] In *Weinstein*, Bank Melli, an instrumentality of a terrorist party (the state of Iran), argued that the TRIA did not establish jurisdiction over it. One of the reasons it offered to the court in support of this proposition was the fact that "the TRIA has been codified as a note to Section 1610 rather than in the sections of the FSIA more directly addressed to exceptions to jurisdictional immunity."[112] We disagreed. First, we explained that "the plain language of the statute cannot be overcome by its placement in the statutory scheme."[113] Turning to that plain language, we concluded that TRIA § 201(a)'s "notwithstanding"

---

109. *Id.* at 329.

110. *Id.* at 328.

111. *Weinstein v. Islamic Republic of Iran*, 609 F.3d 43 (2d Cir. 2010).

112. *Id.* at 49.

113. *Id.*

clause "mak[es] plain that the force of the section extends everywhere."[114]

Consistent with the foregoing, we hold that TRIA § 201(a) supersedes the FSIA's jurisdictional immunity provisions in addition to its execution immunity provisions. We therefore conclude that neither jurisdictional nor execution immunity can prevent us from subjecting DAB to our jurisdiction under the TRIA.[115]

In the alternative, the District Court (GBD) held that TRIA § 201(a) does not provide it with the necessary subject matter jurisdiction to review the case at hand.[116] Not so. In *Weinstein*, we "f[ou]nd it *clear beyond cavil* that Section 201(a) of the TRIA provides courts with subject matter jurisdiction over post-judgment execution and attachment proceedings against property held in the hands of an instrumentality of the judgment-debtor,

---

114. *Id.*

115. This finding is consistent with our prior observation that "at the time the FSIA was passed, the international community viewed execution against a foreign state's property as a greater affront to its sovereignty than merely permitting jurisdiction over the merits of an action." *Walters v. Indus. and Com. Bank of China, Ltd.*, 651 F.3d 280, 289 (2d Cir. 2011) (quoting *Conn. Bank of Com. v. Republic of Congo*, 309 F.3d 240, 255-56 (5th Cir. 2002)). It can therefore be of little surprise that the TRIA, which indisputably abrogates attachment and execution immunity—which *Walters* would characterize as the "greater affront"—also abrogates jurisdictional immunity—the lesser affront.

116. *In re Terrorist Attacks on September 11, 2001*, 657 F. Supp. 3d 311, 330-331 (S.D.N.Y. 2023).

even if the instrumentality is not itself named in the judgment."[117]

The case before us concerns the post-judgment execution proceedings brought by Judgment Plaintiffs. It is against property (DAB's FRBNY-held funds) *allegedly* owned by an instrumentality (DAB) of the judgment-debtor (the Taliban). The TRIA thus plainly provided the District Court with subject matter jurisdiction.

The District Court (GBD) found otherwise, reading *Weinstein*'s holding as applying only to the instrumentalities and agencies of foreign states that have been stripped of immunity under the FSIA.[118] But the holding cannot be so limited. We reached it after examining the meaning of the TRIA and analyzing its legislative history, and we did not conclude that it had the limits now drawn by the District Court.[119]

---

117. *Weinstein*, 609 F.3d at 50 (emphasis added).

118. *In re Terrorist Attacks on September 11, 2001*, 657 F. Supp. 3d 311, 330-331 (S.D.N.Y. 2023) (examining *Weinstein* and concluding that the TRIA only grants subject matter jurisdiction over agencies and instrumentalities not named in the original judgment when "the sovereign's loss of jurisdictional immunity in the underlying judgment flows through to the instrumentality in the attachment proceeding").

119. *Weinstein*, 609 F.3d at 49-50 (finding that the "plain language of Section 201(a)" constituted "an independent grant of jurisdiction over the agencies and instrumentalities" and that "even if . . . there were an ambiguity here, it would be resolved in plaintiff's favor by the legislative history").

Nor could we have done otherwise. As already discussed, the TRIA applies "[n]otwithstanding any other provision of the law."[120] Yet the District Court (GBD)'s proposed articulation of *Weinstein*'s holding suggests that the TRIA's subject matter jurisdiction is curtailed by the very law it was intended to supersede. It would mean that the TRIA, despite its clear language stating that the blocked assets of a terrorist party's agency or instrumentality "shall be subject to execution or attachment" notwithstanding "any other provision of law," would have a built-in exception for certain entities that, in addition to being the agencies or instrumentalities of a terrorist party, were also separately designated as the agencies or instrumentalities of a foreign state granted immunity under the FSIA. Such an interpretation would betray the plain language of the TRIA's "notwithstanding" clause by limiting its jurisdiction with back-reference to an FSIA immunity determination—marking an unmistakable conflict between the TRIA and the FSIA that is flatly prohibited by § 201(a)'s "notwithstanding" clause.[121]

In sum, we find that the TRIA overrides any jurisdictional or execution immunities granted to DAB by the FSIA and creates an independent basis for the court to exercise subject matter jurisdiction over DAB's

120. TRIA § 201(a).

121. This analysis also forecloses the suggestion that the TRIA could only be wielded against DAB if Afghanistan were designated as a state sponsor of terrorism. *In re Terrorist Attacks on September 11, 2001*, 657 F. Supp. 3d 311, 331-332 (S.D.N.Y. 2023).

blocked assets—provided that DAB is an agency or instrumentality of the Taliban.

### 2. DAB Is Not an Agency or Instrumentality of the Taliban Under the TRIA

Herein lies the rub. When reviewing the applicability of the TRIA, the District Court (GBD) went through the statutory criteria and held that Judgment Plaintiffs "satisf[ied] all but one element."[122] That one element was the TRIA's requirement that "the blocked assets must be the assets of the terrorist party or the terrorist party's agency or instrumentality."[123] We agree with the District Court that this element is missing (albeit for a different reason than the one articulated by the District Court [GBD]), and we find that the TRIA is ultimately inapplicable to the case before us.[124] We therefore

---

122. *In re Terrorist Attacks on September 11, 2001*, 657 F. Supp. 3d 311, 333 (S.D.N.Y. 2023).

123. *Id.*

124. The District Court (GBD) reaches this conclusion by reasoning that it was constitutionally restrained from finding that the Taliban controlled the funds of the central bank of Afghanistan, as doing so would recognize the Taliban as the government of Afghanistan and contravene the Executive's recognition power. *In re Terrorist Attacks on September 11, 2001*, 657 F. Supp. 3d 311, 333-336 (S.D.N.Y. 2023). We decide on a different ground, and thus do not reach this issue pursuant to our general rule regarding the avoidance of constitutional issues. *See Allstate Ins. Co. v. Serio*, 261 F.3d 143, 149-150 (2d Cir. 2001) ("It is axiomatic that the federal courts should, where possible, avoid reaching constitutional questions.").

affirm the District Court's judgment denying Judgment Plaintiffs' motions for turnover of DAB funds.

As noted earlier, the TRIA sets forth in relevant part that "the blocked assets of th[e] terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment."[125] Judgment Plaintiffs argue that while the blocked assets are not those of the terrorist party at issue here (the Taliban), they *are* the blocked assets of an agency or instrumentality of the Taliban: DAB.[126] We must therefore determine whether DAB is properly considered an agency or instrumentality of the Taliban under the TRIA. We conclude that it is not.

Though we must first turn to the plain language of the statute, we note that, unlike the FSIA, the TRIA fails to provide a definition for "agency or instrumentality."[127] We have previously held that the FSIA's definition cannot double as the TRIA's,[128] and have instead fashioned our own definition of those terms "according to their ordinary

---

125. TRIA § 201(a).

126. Judgment Plaintiffs' Br. on behalf of *Havlish, Doe, Federal Insurance*, and *Smith* Creditors at 1.

127. *See Kirschenbaum v. 650 Fifth Ave. and Related Props.*, 830 F.3d 107, 132 (2d Cir. 2016) ("While the FSIA defines 'agency or instrumentality,' the TRIA, unfortunately, does not." (internal citations omitted)).

128. *Id.* at 133 (holding that "applying the FSIA's definition of agency or instrumentality" would "contravene a plain reading of the TRIA").

meanings."[129] In that earlier case—*Kirschenbaum*—we held that an entity is an agency or instrumentality of a terrorist party under the TRIA if it "(1) was a means through which a material function of the terrorist party is accomplished, (2) provided material services to, on behalf of, or in support of the terrorist party, *or* (3) was owned, controlled, or directed by the terrorist party."[130] As the disjunctive "or" indicates, an entity is an agency or instrumentality of a terrorist party under the TRIA as long as it satisfies at least one of these three conditions.

It is thus clear what definition we are to use to determine whether DAB is an agency or instrumentality of the Taliban. What is less clear is *when* we are to apply that definition to DAB.

In *Kirschenbaum*, the case in which we defined "agency or instrumentality" for purposes of the TRIA, we concluded that, under the FSIA, "an entity's agency or instrumentality status . . . 'is determined at the time of the filing of the complaint'" because "jurisdiction 'depends upon the state of things at the time . . . the action [is] brought'" and "not necessarily 'as of the time an alleged tort or other actionable wrong occurred.'"[131] Nowhere did we analyze when an entity's agency or instrumentality status should be determined *under the TRIA*. Instead,

---

129. *Id.* at 135.

130. *Id.*

131. *Id.* at 126 (quoting *Dole Food Co. v. Patrickson*, 538 U.S. 468, 471, 478, 480, 123 S. Ct. 1655, 155 L. Ed. 2d 643 (2003)).

after holding that the FSIA's definition of "agency or instrumentality" does not apply to the TRIA, we appeared to transport, in passing and without explanation, the same timing test we use to make the "agency or instrumentality" determination under the FSIA.[132]

But that timing test cannot be appropriate in the TRIA context for at least two reasons. First, the logic undergirding the timing test for FSIA agency or instrumentality determinations that we recounted in 2016 in *Kirschenbaum*—and, indeed, the test itself—no longer controls in our Circuit. In *Bartlett v. Baasiri* (2023), we held that "immunity under the [FSIA] may attach when a defendant becomes an instrumentality of a foreign sovereign *after* a suit is filed."[133] We made this determination by examining the "structure of the FSIA"[134]

---

132. *Id.* at 136 ("Further, insofar as Plaintiffs contend that Alavi itself was sufficiently owned, controlled, or directed by Iran to render it an agency or instrumentality of a terrorist party under the TRIA, questions of fact exist as to whether Alavi was so owned, controlled, or directed *at the time Plaintiffs' complaints were filed*." (emphasis added)).

133. *Bartlett v. Baasiri*, 81 F.4th 28, 33 (2d Cir. 2023) (emphasis added). We reaffirmed this was so in a later case. *See Schansman v. Sberbank of Russia PJSC*, 128 F.4th 70, 79 (2d Cir. 2025) (holding that "an entity's status as an agency or instrumentality" need not be determined "at the time an action is filed," an issue that we "squarely decided" in *Bartlett*).

134. *Bartlett*, 81 F.4th at 33 (noting that the FSIA "gives foreign states immunity not only from judgments, but from process, too," so there is "no reason why that protection should apply only if the defendant had sovereign status from the beginning of the suit").

and the purposes of foreign sovereign immunity.[135] Accordingly, we can no longer say, as we seemed to suggest in *Kirschenbaum*, that FSIA immunity is determined at the time of the complaint's filing because jurisdiction depends on the state of affairs at the time the action was brought; both the rule and its rationale were plainly unseated by our holding in *Bartlett*.

Second, for the same reason that it is improper to simply adopt the FSIA's definition of "agency or instrumentality" for purposes of the TRIA, it is improper to transpose our rule governing the time at which we evaluate an entity's "agency or instrumentality" status for purposes of the FSIA onto our test governing the same under the TRIA. The TRIA is a fundamentally different statute than the FSIA, and it is a mistake to uncritically apply precepts from our FSIA jurisprudence in the TRIA context. Under the FSIA, we are using the "agency or instrumentality" test to, in substantial part, determine whether an entity should be granted jurisdictional or execution immunity. This is the logic that guides our new rule in *Bartlett* concerning *when* we evaluate an entity's possible status as an agency or instrumentality. But as set forth above, the TRIA cares nothing for immunity. Accordingly, ensuring that we capture an entity's present-day immunity eligibility under the FSIA cannot be the controlling factor for deciding the time at which we must

---

135. *Id.* (discussing the reason for foreign sovereign immunity as opposed to other immunities, and noting that it seeks to give foreign states "some protection from the inconvenience of suit as a gesture of comity between the United States and other sovereigns" (quoting *Dole Food*, 538 U.S. at 479)).

evaluate whether an entity is an agency or instrumentality for purposes of the TRIA.

To determine what time *is* appropriate, we first turn to the text of the TRIA. While no guidance is provided there for determining the date of assessment, we find particularly relevant the TRIA's requirement that the property subject to execution or attachment is an entity's "blocked assets."[136] The TRIA sets forth that a "blocked asset" is "any asset seized or frozen by the United States" under one of three statutory provisions.[137] From review of these statutes, it emerges that "blocking" is a status imposed by the United States at a certain time. As blocking is also a critical factor upon which TRIA applicability turns, there is some immediate appeal to utilizing the blocking date as the relevant time at which to assess the agency or instrumentality question.

The attractiveness of this approach only deepens with further consideration of both what the blocking mechanism entails and the purpose of the TRIA. Once an entity's asset is seized or frozen, the entity can exert no control over it; the entity cannot use the asset to further its own objectives or the objectives of any party for which it operates as an agency or instrumentality.[138] There is

136. TRIA § 201(a).

137. TRIA § 201(d)(2)(A). Those statutory provisions are "section 5(b) of the Trading With the Enemy Act (50 U.S.C. App. 5(b))" and "sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701; 1702)." *Id.*

138. For example, the Office of Foreign Asset Control sets forth that when property is blocked, while "[t]itle to the blocked

thus great value in determining what a given entity's status was in relation to a given terrorist party at the time those assets were blocked: If an entity becomes an agency or instrumentality of a terrorist party *after* that entity's property is blocked, those blocked assets cannot have been utilized to further the mission of the terrorist party.

The blocking date therefore serves as a critical inflection point ripe for determining the time at which we should evaluate an entity's status under the TRIA as an agency or instrumentality. This approach is buttressed by consideration of the purpose of the statute. As Congress set forth, the purpose of TRIA § 201 is to enable the victims of terrorism to collect on judgments against terrorist parties "through the attachment of blocked assets of terrorist parties."[139] Surely, though, blocked assets are not "of" a terrorist party if those assets did not belong to either the terrorist party, or an entity then operating as an agency or instrumentality of the terrorist party, as of the date that the assets were blocked. Accordingly, while we apply a broader definition of agency or instrumentality under the TRIA than we do under the FSIA, understanding that terrorist parties "may operate with less transparency than other sovereign countries,"[140]

---

property remains with the blocked [entity] . . . the exercise of powers and privileges normally associated with ownership is prohibited without authorization from OFAC." United States Department of the Treasury, OFAC FAQs No. 9 (Sep. 10, 2002), https://ofac.treasury.gov/faqs/9 [https://perma.cc/2A8R-ZLTE] (last updated Aug. 21, 2024).

139. H.R. Conf. Rep. 107-779, 2002 WL 31529126, at *27 (2002).

140. *Kirschenbaum*, 830 F.3d at 134.

we do not do so free of rational limits. Today we identify one such limit: When we determine whether an entity is an agency or instrumentality of a terrorist party under the TRIA, we assess that entity's status as of the date that the assets at issue were blocked.

In the case before us, it is uncontested that the blocking date was August 15, 2021—which, not coincidentally, was the same date that Kabul fell to the Taliban.[141] We therefore assess DAB's status as of that date and examine whether it satisfies any of the three independently sufficient prongs of the TRIA definition of "agency or instrumentality" that we set forth in *Kirschenbaum*. We find that it does not.

First, there is no evidence that DAB "was a means through which a material function of the [Taliban] is accomplished."[142] Indeed, it is hard to imagine how it could have been, when the Taliban did not even seize Kabul until August 15, 2021. There is no suggestion that DAB was aiding the Taliban in any manner as of the date its FRBNYheld assets were blocked.

Second, for similar reasons, there is no evidence that DAB "provided material services to, on behalf of, or in support of the [Taliban]" as of August 15, 2021.[143] Indeed, the President blocked the assets precisely to "keep[] them out of the hands of the Taliban and other malign actors."[144]

---

141. *See* Judgment Plaintiffs' Br. at 12, 24.

142. *Kirschenbaum*, 830 F.3d at 135.

143. *Id.*

144. Press Release, U.S. Dep't of the Treasury, Joint Statement by U.S. Treasury and State Department: The United States and

Third and finally, there is no evidence to suggest that DAB "was owned, controlled, or directed by the [Taliban]" as of that date.[145] Even assuming *arguendo* that the Taliban "controlled" DAB when it installed an alleged loyalist to head the organization, the Taliban did not do so until August 23, 2021—more than a week after the relevant date for evaluating "agency or instrumentality" status.[146]

In sum: There is quite simply no plausible foothold in the record that would enable Judgment Plaintiffs to mount a credible argument that DAB was an agency or instrumentality of the Taliban on the date its FRBNY-held funds were blocked on August 15, 2021. We are thus required to hold that DAB is not an agency or instrumentality of the Taliban under the TRIA, and consequently, that the TRIA does not apply to the case before us. We therefore affirm the District Court (GBD)'s denial of Judgment Plaintiffs' motions for turnover of DAB funds.

## III. CONCLUSION

To summarize, we hold as follows:

(1) A district court may consider the applicability of attachment or execution immunity *sua sponte*

---

Partners Announce Establishment of Fund for the People of Afghanistan (Sep. 14, 2022), https://home.treasury.gov/news/press-releases/jy0947 [https://perma.cc/952K-6TEY].

145. *Kirschenbaum*, 830 F.3d at 135.

146. Judgment App'x 265-67.

even when the sovereign status of the property at issue is disputed;

(2) The Executive Branch's formal recognition of a state or government establishes that state or government as a foreign state for purposes of the Foreign Sovereign Immunities Act;

(3) Because the Executive Branch formally recognizes Afghanistan as an independent state, Afghanistan is a foreign state for the purpose of our analysis of DAB under the Foreign Sovereign Immunities Act;

(4) Under the Foreign Sovereign Immunities Act, DAB is an "agency or instrumentality" of the foreign state of Afghanistan, and is therefore entitled to execution immunity under 28 U.S.C. § 1609;

(5) The Terrorism Risk Insurance Act abrogates any jurisdictional or execution immunity granted by the Foreign Sovereign Immunities Act;

(6) The Terrorism Risk Insurance Act provides district courts with an independent basis to exercise subject matter jurisdiction over the blocked assets of a terrorist party's agency or instrumentality;

(7) An entity's "agency or instrumentality" status under the Terrorism Risk Insurance Act is to be

assessed as of the date that the assets at issue were blocked; and

(8) The Terrorism Risk Insurance Act does not apply to this case because DAB was not an agency or instrumentality of the Taliban when its FRBNY-held assets were blocked.

For the foregoing reasons, we **AFFIRM** the District Court (VEC)'s order denying Pre-Judgment Plaintiffs' motion to confirm the pre-judgment attachment and we likewise **AFFIRM** the District Court (GBD)'s order denying Judgment Plaintiffs' turnover motions.

*Appendix A*

RICHARD J. SULLIVAN, *Circuit Judge*, concurring in part and dissenting in part:

The Supreme Court has long made clear that interpretation of the "reach" of the Foreign Sovereign Immunities Act (the "FSIA") is a "pure question of statutory construction" that is "well within the province of the [j]udiciary." *Republic of Austria v. Altmann*, 541 U.S. 677, 701, 124 S. Ct. 2240, 159 L. Ed. 2d 1 (2004) (internal quotation marks omitted). Our caselaw likewise recognizes that the FSIA "vested *sole* responsibility for applying [its] standards in the federal judiciary." *Beierwaltes v. L'Office Federale de la Culture de la Confederation Suisse*, 999 F.3d 808, 818 (2d Cir. 2021) (emphasis added). Remarkably, the majority today turns those foundational principles on their head, concluding that "[t]he Executive Branch's formal recognition of a state or government establishes that state or government as a foreign state for purposes of the [FSIA]." Maj. Op. at 54. To reach this conclusion, the majority turns a blind eye to the history of the FSIA, ignores nearly thirty-five years of our own precedents, and misinterprets a single Supreme Court decision involving an unrelated statute to obscure the Court's clear precedent on the FSIA.

The majority's error is compounded by its flawed interpretation of the Terrorism Risk Insurance Act of 2002 ("TRIA"). Even though this issue was never considered by the district court, briefed by the parties, or discussed at oral argument, the majority reaches out to hold, for the first time, that "[a]n entity's 'agency or instrumentality' status under [TRIA] is to be assessed as

of the date that the assets at issue were blocked." *Id.* at 55. This conclusion is unsupported by any legal authority. More importantly, it is at odds with the text and purpose of TRIA and our longstanding approach to determining immunity from execution, which looks to conditions at the time the writ of execution is issued.

The majority's interpretive gymnastics risk upending a carefully constructed statutory scheme and may have unforeseen downstream consequences for future FSIA (and TRIA) cases. It is for this reason the Supreme Court has taken pains to emphasize that "it is not our role to rewrite the FSIA"; that task lies squarely with Congress. *Turkiye Halk Bankasi A.S. v. United States*, 598 U.S. 264, 280, 143 S. Ct. 940, 215 L. Ed. 2d 242 (2023). Accordingly, I respectfully dissent.

## I. The District Court Was Permitted to *Sua Sponte* Consider the Issue of Attachment Immunity

As a threshold matter, I agree with the majority that a district court may, but is not required to, *sua sponte* consider the issue of attachment (or execution) immunity "even when the sovereign status of the property at issue is disputed." Maj. Op. at 20-21. I therefore concur with Section II.A of the majority opinion, which is clearly supported by both the text and structure of the FSIA.

As the majority rightly notes, the FSIA's mandatory language that certain property "shall be immune," 28 U.S.C. § 1609, "signals that . . . immunity inures in the property itself and applies without regard to how the

issue is raised," *Walters v. Indus. & Com. Bank of China, Ltd.*, 651 F.3d 280, 291 (2d Cir. 2011). For this reason, the Seventh Circuit has explained that "immunity does not depend on the foreign state's appearance in the case." *Rubin v. The Islamic Republic of Iran*, 637 F.3d 783, 799 (7th Cir. 2011). Rather, "immunity is presumed[,] and the court must find an exception - with or without an appearance by the foreign state - . . . to give effect to the statutory scheme." *Id.* at 800; *see also Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1125 (9th Cir. 2010) ("The structure of the FSIA - which codifies the background rule that foreign states are immune from suit and execution, and then creates narrow exceptions - suggest[s] that courts must begin with the presumption that a foreign state is immune and then the plaintiff must prove that an exception to immunity applies."). Likewise, the fact that execution immunity does not apply where the foreign state waives immunity, *see* 28 U.S.C. § 1610(a)(1), "strongly suggests that immunity from execution is presumed and waiver of immunity is the exception," *Rubin*, 637 F.3d at 800. This interpretation of the FSIA is further supported by "the common-law practice" whereby courts regularly determined immunity "without regard to the foreign state's appearance in the case." *Id.* at 800-01; *see also Peterson*, 627 F.3d at 1126-27.

The *Aliganga* plaintiffs nevertheless insist that the district court had no authority to *sua sponte* consider attachment immunity because the sovereign status of the property at issue was disputed. But that is hardly dispositive, since each of the above arguments based on the text and structure of the FSIA applies with equal force

even when the sovereign status of the property is disputed. I therefore agree with the majority that the district court in *Aliganga* did not err in *sua sponte* examining the immunity issue. That, however, is where my agreement with the majority's interpretation of the FSIA ends.

## II. Afghanistan Is Not a Foreign State Within the Meaning of the FSIA

The majority concludes that the Da Afghanistan Bank ("DAB") funds are immune from attachment and execution under FSIA section 1609, which provides that "the property in the United States of a foreign state shall be immune from attachment[,] arrest[,] and execution." 28 U.S.C. § 1609.

Naturally, the first step in determining whether section 1609 applies is to identify whether Plaintiffs seek to attach the property *of a foreign state*. While the FSIA does not define what constitutes a foreign state, our binding caselaw "has limited the definition of 'state' to entities that have a defined territory and a permanent population, that are under the control of their own government, and that engage in, or have the capacity to engage in, formal relations with other such entities." *Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria*, 937 F.2d 44, 47 (2d Cir. 1991) (alterations accepted and internal quotation marks omitted); *see also, e.g., Kirschenbaum v. 650 Fifth Ave. & Related Props.*, 830 F.3d 107, 123 (2d Cir. 2016) (applying *Klinghoffer* definition of foreign state).

Applying that definition here, Afghanistan clearly lacks the core attributes of statehood. It is undisputed that Afghanistan is no longer "under the control of [its] own government," *Klinghoffer*, 937 F.2d at 47 (internal quotation marks omitted), but rather is controlled by a non-state actor, the Taliban. The previous government of Afghanistan fled the country and is now defunct. There is not even a government in exile seeking to assert its right to govern the territory. Tellingly, the United States does not recognize "the Taliban or any other entity as the Government of Afghanistan or as part of such a government." Bureau of S. & Cent. Asian Affs., *U.S. Relations with Afghanistan*, U.S. Dep't of State (Aug. 15, 2022), https://perma.cc/T45B-WQ8A; *cf. Baker v. Carr*, 369 U.S. 186, 212, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962) ("[W]ithout executive recognition[,] a foreign state has been called a republic of whose existence we know nothing." (internal quotation marks omitted)). Nor has any other country recognized the Taliban as the government of Afghanistan. *See* Aliganga App'x at 283. In fact, the United Nations has repeatedly refused to grant diplomatic credentials to Taliban officials. *See* Michelle Nichols, *Afghan Taliban Administration, Myanmar Junta Not Allowed into United Nations for Now*, Reuters (Dec. 14, 2022, 8:29 PM ET), https://perma.cc/HYL4-D2L2. And even if the Taliban may one day be vanquished and a democratic government may return to Afghanistan, "the status quo continues" today, *Morgan Guar. Tr. Co. of N.Y. v. Republic of Palau*, 924 F.2d 1237, 1244 (2d Cir. 1991), and we must determine immunity based on conditions "at the time the writ of attachment or execution [was] issued,"

*Aurelius Cap. Partners, LP v. Republic of Argentina*, 584 F.3d 120, 130 (2d Cir. 2009) (emphasis omitted).

Afghanistan - as distinct from the Taliban - no longer "engage[s] in, or [has] the capacity to engage in, formal relations with other" states. *Klinghoffer*, 937 F.2d at 47 (internal quotation marks omitted); *see also* Restatement (Third) of the Foreign Relations Law of the United States § 201 cmt. e (Am. L. Inst. 1987) ("An entity is not a state unless it has competence, within its own constitutional system, to conduct international relations with other states, as well as the political, technical, and financial capabilities to do so."). Many of Afghanistan's embassies have been forced to close, and its former diplomats face the risk of deportation. *See, e.g.*, Lara Jakes, *Afghan Embassy, Now out of Money, Will Shut Down, U.S. Says*, N.Y. Times (Mar. 11, 2022), https://perma.cc/WZ7C-RWM7. And even though one of the *amici* in these appeals calls himself the *Chargé D'Affaires* of the Permanent Mission of the Islamic Republic of Afghanistan to the United Nations, he openly admits that "he does not represent the former government of Afghanistan nor the interest of any political group" but rather "strives to represent the interests of the Afghan people." Faiq Amicus Br. at 1-2 (alterations accepted and internal quotation marks omitted).

At present, Afghanistan is more akin to a failed state. *See Failed State, Black's Law Dictionary* (12th ed. 2024) ("A state that does not or cannot meet or maintain some of the basic social, economic, or political conditions and responsibilities of a sovereign government."). Attributes

of a failed state - each of which are present here - "include the loss of physical control of its territory, an inability to provide reasonable public services, and the erosion of legitimate authority." *Id.* It is therefore clear to me that Afghanistan no longer meets the definition of a foreign state and thus the DAB funds are not covered by the FSIA.

But rather than engage in this inquiry, the district court in *Aliganga* simply accepted the Executive Branch's assertion that the DAB funds were the property of a foreign state and thus immune from attachment. In fact, the district court issued its decision refusing to confirm its prejudgment attachment order *the very same day* that the Executive Branch outlined its views on immunity without giving Plaintiffs any opportunity to respond. Such blind deference to the Executive runs contrary to the purpose of the FSIA and longstanding precedent.

As the Supreme Court has recounted, prior to the passage of the FSIA, immunity determinations were left to the Executive Branch, which generated countless problems because "foreign nations often placed diplomatic pressure on the State Department in seeking immunity," causing "political considerations," rather than predictable legal principles, to dictate the outcome. *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 487, 103 S. Ct. 1962, 76 L. Ed. 2d 81 (1983). As a result, Congress passed the FSIA to strip the immunity determination from the Executive Branch and ensure that it was "made on purely legal grounds and under procedures that insure due process." *Id.* at 488 (internal quotation marks omitted). The FSIA therefore "vested *sole* responsibility for applying [its]

standards in the federal judiciary." *Beierwaltes*, 999 F.3d at 818 (emphasis added). And "[w]hile the United States' views on [immunity] are of considerable interest," the Supreme Court has emphatically held that such views "merit no special deference." *Altmann*, 541 U.S. at 701.

The majority endorses the district court's error by holding that "[t]he Executive Branch's formal recognition of a state or government establishes that state or government as a foreign state for purposes of the Foreign Sovereign Immunities Act." Maj. Op. at 54. This case marks the first time that *any* Circuit across the country has reached such a sweeping conclusion. Not only does this holding fly in the face of the well-established principles that courts have used to interpret the FSIA, it also effectively overrules our decision in *Klinghoffer*. It is axiomatic that we are "bound by the decisions of prior panels until such times as they are overruled either by an *en banc* panel of our Court or by the Supreme Court." *United States v. Peguero*, 34 F.4th 143, 158 (2d Cir. 2022) (internal quotation marks omitted). Neither has occurred here.

The majority advances three arguments in an attempt to escape the conclusion that it is single-handedly overturning Circuit precedent, but none is persuasive.

*First*, the majority seeks to cabin our use of the *Klinghoffer* definition to situations in which there is no "express determination from the Executive Branch" on whether to recognize a foreign state. Maj. Op. at 29. But there is nothing in *Klinghoffer* or our subsequent caselaw

to even remotely suggest that our use of that definition is limited to contexts where the Executive Branch has not made a formal recognition decision.

*Second*, the majority asserts that its holding is compelled by the Supreme Court's more recent decision in *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 135 S. Ct. 2076, 192 L. Ed. 2d 83 (2015). *Zivotofsky*, of course, did not involve the FSIA but rather examined the constitutionality of a statute that required American embassy officials, upon request, to list on passports that Israel was the place of birth of American children born in Jerusalem. *See id.* at 7. The majority latches onto the Supreme Court's unremarkable statement that it is the "exclusive power of the President to control recognition determinations," *id.* at 32, to conflate the formal recognition of a foreign state, which is within the sole province of the Executive, with a determination of whether an entity is covered by the FSIA, which is a task for the judiciary.

Indeed, in *Zivotofsky*, the Supreme Court made clear that "[t]he Executive's exclusive power extends *no further* than his formal recognition determination," and affirmed that Congress could take a variety of actions that might "express its disagreement with the President" on the issue of recognition, such as by declining to confirm an ambassador or fund an embassy, enacting an embargo, or declaring war. *Id.* at 30 (emphasis added). In other words, *Zivotofsky* drew a line between "an official executive statement implicating recognition" - which is the sole prerogative of the Executive - and other acts that fall short of formal recognition and can be undertaken by other branches. *Id.*

The determination of whether an entity is entitled to immunity under the FSIA clearly falls into the latter category. As the Supreme Court has explained, "interpretation of the FSIA's reach" is a "pure question of statutory construction." *Altmann*, 541 U.S. at 701 (internal quotation marks omitted); *see also* Restatement (Fourth) of the Foreign Relations Law of the United States § 452 rptr. n.1 (Am. L. Inst. 2018) (noting that "the President has the exclusive power to recognize foreign states for diplomatic purposes," but "[c]lassification as a foreign state for FSIA purposes is a matter of statutory interpretation"). A court's interpretation of whether a certain entity constitutes a foreign state within the meaning of the FSIA does not tread on the Executive's authority to formally recognize (or withdraw recognition of) that entity, nor does it compel any diplomatic action from the Executive. As Professor William Burke White, who submitted an expert declaration in the *Havlish* case, explained, "recognition of a foreign government is a formal act that is circumscribed by form, and can generally be accomplished *only* by express, unambiguous statements or a narrow subset of diplomatic actions." Havlish App'x at 661 (emphasis added). These actions include "concluding a bilateral treaty or . . . sending or receiving diplomatic agents," neither of which is at issue here. *Id.* at 666 (internal quotation marks omitted); *see also* Restatement (Third) of Foreign Relations Law § 204 rptr. n.2 ("Recognition of a state has been effected by express official declaration, by the conclusion of a bilateral agreement with the state, by the presentation of credentials by a United States representative to the authorities of the new state, and by receiving the credentials of a diplomatic representative of that state."). In other words, a court's legal conclusion as

to whether an entity falls within the coverage of the FSIA does not constitute an act of recognition and thus does not infringe on the exclusive powers of the Executive.[147] Accordingly, it seems clear to me that *Zivotofsky* has not abrogated the rule we set forth in *Klinghoffer*, which thus remains binding authority. *See Peguero*, 34 F.4th at 158.

*Third*, the majority contends that the Restatement (Third) of Foreign Relations Law, which was the basis for *Klinghoffer*'s definition of a foreign state, establishes "a two-step test for determining whether a foreign state legally exists for purposes of" the FSIA. Maj. Op. at 28 n.69 (citing Restatement (Third) of Foreign Relations Law § 204 cmt. a). That is simply not correct. For starters, *Klinghoffer* never cited section 204 of the Restatement, so the majority's reliance on it is misplaced. But more importantly, nothing in section 204's general observations about the President's recognition authority explains how courts should interpret the statutory text of the FSIA. In fact, the Restatement (Fourth) of Foreign Relations Law makes clear that "the views of the executive branch should not control the question of whether, under the FSIA, a foreign state . . . is entitled to immunity." Restatement (Fourth) of Foreign Relations Law § 452 rptr. n.1.

---

147. The majority hangs onto a single statement in *Zivotofsky* that "[l]egal consequences follow formal recognition" because "[r]ecognized sovereigns . . . may benefit from sovereign immunity when they are sued." 576 U.S. at 11. Besides the fact that this statement is dicta, it is clear that the Court was referring to the common-law immunity that foreign states enjoyed prior to the enactment of the FSIA. *See id.* (citing *National City Bank of New York v. Republic of China*, 348 U.S. 356, 358-59, 75 S. Ct. 423, 99 L. Ed. 389 (1955), which predated enactment of the FSIA).

For all these reasons, I am convinced that when interpreting and applying the FSIA, we remain bound by the definition of foreign state that we set forth in *Klinghoffer*, and that Afghanistan clearly fails to meet that definition. As a result, I would (1) hold that the DAB funds are not entitled to immunity under the FSIA, (2) vacate the rulings of the district courts, and (3) remand this case for the district courts to apply New York attachment and execution law to determine whether Plaintiffs can use the DAB funds to satisfy their judgments against the Taliban.

## III. DAB Is Not an Agency or Instrumentality of a Foreign State

But even if the majority is correct that we are bound by the Executive Branch's recognition decision and that the notional state of Afghanistan constitutes a foreign state, the DAB funds are still not entitled to immunity under the FSIA. That is because, in my view, DAB no longer constitutes an agency or instrumentality of a foreign state.

To qualify as an agency or instrumentality of a foreign state under the FSIA, the entity must, among other things, be "an organ of a foreign state or political subdivision thereof, or a majority of [its] shares or other ownership interest [must be] owned by a foreign state or political subdivision thereof." 28 U.S.C. § 1603(b)(2). To determine whether an entity constitutes an organ of a foreign state, we look to five factors:

> (1) whether the foreign state created the entity for a national purpose; (2) whether the foreign state actively supervises the entity; (3) whether

> the foreign state requires the hiring of public employees and pays their salaries; (4) whether the entity holds exclusive rights to some right in the [foreign] country; and (5) how the entity is treated under foreign state law.

*Filler v. Hanvit Bank*, 378 F.3d 213, 217 (2d Cir. 2004) (internal quotation marks omitted).

As the *Aliganga* Plaintiffs amply demonstrated before the district court, DAB is no longer supervised by the state of Afghanistan but rather by the Taliban. Indeed, the Taliban now controls the hiring of DAB employees, "purging prior leadership and technocrats and installing its own unqualified loyalists," including designated terrorists, at the highest levels of DAB's leadership structure. Aliganga App'x at 407. "[A]ny remaining DAB personnel who are not directly affiliated with the Taliban are . . . subject to intimidation and subjugation, preventing them from acting independently." *Id.* at 443. The Taliban has also prohibited women from working at DAB, mandated that employees grow beards and pray five times per day, and required that the Taliban flag be flown at DAB meetings. On this record, it cannot credibly be disputed that the notional state of Afghanistan no longer "actively supervises" DAB, and thus DAB cannot be considered an organ of Afghanistan. *Filler*, 378 F.3d at 217 (internal quotation marks omitted).

The majority sidesteps this analysis entirely and concludes that DAB is still an agency or instrumentality of a foreign state because "a majority of [its] shares or other

ownership interest is owned by" the state of Afghanistan. 28 U.S.C. § 1603(b)(2). Even though this theory was never raised by the parties or considered by the district court, the majority hangs its hat on a clause in the Afghanistan Bank Law, which states that "[t]he capital of [DAB] shall belong to the State, and shall not [be] subject to lien or to encumbrance." Afghanistan Bank Law, art. 27.2 (Dec. 17, 2003), https://perma.cc/NM8N-3U9P. But this single sentence cannot carry the heavy weight the majority places on it. For starters, the Afghanistan Bank Law was passed in December 2003 and thus was not necessarily in force and effect "at the time the writ of attachment [was] issued" in 2022 or confirmation of attachment was sought in 2023. *Aurelius Cap. Partners*, 584 F.3d at 130 (emphasis omitted). Indeed, the *Aliganga* Plaintiffs documented that, at the time of attachment, DAB was openly flouting the Bank Law, including provisions related to the appointment of DAB's governor and first deputy governor, and that the Taliban had "established a committee" to replace the Bank Law with "traditional Islamic banking." Aliganga App'x at 413. What's more, it is not clear that ownership of DAB's capital is the same as the ownership of DAB itself, which is what section 1603 requires for an entity to be considered an agency or instrumentality of a foreign state. In fact, the *Aliganga* Plaintiffs argue that DAB "does not have or issue ownership shares." Aliganga Br. at 55.

With nothing in the record to suggest that DAB's "shares . . . [are] owned by a foreign state," 28 U.S.C. § 1603(b)(2), the majority reaches outside the record to locate a doctoral dissertation that asserts, without any citation or support, that DAB has "100% state ownership,"

Maj. Op. at 36 & n.95 (citing Jan Weidner, The Organisation and Structure of Central Banks 192 (Apr. 20, 2007) (Dr. rer. pol. dissertation, Technische Universität Darmstadt), https://perma.cc/P5TN-UZBY). But this cherrypicked statement is simply not sufficient, in my view, to establish that DAB remains an agency or instrumentality of the notional state of Afghanistan.

## IV. The DAB Funds Were Not Being Used for Central Banking Functions

Upon finding that DAB is an agency or instrumentality of Afghanistan, the majority concludes that the DAB funds are entitled to immunity under FSIA section 1609 and ends its analysis there. But the *Aliganga* district court focused on FSIA section 1611, which provides that "the property of a foreign state shall be immune from attachment and from execution, if . . . the property is that of a foreign central bank or monetary authority held for its own account." 28 U.S.C. § 1611(b). While it is true that "funds . . . held in an account in the name of a central bank or monetary authority . . . are presumed to be immune from attachment under [section] 1611(b)(1)," a plaintiff "can rebut that presumption by demonstrating with specificity that the funds are not being used for central banking functions as such functions are normally understood." *NML Cap., Ltd. v. Banco Cent. de la Republica Argentina*, 652 F.3d 172, 194 (2d Cir. 2011). Our decision in *NML Capital* did not offer a list of those central banking functions, but we relied extensively on a law-review article that provided such a list. These functions include the:

> (1) issu[ance] of notes, coin, and legal tender, (2) custody and administration of the nation's monetary reserves through the holding of gold, silver, domestic and foreign securities, foreign exchange, acceptances and other credit instruments, and IMF Special Drawing Rights, (3) establishment and maintenance of reserves of depository institutions, (4) discounts and advances to depository institutions, (5) receipt of deposits from the government, international organizations, depository institutions, and in special cases, private persons, (6) open market operations, (7) credit controls, and (8) licensing, supervision, and inspection of banks.

Ernest T. Patrikis, *Foreign Central Bank Property: Immunity from Attachment in the United States*, 1982 U. Ill. L. Rev. 265, 274; *see also Central Bank, Black's Law Dictionary* (12th ed. 2024) ("A central bank normally issues currency, functions as the government's bank, regulates the credit system, provides oversight for commercial banks, manages exchange reserves, and implements monetary policy.").

As the *Aliganga* plaintiffs demonstrated through their expert affidavits, DAB no longer functioned as a central bank at the time of attachment in April 2022. For example, DAB was no longer able to print afghanis; DAB curtailed its auctions of U.S. dollars, which had been used to support the value of the afghani; and foreign currency and aid arriving in Afghanistan were routed through private

banks and informal transfer systems rather than DAB. *See* Aliganga App'x at 414, 416. For these reasons, one expert reasonably concluded that DAB "cannot execute central bank functions." *Id.* at 419. That being the case, DAB's assets are not entitled to immunity under FSIA section 1611.

## V. Even If It Could Be Argued That the FSIA Applies Here, TRIA Abrogates the Immunity of an Entity That Is an "Agency or Instrumentality of a Terrorist Party" at the Time of the Turnover Order

Because the majority concludes that the DAB funds are immune under the FSIA from attachment and execution, the majority must still contend with whether TRIA abrogates that immunity for the *Havlish* appeal. TRIA states that "[n]othwithstanding any other provision of law, . . . the blocked assets of [a] terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution in order to satisfy [a] judgment" against that party. TRIA § 201(a). I agree with the majority that TRIA abrogates both jurisdictional and execution immunity and independently provides a grant of subject-matter jurisdiction over post-judgment execution and attachment proceedings. *See* Maj. Op. at 38-45. The majority nevertheless neuters that conclusion by insisting that an entity's status as an agency or instrumentality of a terrorist party under TRIA must "be assessed as of the date that the assets at issue were blocked," *id.* at 55 - an issue that was never considered by the district court, briefed by the parties, or discussed at oral argument.

In *Kirschenbaum*, we previously suggested that an entity's agency or instrumentality status under TRIA should be assessed as of the date the complaint was filed. *See* 830 F.3d at 136. I agree with the majority that *Kirschenbaum's* bright-line rule has been "unseated" by our subsequent caselaw, Maj. Op. at 49, which has made clear that developments subsequent to the filing of a complaint may affect whether an entity is entitled to immunity, *see Bartlett v. Baasiri*, 81 F.4th 28, 33-37 (2d Cir. 2023); *Schansman v. Sberbank of Russ. PJSC*, 128 F.4th 70, 79-80 (2d Cir. 2025). But I disagree with the majority's holding that an entity's status as an agency or instrumentality of a terrorist party must "be assessed as of the date that the assets at issue were blocked." Maj. Op. at 55.

For starters, this reading imposes an extratextual limitation on plaintiffs' ability to enforce judgments against terrorist parties. Nowhere does the plain text of TRIA confine its applicability to assets that belonged to the terrorist party (or its agency or instrumentality) at the time those assets were blocked. In other words, the unambiguous language of the statute makes clear that as long as (1) the assets are blocked and (2) they belong to a terrorist party (or its agency or instrumentality), those assets can be used to satisfy a judgment against the terrorist party.

To hold otherwise runs contrary to the statute's purpose, which "is to deal comprehensively with the problem of enforcement of judgments issued to victims of terrorism in any U.S. court by enabling them to satisfy such judgments from the frozen assets of terrorist

parties." *Weinstein v. Islamic Republic of Iran*, 609 F.3d 43, 50 (2d Cir. 2010) (internal quotation marks omitted). Indeed, we have recognized that "TRIA establishes once and for all, that such judgments are to be enforced against *any* assets available in the [United States]." *Id.* (emphasis added) (internal quotation marks omitted). And yet, under the majority's interpretation, if a terrorist party were to gain control over an entity whose assets were already blocked, those assets could not be used to satisfy a judgment against the terrorist party. In addition to defying logic, such an approach would defeat TRIA's objective of making "any assets available" to the victims of terrorism. *Id.* (internal quotation marks omitted).

The better approach, in my view, is to assess whether an entity is an agency or instrumentality of a terrorist party at the time of the turnover order. This would accord with the approach we have taken to determining attachment and execution immunity under the FSIA, which looks to conditions at the time of attachment or execution. *See Aurelius Cap. Partners*, 584 F.3d at 130. It would also avoid reading extratextual limitations into TRIA and would maximize the assets available to victims of terrorism to enforce judgments against terrorist parties, which was the clear purpose of the statute.

In response, the majority argues that we should look to conditions at the time the assets were blocked because "[i]f an entity becomes an agency or instrumentality of a terrorist party *after* that entity's property is blocked, those blocked assets cannot have been utilized to further the mission of the terrorist party." Maj. Op. at 51. But the

majority cites no authority - nor am I aware of any - to suggest that Congress intended to limit TRIA's reach to assets that were "utilized to further the mission of the terrorist party." *Id.* Rather, as noted above, TRIA simply functions to ensure that the maximum assets are available to victims of terrorism.

The majority also make the semantic argument that "blocked assets are not 'of' a terrorist party if those assets did not belong to either the terrorist party, or an entity then operating as an agency or instrumentality of the terrorist party, as of the date that the assets were blocked." *Id.* at 52. But once again, the plain text of TRIA contains no such limitation, and it strains credulity to suggest that Congress intended to create roadblocks preventing victims of terrorism from accessing the assets of terrorist organizations.

For all these reasons, I would hold that an entity's status as an agency or instrumentality of a terrorist party for purposes of TRIA should be determined as of the date of the turnover order. Applying that test here, I would easily conclude that DAB was an agency or instrumentality of the Taliban when the district court issued its decision on the turnover motion in March 2023. At a minimum, as outlined above, DAB was "controlled[] or directed by" the Taliban as of that date. *Kirschenbaum*, 830 F.3d at 135. As the majority acknowledges, *see* Maj. Op. at 47, that is sufficient to be considered an agency or instrumentality of a terrorist party under our caselaw.

* * *

To sum up, I concur with the majority's holding that a district court may, but is not required to, *sua sponte* consider the issue of attachment (or execution) immunity even when the sovereign status of the assets at issue is disputed. But I disagree with the majority's novel conclusion that "[t]he Executive Branch's formal recognition of a state or government establishes that state or government as a foreign state for purposes of the [FSIA]." *Id.* at 54. That holding effectively overrules three decades of our precedents and ignores longstanding caselaw from the Supreme Court that makes clear the interpretation of the FSIA is purely a task for the judiciary. I would instead apply the test we set forth in *Klinghoffer*, conclude that Afghanistan no longer constitutes a foreign state for purposes of the FSIA, and thus hold that the DAB funds are not entitled to immunity from attachment or execution. I also disagree with the majority's holding that an entity's status as an agency or instrumentality of a terrorist party under TRIA must "be assessed as of the date that the assets at issue were blocked," *id.* at 55, as opposed to the date of the turnover order.

Accordingly, I would vacate the judgments below and remand for the district courts to apply New York attachment and execution law to determine whether Plaintiffs can use the DAB funds to satisfy their judgments against the Taliban.

For all the above reasons, I respectfully dissent.

## APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING REHEARING EN BANC, FILED MARCH 19, 2026

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 19th day of March, two thousand twenty-six.

Present:

DEBRA ANN LIVINGSTON,
*Chief Judge*,
RAYMOND J. LOHIER, JR.,
RICHARD J. SULLIVAN,
JOSEPH F. BIANCO,
MICHAEL H. PARK,
WILLIAM J. NARDINI,
STEVEN J. MENASHI,
EUNICE C. LEE,
BETH ROBINSON,
MYRNA PÉREZ,
ALISON J. NATHAN,
SARAH A. L. MERRIAM,
MARIA ARAÚJO KAHN,
*Circuit Judges.*

23-258 (L), 23-263 (CON), 23-304 (CON),
23-346 (CON), 23-444 (CON)

*Appendix B*

FIONA HAVLISH, *et al.*, JOHN DOES 1 THROUGH 7, FEDERAL INSURANCE CO., *et al.*, RAYMOND ANTHONY SMITH, *et al.*, KATHLEEN ASHTON, *et al.*,

*Plaintiffs-Appellants,*

v.

THE TALIBAN,

*Defendant-Appellee,*

FEDERAL RESERVE BANK OF NEW YORK,

*Garnishee-Interested-Party-Appellee,*

ESTATE OF JESSE NATHANAEL ALIGANGA, *et al.*, RIZWAN KHALIQ, *et al.*, JAMES OWENS, *et al.*,

*Plaintiffs-Appellants,*

v.

TALIBAN, AKA THE ISLAMIC EMIRATE OF AFGHANISTAN,

*Defendant-Appellee.*

March 19, 2026

Following disposition of this appeal on August 26, 2025, an active judge of the Court requested a poll on whether to rehear the case *en banc*. A poll having been

conducted and there being no majority favoring *en banc* review, the petition for rehearing *en banc* is hereby **DENIED**.

William J. Nardini, *Circuit Judge*, joined by Raymond J. Lohier, Jr., *Circuit Judge*, concurs by opinion in the denial of rehearing *en banc*.

Richard J. Sullivan, *Circuit Judge*, joined by Debra Ann Livingston, *Chief Judge*, Joseph F. Bianco, and Michael H. Park, *Circuit Judges*, dissents by opinion from the denial of rehearing *en banc*.

Steven J. Menashi, *Circuit Judge*, dissents by opinion from the denial of rehearing *en banc*.

José A. Cabranes and Guido Calabresi, *Circuit Judges*, filed a statement with respect to the denial of rehearing *en banc*.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

NARDINI, *Circuit Judge*, joined by LOHIER, *Circuit Judge*, concurring in the denial of rehearing *en banc*:

I concur in the denial of rehearing *en banc*. In particular, I agree with the view, expressed by the panel majority and by Judge Menashi in Part I.A-B of his dissent from the denial of rehearing *en banc*, that the Executive Branch is generally entrusted with the power to recognize foreign governments.

SULLIVAN, *Circuit Judge*, joined by LIVINGSTON, *Chief Judge*, BIANCO, PARK, *Circuit Judges*, dissenting from the denial of rehearing *en banc*:

In these cases, victims of terrorism seek to recover assets held by a Taliban-controlled bank. The panel rejected their claims after concluding that those assets belong to the notional State of pre-Taliban Afghanistan and accordingly enjoy immunity under the Foreign Sovereign Immunities Act (the "FSIA"), 28 U.S.C. §§ 1330, 1602-11. To reach that conclusion, the panel conflated diplomatic recognition with statutory immunity in civil litigation, subverted the purpose of the FSIA, and ignored the precedent interpreting it.

Even so, the victims still should have prevailed under the Terrorism Risk Insurance Act of 2002 (the "TRIA"), which overrides immunity as to "the blocked assets of [a] terrorist party." Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, § 201(a), 116 Stat. 2322, 2337-40 (codified as amended 28 U.S.C. § 1610 note). But the panel sidestepped the TRIA's text, its purpose, and our own caselaw to conclude that the victims could not recover because the assets did not belong to the Taliban when the government froze them—even though they did when the victims sought turnover.

The full Court should have addressed those errors today. Instead, we double-down on a panel opinion that obscures the plain meaning of two federal statutes, muddies our jurisprudence, and blocks the families of those killed in Taliban-directed terrorist attacks from

claiming assets held by a Taliban-controlled bank. For the reasons set forth below and in my prior dissent to the panel opinion, I respectfully dissent from the denial of rehearing *en banc*.

## I. Background

The Taliban ruled Afghanistan from 1996 to 2001. During that period, it helped al-Qaeda kill and maim thousands of Americans through several infamous acts of terrorism: the 1998 bombing of the U.S. embassies in Kenya and Tanzania, and the unprecedented attacks of September 11, 2001 in the United States.

After the 9/11 attacks, a U.S.-led coalition invaded Afghanistan and toppled the Taliban. But when U.S. troops left Afghanistan twenty years later, Taliban insurgents once again seized control of the country, capturing Kabul, the capital of Afghanistan, on August 15, 2021. They later "attained *de facto* control" over the former central bank of Afghanistan—Da Afghanistan Bank ("DAB")—by filling its leadership positions with Taliban loyalists, including multiple designated terrorists. *Havlish v. Taliban*, 152 F.4th 339, 346 (2d Cir. 2025).

On the day that Kabul fell to the Taliban, the U.S. Treasury Department froze assets that DAB held in an account at the Federal Reserve Bank of New York (the "FRBNY"). Then-President Biden subsequently issued an Executive Order preventing the Taliban from accessing these funds in order to safeguard the "welfare of the people of Afghanistan." *Id.* (quoting Exec. Order No.

14,064, 87 Fed. Reg. 8391 (Feb. 11, 2022)). The Executive Branch does not view the Taliban as the legitimate government of Afghanistan, and it has transferred similar assets to individuals whom it has accredited as official representatives of the Afghan people. But it cannot be disputed that the former government of Afghanistan no longer exists, that Afghan embassies have been forced to close, and that the Taliban now controls the territory of the country, administers public services, and exercises governmental authority.

With the Taliban back in control, two sets of plaintiffs commenced legal actions to recover from it. In the first case, victims of the embassy bombings pursue pre-judgment attachment of DAB's assets. And in the second, 9/11 victims—who have already obtained a judgment against the Taliban—seek turnover of the same funds. The respective district courts dismissed both suits on FSIA immunity grounds.

A divided panel affirmed, holding *first* that the FSIA protects the assets here because the Executive Branch has recognized a notional state of Afghanistan, and *second* that the TRIA does not apply because the proper time to assess DAB's status as an agency or instrumentality of a terrorist party is as of when the assets were blocked—before the Taliban took control of DAB—and not when the plaintiffs sought turnover. As noted in the panel dissent, both holdings are incorrect as a matter of law. *Id.* at 366 (Sullivan, J., concurring in part and dissenting in part).

## II. The FSIA

The panel opinion's analysis of the FSIA contravenes the statutory text, thwarts its purpose, and throws precedent to the wind. "The FSIA provides that 'a *foreign state* shall be immune from the jurisdiction of the courts of the United States and of the States.'" *Samantar v. Yousuf*, 560 U.S. 305, 313, 130 S.Ct. 2278, 176 L.Ed.2d 1047 (2010) (quoting 28 U.S.C. § 1604 (emphasis added)). Accordingly, we must first determine whether the "defendant is a 'foreign state' within the meaning of the Act." *Id.* Such "[i]nterpretation of the FSIA's reach" presents "a pure question of statutory construction . . . well within the province of the Judiciary." *Republic of Austria v. Altmann*, 541 U.S. 677, 701, 124 S.Ct. 2240, 159 L.Ed.2d 1 (2004) (internal quotation marks omitted).

For over thirty years, we have "construed 'foreign state' as used in the FSIA" by employing a judicially crafted test to examine whether an entity "bear[s] the attributes of statehood." *Kirschenbaum v. 650 Fifth Ave. & Related Props.*, 830 F.3d 107, 123 (2d Cir. 2016) (internal quotation marks omitted) (explaining that those attributes include "a defined territory and population, self-governance and foreign relations, and the capacity to wage war and to enter into international agreements"), *abrogated on other grounds by Rubin v. Islamic Republic of Iran*, 583 U.S. 202, 138 S.Ct. 816 (2018); *see also Samantar*, 560 U.S. at 314, 130 S.Ct. 2278 ("The term 'foreign state' on its face indicates a body politic that governs a particular territory."). By parsing, interpreting, and applying the FSIA's text at the outset of private civil suits, we have

consistently discharged our "solemn duty" to "interpret the act[s] of Congress, in order to ascertain the rights of the parties." *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 385, 144 S.Ct. 2244, 219 L.Ed.2d 832 (2024) (internal quotation marks omitted); *see Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

That duty has added force in the context of the FSIA—which expressly aimed to "transfer primary responsibility for deciding 'claims of foreign states to immunity' from the [Executive] to the courts." *Samantar*, 560 U.S. at 313, 130 S.Ct. 2278 (quoting 28 U.S.C. § 1604). Prior to the FSIA's enactment, "initial responsibility for deciding questions of sovereign immunity fell primarily upon the Executive acting through the State Department, and the courts abided by 'suggestions of immunity' from the State Department." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 487, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983). But rather than enhancing the Executive's flexibility in conducting foreign affairs, this deference to the Executive's immunity determinations instead resulted in foreign governments "putting strong pressure on the Department of State to decide a lawsuit." *Foreign Sovereign Immunities Act: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations*, 94th Cong., 2d Sess. 34 (1976) (testimony of Monroe Leigh, Legal Adviser, Dep't of State). The Executive thus became "involved in a great many cases where [it] would rather not do anything at all," and it accordingly supported the effort to transfer immunity

decisions to the courts, which it "would much rather" have "handle[]" such questions. *Id.* Heeding the Executive's request, "Congress passed the F[SIA] in order to free the Government from the case-by-case diplomatic pressures" of the prior approach. *Verlinden*, 461 U.S. at 488, 103 S.Ct. 1962. For this reason, where the political branches have agreed that immunity decisions should be made by the courts, "the views of the executive branch should not control the question of whether, under the FSIA, a foreign state (or agency or instrumentality) is entitled to immunity." Restatement (Fourth) of Foreign Relations Law § 452 rptr. n.1 (2018) (hereinafter "Restatement").

The panel opinion brushes all this aside. Instead of attempting to interpret and apply the words "foreign state," it holds—flatly and categorically—that "[t]he Executive Branch's formal recognition of a state or government establishes [it] as a foreign state for purposes of the F[SIA]." *Havlish*, 152 F.4th at 365. But that oversimplistic approach to statutory interpretation disregards both the Supreme Court's clear instruction that the Executive's views regarding the FSIA's scope "merit no special deference," *Altmann*, 541 U.S. at 701, 124 S.Ct. 2240, and our own Court's admonition that "reliance on Executive Branch definitions to construe 'foreign state' under the FSIA raises several concerns," *Kirschenbaum*, 830 F.3d at 124.[1]

1. To be sure, the Executive is free to "fil[e] statements of interest suggesting that courts decline to exercise jurisdiction in particular cases implicating foreign sovereign immunity." *Altmann*, 541 U.S. at 701-02, 124 S.Ct. 2240 (expressing no opinion on the question of what level of deference such statements should

The panel opinion races past these warnings because it confuses the "power to recognize foreign nations and governments," *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 14, 135 S.Ct. 2076, 192 L.Ed.2d 83 (2015)—which unquestionably belongs to the Executive and confers a variety of tangible benefits on recognized States—with the separate and narrower authority to determine when statutorily created FSIA immunity should attach in civil litigation, which clearly belongs to the Judiciary. *Havlish*, 152 F.4th at 351-52; *see* Restatement § 452 rptr. n.1 ("[While] the President has the exclusive power to recognize foreign states for diplomatic purposes[,] [c] lassification as a foreign state for FSIA purposes is a matter of statutory interpretation." (citations omitted)).

Both Judge Menashi's separate dissent and Judge Nardini's concurrence repeat this mistake of blurring the distinction between diplomatic recognition and

---

be granted in cases covered by the FSIA). But the government filed no such statement in this appeal, and the panel opinion instead depends primarily on a State Department "Fact Sheet"—an online list of "independent states"—that "was last updated in March 2025." *Havlish*, 152 F.4th at 353. And while Judge Menashi insists that "the Executive Branch *did* provide its views in this case" via letters submitted in the district court proceedings, Menashi Dissent at 111-12, the panel opinion did not rely on those letters, which are brief squibs submitted years ago by a previous U.S. attorney under a prior presidential administration. *See*, *e.g.*, Letter of the United States, *Owens v. Taliban*, No. 22-CV-1949 (S.D.N.Y. Feb. 24, 2023). Accordingly, the question of what degree of deference might be afforded to formal executive intervention of that sort is not before us.

statutory immunity.[2] But while it is true that certain legal benefits have historically flowed from "formal recognition," including the ability to sue in United States courts, to assert *common-law* sovereign immunity (prior to the passage of the FSIA), and to engage in "regular diplomatic relations," *Zivotofsky*, 576 U.S. at 11, 135 S.Ct. 2076, *Zivotofsky* did not call into question Congress's substantial powers over foreign affairs generally. As the Supreme Court explained, "[t]he Executive's exclusive power *extends no further* than his formal recognition determination," and "Congress may . . . express its disagreement with the President in myriad ways." *Id.* at 30, 135 S.Ct. 2076 (emphasis added). With the FSIA, Congress vested the courts—not the Executive—with the role of determining whether foreign states should enjoy statutory immunity. The determination of whether an entity is a "foreign state" under the FSIA in the

2. Judge Menashi persists in this error throughout his dissent. *See* Menashi Dissent at 112 ("The FSIA does not empower the courts to countermand the President's decision to recognize a country."); *id.* at 113 (similar); *id.* at 114 (similar). But no one disagrees that the Executive has the exclusive authority to recognize foreign states, or even that such a recognition decision may "aid" courts "exercising independent judgment in determining the meaning of [the FSIA's] provision[s]." *Loper Bright*, 603 U.S. at 371, 144 S.Ct. 2244. Such Executive input does not, however, strip the courts of their capacity, and duty, to interpret the FSIA, which regulates only the narrow issue of immunity from litigation in a particular case. Judge Menashi's—and the panel's—maximalist approach would ignore that crucial distinction and dispense with any limiting principle: the Executive could recognize Disneyland, Facebook, or Purdue Pharma as a "foreign state," and courts would have to defer to that decision, toss the text of the FSIA aside, and dismiss all private civil suits against those entities.

narrow context of a particular civil suit, does not "alter the President's recognition decision[s]" or their discrete legal effects, *id.*; it merely reserves questions of statutory construction to the judicial branch, as Congress intended.

Answering the FSIA question thus requires the core judicial work of parsing the term "foreign state"—a task in which the Executive's input might assist us, but in which it certainly does not *bind* us. *See Beierwaltes v. L'Office Federale de la Culture de la Confederation Suisse*, 999 F.3d 808, 818 (2d Cir. 2021) (FSIA "vest[s] sole responsibility for applying [its] standards in the federal judiciary"); *Loper Bright*, 603 U.S. at 386, 144 S.Ct. 2244 (emphasizing that while "[t]he views of the Executive Branch could inform the judgment of the Judiciary," they "d[o] not supersede it"). The panel opinion ignores that fundamental principle, making us the first Circuit court in history to conflate the Executive's power to recognize nations with the Judiciary's duty to interpret the jurisdictional grant of the FSIA. In essence, the panel opinion reduces statutory immunity to a mere subspecies of Executive recognition.

Our new rule will have disastrous consequences. In this case it impedes victims of terrorism in their multi-decade quest to recover lawful damages from the perpetrators of heinous acts of terrorism. More generally, it frustrates the congressional intent to compensate victims of terrorism, makes a hash of fifty years of FSIA jurisprudence, and risks confusing other courts. Worst of all, this new rule marks a return to the very "bedlam" that Congress sought to abate by enacting the FSIA. *See Republic of Argentina v. NML Capital, Ltd.*, 573 U.S. 134, 141, 134 S.Ct. 2250,

189 L.Ed.2d 234 (2014) ("Congress abated the bedlam in 1976, replacing the old executive-driven . . . immunity regime with the Foreign Sovereign Immunities Act's 'comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state.'" (quoting *Verlinden*, 461 U.S. at 488, 103 S.Ct. 1962)). Under the panel's theory, courts would have *no* role in interpreting the meaning of the term "foreign state," notwithstanding the clear purpose of the statute and the unmistakable precedents of the Supreme Court and our Court to the contrary. *See Samantar*, 560 U.S. at 323 n.19, 130 S.Ct. 2278 (explaining that, through the passage of the FSIA, the State Department "sought and supported the elimination of its role with respect to claims against foreign states and their agencies or instrumentalities"); *Kirschenbaum*, 830 F.3d at 124-25 (refusing to "rel[y] on Executive Branch definitions to construe 'foreign state' under the FSIA" in part because the FSIA aimed "to transfer the determination of sovereign immunity from the executive branch to the judicial branch" (internal quotation marks omitted)); *see also OI Eur. Grp. B.V. v. Bolivarian Republic of Venezuela*, 73 F.4th 157, 170 (3d Cir. 2023) ("For this Court to hold that . . . decisions about sovereign immunity from suit are once again an Executive prerogative . . . would undermine the principal purpose of the FSIA."). Remarkably, the panel opinion makes no attempt to engage with these problems or explain how its holding comports with the language of the FSIA or the precedents interpreting it.[3]

3. Furthermore, even if Afghanistan qualifies as a foreign state, the FSIA would shield only its own "agen[cies] or instrumentalit[ies]." 28 U.S.C. § 1603(a)-(b). And DAB is an agency

**III. The TRIA**

The panel compounds its FSIA error by imposing extra-textual limits on the reach of the TRIA. But those limits foil that statute's purpose and have no mooring in any text or authority beyond the panel's own vague sense of good policy.

The TRIA broadly empowers plaintiffs to enforce their judgments against "the blocked assets of [a] terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party)." TRIA § 201(a). As we have explained, Congress passed the TRIA to "establish[] once and for all" that judgments obtained by terrorist victims "are to be enforced against *any assets available in the U.S.*" *Weinstein v. Islamic Republic*

---

of the Taliban—not Afghanistan. The Taliban has slotted loyalists (including designated terrorists) into DAB's leadership positions, "prohibited women from working at DAB," and "required that the Taliban flag be flown at DAB meetings." *Havlish*, 152 F.4th at 371-72 (Sullivan, J., concurring in part and dissenting in part); *see also* Menashi Dissent at 114-16 (agreeing with this much of the panel dissent's agency-or-instrumentality analysis). Indeed, the panel opinion itself acknowledges that "[t]here is little question that the Taliban has attained *de facto* control over DAB" and that no country (including the United States) "has recognized the Taliban as Afghanistan's legitimate government." *Havlish*, 152 F.4th at 346. It nevertheless overlooks these inconvenient facts and instead relies on an almost twenty-year-old doctoral dissertation from outside the record to support its (never briefed or raised) theory that the notional state of Afghanistan theoretically owns DAB's capital. *Id.* at 357. But there is simply no evidence that the Taliban has respected the niceties of Afghan banking law as interpreted by a single graduate student in 2007.

*of Iran*, 609 F.3d 43, 50 (2d Cir. 2010) (emphasis added and internal quotation marks omitted). Here, victims of terrorism seek blocked assets held in the U.S. account of a Taliban-controlled entity. The TRIA thus should make this an easy case.

The panel nevertheless holds that courts must assess the defendant's status as an "agency or instrumentality" of a terrorist group at the time when the assets are blocked, as opposed to when a turnover order is issued. *Havlish*, 152 F.4th at 366. That reading both conflicts with the text and purpose of the TRIA and clashes with our approach in FSIA cases, where we assess execution immunity by evaluating conditions at the time of execution. *See Aurelius Cap. Partners, LP v. Republic of Argentina*, 584 F.3d 120, 130 (2d Cir. 2009) (highlighting that, in the FSIA context, "the property that is subject to attachment and execution must be property in the United States of a foreign state and must have been used for a commercial activity *at the time* the writ of attachment or execution is issued" (first emphasis deleted and internal quotation marks omitted)). The panel insists, however, that its interpretation makes sense because "[i]f an entity becomes an agency or instrumentality of a terrorist party *after* that entity's property is blocked, those blocked assets cannot have been utilized to further the mission of the terrorist party." *Havlish*, 152 F.4th at 364.

But nothing in the text of the TRIA limits its scope to assets actively employed to fund a terrorist campaign; rather, the statute uses intentionally broad terms to advance its goal of "deal[ing] comprehensively with the

problem of enforcement of judgments issued to victims of terrorism," *Weinstein*, 609 F.3d at 50 (internal quotation marks omitted); *see also Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461-62, 122 S.Ct. 941, 151 L.Ed.2d 908 (2002) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." (internal quotation marks omitted)). The panel's interpretation thus flows not from the text of the TRIA, nor even from that statute's purpose, but instead from its own sense of how Congress should have acted to limit the exposure of terrorist organizations. In addition to being illogical, that is simply not our role. *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 122, 127 S.Ct. 1534, 167 L.Ed.2d 449 (2007) (Scalia, J., dissenting) ("We must interpret the law as Congress has written it, not as we would wish it to be.").

## IV. Conclusion

The panel opinion's pretzel logic, disregard of precedent, and indifference to text and purpose should not have survived *en banc* review. But instead of giving that opinion our full scrutiny, we close our eyes. That inaction will prove costly, as the panel decision will contort our jurisprudence, confuse lower courts, and eviscerate the FSIA and TRIA—all while leaving victims of terrorism empty-handed. For these reasons, and for the reasons set forth in my original dissent to the panel opinion, I respectfully dissent from the denial of rehearing *en banc*.

*Appendix B*

MENASHI, *Circuit Judge*, dissenting from the denial of rehearing *en banc*:

I would reconsider these cases *en banc* because the panel opinion erred in concluding that the Afghan central bank—"Da Afghanistan Bank" or "DAB"—is entitled to immunity under the Foreign Sovereign Immunities Act.

I agree with the panel opinion that a court cannot second-guess the recognition decision of the President that a country is a "foreign state," even for purposes of the FSIA. The FSIA aimed to provide predictable standards by which foreign sovereigns receive immunity in American courts, and it would undermine that purpose if the Executive and Judicial Branches could reach conflicting conclusions about which states are sovereign in the first place. In our constitutional system, the President rather than the courts recognizes foreign states. Because the Executive Branch recognizes Afghanistan as a foreign state, the panel was bound to accept that determination. But DAB is not itself a foreign state. It receives immunity only if it qualifies as "an agency or instrumentality" of Afghanistan. 28 U.S.C. § 1603(a). DAB does not so qualify because Afghanistan neither owns nor controls it. I would therefore hold that DAB is not entitled to immunity.

The panel opinion further erred in concluding that for purposes of § 201 of the Terrorism Risk Insurance Act of 2002 ("TRIA"), the status of an entity as an agency or instrumentality of a terrorist party must be determined as of the date that the assets sought in the turnover motion were blocked. I would hold instead that a court must make

that determination at the time of the turnover order. This approach accords with the text and purpose of the statute, and it parallels the related framework of the FSIA.

Because I would hold that (1) DAB is not an agency or instrumentality of Afghanistan that receives immunity under the FSIA, and (2) the status of an entity as an agency or instrumentality under the TRIA must be assessed at the time of the turnover order, I dissent from the denial of rehearing *en banc*.

## I

The panel opinion correctly held that the President's determination that a country is a foreign state is conclusive. That holding accords with the text, structure, and purpose of the FSIA. The FSIA does not provide statutory standards for determining whether an entity qualifies as a foreign state, and it does not authorize a federal court to invoke principles of international law to override a recognition decision by the President acting within his exclusive constitutional sphere of authority. The FSIA does, however, provide standards for determining whether an entity qualifies as an agency or instrumentality of a foreign state, and under those standards DAB is not one.

### A

Before the FSIA was enacted, "[t]he doctrine of foreign sovereign immunity developed as a matter of common law." *Samantar v. Yousuf*, 560 U.S. 305, 311, 130 S.Ct. 2278, 176 L.Ed.2d 1047 (2010). Early on, Chief

Justice Marshall explained that a foreign sovereign lacks a right to immunity from suit in American courts because "[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute" and "is susceptible of no limitation not imposed by itself." *Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 136, 3 L.Ed. 287 (1812). As a matter of comity, however, countries typically waived jurisdiction over foreign sovereigns—and, on the suggestion of the Executive Branch, the Supreme Court agreed to waive its jurisdiction over an armed ship of a foreign state found in an American port. *See id.* at 137, 145-47. "[T]hat opinion came to be regarded as extending virtually absolute immunity to foreign sovereigns." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983).

Following that precedent, the Supreme Court "consistently has deferred to the decisions of the political branches—in particular, those of the Executive Branch—on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities." *Id.* "For much of our history, claims of foreign sovereign immunity were handled on a piecework basis that roughly paralleled the process in *Schooner Exchange*." *Opati v. Republic of Sudan*, 590 U.S. 418, 140 S. Ct. 1601, 1605, 206 L.Ed.2d 904 (2020). "[A]fter a plaintiff sought to sue a foreign sovereign in an American court, the Executive Branch, acting through the State Department, filed a 'suggestion of immunity'—case-specific guidance about the foreign sovereign's entitlement to immunity." *Id.* If the State Department provided the suggestion of immunity, "the district court surrendered its jurisdiction." *Samantar*,

560 U.S. at 311, 130 S.Ct. 2278. Only "in the absence of recognition of the immunity by the Department of State" did the district court exercise the "authority to decide for itself whether all the requisites for such immunity existed." *Ex parte Republic of Peru*, 318 U.S. 578, 587, 63 S.Ct. 793, 87 L.Ed. 1014 (1943).

The State Department provided suggestions of immunity in all cases against friendly sovereigns until 1952, when it "announced the 'restrictive' theory of foreign sovereign immunity." *Turkiye Halk Bankasi A.S. v. United States*, 598 U.S. 264, 143 S. Ct. 940, 946, 215 L.Ed.2d 242 (2023); *see also Republic of Austria v. Altmann*, 541 U.S. 677, 689-90, 124 S.Ct. 2240, 159 L.Ed.2d 1 (2004). Pursuant to the restrictive theory, "immunity was typically afforded in cases involving a foreign state's public acts, but not its strictly commercial acts." *Turkiye Halk Bankasi*, 143 S. Ct. at 946. The restrictive theory did not alter the role of the courts. "As in the past, initial responsibility for deciding questions of sovereign immunity fell primarily upon the Executive acting through the State Department, and the courts abided by 'suggestions of immunity' from the State Department." *Verlinden*, 461 U.S. at 487, 103 S.Ct. 1962.

But the adoption of the restrictive theory produced inconsistent results. Diplomatic pressure and political considerations sometimes "led to suggestions of immunity in cases where immunity would not have been available under the restrictive theory." *Id.* When a foreign state failed to request a suggestion from the State Department, "the responsibility fell to the courts to determine whether

sovereign immunity existed, generally by reference to prior State Department decisions." *Id.* "Not surprisingly, the governing standards were neither clear nor uniformly applied." *Id.* at 488, 103 S.Ct. 1962.

By enacting the FSIA in 1976, Congress "sought to standardize the judicial process with respect to immunity for foreign sovereign entities in civil cases." *Turkiye Halk Bankasi*, 143 S. Ct. at 946. The FSIA "codifies a baseline principle of immunity for foreign states and their instrumentalities," *id.* (citing 28 U.S.C. § 1604), and it authorizes suit only if one of several enumerated exceptions to that principle applies, *see* 28 U.S.C. §§ 1605-07.

Congress explained that the purpose of this framework is to provide for "the determination by United States courts of *the claims of foreign states to immunity*." *Id.* § 1602 (emphasis added). Congress furthered that purpose by codifying the restrictive theory of sovereign immunity into a set of rules that could be consistently applied. Those rules replaced the inconsistent invocation of sovereign immunity that prevailed when the courts relied on suggestions of immunity from the State Department. *See* H.R. Rep. No. 94-1487, at 7 (1976); *see also Altmann*, 541 U.S. at 691, 124 S.Ct. 2240.

The FSIA provides no standards, however, for determining whether a country is a "foreign state" in the first place. It does not even define "foreign state." To be sure, in the absence of a recognition decision by the Executive Branch, courts have determined whether a

state is sovereign by reference to "general principles of international law," but "those principles were defeasible, subconstitutional rules that the sovereign could override through clear command." *Fuld v. PLO*, 606 U.S. 1, 145 S. Ct. 2090, 2115, 222 L.Ed.2d 296 (2025) (Thomas, J., concurring in the judgment). Judicial deference to the decisions of the political branches to override international default rules "respects the Constitution's design by reserving matters of foreign affairs to the political branches." *Id.*

If courts were to develop rules that supersede the decision of the political branches that a country qualifies as a foreign state, those rules would replicate the patchwork immunity regime that the FSIA aimed to replace. Under the FSIA, a foreign state receives presumptive immunity from suit. *See* 28 U.S.C. § 1604. If immunity were to depend on a country persuading not only the State Department but each court in which litigation occurs that it should be considered a foreign state, there would be even less predictability than prevailed prior to the FSIA. A court in the Second Circuit might decide that Afghanistan is not a foreign state, but a court in the Fifth Circuit might decide that it is—perhaps based on different interpretations of the relevant international law standards. The Supreme Court would need to resolve such disagreements, followed by remands for previously dismissed litigation to proceed or for previously conducted litigation to be dismissed. This sort of system would not represent an improvement on the pre-FSIA framework; it would be more costly and time-consuming, and the strain on American foreign policy would result not from decisions

of the politically accountable Executive Branch but from the unaccountable courts.

We have explained that "[i]n the FSIA, Congress set forth 'a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities' and vested sole responsibility for applying those standards in the federal judiciary." *Beierwaltes v. L'Office Federale de la Culture de la Confederation Suisse*, 999 F.3d 808, 818 (2d Cir. 2021) (citation and alteration omitted) (quoting *Verlinden*, 461 U.S. at 488, 103 S.Ct. 1962). But that means the responsibility of the federal courts is to adjudicate the "claims of immunity" for which the FSIA provides standards. In contrast to those comprehensive standards, "[t]he FSIA begins with the baseline presumption that foreign states are 'immune from the jurisdiction of United States courts,'" *id.* (quoting *Chettri v. Nepal Rastra Bank*, 834 F.3d 50, 55 (2d Cir. 2016)), and it provides no standards—comprehensive or otherwise—for deciding which entities qualify as foreign states that receive the presumption.

In a different context, the Supreme Court has declined to interpret a statute in a way that "would require courts, rather than the President," to evaluate "a foreign government's conduct" because the statutory text "offers no standards that would enable courts to assess, for example, whether the situation in North Korea justifies entry restrictions while the terrorist threat in Yemen does not." *Trump v. Hawaii*, 585 U.S. 667, 138 S. Ct. 2392,

2415, 201 L.Ed.2d 775 (2018). The FSIA similarly offers no standards for courts to decide—in contravention of the diplomatic position of the United States—that an entity should not be recognized as a foreign state. "[T]he absence of any textual basis" for such authority "likely indicates that Congress did not intend" for courts to exercise it. *Id.*

In my view, the panel opinion was correct to observe that "while the FSIA 'defines the circumstances in which foreign states are immune from suit,' the FSIA emphatically does *not* charge the Judiciary with the threshold power to determine whether the basic legal existence of a foreign state is *recognized*, especially in contravention of the Executive." *Havlish v. Taliban*, 152 F.4th 339, 351 (2d Cir. 2025) (alteration omitted) (quoting *Turkiye Halk Bankasi*, 143 S. Ct. at 947).

"A principal purpose" of the FSIA was "to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby *reducing* the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on *purely legal grounds* and under procedures that insure due process." H.R. Rep. No. 94-1487, at 7 (emphasis added). To transfer the determination of not only immunity but also *statehood* would complicate foreign policy when courts disagreed with each other or with the political branches, and it would require courts to depart from purely legal grounds by making decisions based on extra-statutory standards that implicate political and diplomatic considerations. The FSIA does not suggest that Congress wanted courts to do that.

The other dissent says that if the President wants the courts to respect his recognition decisions, he "is free to file statements of interest suggesting that courts decline to exercise jurisdiction in particular cases implicating foreign sovereign immunity." *Ante* at 104 n.1 (internal quotation marks and alteration omitted). The other dissent reserves judgment on "the question of what degree of deference might be afforded to formal executive intervention" because "the government filed no such statement in this appeal." *Id.* So the other dissent might defer to the recognition decision of the Executive Branch when expressed in a court filing. That possibility undermines the otherwise confident assertion of the other dissent that "Congress vested the courts—not the Executive—with the role of determining whether foreign states should enjoy statutory immunity." *Id.* at 105.

Unquestionably, one purpose of the FSIA was to obviate the need for the State Department to file suggestions of immunity in every case. Yet the other dissent reads the FSIA to require *additional* court filings such that the State Department must provide suggestions not only of *immunity* but also of *statehood*. That approach defeats the purpose of the FSIA. Congress wanted the courts to decide whether a foreign state receives immunity *in a given case*. Nothing in the FSIA confers authority on the courts to determine whether a country should be considered a foreign state at all.

In any event, the Executive Branch *did* provide its views in this case. The United States submitted a letter to the district court arguing that the property of DAB

should be immune from execution because "DAB is an agency or instrumentality of the State of Afghanistan."[1] And the United States filed statements of interest explaining that DAB "is the central bank of the foreign state of Afghanistan"[2] and that "DAB is an agency or instrumentality of the State of Afghanistan."[3] If the United States did not insist that Afghanistan is a foreign state as frequently and as fervently as the other dissent would have preferred, that is only because there has never been a practice of filing suggestions of statehood, and no court has ever said that such a practice is required.

**B**

The FSIA does not empower the courts to countermand the President's decision to recognize a country as a foreign state—and the Constitution certainly does not do so either.

---

1. Letter of the United States at 2, *Owens v. Taliban*, No. 22-CV-1949 (S.D.N.Y. Feb. 24, 2023), ECF No. 81; *see also id.* ("[A]s the United States has previously stated, and confirms again here, the Da Afghanistan Bank ('DAB') 'is an agency or instrumentality of the State of Afghanistan and thus is to be treated as a "foreign state" for purposes of the FSIA.' ") (quoting Statement of Interest at 21, *Havlish v. Bin-Laden*, No. 03-CV-9848 (S.D.N.Y. Feb. 11, 2022), ECF No. 563).

2. Statement of Interest, *supra* note 1, at 8; *see also id.* at 15 ("DAB is the central bank of the State of Afghanistan.").

3. Statement of Interest at 21, *John Does 1 Through 7 v. Taliban*, No. 20-MC-740 (S.D.N.Y. Feb. 11, 2022), ECF No. 49.

Under the Constitution, the President is "the sole organ of the federal government in the field of international relations." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320, 57 S.Ct. 216, 81 L.Ed. 255 (1936). The Constitution vests in the President the power to appoint and to receive ambassadors, U.S. Const. art. II, §§ 2-3, and these authorities mean that "recognition is exclusively a function of the Executive," *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964); *see also Guaranty Trust Co. v. United States*, 304 U.S. 126, 137, 58 S.Ct. 785, 82 L.Ed. 1224 (1938) ("What government is to be regarded here as representative of a foreign sovereign state is a political rather than a judicial question, and is to be determined by the political department of the government."). The Supreme Court has reaffirmed that "[r]ecognition is a topic on which the Nation must 'speak with one voice'" and "[t]hat voice must be the President's." *Zivotofsky v. Kerry*, 576 U.S. 1, 14, 135 S.Ct. 2076, 192 L.Ed.2d 83 (2015) (alteration omitted) (quoting *American Ins. Assn. v. Garamendi*, 539 U.S. 396, 424, 123 S.Ct. 2374, 156 L.Ed.2d 376 (2003)).

The other dissent does not dispute that the recognition power belongs exclusively to the President. It argues, however, that while the "formal" recognition of a foreign state is a decision that "unquestionably belongs to the Executive," the "separate and narrower authority to determine when statutorily created FSIA immunity should attach . . . clearly belongs to the Judiciary." *Ante* at 104-05. The other dissent describes the latter determination as involving "the core judicial work of parsing the term 'foreign state.'" *Id.* at 105. And it emphasizes that it

"is emphatically the province and duty of the judicial department to say what the law is." *Id.* at 103 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803)). But the invocation of that familiar truism begs the question of what the law requires. *Cf. Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 144 S. Ct. 2244, 2263, 219 L.Ed.2d 832 (2024) (recognizing that sometimes "the best reading of a statute" is that another branch of government has "discretionary authority").

Determining whether a country qualifies as a foreign state under the FSIA is—at the very least—not "a *pure* question of statutory construction." *Ante* at 103 (emphasis added) (quoting *Altmann*, 541 U.S. at 701, 124 S.Ct. 2240). The FSIA provides comprehensive statutory standards for evaluating whether, for example, the activities of a foreign state at issue in a particular case were commercial rather than governmental. *See* 28 U.S.C. § 1605(a)(2). But it provides no standards for deciding that a country does not qualify as a foreign state at all and therefore cannot claim immunity in any case. Conducting such an inquiry necessarily requires a court to look beyond the statute to geopolitics, international legal standards, and American diplomacy. That exercise might be inevitable in the absence of a recognition decision by the Executive Branch. Indeed, the traditional approach has been that "a court will decide whether to treat an entity as a state, or a foreign regime as a government, where such a determination is necessary for the purposes of a case before the court" only "[i]n the absence of a Presidential decision." Restatement (Third) of Foreign Relations Law § 204 cmt. a (1987). But when the

relevant constitutional actor has exercised the recognition power, the courts have no authority—based on the FSIA or the Constitution—to second-guess it.[4]

The other dissent criticizes the panel opinion for purportedly making ours "the first [c]ircuit court in history to conflate the Executive's power to recognize nations with the Judiciary's duty to interpret the jurisdictional grant of the FSIA." *Ante* at 105. But no circuit court has overridden a decision of the President—acting within his exclusive constitutional sphere of authority—to recognize a country as a foreign state. The other dissent would have

---

4. I would not displace the traditional approach with the framework proposed in a more recent Restatement. *See Kansas v. Nebraska*, 574 U.S. 445, 475, 135 S.Ct. 1042, 191 L.Ed.2d 1 (2015) (Scalia, J., concurring in part and dissenting in part) ("[M]odern Restatements . . . are of questionable value, and must be used with caution. . . . Over time, the Restatements' authors have abandoned the mission of describing the law, and have chosen instead to set forth their aspirations for what the law ought to be."); *see also United States v. Yousef*, 327 F.3d 56, 99 (2d Cir. 2003) (explaining that Restatements "are not primary sources of international law" and "at most provide evidence of the practice of States, and then only insofar as they rest on factual and accurate descriptions of the past practices of states, not on projections of future trends or the advocacy of the 'better rule'"). But even the most recent Restatement of Foreign Relations Law explains that "[t]o determine whether a particular territorial, political, or regional body is a foreign state under the FSIA, courts consider *whether it has been formally recognized by the United States*, as well as the criteria of statehood from international law." Restatement (Fourth) of Foreign Relations Law § 452 reporters' note 1 (2018) (emphasis added) (citing *Kirschenbaum v. 650 Fifth Ave. & Related Props.*, 830 F.3d 107, 123 (2d Cir. 2016)).

ours be the first circuit court in history to conclude that the FSIA requires that result.

The other dissent faults the panel opinion for "blurring the distinction between diplomatic recognition and statutory immunity." *Id.* at 105. But it is the other dissent that blurs the distinction between immunity and statehood, which have always been understood as different concepts. "[N]ineteenth-century courts deferred to executive findings of 'fact' as to whether the government was officially sovereign. But those findings typically did not resolve the immunity issue itself, which could be dependent on the facts of the case."[5] When courts "could make independent determinations on whether a foreign sovereign was immune from suit in a particular set of circumstances," the courts nevertheless "regarded themselves as bound by executive branch determinations of the existence of sovereign status."[6]

Perhaps Congress might be able to transfer from the President to the courts the determination of which entities qualify as foreign states under the FSIA. If Congress had provided statutory criteria for determining whether a country qualifies as a foreign state—in the same way that it provided criteria for adjudicating the claim of a foreign state to immunity—we would be compelled to conclude that Congress had attempted to do so. The

5. G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 Va. L. Rev. 1, 27 (1999).

6. *Id.* at 134.

question would then arise as to whether Congress was constitutionally permitted to transfer so integral an aspect of the recognition power away from the President. The last time such a dispute arose, the Supreme Court explained that "[t]he President's exclusive recognition power encompasses the authority to acknowledge, in a formal sense, the legitimacy of other states and governments, including their territorial bounds," and that this "is an executive power that Congress may not qualify." *Zivotofsky*, 576 U.S. at 17, 135 S.Ct. 2076. In light of that decision, I lack the confidence of the other dissent that the Constitution would permit Congress to deprive the President of the power to recognize an entity as a foreign state eligible for a presumption of immunity in American courts—and to confer that power instead on the judiciary.

But Congress has not even attempted to make such a transfer. Neither the text nor the structure nor the purpose of the FSIA indicates that Congress wanted courts to decide which countries should be recognized as foreign states. And the FSIA has not previously been understood to transfer this aspect of the recognition power to judges. In the absence of a clearly expressed congressional purpose to encroach on what would otherwise be the President's exclusive constitutional power of recognition, I would not conclude that Congress has impliedly so encroached. *See Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring) ("[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter."); *see also Learning Resources, Inc.*

*v. Trump*, ___ U.S. ___, 146 S. Ct. 628, 639, ___ L.Ed.2d ___ (2026) ("'Both separation of powers principles and a practical understanding of legislative intent' suggest[] Congress would not have delegated 'highly consequential power' through ambiguous language.") (plurality opinion) (alteration omitted) (quoting *West Virginia v. EPA*, 597 U.S. 697, 142 S. Ct. 2587, 2609, 213 L.Ed.2d 896 (2022)).

**C**

While the FSIA does not provide statutory standards for determining whether an entity qualifies as a foreign state, it does provide a detailed scheme for evaluating whether an entity qualifies as an agency or instrumentality of a foreign state. I would accept the determination of the President that Afghanistan is a foreign state but hold that DAB is not an agency or instrumentality of Afghanistan. Accordingly, I agree with the conclusion of the other dissent that DAB is not entitled to sovereign immunity. *See ante* at 106 n.3.

The FSIA provides that not only the foreign state itself but also an agency or instrumentality of the foreign state receives immunity in American courts. *See* 28 U.S.C. § 1603(a). An agency or instrumentality of a foreign state is an entity that is (1) "a separate legal person, corporate or otherwise," (2) "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," and (3) "neither a citizen of a State of the United States . . . nor created under the laws of any third country." *Id.* § 1603(b).

No one disputes that DAB is a separate legal person or contends that it fails the third prong. The question is whether it is "an organ" of Afghanistan or whether a majority of its shares are "owned" by Afghanistan. To determine whether an entity is an organ of a foreign state, we consider "(1) whether the foreign state created the entity for a national purpose; (2) whether the foreign state actively supervises the entity; (3) whether the foreign state requires the hiring of public employees and pays their salaries; (4) whether the entity holds exclusive rights to some right in the foreign country; and (5) how the entity is treated under foreign state law." *Filler v. Hanvit Bank*, 378 F.3d 213, 217 (2d Cir. 2004) (alteration omitted).

The record here demonstrates that the Taliban rather than the State of Afghanistan controls DAB. The district court observed that the Taliban has "laid claim to the roughly $7 billion in assets held by [DAB] at the N.Y. Fed." *Owens v. Taliban*, No. 22-CV-1949, 2023 WL 2214887, at *1 (S.D.N.Y. Feb. 24, 2023). And the district court found as follows:

> Since taking control of Afghanistan, the Taliban has installed its own officials at DAB, controlled DAB's decision-making, established a committee to replace Afghanistan's central banking laws with traditional Islamic banking, and eliminated (or, at a minimum, seriously compromised) DAB's anti-money laundering and anti-terrorism financing efforts. Foreign governments and organizations have avoided transacting with DAB due to its affiliation with the Taliban.

*Id.* at *2 (citations omitted). The Taliban has also set workplace conditions at DAB—which now include a prohibition on women employees, mandatory prayer, and the flying of the Taliban flag at meetings. *See Havlish*, 152 F.4th at 371-72 (Sullivan, J., concurring in part and dissenting in part). The record, in other words, shows that DAB is no longer "an organ" of the State of Afghanistan.

The panel opinion did not contend otherwise but concluded that DAB still qualifies as an agency or instrumentality because "a majority of [its] shares or other ownership interest is owned" by the State of Afghanistan. 28 U.S.C. § 1603(b)(2). That conclusion rested on two pieces of evidence. First, "the Afghanistan banking law sets forth th[at] 'the capital of Da Afghanistan Bank shall belong to the State of Afghanistan.'" *Havlish*, 152 F.4th at 357 (alterations omitted) (quoting Afghanistan Bank Law, art. 27.2 (Dec. 17, 2003)). Second, "a study analyzing the structure of central banks finds that DAB is subject to '100% state ownership.'" *Id.* (quoting Jan Weidner, The Organisation and Structure of Central Banks 192 (Dissertation, Technical University of Darmstadt 2017)). This evidence does not support the conclusion of the panel opinion.

The text of § 1603(b)(2) uses the present tense, and we have explained that "the present tense reflects the FSIA's concern with current political realities and relationships." *Bartlett v. Baasiri*, 81 F.4th 28, 33 (2d Cir. 2023) (internal quotation marks omitted); *see also Altmann*, 541 U.S. at 696, 124 S.Ct. 2240 ("[S]uch immunity reflects current political realities and relationships, and aims to give

foreign states and their instrumentalities some *present* protection from the inconvenience of suit as a gesture of comity.") (internal quotation marks omitted). As a result, we have held 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," and for that reason "immunity under the Foreign Sovereign Immunities Act may attach when a defendant becomes an instrumentality of a foreign sovereign after a suit is filed." *Bartlett*, 81 F.4th at 33 (citation omitted). It follows that immunity may also be lost when a defendant ceases to be an instrumentality of a foreign sovereign because a non-sovereign entity has captured it.

So it matters that the Afghanistan banking law is no longer operative and does not reflect the current ownership of DAB. The study of central banks—which was published before the Taliban took over DAB—simply repeats the formalities of the inoperative banking law. *See* Weidner, *supra*, at 192. It does not address the current reality of the ownership or control of DAB.

The panel opinion departed from those precedents holding that claims of immunity must be evaluated in light of current political realities. I would rehear these cases *en banc* to eliminate the conflict with those precedents. *See* Fed. R. App. P. 40(b)(2)(A)-(B). In doing so, I would conclude that DAB is not an agency or instrumentality of Afghanistan but rather of the Taliban and is not entitled to immunity under the FSIA.

**II**

I agree with the other dissent that the panel opinion additionally erred in holding that the status of an entity as an agency or instrumentality of a terrorist party under the TRIA must be determined as of the time the assets were blocked. *See Havlish*, 152 F.4th at 364-65. I would rehear these cases *en banc* to correct this second error as well.

Section 201(a) of the TRIA authorizes plaintiffs to seek execution or attachment of "the blocked assets of [a] terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party)." 28 U.S.C. § 1610 note. Section 201(d)(2)(A) defines "blocked asset" as "any asset seized or frozen by the United States." *Id.* The panel opinion concluded that "[t]he blocking date . . . serves as a critical inflection point ripe for determining the time at which we should evaluate an entity's status under the TRIA as an agency or instrumentality." *Havlish*, 152 F.4th at 364.

That analysis does not follow from the statutory phrase "blocked assets." An asset may be frozen by the United States, and its owner may later become an agency or instrumentality of a terrorist party. The asset would remain an "asset seized or frozen by the United States"—and accordingly a "blocked asset"—regardless of the change in status of the owner. While "'blocking' is a status *imposed* by the United States at a certain time," *id.* (emphasis added), the status of being a "blocked asset" continues past the blocking date.

The panel opinion suggested that "blocked assets are not 'of' a terrorist party if those assets did not belong to either the terrorist party, or an entity then operating as an agency or instrumentality of the terrorist party, as of the date that the assets were blocked." *Id.* But assets that yesterday were not "of" a terrorist party might today be "of" a terrorist party if the owner has become an agency or instrumentality of a terrorist party. *Cf. Bartlett*, 81 F.4th at 33. No one doubts that the blocked assets here are assets "of" DAB or that DAB is controlled by the Taliban. If the assets were unblocked today, DAB—and therefore the Taliban—would control the assets.

Even if there were some policy reason to approach blocked assets in the way the panel opinion described, that was not the policy that Congress adopted in the TRIA. The statute straightforwardly provides that assets shall be available to satisfy a judgment against a terrorist party if the assets are "blocked" and are "of th[e] terrorist party." 28 U.S.C. § 1610 note. There are no additional requirements.

The history of the statute confirms that Congress intended to adopt this uncomplicated rule. Prior to the TRIA, the President was statutorily authorized to prevent the attachment of the blocked property of foreign states, and he often did so.[7] Congress enacted the TRIA

7. *See Heiser v. Islamic Republic of Iran*, 735 F.3d 934, 939 (D.C. Cir. 2013) ("The President waived [attachment] in almost all cases after finding that attachment of blocked property would 'impede the ability of the President to conduct foreign policy' and 'impede the effectiveness of prohibitions and regulations

to prevent the President from impeding recovery by judgment creditors. *See Heiser*, 735 F.3d at 939. The statute aimed not only to enable "victims of terrorism" to satisfy judgments "from the frozen assets of terrorist parties" but also to "establish[] once and for all, that such judgments are to be enforced against any assets available in the U.S., and that *the executive branch has no statutory authority to defeat such enforcement under standard judicial processes*." *Weinstein v. Islamic Republic of Iran*, 609 F.3d 43, 50 (2d Cir. 2010) (emphasis added) (quoting 148 Cong. Rec. S11528 (Nov. 19, 2002) (statement of Sen. Harkin)). Congress directed that the blocked assets could be used to pay victims "whether or not the executive agreed." *Heiser*, 735 F.3d at 939. But the panel opinion—by limiting the reach of the TRIA to assets that belonged to terrorists before the Executive Branch blocked the assets—effectively returned to the Executive Branch the sort of discretionary power over the assets that the TRIA aimed to eliminate.

These cases illustrate the problem. It is undisputed that the assets are blocked, and there is no real question that the owner of those assets—DAB—is an agency or instrumentality of the Taliban. Yet the panel opinion held that the assets are beyond the reach of victims of terrorism because DAB was not an agency or instrumentality of the Taliban at the time the Executive Branch decided to block the assets. The Executive Branch blocked the assets when

---

upon financial transactions.'") (alteration omitted) (quoting Determination to Waive Requirements Relating to Blocked Property of Terrorist-List States, 63 Fed. Reg. 59201, 59201 (Oct. 21, 1998)).

the Taliban captured Kabul, however, precisely to *avoid* the use of the assets for terrorist purposes. Pursuant to the panel opinion, if the government had blocked the assets *after* the Taliban took over DAB, the funds would be available to victims of the Taliban. But if the government blocked the assets *because* the Taliban was *about* to take over DAB, the victims cannot recover.

The theory of the panel opinion seems to be that the assets continue to belong to the preexisting DAB that was not an agency or instrumentality of the Taliban. But that DAB does not exist. The assets belong to the actual DAB that is an agency or instrumentality of the Taliban. And the TRIA deals with actual rather than imaginary ownership. *Cf. id.* at 940 (deciding, for purposes of the TRIA, whether an entity "actually owns the contested accounts" by reference to a conventional and commonly accepted "measure of ownership").

I would rehear these cases to hold that the status of an entity as an agency or instrumentality of a terrorist party under the TRIA must be assessed at the time of the turnover order because the statute, as in the related context of the FSIA, concerns "current political realities and relationships." *Bartlett*, 81 F.4th at 33.

* * *

The panel opinion correctly accepted the recognition decision of the President that Afghanistan is a foreign state. But when evaluating whether DAB qualifies as an agency or instrumentality under either the FSIA

or the TRIA, the panel opinion ignored the statutory command that sovereign immunity and the execution of judgments must reflect current political realities. DAB is an instrumentality of the Taliban rather than the State of Afghanistan. Because the panel opinion pretended otherwise, I would rehear the cases *en banc*. I dissent from the decision of the court not to do so.

José A. Cabranes and Guido Calabresi, *Circuit Judges*:

After careful review, the Court has voted to deny *en banc* review of these cases. Rightly so. Although the cases involve highly complicated legal issues, we addressed them head-on and painstakingly in our Majority Opinion. Rather than re-engage in lengthy disputations here, we stand by—and refer all interested persons to—that Opinion.

## APPENDIX C — AMENDED ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED APRIL 3, 2026

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 3rd day of April, two thousand and twenty-six,

Before: Guido Calabresi,
José A. Cabranes,
Richard J. Sullivan,
*Circuit Judges.*

Docket No. 23-258 (L), 23-263 (Con)
23-304 (Con), 23-346 (Con),
23-444 (Con).

FIONA HAVLISH, *et al.*, JOHN DOES 1 THROUGH 7, FEDERAL INSURANCE CO., *et al.*, RAYMOND ANTHONY SMITH, *el al.*, KATHLEEN ASHTON, *et al.*,

*Plaintiffs-Appellants,*

v.

THE TALIBAN,

*Defendant-Appellee,*

FEDERAL RESERVE BANK OF NEW YORK,

*Garnishee-Interested-Party-Appellee.*

*Appendix C*

**AMENDED ORDER**

Appellants, having filed a petition for panel rehearing and the panel that determined the appeal having considered the request,

IT IS HEREBY ORDERED that the petition is DENIED.

Judge Sullivan dissents from the denial of petition for rehearing.

For The Court:
Catherine O'Hagan Wolfe,
Clerk of Court

/s/ Catherine O'Hagan Wolfe

## APPENDIX D — MEMORANDUM DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED FEBRUARY 21, 2023

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

IN RE: TERRORIST ATTACKS ON SEPTEMBER 11, 2001; This document relates to: Smith v. The Islamic Emirate of Afghanistan, et al., No. 01-cv-10132; Ashton, el al. v. Al Qaeda Islamic Army, et al., No. 02-cv-6977; Havlish, et al. v. Bin Laden, et al., No. 03-cv-9848; Fed Ins. Co. et al. v. Al Qaida, et al., No. 03-cv-6978; John Does 1 Through 7 v. The Taliban, et al., No. 20-mc-740

03 MDL 1570 (GBD) (SN); No. 01-cv-10132; No. 02-cv-6977; No. 03-cv-9848; No. 03-cv-6978; No. 20-mc-740

February 21, 2023, Filed

February 21, 2023, Decided

### MEMORANDUM DECISION AND ORDER

GEORGE B. DANIELS, United States District Judge:

In this multidistrict litigation, four groups of judgment creditors ("Judgment Creditors")[1] with judgments

1. The Judgment Creditors are the four sets of Plaintiffs in the following cases: *Smith v. The Islamic Emirate of Afghcnistan, et al.*, No. 01-cv-10132 (the "*Smith* Creditors"), *Havlish, et al. v. Bin Laden, et al.*, No. 03-cv-9848 (the "*Havlish* Creditors"), *Fed Ms. Co. et al. v.*

against the Taliban stemming from the terrorist attacks on September 11, 2001 (the "9/11 Attacks") moved for turnover to satisfy their judgments with assets in the name of Afghanistan's central bank, Da Afghanistan Bank ("DAB"), held at the Federal Reserve Bank of New York (the "FRBNY"). (ECF Nos. 7763, 7767, and 7936 in No. 03-md-1570; ECF No. 62 in No. 01-cv-10132; ECF No. 597 in No. 03-cv-9848.)[2] Before this Court is Magistrate Judge Sarah Netburn's August 26, 2022 Report and Recommendation (the "Report"), recommending that this Court deny the Judgment Creditors' motions and not allow Judgment Creditors of the Taliban to satisfy their judgments with DAB funds. (*See* Report, ECF No. 8463, at 2.) Magistrate Judge Netburn advised the parties that failure to file timely objections to the Report would constitute a waiver of those objections on appeal. (*Id.* at 42-43) Judgment Creditors filed objections on November 10, 2022, (*see* Objections, ECF No. 8733),[3] and *amicas curiae* Mr. Naseer A. Faiq, the *Chargé de Affaires* of the

---

*Al Qaida, et al.*, No. 03-cv-6978 (the "*Federal Insurance* Creditors"), and *John Does 1 Through 7 v. The Taliban, et al.*, No. 20-me-740 (the "*Doe* Creditors"). In their filings, Judgment Creditors refer to themselves collectively as the "Joint Creditors."

2. Unless otherwise indicated, all references made herein to the docket sheet refer to the main docket sheet for this multidistrict litigation, No. 03-md-1570. Plaintiffs in *Ashton, et al. v. Al Qaeda Islamic Army, et al.*, No. 02-cv-6977 ("*Ashton* Plaintiffs") also tiled an *ex parte* motion for attachment. (ECF No. 8412; ECF No. 1724 in No. 02-cv-6977.)

3. *Ashton* Plaintiffs joined the Judgment Creditors' objections in part. (*See Ashton* Nov. 16, 2022 Letter, ECF No. 8756.)

Permanent Mission of the Islamic Republic of Afghanistan, responded to those objections on November 25, 2022, (*see* Faiq Nov. 25, 2022 Letter, ECF No. 8773).[4]

Because the parties filed timely objections, this Court undertakes a *de nova* review of the Report. After doing so, this Court ADOPTS Magistrate Judge Netburn's Report in finding that this Court lacks subject-matter jurisdiction over the turnover motions under the FSIA, (Report at 12-26), and that this Court is constitutionally restrained from determining the Taliban is the legitimate government of Afghanistan as required to attach DAB's assets, (Report at 27-37).[5] For the reasons stated herein, the Judgment Creditors' turnover motions are DENIED.

---

4. This Court accepts the *amicus* letter from Mr, Faiq as a response to the Judgment Creditors' objections because Magistrate Judge Netburn granted Mr. Faiq's motion, among others, for leave to file an *amicus* brief on April 27, 2022, prior to the issuance of her Report. (*See* Report at 10-11 (citing Order on *Amici*, ECF No. 7925; also citing Faiq Am. *Amicus* Br., ECF No. 7932-1); *see also* procedural history *infra* Section II.C.)

5. This Court declines to adopt the Report's determination that the Taliban's nonconsensual control prevents DAB from being a Taliban agency or instrumentality. (*See* Report at 37-41.) It is not this Court's responsibility to assess whether the fact that "DAB has been violently occupied by the Taliban" via the Taliban takeover of Afghanistan consequently disqualifies DAB as an instrumentality of the Taliban. (*Contra id.* at 37.) One need only look at numerous examples throughout the world to understand the historic role of military force in the destruction and formation of recognized governments. This Court thus rejects the Report's finding that "the relationship between a terrorist [party] and its agency or instrumentality must be consensual." (*Id.* at 40); *see also,*

*Appendix D*

## I. LEGAL STANDARD

A court "may accept, reject, or modify, in whole or in part, the findings or recommendations" set forth in a magistrate judge's report. 28 U.S.C. § 636(b)(1)(C). The court must review *de novo* the portions of a magistrate judge's report to which a party properly objects. *Id.* The court, however, need not conduct a *de novo* hearing on the matter. *See United States v. Raddatz*, 447 U.S. 667, 675-76, 100 S. Ct. 2406, 65 L. Ed. 2d 424 (1980). Rather, it is sufficient that the court "arrive at its own, independent conclusion" regarding those portions of the report to which objections are made. *Nelson v. Smith*, 618 F. Supp. 1186,1189-90 (S.D.N.Y. 1985) (citation omitted).

Portions of a magistrate judge's report to which no or "merely perfunctory" objections are made are reviewed for clear error. *See Edwards v. Fischer*, 414 F. Supp. 2d 342, 346-47 (S.D.N.Y. 2006) (citations omitted). The clear error standard also applies if a party's "objections are improper—because they are 'conclusory,"general,' or 'simply rehash or reiterate the original briefs to the magistrate judge.'" *Stone v. Comm'r of Soc. Sec.*, No. 17-cv-569 (RJS)(KNF), 2018 U.S. Dist. LEXIS 51974, 2018 WL 1581993, at *3 (S.D.N.Y. Mar. 27, 2018) (citation

---

*Kirschenbaum v. 650 Fifth Ave.*, 257 F. Supp. 3d 463, 523 (S.D.N.Y. 2017), *rev'd and remanded on other grounds sub nom. Havlish v. 650 Fifth Ave. Co.*, 934 F.3d 174 (2d Cir. 2019) ("*Kirschenbaum II*") ("As a matter of law . . . this Court does not believe knowledge of instrumentality status is a required element for a TRIA § 201(a) claim; . . . people or entities may become the unwitting instruments of another,").

omitted). Clear error is present when "upon review of the entire record, [the court is] 'left with the definite and firm conviction that a mistake has been committed.'" *United States v. Snow*, 462 F.3d 55, 72 (2d Cir. 2006) (citation omitted).

## II. BACKGROUND

### A. Afghanistan and 9/11

The 9/11 Attacks resulted in the murder of nearly three thousand innocent people and injuries to thousands more. [6] In the ensuing days, U.S. President George W. Bush launched a global military campaign to respond to the 9/11 Attacks and counter international terrorism. Since 1996, the Taliban had *de facto* control over the Islamic Emirate of Afghanistan, although the United States did not recognize the Taliban as Afghanistan's government.[7] President Bush demanded that the Taliban permanently close terrorist training camps within Afghanistan's borders and hand over those responsible

6. This Court assumes familiarity with the general background of this case and will only restate relevant factual background as necessary to address the pending motions. Because Sections I and II of the Report are adopted in full unless otherwise noted, this Court refers to facts detailed in the Report throughout this opinion.

7. The United States did not recognize the 1996-2001 Taliban government, maintaining that between 1996 and 2000, 'there was no functioning central government' in Afghanistan." (*Smith*, No. 01-cv-10132, ECF No. 63-3, Clayton Thomas, Cong. Rsch. Serv., *Taliban Government in Afghanistan: Background and Issues for Congress* 28 (2021) (citation omitted))

for the 9/11 Attacks, principally al Qaeda leader Osama bin Laden. (*See Smith*, No. 01-cv-10132, ECF No. 63-3, Clayton Thomas, CONG. RSCH. SERV., *Taliban Government in Afghanistan: Background and Issues for Congress* 2 (2021) ("Taliban Background").) When the Taliban refused, the United States and coalition allies invaded Afghanistan on October 7, 2001 as part of Operation Enduring Freedom. *See id.* 2-3. Taliban forces fled Kabul, and the Islamic Emirate of Afghanistan collapsed within weeks. *Id.* The United Nations helped form an interim, and then transitional, government backed by U.S. and allied forces, culminating in the formation of the Islamic Republic of Afghanistan (the "Republic") in 2004. *See id.* at 3, 28.

Following a brutal war spanning two decades, the Taliban has returned to power in Afghanistan. During the administration of President Donald Trump, a February 2020 U.S.-Taliban agreement stipulated that the United States and its allies would fully withdraw all international forces from Afghanistan by May 2021. In April 2021, President Joseph Biden postponed this deadline to August of the same year. *Id.* at 6-7. The Taliban soon thereafter began a sweeping military offensive, capturing large swaths of Afghanistan before finally entering Kabul to overthrow the Republic on August 15, 2021. *See id.* at 7-8. Although U.S. forces managed to evacuate approximately 124,000 people up until the last American soldier left Afghanistan on August 30, 2021, the chaotic final days of U.S, presence coincided with a catastrophic suicide bombing at Kabul's international airport and stranded hundreds of U.S. citizens and tens of thousands of Afghans who had worked with the United States. *See id.* at 22-23.

The people of Afghanistan then faced a relentless barrage of calamities. Up to 97 percent of Afghans may fall into poverty amid the collapse of the banking sector, and more than a million children are at risk of dying of starvation. (See Report at 4 (citing Faiq Am. *Amicus* Br., ECF No. 7932-1, at 2-3).) Some families have resorted to selling bodily organs or their own children to afford food. (*See id.* (citing Afghan Civ. Soc'y Orgs. *Amicus* Br., ECF No. 7896-1, at 5; also citing Faiq Am. *Amicus* Br. at 3).) The Taliban is ruthlessly hunting down journalists, civil society leaders, women activists, religious and ethnic minorities, former Republic officials, and former Afghan security forces who served with U.S.-allied forces. (*See id.* (citing Afghan Civ. Soc'y Orgs. *Amicus* Br. at 6).) After issuing edicts banning women from attending high school or college, the Taliban recently imposed a ban on women conducting humanitarian work, endangering approximately 28 million Afghans who desperately need assistance to survive a harsh winter, economic collapse, and the risk of famine. *See UN and Top Aid Officials Slam Afghan Rulers' NGO Ban for Women*, UN NEWS (Dec, 29, 2022), https://news.un.org/en/story/2022/12/1132082.

As before, the United States does not recognize the Taliban regime as the *de jure* government of Afghanistan. (*See* Report at 4 (citing U.S. Statement of Interest, ECF No. 7661, at 34.) Indeed, no country in the world does. *See, e.g.*, Belquis Ahmadi & Scott Warden, *The Taliban Continue to Tighten Their Grip on Afghan Women and Girls*, U.S. INSTIT. PEACE (Dec. 8, 2022), https://www.usip.org/publications/2022/12/taliban-continue-tighten-their-grip-afghan-women-and-girls.

**B. Da Afghanistan Bank**

DAB has been the central bank of Afghanistan since its founding in 1939. (Report at 4 (citing Decl. Alex Zerden, ECF No. 7766 ¶ 16).) When the Republic fell in August 2021, DAB held approximately $7 billion in assets at the FRBNY. (*Id.* (citing *Havlish* Mem. of Law on Mot. for Turnover, ECF No, 7764). Most of these funds came from international donors and the savings of Afghan citizens. (*Id.* (citing Faiq Am. *Amicus* Br. at 19 n.18).) The U.S. Treasury Department blocked the assets on August 15, 2021—the same day that the Taliban entered Kabul. (*Id.* (citing Taliban Background at 39).) While the action helped ensure that the funds would not fall into Taliban hands, it further exacerbated Afghanistan's humanitarian crisis because Afghan "banks were unable to lend money and citizens [were] unable to withdraw their own funds." (*Id.* (citing Afghan Civ. Soc'y Orgs. Amicus Br. at 5).)

In February 2022, President Biden issued an executive order titled "Protecting Certain Property of Da Afghanistan Bank for the Benefit of the People of Afghanistan." Exec. Order No. 14,064, 87 Fed. Reg. 8391 (Feb. 11, 2022) ("EX/ 14,064"). The order addressed the frozen assets and stated that "the preservation of certain property of Da Afghanistan Bank (DAB) held in the United States by United States financial institutions is of the utmost importance to addressing this national emergency and the welfare of the people of Afghanistan." *Id.* Executive Order 14,064 determined that "the widespread humanitarian crisis in Afghanistan—including the urgent needs of the people of Afghanistan

for food security, livelihoods support, water, sanitation, health, hygiene, shelter and settlement assistance, and COVID-19-related assistance, among other basic human needs" constituted an "unusual and extraordinary threat to the national security and foreign policy of the United States." (Report at 5 (quoting F.O. 14,064).) As a result, President Biden declared a national emergency and ordered that "[a]ll property and interests in property of DAB that are held . . . in the United States by any United States financial institution, including the Federal Reserve Bank of New York, are blocked . . ." (*Id.* (quoting E.O. 14,064 § 1(a)).)

The U.S. Treasury's Office of Foreign Assets Control ("OFAC") implemented Executive Order 14,064 through its issuance of License No. DABRESERVES-E0-2022-886895-1. (citing U.S. Statement of Interest, Ex. B, ECF No. 7661-2 (the "OFAC License").) The United States sought to use the license to transfer $3.5 billion—approximately half of DAB's assets— "for the benefit of the people of Afghanistan, including to an international financing mechanism (in which the United States is a member) holding and disbursing funds for the benefit of the people of Afghanistan, or to a United Nations fund, programme, specialized agency, or other entity or body for the benefit of the people of Afghanistan." (*Id.* (quoting OFAC License § 1(b)).) The United States reported that this OFAC License could not take effect without the Court modifying the writs of execution obtained by the Judgment Creditors or otherwise confirming that the writs did not restrain the $3.5 billion the license sought to transfer. (*Id.* at 5-6

(citing U.S. Statement of Interest at 2-3)) On February 25, 2022, Magistrate Judge Netburn issued an order with the parties' consent confirming that the writs did not restrain the $3.5 billion under the OFAC License. (*See* U.S. Dep't of Just. Feb. 24, 2022 Letter, ECF No. 7700; Order on OFAC License, ECF No. 7701.) The FRBNY retained the remaining DAB funds of $3.5 billion at issue here. (Report at 5-6.)

### C. Procedural History

The Judgment Creditors hold default judgments against the Taliban for their losses arising from the 9/11 Attacks and other acts of terrorism. (*See Id.* at 6-9 (detailing judgments and timeline).) The *Havlish* Creditors and *Smith* Creditors brought suit and obtained default judgments against the Taliban for losses suffered on 9/11. (*Id.* at 6-8.) The *Federal Insurance* Creditors are insurance companies that made payments because of the 9/11 Attacks and obtained a default judgment against the Taliban for their economic losses. (*Id.* at 7.) The *Doe* Creditors obtained a default judgment against the Taliban, among others, arising from a 2016 attack by the Taliban and other terrorist groups at a contractor compound in Afghanistan. (*Id.* at 8.) All of the Judgment Creditors hold judgments against the Taliban that remain substantially unsatisfied. (*See id.* at 6-9.)

The Judgment Creditors now seek to satisfy their judgments against the Taliban with DAB assets. The Republic was defending against claims consolidated in this multidistrict litigation until the Taliban takeover. (*See,*

*e.g.*, *Faulkner v. Bin Laden, et al.*, No. 09-cv-07055, ECF No. 184.) After the Republic fell, the Judgment Creditors obtained writs of execution targeting DAB funds held at FRBNY and later filed respective motions for turnover of the funds pursuant to Federal Rule of Civil Procedure 69(a), New York Civil Practice Law and Rules ("CPLR") §§ 5225(b) and 5227, and the Terrorism Risk Insurance Act of 2002 ("TRIA") § 201, Pub. L. No. 107-297, 116 Stat. 2337, as amended, Pub. L. No. 112-158, 126 Stat. 1260 (codified at 28 U.S.C. § 1610 note). (*See* Report at 6-9 (detailing motions and timeline).) No Judgment Creditor holds a judgment against the state of Afghanistan or DAB. (*Id.* at 6.) Further, no representative for Afghanistan, DAB, or the Taliban is currently defending in this multidistrict litigation. (*Id.*)

The United States Government filed a Statement of Interest for these turnover proceedings. (*See* U.S. Statement of Interest.) Factually, the United States stated that DAB is the central bank of Afghanistan, (*id.* at 8), and provided that the United States has not recognized the Taliban or any other entity as the government of the state of Afghanistan, (*id.* at 26). While acknowledging "a compelling interest in permitting victims of terrorism to obtain compensation to the greatest degree permitted under the law," (*id.* at 19), the United States asserted "a strong interest in the President's constitutional authority to make decisions with respect to the recognition of foreign governments and . . . in ensuring the proper construction of TRIA and the Foreign Sovereign Immunities Act," (*id.* at 3). The United States took "no position" on whether the Judgment Creditors had satisfied TRIA's requirements

for turnover of DAB's assets. (Report at 9 (citing U.S. Statement of Interest at 19-20).) However, the United States noted that the courts should narrowly construe exceptions to the immunity of foreign sovereign property and measure such exceptions "against a benchmark that accounts for the risk of reciprocal challenges to American property abroad." (*id* at 10 (citing U.S. Statement of Interest at 27).) Further, the United States argued that the Judgment Creditors "must establish a theory of ownership by the Taliban that would not require this Court—either expressly or by implication—to make its own determination as to the identity of Afghanistan's government" because such a determination would infringe on the President's constitutional powers to recognize a foreign government. (*See* U.S. Statement of Interest at 26-27.)

Magistrate Judge Netburn accepted four *amicus curiae* briefs on these turnover motions. (Report at 10.) The briefs are from (1) the Women's Forum on Afghanistan (Women's F. Mar. 30,2022 Letter, ECF No. 7823, at 3-4), (2) the Center for Constitutional Rights on behalf of four Afghan civil-society organizations (Afghan Civ. Soc'y Orgs. *Amicus* Br.),[8] (3) the non-governmental organization Unfreeze Afghanistan (Unfreeze Afghanistan *Amicus* Br., *Havlish*, No. 03-cv-9848, ECF No. 617), and (4) the Open Society Justice Initiative, submitted on behalf of Mr. Naseer A. Faiq, the *Chargé de Affaires* of the Permanent

8. Those organizations are Global Advocates for Afghanistan, the Afghan Network for Advocacy and Resources, Afghans For A Better Tomorrow, and the Afghan-American Community Organization. (*See* Afghan Civ. Soc'y Orgs. *Amicus* Br. at vi—vii.)

Mission of the Islamic Republic of Afghanistan (Faiq Am. *Amicus* Br.). Together, "[Obese briefs describe the devastating effects that the Taliban's takeover has had on Afghan civil society and on the Afghan people. They also raise[] several legal arguments against the Judgment Creditors' turnover motions." (Report at 11.) Magistrate Judge Netbum rejected two amicus briefs from groups that included members already represented in this litigation. (Apr. 27, 2022 Order on *Amid*, ECF No. 7925; May 2, 2022 Order on *Amici*, ECF No. 7941.) This Court also denied, based on being unhelpful and untimely, subsequent separate motions for leave to submit briefs as *amici curiae* from Osen LLC and Freshfields Bruckhaus Deringer US LLP on behalf of unnamed "former members of Congress and former government officials." (*See* Nov. 29, 2022 Order on *Amici*, ECF No. 8776, at 3.) Additionally, the FRBNY submitted a single non-substantive letter. (FRBNY May 20, 2022 Letter, ECF No. 8040.)

On August 26, 2022, Magistrate Judge Netburn issued her Report recommending that this Court deny the Judgment Creditors' motions and not allow the Judgment Creditors' to satisfy their judgments with DAB funds. (*See* Report at 2.) The Judgment Creditors filed timely objections on November 10, 2022, (*see* Objections), and Mr. Faiq responded to those objections on November 25, 2022, (*see* Faiq Nov. 25, 2022 Letter). The Judgment Creditors then replied to Mr. Faiq's filing. (Joint Creditors Dec. 14, 2022 Letter, ECF No. 8805.) Additionally, Mr. Faiq filed a notice of supplemental authority relating to the Report's interpretation of TRIA, (*see* Faiq Oct. 17, 2022 Letter, ECF No. 8645), and the Judgment Creditors

responded, (*see* Joint Creditors Mem. of Law in Resp. to Suppl. Authority, ECF No. 8735).

## III. MAGISTRATE JUDGE NETBURN CORRECTLY DETERMINED THAT THIS COURT LACKS SUBJECT-MATTER JURISDICTION OVER THE TURNOVER MOTIONS UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT

This Court lacks subject-matter jurisdiction over DAB and, by extension, over these turnover motions under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 *et seq.* DAB is the central bank of Afghanistan. As an instrumentality of a foreign state, DAB enjoys two presumptive immunities under the FSIA: (1) immunity from jurisdiction and (2) immunity from execution on its property. Both immunities must be independently overcome for a party to reach the assets of an instrumentality of a foreign state. Here, "the Judgment Creditors propose to take their judgments against the non-sovereign Taliban, have DAB declared a Taliban instrumentality, and obtain a waiver of both DAB's immunities under TRIA § 201(a)." (Report at 20.) While TRIA can overcome jurisdictional immunity under certain circumstances, those circumstances are not present here. Therefore, DAB retains its jurisdictional immunity, and this Court lacks subject-matter jurisdiction over DAB and the turnover motions.

*Appendix D*

### A. DAB is a Central Bank Under the FSIA with Both Jurisdictional Immunity and Execution Immunity

"[T]he FSIA is the 'sole basis for obtaining jurisdiction over a foreign state in [U.S.] courts.'" *Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela*, 863 F.3d 96, 113 (2d Cir. 2017) (quoting *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434, 109 S. Ct. 683, 102 L. Ed. 2d 818 (1989)). Foreign states are immune from court jurisdiction unless a specific exception to jurisdictional immunity applies. *Samantar v. Yousuf*, 560 U.S. 305, 313, 130 S. Ct. 2278, 176 L. Ed. 2d 1047 (2010) ("The FSIA provides that 'a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States' except as provided in the Act." (quoting 28 U.S.C. § 1604)). The FSIA "must be applied by the District Courts in every action against a foreign sovereign, since subject matter jurisdiction in any such action depends on the existence of one of the specified exceptions to foreign sovereign immunity." *Verlinden B. V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493, 103 S. Ct. 1962, 76 L. Ed. 2d 81 (1983) (citation omitted). Thus, in order for a court to determine whether it holds subject-matter jurisdiction over a case against a foreign sovereign or its instrumentalities, the court must make a FSIA immunity determination regardless of whether the foreign state is participating in the proceedings. *Id.* at 494 n.20 ("[E]ven if the foreign state does not enter an appearance to assert an immunity defense, a District Court still must determine that immunity is unavailable under the [FSIA].").

*Appendix D*

For the purposes of the immunity determination under the FSIA, a foreign state "includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state." 28 U.S.C. § 1603(a). The FSIA provides that an "agency or instrumentality of a foreign state" is any entity

> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

*Id.* § 1603(b)(1)-(3); (*see also* Report at 14 (quoting same)). A central bank is "the paradigm of a state agency or instrumentality." *S & S Mach. Co. v. Masinexportimport*, 706 F.2d 411, 414 (2d Cir. 1983). Here, all parties and the United States agree that DAB is the central bank of Afghanistan, although the United States has not yet recognized any regime as the *government* of Afghanistan. (*See* Report at 19.) The United States reconciles this apparent contradiction by noting that "there is a distinction between a foreign *government* and a foreign *state*, and `[a] state can . . . recognize or treat an entity as a state while denying that a particular *regime is* its *government:*"

(Statement of Interest at 25 (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 203 cmt. a (1987)) (emphases added).) Therefore, as a central bank, DAB is the instrumentality of the foreign state of Afghanistan.

Generally, a foreign sovereign state and its agencies and instrumentalities, such as DAB, have "two types of foreign sovereign immunity [under the FSIA]—immunity from jurisdiction and immunity from attachment and execution of the sovereign's property." *Vera v. Banco Bilbao Vizcaya Argentaria, S.A.*, 946 F.3d 120, 133 (2d Cir. 2019) (*"Vera II"*). FSIA § 1604 grants foreign states and their instrumentalities immunity from *jurisdiction*, unless an exception under §§ 1605 to 1607 applies. In contrast, FSIA § 1609 renders the *property* of foreign states and their instrumentalities immune from *attachment* and *execution*, unless an exception under §§ 1610, 1611 applies. These "provisions governing jurisdictional immunity, on one hand, and execution immunity, on the other, operate independently." *Walters v. Indus. & Com. Bank of China, Ltd.*, 651 F.3d 280, 288 (2d Cir. 2011). "[A] waiver of immunity from suit does not imply a waiver of immunity from attachment of property, and a waiver of immunity from attachment of property does not imply a waiver of immunity from suit." *Id.* (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 456(1)(b)) . Thus, a party seeking to attach the central bank assets of a foreign sovereign must overcome both immunities. (*See also* Report at 15.)

Because DAB is Afghanistan's central bank, it is immune from the jurisdiction of U.S. courts under 28 U.S.C. § 1604 unless an exception to jurisdictional immunity applies. As to foreign state property, the FSIA neither grants nor forbids *in rem* civil-forfeiture actions. *See United States v. Assa Co.*, 934 F.3d 185, 190 (2d Cir. 2019) ("The FSIA does not create jurisdiction over, and does not immunize a foreign state's property from, *in rem* civil-forfeiture actions."). However, such actions face a steep climb because the FSIA was designed "to prevent the location of the [foreign state] property from conferring jurisdiction on the court—i.e., to prevent *in rem* and *quasi-in-rein* actions from undermining the general principles codified in the FSIA." *Brenntag Int'l Chemicals, Inc. v. Bank of India*, 175 F.3d 245, 253 (2d Cir. i 999). Through the FSIA, "Congress sought to clamp down on *quasi in rem* suits because they 'caused significant irritation to many foreign governments' and could potentially 'give rise to serious friction in United States' foreign relations.'" *Assa Co.*, 934 F.3d at 190 (citation omitted).

Furthermore, central bank assets used for central banking enjoy stronger protection from execution. FSIA § 1611(b)(1) stipulates that, notwithstanding the normal exceptions permitting execution on a foreign sovereign's assets, "the property . . . of a foreign central bank or monetary authority held for its own account" is immune from attachment or execution. (*See also* Report at 15.) In drafting the FSIA, Congress determined that "[i]f execution could be levied on such funds without an explicit waiver, deposit of foreign funds in the United States might be discouraged. Moreover, execution against the reserves

of foreign states could cause significant foreign relations problems." *EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 473 (2d Cir. 2007) (quotation marks and citation omitted). Courts must therefore be especially cautious about "weakening the immunity from suit or attachment traditionally enjoyed by the instrumentalities of foreign states" because such actions "could lead foreign central banks, in particular, to withdraw their reserves from the United States and place them in other countries." *EM Ltd. v. Banco Cent. De La Republica Argentina*, 800 F.3d 78, 98 (2d Cir. 2015) (quotation marks and citation omitted).

Here, the Judgment Creditors seek DAB assets maintained for central banking and held at the FRBNY. Therefore, to reach DAB's assets, the Judgment Creditors need exceptions to the FSIA both for DAB's jurisdictional immunity and execution immunity; they look to TRIA.

### B. TRIA Does Not Nullify DAB's Jurisdictional Immunity to Provide This Court with Subject-Matter Jurisdiction

The Judgment Creditors argue that TRIA's text nullifies any relevant constraint on DAB's jurisdictional immunity provided by the FSIA. (*See generally* Objections at 28-39.) A court begins its statutory analysis by looking to the ordinary meaning of the statutory text, rules of grammar, and statutory context. *See N. L. R. B. v. SW Gen., Inc.*, 580 U.S. 288, 299-301, 137 S. Ct. 929, 197 L. Ed. 2d 263 (2017); *see also United States v. Sampson*, 898 F.3d 287, 302 (2d Cir. 2018) (looking to the "plain language" of the statutory text). Codified as a note to 28 U.S.C. § 1610, TRIA § 201(a)'s terrorism-related exception reads

> Notwithstanding any other provision of law . . . in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, or for which a terrorist party is not immune under [28 U.S.C. § 1605A or 28 U.S.C. § 1605(a)(7)(repealed)], the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.

TRIA § 201(a). As applicable to TRIA, "courts must be careful when interpreting the scope of the FSIA's exceptions" in order to ensure foreign sovereigns are held accountable "where Congress dictated," while avoiding "a flood of suits against foreign states, prompting those nations to reciprocate in foreign suits against the United States." *Beierwaltes v. L'Office Federale De La Culture De La Confederation Suisse*, 999 F.3d 808, 819 (2d Cir. 2021) (citations omitted).

In arguing that TRIA's exception abrogates the FSIA's provisions on jurisdictional immunity, the Judgment Creditors assert that TRIA § 201(a)'s clause of "[n]otwithstanding any other provision of law" overcomes any barrier to execution posed by DAB's jurisdictional immunities. (*See* Objections at 32-35; *see also* Report at 20-27.) For such a notwithstanding clause, courts must

determine the statute's scope to understand what laws are overcome by the clause. *See Smith v. Fed. Rsrv. Bank of New York*, 280 F. Supp. 2d 314, 319 (S.D.N.Y. 2003), *aff'd, 75* F. App'x 860 (2d Cir. 2003), *and aff'd sub nom. Smith ex rel. Est. of Smith v. Fed. Rsrv. Bank of New York*, 346 F.3d 264 (2d Cir. 2003). In *Smith v. Federal Reserve Bank of New York*, the District Court determined that TRIA's notwithstanding clause, although broad, "necessarily has a scope and that scope depends on the substance of the provision to which it is attached." *Id.* TRIA's notwithstanding clause does not trump every statute but rather only those which conflict with TRIA. *See id.* ("The phrase 'notwithstanding any other provision of law' simply means that Section 201(a) controls if there is another provision of law that conflicts with it.").

Thus, the question is whether the FSIA and TRIA conflict with respect to jurisdictional immunity. They do not. "TRIA . . . [is] an execution statute," *see Weininger v. Castro*, 462 F. Supp. 2d 457, 480 (S.D.N.Y. 2006). "Congress . . . created terrorism-related exceptions to immunity under FSIA," and "[o]ne such exception is TRIA's authorization of the *attachment of the properly* of terrorist parties and that of their agencies or instrumentalities." *Hausler v. JP Morgan Chase Bank, NA.*, 770 F.3d 207, 211 (2d Cir. 2014) (per curiam) (emphasis added); (*see also* Report at 15-16).

As detailed in the Report, the language in TRIA resembles the other execution immunity language in the FSIA, distinguishing it from the FSIA's language abrogating jurisdictional immunity. "[I]dentical words

used in different parts of the same statute are generally presumed to have the same meaning." *Bruce Katz, M.D., P.C. v. Focus Forward, LLC*, 22 F.4th 368, 372-73 (2d Cir. 2022) (quotation marks and citation omitted). The sections of FSIA that 28 U.S.C. § 1604 expressly identifies as exceptions to immunity from *jurisdiction* are 28 U.S.C. §§ 1605 to 1607. 28 U.S.C. § 1604. Those exceptions stipulate when "[a] foreign state shall not be immune from the jurisdiction of the courts of the United States . . . ." *See* 28 U.S.C. §§ 1605 to 1607; (*see also* Report at 23 (quoting provisions)). In contrast, the sections of FSIA that 28 U.S.C. § 1609 expressly identifies as exceptions to immunity from *attachment* and *execution* are 28 U.S.C. §§ 1610 (where TRIA § 201(a) exists as a note) and 1611. 28 U.S.C. § 1609. Those exceptions specify when the "property of a foreign state" or "property of an agency or instrumentality of such a state . . . shall not be immune from attachment in aid of execution . . ." *See* 28 U.S.C. §§ 1610 to 1611; (*see also* Report at 23-24 (quoting provisions)). TRIA § 201(a) mirrors this attachment and execution language, providing that "the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) *shall be subject to execution or attachment in aid of execution* . . . ." (emphasis added). TRIA is thus rightfully categorized as an execution statute within the FSIA framework, "preserv[ing] a common law distinction between . . . jurisdictional immunity from actions brought in United States courts and immunity from attachment or execution of the foreign sovereign's property." *Weininger*, 462 F. Supp. 2d at 481.

As part of an execution statute, TRIA's notwithstanding clause defeats provisions that conflict with TRIA's specific terms of execution. The District Court in *Smith* addressed execution on Iraqi assets held at the FRBNY, which President Bush confiscated under the International Emergency Economic Powers Act ("IEEPA") and delivered to the U.S. Treasury. 280 F. Supp. 2d at 317-18. There, the plaintiffs argued that TRIA's notwithstanding clause trumped IEEPA and enabled them to reach the assets, but the *Smith* court rejected such an expansive scope of the notwithstanding clause. *Id.* at 319-20. The court held that "[a]lthough the 'notwithstanding' language Congress used in the TRIA was broad," "TRIA and the relevant provision of the IEEPA coexist with no conflict," so TRIA's notwithstanding clause did not permit the plaintiffs to execute on assets seized by the President under the IEEPA. *Id.* Applying these principles, TRIA would prevail in a statutory conflict if the Judgment Creditors sought to execute on assets but were prevented from doing so by an immunity to execution contained in 28 U.S.C. § 1610, § 1611, or some other statute. (*See also* Report at 25.) As Magistrate Judge Netburn rightly determined, TRIA's notwithstanding clause "is not a bulldozer that clears every possible legal obstacle between a litigant and their goal." (*Id.* at 21.) Because TRIA is an *execution* statute, it does not conflict with the provisions of FSIA that deal with *jurisdictional* immunity, and TRIA fails to provide the jurisdiction over DAB assets that the Judgment Creditors need. *See Walters*, 651 F.3d at 288 (stating immunities from jurisdiction and execution operate independently).

Although secondary to the plain text, the circumstances around TRIA's passage also supports this interpretation of TRIA's notwithstanding clause. When faced with a plausibly ambiguous statute, a court may turn to legislative history to determine the statute's underlying purpose or confirm a reading suggested by other tools.[9] *See, e.g., Milner v. Dep't of the Navy*, 562 U.S. 562, 572, 131 S. Ct. 1259, 179 L. Ed. 2d 268 (2011) ("Those of us who make use of legislative history believe that clear evidence of congressional intent may illuminate ambiguous text."). As noted by Magistrate Judge Netburn, TRIA resulted from a battle between Congress and the President over the extent to which foreign sovereign property was subject to execution. (Report at 26.) Congress modified the FSIA exceptions in 1998 by adding 28 U.S.C. § 1610(f), which waives execution immunity for blocked assets of a foreign state where there is a judgment against the state for acts of terrorism. 28 U.S.C. § 1610(f)(1). However, this iteration

9. This Court rejects the Judgment Creditors' misplaced emphasis on statements of *individual* members of Congress as evidence of *congressional* intent. (*See* Objections at 39-41.) Such statements "reflect at best the understanding of individual Congressmen." *Zuber v. Allen*, 396 U.S. 168,186, 90 S. Ct. 314, 24 L. Ed. 2d 345 (1969); *see also, e.g., SW Gen., Inc.*, 580 U.S. at 306 ("What Congress ultimately agrees on is the text that it enacts, not the preferences expressed by certain legislators."); *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998) ("[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed,"); (*see also* Nov. 29, 2022 Order on *Amici* at 4). This Court similarly declines to credit the floor statements of an individual senator cited in the Report as persuasive evidence of congressional intent. (*See* Report at 26-27 (quoting Sen. Tom Harkin).)

of the FSIA enabled the President, in the interest of national security, to waive this immunity exception. 28 U.S.C. § 1610(f)(3); (*see also* Report at 26). The President consistently issued such waivers, preventing the terms of the § 1610(f) exception from ever taking effect. *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 826 n.6, 200 L. Ed. 2d 58 (2018). Congress responded with TRIA, where it "placed the 'notwithstanding' clause in § 201(a) . . . to eliminate the effect of any Presidential waiver issued under 28 U.S.C. § 1610(f) prior to the date of the TRIA's enactment." *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Elahi*, 556 U.S. 366,386, 129 S. Ct. 1732, 173 L. Ed. 2d 511 (2009). Thus, TRIA's notwithstanding clause and other broad language such as the statute's application "in every case," (*cf.* Objections at 35-36), do not abrogate the jurisdictional immunity that applies to DAB and its assets under the FSIA.

### C. Judgments Against the Taliban Are Insufficient to Reach DAB's Assets under TRIA

As an execution statute within the FSIA framework, TRIA § 201(a)'s waiver of immunity can provide a court with jurisdiction over the property of a foreign state or its instrumentality where there exists a valid underlying judgment *against the sovereign*. In *Weinstein v. Islamic Republic of Iran*, 609 F.3d 43 (2d Cir. 2010), plaintiffs obtained a default judgment against the Islamic Republic of Iran and then initiated execution proceedings against frozen assets held by separate entity Bank Melli, *id.* at 46-47. Plaintiffs held a valid judgment against Iran, for

which Iran's jurisdictional immunity was waived under then 28 U.S.C. § 1605(a)(7), because the U.S. State Department had officially designated Iran as a "state sponsor of terrorism." *Id.* at 48. Bank Melli's status as an instrumentality of Iran was uncontested, but the bank argued that the district court lacked jurisdiction over the bank because it was not named in the original judgment. *Id.* at 48-49. The Court of Appeals for the Second Circuit rejected the argument and held that the plain language of TRIA § 201(a) covering "the blocked assets of any agency or instrumentality of that terrorist party" conferred subject-matter jurisdiction over an instrumentality not named in that original judgment if there was a valid judgment against the underlying sovereign. *Id.* at 50 (quoting TRIA § 201(a)).

Subsequent decisions reaffirmed that TRIA § 201 "provides for federal court jurisdiction over execution and attachment proceedings involving the assets of a foreign sovereign . . . *only* where 'a valid judgment has been entered' against the sovereign." *Vera II*, 946 F.3d at 133 (quoting *Vera v. Republic of Cuba*, 867 F.3d 310, 321 (2d Cir. 2017) ("*Vera P*)) (emphasis added); *see also Kirschenbaum v. 650 Fifth Ave. & Related Props.*, 830 F.3d 107, 131 (2d Cir. 2016) ("*Kirschenbaum I*"), *abrogated on other grounds by Rubin*, 138 S. Ct. 816 ("TRIA provides jurisdiction for execution and attachment proceedings to satisfy a judgment for which there was original jurisdiction under the FSIA if certain statutory elements are satisfied."); (*see also* Report at 17-18 (quoting same)). Further, the waiver of immunity from execution for foreign sovereign property includes central bank assets

otherwise protected under 28 U.S.C. § 1611, where a valid judgment has been entered against the sovereign. *Bank Markazi v. Peterson*, 578 U.S. 212, 217 n.2, 136 S. Ct. 1310, 194 L. Ed. 2d 463 (2016) ("FSIA's central-bank immunity provision" does not limit the availability of assets under TRIA).

While the sovereign's loss of jurisdictional immunity in the underlying judgment flows through to the instrumentality in the attachment proceeding, the Judgment Creditors here lack a judgment against a sovereign. There has been no waiver of jurisdictional immunity against DAB or Afghanistan in any of the Judgment Creditors' underlying judgments. (*See* Report at 18.) Without a waiver of jurisdictional immunity, TRIA § 201(a) does not offer a freestanding mechanism for waiving a foreign sovereign instrumentality's immunity to jurisdiction. (*Id.; supra* Section III.B.) The *Weinstein* court held that TRIA § 201(a) provided subject-matter jurisdiction over an instrumentality not named in that original judgment because there was a valid judgment against Iran—the underlying sovereign. 609 F.3d at 50. Here, the Judgment Creditors' judgments are inapposite because the Judgment Creditors hold valid default judgments against *the Taliban*, not the underlying sovereign. (*See* Report at 19-20 (listing Judgment Creditors' judgments against the Taliban as basis for turnover motions).) Without a waiver of jurisdictional immunity against DAB or Afghanistan in any of the Judgment Creditors' underlying judgments, *Weinstein's* application of TRIA is of no avail.

The Judgment Creditors misread the relevant case law in countering that any underlying judgment is sufficient to overcome the obstacle of jurisdictional immunity. In *Hausler v. JP Morgan Chase Bank, N.A.*, 770 F.3d 207, the Second Circuit noted that "Congress . . . has created terrorism-related exceptions to immunity under FSIA," *id.* at 211; (*see also* Objections at 28 (quoting same)). The *Hausler* court continues, however, to explain that "[o]ne such exception is TRIA 's authorization of *the attachment of the property* of terrorist parties and that of their agencies or instrumentalities to satisfy *certain judgments issued against them.*" *Hausler*, 770 F.3d at 211 (emphasis added). The *Hausler* court thus construed TRIA as an execution statute where judgments are issued against parties that would otherwise have foreign sovereign immunity. In fact, *Hausler* offers yet another example of TRIA abrogating execution immunity in a case where the underlying judgment was against a foreign state—namely, the Republic of Cuba. Therefore, *Hausler*, like *Vera II*, confirms the narrowness of *Weinstein's* holding that pertains only to situations in which there is a valid underlying judgment against a foreign sovereign. Finding that TRIA permits execution to satisfy any valid underlying judgment, whether or not against a foreign sovereign, would require overlooking the defining feature of TRIA: its abrogation of immunity enjoyed by foreign sovereigns under the FSIA.

Moreover, TRIA § 201(a) could not be wielded against Afghanistan or its instrumentalities independently because Afghanistan has not been designated as a state sponsor of terrorism. TRIA defines a "terrorist

party" whose assets may be targeted as "a foreign state designated as a state sponsor of terrorism under [former] section 6(j) of the Export Administration Act of 1979 . . . or section 620A of the Foreign Assistance Act of 1961." TRIA § 201(d)(4). A party may also use TRIA to collect on judgments for acts for which a terrorist party lacks immunity under 28 U.S.C. § 1605A. *See* TRIA § 201(a). Like TRIA § 201(d)(4), section 1605A requires that a foreign state be designated as a state sponsor of terrorism. 28 U.S.C. § 1605A(a)(2)(A)(i)(I), (c). Yet, Afghanistan does not qualify as either a "terrorist party" under TRIA § 201(d)(4) or a nation liable for acts of terrorism under 28 U.S.C. § 1605A because Afghanistan is not and has never been designated as a state sponsor of terrorism. (*See* U.S. Statement of Interest at 9 n.2; *Havlish* Mem. of Law on Mot. for Turnover at 3 n.7.)

In sum, the Judgment Creditors' motions fail because DAB is a central bank under the FSIA, and TRIA § 201(a) does not overcome DAB's jurisdictional immunity under 28 U.S.C. § 1604. Furthermore, the Judgment Creditors cannot use TRIA to reach DAB's assets because their judgments are against the non-sovereign Taliban—not the sovereign nation of Afghanistan—and Afghanistan has never been designated as a state sponsor of terrorism.

## IV. THE U.S. CONSTITUTION RESTRAINS THIS COURT FROM THE FINDING REQUIRED UNDER TRIA TO ATTACH DAB'S ASSETS

Even if this Court had jurisdiction, the U.S. Constitution prevents this Court from rendering the

findings that TRIA requires. For the Judgment Creditors to prevail, this Court must be able to find that DAB is a Taliban "agency or instrumentality." Finding that the Taliban controls DAB or can use DAB to advance its goals implies that the Taliban is Afghanistan's government. The Constitution vests this authority to recognize governments in the Executive Branch alone. (*See also* Report at 27-37.)

### A. The Judgment Creditors Fail to Satisfy All the Required Elements in the Legal Framework Governing Their Turnover Motions

Federal Rule of Civil Procedure 69(a), New York CPLR §§ 5225(b) and 5227, and TRIA § 201 govern these turnover motions. Under Rule 69(a), judgments are enforced through a writ of execution, and the laws of the state where the court is located govern execution procedures unless a federal law applies. Fed. R. Civ. P. 69(a)(1). In New York, CPLR §§ 5225(b) and 5227 govern turnover proceedings. *CSX Transportation, Inc. v. Island Rail Terminal, Inc.*, 879 F.3d 462, 468 (2d Cir. 2018) ("*CSX I*"). These statutes are "essentially interchangeable," *CSX Transportation, Inc. v. Emjay Env't Recycling, LTD.*, No. 12-cv-1865 (JS)(AKT), 2016 U.S. Dist. LEXIS 23014, 2016 WL 755630, at *3 (E.D.N.Y. Feb. 25, 2016) (quoting *LaBarbera v. Audax Constr. Corp.*, 971 F. Supp. 2d 273, 278 (E.D.N.Y. 2013)); (*see also* Objections at 5 n.5), and Magistrate Judge Netburn properly analyzed the turnover motions under CPLR § 5225(b) for simplicity,[10] (Report at

10. New York CPLR § 5225(b) permits judgment creditors to initiate "a special proceeding . . . against a person in possession or custody of money . . . in which the judgment debtor has an interest,

28). Under CPLR § 5225(b), the judgment creditor must show that (1) the judgment debtor has an interest in the property the creditor is targeting and (2) the judgment creditor is entitled to the property or has rights superior to the party possessing the property. *Commodities & Mins. Enter. Ltd. v. CVG Ferrominera Orinoco, C.A.*, 423 F. Supp. 3d 45, 51 (S.D.N.Y. 2019) (citation omitted).

A judgment creditor seeking turnover pursuant to TRIA will also have to satisfy the requirements of TRIA § 201(a): (1) the judgment creditor has obtained a judgment against a terrorist party, (2) on a claim based on an act of terrorism or an act for which a terrorist party is not immune under 28 U.S.C. § 1605A or 28 U.S.C. § 1605(a)(7),[11] which the creditor seeks to satisfy with the (3) blocked assets, (4) of that terrorist party or that terrorist party's agency or instrumentality, (5) to the extent of only the creditor's compensatory damages. TRIA § 201(a); (*see also* Report at 29 (same).)

The Judgment Creditors satisfy all but one element under TRIA. First, the Judgment Creditors hold judgments against the Taliban, a "terrorist party" as defined under TRIA § 201(d)(4) by reference to 8 U.S.C.

---

or against a person who is a transferee of money or other personal property from the judgment debtor, where it is shown that the judgment debtor is entitled to the possession of such property . . ."

11. As previously noted, Congress repealed FSIA § 1605(a)(7)'s terrorism exception to immunity and replaced it with § 1605A in 2008. Pub. L. No. 110-181, div. A, title X, § 1083(a)(1), 122 Stat. 338-44 (2008).

§ 1182(a)(3)(B)(vi). *See* 8 U.S.C. § 1182(a)(3)(B)(iii)—(vi) (describing a terrorist organization as one committing or materially supporting activities such as hijacking, assassination, and the use of explosives to threaten individuals and property). Second, all of the judgments are based on the Taliban's role in the 9/11 Attacks or separate explosive attacks against Americans for which the Taliban is not immune. (*See* Report at 29 (listing judgments).) Third, the turnover motions seek DAB funds that constitute "blocked assets" under TRIA. *See* TRIA § 201(d)(2)(A) (defining blocked assets as "any asset seized or frozen by the United States . . . under sections 202 and 203 of the [IEEPA]. . . ."); E.O. 14,064 (blocking DAB funds pursuant to IEEPA). Finally, the Judgment Creditors seek only compensatory damages. (*See* Report at 30 (citing turnover motions).) Missing is the fourth prong required by TRIA: the blocked assets must be the assets of the terrorist party or the terrorist party's agency or instrumentality. TRIA § 201(a).

### B. This Court Lacks the Power to Recognize the Government of Afghanistan under the U.S. Constitution

The Judgment Creditors urge this Court to find that DAB is an "agency or instrumentality" of the Taliban. "TRIA, unfortunately, does not" define the meaning of a terrorist party's "agency or instrumentality." *Kirschenbaum I*, 830 F.3d at 132. Thus, the Second Circuit in *Kirschenbaum I* construed the terms "according to their ordinary meanings," holding that an entity is an agency or instrumentality of a terrorist group if it "(1) was

a means through which a material function of the terrorist party is accomplished, (2) provided material services to, on behalf of, or in support of the terrorist party, or (3) was owned, controlled, or directed by the terrorist party." *Id.* at 135. Here, for the Judgment Creditors to prevail in their turnover motions, this Could would have to make a judicial finding that DAB provided the Taliban with material functionality, material services, or was owned, controlled, or directed by the Taliban.

Under *Kirschenbaum I*, the government of Afghanistan necessarily exercises a degree of control or authority over its own central bank to make the central bank the Afghan government's agency or instrumentality. For instance, FSIA § 1611 stipulates that the property of a central bank is immune from attachment and execution "unless such bank or authority, or its *parent foreign government*, has explicitly waived its immunity from attachment in aid of execution, or from execution . . . ." *Id.* § 1611(b)(1) (emphasis added). Section 1611 thus conveys that a foreign government exercises control over the central bank, *e. g.*, through the foreign government's ability to waive the immunity of its central bank's property to attachment and execution.

DAB is Afghanistan's central bank and thus a government instrumentality subject to the government of Afghanistan. *See supra* Section III.A. The Judgment Creditors further argue that the Taliban is exercising control over DAB. (*See, e.g.*, Objections at 11 ("the Taliban retook control of DAB"); *id.* at 43-51.) The Judgment Creditors assert that the Taliban has appointed loyalists

to key DAB leadership positions, women and dissidents have left DAB jobs, and non-Taliban personnel are merely figureheads. (*See* Report at 32 (citing *Havlish* and *Smith* expert reports for claims that the Taliban appointed DAB's Acting Governor, First Deputy Governor, and Second Deputy Governor).) The Judgment Creditors also argue that the Taliban is using DAB to set Afghanistan's monetary policy and manage the country's financial sector. (*Id.*) Additionally, in August 2021, "Wile Taliban reportedly visited the central bank and asked to inspect its reserves, only to be told that most were located in New York." (Taliban Background at 39; *see also* Report at 33 (citing same).) The judicial finding the Judgment Creditors seek necessarily and impermissibly implies that the Taliban constitutes the recognized government of Afghanistan.

The Constitution vests in the Executive Branch the primary role of managing foreign affairs. *See Chicago & Southern Air Lines v. Waterman S. S. Corp.*, 333 U.S. 103, 109, 68 S. Ct. 431, 92 L. Ed. 568 (1948) (characterizing the President "as the Nation's organ in foreign affairs"); *U.S. v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936), 57 S. Ct. 216, 81 L. Ed. 255 (deeming the President "the sole organ of the federal government in the field of international relations"). Critically, "[t]he text and structure of the Constitution grant the President the power to recognize foreign nations and governments." *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 14, 135 S. Ct. 2076, 192 L. Ed. 2d 83 (2015); *see also Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410, 84 S. Ct. 923, 11 L. Ed. 2d 804 (1964) ("Political recognition is

exclusively a function of the Executive."). Courts have long encouraged judicial modesty in recognizing foreign governments, understanding that "recognition of foreign governments so strongly defies judicial treatment that without executive recognition a foreign state has been called 'a republic of whose existence we know nothing.'" *Baker v. Carr*, 369 U.S. 186, 212, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962) (quoting *United States v. Klintock*, 18 U.S. 144, 149, 5 L. Ed. 55 (1820)). Similarly, courts have consistently held that unrecognized regimes lack standard privileges and immunities of foreign sovereigns, reasoning that permitting such regimes to invoke that status would encroach on the President's recognition power. *See, e.g., Knox v. Palestine Liberation Org.*, 306 F. Supp. 2d 424, 444 (S.D.N.Y. 2004); *Fed. Rep. of Germany v. Elicon*, 358 F. Supp. 747, 756 (E.D.N.Y. 1970).

The President has the exclusive power to grant formal recognition to a foreign sovereign. *Zivotofsky*, 576 U.S. at 28 ("[T]he power to recognize foreign states and governments . . . is exclusive to the Presidency."). In *Zivotofsky ex rel. Zivotofsky v. Kerry*, the Supreme Court evaluated a conflict between the Foreign Relations Authorization Act, Fiscal Year 2003 (the "FRAA") and the U.S. State Department's Foreign Affairs Manual (the "FAM"). *See id.* at 5-8. In accordance with then-presidential policy to decline acknowledging any nation's sovereignty over the city of Jerusalem, the FAM required that the State Department list place of birth as "Jerusalem" rather than "Israel" on the passports for those born in Jerusalem. *Id.* at 6-7. However, the FRAA allowed (though did not require) those born in Jerusalem to list their place of birth as "Israel" on

their passports. *Id.* at 7. The Supreme Court held that this accommodation, although "not itself constituting] a formal act of recognition," was unconstitutional because it was "a mandate that the Executive contradict his prior recognition determination in an official document issued by the Secretary of State." *Id.* at 30.

The Constitution forbids this Court from determining what the Judgment Creditors require under TRIA: a finding that the Taliban regime is in control of DAB—an instrumentality of the government of Afghanistan—and that the Taliban thus acts as the government of Afghanistan. Promoting financial stability and managing foreign reserves are the quintessential public and government functions performed by central banks. *See, e.g., Filler v. Hanvit Bank*, 378 F.3d 213, 217 (2d Cir. 2004); *NML Cap., Ltd. v. Banco Cent. de la Republica Argentina*, 652 F.3d 172, 195 (2d Cir. 2011). The Judgment Creditors "suggest that DAB is an agency or instrumentality of the Taliban because it has appointed leaders and those leaders are promulgating policies or taking acts like the elimination of money-laundering controls that materially advance the Taliban's goals." (Report at 35.) Accepting the Taliban's "appointments" to DAB as legitimate or its pronouncements as authoritative monetary policies bestows recognition on the Taliban that this Court may not constitutionally confer. *See, e.g.*, DAB, Da Afghanistan Bank Law art. 11 (2003), https://dab.gov.af/sites/default/files/2018-12/DABLaw1English_2.pdf (last visited Feb. 7, 2023) ("The Governor, the First Deputy Governor and the other members of the Supreme Council shall be appointed by a decree of the *President* of Afghanistan . . .") (emphasis

added). As Magistrate Judge Netburn rightly found, "[t]o credit those appointments as evidence of Taliban control would be to suggest that the group is wielding power that was until recently vested in the Afghan state and the Republic." (Report at 36.)

This Court "can acknowledge the facts on the ground while recognizing that those facts do not permit it to recognize the Taliban as the government of Afghanistan directly or by implication." (Report at 34.) In September 2021, Secretary of State Antony Blinken did just that, acknowledging that the Taliban was the "*de facto* government" of Afghanistan. (*Id.* at 33 (citation omitted).) While Secretary Blinken and this Court can acknowledge the Taliban's *de facto* dominance over Afghanistan, accepting the Judgment Creditors' argument as to the Taliban's control over DAB makes the implied recognition of the Taliban as Afghanistan's government inescapable. (*See also* Report at 34.)

The Judgment Creditors' effort to distinguish between formal and informal recognition of a foreign government conflates Congress' powers with those of the Judiciary. The Judgment Creditors argue that only "formal" acts of recognition, such as an express declaration, concluding a treaty, or exchanging ambassadors, implicate the constitutional separation of powers. (Objections at 48-49.) While the *Zivotofsky* Court held that the "Executive's exclusive power extends no further than his formal recognition determination," 576 U.S. at 30, the non-exclusive, informal acts of recognition are shared with *Congress*, not the courts, *id.* at 22. "[T]he Court . . .

mentioned both of the political branches in discussing international recognition, but it [did] so primarily in affirming that the Judiciary is not responsible for recognizing foreign nations." *Id.* (citing *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302, 38 S. Ct. 309, 62 L. Ed. 726 (1918) ("Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but is a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges.") (quotation marks and citation omitted)). The *Zivotofsky* Court thus denied any judicial role in the recognition of a foreign government.

"Recognition is a topic on which the Nation must 'speak . . . with one voice" in order to determine "which governments are legitimate in the eyes of the United States and which are not." *Id.* at 14 (quoting *Am. Ins. Assn. v. Garamendi*, 539 U.S. 396, 424, 123 S. Ct. 2374, 156 L. Ed. 2d 376 (2003)). This Court would intrude with a voice of its own were it to permit Afghanistan's treasury to pay the Taliban's judgment debts, even as the President declines to recognize the Taliban as the government of Afghanistan.

The fundamental conclusion as required by TRIA. and the Constitution—is that neither the Taliban nor the Judgment Creditors are entitled to raid the coffers of the state of Afghanistan to pay the Taliban's debts. While the "funds of foreign central banks are managed through those banks' accounts in the United States, those funds are, in fact, the reserves of the foreign states themselves." *NML Cap., Ltd.*, 652 F.3d at 189 (cleaned up). DAB funds are the property of the state of Afghanistan, and "a

regime not recognized as the government of a state is not entitled to property belonging to that state located in the United States." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 205(2); *see also Repub. of Panama v. Rep. Nat. Bank of N.Y.*, 681 F. Supp. 1066, 1071 (S.D.N.Y. 1988) ("[I]t is not a proper function of a domestic court of the United States to attempt to judge which government best represents the interests of a foreign nation.) (quotation marks and citation omitted). Therefore, as the Restatement provides and TRIA and the Constitution dictate, this Court cannot find that the Taliban is entitled to Afghanistan's state funds held at the FRBNY or that the Judgment Creditors can obtain those funds through their default judgments against the Taliban.

## V. CONCLUSION

The Judgment Creditors are entitled to collect on their default judgments and be made whole for the worst terrorist attack in our nation's history, but they cannot do so with the funds of the central bank of Afghanistan. Pursuant to the FSIA, TRIA, and the U.S. Constitution, the Taliban—not the former Islamic Republic of Afghanistan or the Afghan people must pay for the Taliban's liability in the 9/11 Attacks. Therefore, the Judgment Creditors' motions for turnover of DAB funds (ECF Nos. 7763, 7767, and 7936 in 03-md-1570; ECF No. 62 in 01-cv-10132; ECF No. 597 in 03-cv-9848) are DENIED.[12] The Judgment

12. This decision in no way affects the Executive Branch's prerogative in determining the ultimate disposition of the blocked DAB assets that remain held at the FRBNY.

*Appendix D*

Creditors' motion for post-judgment attachment (ECF No. 8586 in 03-md-1570), *Ashton* Plaintiffs' motion for attachment (ECF No. 8412 in 03-md-1570; ECF No. 1724 in 02-cv-6977), *Ashton* Plaintiffs' motion for a protective order (ECF No. 7895 in 03-md-1570), *Owens* Proposed Intervenors' motion to intervene (ECF No. 8018 in 03-md-1570; ECF No. 1120 in 03-cv-6978), and *Federal insurance* Creditors' motion to vacate (ECF No. 8055 in 03-md-1570) are DENIED as moot. The Clerk of Court is directed to close the motions accordingly.

Dated: February 21, 2023
New York, New York

SO ORDERED.

/s/ George B. Daniels
GEORGE B. DANIELS
United States District Judge

**APPENDIX E — REPORT & RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED AUGUST 26, 2022**

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

**03-MD-01570 (GBD)(SN)**

**REPORT & RECOMMENDATION**

In re:

TERRORIST ATTACKS ON SEPTEMBER 11, 2001

**SAKAH NETBURN, United States Magistrate Judge.**

**TO THE HONORABLE GEORGE B. DANIELS**:

This document relates to:

> *Smith v. The Islamic Emirate of Afghanistan, et al.*, No. 01-cv-10132
> *Havlish, et al. v. Bin Laden, et al.*, No. 03-cv-9848
> *Fed. Ins. Co. et. al. v. Al Qaida, et al.*, No. 03-cv-6978
> *John Does 1 Through 7 v. The Taliban et al.*, No. 20-mc-740

In November 2001, an Afghan-American coalition drove the Taliban from the Afghan capital of Kabul. Almost two decades later, the Taliban returned, retook Kabul, and destroyed the Islamic Republic of Afghanistan (the "Republic") that this coalition had established.

Afghanistan now lies in disarray. It has no internationally recognized government, its people face a humanitarian crisis of catastrophic proportions, and while the Taliban is not the recognized government, it has *de facto* control over the country.

This has made Afghanistan's assets a target for the Taliban's victims. While the Republic is gone, Afghanistan's central bank, Da Afghanistan Bank ("DAB"), remains. It holds several billion dollars (the "DAB Funds") in assets in the Federal Reserve Bank of New York (the "FRBNY").

Four groups of judgment creditors (the "Judgment Creditors") seek to satisfy their judgments against the Taliban with these funds: *Smith v. The Islamic Emirate of Afghanistan, et al.*, No. 01-cv-10132 (the "*Smith* Creditors"), *Havlish, et al. v. Bin Laden, et al.*, No. 03-cv-9848 (the "*Havlish* Creditors"), *Fed. Ins. Co. et. al. v. Al Qaida, et al.*, No. 03-cv-6978 (the "*Federal Insurance* Creditors"), and *John Does 1 Through 7 v. The Taliban et al.*, No. 20-mc-740 (the "*Doe*" and the "*Doe* Creditors"). These creditors hold judgments against the Taliban for its role in the September 11 Terrorist Attacks or other terrorist acts. They move under § 201(a) of the Terrorism Risk Insurance Act of 2002 ("TRIA") for a turnover of the DAB Funds to satisfy these judgments.

The Court recommends denying these motions for three reasons. First, DAB is immune to this Court's jurisdiction. It is the central bank of a foreign state. This means it is entitled to immunity from jurisdiction and its property is entitled to immunity from execution.

TRIA may overcome DAB's execution immunity, but not its jurisdictional immunity. Second, even if there was jurisdiction, the Court is constitutionally restrained from making the finding that TRIA requires to authorize the turnover. Only the President may recognize the government of a foreign sovereign nation. Courts may not do so directly or by implication. Authorizing the parties to satisfy the Taliban's judgments with Afghanistan's central bank funds unavoidably acknowledges the Taliban as the Afghan government. Third, even if that were not the case, TRIA § 201(a) requires an agency relationship in order to execute on an entity's assets. This relationship requires a manifestation of consent that is not present where the Taliban has seized DAB by force.

## BACKGROUND

The Court assumes familiarity with the broader procedural and factual background of this litigation. It discusses only those elements relevant to the Judgment Creditors' turnover motions.

### I. Factual Background

#### A. The Fall of the Republic

These motions have their origins in the fall of the Republic. A full accounting of this tragedy is beyond the scope of this Report and Recommendation. The Court recounts only the broad outlines.

*Appendix E*

After the devastation of the September 11 Terrorist Attacks, the United States invaded Afghanistan to force the Taliban from power. The United States never recognized the Taliban as the *de jure* government of Afghanistan but it had ruled the country since capturing Kabul in September 1996. In October 2001, a coalition of U.S. and Afghan forces attacked the Taliban, evicting it from Kabul in November 2001. Clayton Thomas, Cong. Rsch. Serv., *Taliban Government in Afghanistan: Background and Issues for Congress* 7-8 (2021) (the "*Taliban Report*").[1] The Republic was then established.

By 2020, the Taliban was ascendant again. In February 2020, the United States and the Taliban agreed that the U.S. would withdraw all its troops by April 2021. As American forces withdrew, the Republic's position deteriorated. The crisis reached a head in August 2021. Taliban forces made a series of rapid advances throughout Afghanistan ending in the second capture of Kabul on August 15, 2021. While Afghan leaders attempted to establish a resistance in the Panjshir province, that area fell by September 2021. *Taliban Report* at 11-15. The fall of Panjshir left the Taliban in even more complete control of Afghanistan than it was in 1990s. *Id.* at 18. As before, the United States has not recognized the Taliban as the *de jure* government of Afghanistan. ECF No. 7661 at 34.[2]

---

1. This document was appended as an exhibit in *Smith*, No. 01-cv-10132, ECF No. 63-3. It has also been cited by the other Judgment Creditors, ECF Nos. 7764 at 14 n.29 (*Havlish* Creditors); 7769 at 13 n.31 (*Doe* Creditors); 7937 at 14 n.25 (*Federal Insurance* Creditors).

2. Unless otherwise noted, all ECF citation are to *In re Terrorist Attacks*, 03-md-1570.

The fall of the Republic has been an unmitigated disaster for the Afghan people. Food, water, and shelter are all in critically short supply. ECF No. 7896 at 17. By the end of 2022, as many as 97 percent of Afghans could be living in poverty. More than a million children are at risk of dying of starvation. ECF No. 7932 at 10-11. The society-wide deprivation is so severe that some families are selling their children or organs to escape starvation. ECF Nos. 7896 at 17, 7932 at 11. The Taliban has also begun a brutal crackdown on women, religious and ethnic minorities, former Republic officials, and many civil society organizations. ECF No. 7896 at 18. More Afghans may eventually die from these society-wide convulsions than perished in the last two decades of war. ECF Nos. 7896 at 17, 7932 at 11.

**B. Da Afghanistan Bank**

The Republic's collapse made DAB's assets a target. DAB has been the central bank of Afghanistan since its founding in 1939. ECF No. 7766 at ¶ 16. When the Republic fell, DAB held approximately $7 billion in assets at the FRBNY. ECF No. 7764 at 11. Most of this appears to have come from international donors or the savings of Afghan citizens. ECF No. 7932 at 27 n.18. The U.S. Treasury Department blocked these assets the same day that the Taliban entered Kabul. *Taliban Report* at 45. Amici report that the decision to freeze Afghan assets has further exacerbated the country's humanitarian crisis because "banks were unable to lend money and citizens unable to withdraw their own funds." ECF No. 7896 at 17.

Six months later President Biden addressed the use of these assets with Executive Order 14064. Exec. Order No. 14,064, 87 Fed. Reg. 8391 (Feb. 15, 2022) ("E.O. 14,064"). This order determined that "the widespread humanitarian crisis in Afghanistan — including the urgent needs of the people of Afghanistan for food security, livelihoods support, water, sanitation, health, hygiene, shelter and settlement assistance, and COVID-19-related assistance, among other basic human needs" was an "unusual and extraordinary threat to the national security and foreign policy of the United States." *Id.* It further stated that "the preservation of certain property of Da Afghanistan Bank (DAB) held in the United States by United States financial institutions is of the utmost importance to addressing this national emergency and the welfare of the people of Afghanistan." *Id.*

Accordingly, E.O. 14,064 provided that "[a]ll property and interests in property of DAB that are held, as of the date of this order, in the United States by any United States financial institution, including the Federal Reserve Bank of New York, are blocked . . . ." *Id.* at § 1(a). This order was implemented when the U.S. Treasury's Office of Foreign Assets Control ("OFAC") issued License No. DABRESERVES-EO-2022-886895-1. *See* ECF No. 7661-2 (the "OFAC License"). With this license, the United States sought to transfer $3.5 billion, or approximately half of DAB's assets, "for the benefit of the people of Afghanistan, including to an international financing mechanism (in which the United States is a member) holding and disbursing funds for the benefit of the people of Afghanistan, or to a United Nations fund, programme,

specialized agency, or other entity or body for the benefit of the people of Afghanistan." *Id.* at § 1(b). The remaining $3.5 billion was retained in the FRBNY.

The United States reported that this license could not take effect without the Court modifying the writs of execution obtained by the Judgment Creditors or otherwise confirming that the writs did not restrain the $3.5 billion the license sought to transfer. ECF No. 7661 at 10-11. The Court granted this request with the parties' consent on February 25, 2022. ECF Nos. 7700, 7701. The FRBNY hold the remaining DAB Funds.

## II. Procedural Background

After the fall of the Republic, the Judgment Creditors filed their turnover motions. Four amici and the United States also filed briefs. No Judgment Creditor has a judgment against the nation of Afghanistan or DAB. No representative for Afghanistan, DAB, or the Taliban has appeared in this case. The FRBNY has submitted only a single non-substantive letter. ECF No. 8040.

### A. The *Havlish* Motion

The *Havlish* Creditors are family members and estates of Americans killed in the September 11 Attacks. They secured a default liability judgment against the Taliban for its role in this attack on December 22, 2011. ECF No. 2516. They were awarded compensatory damages, punitive damages, and prejudgment interest on their non-economic compensatory damages. ECF No. 2618, *adopted at* ECF

No. 2623. Their total outstanding compensatory damages are $2,086,386,669. ECF No. 7765 at 3-4.

On August 27, 2021, shortly after the fall of the Republic, the *Havlish* Creditors obtained a writ of execution (the "*Havlish* Writ") targeting the DAB Funds held at FRBNY. *In re Terrorist Attacks*, No. 03-md-1570, Minute Entry, August 27, 2021. Marshals attached the DAB Funds by serving the writ on the FRBNY on September 14, 2021. ECF No. 7765-3 (service of process receipt).

The enforcement of this writ was stayed on September 16, 2021, at the request of the United States, which was deciding whether to file a Statement of Interest. *Havlish*, No. 03-cv-9848, ECF No. 526. The Court granted that request and three extensions. ECF Nos. 7120, 7269, 7402, 7631. It also extended the duration of the *Havlish* Writ beyond the 90-day period normally afforded for execution to accommodate these extensions. ECF No. 7447. The United States filed its Statement of Interest in *Havlish* and other related cases on February 11, 2022. ECF No. 7661.

The stay of enforcement was then lifted. ECF No. 7717. The *Havlish* Creditors promptly filed their motion for the turnover of the DAB assets pursuant to Rule 69(a), N.Y. CPLR §§ 5225(b) and 5227, and TRIA § 201. ECF No. 7763.

### B. The *Federal Insurance* Motion

The *Federal Insurance* Creditors are insurance companies who made payments because of the September 11 Attacks. They obtained a default judgment of liability against the Taliban, Al Qaeda, and Hezbollah in April 2006. ECF No. 1755. The Court awarded them $9,351,247,965.99 as to Al Qaeda. ECF No. 2502. Just less than a decade later, the *Federal Insurance* Creditors requested that this award be extended against the Taliban. ECF No. 7790. The Court granted this partial default judgment and extended this award against the Taliban. ECF No. 7833. It also waived the automatic 60-day stay of execution provided for by Rule 62(a). *Id.* at 3.

The *Federal Insurance* Creditors obtained their writ of execution on April 20, 2022. *Fed. Ins. Co. et al.*, No. 03-cv-6978, Minute Entry, April 20, 2022. The DAB Funds at the FRBNY were attached a day later. ECF No. 7938-2 at 1. The *Federal Insurance* Creditors promptly moved for a turnover order.

### C. The *Smith* Motion[3]

The *Smith* Creditors also brought suit against the Taliban for losses suffered on September 11. *Smith*, No. 01-cv-10132, ECF No. 63 at 5. Judge Harold Baer found in their favor on May 7, 2003, awarding economic damages,

3. *Smith* was not initially a part of this case but was accepted as a related case on June 6, 2022. *Smith*, No. 01-cv-10132, Minute Entry, June 6, 2022.

solatium damages, and compensation for their decedents' pain and suffering. *Id.* at ECF No. 25.[4] A final judgment was entered two months later. *Id.* at ECF No. 28. Almost nineteen years later, the *Smith* Creditors served their writ of execution on the FRBNY, also seeking to satisfy their judgments with the DAB Funds. *Id.* at ECF No. 41. They moved for a turnover order on May 18, 2022. *Id.* at ECF Nos. 62, 63 at 6-7.

### D. The *Doe* Motion

The *Doe* Creditors' injuries arose from a 2016 attack by the Taliban and other terror groups. Their operatives crashed a truck laden with explosives into the gates of a contractor compound located in Afghanistan.[5] The *Doe* Creditors obtained a default judgment against the Taliban, Al Qaeda, and the Haqqani Network in the Northern District of Texas on November 5, 2020. *Doe*, 20-mc-740, ECF No. 1 at 2-4. They were awarded compensatory damages and post-judgment interest. ECF No. 7770 at ¶ 2. The *Doe* Creditors collected some of this award from an Al Qaeda instrumentality. ECF No. 7769 at 10. As of March 21, 2022, however, most of their judgment remains unsatisfied. ECF No. 7770 at ¶ 4. They registered that

4. A copy of this opinion is not on ECF but is available under the following citation: *Smith ex rel. Smith v. Islamic Emirate of Afghanistan*, 262 F. Supp. 2d 217 (S.D.N.Y. 2003), *amended sub nom. Smith ex rel. Est. of Smith v. Islamic Emirate of Afghanistan*, No. 01-cv-10132 (HB), 2003 WL 23324214 (S.D.N.Y. May 19, 2003).

5. A copy of this complaint is available at *Doe*, 20-mc-740, ECF No. 8-2.

judgment in this District about a month after obtaining the award. *Doe*, 20-mc-740, ECF No. 1.

The *Doe* Creditors sought an emergency writ of execution on August 26, 2021. *Id.* at ECF No. 15. As in *Havlish*, the United States requested that a ruling on this motion be delayed as it decided whether to file a Statement of Interest. *Id.* at ECF No. 18. While this decision was pending, the *Doe* Creditors secured a writ of execution targeting the DAB Funds. The Court stayed enforcement of this writ pending the United States' Statement of Interest decision. *Id.* at ECF No. 26. The writ was served on FRBNY in the meanwhile. *Id.* at ECF No. 67. As with the *Havlish* Writ, the Court directed that this writ not expire absent further action. *Id.* at ECF No. 41. *Doe* was then transferred to this multidistrict litigation given the common issues presented by the DAB Funds. *Id.* at ECF No. 54.

The stays of the *Doe* and *Havlish* writs were lifted at the same time. ECF No. 7717. The *Doe* Creditors moved for turnover of the assets on the same day as the *Havlish* Creditors. ECF No. 7767.

**E. United States' Statement of Interest**

The Statement of Interest asserted that "[t]he United States has significant interests in the disposition of these [turnover] proceedings." ECF No. 7661 at 10. Some of these interests related to the speedy resolution of the issues associated with the OFAC License. Beyond this, the United States asserted "a strong interest in the

President's constitutional authority to make decisions with respect to the recognition of foreign governments and . . . in ensuring the proper construction of TRIA and the Foreign Sovereign Immunities Act." *Id.* at 11. At the same time, the United States recognized "a compelling interest in permitting victims of terrorism to obtain compensation to the greatest degree permitted under the law." *Id.* at 27.

While it acknowledged these interests, the United States took no position on whether the Judgement Creditors had satisfied TRIA's requirements. *Id.* at 27-28. Instead, it raised a series of considerations for the Court's attention. It noted that "determinations of ownership for purposes of TRIA implicate significant issues of foreign policy that sound in federal law, both as pertains to the governance of the international banking system and the prerogative of the President to recognize and to conduct diplomacy with foreign states . . . ." *Id.* at 28. In particular, it noted that exceptions to immunity that a foreign sovereign's property enjoys must be construed narrowly and "be measured against a benchmark that accounts for the risk of reciprocal challenges to American property abroad." *Id.* at 35. It also stated that, to prevail, the Judgement Creditors "must establish a theory of ownership by the Taliban that would not require this Court—either expressly or by implication—to make its own determination as to the identity of Afghanistan's government" because such a determination would infringe on the President's constitutional prerogatives to conduct foreign relations. *Id.*

The Statement of Interest also put forward several factual positions. The United States stated that it had not recognized the Taliban or any other entity as the government of the state of Afghanistan. *Id.* at 34. It also confirmed that DAB is the central bank of Afghanistan. *Id.* at 16.

### F. Amicus Briefs

The Court accepted four amicus briefs on these turnover motions. The first is a letter submitted by the Women's Forum on Afghanistan signed by several women who held prominent civil positions in the Republic before its fall. ECF No. 7823. The second is from the Center for Constitutional Rights on behalf of four Afghan civil organizations: Global Advocates for Afghanistan, The Afghan Network for Advocacy and Resources, Afghans for A Better Tomorrow, and the Afghan-American Community Organization. ECF No. 7896-1. The third brief is submitted by Unfreeze Afghanistan, a woman-led non-governmental organization advocating for the release of the DAB Funds. *Havlish*, No. 03-cv-9848, ECF No. 617. The final brief is from the Open Society Justice Initiative, submitted on behalf of Naseer A. Faiq, the *Chargé de Affaires* of the Permanent Mission of the Islamic Republic of Afghanistan. ECF No. 7932-1. These briefs describe the devastating effects that the Taliban's takeover has had on Afghan civil society and on the Afghan people. They also raised several legal arguments against the Judgment Creditors' turnover motions.

The Court accepted each of these briefs after finding that they provided unique information that would not create or enlarge the issues presented by the turnover motions. ECF Nos. 7823 at 1-2, 7925 at 2-3. It rejected two amicus briefs from groups that included members already represented in this case. ECF Nos. 7925, 7941.

## DISCUSSION

The Judgment Creditors' motions must be denied for three reasons. First, the Court lacks subject matter jurisdiction over DAB under the Foreign Sovereign Immunities Act ("FSIA"). Second, even if the Court has jurisdiction, it may not constitutionally render the findings required by TRIA. For the Judgment Creditors to prevail, the Court must be able to find that DAB is a Taliban agency or instrumentality. Finding that the Taliban controls DAB or can use it to advance its goals implies that the Taliban is Afghanistan's government. The Constitution vests the authority to recognize governments in the President alone. Third, TRIA requires an agency relationship based on consent to find that an entity is the agency or instrumentality of a terrorist group. That relationship is plainly not present where the Taliban has seized DAB by force.

This determination is not affected by *Levinson v. Kuwait Fin. House (Malaysia) Berhad*, which was decided while this turnover motion was pending. 2022 U.S. App. LEXIS 22317, 2022 WL 3269083 (2d Cir. 2022). Under *Levinson*, "[t]o be entitled to attachment or execution under TRIA, a plaintiff must first establish defendant's

status as an agency or instrumentality." 2022 U.S. App. LEXIS 22317, [WL] at *4. No determination was made as to DAB's agency or instrumentality status before these writs of execution were issued.

A creditor, however, need not obtain a writ of execution before seeking a turnover under N.Y. CPLR §§ 5225(b) and 5227. *Garland D. Cox & Assocs., Inc. v. Koffman*, 48 N.Y.2d 878, 400 N.E.2d 302, 424 N.Y.S.2d 360 (N.Y. 1979) ("There is no requirement that a judgment creditor obtain priority by way of execution before he resorts to one of the other enforcement devices provided by CPLR article 52 . . . "); *see also CSX Transportation, Inc. v. Island Rail Terminal, Inc.*, 879 F.3d 462, 472-73 (2d Cir. 2018) ("*CSX I*") ("[A] judgment creditor must take additional steps—such as securing a turnover order or an execution levy—to prevent intervening parties from attaining higher priority.") Thus, regardless of the validity of the parties' writs of execution, they are entitled to make the motions for turnover under N.Y. CPLR §§ 5225(b) and 5227 that are the predicate for this Report and Recommendation.[6]

6. Rule 69(a) provides that "[a] money judgment is enforced by a writ of execution . . . ." Thus, if the Judgment Creditors were to prevail, there is a question of whether given the effect of *Levinson* on their writs, they would be required to seek new writs of execution to permit the enforcement of their judgments. As the Court recommends that they do not prevail on these turnover motions, it need not reach this question. Here, the only question is if the absence of a writ of execution bars the Court from hearing the Judgment Creditors' turnover motions. The answer is no. Rule 69(a) provides that procedures in aid of judgment or execution must accord with state law. New York state law does not require a writ of execution as a prerequisite to a turnover motion.

*Appendix E*

## I. The Court Lacks Subject Matter Jurisdiction Over the Turnover Motions Under the FSIA

The Court lacks subject matter jurisdiction over DAB and by extension over these turnover motions. This analysis begins with the critical and uncontroverted fact that DAB is the central bank of Afghanistan. As an instrumentality of a foreign state, it enjoys immunity from jurisdiction under the FSIA. The Judgment Creditors propose to overcome this immunity through TRIA § 201. This statute defeats the immunity from execution that the property of sovereign states and their instrumentalities normally enjoy. Sovereign states and instrumentalities, however, possess immunity from both jurisdiction and execution on their property. Both immunities must be independently overcome. In limited circumstances, TRIA can overcome jurisdictional immunity. Those circumstances are not present here. DAB therefore retains its jurisdictional immunity.

### A. The FSIA and the Sovereign's Two Immunities

Under the FSIA, a foreign sovereign state and its agencies and instrumentalities possess two immunities: immunity from jurisdiction and immunity from the execution on property. Recognizing the "Supreme Court's emphatic and oft-repeated declaration in *Amerada Hess* . . . the FSIA is the 'sole basis for obtaining jurisdiction over a foreign state in our courts . . . .'" *Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela*, 863 F.3d 96, 113 (2d Cir. 2017) (quoting *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434, 109 S.

Ct. 683, 102 L. Ed. 2d 818 (1989)).[7] Thus, the FSIA "must be applied by the District Courts in every action against a foreign sovereign, since subject matter jurisdiction in any such action depends on the existence of one of the specified exceptions to foreign sovereign immunity . . . ." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493, 103 S. Ct. 1962, 76 L. Ed. 2d 81 (1983). Because the FSIA implicates the Court's subject matter jurisdiction, a court must consider its applicability even *sua sponte* if necessary. *See, e.g., Walters v. Indus. & Com. Bank of China, Ltd.*, 651 F.3d 280, 287 (2d Cir. 2011).[8]

---

7. A narrow exception to this rule exists for *in rem* actions. "The FSIA does not create jurisdiction over, and does not immunize a foreign state's property from, in rem civil-forfeiture actions." *United States v. Assa Co.*, 934 F.3d 185, 190 (2d Cir. 2019). In drafting the FSIA, however, "Congress sought to clamp down on *quasi in rem* suits because they 'caused significant irritation to many foreign governments' and could potentially 'give rise to serious friction in United States' foreign relations.'" *Assa Co.*, 934 F.3d at 190 (quoting H.R. Rep. No. 94-1487, at 27 (1976), as reprinted in 1976 U.S.C.C.A.N. 6604, 6626). Absent this *in rem* exception, the Court heeds the general requirement that all actions against foreign sovereigns and their instrumentalities must satisfy the FSIA's requirements.

8. Where a sovereign defendant appears and invokes sovereign immunity, that defense is analyzed under a burden-shifting framework. *Rukoro v. Fed. Republic of Germany*, 976 F.3d 218, 224 (2d Cir. 2020) (describing this framework). This accords with "the FSIA's legislative history suggest[ing] that jurisdictional immunity is 'an affirmative defense which must be specially pleaded' by the foreign sovereign." *Walters*, 651 F.3d at 287. Nonetheless, as immunity from jurisdiction goes to a court's subject matter jurisdiction, "even if the foreign state does not enter an appearance to assert an immunity defense, a District Court still must determine

*Appendix E*

The FSIA does not define a "foreign state" but provides that it "includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state." 28 U.S.C. § 1603(a). "An 'agency or instrumentality of a foreign state' means any entity --

> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) 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, and
>
> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

28 U.S.C. § 1603(b)(1)-(3).

Foreign states and instrumentalities that meet these criteria have "two types of foreign sovereign immunity [under the FSIA] —immunity from jurisdiction and immunity from attachment and execution of the sovereign's property." *Vera v. Banco Bilbao Vizcaya Argentaria, S.A.*, 946 F.3d 120, 133 (2d Cir. 2019) ("*Vera II*"). Section § 1604 of the FSIA renders foreign sovereigns and their

---

that immunity is unavailable under the [FSIA]." *Verlinden B.V.*, 461 U.S. at 494 n.20.

instrumentalities immune from jurisdiction unless an exception under 28 U.S.C. §§ 1605 to 1607 applies. Section § 1609 of the FSIA renders the property of foreign sovereigns immune from attachment or execution unless there is an exception under 28 U.S.C. §§ 1610 or 1611.

Central banks enjoy heightened protection from execution. Section 1611(b)(1) of the FSIA provides that, notwithstanding the normal exceptions permitting execution on a foreign sovereign's assets, "the property . . . of a foreign central bank or monetary authority held for its own account" is immune to attachment or execution. Sound reasons exist for extending additional protections to assets held by foreign central banks used exclusively for central banking. Congress recognized that "[i]f execution could be levied on such funds without an explicit waiver, deposit of foreign funds in the United States might be discouraged. Moreover, execution against the reserves of foreign states could cause significant foreign relations problems." *EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 473 (2d Cir. 2007) (quoting H.R.Rep. No. 94-1487 at 31, as reprinted in 1976 U.S.C.C.A.N. 6604, 6630) (internal quotations omitted).

These two immunities, jurisdictional and execution-based, generally "operate independently." *Walters*, 651 F.3d at 288. "[A] waiver of immunity from suit does not imply a waiver of immunity from attachment of property, and a waiver of immunity from attachment of property does not imply a waiver of immunity from suit." *Id.* (quoting Restatement (Third) of Foreign Relations Law of the United States, § 456(1)(b) (1987)). Thus, a party

seeking to attach the central bank assets of a foreign sovereign must overcome both immunities.

**B. TRIA**

TRIA § 201 is an exception provided under the FSIA to a sovereign's immunity to attachment and execution.[9] *Hausler v. JP Morgan Chase Bank, N.A.*, 770 F.3d 207, 211 (2d Cir. 2014) ("Congress . . . has created terrorism-related exceptions to immunity under FSIA . . . One such exception is TRIA's authorization of the attachment of the property of terrorist parties and that of their agencies or instrumentalities.") In certain limited circumstances, it also provides subject matter jurisdiction over instrumentalities where there was a valid underlying judgment against the sovereign. TRIA § 201(a) is codified as a note to 28 U.S.C. § 1610, which sets out other exceptions to sovereign property immunity:

> Notwithstanding any other provision of law . . . every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, or for which a terrorist party is not immune under [28 U.S.C. § 1605A or 28 U.S.C. § 1605(a)(7)(repealed)]

9. The relevant section of TRIA was first passed as part of Pub. L. 107-297, Title II, § 201(a), (b), (d), Nov. 26, 2002, 116 Stat. 2337. It was then amended by Pub. L. 112-158, Title V, § 502(e)(2), Aug. 10, 2012, 126 Stat. 1260. For simplicity, the Court refers to the relevant section of Pub. L. 107-297 as amended by Pub. L. 112-158 as "TRIA" with additional clarification on which section of TRIA the Court references as needed.

> the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.

TRIA § 201(a). This provides a broad waiver of the immunity from execution that foreign sovereigns' property enjoys. This includes even the immunity of central bank assets provided by 28 U.S.C. § 1611. *Bank Markazi v. Peterson*, 578 U.S. 212, 217 n.2, 136 S. Ct. 1310, 194 L. Ed. 2d 463 (2016) (the "FSIA's central-bank immunity provision" does not limit the availability of assets under TRIA).

In certain circumstances, TRIA § 201(a) also provides "subject matter jurisdiction over post-judgment execution and attachment proceedings involving blocked assets." *Vera II*, 946 F.3d at 133. This was established in *Weinstein v. Islamic Republic of Iran*, 609 F.3d 43 (2d Cir. 2010). There, plaintiffs obtained a default judgment against the Islamic Republic of Iran. They then initiated execution proceedings against frozen assets held by a separate entity, Bank Melli. It was uncontested that there was a valid underlying judgment against Iran for which its jurisdictional immunity was waived under the FSIA. It was also uncontested that Bank Melli was an

instrumentality of Iran. *Id.* at 48. Nonetheless, Bank Melli claimed that the district court lacked jurisdiction over it because it was not named in the original judgment.

The Court of Appeals rejected this argument. It found that TRIA § 201(a) provided subject matter jurisdiction over an instrumentality not named in that original judgment if there was a valid judgment against the underlying sovereign. *Id.* at 50. The analysis turned on the need to avoid surplusage in the line: "the blocked assets of that terrorist party *(including the blocked assets of any agency or instrumentality of that terrorist party)* . . . ." TRIA § 201(a) (emphasis added). *Weinstein* noted that, if a party was required to obtain jurisdiction independently via a judgment against both the foreign sovereign and its agency or instrumentality, the agency and instrumentality language would be rendered superfluous "since the agency or instrumentality would itself have been a "terrorist party" against which the underlying judgment had been obtained." *Weinstein*, 609 F.3d at 49.

Thus, *Weinstein* addressed a specific scenario: one in which a court may maintain jurisdiction over an execution against a foreign sovereign instrumentality where the foreign sovereign's jurisdictional immunity was already overcome as part of an underlying judgment. The court specifically noted that original jurisdiction under the FSIA was not an issue in the case before it. *Id.* at 52 ("The TRIA provides jurisdiction for execution and attachment proceedings to satisfy a judgment for which there was original jurisdiction under the FSIA (which is not challenged here) if certain statutory elements are satisfied.")

Subsequent decisions reaffirmed that TRIA § 201 "provides for federal court jurisdiction over execution and attachment proceedings involving the assets of a foreign sovereign . . . *only* where 'a valid judgment has been entered' against the sovereign." *Vera II*, 946 F.3d at 133 (citing *Vera v. Republic of Cuba*, 867 F.3d 310, 321 (2d Cir. 2017) ("*Vera I*")) (emphasis added); *see also Kirschenbaum v. 650 Fifth Ave. & Related Properties*, 830 F.3d 107, 131 (2d Cir. 2016) ("*Kirschenbaum I*"), *abrogated on other grounds by Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 200 L. Ed. 2d 58 (2018) ("The TRIA provides jurisdiction for execution and attachment proceedings to satisfy a judgment for which there was original jurisdiction under the FSIA if certain statutory elements are satisfied."); *Weininger v. Castro*, 462 F. Supp. 2d 457, 487 (S.D.N.Y. 2006) ("[I]n the plain language of TRIA and its legislative history there is such a clear expression to make the instrumentalities substantively liable for the debts of their related foreign governments . . . .")[10]

10. One court in this Circuit initially granted post-judgment execution under TRIA § 201(a) against a state instrumentality on the basis that it was also the instrumentality of a non-state terrorist organization. *See Caballero v. Fuerzas Armadas Revolucionarias De Coloumbia, et al.*, 20-mc-0040 (W.D.N.Y. Sept. 10, 2020), ECF No. 15. That execution, however, was obtained *ex parte*. This instrumentality has since appeared and filed a motion to vacate. *Id.* at ECF No. 85. The United States has since also appeared and stated that it intends to file a statement of interest. *See id.* at ECF No. 118. As the *Caballero* court did not have the benefit of full adversarial briefing in rendering its initial decision, the Court declines to reference that decision in the resolution of these motions.

In effect, the sovereign's loss of jurisdictional immunity in the underlying judgment flows through to the instrumentality in the attachment proceeding. *Weinstein* did not address the treatment of jurisdictional immunity where the underlying judgment is not against a foreign sovereign and so original jurisdiction against a sovereign entity under the FSIA was never obtained.

### C. Judgment Creditors Lack an Original Judgment That May Overcome DAB's Immunity and Grant This Court Subject Matter Jurisdiction

There has been no waiver of jurisdictional immunity against DAB or Afghanistan in any of the Judgment Creditors' underlying judgments. Without this original waiver of jurisdictional immunity, TRIA § 201(a) does not provide a freestanding mechanism for waiving a foreign sovereign instrumentality's immunity to jurisdiction. Accordingly, the Court lacks jurisdiction over DAB and its assets.

#### 1. DAB is a Central Bank Under the FSIA

DAB is the instrumentality of a foreign state, and specifically, a central bank. An entity must have three attributes to be a foreign instrumentality: separate legal personhood, not being a U.S. citizen or third-party legal entity, and being an "organ" of a foreign state. 28 U.S.C. § 1603(b)(1)-(3) While these factors are sometimes sharply disputed, that is not the case here.

*Appendix E*

Central banks are "the paradigm of a state agency or instrumentality." *S & S Mach. Co. v. Masinexportimport*, 706 F.2d 411, 414 (2d Cir. 1983), and all parties agree that DAB is the central bank of Afghanistan. While the United States has not yet recognized any entity as the government of Afghanistan, it agrees that DAB is Afghanistan's central bank. ECF No. 7661 at 9, 16, 23. The *Havlish* Creditor's expert states that "DAB is the central bank of Afghanistan and has been since its formation in 1939." ECF No. 7766 at ¶ 16. The *Doe* and *Federal Insurance* Creditors both rely on this expert's declaration in support of their own motions. ECF Nos. 7771-1 (*Doe* Creditors), 7938 at ¶ 10 (*Federal Insurance* Creditors). The *Smith* Creditors have their own expert who also states that "DAB is the central bank of Afghanistan . . . and its main tasks, as described on DAB's website, are those commonly associated with a central bank." *Smith*, No. 01-cv-10132, ECF No. 64 at ¶ 33.

Because DAB is Afghanistan's central bank, it is immune from the jurisdiction of this Court under 28 U.S.C. § 1604 unless an exception to jurisdictional immunity applies. The Judgment Creditors do not identify one. The Court has not either. They acknowledge that they do not have a judgment against either the state of Afghanistan or DAB for which immunity under the FSIA was waived. All of their turnover motions are based on judgments against the Taliban. *See* ECF No. 7764 at 9 n.7 (*Havlish* Creditors), ECF No. 7769 at 9 n.7 (*Doe* Creditors), ECF No. 7937 at 9 (*Federal Insurance* Creditors), *Smith*, No. 01-cv-10132, ECF No. 63 at 5 (*Smith* Creditors).

In fact, TRIA § 201(a) could not be wielded against Afghanistan or its instrumentalities independently. The statute defines a "terrorist party" whose assets may be targeted as "a foreign state designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 . . . or section 620A of the Foreign Assistance Act of 1961 . . . ." TRIA § 201(d)(4). Alternatively, it may be employed to collect on judgments for acts for which a terrorist party lacks immunity under 28 U.S.C. § 1605A. Section 1605A similarly requires that a state be designated a state sponsor of terrorism. 28 U.S.C. § 1605A(a)(2)(A)(i)(I), (c). Afghanistan is not and has never been designated a state sponsor of terrorism, ECF Nos. 7661 at 17 n.2, 7764 at 9 n.7, so it could not be a "terrorist party" or a nation liable for acts of terrorism under 28 U.S.C. § 1605A.

### 2. DAB's Assets May Not Be Attached Under TRIA Based on a Judgment Against the Taliban

To overcome DAB's immunities, the Judgment Creditors proffer TRIA's "agency and instrumentality" language as a backdoor exception to jurisdictional immunity that could not be obtained otherwise. Lacking a judgment against either Afghanistan or DAB, the Judgment Creditors propose to take their judgments against the non-sovereign Taliban, have DAB declared a Taliban instrumentality, and obtain a waiver of both DAB's immunities under TRIA § 201(a). The text and history of the FSIA and TRIA foreclose this.

*Appendix E*

The lynchpin of the Judgment Debtor's case is TRIA's broad language. It applies "[n]otwithstanding any other provision of law . . . ." TRIA § 201(a). The Judgment Creditors argue that this is sufficient to overcome any barrier to execution posed by DAB's immunities to jurisdiction and execution.

A "notwithstanding clause," however, is not a bulldozer that clears every possible legal obstacle between a litigant and their goal. A court may not handwave away requirements of jurisdiction, service, liability, judgment, or execution simply because some law the suit touches includes a "notwithstanding" clause. Rather, when confronted with a "notwithstanding" clause, a court must determine its scope. Laws that fall within that scope yield to the statute with the "notwithstanding" clause.

*Kucana v. Holder* is instructive. 558 U.S. 233, 130 S. Ct. 827, 175 L. Ed. 2d 694 (2010). There, the Court assessed the operation of 8 U.S.C. § 1252(a)(2)(B), which stripped courts of jurisdiction over certain immigration issues. It provides that "[n]otwithstanding any other provision of law (statutory or nonstatutory) . . . no court shall have jurisdiction to review" an enumerated array of actions. 8 U.S.C. § 1252(a)(2)(B). As *Kucana* noted, that "introductory clause . . . does not define the scope of [the enumerated action's] jurisdictional bar. It simply informs that once the scope of the bar is determined, jurisdiction is precluded regardless of what any other provision or source of law might say." 558 U.S. at 238 n.1. Accordingly, to understand what laws are overcome by a statute with a "notwithstanding" clause, a court must first determine that statute's scope.

Courts in this District have already applied this principle to TRIA § 201(a). *Smith v. Fed. Rsrv. Bank of New York* addressed execution on Iraqi assets held in the FRBNY. 280 F. Supp. 2d 314 (S.D.N.Y.), *aff'd*, 75 F. App'x 860 (2d Cir. 2003), and *aff'd sub nom. Smith ex rel. Est. of Smith v. Fed. Rsrv. Bank of New York*, 346 F.3d 264 (2d Cir. 2003). Those assets, however, were confiscated by President Bush under the International Emergency Economic Powers Act ("IEEPA") and delivered to the U.S. Treasury. The defendants argued that this put the funds beyond the reach of TRIA. The plaintiffs retorted that TRIA's "notwithstanding" clause trumped the IEEPA. *Id.* at 317-18.

*Smith* rejected such an expansive scope of TRIA's "notwithstanding" clause. The court noted that "[a]lthough the 'notwithstanding' language Congress used in the TRIA was broad, it necessarily has a scope and that scope depends on the substance of the provision to which it is attached." *Id.* at 319. Where TRIA's terms conflict with the terms of another law, that law yields to TRIA. The IEEPA, however, merely authorized the President to do something that negatively affected the Plaintiffs. It did not conflict with TRIA's execution provisions. Because "TRIA and the relevant provision of the IEEPA coexist with no conflict," TRIA's notwithstanding clause did not permit the Plaintiffs to execute on assets seized by the President under the IEEPA. *Id.* at 319-20.

The first step then is to identify TRIA's scope. "[C]ourts must be careful when interpreting the scope of the FSIA's exceptions . . . Too restrictive a reading, and

foreign sovereigns could avoid accountability even where Congress dictated otherwise. Too expansive, and the exceptions could result in a flood of suits against foreign states, prompting those nations to reciprocate in foreign suits against the United States." *Beierwaltes v. L'Office Federale De La Culture De La Confederation Suisse*, 999 F.3d 808, 819 (2d Cir. 2021) (internal citations omitted); *see also Rubin v. Islamic Republic of Iran*, 830 F.3d 470, 480 (7th Cir. 2016), *aff'd*, 138 S. Ct. 816, 200 L. Ed. 2d 58 (2018) ("Seizing a foreign state's property is a serious affront to its sovereignty . . . Correspondingly, judicial seizure of a foreign state's property carries potentially far-reaching implications for American property abroad.")

Courts must be even more cautious about "weakening the immunity from suit or attachment traditionally enjoyed by the instrumentalities of foreign states" because this "could lead foreign central banks, in particular, to withdraw their reserves from the United States and place them in other countries. Any significant withdrawal of these reserves could have an immediate and adverse impact on the U.S. economy and the global financial system." *EM Ltd. v. Banco Cent. De La Republica Argentina*, 800 F.3d 78, 98 (2d Cir. 2015) (internal citations and quotations omitted).

"TRIA . . . [is] an execution statute." *Weininger*, 462 F. Supp. 2d at 480. It is silent on jurisdiction. This is readily apparent when it is compared to 28 U.S.C. §§ 1605 to 1607, the sections that 28 U.S.C. § 1604 expressly identifies as providing exceptions to jurisdictional immunity. ("[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.") Three of these sections, 28 U.S.C. § 1605, § 1605A, and § 1605B, begin their jurisdictional immunity waiving provisions with virtually the same words. *See* 28 U.S.C. § 1605(a) ("A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . ."); 28 U.S.C. § 1605(b) ("A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case . . . ."); 28 U.S.C. § 1605(d) ("A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action . . . ."); 28 U.S.C. § 1605A(a)(1) ("A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . ."); 28 U.S.C. § 1605B(b) ("A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case . . . .") The last section, § 1607, which deals exclusively with counterclaims, provides that a "foreign state shall not be accorded immunity with respect to any counterclaim . . . ."

Similarly, each exception to attachment and immunity identified in 28 U.S.C. § 1609 and set out at 28 U.S.C. §§ 1610 and 1611, including TRIA § 201(a), references the waiver or scope of immunity specifically with respect to attachment or execution. *See, e.g.*, 28 U.S.C. § 1610(a) ("The property in the United States of a foreign state . . . used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment . . . ."); 28 U.S.C. § 1610(b) ("[A]ny property in the United States of an agency or instrumentality of a foreign state engaged in commercial

activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State"); 28 U.S.C. § 1610(d) ("The property of a foreign state . . . used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment . . . ."), 28 U.S.C. § 1610(g)(1) ("the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity . . . is subject to attachment in aid of execution, and execution . . . ."); 28 U.S.C. § 1611(b) ("Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if . . . ."). TRIA § 201(a) similarly says that "the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) *shall be subject to execution or attachment in aid of execution* . . . ." (emphasis added).

The consistent use of language in the jurisdictional exceptions on the one hand and the execution exceptions on the other reflects that "the FSIA preserves a common law distinction between . . . jurisdictional immunity from actions brought in United States courts and immunity from attachment or execution of the foreign sovereign's property." *Weininger*, 462 F. Supp. 2d at 481. Where Congress sought to target jurisdictional immunity, the statute references jurisdiction, and in all but one instance, does so with virtually identical language. Where Congress sought to target execution, it does so by explicitly stating

what property is "subject to attachment in aid of execution" or what property "shall not be immune from attachment in aid of execution, or from execution."

Comparing these statutes shows that Congress knows how to draft a statute to waive immunity from either jurisdiction or execution and what language accomplishes each goal. TRIA § 201(a) uses the language of execution waivers, not jurisdictional waivers, a topic on which it says nothing. "The familiar 'easy-to-say-so-if-that-is-what-was-meant' rule of statutory interpretation has full force here. The silence of Congress is strident." *Comm'r of Internal Revenue v. Beck's Est.*, 129 F.2d 243, 245 (2d Cir. 1942); *see also, e.g., Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1617, 200 L. Ed. 2d 889 (2018) ("Telling, too, is the fact that when Congress wants to mandate particular dispute resolution procedures it knows exactly how to do so . . . .")

Because TRIA is an execution statute, there is generally no conflict between it and those parts of the FSIA that deal with jurisdictional immunity. Immunities from jurisdiction and execution operate independently. *Walters*, 651 F.3d at 288. A conflict would arise if the Judgment Creditors sought to execute on TRIA's assets and were prevented from doing so by an immunity to execution contained in 28 U.S.C. § 1610, 28 U.S.C. § 1611, or some other statute. Only in that case would TRIA prevail.

Additionally, when, like in *Weinstein*, jurisdictional immunity has already been overcome against the sovereign, TRIA pulls that jurisdictional waiver through

to the sovereign's instrumentalities, since an alternative reading would render parts of TRIA superfluous. 609 F.3d at 49. But this is a limited rule that "provides for federal court jurisdiction over execution and attachment proceedings involving the assets of a foreign sovereign . . . *only* where 'a valid judgment has been entered' against the sovereign." *Vera II*, 946 F.3d at 133.

TRIA's legislative history further confirms that its scope is execution, not jurisdiction. Its passage was the culmination of an extended battle between Congress and the President over the extent to which foreign sovereigns' property could be subject to execution by plaintiffs. In 1998, Congress modified the FSIA's exceptions to execution immunity in 28 U.S.C. § 1610, by adding a new section, § 1610(f). This waived execution immunity for blocked assets of foreign states that had judgments against them for acts of terrorism. Pub. L. No. 105-277 § 117, October 21, 1998, 112 Stat 2681 . This subsection could be waived by the President in the interest of national security. President Clinton waived this section the same day he signed the law. 1998 U.S.C.C.A.N. 576, 581, 1998 WL 971395.

Two years later, Congress modified the section, but again authorized the President to waive this section in the interest of national security. Pub. L. No. 106-386 § 2002, October 28, 2000, 114 Stat 1464. Again, President Clinton waived § 1610(f) the same day he signed the bill into law. Statement by the President on HR 3244 10/28/00 (Oct. 28, 2000), 2000 WL 1617225, at *5. No President has rescinded these waivers, and 28 U.S.C. § 1610(f) has never taken

effect. *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 826 n.6, 200 L. Ed. 2d 58 (2018).

Congress responded with TRIA, where it "placed the 'notwithstanding' clause in § 201(a) . . . to eliminate the effect of any Presidential waiver issued under 28 U.S.C. § 1610(f) prior to the date of the TRIA's enactment." *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Elahi*, 556 U.S. 366, 386, 129 S. Ct. 1732, 173 L. Ed. 2d 511 (2009). The floor statements of Senator Harkin confirm this:

> Let there be no doubt on this point. Title II operates to strip a terrorist state of its immunity from execution or attachment in aid of execution by making the blocked assets of that terrorist state, including the blocked assets of any of its agencies or instrumentalities, *available for attachment and/or execution of a judgment issued against that terrorist state*. Thus, *for purposes of enforcing a judgment against a terrorist state*, title II does not recognize any juridical distinction between a terrorist state and its agencies or instrumentalities.

148 Cong. Rec. S11524-01 at S11528, 2002 WL 31600115 (Nov. 19, 2002) (statement of Sen. Harkin) (emphases added)).

Senator Harkin's references to execution and attachment, rather than jurisdiction confirms that TRIA is an execution statute intended to aid in the enforcement of

judgments already issued against terrorist states. It does not waive jurisdictional immunity for a sovereign state or instrumentality that would not otherwise be viable. Senator Harkin's statements cannot be given controlling effect, but because they are consistent with TRIA's text, they provide further evidence of Congress' intent that TRIA not provide a basis to obtain jurisdiction over a sovereign without an underlying judgment for which immunity under the FSIA was already defeated. *See, e.g., Brock v. Pierce Cnty.*, 476 U.S. 253, 263, 106 S. Ct. 1834, 90 L. Ed. 2d 248 (1986) ("[S]tatements by individual legislators should not be given controlling effect, but when they are consistent with the statutory language and other legislative history, they provide evidence of Congress' intent.")

TRIA § 201(a) does not overcome DAB's jurisdictional immunity under 28 U.S.C. § 1604. The Court, therefore recommends finding that there is no jurisdiction over DAB or, by extension, these turnover motions.

## II. The Court is Constitutionally Restrained from Making the Finding TRIA Requires to Attach DAB's Assets

Even if the Court had jurisdiction, it is constitutionally restrained from making the findings that are required by TRIA § 201 to authorize execution. The Constitution vests the President with the sole power to recognize foreign governments. Courts may not extend such recognition either directly or by implication. Yet such recognition would be inescapably implied if this Court found that the

DAB is being controlled and used by the Taliban such that the Taliban may use DAB's assets (ultimately the assets of the sovereign state of Afghanistan) to pay its legal bills. The Constitution thus restrains the Court from making the finding necessary to attach DAB's assets.

### A. Framework for the Turnover Motions

These turnover motions are governed by Rule 69, CPLR §§ 5225(b) and 5227, and TRIA § 201. Rule 69 provides the procedure for enforcing money judgments. Under Rule 69(a), judgments are enforced through a writ of execution. Execution procedures are governed by the laws of the state where the court is located unless a federal law applies. In New York, CPLR §§ 5225(b) and 5227 govern turnover proceedings. *CSX I*, 879 F.3d at 468. These statutes are "essentially interchangeable," *CSX Transportation, Inc. v. Emjay Env't Recycling, LTD.*, No. 12-cv-1865 (JS)(AKT), 2016 U.S. Dist. LEXIS 23014, 2016 WL 755630, at *3 (E.D.N.Y. Feb. 25, 2016) (quoting *LaBarbera v. Audax Constr. Corp.*, 971 F. Supp. 2d 273, 278 (E.D.N.Y. 2013)), so the Court analyzes the turnover motions under CPLR §§ 5225(b) for simplicity.

Section 5225(b) permits judgment creditors to initiate:

> a special proceeding . . . against a person in possession or custody of money . . . in which the judgment debtor has an interest, or against a person who is a transferee of money or other personal property from the judgment debtor, where it is shown that the judgment debtor is entitled to the possession of such property . . . .

The Federal Rules have no equivalent to a "special proceeding" so parties may seek a turnover under these provisions by motion. *CSX I*, 879 F.3d at 470.

CPLR § 5225(b) "requires a two-part showing before the Court can order the third party to turn over the money to the judgment creditor." *Hyegate, LLC v. Boghossian*, No. 21-cv-1450 (JGK), 2022 U.S. Dist. LEXIS 85965, 2022 WL 1488171, at *2 (S.D.N.Y. May 11, 2022) (*Commodities & Mins. Enter. Ltd. v. CVG Ferrominera Orinoco, C.A.*, 423 F. Supp. 3d 45, 51 (S.D.N.Y. 2019)). The judgment creditor must show that the judgment debtor has an interest in the property the creditor is targeting, and that the judgment creditor is entitled to that property or has rights superior to the party possessing the property. *Id.*

A judgment creditor must also satisfy the requirements of TRIA § 201(a) if they seek a turnover on those grounds. A party seeking to execute against assets using TRIA § 201(a) must show that: (1) they have obtained a judgment against a terrorist party, (2) on a claim based on an act of terrorism or an act for which a terrorist party is not immune under 28 U.S.C. § 1605A or 28 U.S.C. § 1605(a)(7), which they seek to satisfy with the (3) blocked assets, (4) of that terrorist, terrorist party, or their agency or instrumentality, (5) to the extent of only their compensatory damages.

The Judgment Creditors easily show all but one element. They all possess judgments against the Taliban, a terrorist group, for the September 11 Terrorist Attacks or other acts of terrorist violence. TRIA § 201(d)(4) defines

a terrorist party by reference to 8 U.S.C. § 1182(a)(3)(B)(vi). This describes a terrorist group as one involved in activities such as hijacking, assassination, and the use of explosives to threaten individuals and property. 8 U.S.C. § 1182(a)(3)(B)(iii), (vi). All of the judgments the parties possess against the Taliban are based on its role in the September 11 Attacks, ECF Nos. 1755 (*Federal Insurance* Creditors), 2516 (*Havlish* Creditors), *Smith*, No. 01-cv-10132, ECF No. 25 (*Smith* Creditors), or separate acts in which explosives were used to attack Americans, *Doe*, No. 20-mc-740, ECF Nos. 1, 8-2 (*Doe* Creditors).

The DAB Funds are "blocked assets." TRIA § 201(d)(2)(A) defines blocked assets as "any asset seized or frozen by the United States . . . under sections 202 and 203 of the [IEEPA] (50 U.S.C. 1701; 1702) . . . ." E.O. 14,064 blocks the DAB Funds pursuant to the IEEPA.

All the parties seek compensatory damages only. *See* ECF Nos. 7765 at ¶¶ 10-11 (*Havlish* Creditors); 7770 at ¶ 4 (*Doe* Creditors); 7938 at ¶ 9 (*Federal Insurance* Creditors); *Smith*, No. 01-cv-10132, ECF Nos. 25, 63 at 7 (*Smith* Creditors). The only question is whether the blocked DAB Funds are the assets of an agency or instrumentality of the Taliban.

### B. The Constitution Prevents the Court From Declaring DAB a Taliban Agency or Instrumentality

Declaring DAB an agency or instrumentality of the Taliban inescapably implies that the Taliban is the

government of Afghanistan. Only the President may make such a determination. The Court is thus constitutionally restrained from finding that DAB is a Taliban agency or instrumentality as TRIA § 201(a) requires.

"TRIA, unfortunately, does not" define what it means to be an "agency or instrumentality" of a terrorist party. *Kirschenbaum I*, 830 F.3d at 132. "Because the terms 'agency or instrumentality' are undefined under the TRIA," the Court of Appeals "construe[d] these words according to their ordinary meanings." *Id.* at 135.

Drawing on several dictionary definitions, the Court of Appeals determined that an entity is an agency or instrumentality of a terrorist group if it "(1) was a means through which a material function of the terrorist party is accomplished, (2) provided material services to, on behalf of, or in support of the terrorist party, or (3) was owned, controlled, or directed by the terrorist party." *Id.*

The Court cannot find that that DAB was owned, controlled, or directed by the Taliban or that it provided the Taliban with materials services and functionality without recognizing the Taliban as the government of Afghanistan. The Constitution forbids this. "[T]he power to recognize foreign states and governments . . . is exclusive to the Presidency." *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 28, 135 S. Ct. 2076, 192 L. Ed. 2d 83 (2015). This is true whether recognition is direct or by implication.

*Zivotofsky*, for example, dealt with a conflict between the Foreign Relations Authorization Act, Fiscal Year 2003 (the "FRAA"), and the U.S. State Department's Foreign Affairs Manual (the "FAM"). At the time of *Zivotofsky*, presidential policy was to refuse to acknowledge any nation's sovereignty over the city of Jerusalem. The FAM thus required that when the State Department issued passports to people born in Jerusalem, the passport list their place of birth as "Jerusalem" rather than "Israel." The FRAA permitted (though did not require) people born in Jerusalem to list their place of birth as "Israel" on their passports. *Id.* at 5-8. Even though this amounted to little more than a requirement that the President accommodate private citizens' requests on their passports, the Supreme Court held that this accommodation was unconstitutional because it was "a mandate that the Executive contradict his prior recognition determination in an official document issued by the Secretary of State." *Id.* at 30.

Applying this to DAB, the government of a foreign sovereign state exercises some manner of control or authority over the central bank. This is apparent from 28 U.S.C. § 1611 of the FSIA which specifically addresses central banks and their assets. This makes the property of a central bank immune from attachment and execution "unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution . . . ." 28 U.S.C. § 1611(b)(1). The use of "parent" implies a degree of supervision by the foreign government over the central bank. *See, e.g.*, Parent Corporation, Black's Law Dictionary (11th ed. 2019) ("A corporation that has

a controlling interest in another corporation."). Further confirming that a government exercises some control over the central bank, 28 U.S.C. § 1611(b)(1) permits a foreign government to waive the immunity of their central bank's property to attachment and execution.

The Judgment Creditors allege the Taliban is exercising control over DAB. The *Havlish* Creditors' expert reports that the Taliban has appointed loyalists to key leadership positions. ECF No. 7766 at ¶ 54. This includes DAB's Acting Governor, *id.* at ¶ 55, First Deputy Governor, *id.* at ¶ 59, Second Deputy Governor, *id.* at ¶ 73, and personnel throughout the organization. *Id.* at ¶¶ 85-91. Numerous former DAB leaders and employees have fled the institution because they will not work for the Taliban. *Id.* at ¶¶ 52-53. Senior personnel and experts have joined the exodus or are trying to leave. *Id.* at ¶¶ 88, 102. Women have been forced to leave DAB jobs, *id.* at ¶ 90, and those DAB personnel that remain appear to be doing so only because of Taliban coercion. *Id.* at ¶ 89. The *Smith* Creditor's expert similarly notes that numerous Taliban loyalists have been appointed to senior leadership positions in DAB. *Smith*, No. 01-cv-10132, ECF No. 64 at ¶¶ 40-41. Non-Taliban personnel in leadership positions are reportedly little more than figureheads subject to Taliban control. *Id.* at ¶¶ 42-43.

The Taliban is using its control of DAB through these senior positions to set monetary policy. It has tried to use DAB "to halt the local currency's depreciation." ECF No. 7766 at ¶ 92. Through DAB, it is supervising the entire Afghan financial sector, *id.* at ¶ 98, and its appointees

make statements about the country's banking policies. *Id.* at ¶ 128.

Finally, the Judgment Creditors suggest that the Taliban can use its control of DAB to advance its cause in numerous ways. It can cripple the central bank's anti-money laundering controls, *id.* at ¶¶ 155, 160, 165, generate revenue from the narcotics trade, *id.* at ¶¶ 155, 161, weaponize sensitive financial information against its enemies, *id.* at ¶ 159, and weaken oversight of high-risk financial sectors (*e.g.*, *hawala*, an informal money exchange system) that are likely to fund terrorists, *id.* at ¶¶ 168-78.

The *Smith* Creditor's expert expands on this. He notes that beyond advancing its aims through monetary policy, one of the Taliban's goals in controlling DAB is "to show that they are capable of governing Afghanistan . . . ." *Smith*, No. 01-cv-10132, ECF No. 64 at ¶ 36. It appointed DAB leadership even before it announced the establishment of its caretaker "government." *Id.* at ¶ 35. To advance this effort and create the impression of a competent Taliban-run DAB, the Taliban has employed tactics like presenting credentialed non-Taliban technical experts as DAB personnel in external meetings while Taliban loyalists handle internal affairs. *Id.* at ¶ 36. Thus, for example, the *Smith* Creditor's expert reports that the current DAB Governor, Shakir Jalali, was "chosen for his credentials" but, despite being DAB's governor, he "acts in an advisory position without decision-making authority." *Id.* at ¶ 42. This governance structure "is designed to present DAB as a 'normal' central bank to outside observers, while simultaneously maintaining Taliban control over DAB strategy and funds." *Id.* at ¶ 44.

The *Smith* Creditor's expert also notes that part of the allure of controlling DAB is gaining control over its reserves. The Taliban claimed a right to that money "immediately," *id.* at ¶ 35, and reportedly sought to inspect the reserves just after gaining physical control of DAB's premises, *Taliban Report* at 45.

The Court has little doubt that much or all of this is factually true, and that the Taliban is using their control of DAB to advance their aims. In September 2021, Secretary of State Antony Blinken acknowledged that the Taliban was the "*de facto* government" of Afghanistan.[11] There is no reason to think DAB has escaped this dominion. But, just as Secretary Blinken could acknowledge the Taliban's *de facto* dominance of Afghanistan even as the United States declines to formally recognize it as Afghanistan's government, the Court can acknowledge the facts on the ground while recognizing that those facts do not permit it to recognize the Taliban as the government of Afghanistan directly or by implication.

If the Court accepts the Judgment Creditors' argument, the implied recognition of the Taliban as Afghanistan's government is inescapable. The Judgment Creditors report that the Taliban has appointed leaders to the institution. It is advancing its goals through those leaders and by setting monetary policies like preventing currency depreciation. Promoting financial stability and managing foreign reserves are classic public and

---

11. Amanda Macias, Secretary of State Blinken calls Taliban 'the de facto government of Afghanistan', CNBC (last updated Mon. Sept. 13, 2021), https://www.cnbc.com/2021/09/13/secretary-of-state-blinken-calls-taliban-the-de-facto-government-of-afghanistan.html.

government functions performed by central banks. *See, e.g., Filler v. Hanvit Bank*, 378 F.3d 213, 217 (2d Cir. 2004); *NML Cap., Ltd. v. Banco Cent. de la Republica Argentina*, 652 F.3d 172, 195 (2d Cir. 2011). The Taliban directing DAB's governmental functions implies that the Taliban acts as a government.

Recognition would be further implied if the Court was prepared to give effect to the acts of those DAB "leaders" installed by the Taliban. A hypothetical involving waiver provisions of 28 U.S.C. § 1611(b)(1) illustrates the point. This section allows either the central bank or its parent government to waive immunity to execution on central bank resources. If the Taliban, through their appointed DAB leaders, proffered such a waiver to advance some objective, two outcomes are possible. A court could give effect to the waiver. In that case, Taliban-appointed leaders, on orders from the Taliban, would be issuing an order that controlled the disposition of Afghanistan's central bank reserves. If permitting a private citizen born in Jerusalem to choose "Israel" as his place of birth on his passport impermissibly encroaches on the President's prerogative to recognize governments, then handing over Afghanistan's reserves on the Taliban's say-so must as well. Or, a court could refuse to credit the waiver because acknowledging that the Taliban can control DAB assets or policies in this way confers governmental recognition on the organization that is the sole constitutional prerogative of the President.

The Judgment Creditors' argument is only a less extreme version of this scenario. They suggest that

DAB is an agency or instrumentality of the Taliban because it has appointed leaders and those leaders are promulgating policies or taking acts like the elimination of money-laundering controls that materially advance the Taliban's goals. But accepting that these leaders have actually been appointed to lead DAB or that, based on these appointments they may legitimately promulgate the policies and pronouncements that materially advance the Taliban's goals bestows governmental recognition on the Taliban that this Court may not constitutionally confer.

Other factors further confirm that permitting the turnover of the DAB Funds on the basis proffered by the Judgment Creditors implies recognition of the Taliban. The Judgment Creditors' expert declarations reference DAB's website as a credible source of information about the institution. *See, e.g.*, ECF No. 7766 at ¶ 16 n.5, ¶ 55 n.39, ¶ 58 n.45, ¶ 58 n.46, ¶ 94 n.86, ¶ 126-35; *Smith*, No. 01-cv-10132, ECF No. 64 at ¶ 33 n.32. That website includes a section with the "Da Afghanistan Bank Law," which sets out the governance of the institution. *See* DAB, *Laws* (last visited August 26, 2022), available at *https://dab.gov.af/laws*. Article 11 of the Da Afghanistan Bank Law provides that "[t]he Governor, the First Deputy Governor and the other members of the Supreme Council shall be appointed by a decree of the President of Afghanistan." *See* DAB, *Da Afghanistan Bank Law* (last visited August 26, 2022), available at https://dab.gov.af/sites/default/files/2018-12/DABLaw1English_2.pdf.[12]

12. The Unfreeze Afghanistan amicus brief similarly references this Afghanistan Bank Law. *See Havlish*, No. 03-cv-9848, ECF No. 617 at 5.

*Appendix E*

The laws of Afghanistan are doubtless in flux given the Republic's collapse but the legal authorities DAB proffers on its website still state that the President of Afghanistan is responsible for appointing DAB officials. The Judgment Creditors, meanwhile, point to the Taliban's appointment of these officials as evidence of its control over DAB. To credit those appointments as evidence of Taliban control would be to suggest that the group is wielding power that was until recently vested in the Afghan state and the Republic.

Accepting this argument is particularly ill-advised given the *Smith* Creditor's expert opinion that the Taliban sees its control over DAB as a means to demonstrate that it can competently govern Afghanistan. To find that DAB is an agency or instrumentality of the Taliban based on its control of it and use to advance its ends would thus effectively adopt the group's theory for why it is Afghanistan's legitimate government.

Finally, permitting the Taliban to pay its judgments with DAB's money implies an ownership that is only properly held by Afghanistan and its government. While "the funds of foreign central banks are managed through those banks' accounts in the United States, those funds are, in fact, the reserves of the foreign states themselves." *NML Cap., Ltd.*, 652 F.3d at 189 (internal citations omitted) (cleaned up). The reserves are thus foreign state property and "a regime not recognized as the government of a state is not entitled to property belonging to that state located in the United States . . . ." Restatement (Third) of Foreign Relations Law § 205(2) (1987). If the Court

nonetheless permitted the Taliban to pay its judgments with Afghan state money held in the United States, the reasonable interpretation given § 205(2) is that the Taliban is entitled to Afghanistan's property.

*Zivotofsky* recognized that the "[t]he Nation must 'speak . . . with one voice' regarding which governments are legitimate in the eyes of the United States and which are not . . . ." 576 U.S. at 2 (quoting *American Insurance Assn. v. Garamendi*, 539 U.S. 396, 424, 123 S. Ct. 2374, 156 L. Ed. 2d 376 (2003)). That would be impossible if, even as the President declines to accept the Taliban as the Afghan government, the Court permits these terrorists' judgments to be paid with Afghanistan's treasury. The Court thus recommends finding that it is constitutionally restrained from rendering the finding TRIA requires for the Judgment Creditor's turnover motions.

## III. The Taliban's Nonconsensual Control Prevents DAB From Being an Agency or Instrumentality

Finally, even if the Court was not constitutionally restrained from finding that DAB is an agency or instrumentality of the Taliban, the Judgment Creditors cannot establish an agency relationship. "To be entitled to attachment or execution under TRIA, a plaintiff must first establish defendant's status as an agency or instrumentality." *Levinson*, 2022 U.S. App. LEXIS 22317, 2022 WL 3269083, at *4. Consent is essential to an agency relationship. DAB has been violently occupied by the Taliban. It cannot not demonstrate the consent necessary to an agency relationship.

Because TRIA does not define an "agency or instrumentality," *Kirschenbaum I* defined these terms "according to their ordinary meanings," settling on the three possible tests noted above. 830 F.3d at 135. But *Kirschenbaum I* and its progeny acknowledged that this test was only a starting point that would necessarily be refined as new circumstances presented themselves. *Kirschenbaum I* specifically acknowledged that the decision did not address:

> whether, to satisfy the TRIA's definition of agency or instrumentality, Plaintiffs must here show that Defendants knew, or reasonably should have known, that they were functioning for, providing material services on behalf of, or being owned, controlled, or directed by the terrorist party (here, Iran). Nor have they addressed whether an innocent-owner-type defense would be available to a terrorist's agency or instrumentality.

830 F.3d at 136. Similarly, *Kirschenbaum v. Assa Corp.* acknowledged that "it is possible that, if broadly construed, *Kirschenbaum I*'s reading of TRIA could invite lawsuits against a third-party institution, such as a bank, that had only incidental and perhaps unintentional involvement with a terrorist party. How TRIA balances these concerns is not an issue before us at this time . . . ." 934 F.3d 191, 199 (2d Cir. 2019) ("*Kirschenbaum II*"). Together, *Kirschenbaum I* and *Kirschenbaum II* acknowledge that the *Kirschenbaum I* test left unanswered the question of what level of knowledge and consent is required to be an agency or instrumentality.

That question is now squarely before the Court. As the Judgment Creditors acknowledge, the Taliban has seized DAB by force. The Havlish Creditors acknowledge that the Taliban has "forcibly seized Afghan territory and institutions, including DAB." ECF No. 8019 at 24. Thus, the Court must determine whether a bank robber can transform an unwilling bank into his agency or instrumentality.

The answer must be no. To determine this, the Court returns to *Kirschenbaum I*'s guidance that "agency or instrumentality" must be defined based on the ordinary meaning of those words. 830 F.3d at 135. It also considers that "Congress is understood to legislate against a background of common-law adjudicatory principles." *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108, 111 S. Ct. 2166, 115 L. Ed. 2d 96 (1991). "Thus, where a common-law principle is well established . . . the courts may take it as given that Congress has legislated with an expectation that the principle will apply except when a statutory purpose to the contrary is evident." *Id.* (internal citations and quotations omitted)."

With that background, the Court returns to TRIA § 201(a)'s text. The ordinary meanings of "agency or instrumentality" identified in *Kirschenbaum I* reflect the need for its definition to account for the traditional elements of an agency relationship. That an agency relationship is implied in the use of the term "agency" is apparent, but the definition of "instrumentality" put forward in *Kirschenbaum I* similarly returns to the concept of agency as an essential element of being an instrumentality:

> "Instrumentality" is a means through which a function of another entity is accomplished, analogous to a branch of a governing body. See Black's Law Dictionary (10th ed. 2014) (defining "instrumentality" as "a means or *[a]gency* through which a function of another entity is accomplished, such as a branch of a governing body"); Webster's Third New International Dictionary 1172 (1993) (defining instrumentality as "something that serves as an intermediary or *agent* through which one or more functions of a controlling force are carried out: a part, organ, or subsidiary branch esp. of a governing body"); OED Online, Oxford University Press, June 2016 (defining instrumentality as "[t]hat which serves or is employed for some purpose or end; a means, an *agency*"); Merriam-Webster Collegiate Dictionary 22 (10th ed. 1993) (defining instrumentality as a "means" or an "*agency*").

830 F.3d at 135 (emphases added).

"Agency" is a well-defined common law concept. *See generally* Restatement (Third) of Agency (2006). The Court of Appeals has already resorted to agency principles in *Kirschenbaum II*, noting that "courts need not 'adhere blindly to the corporate form' [in TRIA actions] where doing so would ignore a foreign state's *principal-agent relationship* or lead to fraud or injustice. *Kirschenbaum II*, at 934 F.3d at 199 (quoting *First Nat. City Bank v. Banco Para El Comercio Exterior de*

*Cuba*, 462 U.S. 611, 632, 103 S. Ct. 2591, 77 L. Ed. 2d 46 (1983)). Thus, if Congress had intended to displace agency principles in a statute discussing agency, one would have expected explicit language like in 28 U.S.C. § 1603(b) where it provided a specific definition of "agency or instrumentality of a foreign state . . . ." Instead, it left the term undefined, and courts have filled the gap through the normal interpretive tools of ordinary usage and common law meaning. The need for an agency relationship between the terrorist party and its "agency or instrumentality" is thus apparent from TRIA § 201(a)'s text.

This also aligns with the Circuit and the District's existing TRIA jurisprudence. There has been no case invoking the *Kirschenbaum I* test where the entity alleged to be an agency or instrumentality was credibly alleged to be an unwilling or even unknowing pawn of the terrorists controlling them. *See, e.g., Kirschenbaum II*, 934 F.3d at 199 (2d Cir. 2019) (targeted entity was the "alter ego" of Iran), *Levin v. Bank of New York Mellon*, 2019 U.S. Dist. LEXIS 22788, 2019 WL 564341, at *4 (S.D.N.Y. 2019) (noting that a person was an instrumentality of Hezbollah where he contributed money to them and ran their front companies). Returning to agency principles thus comports with this Circuit's existing jurisprudence.

An agency requirement also aligns with Congress' purpose in passing TRIA. The Taliban may have defeated the Republic and occupied Afghanistan, but without presidential recognition, it has no legitimate authority to represent the Afghan state or the Afghan people. "To the extent innocent parties pay some part of a terrorist state's

judgment debt, the terrorist state's liability is ultimately reduced. Congress could not have intended such a result." *Heiser v. Islamic Republic of Iran*, 735 F.3d 934, 940, 407 U.S. App. D.C. 181 (D.C. Cir. 2013). The same is true if a non-state terrorist group like the Taliban can drain an Afghan treasury built on international donations and Afghans' savings to reduce its own liability. An agency requirement ensures that only those who have agreed to aid terrorists are responsible for those terrorists' liabilities.

Because an agency relationship is required, that means the relationship between a terrorist and its agency or instrumentality must be consensual, or at least not adversarial. "New York common law provides that an agency relationship 'results from a manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and the consent by the other to act.'" *New York Marine & Gen. Ins. Co. v. Tradeline (L.L.C.)*, 266 F.3d 112, 122 (2d Cir. 2001) (quoting *Meese v. Miller*, 79 A.D.2d 237, 242, 436 N.Y.S.2d 496 (4th Dep't 1981)); *see also* Restatement (Third) of Agency § 1.01 cmt. d (2006) ("Under the common-law definition, agency is a consensual relationship. The definition requires that an agent-to-be and a principal-to-be consent to their association with each other.")[13]

13. While this motion was pending, the Court of Appeals for the Eleventh Circuit decided *Stansell v. FARC*, No. 20-11736 (11th Cir. August 23, 2022). While not binding on this Court, *Stansell* addresses the requirements for an entity to be deemed an agency or instrumentality so a brief discussion here is appropriate. *Stansell* defined "agency or instrumentality" according to the legal

*Appendix E*

DAB and the Taliban do not have a consensual relationship. The Taliban destroyed the Republic in battle and occupies its central bank by force. When DAB promulgates policies or aids in the Taliban's efforts, it does so with leadership that was illegitimately installed. The Court cannot credit these leaders' acts for the constitutional recognition reasons already identified. But, even if the Court had jurisdiction, and even if it was not constitutionally restrained from making the finding TRIA requires, it recommends finding that the Judgment

---

definitions of those terms, rather than the common understanding, which it recognized was "largely synonymous." *Id.* at 20, 22. Thus, while "agency" required an agency relationship and the normal requirements associated with that relationship (*i.e.*, consent), *id.* at 23-24, an "instrumentality" may be an unwitting "person or thing through which or by which some end or purpose is achieved." *Id.* at 24-25. The Court finds this unpersuasive for two reasons. First, the use of specifically legal definitions conflicts with *Kirschenbaum* I, which defined instrumentality by reference to common usage and general-purpose dictionaries. 830 F.3d at 135. As discussed, this common usage in this case requires an agency relationship where instrumentality is concerned. Alternatively, one could imagine a interpretation in which an "instrumentality" is an inanimate object such as a boat used by terrorists, and so seized by judgment creditors, where an agency relationship is then inapplicable. This would also eliminate concerns about construing "instrumentality" in a way that renders it surplusage since it would cover a category (inanimate objects and things that are not legal persons) not covered by "agency." The Court need not address this because that would be inapplicable to DAB. Second, *Stansell*'s "instrumentality" definition would swallow its "agency" definition. Any agent is also a means of achieving some end so the *Stansell* "instrumentality" definition is basically the same as that of an "agency" but without additional consent requirements, rendering it surplusage.

Creditors cannot show that DAB has proffered the consent necessary to find DAB to be a Taliban agency or instrumentality.

## CONCLUSION

The Taliban's victims have fought for years for justice, accountability, and compensation. They are entitled to no less. But the law limits what compensation the Court may authorize and those limits put the DAB's assets beyond its authority. Accordingly, the Court recommends dismissing these turnover motions. The Court lacks subject matter jurisdiction over the turnover motions because the Judgment Creditors have not overcome DAB's immunity from jurisdiction. And even if they had, the Court cannot find that DAB is an agency or instrumentality of the Taliban under TRIA § 201 without infringing on the President's constitutional recognition prerogative. Finally, if all that were not the case, the Judgment Creditors have not made the showing required by TRIA because they have not established that the relationship between the Taliban and DAB is the kind of consensual relationship required for an entity to be an "agency or instrumentality." Upon resolution of these motions, the Clerk of the Court may terminate the motions at ECF Nos. 7763, 7936, *Havlish*, No. 03-cv-09848, ECF No. 597, and *Smith*, No. 01-cv-10132, ECF No. 62.

/s/ Sarah Netburn
SARAH NETBURN
United States
Magistrate Judge

Dated: August 26, 2022
New York, New York

# APPENDIX F — RELEVANT STATUTORY PROVISIONS

## Terrorism Risk Insurance Act of 2002, § 201

Pub. L. No. 107-297, § 201, 116 Stat. 2322, 2337-2340, as amended, Pub. L. No. 112-158, 126 Stat. 1214, 1260 (codified at 28 U.S.C. § 1610 note)

****

SEC. 201. SATISFACTION OF JUDGMENTS FROM BLOCKED ASSETS OF TERRORISTS, TERRORIST ORGANIZATIONS, AND STATE SPONSORS OF TERRORISM.

"(a) **In General.—**

Notwithstanding any other provision of law, and except as provided in subsection (b), in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, or for which a terrorist party is not immune under section 1605A or 1605(a)(7) (as such section was in effect on January 27, 2008) of title 28, United States Code, the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.

"(b) **Presidential Waiver.—**

"(1) **In general.—**

Subject to paragraph (2), upon determining on an asset-by-asset basis that a waiver is necessary in the national security interest, the President may waive the requirements of subsection (a) in connection with (and prior to the enforcement of) any judicial order directing attachment in aid of execution or execution against any property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations.

"(2) **Exception.—A** waiver under this subsection shall not apply to—

"(A) property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations that has been used by the United States for any nondiplomatic purpose (including use as rental property), or the proceeds of such use; or

"(B) the proceeds of any sale or transfer for value to a third party of any asset subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations.

"(d) **Definitions.—**In this section, the following definitions shall apply:

"(1) **Act of terrorism.**—The term 'act of terrorism' means—

"(A) any act or event certified under section 102(1) [Pub. L. 107-297, set out in a note under section 6701 of Title 15, Commerce and Trade]; or

"(B) to the extent not covered by subparagraph (A), any terrorist activity (as defined in section 212(a)(3)(B)(iii) of the Immigration and Nationality Act (8 U.S.C. l 182(a)(3)(B)(iii))).

"(2) **Blocked asset.**—The term 'blocked asset' means—

"(A) any asset seized or frozen by the United States under section 5(b) of the Trading With the Enemy Act (50 U.S.C. App. 5(b)) [now 50 U.S.C. 4305(b)] or under sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701; 1702); and

"(B) does not include property that—

"(i) is subject to a license issued by the United States Government for final payment, transfer, or disposition by or to a person subject to the jurisdiction of the United States in connection with a transaction for which the issuance of such license has been specifically required by statute other than the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.)

or the United Nations Participation Act of 1945 (22 U.S.C. 287 et seq.); or

"(ii) in the case of property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations, or that enjoys equivalent privileges and immunities under the law of the United States, is being used exclusively for diplomatic or consular purposes.

"(3) **CERTAIN PROPERTY.—**

The term 'property subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations' and the term 'asset subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations' mean any property or asset, respectively, the attachment in aid of execution or execution of which would result in a violation of an obligation of the United States under the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations, as the case may be.

"(4) **TERRORIST PARTY.—**

The term 'terrorist party' means a terrorist, a terrorist organization (as defined in section 212(a)(3)(B)(vi) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(B)(vi))), or a foreign state designated as a state sponsor of terrorism under [former] section 6G) of the

*Appendix F*

Export Administration Act of 1979 (50 U.S.C. App. 2405G)) [former 50 U.S.C. 4605G)] or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371)."

****

**Foreign Sovereign Immunities Act**

Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified at 28 U.S.C. §§ 1330, 1602–11)

**28 U.S.C.A. § 1602**

§ 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

*Appendix F*

**28 U.S.C. § 1603. Definitions**

For purposes of this chapter-

**(a)**
A "foreign state", except as used in **section 1608 of this title,** includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

**(b)**
An "agency or instrumentality of a foreign state" means any entity-

(1)
which is a separate legal person, corporate or otherwise, and

(2)
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, and

(3)
which is neither a citizen of a State of the United States as defined in section 1332 (c) and (e) of this title, nor created under the laws of any third country.

**(c)**
The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

**(d)**
A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

**(e)**
A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

**28 U.S.C. § 1604**

§ 1604. Immunity of a foreign state from jurisdiction

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.

**28 U.S.C.A. § 1605**

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

**(a)** A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case--

**(1)** in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

**(2)** in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

**(3)** in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

**(4)** in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

**(5)** not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign

state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to--

> **(A)** any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or
>
> **(B)** any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

**(6)** in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards,

**(C)** the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

**(b)** A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: Provided, That--

**(1)** notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and

**(2)** notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such

party determined the existence of the foreign state's interest.

**(c)** Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

**(d)** A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in section 31301 of title 46. Such action shall be brought, heard, and determined in accordance with the provisions of chapter 313 of title 46 and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

*Appendix F*

[**(e)**, **(f)** Repealed. Pub.L. 110-181, Div. A, Title X, § 1083(b)(1)(B), Jan. 28, 2008, 122 Stat. 341.]

**(g) Limitation on discovery.**--

**(1) In general.**--**(A)** Subject to paragraph (2), if an action is filed that would otherwise be barred by section 1604, but for section 1605A or section 1605B, the court, upon request of the Attorney General, shall stay any request, demand, or order for discovery on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action, until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere.

**(B)** A stay under this paragraph shall be in effect during the 12-month period beginning on the date on which the court issues the order to stay discovery. The court shall renew the order to stay discovery for additional 12-month periods upon motion by the United States if the Attorney General certifies that discovery would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action.

**(2) Sunset.**--**(A)** Subject to subparagraph (B), no stay shall be granted or continued in effect under paragraph (1) after the date that is 10 years after the

date on which the incident that gave rise to the cause of action occurred.

**(B)** After the period referred to in subparagraph (A), the court, upon request of the Attorney General, may stay any request, demand, or order for discovery on the United States that the court finds a substantial likelihood would--

> **(i)** create a serious threat of death or serious bodily injury to any person;
>
> **(ii)** adversely affect the ability of the United States to work in cooperation with foreign and international law enforcement agencies in investigating violations of United States law; or
>
> **(iii)** obstruct the criminal case related to the incident that gave rise to the cause of action or undermine the potential for a conviction in such case.

**(3) Evaluation of evidence.**--The court's evaluation of any request for a stay under this subsection filed by the Attorney General shall be conducted ex parte and in camera.

**(4) Bar on motions to dismiss.**--A stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

**(5) Construction.**--Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States.

**(h) Jurisdictional immunity for certain art exhibition activities.**--

**(1) In general.**--If--

**(A)** a work is imported into the United States from any foreign state pursuant to an agreement that provides for the temporary exhibition or display of such work entered into between a foreign state that is the owner or custodian of such work and the United States or one or more cultural or educational institutions within the United States;

**(B)** the President, or the President's designee, has determined, in accordance with subsection (a) of Public Law 89-259 (22 U.S.C. 2459(a)), that such work is of cultural significance and the temporary exhibition or display of such work is in the national interest; and

**(C)** the notice thereof has been published in accordance with subsection (a) of Public Law 89-259 (22 U.S.C. 2459(a)),

any activity in the United States of such foreign state, or of any carrier, that is associated with the temporary exhibition or display of such work shall

not be considered to be commercial activity by such foreign state for purposes of subsection (a)(3).

**(2) Exceptions.**--

**(A) Nazi-era claims.**--Paragraph (1) shall not apply in any case asserting jurisdiction under subsection (a)(3) in which rights in property taken in violation of international law are in issue within the meaning of that subsection and--

**(i)** the property at issue is the work described in paragraph (1);

**(ii)** the action is based upon a claim that such work was taken in connection with the acts of a covered government during the covered period;

**(iii)** the court determines that the activity associated with the exhibition or display is commercial activity, as that term is defined in section 1603(d); and

**(iv)** a determination under clause (iii) is necessary for the court to exercise jurisdiction over the foreign state under subsection (a)(3).

**(B)** Other culturally significant works.--In addition to cases exempted under subparagraph (A), paragraph (1) shall not apply in any case asserting jurisdiction under subsection (a)(3) in which rights in property taken in violation of international law

are in issue within the meaning of that subsection and--

**(i)** the property at issue is the work described in paragraph (1);

**(ii)** the action is based upon a claim that such work was taken in connection with the acts of a foreign government as part of a systematic campaign of coercive confiscation or misappropriation of works from members of a targeted and vulnerable group;

**(iii)** the taking occurred after 1900;

**(iv)** the court determines that the activity associated with the exhibition or display is commercial activity, as that term is defined in section 1603(d); and

**(v)** a determination under clause (iv) is necessary for the court to exercise jurisdiction over the foreign state under subsection (a)(3).

**(3) Definitions.**--For purposes of this subsection--

**(A)** the term "work" means a work of art or other object of cultural significance;

**(B)** the term "covered government" means--

**(i)** the Government of Germany during the covered period;

**(ii)** any government in any area in Europe that was occupied by the military forces of the Government of Germany during the covered period;

**(iii)** any government in Europe that was established with the assistance or cooperation of the Government of Germany during the covered period; and

**(iv)** any government in Europe that was an ally of the Government of Germany during the covered period; and

**(C)** the term "covered period" means the period beginning on January 30, 1933, and ending on May 8, 1945.

**28 U.S.C.A. § 1605A**

§ 1605A. Terrorism exception to the jurisdictional immunity of a foreign state

**(a) In general.**--

**(1) No immunity.**--A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of

material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

**(2) Claim heard.**--The court shall hear a claim under this section if--

> **(A)(i)(I)** the foreign state was designated as a state sponsor of terrorism at the time the act described in paragraph (1) occurred, or was so designated as a result of such act, and, subject to subclause (II), either remains so designated when the claim is filed under this section or was so designated within the 6-month period before the claim is filed under this section; or
>
> **(II)** in the case of an action that is refiled under this section by reason of section 1083(c)(2)(A) of the National Defense Authorization Act for Fiscal Year 2008 or is filed under this section by reason of section 1083(c)(3) of that Act, the foreign state was designated as a state sponsor of terrorism when the original action or the related action under section 1605(a)(7) (as in effect before the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) was filed;

**(ii)** the claimant or the victim was, at the time the act described in paragraph (1) occurred--

**(I)** a national of the United States;

**(II)** a member of the armed forces; or

**(III)** otherwise an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment; and

**(iii)** in a case in which the act occurred in the foreign state against which the claim has been brought, the claimant has afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration; or

**(B)** the act described in paragraph (1) is related to Case Number 1:00CV03110 (EGS) in the United States District Court for the District of Columbia.

**(b) Limitations.**--An action may be brought or maintained under this section if the action is commenced, or a related action was commenced under section 1605(a)(7) (before the date of the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) not later than the latter of--

**(1)** 10 years after April 24, 1996; or

**(2)** 10 years after the date on which the cause of action arose.

**(c) Private right of action.**--A foreign state that is or was a state sponsor of terrorism as described in subsection (a)(2)(A) (i), and any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, shall be liable to--

**(1)** a national of the United States,

**(2)** a member of the armed forces,

**(3)** an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment, or

**(4)** the legal representative of a person described in paragraph (1), (2), or (3),

for personal injury or death caused by acts described in subsection (a)(1) of that foreign state, or of an official, employee, or agent of that foreign state, for which the courts of the United States may maintain jurisdiction under this section for money damages. In any such action, damages may include economic damages, solatium, pain and suffering, and punitive damages. In any such action, a foreign state shall be vicariously liable for the acts of its officials, employees, or agents.

**(d) Additional damages.**--After an action has been brought under subsection (c), actions may also be brought for reasonably foreseeable property loss, whether insured or uninsured, third party liability, and loss claims under life and property insurance policies, by reason of the same acts on which the action under subsection (c) is based.

**(e) Special masters.**--

**(1) In general.**--The courts of the United States may appoint special masters to hear damage claims brought under this section.

**(2) Transfer of funds.**--The Attorney General shall transfer, from funds available for the program under section 1404C of the Victims of Crime Act of 1984 (42 U.S.C. 10603c), to the Administrator of the United States district court in which any case is pending which has been brought or maintained under this section such funds as may be required to cover the costs of special masters appointed under paragraph (1). Any amount paid in compensation to any such special master shall constitute an item of court costs.

**(f) Appeal.**--In an action brought under this section, appeals from orders not conclusively ending the litigation may only be taken pursuant to section 1292(b) of this title.

**(g) Property disposition.**--

**(1) In general.**--In every action filed in a United States district court in which jurisdiction is alleged

under this section, the filing of a notice of pending action pursuant to this section, to which is attached a copy of the complaint filed in the action, shall have the effect of establishing a lien of lis pendens upon any real property or tangible personal property that is--

**(A)** subject to attachment in aid of execution, or execution, under section 1610;

**(B)** located within that judicial district; and

**(C)** titled in the name of any defendant, or titled in the name of any entity controlled by any defendant if such notice contains a statement listing such controlled entity.

**(2) Notice.**--A notice of pending action pursuant to this section shall be filed by the clerk of the district court in the same manner as any pending action and shall be indexed by listing as defendants all named defendants and all entities listed as controlled by any defendant.

**(3) Enforceability.**--Liens established by reason of this subsection shall be enforceable as provided in chapter 111 of this title.

**(h) Definitions.**--For purposes of this section--

**(1)** the term "aircraft sabotage" has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation;

**(2)** the term "hostage taking" has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages;

**(3)** the term "material support or resources" has the meaning given that term in section 2339A of title 18;

**(4)** the term "armed forces" has the meaning given that term in section 101 of title 10;

**(5)** the term "national of the United States" has the meaning given that term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22));

**(6)** the term "state sponsor of terrorism" means a country the government of which the Secretary of State has determined, for purposes of section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)), section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371), section 40 of the Arms Export Control Act (22 U.S.C. 2780), or any other provision of law, is a government that has repeatedly provided support for acts of international terrorism; and

**(7)** the terms "torture" and "extrajudicial killing" have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991 (28 U.S.C. 1350 note).

**28 U.S.C.A. § 1605B**

§ 1605B. Responsibility of foreign states for international terrorism against the United States

*Appendix F*

**(a) Definition.**--In this section, the term "international terrorism"--

**(1)** has the meaning given the term in section 2331 of title 18, United States Code; and

**(2)** does not include any act of war (as defined in that section).

**(b) Responsibility of foreign states.**--A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which money damages are sought against a foreign state for physical injury to person or property or death occurring in the United States and caused by--

**(1)** an act of international terrorism in the United States; and

**(2)** a tortious act or acts of the foreign state, or of any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, regardless where the tortious act or acts of the foreign state occurred.

**(c) Claims by nationals of the United States.**--Notwithstanding section 2337(2) of title 18, a national of the United States may bring a claim against a foreign state in accordance with section 2333 of that title if the foreign state would not be immune under subsection (b).

**(d) Rule of construction.**--A foreign state shall not be subject to the jurisdiction of the courts of the United

States under subsection (b) on the basis of an omission or a tortious act or acts that constitute mere negligence.

**28 U.S.C.A. § 1606**

§ 1606. Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

**28 U.S.C.A. § 1607**

§ 1607. Counterclaims

In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim--

**(a)** for which a foreign state would not be entitled to immunity under section 1605 or 1605A of this chapter had

such claim been brought in a separate action against the foreign state; or

**(b)** arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

**(c)** to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

**28 U.S.C.A. § 1608**

§ 1608. Service; time to answer; default

**(a)** Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

**(1)** by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

**(2)** if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

**(3)** if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state,

by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

**(4)** if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services--and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

**(b)** Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

**(1)** by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

**(2)** if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

**(3)** if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state--

**(A)** as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

**(B)** by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

**(C)** as directed by order of the court consistent with the law of the place where service is to be made.

**(c)** Service shall be deemed to have been made--

**(1)** in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

**(2)** in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

**(d)** In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

**(e)** No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

**28 U.S.C. § 1609**

§ 1609. Immunity from attachment and execution of property of a foreign state

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

*Appendix F*

**28 U.S.C. § 1610**

§ 1610. Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act' if—

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property—

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: Provided, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment, or

(6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement, or

(7) the judgment relates to a claim for which the foreign state is not immune under section 1605Aor section 1605(a)(7) (as such section was in effect on January 27, 2008), regardless of whether the property is or was involved with the act upon which the claim is based.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2), (3), or (5) or 1605(b) of this chapter, regardless of whether the property is or was involved in the act upon which the claim is based, or

(3) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605A of this chapter or section 1605(a)(7) of this chapter (as such section was in effect on January 27, 2008), regardless of whether the property is or was involved in the act upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the

elapse of the period of time provided in subsection (c) of this section, if—

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

(e) The vessels of a foreign state shall not be immune from arrest in rem, interlocutory sale, and execution in actions brought to foreclose a preferred mortgage as provided in section 1605(d).

(f)(1)(A) Notwithstanding any other provision of law, including but not limited to section 208(f) of the Foreign Missions Act (22 U.S.C. 4308(f)), and except as provided in subparagraph (B), any property with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the Trading with the Enemy Act (50 U.S.C. App. 5(b)), section 620(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2370(a)), sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701-1702), or any other proclamation, order, regulation, or license issued pursuant thereto, shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign

state (including any agency or instrumentality or such state) claiming such property is not immune under section 1605(a)(7) (as in effect before the enactment of section 1605A) or section 1605A.

(B) Subparagraph (A) shall not apply if, at the time the property is expropriated or seized by the foreign state, the property has been held in title by a natural person or, if held in trust, has been held for the benefit of a natural person or persons.

(2)(A) At the request of any party in whose favor a judgment has been issued with respect to a claim for which the foreign state is not immune under section 1605(a)(7) (as in effect before the enactment of section 1605A) or section 1605A, the Secretary of the Treasury and the Secretary of State should make every effort to fully, promptly, and effectively assist any judgment creditor or any court that has issued any such judgment in identifying, locating, and executing against the property of that foreign state or any agency or instrumentality of such state.

(B) In providing such assistance, the Secretaries—

(i) may provide such information to the court under seal; and

(ii) should make every effort to provide the information in a manner sufficient to allow the court to direct the United States Marshall's office to promptly and effectively execute against that property.

(3) Waiver.--The President may waive any provision of paragraph (1) in the interest of national security.

(g) Property in certain actions.--

(1) In general.--Subject to paragraph (3), the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of—

(A) the level of economic control over the property by the government of the foreign state;

(B) whether the profits of the property go to that government;

(C) the degree to which officials of that government manage the property or otherwise control its daily affairs;

(D) whether that government is the sole beneficiary in interest of the property; or

(E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

(2) United States sovereign immunity inapplicable.--Any property of a foreign state, or agency or instrumentality of a foreign state, to which paragraph (1) applies shall not be immune from attachment in aid of execution, or execution, upon a judgment entered under section 1605A because the property is regulated by the United States Government by reason of action taken against that foreign state under the Trading With the Enemy Act or the International Emergency Economic Powers Act.

(3) Third-party joint property holders.--Nothing in this subsection shall be construed to supersede the authority of a court to prevent appropriately the impairment of an interest held by a person who is not liable in the action giving rise to a judgment in property subject to attachment in aid of execution, or execution, upon such judgment.

**28 U.S.C. § 1611**

§ 1611. Certain types of property immune from execution

(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if—

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver; or

(2) the property is, or is intended to be, used in connection with a military activity and

(A) is of a military character, or

(B) is under the control of a military authority or defense agency.

(c) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution in an action brought under section 302 of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 to the extent that the property is a facility or installation used by an accredited diplomatic mission for official purposes.

## APPENDIX G — LIST OF PETITIONERS

### LIST OF PETITIONERS

**Plaintiffs-Appellants in Havlish et al., No. 23-258 (2d Cir.)**

Donald Bane
Tara Bane
Christina Bane-Hayes
Gerald Bingham
Julia Boryczewski
Krystyna Boryczewski
Michele Boryczewski
Christopher Caproni
Dolores Caproni
Michael Caproni
Richard A. Caproni
Lisa Caproni-Brown
Alice Carpeneto
Stephen L. Cartledge
Hui-Chien Chen
FuMei Chien
Clara Chirchirillo
Livia Chirchirillo
William Coale
Frances M. Coffey
Kevin M. Coffey
Brian Collman
Charles Collman
Dwayne W. Collman
Susan Conklin
Catherine Deblieck
Benefit of Devon
Loisanne Diehl
Anne Marie Dorf
Joseph Dorf
Michelle Dorf
Morris Dorf
Robert Dorf
Corazon Femandez

*Appendix G*

Joanne Gori
Tina Grazioso
Alan Gu
Maureen Halvorson
Maureen R. Halvorson
Fiona Havlish
William Havlish
Haomin Jian
Hui-Chuan Jian
Huichun Jian
Hui-Zon Jian
Grace Kneski
Roni Levine
Jin Liu
Michael Loguidice
Teresanne Lostrangio
Joanne Lovett
Daniel D. Coffey, M.D.
George Stergiopoulos, M.D.
Ralph S. Maerz
Margaret Mauro
Ramon Melendez
Regina Maria Merwin
Patricia Milano
Ivy Moreno
Martin Panik
Christine Papasso
Marie Ann Paprocki
Grace M. Parkinson-Godshalk
Christine Barton (now Pence)
Patricia J. Perry
Marshee R. Ratchford
Rodney M. Ratchford
Rodney Ratchford
Judith Reiss
Joanne Renzi
Marie Rodak
Chelsea Nicole Rodak
John Rodak
Joyce Ann Rodak
Regina Rodak
Diane Romero

*Appendix G*

Helen Rosenthal

Loren Rosenthal

Alexander Rowe

Barry Russin

Ed Russin

Gloria Russin

Linda Sammut

Ester Santillian

Expedito Santillian

Ellen Saracini

Paul Schertzer

Pamela Schiele

Ronald S. Sloan

Raymond Doyle Smith

Brenda Sorenson

Katherine Soulas

Donald Havlish, Sr.

Mary Lynn-Anna Panik Stanley

Russa Steiner

Angela Stergiopoulos

Sandra Straub

Joan E. Tino

Doyle Raymond Ward

Michelle Wright

Joslin Zeplin

Leona Zeplin

Leonard Zeplin

Benefit of
Maranda C. Ratchford

Guardian of
Anne C. Saracini

Estate of Michael A. Bane

Estate of
Martin Boryczewski

Estate of
Michael Boryczewski

Estate of Steven Cafiero

Estate of
Richard M. Caproni

Estate of
Peter Chirchirillo

Estate of Jeffrey Coale

Estate of Daniel M. Coffey

Estate of Jason Coffey

*Appendix G*

Estate of Jeffrey Collman

Estate of Michael Diehl

Estate of Stephen Dorf

Estate of Judy Fernandez

Estate of Ronald Gamboa

Estate of
William R. Godshalk

Estate of John Grazioso

Estate of Liming Gu

Estate of
James D. Halvorson

Estate of
Donald J. Havlish, Jr.

Estate of Denis Lavelle

Estate of Robert Levine

Estate of
Joseph Lostrangio

Estate of Dorthy Mauro

Estate of Mary Melendez

Estate of Peter T. Milano

Estate of
Yvette Nichole Moreno

Estate of Brian Nunez

Estate of
Philip Paul Ognibene

Estate of
Vincent A. Ognibene

Estate of
Linda Ellen Panik

Estate of
Salvatore T. Papasso

Estate of
John William Perry

Estate of
Marsha Dianah Ratchford

Estate of
Joshua Scott Reiss

Estate of John M. Rodak

Estate of Elvin Romero

Estate of
Richard Rosenthal

Estate of
Maria Theresa Santillian

Estate of Victor Saracini

Estate of Scott Schertzer

Estate of Paul K. Sloan

Estate of
George Eric Smith

*Appendix G*

Estate of
Timothy P. Soulas

Estate of William R. Steiner

Estate of Andrew Stergiopoulos

Estate of
Edward W. Straub

Estate of Jennifer Tino

Estate of
Jeanmarie Wallendorf

Estate of Meta Waller

Estate of
Timothy Raymond Ward

**Plaintiffs-Appellants in John Does 1–7, No. 23-263 (2d Cir.)**

John Doe 1, an individual

John Doe 2, an individual

John Doe 3, an individual

John Doe 4, an individual

John Doe 5, an individual

John Doe 6, an individual

John Doe 7, an individual

**Plaintiffs-Appellants in Smith et al., No. 23- 304 (2d Cir.)**

Raymond Anthony Smith, as Administrator of the Estate of George Eric Smith, deceased.

Katherine Soulas in her own right, as Representative of the Heirs, on behalf of her minor children, and as Executrix of the Estate of Timothy Soulas, Deceased.

*Appendix G*

**Plaintiffs-Appellants in Federal Insurance Co., et al., No. 23-346 (2d Cir.)**

John Ashton

Chubb Custom Insurance Company

Chubb Indemnity Insurance Company

Chubb Insurance Company of Canada

Chubb Insurance Company of New Jersey

Federal Insurance Company

Great Northern Insurance Company

Pacific Indemnity Company

TIG Insurance Company

Vigilant Insurance Company