No. 23-568

IN THE

Supreme Court of the United States

ROBERT BARTLETT, ET AL.,

Petitioners,

v.

DR. MUHAMMAD BAASIRI AND
JAMMAL TRUST BANK SAL,

Respondents.

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

BRIEF ON BEHALF OF THE AMERICAN ASSOCIATION OF JEWISH LAWYERS AND JURISTS, AS *AMICUS CURIAE*, IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTEREST OF AMICUS[1]

The American Association of Jewish Lawyers and Jurists ("AAJLJ") is an affiliate of the International Association of Jewish Lawyers and Jurists and is open to all members of the legal profession regardless of religion. The AAJLJ's mission includes representing and furthering the human rights interests of the American Jewish community. The AAJLJ's mission statement, "Justice, Justice Shall You Pursue" (Deuteronomy 16:20), compels support for Petitioners in this case,[2] all of whom in the same manner as any party injured by terrorism deserve an opportunity to seek justice in an American court under American law.

AAJLJ has a strong interest in supporting and furthering United States policy against terrorism and efforts to confront, dismantle, and hold accountable financial institutions such as Jammal Trust Bank ("JTB"), that provides financial assistance to terrorist organizations such as the Islamic Revolutionary Guard Corps and its Lebanese affiliate, Hezbollah. Through its sophisticated financial channels, JTB has aided Hezbollah in its efforts to commit acts of terrorism that have led to the deaths of thousands of innocent civilians throughout the Middle East. Financial institutions like JTB provide the economic

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[1] No party or their counsel either: (a) authored this brief in whole or in part; or (b) made a monetary contribution intended to fund the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. All counsel of record for all parties before this Court received notice of AAJLJ's intention to file an amicus curiae brief at least 10 days prior to the due date for this amicus curiae brief and did not object to its filing. *See* Sup. Ct. R. 37.2.

[2] A complete listing of the more than 1,100 Petitioners seeking a writ of certiorari can be found in Petitioners' Petition for a Writ of Certiorari, at pp. ii – xvii.

wherewithal for terrorist organizations, like Hezbollah, to move assets used to conduct acts of terrorism and to reward the families of suicide bombers and others who are killed in furtherance of Hezbollah's hateful agenda.

AAJLJ has a strong interest in stopping terrorism financing by, among other means, ensuring that all victims of such terrorism are compensated fully. This includes the full application of the secondary liability provision of the Justice Against Sponsors of Terrorism Act ("JASTA"), Pub. L. No. 114-222, 130 Stat. 852 (September 28, 2016). Consistent with JASTA, AAJLJ supports holding terrorist organizations – and those who aid and abet them through laundering funds to finance them – responsible for their violations of human rights.

Finally, AAJLJ has an interest in precluding the misuse of the Foreign Sovereign Immunity Act, 28 U.S.C. §§ 1330, 1332, 1391(f), 1441(d), and 1602–1611 (the "FSIA"), to avoid liability for grave wrongs like JTB's. If upheld, the Second Circuit's decision will provide a blueprint for foreign nations whose private businesses are sued in American courts to simply nationalize those organizations, even if only temporarily, and invoke sovereign immunity under the FSIA. Reversing the Second Circuit's decision will restrain such conduct and further AAJLJ's pursuit of justice for all.

SUMMARY OF THE ARGUMENT IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Petitioners are more than 1,100 U.S. citizens who were injured or whose family members were killed or injured in terrorist attacks while serving in the U.S. military in Iraq. They brought suit against several private Lebanese financial institutions. The suit alleged that those institutions knowingly laundered billions of dollars for Iran's Islamic Revolutionary Guard Corps and its Lebanese proxy, Hezbollah. These groups carried out hundreds of terrorist attacks between 2004 and 2011 in an effort to drive the U.S. military out of Iraq at a devastating cost in life to American service men and women, among others. After the suit was filed and the Treasury Department identified one of the private defendants as a Specially Designated Global Terrorist, Lebanon acquired its assets. The Second Circuit rewarded this act by Lebanon by providing this SDGT with immunity from suit under FSIA. This decision contradicted Supreme Court precedent and the precedent of several Circuits. This Court should consequently grant *certiorari* and reverse.

The United States has a long history of protecting those that have been the victims of unspeakable acts. Indeed, days after 9/11, President Bush expressed the long standing policy of the United States:

> Our priority will be first to disrupt and destroy terrorist organizations of global reach and attack their leadership; command, control, and communications; material support; and finances. This will have a disabling effect upon the terrorists' ability to plan and operate.

President George W. Bush's Statement at the National Cathedral in Washington D.C. (Sept. 14, 2001) (https://georgewbush-whitehouse.archives.gov/nsc/nssall.html#:~:text=Our%20priority%20will%20be%20first,ability%20to%20plan%20and%20operate).

Although President Bush was speaking of the incomprehensible wrongs of 9/11, his statement reinforces the United States' longstanding policy that terrorist financing cannot be tolerated. *See id.* ("To defeat this threat we must make use of every tool in our arsenal—military power, better homeland defenses, law enforcement, intelligence, and *vigorous efforts to cut off terrorist financing*." (emphasis supplied). Unfortunately, terrorist atrocities continue to occur to this day, and one need only look to the October 7, 2023 massacres committed by Hamas against civilians in Israel (including many Americans) as an example. This incident resulted in the largest slaughter of Jews on one day since the Holocaust.

In 2016, with the enactment of JASTA, Congress provided a broad remedy for terrorism victims against those who aid and abet terrorists. The express purpose of JASTA is to allow litigants the "broadest possible basis … to seek relief against persons … that have provided material support, directly or indirectly" to groups like Hezbollah. Pub. L. No. 114-222, § 2(b). Under JASTA, those injured by an act of international terrorism can sue the relevant terrorists directly under § 2333(a)—or they can sue anyone "who aids and abets, by knowingly providing substantial assistance, or who conspires with the person who committed such an act of international terrorism" under § 2333(d)(2). *Twitter, Inc. v. Taamneh*, 598 U.S. 471, 483 (2023). JASTA is the foundation that allows

survivors of terrorism to pursue claims in United States Courts.

In this case, however, the Second Circuit allowed the express purpose of JASTA to be frustrated by its misapplication of the Foreign Sovereign Immunity Act. While the FSIA renders "foreign states" and their instrumentalities immune from U.S. jurisdiction, *see* 28 U.S.C. §§ 1603-1607, this Court has clearly held that the determination of whether a defendant is a foreign state must be made "at the time of the filing of the complaint." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 480 (2003); *see also Samantar v, Yousef*, 560 U.S. 305, 323-24 (2010). The District of Columbia Circuit and, previously, the Second Circuit followed *Dole Food* and held that whether a potential defendant is an instrumentality of a foreign state and so immune from jurisdiction must be made at the time of filing. *TIG Insurance Company v. Republic of Argentina*, 967 F.3d 778, 782-83 (D.C. Cir. 2020); *Abrams v. Societe Nationale des Chemins de Fer Francais*, 389 F.3d 61, 64 (2d Cir. 2004). However, the 2nd Circuit rejected this clear standard and allowed a foreign state to make an end-run around American victims' rights to be made whole simply by acquiring the assets of a JASTA defendant after litigation had been filed against it. *See Bartlett v. Baasiri*, 81 F.4th 28, 35 (2d Cir. 2023).

Certiorari is warranted here because (1) the Second Circuit's decision departs from this Court's clear holding in *Dole Food*; (2) the Second Circuit's decision conflicts with decisions from the Seventh and D.C. Circuits, (3) the Second Circuit's decision subverts the general principle that lawsuits proceed based on the facts in existence at the time a complaint is filed, and (4) the Second Circuit's decision does an injustice to the United States' policy of combatting unspeakable

wrongs through redress in our courts. If certiorari is not granted and the Second Circuit's holding remains, foreign actors will be encouraged to engage in gamesmanship to avoid justice for supporting terrorism.

ARGUMENT

I. Factual Background and Proceedings Below.

Nine months after the 1,100 terrorist victims filed this suit, the U.S. Treasury Department designated JTB, a named defendant in the suit, a Specially Designated Global Terrorist ("SDGT") pursuant to Executive Order 13224, 66 Fed. Reg. 49,079 (Sept. 23, 2001). *After* this designation, JTB entered voluntary liquidation pursuant to Lebanese law. The Central Bank of Lebanon then acquired JTB's assets and appointed Respondent Dr. Muhammad Baasiri as the liquidator. Over one year after being designated a SDGT, and multiple years after financing the terrorist actions at issue, JTB moved to dismiss the pending case on the basis that it was now (but not at filing) an instrumentality of Lebanon, under § 1603(b)(2) of the FSIA.

The District Court, relying on *Dole Food*, denied JTB's motion to dismiss, holding that FSIA immunity instrumentality status of a party is determined at the time of filing. *Bartlett v. Societe Generale de Banque au Liban SAL*, No. 19CV00007CBATAM, 2021 WL 3706909 at *8-9 (E.D.N.Y. Aug. 6, 2021), vacated and remanded sub nom. *Bartlett v. Baasiri*, 81 F.4th 28 (2d Cir. 2023). In addition to *Dole Food*, the District Court cited to other cases from this Court, such as *Keene*, where post-filing changes in a party's status could not alter the court's jurisdiction. *Id.* at *8, citing *Keene Corp. v. United States*, 508 U.S. 200, 207 (1993).

On appeal, the Second Circuit reversed. The Second Circuit rejected this Court's holding in *Dole Food*; not

only refusing to follow this Court's precedent, but also creating a sharp split from the Seventh and D.C. Circuits, both of which followed *Dole Food. See Bartlett v. Baasiri*, 81 F.4th 28, 35 (2d Cir. 2023). The Second Circuit's decision further provided a roadmap for foreign states to circumvent the American judicial system by unilaterally nationalizing any corporation named as defendant in an American court.

On November 22, 2023, Petitioners filed their Petition for Writ of Certiorari to this Court. For the reasons articulated herein, this Court should grant certiorari and reverse the Second Circuit's erroneous decision.

II. JASTA and the FSIA.

JASTA's express purpose is to "provide civil litigants with the broadest possible basis, consistent with the Constitution of the United States, to seek relief against persons, entities, and foreign countries, wherever acting and wherever they may be found, that have provided material support, directly or indirectly, to foreign organizations or persons that engage in terrorist activities against the United States." Pub. L. No. 114-222, § 2(b); *Atchley v. AstraZeneca UK Limited*, 22 F.4th 204, 215 (D.C. Cir. 2022); *Kaplan v. Lebanese Canadian Bank, SAL*, 999 F.3d 842, 855 (2d Cir. 2021).

The FSIA, enacted in 1976, governs how claims of foreign states to immunity are decided by U.S. Courts by providing U.S. District Courts with original jurisdiction over civil suits against a foreign state for claims to which the state is not immune. The goal of the FSIA was to replace the old system, where the court would consult with and defer to the State Department on an ad hoc basis, and where immunity

was often only granted to suits against friendly foreign states.[3] Consequently, FSIA transferred "primary responsibility for immunity determinations from the Executive to the Judicial Branch." *Republic of Austria v. Altmann*, 541 U.S. 677, 691 (2004); *see* 28 U.S.C. § 1602.

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 FSIA. *Id*. at § 1604. Thus, if a defendant is a "foreign state" within the meaning of FSIA, then the defendant is immune from jurisdiction unless one of the exceptions in FSIA applies. *See id*. at §§ 1605–1607 (enumerating exceptions).

FSIA, if it applies, is the "sole basis for obtaining jurisdiction over a foreign state in federal court." *Argentine Republic v. Amerada Hess Shipping Corp*., 488 U.S. 428, 439 (1989). The Act defines "foreign state" as follows:

> (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).
>
> (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

[3] FSIA codified the principles set forth in the State Department's 1952 "Tate Letter," which suggested a restrictive theory of sovereign immunity where the immunity only shields a foreign sovereign's public, noncommercial acts.

> 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.

III. The Second Circuit's Decision Disregards this Court's Clear Precedent from *Dole Food*.

In *Dole Food*, this Court held that instrumentality status for purposes of FSIA sovereign immunity is "determined at the time suit is filed." 538 U.S. at 478. As this Court observed, the plain text of the FSIA mandates this time-of-filing determination. *Id.* In *Dole Food*, a group of farm workers sued the Dole Food Company (among other related companies) for injuries they incurred as a result of exposure to an agricultural pesticide while working for Dole in Costa Rica, Ecuador, Guatemala, and Panama. *Id*. at 471. Dole impleaded two other companies, Dead Sea Bromine Co., Ltd. and Bromine Compounds, Ltd. (the "Dead Sea Companies"). *Id*. The Dead Sea Companies moved to remove the case to federal court pursuant to the FSIA on the grounds that at the time of their alleged involvement with Dole, they were instrumentalities of the State of Israel (though that was no longer the case by the time suit was filed). *Id*. at 472. The district court granted the Dead Sea Companies' removal request, the Ninth Circuit reversed, and this Court accepted the case on writ of certiorari.

This Court held that while the Dead Sea Companies were instrumentalities of the State of Israel at the

time of their alleged wrongdoing, because the State of Israel had divested itself of any interest in the Dead Sea Companies by the time the lawsuit was filed, the Dead Sea Companies were not entitled to the jurisdictional immunities of the FSIA. *Id*. at 478. Looking to the text of the FSIA, this Court unequivocally held:

> To be entitled to removal under § 1441(d), the Dead Sea Companies must show that they are entities "a majority of whose shares or other ownership interest is owned by a foreign state." § 1603(b)(2) [of the FSIA]. We think the plain text of this provision, because it is expressed in the present tense, requires that *instrumentality status be determined at the time suit is filed.*

Id (emphasis supplied.). Citing *Keene Corp. v United States,* this Court held that its analysis was consistent with the "longstanding principle that 'the jurisdiction of the Court depends upon the state of things at the time of the action brought.'" *Id.* quoting *Keene Corp. v. United States*, 508 U.S. 200, 207 (1993). This Court therefore concluded that because the Dead Sea Companies were not instrumentalities of the State of Israel at the time that the action was commenced, they were not to be considered foreign state instrumentalities under the FSIA and not entitled to claim immunity. *Dole Food*, 538 U.S. at 480.

The District Court in this case, applying *Dole Food* as it was bound to do, properly held that JTB could not claim sovereign immunity because it was not an instrumentality of a foreign sovereign at the time that Petitioners filed their complaint against it and did not obtain instrumentality status until over a year after this action was commenced. *Bartlett*, 2021 WL 3706909 at *9. It therefore denied JTB's Rule 12(b)(1)

motion to dismiss. *Id.* The Second Circuit, however, contrary to this Court's holding in *Dole Food*, reversed, issuing the first and only decision holding that FSIA instrumentality status may change mid-suit and that a later unilateral act by a foreign state divests the United States Courts of jurisdiction. *Bartlett*, 81 F.4th at 35. That decision was error.

First, the Second Circuit concluded that this Court's holding in *Dole Food* did not mean what it said, writing: "The plaintiffs object that *Dole Food* gave us a clear rule, and as a lower court, we are bound by it. But opinions are not statutes. They should not be read as if they were." *Id.* But this is not a matter of applying canons of construction to parse complicated language. The rule set out in *Dole Food* was clear and explicit. *E.g. Abrams v. Societe Nationale des Chemins*, 389 F.3d 61, 64 (2d Cir. 2003) (describing the *Dole Food* holding as unequivocal). The Second Circuit's decision to disregard an unequivocal holding from this Court merits review and reversal.

Second, the Second Circuit's rationale for deviating from this Court's clear precedent lacks merit. Indeed, despite this Court's clear direction in *Dole Food* that FSIA "instrumentality status be determined at the time suit is filed,"[4] the Second Circuit characterized this Court's holding as only applicable when an entity loses instrumentality status before suit is filed – not when it is not an instrumentality as of filing but gains that status afterwards. As set forth below, other Circuits – in the same FSIA context – have properly

[4] *See Dole Foods v. Patrickson*, 538 U.S. 468, 478 (2003).

applied *Dole Food* to reject this counterintuitive approach.[5]

If anything, the defendant in *Dole Food* had the better claim to sovereign immunity than JTB does here, because it was acting as a sovereign instrumentality when it committed the alleged conduct at issue. JTB, however, was acting as a private, commercial entity when it allegedly performed the injurious conduct (financing the killing of innocent civilians) and was a private entity when sued, and should have fully anticipated facing suit and having to defend its actions in the United States.

The Second Circuit's decision goes against not only what this Court has expressly held, but also what the legislature expressly stated in the FSIA. Accordingly, this Court should grant review and reverse the Second Circuit's decision.

IV. The Second Circuit's Decision Creates a Circuit Split.

Following *Dole Food*, the Seventh and D.C. Circuits held that FSIA immunity status must be determined—and is thereby fixed for the remainder of the case—at the time that the complaint at issue is filed. Instead of following these Circuits (not to mention this Court in *Dole Food*), the Second Circuit chose to split from its sister circuits and this Court and chart its own course of FSIA jurisprudence whereby post-filing changes in a foreign entity's sovereign

[5] The Second Circuit's reliance on *Beaty* is misplaced. In *Beaty*, the intervening event which gave rise to immunity was the passage of a federal statute giving the President the right to waive immunity, which he subsequently did. *Republic of Iraq v. Beaty*, 556 U.S. 848 (2009).

status can invoke FSIA sovereign immunity at any time.

In *TIG Insurance v. Republic of Argentina*, the D.C. Circuit analyzed whether the Republic of Argentina could claim FSIA immunity status over a piece of property in Washington, D.C. 967 F.3d 778, 782-83 (D.C. Cir. 2020). The FSIA allows a foreign sovereign to assert immunity over real property if the property at issue is not used for commercial purposes. *Id*. at 781. Like in *Dole Food*, this required the D.C. Circuit to set a point in time at which the property's use would be evaluated. Following *Dole Food*—as it was bound to do—the D.C. Circuit held that "a statute's use of the present tense ordinarily refers to the time the suit is filed, not the time the court rules." *Id*. at 783. Accordingly, because the property at issue was used for commercial purposes at the time that the complaint was filed, FSIA immunity did not apply – even though Argentina ceased the commercial use of the property after suit was filed. *Id*. at 785. The court reasoned that such analysis is logical because litigation "proceeds based on facts as alleged in a complaint," and that should be the temporal touchstone for a case. *Id.*

Similarly, the Seventh Circuit in *Olympia Express v. Linee Aeree Italiane S.P.A.*, held that the facts in existence at the time of filing dictate whether a party is entitled to make a jury demand under the FSIA. 509 F.3d 347, 349 (7th Cir. 2007). In that case, the plaintiffs sued the defendant entity in Illinois state court at a time when the Italian government was its majority shareholder. *Id*. at 348. This made the defendant a foreign-government instrumentality under the FSIA and, therefore, entitled defendant to removal to federal court and trial without a jury. *Id*.

After the case was removed, the Italian government sold its majority interest in the defendant, following which defendant demanded a jury trial. *Id*. The district court agreed to the jury demand and the plaintiffs appealed. *Id*. at 348-49. On appeal, the Seventh Circuit reversed and held that the post-filing divestiture could not entitle the defendant to a jury demand. *Id*. at 349. Citing *Dole Food* and another decision from this Court, *Grupo Dataflux v. Atlas Global Group, L.P.*, the Seventh Circuit noted that:

> [J]urisdiction is determined by the facts that exist when suit is filed. It would be a big surprise to discover that the Court has changed its mind and now thinks that jurisdiction under the [FSIA] is determined when a party demands a jury trial—in this case, demands it years after the suit was first removed to the federal court under section 1441(d).

Olympia Express, 509 F.3d at 349, citing *Dole Food*, 538 U.S. at 478, and *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567 (2004).

With its decision in this case, the Second Circuit split from the D.C. and Seventh Circuit decisions. Addressing *TIG Insurance*, the Second Circuit rejected the D.C. Circuit's analysis regarding instrumentality status, and instead held that the statute should be read to confer foreign sovereign immunity even when the defendant gains its sovereign status mid-suit. *Bartlett v. Baasiri*, 81 F.4th at 33. What is missing from the Second Circuit's discussion of *TIG Insurance*, however, is any rational reasoning for the departure. Indeed, the Second Circuit merely concluded—with little to no analysis at all—that the holding of *TIG Insurance* did not apply because the concerns over a property's commercial use are not present here. *Id.* at

36. Like its interpretation of *Dole Food*, the Second Circuit's interpretation of the force and effect of *TIG Insurance* is unreasonably narrow. The Second Circuit consigned *Olympia Express* to a footnote, suggesting it rejected the reasoning of *Matton v. British Airways Board, Inc.*[6]—an unpublished decision from the Southern District of New York that pre-dated *Dole Food*. *Id*. at 31, n.3. Moreover, permitting a post filing change to confirm immunity, as the Second Circuit did, is illogical as post filing changes are done when the involved foreign state *knows* of the need to immunize a party.

Accordingly, this Court should grant Petitioners' Petition for Writ of Certiorari and accept this case on the merits so that it can reaffirm its prior decision in *Dole Food* and reestablish uniformity among the Circuits in terms of the time at which FSIA instrumentality status is to be determined.

V. The Second Circuit's Decision Upends Established Legal Principles Dictating that the Circumstances in Existence at the Time of Filing Control.

Separate and apart from the fact that the Second Circuit's decision disregarded this Court's holding in *Dole Food* and created a split of authority among the Circuits—which alone warrants this Court's review[7]—the Second Circuit's decision also departed from the established principle that the circumstances in existence at the time a complaint is filed control various components of the case. Indeed, in finding that FSIA instrumentality status may be evaluated and

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[6] No. 85-cv-1268, 1988 WL 117456 (S.D.N.Y. Oct. 27, 1988).

[7] U.S. Sup. Ct. R. 10.

determined at any time over the course of a lawsuit, the Second Circuit turned on its head the established principle that it is the facts in existence at the time a complaint is filed that dictate jurisdictional and other details of how that case will proceed.

In numerous instances, this Court and the various Circuit courts have held that federal jurisdiction is based on the facts in existence at the time the action is filed, regardless of any subsequent facts that may come into existence later. In *Lujan v. Defenders of Wildlife*, for instance, this Court—addressing several environmental groups' standing to sue the Secretary of the Interior related to his enforcement of the Endangered Species Act—held that because the plaintiffs could not alleged that they had suffered an "injury in fact" at the time their complaint was filed, plaintiffs had no standing to sue. 504 U.S. 555, 576 (1992). Citing its prior decision in *Newman–Green, Inc. v. Alfonzo–Larrain*, the *Lujan* Court stated that "[t]he existence of federal jurisdiction ordinarily depends on the facts as they exist when the complaint is filed." 490 U.S. 826, 830 (1989). *Lujan*, 504 U.S. at 569 n.4.

Similarly, the Federal Circuit has held that a plaintiff's post-filing acquisition of certain patents and trademarks could not create standing to sue under the Lanham Act where the plaintiff did not own the patents and trademarks at the time of filing. *Gaia Technologies, Inc. v. Reconversion Technologies, Inc.*, 93 F.3d 774, 789-80 (Fed. Cir. 1996). Citing this Court's holding in *Minneapolis & St. Louis R.R. Co. v. Peoria & Pekin Union Ry. Co.*, for the proposition that "[t]he jurisdiction of the lower court depends upon the state of things existing at the time the suit was brought[,]" the Federal Circuit held that a post-filing

assignment to plaintiff of those very patents and trademarks which plaintiff did not own at the time of filing but would come to own under the assignment could not remedy plaintiff's standing deficiency at the time of filing its complaint. 270 U.S. 580, 586, (1926). *Gaia Technologies*, 93 F.3d at 780. The post-filing assignment agreement was "not sufficient to confer standing on Gaia retroactively[]" and could not change the circumstances in existence at the time of filing. *Id*. at 779.

Applying this same reasoning, the Fifth, Eleventh, and Federal Circuits have enforced the time-of-filing rule to determine a party's standing to sue. *See Neutron Depot, LLC v. Bankrate, Inc*., 798 Fed. App'x 803, 809-807 (5th Cir. 2020) (holding that plaintiff who did not own trademark at time of filing could not sue for trademark infringement even if plaintiff later came into ownership of the mark); *see also GAF Building Materials Corp. v. Elk Corp. of Dallas*, 90 F.3d 479, 483 (Fed. Cir. 1996) ("[L]ater events may not create jurisdiction where none existed at the time of filing[.]"). Rather, as if criticizing the Second Circuit's decision here, the Federal Circuit, years ago, stated that "[t]he presence *or absence of jurisdiction* must be determined on the facts existing at the time the complaint under consideration was filed." *GAF*, 90 F. 3d at 483 (internal citations omitted) (emphasis supplied); *see also Kennedy v. Solano*, 735 Fed. App'x 653, 655 (11th Cir. 2018) (post-filing facts could not cure jurisdictional defects in complaint because "courts determine standing at the time of filing").

Aside from enforcing the time-of filing rule for standing purposes, courts also look to the time of filing when determining if the amount in controversy threshold of diversity jurisdiction has been satisfied,

as the pleader must allege that at the time of filing their complaint the amount in controversy exceeds the sum or value of $75,000, exclusive of interest and costs. 28 U.S.C. § 1332; *Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743, 1748 (2019). This Court in *Home Depot* concluded that defendants' rights to remove a class-action proceeding to federal court inhered only in original defendants named in the complaint (*i.e.*, defendants who qualified at the time the complaint was filed), not subsequently-added counterclaim or third-party defendants. *Id*. And a plaintiff filing a purported class action must allege that at the time the complaint is filed the class meets the numerosity, typicality, and adequacy of representation requirements of Federal Rule of Civil Procedure 23.

It would defy these settled time-of-filing principles to permit post-filing actions to alter the jurisdiction of the courts, thereby giving litigants and sympathetic foreign nations unprecedented authority to stop litigation in the United States and frustrate justice. Indeed, our courts would never allow a party intending to invoke a federal court's jurisdiction on the basis that although it lacked standing (or other jurisdictional prerequisite) at the time of filing, it had the potential to remedy that deficiency at some uncertain time in the future. Similarly, the courts should not, as did the Second Circuit, permit a third party to unilaterally act to divest the court of jurisdiction that was present at the time of filing. The same should be true for alleging and establishing FSIA instrumentality status and the corresponding immunity it provides.

VI. The Question Presented is Important and Requires this Court's Review.

Congress promulgated the FSIA to "serve the interests of justice and [to] protect the rights of both foreign states and litigants in United States courts". 28 U.S.C. § 1602. But the Second Circuit set aside the interests of justice and U.S. litigants and, by determining JTB's instrumentality status post-filing for immunity purposes, allowed a bad actor to cloak itself in the immunity of a foreign sovereign and thus preclude American citizens from litigating their claims in United States courts. The result is a designated SDGT receiving a jurisdictional windfall in the form of sovereign immunity in direct contradiction of the purposes of JASTA.

Should the Second Circuit's decision be allowed to stand, the consequences would cut deeper than a circuit split. The Second Circuit's decision provides a roadmap for foreign sovereign powers to circumvent the United States courts and system of justice. Foreign powers that are not aligned with the United States need only nationalize, after suit is filed, an entity funding terrorist organizations (or engaged in any other wrong justiciable in American court) to evade judicial review, and bad actors facing U.S. litigation may use similar schemes to avoid compensating victims.[8] Nationalization need not even be permanent; it could be temporary for the sole purpose of evading a lawsuit. Such a process runs afoul of the FSIA's

[8] The Second Circuit concluded without explanation that JTB did not engage in gamesmanship but was forced into liquidation by being designated as a SDGT. Regardless of the merit of this finding, the rule that if a defendant becomes an instrumentality after suit is filed against it, it is immune from that suit, would invite gamesmanship in a variety of future cases.

purpose as it would deprive American litigants of their rights under the statute.

Accepting this case on the merits and ultimately reversing the Second Circuit's decision would also bolster this Court's commitment to discouraging the use of gamesmanship. Indeed, this Court recently overturned another Second Circuit decision on the grounds that it created room for gamesmanship by foreign actors. In *Animal Science Products v. Hebei Welcome Pharmaceutical Co.*, this court overturned a Second Circuit decision on the basis that the Second Circuit was overly deferential to Chinese companies accused of price fixing. 138 S. Ct. 1865 (2018). The Second Circuit held that because the foreign state had provided a reasonable interpretation of its own laws, the court was "bound to defer to those statements" regardless of evidence to the contrary of such statement. *Id.* at 1872. In overturning the Second Circuit's decision, this Court held that such a rule would incentivize gamesmanship. The same rationale is even more pressing here, where the Second Circuit has permitted foreign gamesmanship to curtail the reach of a national security statute like JASTA. This warrants this Court's review on the merits.

CONCLUSION

For the above reasons, this Court should grant certiorari and reverse the decision of the Second Circuit vacating the Eastern District of New York's decision denying Respondents' Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1).

Respectfully submitted,

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