No. 16-827

In The Supreme Court of the United States

ALAVI FOUNDATION and
650 FIFTH AVENUE COMPANY,

Petitioners,

v.

JASON KIRSCHENBAUM, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Section 1603(b) of the Foreign Sovereign Immunities Act of 1976 ("FSIA"), Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended at 28 U.S.C. §§ 1602 *et seq.*), 28 U.S.C. § 1603(b), defines the term "agency or instrumentality of a foreign state." Section 201 of the Terrorism Risk Insurance Act of 2002 ("TRIA"), Pub. L. No. 107-297, § 201, 116 Stat. 2322, 2337 (reproduced at 28 U.S.C. § 1610 Note), applies to, *inter alia*, "agencies or instrumentalities of [a] terrorist party," and the term "terrorist party" is defined in TRIA to include "a terrorist, a terrorist organization (as defined in . . . the Immigration and Nationality Act . . . , or a foreign state designated as a state sponsor of terrorism under[, *inter alia*,] section 6(j) of the Export Administration Act of 1979 . . .)."

The question presented is whether § 1603(b)'s definition of "agency or instrumentality of a foreign state" applies to TRIA's use of the phrase "agency or instrumentality of [a] terrorist party."

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BRIEF IN OPPOSITION

Respondents Jason Kirschenbaum, *et al.*, respectfully submit that the petition for writ of certiorari filed by Petitioners Alavi Foundation and the 650 Fifth Avenue Company should be denied.

OPINIONS BELOW

The opinion of the court of appeals is reported at 830 F.3d 107 (2d Cir. 2016). Pet. App. 1a-76a. The opinions of the United States District Court for the Southern District of New York are unofficially reported at *In re 650 Fifth Ave. & Related Props.*, No. 08 Civ. 10934, 2014 WL 1284494 (S.D.N.Y. Mar. 28, 2014) (Pet. App. 158a-238a), and *In re 650 Fifth Ave. & Related Props.*, No. 08 Civ. 10934, 2014 WL 1516328 (S.D.N.Y. Apr. 18, 2014) (Pet. App. 77a-157a).

JURISDICTION

The opinion of the court of appeals was entered on July 20, 2016. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This Court should deny certiorari because there is no circuit split to resolve and the lower courts have not yet had an opportunity to apply the legal test for

"agency or instrumentality of [a] terrorist party" announced in the opinion Petitioners ask the Court to review. Petitioners strain to create a circuit split between the Second Circuit, on the one hand, and the Eleventh and Ninth Circuits, on the other, by cherry-picking one or two words from opinions and casting them as inapposite to the Second Circuit's opinion here. There is no circuit split. Contrary to Petitioners' suggestion, the Second Circuit *agreed with* the Eleventh Circuit on the question presented – whether § 1603(b)'s "agency or instrumentality of a foreign state" definition applied to TRIA – and the Ninth Circuit has never addressed that particular issue. Petitioners' reliance on a handful of district court cases to bolster its claim of a split in authority is equally unavailing for the same reason – none of those courts were confronted with the question presented in the petition.

Further, Petitioners' attempt to justify certiorari review at this stage in the proceeding because of a number of hypothetical concerns over the potential reach of the Second Circuit's definition is premature. The Second Circuit announced the definition in the opinion below, but the district court has not yet been given an opportunity to apply that standard. Instead, the Second Circuit remanded the case to the district court to resolve the factual disputes it identified in the opinion *and*, importantly, to delineate the proper scope of the standard in the first instance, *e.g.*, to determine what (if any) knowledge requirement must be met to satisfy the definition and to determine if any defenses are available. Accordingly, this Court should allow the

lower courts an opportunity to resolve these issues in the first instance before deciding whether they require certiorari review.

The petition for a writ of certiorari should be denied.

I. STATUTORY FRAMEWORK

A. The FSIA

Congress originally enacted the FSIA in 1976 to establish "when and how parties can maintain a lawsuit against a foreign state or its entities in the courts of the United States and to provide when a foreign state is entitled to sovereign immunity." H.R. Rep. No. 94-1487, at 6 (Sept. 9, 1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6604. Congress defined the term "foreign state" to "include a political subdivision of a foreign state or an agency or instrumentality of a foreign state." 28 U.S.C. § 1603(a). It also defined the term "agency or instrumentality of a foreign state" to mean:

> 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.

Id. § 1603(b).

Under the FSIA, foreign states are "immune from the jurisdiction of the courts of the United States and of the States except as provided in [28 U.S.C. §§ 1605 through 1607]." *Id.* § 1604. Sections 1605 through 1607, in turn, provide exceptions to the immunity conferred by the FSIA and, therefore, delineate the circumstances under which a foreign state can be sued in the United States. *See, e.g.*, *id.* § 1605(a)(1). Further, the FSIA also confers on foreign states "immun[ity] from attachment arrest and execution" unless an exception to such immunity is provided for in §§ 1610 and 1611 of the FSIA. *Id.* § 1609; *see also Walters v. Indus. & Commercial Bank of China Ltd.*, 651 F.3d 280, 286-88 (2d Cir. 2011) (detailing the two types of immunity conferred by the FSIA).

In 1996, as part of the Antiterrorism and Effective Death Penalty Act of 1996, § 221, Pub. L. No. 104-132, 110 Stat. 1214, Congress enacted the first of the so-called "terrorism exceptions" to foreign sovereign immunity. First, in § 1605(a)(7), Congress abrogated a foreign state's jurisdictional immunity from claims seeking money damages for "personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, [or] hostage taking," provided that the foreign state was designated "as a state sponsor of terrorism . . . at the time the act occurred" or

so-designated later "as a result of [the] act."[1] Second, in § 1610(b), Congress created exceptions to a foreign state's immunity from attachment for judgments arising from § 1605(a)(7).

Victims who obtained judgments against Iran under § 1605(a)(7)'s terrorism exception to jurisdictional immunity, however, faced "a number of practical, legal, and political obstacles" that "made it all but impossible . . . to enforce" their judgments. *In re Islamic Republic of Iran Terrorism Litig.*, 659 F. Supp. 2d 31, 49 (D.D.C. 2009). Iran has very few assets located within the United States and those assets that are located here are "subject to a dizzying array of statutory and regulatory authorities" in part "because of the increasing hostility in the relationship between Iran and the United States in the wake of the hostage crisis and the continuous designation of Iran as a state sponsor of terrorism since 1984." *Id.* at 52. Thus, although victims of terrorism were able to obtain large damage awards against Iran, they were often unable to execute on those judgments against property owned by Iran. *See id.* at 52-53.

B. TRIA

Starting in 1998, Congress began to address terrorism victims' inability to execute on their judgments by enacting a series of statutes, including TRIA, the

[1] Section 1605(a)(7) was subsequently repealed and replaced with 28 U.S.C. § 1605A. *See* National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 3, § 1083.

statute at issue here, in 2002. Section 201(a) of TRIA provides:

> 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 section 1605A or 1605(a)(7) . . . , 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.

28 U.S.C. § 1610 Note. By its plain terms, TRIA applies to "terrorist part[ies]"; it does not expressly apply to "foreign states" or "agencies or instrumentalities of foreign states" (as those terms are used in the FSIA). Under TRIA, "[t]he term 'terrorist party' means a terrorist, a terrorist organization (as defined in . . . the Immigration and Nationality Act . . . , or a foreign state designated as a state sponsor of terrorism under[, *inter alia*,] section 6(j) of the Export Administration Act of 1979 . . .)." Iran has been designated a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 since January 23, 1984 because it "has repeatedly provided support for acts of international terrorism," and is, therefore, a "terrorist party" under TRIA. 49 Fed. Reg. 2836 (Jan. 23, 1984); *see also* 50 U.S.C.A. § 4605(j).

With TRIA, Congress sought "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." 148 Cong. Rec. S11524, at S11528 (Nov. 19, 2002) (statement of Sen. Harkin). The legislative history accompanying the passage of § 201(a) of TRIA makes clear that Congress intended the statute to punish and deter terrorists and, therefore, to broadly reach all property interests in the United States held by terrorist parties. *See id.* ("[T]his title establishes, once and for all, that [judgments issued to victims of terrorism] are to be enforced against *any assets* available in the U.S.") (emphasis added); 148 Cong. Rec. H6131, at H6134 (Sept. 10, 2002) (statement of Rep. Cannon) ("The provision in this bill today will allow access to the frozen assets of terrorists, terrorist organizations and terrorist-sponsored states, and American victims of international terrorism who obtain judgments against those terrorists."); *id.* at H6136 (statement of Rep. Baker) ("Using terrorists' assets to compensate victims punishes terrorists and deters future acts of violence, hopefully; maybe, may not, but whether it does or does not, we want them to pay for what they have done. Terrorist states and organizations should not go unpunished for murdering innocent Americans.").

II. PROCEEDINGS BELOW

A. Proceedings in the District Court

Respondents are all United States citizens or representatives of their estates who hold unsatisfied money judgments entered against Iran pursuant to the FSIA's terrorism exception to immunity from suit, 28 U.S.C. §§ 1605A and 1605(a)(7). Among the many murderous acts of terrorism that gave rise to these judgments were the terrorist attacks on the Marine barracks in Beirut, Lebanon, in 1983, the United States military base in Dhahran, Saudi Arabia, in 1996, and the World Trade Center and Pentagon on September 11, 2001. In each of their respective cases, Respondents proved by "evidence satisfactory to the court," as required by 28 U.S.C. § 1608(e), that Iran was liable for the terrorist acts that injured them or took the lives of their loved ones. Although Iran does not dispute the evidence against it or the validity of the judgments, it refuses to satisfy the judgments entered against it. Combined, Respondents' uncollected judgments amount to well over $3 billion in compensatory damages alone.

Petitioners Alavi Foundation ("Alavi") and 650 Fifth Avenue Company (the "Fifth Avenue Company" and, together with Alavi, "Petitioners") are a New York not-for-profit corporation and a New York partnership, respectively. Pet. App. 22a-23a. The Fifth Avenue Company's main asset is the land and building (a multi-story skyscraper) located at 650 Fifth Avenue, New York, New York (the "Building"). *Id.* at 23a-24a. Its

partners are Alavi (60%) and defendant Assa Corporation (40%). *Id.* Alavi is the manager partner of the Fifth Avenue Company and oversees management of the Building on behalf of itself and Assa Corporation. *Id.* Alavi also has significant ties to the Government of Iran, as well as to Bank Melli, which is Iran's largest bank and 100% owned by the Government of Iran. Through directives issued from the Supreme Leader of Iran, the Iranian Ambassador to the United Nations, and others, the Government of Iran has, for example, dictated the composition of Alavi's board and instructed Alavi on how to act. *Id.* at 24a-25a. Assa Corporation is a New York corporation owned by Assa Company Limited (collectively referred to as the "Assa Entities"). The Assa Entities are front companies for Bank Melli. *Id.* at 23a-24a.

On October 25, 2007, the United States Department of the Treasury, Office of Foreign Assets Control ("OFAC"), acting pursuant to Executive Order 13,382 of June 28, 2005, added Bank Melli to the list of Specially Designated Nationals subject to sanctions because of Bank Melli's role in Iran's systematic proliferation of weapons of mass destruction. *See* 72 Fed. Reg. 62,520 (Nov. 5, 2007); *see also* Press Release, U.S. Dep't of the Treasury, *Fact Sheet: Designation of Iranian Entities and Individuals for Proliferation Activities and Support for Terrorism* (Oct. 25, 2007), www.treasury.gov/press-center/press-releases/Pages/hp644.aspx ("Through its role as a financial conduit, Bank Melli has facilitated numerous purchases of sensitive materials for Iran's nuclear and missile

programs."). Then, on December 17, 2008, again acting pursuant to Executive Order 13,382, OFAC added the Assa Entities to the list of Specially Designated Nationals because the Assa Entities were "being controlled by, and [were] acting for or on behalf of, Iran's Bank Melli, and for having provided financial support for, or services in support of, Bank Melli." Press Release, U.S. Dep't of the Treasury, *Treasury Designates Bank Melli Front Company in New York City* (Dec. 17, 2008), www.treasury.gov/press-center/press-release/Pages/hp1330.aspx; *see also* 73 Fed. Reg. 80,513, 80,514 (Dec. 31, 2008).[2]

Also on December 17, 2008, the U.S. Government commenced a civil forfeiture action seeking forfeiture of property owned by the Assa Entities, including the Assa Entities' interest in the Building as a 40% partner in the Fifth Avenue Company. The Government later amended its complaint to include property owned by Alavi and the Fifth Avenue Company, including the Building itself. One week after the Government filed

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[2] Bank Melli and the Assa Entities were removed from the list of Specially Designated Nationals as part of the Joint Comprehensive Plan of Action between, *inter alia*, the United States and Iran; however, as the Second Circuit noted in its opinion, "individuals and entities meeting the definition of the Government of Iran or an Iranian financial institution, . . . remain persons whose property and interests in property are blocked pursuant to Executive Order 13,599 and [31 C.F.R.] § 560.211." Pet. App. 68a (internal quotation marks omitted); *see also* 31 C.F.R. § 515.402 (removal from Specially Designated Nationals list "shall not unless otherwise specifically provided be deemed to affect . . . any suit or proceeding had or commenced in any civil or criminal case, prior to such amendment, modification, or revocation").

its initial forfeiture complaint, Respondents Steven M. Greenbaum, *et al.*, commenced an action against the Assa Entities, Alavi, and the Fifth Avenue Company seeking turnover of the Building, as well as the other defendant properties identified in the civil forfeiture action, as Iranian-owned property. In the years following December 2008, the other Respondents, along with other judgment creditors of Iran, filed their own complaints seeking turnover of some or all of the same property. The Government alleged that Alavi, the Fifth Avenue Company, and the Assa Entities violated the International Emergency Economic Powers Act ("IEEPA"), Pub. L. No. 95-223, 91 Stat. 1626 *et seq.* (codified at 50 U.S.C. §§ 1701 *et seq.*), and engaged in multiple money laundering violations through their illegal management of the Building for Bank Melli's benefit and through their illegal funneling of proceeds from the Building to Bank Melli in Iran. Respondents' individual complaints were based on the same allegations.

The district court consolidated the Government's civil forfeiture action and the private turnover actions for pre-trial purposes and thereafter for trial as well. SDNY Dkt. No. 108, 370.[3] Prior to the start of the consolidated trial, in two separate Decisions and Orders, the district court granted summary judgment to the Government and the private judgment creditors, including Respondents, and against Alavi, the Fifth Avenue Company, and the Assa Entities. The district

[3] References to "SDNY Dkt. No. ___" refer to documents filed on the electronic docket of *In re 650 Fifth Ave. & Related Properties*, 08 Civ. 10934, in the Southern District of New York.

court thereafter entered final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure against Alavi and the Fifth Avenue Company.[4]

B. The Second Circuit's Decisions

In two separate opinions, the Second Circuit vacated and remanded the district court's grant of summary judgment in favor of the Government, *see In re 650 Fifth Ave. & Related Props.*, 830 F.3d 66 (2d Cir. 2016), and its grant of summary judgment in favor of Respondents, *see Kirschenbaum v. 650 Fifth Ave. & Related Props.*, 830 F.3d 107 (2d Cir. 2016) (Pet. App. 1a-76a). In the Government's case, the Second Circuit held, as a matter of law, that Bank Melli (and, therefore, Iran) owned and controlled the Assa Entities. *See In re 650 Fifth Ave. & Related Props.*, 830 F.3d at 89-93. Nevertheless, the court of appeals determined that there were disputed issues of material fact as to whether Alavi knew of Bank Melli's ownership and control of the Assa Entities after 1995, when it became illegal to provide services to Bank Melli, and that there were, therefore, triable issues of fact as to whether Petitioners violated IEEPA. *See id.* at 93-95. Similarly, because the Government's money laundering claims were based on Petitioners' IEEPA violations, the court of appeals likewise determined that factual disputes prevented those claims from being determined on summary judgment. *See id.* at 95-96. Accordingly, the

[4] The Assa Entities did not request an entry of final judgment and were not parties to Petitioners' subsequent appeal.

Second Circuit remanded the case to the district court to, *inter alia*, hold a trial to determine whether Alavi and the Fifth Avenue Company knew of Bank Melli's continued ownership and control of the Assa Entities after 1995 and, therefore, violated IEEPA and engaged in money laundering violations. *Id.* at 106-07. That trial is currently scheduled to begin on May 30, 2017. *See, e.g.*, SDNY Dkt. No. 1400.

In Respondents' case, the Second Circuit reaffirmed its conclusion that, as a matter of law, "Bank Melli has owned the [Assa E]ntities since their creation." Pet. App. 24a. The court of appeals, however, held that neither Alavi nor the Fifth Avenue Company could be deemed a "foreign state" (Iran) or an "agency or instrumentality of a foreign state" as those terms are defined in the FSIA. Pet. App. 33a-51a. For its "agency or instrumentality of a foreign state" ruling, the court of appeals relied on the fact that Alavi and the Fifth Avenue Company were both created under New York law and, therefore, failed to satisfy 28 U.S.C. § 1603(b)(3)'s requirement that agencies or instrumentalities not be, *inter alia*, "citizen[s] of a State of the United States."[5]

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[5] As to the Fifth Avenue Company, the Second Circuit noted that it was not, in the words of the statute, "a citizen of a State of the United States *as defined in* section 1332(c) and (e) of [title 28 of the U.S. Code]," because that section of the Code concerns corporations, not partnerships. Pet. App. 43a n.10. But, because the issue was not raised, the court of appeals assumed without deciding that the Fifth Avenue Company's New York citizenship (based on the citizenship of its partners) prevented it from being an "agency or instrumentality of a foreign state" under § 1603(b)(3). *Id.*

Pet. App. 40a-45a. Accordingly, the Second Circuit ruled that Respondents' claims based on §§ 1610(a)(7) and (g) of the FSIA failed.

But TRIA, the court of appeals held, was different. Because TRIA's applicability is determined based on an entity's status as a "terrorist party" or an "agency or instrumentality of that terrorist party," the Second Circuit joined the Eleventh Circuit and ruled that the FSIA's definition of "agency or instrumentality of a foreign state" in § 1603(b) did not apply. Pet. App. 54a-65a. To hold otherwise, both courts of appeals reasoned, "would leave only terrorist states as potential sponsors of agencies or instrumentalities under TRIA § 201, eviscerating TRIA's effectiveness vis-à-vis non-state terrorist organizations." Pet. App. 58a (quoting *Stansell v. Revolutionary Armed Forces of Colombia*, 771 F.3d 713, 731 (11th Cir. 2014)). The Second Circuit instead "determine[d] the ordinary meaning of [agency or instrumentality] in light of the statutory text of the TRIA as a whole." Pet. App. 60a. Using a definition substantially similar to the one adopted by the Eleventh Circuit in *Stansell*, the Second Circuit held that, to prove Alavi and the Fifth Avenue Company are agencies or instrumentalities of a terrorist party, Respondents must show that they "(1) [were] 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) [were] owned, controlled, or directed by the terrorist party." Pet. App. 62a.

Additionally, the Second Circuit rejected Alavi and the Fifth Avenue Company's argument that TRIA did not apply to them regardless of their status as an agency or instrumentality of a terrorist party because their assets were not "blocked." Here, the court of appeals held that there were factual disputes as to whether Executive Order 13,599 blocked Alavi and the Fifth Avenue Company's assets, particularly, whether Alavi and the Fifth Avenue Company satisfy the definition of "Government of Iran" in the Executive Order because they are a "political subdivision, agency, or instrumentality thereof, including . . . any person owned or controlled by, or acting for or on behalf of, the Government of Iran." Pet. App. 74a. Thus, the Second Circuit remanded the case to the district court to conduct a trial to determine whether Alavi and the Fifth Avenue Company are "agencies or instrumentalities of [a] terrorist party" under TRIA and whether their assets are blocked. Pet. App. 76a. The issuance of the Mandate has been stayed pending resolution of this petition.

REASONS FOR DENYING THE PETITION

I. THERE IS NO CIRCUIT SPLIT CONCERNING THE DEFINITION OF "AGENCY OR INSTRUMENTALITY OF [A] TERRORIST PARTY" IN TRIA

The petition should be denied because there is no split among the courts of appeals concerning the definition of "agency or instrumentality of [a] terrorist

party" in TRIA. Petitioners' claimed split between the Second Circuit below, on the one hand, and the Eleventh and Ninth Circuits, on the other hand, does not exist. The Second and Eleventh Circuits – the only two courts of appeals to have considered the issue – are in agreement that the term "agency or instrumentality of [a] terrorist party" in TRIA did not import the definition of "agency or instrumentality of a foreign state" from § 1603(b) of the FSIA. The Ninth Circuit has not weighed in on the issue. Because there is no split among the courts of appeals, review here is unwarranted. *See, e.g.*, S. Ct. R. 10(a).

First, there is no split between the Second and Eleventh Circuits on this issue. In the decision below, the Second Circuit expressly agreed with the Eleventh Circuit on whether the definition in § 1603(b) of the FSIA applied to TRIA: "Thus, we agree with the Eleventh Circuit that 'applying the FSIA's definition of agencies or instrumentalities to TRIA would leave only terrorist states as potential sponsors of agencies or instrumentalities under TRIA § 201, eviscerating TRIA's effectiveness vis-à-vis non-state terrorist organizations.'" Pet. App. 58a (quoting *Stansell*, 771 F.3d at 731). Notwithstanding the Second Circuit's express agreement with the Eleventh Circuit's decision in *Stansell*, Petitioners attempt to fabricate a circuit split by relying on two out-of-context words in the Eleventh Circuit's opinion ("feasible" and "tweak"). Pet. 14-15. Consideration of the context in which those words were used demonstrates the absence of a conflict between the Second and Eleventh Circuits. In *Stansell*, the

Eleventh Circuit recognized that § 1603(b) could not be applied to Claimants unless the definition was "tweak[ed]" because § 1603(b) applied to agencies or instrumentalities of foreign states, whereas Claimants were "alleged to be agencies or instrumentalities of a non-state terrorist organization." *Stansell*, 771 F.3d at 730-31. But the Eleventh Circuit *declined* to tweak § 1603(b). The court of appeals then acknowledged, in *dictum*, that *in the non-terrorism context*, application of the § 1603(b) factors was "feasible" because a non-terrorist sovereign's "agencies or instrumentalities are likelier to be diplomatic organs or state-owned enterprises with clear ownership structures." *Id.* at 732. In the context of dealing with terrorist organizations, however, the Eleventh Circuit reasoned that "the realities of terrorism make it unrealistic to apply the FSIA standard to TRIA execution." *Id.*[6] Thus, the Eleventh Circuit adopted a standard for "agency or instrumentality of [a] terrorist party" under TRIA that is different than the definition contained in § 1603(b) and

[6] This rationale is equally applicable to state-sponsors of terrorism, such as Iran, who, out of necessity and as a matter of common practice, utilize a host of front organizations and other non-traditional state proxies to carry out their terrorist objectives. *See, e.g.*, Finding that the Islamic Republic of Iran is a Jurisdiction of Primary Money Laundering Concern, 76 Fed. Reg. 72,756, 72,761 (Nov. 25, 2011) ("Iran has a well-established history of using front companies and complex corporate ownership structures to disguise the involvement of government entities known to be involved in Iranian proliferation activity when conducting commercial transactions.").

substantially similar to the one articulated by the Second Circuit. *See id.*[7]

Petitioners' characterization of the Second Circuit's definition of "agency or instrumentality of [a] terrorist party" as "novel" and one that "swept far beyond the definition established by the Eleventh Circuit" in *Stansell*, Pet. 16-19, is overblown and does not warrant certiorari review. Rhetoric aside, Petitioners identify only one perceived difference between the Eleventh Circuit's standard and the Second Circuit's. According to them, the Second Circuit's definition "would apply based on the provision of services" alone whereas the Eleventh Circuit's definition requires "involvement in and support of unlawful activity." Pet. 19. In pressing

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[7] Under the Eleventh Circuit's standard, an agency or instrumentality is defined as:

> Any SDNT . . . , including all of its individual members, divisions and networks, that is or was ever involved in the cultivation, manufacture, processing, purchase, sale, trafficking, security, storage, shipment or transportation, distribution of FARC coca paste or cocaine, or that assisted the FARC's financial or money laundering network, . . . because it was either:
>
> (1) materially assisting in, or providing financial or technological support for or to, or providing goods or services in support of, the international narcotics trafficking activities of . . . [FARC]; and/or
>
> (2) owned, controlled, or directed by, or acting for or on behalf of, . . . [FARC]; and/or
>
> (3) playing a significant role in international trafficking [related to coca paste or cocaine manufactured or supplied by the FARC].

Stansell, 771 F.3d at 724 n.6.

this argument, Petitioners conveniently ignore the fact that knowingly providing services to Iran *is* unlawful activity. Indeed, the Second Circuit remanded the Government's forfeiture case to the district court to determine whether Alavi and the Fifth Avenue Company violated IEEPA and committed money laundering violations because of their relationship with the Assa Entities. *See In re 650 Fifth Ave. & Related Props.*, 830 F.3d at 93-96. Thus, even assuming that the Second Circuit's definition does not require a finding of involvement in and support of unlawful activity (an assumption which, at this stage of the proceeding, is not at all clear), certiorari is still inappropriate here because this case concerns parties that *were* involved in and supportive of illegal activity.[8] This Court should not grant certiorari to resolve a potential difference between the Second and Eleventh Circuits unless and until it is clear that such a difference actually exists and, more importantly, that Petitioners will actually benefit from the Court's decision.

Second, there is no split between the Second Circuit below and the Ninth Circuit in *Bennett v. Islamic*

[8] Because the lower courts have not had an opportunity to define the full scope of the Second Circuit's definition or actually apply it to the facts of this case, it is not clear whether a connection to legal activity is required or what (if any) defenses will be available to Alavi and the Fifth Avenue Company. *See, e.g.*, Pet. App. 62a-63a (discussing potential knowledge requirement and innocent-owner-like defense, but refusing to decide whether either are applicable because they had not yet been raised). For the reasons discussed in more detail below, *see infra* at 22-25, this further counsels in favor of denying the petition.

Republic of Iran, 825 F.3d 950 (9th Cir. 2016). *Bennett* involved blocked assets owned by Bank Melli, an admitted instrumentality of Iran. In a section detailing the "Factual and Procedural History" of the case, the Ninth Circuit stated: "It is undisputed that Bank Melli qualifies as an instrumentality under the FSIA." *Bennett*, 825 F.3d at 957. Accordingly, the Ninth Circuit did not need to analyze or decide whether Bank Melli was an instrumentality of Iran as defined in § 1603(b) or whether the definition of "agency or instrumentality of a foreign state" in that section of the FSIA applied to TRIA. And, not surprisingly, it did not analyze or decide either of those issues when deciding the actual arguments raised by the parties to that appeal. Instead, in the Ninth Circuit's substantive discussion of TRIA, the only issue it decided was whether TRIA overrode the presumption of separateness between Iran and its agencies and instrumentalities or whether it preserved that presumption except in the case of alter egos. *See id.* at 958-59 (rejecting Bank Melli's argument that TRIA "applies only to instrumentalities that are alter egos of the state").

Finally, none of the district court cases cited by Petitioners (Pet. 14-16) reached a conclusion that conflicts with the Second Circuit's decision below or the Eleventh Circuit's decision in *Stansell*. None of the cited cases held that § 1603(b) applied to TRIA nor did they analyze the proper interpretation of the phrase "agency or instrumentality of [a] terrorist party." To the extent they reference § 1603(b) at all, it is clear from the context that, because the issue of whether

§ 1603(b)'s definition of "agency or instrumentality of a foreign state" should apply to TRIA's use of the phrase "agency or instrumentality of [a] terrorist party" was not before them, the courts simply assumed that satisfaction of § 1603(b)'s "agency or instrumentality of a foreign state" definition likewise satisfied TRIA's "agency or instrumentality of [a] terrorist party" requirement. For example, in *Weininger v. Castro*, 462 F. Supp. 2d 457 (S.D.N.Y. 2006), the district court "stated that [s]tate-owned central banks indisputably are included in the § 1603(b) definition of 'agency or instrumentality.'" *Id.* at 498 (quotation marks omitted); *see also Levin v. Bank of New York*, No. 09 Civ. 5900, 2011 WL 812032, at *20 (S.D.N.Y. Mar. 4, 2011) (quoting same statement from *Weininger*). The mere fact that state-owned central banks are included in § 1603(b)'s definition does not compel a finding that § 1603(b) applies to TRIA or that entities that do not satisfy § 1603(b)'s definition *cannot* be agencies or instrumentalities of a terrorist party under TRIA.[9] Inconsistent-sounding snippets from *dictum* in a

[9] *See Volloldo v. Ruz*, No. 14-mc-0025, 2016 WL 81492, at *7 (N.D.N.Y. Jan. 7, 2016) (expressly declining to "decide the antecedent issue of whether Trans-Cuba is an agency or instrumentality of Cuba" because the property at issue was "not the property of Cuba"); *Gates v. Syrian Arab Rep.*, No. 11 Civ. 8715, 2013 WL 1337223, at *4 (N.D. Ill. Mar. 29, 2013) (finding that Central Bank of Syria is an "agency or instrumentality" of Syria in part because "no party has objected" to its classification as such); *Hausler v. JPMorgan Chase Bank, N.A.*, 845 F. Supp. 2d 553, 571-72 (S.D.N.Y. 2012), *rev'd on other grounds*, 770 F.3d 207 (2d Cir. 2014) (finding that Cuban banks were agencies or instrumentalities of Cuba in part because they "default[ed] and consequential[ly] admi[tted] their status as agencies or instrumentalities").

handful of district court decisions does not create a split of authorities warranting certiorari review. *See, e.g.*, S. Ct. R. 10(a).

II. THIS CASE IS AN IMPROPER VEHICLE FOR CERTIORARI BECAUSE NEITHER THE DISTRICT COURT NOR THE COURT OF APPEALS HAVE HAD A CHANCE TO APPLY THE STANDARD

Petitioners' arguments that certiorari is also warranted here because its petition raises important federal questions as to TRIA's definition of "agency or instrumentality of [a] terrorist party" and because of potential constitutional concerns allegedly raised by the Second Circuit's definition are without merit. Crucially, although the Second Circuit outlined a standard for the district court to employ when determining whether Alavi and the Fifth Avenue Company should be considered an "agency or instrumentality of [a] terrorist party" pursuant to TRIA, neither the district court nor the court of appeals has had an opportunity to actually apply that standard or fully delineate its scope. Instead, the district court still needs to hold a trial to determine, among other things, whether the Second Circuit's standard is satisfied here, which will include resolution of (1) the disputed factual issues identified by the Second Circuit; (2) the knowledge requirement (if any) that must be satisfied to support a finding of agency or instrumentality status; and (3) any defenses available to a finding of agency or instrumentality status. *See, e.g.*, Pet. App. 62a-63a

(discussing unresolved issues remaining on remand). Review now on a writ of certiorari is, therefore, particularly inappropriate because all of the concerns raised by Petitioners – concerns which are, in any event, unavailing – are purely hypothetical.

Petitioners should only seek this Court's review once they actually have been aggrieved (if ever) by application of the standard announced by the Second Circuit and only after the district court and the Second Circuit have had an opportunity to consider and decide, in the first instance, the issues raised in the petition. By seeking certiorari now, Petitioners seek to circumvent the lower courts' ability to consider the issues they ask this Court to review and essentially ask for the Court to guard against a hypothetical outcome. Granting certiorari would be premature; the Court should not review the issues raised by the petition in advance of their full development below. *Cf. California v. Rooney*, 483 U.S. 307, 313 (1987) ("This Court 'reviews judgments, not statements in opinions.' . . . Even if everything the prosecution fears comes to bear, the State will still have the opportunity to appeal such an order, and this Court will have the chance to review it, with the knowledge that we are reviewing a state-court *judgment* on the issue[.]") (citing *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956)); *Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 74 (1955) ("A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly

interest in such issues. . . . 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic."); *see also Virginia Military Inst. v. United States*, 113 S. Ct. 2431 (1993) (Scalia, J., respecting the denial of cert.) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction."); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) ("[E]xcept in extraordinary cases, the writ is not issued until final decree.").

Petitioners' framing of the Question Presented demonstrates the premature nature of this petition. According to them, the question presented is "whether an individual or entity need only provide 'material services' to a foreign state sponsor of terrorism in order to qualify as its 'agency or instrumentality,' or whether the individual or entity must satisfy a stricter definition based on majority ownership *or* control by the foreign state." Pet. i (emphasis added). Under the Second Circuit's definition, an entity will be deemed an "agency or instrumentality of [a] terrorist party" if it, *inter alia*, "was owned, controlled, or directed by the terrorist party," and the court remanded the case to the district court to determine, among other things, whether "Alavi itself was sufficiently owned, controlled, or directed by Iran to render it an agency or instrumentality of a terrorist party under the TRIA." Pet. App. 62a-63a. Thus, on remand, the district court will determine whether, even under the standard Alavi and the Fifth Avenue Company ask the Court to adopt, they are agencies or instrumentalities of Iran under TRIA. This Court should wait until that determination

has been made and reviewed before deciding whether certiorari is warranted.

III. THE UNIQUE POSTURE OF THIS CASE AND ISSUES OF JUDICIAL ECONOMY FURTHER SUPPORT DENIAL OF THE PETITION

Furthermore, the case at bar presents a unique circumstance in that a separate but related case brought by the Government is set to go to trial in the district court on May 30, 2017. The two cases present virtually the same witnesses and evidence; indeed, before granting summary judgment and entering final judgment in all the cases, the district court had scheduled the Government's trial to be heard simultaneously with Respondents' trials because of the significant overlap and to conserve judicial resources. *See, e.g.*, SDNY Dkt. No. 1046 at 3:2-4:9. Thus, not only are there outstanding legal and factual issues for the lower courts to resolve, but the district court is already set to hear the evidence that would resolve those factual issues regardless of any disposition that may occur here. Important principles of judicial economy will be served by denying the petition and allowing Respondents' trials to go forward in tandem with the Government's trial as originally planned. Delay now to resolve the hypothetical issues identified by the petition would, in the case of a remand at some later date, require a

second, almost identical trial as the one scheduled to start in the district court in just three months' time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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