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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF FOR THE PETITIONER[1]

This Court should grant certiorari in this case for two reasons: to resolve the split among the courts as to whether the FSIA's definition of "agency or instrumentality of a foreign state" applies to the TRIA's use of "agency or instrumentality" of a foreign state sponsor of terrorism, and to address important federal issues of statutory interpretation and constitutional law.

Contrary to Respondents' assertion, every court that has addressed the issue, except for the Second Circuit, has ruled that the FSIA's definition of "agency or instrumentality of a foreign state" applies to the TRIA's use of "agency or instrumentality" of a foreign state sponsor of terrorism. Respondents do not dispute this fact. Instead, they assert that the courts that have applied the FSIA's definition to TRIA claims have merely done so in dicta. That contention is contrary to the courts' actual rulings.

Moreover, the Second Circuit's ruling raises important issues of federal law that warrant this Court's review. The Second Circuit arrived at its overbroad definition of "agency or instrumentality" by breaking this phrase into its component parts and reading each in isolation. This interpretive method violates fundamental principles of statutory

[1] Terms not defined herein have the meaning ascribed to them in the Petition for a Writ of Certiorari ("Petition") filed on December 22, 2016.

interpretation. The Second Circuit was required to apply the controlling definition of "agency or instrumentality" set forth in the FSIA or, at the very least, read this phrase within its statutory context. It failed to do either. Rather, the court construed this phrase so broadly that it allows judgment creditors of a terrorist state to satisfy their judgments by executing against the assets of an independent third party not involved in any terrorist act, solely on the grounds that the third party provided a material service to the terrorist state. Such a standard fails to satisfy the requirements of due process.

This case is the appropriate vehicle for addressing these important questions. The Court should grant certiorari.

ARGUMENT

I. There Is a Split as to the Proper Interpretation of "Agency or Instrumentality" under the TRIA

As explained in the Petition, every court—other than the Second Circuit—that has addressed a TRIA claim against an alleged "agency or instrumentality" of a foreign state sponsor of terrorism has applied the FSIA's definition of "agency or instrumentality of a foreign state." 28 U.S.C. § 1603(b). The Second Circuit is alone in ruling that the FSIA's definition does not control TRIA claims against alleged agencies or instrumentalities of a foreign state. Indeed, Respondents cannot point to any other court that has applied a TRIA standard that permits a finding

of "agency or instrumentality" status based solely on the provision of material services. Respondents' main contention is that the TRIA cases cited by Petitioners either contain dicta concerning the TRIA or apply a standard similar to the Second Circuit's. That argument does not withstand scrutiny.

In *Bennett v. Islamic Republic of Iran*, 825 F.3d 950, 965 (9th Cir. 2016), the Ninth Circuit held that Bank Melli's assets were subject to turnover to satisfy judgments against Iran under both the FSIA and the TRIA. This holding necessarily included a finding that Bank Melli was an "agency or instrumentality" of Iran within the meaning of the TRIA. Because the Ninth Circuit's TRIA analysis relied on Bank Melli's admission that it was an instrumentality of Iran "under the FSIA," *id.* at 957, the court clearly applied the FSIA's "agency or instrumentality" definition to the TRIA claim. The Ninth Circuit did not create or apply a separate definition of "agency or instrumentality" for the TRIA claim, nor did it determine that the mere provision of material services to Iran could render an entity an "agency or instrumentality" of a foreign state sponsor of terrorism under the TRIA.

Respondents also misread the Eleventh Circuit's decision in *Stansell v. Revolutionary Armed Forces of Colombia*, 771 F.3d 713 (11th Cir. 2014). According to Respondents, *Stansell* acknowledged "that *in the non-terrorism context*, application of the [FSIA] § 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.'" (Resp.

Br. at 17.) As an initial matter, Respondents' argument fails because the TRIA is *only* applicable in the terrorism context; the *Stansell* court would have had no reason to consider the applicability of § 1603(b) to the TRIA in the "non-terrorism context."

Moreover, *Stansell* did not draw a distinction between terrorist states and non-terrorist states with respect to application of the FSIA § 1603(b) factors, as Respondents claim. Rather, the court drew a distinction between *state* actors and *non-state* actors, explaining that § 1603(b)'s definition is "feasible" in the TRIA context for foreign state sponsors of terrorism because "[s]overeign countries—the parties the FSIA contemplates—operate with more transparency, and their agencies or instrumentalities are likelier to be diplomatic organs or state-owned enterprises with clear ownership structures." *Id.* at 732. Respondents' reading of *Stansell* also ignores the fact that the Eleventh Circuit affirmed the district court's decision, which expressly recognized that the FSIA's definition of "agency or instrumentality" was "applicable to foreign state sponsors of terrorism" under the TRIA, but not to terrorist organizations. *Stansell v. Revolutionary Armed Forces of Colombia*, No. 09 Civ. 2308, Dkt. No. 327, at 5 n.5 (M.D. Fl. Sept. 6, 2011).

Even if *Stansell*'s statements regarding the applicability of § 1603(b) to TRIA claims against an "agency or instrumentality" of a foreign state sponsor of terrorism were dicta, the Eleventh Circuit's definition of an "agency or instrumentality" of a terrorist organization under the TRIA differs

starkly from the Second Circuit's standard. Respondents reluctantly acknowledge the "potential difference" between the two circuit courts' standards: the Eleventh Circuit requires involvement in and support of a terrorist party's unlawful activity in order to be deemed its "agency or instrumentality," while the Second Circuit does not. (Resp. Br. at 19.) Respondents argue that this difference is immaterial here because Petitioners have been accused of unlawful activity, namely providing partnership and property management services to Iran in violation of IEEPA. But even if proven, such conduct would not satisfy *Stansell*'s test. First, *Stansell* requires an agency or instrumentality to be "involved in" the unlawful activity *of the terrorist party*—not just any unlawful activity. 771 F.3d at 724 n.6. Second, *Stansell* requires the unlawful activity to be the activity that caused the terrorist party to be designated as such. *Id.* Third, if an entity is alleged to be an agency or instrumentality of a terrorist party based on the provision of services, those services must be "in support of" the terrorist activity. *Id.* The Second Circuit's decision does not require any of these elements to be present.

Respondents also contend that there is no tension between the numerous district court decisions cited by Petitioners and the Second Circuit's decision. (Resp. Br. at 20.) To the contrary, each of these district courts applied § 1603(b)'s definition of "agency or instrumentality" to TRIA claims against an "agency or instrumentality" of a foreign state terrorist party. For example, in *Gates v. Syrian Arab Republic*, No. 11 Civ. 8715, 2013 U.S. Dist. LEXIS 45327, at *18 (N.D. Ill. Mar. 29, 2013),

the court applied the § 1603(b) test to the Syrian central bank and held that it was "an 'organ' of the Syrian state, and [was] an 'agency or instrumentality' for purposes of attachment and execution of judgment *under the FSIA and the TRIA*." (Emphasis added.) In *Weininger v. Castro*, 462 F. Supp. 2d 457, 477 (S.D.N.Y. 2006), the court similarly held that "TRIA § 201(a) permits execution against funds held by or owed to those entities that are agencies and instrumentalities of a foreign state *as defined by the FSIA*." (Emphasis added.) *See also Hausler v. JP Morgan Chase Bank, N.A.*, 845 F. Supp. 2d 553, 572-74 (S.D.N.Y. 2012) (applying § 1603(b) test and holding that the evidence "establish[ed] that the Cuban Banks are agencies or instrumentalities of Cuba" under the TRIA), *rev'd on other grounds*, 770 F.3d 207 (2d Cir. 2014); *Levin v. Bank of New York*, No. 09 Civ. 5900, 2011 U.S. Dist. LEXIS 23779, at *75 (S.D.N.Y. Mar. 4, 2011) (holding that bank accounts were subject to turnover under the TRIA because "[s]tate-owned central banks indisputably are included in the § 1603(b) definition of 'agency or instrumentality'"); *Volloldo v. Ruz*, No. 14-mc-0025, 2016 U.S. Dist. LEXIS 1410, at *47-48 (N.D.N.Y. Jan. 7, 2016) (holding that Cuban bank was "an agency or instrumentality of Cuba *under the FSIA*" whose accounts were "subject to turnover under § 1610(b)(3) of the FSIA and TRIA § 201") (emphasis added).[2] None of these courts

[2] Respondents argue that *Volloldo* expressly declined to determine whether an entity named Trans-Cuba was an agency or instrumentality of Cuba. (Resp. Br. at 21 n.9.) However, Respondents fail to mention the court's holding that another entity—Banco Nacional—was an agency or instrumentality of Cuba within the meaning of the FSIA

applied a definition of "agency or instrumentality" under the TRIA that is remotely similar to the Second Circuit's definition.

In short, the Second Circuit's ruling broke with every other court that has addressed the TRIA's definition of an "agency or instrumentality" of a foreign state sponsor of terrorism. Even if *Stansell* had rejected the application of the FSIA's definition to the TRIA altogether, which it did not, there would then be a three-way split on the correct interpretation of the TRIA: the Second Circuit standard, which permits a finding of agency or instrumentality based solely on the provision of services; the *Stansell* standard, which requires the agency or instrumentality to be involved in and to support the terrorist party's terrorist activities; and the FSIA standard used by the *Bennett* court and district courts throughout the country. This Court should grant certiorari to address this split and to promote uniformity among the courts.

II. This Case Raises Important Questions of Statutory Interpretation and Constitutional Law

This case raises the important question of whether the Second Circuit's establishment of a novel definition of "agency or instrumentality" under the TRIA is consistent with the FSIA's statutory framework and due process. Respondents do not offer any substantive response to the weighty

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and the TRIA. *Volloldo*, 2016 U.S. Dist. LEXIS 1410, at *47-48. In reaching this conclusion, the court applied § 1603(b)'s "agency or instrumentality" test. *Id.*

statutory and constitutional questions raised in the Petition.

As demonstrated by the Petition, the Second Circuit's broad interpretation of the TRIA contravenes the plain text of the FSIA. While the court recognized that Petitioners do not qualify as "agencies or instrumentalities" of Iran within the meaning of FSIA § 1603(b), it nonetheless concluded that there are issues of fact as to whether they qualify as "agencies or instrumentalities" of Iran within the meaning of the TRIA. Respondents do not dispute the fact that the § 1603(b) definition of "agency or instrumentality of a foreign state" applies to the entire U.S. Code "chapter" in which the FSIA and the TRIA are codified. 28 U.S.C. § 1603. Nor can they dispute that the FSIA contains 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." *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 488 (1983); *see also Republic of Arg. v. NML Capital, Ltd.*, 134 S. Ct. 2250, 2256 (2014). The Second Circuit should have applied § 1603(b)'s definition to Respondents' TRIA claims.

Respondents also have no response to Petitioners' argument that the Second Circuit's ruling violated fundamental principles of statutory interpretation. Even assuming that the FSIA's definition of "agency or instrumentality" does not apply to TRIA claims, the Second Circuit was required to read the phrase within its statutory context. *Sullivan v. Stroop*, 496 U.S. 478, 482 (1990). Instead, the court interpreted each word in

isolation and without reference to the surrounding terms or the use of the phrase "agency or instrumentality" elsewhere in the FSIA, in which the TRIA is codified.

Respondents likewise fail to address the fact that the Second Circuit's ruling ignored the settled meaning of the phrase "agency or instrumentality" as a legal term of art. *See Molzof v. United States*, 502 U.S. 301, 307 (1992) (noting the "cardinal rule of statutory construction" that when Congress "borrows terms of art . . . it presumably knows and adopts the cluster of ideas that were attached to each borrowed word"). In interpreting these terms in other federal statutes and under the common law, this Court has consistently required a relationship of majority ownership or control by the principal. *See, e.g.*, *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 394-400 (1995); *Logue v. United States*, 412 U.S. 521, 527-28 (1973); *Reconstruction Fin. Corp. v. J.G. Menihan Corp.*, 312 U.S. 81, 83 (1941). The Court has repeatedly rejected the proposition that an entity may be deemed an "agency or instrumentality" based solely on the provision of services to the principal. *See, e.g.*, *Logue*, 412 U.S. at 525-28; *United States v. New Mexico*, 455 U.S. 720, 734-35 (1982); *Penn Dairies, Inc. v. Milk Control Comm'n*, 318 U.S. 261, 269 (1943). The Second Circuit ignored this body of settled law.

Finally, Respondents do not counter Petitioners' argument that the Second Circuit's interpretation of the TRIA raises serious constitutional concerns. The Second Circuit's standard could impose liability upon *independent*

entities that have attenuated business relationships with a terrorist state and are not in any way involved in terrorist activities. Here, Petitioners could be held liable for Respondents' $3 billion in terrorism-related judgments against Iran—not to mention the billions of dollars in judgments held by other creditors—merely because Petitioners provided partnership and building management services to an entity in which Iran had an indirect minority interest. The imposition of ruinous financial liability upon Petitioners under the TRIA would be arbitrary, irrational, and disproportionate to the culpability of Petitioners' conduct, in violation of due process. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 429 (2003); *Cooper Indus. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 435 (2001); *St. Louis, I. M. & S. R. Co. v. Williams*, 251 U.S. 63, 67 (1919). If taken seriously, the Second Circuit's standard could also impose devastating consequences on any number of other entities that have provided services to foreign states like Iran, including a number of systemically important financial institutions. (Petition at 34.)

These important federal questions are an independent basis for granting certiorari.

III. Certiorari Review Is Warranted in This Case

This case is an ideal vehicle for remedying the Second Circuit's flawed interpretation of the TRIA. Respondents argue against a grant of certiorari, asserting that the lower courts have not yet had an opportunity to apply the Second Circuit's standard

or to "fully delineate its scope." (Resp. Br. at 22.) That contention is untenable.

First, this Court can address the fundamental flaws in the Second Circuit's decision as a matter of law without awaiting a final judgment on the merits. The Second Circuit's ruling not only creates two different definitions for the same phrase used in the same chapter of the U.S. Code, but is also contrary to this Court's precedent holding that the FSIA contains a "comprehensive set of legal standards" governing claims against a foreign state or its agencies or instrumentalities. *See Verlinden*, 461 U.S. at 488. A resolution of this legal issue is not contingent upon resolution of any factual issues at trial.

Second, there is no need for this Court to await further development of this issue within the Second Circuit. Whatever gloss the lower courts may place on the Second Circuit's ruling, they cannot depart from its holdings that § 1603(b) does not apply to the TRIA and that the mere provision of material services renders an entity an "agency or instrumentality" of a terrorist state.

Third, the Second Circuit established a standard that incentivizes judgment creditors to file TRIA claims against a variety of service providers—*e.g.*, financial institutions that have admitted to providing banking services to Iran in violation of Treasury Department regulations (Petition at 34)—on the theory that they are "agencies or instrumentalities" of Iran. As a result, the entirety of those institutions' assets may be subject to

turnover to satisfy billions of dollars in judgments against Iran. Other service providers may be compelled to settle TRIA claims in order to avoid being deemed an "agency or instrumentality" of Iran that may be held liable for *all* terrorism-related judgments against Iran. This Court should not allow the Second Circuit's misinterpretation of the TRIA to wreak havoc for the years that it may take for another defendant to bring these issues before this Court.

Lastly, it would be inefficient for the parties and wasteful of judicial resources to try the TRIA claims in this case under an incorrect standard. Indeed, if the Court agrees with Petitioners that the FSIA's definition of "agency or instrumentality" applies to Respondents' TRIA claims, no further proceedings before the District Court will be necessary. Alternatively, if *Stansell*'s definition of an "agency or instrumentality" of a terrorist organization were found to apply to all TRIA claims, that standard should be established now rather than after an unnecessary trial. The interests of judicial economy will be better served if this Court corrects the Second Circuit's interpretation of the TRIA *prior* to trial.[3]

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[3] Respondents' assertion that this Court rarely grants certiorari in absence of a final judgment is without basis. (Resp. Br. at 23-24.) This Court routinely accepts cases in which, as here, a district court's grant of summary judgment has been vacated and the case has been remanded for further proceedings. *See, e.g.*, *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 668-69 (2016); *Kappos v. Hyatt*, 566 U.S. 431, 436 (2012); *Sullivan v.*

CONCLUSION

The petition for certiorari should be granted.

February 24, 2017 Respectfully submitted,

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Zebley, 493 U.S. 521, 527 (1990); *Abbott Laboratories v. Portland Retail Druggists Ass'n*, 425 U.S. 1, 6 (1976).