

No. _____

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

PETITION FOR A WRIT OF CERTIORARI

DANIEL S. RUZUMNA
Counsel of Record
MUHAMMAD U. FARIDI
DIANA M. CONNER
PATTERSON BELKNAP WEBB
& TYLER LLP
1133 Avenue of the Americas
New York, New York 10036
(212) 336-2000
druzumna@pbwt.com
Attorneys for Petitioners

QUESTION PRESENTED

The Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, 116 Stat. 2322, 2337 (codified at 28 U.S.C. § 1610 note), authorizes a judgment creditor holding an unsatisfied judgment against a foreign state designated as a state sponsor of terrorism to enforce that judgment by executing against and attaching blocked assets belonging to an “agency or instrumentality” of that foreign state. This case presents the question 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, such as the definition of “agency or instrumentality” set forth in the Foreign Sovereign Immunities Act.

PARTIES TO THE PROCEEDING

The parties to the proceedings are as follows:

Alavi Foundation and 650 Fifth Avenue Company,
Petitioners

Jason Kirschenbaum, Isabelle Kirschenbaum, on her
own behalf and as Executrix of the Estate of Martin
Kirschenbaum, Joshua Kirschenbaum, David
Kirschenbaum, Danielle Teitlebaum, Respondents

Anna Beer, Harry Beer, on his own behalf and as
Administrator of the Estate of Alan Beer, Estelle
Carroll, Phyllis Maisel, Respondents

Steven M. Greenbaum, in his personal capacity and
as administrator of the Estate of Judith (Shoshana)
Lillian Greenbaum, Alan Hayman, Shirlee Hayman,
Respondents

Carlos Acosta, Maria Acosta, Tova Ettinger, Irving
Franklin, in his personal capacity and as personal
representative of the estate of Irma Franklin,
Baruch Kahane, Libby Kahane, in her personal
capacity and as Administratrix of the Estate of Meir
Kahane, Ethel J. Griffin, as Public Administrator of
the County of New York and Administratrix of the
Estate of Binyamin Kahane, Norman Kahane, in his
personal capacity and as Executor of the Estate of
Sonia Kahane, Ciporah Kaplan, Respondents

Edwena R. Hegna, Executrix of the Estate of Charles
Hegna, Steven A. Hegna, Lynn Marie Hegna Moore,
Craig M. Hegna, Paul B. Hegna, Respondents

Terry Abbott, John Robert Allman, Ronny Kent
Bates, James Baynard, Jess W. Beamon, Alvin
Burton Belmer, Richard D. Blankenship, John W.
Blocker, Joseph John Boccia Jr., Leon Bohannon,

John Bonk Jr., Jeffrey Joseph Boulos, John Norman Boyett, William Burley, Paul Callahan, Mecot Camara, Bradley Campus, Johnnie Ceasar, Robert Allen Conley, Charles Dennis Cook, Johnny Len Copeland, David Cosner, Kevin Coulman, Rick Crudale, Russell Cyzick, Michael Devlin, Nathaniel Dorsey, Timothy Dunnigan, Bryan Earle, Danny R. Estes, Richard Andrew Fluegel, Michael D. Fulcher, Sean Gallagher, George Gangur, Randall Garcia, Harold Ghumm, Timothy Giblin, Michael Gorchinski, Richard Gordon, Davin M. Green, Thomas Hairston, Michael Haskell, Mark Anthony Helms, Stanley G. Hester, Donald Wayne Hildreth, Richard Holberton, Dr. John Hudson, Maurice Edward Hukill, Edward Iacovino Jr., Paul Innocenzi III, James Jackowski, Jeffrey Wilbur James, Nathaniel Walter Jenkins, Edward Anthony Johnston, Steven Jones, Thomas Adrian Julian, Thomas Keown, Daniel Kluck, James C. Knipple, Freas H. Kreischer III, Keith Laise, James Langon IV, Michael Scott LaRiviere, Steven LaRiviere, Richard Lemnah, Joseph R. ("Joel") Livingston III, Paul D. Lyon Jr., John Macroglou, Samuel Maitland Jr., Charlie Robert Martin, David Massa, John McCall, James E. McDonough, Timothy R. McMahon, Richard Menkins II, Ronald Meurer, Joseph Peter Milano, Joseph Moore, Harry Douglas Myers, David Nairn, John Arne Olson, Joseph Albert Owens, Connie Ray Page, Ulysses Gregory Parker, John L. Pearson, Thomas S. Perron, John Arthur Phillips Jr., William Roy Pollard, Victor Mark Prevatt, James Price, Patrick Kerry Prindeville, Diomedes J. Quirante, Warren Richardson, Louis J. Rotondo, Michael Caleb Sauls, Charles Jeffrey Schnorf, Scott Lee Schultz, Peter Scialabba, Gary Randall Scott, Thomas Alan Shipp, Jerryl

Shropshire, Larry H. Simpson Jr., Kirk Hall Smith, Thomas Gerard Smith, Vincent Smith, William Scott Sommerhof, Stephen Eugene Spencer, William Stelpflug, Horace Renardo ("Ricky") Stephens Jr., Craig Stockton, Jeffrey Stokes, Eric D. Sturghill, Devon Sundar, Thomas Paul Thorstad, Stephen Tingley, Donald H. Vallone Jr., Eric Glenn Washington, Dwayne Wigglesworth, Rodney J. Williams, Scipio Williams Jr., Johnny Adam Williamson, William Ellis Winter, Donald Elberan Woollett, Craig Wyche, Jeffrey D. Young, Marvin Albright, Pablo Arroyo, Anthony Banks, Rodney Darrell Burnette, Frank Comes Jr., Glenn Dolphin, Frederick Daniel Eaves, Charles Frye, Truman Dale Garner, Larry Gerlach, John Hlywiak, Orval Hunt, Joseph P. Jacobs, Brian Kirkpatrick, Burnham Matthews, Timothy Mitchell, Lovelle "Darrell" Moore, Jeffrey Nashton, John Oliver, Paul Rivers, Stephen Russell, Dana Spaulding, Craig Joseph Swinson, Michael Toma, Danny Wheeler, Thomas D. Young, Lilla Woollett Abbey, James Abbott, Mary Abbott (Estate Of), Elizabeth Adams, Eileen Prindeville Ahlquist, Miralda (Judith Maitland) Alarcon, Anne Allman, Robert Allman, Theodore Allman (Estate Of), Dianne Margaret ("Maggie") Allman, Margaret E. Alvarez, Kimberly F. Angus, Donnie Bates, Johnny Bates, Laura Bates, Margie Bates, Monty Bates, Thomas Bates Jr., Thomas C. Bates Sr., Mary E. Baumgartner, Anthony Baynard, Barry Baynard, Emerson Baynard, Philip Baynard, Thomasine Baynard, Timothy Baynard, Wayne Baynard, Stephen Baynard, Anna Beard, Mary Ann Beck, Alue Belmer, Annette Belmer, Clarence Belmer, Colby Keith Belmer, Denise Belmer, Donna Belmer, Faye Belmer, Kenneth Belmer, Luddie Belmer, Shawn Biellow, Mary Frances Black,

Donald Blankenship Jr., Donald Blankenship Sr., Mary Blankenship (Estate Of), Alice Blocker, Douglas Blocker, John R. Blocker, Robert Blocker, James Boccia, Joseph Boccia Sr., Patricia Boccia, Raymond Boccia, Richard Boccia, Ronnie (Veronica) Boccia, Leticia Boddie, Angela Bohannon, Anthony Bohannon, Carrie Bohannon, David Bohannon, Edna Bohannon, Leon Bohannon Sr., Ricki Bohannon, Billie Jean Bolinger, Joseph Boulos, Lydia Boulos, Marie Boulos, Rebecca Bowler, Lavon Boyett, Norman E. Boyett Jr. (Estate Of), Theresa U. Roth Boyett, William A. Boyett, Susan Schnorf Breeden, Damion Briscoe, Christine Brown, Rosanne Brunette, Mary Lynn Buckner, Claude Burley (Estate Of), William Douglas Burley (Estate Of), Myra Burley, Kathleen Calabro, Rachel Caldera, Avenell Callahan, Michael Callahan, Patricia (Patsy Ann) Calloway, Elisa Rock Camara, Theresa Riggs Camara, Candace Campbell, Clare Campus, Elaine Capobianco, Florene Martin Carter, Phyllis A. Cash, Theresa Catano, Bruce Ceasar, Franklin Ceasar, Fredrick Ceasar, Robbie Nell Ceasar, Sybil Ceasar, Christine Devlin Cecca, Tammy Chapman, James Cherry, Sonia Cherry, Adele H. Chios, Jana M. Christian, Sharon Rose Christian, Susan Ciupaska, Leshune Stokes Clark, Rosemary Clark, Mary Ann Cobble, Karen Shipp Collard, Jennifer Collier, Melia Winter Collier, Deborah M. Coltrane, James N. Conley Jr., Roberta Li Conley, Charles F. Cook, Elizabeth A. Cook, Mary A. Cook (Estate Of), Alan Tracy Copeland, Betty Copeland, Donald Copeland, Blanche Corry, Harold Cosner, Jeffrey Cosner, Leanna Cosner, Marva Lynn Cosner (Estate Of), Cheryl Cossaboom, Bryan Thomas Coulman, Christopher J. Coulman, Dennis P. Coulman, Lorraine M. Coulman, Robert D. Coulman, Robert

Louis Coulman, Charlita Martin Covington, Amanda Crouch, Marie Crudale, Eugene Cyzick, Lynn Dallachie, Anne Deal, Lynn Smith Derbyshire, Theresa Desjardins, Christine Devlin, Daniel Devlin, Gabrielle (Colleen) Devlin, Richard Devlin, Sean Devlin, Rosalie Donahue (Milano), Ashley Doray, Rebecca Doss, Chester Dunnigan, Elizabeth Ann Dunnigan, Michael Dunnigan, William Dunnigan, Claudine Dunnigan, Janice Thorstad Edquist, Mary Ruth Ervin, Barbara Estes, Charles Estes, Frank Estes, Lori Fansler, Angela Dawn Farthing, Arlington Ferguson, Hilton Ferguson, Linda Sandback Fish, Nancy Brocksbank Fox, Tia Fox, Tammy Freshour, Ruby Fulcher, Barbara Gallagher, Brian Gallagher, James Gallagher (Estate Of), James Gallagher Jr., Kevin Gallagher, Michael Gallagher, Dimitri Gangur, Mary Gangur, Jess Garcia, Ronald Garcia, Roxanne Garcia, Russell Garcia, Violet Garcia, Suzanne Perron Garza, Jeanne Gattegno, Arlene Ghumm, Ashley Ghumm, Bill Ghumm, Edward Ghumm, Hildegard Ghumm, Jedaiah Ghumm (Estate Of), Jesse Ghumm, Leroy Ghumm, Moronica Ghumm, Donald Giblin, Jeanne Giblin, Michael Giblin, Tiffany Giblin, Valerie Giblin, William Giblin, Thad Gilford-Smith, Rebecca Gintonio, Dawn Goff, Christina Gorchinski, Judy Gorchinski, Kevin Gorchinski, Valerie Gorchinski, Alice Gordon, Joseph Gordon, Linda Gordon, Norris Gordon (Estate Of), Paul Gordon, Andrea Grant, Deborah Graves, Deborah Green, Liberty Quirante Gregg, Alex Griffin, Catherine E. Grimsley, Megan Gummer, Lyda Woollett Guz, Darlene Hairston, Tara Hanrahan, Mary Clyde Hart, Brenda Haskill, Jeffrey Haskell, Kathleen S. Hedge, Christopher Todd Helms, Marvin R. Helms, Doris Hester, Clifton Hildreth, Julia Hildreth, Mary Ann Hildreth,

Michael Wayne Hildreth, Sharon A. Hilton, Donald Holberton, Patricia Lee Holberton, Thomas Holberton, Tangie Hollifield, Debra Horner, Elizabeth House, Joyce A. Houston, Tammy Camara Howell, Lisa H. Hudson, Lorenzo Hudson, Lucy Hudson, Ruth Hudson, Samuel Hudson (Estate Of), William J. Hudson, Susan Thorstad Hugis (Estate Of), Nancy Tingley Hurlburt, Cynthia Perron Hurston, Edward Iacovino Sr. (Estate Of), Elizabeth Iacovino, Deborah Innocenzi, Kristin Innocenzi, Mark Innocenzi, Paul Innocenzi IV, Bernadette Jacom, John Jackowski Jr., John Jackowski Sr., Victoria Jacobus, Elaine James, Nathalie C. Jenkins, Stephen Jenkins, Rebecca Jewett, Linda Martin Johnson, Ray Johnson, Rennitta Stokes Johnson, Sherry Johnson, Charles Johnston, Edwin Johnston, Mary Ann Johnston, Zandra LaRiviere Johnston, Alicia Jones, Corene Martin Jones, Kia Briscoe Jones, Mark Jones, Ollie Jones, Sandra D. Jones, Synovure Jones (Estate Of), Robin Copeland Jordan, Susan Scott Jordan, Joyce Julian, Karl Julian, Nada Jurist, Adam Keown, Bobby Keown Jr., Bobby Keown Sr., Darren Keown, William Keown, Mary Joe Kirker, Kelly Kluck, Michael Kluck, John D. Knipple (Estate Of), John R. Knipple, Pauline Knipple (Estate Of), Shirley L. Knox, Doreen Kreischer, Freas H. Kreischer Jr., Cynthia D. Lake, Wendy L. Lange, James Langon III, Eugene LaRiviere, Janet LaRiviere, John M. LaRiviere, Lesley LaRiviere, Michael LaRiviere, Nancy LaRiviere, Richard LaRiviere, Richard G. LaRiviere (Estate Of), Robert LaRiviere, William LaRiviere, Cathy L. Lawton, Heidi Crudale Legault, Clarence Lemnah (Estate Of), Etta Lemnah, Fay Lemnah, Harold Lemnah, Marlys Lemnah, Robert Lemnah, Ronald Lemnah, Annette R. Livingston, Joseph R.

Livingston IV, Joseph R. Livingston Jr. (Estate Of), Robin M. Lynch, Earl Lyon, Francisco Lyon, June Lyon, Maria Lyon, Paul D. Lyon Sr., Valerie Lyon, Heather Macrogrou, Kathleen Devlin Mahoney, Kenty Maitland, Leysnal Maitland, Samuel Maitland Sr., Shirla Maitland, Virginia Boccia Marshall, John Martin, Pacita Martin, Renerio Martin, Ruby Martin, Shirley Martin, Mary Mason, Cristina Massa, Edmund Massa, Joao ("John") Massa, Jose ("Joe") Massa, Manuel Massa Jr., Ramiro Massa, Mary McCall, Thomas Mccall (Estate Of), Valerie Mccall, Gail McDermott, Julia A. McFarlin, George McMahan, Michael McMahan, Patty McPhee, Darren Menkins, Gregory Menkins, Margaret Menkins, Richard H. Menkins, Jay T. Meurer, John Meurer, John Thomas Meurer, Mary Lou Meurer, Michael Meurer, Penny Meyer, Angela Milano, Peter Milano Jr., Earline Miller, Henry Miller, Patricia Miller, Helen Montgomery, Betty Moore, Harry Moore, Kimberly Moore, Mary Moore, Melissa Lea Moore, Michael Moore (Estate Of), Elizabeth Phillips Moy, Debra Myers, Geneva Myers, Harry A. Myers, Billie Ann Nairn, Campbell J. Nairn III, Campbell J. Nairn Jr. (Estate Of), William P. Nairn, Richard Norfleet, Deborah O'Connor, Pearl Olaniji, Bertha Olson (Estate Of), Karen L. Olson, Randal D. Olson, Roger S. Olson, Ronald J. Olson, Sigurd Olson (Estate Of), David Owens, Deanna Owens, Frances Owens, James Owens (Estate Of), Steven Owens, Connie Mack Page, Judith K. Page, Lisa Menkins Palmer, Geraldine Paolozzi, Maureen Pare, Henry James Parker, Sharon Parker, Helen M. Pearson, John L. Pearson Jr., Sonia Pearson, Brett Perron, Deborah Jean Perron, Michelle Perron, Ronald R. Perron, Muriel Persky, Deborah D. Peterson, Sharon Conley Petry, Sandra Petrick,

Donna Vallone Phelps, Harold Phillips, John Arthur Phillips Sr., Donna Tingley Plickys, Margaret Aileen Pollard, Stacey Yvonne Pollard, Lee Hollan Prevatt, Victor Thornton Prevatt, John Price, Joseph Price, Barbara D. Prindeville (Estate Of), Kathleen Tara Prindeville, Michael Prindeville, Paul Prindeville, Sean Prindeville, Belinda J. Quirante, Edgar Quirante, Godofredo Quirante (Estate Of), Milton Quirante, Sabrina Quirante, Susan Ray, Laura M. Reininger, Alan Richardson, Beatrice Richardson, Clarence Richardson, Eric Richardson, Lynette Richardson, Vanessa Richardson, Philiece Richardson-Mills, Melrose Ricks, Belinda Quirante Riva, Barbara Rockwell, Linda Rooney, Tara Smith Rose, Tammi Ruark, Juliana Rudkowski, Marie McMahon Russell, Alicia Lynn Sanchez, Andrew Sauls, Henry Caleb Sauls, Riley A. Sauls, Margaret Medler Schnorf, Richard Schnorf, Richard Schnorf, Robert Schnorf, Beverly Schultz, Dennis James Schultz, Dennis Ray Schultz, Frank Scialabba, Jacqueline Scialabba, Samuel Scott Scialabba, Jon Christopher Scott, Kevin James Scott, Larry L. Scott (Estate Of), Mary Ann Scott, Sheria Scott, Stephen Allen Scott, Jacklyn Seguerra, Bryan Richard Shipp, James David Shipp, Janice Shipp, Maurice Shipp, Pauline Shipp, Raymond Dennis Shipp, Russell Shipp, Susan J. Sinsioco, Ana Smith-Ward, Angela Josephine Smith (Estate Of), Bobbie Ann Smith, Cynthia Smith, Donna Marie Smith, Erma Smith, Holly Smith, Ian Smith, Janet Smith, Joseph K. Smith III, Joseph K. Smith Jr., Keith Smith, Kelly B. Smith, Shirley L. Smith, Tadgh Smith, Terrence Smith, Timothy B. Smith, Jocelyn J. Sommerhof, John Sommerhof, William J. Sommerhof, Douglas Spencer, Christy Williford Stelpflug, Joseph Stelpflug, Kathy Nathan Stelpflug, Laura Barfield

Stelpflug, Peggy Stelpflug, William Stelpflug, Horace
 Stephens Sr., Joyce Stephens, Keith Stephens, Dona
 Stockton, Donald Stockton (Estate Of), Richard
 Stockton, Irene Stokes, Nelson Stokes Jr., Nelson
 Stokes Sr. (Estate Of), Robert Stokes, Gwenn Stokes-
 Graham, Marcus D. Sturghill, Marcus L. Sturghill
 Jr., Nakeisha Lynn Sturghill, Doreen Sundar,
 Margaret Tella, Susan L. Terlson, Mary Ellen
 Thompson, Adam Thorstad, Barbara Thorstad,
 James Thorstad Jr., James Thorstad Sr., John
 Thorstad, Ryan Thorstad, Betty Ann Thurman,
 Barbara Tingley, Richard L. Tingley, Russell
 Tingley, Keysha Tolliver, Mary Ann Turek, Karen
 Valenti, Anthony Vallone, Donald H. Vallone,
 Timothy Vallone, Leona Mae Vargas, Denise Voyles,
 Ila Wallace, Kathryn Thorstad Wallace, Richard J.
 Wallace, Barbara Thorstad Warwick, Linda
 Washington, Vancine Washington, Kenneth Watson,
 Diane Whitener, Daryl Wigglesworth, Darrin A.
 Wigglesworth, Henry Wigglesworth, Mark
 Wigglesworth, Robyn Wigglesworth, Sandra
 Wigglesworth, Shawn Wigglesworth, Dianne Stokes
 Williams, Gussie Martin Williams, Janet Williams,
 Johnny Williams, Rhonda Williams, Ronald
 Williams, Ruth Williams, Scipio J. Williams, Wesley
 Williams, Delma Williams-Edwards, Tony
 Williamson, Jewelene Williamson, Michael Winter,
 Barbara Wiseman, Phyllis Woodford, Joyce Woodle,
 Beverly Woollett, Paul Woollett, Melvina Stokes
 Wright, Patricia Wright, Glenn Wyche, John Wyche,
 John F. Young, John W. Young, Judith Carol Young,
 Sandra Rhodes Young, Joanne Zimmerman, Stephen
 Thomas Zone, Patricia Thorstad Zosso, Jamaal
 Muata Ali, Margaret Angeloni, Jesus Arroyo,
 Milagros Arroyo, Olympia Carletta, Kimberly
 Carpenter, Joan Comes, Patrick Comes, Christopher

Comes, Frank Comes Sr., Deborah Crawford, Barbara Davis, Alice Warren Franklin, Patricia Gerlach, Travis Gerlach, Megan Gerlach, Arminda Hernandez, Margaret Hlywiak, Peter Hlywiak Jr., Peter Hlywiak Sr., Paul Hlywiak, Joseph Hlywiak, Cynthia Lou Hunt, Rosa Ibarro, Andrew Scott Jacobs, Daniel Joseph Jacobs, Danita Jacobs, Kathleen Kirkpatrick, Grace Lewis, Lisa Magnotti, Wendy Mitchell, James Otis Moore (Estate Of), Johnney S. Moore (Estate Of), Marvin S. Moore, Alie Mae Moore, Jonnie Mae Moore-Jones, Alex W. Nashton (Estate Of), Paul Oliver, Riley Oliver, Michael John Oliver, Ashley E. Oliver, Patrick S. Oliver, Kayley Oliver, Tanya Russell, Wanda Russell, Jason Russell, Clydia Shaver, Scott Spaulding, Cecilia Stanley, Mary Stilpen, Kelly Swank, Kenneth J. Swinson (Estate Of), Ingrid M. Swinson (Estate Of), Daniel Swinson, William Swinson, Dawn Swinson, Teresa Swinson, Bronzell Warren, Jessica Watson, Audrey Webb, Jonathan Wheeler, Benjamin Wheeler, Marlis "Molly" Wheeler (Estate Of), Kerry Wheeler, Andrew Wheeler, Brenda June Wheeler, Jill Wold, Nora Young (Estate Of), James Young, Robert Young (Estate Of), Respondents

The Estate of Michael Heiser, Gary Heiser, Francis Heiser, The Estate of Leland Timothy Haun, Ibis S. Haun, Milagritos Perez-Dalis, Senator Haun, The Estate of Justin R. Wood, Richard W. Wood, Kathleen M. Wood, Shawn M. Wood, The Estate of Earl F. Cartrette Jr., Denise M. Eichstaedt, Anthony W. Cartrette, Lewis W. Cartrette, The Estate of Brian Mcveigh, Sandra M. Wetmore, James V. Wetmore, The Estate of Millard D. Campbell, Marie R. Campbell, Bessie A. Campbell, The Estate of

Kevin J. Johnson, Shyrl L. Johnson, Che G. Colson, Kevin Johnson Jr., Nicholas A. Johnson, Laura E. Johnson, Bruce Johnson, The Estate of Joseph E. Rimkus, Bridget Brooks, James R. Rimkus, Anne M. Rimkus, The Estate of Brent E. Marthaler, Katie L. Marthaler, Sharon Marthaler, Herman C. Marthaler Iii, Mathew Marthaler, Kirk Marthaler, The Estate of Thanh Van Nguyen, Christopher R. Nguyen, The Estate of Joshua E. Woody, Dawn Woody, Bernadine R. Beekman, George M. Beekman, Tracy M. Smith, Jonica L. Woody, Timothy Woody, The Estate of Peter J. Morgera, Michael Morgera, Thomas Morgera, The Estate of Kendall Kitson Jr., Nancy R. Kitson, Kendall K. Kitson, Steve K. Kitson, Nancy A. Kitson, The Estate of Christopher Adams, Catherine Adams, John E. Adams, Patrick D. Adams, Michael T. Adams, Daniel Adams, Mary Young, Elizabeth Wolf, William Adams, The Estate of Christopher Lester, Cecil H. Lester Jr., Judy Lester, Cecil H. Lester Jr., Jessica F. Lester, The Estate of Jeremy A. Taylor, Lawrence E. Taylor, Vicki L. Taylor, Starlina D. Taylor, The Estate of Patrick P. Fennig, Thaddeus C. Fennig, Catherine Fennig, Paul D. Fening, Mark Fening, Respondents

Fiona Havlish, individually and on behalf of the Estate of Donald J. Havlish Jr., Donald Havlish Sr., Susan Conklin, William Havlish, Tara Bane, individually and on behalf of the Estate of Michael A. Bane, Donald Bane, Christina Bane-Hayes, Krystyna Boryczewski, individually and on behalf of the Estate of Martin Boryczewski, Estate of Michael Boryczewski, Julia Boryczewski, Michele Boryczewski, Grace Kneski, individually and on behalf of the Estate of Steven Cafiero, Richard A. Caproni, individually and on behalf of the Estate of

Richard M. Caproni, Dolores Caproni, Christopher Caproni, Michael Caproni, Lisa Caproni-Brown, Clara Chirchirillo, individually and on behalf of the Estate of Peter Chirchirillo, Livia Chirchirillo, Catherine Deblieck, William Coale, individually and on behalf of the Estate of Jeffrey Coale, Frances Coffey, individually and on behalf of the Estates of Daniel M. Coffey and Jason Coffey, Daniel D. Coffey, M.D., Kevin M. Coffey, The Estate of Jeffrey Collman, Dwayne W. Collman, Brian Collman, Charles Collman, Brenda Sorenson, Loisanne Diehl, individually and on behalf of the Estate of Michael Diehl, Morris Dorf, individually and on behalf of the Estate of Stephen Dorf, Michelle Dorf, Anne Marie Dorf, Robert Dorf, Joseph Dorf, Linda Sammut, Corazon Fernandez, individually and on behalf of the Estate of Judy Fernandez, Maria Regina Merwin, individually and on behalf of the Estate of Ronald Gamboa, Grace Parkinson-Godshalk, individually and on behalf of the Estate of William R. Godshalk, Tina Grazioso, individually and on behalf of the Estate of John Grazioso, Jin Liu, individually and on behalf of the Estate of Liming Gu, Alan Gu, Maureen Halvorson, individually and on behalf of the Estate of James D. Halvorson, Marie Ann Paprocki, individually and on behalf of the Estate of Dennis Lavelle, Roni Levine, individually and on behalf of the Estate of Robert Levine, Teresanne Lostrangio, individually and on behalf of the Estate of Joseph Lostrangio, Margaret Mauro, individually and on behalf of the Estate of Dorothy Mauro, Ramon Melendez, individually and on behalf of the Estate of Mary Melendez, Patricia Milano, individually and on behalf of the Estate of Peter T. Milano, Ivy Moreno, individually and on behalf of the Estate of Yvette Nichole Moreno, Joanne Lovett,

individually and on behalf of the Estate of Brian Nunez, Estate of Vincent A. Ognibene, individually and on behalf of the Estate of Philip Paul Ognibene, Christine Papasso, individually and on behalf of the Estate of Salvatore T. Papasso, Patricia J. Perry, individually and on behalf of the Estate of John William Perry, Rodney Ratchford, individually and on behalf of the Estate of Marsha Dianah Ratchford, Rodney M. Ratchford, Marshee R. Ratchford, Rodney Ratchford for the Benefit of Maranda C. Ratchford, Judith Reiss, individually and on behalf of the Estate of Joshua Scott Reiss, Joyce Ann Rodak, individually and on behalf of the Estate of John M. Rodak, Chelsea Nicole Rodak, Joyce Ann Rodak for the Benefit of Devon Marie Rodak, John Rodak, Regina Rodak, Joanne Gori, Diane Romero, individually and on behalf of the Estate of Elvin Romero, Loren Rosenthal, individually and on behalf of the Estate of Richard Rosenthal, Expedito Santillian, individually and on behalf of the Estate of Maria Theresa Santillian, Ester Santillian, Ellen Saracini, individually and on behalf of the Estate of Victor Saracini, Guardian of Anne C. Saracini, Joanne Renzi, Paul Schertzer, individually and on behalf of the Estate of Scott Schertzer, Ronald S. Sloan, individually and on behalf of the Estate of Paul K. Sloan, Estate of George Eric Smith, Raymond Smith, Katherine Soulas, individually and on behalf of the Estate of Timothy P. Soulas, Russa Steiner, individually and on behalf of the Estate of William R. Steiner, Angela S. Stergiopoulos, individually and on behalf of the Estate of Andrew Stergiopoulos, George Stergiopoulos, individually and on behalf of the Estate of Andrew Stergiopoulos, Sandra Straub, individually and on behalf of the Estate of Edward W. Straub, Joan E. Tino,

individually and on behalf of the Estate of Jennifer Tino, Pamela Schiele, Christine Barton-Pence, individually and on behalf of the Estate of Jeanmarie Wallendorf, Estate of Meta Waller, Doyle Raymond Ward, individually and on behalf of the Estate of Timothy Raymond Ward, Gerald Bingham, Alice Carpeneto, Stephen L. Cartledge, Michelle Wright, Haomin Jian, Fumei Chien, Huichun Jian, Huichuan Jian, Hui-Chien Chen, Hui-Zon Jian, Michael Loguidice, Ralph S. Maerz, Martin Panik, Estate of Linda Ellen Panik, Mary Lynn-Anna Panik Stanley, Helen Rosenthal, Alexander Rowe, Ed Russin, Gloria Russin, Barry Russin, Leonard Zeplin, Leona Zeplin, Joslin Zeplin, Respondents

Jenny Rubin, Deborah Rubin, Stuart E. Hersh, Renay Frym, Noam Rozenman, Elena Rozenman, Tzvi Rozenman, Daniel Miller, Abraham Mendelson, Respondents

Assa Corporation, Assa Company Limited, Respondents

RULE 29.6 STATEMENT

The Alavi Foundation is a not-for-profit corporation organized under the laws of New York. The Alavi Foundation has no parent corporation, and no publicly-held corporation owns 10% or more of its stock.

The 650 Fifth Avenue Company is a partnership organized under the laws of New York. The 650 Fifth Avenue Company has no parent corporation, and no publicly-held corporation owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Alavi Foundation and 650 Fifth Avenue Company respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-76a) is reported at 830 F.3d 107 (2d Cir. 2016). The opinions of the United States District Court for the Southern District of New York are unofficially reported at 2014 U.S. Dist. LEXIS 42531 (App. 158a-238a) and 2014 U.S. Dist. LEXIS 54412 (App. 77a-157a).

JURISDICTION

The judgment of the court of appeals was entered on July 20, 2016. A timely petition for panel rehearing or rehearing en banc was denied on September 28, 2016. (App. 239a-256a.) This Court has jurisdiction under 28 U.S.C. § 1254(1). Although 28 U.S.C. § 2403(a) may apply, the court of appeals did not invoke that provision. The United States is being served with this petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Terrorism Risk Insurance Act of 2002, 28 U.S.C. § 1610 note; the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602 *et seq.*; and the Due Process Clause of the

Fifth Amendment to the U.S. Constitution, are set forth in the Appendix. (App. 275a-277a.)

INTRODUCTION

The Terrorism Risk Insurance Act (“TRIA”), Pub. L. No. 107–297, 116 Stat. 2322, 2337 (codified at 28 U.S.C. § 1610 note), allows a judgment creditor holding an unsatisfied judgment against a “terrorist party” to collect on that judgment by executing against and attaching the blocked assets of the terrorist party or the blocked assets of any “agency or instrumentality of that terrorist party.” In these consolidated actions, Plaintiffs-Respondents (“Respondents”) hold billions of dollars’ worth of unsatisfied, terrorism-related judgments against Iran, which has been designated as a foreign state sponsor of terrorism. Respondents seek to execute those judgments against the assets of Petitioners-Defendants 650 Fifth Avenue Company (“Fifth Avenue Company”), a New York-based real estate partnership, and Alavi Foundation (“Alavi”), a New York not-for-profit corporation that is the majority partner in the Fifth Avenue Company (together, “Petitioners”).

Petitioners were neither parties to the underlying actions against Iran nor involved in any terrorist activity. Nonetheless, Respondents seek turnover of Petitioners’ assets on the theory that Petitioners are “agencies or instrumentalities” of Iran within the meaning of the TRIA. Respondents allege that Petitioners provided services to Iran because the minority partner in the Fifth Avenue Company, a New York corporation called Assa

Corporation (“Assa”), was owned or controlled by an Iranian bank and Petitioners allegedly provided partnership and property management services to Assa. The question presented here is whether Petitioners—who, as a matter of law, are *not* “agencies or instrumentalities” of Iran under the Foreign Sovereign Immunities Act (“FSIA”), within which the TRIA is codified—may nevertheless be deemed Iran’s “agencies or instrumentalities” under the TRIA merely by virtue of having provided such services.

In this case, the Court of Appeals for the Second Circuit determined that an entity need only “provide[] material services” to a terrorist party in order to be considered its “agency or instrumentality” under the TRIA. Thus, entities that provide routine commercial services to a foreign state may be held liable for that state’s terrorist activity, regardless of whether those services had any connection to terrorism. No other court has applied such a sweeping definition of “agency or instrumentality” under the TRIA. And for good reason: the Second Circuit’s chosen definition of “agency or instrumentality” contravenes the plain text of the FSIA, the statutory context of the TRIA itself, and the definitions regularly applied to the phrase under federal law in other contexts. This interpretation is untenable for several reasons.

First, the FSIA provides a strict definition of “agency or instrumentality of a foreign state” that, by its plain terms, applies in this case. The FSIA’s definition explicitly applies to chapter 97 of Title 28 of the U.S. Code, which includes the TRIA. The

TRIA refers to an “agency or instrumentality” of a “terrorist party,” which can be (1) a “terrorist,” (2) a “terrorist organization,” or (3) a “foreign state designated as a state sponsor of terrorism.” Although the FSIA’s definition would not apply to individual terrorists or non-state terrorist organizations, where—as here—the “terrorist party” *is* a “foreign state,” the FSIA’s definition of a foreign state’s “agency or instrumentality” and the TRIA’s definition should be coextensive. Indeed, other than the Second Circuit in this case, every court that has addressed TRIA claims against an alleged “agency or instrumentality” of a foreign state has applied the FSIA’s definition. This definition requires the “agency or instrumentality” to be either majority-owned by the foreign state or an “organ” of the foreign state. As the Second Circuit held, Petitioners do not satisfy the FSIA’s definition of an “agency or instrumentality” of Iran. Thus, Respondents’ TRIA claims should have been dismissed.

Second, the Second Circuit’s broad interpretation of “agency or instrumentality” ignores the statutory context. The court purported to interpret the words “agency” and “instrumentality” according to their ordinary meanings. But the court failed to read the statute as a whole and, instead, read the words “agency” and “instrumentality” in isolation. In the context of the statutory scheme, it is clear that an “agency or instrumentality of [a] terrorist party” must have a close relationship with the terrorist party. Indeed, “agency or instrumentality” is a legal term of art that has been consistently used in federal statutory and common law to refer to an entity that is majority-owned by

the principal or subject to its control. Congress legislated against this backdrop in drafting the TRIA. Moreover, the legislative history of the TRIA demonstrates that it was intended to impose liability upon entities owned and controlled by terrorist parties—not entities that may have provided services to terrorist parties.

Finally, the Second Circuit’s broad definition would yield absurd results and raise serious due process concerns. It would subject service providers to unbounded liability for the conduct of unrelated terrorist parties, regardless of whether the service provider was involved in any terrorist activity. Such arbitrary and disproportionate liability would violate due process. Left uncorrected, the Second Circuit’s ruling could have ruinous consequences for American companies with absolutely no connection to terrorism.

This Court should grant certiorari to clarify the scope of liability under the TRIA.

STATEMENT OF THE CASE

I. Statutory Background

The TRIA is codified as part of the FSIA, which “comprehensively regulat[es] the amenability of foreign nations to suit in the United States.” *Republic of Arg. v. NML Capital, Ltd.*, 134 S. Ct. 2250, 2256 (2014). In an action against a foreign state, including an agency or instrumentality of a foreign state, the FSIA “must be applied . . . since subject-matter jurisdiction in any such action depends on the existence of one of the specified

exceptions to foreign sovereign immunity, 28 U.S.C. § 1330(a).” *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 493 (1983). The FSIA provides that foreign states are immune from both federal and state court jurisdiction and from execution against their assets, unless the plaintiff can demonstrate that an exception set forth in the statute applies. *See* 28 U.S.C. §§ 1604, 1609.

In order to be presumptively entitled to foreign sovereign immunity, an entity must qualify as a “foreign state” within the meaning of the statute’s “Definitions” section, 28 U.S.C. § 1603. The FSIA’s definitions apply “[f]or purposes of this chapter,” *i.e.*, chapter 97 of Title 28 of the U.S. Code, which includes both the FSIA and the TRIA. *Id.* § 1603.

FSIA § 1603(a) provides that “[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).” *Id.* § 1603(a). Section 1603(b), in turn, defines an “agency or instrumentality of a foreign state” as 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). An entity must fulfill all three requirements in order to qualify as an “agency or instrumentality” entitled to sovereign immunity. With limited exceptions not relevant here, a foreign state is immune from attachment and execution unless an exception to sovereign immunity applies. *See id.* § 1609.

In 2002, Congress enacted the TRIA. *See* Pub. L. No. 107-297, 116 Stat. 2322, 2337. Section 201 of the TRIA was intended to address impediments that terrorism victims faced in enforcing judgments against foreign state sponsors of terrorism and other terrorist parties. *See Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1318 (2016). It states:

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 (emphasis added). Thus, the TRIA permits a terrorism-related judgment creditor to execute against the “blocked assets” of a terrorist party,¹ including the blocked assets of its “agencies or instrumentalities.” *Id.* “The effect of the TRIA . . . was simply to render a judgment more readily enforceable against a *related* third party.” *Weinstein v. Islamic Rep. of Iran*, 609 F.3d 43, 51 (2d Cir. 2010) (emphasis added).

The TRIA defines a “terrorist party” as: (1) a “terrorist,” (2) a “terrorist organization,” or (3) a “foreign state designated as a state sponsor of terrorism.” 28 U.S.C. § 1610 note. Thus, it applies to both state actors and non-state actors that are involved in terrorist activity. With respect to state actors that are presumptively entitled to foreign sovereign immunity under the FSIA, the TRIA abrogates execution immunity for the purposes of enforcing terrorism-related judgments against foreign state sponsors of terrorism and their agencies or instrumentalities.

¹ The TRIA defines “blocked assets” as “any asset seized or frozen by the United States under” the International Emergency Economic Powers Act or the Trading With the Enemy Act. 28 U.S.C. § 1610 note.

II. The Parties

Alavi is a New York not-for-profit corporation that was organized over forty years ago with a charitable mission of promoting Islamic culture and the study of Persian language, literature, and civilization in the United States. The Fifth Avenue Company is a New York partnership formed in 1989 for the purpose of holding title to an office building located at 650 Fifth Avenue in midtown Manhattan (the “Building”). Alavi was the sole owner of the Building until 1989, when it transferred its interest to the Fifth Avenue Company in exchange for a majority interest in the partnership. Alavi is now the 60% partner of the Fifth Avenue Company. Its partner, Assa, is the owner of the remaining 40% interest. Alavi serves as managing partner of Fifth Avenue Company and provides building management services to the partnership.

In December 2008, the U.S. Government instituted a civil forfeiture action seeking to forfeit property owned by Assa and Bank Melli, an Iranian bank found to be the undisclosed owner of Assa. The Government alleged that Assa and Bank Melli violated the International Emergency Economic Powers Act (“IEEPA”), 50 U.S.C. § 1701 *et seq.*, and the federal money laundering statutes, 18 U.S.C. §§ 1956 and 1957, and that Assa is a front for Bank Melli.

In November 2009, the Government filed an amended complaint that added Alavi’s and the Fifth Avenue Company’s properties as additional defendants-*in-rem*. It alleged that Petitioners’ assets were subject to forfeiture because Petitioners

provided services to Assa in violation of IEEPA, including managing the partnership and its main asset, the Building, on behalf of the partnership and indirectly Assa.

Following the filing of the initial forfeiture complaint, from 2009 to 2013, Respondents brought these private actions in the Southern District of New York seeking to execute outstanding judgments they had obtained against Iran (the “Iran Judgments”). Respondents acknowledged that neither Alavi nor the Fifth Avenue Company was a party to or in any way involved in the underlying actions in which the Iran Judgments were entered. Nonetheless, Respondents claimed that Petitioners should be deemed the “foreign state” of Iran or an “agency or instrumentality” of Iran under the FSIA and the TRIA because Petitioners allegedly provided services to and were alter egos of Iran. Respondents sought turnover of Petitioners’ properties in partial satisfaction of the Iran Judgments.² The private Respondents’ actions were consolidated with each

² In support of their TRIA claims, Respondents allege that Petitioners’ assets are blocked under IEEPA through Executive Order No. 13,599, 77 Fed. Reg. 6659 (Feb. 5, 2012). That Order states that “[a]ll property and interests in property of the Government of Iran, including the Central Bank of Iran, that are in the United States . . . are blocked” *Id.*; see also 31 C.F.R. § 560.211 (implementing blocking order). The Order defines the “Government of Iran” to mean the “Government of Iran, any political subdivision, agency, or instrumentality thereof . . . and any person owned or controlled by, or acting for or on behalf of, the Government of Iran.” Exec. Order No. 13,599.

other and with the Government's civil forfeiture action.

III. Proceedings Below

In April 2014, after having granted forfeiture of the vast majority of Petitioners' properties, the District Court granted summary judgment to Respondents on their turnover claims. (App. 77a-157a.) It held that Petitioners "are" the "foreign state" of Iran and "agencies or instrumentalities" of Iran under both the FSIA and the TRIA. The District Court granted turnover of all of Petitioners' properties in partial satisfaction of the Iran Judgments. After entry of partial final judgment, Petitioners appealed.

On July 20, 2016, the Second Circuit issued two lengthy decisions reversing the District Court's summary judgment orders in the forfeiture and turnover actions. As to Respondents' FSIA claims, the court ruled as a matter of law that (1) Petitioners do not qualify as the "foreign state" of Iran, (2) Petitioners do not qualify as "agencies or instrumentalities" of Iran, and (3) Petitioners do not qualify as "alter egos" of Iran. (*Id.* at 40a, 45a, 51a.) Accordingly, Respondents' FSIA claims failed. (*Id.* at 75a.)

As to Respondents' TRIA claims, the Second Circuit ruled that Petitioners do not qualify, as a matter of law, as Iran in its capacity as a "foreign state designated as a state sponsor of terrorism." (*Id.* at 54a.) In so concluding, the court relied upon the definition of a "foreign state" under FSIA § 1603(a). (*Id.* at 52a.) However, despite the Second

Circuit’s conclusion that Petitioners do not qualify as “agencies or instrumentalities” of Iran under the FSIA, the court ruled that Petitioners’ status as “agencies or instrumentalities” of Iran under the TRIA is not foreclosed as a matter of law. (*Id.* at 64a-65a.) The court held that § 1603(b)’s definition of “agency or instrumentality of a foreign state” does not apply in determining whether an entity is an “agency or instrumentality of [a foreign state designated as a state sponsor of terrorism]” for TRIA purposes. (*Id.* at 59a-60a.) Instead, the court looked to the dictionary for the supposed “ordinary meanings” of the terms “agency” and “instrumentality” and concluded that an entity could qualify for such status under the TRIA if it: “(1) was a means through which a material function of the terrorist party is accomplished, (2) provided material services to, on behalf of, or in support of the terrorist party, *or* (3) was owned, controlled, or directed by the terrorist party.” (*Id.* at 60a, 62a.) The Second Circuit remanded the matter to the District Court for further proceedings to resolve the question whether Petitioners meet this three-prong standard. (*Id.* at 76a.)

On August 17, 2016, Petitioners sought panel rehearing or rehearing en banc, arguing that FSIA § 1603(b)’s definition of “agency or instrumentality of a foreign state” should be applied to TRIA claims against alleged agencies or instrumentalities of foreign state sponsors of terrorism, or alternatively, that the Second Circuit’s definition should be substantially narrowed. The Second Circuit denied Petitioners’ request on September 28, 2016. (*Id.* at 239a-256a.)

REASONS FOR GRANTING THE PETITION

The Second Circuit’s holdings in this case warrant this Court’s review. The court’s interpretation of the TRIA has created a circuit split concerning the proper definition of “agency or instrumentality of [a] terrorist party” as applied to foreign state sponsors of terrorism. All other courts that have addressed this issue have applied the narrow FSIA definition of “agency or instrumentality of a foreign state”; in contrast, the Second Circuit invented a novel definition that sweeps in unrelated service providers that would not be considered “agencies or instrumentalities” under the FSIA or any number of other federal legal regimes. This Court should clarify that the FSIA’s definition controls where foreign state terrorist parties are concerned. This narrower interpretation of the TRIA would avoid the serious constitutional questions raised by the Second Circuit’s sweeping definition. This Court should grant review in order to address this important federal question.

I. The Decision Below Creates a Circuit Split Concerning the Proper Interpretation of the TRIA

The Second Circuit’s three-prong definition of an “agency or instrumentality of [a] terrorist party” under the TRIA conflicts with all existing precedent. This Court should grant certiorari in order to resolve this Circuit split.

**A. All Other Courts Considering
TRIA Claims Against Alleged
“Agencies or Instrumentalities” of
Foreign State Sponsors of
Terrorism Have Applied the FSIA’s
Definition**

The Second Circuit’s interpretation of “agency or instrumentality” under the TRIA conflicts with the rulings of other courts, which consistently have applied FSIA § 1603(b)’s definition in TRIA cases concerning foreign state sponsors of terrorism. The Ninth Circuit, for instance, recently employed § 1603(b)’s definition of “agency or instrumentality of a foreign state” in its TRIA analysis concerning an alleged agency or instrumentality of Iran. In *Bennett v. Islamic Republic of Iran*, 825 F.3d 950 (9th Cir. 2016), the plaintiffs sought turnover of assets belonging to Bank Melli in satisfaction of their judgment against Iran. The Ninth Circuit relied on Bank Melli’s admission that it was an “instrumentality” of Iran within the meaning of the FSIA to hold that Bank Melli’s assets were attachable pursuant to both the FSIA *and* the TRIA. *See id.* at 957-58. The court did not perform a *separate* analysis of whether Bank Melli constituted an “agency or instrumentality” of Iran under the TRIA, effectively holding that the FSIA definition controls for both statutes.

Similarly, in *Stansell v. Revolutionary Armed Forces of Colombia*, 771 F.3d 713, 732 (11th Cir. 2014), the Eleventh Circuit stated that applying FSIA § 1603(b)’s definition of an “agency or instrumentality of a foreign state” is “feasible” in

TRIA cases in which the terrorist party is a foreign state sponsor of terrorism. In fact, the district court in *Stansell* recognized that the FSIA's definition *would have applied* to the TRIA claims if the relevant terrorist party had been a foreign state. See *Stansell v. Revolutionary Armed Forces of Colombia*, No. 09 Civ. 2308, Dkt. No. 327, at 5 n.5 (M.D. Fl. Sept. 6, 2011) ("The TRIA is not limited to the definition of 'agency or instrumentality' under the definition *applicable to foreign state sponsors of terrorism* found in the [FSIA] because state sponsors of terrorism are only one type of specifically defined types of 'terrorist party' under the TRIA.") (emphasis added). However, the relevant terrorist party in *Stansell* was not a foreign state. The Eleventh Circuit recognized that the FSIA's definition of an "agency or instrumentality of a foreign state" would have to be "tweak[ed]" in order to be applied to an agency or instrumentality of a non-state terrorist organization. 771 F.3d at 730. It ultimately applied a definition of "agency or instrumentality" that was much narrower than the Second Circuit's definition. See *id.* at 730-31; see also *infra* at 17-18.

Finally, a number of district courts have had occasion to address TRIA claims against alleged "agencies or instrumentalities" of foreign state sponsors of terrorism, and they have *unanimously* applied FSIA § 1603(b)'s definition of that phrase. See *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 account was subject to execution 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 *18 n.6, *47-48 (N.D.N.Y. Jan. 7, 2016) (relying on § 1603(b) to find that Cuban central bank is “agency or instrumentality” of Cuba under TRIA); *Gates v. Syrian Arab Rep.*, No. 11 Civ. 8715, 2013 U.S. Dist. LEXIS 45327, at *11-18 (N.D. Ill. Mar. 29, 2013) (applying § 1603(b) to TRIA claims against Syrian Central Bank); *Hausler v. JP Morgan Chase Bank, N.A.*, 845 F. Supp. 2d 553, 572 (S.D.N.Y. 2012) (applying § 1603(b) to TRIA claims against Cuban banks), *rev’d on other grounds*, 770 F.3d 207 (2d Cir. 2014); *Weininger v. Castro*, 462 F. Supp. 2d 457, 494-98 (S.D.N.Y. 2006) (applying § 1603(b) to TRIA claims).

The Second Circuit’s ruling broke with the consensus of other courts that § 1603(b)’s definition applies to TRIA claims against alleged agencies or instrumentalities of foreign state sponsors of terrorism.

B. The Second Circuit Articulated an Unprecedented Definition of “Agency or Instrumentality” under the TRIA

Instead of applying the FSIA definition, the Second Circuit held that any entity that “provide[s] material services” to a terrorist party can be deemed its “agency or instrumentality,” regardless of whether those services have any connection to terrorist activity. While the Second Circuit claimed to follow the approach in *Stansell*, its novel definition swept far beyond the definition established by the Eleventh Circuit for non-state terrorist parties. Indeed, no other court has applied

such a broad definition of “agency or instrumentality” under the TRIA.

In *Stansell*, the plaintiffs were judgment creditors of the terrorist narco-trafficking organization Revolutionary Armed Forces of Colombia (or “FARC”). They asserted TRIA claims against various individuals and entities affiliated with FARC on the grounds that they were allegedly “agencies or instrumentalities” of the organization. The district court determined that the defendants could properly be deemed “agencies or instrumentalities” based on their ownership or control by the FARC or their involvement with its criminal activities. *Stansell*, No. 09 Civ. 2308, Dkt. No. 327, at 4. It stated:

Any [Specially Designated Narcotics Trafficker] . . . , 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, is an agency or instrumentality of the FARC under the TRIA 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 narcotics trafficking [related to coca paste or cocaine manufactured or supplied by the FARC].

Id. at 4-5. The Eleventh Circuit affirmed the district court’s use of this definition for the non-state terrorist organization at issue. *See Stansell*, 771 F.3d at 732.

The Second Circuit cited *Stansell* in support of its three-prong definition of an “agency or instrumentality of [a] terrorist party” under the TRIA. But the court misread *Stansell*. The *Stansell* court held that an entity may be deemed an “agency or instrumentality” of a non-state terrorist party on the basis that it was “owned, controlled, or directed by, or acting on behalf” a terrorist party or “providing goods or services *in support of*” the terrorist party’s criminal activities. 771 F.3d at 724 n.6 (emphasis added). Moreover, *Stansell*’s definition has a predicate requirement that the alleged agency or instrumentality must be “involved

in” the activity that caused the terrorist party to be designated with such status. *Id.*

In contrast, the Second Circuit adopted a far more expansive definition that would apply based on the provision of services. (App. 62a.) It ignored a critical limitation imposed by the *Stansell* court: involvement in and support of unlawful activity. Thus, there is a great disparity between the definitions adopted by the Second and Eleventh Circuits.

II. This Case Raises the Important Federal Question as to the TRIA Definition of an “Agency or Instrumentality”

This Court should grant certiorari in order to address the question of how to interpret the phrase “agency or instrumentality of [a] terrorist party” under the TRIA when the terrorist party is a foreign state sponsor of terrorism. The Court’s guidance here is critical, given the grave consequences of being deemed a terrorist party’s agency or instrumentality.

A. The FSIA’s Definition of “Agency or Instrumentality” Governs the TRIA Where the Terrorist Party at Issue Is a Foreign State

The Second Circuit erred in refusing to apply FSIA § 1603(b)’s definition of “agency or instrumentality” to Respondents’ TRIA claims. As all other courts to address the issue have held, the FSIA’s definition applies to TRIA claims where the

terrorist party at issue is a foreign state sponsor of terrorism.

As explained above, the TRIA is codified as part of the FSIA. See 28 U.S.C. § 1610 note. Courts must read the TRIA within this “statutory context” and interpret the FSIA “as a symmetrical and coherent regulatory scheme.” *Calderon-Cardona v. Bank of N.Y. Mellon*, 770 F.3d 993, 1000 (2d Cir. 2014) (quoting *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)). “[D]iscordant” interpretations of the TRIA and the FSIA must be avoided. *Id.* Section 1603(b) provides a strict definition of an “agency or instrumentality of a foreign state” which applies “[f]or purposes of this chapter”—the U.S. Code chapter that includes the TRIA. While the TRIA refers to an “agency or instrumentality of [a] terrorist party,” the statute defines “terrorist party” to include a “foreign state designated as a state sponsor of terrorism.” 28 U.S.C. § 1610 note. Thus, the FSIA’s definition of “agency or instrumentality of a foreign state” applies whenever a court is determining whether an entity is an “agency or instrumentality of [a foreign state designated as a state sponsor of terrorism]” under the TRIA.

Rather than following this simple mechanical process and employing the FSIA’s definition of the terms, the Second Circuit adopted a definition of “agency or instrumentality” under the TRIA that is wholly different and substantially inconsistent. The court found that applying § 1603(b)’s definition would “contravene a plain reading of the TRIA” since the statute is not limited in reach to “foreign state”

terrorist parties. (App. 57a.) But the Second Circuit’s ruling was not compelled by the TRIA or the FSIA. The court overlooked the fact that, by its plain terms, § 1603(b) applies narrowly to only *one* type of terrorist party: a “foreign state.” Accordingly, that definition only applies in determining whether an entity is an “agency or instrumentality of a *foreign state*” under the TRIA. While the panel would not have been required to apply § 1603(b)’s definition in a TRIA case against a *non-state* terrorist party (as in *Stansell*), there was no valid basis for disregarding that definition in this case, where it does apply.

The definition of “agency or instrumentality” established by Congress in the FSIA focuses on the issues of majority ownership, status as an organ of a state, and citizenship, while the Second Circuit’s definition permits a finding of “agency or instrumentality” status merely for “provid[ing] material services to” a foreign state. *Compare* 28 U.S.C. § 1603(b) with App. 62a. As the Second Circuit held, Petitioners do not satisfy § 1603(b)’s definition of an “agency or instrumentality” of Iran. (App. 45a.) Like Respondents’ FSIA claims, the TRIA claims should be dismissed under this standard.

B. Even If the FSIA’s Definition Does Not Apply, the TRIA Must Be Read in Context

Even assuming, *arguendo*, that the FSIA’s definition of “agency or instrumentality” does not apply to the TRIA, the Second Circuit’s definition is incorrect under the rules of statutory interpretation.

It is a fundamental principle of statutory construction that statutes “should not be read as a series of unrelated and isolated provisions.” *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995). Rather, “[t]he relevant phrase . . . must be read in its entirety,” *id.* at 574, and “the text should be placed in the context of the entire statutory structure.” *Gottlieb v. Carnival Corp.*, 436 F.3d 335, 338 (2d Cir. 2006); *see also Sullivan v. Strop*, 496 U.S. 478, 482 (1990) (“In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.”). Reading the language of the TRIA in context, the most logical and coherent interpretation of the statute is that it requires an “agency or instrumentality” of a terrorist party to have a close relationship with the terrorist party—a relationship based on majority ownership or control. Indeed, principles of statutory construction yield a definition of “agency or instrumentality” that is substantially similar to the FSIA definition.

1. The Court Below Disregarded the Statutory Context of the TRIA and the FSIA

The Second Circuit purported to determine the “ordinary meanings” of “agency” and “instrumentality.” (App. 60a.) As the court noted, dictionaries provide varying definitions of the terms. (*Id.* at 61a.) The interpretive question at hand is whether an “agency or instrumentality” under the TRIA must be majority-owned or controlled by the principal, or whether providing a material service to

the principal would suffice. While most of the dictionary definitions of these terms suggest that a relationship of ownership or control is required (*id.*), these terms are “susceptible of more than one meaning” and, therefore, “potentially ambiguous.” *Green v. City of New York*, 465 F.3d 65, 79 (2d Cir. 2006). The Second Circuit resolved this issue by combining the various dictionary definitions into a three-prong test. (App. 62a.) This was error.

The Second Circuit ignored the fundamental interpretive principle that a court cannot read the words of a statute in isolation. *See Gustafson*, 513 U.S. at 570. The court should have considered the relevant phrase in its entirety and construed the language within the broader statutory context. *See id.* at 574; *Sullivan*, 496 U.S. at 482; *United States v. Costello*, 666 F.3d 1040, 1044 (7th Cir. 2012) (“Dictionary definitions are acontextual, whereas the meaning of sentences depends critically on context . . .”). Because the words of a statute gather meaning from those surrounding them, the terms “agency” and “instrumentality” should be interpreted to have similar meanings. *See Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961) (“The maxim *noscitur a sociis*, that a word is known by the company it keeps . . . is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress.”). Given that an “instrumentality” is generally considered to be a branch of the principal that is subject to its control (App. 61a), the word “agency” should be construed to require a similar relationship.

Looking beyond the terms “agency” and “instrumentality,” the TRIA permits execution or attachment against “the blocked assets of [a] terrorist party (*including* the blocked assets of any agency or instrumentality of that terrorist party).” 28 U.S.C. § 1610 note (emphasis added). The statute states that the blocked assets of the terrorist party “includ[e]” the blocked assets of its “agency or instrumentality,” which closely tracks § 1603(a)’s definition of a foreign state as “including . . . an agency or instrumentality of a foreign state.” 28 U.S.C. § 1603(a). The word “include” means “[t]o contain as a part of something.” Black’s Law Dictionary (10th ed. 2014). For a terrorist party’s assets to “include” those of its “agency or instrumentality,” that agency or instrumentality must be closely connected to the terrorist party such that its assets can essentially be considered the assets of the terrorist party itself (and, thus, fairly subject to turnover to satisfy judgments against the terrorist party).

Reading the provision as a whole demonstrates that independent service providers cannot be deemed “agencies or instrumentalities” of terrorist parties. It would be illogical to say that the assets of a terrorist party “include” the assets of unrelated entities that merely provide services to the party. For example, one would not say that Iran’s assets “include” the assets of Barclays Bank, HSBC, or Credit Suisse simply because those banks admitted to providing financial services to Iran. *See infra* at 34 n.8. Rather, one would expect there to be a close relationship between the “agency or instrumentality” and the terrorist party in order for

the former's assets to be "included" in those of the latter. It is particularly appropriate to require a close relationship between the two entities, given that the statute imposes *full liability* upon the "agency or instrumentality" for the terrorist party's wrongdoing. Federal statutes do not—and cannot for constitutional reasons, *see infra* at 31-36—impose liability for one party's wrongdoing upon independent entities that happen to do business with them. *See, e.g., Logue v. United States*, 412 U.S. 521, 527-28 (1973) (requiring a corporation to be controlled by the U.S. Government, as opposed to an independent contractor, in order to be deemed an "instrumentalit[y] or agenc[y]" whose acts could subject the United States to liability under the Federal Tort Claims Act).³

Further, the words of the TRIA must be read in their broader statutory context. *See Sullivan*, 496 U.S. at 482. Within the FSIA statutory scheme, which includes the TRIA, there is another provision that uses the words "include" and "agency or instrumentality" in close proximity—§ 1603. This section states that a "foreign state" "includes" an "agency or instrumentality of a foreign state." 28

³ Indeed, the Second Circuit's interpretation of the TRIA would lead to an absurd result: the imposition of unlimited liability against mere service providers for the terrorist acts of unrelated parties. It is a fundamental principle of statutory construction that "interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available." *Griffin v. Oceanic Contractors*, 458 U.S. 564, 575 (1982); *see also United States v. Kirby*, 74 U.S. 482, 486 (1869).

U.S.C. § 1603(a). It requires an “agency or instrumentality” to be closely connected to its foreign state principal: the agency or instrumentality must be either majority-owned by the foreign state or its “organ.” *Id.* § 1603(b). Even assuming that § 1603(b)’s definition does not control the determination of whether an entity is an “agency or instrumentality of [a] terrorist party” under the TRIA, it nonetheless provides valuable guidance about Congress’s understanding of the phrase in the statutory scheme.

**2. The Court Below Disregarded
the Settled Meaning of
“Agency or Instrumentality”
as a Legal Term of Art**

The Second Circuit also failed to recognize that “agency or instrumentality” is a legal term of art that has been consistently interpreted with respect to federal statutes and common law to require majority ownership or control by the principal. It is a “cardinal rule of statutory construction” that when Congress uses a term of art, “it presumably knows and adopts the cluster of ideas that were attached to each borrowed word” *Molzof v. United States*, 502 U.S. 301, 307 (1992). Thus, “where a word is given a consistent meaning throughout the United States Code, then the courts assume that it has that same meaning in any particular instance of that word.” *Firststar Bank, N.A. v. Faul*, 253 F.3d 982, 990 (7th Cir. 2001); *see also W. Va. Univ. Hosps. v. Casey*, 499 U.S. 83, 88 (1991) (reviewing the “record of statutory usage” of certain language).

Congress has used the terms “agency” and “instrumentality” together in a variety of statutory contexts, including the FSIA. These terms have consistently been interpreted to mean that the principal owns a majority interest in or controls its agency or instrumentality. *See Logue*, 412 U.S. at 527-28 (holding that the “critical factor” in determining whether a corporation is an “instrumentalit[y] or agenc[y] of the United States” under the Federal Tort Claims Act is “the authority of the principal to control the detailed physical performance of the contractor”); *United States v. Esquenazi*, 752 F.3d 912, 925 (11th Cir. 2014) (holding that an “agency” or “instrumentality” of a foreign government under the Foreign Corrupt Practices Act means “an entity controlled by the government of a foreign country,” such as an entity in which the government has a “majority interest”); *Schaefer v. Transp. Media, Inc.*, 859 F.2d 1251, 1255 (7th Cir. 1988) (holding that an entity must be subject to “supervisory control” by a city in order to be considered its “agency or instrumentality” under the Age Discrimination in Employment Act); *Rose v. Long Island R. Pension Plan*, 828 F.2d 910, 918 (2d Cir. 1987) (holding that the factors determinative of whether an entity is an “agency or instrumentality” of the government under the Employee Retirement Income Security Act include “whether control and supervision of the organization is vested in public authority” and whether the government has “the powers and interests of an owner”).

Similarly, the common-law meaning of the terms “agency” and “instrumentality” requires such an entity to be majority-owned or controlled by the

principal. *See, e.g., Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 394-400 (1995) (holding that Amtrak was “agency or instrumentality of the United States” for constitutional purposes because the government “retains for itself permanent authority to appoint a majority of the directors” and Amtrak furthers “governmental objectives”); *Reconstruction Fin. Corp. v. J.G. Menihan Corp.*, 312 U.S. 81, 83 (1941) (holding that Reconstruction Finance Corporation was an “agency” of the federal government entitled to sovereign immunity because the government was its “sole stockholder” and its board of directors was appointed by the president).

Courts also have consistently held that merely providing services to an entity is insufficient to render the service provider an agency or instrumentality. *See, e.g., Penn Dairies, Inc. v. Milk Control Comm'n*, 318 U.S. 261, 269 (1943) (holding that “those who contract to furnish supplies or render services to the government” are not “agencies” of the government entitled to its immunity); *Logue*, 412 U.S. at 525-28 (holding that county jail was not an “instrumentalit[y] or agenc[y] of the United States” for purposes of the FTCA merely by reason of its contract to provide services to the federal government); *United States v. New Mexico*, 455 U.S. 720, 734-35 (1982) (holding that federal contractors that “provid[ed] services” to government at research laboratories were not “agenc[ies] or instrumentalit[ies]” immune from taxation); *Esquenazi*, 752 F.3d at 921 n.6 (holding that an “agency” or “instrumentality” of a foreign government under the FCPA “exclude[s] a private contractor not controlled or created by the state that

provided a service to the public”); *Edison v. Doublerly*, 604 F.3d 1307, 1310 (11th Cir. 2010) (holding that a private entity is not an agency or instrumentality of the government under the Americans with Disabilities Act “merely because it contracts with a public entity to provide some service”); *Schaefer*, 859 F.2d at 1254 (holding that the “mere existence of an exclusive contract” to provide advertising services to a city does not render the contractor an “agency or instrumentality” of the city under the ADEA).

In drafting the TRIA, Congress legislated against the backdrop of the entire body of federal statutory and common law interpreting the phrase “agency or instrumentality.” This Court should presume that Congress incorporated the settled meaning of these terms. *See Molzof*, 502 U.S. at 307.

3. The Court Below Disregarded the TRIA’s Legislative History

The Second Circuit also failed to recognize that the TRIA’s legislative history demonstrates Congress’s intent to impose liability for terrorist acts upon entities that are majority-owned and controlled by the terrorist parties.⁴ In a floor statement, one of the TRIA’s co-sponsors stated:

[T]errorist-sponsored states will no longer be able to use their

⁴ A statute’s legislative history is relevant in interpreting ambiguous language. *See Green*, 465 F.3d at 78.

diplomatic and intelligence agencies to support terrorists with financial impunity Terrorism-sponsoring states use those *wholly owned and controlled agencies and instrumentalities* to raise, to launder, and to distribute funds to terrorist cells, sometimes even in the United States of America. Ironically, these agencies and instrumentalities can claim foreign sovereign immunity against victims in U.S. courts because of their relationship with the terrorist-sponsoring states.

148 Cong. Rec. H6133, H6134 (Sept. 10, 2002) (statement of Rep. Fossella) (emphasis added). Any ambiguity regarding the meaning of the terms “agency or instrumentality” should be resolved in a manner consistent with Congress’s focus on entities “owned and controlled” by a terrorist party. *Id.*⁵

One of the drafters of the TRIA similarly stated that the statute “operates to strip a terrorist state of its immunity from execution or attachment in aid of execution by making the blocked assets of that terrorist state, including the blocked assets of

⁵ This floor statement indicates that Congress intended FSIA § 1603(b)’s definition of “agency or instrumentality” to apply to TRIA claims concerning foreign state sponsors of terrorism; an entity would only be able to “claim foreign sovereign immunity” if it satisfied § 1603(b)’s definition of “agency or instrumentality of a foreign state.” *See* 28 U.S.C. §§ 1603, 1609.

any of its agencies or instrumentalities, available for attachment and/or execution of a judgment issued against that terrorist state.” 148 Cong. Rec. S11524, S11528 (Nov. 19, 2002) (statement of Sen. Harkin). Congress viewed the imposition of liability upon an “agency or instrumentality” of a terrorist state as stripping the terrorist state of “its” immunity, strongly suggesting that the entities must be closely related. *Id.* The TRIA would not strip a terrorist state of “its” immunity if the statute permitted the execution of judgments against unrelated service providers.

There is no indication in the TRIA’s legislative history that Congress intended to subject service providers to liability for the wrongdoing of unrelated terrorist parties. Rather, the statute’s legislative history demonstrates that Congress used the phrase “agency or instrumentality of [a] terrorist party” with the intent that judgment creditors would be able to execute against the assets of an entity that is majority-owned or controlled by the terrorist party against which the judgment was entered.

C. The Second Circuit’s Interpretation of the TRIA Raises Serious Constitutional Concerns

The Second Circuit’s expansive interpretation of “agency or instrumentality” under the TRIA runs afoul of the Due Process Clause because it arbitrarily subjects entities with no connection to terrorist activity to unbounded liability for the wrongdoing of an unrelated terrorist party. The TRIA must be construed more narrowly to avoid this serious constitutional concern. *See Rust v. Sullivan*,

500 U.S. 173, 190-91 (1991) (“[A] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.”).

Due process prohibits “irrational and arbitrary” deprivations of property, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 429 (2003), including the imposition of “grossly excessive” liability on tortfeasors. *BMW of N. Am. v. Gore*, 517 U.S. 559, 562 (1996).⁶ In the context of punitive damages, this Court has limited such awards based on the following factors: “(1) the degree of the defendant’s reprehensibility or culpability, (2) the relationship between the penalty and the harm to the victim caused by the defendant’s actions, and (3) the sanctions imposed in other cases for comparable misconduct.” *Cooper Indus. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 435 (2001) (citations omitted). Similarly, this Court has held that there are due process limitations on statutory damages. Such awards are unconstitutional where they are “so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable.” *St. Louis, I. M. & S. R. Co. v. Williams*, 251 U.S. 63, 67 (1919). Likewise, due process necessarily limits Congress’s authority to impose liability upon third parties that

⁶ Cf. *United States v. Bajakajian*, 524 U.S. 321, 334 (1998) (holding that the Eighth Amendment’s Excessive Fines Clause prohibits punitive forfeitures that are “grossly disproportional to the gravity of a defendant’s offense”).

had no involvement in an underlying wrongdoing that gave rise to a judgment.

The Second Circuit’s interpretation of the TRIA, however, provides no reasonable limitation on liability. The TRIA permits a judgment creditor to satisfy any compensatory damages component of its judgment against a terrorist party by executing against all blocked assets of an “agency or instrumentality” of that terrorist party.⁷ Under this interpretation, therefore, a service provider to Iran could be subjected to unlimited liability based only on a determination that its services were “material.” Moreover, the Second Circuit made clear that an entity would be considered to be providing services to Iran *indirectly* if the entity provided services to an agency or instrumentality of Iran. (App. 63a (“Bank Melli owned and controlled Assa . . . such that Alavi was providing services to Bank Melli (*and, therefore, Iran*) . . .”) (emphasis added).) In other words, the court ruled that Alavi could be deemed an “agency or instrumentality” of Iran for providing services to Assa, which is allegedly owned by Bank Melli, which is owned by Iran. Such an attenuated connection to the Iranian government would be sufficient to subject Alavi to billions of dollars in liability for Iran’s terrorist activity.

⁷ Though the TRIA permits a judgment creditor to recover only against “blocked assets,” such a limitation is meaningless where Iran is concerned. Under the Second Circuit’s ruling, all assets of the “Government of Iran,” which includes any “agency, or instrumentality” of Iran or any person acting on its behalf, are automatically blocked under Executive Order No. 13,599. (App. 70a, 74a.)

The Second Circuit's standard fails to meet constitutional muster. It does not take into account the reprehensibility of the service provider's conduct, whether there is any connection between the services and the harm to the victim, or whether the deprivation of property would be excessive in light of the nature of the services provided. *See Cooper*, 532 U.S. at 435; *Williams*, 251 U.S. at 66-67. It would impose unlimited liability upon entities that are not related to Iran and that had no involvement in terrorist activity simply for providing services to Iran or its agency or instrumentality. Such a deprivation of property would be arbitrary, disproportionate, and grossly excessive, in violation of due process. *See State Farm*, 538 U.S. at 416, 429; *Williams*, 251 U.S. at 66-67.

The threat of arbitrary and disproportionate property deprivations is not just theoretical. The Second Circuit's ruling could have ruinous consequences for individuals and companies that have provided routine commercial services to Iran, given the literally *tens of billions of dollars* of outstanding terrorism-related judgments against Iran. Under the Second Circuit's ruling, the assets of a number of major banks would be subject to turnover, given that they have admitted to providing services to Iran in violation of Treasury Department regulations.⁸ The court's interpretation of the TRIA

⁸ *See, e.g.*, Settlement Agreement between U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC") and Credit Suisse AG (Dec. 16, 2009) (App. 430a-446a); Deferred Prosecution Agreement between U.S. Department of Justice ("DOJ") and Credit Suisse AG (Dec. 16, 2009) (*id.* at 447a-491a); Settlement

could also generate a flood of litigation against American companies that provide online communication services. *Cf. Force v. Facebook, Inc.*, No. 16 Civ. 5158, Dkt. No. 1, ¶ 1 (E.D.N.Y.) (complaint asserting Antiterrorism Act claims against Facebook for allegedly “provid[ing] material support” to Hamas, a terrorist organization, in the form of social networking services). And in this case, Respondents could potentially obtain turnover of all of Petitioners’ assets, merely because Petitioners allegedly provided partnership and management services to themselves and Assa.

In order to avoid this constitutionally impermissible outcome, the Court should clarify that the TRIA must be construed more narrowly. *See INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001) (“[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is fairly possible, we are obligated to construe the statute to avoid such problems.”) (citations omitted). The Court should impose an “agency or instrumentality” test that requires a close relationship between the agency or instrumentality and the terrorist party—namely, a relationship of majority ownership or control. Such a standard would not violate due

Agreement between OFAC and Barclays Bank PLC (Aug. 18, 2010) (*id.* at 376a-388a); Deferred Prosecution Agreement between DOJ and Barclays Bank PLC (Aug. 16, 2010) (*id.* at 389a-429a); Settlement Agreement between OFAC and HSBC Holdings plc (Dec. 11, 2012) (*id.* at 278a-296a); Deferred Prosecution Agreement among DOJ, HSBC Bank USA, N.A., and HSBC Holdings plc (Dec. 11, 2012) (*id.* at 297a-375a).

process because the entity being subjected to liability would essentially be a part of the terrorist party found to have committed grave wrongdoing in the underlying action. *See Cooper*, 532 U.S. at 435 (considering the defendant's "reprehensibility"). Thus, the entity could fairly be held liable for the terrorist party's wrongdoing.

III. This Case is the Ideal Vehicle for Resolving These Important Issues

This case presents an ideal vehicle for the Court to clarify the scope of the TRIA because the facts exemplify how the Second Circuit's broad "agency or instrumentality" test is unworkable. The Second Circuit's ruling provides no guidance on what types of services may be deemed "material" and suggests that the services need not be in any way connected to the principal's terrorist or unlawful activities. This test would create uncertainty and lead to fundamentally unfair and unconstitutional outcomes. Service providers attempting to avoid liability under the TRIA must now assess (1) whether their services could be deemed "material," and (2) whether their customers have any connection to a "terrorist party," however remote.

The problems with the Second Circuit's standard are borne out by the facts of this case. Respondents allege that Alavi provided management services to Assa in connection with a real estate partnership. They do not allege that Alavi provided services with *any* nexus to terrorist activity. Under the Second Circuit's test, the factfinder may conclude that Alavi's management of the partnership

constituted a “material” service that subjects Alavi to liability under the TRIA as an “agency or instrumentality” of Iran. The Second Circuit’s ruling casts a cloud of uncertainty over other types of routine commercial services, such as banking and communication services.

Moreover, this case demonstrates the practical problems associated with imposing TRIA liability on entities that indirectly provide routine commercial services to a terrorist party. The connection between Alavi and Iran is extremely attenuated: Alavi allegedly provided partnership management services to Assa, which is owned by Bank Melli. Yet the Second Circuit stated that Alavi may be deemed to have provided services *to Iran*. (App. 62a.) Under the Second Circuit’s test, a service provider would need to investigate the ownership and business relationships of each of its customers in order to determine whether providing services to that customer could somehow lead to an indirect provision of services to a terrorist party. This test would place an unreasonable burden on companies having no relationship to terrorism in order to avoid TRIA liability.

Further, this case involves a fertile area for litigation under the TRIA and the FSIA because Iran has a large number of creditors with billions of dollars in unsatisfied terrorism-related judgments. Iran’s judgment creditors have moved aggressively to attach assets in the United States held by third parties to recover on their judgments. *See, e.g., Bennett*, 825 F.3d at 965-66 (holding that judgment creditors of Iran may attach and execute against

monies in the possession of Visa Inc. that were contractually owed to Bank Melli). This case demonstrates the scope of activity that could subject entities to the execution against and attachment of their properties to satisfy judgments against Iran. The Second Circuit's ruling will surely lead to abusive litigation against other service providers with attenuated, at best, connections to Iran.

Finally, the interests of judicial economy would be served by this Court's intervention at this stage of the litigation. This case has dragged on for eight years and is now headed for trial on two issues: (1) whether Petitioners are "agencies or instrumentalities" of Iran under the TRIA, and (2) whether Petitioners' assets are "blocked" within the meaning of the TRIA. It would waste the time and resources of the District Court to try one of the central issues in the case under an incorrect standard. Given the confusion among the circuit courts on the proper interpretation of the TRIA, this Court should step in and settle the issue.

The facts of this case demonstrate that the Second Circuit's interpretation of the TRIA is unworkable and that a stricter standard is needed. This Court should grant certiorari and clarify that an "agency or instrumentality" of a foreign state sponsor of terrorism must satisfy FSIA § 1603(b)'s standard or, at the very least, be majority-owned or controlled by that foreign state. Either standard would provide clear guidance to companies attempting to avoid liability under the TRIA.

CONCLUSION

The petition for certiorari should be granted.

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DANIEL S. RUZUMNA
Counsel of Record
MUHAMMAD U. FARIDI
DIANA M. CONNER
PATTERSON BELKNAP WEBB &
TYLER LLP
1133 Avenue of the Americas
New York, NY 10036-6710

Counsel for Petitioners