23-354(L)

23-797(C)

United States Court of Appeals

FOR THE SECOND CIRCUIT

JAMES OWENS, ET AL.,
Plaintiffs-Appellants,

v.

TALIBAN a/k/a ISLAMIC EMIRATE OF AFGHANISTAN,
Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
Hon. Valerie E. Caproni
Case No. 1:22cv1949

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* NASEER A. FAIQ, *CHARGÉ D'AFFAIRES*, PERMANENT MISSION OF THE ISLAMIC REPUBLIC Of AFGHANISTAN TO THE UNITED NATIONS, SUPPORTING AFFIRMANCE OF THE VACATUR OF PREJUDGMENT ATTACHMENT

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Mr. Naseer A. Faiq respectfully moves this Court for leave to file the accompanying brief as *amicus curiae* in support of affirming the district court in these two consolidated appeals. Counsel for the *Owens* Plaintiffs-Appellants consent to Mr. Faiq's motion.

Mr. Faiq is head of the Permanent Mission of Islamic Republic of Afghanistan (Afghanistan) to the United Nations (UN) in New York. He assumed the position of *chargé d'affaires* in December 2021. Mr. Faiq has served Afghanistan as a diplomat for nearly two decades in various senior-level capacities. The Taliban opposes Mr. Faiq's service in his current role on the ground that he does not represent the Taliban regime. Indeed, Mr. Faiq openly and staunchly opposes their takeover of Afghanistan and has called for urgent international action to end the Taliban's hold on the country and to sanction its leaders.[1]

The interests of Afghanistan and the Afghan people would be radically impacted by the turnover of the Da Afghanistan Bank ("DAB")

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[1] *See, e.g.*, Press Release, Security Council, Induce Taliban to End 'Gender Apartheid' in Afghanistan through All Available Means, Speakers Urge Security Council, Alarmed by Growing Oppression of Women, Girls, U.N. Press Release SC/15421 (Sept. 26, 2023) *available at* https://press.un.org/en/2023/sc15421.doc.htm; Naseer A. Faiq (@faiq_naseer), X (Aug. 23, 2023, 10:49 PM), https://x.com/faiq_naseer/status/1694542470435025312?s=20.

assets, yet they are not represented in these proceedings. As access to Afghanistan's reserves is vital to the country's future and its people, Mr. Faiq seeks to offer his unique and crucial perspective of Afghanistan, to enable the Court to adjudicate the issues before it on a more complete basis. *See SEC v. Ripple Labs, Inc.*, No. 20 CIV. 10832 (AT), 2021 WL 4555352, at *5 (S.D.N.Y. Oct. 4, 2021) (participation as amicus is appropriate when, *inter alia*, "a party is not represented . . . or when the amicus has unique information or perspective that can help the court" (citation omitted)).

The proposed brief seeks to elucidate critical immunity and jurisdictional issues concerning the DAB assets that neither the parties, nor other proposed *amici curiae*, have addressed. It explains why the district court did not abuse its discretion in considering *sua sponte* whether DAB's assets are the central reserves of a foreign sovereign protected by the Foreign Sovereign Immunities Act ("FSIA"); and why the district court correctly determined, as a substantive matter, that the assets are immune under the FSIA's heightened protections for foreign central reserves, in 28 U.S.C. § 1611(b). Moreover, the proposed brief explains the significant adverse consequences to the United States of any

interpretation of § 1611(b) or its procedural applicability that would make DAB's assets attachable here.

Mr. Faiq also proposes to highlight the adverse consequences that attaching or executing on the DAB assets would have on the international economy, and particularly on the United States. Authorizing the use of central bank assets to satisfy judgments against a nonstate entity would be a radical departure from the longstanding principle of central bank immunity and would considerably destabilize the international financial system and New York's place at the center of it.

In addition, Mr. Faiq is an active participant as *amicus curiae* in the turnover proceedings that are the subject of the five consolidated appeals to be argued in tandem with the instant appeals. His familiarity with that record and those proceedings makes him well positioned to aid the Court as it wades through the record in the various appeals concerning attempts to attach or execute on Afghanistan's reserves.[2]

To be clear, Mr. Faiq fully supports compensation for victims of the horrific acts of the Taliban, including the Plaintiffs-Appellants in these

[2] Mr. Faiq's counsel is also able and willing to participate in oral argument, should this Court schedule one.

matters who have obtained judgments against them. Mr. Faiq, however, disagrees with the notion that compensation for the acts of terror wrought by the Taliban should come from the Afghan people, who are neither morally nor legally responsible for the tragic events of September 11, 2001, or the other acts of terrorism committed by the Taliban, and who have likewise been victimized by the Taliban.

Mr. Faiq respectfully requests that the Court grant him leave to file the accompanying brief.

Dated: October 6, 2023

Respectfully submitted,

/s/ Justin B. Cox

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the undersigned hereby certifies that this motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A). Exclusive of the exempted portions of the brief, as provided in Federal Rule of Appellate Procedure 32(f), the motion contains 694 words. This motion also complies with the typeface and type style requirements of Federal Rules of Appellate Procedure 32(a)(5) and (6) because it has been prepared in 14-point Century Schoolbook, which is proportionally spaced, and it has been prepared using Microsoft Word.

/s/ Justin B. Cox
Justin B. Cox

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INTEREST OF *AMICUS CURIAE*[1]

Naseer A. Faiq is the highest ranking Afghan diplomat in the United States. He has served as the *chargé d'affaires* of the Permanent Mission of the Islamic Republic of Afghanistan (Afghanistan) to the United Nations in New York since December 2021. Mr. Faiq has served Afghanistan as a diplomat for nearly two decades in various senior-level capacities, including as the Mission's Minister Counselor, Political Coordinator, and Economic Counsellor; and as Afghanistan's Deputy Director General of the Ministry of Foreign Affairs.

The Taliban, whose hostile occupation terrorizes Afghanistan, opposes Mr. Faiq's service in his current position, noting that he does not represent the Taliban regime—a regime that is not recognized as the government of Afghanistan by the international community or any individual country, including the United States. As Mr. Faiq stated in a speech to the UN Security Council, he does "not represent[] the former

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[1] No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person—other than counsel for *amicus curiae*—contributed money that was intended to fund preparing or submitting this brief.

government of Afghanistan … nor … the interest of any political group." Mr. Faiq strives to represent the interests of the Afghan people, who have endured "a relentless barrage of calamities" since the Taliban returned to power in August 2021, culminating in a devastating and ongoing humanitarian crisis exacerbated by the unavailability of their reserves held by the Federal Reserve Bank of New York ("FRBNY") for Da Afghanistan Bank ("DAB"), Afghanistan's central bank. *In re Terrorist Attacks on Sept. 11, 2001*, ___ F. Supp. 3d ___, No. 03-MDL-1570, 2023 WL 2138691, at *3 (S.D.N.Y. Feb. 21, 2023).

Mr. Faiq and the Afghan people have a paramount interest in the continued safeguarding of the State of Afghanistan's reserves. For more than forty years, the Afghan people have suffered from war, violence, conflict, and terrorism. Millions have lost their lives, been severely injured, or been forced to flee the nation altogether. After decades of hardship, many Afghans have hoped to reach a new age of durable and inclusive peace and prosperity. But following the reemergence of the Taliban, all fundamental rights are under attack, and Afghanistan is grappling with a humanitarian crisis of famine and extreme poverty.

Mr. Faiq fully supports compensation for the Taliban's victims,

including those who have obtained judgments in American courts. But that compensation cannot come from the Afghan people, who are neither morally nor legally responsible for the tragic events of September 11, 2001, or other acts of terrorism committed by the Taliban. To the contrary, countless Afghans worked alongside Americans as allies to push and keep the Taliban from power, in furtherance of the United States' global fight against terrorism. To this day, in the face of reprisal, including death, brave Afghans continue to resist the Taliban regime, motivated by the hope that they, too, can someday enjoy the liberty, freedom, and democracy found elsewhere.

Given the absence of adversarial briefing and the importance of Afghanistan's reserves to the future of the Afghan people, Mr. Faiq seeks to aid the Court by addressing issues specific to the instant appeals that are not addressed in the brief he is contemporaneously filing in the five consolidated appeals to be heard in tandem.[2] Specifically, Mr. Faiq discusses below why the district court did not abuse its discretion in considering *sua sponte* whether DAB's assets (which the *Owens*

[2] Nos. 23-258(L), 23-263(C), 23-304(C), 23-346(C), 23-444(C).

Appellants attached prejudgment) are the central reserves of a foreign sovereign protected by the Foreign Sovereign Immunities Act ("FSIA"); and why the district court correctly determined, as a substantive matter, that the assets are immune under the FSIA's heightened protections for foreign central reserves, in 28 U.S.C. § 1611(b).

Mr. Faiq also underscores the significant adverse consequences to the United States of any interpretation of § 1611(b) or its procedural applicability that would make DAB's assets attachable here. While this case concerns a minute fraction of the trillions of dollars in foreign exchange reserves held just at FRBNY, a ruling that the DAB's assets are available to satisfy judgments against the Taliban would create significant uncertainty regarding the immunity of other foreign reserves. Such a decision could have profoundly destabilizing consequences for the international financial system and New York's place in it, which only confirms the congressional intent to immunize these assets through § 1611(b).

Should the Court decide to hold oral argument on these appeals, counsel for Mr. Faiq is available to participate.

INTRODUCTION AND SUMMARY OF ARGUMENT

If this Court reaches the merits of the *Owens* appeals,[3] it should affirm the district court's decision to vacate the prejudgment attachment of Afghanistan's reserves held in DAB's name by FRBNY. As the central bank of Afghanistan, DAB must be treated as the State of Afghanistan itself under the FSIA. 28 U.S.C. § 1603(a). DAB is thus presumptively immune from the jurisdiction of U.S. courts, *id.* § 1604, and its assets—which belong to the Afghan people—are immune from attachment or execution, *see id.* §§ 1609, 1611(b) (special protections for central bank funds), as the district court correctly held, SPA1.

Unlike the Taliban's creditors in the five consolidated appeals to be argued in tandem, the *Owens* appeals do not concern the Terrorism Risk Insurance Act ("TRIA"), which *Owens* Appellants do not mention. Instead, their claim of entitlement to Afghanistan's reserves is based on their contention that the DAB funds are now owned by the Taliban. That

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[3] Mr. Faiq takes no position on whether this Court has appellate jurisdiction. *See Owens* Br., ECF 75, at 25-32. For the reasons explained in his brief contemporaneously filed in the appeals referenced in note 2 *supra*, however, the district court lacked statutory jurisdiction to order attachment, execution, or turnover of DAB's assets.

alleged ownership, they argue, means the assets are not entitled to any immunity under the FSIA and consequently can be taken by the Taliban's creditors to pay the Taliban's bills. *Owens* Appellants assert that the district court abused its discretion for even considering the question of sovereign immunity under the FSIA; and erred in concluding that DAB's assets are entitled to central bank immunity under § 1611(b) of the FSIA. Neither argument has merit.

1. The district court did not abuse its discretion when it considered the immunity issues inherent in Appellants' attempts to attach the assets of the State of Afghanistan's central bank. *Owens* Appellants' sole claim that the district court abused its discretion is that "non-jurisdictional" immunity cannot be considered *sua sponte*. However, as this Court and the Supreme Court have made clear, courts act well within their discretion when they decide *sua sponte* to consider issues of sovereign immunity. *See, e.g.*, *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493 n.20 (1983) ("[E]ven if the foreign state does not enter an appearance to assert an immunity defense, a District Court still must determine that immunity is unavailable under the Act."); *Walters v. Indus. & Com. Bank of China*, 651 F.3d 280, 291 (2d Cir. 2011) ("[The FSIA] places no limit on

the district court's authority to recognize execution immunity," which "inures in the property itself and applies without regard to how the issue is raised.").

Furthermore, in this context the immunity issues *are* jurisdictional and thus warrant consideration. While execution immunity might be non-jurisdictional in other circumstances, civil litigants cannot take sovereign assets absent an exception to jurisdictional immunity; and the sole way to obtain such an exception is through the FSIA. *See Turkiye Halk Bankasi A.S. v. United States*, 598 U.S. 264, 278 (2023) ("*Halkbank*") (discussing *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 437 (1989)). Here, the applicability of both types of immunity—and therefore jurisdiction—is bound up in the nature of assets to be judicially restrained and DAB's status as the central bank of Afghanistan. Thus the district court properly considered it *sua sponte*.[4] Both the unique nature of the assets at issue—central reserves, which are not just any sovereign asset—and the prejudgment posture made it all the more

[4] These appeals thus do not present the question whether a district court can consider execution immunity *sua sponte* when jurisdictional immunity has already been abrogated.

appropriate here to consider immunity, given the FSIA's specific protections for foreign reserves in § 1611(b) and its express prohibition on prejudgment attachment of sovereign assets in order "to obtain jurisdiction." 28 U.S.C. § 1610(d)(2).

Owens Appellants argue that the district court abused its discretion because "*[s]ua sponte* consideration of FSIA immunity is improper where the sovereign is absent, and it is unclear that the property at issue actually belongs to a sovereign entity," *Owens* Br. at 22 (emphasis added). In addition to the authority cited above, this specific argument is squarely foreclosed by the Supreme Court, which held in *Republic of Philippines v. Pimentel* that where there is a "not frivolous" possibility that the assets belong to a foreign sovereign, then that sovereign is a required party under Federal Rule of Civil Procedure 19 and the case "must be dismissed" if the sovereign cannot be joined because of FSIA immunity. 553 U.S. 851, 867 (2008). *Pimentel* also held that a court may consider *sua sponte* the failure to join a required sovereign. *Id.* at 861. *Owens* Appellants made no effort to join DAB or Afghanistan, which they could not have done in any event because of jurisdictional immunity.

The "unclear" ownership premise of Appellants' argument is likewise false: ownership of the DAB assets is not unclear. They belong to the Afghan people, and the Taliban have no property interest in them that a U.S. court can countenance, as the district court suggested.

2. The district court correctly determined that Afghanistan's reserves held by FRBNY for DAB are protected by the FSIA's central bank immunity provision, § 1611(b). DAB has been Afghanistan's central bank since its founding in 1939; the reserves are "held for its own account"; and the holding of such reserves is a quintessential central banking function. DAB's assets are precisely the type that Congress intended § 1611(b) to protect—and for good reason, as the United States reaps enormous benefits from the trillions of dollars in foreign reserves that are kept in U.S. banks, and in particular at FRBNY. *See generally NML Cap. v. Banco Central de la Republica Argentina*, 652 F.3d 172 (2d Cir. 2011); *EM Ltd. v. Republic of Argentina*, 473 F.3d 463 (2d Cir. 2007).

The district court was right to reject *Owens* Appellants' argument that because the assets are blocked under an Executive Branch sanctions program, they are not being used for central banking functions within the meaning of this Court's *NML* decision. *See Owens* Br. at 53-54. This

is a misuse of *NML*, which considered how to distinguish between sovereign assets being used for central banking purposes (entitled to immunity under § 1611(b)) and sovereign assets that are being used for ordinary commercial banking purposes (not immune under § 1611(b)). The Court there had no occasion to consider whether central banking funds *lose* their immunity under § 1611(b) simply because they are blocked under an Executive Branch sanctions program. They plainly do not—controlling precedent is clear that blocking does not affect title to property, *see Smith ex rel. Estate of Smith v. FRBNY*, 346 F.3d 264, 272 (2d Cir. 2003), and so DAB's assets remain "held for its own account" under § 1611(b). As such, *NML* fully supports the district court's decision.

Regardless, even if the *extra* protection of § 1611(b) is inapplicable, Afghanistan's reserves are still sovereign assets presumptively immune from attachment or execution under § 1609. *Owens* Appellants do not claim that § 1609 has been abrogated, and thus this Court need not reach their arguments about § 1611(b)'s applicability.

As Judge Caproni explained, AA467, *Owens* Appellants similarly miss the relevant point when they argue that the district court should have "independently analyzed … whether DAB is still 'an organ of

[Afghanistan],' at the time of the attachment proceeding," in light of the Taliban's apparent unlawful control of DAB. *Owens* Br. at 56 (quoting 28 U.S.C. § 1603(b)(2) (second alteration in original)). The assets held in DAB's name belong to the State of Afghanistan; its rights to that property, and that property's immunity under § 1609, are categorically unaffected by whether the bank currently meets that definition in the FSIA, which has nothing to do with property rights. *See* C*alderon-Cardona v. Bank of New York Mellon*, 770 F.3d 993, 1001 (2d Cir. 2014) (discussing how the FSIA "merely attaches consequences, federally defined, to rights created under state law"). "[A] regime not recognized as the government of a state is not entitled to property belonging to that state located in the United States." *Restatement (Third) of Foreign Relations Law of the United States* § 205(2). For that reason, as the district court explained, "evidence that the Taliban has seized control of DAB's operations is not the same as evidence that DAB's assets are now the assets of the Taliban." AA468.

Owens Appellants conceded to the district court that "because a judgment creditor stands in the shoes of the judgment debtor" under New York law, their "claims to the [DAB] funds—and ability to attach them—

[are] coextensive with the Taliban's." ECF No. 48 at 17, No. 1:22cv1949 (citation omitted). Yet *Owens* Appellants were unable to articulate to the district court any legal basis upon which the Taliban could have any property rights in Afghanistan's reserves, *see* AA469; nor are they able to do so on appeal. Instead, as the district court observed, "their position seems to be that the Taliban will steal the funds from the Afghan people if the Government allows them to do so and, therefore, Plaintiffs should be able to seize the funds to satisfy the Taliban's debt." *Id.* This is simply not the law, as the district court correctly held.

BACKGROUND

I. Central Bank Reserves

This case concerns a foreign sovereign's central bank reserves, a unique category of assets that Congress has comprehensively shielded for important reasons. First, such reserves play a crucial role in promoting and maintaining regional and global economic stability, particularly in times of crisis. In addition, the deposit of central bank funds in the United States, primarily in the FRBNY—without fear of litigation or attachment—brings tremendous benefits to public and private enterprise

in this country and contributes to New York's status as the world's premiere financial center.

Central banks use their assets to perform a variety of critical stabilizing functions. To maintain price stability and to control inflation, for example, central banks auction dollars or other reserve currencies. They also seek to ensure that the local economy is sufficiently capitalized to support its everyday activity, such as purchasing supplies, investing in businesses, and paying employee salaries. In times of crisis, central banks can absorb solvency shocks by using their reserves—which are typically maintained in stable currencies, such as the dollar—to inject liquidity into an otherwise frozen financial market. *See generally* Paul L. Lee, *Central Banks and Sovereign Immunity*, 41 Colum. J. Transnat'l L. 327, 356-59 (2003).

Afghanistan's central bank, DAB, used its assets in these same ways prior to the Taliban's takeover in August 2021. For nearly twenty years, the United States worked with Afghanistan to build a banking system that was sufficiently capitalized and was independent of the government. When the Taliban was pushed from power by coalition forces in 2001, "the Afghan central bank had around $90,000 in foreign

exchange reserves." Clayton Thomas, Cong. Research Serv., *Taliban Government in Afghanistan: Background and Issues for Congress* 38 (Nov. 2, 2021).[5] By the time the United States withdrew from Afghanistan in August 2021, DAB had accumulated over $10 billion in assets. *See id.*

Like many other central banks, DAB held most of its foreign reserves—more than $7 billion in gold and investments—at FRBNY. *Id.* As of 2010, some 250 foreign central banks and monetary authorities held accounts at the FRBNY, with assets totaling more than $3 trillion—about half of the world's official dollar reserves at that time.[6] *See* Br. for FRBNY as *Amicus Curiae* at 3, *NML Capital, Ltd. v. Banco Central de la Republica Argentina*, 652 F.3d 172 (2d Cir. 2011) (No. 10-1487), 2010 WL 3032829 ("FRBNY Amicus").

The deposit of foreign reserves in U.S. banks is extremely important to the U.S. economy. Among other benefits, their presence increases the depth and liquidity of U.S. financial markets; reduces

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[5] *Available at* crsreports.congress.gov/product/pdf/R/R46955.

[6] This data from 2010 appears to be the most recent public data readily available.

transaction costs for private enterprises, particularly those engaging in cross-border transactions; lowers the debt servicing costs of the United States in financing its public debt, by exerting downward pressure on interest rates; and promotes the dollar as the preferred currency reserve of the world. *See id*. at 2-5. The maintenance of those foreign reserves at FRBNY "is an important component of what makes the United States, and New York in particular, one of the world's premier financial centers, augmenting this nation's ability to exercise leadership on the world stage." *Id*. at 4.

Foreign central banks can of course choose to maintain their reserves elsewhere. What has been "critical" to their decision to hold their resources in the United States "has been the assurance long provided by United States law that central banking funds held in this country are immune from attachment, save for very narrow exceptions." Br. for the United States as *Amicus Curiae* at 2, *NML Capital, Ltd. v. Banco Central de la Republica Argentina*, 652 F.3d 172 (2d Cir. 2011) (No. 10-1487), 2010 WL 4597226. The substantive legal protection for foreign central reserves is codified in § 1611(b) of the FSIA, which provides that absent an explicit waiver, and notwithstanding the exceptions to execution

immunity contained in § 1610, "property … of a foreign central bank or monetary authority held for its own account" "shall be immune from attachment and from execution." 28 U.S.C. § 1611(b)(1). Congress granted central bank property these "special protections" because of "the particular sovereign interest" they implicate; to provide an incentive for foreign central banks to maintain their reserves in the U.S. banks, given the benefits noted above; to protect against reciprocal treatment of U.S. assets held abroad;[7] and to avoid the "significant foreign relations problems" that come with "execution against the reserves of foreign states." *NML Cap.*, 652 F.3d at 188-89 (citations omitted); *see also EM Ltd.*, 473 F.3d at 473.

"Central banks and monetary authorities," FRBNY has explained, "are extremely attentive to the safety and security of their reserves, and look for assurance that their accounts at the FRBNY are protected under U.S. law," particularly § 1611(b). FRBNY Amicus at 4. "If central banks perceive the United States as having a hostile legal environment in

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[7] "At any given time the Department of Justice's Office of Foreign Litigation represents the United States in about 1,000 cases in 100 courts around the world." *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 581 U.S. 170, 183 (2017).

comparison to other nations," or if our "immunity law" is "inadequate or uncertain," foreign banks will take their money elsewhere. *Id.* at 4-5. In such an event, "the potential disruptive effects on deposits of dollar reserves here and the resulting impact on the international financial system could be profound." FRBNY Amicus at 6; *see also id.* at 12 (expressing concern about an interpretation of central bank immunity that is "imprecise, lacks legal certainty, and requires a fact finding before immunity can attach").

II. *Owens* Procedural History

Owens Appellants are approximately two hundred American and foreign nationals who were among those victimized on August 7, 1998 by the nearly-simultaneous detonation of truck bombs at U.S. embassies in Kenya and Tanzania. The suicide bombings were carried out by al-Qaeda, which allegedly received assistance from numerous non-state actors (including the Taliban) and foreign sovereigns (but not Afghanistan). *Owens* Appellants have filed suit against various parties allegedly responsible for the bombings, but have never sued Afghanistan or DAB, nor sought to join either in any pre- or post-judgment collection efforts, including those at issue in these appeals.

Owens Appellants sued the Taliban for their role in the 1998 bombings on March 8, 2022. AA163. That same day, they moved *ex parte* for an "emergency" prejudgment order attaching the DAB assets held by FRBNY. *See generally* ECF 5, No. 1:22cv1949. *Owens* Appellants explained to the district court that there were numerous other Taliban creditors; that writs of execution issued on behalf of the *Havlish* and *Doe* Taliban creditors (two of the "Joint Creditors" whose appeals will be argued in tandem) had already encumbered the majority of the available DAB funds; and that the plaintiffs were concerned that none of Afghanistan's reserves would be left by the time their case reached final judgment. *See id.* Then, as now, *Owens* Appellants claimed entitlement to Afghanistan's reserves based on their alleged ownership by the Taliban—which is unsurprising, given that ownership was an asserted basis of the *Havlish* execution lien (which was itself the basis of the *Doe* execution lien).[8] As *Owens* Appellants reasoned:

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[8] The *Havlish* and *Doe* procedural history is discussed in Mr. Faiq's brief filed in the five consolidated appeals referenced in note 2 *supra*. Unlike *Owens* Appellants, the Taliban creditors in those other appeals abandoned any claim that the Taliban has a property interest in DAB's assets after *Havlish* counsel made those representations to the Clerk of

> In granting post-judgment writs of execution on the same assets, two other decisions in this District have already ruled that the assets held in DAB's name at the Federal Reserve Bank of New York may be attached to satisfy judgments against the Taliban. *See* Writ of Execution, *John Does 1 Through 7*, No. 20-mc-00740 (S.D.N.Y.), ECF entry dated Sept. 27, 2021; Writ of Execution, *Havlish*, No. 03-cv-09848 (S.D.N.Y.), ECF entry dated Jan. 19, 2022. Implicit in these rulings is a determination that the assets belong to the Taliban, given the Taliban's "ownership and control of [DAB]." Emergency Mot. for Writ of Execution at 8, *John Does 1 Through 7*, No. 20-mc-00740 (S.D.N.Y. Aug. 26, 2021), ECF No. 15. Those decisions are determinative here. The same assets in the same account cannot be treated as the Taliban's in two cases but not in a third.

Id. at 20 (alteration in original). The district court expressed unease at the "unseemly" circumstances, AA318n.8, but issued the order for prejudgment attachment (AA304) on the ground that it was seemingly required by New York law, *see* AA317-18. The district court expressly reserved consideration of "complicated issues of law," AA311, specifically including whether the Taliban actually owns DAB's assets. AA309n.2, AA316n.5

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the Court in August 2021 in order to obtain the first writ of execution encumbering Afghanistan's reserves. *See id.*; *accord Owens* Br. at 1-2 ("[T]he various enforcement efforts by victims of terrorism against the [DAB] Funds have been predicated from the start on the fact that the Funds now are owned by the Taliban by dint of its takeover of Afghanistan and DAB.").

Upon consideration of those reserved issues some eleven months later, the district court vacated the prejudgment attachment, concluding that it "should not have been granted in the first instance." SPA6. In the interim, both FRBNY and the United States had highlighted for the district court legal principles concerning immunity and jurisdiction that preclude execution on Afghanistan's reserves to satisfy judgments against the Taliban. *See* ECF No. 61, No. 1:22cv1949 (FRBNY letter); AA450 (U.S. letter). Also in the interim, both Magistrate Judge Netburn and District Judge Daniels had concluded that multiple, independent obstacles preclude the Taliban's creditors from executing on the sovereign assets of the Afghan people. *See* SPA4 (discussing *In re Terrorist Attacks on Sept. 11, 2001*, 2023 WL 2138691). In her decision vacating the prejudgment attachment, Judge Caproni agreed with Judges Netburn and Daniels that DAB's assets remain immune under the FSIA, SPA10-11, while also expressing skepticism that *Owens* Appellants could establish the Taliban's ownership of the assets in any event, SPA3n.2. Two weeks later, in March 2023, the district court denied *Owens* Appellants' motion for equitable relief pending appeal to maintain their priority. AA465.

Approximately a month after vacating the prejudgment attachment, the district court entered a final (default) judgment against the Taliban for compensatory damages plus prejudgment interest in the amount of $1,905,269,836.12 and punitive damages in the amount of $3,291,109,761.26, for a total judgment of $5,196,379,597.38, plus post-judgment interest to run from the date of judgment until it is satisfied. SPA12. *Owens* Appellants then filed a second notice of appeal. AA527. On July 6, 2023, this Court denied *Owens* Appellants' motion for equitable relief to maintain their priority pending appeal.

III. Arguments on Appeal

On appeal, *Owens* Appellants make two arguments regarding the immunity of DAB's assets. First, they contend the district court abused its discretion in even considering the question of FSIA immunity. *Owens* Br. at 35-42. Second, they argue that the district court reached the wrong substantive conclusion when it determined that Afghanistan's reserves held by FRBNY are entitled to central bank immunity under § 1611(b) of the FSIA, *id.* at 53-72. Neither argument has merit.

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY CONSIDERING SOVEREIGN IMMUNITY

The district court acted well within its discretion when it *sua sponte* considered whether *Owens* Appellants were seeking to harness the judicial authority of the United States to encumber assets of an absent foreign sovereign that are, as a matter of U.S. law, immune from those precise efforts. Indeed, both the Supreme Court and this Court have held that a district court in fact *should* evaluate the possibility of immunity even where, as here, the foreign sovereign is absent. *See Verlinden*, 461 U.S. at 493 n.20; *Walters*, 651 F.3d at 291. Likewise, and as the district court noted, the FSIA's mandate that the property of foreign central banks "shall" be immune from attachment and execution makes that inquiry all the more appropriate, as does *Owens* Appellants' concession that the district court *could* consider immunity in the context of their motion to confirm their *ex parte* attachment order. *See* SPA8.

The only argument to the contrary that the *Owens* Appellants muster is to assert that this Court held in *Walters* that "non-jurisdictional" immunity may not be considered *sua sponte* when ownership is "unclear," *Owens* Br. at 22, or "disputed," *id.* at 34-41. But

(as discussed in the section below), ownership of Afghanistan's reserves is not unclear. *See* AA468; Restatement (Third) of Foreign Relations Law of the United States § 205(2).

Owens Appellants also do not fairly characterize what *Walters* held; to the contrary, it expressly held that, given the text and structure of the FSIA, and because sovereign immunity "inures in the property itself," courts *should* consider immunity even if the sovereign does not appear. 651 F.3d at 291. *Walters* also refused to adopt any distinction between a district court's consideration of jurisdictional and "non-jurisdictional" immunity, rejecting that proffered distinction as contrary to the text of the FSIA itself. *See* 651 F.3d at 293 ("[T]he FSIA, by its terms, authorizes consideration of sovereign immunity from both jurisdiction and execution even in the absence of an appearance by the sovereign."). *Walters* provides no basis to conclude that the district court abused its discretion.

And even setting aside the arguments about "non-jurisdictional" immunity, the sovereign immunity issues here *are* jurisdictional, and thus had to be considered even under *Owens* Appellants' view of *Walters*. Execution immunity might be non-jurisdictional in some circumstances, but civil litigants seeking to take the assets of a foreign sovereign have

to show an exception to jurisdictional immunity, too. *See Walters*, 651 F.3d at 287; *see also In re Terrorist Attacks of Sept. 11, 2001*, 2023 WL 2138691, at *5-9. Here, the applicability of both types of immunity—and therefore jurisdiction—is bound up in the nature of these assets and DAB's status as the central bank of Afghanistan. The district court thus properly considered it *sua sponte*. *See Walters*, 651 F.3d at 287 (quoting *Verlinden*, 461 U.S. at 493 n.20).

Finally, *Owens* Appellants' specific formulation of the rule of law they would have this Court adopt—that "*[s]ua* sponte consideration of FSIA immunity is improper where the sovereign is absent, and it is unclear that the property at issue actually belongs to a sovereign entity," *Owens* Br. at 22—is squarely foreclosed by the Supreme Court's decision in *Pimentel*. There, a class of human rights victims had obtained a nearly $2 billion judgment against the former President of the Philippines, Ferdinand Marcos, and then sought to attach assets of a company incorporated by Marcos. *See* 553 U.S. at 857-58. Those assets were allegedly stolen by Marcos from the Republic of the Philippines while he was in office. *Id.* at 854-55; *compare with* AA468 ("Accepting [*Owens* Appellants'] argument would effectively mean that the power of the

United States Courts would be used to pay the Taliban's debts with assets of the Afghan people that the Taliban has stolen."). Although initially part of the litigation, sovereign entities of the Philippines were dismissed from the action on jurisdictional immunity grounds. 553 U.S. at 859.

Pimentel ultimately held that, given the "not frivolous" possibility that the assets in question did, in fact, belong to the sovereign Republic, it was a required party under Federal Rule of Civil Procedure 19. *See id.* at 863-64. And because the sovereign entities' FSIA immunity prevented them from being joined, the Supreme Court held that the case "may not proceed," *id.* at 864, and instead "must be dismissed," *id.* at 872. The Court acknowledged that its holding "will mean, in some instances, that plaintiffs will be left without a forum for definitive resolution of their claims," but explained that such a result "is contemplated under the doctrine of foreign sovereign immunity." *Id.* at 872. *Pimentel* requires the same result here.[9]

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[9] *Pimentel* also held that courts "may also consider *sua sponte* the absence of a required person and dismiss for failure to join." *Id.* at 861.

II. THE DISTRICT COURT CORRECTLY HELD THAT AFGHANISTAN'S RESERVES HELD BY FRBNY FOR DAB ARE PROTECTED BY THE FSIA'S CENTRAL BANK IMMUNITY.

The district court likewise reached the correct conclusion when it determined that *Owens* Appellants had not rebutted the presumption that the assets held by FRBNY in the name of DAB are sovereign assets protected by § 1611(b) and the FSIA more generally. *See* AA467. *Owens* Appellants have but two arguments that the district court erred, but neither comes close to carrying that burden, and even if accepted, neither would justify reversal.

First, *Owens* Appellants contend that § 1611(b) is inapplicable because the funds are now frozen and cannot be used for any purpose. *See Owens* Br. at 54. This argument is premised on their read of *NML Capital*, where this Court was called upon to consider whether particular sovereign assets of Argentina were being used for central banking purposes (meriting § 1611(b) protection) or generic commercial banking purposes instead (and therefore not protected by § 1611(b)). *See* 652 F.3d at 194. *NML Capital* held that § 1611(b)'s applicability in this context turned on whether the funds were "being used for central banking functions as such functions are normally understood." *Id. Owens*

Appellants assert that since Afghanistan's reserves are blocked, they are not being used for anything at all—and therefore do not meet the *NML Capital* requirement that § 1611(b) applies to sovereign assets "being used for central banking functions as such functions are normally understood." *Owens* Br. at 54.

This argument regarding *NML Capital* is a prime example illustrating this Court's warning that "it is always hazardous to seize upon a single word or phrase in a judicial opinion and build upon it a rule that was not in issue in the case being decided." *Howard v. Senkowski*, 986 F.2d 24, 28 (2d Cir. 1993). It makes no sense to apply the *NML Capital* test, which was developed for a particular context entirely different from this one, to the question of whether the blocking of a central banks' reserves—which indisputably were being used for central banking functions prior to that blocking—somehow *deprives* those assets of protection under § 1611(b). That question is answered instead by a straightforward application of the statutory text: the assets are still held by FRBNY for DAB's own account. *See Smith*, 346 F.3d at 272 (blocking alters possessory interest but not property rights).

To the extent that the blocking is relevant at all, Executive Order 14064 is explicit: DAB's assets are the property of the Afghan people that were blocked protectively "for the Benefit of the People of Afghanistan." AA233. The same purpose can be seen in OFAC's protective licensing of DAB's unencumbered assets, AA297, as well as the order to consolidate DAB's assets in New York, AA233, which prevented the "fortuitous presence of property" in a different forum from being used to justify of jurisdiction, *Nat'l Am. Corp. v. Fed. Republic of Nigeria*, 448 F. Supp. 622, 638 (S.D.N.Y. 1978), as had already been done in the Southern District of New York in the appeals to be argued in tandem.[10]

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[10] *Owens* Appellants assert that it was "widely understood" that the February 11, 2022 blocking of DAB's (already blocked) assets "mean[t] that victims of terrorism could use these assets to satisfy judgments against the Taliban," *Owens* Br. at 52, but that opinion is not material to any question before this Court. *See Samantar v. Yousuf*, 560 U.S. 305, 323 (2010) (explaining that in the FSIA Congress assigned the judiciary the exclusive responsibility to make foreign sovereign immunity determinations to ensure they "are made on purely legal grounds" (citation omitted)). Their contention is also rank speculation; it just as plausible, for example, that the Executive acted out of concern that, given the *Havlish* and *Doe* execution liens on more than $7 billion of DAB's assets, the United States risked liability under the Takings Clause if it took any action making those encumbered assets unavailable to them.

But Appellants' arguments about whether DAB's assets are still entitled to protection under § 1611(b) because of the way they are (or are not) being used are also irrelevant, considering the additional hurdles to execution that would remain. Even assuming they can no longer be considered assets of a central bank held for its account meriting the additional protections of § 1611(b), they are still the assets of a foreign sovereign presumptively immune under § 1609. The *Owens* Appellants do not argue or even assert that § 1609 has been abrogated; nor is there any basis for such an argument, so their § 1611(b) argument does not get them any closer to entitlement to Afghanistan's assets.

Similarly devoid of either merit or relevance is *Owens* Appellants' other argument: that the district court erred in not independently analyzing whether DAB "remained" an organ of a foreign state within the meaning of § 1603(a) of the FSIA, in light of the Taliban's unlawful control over it, *Owens* Br. at 56 (emphasis omitted). *Owens* Appellants' premise is that if DAB no longer meets § 1603(a)'s definition of a "foreign state," then the assets held in DAB's name by FRBNY are no longer "'the property of a foreign state' under [§] 1611(b)" and so can be taken in satisfaction of the Taliban's debts. *See id.* at 54-56. That premise is

fallacious. It does not matter whether DAB meets that definition, which has nothing to do with property rights; the State of Afghanistan owned DAB's assets when DAB unquestionably met the definition in § 1603(a), and it owns them still, regardless of whether the Taliban's control of DAB means it might not still meet that definition. "Control and ownership . . . are distinct concepts," *Dole Food Co. v. Patrickson*, 538 U.S. 468, 477 (2003), and *Owens* Appellants articulate no basis for conflating the Taliban's unlawful control of DAB with its ownership of the State of Afghanistan's assets. AA468 ("[E]vidence that the Taliban has seized control of DAB's operations is not the same as evidence that DAB's assets are now the assets of the Taliban"). In other words, even if the district court undertook the analysis urged by *Owens* Appellants, no outcome of that analysis could change anything material regarding Taliban's entitlement to Afghanistan's reserves. The district court did not err in refusing to undertake an irrelevant analysis.

CONCLUSION

Mr. Faiq reiterates his deepest sympathy for the Taliban's American victims and his appreciation for the United States' commitment to the rule of law.

Dated: October 6, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the undersigned hereby certifies that this brief complies with the type-volume limitation of Second Circuit Local Rule 29.1(c). Exclusive of the exempted portions of the brief, as provided in Federal Rule of Appellate Procedure 32(f), the brief contains 6108 words, according to the word count feature of the word processing system. This brief also complies with the typeface and typestyle requirements of Federal Rules of Appellate Procedure 32(a)(5) and (6), as it has it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook type style.

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