

Nos. 26-292, 26-293, 26-294

IN THE
Supreme Court of the United States

FIONA HAVLISH, ET AL., *Petitioners*,
v.
THE TALIBAN, ET AL., *Respondents*.
(No. 26-292)

KATHLEEN ASHTON, ET AL., *Petitioners*,
v.
THE TALIBAN, ET AL., *Respondents*.
(No. 26-293)

JAMES OWENS, ET AL., *Petitioners*,
v.
THE TALIBAN, ET AL., *Respondents*.
(No. 26-294)

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

**BRIEF OF NASEER A. FAIQ, CHARGÉ D’AFFAIRES
OF THE PERMANENT MISSION OF
AFGHANISTAN TO THE UNITED NATIONS, AS
AMICUS CURIAE IN OPPOSITION TO THE
PETITIONS**

NATASHA ARNPRIESTER
JAMES A. GOLDSTON
OPEN SOCIETY JUSTICE
INITIATIVE
224 West 57th Street
New York, NY 10019

JUSTIN B. COX
Counsel of Record
LAW OFFICE OF
JUSTIN B. COX
P.O. Box 1106
Hood River, OR 97031
(541) 716-1818
justin@jcoxconsulting.org

Counsel for Amicus Curiae

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INTEREST OF AMICUS CURIAE

Naseer A. Faiq has been chargé d'affaires of the Permanent Mission of Afghanistan to the United Nations since December 2021.¹ He has represented Afghanistan there since, the Credentials Committee having deferred the Taliban regime's competing claim at every session—most recently in November 2025, the fifth consecutive deferral. Rep. of the Credentials Comm., U.N. Doc. A/80/547 (Nov. 2025). The Taliban opposes his service. His interest is the State's, and its people's, in reserves these petitions wrongly call the Taliban's.

Mr. Faiq's position has precedent. From 1996 to 2001, as now, the United States recognized the State of Afghanistan and no government of it, App. 125a n.7.² The Credentials Committee deferred the Taliban's competing claim each session while "the current representatives of Afghanistan accredited to the United Nations could continue to participate in the work of the General Assembly." Repertory of

¹ Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person other than amicus and his counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received timely notice of the intent to file this brief under Rule 37.2.

² Citations are to the Havlish Appendix and Second Circuit ("C.A.") docket, No. 23-258, unless noted. "MDL" is *In re Terrorist Attacks on September 11, 2001*, No. 03-md-1570 (S.D.N.Y.); "Havlish ECF" and "Owens ECF" are Nos. 03-cv-9848 and 22-cv-1949 (S.D.N.Y.). The Havlish petitioners are four creditor groups. "Havlish Br." and "Havlish Reply" are their appellate briefs, C.A. Dkts. 118, 198; "Ashton Br.," C.A. Dkt. 116; "Faiq Br.," C.A. Dkt. 242; "Owens Br." and "Owens Reply," No. 23-354, Dkts. 75, 122; "Faiq Owens Br.," No. 23-354, Dkt. 157.

Practice of United Nations Organs, Supp. No. 9, vol. 2, art. 9, ¶¶ 12-20.

That is again the situation today. App. 28a. As a consequence, no one is authorized to appear for Afghanistan in U.S. courts. *Guaranty Trust Co. v. United States*, 304 U.S. 126, 137 (1938); MDL 7731 at 4-5 (“neither the Republic nor any other entity is presently authorized to represent [Afghanistan] as its government before this Court”).

Every Taliban judgment here is a default judgment; no defendant has appeared at any stage. The parties’ only adversity has been over how to divide Afghanistan’s reserves among themselves. Immunity under the Foreign Sovereign Immunities Act (FSIA) must be decided regardless. *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493 n.20 (1983); MDL 7662; App. 19a-21a, 59a.

Mr. Faiq supports compensation for the Taliban’s victims, including the U.S. citizen and foreign national petitioners who hold judgments from American courts. But it cannot come from the Afghan people, who have no liability for the Taliban’s crimes and who resisted the Taliban, at great cost, alongside the United States. He said so as amicus curiae below, MDL 7932-1, 8645, 8773; Faiq Br.; Faiq Owens Br.; C.A. Dkt. 263, and he writes here to explain why none of the petitions warrants review.

STATEMENT

Under the FSIA, a foreign state—including its agencies and instrumentalities, 28 U.S.C. 1603(a)—is presumptively immune from suit, 28 U.S.C. 1604, and its property from attachment and execution, 28 U.S.C.

1609. Property “of a foreign central bank or monetary authority held for its own account” is immune even where other sovereign property is not, 28 U.S.C. 1611(b)(1), a protection meant “to provide an incentive for foreign central banks to maintain their reserves in the United States.” *EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 473 (2d Cir. 2007); see Faiq Owens Br. 14-17. Section 201(a) of the Terrorism Risk Insurance Act of 2002 (TRIA), 28 U.S.C. 1610 note, makes the blocked assets of a “terrorist party,” and of its agencies and instrumentalities, available to satisfy a terrorism judgment against it.³ A “terrorist party” is a terrorist, a terrorist organization, or a designated foreign state sponsor of terrorism. TRIA § 201(d)(4).

A. *Afghanistan’s reserves and the encumbrances*

Da Afghanistan Bank (DAB) is Afghanistan’s central bank. Its capital “belong[s] to the State.” App. 37a; see also *NML Cap., Ltd. v. Banco Cent. de la República Argentina*, 652 F.3d 172, 188-189 (2d Cir. 2011). DAB has never been a defendant here, and no judgment runs against it or Afghanistan. Afghanistan itself was once a September 11 defendant and litigated its immunity for nearly two decades; its counsel withdrew after Kabul fell. MDL 7326.

Kabul fell on August 15, 2021. That day, Treasury blocked DAB’s assets, including roughly \$7 billion at

³ That extension displaces the presumption that a state’s instrumentalities are juridically separate from it, *First Nat’l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 626-627 (1983) (*Bancec*); see *Bennett v. Islamic Republic of Iran*, 825 F.3d 949, 958 (9th Cir. 2016) (Congress “purposely overrode the *Bancec* presumption”).

the Federal Reserve Bank of New York (FRBNY), under existing authorities, to prevent Taliban access. App. 11a & n.6, 54a & n.141 (blocking date “uncontested”). Blocking freezes property; “[t]itle to the blocked property remains” where it was. App. 53a n.138 (citation omitted). TRIA likewise “has not created any new property rights.” *Hausler v. JP Morgan Chase Bank, N.A.*, 770 F.3d 207, 212 (2d Cir. 2014) (citation omitted).

Twelve days later, on August 27, the Havlish creditors obtained a writ of execution from the district court clerk. No motion was filed, no judge was involved, and TRIA was unmentioned. The writ levied on property held “for the benefit of the government of Afghanistan (which the Taliban ... now claims to be and to control)” and asserted that the Taliban judgment “can now be enforced against any and all assets belonging to the government of Afghanistan.” Havlish ECF 526-1 at 12-13. The Havlish creditors “did not publicly docket their writ of execution against the Taliban in the District Court or otherwise notify other parties in the District Court about their plan.” Ashton Br. 6. The presiding judges first learned of the writ from the United States, some three weeks after it issued. Havlish ECF 526. Other writs followed, and a “race among creditors and would-be creditors of the Taliban to attach the funds” commenced. Owens App. 77; *see also* Faiq Br. 14-17.

On February 11, 2022, the President issued Executive Order 14,064, “Protecting Certain Property of Da Afghanistan Bank for the Benefit of the People of Afghanistan,” which continued to block DAB’s U.S. property and consolidated it at FRBNY. App. 12a-13a. The same day, Treasury licensed \$3.5 billion for

transfer “for the benefit of the people of Afghanistan,” App. 13a, and the United States filed a statement of interest setting out principles bearing on whether the reserves were reachable under TRIA, without taking a position on that ultimate question. MDL 7661 at 19-20, 27 (petitioners “must establish a theory of ownership by the Taliban that would not require this Court—either expressly or by implication—to make its own determination as to the identity of Afghanistan’s government”).⁴

In the subsequent weeks, the last two of the four Havlish groups obtained writs, App. 169a-170a; the Owens petitioners attached the assets prejudgment, App. 16a; and some Ashton petitioners filed a putative class action, MDL 7923.

**B. *The turnover and attachment
confirmation proceedings***

Petitioners were then heard. The Havlish petitioners told the district court that sovereign immunity is “legally irrelevant,” that they “are not claiming that the DAB Assets are the Taliban’s ‘by virtue of its claim to be the government of Afghanistan,’” and that DAB’s instrumentality status should be measured as of “March 2022, when [they] filed their turnover motions.” MDL 8019 at 6, 8, 18, 20. Ashton opposed turnover to the Havlish petitioners alone and sought a broader distribution. MDL 7894. Owens moved to confirm its attachment

⁴ A later U.S. statement of interest drew the conclusion those principles dictate: TRIA does not authorize execution on a foreign state’s assets to satisfy a judgment against a nonstate terrorist party. MDL 8645-1 at 20-23.

“under New York law, not TRIA,” arguing that “DAB now is the Taliban.” Owens ECF 48 at 24, 25 n.10.

Magistrate Judge Netburn recommended denying turnover on three grounds: (1) no basis for jurisdiction over the absent sovereign, App. 176a-195a; (2) turnover reaches only the debtor’s property, App. 197a, and the Taliban’s only claim to Afghanistan’s reserves would be as its government—“recognition ... that this Court may not constitutionally confer,” App. 205a; and (3) any agency relationship between the Taliban and DAB was nonconsensual, App. 207a-213a. In February 2023 the district court (Daniels, J.) adopted the first two holdings, App. 121a, emphasizing that the reserves “are the property of the state of Afghanistan” and that “neither the Taliban nor the Judgment Creditors are entitled to raid the coffers of the state of Afghanistan to pay the Taliban’s debts.” App. 158a. Three days later, Judge Caproni vacated the Owens attachment, holding the property immune. Owens App. 82-87.

C. The appeals and these petitions

On appeal, the Havlish petitioners asserted that execution “does not require any finding that the Taliban itself owns the blocked DAB assets or is ‘entitled to’ them,” Havlish Br. 57. Ashton agreed with Havlish on “threshold” issues, App. 17a n.27, but attacked their writs as invalid, Ashton Br. 15, 19. Owens argued that the reserves are “owned by the Taliban by dint of its takeover,” Owens Br. 2-3, and contested only whether DAB remained an “organ” of Afghanistan under 28 U.S.C. 1603(b)(2), dismissing that provision’s ownership prong: DAB “does not have or issue ownership shares, so the second part of this definition is inapplicable,” Owens Br. 55.

The panel affirmed in an opinion by Judge Cabranes. App. 1a. It held that TRIA abrogates both FSIA immunities and independently supplies jurisdiction, App. 43a-46a;⁵ that the Executive “continues to afford formal recognition to the *state* of Afghanistan, even as it denies formal recognition of any *government* thereof,” App. 28a; that DAB is Afghanistan’s instrumentality under the ownership prong Owens had called inapplicable, because its capital “belong[s] to the State,” App. 37a; and that status under TRIA is measured “as of the date that the assets at issue were blocked,” App. 53a-54a. It did not reach the constitutional ground, App. 47a n.124, or Section 1611(b)(1), App. 39a n.100. Judge Sullivan, dissenting in part, would have measured instrumentality status as of the turnover order. App. 76a. Rehearing en banc was denied. App. 79a.

These petitions followed. Havlish presents only the TRIA timing question; its petition (at 6 n.5) calls the panel’s FSIA ruling “relevant only to the claims of the Pre-Judgment Plaintiffs.”⁶ Owens presents only the FSIA “foreign state” question, on which Ashton asks for a GVR.

SUMMARY OF ARGUMENT

These petitions do not warrant review.

⁵ The panel did not address whether Afghanistan was a required party. See *Samantar v. Yousuf*, 560 U.S. 305, 324-325 (2010); *Republic of Philippines v. Pimentel*, 553 U.S. 851, 864-867, 872 (2008).

⁶ Ashton and Owens are no longer pre-judgment; they obtained final judgments against the Taliban beginning in spring 2023, after the district court rulings. Owens App. 133; MDL 8973.

First, by petitioners' own account, these facts are unlikely to recur. Petitioners told the courts below that this case is one of a kind: a state whose government fell to a designated terrorist organization, with reserves blocked the same day. A rule for a situation that has arisen once in TRIA's history is not a question of recurring importance.

Second, the Havlish petition presents no conflict and a poor vehicle, and a victory would not produce turnover to petitioners. The disagreement below is between two dates within one circuit about when to measure instrumentality status under TRIA. No court of appeals has adopted the writ-issuance rule the petition proposes; the petition's own authorities require ownership; and petitioners do not agree among themselves on a date. The writ date is the worst of the options: this record shows a writ issued *ex parte* on a form, on a premise petitioners have since disclaimed, at a point when, under Second and Eleventh Circuit law, a court must already have decided the entity's instrumentality status—the very question the writ date is supposed to settle.

And reversal on timing yields a remand, not ultimate relief: an issue that decided this case—whether the reserves are assets “of” the Taliban or its instrumentality—has never been resolved in petitioners' favor on any date. Nor has any appellate court reached what a remand would raise: whether a court may constitutionally find that the Taliban controls Afghanistan's central bank, App. 156a; whether Afghanistan is a required party, *supra* note 5; and whether the reserves are immune central-bank property under 28 U.S.C. 1611(b)(1), App. 39a n.100.

Third, the FSIA question the Owens and Ashton petitions present matters only to their own priority among the Taliban’s creditors. The reserves are blocked and so reachable only through TRIA. Additionally, Owens never contested the ground on which the panel rested (Section 1603(b)(2)’s ownership prong) and confuses nonrecognition of a government with nonexistence of a state. Ashton never raised the FSIA question below, and *Exxon Mobil Corp. v. Corporación Cimex, S.A.*, 609 U.S. 108 (2026)—about a different statute, and where the defendants’ status as Cuban instrumentalities was a given—is no basis for a GVR.

ARGUMENT

I. By petitioners’ own account, these facts are unlikely to recur.

Petitioners have told the courts below, repeatedly, that this case is singular. When Mr. Faiq warned that petitioners’ reading would expose the reserves of “every other country in the world,” Faiq Br. 29, the Havlish petitioners answered that it required “the highly unusual confluence of events” here, Havlish Reply 21: this “particular set of circumstances is so rare that it has occurred precisely once—in this case—in the two decades since TRIA’s enactment,” and asked only what would follow “[i]f this lightning were to strike twice.” Havlish Reply 22.⁷ Owens called the

⁷ See also MDL 8019 at 7 n.10 (terrorist seizure of central bank “has happened twice in modern history, both times by the Taliban in Afghanistan”); MDL 8805 at 1 (“only once before”); MDL 7894 at 16 (Ashton: “an unprecedented situation”); Owens ECF 63 at 6 (“highly unusual circumstances (which hopefully will never be repeated)”).

circumstances “sui generis” and said they “reflect just how limited are the implications of Victims’ position.” Owens Reply 21.⁸

Petitioners should be taken at their word. This Court grants certiorari to settle “important question[s] of federal law,” Sup. Ct. R. 10(c), and does not sit to decide questions of “isolated significance.” *Rice v. Sioux City Mem’l Park Cemetery*, 349 U.S. 70, 76-77, 79 (1955). Each petition asks the Court to fix a rule for facts petitioners rightly call unique.

The stakes for these petitioners are admittedly real, but the Court’s concern is “importance to the public as distinguished from that of the parties.” *Rice*, 349 U.S. at 79 (internal quotation marks omitted). On that measure the balance favors denial. What the decision below protects is public: the reserves of a nation that was America’s partner for twenty years and is now in humanitarian crisis, and the assurance, written into Section 1611(b)(1), that keeps trillions of dollars of the world’s central-bank reserves in New York, App. 139a, 189a. Nothing in the petitions warrants unsettling it.

II. The Havlish petition presents no circuit conflict and a poor vehicle.

A. *No court of appeals has adopted the Havlish petitioners’ rule, and petitioners do not agree on a date.*

Petitioners contend (Havlish Pet. 16-20) that the decision below conflicts with decisions of the Ninth

⁸ The Havlish petition’s other scenario (at 29)—blocked assets “illicitly transferred” to terrorists—cannot arise; unlicensed transfers are “null and void.” 31 C.F.R. 594.202(a).

and Eleventh Circuits. It does not. The only disagreement is between the panel majority and the partial dissent, and it is narrow. Both agreed that an entity's status under TRIA is not frozen: *Kirschenbaum v. 650 Fifth Avenue & Related Properties*, 830 F.3d 107, 136 (2d Cir. 2016), had suggested otherwise, but *Bartlett v. Baasiri*, 81 F.4th 28, 33 (2d Cir. 2023), which held that an entity may acquire FSIA immunity after suit is filed, “plainly unseated” that suggestion. App. 51a, 75a. The majority declined to carry *Bartlett*'s rule into TRIA, which, it said, “cares nothing for immunity,” App. 51a-52a, and measured status at blocking, App. 53a-54a. Judge Sullivan would measure it at the turnover order. App. 76a. Two dates, one circuit, a timing question reached for the first time in this case.

The petition asserts (Havlish Pet. 15) that its rehearing petition “rais[ed] the same arguments as this Petition.” It did not. The rehearing petition claimed no circuit conflict, though Federal Rule of Appellate Procedure 40(b)(2)(C) invited that showing. It cited *Stansell v. Revolutionary Armed Forces of Colombia*, 45 F.4th 1340 (11th Cir. 2022), only once, in a footnote, without claiming any conflict therewith. C.A. Dkt. 304 at 8 n.3. It did not cite the Ninth Circuit's *Bennett* decisions at all.

The conflict newly asserted does not exist. Neither *Bennett* decision announces a timing rule. In the first, the entity's status was undisputed and static, and its assets were blocked before execution, *Bennett*, 825 F.3d at 957; the passage the petition relies on decides a California property question, *id.* at 963-964. The gloss the petition attributes to *Bennett* (Havlish Pet. 18-19)—that status is measured “when writs are

issued pursuant to [Rule] 69(a)(1)” —appears nowhere in *Bennett*. The second *Bennett* is an unpublished memorandum about ownership. *Bennett v. Islamic Republic of Iran*, 778 F. App’x 541, 543 (9th Cir. 2019).

Nor does the Eleventh Circuit hold what the petition says. Its “is or was ever” formulation (Havlish Pet. 18) looks backward: status when the writ is sought is not required because past ties suffice, and “shall” settles nothing about timing. *Stansell*, 45 F.4th at 1350-1351 & n.4. That is a rule for reaching an entity that was once a terrorist party’s instrumentality, not one for an entity that became affiliated only after its assets were blocked. No court of appeals has confronted that case or adopted petitioners’ rule.

Nor do petitioners agree among themselves. Havlish presses two dates: the issuance of the writ, Havlish Pet. 18-19, and the filing of the turnover motions, *id.* at 17 & n.7. Owens, on the parallel FSIA question, would measure status “at the time of Victims’ attachment proceeding.” Owens Br. 55. The panel chose the blocking date; the dissenters the turnover order. Five candidate dates on one record. No judge below, at any stage, adopted the writ date.

The writ date is the worst possibility, and this record shows why. The Havlish writ issued from the clerk, on a form, without any finding or mention of TRIA. *Supra* p. 4. Its premise was that the Taliban judgment reached “any and all assets belonging to the government of Afghanistan” because the Taliban now claimed to be its government. Havlish ECF 526-1 at 12-13. Petitioners never again asserted that premise, and on appeal said finding DAB to be the Taliban’s instrumentality “would not hold—or even imply—that

the Taliban is the legitimate or ‘recognized’ government of Afghanistan or that it owns DAB’s assets,” Havlish Br. 21. Petitioners would have the statute measured by a filing whose premise they have since abandoned.

The writ date is also circular. In the Second Circuit, a TRIA plaintiff “must first establish defendant’s status as an agency or instrumentality” before a writ may issue, *Levinson v. Kuwait Fin. House (Malaysia) Berhad*, 44 F.4th 91, 97 (2d Cir. 2022); here, no such determination preceded the writs, App. 175a. Petitioners’ own Eleventh Circuit authority agrees. *Stansell v. Revolutionary Armed Forces of Colombia*, 771 F.3d 713, 729 (11th Cir. 2014); see *id.* at 726. On their own authorities, the Havlish petitioners’ four writs should not have issued.

Two judges below questioned whether these writs survive *Levinson*. Owens App. 84 n.10; App. 174a-175a. Petitioners themselves say the writ was unnecessary: “a writ of execution is not a prerequisite to a turnover order.” Havlish Br. 64 n.29. A federal statute’s reach cannot turn on a filing petitioners say is unnecessary to the proceeding.

Judge Menashi’s objection, which the petition adopts (Havlish Pet. 29-31), is that the blocking-date rule “effectively returned to the Executive Branch the sort of discretionary power over the assets that the TRIA aimed to eliminate.” App. 116a. Not so. What TRIA eliminated was the President’s power to waive execution against blocked assets. App. 115a-116a; see *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Elahi*, 556 U.S. 366, 386 (2009). Under the panel’s rule that waiver stays eliminated.

The discretion that remains—what to block, license, and unblock—is not one the panel handed back; that is TRIA’s premise. The statute reaches only “blocked assets,” TRIA § 201(a): nothing is within it until the Executive acts, and anything leaves it when the Executive licenses or unblocks it—as half of these reserves did, with some petitioners’ consent. App. 13a; MDL 7699-7701. Judge Menashi’s complaint is that the Executive blocked these assets “because the Taliban was about to take over DAB,” not after it had. App. 117a (emphasis omitted). But keeping a state’s reserves from a terrorist organization is what blocking is for. *See* 50 U.S.C. 1701(a), 1702(a)(1)(B); App. 55a & n.144. On petitioners’ rule, the act that kept Afghanistan’s reserves from the Taliban would become the condition on which the Taliban’s creditors take them. And the blocking date is the only one set by the political branches rather than by a creditor’s filing—the same for every creditor, and fixed regardless of shifting conditions on the ground abroad.

The turnover-motion date (Havlish Pet. 17 & n.7) is creditor-chosen too, and *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003), does not support it. *Dole* measured status at the filing of the complaint because “the jurisdiction of the Court depends upon the state of things at the time of the action brought.” *Id.* at 478 (internal quotation marks omitted). The petition carries that rule over to its “complaints for attachment and turnover,” Havlish Pet. 17 n.7, by reading *Kirschenbaum* to measure status when “complaints [for turnover]” were filed, *id.* at 17 (alteration in original). The brackets do the work.

Whatever a turnover application is called, it is not a complaint in *Dole*’s sense: “execution proceedings

are continuations of merits proceedings, not new lawsuits.” *Bank Markazi v. Peterson*, 578 U.S. 212, 233 n.26 (2016). Petitioners invoked no new jurisdiction, so there was no “time of the action brought” in 2022 for *Dole*’s rule to fix. *See* MDL 7932-1 at 18 n.17.⁹

Every later date requires a court to find, as a fact, who controlled a foreign central bank on a day a creditor chose—with the sovereign that owns the bank unable to appear. The district court held that a court may not constitutionally make that finding at all. App. 156a. Petitioners’ rule would require that finding writ by writ, and in the sovereign’s absence.

The petition’s allegedly split authority also does not hold what petitioners need. *Bennett* holds that blocked assets, “to be subject to execution or attachment” under TRIA, “must be ‘assets of’ the instrumentality.” 825 F.3d at 963; 778 F. App’x at 543. *Stansell* likewise requires that the asset be blocked and “that the owner of the asset is an agency or instrumentality.” 771 F.3d at 726. On petitioners’ own authority, the question is not when DAB became the Taliban’s instrumentality but whether Afghanistan’s reserves are assets “of” anyone the statute reaches.

B. *A reversal buys a remand, not a turnover.*

Petitioners also say they win under the rule they ask this Court to overturn, because DAB was already

⁹ *Dole*’s rule also presupposes an action against the entity whose status is measured. Petitioners never sued DAB, and a suit against it would require its own jurisdictional basis. *Peacock v. Thomas*, 516 U.S. 349, 357 (1996); *see* Faiq Br. 31 & n.15.

the Taliban's instrumentality on August 15, 2021. Havlish Pet. 12. No court has so found, and petitioners say the record on the point was never developed, Havlish Pet. 14-15—though the date was theirs: the panel called August 15 “uncontested” because their own brief said so. App. 54a & n.141 (citing Havlish Br. 12, 24). On rehearing they argued the reverse as well: that the block came later—when the Taliban seized DAB, or by the February 2022 order—so that they satisfy the panel's rule either way. C.A. Dkt. 304 at 14-16. Those are claims that the panel misapplied its rule to the facts; the court of appeals denied rehearing on them, App. 79a, 119a, and this Court does not grant certiorari to re-find facts. Petitioners ask the Court to grant review of a rule they say they satisfy anyway.

Whatever the date, moreover, petitioners' claim founders on ownership. Blocking reaches any “interest” in property, 50 U.S.C. 1702(a)(1)(B)—“an interest of any nature whatsoever, direct or indirect,” 31 C.F.R. 594.306; TRIA reaches only assets “of” the terrorist party. As the United States explained in a 2019 statement of interest, “ownership is not required to block an asset, although it is required to attach that asset under TRIA.” MDL 7769-2 at 4. Petitioners disclaim Taliban ownership. *Infra* p. 17.

The district court worked through TRIA § 201(a)'s requirements and stopped at one: “Missing is the fourth prong required by TRIA: the blocked assets must be the assets of the terrorist party or the terrorist party's agency or instrumentality.” App. 152a; *accord* App. 197a-198a. That element has two halves; neither has been resolved in petitioners' favor.

The first is status. The court of appeals held that DAB was not the Taliban's agency or instrumentality

on August 15, 2021. App. 54a. No court has found that it was on any date. The district court held it could not make the finding at all: to find that the Taliban controls Afghanistan’s central bank “bestows recognition on the Taliban that this Court may not constitutionally confer.” App. 156a. The court of appeals affirmed on a different ground and did not reach that one. App. 47a n.124.¹⁰ A new measuring date would not change that. At most it buys a remand—to the constitutional question the district court answered against petitioners and the court of appeals did not reach.

The second half is ownership, which petitioners likewise lost at the district court and the appellate court did not reach. The Havlish petitioners do not claim the Taliban owns the reserves; they disclaimed that below, Havlish Br. 21, 57, and seem to disclaim it here, Havlish Pet. 12. Their theory is that the reserves are assets “of” DAB because the account bears DAB’s name: “Here, of course, there is no question that DAB owns the blocked assets.” MDL 8733 at 56; *see* Havlish Reply 31. But the instrumentality clause presupposes the relationship *Bancec* addresses, *supra* note 3: an instrumentality’s property answers for the terrorist party’s debt because the instrumentality is that party’s own, as Bank Melli was Iran’s in *Bennett*, 825 F.3d at 957. Petitioners disclaim that link, and their own question presented asks whether “the assets’

¹⁰ The petition (at 7) notes that Treasury treated DAB as Taliban-controlled in 2000. As the United States has explained, that determination was “made solely in the sanctions context, rested on a different standard than the ‘agency or instrumentality’ analysis under TRIA,” and has not been repeated. MDL 7661 at 22-23 n.7.

owner” was the Taliban’s instrumentality. Havlish Pet. i. The only owner any court has found is Afghanistan: the reserves “are the property of the state of Afghanistan,” and “a regime not recognized as the government of a state is not entitled to property belonging to that state located in the United States.” App. 158a-159a (quoting Restatement (Third) of the Foreign Relations Law of the United States § 205(2) (Am. L. Inst. 1987)); *accord* App. 206a; MDL 7661 at 26.

The United States has said that ownership is the question: TRIA “requires an inquiry into whether a terrorist party (or an agency or instrumentality thereof) has an ownership interest in the DAB Assets,” one that “can be answered by looking to which entity has been recognized by the United States.” MDL 7661 at 20, 26. A judgment creditor “cannot acquire more property rights in a property than those already held by the judgment debtor,” *Heiser v. Islamic Republic of Iran*, 735 F.3d 934, 938 (D.C. Cir. 2013) (citation omitted); “[c]ontrol and ownership ... are distinct concepts,” *Dole*, 538 U.S. at 477. Owens agrees that its claim to the funds is “coextensive with the Taliban’s,” Owens ECF 48 at 17.

Petitioners cannot avoid the ownership question; their own argument turns on it. Having disclaimed Taliban ownership, the petition argues (Havlish Pet. 25-26) that a judgment creditor may reach a debtor’s after-acquired property and that the blocking-date rule “perversely” protects assets a terrorist party acquired after they were blocked. That presupposes the Taliban *acquired* the reserves, which nothing below holds and the petition elsewhere denies. Its own gloss on the statute is an ownership test: “blocked

assets of” means “blocked assets that presently belong to a terrorist party or its agency or instrumentality.” Havlish Pet. 24. “Belong” is the word the district court used when it held that the reserves belong to the State. App. 158a-159a. Below, petitioners went further: any ownership inquiry “would be misguided in the context of nonstate terrorist parties.” Havlish Br. 57. But DAB is not a nonstate terrorist party. It is a foreign state’s central bank.

And that foreign state cannot appear; that obstacle runs through everything. Petitioners explained the consequence themselves: execution immunity is construed strictly “in order to protect foreign state property where the state is not able, willing, or entitled to intervene.” MDL 8733 at 26-27. Afghanistan cannot intervene.

Allowing a suit to proceed against a sovereign’s property in its absence is “the more specific affront” to it. *Pimentel*, 553 U.S. at 866. Mr. Faiq raised the concern in both appeals, Faiq Br. 8, 33-34; Faiq Owens Br. 8, 24-25; the Havlish and Owens petitioners answered it, Havlish Reply 23-25; Owens Reply 29-34; no court has addressed it. Whether Afghanistan’s reserves can be adjudicated with no one able to speak for Afghanistan is a threshold question any merits ruling must answer first. It is not presented, and it has not been decided. And were review granted, no respondent would defend the judgment.

III. The Owens and Ashton petitions matter only to their priority among the Taliban’s creditors.

The reserves are blocked, so TRIA is the only route to them, whatever the FSIA says: under the panel

opinion, if TRIA applies, it overrides all FSIA immunity, App. 43a-46a; if not, sanctions law bars attachment whether or not the reserves are immune. Owens itself agreed that actual execution would depend on TRIA. Owens ECF 48 at 25 n.10. The FSIA question matters, if at all, only to priority among the Taliban's creditors.

Owens contends (Owens Pet. 13-23) that the court of appeals deferred to the Executive on a question of statutory interpretation—whether Afghanistan is a “foreign state”—that belongs to the courts. That misdescribes the decision. Owens conceded below that “the Executive has the exclusive power to recognize foreign governments for diplomatic purposes.” Owens Br. 42-43. Even the en banc dissenters agreed. App. 89a n.2 (Sullivan, J., dissenting from denial of rehearing en banc) (“no one disagrees that the Executive has the exclusive authority to recognize foreign states”). The panel took recognition as a fact, which is what recognition is, *Guaranty Trust*, 304 U.S. at 137-138, and then construed the FSIA itself. It agreed with Owens that “the Judiciary cannot rely on an articulation by the Executive to resolve the matter of agencies or instrumentalities under the FSIA.” App. 38a n.97. It then decided that question on Afghan law: DAB's capital “belong[s] to the State,” which makes DAB Afghanistan's instrumentality under Section 1603(b)(2)'s ownership prong. App. 37a. Owens had called that prong “inapplicable,” Owens Br. 55, and does not challenge it here.

What remains is one proposition: that nonrecognition of a government means nonexistence of a state. The United States recognizes Afghanistan and no government of it, App. 28a, as it did from 1996

to 2001. It has said so in formal acts, not web pages: the Executive Order defines DAB as “the Central Bank of Afghanistan,” Exec. Order No. 14,064, § 4(a), and the Secretary of State has certified Afghanistan’s accredited representatives under a statute that applies only to foreign states, 12 U.S.C. 632; App. 13a & n.19; *see also* MDL 7662 at 1 (FSIA “provides a mechanism for plaintiffs to sue foreign states, not specific governments,” and Afghanistan “continues to exist”); C.A. Dkt. 263-2 at 7 (Havlish petitioners, in another court: Afghanistan, “regardless of whether its current government garners any international recognition—remains a foreign state within the meaning of the [FSIA]”). And the opinion Owens quotes (at 18-19) for the Restatement’s definition of a state treated Somalia, which then had no recognized government, as a “foreign state” under the FSIA as a matter of course. *Samantar*, 560 U.S. at 308-309, 314-316. The circuits Owens cites likewise treat recognition as the Executive’s and the statutory question as the court’s, which is what the panel did.¹¹

Ashton did not argue the FSIA question below and joined a rehearing petition that did not raise it. It now contends (Ashton Pet. 5-12) that the panel “never asked” whether TRIA’s text and structure supply the statutory override of FSIA immunity that *Cimex* requires. Ashton Pet. 8. The panel asked exactly that and answered yes. App. 43a-46a.

¹¹ *OI Eur. Grp. B.V. v. Bolivarian Republic of Venezuela*, 73 F.4th 157, 166, 169-170 (3d Cir. 2023); *O’Bryan v. Holy See*, 556 F.3d 361, 369, 372, 374 n.4 (6th Cir. 2009); *Ungar v. Palestine Liberation Org.*, 402 F.3d 274, 281, 284 n.6 (1st Cir. 2005).

A GVR requires a reasonable probability that the decision below rests on a premise the lower court would reject in light of the intervening decision, and a redetermination that may change the outcome. *Lawrence v. Chater*, 516 U.S. 163, 167-168 (1996) (per curiam). Neither is present. *Cimex* held that the Helms-Burton Act abrogates the immunity of Cuban instrumentalities whose status as such was a given, 609 U.S. at 111, 114; it says nothing about recognition or how to decide whether a state exists.

Nor would a redetermination change anything: under the decision below, TRIA overrides both immunities, App. 43a-46a, and petitioners lost on TRIA's terms. The Owens petition, which actually presents the FSIA question, cites *Cimex* (at 5) only as background, and claims no support from it.

* * *

Denying these petitions leaves petitioners' judgments intact and a decision in place that resolved one date under one statute. It reserves for another day—in a case with a party on both sides—the many questions these cases never reached.

Petitioners ask this Court to hold something else: that a foreign state's reserves deposited here on the strength of Section 1611(b)(1) can be taken the day a terrorist organization claims to control state institutions, in a proceeding where the state was not a party and could not be made one because of immunity and because no one is authorized to appear for it—all to satisfy a judgment against the terrorist organization victimizing it.

The property belonged to Afghanistan on August 15, 2021, and belongs to Afghanistan now. The

blocking kept it from the Taliban, and TRIA cannot give the Taliban's creditors what the Taliban does not have. The district court explained: petitioners "are entitled to collect on their default judgments and be made whole for the worst terrorist attack in our nation's history, but they cannot do so with the funds of the central bank of Afghanistan." App. 159a.

CONCLUSION

Mr. Faiq reiterates his deepest sympathy for the Taliban's victims and his appreciation for the United States' commitment to the rule of law. The petitions for writs of certiorari should be denied.

Respectfully submitted,

NATASHA ARNPRIESTER
JAMES A. GOLDSTON
OPEN SOCIETY JUSTICE
INITIATIVE
224 West 57th Street
New York, NY 10019

JUSTIN B. COX
Counsel of Record
LAW OFFICE OF
JUSTIN B. COX
P.O. Box 1106
Hood River, OR 97031
(541) 716-1818
justin@jcoxcconsulting.org

Counsel for Amicus Curiae

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