Nos. 01-593 and 01-594

In the Supreme Court of the United States

DOLE FOOD COMPANY, ET AL., PETITIONERS

v.

GERARDO DENNIS PATRICKSON, ET AL.

DEAD SEA BROMINE CO., LTD., ET AL., PETITIONERS

v.

GERARDO DENNIS PATRICKSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

The Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1603(b)(2), defines an "agency or instrumentality of a foreign state" as an entity that (among other definitional requirements) is a separate legal person, such as a corporation, "a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof." This case presents the following questions:

1. Whether a corporation is an "agency or instrumentality" if a foreign state owns a majority of the shares of a corporate enterprise that in turn owns a majority of the shares of the corporation.

2. Whether a corporation is an "agency or instrumentality" if a foreign state owned a majority of the shares of the corporation at the time of the events giving rise to litigation, but the foreign state does not own a majority of those shares at the time that a plaintiff commences a suit against the corporation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Miscellaneous—Continued: Page

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

Respondents are foreign farm workers who brought suit in Hawaii state court against various fruit and chemical companies to recover damages for injuries allegedly resulting from the overseas use of the pesticide dibromochloropropane (DBCP). The defendant companies are the petitioners in No. 01-593 (*Dole*). The *Dole* petitioners impleaded two companies incorporated

in Israel, Dead Sea Bromine Company (DSB), and Bromine Compounds Limited (BCL) (collectively the Dead Sea Companies), that allegedly produced DBCP that was used on foreign fruit farms. The Dead Sea Companies are the petitioners in No. 01-594 (*Dead Sea*). The Dead Sea Companies removed the suit to federal court under the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1602 *et seq.* The court of appeals reversed the federal district court's order granting removal, holding that the Dead Sea Companies are not agencies or instrumentalities of a foreign state for purposes of the FSIA. Pet. App. 1a-23a.[1]

1. The FSIA provides "the sole basis for obtaining jurisdiction over a foreign state in our courts," whether state or federal. *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). Section 1603(a) of the FSIA provides that, except for purposes of Section 1608 (which addresses service of process on a foreign state), 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)." 28 U.S.C. 1603(a). Subsection (b) of Section 1603 provides:

> An "agency or instrumentality of a foreign state" means 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

[1] Citations to "Pet. App." refer to the *Dole* petition appendix.

> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

28 U.S.C. 1603(b). By virtue of provisions of the general federal removal statute, 28 U.S.C. 1441(d), the FSIA also "guarantees foreign states the right to remove any civil action from a state court to a federal court." *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 489 (1983) (citing 28 U.S.C. 1441(d)).

2. This case is one of numerous personal injury suits in which foreign farm workers, such as respondents, seek compensation from various fruit and chemical companies for injuries allegedly suffered as a result of overseas use of DBCP on foreign fruit farms. As the court of appeals noted, "[t]his case represents one front in a broad litigation war between these plaintiffs' lawyers and these defendants." Pet. App. 4a. Some of the tactical maneuvering in that litigation war has centered on whether the Dead Sea Companies, which allegedly produced and sold DBCP for use on foreign fruit farms, should be joined in this litigation, and on whether those Israeli corporations are entitled to invoke removal jurisdiction pursuant to the FSIA.

During the period of time in which the use of DBCP occurred, the State of Israel did not itself own a majority of the shares of the Dead Sea Companies, but it owned shares of other corporations that in turn owned shares of the Dead Sea Companies. Pet. App. 16a, 33a. From 1968 to 1975, Israel owned the majority of shares of Dead Sea Works, Ltd., which owned a majority of the shares of DSB. 01-594 Pet. 6. From 1975 to 1995, Israel owned a majority of the shares of Israel Chemicals, Ltd., which owned a majority of the

shares of Dead Sea Works, Ltd., which owned a majority of the shares of DSB. *Id.* at 7. During relevant portions of those periods, DSB owned a majority of the shares of BCL. *Ibid.*; see also Br. in Opp. 17-18 n.3. By 1995, two years before this suit was brought, Israel had sold its majority interest in Israel Chemicals, Ltd. See Pet. App. 16a-17a, 33a; 01-594 Pet. ii, 5-7; Br. in Opp. 17-18 n.3.

3. In this case, as in other similar suits, the foreign farm workers did not name the Dead Sea Companies as defendants in their tort suit; rather, they sought to craft their claims to avoid implicating those companies. See Br. in Opp. 13-14; see also, *e.g.*, *Delgado* v. *Shell Oil Co.*, 231 F.3d 165, 177-180 (5th Cir. 2000), cert. denied, 532 U.S. 972 (2001). The *Dole* petitioners, however, impleaded the Dead Sea Companies as third-party defendants, and the Dead Sea Companies, in turn, invoked the FSIA and removed the case to federal district court. Pet. App. 27a. The district court concluded that the indirect nature of Israel's interest in the Dead Sea Companies failed to satisfy Section 1603(b)(2)'s definition of an "agency or instrumentality." *Id.* at 33a-39a. The district court nevertheless upheld removal on the alternative theory, advanced by the *Dole* petitioners, that the federal common law of foreign relations provided jurisdiction sufficient to support removal. *Id.* at 46a-49a.

4. The court of appeals held that the case had not been properly removed to federal court and ordered it remanded to state court. Pet. App. 1a-23a. The court of appeals first rejected the district court's rationale that removal could be justified because the case might implicate federal common law respecting foreign relations, finding that Congress had not authorized removal on that basis. See *id.* at 5a-16a. The court then

rejected the theory, which had been rejected by the district court, that Israel's interest in the Dead Sea Companies was sufficient to satisfy the FSIA's "agency or instrumentality" test. *Id.* at 16a-23a.

The court of appeals questioned, at the outset, whether the FSIA provisions were relevant because, by the time of suit, Israel had divested its majority stock ownership in the parent corporations that owned the stock of the Dead Sea Companies. Pet. App. 16a-19a. The court nevertheless "assume[d] for purposes of this case that the FSIA would grant federal jurisdiction over an entity that at the time of the tortious conduct was—but no longer is—a government instrumentality." *Id.* at 19a.

The court then determined that its prior decision in *Gates* v. *Victor Fine Foods*, 54 F.3d 1457 (9th Cir.), cert. denied, 516 U.S. 869 (1995), resolved the question whether, for purposes of the FSIA, Israel owned a majority of the shares of the Dead Sea Companies. *Gates* "held that a corporation wholly owned by an instrumentality of a foreign government is not a foreign instrumentality under the FSIA." Pet. App. 19a. The court ruled that, because the State of Israel did not itself own the majority of the shares of stock in the Dead Sea Companies, those companies were not agencies or instrumentalities of a foreign state for purposes of the FSIA. *Id.* at 19a-21a.

Finally, the court of appeals rejected, on the facts, the argument that the Dead Sea Companies were agents or instrumentalities of the State of Israel because they were "organs" of the State of Israel within the meaning of 28 U.S.C. 1603(b)(2). Pet. App. 21a-22a. Rather, the court reasoned that Dead Sea Companies were "indirectly owned commercial operations, which do not qualify as instrumentalities under the FSIA."

Id. at 23a. The court of appeals accordingly directed the district court to remand the case to Hawaii state court. *Ibid.*

DISCUSSION

This Court should grant the petitions for a writ of certiorari. The court of appeals correctly concluded that the FSIA does not extend foreign instrumentality status to the subsidiaries of a corporation, "a majority of whose shares * * * is owned by a foreign state." 28 U.S.C. 1603(b)(2). The courts of appeals, however, are squarely divided on that issue, and that circuit conflict warrants resolution by this Court. In one respect, this case may not be an ideal vehicle for doing so, because it raises the separate question whether the FSIA grants foreign instrumentality status to a corporation if the foreign state no longer owns a majority of the shares at the time of suit. The answer to that question, which was raised but not decided below, would provide an alternative basis for affirmance. Notwithstanding the presence of that additional issue, this case on balance presents an appropriate vehicle for resolving the question presented by the petitions. If the Court grants the petitions, however, it should request the parties to address that additional issue in their briefs on the merits.

1. As relevant here, Section 1603(b)(2) defines an instrumentality of a foreign state as an entity "a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof." 28 U.S.C. 1603(b)(2). That statutory language—requiring that "shares * * * [be] owned by a foreign state"—is most naturally understood to refer to actual legal ownership of a corporation's stock, and not to

constructive ownership through a tiered corporate structure.

Section 1603(b)(2) should be construed in light of basic legal understandings respecting the consequences of utilizing the corporate form. As this Court has recognized, "incorporation's basic purpose is to create a distinct legal entity." *Cedric Kushner Promotions, Ltd.* v. *King*, 533 U.S. 158, 163 (2001). Accordingly, "[a] corporation and its stockholders are generally to be treated as separate entities." *Burnet* v. *Clark*, 287 U.S. 410, 415 (1932). For that reason, "the parent corporation and its subsidiary are treated as separate and distinct legal persons even though the parent owns all the shares in the subsidiary and the two enterprises have identical directors and officers." Harry Henn & John Alexander, *Laws of Corporations* § 148, at 355 (1983).

Under that background rule, a foreign state's ownership of a majority of the shares of stock of a parent corporation that owns a majority of the shares of a subsidiary may give the foreign state effective control of the subsidiary, but it does not mean that the foreign state itself owns a majority of the shares of the subsidiary. Rather, it is the parent corporation that owns the shares of stock in the subsidiary as a corporate asset. See 1 *Fletcher Cyclopedia of the Law of Private Corporations* § 31, at 509 (rev. perm. ed. 1999) ("[t]he property of the corporation is its property, and not that of the shareholders, as owners" (footnote omitted)). Accord Henn & Alexander, *supra*, § 71, at 128-129 ("Shareholders are neither agents of the corporation or of each other nor owners of the corporation's assets."). That principle of separate corporate status is reflected in the related concept of limited corporate liability. See, *e.g.*, *United States* v. *Bestfoods*,

524 U.S. 51, 62 (1998) (a parent corporation is not "liable as an owner or operator under [the Comprehensive Environmental Response, Compensation, and Liability Act of 1980] simply because its subsidiary is subject to liability for owning or operating a polluting facility").[2]

Congress is presumed to enact legislation against the backdrop of those "bedrock" principles of corporate law. See *Bestfoods*, 524 U.S. at 62. There is no reason to depart from those principles in construing the FSIA, at least where, as appears to be the case here, the corporations at issue are organized under principles of foreign law that parallel the background principles of corporate law in the United States. To the contrary, this Court has recognized, in the context of assessing whether a foreign-owned company may be held liable for the acts of its government, that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." See *First Nat'l City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 626-627 (1983).[3]

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[2] In this case, of course, the State of Israel is even further removed from owning shares of the Dead Sea Companies because of the presence of two intermediate corporations, Israel Chemicals, Ltd., and Dead Sea Works, Ltd. See pp. 3-4, *supra*.

[3] As the Court recognized in *First National City Bank*, the separate entity limitation "may be overcome in certain circumstances." 462 U.S. at 628. See, *e.g.*, *id.* at 628-633. Likewise, the general rule that a parent corporation does not own the assets of its subsidiary is subject to limited exceptions, but those exceptions should not be lightly inferred. See, *e.g.*, *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 292 (1988) (holding that Congress's restriction on the importation of trademarked products whose trademark is "owned by" a United States company does not unambiguously apply to a product whose trademark is owned by a United States subsidiary of a foreign corporation); 1 Fletcher, *supra*, § 31, at 518

Section 1603(b)(2) should be interpreted in light of the foregoing principles. That Section provides that the term "agency or instrumentality" of a foreign state includes a corporation "a majority of *whose* shares * * * is *owned by a foreign state*." 28 U.S.C. 1603(b)(2) (emphasis added). In this case, the State of Israel may have exercised effective control over the Dead Sea Companies through its ownership of the shares of their parent corporations, but, under the plain terms of the FSIA, that does not suffice. Israel itself has never *owned* a majority of the shares of DSB and BCL, the companies *whose* shares are relevant. Accordingly, those companies are not agencies or instrumentalities of the State of Israel.[4]

("Under certain circumstances, to work justice, the corporate entity and ownership may be disregarded and the shareholder or shareholders regarded as owners; but this concedes the general rules to be just as stated."); cf. *Flink* v. *Paladini*, 279 U.S. 59, 63 (1929) (Holmes, J.) ("In common speech the stockholders [of a corporation that owned a ship] would be called owners [of the ship], recognizing that their pecuniary interest did not differ substantially from those who held shares in the ship.").

[4] When Congress intends legislation to embrace both a parent corporation and its subsidiaries, it typically uses more explicit language. For example, the Newspaper Preservation Act defines "newspaper owner" to mean "any person who owns or controls directly, or indirectly through separate or subsidiary corporations, one or more newspaper publications." 15 U.S.C. 1802(3). Similar formulations, referring to direct or indirect ownership or control, appear in many other provisions throughout the United States Code. See *e.g.*, 7 U.S.C. 1a(8) (agricultural cooperative associations); 12 U.S.C. 221a(b)(4) (bank affiliates); 12 U.S.C. 1813(w)(4)(A) (bank subsidiaries); 12 U.S.C. 3106(c)(1) (foreign bank affiliates); 22 U.S.C. 5605(b)(2)(F) (foreign air carriers); 26 U.S.C. 482 (allocation of income and deductions among taxpayers); 30 U.S.C. 184(a)(1) (coal lease acreage limitations); 47 U.S.C. 702(7) (communications common carriers). There can be no doubt that

The Fifth Circuit's decision in *Delgado* v. *Shell Oil Co.*, 231 F.3d 165 (2000), cert. denied, 532 U.S. 972 (2001), does not provide an adequate rationale for a contrary result. That court reasoned that "[t]he plain language of the statute * * * draws no distinction between direct and indirect ownership; neither does it expressly impose a requirement of direct ownership." *Delgado*, 231 F.3d at 176. But that line of reasoning assumes that Congress wrote Section 1603(b)(2) without regard to established corporate law principles and that Congress has an obligation to distinguish between "direct" and "indirect" ownership. This Court has indicated, however, that exactly the opposite presumption should apply. See, *e.g.*, *Bestfoods*, 524 U.S. at 62; *First Nat'l City Bank*, 462 U.S. at 623.

The Seventh Circuit's analysis in *In re Air Crash Disaster Near Roselawn*, 96 F.3d 932 (1996), is also unsatisfactory. That court concluded that, by defining a foreign state to include an agency or instrumentality, Congress intended to allow a parent corporation that qualifies as an agency or instrumentality to imbue any of its majority-owned subsidiaries with a similar status. See *Roselawn*, 96 F.3d at 939. The Seventh Circuit's recursive approach "would provide potential immunity for every subsidiary in a corporate chain, no matter how far down the line." See *Gates*, 54 F.3d at 1462. That result, however, is inconsistent with Section 1603(b)(2)'s text, which confers agency or instrumentality status on an entity "a majority of whose shares

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such language is intended to embrace affiliated corporations. But the pertinent language of Section 1603(b)(2) offers no such indication; indeed, it does not include the concept of control (as opposed to ownership), any variation of the phrase "direct or indirect," or any reference to subsidiary corporations.

* * * is owned by a *foreign state* or *political subdivision*." 28 U.S.C. 1603(b)(2) (emphasis added). If Congress had intended that ownership by another agency or instrumentality would also suffice, it would have conferred "agency or instrumentality" status on any entity "a majority of whose shares * * * is owned by a foreign state or political subdivision *or agency or instrumentality of a foreign state*." Congress's failure to include the italicized words, while including both "foreign state" and "political subdivision," indicates that Congress did not intend the Seventh Circuit's result. See *Gates*, 54 F.3d at 1462.

The result that the Fifth and Seventh Circuits have reached suffers from an additional defect. Interpreting Section 1603(b)(2) to extend "agency or instrumentality" status to second-tier or further-removed subsidiaries would grant foreign states more generous immunity-based protections than foreign states extend to the United States or other foreign states. Foreign states generally do not grant such protections to government-owned corporations *at all* unless those corporations are engaged in sovereign acts. See William Hoffman, *The Separate Entity Rule in International Perspective: Should State Ownership of Corporate Shares Confer Sovereign Status for Immunity Purposes?*, 65 Tulane L. Rev. 535 (1991). The FSIA's grant of foreign sovereign status to first-tier corporations reflects a conscious decision to extend the benefits of the FSIA—presumptive immunity from suit and various procedural protections —beyond what foreign states typically provide on a reciprocal basis. But Congress did not manifest an intention to take the additional step of extending those special benefits of this Nation's foreign sovereign immunity regime still further. The courts should be cautious in extending

those benefits through a judicial interpretation of the FSIA that departs from familiar corporate law principles. The court of appeals correctly declined to extend the FSIA in that manner, and it therefore properly ruled that the FSIA does not provide a basis for removal of this action to federal court. Pet. App. 19a-21a.[5]

2. The Ninth Circuit correctly resolved whether the FSIA's definition of an agency or instrumentality extends not only to a corporation, a majority of whose shares are owned by a foreign state, but also to subsidiaries of such a majority-owned corporation. Nevertheless, the Court should grant the petitions for a writ of certiorari to resolve the conflict on that issue between the Ninth Circuit, on the one hand, and the Fifth and Seventh Circuits on the other.

As the Ninth Circuit acknowledged in this case, the courts of appeals expressly disagree on whether the FSIA's definition of "agency or instrumentality" in Section 1603(b)(2) extends to an entity whose shares are owned by a parent corporation, a majority of whose shares are, in turn, owned by a foreign state. See Pet. App. 20a-21a. The Ninth Circuit has twice held that

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[5] A different approach to ownership of shares or "other ownership interests" (28 U.S.C. 1603(b)(2)) might be appropriate if the entity in question were organized under a legal system whose principles governing enterprise organization do not resemble our own. See Pet. App. 20a. Furthermore, a determination that a foreign state does not own a majority of the shares of a corporate entity does not exclude the possibility that the corporation may nevertheless qualify as an "organ" of a foreign state. 28 U.S.C. 1603(b)(2); see Pet. App. 21a-23a. That alternative means of qualifying as an agency or instrumentality of a foreign state provides considerable protection to corporate entities that, while not majority-owned by a foreign state, nevertheless exercise sovereign powers or perform sovereign functions on behalf of a foreign state.

those entities are not instrumentalities of the foreign state. See *ibid.*; *Gates* v. *Victor Fine Foods*, 54 F.3d 1457, 1462, cert. denied, 516 U.S. 869 (1995). The Fifth and Seventh Circuits, by contrast, have extended the protections of the FSIA to companies that are owned by another company that is, in turn, owned by a foreign state or its political subdivision. See *Delgado* v. *Shell Oil Co.*, 231 F.3d 165, 176 (5th Cir. 2000), cert. denied, 532 U.S. 972 (2001); *In re Air Crash Disaster Near Roselawn*, 96 F.3d 932, 939-941 (7th Cir. 1996).[6]

That conflict among the circuits is unlikely to be resolved by further consideration in the lower courts. The court of appeals in this case did not question the correctness of *Gates*. See Pet. App. 21a, 123a. Furthermore, the Ninth Circuit had already decided *Gates* at the time the Fifth Circuit decided *Delgado* and the Seventh Circuit decided *Roselawn*, and the Fifth Circuit and the Seventh Circuit each declined to follow *Gates*. See *Delgado*, 231 F.3d at 176; *Roselawn*, 96 F.3d at 939-941. All of those courts have denied petitions for rehearing or rehearing en banc on the issue. See Pet. App. 123a; *Delgado*, 231 F.3d at 166; *Roselawn*, 96 F.3d at 932 (1996 WL 531704, at *1). Hence, the conflict among the courts of appeals is likely to persist.

In enacting the FSIA, Congress recognized "the importance of developing a uniform body of law in this area." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 32 (1976). See *Verlinden*, 461 U.S. at 489. That need for

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[6] The Sixth and District of Columbia Circuits also have applied the FSIA to tiered corporations, albeit without meaningful discussion of the issue. See *Gould, Inc.* v. *Pechiney Ugine Kuhlmann*, 853 F.2d 445, 450 (6th Cir. 1988); *Gilson* v. *Republic of Ireland*, 682 F.2d 1022, 1026 (D.C. Cir. 1982).

uniformity counsels in favor of granting review in this case to resolve the persistent conflict.

3. In addition to presenting the question of how the FSIA's definition of "agency or instrumentality" applies to tiered corporations, this case appears to pose the question whether the FSIA applies to "companies that were owned by the [foreign] state at the time of the allegedly tortious conduct, but have since been cut free." Pet. App. 17a. The court of appeals did not reach that question, and petitioners have not included it in their requests for review, but respondents have identified that issue as a reason to deny the petitions for a writ of certiorari. Respondents suggest that Israel's divestiture of a majority interest in the parent corporations that owned a majority of the shares of the Dead Sea Companies would provide an alternative basis for affirming the judgment below. Br. in Opp. 11-13.[7]

The so-called "timing" question has not generated a conflict among the courts of appeals. As the court of appeals noted, "all courts that have considered the issue have held that the FSIA applies to an entity that was a foreign state at the time of the [alleged] wrongdoing, even if the entity is no longer a state instrumentality [at the time of suit]." Pet. App. 17a, citing *Pere* v. *Nuovo Pignone, Inc.*, 150 F.3d 477, 480-481 (5th Cir.

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[7] The court of appeals presumably elected to decide the case based on whether Israel owned a majority of the shares of the Dead Sea Companies because its prior decision in *Gates* dictated the result on that issue. But in the absence of that circumstance, there is no obvious reason why the "tiering" issue should be decided before the "timing" issue. Each turns on construction of Section 1603(b)(2), which places a potential limitation on the federal court's jurisdiction and the availability of removal under 28 U.S.C. 1441(d).

1998), cert. denied, 525 U.S. 1141 (1999); *General Elec. Capital Corp.* v. *Grossman*, 991 F.2d 1376, 1381-1382 (8th Cir. 1993); and *Gould, Inc.* v. *Pechiney Ugine Kuhlmann*, 853 F.2d 445, 450 (6th Cir. 1988). Cf. *Straub* v. *A P Green, Inc.*, 38 F.3d 448, 451 (9th Cir. 1994) (holding that the FSIA applies when a party is a state instrumentality at the time the lawsuit is filed, even though it was not an instrumentality at the time of the alleged wrongdoing).

Nevertheless, the court of appeals correctly recognized that "the unanimity of other circuits" may not reflect a correct interpretation of the FSIA. Pet. App. 17a. Section 1603(b)(2) is more naturally read to require that the statutory definition of an agency or instrumentality must be satisfied at the time of suit. Most tellingly, the text of Section 1603(b)(2) uses the present tense. An entity comes within the definition of an agency or instrumentality if a majority of its shares "*is* owned by a foreign state." 28 U.S.C. 1603(b)(2). That use of the present tense indicates that present ownership is required at the time of suit, when the subject matter jurisdiction of the court is normally ascertained. See, *e.g.*, *Anderson* v. *Watts*, 138 U.S. 694, 702-703 (1891). Contrary to the view of the Eighth Circuit, Section 1603(b)(2) cannot reasonably be read to "speak to a variety of situations, including the time of the alleged wrongdoing." *GE Capital*, 991 F.2d at 1381 (citing *Wiener* v. *Eastern Ark. Planting Co.*, 975 F.2d 1350, 1355 (8th Cir. 1992)).

Congress sought to preclude United States courts from exercising jurisdiction over *foreign states*, including their agencies or instrumentalities, except when a particular statutory exception to immunity would apply. See, *e.g.*, *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607, 610 (1992). The courts of

appeals that have decided the issue have identified no adequate basis in the text, structure, or purpose of the FSIA that would justify treating a corporation as an agency or instrumentality of a foreign state when it lacks the necessary affiliation with the foreign state at the time of suit. The mere fact that a corporation once was, but no longer is, owned by a foreign state does not provide a basis for conferring the extraordinary benefit of the special procedural protections of the FSIA and the presumptive immunity from suit it affords under 28 U.S.C. 1604.

Although the question whether the foreign state must own a majority of shares of the corporation at the time of suit in order for the corporation to qualify as an agency or instrumentality has not generated a conflict among the courts of appeals, it presents an important issue under the FSIA in its own right, and the Ninth Circuit in this case expressed serious reservations about the conclusion reached by other court of appeals that have decided it. See Pet. App. 16a-19a. The "timing" issue also serves to illuminate further the relatively attenuated claim by petitioners to the special protections of the FSIA for the corporations in this case. For those reasons—and in light of the strong federal interest in a uniform interpretation of the FSIA and the apparent misconception of all the courts of appeals that have decided the timing issue—if the Court grants the petitions for writ of certiorari, the Court should request the parties to address the timing issue as well.[8]

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[8] This Court noted, but did not decide, a timing issue that presents the reverse of the situation here. See *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 38 (1989). There, petitioner had been a private company during the relevant period and was nationalized

CONCLUSION

The petitions for a writ of certiorari should be granted. In addition, the Court should request the parties to address the question whether a corporation is an "agency or instrumentality" of a foreign state if the foreign state owned a majority of the shares of the corporation at the time of the events giving rise to the litigation, but no longer owns a majority of those shares at the time that the plaintiff commences a suit against the corporation.

Respectfully submitted.

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MAY 2002

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and arguably became an instrumentality of a foreign state during the pendency of the case in the bankruptcy court. Respondent sought to use that status offensively, seeking a ruling that petitioner was not entitled to request a jury trial because such tribunals are not available under the FSIA. This Court declined to address that question because respondent had not raised it below and it had not been "adequately briefed and argued." *Ibid.* Here, the question was raised in the courts below, and, if the Court so directed, there would be a full opportunity for the parties, including the United States as amicus curiae, to brief the issue.