No. 01-593

IN THE

Supreme Court of the United States

DOLE FOOD COMPANY, *et al.*,
Petitioners,

v.

GERARDO DENNIS PATRICKSON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

REPLY BRIEF FOR PETITIONERS DOLE FOOD COMPANY, *ET AL.*

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REPLY BRIEF FOR PETITIONERS DOLE FOOD COMPANY, *ET AL.*

In their petition, Dole Food Company, Inc., *et al.*, demonstrated that (1) there is a square conflict among the courts of appeals over the treatment of tiered corporate entities under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1332(a), 1391(f), 1441(d), 1602-11 ("FSIA") (Pet. 11-14), and (2) this is an important and recurring question of federal law (Pet. 19-20). Indeed, the Ninth Circuit's treatment of Dead Sea below contradicts the Fifth Circuit's treatment of the very same entity in *Delgado v. Shell Oil Co.*, 231 F.3d 165 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 1603 (2001). Respondents do not dispute either of these points. Moreover, the arguments that they do make in opposing certiorari are without merit.

1. Respondents' principal argument is an attempt to use *Delgado* against petitioners. Observing that petitioners opposed certiorari in that case, respondents make the incredible claim that "[n]othing has changed in the interim to warrant this Court's review of the FSIA question." (Opp. 8.) That is not true. As petitioners pointed out in opposing certiorari in *Delgado*, up until the time of the decision below, every court of appeals to consider directly the precise issue in this case — whether a tiered corporation was entitled to invoke the FSIA—had held that it was. *See* Opposition Brief of the Dole Defendants at 9-14, *Delgado v. Shell Oil Co.*, No. 00-1316 (U.S. Mar. 8, 2001) [hereinafter *Delgado* Opposition]. At the time of the *Delgado* petition, it was not clear how the Ninth Circuit would rule. Although respondents claim that the decision in *Gates v. Victor Fine Foods*, 54 F.3d 1457 (9th Cir. 1995), settled the question, it did not settle the question at all. As the district court below noted, *Gates* was "not entirely on point" (Pet. App. 34a): it involved a corporation indirectly owned not by a foreign state, but by an organ of a foreign state. *See* 54 F.3d at 1459-61. *Gates* therefore did not present the question whether a corporation can qualify as a foreign state based upon a foreign

government's indirect ownership of it. Indeed, the Ninth Circuit had implicitly endorsed tiering in several cases prior to *Gates*. *See Straub v. A P Green, Inc.*, 38 F.3d 448, 451 (9th Cir. 1994); *Teledyne, Inc. v. Kone Corp.*, 892 F.2d 1404, 1406-07, 1411-12 (9th Cir. 1989); *Am. W. Airlines, Inc. v. GPA Group, Ltd.*, 877 F.2d 793, 795-96 (9th Cir. 1989). Thus, the question of tiering was definitively decided by the Ninth Circuit for the first time in this case.

Accordingly, petitioner Dole Food Company and several of its related entities ("the Dole Defendants") recommended, in opposing certiorari in *Delgado*, that this Court wait until the Ninth Circuit had considered the tiering issue "for the simple reason that the decision in *Patrickson* may clarify whether there is any conflict between Ninth Circuit law and the decision below." *Delgado* Opposition, *supra*, at 18. Now that the Ninth Circuit has clarified its position on tiering, and the conflict among the circuits is clear, review by this Court is appropriate.

Respondents also claim that the "practical and policy considerations" cited by the Dole Defendants in opposition to certiorari in *Delgado* also militate against granting certiorari here. (Opp. 9.) In fact, just the opposite is true. The Dole Defendants argued in *Delgado* that further review threatened to prolong a case that had been pending for more than eight years, including more than three years in the Fifth Circuit, and that a reversal by this Court "would effectively unwind foreign suits that ha[d] been proceeding for years" after the case was dismissed on *forum non conveniens* grounds in 1995. *Delgado* Opposition, *supra*, at 18-19. This case, by contrast, has been pending for a much shorter period, and a reversal would serve to facilitate the continuation of the foreign litigation that was commenced as a result of the district court's *forum non conveniens* dismissal. Thus, the practical and policy reasons that counseled against certiorari in *Delgado* support it here.

2. Although respondents do not dispute that there is a square conflict among the courts of appeals over the tiering issue, they attempt to minimize that conflict. Respondents say that petitioners "inflate[d]" the circuit split by citing two cases—*Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445 (6th Cir. 1988), and *Gilson v. Republic of Ireland*, 682 F.2d 1022 (D.C. Cir. 1982)—in which the issue was not expressly addressed. This argument is both wrong and irrelevant.

First, both cases held that tiered foreign corporations were "foreign states" entitled to invoke the FSIA. *See Gould*, 853 F.2d at 448-49; *Gilson*, 682 F.2d at 1026 & n.19. Accordingly, the Ninth Circuit itself recognized that the decision below conflicts with the Sixth Circuit's *Gould* decision. (Pet. App. 20a.) *See also Delgado*, 231 F.3d at 176 (relying on *Gould*). Other authorities have similarly recognized *Gilson* as accepting tiering under the FSIA. *See, e.g.*, *Millicom Int'l Cellular, S.A. v. Republic of Costa Rica*, 995 F. Supp. 14, 18 n.5 (D.D.C. 1998); Working Group of the Int'l Litig. Comm. of the Am. Bar Ass'n, *Recommendations and Report on the U.S. Foreign Sovereign Immunities Act* 38 & n.93 (2001) [hereinafter ABA Working Group].

Second, even if, as respondents themselves concede (Opp. 10), the split involved decisions in only three circuits—this case, *Delgado*, and *In re Air Crash Disaster Near Roselawn, Ind. on Oct. 31, 1994*, 96 F.3d 932 (7th Cir. 1996)—that split would still warrant this Court's attention. Indeed, in the last three Terms this Court has granted certiorari at least a dozen times in cases involving conflicts among just two or three circuits.[1] Moreover, review of such a conflict is especially

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[1] *See, e.g.*, *United Dominion Indus. v. United States*, 121 S. Ct. 1934, 1938 (2001); *United States v. Cleveland Indians Baseball Co.*, 121 S. Ct. 1433, 1438 (2001); *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 360 n.1 (2001); *Miller v. French*, 530 U.S. 327, 335-36 (2000); *Ohler v. United States*, 529 U.S. 753, 755 (2000); *Christensen v. Harris County*, 529 U.S.

appropriate here because Congress enacted the FSIA in part to ensure "uniformity in decision" by the judiciary and to avoid the "adverse foreign relations consequences" that "disparate treatment of cases involving foreign governments" may bring. H.R. Rep. No. 94-1487, at 13 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6611.

Finally, contrary to respondents' suggestion (Opp. 11), there is no chance that the split will resolve itself. The position adopted by the Fifth, Sixth, Seventh, and D.C. Circuits is well established as the majority position, *see* ABA Working Group, *supra*, at 38, and after denying rehearing *en banc* in this case (Pet. App. 98a), the Ninth Circuit is equally committed to the opposite view. Nothing that happens in the other circuits will change that. Moreover, while respondents assert "that the matter would enormously benefit from further percolation," notably absent from their brief is any explanation as to how that would occur. (Opp. 11.)

3. Respondents attempt to show that this case is an "unsuitable vehicle" because there are other grounds on which they say petitioners' bid for federal jurisdiction would likely fail on remand even if this Court reversed. (Opp. 11-15.) These arguments are also meritless.

Unsettled and potentially dispositive questions will often remain after this Court has decided an issue. As this Court recognized numerous times this Term and last, that is a reason for remanding after reversal, not a reason for denying

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576, 582 (2000); *Drye v. United States*, 528 U.S. 49, 55 (1999); *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 533 (1999); *Cunningham v. Hamilton County*, 527 U.S. 198, 202-03 (1999); *O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999); *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 764-65 (1999); *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 & n.7 (1999).

certiorari.[2] Moreover, here, it is possible, and indeed logical, to decide the threshold question whether indirect majority ownership can qualify a corporation for the protections of the FSIA before getting into other questions that might affect FSIA jurisdiction.

In any event, respondents' alternative arguments are unpersuasive. Respondents argue that Dead Sea cannot invoke the FSIA in this case because Israel sold its interest in Dead Sea's parent after the events at issue in the underlying litigation but before the suit below was filed. (Opp. 11.) They rely on the Ninth Circuit's discussion (but not resolution) of this issue in dicta. (Opp. 12-13.) They fail, however, to acknowledge, as the Ninth Circuit did, that all courts of appeals "that have considered the issue have held that the FSIA applies to an entity that was a foreign state at the time of the wrongdoing, even if the entity is no longer a state instrumentality." (Pet. App. 17a.)[3]

Respondents also claim that Dead Sea was fraudulently joined. (Opp. 14.) They make a great deal of the fact that, in their complaint, they disavowed any intention to seek recovery for exposure to DBCP manufactured by Dead Sea. (Opp. 14.) They do not, however, even attempt to explain how this issue affects the consideration of the question presented. They also fail to recognize that the Fifth Circuit, facing nearly identical

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[2] *See, e.g.*, *TRW, Inc. v. Andrews*, No. 00-1405, 2001 WL 1401902, at *10 (Nov. 13, 2001); *Palazzolo v. Rhode Island*, 121 S. Ct. 2448, 2465 (2001); *Lorillard Tobacco Co. v. Reilly*, 121 S. Ct. 2404, 2430 (2001); *United Dominion Indus.*, 121 S. Ct. at 1943; *Ferguson v. City of Charleston*, 121 S. Ct. 1281, 1287 (2001); *Glover v. United States*, 531 U.S. 198, 205 (2001).

[3] *See Pere v. Nuovo Pignone, Inc.*, 150 F.3d 477, 480-81 (5th Cir. 1998); *Gen. Elec. Capital Corp. v. Grossman*, 991 F.2d 1376, 1381-82 (8th Cir. 1993); *Gould*, 853 F.2d at 450; *In re Chase & Sanborn Corp.*, 835 F.2d 1341, 1347-48 (11th Cir. 1988), *rev'd on other grounds sub nom. Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989).

disclaimers in *Delgado*, refused to find that Dead Sea had been fraudulently joined. *See Delgado*, 231 F.3d at 180-81.

As a consequence, none of petitioners' objections casts doubt on this case's appropriateness for resolving the issue presented in this petition.

4. Finally, respondents claim that the decision below is correct. (Opp. 15-19.) This claim does not in any way undermine the appropriateness of considering the question presented in this case. Petitioners, of course, urge this Court to grant review precisely so that it can resolve an issue that has created a conflict among the circuits. In all events, respondents' merits arguments are erroneous.

Respondents say that the word "owned" in Section 1603(b)(2) does not encompass indirect ownership through intermediate corporations (Opp. 15-16), apparently forgetting that in their Ninth Circuit brief they described Dead Sea as being "majority-owned by the State of Israel." Brief of Plaintiffs-Appellants/Cross-Appellees at 7, *Patrickson v. Dole Food Co.*, 251 F.3d 795 (9th Cir. 2001). Respondents also ignore this Court's observation that "'[i]n common speech the stockholders would be called owners'" of a corporation's assets. (Pet. 15 (quoting *Flink v. Paladini*, 279 U.S. 59, 63 (1929).) In addition, they make no effort to show that their preferred interpretation is consistent with the FSIA's purpose of securing uniform treatment for foreign states regardless of how they choose to structure their commercial interests. (Pet. 16-17.)

Respondents also recommend the Ninth Circuit's approach as offering a "simpler and more judicially administrable test." (Opp. 17.) In support, respondents devote a page-long footnote to rehearsing variations in the ownership structure of Dead Sea over a period of three decades. (Opp. 17 n.3.) But they do not—and cannot—claim that there are any factual disputes about the ownership of Dead Sea. This is not surprising: ordinarily, it should be easy to determine who

owns what shares of a given corporation. In any event, judicial administrability is not a reason to ignore a statute's language or purpose.

Respondents also contend that any ambiguity about the scope of the FSIA should be resolved in their favor on the principle that "federal jurisdictional statutes should be construed narrowly." (Opp. 17.) In fact, however, just the opposite rule applies in cases involving the FSIA and its removal provision: "In letter and spirit, a liberal approach in implementing the FSIA's comprehensive jurisdictional scheme is most conducive to the FSIA's paramount objectives of keeping federal courts open to foreign states, and indeed of affirmatively encouraging private actions against foreign states to be adjudicated in federal court." *In re Tex. E. Transmission Corp. PCB Contamination Ins. Coverage Litig.*, 15 F.3d 1230, 1241 (3d Cir. 1994); *see also id.* at 1243 ("We concur with our sister circuits which give an expansive interpretation of the nature of the right to remove under § 1441(d).").

The remainder of respondents' arguments on the merits are directed against the "infinite looping" construction of the FSIA advocated by the Seventh Circuit in *Roselawn*, 96 F.3d at 939-41. (Opp. 15-17.) But these arguments do not address petitioners' submission that indirect majority ownership exists only if the foreign state indirectly owns at least 51 percent of the entity in question. (Pet. 18.)

* * * *

In sum, this case squarely presents an important and recurring question of federal law and creates a clear conflict among the circuits. Because the persistence of this conflict directly undermines the purpose of the FSIA, this Court should grant review.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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