No.

IN THE

Supreme Court of the United States

VEKUII RUKORO, ET AL.,

v.

FEDERAL REPUBLIC OF GERMANY

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

PETITION FOR WRIT OF CERTIORARI

KENNETH F. MCCALLION
Counsel of Record

THOMAS A. HOLMAN
Of Counsel

PROF. RICHARD H. WEISBERG
Of Counsel

ANNA FREYMANN
Of Counsel

McCallion & Associates LLP
100 Park Avenue
16th floor
New York, NY 10017
kfm@mccallionlaw.com
(646) 366-0884

CURRY & TAYLOR ♦ (202) 350-9073

QUESTIONS PRESENTED

1. Does the Second Circuit's opinion in *Rukoro et al v. Federal Republic of Germany*, 976 F.3d 218 (2d Cir. 2020) conflict with the opinion of the D.C. Circuit in *Agudas Chasidei Chabad of U.S. v. Russian Fed'n*, 528 F.3d 934 (D.C. Cir. 2008)("*Chabad*"), and four decades of this Court's FSIA jurisprudence, from *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493-94 (1983) to *Argentina v. NML Capital, Ltd.*, 573 U.S. 134, 141-42 (2014)?
2. Under FSIA's takings exception, §1605(a)(3), which requires that jurisdiction lie over "any case" in which rights in qualifying properties are "in issue," does the "based-upon-an-act" language of the preceding commercial-activity section, §1605(a)(2), apply also to the takings exception, even though such a requirement is not found in the plain language of the takings exception?
3. Under FSIA's takings exception, §1605(a)(3), does the commercial-activity exception's jurisdictional requirement, of §1605(a)(2), that some "gravamen" of a claim must relate to the commercial activity, also apply to the takings exception, even though such a requirement is not found in the plain language of the takings exception?
4. Even assuming the commercial activity's exception "based-upon-an-act" or "gravamen" standard were applicable to the takings exception, is the mass harvesting of bodies in violation of international law and sale of those body parts in the U.S. an element of the claims'

core allegations or "gravamen" of the case, such that the sale of the skulls and body parts by a German agent to the American Museum of Natural History ("AMNH") in New York City provide a sufficient jurisdictional basis under the takings exception?

5. Can a case such as this one properly have more than one "gravamen," as opposed to the incorrect single gravamen standard applied by the Second Circuit?

6. Does the takings exception requirement that the property in question "be present in the United States in connection with a commercial activity carried on in the United States by the foreign state" require that the commercial activity must continue "to be carried on" as of the date of the filing of the action, or (as the use of the past participle "carried on" indicates), may the subject property present in the U.S. be here in connection with a completed commercial activity "carried on" in the U.S. at a prior time?

PARTIES TO THE PROCEEDINGS

Vekuii Rukoro, Paramount Chief of the Ovaherero people and representative of the Ovaherero Traditional Authority, Johannes Isaack, Chief and Chairman of the Nama Traditional Leaders Association, the Association of the Ovaherero Genocide in the U.S.A., Inc. (the "Association"), Barnabas V. Katuuo, Officer of the Association, and the Federal Republic of Germany ("Germany").

CORPORATE DISCLOSURE STATEMENT

Named Plaintiff the Association of the Ovaherero Genocide in the USA, Inc. (the "Association") has no parent corporation; nor does any publicly held corporation own any stock or interest in the Association

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

PETITION FOR WRIT OF CERTIORARI

Petitioners Vekuii Rukoro, Johannes Isaack, the Association of the Ovaherero Genocide in the U.S.A., Inc., and Barnabas V. Katuuo ("Petitioners") respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit (the "Second Circuit").

OPINIONS BELOW

The memorandum opinion of the Second Circuit in *Rukoro et al v. Federal Republic of Germany*, 976 F.3d 218 (2d Cir. 2020) is included herein as an Appendix at page 1 ("App. 1a"); the Second Circuit's denial of a petition for en banc review is included here at page 45 of the Appendix (App. 45a); and the Second Circuit's Judgment (Mandate) issued on November 30, 2020 is included at page 47a of the Appendix.

The memorandum opinion of the United States District Court for the Southern District of New York (the "District Court") in *Rukoro et al v. Federal Republic of Germany*, 363 F.Supp.3d 436 (S.D.N.Y. 2019) is included herein at App. 17a.

JURISDICTION

This Court has jurisdiction of this petition to review the Second Circuit's judgment pursuant to 28 U.S.C. §1254(1). The Second Circuit's memorandum opinion was filed on September 24, 2020 (App. 1a) and Petitioners' Petition for Rehearing and Rehearing En Banc was denied on November 19, 2020. App. 45a. The District Court had subject matter jurisdiction pursuant to 42 U.S.C. §1983 and 28 U.S.C. §1331 because the civil

action arises under the Constitution and the laws of the United States.

STATUTORY PROVISIONS

28 U.S.C. § 1603(a).

> A "foreign state," except as used in section 1608 of this title, 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(d).

> A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

28 U.S.C. § 1603(e).

> A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

28 U.S.C. §1605 provides, in relevant part:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case-- …

> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;
> (3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States; ….

STATEMENT

A. Facts

Petitioners brought this case against Germany for its mass expropriation of the body parts of Ovaherero and Nama civilians, genocide, and its taking of other real and personal property in violation of international law during the period from 1884 to 1915 in Hereroland and Great Namaqualand, sovereign entities

now part of the Republic of Namibia.[1] Germany entered into numerous treaties with the Ovaherero and Nama Chiefs and Captains, who guaranteed their sovereignty in return for their promise to protect German citizens wishing to settle in their lands. Germany breached these treaties and, through its colonial authorities, pursued policies of fraud, plunder, exploitation, and violence against the Ovaherero and Nama peoples. Germany's many wrongs and crimes violently climaxed in the period from 1904 to 1908, when Germany expropriated Petitioners' real and personal property, including the taking of human body parts of the victims, which were then exploited for commercial purposes.

In furtherance of Germany's policy of property expropriation and "ethnic cleansing" of these two sovereign peoples, Germany printed "extermination orders" in German, with translated, signed, and certified copies printed and issued in Petitioners' native languages and in Cape Dutch for maximum clarity. Some 100,000 victims - at least 80% of the Ovaherero and at least 50% of the Nama - lost their lives, including defenseless children, women, and men. Those unable to escape to Botswana or South Africa—where Ovaherero and Nama communities still exist today—were enslaved and put in concentration camps, where they were forced to be laborers until they died of exhaustion, starvation and from untreated illnesses. The skulls and

---

[1] Since neither Petitioners nor any member of the putative class were nationals of Germany, this Court's recent decision in *Federal Republic of Germany v. Philipp*, No. 19-351, 2021 U.S. LEXIS 756 (Feb. 3, 2021) is not relevant, to the extent that this Court found there that the FSIA's expropriation exception's "reference to 'violation of international law' does not cover expropriations of property belonging to a country's own nationals." *Id.*, quoting *Republic of Austria v. Altmann*, 541 U. S. 677, 713 (2004).

other body parts were then diabolically packed in crates and shipped to Berlin, where this wrongfully taken personal property of the victims were then exploited commercially by Germany, including the sale of some of the body parts to the American Museum of Natural History ("AMNH") in New York City.

The substantial state-sponsored industry that arose in the purchase and sale of human body parts was known internationally as the "bone trade." After the German colonial authorities' ghastly decapitating of heads and boiling of body parts of their victims, women prisoners were forced to scrape them clean with glass, before being packed in crates for shipment to Germany. The body parts were then sold for commercial profit and ghoulish medical experimentation designed to "prove" the inferiority of African peoples and the superiority of the White races. The body parts and records relating to Germany's international "bone trade" that were sold to the AMNH still remain today. Some of those skulls are inscribed with the date and place of their murder, such as one tattooed "Lüderitz Bay," the location of the notorious Shark Island concentration camp. Germany carried on this sale to the AMNH as part of a broad course of commercial conduct and substantial contact with the United States, including the harvest, trade, and trafficking of African-American, Mohawk, Paiute, Sioux, Inuit, and other American body parts. Indeed, Germany's sale to the AMNH of a "Teaching Collection" that included human remains merged the body parts taken in connection with its unlawful takings in Africa with its American commerce, placing the fruits of its commerce—American skulls— within the U.S. alongside the fruits of its international wrongful taking of Petitioners' body parts—Ovaherero and Nama skulls.

B. Procedural History

Petitioners originally brought suit in the District Court on January 5, 2017, and thereafter filed an Amended Complaint on February 14, 2018. (App. 49a). Germany filed its Motion to Dismiss on March 13, 2018, and on October 31, 2018, Petitioners moved for leave to supplement the record or amend the complaint again, based upon new evidence. (App. 203a). Germany opposed the motion and, after briefing, on March 6, 2019, the district court (Swain, J.) granted Germany's motion to dismiss, and denied Petitioners' motion to supplement or, in the alternative, to amend. 363 F.Supp.3d 436. (App. 17a). The Second Circuit denied Petitioners' appeal on September 24, 2020 (App. 1a), and denied their Petition for an en banc review on November 19, 2020 (App. 45a). The Judgment (Mandate) was issued on November 30, 2020. (App. 47a).

C. The Second Circuit's Opinion

The Second Circuit's Opinion ("Opinion") contains four major errors, two of which are based on a conflation of the exceptions granted under the Foreign Sovereign Immunities Act (FSIA) and add jurisdictional requirements to the takings exception (FSIA § 1605(a)(3)) that are neither found in the plain text of the statute nor supported by precedent.

The third error improperly grafts onto the takings exception from the more-rigorous requirements of the preceding commercial-activity subsection (subsection 1605(a)(2)), thereby applying requirements that clearly conflict with plain statutory language.

The fourth major error in the Opinion is that it rewrites FSIA's takings exception by re-conjugating a past participle selected by Congress ("carried on") and converting it to the present-progressive tense, thus improperly requiring that the "commercial activity" carried on in the United States be *continuing* and *ongoing* as of the date of the filing of the suit, while excluding commercial activity "carried on" in the past but not continuing. Consequently, the Opinion adds a new "continuity" element not found in the plain language of the statute.

REASONS FOR GRANTING THE PETITION

The Second Circuit's Opinion conflicts with the opinion of the D.C. Circuit in *Agudas Chasidei Chabad of U.S. v. Russian Fed'n*, 528 F.3d 934 (D.C. Cir. 2008)("*Chabad*"), and four decades of this Court's FSIA jurisprudence, from *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493-94 (1983) to *Argentina v. NML Capital, Ltd.*, 573 U.S. 134, 141-42 (2014): "Any sort of immunity defense made by a foreign sovereign in an American court must stand on the Act's text. Or it must fall." The Opinion ignores this imperative in two significant ways, each of which is two-fold:

First, the Opinion contains a two-fold conflation of the specific requirements of the exceptions granted under FSIA § 1605(a). The first one is a conflation of the takings and the commercial activity exception by replacing the "rights-in-issue" standard of the takings exception (§1605(a)(3)) with a "based-upon-an-act" and "gravamen" standard wholly "cut-and-pasted" from the "commercial activity" exception (§ 1605(a)(2)). The takings exception requires that jurisdiction be exercised in "*any case*" in which "*rights*" in qualifying

property are "*in issue*." § 1605(a)(3). The more rigorous commercial activity exception's "based-upon-an-act" standard is derived from *that* subsection's "based upon" language. § 1605(a)(2). The Opinion clearly misapplies to Petitioners' (a)(3) case the (a)(2) ruling in *Garb v. Poland*, 440 F.3d 579 (2d Cir. 2006) and other cases dealing with the commercial activity exception's "based upon an act" or "gravamen" standard.

The second conflation pertains to clauses one and two of the takings exception, more precisely the "carried on" language in clause one and the "is engaged in" language in clause two.

This case only involves clause one of the takings exception. Yet, the Opinion in its interpretation of "carried on" relies on a case that dealt exclusively with the meaning of "is engaged in" in clause two (*Schubarth v. Germany*, 220 F.Supp.3d 111 (D.D.C. 2016), *aff'd in part*, 891 F.3d 392 (D.C.Cir. 2018), *see infra* pp. 18, 21 seq.). Nonetheless, and without any further substantiation, the Opinion applies *Schubarth's* rationale to this case, thereby ignoring the clauses' materially different wordings. This conflation is in direct conflict with the D.C. Circuit's opinion in *Chabad*, 528 F.3d 934, which stands for the proposition that courts in their interpretation of the takings exception have to give meaning to the different wordings of clause one and clause two since the legislature deliberately used such differentiated language.

Second, the Opinion improperly grafts onto the plain language of the FSIA takings exception (subsection 1605(a)(3)) the following two requirements that clearly conflict with the plain statutory language,

as well as the FSIA jurisprudence of this Court and other Circuit Courts.

Even assuming the "based-upon-an-act"-and-"gravamen" standard were applicable to the takings exception (it is not), the Opinion erroneously concludes that the taking of victims' skulls and bodies for and with sovereign and commercial purposes and activities was not part of the "gravamen" of Plaintiffs' pleadings. Indeed, the Opinion does not even mention Plaintiffs' numerous Counts asserting claims for Germany's mass harvesting of victim's bodies and body parts.

Moreover, the Opinion rewrites the takings exception by re-conjugating a past participle selected by Congress ("carried on") and converting it to present-progressive tense. Consequently, the Opinion improperly requires that, although a single act or sale may constitute "commercial activity" under statutory definitions, the commercial activity must continue and be ongoing as of the date of filing of suit. The Opinion thus misinterprets critical language requiring only that the qualifying property be "present in the United States *in connection with* a commercial activity *carried on*." There is no "ongoing" activity requirement, and jurisdiction may not be withheld where otherwise qualifying properties are still present in the United States in connection with a commercial activity carried on but no longer ongoing.

I. THE SECOND CIRCUIT'S GROSS DEPARTURES FROM FSIA'S PLAIN LANGUAGE AND PRECEDENTS OF THIS COURT AND THE CIRCUIT COURTS REQUIRE THE EXERCISE OF THIS COURT'S JURISDICTION

A. The Second Circuit's Opinion Erroneously Changed the Text of FSIA's "Taking Exception" to Add Two Additional Elements Not Found in the Act

The Opinion concludes by acknowledging that there were "terrible wrongs elucidated in" the pleadings. But the Opinion bars the Petitioners from asserting in the U.S. courts their meritorious claims, based on three legally erroneous grounds.

B. The Opinion Replaces the "Rights-In-Issue" Standard with its Own; Regardless, Petitioners' Allegations Regarding the Human Remains Place Them and Their Taking as "Gravamen" at the Heart of the Case

The Opinion misinterprets the takings exception's clear expression by replacing the words carefully selected by Congress with new ones.

1. *The "Rights-In-Issue" Standard Applies*

The plain text of the takings-exception requires that jurisdiction be exercised in "any case" in which "rights" in qualifying property are "in issue." Count VII of the Amended Complaint ("AC") asserts claims for "Conversion of Skulls, Body Parts, and Mortal Remains" as to the taking of the body parts that

Germany used in connection with extensive commercial activity. *See, e.g.*, AC ¶ 360-65 (App. 49a); *see also*, proposed Second Amended Complaint ("SAC") ¶ 300-319 (App. 210a); and Lockman Supp. Dec. ¶ 2, *et seq.*, A.981-1044 (App. 393a). Nowhere in the District Court opinion (App. 17a) or the Second Circuit Opinion (App. 1a) is it suggested that Petitioners failed to state valid claims.

2. *The "Based-Upon-An-Act"-and-"Gravamen" Standard Is Inapplicable and Unsupported By the Plain Text of the Takings Exception*

The Opinion improperly imports § 1605(a)(2) jurisprudence into a § 1605(a)(3) case without regard for the differing statutory texts. Indeed, the Opinion erroneously cites *only* § 1605(a)(2) cases in deriving the "based-upon" standard. Opinion ("Op.") at 20 (citing *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 396 (2015), *etc.*). However, these cases are inapposite, as subsection 1605(a)(2) is inapplicable here to the takings exception, subsection 1605(a)(3).

The Opinion's "based-upon"-and-"gravamen" analysis is simply inapplicable to an appropriate consideration of the takings exception, where the "rights-in-issue" standard governs. The Opinion identifies the "rights-in-issue" standard as applicable, but then fails to apply that standard. Op. at 12, 19-21 (App. 1a). The Second Circuit further ignores all of Petitioners' property expropriation and "bone-trade" allegations (that people were taken, body parts expropriated, shipped to Berlin, and then used in connection with commercial activity). AC, ¶¶ 172, 219-233, 297-301 (App. 49a). These allegations were more than sufficient to establish the first element of the

takings exception: that "rights in property are in issue." *See Zappia Middle East Construction Company v. Emirate of Abu Dhabi*, 215 F.3d 247, 251 (2d Cir. 2000). The Opinion ignores this.

3. *The Second Circuit Fundamentally Erred in Applying a "Gravamen" Standard to its § 1605(a)(3) Analysis Since the District Court Only Applied That Standard to the § 1605(a)(2) Portion of its Opinion*

The Opinion quotes the District Court's "gravamen" analysis without noting that it took it from the §1605(a)(2) portion of the District Court opinion. *Rukoro*, 363 F.Supp.3d at 444-45 (App. 17a). This error is fundamental, since the District Court (i) did *not* hold that the takings exception requires applying a gravamen standard, and (ii) thus did not address whether the Counts regarding the wrongful taking and sale of human bodies, and their presence in the AMNH in New York, were not part of the "gravamen." The Opinion then erred in its gravamen analysis by making the conclusory leap-of-faith that the human skulls in Manhattan (there because of Germany's commercial activity) are somehow *not* a part of the gravamen of Petitioners' case.

This misapplication of FSIA should be corrected. The Second Circuit's conflation of the different requirements under the commercial activity and takings exception underscores the need for clarification of the proper interpretation and application of FSIA.

4. *Even Under the Inapplicable "Gravamen" Standard, the Human Remains at the AMNH Fall Squarely Within It, Since Cases May Have Multiple Aspects Qualifying As "Gravamen"*

In its fundamental misapplication of the "based-upon" and "gravamen" standard, the Opinion erred for several reasons in holding, without analysis, that the Amended Complaint counts dealing with the taking of human bodies and body parts were not within the scope of the gravamen of the case.

The Opinion provides only one reason why the Counts relating to human body parts are not the claims' gravamen: that Petitioners also allege a wrongful taking of "land," "livestock," and "personal property." Op. at 21 (App. 1a). However, the mere fact that Petitioners allege the taking of other property as well does not vitiate the importance of their claims for the taking of human body parts.

In acknowledging three elements of the gravamen of the case (land, livestock, and personal property), the Opinion erred by overlooking the victims themselves and Germany's trafficking in their body parts. Petitioners' pleadings focus not only on Defendant's taking but also the *sale* of human body parts - that should support a "gravamen" finding. AC, ¶¶ 172, 219-233, 297-301 (App. 49a). This showing is not even mentioned in the Opinion.

Complex cases like this one are often multi-faceted, with multiple gravamen or multiple aspects of one gravamen; there is rarely *one* "essence" or "gist." *Cf. Braverman v. United States*, 317 U.S. 49, 54, 87 L. Ed. 23, 63 S. Ct. 99 (1942) ("The allegations in a single count of a conspiracy to commit several crimes is not duplicitous, for 'the conspiracy is the crime, and that is

one, however diverse its objects.'" (Citations omitted.)). It is indeed the precedent the Opinion relies on the most, *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27 (2015), that stands for just this proposition.

In *Sachs*, the court explicitly acknowledged that the decision's precedential value only extended to cases "in which the gravamen of each claim [was] found in the same place." 577 U.S. 27, 36 (2015) at n. 2. ("We cautioned in *Nelson* that the reach of our decision was limited, *see Saudi Arabia* v. *Nelson*, 507 U.S. 349, 358, n. 4, 113 S. Ct. 1471, 123 L. Ed. 2d 47 (1993), and similar caution is warranted here. … [W]e consider here only a case in which the gravamen of each claim is found in the same place."). *Also see Jam v. Int'l Fin. Corp.*, Civil Action No. 15-612 (JDB), 2020 U.S. Dist. LEXIS 152855, at 16, n.6 (D.D.C. Aug. 24, 2020) ("It is true … that *Sachs* suggested that "the gravamina of different claims may occur in different locations."); *Rodriguez v. Pan Am. Health Org.*, Civil Action No. 20-928 (JEB), 2020 U.S. Dist. LEXIS 208904, at 13 (D.D.C. Nov. 9, 2020) (expressly citing to footnote 2 in *Sachs*.).

By implication, this footnote in *Sachs* clarifies that multiple claims can have multiple gravamina which can be found in different places. *See Devengoechea v. Bolivarian Republic of Venez.*, 889 F.3d 1213, 1223 (11th Cir. 2018) ("[Sachs] expressly recognized that the gravamina of different claims may occur in different locations.").

Sachs noted that all of "the "essentials" of [Sachs's] suit for purposes of §1605(a)(2) [were] found in Austria, [r]egardless of whether [she] [sought] relief under claims for negligence, strict liability for failure to warn, or breach of implied warranty." *Id.* The court in *Sachs* therefore was not confronted with, and accordingly did not decide, a situation where multiple

gravamina were at issue. *See also Devengoechea* at 1223 ("[T]he Court [in *Sachs*] found that the conduct making up the gravamen of Sachs's suit happened in Austria because all of her claims turned on the same tragic episode that occurred there. Nevertheless, the Court did caution that domestic conduct with respect to different types of commercial activity may play a more significant role in other suits." (Internal citations omitted.)).

In this case – to mirror the language of *Sachs* and *Devengoechea* – not all of Petitioners' claims "turn on the same tragic episode." Rather, Petitioners seek relief under multiple claims with different underlying sets of facts, and accordingly different locations. As such, this is a case with multiple gravamina – all of which need to be considered. This includes the taking and trafficking in body parts.

Figure 1: Victims' skulls being crated for transport to Germany, some of which were sold and transported to

the AMNH in Manhattan, where they remain today. L.Supp.Dec. Ex.B, (App. 373a et seq.).

Textfigur 1. Hottentotte, Mädchen.

Figure 2: "Jeannie," a Nama girl pressed in a tiny tin and preserved in alcohol. L.Supp.Dec. ¶¶ 21 & nn.55 & 60 (App. 373a et seq.).

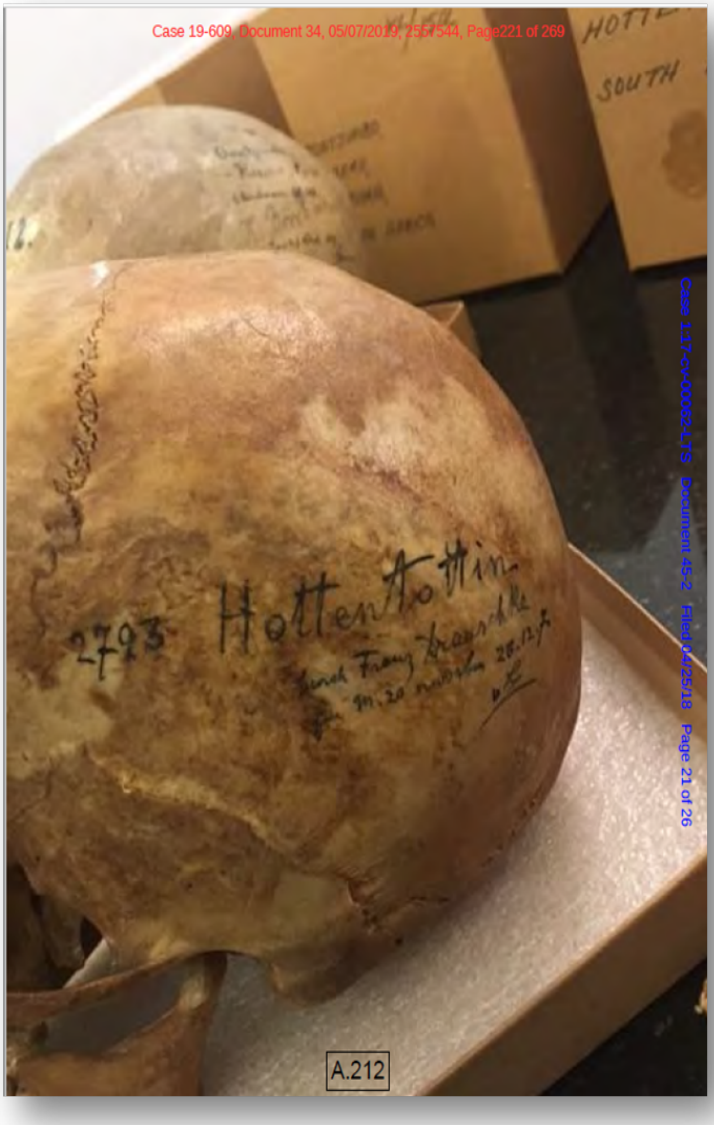

Figure 3: "Jane Doe" (#2793) from Shark Island at AMNH. Declaration of Barnabas Katuuo (App. 462a et seq.)

5. ***Even If Several Counts Unrelated to the Taking of Human Remains Were Jurisdictionally Insufficient, the Proper Remedy Was Severance, Not Dismissal of the Entire Amended Complaint, so the Counts Relating to the Taking of Human Body Parts Could Proceed.***

Even accepting the flawed holding of the Second Circuit, the proper remedy was *not dismissal*: it was *severance* of the jurisdictionally insufficient counts so that the counts relating to the property taking and commercial sale of human remains could proceed.

6. ***In the Alternative, the Second Circuit Should Have Granted Petitioners' Motion to File the Proposed Second Amended Complaint Under 28 U.S.C. § 1653***

Under the "liberal" standards of § 1653, *any* jurisdictional case may be amended before the District Court or even the Circuit Court "if it is at all possible to determine from the record that jurisdiction does in fact exist." *Cox v. Livingston*, 407 F.2d 392, 393 (2d Cir. 1969).

II. THE SECOND CIRCUIT IMPROPERLY REWROTE THE TAKINGS EXCEPTION TO REQUIRE THAT THE PROPERTY BE PRESENT IN CONNECTION WITH MORE THAN ONE COMMERCIAL ACTIVITY AND THAT THE COMMERCIAL ACTIVITY BE ONGOING

A. The Second Circuit Erroneously Inserted into the FSIA's Definition of "Commercial Activity" A Requirement of More Than One Commercial Transaction

The Opinion correctly cites to FSIA's definition of "commercial activity" as "either a regular course of commercial conduct *or a particular commercial transaction or act*." Op. at 17; App. 11a (§1603(d)). But the Opinion then ignores the second half of the definition by ruling that the takings exception requires more than a single *isolated* commercial transaction, and that the property must be present here in connection with ongoing and continuing activity.

FSIA's takings exception requires only that the property wrongfully taken under international law be taken "in connection with a commercial activity *carried on* in the United States by the foreign state…." §1605(a)(3) (emphasis added). Nevertheless, the Second Circuit erroneously converts this "carried on" language of the takings exception to the present tense, thus requiring that the commercial activity is "*being* carried on" or must "be carried on," such that property present in the U.S. in connection with commercial activity "carried on" but not still ongoing is excluded from the scope of the exception. App. 14a (the takings statute

"requires the activity at issue be current.") This is an important issue of first impression, Op at 19-23, citing only to *Schubarth v. Germany*, 220 F.Supp.3d 111 (D.D.C. 2016), *aff'd in part*, 891 F.3d 392 (D.C.Cir. 2018), which, as discussed below, is inapposite. App. 12a et seq.

Congress well knew this in drafting the FSIA's takings exception, specifically using the term "carried on" to include those activities that were "completed," just as it had done with other similar statutes. *See Smith v. United States*, 508 U.S. 223, 228-37 (1993) (firearm traded for drugs was "used" during drug-trafficking crime because "broad" statutory language includes all meanings). In *Smith*, this Court did not require that the use of firearms during the course of criminal activity be still ongoing; nor should it permit a Circuit court to overrule Congress in its interpretation intended that a foreign state's commercial activity in the U.S. that resulted in property being present here be still ongoing or continuing. The "carried on" language of the takings exception modifies the term "a commercial activity," defined to include "a particular commercial transaction or act." § 1603(d). If the Court permits the Second Circuit's Opinion to stand, then the "carried on" language of the takings exception will inferentially voids §1603(d) by excluding one completed transaction from its scope. This the U.S. courts cannot do. *Dig. Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 770 (2018) ("A statute's explicit definition must be followed, even if it varies from a term's ordinary meaning."); *In re Mazzeo*, 131 F.3d 295, 302 (2d Cir. 1997) (statutes must be interpreted consistently with their "definitions"). This view also is consistent with the FSIA's retroactivity. *See Altmann v. Austria*, 541 U.S. 677, 697 (2004).

B. The Opinion Misinterprets the Takings Exception by Erroneously Relying on *Schubarth*

The Opinion erroneously cites *Schubarth v. Germany*, 220 F.Supp.3d 111 (D.D.C. 2016), *aff'd in part*, 891 F.3d 392 (D.C.Cir. 2018), which dealt solely with the second nexus clause of the takings exception (§1605(a)(3)), which requires that an agency or instrumentality *is engaged* in a commercial activity in the United States. *See Schubarth*, at 114. ("[Plaintiff] hangs her hat on clause [2]."). Only in this context did the District Court note that courts look "for evidence of recent or ongoing transactions." *Id.*, at 115, relying on *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 693 (7th Cir. 2012); *Altmann v. Republic of Austria*, 317 F.3d 954, 961, 969 & n.5 (9th Cir. 2002), both of which deal with clause two of the takings exception.

However, clause *one* of the takings exception requires only that property or any property exchanged for such property is present in the United States in connection with a commercial activity *carried on* in the United States. Thus, *Schubarth* is inapposite to the analysis in this case, which relies solely on clause one.

Indeed, the *Chabad* case, cautions against such conflation of clauses one and two of the takings exception. *See Chabad* at 947 ("Congress took the trouble to use different verbs in the separate prongs, and to define the phrase in the first prong. [Defendant] wants us to turn that upside down and obliterate the distinction Congress drew."). Thus, the D.C. Circuit Court's decision in *Chabad* cannot be reconciled with the Second Circuit Opinion.

The Opinion should not be permitted to stand as precedent, since it misinterprets the plain language of

the takings exception and erroneously relies on *Schubarth.*

CONCLUSION

For the reasons set forth above, Petitioners Vekuii Rukoro, Johannes Isaack, the Association of the Ovaherero Genocide in the U.S.A., Inc., and Barnabas V. Katuuo respectfully request this Petition for Certiorari be granted.

Respectfully submitted,
McCALLION & ASSOCIATES LLP
Kenneth F. McCallion,
Counsel of Record

Thomas A. Holman
Professor Richard H. Weisberg
Anna Freymann
100 Park Avenue – 16th floor
New York, New York 10017
646-366-0884