No. 20-1454

IN THE

Supreme Court of the United States

VEKUII RUKORO, ET AL., PETITIONERS

v.

FEDERAL REPUBLIC OF GERMANY

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

BRIEF FOR JEWISH HERITAGE FOUNDATION INC. AS AMICUS CURIAE SUPPORTING PETITIONERS

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STATUTES

INTEREST OF AMICUS CURIAE[1]

Amicus curiae The Jewish Heritage Foundation Inc. ("JHF") is an IRC § 501 (c) (3) organization that is dedicated to locating, authenticating, recovering and restoring stolen Judaica, *i.e.*, religious and cultural items of the Jewish people and the Jewish Heritage, to help preserve the history and culture of the Jewish people so that they can be available for religious, communal, cultural and educational uses. Most of the Torah scrolls and other stolen pieces of Judaica that JHF has been able to recover were stolen during the Holocaust, and many of then were sold commercially. JHF believes that the history of the Holocaust must be remembered, and that the Jewish cultural property wrongfully taken should be returned to its rightful owners. JHF membership includes community leaders, rabbis, Holocaust restitution experts, museum officials, philanthropists, lawyers, accountants, historians, students and lay persons, both Jewish and non-Jewish.

This case is of critical importance to JHF and other organizations seeking to recover Judaica and artworks stolen from Jewish communities during the Holocaust in that these cultural items were wrongfully taken and then sold in connection with commercial

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[1]Pursuant to Rule 37.6 of the Rules of this Court, the undersigned hereby states that no counsel for a party wrote this brief in whole or in part, and that, other than amicus curiae or its counsel, no one contributed money to fund the preparation or submission of this brief except for The Jewish Heritage Foundation Inc. itself, which contributed the funds used to pay for the printing of this amicus brief. Pursuant to Rule 37.3(a) of the Rules of this Court, counsel for all parties have filed with the Clerk letters of blanket consent to the filing of amicus briefs in these cases.

activity carried on, at least in part, in the United States, but such commercial activity is no longer ongoing. Prior to the Second Circuit's decision in this case, JHF relied upon the fact that the plain language of FSIA's commercial activity exception covered such completed, but not still ongoing, commercial activity. Judaica located in the U.S. that was taken in violation of international law in the past is almost always part of a completed commercial activity between an instrumentality of a foreign government and a museum or private collection that is no longer ongoing. Indeed, 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 decision 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.") If such an erroneous interpretation of the plain language of the statute were permitted to stand, JHF would no longer be able to hold foreign state instrumentalities responsible for their past commercial sales of stolen Judaica to U.S. museums, other institutions, and to private collections.

The Second Circuit's decision at issue in Mr. Rukoro's petition for certiorari hits the Jewish community whose interests JHF represents disproportionately hard as New York is located within the Second Circuit and more than 1.7 million Jews are

estimated to live in New York State, which, in context, represents almost 25% of the total Jewish population of the United States.[2] The Second Circuit's Rukoro decision would effectively bar JHF from assisting any potential litigant who wishes to pursue a claim for Judaica who lacks venue options other than within the Second Circuit. This is thus not a case where the burden of the circuit split falls equally, and JHF submits that this fact alone is a strong reason for this Court to resolve the issues in the Rukoro petition for certiorari now.

INTRODUCTION & SUMMARY OF THE ARGUMENT

Amicus JHF urges the Court to accept Petitioners' application to have this Court resolve a significant conflict between the Second Circuit's Opinion in this case,[3] and 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).

The Opinion improperly interjects the "is engaged in" language of the second clause of the takings exception, and cases relating thereto, into the analysis of this case, which solely relates to the first

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[2]https://www.jewishvirtuallibrary.org/jewish-population-in-the-united-states-by-state.

[3]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.

clauses "carried on" language. Although this case only involves clause one of the takings exception, 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.). 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. This misinterpretation is in direct conflict with the D.C. Circuit's opinion in *Chabad*, 528 F.3d 934, which points out the different wordings of clause one and clause two of the takings exception and the importance of differentiating the language of those two clauses.

ARGUMENT

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 FSIA defines "commercial activity" as "either a regular course of commercial conduct *or a particular commercial transaction or act*." Op. at 17; App. 11a (§1603(d)). It 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 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).[4] Nevertheless, the

[4] Webster's dictionary defines "carried" as the past-participle of "carry". Webster's also defines "past participle" as a participle expressing a "completed action." A dictionary definition of a word is regularly relied upon by the federal courts. See *United States v. Melvin*, 948 F.3d 848 (7th Cir. 2020); see also *Jackson v. Blitt & Gaines, P.C.*, 833 F.3d 860, 863 (7th Cir. 2016) ("As with all questions of statutory interpretation, we start with the text of the statute to ascertain its plain meaning.").

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").

The Second Circuit Opinion thus violates the Plain Meaning Rule. *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1987) ("Our inquiry must cease if the statutory language is unambiguous and the statutory scheme is coherent and consistent"). *Id.* at 340, citing *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240 (1989).

This is thus 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 void §1603(d) by excluding one completed transaction from its scope. This the U.S. courts should not 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 *Chabad*, 528 F.3d 934, 948 ("Thus §1605(a)(3)'s *second alternative* commercial activity requirement is plainly satisfied."); *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).

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, which is relied on by *Schubarth*, cautions against a 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, erroneously relies on *Schubarth*, and frustrates the important work of organizations such as the JHF, who are working to recover religious, cultural and artistic property taken in violation of international law.

CONCLUSION

Amicus Curiae Jewish Heritage Foundation Inc. respectfully request the Petition for Certiorari be granted, so that the Second Circuit's Opinion can be reviewed and corrected.

Respectfully submitted,

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