No. 20-684

In the Supreme Court of the United States

BENJAMIN TAGGER,

Petitioner,

v.

STRAUSS GROUP LTD,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176 (1982), Chief Justice Burger, writing for a unanimous Court, detailed the history and legislative intent of Friendship, Commerce, and Navigation treaties ("FCN Treaties") between the United States and various countries. FCN Treaties provide varying levels of access to domestic courts, differentiating between those providing lesser "most favored nation treatment" and a set of nations granted "National Treatment", the "highest level of protection afforded by commercial treaties," providing parity "upon terms no less favorable than the treatment accorded . . . to nationals . . . " *Id.* at 188.

Petitioner Benjamin Tagger, a permanent resident domiciled in New York, and Israeli national, invoked the Israel Friendship, Commerce and Navigation Treaty (the "Israel Treaty") in a diversity jurisdiction case under 28 U.S.C. § 1332(a) against an alien company, Strauss Group of Israel. Petitioner argued that the Israel Treaty provided him access to federal court on equal terms with an American national, and that diversity existed in a suit against an alien company, Respondent Strauss Group. The Second Circuit held that National Treatment applied only to minor procedural matters such as the "employment of lawyers" and "filing fees." The Question Presented Is:

Does the National Treatment clause in Friendship, Commerce, and Navigation Treaties provide permanent resident aliens from treaty nations access to federal courts on equal terms as an American national, allowing them to initiate diversity actions against alien companies or individuals in pursuit or defense of their rights?

LIST OF PROCEEDINGS

United States Court of Appeals for the Second Circuit

Docket No: 18-3189

Benjamin Tagger, Plaintiff-Appellant, v. Strauss Group Ltd., Defendant-Appellee, Sabra Dipping Co., LLC, Defendant.

Opinion: February 27, 2020

Rehearing Denial: June 15, 2020

United States District Court
Eastern District of New York

Docket No. 18-cv-2923

Benjamin Tagger, Plaintiff, v. The Strauss Group Ltd., Defendant.

Decision: September 12, 2018

RELATED PROCEEDING IN ISRAEL

Netanya Magistrate's Court, Israel

Appeal No. 46625-07-13

Tagger v. Strauss

Decision: June 8, 2013

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully asks this Court to issue a writ of certiorari to review the Decision and Order of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Second Circuit, dated February 27, 2020, is published at 951 F.3d 124 and included below at App.1a. The opinion of the United States District Court Eastern District of New York, dated September 12, 2018, is included below at App.7a.

JURISDICTION

The United States Court of Appeals for the Second Circuit denied a timely filed Petition for Rehearing on September 12, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Art. III, § 2, Cl. 1

> The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party;—to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects

U.S. Const., amend. XIV, § 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 1332(a)

> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—
>
> (1) citizens of different States;
>
> (2) citizens of a State and citizens or subjects of a foreign state, except that the district courts shall not have original jurisdiction under this subsection of an action between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same State;
>
> (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
>
> (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

Israel Friendship, Commerce and Navigation Treaty ("Israel Treaty")

The Israel Treaty was signed in Washington, D.C. on August 23, 1951. The government of the State of Israel ratified the treaty on January 6, 1952. The United States Senate ratified the treaty on January 6, 1952. The relevant excerpts of this treaty are:

[. . .]

> The United States of America and Israel, desirous of strengthening the bonds of peace and friendship traditionally existing between them and of

encouraging closer economic and cultural relations between their peoples, and being cognizant of the contributions which may be made toward these ends by arrangements encouraging mutually beneficial investments, promoting mutually advantageous commercial and cultural intercourse and otherwise establishing mutual rights and privileges, have resolved to conclude a Treaty of Friendship, Commerce and Navigation, based in general upon the principles of national and of most-favored-nation treatment unconditionally accorded, and for that purpose have appointed as their Plenipotentiaries.

[. . .]

Article V

1. Nationals and companies of either Party shall be accorded national treatment and most-favored-nation treatment with respect to access to the courts of justice and to administrative tribunals and agencies within the territories of the other Party, in all degrees of jurisdiction, both In pursuit and in defense of their rights. It is understood that companies of either Party not engaged in activities within the territories of the other Party shall enjoy such access therein without any requirement of registration or domestication.

[. . .]

Article XXII

1. The term "national treatment" means treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of such Party.

2. The term "most-favored-nation treatment" means treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of any third country. It is understood that established concessions and regimes which antedate the independence of Israel do not come within the purview of Article VII, paragraph 4, and Article VIII, paragraph 3.

3. As used in the present Treaty, the term "companies" means corporations, partnerships, companies and other associations, whether or not with limited liability and whether or not for pecuniary profit. Companies constituted under the applicable laws and regulations within the territories of either Party shall be deemed companies thereof and shall have their juridical status recognized within the territories of the other Party.

4. National treatment accorded under the provisions of the present Treaty to companies of Israel shall, in any State, Territory or possession of the United States of America,

be the treatment accorded therein to companies created or organized in other States, Territories, and possessions of the United States of America.

[. . .]

Protocol

1. The term "access" as used in Article V, paragraph 1, comprehends, among other things, legal aid and security for costs and judgment.

2. The first sentence of Article V, paragraph 1 (the National Treatment clause), shall not obligate either Party with respect to entertaining an action where a decree of dissolution of marriage is sought by an alien. For this purpose, decree of dissolution of marriage includes a decree of divorce and a decree of nullity.

STATEMENT OF THE CASE

A. Factual Background

The Petitioner and Plaintiff-Appellant below BENJAMIN TAGGER ("TAGGER") is a United States permanent resident, of Israeli nationality, residing and domiciled in Kings County, New York.

The Respondent and Defendant-Appellee below is the STRAUSS GROUP, LTD. ("STRAUSS") formerly known as Strauss-Elite Ltd. and is an Israeli publicly-traded entity with headquarters in Israel. Through itself and

its subsidiaries, the company sells food and beverage products globally, including the United States.

The Second Circuit recognized the nationality and domicile of the parties as follows: "Although a citizen of Israel, Tagger lives in Brooklyn as a lawful permanent resident, and Strauss is an Israeli corporation with its headquarters there." Tagger Second Circuit Opinion, p.3 (App.2a)

In 1999, Petitioner entered into a contractual agreement to settle a foreclosure debt owed by Tagger to Strauss, which stipulated terms of repayment. Tagger issued guarantees and made payments over the course of 10 months, with the final payment in May 2000, meeting the complete obligations of the contract.

Despite the contract fulfillment, Strauss, acting in bad faith, requested the Israel State Collection Office to issue a set of prohibitions on Tagger which were issued in or about July 2011 under Israeli law. These included including the prohibition of passport renewal, restraint of bank accounts, and the blocking of exit from the country. While visiting Israel, and unaware these prohibitions had been imposed, in July 2103, he was blocked while trying to exit due to the Strauss stop-exit order.

Tagger appealed the stop-exit order to an Israeli Magistrate Court. On August 6, 2013, this court unconditionally cancelled the stop-exit order finding that under the law of Israel that Tagger is a foreign resident, and that Strauss had been at fault because it had not used a bank guarantee provided by Tagger to cover the debt. *Tagger v. Strauss*, Appeal 46625-07-13, Netanya Magistrate's Court, Israel (June 8, 2013).

B. Proceedings in District Court

In May 2018, Tagger filed suit in the United States Eastern District of New York against Strauss for various common law contract and tort claims, alleging that Strauss falsely brought legal action against him in Israel which caused him to be prohibited from leaving Israel as discussed above. *See* First Amended Complaint, Dist. Doc. 16. Taggert brought claims for defamation, conspiracy, negligence, obstruction of justice, fraud, negligent infliction of emotional distress, intentional infliction of emotional distress, interference with contractual relationships, and violations of human rights under the Universal Declaration of Human Rights. *Tagger* District Opinion, p.3-4.

Indeed, the specific actions undertaken by Strauss as articulated in the Complaint were disgraceful and offended the basics of human decency, and the principles articulated in the Universal Declaration of Human Rights. Petitioner had fulfilled the terms of the contract; yet Strauss, leveraging its power and sway in the Israeli political and legal system, vindictively requested and received a stop-exit order against Petitioner after the contract had been extinguished. Petitioner lost his liberty of movement and faced threats to his bank accounts, and was effectively extorted by Strauss.

Tagger invoked federal diversity jurisdiction under 28 U.S.C. § 1332(a). As noted above, Tagger was and is an American permanent resident, an Israeli national, and is residing and domiciled in Kings County, New York. Strauss is an Israeli corporation, publicly-traded and headquartered in Israel.

In his initial and amended complaint, Tagger invoked the treaty benefits conferred to him under the Treaty of Friendship, Commerce and Navigation between the United States of America and Israel. He specifically invoked the provision according him National Treatment with respect to access to the courts in all degrees of jurisdiction, giving him the same right to pursue and defend his rights in federal court as an American national. An American national domiciled in the state of New York would be deemed a citizen of that State. Given Strauss' status us as an Israeli corporation, diversity was satisfied since the suit involved " . . . citizens of a State and citizens or subjects of a foreign state . . . " 28 U.S.C. § 1332(a)(2).

Strauss moved to dismiss the complaint for, *inter alia*, lack of subject matter jurisdiction and under *forum non conveniens*. The District Court found in Defendant's favor dismissing the case for lack of subject matter jurisdiction under 28 U.S.C. § 1332. The District Court determined that both Tagger and Straus are considered aliens for the purpose of diversity jurisdiction:

> Defendant is an Israeli corporation with its principal place of business in Israel. A corporation is a citizen "of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business." 28 U.S.C. § 1332 (c)(1).
>
> Defendant is therefore considered to be a citizen of Israel. Plaintiff is a lawful permanent resident domiciled in the state of New York. Generally, an individual's citizenship is determined by his domicile. *Palazzo ex rel.*

> *Delmage v. Corio*, 232 F.3d 38, 42 (2d Cir. 2000). However, the history of § 1332(a) and an analysis of that history by courts within the Second Circuit instruct that plaintiff is also considered to be an alien for the purposes of diversity jurisdiction.

District Court Opinion, p.5. (App.13a)

However, the District Court's diversity analysis reviewed 28 U.S.C. § 1332 in a vacuum, failing to consider how State citizenship is impacted by the Israel Treaty; this despite the fact that the Treaty was invoked as a key underpinning to jurisdiction in Taggert's complaint and amended complaint.

C. Proceedings in the Second Circuit

The Second Circuit addressed the issue that was ignored in the District Court—the applicability of the Israel Treaty (which the Second Circuit refers to as the "FCN Treaty"). The Second Circuit construed the access provisions of the Israel Treaty to confer narrow procedural rights.

> We have previously commented that these types of "access" provisions of international commercial treaties were "intended to guarantee treaty nationals equal treatment with respect to procedural matters like filing fees, the employment of lawyers, legal aid, security for costs and judgment, and so forth." *Blanco v. United States*, 775 F.2d 53, 62 (2d Cir. 1985).

Tagger Second Circuit Opinion, p.7. (App.5a)

The Second Circuit sidestepped the question of what is meant by National Treatment, acknowledging that an Israeli national is on equal terms with an American, but does not go further in analyzing what this means in terms of substantive legal rights, access to the courts, or diversity.

> The terms "national treatment" and "most-favored-nation treatment" also do not offer Tagger any relief. The Supreme Court has stated that "national treatment" means nothing more than offering foreign nationals "equal treatment" with domestic nationals *See Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 188 n.18 (1982). Similarly, "most-favored-nation treatment means treatment no less favorable than that accorded to nationals or companies of any third country." *Id.* Therefore, the access provision of the Israel-U.S. FCN Treaty does not offer Tagger any more substantive rights than any U.S. citizen would be entitled. Tagger is still required to show that there is complete diversity between the parties, just like any U.S. citizen would.

Tagger Second Circuit Opinion, p.7. (App.5a)

Tagger petitioned for *en banc* consideration of the Second Circuit decision which was denied on June 15, 2020. (App.21a)

SUMMARY OF THE ARGUMENT

In holding that Petitioner, a legal permanent resident of the United States and domiciled in New York, was not a domiciliary of New York for diversity subject matter purposes in an action against an Israeli corporation transacting business in the United States, ran contrary to the explicit terms of the Israel Treaty which

REASONS FOR GRANTING THE PETITION

I. UNDER THIS COURT'S LAW IN *SUMITOMO SHOJI AM., INC. V. AVAGLIANO,* PERSONS COVERED UNDER THE ISRAEL TREATY ARE ENTITLED TO THE SAME ACCESS TO FEDERAL COURTS IN ALL JURISDICTIONS AS AMERICAN CITIZENS.

A. In *Sumitomo*, this Court Articulated the Ample Breadth of National Treatment and the Importance of Such Treaties in International Commercial Relations.

This Court's definitive case on the interpretation of Friendship, Commerce, and Navigation Treaties is *Sumitomo Shoji Am., Inc. v. Avagliano,* 457 U.S. 176 (1982). (*Sumitomo*). In this case, female secretarial employees of Sumitomo, who with one exception, were United States citizens, brought a class action Sumitomo Shoji America, Inc., a New York corporation and wholly owned subsidiary of a Japanese general

trading company. The plaintiffs claimed that Sumitomo's alleged practice of hiring only male Japanese citizens to fill executive, managerial, and sales positions violated Title VII of the Civil Rights Act of 1964. Sumitomo moved to dismiss the complaint on the ground that its practices were protected under Art. VIII(1) of the Friendship, Commerce and Navigation Treaty between the United States and Japan, which provides that "companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice." Similar to the Israel Treaty, the Japan FCN Treaty, accords "national treatment . . . with respect to access to the courts of justice . . . in all degrees of jurisdiction." The Second Circuit held that the Treaty meant to treat U.S. incorporated subsidiaries of foreign companies as foreign, but the Supreme Court reversed, holding that that the Sumitomo subsidiary at suit was an American corporation, since it was constituted under the laws and regulations of New York. *Sumitomo* at 178.

After deciding the case as applied to the facts of *Sumitomo*, Chief Justice Burger, writing for a unanimous Court, expounded on the history and scope of FCN Treaties, as well as the importance and breadth of the term National Treatment. As with all treaties, the interpretation, "must, of course, begin with the language of the Treaty itself. The clear import of the treaty language controls, unless 'application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories.'" *Sumitomo*

at 180, quoting *Maximov v. United States*, 373 U.S. 49, 373 U.S. 54 (1963), and also referencing *The Amiable Isabella*, 6 Wheat. 1, 19 U.S. 72 (1821).

This Court stated that an unincorporated Japanese subsidiary would have the same access to the legal system as a domestically incorporated subsidiary. *Sumitomo* at 189. The non-incorporated subsidiary would also enjoy rights specifically conferred by the FCN Treaty, which for Japanese companies were those conferred by the Japan FCN Treaty, Article VIII(1), allowing the exemption from hiring discrimination laws. Thus had the subsidiary been unincorporated, it had the right to exercise Japan FCN Article VIII(1).

The Court went on to discuss the ample breadth of the term National Treatment, stating that

> [National Treatment] it is ordinarily the highest level of protection afforded by commercial treaties. In certain areas, treaty parties are unwilling to grant full national treatment; in those areas, the parties frequently grant "most-favored-nation treatment," which means treatment no less favorable than that accorded to nationals or companies of any third country. *See* Article XXII(2) of the Treaty.
>
> "The most-favored-nation rule can now, therefore, imply or allow the status of alien disability, rather than of favor. In applicable situations nowadays, the first-class treatment tends to be national treatment; that which the citizens of the country enjoy."

Sumitomo fn. 18, citing Walker, *Modern Treaties of Friendship, Commerce and Navigation*, 42 MINN. L. REV. 805, 811 (1958).

Discussing the historical rationale for FCN treaties, the *Sumitomo* court articulated the importance of such treaties in ensuring confidence to American trading partners that U.S. domestic aliens will be treated fairly on equal basis with American nationals.

> The primary purpose of the corporation provisions of the Treaties was to give corporations of each signatory legal status in the territory of the other party, and to allow them to conduct business in the other country on a comparable basis with domestic firms. Although the United States negotiated commercial treaties as early as 1778, and thereafter throughout the 19th century and early 20th century, these early commercial treaties were primarily concerned with the trade and shipping rights of individuals. Until the 20th century, international commerce was much more an individual than a corporate affair.

Sumitomo, 457 U.S. 186.

Thus this Court's decision in this case is of national, and indeed international importance. This Court ought take the opportunity to review this case, by granting certiorari, in order to ensure that permanent residents like Petitioner " . . . have the right to conduct business within the territory of the other party without suffering discrimination as an alien entity . . . " *Sumitomo*, 457 U.S. 188.

B. The Second Circuit Incorrectly Interprets the Phrase "Access To" as "Access Within" and Thereby Narrows *Sumitomo's* Broad Conferral of National Treaty and Court Access Rights to a Set of Narrow Procedural and Clerical Rights.

In the instant case, the Second Circuit has rendered the benefits conferred under the Israel Treaty to a banal set of near-clerical items. Instead of employing the broad description of National Treatment as providing the "highest level of protection" which "citizens of the country enjoy" in *Sumitomo*, the Second Circuit shrinks it, stating:

> The Supreme Court has stated that "national treatment" means nothing more than offering foreign nationals "equal treatment" with domestic nationals.

Taggert Second Circuit Opinion, p. 7 (App.5a, emphasis added).

It is unclear how the Second Circuit transforms the broad, sweeping language of this Court in *Sumitomo* and qualifies by the phrase "nothing more" than "equal treatment." The phrase "nothing more" is deceptive with the intent to derogate the rights conferred by the Israel Treaty.

Instead of analyzing the particular language of the Israel Treaty (contrary to *Sumitomo*, where the words of the Treaty itself are the starting point for proper analysis), the Second Circuit grouped the Israel Treaty in with the FCN Treaty between the United States and Honduras, which has some overlapping provisions than the Israel Treaty, but has

some important differences. Speaking of FCN Treaties generally, the Second Circuit states:

> We have previously commented that these types of "access" provisions of international commercial treaties were "intended to guarantee treaty nationals equal treatment with respect to procedural matters like filing fees, the employment of lawyers, legal aid, security for costs and judgment, and so forth." *Blanco v. United States*, 775 F.2d 53, 62 (2d Cir. 1985).

Taggert Second Circuit Opinion, p. 7 (App.5a).

The Second Circuit case cited, *Blanco v. United States*, is the font for the Second Circuit's analysis of FCN Treaties. In *Blanco*, the Second Circuit arrived at the opinion that "access" to courts was separate from jurisdiction because the Honduras FCN treaty qualified the enjoyment of "freedom of access to the courts of justice . . . in all degrees of jurisdiction established by law." The *Blanco* court then stated that because jurisdictions were limited to "degrees of jurisdiction established by law," that the drafters of the treaty necessarily considered "access" and "jurisdiction" to be separate concepts. *Blanco* at 61, and then goes on to limit "access" solely to procedural matters.

However, this presents two textual problems. First, the Israel Treaty does not condition access to limited jurisdictions, instead granting access to all jurisdictions. Second the text of both treaties does not discuss "access within" or "access inside" courts; instead, it says "access to" courts, which by standard legal or dictionary definitions means entry to these

courts, *i.e.* jurisdiction. The Treaty does not, as the Second Circuit states in *Blanco*, make an distinction between "access to courts" and "jurisdiction". Instead the "jurisdiction" term in these FCN Treaties serves the purpose of specifying into which court jurisdictions the treaty beneficiary may claim access to. For Honduras, it is a jurisdiction established by law. For the Israel Treaty, it is any jurisdiction–*i.e.* "in all degrees of jurisdiction" Israel Treaty, Section V.

If the courts accept the limited procedural rights specified by the Second Circuit in *Tagger* and *Blanco*, there would appear to be no additional benefits, procedural or jurisdictional, to beneficiaries from FCN Treaty countries that are any different than those given to non-treaty countries. Such a narrow reading is inconsistent with this Court's unanimous position in *Sumitomo*, which spoke of treating FCN Treaty beneficiaries on an equal basis with U.S. citizens.

C. The Israel Treaty Protocol Contains Language Limiting Marital/Divorce Cases, Illustrating that National Treatment and Court Access Was Meant to Be Broad in Coverage and Jurisdictional in Nature.

Since interpretation of a treaty must always begin with the text, the meaning of National Treatment is evident from the treaty language. In addition to the application of the Israel Treaty's access provision to all jurisdictions, the Israel treaty provides one example to demonstrate the breath of the National Treatment and access provision. Protocol, Point 2, states:

> The first sentence of Article V, paragraph 1 (the National Treatment clause), shall not obligate either Party with respect to entertaining an action where a decree of dissolution of marriage is sought by an alien. For this purpose, decree of dissolution of marriage includes a decree of divorce and a decree of nullity.

Protocol 2 thus limits the broad access provision of Article V, paragraph 1, in only one type of case—marriage dissolution and divorce. If the Israel Treaty were, as the Second Circuit believes, limited to narrow procedural and clerical items such as "filing fees", there would be no need for Protocol 2. If the rights under Article V, paragraph 1 were procedural or clerical, then any carve-out in the treaty would be for a mundane procedural item. Instead, it is for a specific matter of jurisdiction, in a subject-matter federal courts have typically not take jurisdiction over–marriage and divorce. In 1858, in *Barber v. Barber*, 62 U.S. (21 How.) 582 (1858), this Court declared that the jurisdiction of the federal courts did not extend to the "subject of divorce." Later in the nineteenth century, the Court, in the case of *In re Burrus*, 136 U.S. 586 (1890), proclaimed that all matters concerning "the domestic relations of husband and wife, parent and child" were the exclusive province of state law. The lower federal courts have generally interpreted the *Burrus* language as an expansion of the *Barber* doctrine and have, for the most part, declined to exercise diversity jurisdiction over all domestic relations cases.

Thus, staying within the intent of the text itself, it is clear that National Treatment and access to

courts in all jurisdictions in pursuit and defense of rights, is meant to be access to the courts, *i.e.* jurisdictional access in all types of cases and jurisdictions where a U.S. citizen could exercise their rights, with the sole exception of cases involving marriage and divorce.

II. AN ALIEN RESIDENT, EXERCISING NATIONAL TREATMENT UNDER THE ISRAEL TREATY, MUST BE TREATED AS A CITIZEN OF HIS STATE FOR THE PURPOSE OF DIVERSITY JURISDICTION

A. Alien State Citizenship and Diversity in Federal Courts.

Federal Courts are established under Article III, § 2 of the U.S. Constitution which permits adjudication of cases and controversies "between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." It is noteworthy that the citizenship clause in Article III refers to Citizens of States, not to Citizens of the United States or to persons of United States Nationality. The original Constitution, prior to Reconstruction, contained no definition of citizenship, and precious few references to the concept altogether. Historically in the courts the term "Citizen" applied to states does not have a fixed definition, as it is affected by domicile. "In order to acquire a domicile and citizenship in Illinois the defendant must have gone there in November, 1883, with the intention of remaining there permanently . . . " *Chicago & N.W.R.R. v. Ohle*, 117 U.S. 123 (1886). In addition, the concept of who is a State Citizen has varied in cases based on factors such as the place of residence, where taxes are paid, place of voting, etc. *Knox v. Greenleaf*, 4 U.S. (4 Dall.) 360 (1802); *Shelton v. Tiffin*, 47 U.S. (6

How.) 163 (1848); *Williamson v. Osenton*, 232 U.S. 619 (1914).

Congress added a statutory layer with the Judiciary Act of 1789, narrowing federal jurisdiction to civil actions in which a minimum sum was disputed and "an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State." Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78.

The modern diversity statute, codified at 28 U.S.C. § 1332, has undergone several changes which at times have tried to articulate the treatment of permanent resident aliens, but is still imprecise in its construction, leaving open questions. While Federal Courts have historically been barred to pure alien-alien lawsuits where all parties are domiciled abroad, there has been varying treatment of permanent resident aliens domiciled in the United States. With the 1988 amendment to 28 U.S.C. § 1332, permanent residents were "deemed a citizen of the State in which such alien is domiciled." (the "deeming clause.") The Third Circuit following the letter of the statute, deemed permanent residents to be citizens of their state of domicile. *Manjit Singh v. Daimler Benz AG et al.*, 9 F.3d 303 (3rd Cir. 1993).

Similarly, Congress has passed legislation deeming alien corporations as domestic. "Federal Courts have routinely treated corporations in accordance with statutory text. Congress's periodic revisions in the treatment of corporations for purposes of their citizenship consistently has been accepted by the courts. Thus, Congress's power to enact the 1958 amendment to section 1332(c) deeming a corporation to be a citizen not only of the state of its incorporation but

also of the state of its principal place of business is unquestioned." *Singh* at 310.

In 2011, Congress passed an amendment to 28 U.S.C. § 1332 to eliminate the deeming clause. Although called the Federal Courts Jurisdiction and Venue Clarification Act of 2011, the amendments still left many uncertainties. "The Clarification Act of 2011 amended the long-standing diversity jurisdiction statute, 28 U.S.C. § 1332, to clear up some, but not all, lingering questions about the authority of federal courts to adjudicate disputes involving resident aliens . . . Even with the amendment, however, federal jurisdiction over foreign citizens and businesses can be uncertain." Hon. Geraldine Soat Brown, *When is a Foreigner Diverse?*, THE FEDERAL LAWYER, January/February 2015. The 2011 amendment eliminated the deeming provision which declared the permanent resident to be a deemed citizen of the state of domicile, but it still left vague whether there other ways a permanent resident could be deemed a citizen of a state, such as through the exercise of FCN Treaty rights. The only types of case explicitly excluded from diversity jurisdiction in the 2011 amended statute are those where the permanent resident lives in the same State as the other party: " . . . the district courts shall not have original jurisdiction under this subsection of an action between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same State." 28 U.S.C. § 1332(a)(2)(2011). However, it is noteworthy that the amendment is silent as to whether a permanent resident in one state can file a diversity

case against another permanent resident in a second state.

Thus, the 2011 Amendment, is poorly-named as the "Clarification Act" as it leaves open important unanswered questions, and does not address the rights of permanent residents exercising rights under an FCN Treaty.

B. A Resident Alien Who Claims National Treatment Under a Valid FCN Treaty Is on an Equal Footing with an American Citizen.

An individual covered under certain FCN Treaties like the Israel Treaty has the right to invoke its protections, including National Treatment and access to the courts in all jurisdictions both in pursuit and defense of its interests. As noted in *Sumitomo*, an individual who qualifies for treaty must enjoy the same treatment as a U.S. National.

This Court honors the force of law of treaties with foreign nations, so long as they do not conflict with the Constitution. Noting that treaties " . . . by Article VI treaties made under the authority of the United States, along with the Constitution and laws of the United States made in pursuance thereof, are declared the supreme law of the land. If the treaty is valid there can be no dispute about the validity of the statute under Article I, § 8, as a necessary and proper means to execute the powers of the Government." *Missouri v. Holland*, 252 U.S. 416, 432. Therefore, when Petitioner invokes the Israel treaty, he is invoking a law of the United States of America, which has constitutional supremacy. U.S. Const. Art. VI, cl. 2.

The first step in a proper analysis of the Israel Treaty in this case is that the Petitioner be treated as indistinguishable from an American national. The second logical step would be to determine whether he can be considered a citizen of a U.S. State (as opposed to an American citizen). Due to the fact that he is an American permanent resident, is domiciled in the state of New York, and pays taxes in the United States and to the State of New York, he has established himself as a citizen of that State. *See Knox v. Greenleaf*; *Shelton v. Tiffin*; and *Williamson v. Osenton, supra.*

Effectively his legal status in diversity actions is the same as it would have been under 28 U.S.C. § 1332 prior to the 2011 Amendment, since this Amendment did not foreclose the invocation of a valid and relevant FCN Treaty in a diversity action, nor specifically exclude actions by permanent residents except those living in the same state as the other party. Where an amendment to a statute remains unclear, vague, or has gaps in its logic, this Court has reverted to prior meanings of a statute. *See Skilling v. United States*, 561 U.S. 358 (2010), which sought to interpret changes to the honest services fraud statute, 18 U.S.C. § 1346. Due to unconstitutional vagueness of the term ""the intangible right of honest services" this Court limited the scope of the hones services fraud statute to schemes involving bribes and kickbacks, which was the prior standard of the Court in *McNally v. United States*, 483 U.S. 350, 356 (1987).

Applying the same logic of statutory interpretation of *Skilling*, wherein this Court looked to prior meanings of the statute to assist in the proper interpretation,

this Court should mend the unresolved gaps in diversity jurisdiction statutes by applying the Court's own common law principles for determining State citizenship which have historically involved a variety of factors, domicile, and the payment of taxes.

The Second Circuit reads exclusions into to the statute that do not apply to the Petitioner. Citing 28 U.S.C. § 1332(a)(2)(2011), the Second Circuit concludes that a permanent resident cannot bring a diversity action against an alien. However this Amended statute only excludes a narrow class of diversity actions–those between American nationals and permanent residents who are domiciled in the same state.

The exclusion cited by the Second Circuit is completely inapplicable in the instant case because Respondent Strauss Group is a foreign company. "Here, it is undisputed that Strauss, an Israeli corporation with its headquarters in Petach Tivka, is a foreign party for the purposes of diversity." Tagger Second Circuit Opinion, p.4

By invoking the Israel Treaty, and in seeking the same treatment as American nationals in obtaining access to courts in all jurisdictions, the Petitioner's position is further reinforced by the principles United States Constitution, Fourteenth Amendment, which among other things provides, that no state shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The Equal Protection Clause (as well as the Due Process Clause) make no distinction in its text between the protections it affords citizens and non-citizens. "No State shall deny to any person . . . the equal protection of the laws."

Although the Petitioner does not frame this petition as a Fourteenth Amendment case, the principles therein are instructive, since diversity jurisdiction under 28 U.S.C. § 1332 is premised on a determination of State citizenship. This Court has held that Fourteenth Amendment subjects statutes that discriminate against aliens to strict scrutiny. In *Graham v Richardson*, 403 U.S. 365 (1971), the Court struck down a law that conditioned the payment of state welfare benefits on citizenship. Preserving limited state resources for citizens was not found to be a sufficiently compelling interest. With *In re of Griffiths*, 413 U.S. 717 (1973), the Court considered a state law that restricted bar membership to citizens. Again, a majority of the Court applied strict scrutiny to strike down the law, finding citizenship to not be closely related to one's ability to fulfill the responsibilities of a lawyer.

After invoking a valid and relevant FCN Treaty, a domestically domiciled permanent resident should receive the same due process and equal protection rights as an American national. When one compares the cost of granting state welfare benefits to permanent residents (*Graham v. Richardson*) to the cost of allowing permanent residents the same rights as American nationals in federal court (the instant case *Tagger v. Strauss Group*), the cost is minuscule, and certainly would not survive strict scrutiny.

CONCLUSION

Petitioner Benjamin Tagger invoked his rights under the Israel Treaty at the District Court and again in the Second Circuit Court of Appeals. He requested National Treatment and equal access to federal court to pursue his interests, as articulated in *Sumitomo.* The Second Circuit trivialized the Petitioner's treaty rights to a *de minimus* set of procedural and clerical items that are not differentiable from those which would be enjoyed by an alien from a non-treaty country. The Second Circuit held that access in all jurisdiction was not the same as access to the jurisdiction. This decision did not reflect the text of the Treaty, based on either the plain reading or an analysis of its construction, wherein the presence of a jurisdictional exclusion for marital and divorce cases is incontrovertible proof that access to courts was contemplated to include federal jurisdiction–*i.e.* access to the court. Once a court determines that a permanent resident is entitled to National Treatment, the next logical step is to determine their State of citizenship, if any, based on factors such as domicile and taxes. If a similarly situated American national would be citizen of a State, the resident alien exercising applicable FCN Treaty rights should also be deemed a citizen of that State for diversity jurisdiction purposes.

The petition for writ of certiorari should be granted.

Respectfully submitted,

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NOVEMBER 9, 2020

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OPINION AND ORDER

REHEARING ORDER

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