No. 24-

IN THE

Supreme Court of the United States

AGUDAS CHASIDEI CHABAD OF UNITED STATES,
Petitioner,

v.

RUSSIAN FEDERATION, *et al.*,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Foreign Sovereign Immunities Act ("FSIA"), a "*foreign state* shall not be immune from the jurisdiction of courts of the United States" for suits involving the unlawful expropriation of property if one of two U.S.-nexus tests is met. 28 U.S.C. § 1605(a)(3) (emphasis added). Either "that property or any property exchanged for such property": (1) "is present in the United States in connection with a commercial activity carried on in the United States by the foreign state," or it (2) "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." *Id.*

The question presented is whether a "foreign state" lacks immunity from U.S. jurisdiction under the FSIA if either U.S.-nexus test is met or whether, as the D.C. Circuit holds, a "foreign state" loses its immunity only if the first U.S.-nexus test is met—*i.e.*, if the expropriated property, or property exchanged for it, is found in the United States.

PARTIES TO THE PROCEEDING

Petitioner Agudas Chasidei Chabad of United States was plaintiff in the district court and appellee in the court of appeals.

Respondents Russian Federation, Russian Ministry of Culture and Mass Communication, Russian State Library, and Russian State Military Archives were defendants in the district court and appellees in the court of appeals.

Respondent Tenex-USA Incorporated was nonparty respondent in the district court and intervenor-appellee and intervenor-appellant in the court of appeals.

Respondent State Development Corporation VEB.RF was intervenor in the district court and interested party-appellant and interested party-appellee in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner Agudas Chasidei Chabad of United States states that it is a nonprofit religious corporation organized under the laws of New York State. Chabad has no parent company or shareholders, and therefore no public entity owns or controls 10% or more of an interest in Chabad.

DIRECTLY RELATED PROCEEDINGS

Agudas Chasidei Chabad of United States v. *Russian Federation*, Nos. 23-7036, 23-7037 (D.C. Cir.) (opinion issued on August 6, 2024; rehearing denied on September 23, 2024).

Agudas Chasidei Chabad of United States v. *Russian Federation*, No. 1:05-cv-01548-RCL (D.D.C.) (order and memorandum opinion denying without prejudice motion to attach property issued on February 27, 2023).

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INTRODUCTION

The D.C. Circuit's decision below granted the Russian state immunity for its unlawful taking of Agudas Chasidei Chabad's ("Chabad") sacred religious library and archive, which are now in the possession of Russian state instrumentalities that engage in commercial activity in the United States. That decision cannot be squared with the plain language of the Foreign Sovereign Immunities Act ("FSIA"), which confers jurisdiction over foreign states that take property in violation of international law and *either* bring that property to the United States *or* give it to an agency or instrumentality of the foreign state that does business in the United

States. In this case, the D.C. Circuit concluded that Russia was immune from suit because it misread the FSIA's expropriation exception as permitting jurisdiction over foreign states only if they bring that property to the United States, and not if they give the property to an agency or instrumentality of the state that does business in the United States.

That erroneous decision cements a split among the circuit courts over the proper interpretation of the expropriation exception. The Fifth and Ninth Circuits have applied the FSIA's unambiguous text to uphold jurisdiction over foreign states when the second U.S.-nexus test is met (*i.e.*, when an agency or instrumentality that owns or operates the property expropriated by the foreign state engages in commercial activities in the United States), whereas the D.C. Circuit has held that U.S. courts lack jurisdiction over foreign states even if the second U.S.-nexus test is met. The Fourth and Second Circuits have cautiously indicated agreement with the D.C. Circuit on this issue.

The D.C. Circuit's decision in this case also departs from its own previous rulings on this issue in this very case. Chabad filed this lawsuit against the Russian Federation and three of its instrumentalities in 2004 to secure the return of a religious library and archive that the Russian Federation's predecessor, the Soviet Union, stole following the Bolshevik Revolution and the Holocaust. In 2008, the D.C. Circuit sided with Chabad, rejected the defendants' sovereign immunity defense, and held that the claims against all defendants could proceed in U.S. court under the expropriation exception. App. 71a (*Agudas Chasidei Chabad of U.S.* v. *Russian Federation*, 528 F.3d 934 (D.C. Cir. 2008) ("*Chabad I*")). Although the property was not in the United States, the D.C. Circuit held that Chabad had satisfied the requisite

U.S. nexus by establishing that the Russian state had given the stolen property to Russian instrumentalities that do business in the United States. The district court entered final judgment against the Russian Federation and other defendants in 2010. C.A.J.A. 102-112.

The D.C. Circuit has now adopted an atextual reading of the FSIA, abandoning its own prior precedent in this case, overturning a final judgment issued pursuant to the D.C. Circuit's 2008 mandate, and mooting 20 years of litigation and 14 years of post-judgment proceedings by granting what amounts to absolute immunity to any foreign state that expropriates U.S. property abroad in violation of international law.

The question presented in this case is important and far-reaching. Does the FSIA mean what it says, *i.e.*, that a "foreign state" shall not be immune when it unlawfully takes U.S. property and either U.S.-nexus requirement is satisfied, or does it mean what the D.C. Circuit now says, which is that a foreign state can unlawfully take U.S. property and maintain immunity, even if it gives the stolen U.S. property to one if its agencies or instrumentalities that engage in commercial activity in the United States? If it means what the D.C. Circuit says, the expropriation exception will no longer be a source of jurisdiction over foreign states, which know not to bring stolen U.S. property into the United States.

Because the FSIA provides that the District of Columbia is an appropriate venue for any suit against a foreign state, the D.C. Circuit's decision will have an outsized impact on this category of claims. Absent this Court's intervention, the D.C. Circuit's decision will render the expropriation exception a dead letter against foreign states because it will be impossible for U.S. plaintiffs to hold any foreign state accountable in U.S.

courts for the unlawful taking of U.S. property unless the foreign state brings the property to the United States. That means that the foreign state will never be answerable to U.S. courts in cases involving U.S.-owned real property such as land, factories, and refineries. And even in cases involving U.S.-owned personal property, a foreign state would be able to evade U.S. jurisdiction simply by keeping the property at home.

The decision provides a roadmap for foreign states to take U.S. property and avoid jurisdiction in U.S. courts merely by holding the property outside the United States. It puts overseas assets owned by U.S. citizens and entities at risk by immunizing foreign states that take such assets without paying for them—from religious relics and precious heirlooms looted from individuals or organizations, to commercial properties, factories, farms, and mines seized from U.S. investors abroad. The beneficiaries of the decision are the countries most hostile to the rule of law, including Vladimir Putin's Russia, Ruhollah Khamenei's Iran, and Nicolás Maduro's Venezuela, all of which have been defendants in recent FSIA expropriation proceedings.

OPINIONS BELOW

The court of appeals' opinion (App. 1a-24a) is published at *Agudas Chasidei Chabad of United States* v. *Russian Federation*, 110 F.4th 242 (D.C. Cir. 2024) ("*Chabad III*"). The court's en banc order (App. 93a) is unpublished and available at 2024 WL 4291931 (D.C. Cir. Sept. 23, 2024).

The district court's opinion (App. 25a-51a) is reported at *Agudas Chasidei Chabad of United States* v. *Russian Federation*, 659 F. Supp. 3d 1 (D.D.C. 2023).

JURISDICTION

The D.C. Circuit entered judgment on August 6, 2024, and denied rehearing en banc on September 23, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Pertinent provisions of the Foreign Sovereign Immunities Act are reproduced in the appendix. App. 95a-98a.

STATEMENT

A. Statutory Background

The FSIA reflected a sea change in the treatment of sovereign immunity in the United States, which had previously been a matter of executive discretion. Prior to 1952, the State Department typically exercised that discretion to grant foreign states absolute immunity from suit in the United States. *Republic of Austria* v. *Altmann*, 541 U.S. 677, 690 (2004). In 1952, however, the State Department adopted the so-called "restrictive theory" of sovereign immunity, under which "'the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*).'" *Id.* That decision rested on a determination "that the adjudication of a commercial claim against a foreign state on the merits does not affront the sovereignty of a foreign nation because sovereignty, as such, is not implicated in such an adjudication. The foreign state makes its appearance in the marketplace as a merchant, not as a sovereign." *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearing on H.R. 11315 Before the H. Comm. On the Judiciary, Subcomm. on Administrative Law and*

Government Relations, 94th Cong. 30 (1976) (testimony of Bruno A. Ristau, Chief, Foreign Litigation Section, Department of Justice).

The result of this policy change was "disarray." *Altmann*, 541 U.S. at 690. Sovereign immunity decisions "fell primarily upon the Executive acting through the State department." *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 487 (1983). Courts generally followed the State Department's "suggestions of immunity," which caused foreign states to apply pressure on the State Department to file such suggestions on their behalf. *Altmann*, 541 U.S. at 690. Immunity decisions thus frequently turned on political or other considerations that created inconsistency in the law.

To ensure uniform application of sovereign immunity across cases, Congress enacted the FSIA in 1976, removing immunity decisions from State Department control by establishing nondiscretionary exceptions to immunity. While "[f]or the most part, the Act codifies, as a matter of federal law, the restrictive theory of sovereign immunity," *Verlinden*, 461 U.S. at 488, Congress established additional exceptions to sovereign immunity, *see Federal Republic of Germany* v. *Philipp*, 592 U.S. 169, 183 (2021), beyond those concerning only a foreign state's commercial activities.

The FSIA includes an expropriation exception, 28 U.S.C. § 1605(a)(3), which provides that a "foreign state" shall not be immune in cases where plaintiffs seek to hold a foreign state or its agencies or instrumentalities accountable for the unlawful expropriation of U.S. property. *Philipp*, 592 U.S. at 182. Specifically, that exception confers jurisdiction over "[a] foreign state" in any case "in which rights in property taken in violation of international law are in issue" if:

> [1] 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
>
> [2] 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.

28 U.S.C. § 1605(a)(3). That is, the exception applies when three elements are met: (1) a taking in violation of international law has occurred, (2) rights in property are in issue, and (3) there is a commercial nexus to the United States (the "U.S.-nexus test").

This exception to immunity applies to a "foreign state," which the FSIA defines to "includ[e] a political subdivision of a foreign state or an agency or instrumentality of a foreign state." 28 U.S.C. § 1603(a). The FSIA separately defines an "agency or instrumentality of a foreign state" to mean "an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof." *Id.* § 1603(b)(2).

The expropriation exception "goes beyond even the restrictive view" of sovereign immunity because it "permits the exercise of jurisdiction over some public acts of expropriation." *Philipp*, 592 U.S. at 183. "History and context explain this nonconformity": "The United States has long sought to protect the property of its citizens abroad as part of a defense of America's free enterprise system." *Id.* As this Court recently recognized, the language of the expropriation exception comes from the Second Hickenlooper Amendment, which Congress enacted to "permit adjudication of claims … against

foreign nations for expropriation of American-owned property," *id.* at 179, including in communist states like Cuba, which had recently expropriated vast amounts of U.S.-owned property in that country. The Amendment was Congress's direct response to this Court's invocation of the "act of state doctrine" in *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964), which had shielded the Cuban state from U.S. jurisdiction following President Fidel Castro's widespread nationalization of American property in Cuban territory in 1960. *See Philipp*, 592 U.S. at 178-179. Because Congress wanted U.S. courts to hold Cuba and other communist states accountable for the unlawful expropriation of U.S. property, the Second Hickenlooper Amendment forbade U.S. courts from applying the act of state doctrine in cases where a "'right[] to property is asserted' based upon a 'taking ... by an act of that state in violation of the principles of international law.'" *Id.* at 179 (alteration in original).

Those same circumstances and concerns animated the FSIA's drafting and enactment. Congress was acutely focused on the illegal seizure of American property abroad because regimes from Cuba to Chile were nationalizing American assets without compensation. *See* H. Comm. on Foreign Affairs, 88th Cong., *Report on Expropriation of American-Owned Property by Foreign Governments in the Twentieth Century* 16-18 (Comm. Print 1963). In May 1971, the State Department estimated that 56 cases involving American investments remained unresolved, representing an aggregate value of $875 million in U.S. interests. Memorandum from Acting Secretary of State John Irwin to President Nixon (May 8, 1971), https://history.state.gov/historicaldocuments/frus1969-76v04/d153. The FSIA reflected Congress's decision to give victims of uncompensated

expropriations of U.S. property located overseas access to U.S. courts to hold *foreign states* accountable, much as the *United States itself* is accountable in court when it takes private property without compensation, *see*, *e.g.*, *Knick* v. *Township of Scott, Pennsylvania*, 588 U.S. 180, 189 (2019) ("We have long recognized that property owners may bring Fifth Amendment claims against the Federal Government as soon as their property has been taken.").

B. The Unlawful Expropriation Of Chabad's Property

Chabad is a religious organization founded in 1775 in the Russian town of Lubavitch. C.A.J.A. 40. Over the following century and a half, Chabad compiled a library of sacred texts (the "Library"). C.A.J.A. 41. Chabad also collected and preserved manuscripts, organizational records, correspondence, and other religious and historical documents (the "Archive"). The Library and the Archive are collectively referred to as the "[Schneerson] Collection." *Id.*

In 1927, the Soviet government condemned to death Chabad's religious and secular leader, the Rebbe, for the alleged "crime" of establishing Jewish schools. C.A.J.A. 42; App. 55a. The Rebbe and his followers escaped Russia, but they had to leave the Library behind. The Soviet government confiscated the Library and placed it in the Lenin State Library, the predecessor of respondent Russian State Library ("RSL"). C.A.J.A. 42.

After fleeing Russia, the Rebbe settled in Poland. His refuge there, however, was short-lived. App. 55a. In the ensuing years, Hitler and the Nazi Party rose to power, and Germany invaded Poland. *Id.* The Rebbe was granted refuge in America, but the Nazis stole the Archive and hid it in a castle in Poland. *Id.* When the

Soviet Army occupied the region, it confiscated the Archive and transferred it to respondent Russian State Military Archive ("RSMA"). *Id.*

For years Chabad sought return of the Schneerson Collection through Russian legal channels, without success. Following the collapse of the Soviet Union, the highest judicial authorities in Russia ruled in Chabad's favor in 1991, ordering the return of the Library. An executive order in 1992 likewise directed RSL to return the library to Chabad's representatives. But the Russian government refused to comply with these orders, backed by a judicial official purporting to reverse the prior court orders and legislative action purporting to reverse the prior executive decree—events that the D.C. Circuit held to be a second expropriation. App. 66a-70a. The Russian state and its instrumentalities retain possession of the Collection to this day, despite intense diplomatic and other efforts seeking the return of Chabad's property. The U.S. Congress has supported Chabad in these efforts, including by sending successive Russian Presidents letters signed by all 100 U.S. Senators calling for the return of the Collection. C.A.J.A. 73.

C. Chabad Successfully Sues To Recover Its Property And Obtains Final Judgment Against The Russian Federation

With no hope of obtaining relief through diplomacy or Russian courts, in 2004 Chabad sued the Russian Federation, the RSL, the RSMA, and Russian Ministry of Culture and Mass Communication (collectively, "Russia") in the U.S. District Court for the Central District of California. App. 56a. Russia successfully moved to transfer the case to the U.S. District Court for the District of Columbia, as permitted under the FSIA. C.A.J.A. 38-39; 28 U.S.C. § 1391(f)(4).

Russia then moved to dismiss on sovereign immunity grounds. Chabad opposed, arguing that the FSIA's expropriation exception, 28 U.S.C. § 1605(a)(3), applied to its claims. C.A.J.A. 47. The district court held that defendants had immunity as to the Library, but not the Archive. C.A.J.A. 75. With respect to the Library, the court held that Chabad had failed to establish the first element of the expropriation exception—that the property was taken in violation of international law—because the Library had been expropriated by Soviet authorities when its owner was a Soviet citizen and "international law does not govern disputes between a sovereign nation and its citizens." C.A.J.A. 48, 53-54. But the court found all the expropriation-exception elements met as to the Archive. As relevant here, the court held that the U.S.-nexus test was satisfied for the Russian state and the other defendants based on the ownership or operation of the property by a Russian instrumentality (RSMA) engaged in commercial activity in the United States. C.A.J.A. 63-65.

Chabad and Russia cross-appealed. Affirming in part and reversing in part, the D.C. Circuit held that the expropriation exception applied to Chabad's claims as to both the Library and the Archive. It reasoned that Chabad had a property interest in the Library and the Archive, both of which Russia took in violation of international law. The court then held that "both the RSMA and RSL engaged in sufficient commercial activity" to satisfy the second U.S.-nexus test. App. 71a. The court therefore held that Chabad had established jurisdiction over the Russian state and the other defendants. *See* App. 89a (*Chabad I*); *de Csepel* v. *Republic of Hungary*, 859 F.3d 1094, 1114 (D.C. Cir. 2017) (Randolph, J., concurring in part and dissenting in part) ("The result in *Chabad* was clear: the court affirmed the district court's

judgment upholding jurisdiction over Russia with regard to the 'Archive' claim and reversed the district court's judgment granting Russia immunity on the 'Library' claim."), *cert. denied*, 586 U.S. 1096 (2019).

On remand, the Russian Federation and all three instrumentality defendants filed a "[Notice] With Respect to Future Participation," stating defendants would stop appearing in U.S. courts given their disagreement with the court's exercise of its "authority to enter Orders with respect to the property owned by the Russian Federation and in its possession." C.A.J.A. 92-93. After a hearing on the merits, the district court entered final judgment by default against the Russian state and its instrumentalities, ordering the return of the Schneerson Collection to Chabad. C.A.J.A. 102-112.

Defendants refused to comply with the order of the district court, which held the defendants in contempt and imposed sanctions payable to Chabad. D.Ct. Dkt. 100; C.A.J.A. 151-160.

D. Proceedings Below

To enforce the final judgment, Chabad served subpoenas on two Russian state instrumentalities doing business in the United States: Tenex-USA Inc. ("Tenex-USA") and VEB.RF. Tenex-USA moved to reopen the judgment under Federal Rule of Civil Procedure 60(b) on the ground that the district court lacked subject matter jurisdiction over the Russian Federation.

The district court denied the motion. In an extensive opinion, it set out the basis for its conclusion that the district court had, and continues to have, jurisdiction over Russia. C.A.J.A. 381-434. The D.C. Circuit affirmed, holding that Rule 60(b) allows only a party or its legal representative to seek relief from a final judgment,

and Tenex-USA was neither. *Agudas Chasidei Chabad of U.S.*, 19 F.4th 472, 477 (D.C. Cir. 2021) ("*Chabad II*").

Chabad then moved for leave to attach assets owned by Tenex-USA or its parent. App. 26a. Tenex-USA opposed the motion on several grounds, including, again, that the district court lacked subject matter jurisdiction over the Russian Federation. App. 34a.

The district court denied Chabad's motion without prejudice to serve post-judgment documents on the Russian Federation through diplomatic channels. App. 51a. As to Tenex-USA's jurisdictional arguments, the district court again dismissed them, noting that "[t]his Court and the Circuit have addressed the issue of jurisdiction under the expropriation jurisdiction exception five separate times" and that the district court "still has subject-matter jurisdiction because a 2008 panel of the D.C. Circuit held as much in *Chabad* [*I*] and the Circuit has never overruled that holding." App. 35a-37a.

Tenex-USA appealed, and this time the D.C. Circuit reversed the lower court—and its own prior holding in this case—and ordered the district court to dismiss the Russian Federation. App. 2a. The panel based its reversal on two circuit decisions that post-dated *Chabad I*. App. 13a-15a (*Chabad III*).

In *Simon* v. *Republic of Hungary*, the first of the two decisions, the D.C. Circuit became the first court of appeals in the history of FSIA jurisprudence to hold that jurisdiction can be obtained over the foreign state only under the first of the U.S.-nexus tests. 812 F.3d 127, 146 (D.C. Cir. 2016), *abrogated on other grounds by Philipp*, 592 U.S. 169. The other, it held, exempts from immunity only agencies and instrumentalities of the foreign state. The result is that the foreign state itself is immune from

U.S. jurisdiction unless the expropriated property somehow makes its way to the United States. *Id.*

In *de Csepel*, the D.C. Circuit held that *Simon* (rather than its earlier decision in *Chabad I*) was binding and correct. *de Csepel*, 859 F.3d at 1107. Despite recognizing that "the list of exceptions begins '[a] foreign state shall not be immune'" if there has been a taking in violation of international law and either of the two U.S.-nexus tests has been met, the *de Csepel* panel determined "that the foreign state itself does not lose immunity" if only the second test is satisfied. *Id.* It reasoned that the second of the two ways applies only to the agencies and instrumentalities of the foreign state and not to the foreign state itself. *Id.*

Judge Randolph dissented, arguing that the majority opinion erred in following *Simon* because it is "a decision bereft of any statutory analysis" that "transform[s] the governing jurisdictional statute to mean the opposite of what it says." *Id.* at 1110. His opinion explained that the majority effectively rewrote the opening provision of § 1605(a) by "cross[ing] out the 'not'" in the introductory phrase "a foreign state shall *not* be immune from suit," thereby interpreting it to mean "that the foreign state shall be immune" when only the second U.S.-nexus test is satisfied. *Id.* at 1111 (emphasis added). Then-Judge Kavanaugh and Judge Griffith dissented from the denial of a petition for rehearing en banc on this issue and noted they would have granted the petition. *de Csepel*, No. 16-7042 (D.C. Cir. Oct. 4, 2017), Doc. 1696813.

When the D.C. Circuit decided *Chabad III*, the panel concluded that the district court's 2010 final judgment must be set aside. The panel recognized that "principles of res judicata apply to jurisdictional

determinations—both subject matter and personal." App. 17a (quoting *Insurance Corp. of Ireland, Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.9 (1982)). Nevertheless, the panel invoked "equitable considerations and exceptions [that]," in its view, "have always informed the application of res judicata," App. 18a, to conclude that it did not need to apply jurisdictional finality to the longstanding judgment against the Russian Federation.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW IS WRONG AND CONFLICTS WITH DECISIONS OF OTHER CIRCUITS

A. The Holding Below Is Wrong

The court below erred in holding that Russia is immune from suit, notwithstanding that it took Chabad's religious property in violation of international law and gave that property to its instrumentalities engaged in commercial activity in the United States. In the decision below, the D.C. Circuit misapplied the FSIA's definitions of the relevant terms—interpreting the term "foreign state" to exclude the foreign state itself—in the face of settled canons of statutory construction and clear congressional intent to hold foreign states accountable for their unlawful taking of U.S. property in circumstances just like these. The practical result is that the D.C. Circuit's decision eviscerates the expropriation exception, rendering it a dead letter as to foreign states that expropriate U.S.-owned property so long as they keep that property out of the United States.

1. The Holding Below Contradicts The Plain Text Stating That "A Foreign State Shall Not Be Immune" For An Unlawful Taking If Either Of Two U.S.-Nexus Tests Is Met

The plain language of the expropriation exception states that "a foreign state shall not be immune" for a taking in violation of international law if either of two alternative U.S.-nexus tests is satisfied. It does not set out one test for a foreign state and another for the agencies and instrumentalities of a foreign state.

The expropriation exception provides in its entirety that "[a] *foreign state* shall not be immune from the jurisdiction of courts of the United States or of the States in any case … in which rights in property taken in violation of international law are in issue and":

> [1] 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*
>
> [2] 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.

28 U.S.C. § 1605(a)(3) (emphases added). The exception thus provides two options for satisfying the U.S.-nexus requirement for a takings action against a "foreign state"—one in which the nexus is based on the presence of the property (or property exchanged for such property) in the United States in connection with a commercial activity of the foreign state and another in which the nexus is based on commercial activity in the United States by an agency or instrumentality that owns or

operates the property. The FSIA defines the term "foreign state" to "include[] a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b)." *Id.* § 1603(a). It is undisputed that, as the text itself states, the term "foreign state" includes the foreign state itself. *See, e.g.*, *Samantar* v. *Yousuf*, 560 U.S. 305, 313-314 (2010).[1]

The expropriation exception thus strips a "foreign state" itself of immunity in any case involving unlawful expropriations if either U.S.-nexus alternative is satisfied: *either* the property (or property exchanged for such property) is in the United States in connection with the foreign state's commercial activity *or* the property is owned or operated by an agency or instrumentality of the foreign state that engages in commercial activity in the United States. Nothing in the text indicates that the exception sets out one exception to immunity for the foreign state itself (exclusive of agencies and instrumentalities) and another exception for only agencies and instrumentalities.

The D.C. Circuit, however, held to the contrary: that the expropriation provision strips a foreign state of immunity only if the first U.S.-nexus test is met—*i.e.*, where the confiscated property (or property exchanged for it) is actually present in the United States in connection with a commercial activity carried on in the United

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[1] Section 1603(a) provides a statutory definition of "'foreign state,' *except as used in section 1608 of this title*." 28 U.S.C. § 1603(a) (emphasis added). Section 1608 provides separate service requirements for foreign states versus their agencies and instrumentalities. *See id.* § 1608. The carveout in the definition of "foreign state" does not include section 1605, *see id.*, affirming that the use of the term "foreign state" in the expropriation exception includes both the foreign state and its agencies and instrumentalities.

States by the foreign state. *See* App. 12a-15a (citing *Simon*, 812 F.3d at 146; *de Csepel*, 859 F.3d at 1104-1105). The court accepted *Simon* as binding precedent and endorsed its "construction of the expropriation exception" "for the reasons explained in *[d]e Csepel*." *See* App. 17a (citing *Simon* generally and *de Csepel*, 859 F.3d at 1107-1108).

The reasoning in *de Csepel*, adopted by the court below, is flawed in three respects. First, it is wrong that abrogating "a foreign state['s]" immunity under either of the two U.S.-nexus tests "would produce an anomalous result: the court would have no jurisdiction over the agencies and instrumentalities that actually own or operate the expropriated property." *De Csepel*, 859 F.3d at 1107. The FSIA defines a "foreign state" to include its agencies and instrumentalities, which means that both the foreign state and its agencies or instrumentalities may be subject to U.S. jurisdiction when the "foreign state" lacks immunity for an unlawful taking. 28 U.S.C. § 1603(a).

Second, *de Csepel* also wrongly concluded that adhering to the plain language of the FSIA would make it impossible to obtain jurisdiction over any agency or instrumentality that "actually possess[es]" the stolen property. 859 F.3d at 1107. The FSIA provides for jurisdiction over such entities by defining "a foreign state" to include agencies and instrumentalities, 28 U.S.C. § 1603(a), and stating that "a foreign state" (as defined) "shall not be immune" if the stolen property either is in the United States or 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." *Id.* § 1605(a)(3). *de Csepel*'s conclusion in the face of this plain text that it would be impossible to obtain jurisdiction over agencies or

instrumentalities that actually possess the stolen property overlooks that the phrase "agency or instrumentality of the foreign state" is itself a defined term in the FSIA, meaning "an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof." *Id.* § 1603(b)(2). Rather than apply that definition, *de Csepel* applied its own circular definition—effectively reading the phrase in the second U.S.-nexus test to mean "'an agency or instrumentality' of [an agency or instrumentality]," which the court said would make it impossible to obtain jurisdiction over the instrumentalities that "actually possess the [art] collection—the museums and the university—because the collection is not 'present in the United States' (clause one) nor 'owned or operated by an agency or instrumentality' of the museums and the university (clause two)." 859 F.3d at 1107.

It is thus the D.C. Circuit's reading that produces the anomalous result—in which the defined term "foreign state" does not include the foreign state itself.

Third, *de Csepel* erroneously analogized to the commercial-activity exception, *see* 859 F.3d at 1107 (citing *Foremost-McKesson, Inc.* v. *Islamic Republic of Iran*, 905 F.2d 438, 446-447 (D.C. Cir. 1990)), pursuant to which an action must be "based upon" commercial acts, not "sovereign acts," *see, e.g.*, *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 356 (1993); *see also* 28 U.S.C. § 1605(a)(2) (setting forth the FSIA's commercial-activity exception). The opposite is true under the expropriation exception, where an action is based upon the sovereign act of a taking by the foreign state and any commercial activity is relevant only insofar as it establishes a U.S. nexus. *See* 28 U.S.C. § 1605(a)(3) (setting forth the FSIA's expropriation exception); *see also supra* pp.7-8

(explaining that the expropriation exception goes beyond the restrictive view of sovereign immunity because it permits liability for sovereign acts). *de Csepel* missed the import of this distinction: the expropriation exception strips immunity of the *foreign state itself* because it is the foreign state that commits the sovereign act of taking property in violation of international law. *See*, *e.g.*, *Bolivarian Republic of Venezuela* v. *Helmerich & Payne Int'l Drilling Co.*, 581 U.S. 170, 181-182 (2017); *see also Restatement (Fourth) of Foreign Relations Law of the United States* § 455 Reporters' Note 4 (2024 update) ("expropriations or nationalizations are sovereign (or 'public') rather than commercial acts"); *id.* § 455 Reporters' Note 15 ("Acts of expropriation are unsurprisingly considered as acts *jure imperii* … based on … an act of sovereign authority by which the State takes the property in the public interest.").

2. Canons Of Construction Confirm The Plain Meaning Of The Text

Established canons of construction confirm the plain text's meaning. First, "[w]hen Congress takes the trouble to define the terms it uses, a court must respect its definitions as 'virtually conclusive.'" *Department of Agric. Rural Development Rural Hous. Serv.* v. *Kirtz*, 601 U.S. 42, 59 (2024) (quoting *Sturgeon* v. *Frost*, 587 U.S. 28, 56 (2019)). Here, Congress took the trouble to define the relevant terms—a "foreign state" and an "agency or instrumentality of a foreign state"—which the D.C. Circuit has now repeatedly declined to apply, as if Congress did not mean what it said when it used the phrase "a foreign state shall not be immune" in the introductory clause of section 1605(a).

Second, "'[w]here Congress includes particular language in one section of a statute but omits it in another

section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Bates* v. *United States*, 522 U.S. 23, 29-30 (1997) (quoting *Russello* v. *United States*, 464 U.S. 16, 23 (1983)). Elsewhere in the FSIA, Congress specified when it wanted to apply unique treatment to agencies and instrumentalities of foreign states as opposed to foreign states. For example, section 1606, which governs the extent of liability of a foreign state, specifies that "a foreign state *except for an agency or instrumentality thereof* shall not be liable for punitive damages." 28 U.S.C. § 1606 (emphasis added). Similarly, section 1610, which provides specific exceptions to immunity from attachment or execution upon a judgment entered by a U.S. court, lists certain exceptions to "property in the United States of a *foreign state*" in section 1610(a)—*i.e.*, inclusive of foreign states and their agencies and instrumentalities—and other exceptions limited to "property in the United States of *an agency or instrumentality of a foreign state*" in section 1610(b)—*i.e.*, exclusive of foreign states. *Id.* § 1610(a)-(b) (emphases added).

As these examples show, Congress intentionally used the term "foreign state" to refer to the foreign state and its agencies and instrumentalities, and the term "agency or instrumentality of a foreign state" to refer to just agencies and instrumentalities. The same is true of the U.S.-nexus test of the expropriation exception itself, with the first prong applying to property in the United States that is connected to a commercial activity by "the foreign state," including its agencies and instrumentalities, and the second prong applying to property owned or operated by "an agency or instrumentality." 28 U.S.C. § 1605(a)(3). Although the second U.S.-nexus test focuses on the activity of the agency or

instrumentality that has the property, the result of both tests is to strip the "foreign state" of its immunity. *Id.*

3. The Legislative History Confirms The Plain Meaning Of The Text

The legislative history likewise confirms the plain reading of the expropriation exception's text as setting out two alternative ways to establish jurisdiction over the foreign state itself.

As explained above, *supra* pp.7-9, Congress enacted the FSIA against the backdrop of dozens of uncompensated expropriations around the world, especially in communist countries. H. Comm. on Foreign Affairs, 88th Cong., *Report on Expropriation of American-Owned Property by Foreign Governments in the Twentieth Century* 12 (Comm. Print 1963). The FSIA provided U.S. investors with a forum to seek relief for these unlawful expropriations.

The House and Senate Reports explained the FSIA's jurisdictional reach. *Cf. County of Maui* v. *Hawaii Wildlife Fund*, 590 U.S. 165, 176 (2020) (treating a House Report as instructive in interpreting the Clean Water Act). The Reports did not suggest that the U.S.-nexus test establishes separate immunity exceptions for foreign states on the one hand, and their agencies and instrumentalities on the other. Instead, Congress differentiated the two tests based on the location of the expropriated property. H. Rep. No. 94-1487, at 19 (1976); S. Rep. No. 94-1310, at 19 (1976). The Reports explained that under the first prong, the expropriated property must be present in the United States in connection with a commercial activity of the foreign state (defined to include its agencies or instrumentalities), whereas "[u]nder the second category, the property need not be present [in the United States] in connection with a

commercial activity of the agency or instrumentality." *Id.* Under both prongs, the Reports made clear that "Section 1605(a)(3) would … deny immunity." *Id.* And where section 1605(a)(3) "denies immunity," the Reports made plain whose immunity is denied: "Section 1605 sets forth the general circumstances in which *a claim of sovereign immunity by a foreign state, as defined by section 1603(a)*, would not be recognized in a Federal or State court in the United States." H. Rep. No. 94-1487, at 18 (emphasis added); S. Rep. No. 94-1310, at 17 (emphasis added).

The Reports also explained that "foreign state" carries one definition throughout the FSIA—the only exception being section 1608, which outlines rules for serving a foreign state. Elsewhere, the term "foreign state" "includes not only the foreign state but also political subdivisions, agencies and instrumentalities of the foreign state." H. Rep. No. 94-1487, at 15; S. Rep. No. 94-1310, at 14. By contrast, "[i]n section 1608, the term 'foreign state' refers only to the sovereign state itself." *Id.* The D.C. Circuit overlooked these statements of Congress's intent, which confirm the plain meaning and the intentionality of the particular language at issue here. As the legislative history shows, when Congress said that "a foreign state shall not be immune" in unlawful takings cases, it intended to include the foreign state itself.

B. The Decision Below Conflicts With Decisions Of Other Circuits

The decision below cements a circuit split over the proper interpretation of the expropriation exception. The Ninth and Eleventh Circuits have each adhered to the plain language of the FSIA and held that both U.S.-nexus tests apply to abrogate the immunity of "a foreign state," as defined. The D.C. Circuit has held the

opposite, and the Second and Fourth Circuits have indicated in dicta that they would agree with the contrary interpretation reflected in the decision below. The split is irreconcilable and confirmed. *See*, *e.g.*, *Arch Trading Corp.* v. *Republic of Ecuador*, 839 F.3d 193, 205-206 (2d Cir. 2016); *Restatement (Fourth) of Foreign Relations Law of the United States* § 455 Reporters' Notes 8-9.

1. The Ninth Circuit has upheld jurisdiction over Austria under the expropriation exception, where the U.S.-nexus test was satisfied by the commercial activities of an Austrian instrumentality in the United States. *Altmann* v. *Republic of Austria*, 317 F.3d 954, 968-969 (9th Cir. 2002), *aff'd on other grounds*, 541 U.S. 677 (2004). Subsequently, in *Cassirer* v. *Kingdom of Spain*, the Ninth Circuit en banc followed *Altmann* in finding jurisdiction over Spain under the expropriation exception, where the U.S. nexus was satisfied by the "many contacts" Spain's instrumentality had with the United States. 616 F.3d 1019, 1032-1034 (9th Cir. 2010). The Ninth Circuit has continued to follow *Altmann* and *Cassirer* even after the D.C. Circuit's decisions in *Simon* and *de Csepel*. In *Sukyas* v. *Romania*, the Ninth Circuit relied on *Cassirer* to affirm that the district court could exercise jurisdiction over Romania under the expropriation exception, where the U.S. nexus was satisfied by the commercial activities of a Romanian instrumentality, providing there were "rights in property" that were indeed "taken in violation of international law." 765 F. App'x 179, 180 (Mem.) (9th Cir. 2019).

The Eleventh Circuit likewise has held that the commercial activity of a foreign state's agency or instrumentality can satisfy the U.S. nexus necessary to strip the foreign state itself of immunity under the expropriation exception. The court reversed dismissal of a complaint against both Venezuela and its instrumentality in

Comparelli v. *Republica Bolivariana de Venezuela*, 891 F.3d 1311, 1326 (11th Cir. 2018), on the ground that, if "at least one of the two statutory nexus requirements [of the expropriation exception] are satisfied," then neither defendant would enjoy sovereign immunity. The Eleventh Circuit thus has held that jurisdiction would be proper over Venezuela if *either* U.S.-nexus test is satisfied.

2. The D.C. Circuit has now repeatedly held the opposite. *See Simon*, 812 F.3d at 146; *de Csepel*, 859 F.3d at 1107; App. 15a (*Chabad III*). And two circuits have indicated support for the D.C. Circuit's approach. In *Berg* v. *Kingdom of Netherlands*, 24 F.4th 987, 992 (4th Cir. 2022), the Fourth Circuit upheld dismissal of a lawsuit against political subdivisions of the Netherlands, noting that "agencies and instrumentalities may lose their sovereign immunity under the second clause of the expropriation exception, while … political subdivisions"—which are "legally inseparable" from the foreign state—"cannot." The court recognized, however, that "[i]t is arguable that under the second clause of the expropriation exception, the commercial actions of an agency or instrumentality may abrogate the sovereign immunity of both that entity and any related foreign state or political subdivision." *Id.* at 992 n.4 (citing *de Csepel*, 859 F.3d at 1110-1113 (Randolph, J., dissenting)). The Fourth Circuit did not resolve the issue because the plaintiff "concede[d] the issue on appeal." *Id.*

The Second Circuit likewise has indicated agreement with the D.C. Circuit's current view. In *Garb* v. *Republic of Poland*, 440 F.3d 579, 589-598 (2d Cir. 2006), the court held that plaintiffs could not maintain their suit against Poland under the expropriation exception because the property at issue was not located in the United States (making the first prong of the U.S.-nexus test

inapplicable), and because the entity against which the claim was brought was not in fact an agency or instrumentality of Poland (making the second prong of the U.S.-nexus test inapplicable). The court went on to state that the second prong of the U.S.-nexus test "permits a plaintiff to bring suit against an 'agency or instrumentality of [a] foreign state,'" not the foreign state itself. *Id.* at 589-590. Because the Second Circuit's interpretation of the second prong of the U.S.-nexus test was not necessary to the holding of the case, it has properly been viewed as dicta. *See Freund* v. *Republic of France*, 592 F. Supp. 2d 540, 561 n.10 (S.D.N.Y. 2008), *aff'd sub nom. Freund* v. *Societe Nationale des Chemins de Fer Francais*, 391 F. App'x 939 (2d Cir. 2010). Nevertheless, at least one district court has relied on *Garb* to conclude that the expropriation exception "does not provide jurisdiction" over a foreign state "[w]hen the property at issue is not in the United States." *Hammerstein* v. *Federal Republic of Germany*, 2011 WL 9975796, at *5 (E.D.N.Y. Aug. 1, 2011). In *Arch Trading*, the Second Circuit recognized the "confusion" among the lower courts on this issue. 839 F.3d at 206 (citing *Freund*, 592 F. Supp. 2d at 561; *Hammerstein*, 2011 WL 9975796, at *5; *Chabad I*, 528 F.3d at 948 (App. 75a); and *Cassirer*, 616 F.3d at 1022, 1028-1034).

3. Thus, whereas in the D.C. Circuit, and arguably the Second and Fourth Circuits, a plaintiff can sue a foreign state for an unlawful expropriation only if the first U.S.-nexus test is satisfied, in the Ninth and Eleventh Circuits a plaintiff can sue a foreign state for an unlawful expropriation if either U.S.-nexus test is satisfied.

4. This split warrants intervention now. The split is confirmed and irreconcilable, and the D.C. Circuit's erroneous decision below has a disproportionately large impact on expropriation claims brought under the FSIA

because the FSIA's venue provision creates a strong presumption that suits against a foreign state will be filed or transferred to the D.C. Circuit. *See* 28 U.S.C. §1391(f).

The FSIA provides that venue shall be proper in "[a] civil action against a foreign state" or against an agency or instrumentality of a foreign state "in the United States District Court for the District of Columbia if the action is brought against a foreign state" or "in any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state." 28 U.S.C. § 1391(f)(3)-(4). This means that the District of Columbia operates as the default venue for actions "brought against a foreign state or political subdivision thereof." *Id.* § 1391(f)(4). Venue for suits against foreign states will always be proper in the District Court for the District of Columbia, and venue will *only* be proper in the District of Columbia except in the highly unusual situation in which a foreign state brings the expropriated property into the United States or the foreign state's instrumentality is "licensed to do business or is doing business" in a specific judicial district.[2]

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[2] Establishing that an agency or instrumentality is "licensed to do business or is doing business" in a judicial district requires showing that the agency or instrumentality has sufficient ties to the judicial district. 28 U.S.C. § 1391(f)(3). Congress explained that section 1391(f)(3) was "based on 28 U.S.C. 1391(c)," *see* H. Rep. No. 94-1487, at 32; S. Rep. No. 94-1310, at 31, which at the time provided that "[a] corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business." 28 U.S.C. § 1391(c) (1976). This standard generally required "[m]ore than a single or casual transaction … before [a] corporation was regarded as doing business in [a] district for federal venue purposes."

Moreover, this Court has recognized that consistent application of the FSIA is of paramount importance: "[C]larity is doubly important here [in FSIA cases] where foreign nations and foreign lawyers must understand our law." *Helmerich & Payne Int'l Drilling*, 581 U.S. at 183. For these reasons, this Court's immediate intervention is warranted.

II. THE ISSUES IN THIS CASE ARE CRITICALLY IMPORTANT AND RECURRING

By holding that "a foreign state is immune to claims for the expropriation of property not present in the United States," App. 15a, the decision below provides a simple playbook for autocratic regimes to maintain sovereign immunity in U.S. courts: steal property from U.S. citizens and keep that property outside the territory of the United States.

1. While the decision below preserves a path to establish jurisdiction over agencies and instrumentalities of foreign states operating in the United States, judgments against these entities rarely provide plaintiffs relief. A foreign state seeking to avoid liability can simply ensure those instrumentalities are judgment-proof or easily dissolvable in the case of an adverse judgment.

2. Nor can American businesses and religious or cultural organizations such as Chabad obtain meaningful relief in alternative forums because they are at the

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14D Wright & Miller, *Federal Practice and Procedure* § 3811 (4th ed. 2024). Indeed, Chabad's own suit against Russia was transferred from the Central District of California to the District of Columbia because the instrumentality defendants (RSL and RSMA) did not have sufficient ties to the judicial district and thus venue was appropriate only in the District of Columbia. C.A.J.A. 39; *see also* D.Ct. Dkt. 1 at 7.

mercy of courts controlled by the very regimes that violated their rights. Even if foreign courts in autocratic states are willing to hear claims brought by U.S. victims, and even if the plaintiffs somehow succeed in those courts, they will often be powerless to enforce their decisions or provide victims with any relief—as occurred here, where Chabad successfully brought claims in Russian courts, only to find that the *Russian court's* judgments were unenforceable *in Russia*. App. 66a-70a.

3. The D.C. Circuit's position is particularly detrimental to owners of real or other immoveable property located outside the United States—defeating a core congressional purpose of the expropriation exception. As discussed, the expropriation exception was modeled on the Second Hickenlooper Amendment, enacted after this Court declined to exercise jurisdiction over Cuba for its takings of American property, precisely in order to ensure that Americans could seek accountability in U.S. courts against foreign sovereigns for illegal expropriations of their rights in property abroad. *See Philipp*, 592 U.S. at 178-179.

The impact of the D.C. Circuit's misreading is exemplified by a case brought by Helmerich & Payne, an American drilling company based in Oklahoma, raising expropriation claims against Venezuela and its state-owned oil company, PDVSA, for taking the entire business of its Venezuelan subsidiary, including its oil rigs, motors, and other drilling equipment. *Helmerich & Payne International Drilling Co.* v. *Bolivarian Republic of Venezuela*, 2024 WL 4253142, at *4 (D.D.C. Sept. 20, 2024). In 2023, the district court for the District of Columbia dismissed Venezuela from the case, citing the D.C. Circuit's decision in *de Csepel*. *Helmerich & Payne International Drilling Co.* v. *Bolivarian Republic of Venezuela*, 2023 WL 1401372 (D.D.C. Jan. 31, 2023).

While the claims against PDVSA are proceeding for now, it is unclear whether Helmerich & Payne will ultimately be able to recover from PDVSA given the line of judgment creditors already seeking to recover from PDVSA's known assets in the United States, *see Crystallex International Corporation* v. *Bolivarian Republic of Venezuela*, No. 1:17-mc-00151 (D. Del.), Dkt. 1101-1 at 2.

4. The decision below may impact not only ongoing cases but also cases previously adjudicated and finally resolved on appeal. That is because the panel held that, in a later challenge brought by a third-party state instrumentality, principles of res judicata did not require adherence to its own prior holding that Russia was not entitled to sovereign immunity under the FSIA. *See supra* pp.14-15. Going forward, to evade enforcement of final judgments in FSIA proceedings, a foreign state can follow the Russian Federation's example: (1) repeatedly challenge jurisdiction in the district court and on appeal; (2) if the court of appeals finds that the district court had jurisdiction, withdraw and allow the district court to enter final judgment; and (3) when the plaintiff seeks to enforce the judgment against an entity controlled by the foreign state, challenge the jurisdictional merits all over again through one of its proxies.

Even if courts do not henceforth overturn a significant number of final judgments, the fact that under the decision below final judgments are open to challenge by related third parties will add significant uncertainty, as well as substantial cost and complexity, to FSIA litigation, even after a plaintiff has spent years obtaining a final judgment granting relief. *See* 28 U.S.C. § 1608(e).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 20, 2025