APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23-7036
Consolidated with 23-7037

AGUDAS CHASIDEI CHABAD OF UNITED STATES,
A NON-PROFIT RELIGIOUS CORPORATION,
Appellee,

v.

RUSSIAN FEDERATION, A FOREIGN STATE, ET AL.,
Appellees

TENEX-USA INCORPORATED,
Appellant

Argued April 11, 2024
Decided August 6, 2024

Appeals from the United States District Court
for the District of Columbia
(No. 1:05-cv-01548)

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* * *

BEFORE: SRINIVASAN, *Chief Judge*; WILKINS and CHILDS, *Circuit Judges*.

Opinion of the Court filed by *Chief Judge* SRINIVASAN.

SRINIVASAN, *Chief Judge*: For the third time, we consider an appeal in this long-running lawsuit brought by Agudas Chasidei Chabad of United States to reclaim religious property unlawfully expropriated by the

Russian state. Years ago, Chabad obtained a default judgment against the Russian Federation and several of its agencies along with an order directing them to return the expropriated property. The defendants ignored that order, so the district court imposed monetary sanctions against them, payable to Chabad. The sanctions have now accrued to over $175 million and have been made enforceable through interim judgments.

This appeal arises out of Chabad's attempt to collect on those sanctions judgments by attaching the property of three companies it contends the Russian Federation owns and controls. We hold that Chabad may not do so. As a foreign state, the Russian Federation has sovereign immunity from civil suits unless its immunity has been abrogated by the Foreign Sovereign Immunities Act. The district court believed that it had jurisdiction over the Russian Federation pursuant to that Act's "expropriation exception" to immunity. Our precedents, however, establish that the expropriation exception is inapplicable in the circumstances of this case. The district court thus does not have—and has never had—jurisdiction over Chabad's claims against the Russian Federation.

Because the district court entered the default judgment and sanctions judgments against the Russian Federation in excess of its jurisdiction, those judgments are void as against the Federation. And without the judgments against the Federation, there is no predicate for Chabad to attach the property of companies the Federation allegedly owns and controls. We vacate the district court's decision concluding otherwise.

I.

A.

Agudas Chasidei Chabad of United States (Chabad) is a religious movement of Russian origin dating back to the 1700s. Over its first century and a half, Chabad accumulated a library of more than 12,000 volumes containing its history and central teachings (the Library). It also compiled an archive of the writings of its spiritual leaders, or Rebbes, documents it considers sacred (the Archive). Collectively, the Library and the Archive are known as "the Collection." As our first decision in this case recognized, "[t]he religious and historical importance of the Collection to Chabad ... can hardly be overstated." *Agudas Chasidei Chabad of U.S. v. Russian Fed'n* (*Chabad I*), 528 F.3d 934, 938 (D.C. Cir. 2008).

During the twentieth century, the Soviet Union took both pieces of the Collection from Chabad—the Library in the 1920s and the Archive after the end of World War II. Since their expropriation, the Library and Archive have resided in Russia in the custody of government agencies now called the Russian State Library (RSL) and the Russian State Military Archive (RSMA).

B.

Chabad filed this lawsuit in 2004, naming as defendants the Russian Federation, the RSL, the RSMA, and the Russian Ministry of Culture and Mass Communications. Chabad sought, among other relief, an order directing the Collection's return.

As a basis for jurisdiction, Chabad invoked the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1330, 1602 *et seq*. The FSIA affords a blanket grant of immunity to foreign states (and their agencies and

instrumentalities) from the civil jurisdiction of American courts, subject to certain exceptions. *Id.* §§ 1604-1611. Chabad relied on the FSIA's so-called "expropriation exception," which allows courts to hear certain claims against foreign states involving "property taken in violation of international law." *Id.* § 1605(a)(3).

The case first reached our court after the district court granted in part the defendants' motion to dismiss. The district court held that, under the FSIA's expropriation exception, it had jurisdiction over Chabad's claims against the RSMA but not over its claims against the RSL. *Agudas Chasidei Chabad of U.S. v. Russian Fed'n*, 466 F. Supp. 2d 6, 19-20, 31 (D.D.C. 2006). We affirmed in part and reversed in part, concluding that the district court had jurisdiction over both. *Chabad I*, 528 F.3d at 939, 955.

But neither the district court nor our court examined whether there was jurisdiction over Chabad's claims against the Russian Federation itself or whether the Federation instead was immune from suit. Although our opinion remarked that we "reverse [the district court's] finding of *Russia*'s immunity," just what precisely we meant by that statement vis-à-vis the Russian Federation is unclear, since we at times in the opinion referred to all the defendants collectively as "Russia" and conducted no analysis specific to the Russian Federation. *Id.* at 955 (emphasis added); *see generally De Csepel v. Republic of Hungary*, 859 F.3d 1094, 1105-06 (D.C. Cir. 2017).

The upshot of *Chabad I* was that all the defendants, including the Russian Federation, remained in the case. In the wake of our decision, however, the defendants withdrew from the litigation. The Russian Federation, speaking on behalf of itself and its agencies, asserted its

belief that "a Court in the United States does not have the authority to adjudicate rights in property that in most cases always has been located in the Russian Federation." Statement with Respect to Further Participation at 1 (June 26, 2009), J.A. 92. The Federation thus concluded that further participation in the case would be inconsistent with its "sovereignty." *Id.* at 2, J.A. 93.

Approximately a year later, the district court granted Chabad a default judgment against all defendants and ordered them to surrender the Collection. After the defendants failed to comply, the court imposed contempt sanctions, requiring the defendants to pay Chabad $50,000 per day until they returned the Collection. The defendants, though, neither paid the sanctions nor returned the Collection. In the ensuing years, the court entered interim judgments of accrued sanctions, which now total more than $175 million.

C.

Unable to execute directly against the assets of the absent defendants to satisfy the accumulating sanctions judgments, Chabad looked elsewhere. It sought, in particular, to collect from entities in the United States with connections to the Russian state. That effort eventually led Chabad to Tenex-USA, a third-tier subsidiary of the Russian State Atomic Energy Corporation, and State Development Corporation VEB.RF (VEB), a Russian state development bank. *See Agudas Chasidei Chabad of U.S. v. Russian Fed'n* (*Chabad II*), 19 F.4th 472, 474-75 (D.C. Cir. 2021).

Our second decision in this case, *Chabad II*, followed Chabad's efforts to subpoena information from Tenex-USA and VEB about their assets and ownership. *Id.* As

relevant here, Tenex-USA responded to the subpoena by seeking partial vacatur of the default judgment and sanctions judgments pursuant to Federal Rule of Civil Procedure 60(b). *Id.* Tenex-USA argued that the district court lacked jurisdiction over Chabad's claims against the Russian Federation under the FSIA's expropriation exception. *Id.* at 475. And Tenex-USA maintained that, absent jurisdiction as to the Russian Federation, there was no basis for Chabad to seek attachment of Tenex-USA's assets based on its alleged ties to the Federation. *Id.*

We disposed of *Chabad II* without reaching that jurisdictional question. We held that, regardless of the district court's jurisdiction over the Russian Federation, Tenex-USA could not invoke Rule 60(b) to void the judgments against the Russian Federation. *Id.* at 477. That rule allows only "a party or its legal representative" to seek relief from judgment. Fed. R. Civ. P. 60(b). And Tenex-USA was neither a party to the judgments—the parties instead were the Russian Federation and its agencies—nor any party's legal representative. *Chabad II*, 19 F.4th at 477.

The case thus returned to the district court. Chabad then moved to attach the U.S. property of Tenex-USA, its parent company Tenex Joint-Stock Company (Tenex JSC), and VEB, and to execute on that property to satisfy the sanctions judgments it held against the Russian Federation. Chabad argued that all three companies were alter egos of the Russian Federation and that their property should be considered Russian Federation property for purposes of enforcing the judgments.

The district court denied Chabad's motion without prejudice. *Agudas Chasidei Chabad of U.S. v. Russian*

Fed'n, 659 F. Supp. 3d 1, 3 (D.D.C. 2023). The court first held that Chabad had satisfied the FSIA's expropriation exception as to the Russian Federation, so the Federation lacked immunity with respect to the judgments entered against it. *Id.* at 7-10. The court next concluded that, for the most part, Chabad had satisfied a separate FSIA exception to the immunity from attachment that the FSIA otherwise confers on foreign state property. *Id.* at 10-11.

While the court ruled in Chabad's favor in those respects, it further determined that Chabad had not fulfilled the FSIA's requirement to provide notice of a default judgment to a defendant before attaching its assets to satisfy the judgment. *Id.* at 11-15 (citing 28 U.S.C. § 1610(c)). Although Chabad had served the default judgment on the Russian Federation, it had not served the sanctions judgments. *Id.* at 12-15. The court therefore denied Chabad's motion without prejudice, directing Chabad to serve the sanctions judgments on the Russian Federation and then file a renewed attachment motion. *Id.* at 15. Because the court rested its decision on lack of notice, it did not resolve whether the property of Tenex JSC, Tenex-USA, or VEB is in fact property of the Russian Federation to which Chabad has a legitimate claim. *Id.*

VEB and Tenex-USA now appeal. They argue, among other things, that the district court erred in asserting jurisdiction over Chabad's claims against the Russian Federation under the FSIA's expropriation exception. (Because Tenex-USA purports to speak only for itself, not Tenex JSC, we refer almost entirely to Tenex-USA throughout the remainder of the analysis. And because VEB raises no arguments of its own and merely incorporates those of Tenex-USA, we generally

do not refer separately to VEB, although most of what we say about Tenex-USA applies to VEB too.)

II.

We begin by confirming our jurisdiction over this appeal. Chabad raises four jurisdictional objections, none of which has merit.

First, Chabad contends that Tenex-USA lacks standing to appeal a decision in its favor—viz., the district court's denial of Chabad's attachment motion. Chabad is correct that, in general, "a party cannot appeal from a favorable judgment." 15A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 3902 (3d ed. 2023); *see also California v. Rooney*, 483 U.S. 307, 311 (1987) (per curiam). The district court, though, did not deny Chabad's attachment motion outright; instead, it denied the motion *without prejudice*. And a party is "within its rights to appeal a dismissal without prejudice on the grounds that it wants one with prejudice." *El Paso Nat. Gas Co. v. United States*, 750 F.3d 863, 885 (D.C. Cir. 2014) (citation and internal quotation marks omitted).

The reason is that an order dismissing a case (or, as here, denying an attachment motion) without prejudice "subject[s] the defendant to the risk ... of further litigation." *Disher v. Info. Res., Inc.*, 873 F.2d 136, 138 (7th Cir. 1989). That is the case here. The district court's order expressly contemplates that Chabad will "file its motion again" and "have the opportunity and authority to collect upon a renewed motion." *Agudas Chasidei Chabad of U.S.*, 659 F. Supp. 3d at 15. But if Tenex-USA had gotten the ruling it wanted—a denial of Chabad's motion *with prejudice*—further proceedings would be foreclosed, and Tenex-USA would be out of the case.

Tenex-USA may take this appeal in an effort to achieve that more favorable outcome.

Second and similarly, Chabad argues that Tenex-USA seeks to appeal the district court's reasoning, rather than its judgment, contrary to the basic principle that a party may only appeal "judgments, not opinions." *United States v. Simpson*, 430 F.3d 1177, 1184 (D.C. Cir. 2005) (citation and internal quotation marks omitted). But Tenex-USA in fact asks us to review a judgment—or, more accurately, an order—not merely an opinion. Tenex-USA seeks review of the portion of the district court's order that denies Chabad's motion without prejudice rather than with prejudice. And because we may review an order to that effect, we also may review the reasons the court denied the order without prejudice rather than with prejudice. *See El Paso Nat. Gas*, 750 F.3d at 885.

Third, Chabad maintains that we already determined in *Chabad II* that Tenex-USA lacks standing to raise the issue of the Russian Federation's immunity. Chabad misunderstands *Chabad II's* holding. *Chabad II*, as noted, held that Tenex- USA could not attack the judgments in this case through a Rule 60(b) motion because Tenex-USA was not "a party or its legal representative" in the litigation resulting in those judgments. 19 F.4th at 477 (quoting Fed. R. Civ. P. 60(b)). But *Chabad II* did not foreclose the possibility of Tenex-USA ever raising a sovereign-immunity argument.

In fact, the court specifically recognized that VEB—identically situated to Tenex-USA—could have raised such an argument in an appeal of the denial of its motion to quash Chabad's subpoena. *Id.* at 476. And rightly so: a nonparty may challenge an order on sovereign-

immunity grounds if the nonparty "has an interest that is affected" by the order—as long as it does so through an appropriate procedural vehicle. *Aurelius Cap. Partners v. Republic of Argentina*, 584 F.3d 120, 127-28 (2d Cir. 2009); *see Pinson v. Samuels*, 761 F.3d 1, 7 (D.C. Cir. 2014); *Broidy Cap. Mgmt. LLC v. Muzin*, 61 F.4th 984, 991 (D.C. Cir. 2023). The district court's order plainly affects Tenex-USA's interest in its United States property. So even if Tenex-USA could not protect that interest through a Rule 60(b) motion, it can do so in this appeal.

Finally, Chabad submits that the denial without prejudice of its attachment motion cannot be appealed until the district court's proceedings have come to an end. It is true that our jurisdiction ordinarily is limited to appeals from "final decisions of the district courts" that end the litigation on the merits. 28 U.S.C. § 1291. But under the collateral order doctrine, there is a "'small class' of collateral rulings that, although they do not end the litigation, are appropriately deemed 'final'" and immediately appealable. *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009) (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545-46 (1949)).

The district court's ruling that it has jurisdiction over the Russian Federation under the FSIA's expropriation exception meets the three conditions that render an interlocutory decision an immediately appealable collateral order. *See Johnson v. Jones*, 515 U.S. 304, 310-11 (1995). First, the court conclusively decided that it has jurisdiction. *See Agudas Chasidei Chabad of U.S.*, 659 F. Supp. 3d at 10. Second, the issue of a court's jurisdiction over claims against a foreign state is important and separate from the ultimate merits question in the ongoing collection proceedings: whether

Tenex-USA's property is in fact attachable. *See Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1126 (D.C. Cir. 2004). And third, the denial of sovereign immunity is "effectively unreviewable on appeal from a final judgment." *Id.* (citation and internal quotation marks omitted); *see EM Ltd. v. Republic of Argentina*, 695 F.3d 201, 205 (2d Cir. 2012) (explaining that "[i]n post-judgment litigation," the relevant final judgment is the "judgment that concludes the collection proceedings"). "[S]overeign immunity," we have explained, "is an immunity from trial and the attendant burdens of litigation, and not just a defense to liability on the merits." *Kilburn*, 376 F.3d at 1126 (citation and internal quotation marks omitted); *see also Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438,443 (D.C. Cir. 1990).

Because our conclusion as to the Russian Federation's immunity suffices to resolve this appeal, and because a particular ruling in an order may be immediately appealable even if the order in its entirety is not, *see Oglala Sioux Tribe v. U.S. Nuclear Regul. Comm'n*, 896 F.3d 520, 527-28 (D.C. Cir. 2018), we need not consider whether we have jurisdiction at this time to review other rulings in the district court's order.

III.

Tenex-USA's primary submission is that the district court lacks—and has always lacked—jurisdiction over Chabad's claims against the Russian Federation. Accordingly, Tenex-USA says, the default judgment and sanctions judgments the court entered against the Russian Federation are void. And as a result, Chabad is without a legal predicate to attach Tenex-USA's property in satisfaction of those judgments, even assuming that property is Russian Federation property

in the relevant sense (which Tenex-USA vigorously denies).

We agree with Tenex-USA's argument: under our precedents, the FSIA's expropriation exception does not abrogate the Russian Federation's sovereign immunity in the circumstances of this case. And we reject Chabad's contention that, even if the district court lacks jurisdiction over its claims against the Russian Federation, the principle of jurisdictional finality precludes us from giving effect to that conclusion at this stage of the proceedings.

A.

1.

The FSIA establishes that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States" unless an exception to immunity applies. 28 U.S.C. § 1604. The sole exception in play in this case is the "expropriation exception." That exception divests foreign sovereign immunity "in any case"

> **[1]** in which rights in property taken in violation of international law are in issue and **[2A]** 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 **[2B]** 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… .

Id. § 1605(a)(3) (bracketed labels added). A district court thus has jurisdiction over claims against a foreign state

or its agencies and instrumentalities under the expropriation exception if rights in property are at issue, that property has been taken in violation of international law, and the appropriate "commercial-activity nexus requirement" is satisfied. *De Csepel*, 859 F.3d at 1104.

In Simon v. Republic of Hungary, 812 F.3d 127, 146 (D.C. Cir. 2016), *rev'd in part on other grounds sub nom. Fed. Republic of Germany v. Philipp*, 592 U.S. 169 (2021), we held that "[t]he nexus requirement differs somewhat for claims against the foreign state ... as compared with claims against an agency or instrumentality of the foreign state." *Simon* understood clause 2A to be the only path to jurisdiction over claims against a foreign state itself: the property that is the subject of the claims (or property exchanged for it) must be "present in the United States in connection with a commercial activity" that the foreign state "carrie[s] on" in the United States. *Id.* (quoting 28 U.S.C. § 1605(a)(3)). And *Simon* correspondingly read clause 2B to be the only basis for jurisdiction over claims against an agency or instrumentality of a foreign state: the property need not be present in the United States, but it must be "owned or operated by an agency or instrumentality of the foreign state" that is "engaged in a commercial activity in the United States." *Id.*

Simon was decided years after *Chabad I*, and *Simon* did not discuss the fact that *Chabad I* apparently kept the Russian Federation in this case. *See* pp. 4-5, *supra*. But under *Simon's* interpretation of the expropriation exception, the Russian Federation ought to have been dismissed: a claim against a foreign state must fit within clause 2A, which, as noted, requires the expropriated property in issue to be present in the United States. Yet it is undisputed that the expropriated property giving rise to this suit—the Collection—is not present in the

United States. Nonetheless, *Chabad I* said (without elaboration) that it was overturning the district court's "finding of Russia's immunity." 528 F.3d at 955.

Although *Simon* did not address that seeming tension with *Chabad I*, our court directly confronted it the following year in *De Csepel v. Republic of Hungary*. *De Csepel*, like this case and *Simon*, was an expropriation-exception suit against a foreign sovereign (Hungary) concerning property located outside the United States. 859 F.3d at 1104-05. The plaintiffs argued that, under *Chabad I*, jurisdiction existed over Hungary even though the expropriated property was not in the United States. *Id.* at 1105. Hungary responded by relying on *Simon*, under which jurisdiction over Hungary could arise only pursuant to clause 2A, which is inapplicable when the property is outside the United States. *Id.* at 1104.

We sided with Hungary, holding that *Simon*'s interpretation of the expropriation exception governed. We reasoned that *Chabad I* had not in fact "*held* that a foreign state loses immunity if the second nexus requirement [clause 2B] is met." *Id.* at 1105 (first alteration in original). "The issue of the Russian state's immunity," we explained, "was completely unaddressed by the district court and neither raised nor briefed on appeal" in *Chabad I*. *Id.* What is more, the *Chabad I* court "did not explain why it kept the Russian Federation in the case." *Id.* It instead "reversed the district court with no explanation at all," *id.* at 1106, stating in a single conclusory sentence that it "reverse[d] [the district court's] finding of Russia's immunity," *id.* at 1105 (quoting *Chabad I*, 528 F.3d at 955) (second alteration in original). Such a "cursory and unexamined statement[] of jurisdiction," we determined, had "no precedential effect." *Id.* at 1105-06

(citation and internal quotation marks omitted). *Simon*, by contrast, had "expressly considered and decided the question of foreign state immunity under the expropriation exception." *Id.*

We have applied the expropriation exception on more than one occasion since *De Csepel*. In each instance, we considered ourselves bound by *Simon*'s construction of § 1605(a)(3). *See Schubarth v. Fed. Republic of Germany*, 891 F.3d 392, 399- 401 (D.C. Cir. 2018); *Philipp v. Fed. Republic of Germany*, 894 F.3d 406,414 (D.C. Cir. 2018), *rev'd in part on other grounds*, 592 U.S. 169 (2021). Accordingly, *De Csepel* and our subsequent decisions have consistently held that "a foreign state is immune to claims for the expropriation of property not present in the United States." *Schubarth*, 891 F.3d at 394-95.

2.

Under *Simon* and *De Csepel*, the expropriation exception cannot provide a basis for jurisdiction over Chabad's claims against the Russian Federation in this case. The expropriated property those claims involve, the Collection, sits in Russia, not the United States. And as we have now held several times, expropriated property must be located in the United States for jurisdiction to lie under the expropriation exception over claims against a foreign state. *Simon*, 812 F.3d at 146. Even if *Chabad I* could be read to have reached a different conclusion, our decision in *De Csepel* resolved that *Simon*, not *Chabad I*, controls.

In nonetheless concluding that it had jurisdiction over Chabad's claims against the Russian Federation, the district court relied on *Chabad I*. The court read *Chabad I* to have allowed for jurisdiction over a foreign state under either clause 2A or clause 2B of the

expropriation exception. *Agudas Chasidei Chabad of U.S.*, 659 F. Supp. 3d at 8. And it thought that our later decisions—including *Simon* and *De Csepel*—did not mandate a different result, because they departed from *Chabad I*, an earlier and, in the court's view, binding precedent. *Id.* at 9. As the district court saw things, *Chabad I* established the law of the circuit, and it remains the law of the circuit because we have not overruled it en banc. *Id.* at 9-10.

We appreciate that, at one time, there might have been uncertainty about whether *Chabad I* or *Simon* supplied this circuit's law on the proper interpretation of the expropriation exception. But our decision in *De Csepel* definitively settled the matter in favor of *Simon*. We extensively analyzed the issue and squarely held that *Chabad I* did not create "[b]inding circuit law" because it never held "that a foreign state loses immunity if the second nexus requirement is met." *De Csepel*, 859 F.3d at 1105 (alteration in original) (citation and internal quotation marks omitted). *Chabad I*'s passing remark about "Russia's immunity," *De Csepel* emphasized, had "no precedential effect." *Id.* at 1105-06 (citation and internal quotation marks omitted).

De Csepel's authoritative reading of *Chabad I* is now itself binding circuit law, which the district court (and our court) must follow unless we reconsider the issue en banc. Lest any doubt remain about the law in this circuit, we reiterate once again: there is no jurisdiction over a claim against a foreign state under the FSIA's expropriation exception unless the expropriated property is located in the United States. *De Csepel* forecloses reliance on *Chabad I* to conclude otherwise.

B.

Chabad advances two reasons why we nevertheless should not apply Simon in this case. The first is readily dismissed: *Chabad* asks us to reconsider *Simon's* holding, but we are bound by that holding after *De Csepel*, no less than were the panels in *Schubarth* and *Philipp*. And in any event, for the reasons explained in *De Csepel*, we would adopt *Simon's* construction of the expropriation exception even if we were free to interpret the FSIA on a blank slate. *De Csepel*, 859 F.3d at 1107-08.

Chabad also argues that, even if *Simon* is the law today, the principle of jurisdictional finality precludes us from revisiting the district court's jurisdiction over its claims against the Russian Federation at this stage of the proceedings. We conclude, however, that jurisdictional finality poses no barrier to our applying our governing precedent in this case.

Under the doctrine of jurisdictional finality, "principles of res judicata apply to jurisdictional determinations—both subject matter and personal." *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.9 (1982). The usual rule is that "[a] party that has had an opportunity to litigate the question of ... jurisdiction" may not "reopen that question in a collateral attack upon an adverse judgment." *Id.*

To support application of that principle here, *Chabad* relies on *Practical Concepts, Inc. v. Republic of Bolivia*, 811 F.2d 1543 (D.C. Cir. 1987), in which we described two options available to a defendant who questions the jurisdictional basis of a lawsuit against it. First, such a defendant "may appear, raise the jurisdictional objection, and ultimately pursue it on

direct appeal. If he so elects, he may not renew the jurisdictional objection in a collateral attack." *Id.* at 1547. "Alternatively, the defendant may refrain from appearing, thereby exposing himself to the risk of a default judgment. When enforcement of the default judgment is attempted, however, he may assert his jurisdictional objection." *Id.*

According to Chabad, the Russian Federation took option one: it initially appeared in the case, contested jurisdiction, appealed, and lost (in *Chabad I*). That result, Chabad reasons, cannot now be challenged in enforcement proceedings following the default judgment, because a party that appears and challenges jurisdiction cannot "renew the jurisdictional objection in a collateral attack." *Practical Concepts*, 811 F.2d at 1547.

The *Practical Concepts* framework does not control in this case. To begin with, the defendant in *Practical Concepts* had not appeared in the case prior to the entry of a default judgment against it, so only the second path we described was relevant to our disposition. *Id.* at 1545. Nor did we purport to establish any ironclad rule in *Practical Concepts*, stating only that defendants "generally" face the choice we described. *Id.* at 1547. Our use of indefinite language was appropriate, given that equitable considerations and exceptions have always informed the application of res judicata. *See Canonsburg Gen. Hosp. v. Burwell*, 807 F.3d 295, 306 (D.C. Cir. 2015). The *Practical Concepts* passage on which *Chabad* relies thus provides "generally" applicable guidance, but it does not delimit the full range of permissible outcomes. And several features of the present case persuade us that applying jurisdictional finality is unwarranted.

First, the party now contesting jurisdiction, Tenex-USA, was not a defendant in the case when it was filed or when the district court entered the default judgment. *See Chabad II*, 19 F.4th at 477. Indeed, Tenex-USA had no reason even to be aware of the litigation until it received a subpoena from Chabad in 2019, in the course of post-judgment enforcement proceedings. So we see little reason to deny Tenex-USA the benefit of FSIA law that was clearly established in our circuit by the time Tenex-USA first became involved in the case. After all, the reasoning of *Practical Concepts* by its own terms applies in situations in which the party contesting jurisdiction post-judgment was "[a] defendant who kn[ew] of" the initial action against it. 811 F.2d at 1547. So, while a "party that has had an opportunity to litigate the question of subject-matter jurisdiction may not ... reopen that question in a collateral attack upon an adverse judgment," *Ins. Corp. of Ireland*, 456 U.S. at 702 n.9, Tenex-USA is not such a party. Rather, Tenex-USA contested jurisdiction at the first opportunity available to it.

We recognize that it remains unresolved whether, notwithstanding its "separate juridical status," *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 621 (1983), Tenex-USA is in fact an alter ego of the Russian Federation, as Chabad alleges. But even if Chabad is correct on that score, it would not change the jurisdictional finality analysis. The Russian Federation is an indirect shareholder of Tenex-USA. And in general, a judgment against the shareholder of a corporation binds the corporation "only if" the corporation has "notice" of the "action resulting in the judgment" and a "fair opportunity to defend" in that action. Restatement (Second) of Judgments § 59(5) (Am. L. Inst. 1982); 18A Wright & Miller, *supra*, § 4460. There

is no suggestion here that Tenex-USA was on notice of this suit or had an opportunity to defend itself prior to the default judgment. What is more, the Russian Federation's actions—with respect to the Collection and in this litigation—are entirely disconnected from its status as an indirect Tenex-USA owner. So it is immaterial to the jurisdictional-finality inquiry whether Tenex-USA's corporate separateness from the Russian Federation should be disregarded for attachment purposes.

In addition, the issue of the Russian Federation's immunity was never adjudicated before entry of the default judgment that now provides the predicate for attachment proceedings against Tenex-USA. As we explained in *De Csepel*, the Russian Federation's immunity "was completely unaddressed by the district court" in the proceedings that led to *Chabad I* and "neither raised nor briefed on appeal." 859 F.3d at 1105. The issue then received at best a "drive-by" ruling in our court that did not amount to a precedential holding. *Id.* at 1106 (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998)). And while the district court's later opinion accompanying the default judgment contained a jurisdictional analysis, that analysis was limited to the RSL and RSMA and said nothing specifically about the Russian Federation. *See Agudas Chasidei Chabad of U.S. v. Russian Fed'n*, 729 F. Supp. 2d 141, 146-48 (D.D.C. 2010). Given that procedural backdrop and the other considerations weighing against the application of jurisdictional finality, the Russian Federation's immunity need not be forever insulated from examination.

Settling a jurisdictional question correctly—rather than simply settling it—is also particularly important when the question concerns foreign sovereign immunity.

"Actions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States," *Verlinden B.V v. Cent. Bank of Nigeria*, 461 U.S. 480, 493 (1983), and can have serious "diplomatic implications," *Republic of Sudan v. Harrison*, 587 U.S. 1, 19 (2019). This case is illustrative: the United States informed the district court several times that the imposition of contempt sanctions on the Russian Federation "risk[ed] damage to significant foreign policy interests." Statement of Interest of the United States at 10 (Aug. 29, 2012), J.A. 145; Statement of Interest of the United States at 6-7 (Feb. 21, 2014), J.A. 166-67.

Mindful of such concerns, the Supreme Court has explained that "the rule of law demands adherence to [the FSIA's] strict requirements." *See Harrison*, 587 U.S. at 19. And we have likewise cautioned that "[i]ntolerant adherence to default judgments against foreign states could adversely affect this nation's relations with other nations and undermine the State Department's continuing efforts to encourage foreign sovereigns generally to resolve disputes within the United States' legal framework." *FG Hemisphere Assocs., LLC v. Democratic Republic of Congo*, 447 F.3d 835, 838-39 (D.C. Cir. 2006) (quoting *Practical Concepts*, 811 F.2dat 1551 n.19). Those considerations do not give foreign states a free pass with respect to jurisdictional finality. But they do counsel in favor of rectifying an evident jurisdictional problem in the circumstances of this case.

Finally, there is no indication of gamesmanship on the part of the Russian Federation or Tenex-USA. It would be a different case if, for instance, the Russian Federation had appeared and contested jurisdiction, determined that its arguments were unlikely to succeed,

withdrawn and defaulted, and then strategically reappeared in an attempt to challenge jurisdiction a second time. Or one could imagine a scenario in which a foreign state relied on its agencies or instrumentalities for the specific purpose of raising or re-raising jurisdictional arguments that otherwise would be precluded. In such situations, applying jurisdictional finality would best promote the values preclusion serves—judicial economy and the protection of opposing litigants. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979).

But there is no hint of anything like that in this case. The Russian Federation withdrew from the litigation in 2009. And nothing in the record indicates that, 15 years on, it is using Tenex-USA to make arguments on its behalf. Rather, Tenex- USA was a stranger to the case until years after the default judgment, when Chabad served it with legal process in enforcement proceedings. At that point, Tenex-USA understandably began to challenge the district court's exercise of jurisdiction as inconsistent with our precedents.

For those reasons, the doctrine of jurisdictional finality does not prevent us from applying in this case the interpretation of the FSIA's expropriation exception that governs in our circuit—just as we would do in any other case presenting the issue.

C.

Because the district court lacked jurisdiction over Chabad's claims against the Russian Federation when it entered the default judgment and sanctions judgments, those judgments are void as against the Federation. Consequently, the judgments may not be enforced through attachment of Tenex JSC's, Tenex-USA's, or VEB's assets. *See TIG Ins. Co. v. Republic of*

Argentina, 967 F.3d 778, 781 (D.C. Cir. 2020). Chabad's claim on those assets is entirely derivative of its claim on the Russian Federation's assets. And without a valid judgment against the Russian Federation, it no longer has any such claim.

Though Chabad does not raise the point, we note that a final judgment entered in excess of a court's jurisdiction typically is not void unless "the court that rendered judgment lacked even an arguable basis for jurisdiction." *Lee Mem'l Hosp. v. Becerra*, 10 F.4th 859, 863-64 (D.C. Cir. 2021) (internal quotation marks omitted) (quoting *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260,271 (2010)). And given the abstruseness of *Chabad I's* jurisdictional determinations and the fact that *Simon* had yet to be decided, we cannot say there was no arguable basis for the district court's exercise of jurisdiction over the Russian Federation when it entered the default judgment and most of the sanctions judgments. But as *Lee Memorial Hospital v. Becerra* recognized, we have declined to apply the arguable-basis standard in cases involving foreign sovereign immunity when the "objecting party"—here, Tenex-USA—did not "appear[] in the challenged proceeding." *Id.* at 864 (quoting *Bell Helicopter Textron, Inc. v. Islamic Republic of Iran*, 734 F.3d 1175, 1182 (D.C. Cir. 2013)). Since that is the present situation, the judgments against the Russian Federation are void simply because "the issuing court lacked subject-matter jurisdiction, regardless of whether there existed an 'arguable basis' for jurisdiction." *Bell Helicopter*, 734 F.3d at 1181.

Our holding also requires the Russian Federation to be dismissed from the case: absent an applicable FSIA exception, it is immune from Chabad's claims. 28 U.S.C. §§ 1330(a), 1604. In arriving at that conclusion, we do

not intend in any way to downplay the wrongs Chabad has suffered or the frustrations it has endured in its hundred-year effort to reacquire its wrongfully taken sacred objects, of which this lawsuit is only the latest chapter. The result we reach is simply a consequence of the statute Congress enacted and the limits it chose to set on claims against foreign states like the Russian Federation. And we do not disturb the district court's exercise of jurisdiction over, or entry of judgment against, the RSL and RSMA. Chabad remains free to proceed against those entities—and perhaps also against the Russian Ministry of Culture and Mass Communications, although the Ministry's amenability to suit has not specifically been addressed to date-as appropriate.

* * * * *

The district court stated that "unless and until it receives a mandate" from this court directing it to dismiss the Russian Federation, it "would continue to assert subject-matter jurisdiction" over the Federation. *Agudas Chasidei Chabad of U.S.*, 659 F. Supp. 3d at 10. This opinion occasions such a mandate. We vacate the district court's order and remand for further proceedings consistent with this opinion.

So ordered.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 1:05-cv-1548-RCL

AGUDAS CHASIDEI CHABAD OF UNITED STATES,
Plaintiff,

v.

RUSSIAN FEDERATION, RUSSIAN MINISTRY OF CULTURE AND MASS COMMUNICATION, RUSSIAN STATE LIBRARY, and RUSSIAN STATE MILITARY ARCHIVE,
Defendants.

Filed February 27, 2023

MEMORANDUM OPINION

During the 20th century, amid civil unrest, revolution, and then world war, a collection of invaluable religious books and manuscripts were seized in violation of international law. Plaintiff Agudas Chasidei Chabad of the United States ("Chabad") is the rightful owner of those books and manuscripts. Nearly two decades ago, it sued the Russian Federation ("Russia"), Russian Ministry of Culture and Mass Communication, Russian State Library, and Russian State Military Archive (together, "defendants") and requested that this Court order a return of that property. In 2010, after determining that the materials were indeed expropriated, the Court entered a default judgment against defendants and ordered them to return the texts to Chabad. After they failed to comply with that directive, the Court imposed monetary sanctions to

coerce compliance. Since that time, defendants have failed to satisfy the Court's order and the accrued sanctions now approach $200 million. To make good on that debt, Chabad moves now to attach and execute on Russian property held or controlled by third parties VEB.RF ("VEB") and Tenex (whether it be Tenex-USA or its corporate parent entity). Chabad alternatively seeks authorization to assert and record judicial liens.

Because the judgments that Chabad seeks to enforce were entered by default, and defendants have not received required notice, this Court will **DENY WITHOUT PREJUDICE** Chabad's motion.

I. BACKGROUND

The Court has comprehensively and repeatedly explained the factual and procedural history of this lawsuit, *see, e.g.*, *Agudas Chasidei Chabad of U.S. v. Russian Fed'n* ("*Stay Opinion*"), No. 1:05-cv-1548-RCL, 2020 WL 13611456, at *1-8 (D.D.C. Nov. 6, 2020), *aff'd*, *Agudas Chasidei Chabad of United States v. Russian Fed'n*, 19 F.4th 472 (D.C. Cir. 2021), and therefore the following will constitute a non-exhaustive summary of the pertinent information for the present motion.

The plaintiff here is Chabad, a non-profit corporation in New York representing the longstanding Chabad Chasidic movement of Judaism which started "in the mid-18th Century in and around the Russian Empire." *Id.* at *1 (internal quotation marks omitted). Over time, the organization "produced and curated a body of religious materials central to Chabad Chasidism." *Id.* At issue in this case are two sets of those materials: "the Library," which contains thousands of books and hundreds of manuscripts dating back to 1772, and "the Archive," which contains the "Chabad Rebbes' handwritten teachings,

correspondence, and other records." *Id.* (internal quotation marks omitted).

In 2004, Chabad sued defendants, alleged that they possessed the Library and Archive, and asked this Court to issue an order directing defendants to return them. *Id.* at *1-2. The defendants appeared and moved to dismiss the complaint, alleging that they were immune from suit. *Id.* at *2.

Though Congress has established a general rule depriving courts of subject-matter jurisdiction over lawsuits against foreign states—an instruction located in the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1604 *et seq.*—the statute provides an exception to that presumption when property is taken in violation of international law. *Id.* § 1605(a)(3). This Court held that, pursuant to Section 1605(a)(3), the Court maintained subject-matter jurisdiction over claims related to the Archive, but not claims related to the Library. *Agudas Chasidei Chabad of U.S. v. Russian Fed'n* ("*Chabad I*"), 466 F. Supp. 2d 6, 31 (D.D.C. 2006). The D.C. Circuit then affirmed in part, vacated in part, and reversed in part, concluding that, under Section 1605(a)(3), this Court had subject-matter jurisdiction over Chabad's claims related to both the Archive and the Library. *Agudas Chasidei Chabad of U.S. v. Russian Fed'n* ("*Chabad II*"), 528 F.3d 934, 939, 955 (D.C. Cir. 2008).

After the D.C. Circuit remanded the case, defendants withdrew from further participation in this action. ECF No. 71-1. Russia explained that it took issue with the Circuit's ruling depriving it of immunity from suit and it would therefore no longer participate. *Id.* This Court subsequently entered default judgment against all defendants. *Agudas Chasidei Chabad of U.S.*

v. Russian Fed'n ("*Chabad III*"), 729 F. Supp. 2d 141, 148 (D.D.C. 2010). It then ordered defendants to ensure a "prompt and safe" return of Chabad's religious materials. Order Granting Pl.'s Mot. for Entry of Default Judgment, ECF No. 80. Specifically, the Court directed defendants to "surrender to the United States Embassy in Moscow or to the duly appointed representatives of … Chabad … the complete collection." *Id.*

In 2011, after determining that Russia had received adequate notice of the Court's default judgment, and "that plaintiff ha[d] demonstrated defendants' non-compliance to a reasonable certainty," this Court instructed defendants to show cause why they should not be held in civil contempt. *Agudas Chasidei Chabad of U.S. v. Russian Fed'n* ("*Chabad IV*"), 798 F. Supp. 2d 260, 273 (D.D.C. 2011) (internal quotation marks omitted). The Court then "direct[ed] plaintiff to serve a copies of its motion for sanctions and t[he] order to show cause on defendants via mail using the addresses defendants' former counsel provided, and [] g[a]ve defendants the same 60 days they are generally entitled in responding to service of papers initiating suit under the FSIA." *Id.* at 273-74.

In 2013, after defendants failed to respond, Chabad moved for civil monetary contempt sanctions against defendants. *Chabad v. Russian Fed'n* ("*Sanctions Opinion*"), 915 F. Supp. 2d 148, 149-51 (D.D.C. 2013). This request came after "multiple meetings at the Russian Embassy in Washington, D.C.," during which "the parties were unable to reach a settlement." *Id.* at 150-51 (internal quotation marks and citation omitted). After determining that civil monetary sanctions were both within the Court's authority and appropriate for the situation, the Court issued sanctions in the amount

of $50,000 per day until defendants comply with the Court's 2010 order to return the materials. *Id.* at 154-55; Order ("Sanctions Order"), ECF No. 115. That day has yet to arrive.

Following the imposition of sanctions, this Court has thrice issued interim judgments of accrued sanctions. Interim Judgment, ECF No. 144; Order and Judgment ("Second Interim Judgment"), ECF No. 201; Revised Interim Judgment, ECF No. 263. Chabad also subpoenaed various entities, including VEB and Tenex-USA, to discover Russian property that might satisfy the accrued sanctions debt. *See* Mem. Order 1 ("Motion to Quash Order"), ECF No. 198; *Stay Opinion*, 2020 WL 13611456 at *7.

Following that discovery, Chabad moved to attach and execute to satisfy the sanctions debt, or alternatively to assert and record judicial liens. Pl.'s Mot., ECF No. 235. Chabad also filed a sealed memorandum in support. Pl.'s Mem., ECF No. 236-2. VEB opposed, VEB's Opp'n, ECF No. 241-1, and Chabad replied, Pl.'s Reply to VEB, ECF No. 254. Tenex-USA also opposed, Tenex-USA's Opp'n, ECF No. 248-2, and Chabad replied, Pl.'s Reply to Tenex-USA, ECF No. 253. Tenex-USA moved to file a sur-reply, Tenex-USA's Mot. Sur-Reply ECF No. 256-2, Chabad opposed, Pl.'s Opp'n to Sur-Reply, ECF No. 258, and Tenex-USA replied, Tenex-USA's Reply Sur-Reply, ECF No. 259.[1]

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[1] The Court concludes that Tenex-USA's sur-reply is appropriate and grants its motion to file. *See Doe v. Exxon Mobil Corp.*, 69 F. Supp. 3d 75, 85-86 (D.D.C. 2014). However, Tenex-USA's argument that there is a due process or service issue for Tenex, raised for the first time in its sur-reply despite being previously available to it, will not be considered. *See* Proposed Sur-

Upon consideration of the parties briefing, the applicable law, and the whole record, the Court will **DENY WITHOUT PREJUDICE** Chabad's motion because defendants have not been provided sufficient notice of the monetary sanctions judgments that Chabad seeks to enforce.

II. LEGAL STANDARDS

The FSIA provides the governing legal standards in this dispute. Under that statute, "Congress established … a comprehensive framework for resolving any claim of sovereign immunity." *Republic of Argentina v. NML Cap., Ltd.*, 573 U.S. 134, 141 (2014) (quoting *Republic of Austria v. Altmann*, 541 U.S. 677 (2004)). "Thus, any sort of immunity defense made by a foreign sovereign in an American court must stand on the Act's text. Or it must fall." *Id.* at 141-42. The framework includes two kinds of immunity: jurisdictional immunity and execution immunity. *TIG Ins. Co. v. Republic of Argentina*, 967 F.3d 778, 781 (D.C. Cir. 2020). "To enforce an award against a foreign state in the United States, a party must therefore establish both that the foreign state is not immune from suit and that the property to be attached or executed against is not immune." *Id.* Because Chabad seeks attachment of Russia's property, both immunities must be defeated for it to succeed.

A. Jurisdictional Immunity

As this Court and the D.C. Circuit have already determined, an exception to the FSIA's default rule of

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Reply 4-5, ECF No. 256-3; *Connecticut v. Dep't of the Interior*, 344 F. Supp. 3d 279, 317 n.36 (D.D.C. 2018) ("[T]he Court declines to entertain an argument raised for the first time in a sur-reply.").

sovereign immunity applies. That exception reads as follows:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
>
> (3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.

Id. § 1605(a)(3). The Court will refer to Section 1605(a)(3) as the "expropriation jurisdiction exception."

When jurisdictional immunity has been overcome, the scope of the Court's power is broad. For "any claim for relief with respect to which a foreign state is not entitled to immunity ... the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances." *Id.* § 1606; *see Republic of Argentina*, 573 U.S. at 142.

B. Attachment and Execution Immunity

Attachment and execution immunity "is not itself jurisdictional." *TIG Ins. Co.*, 967 F.3d at 781. Instead, there is a default presumption against "attachment of a foreign sovereign's property." *Id.* Specifically, "the property in the United States of a foreign state shall be immune from attachment arrest and execution,"

28 U.S.C. § 1609, unless the judgment creditor demonstrates the applicability of a statutory "[e]xception[] to the immunity from attachment or execution," *id.* § 1610. *See TIG Ins. Co.*, 967 F.3d at 781.

The attachment exception at issue in this case reads as follows:

> (a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—
>
> (3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law.

28 U.S.C. § 1610(a)(3). The Court will refer to the requirements of (a) and (3) together as the "expropriation attachment exception."

As the statutory text lays out, the exception requires a judgment creditor to establish that "the execution relates to a judgment establishing rights in property" of the type described in the statute. *Id.* If that element is satisfied, the creditor "must satisfy the two general requirements outlined in the opening language of [Section 1610(a)]" which relates to the specific property that it seeks to attach or execute on. *TIG Ins. Co.*, 967 F.3d at 781; *see Chabad IV*, 798 F. Supp. 2d at 271.

In sum, the judgment creditor must demonstrate first that "the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law" and then identify (a) "property in the United States of a foreign state" that is (b) "used for a commercial activity in the United States." 28 U.S.C. § 1610(a)(3); *see TIG Ins. Co.*, 967 F.3d at 781. For the latter requirement, a court must consider the property's use at the time of the filing of the lawsuit and do so under the totality of the circumstances. *TIG Ins. Co.*, 967 F.3d at 782, 785.

Finally, before the Court orders attachment or execution, it must have "determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under [28 U.S.C. § 1608(e)]." 28 U.S.C. § 1610(c). Section 1608(e) reads as follows:

> No *judgment by default* shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. *A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.*

Id. § 1608(e) (emphases added).

III. DISCUSSION

Chabad seeks to attach and execute on "the property of the Russian Federation held or controlled by" VEB and Tenex. Chabad's Mot. 1. VEB and Tenex-USA oppose on several grounds, including that (1) the Court does not have subject-matter jurisdiction; (2) attachment immunity applies to any Russian property because the relevant judgments do not satisfy the first element of the expropriation attachment exception; (3) defendants have not received proper notice of the monetary sanctions judgments that Chabad seeks to enforce; and (4) Chabad has not identified specific Russian property used for a commercial activity in the United States.[2]

The Court will take those arguments in the order identified, rejecting the first two but agreeing with the third. Accordingly, this Court will dismiss Chabad's current motion without prejudice. However, this is only a temporary reprieve. Once defendants have proper notice, and the reasonable period of time following notice has passed, Chabad may again file for attachment and execution. At that point the remaining question will simply be whether particular Russian property in the United States has been identified and whether the property was used for a commercial activity in the United States.

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[2] The fourth argument raised by VEB and Tenex-USA is premised in part on the assertion that VEB and Tenex-USA are not Russian agencies or instrumentalities. Relatedly, Tenex-USA argues that assets of its corporate parent cannot be attached. Because the Court holds that defendants have not received proper notice of this Court's sanctions, it would be inappropriate to reach the merits of whether there is property that can be attached and executed on, or for which judicial liens may be recorded.

The Court will accordingly deny Chabad's motion without prejudice and direct plaintiff to provide proper notice of the sanctions judgments it seeks to enforce.

A. Subject-Matter Jurisdiction Over Russia is Appropriate Under the Expropriation Jurisdiction Exception

VEB and Tenex-USA first bring back the now oft-defeated argument that this Court does not have subject-matter jurisdiction. VEB's Opp'n 13-14; Tenex-USA's Opp'n 9-12. Specifically, they contest the application of the expropriation jurisdiction exception to abrogate Russia's immunity to suit. This Court and the Circuit have addressed the issue of jurisdiction under the expropriation jurisdiction exception five separate times. *See Chabad I*, 466 F. Supp. 2d at 14-20; *Chabad II*, 528 F.3d at 939, 955; *Chabad III*, 729 F. Supp. 2d at 144-48; Mem. Order ("Interlocutory Appeal Order"), ECF No. 220 at 3-4; *Stay Opinion*, 2020 WL 13611456 at *11-25. Nevertheless, because VEB and Tenex-USA raise the argument now to oppose a motion that threatens assets held or controlled by them, rather than through an ancillary motion for interlocutory appeal or a motion for stay, the Court will briefly summarize why the argument against subject-matter jurisdiction fails again.

In 2006, this Court was first faced with the question of whether the expropriation jurisdiction exception applies in this case. At that time, the Court held that the expropriation jurisdiction exception applied to claims regarding the taking of the Archive, but not to the taking of the Library. *Chabad I*, 466 F. Supp. 2d at 14-20. Because subject-matter jurisdiction does not lie over a foreign state without an FSIA exception, the Court

held that it had subject-matter jurisdiction over Russia only for claims related to the Archive. *Id.* at 31.

A panel of the D.C. Circuit, reviewing this Court's decision, "affirm[ed] the judgment of the district court finding jurisdiction over Agudas Chasidei Chabad's claims concerning the Archive; [while] revers[ing] its finding of Russia's immunity as to the Library claims." *Chabad II*, 528 F.3d at 955. That is, the D.C. Circuit concluded that the Court had subject-matter jurisdiction over Russia for both of Chabad's claims. *Id.* at 939-40, 942-50, 955. The Circuit explained that a foreign state like Russia is not immune from suit when the two elements of the expropriation jurisdiction exception are met. The first element can only be satisfied a single way, by establishing "[A] rights in property taken in violation of international law are in issue." *Id.* at 946-47 (alteration in original) (quoting 28 U.S.C. § 1605(a)(3)). The second element may be satisfied with either of two "alternative commercial activity requirements"—either "[B][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." *Id.* (alterations and emphases in original) (quoting 28 U.S.C. § 1605(a)(3)). In holding that subject-matter jurisdiction over Russia was proper, the panel explained that "§ 1605(a)(3)'s second alternative commercial activity requirement is plainly satisfied." *Id.* at 948.

Over a decade later, after Tenex-USA was brought into the case as a third party, it raised the issue of subject-matter jurisdiction afresh. Interlocutory

Appeal Order 3-4. It asserted that D.C. Circuit opinions in other cases, issued several years after the *Chabad II* panel's judgment, effectively ousted this Court of its previously established jurisdiction. *Id.* Tenex-USA brought this argument to bear through the procedural vehicle of seeking a certification of interlocutory appeal to the D.C. Circuit. *Id.* at 1. This Court rejected that argument and denied certification. *Id.* at 3-4. When Tenex-USA moved for a stay of this case pending appeal, this Court once again tackled the challenge to subject-matter jurisdiction under the expropriation jurisdiction exception and explained in comprehensive fashion why the D.C. Circuit's latter cases fail to deprive this Court of jurisdiction. *Stay Opinion*, 2020 WL 13611456 at *11-25. Now VEB and Tenex-USA raise the issue again. VEB's Opp'n 13-14; Tenex-USA's Opp'n 9-12.

At the risk of belaboring the point, this Court still has subject-matter jurisdiction because a 2008 panel of the D.C. Circuit held as much in *Chabad II* and the Circuit has never overruled that holding. *See Stay Opinion*, 2020 WL 13611456 at *11-25 (explaining the Court's continuing subject-matter jurisdiction in detail). Tenex-USA was correct before, and is correct now, that several D.C. Circuit panel opinions, issued starting in 2016, conflict with the reasoning of the *Chabad II* panel. Specifically, the panel held that the second alternative commercial activity requirement contained in the expropriation jurisdiction exception did not distinguish between, and therefore equally abrogated the sovereign immunity of, foreign sovereigns and their agencies or instrumentalities. *Chabad II*, 528 F.3d at 955. Later panels held that the *second* alternative commercial activity requirement defeats immunity only for *agencies and instrumentalities*, while the *first* alternative

commercial activity requirement must be satisfied when subject-matter jurisdiction is asserted over *foreign states*. *Simon v. Republic of Hungary*, 812 F.3d 127, 146 (D.C. Cir. 2016) (citing *Chabad II*, 528 F.3d at 947), *abrogated on other grounds by Fed. Republic of Germany v. Philipp*, 141 S. Ct. 703 (2021); *De Csepel v. Republic of Hungary*, 859 F.3d 1094 (D.C. Cir. 2017) (relying on *Simon); Schubarth v. Federal Republic of Germany*, 891 F.3d 392 (D.C. Cir. 2018) (same); *Philipp v. Fed. Republic of Germany*, 894 F.3d 406 (D.C. Cir. 2018) (same), *vacated and remanded on other grounds*, 141 S. Ct. 703 (2021).

Each later panel's interpretation of the second alternative commercial activity requirement "is irreconcilable with the D.C. Circuit's decision in *Chabad*." *Stay Opinion*, 2020 WL 13611456 at *11. Yet, under the law of the circuit doctrine, a prior panel's decision is binding on a latter panel unless that opinion is overruled by the procedures of the D.C. Circuit or by the Supreme Court. *Maxwell v. Snow*, 409 F.3d 354, 358 (D.C. Cir. 2005). Under the D.C. Circuit's procedures, "the D.C. Circuit can overrule the earlier decision of one of its panels only through two specific actions: either through an *en banc* sitting or, more rarely, through a procedure called an *Irons* footnote." *Stay Opinion*, 2020 WL 13611456 at *12 (citing *Irons v. Diamond*, 670 F.2d 265,268 n.11 (D.C. Cir. 1981)). *Irons* requires that a special footnote appear in the panel opinion explaining that the prior panel's decision has been overruled by consideration of the full D.C. Circuit. *Id.*

Here, none of the methods by which a prior panel opinion may be overruled have been undertaken. *Id.* at *11-25. There is no claim that the Supreme Court has overturned the relevant portion of the *Chabad II* panel's opinion. *Id.* No *en banc* sitting has concluded that the

proper interpretation of the expropriation jurisdiction exception is the one endorsed by the *Simon* panel and its progeny, or alternatively that the *Chabad II* panel's reasoning was incorrect. *Id.* And no *Irons* footnote has been employed to overrule the decision. *Id.*

That puts this Court in an awkward position. It must choose a panel opinion to follow. The question is which.

The law of the case doctrine provides the answer. Under that doctrine, a decision on FSIA immunity made by a higher court "may be revisited [by the lower court] only if there is an intervening change in the law or if the previous decision was clearly erroneous and would work a manifest injustice." *Simon v. Republic of Hungary*, 443 F. Supp. 3d 88, 111 (D.D.C. 2020) (quoting *Kimberlin v. Quinlan*, 199 F.3d 496, 500 (D.C. Cir. 1999)) (internal quotation marks omitted)).[3] The exceptions do not apply here, so the Court must follow the panel opinion in this case. As discussed above, the D.C. Circuit has not changed the law because it has not followed its procedure for doing so. The previous decision was not clearly erroneous, nor would following it work a manifest injustice, both because it is binding under the law of the circuit doctrine and, if that were not enough, the interpretation appears correct on the merits. *See Stay Opinion*, 2020 WL 13611456 at *11-25.

Unless and until the Court receives a mandate from the D.C. Circuit stating otherwise, or the Circuit

[3] That means, for example, that a decision on immunity made prior to trial, but upset by the actual record developed later, need not be "calcif[ied]" by the law of the case doctrine. *Wye Oak Tech., Inc. v. Republic of Iraq*, 24 F.4th 686, 698-700 (D.C. Cir. 2022). But no new facts have emerged that undermine application of the expropriation jurisdiction exception here.

overrules the *Chabad II* panel opinion through its procedures for doing so, this Court will continue to assert subject-matter jurisdiction in accordance with the 2008 mandate issued by the Circuit. In short, of the panel opinions to choose from, the earliest one, directed at this Court for this very case, is most appropriate.

For those reasons, and the expansive explanation in its prior opinion, *id.*, the Court maintains subject-matter jurisdiction over Russia under the expropriation jurisdiction exception.

B. The "Relates To" Element of the Expropriation Attachment Exception is Satisfied

VEB and Tenex-USA next challenge whether the first element of the expropriation attachment exception applies here. VEB's Opp'n 3-8; Tenex-USA's Opp'n 14-17. As a reminder, that element requires that "the execution *relates to a judgment* establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law." 28 U.S.C. § 1610(a)(3) (emphasis added). The question then is whether the execution that Chabad seeks relates to a qualifying judgment. When it previously authorized discovery, this Court suggested why the answer to that question is yes. Motion to Quash Order 7. It now so holds for the purpose of Chabad's present motion.

Stepping back for a moment, it is important to recognize that nearly anytime a judgment creditor seeks to execute a judgment predicated on the expropriation jurisdiction exception, the creditor will also be able to satisfy this first element of the expropriation attachment exception. That is inevitable because the language of the expropriation attachment exception

closely mirrors the language of the expropriation jurisdiction exception. *Compare* 28 U.S.C. § 1605(a)(3) ("[I]n which rights in property taken in violation of international law are in issue."), *with* 28 U.S.C. § 1610(a)(3) ("[R]elates to a judgment establishing rights in property which has been taken in violation of international law."). It is difficult to imagine a situation where a plaintiff would be able to establish the applicability of the jurisdictional exception, and obtain a judgment based on that exception, but subsequently fail at the "relates to" portion of the attachment exception for that same judgment. Indeed, VEB and Tenex-USA do not point to any such case where that has occurred.[4]

This case does not break the mold. Here, the Court entered a default judgment in 2010 "clearly predicated on Chabad's rights to the stolen collection." Motion to Quash Order 7. Specifically, the Court concluded that "plaintiff has shown that rights in property are at issue" and "defendants expropriated both the Archive and Library from plaintiff in violation of international law." *Chabad III*, 729 F. Supp. 2d at 145-46. The result of those findings was "a judgment establishing rights in property which has been taken in violation of international law." *See* 28 U.S.C. § 1610(a)(3); Order Granting Pl.'s Mot. for Entry of Default Judgment.

Furthermore, the execution that Chabad seeks relates to that qualifying judgment. As the Court has previously explained, it "will read 'relates to' under its plain meaning." Motion to Quash Order 7. Generally, that phrase means "to connect (something) with

[4] Of course, a judgment creditor could still fail at the second requirement, identifying "property in the United States of a foreign state used for a commercial activity in the United States." 28 U.S.C. § 1610(a).

(something else)" "to be connected with (someone or something)" or "to be about (someone or something)." *Relate to*, Merriam-Webster Dictionary Online, https://www.merriam-webster.com/dictionary/relate%20to (last visited Jan. 20, 2023); *see also Relate*, Webster's Third New Int'l Dictionary 1916 (1965) (providing a similar definition). For the expropriation attachment exception to apply, executing on property to satisfy the monetary sanctions must be connected with, or otherwise about, the 2010 default judgment establishing Chabad' s rights in the collection.

The "relates to" requirement is plainly satisfied because the Court's sanctions order, and the associated interim judgments, are based entirely on the default judgment establishing Chabad's rights in the property. Specifically, the monetary sanctions were "calibrated to coerce compliance with the 2010 [default judgment]." *Sanctions Opinion*, 915 F. Supp. 2d at 154 (internal quotation marks omitted). The Court "issue[d] civil contempt sanctions against defendants in the amount of $50,000 per day," not for their own sake, but rather to compel "defendants [to] comply with this Court's [default judgment and order to return the property]." *Id.* at 154-55; Sanctions Order. Execution premised on the monetary sanctions is therefore directly connected with, and based on, the judgment establishing Chabad's rights in property taken in violation of international law. Accordingly, the sanctions judgments, calculating the total sanctions that have accrued by a given date thereby providing a specific sum to collect, "are clearly predicated on Chabad's rights to the stolen collection" and therefore satisfy the "relates to" element of the expropriation attachment exception. *See* Motion to Quash Order 7.

C. Section 1610(c)'s Notice Requirement Has Not Been Satisfied

Despite fending off the first two arguments against attachment, Chabad stumbles when faced with the FSIA's notice requirement for a judgment by default. The question here is novel: whether the sanctions judgments entered following the 2010 default judgment are themselves "judgment[s] by default" and therefore must be served in compliance with Sections 1608(e). The Court concludes that the answer is yes. Because the monetary sanctions Chabad seeks to enforce are based on judgments entered by default that have not been properly served on defendants, the Court is barred from ordering attachment and execution.

The relevant requirement states that "[n]o attachment or execution ... shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e)." 28 U.S.C. § 1610(c). Under the referenced Section 1608(e):

> No *judgment by default* shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. *A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.*

Id. § 1608(e) (emphases added). The "manner prescribed for service" is detailed in Section 1608(a) for foreign

states or political subdivisions and in Section 1608(b) for agencies or instrumentalities of a foreign state. *Chabad IV*, 798 F. Supp. 2d at 267-68.

This notice requirement is no mere technicality. Rather, it is an "important procedural protection[] for foreign states and their instrumentalities built into the FSIA." *Haim v. Islamic Republic of Iran*, 902 F. Supp. 2d 71, 74 (D.D.C. 2012). The notice portion was "designed [in part] to ... preserve foreign property interests by insisting upon prompt notification of any entry of judgment that might put such interests at risk." *Murphy v. Islamic Republic of Iran*, 778 F. Supp. 2d 70, 72 (D.D.C. 2011). In short, the requirement cannot be given short shrift.

When notice is mandated, service must be satisfied pursuant to the directives in Sections 1608(a) and Section 1608(b). For service on foreign states or political subdivisions, a plaintiff must strictly comply with the four methods of service listed in Section 1608(a). *Chabad IV*, 798 F. Supp. 2d at 267. Indeed, even "actual notice" is insufficient to bypass the requirement. *Barot v. Embassy of the Republic of Zambia*, 785 F.3d 26, 27 (D.C. Cir. 2015). For agencies or instrumentalities, "[S]ection 1608(b) may be satisfied by technically faulty service that gives adequate notice" and substantial compliance may be sufficient. *Chabad IV*, 798 F. Supp. 2d at 268-69 (quoting *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 153 (D.C. Cir. 1994)).

Because Chabad seeks to rely on the sanctions judgments to attach and execute on property, Tenex-USA argues that defendants must receive the notice required for judgments by default. Tenex-USA's Opp'n 12-14. Tenex-USA is correct only if (1) proper notice has not already been given by the 2010 default judgment; (2)

the sanctions judgments are indeed entries of judgment; and (3) the judgments were "any such default judgment," meaning "judgment[s] by default." After considering the text of the statute and the broader principles underlying notice in this context, the Court concludes that the notice requirement does apply and therefore the sanctions judgments must be served on defendants before attachment and execution premised on those judgments is ordered.

First, it is important to address why the previous notice for the 2010 default judgment, which was properly served, is not enough. *See* Chabad's Reply to Tenex-USA 9; *Chabad IV*, 798 F. Supp. 2d at 270. The answer is simple—defendants were served at that time with a judgment that said nothing about monetary sanctions, imposed no obligation on defendants to pay such sanctions, and granted Chabad no right to collect such sanctions. *See* Order Granting Pl.'s Mot. for Entry of Default Judgment. Indeed, when the Court first considered issuing sanctions in 2011, it noted that while "defendants ha[d] certainly received notice directing them to return the Library and Archive to plaintiff they ha[d] received no notice that failure to comply with that order may subject them to additional monetary penalties." *Chabad IV*, 798 F. Supp. 2d at 273 (internal citation omitted). It was a few years later that the Court adjudged and decreed that defendants were in civil contempt, ordered sanctions of $50,000 per day, and later still when the Court issued three interim judgments of accrued sanctions. Sanctions Order; Interim Judgment; Second Interim Judgment; Revised Interim Judgment. And it is the sanctions judgments, not the 2010 default judgment, that Chabad seeks to enforce. "A copy of any such default judgment" must be served under Section 1608(e) and therefore notice of the 2010 default

judgment cannot also provide notice for the later judgments.

Second, the sanctions judgments are plainly judgments within the standard definition. Black's Law Dictionary defines judgment as "[a] court's final determination of the rights and obligations of the parties." *Judgment*, Black's Law Dictionary (10th ed. 2014). The Court did exactly that when it ordered and adjudged that Chabad may recover from defendants each sum certain. The fact that Chabad seeks to act on those awards—representing final determinations of its right to monetary relief and defendants' corresponding final obligation to pay—makes the applicability of that definition even clearer.

Moreover, Chabad, when filing motions for interim sanctions judgments, and the Court, when granting them, understood the Court to have been entering judgment. The first interim sanctions judgment stated that the "Motion for an Interim Judgment of Accrued Sanctions ... is GRANTED" that "plaintiff requests the Court enter interim judgment in the amount of $43,700,000" and explained that "the Clerk of Court may, upon application of plaintiff, *enter an additional judgment* pursuant [to a schedule of amounts]." Interim Judgment (emphasis added). The next interim judgment was titled "Order and Judgment" and it stated that "the Court hereby: ORDERS AND AJUDGES that plaintiff recover from defendants, jointly and severally, an additional $78,300,300." Second Interim Judgment. The latest interim judgment, from this year, was titled "Revised Interim Judgment" and stated that "the Court hereby ... ORDERS AND ADJUDGES that Plaintiff recover from Defendants, jointly and severally, $178,800,000.00." Revised Interim Judgment.

This Court's understanding that entry of the accrued amount of sanctions against a defendant in the FSIA context is the entry of judgment comports with the actions of other courts, both inside and outside of this District. *See, e.g.*, *Sistem Muhendislik Insaat Sanayi Ve Ticaret, A.S. v. Kyrgyz Republic*, No. 12-cv-4502 (ALC), 2022 WL 5246422, at *1 (S.D.N.Y. Oct. 6, 2022) ("[Plaintiff] moved this court to enter a second interim judgment in the amount of total outstanding sanctions. ... [T]he Court [will] grant [plaintiffs] motion and enter a second interim judgment against Defendant in the amount of $8,560,000."); *Micula v. Gov't of Romania*, No. 17-cv-02332 (APM), 2021 WL 5178852, at *3 (D.D.C. Nov. 8, 2021) ("The court will enter a judgment in the amount of $1,500,000, representing approximately 50% of the accrued sanctions."), *motion for relief from judgment denied*, 2022 WL 18356669 (D.D.C. Dec. 22, 2022).

Finally, each sanctions judgment is also a 'judgment by default" and is accordingly "any such default judgment," therefore triggering the notice requirement. *See* 28 U.S.C. § 1608(e). That result flows from a plain reading of the statute and the overall principles of notice for default judgments under the FSIA.

First, the language "judgment by default" facially covers the sanctions judgments here. After all, defendants were undoubtably in default at the time of each judgment. The clerk's entry of default came in 2010 following the defendants' noisy withdrawal. *See* ECF No. 71-1; ECF No. 82. The order imposing monetary sanctions was after this entry. *Chabad IV*, 798 F. Supp. 2d at 274; *Sanctions Opinion*, 915 F. Supp. 2d at 149-51. And then each of the sanctions judgments were entered later, without the participation of defendants, who never reentered this lawsuit to defend themselves. Crucially,

not every imposition of monetary contempt sanctions occurs without such participation. *See, e.g.*, *Micula v. Gov't of Romania*, No. 17-cv-02332 (APM), 2020 WL 6822695, at *5 (D.D.C. Nov. 20, 2020) (involving participation by Romania in contesting the imposition of sanctions), *aff'd*, No. 20-7116, 2022 WL 2281645 (D.C. Cir. June 24, 2022). But, in this novel situation, where sanctions judgments came after entry of default, and without participation or defense by defendants, those judgments are naturally 'judgment[s] by default."

Second, the Court's plain reading is reinforced by the broader principles embedded in the notice requirement. Preservation of foreign property interests and notice of any threats thereto are the core value at the heart of the postjudgment notice requirement. *See Murphy*, 778 F. Supp. 2d at 72. It is why a plaintiff is directed to serve the relevant judgment by default in compliance with the onerous requirements of foreign service and why courts are directed to wait until a reasonable period of time has elapsed before allowing attachment and execution based on such a judgment. *See id.*

The last time that defendants were given statutorily required notice of a judgment by default under Section 1610(c), they were directed to return the Library and the Archive. Order Granting Pl.'s Mot. for Entry of Default Judgment; *see Chabad IV*, 798 F. Supp. 2d at 273. Today, Chabad has the right to more than $178 million and defendants have a final corresponding obligation to pay that sanctions debt. The 2010 default judgment "[gave] no notice that failure to comply with that order may subject them to additional monetary penalties." *Id.* The sanctions judgments threaten the absent defendants' property interests in a starkly different manner than the 2010 judgment ordering the

return of the Library and the Archive. The lack of notice as to those new final obligations reinforces this Court's conclusion that the FSIA's notice requirement applies.

Finally, Chabad's alternative contention that, even if notice is required, it was satisfied through regular mailing, is baseless. *See* Chabad's Reply to Tenex-USA 10. Chabad must strictly follow the requirements of Section 1608(a) for notice on a foreign state or political subdivision, and at least substantially comply with 1608(b) for Russian agencies or instrumentalities. *Chabad IV*, 798 F. Supp. 2d at 267-68. Therefore, mailings sent by Chabad itself, as well as Tenex-USA's use of commercial mail service to send documents to Russia during the recent appeal to the D.C. Circuit, *see* ECF No. 254-2, were definitionally not in compliance with Section 1608(a). For agencies or instrumentalities, Chabad would have to at least demonstrate substantial compliance with Section 1608(b) for the judgments that it seeks to rely on. *Chabad IV*, 798 F. Supp. 2d at 268-69. It has not presented such evidence.

Similarly, notice of the possibility of sanctions through the Court's original order to show cause served on defendants' former counsel, as well as evidence of actual notice on Russian representatives, cannot substitute for Chabad's notice obligations to serve the *judgments* in compliance with Section 1608. *Id.* at 274; *Sanctions Opinion*, 915 F. Supp. 2d at 150-51; *Barot*, 785 F.3d at 27.

* * *

In sum, because "judgment by default" naturally applies to these sanctions judgments, and given the broader principles embedded in the notice requirement, the Court concludes that the sanctions judgments must be served on defendants before attachment and

execution can be ordered. To conclude otherwise, allowing Chabad to rely on notice of a different judgment for a different kind of relief, would be to betray Section 1610(c)'s core premise. And the Court will not undermine the "important procedural protection[] for foreign states and their instrumentalities" in such a manner. *See Haim*, 902 F. Supp. 2d at 74.

The Court will therefore direct Chabad to serve each defendant in compliance with the manner prescribed for service in Section 1608. *See Chabad IV*, 798 F. Supp. 2d at 267-68; *Murphy*, 778 F. Supp. 2d at 72. After a reasonable period of time has elapsed—six weeks would be sufficient—Chabad may file its motion again. *See Chabad IV*, 798 F. Supp. 2d at 270 (citing *Ned Chartering & Trading, Inc. v. Republic of Pak.*, 130 F. Supp. 2d 64, 67 (D.D.C. 2001)). Indeed, Chabad suggests that a direction by this Court to provide defendants such notice can be done "without significant delay." Pl.'s Reply to Tenex-USA 11 n.3.

For now, then, the Court does not resolve whether Chabad has identified particular Russian property in the United States used for a commercial activity in the United States. And in the meantime, it is possible, however unlikely, that notice to defendants will spur a final reversal of Russia's shameful withholding of Chabad's treasured texts. It is feasible that Russia will now comply with this Court's decade-old order and Chabad will be reunited with what it has lost. If not, Russia's sanctions debt will keep accruing. And if Russia fails to act, Chabad will soon have the opportunity and authority to collect upon a renewed motion.

IV. CONCLUSION

For the above-stated reasons, Chabad's motion will be **DENIED WITHOUT PREJUDICE**. The Court will **DIRECT** Chabad to provide service on all defendants of the sanctions judgments. For purposes of completeness, the Court will also direct service of the sanctions order and accompanying opinion. A separate Order consistent with this Memorandum Opinion shall issue this date.

Signed on this 27th day of February, 2023.

[Signature]
ROYCE C. LAMBERTH
UNITED STATES
DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-7002
Consolidated with 07-7006

AGUDAS CHASIDEI CHABAD OF UNITED STATES,
Appellee/Cross-Appellant,

v.

RUSSIAN FEDERATION, RUSSIAN MINISTRY OF CULTURE AND MASS COMMUNICATION, RUSSIAN STATE LIBRARY, AND RUSSIAN STATE MILITARY ARCHIVE,
Appellants/Cross-Appellees.

Argued March 17, 2008
Decided June 13, 2008

Appeals from the United States District Court
for the District of Columbia
(No. 05cv01548)

* * *

Before: HENDERSON, *Circuit Judge*, and EDWARDS and WILLIAMS, *Senior Circuit Judges*.

Opinion for the Court filed by *Senior Circuit Judge* WILLIAMS.

Opinion concurring m the judgment filed by *Circuit Judge* HENDERSON.

WILLIAMS, *Senior Circuit Judge*: Agudas Chasidei Chabad of United States is a non-profit Jewish

organization incorporated in New York. It serves as the policy-making and umbrella organization for Chabad-Lubavitch—generally known as "Chabad"—a worldwide Chasidic spiritual movement, philosophy, and organization founded in Russia in the late 18th century. (Chabad's name is a Hebrew acronym standing for three kinds of intellectual faculties: *Chachmah*, *Binah*, and *Da'at*, meaning wisdom, comprehension, and knowledge.) In every generation since the organization's founding, it has been led by a Rebbe-a rabbi recognized by the community for exceptional spiritual qualities. Agudas Chasidei Chabad stakes claim to thousands of religious books, manuscripts, and documents (the "Collection") that were assembled by the Rebbes over the course of Chabad's history and comprise the textual basis for the group's core teachings and traditions. The religious and historical importance of the Collection to Chabad, which is extensively reviewed in the district court opinion, can hardly be overstated. See *Agudas Chasidei Chabad v. Russian Federation* ("District Court Decision"), 466 F. Supp. 2d 6, 10-14 (D.D.C. 2006). Agudas Chasidei Chabad says that the Collection was taken by the Soviet Union—or its successor, the Russian Federation—in violation of international law.

According to the plaintiff's allegations (as amplified in some cases by later submissions), Russia's Bolshevik government seized one portion of the Collection (known as the "Library") during the October Revolution of 1917, taking it from a private warehouse in Moscow, where the Fifth Rebbe had sent it for safekeeping as he fled the German forces invading Russia. Although the Soviet government initially acted with some hesitancy, by 1925 it appears to have finally rejected pleas for return of the Library by the Fifth Rebbe and the Sixth (who

succeeded the Fifth in 1920). The regime stored the materials at its Lenin Library, which later became the Russian State Library ("RSL," a term we use to include its predecessor).

After arresting the Sixth Rebbe for "counter revolutionary activities" (namely establishing Jewish schools), the Soviets beat him and sentenced him to death by firing squad, but then commuted the sentence to exile. The Sixth Rebbe resettled in Latvia in 1927 and became a citizen there, bringing with him another set of religious manuscripts and books known as the "Archive." In 1933 he moved to Poland, bringing the Archive along. On September 1, 1939, Nazi German forces invaded Poland, forcing the Rebbe to flee yet again. Nazi forces seized the Archive and transferred it to a Gestapo-controlled castle at Wölfelsdorf, a village about fourteen miles south of Glatz (now Klodzko) in Lower Silesia. Soviet military forces commandeered the Archive in September 1945, calling its contents "trophy documents" and carrying them away to Moscow. The Archive is now held by the Russian State Military Archive ("RSMA," again a term we use to include its predecessors).

With the assistance of the U.S. government, the Sixth Rebbe escaped Nazi Europe and came to New York, where Agudas Chasidei Chabad was incorporated in 1940. The plaintiff and its predecessor made various efforts to recover the Collection for nearly 70 years. It enjoyed brief successes regarding the Library in 1991-1992, amid a flurry of Soviet and then Russian judicial, executive, and legislative pronouncements, but various governmental actions ultimately thwarted the group's efforts to secure possession of the Library, actions that it describes as a further expropriation.

To regain possession of both the Library and the Archive, the plaintiff brought suit against the Russian Federation as well as its Ministry of Culture and Mass Communication, the RSL, and the RSMA (all collectively referred to as "Russia" except as needed to distinguish among them). Russia moved to dismiss the claims on grounds of foreign sovereign immunity, forum non conveniens, and the act of state doctrine. Before the district court,[1] Russia scored a partial victory; the court dismissed all claims as to the Library, finding for them no exception to Russia's sovereign immunity, but it denied Russia's motion as to the Archive. District Court Decision, 466 F. Supp. 2d at 31. Both sides appeal.

We affirm the district court's order in part and reverse it in part. First, on our reading of the expropriation exception of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1605(a)(3), plaintiffs must demonstrate certain jurisdictional prerequisites by a preponderance of the evidence before the case goes forward, whereas they can satisfy others simply by presenting substantial and non-frivolous claims. On this reading, we hold that Agudas Chasidei Chabad satisfied the FSIA's jurisdictional requirements as to both the Library and the Archive. Second, we conclude that the district court did not abuse its discretion in rejecting the application of forum non conveniens. Finally, we affirm the district court's rejection of Russia's motion to dismiss as to the Archive on act of state grounds, and we vacate its apparent ruling that the act of state doctrine operates as an

[1] The plaintiff initially filed suit in the Central District of California, but that court, in response to a Russian motion for change of venue, ordered the case transferred to the district court here.

alternative ground for dismissal of Chabad's claims as to the Library.

I. FSIA: Immunity and Jurisdiction

The district court held that Russia was immune under the FSIA with respect to the Library claims, but not with respect to the Archive. 466 F. Supp. 2d at 31. Agudas Chasidei Chabad's appeal as to the Library is properly before us because the district court entered final judgment as to those claims under Fed. R. Civ. P. 54(b), expressly determining that there is "no just reason for delay" of appellate review. Under the collateral order doctrine, we also have jurisdiction over Russia's appeal of the district court's assertion of jurisdiction over the Archive claim. *See Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1126 (D.C. Cir. 2004).

A. Background and General Principles

Section 1330(a) of Title 28 gives the district courts subject matter jurisdiction over cases against foreign states "as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title [parts of the FSIA] or under any applicable international agreement." In its suit against Russia, Agudas Chasidei Chabad argues that the FSIA's expropriation exception, § 1605(a)(3), precludes the defendants' immunity. It states in relevant part:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States many case—
>
> … .
>
> (3) in which [A] rights in property taken in violation of international law are in issue and

> [B][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).

The provision appears to rest jurisdiction in part on the character of a plaintiff's claim (designated "A") and in part on the existence of one or the other of two possible "commercial activity" nexi between the United States and the defendants (designated "B"). Before exploring the statute's particular requirements, we pause to note the standards by which courts are to resolve questions of federal jurisdiction.

First, to the extent that jurisdiction depends on particular factual propositions (at least those *independent* of the merits), the plaintiff must, on a challenge by the defendant, present adequate supporting evidence. Thus, a plaintiff must establish the facts of diversity for purposes of jurisdiction under 28 U.S.C. § 1332. *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178 (1936). For purely factual matters under the FSIA, however, this is only a burden of production; the burden of persuasion rests with the foreign sovereign claiming immunity, which must establish the absence of the factual basis by a preponderance of the evidence. See, e.g., *Aquamar S.A. v. Del Monte Fresh Produce NA., Inc.* 179 F.3d 1279, 1290 (11th Cir. 1999); *Cargill Int'l v. MIT Pavel Dybenko*, 991 F.2d 1012, 1016

(2d Cir. 1993); *Alberti v. Empresa Nicaraguense de la Carne*, 705 F.2d 250, 255-56 (7th Cir. 1983).

Second, to the extent that jurisdiction depends on the plaintiff's asserting a particular type of claim,[2] and it has made such a claim, there typically is jurisdiction unless the claim is "immaterial and made solely for the purpose of obtaining jurisdiction or … wholly insubstantial and frivolous," i.e., the general test for federal-question jurisdiction under *Bell v. Hood*, 327 U.S. 678, 682-83 (1946), and *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 513 & n.10 (2006). (Other circuit courts have applied this same standard when jurisdiction depends on factual propositions intertwined with the merits of the claim, but we need not express any opinion on this point. See *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1040 (9th Cir. 2004); cf. *Morrison v. Amway Corp.*, 323 F.3d 920, 925 (11th Cir. 2003) (finding no need for the independent ascertainment, for jurisdictional purposes, of merits-intertwined facts).) The *Bell v. Hood* standard to be applied is obviously far less demanding than what would be required for the plaintiff's case to survive a summary judgment motion under Fed. R. Civ. P. 56. Thus, for example, in *Clark v. Tarrant County*, 798 F.2d 736 (5th Cir. 1986), the court upheld jurisdiction on a finding that the plaintiffs' position on the disputed element of their claim "cannot be said [to be] wholly frivolous," *id.* at 742, saying expressly that it did "not intimate whether" the plaintiffs in fact established the necessary element, *id.* at 743. See generally Harry T. Edwards & Linda A. Elliott, Federal Standards of Review ch. III.A (2007).

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[2] We do not understand our concurring colleague's gerrymandering of this phrase to suggest that it refers to jurisdictional facts. See Henderson Op. at 2.

Section 1605(a)(3) presents both types of jurisdictional questions. The alternative "commercial activity" requirements ("B") are purely factual predicates independent of the plaintiff's claim, and must (unless waived—see below) be resolved in the plaintiff's favor before the suit can proceed. The remainder ("A") does not involve jurisdictional facts, but rather concerns what the plaintiff has put "in issue," effectively requiring that the plaintiff assert a certain type of claim: that the defendant (or its predecessor) has taken the plaintiff's rights in property (or those of its predecessor in title) in violation of international law.[3] It is undisputed that Agudas Chasidei Chabad has made such claims as to both parts of the Collection. The defendants assert various legal and factual inadequacies in the claims. It is rather unclear what standard the district court applied to those contentions, but *Bell* requires only that such potential inadequacies do not render the claims "wholly insubstantial" or "frivolous." See 327 U.S. at 682-83. As we shall show below, the claims plainly survive that test.

Russia has seemed to draw a distinction between the "rights in property" element of the plaintiff's claim and the "taken in violation of international law" element. In a motion to dismiss Russia conceded that "[h]ere, for the purposes of this motion only, the first prong [of the expropriation exception] (rights in property at issue) is not disputed, inasmuch as Plaintiff's claims of right to the Library and the Archive are placed in issue by Plaintiff's complaint." Def. Mot. Dismiss 10. The motion

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[3] The District Court stated that under § 1605(a)(3) a plaintiff can put property "in issue" without making any claim of its own to rights in the property. 466 F. Supp. 2d at 21-22. This is incorrect; and, in any case, a plaintiff relying on § 1605(a)(3) would have an independent obligation to assert a basis for its own standing.

then stated, "Obviously, the Defendants vigorously deny that Plaintiff has any right of ownership or possession of either the Library or the Archive." *Id.* at 10 n.7. On that issue, therefore, Russia recognized that Agudas Chasidei Chabad's burden was only to put its rights in property in issue in a non-frivolous way. Where a plaintiff has failed to do so, such as by making concessions logically inconsistent with a substantial claim to "'rights in property' of which he was deprived in derogation of international law," a court will not find jurisdiction. *Peterson v. Kingdom of Saudi Arabia*, 416 F.3d 83, 88 (D.C. Cir. 2005).

When it came to whether rights had been "taken in violation of international law," however, Russia vigorously disputed the matter, seeming to regard this element as a jurisdictional fact that—like "commercial activity"—must be resolved definitively before the court could proceed to the merits. On the contrary, for jurisdiction, non-frivolous contentions suffice under *Bell*. Thus in *West v. Multibanco Comermex, S.A.*, 807 F.2d 820 (9th Cir. 1987), the Ninth Circuit found jurisdiction proper under§ 1605(a)(3) when the plaintiff's claim of conversion was "substantial and non-frivolous" and "provide[d] a sufficient basis for the exercise of our jurisdiction, even though we ultimately rule against the plaintiffs on the merits"; indeed, the court found on the merits that the defendant's acts were not actually "takings in violation of international law." *Id.* at 826, 831-33; see also *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 712-13 (9th Cir. 1992) (finding "no difficulty [in] concluding that the ... complaint contains 'substantial and non-frivolous' allegations that [the disputed property] was taken in violation of international law," subject to further fact finding on remand).

B. Specific Application

We address first the "rights in property" element of the plaintiff's claim, then the "taken in violation of international law" element, and then the commercial activity nexus. Finally, we address Russia's related argument that the plaintiff failed to exhaust its remedies in Russia before proceeding in the United States.

1. *Agudas Chasidei Chabad's property rights.* The plaintiff maintains that the international Chabad organization held a property interest in the Collection as it accumulated, with a succession of Rebbes acting as custodians for the benefit of Chabad and its followers, and that on incorporation it automatically became vested under New York law with the property rights of its predecessor entity. See N.Y. Relig. Corp. Law § 4. As mentioned, Russia initially conceded that "[h]ere, for purposes of this motion only, the first prong [of the expropriation exception] (rights in property at issue) is not disputed, inasmuch as Plaintiff's claims of right to the Library and the Archive are placed in issue by Plaintiff's complaint." Def. Mot. Dismiss 10. Before us, however, in its reply brief, Russia claims that it somehow rendered its waiver operative.[4]

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[4] An FSIA defendant's waiver of immunity is effective to meet the FSIA's jurisdictional requirements because Congress, in deploying the FSIA to implement Article Ill's grant of subject matter jurisdiction over suits between citizens of a state and foreign states, limited that jurisdiction to cases in which a foreign state (or its agency or instrumentality) is not immune under the FSIA. Those immunities are entirely personal, as is shown by Congress's specification in § 1605(a)(l) that there is no immunity in any case in which the foreign state has waived immunity. See generally Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 Harv. L. Rev. 1559 (2002).

Whether it did so or not is of no moment, however, as the concession was obviously correct; the plaintiff's complaint indeed put in issue its property rights, if any, in the Collection. Russia's sole basis for attacking the plaintiff's assertion of property rights rests on a notion that the Collection's ownership has been conclusively resolved against Agudas Chasidei Chabad in a prior litigation: *Agudas Chasidei Chabad of United States v. Gourary*, 650 F. Supp. 1463 (E.D.N.Y 1987), *aff'd*, 833 F.2d 431 (2d Cir. 1987). As Russia was not a party to that litigation, any preclusive effect could only take the form of non-mutual collateral estoppel. And while the effectiveness of such an estoppel argument to render a claim "frivolous" is unclear, in any event the *Gourary* judgment affords Russia no basis for precluding the plaintiff here.

In *Gourary*, Agudas Chasidei Chabad sued the Sixth Rebbe's heirs over the ownership of certain religious books and manuscripts that the Sixth Rebbe possessed in New York at the time of his death (obviously *not* the Library or the Archive, which were in Russia). The plaintiff claimed that the Rebbe held them on behalf of the Chabad community and that they therefore belonged to Agudas Chasidei Chabad; the Rebbe's heirs claimed them to be his personally and therefore part of his estate. The books and papers at issue were ones collected after 1925 that had made their way from Poland to America during World War II and thereafter.

The reasons not to apply non-mutual collateral estoppel here seem to be legion, but let us simply address one fatal problem. Issue preclusion can be applied only as to an issue resolved against the party sought to be estopped and necessary to the judgment. *Consol. Edison Co. of NY v. Bodman*, 449 F.3d 1254, 1258 (D.C. Cir. 2006) (citing Restatement (Second) of

Judgments § 27). In *Gourary*, Agudas Chasidei Chabad had pressed two alternative theories. The broad one was that it (or its predecessor) had owned the materials from the start of the collection, the successive Rebbes acting at all times on behalf of the religious community. The narrow one was that the Sixth Rebbe had owned them and then subsequently transferred them to Agudas Chasidei Chabad. In ruling *in favor of* Agudas Chasidei Chabad, the *Gourary* court appeared to rely on the narrow theory, 650 F. Supp. at 1474 & n.9, 1476, but to the extent that it rejected the broad theory, that rejection was completely unnecessary to the court's unqualified judgment in Agudas Chasidei Chabad's favor.

At oral argument Russia tried to save its theory by a claim that the *Gourary* court decided in part against Agudas Chasidei Chabad, because on the narrow theory Agudas Chasidei Chabad would be holding the documents for the benefit of the worldwide religious community, of which the Sixth Rebbe's heirs were members. Tr. of Oral Arg. at 12-13. Even assuming *arguendo* that some difference in community members' rights might tum on whether the community's ownership rested on one historical theory as opposed to another, the Rebbe's heirs were not seeking access to the materials as members of the community; they were seeking outright ownership. They lost. Completely.

2. *A taking in violation of international law.* Under this prong, Russia challenges both Agudas Chasidei Chabad's Library claims—the taking in 1917-1925 and the taking (or retaking) in 1991-1992. (It does not challenge the district court's holding on the Archive claim under this prong except with respect to exhaustion, as discussed below.) As to the Library's taking in 1917-1925, Russia's sole challenge rests on its

contention that at the relevant times, the Library and the Archive were the personal property of the Fifth or the Sixth Rebbe (who were Soviet citizens in the 1917-1925 period), not of Chabad, so that any taking by the Soviet government could not have violated international law. But again Russia rests entirely on its proposed misapplication of the *Gourary* case, and thus fails to show the plaintiff's claim to be insubstantial or frivolous. (Apparently relying only on *Gourary*, the district court adopted Russia's view as to the ownership of the Library and its proposed conclusion as to the absence of any violation of international law. But the plaintiff's contention is that the worldwide Chabad organization, not any Soviet citizen, owned the Library, creating at least a substantial and non-frivolous claim of a taking in violation of international law. Cf. *De Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1396-97 & n.17 (5th Cir. 1985); Restatement (Third) of the Foreign Relations Law of the United States § 712 (1987).)

This leaves the alleged taking of the Library in 1991-1992. To the extent that Russia again relies on *Gourary*, its reliance is no better grounded than before. But here the defendants have a stronger theory, namely that the events of 1991-1992 were not a taking at all. In view of the plaintiff's contention that the Library had been taken in 1917-1925, this obviously has some traction. We emphasize yet again, however, that the jurisdictional question is only whether the plaintiff's claim is wholly insubstantial or frivolous. It is not.

To simplify matters, we look first at Agudas Chasidei Chabad's theory. It casts the events of 1991-1992 as a "renewal" of the earlier illegal takings. Chabad Br. 41. The facts of *Altmann v. Republic of Austria*, 142 F. Supp. 2d 1187, 1203 (C.D. Cal. 2001), *aff'd*, 317 F.3d 954, 968 n.4 (9th Cir. 2002), *aff'd* 541 U.S. 677 (2004),

provide a possible template. There a plaintiffs predecessors in title *recovered* Klimt paintings that the Nazis had seized, but then, in exchange for export licenses, "donated" them to a government art gallery. They claimed that the forced donation was a taking. Here, Agudas Chasidei Chabad never recovered *possession* of the Library, but we should think that a final court decree in its favor, subject to no *lawful* appeal, might be considered a recovery, such that government frustration of the decree's enforcement could qualify as a renewal of the earlier taking. In this country, certainly, if a property owner secured a judgment invalidating a prior taking, affirmed by the highest court having jurisdiction, we would likely see executive officials' later assertion of ownership, and their frustration of the owner's efforts at physical recovery, as very much like a retaking of the property.

The procedural history surrounding the Library, however, is far more complex. In 1990, as *perestroika* unfolded, the Seventh Rebbe dispatched a delegation to the Soviet Union to undertake further efforts to obtain the Library. Various institutions, first of the Soviet Union and then of the Russian Federation, proceeded to issue a welter of confusing orders and decrees. On September 6, 1991 Alexander Yakovlev, a special adviser to General Secretary Mikhail Gorbachev, assured the Chabad delegation that Gorbachev would that day issue an order to the RSL to return the Library to Chabad. The delegation followed this up with a petition to a Soviet court, the State Arbitration Tribunal, to direct the RSL to return the Library. That court issued such a direction on October 8, 1991, giving the RSL one month to comply and placing a lien on the Library. State Arbitration Tribunal, Russian Socialist Federative Soviet Republic, Case #350/13 (Oct. 8, 1991).

The court also found that the Library was "the communal property of the entire Agudas Chasidei Chabad movement" and that the Soviet government had failed to prove that the Library "acquir[ed] a status of National property." *Id.*; see also District Court Decision, 466 F. Supp. 2d at 13.

On November 18, 1991, the Chief State Arbiter affirmed in part and reversed in part. Chief State Arbiter, State Arbitration Court of the Russian Soviet Federative Socialist Republic, Decree Regarding Reconsideration of Ruling, No. 350/13H (Nov. 18. 1991) ("11/18/91 Decree"). He stated that "the Arbitration Court is not obligated to consider the matter of legal ownership of the ... Library by either the Community or the State (represented by [the RSL]), since evidence on file in this case does not contain any basis upon which assumption can be made that the aforementioned collection belongs to anyone *other than* the Lubavitcher Rebbe." *Id.* The district court characterized this as a finding that "the Rebbe, *rather than Chabad*, was the rightful owner of the Library," 466 F. Supp. 2d at 18 (emphasis added), and thus as a rejection of the lower tribunal's conclusion that the Library was the "communal property of the entire Agudas Chasidei Chabad movement." That characterization is questionable, however.

The higher court's *action* was to grant the Chabad community precisely the relief it sought. After noting that the "Community [had] appealed to the State Arbitration Court, requesting that the … Library be transferred to the newly established Jewish National Library," 11/18/91 Decree at 4, the Chief State Arbiter ordered the transfer of the Library—starting the day of the decision's issuance—to precisely that institution. *Id.* The Jewish National Library was Chabad's co-petitioner

in the lawsuit, and the plaintiff's expert, Professor Veronika R. Irina-Kogan, declared under oath that the Jewish National Library participated in the suit "on behalf of the Chabad Community." Declaration of Veronika R. Irina-Kogan ¶ 11.

Thus there appears a substantial and non-frivolous factual basis for the view that the November 18, 1991 decision of the Chief State Arbiter represented a legal recovery of the property by Agudas Chasidei Chabad, possibly subject to limitations on its removal from Russia. See 11/18/91 Decree at 3 (stating that the materials were "part of Russia's national treasure").

But the delegation's efforts to have the order carried out were frustrated—a frustration that arguably constituted a new taking. According to a declaration submitted by the plaintiff, RSL staff members responded to their efforts to take possession by taunting them with anti-Semitic slurs and threats of violence. "[A]pproximately 30 baton-wielding" RSL police officers allegedly attacked the delegation and its supporters. Declaration of Rabbi Boruch Shlomo Eliyahu Cunin ¶ 10.

In December 1991 the Soviet Union dissolved, to be replaced by various successor states, including the Russian Federation. On January 29, 1992, Deputy Chairman of the Russian Federation Aleksandr Shokhin ordered the RSL to relinquish the Library. The executive order stated that the Russian government "accept[s] a request from officials of the movement of Lubavich Chassids (Agudas Chasidei Chabad) for the delivery of [Library] holdings available to the [RSL] to the [Maimonides] State Jewish Academy," which houses the Jewish National Library. By directing the latter to duplicate the documents and deliver the copies to the

RSL "before the end of 1992," the order by implication required delivery of the originals *to* the Jewish National Library well before that date. Government of the Russian Federation Regulation No. 157-r (Jan. 29, 1992), Declaration of Tatiana K. Kovaleva, Ex. D. An affidavit submitted by the plaintiff characterizes the resolution as "ordering the RSL to return the Library to Chabad's representatives." Cunin Decl. ¶ 11. That reading appears plausible, given that the resolution is framed as the executive's "accept[ing]" a request from Agudas Chasidei Chabad officials.

Thus, while the November 11, 1991 Decree may have represented a *judicial* judgment transferring the Library into the hands of Chabad's allies, the Shokhin decree of January 1992 appears to have constituted parallel relief from the *executive* branch.

But this executive relief was no more easily realized than that provided by the Chief State Arbiter. The Chabad delegation approached the RSL, but the plaintiff reports that once again it was confronted by an anti-Semitic mob, which thwarted its efforts to secure the Library, this time incited by the director of the manuscript department at the RSL, who "shout[ed] death threats through a bullhorn." Cunin Decl. ¶ 11.

Further, Chabad's original success before State Arbitration Tribunal and the Chief State Arbiter encountered not only practical but also juridical frustration. On February 14, 1992, the Deputy Chief State Arbiter of the Russian Federation purported to reverse the prior court orders that had required that the RSL transfer the Library, and ordered that "all further action" in the case "cease." Agudas Chasidei Chabad's expert maintains that the deputy made the ruling "unilaterally and secretly" and says that the deputy

lacked authority under Russian law to nullify the order of the Chief State Arbiter, and that his ruling "lacked any legal or binding effect under Russian law." Irina-Kogan Decl. ¶¶ 12-14. Given the decider's title as "*Deputy* Chief State Arbiter," the assertion is hardly implausible.

Finally, a legislative action purported to reverse Shokhin's January 29, 1992 decree ordering transfer of the Library to Chabad's representative. On February 19, 1992, the Russian Federation's Supreme Soviet (despite its title, a body vested with legislative authority only between sessions of the Congress of Soviets, a/k/a Congress of People's Deputies) issued an order purporting to nullify that decree and stating that "the safety, movement and use of the holdings available to the Russian State Library [be effectuated] solely on the basis of the legislation of the Russian Federation and the provisions of international law." Supreme Soviet of the Russian Federation, Decree No. 2377-1 (Feb. 19, 1992). Agudas Chasidei Chabad's later attempts to secure the return of the Library have all failed.

To the extent that Shokhin's decree or the Chief State Arbiter's order effected a recovery of the Library (within the meaning of *Altmann*), the actions of the Deputy Chief State Arbiter and the Supreme Soviet, coupled with RSL action on the ground, would appear to have effected a retaking. To return to our earlier variation on the facts of *Altmann*: if the victim of a property seizure secured a judgment from the highest available judicial authority that papers seized by the government should be turned over to its ally, and a *lower* court then abruptly "reversed" that decision, authorizing the government to keep the papers, we would have little difficulty viewing the latter order as a purported retaking of the property. It would enhance

the retaking case if high executive officials issued orders paralleling those of the highest court, followed by countermanding legislative action and accompanied by government officials' physical action. We cannot say that the analogy is perfect. Here, the lines of authority among the various judicial, executive, and legislative bodies appear to defy comprehension by outsiders (indeed, they may be inconsistent with the concept of lines of authority altogether). But neither can we declare insubstantial or frivolous the plaintiff's claim that the 1991-1992 actions of Russia and the Russian State Library constituted a retaking of the property; thus we reverse the district court's decision on the point.

3. *Commercial activity.* Contrary to Russia's claims, we find that both the RSMA and the RSL engaged in sufficient commercial activity in the United States to satisfy that element of 28 U.S.C. § 1605(a)(3). (The district court so found for the RSMA, but did not reach the issue as to the RSL because, focusing exclusively on the events of 1991-1992, it concluded that the plaintiff had failed to show a taking of the Library in violation of international law. 466 F. Supp. 2d at 23, 24 & n.22.)

The argument over the RSL's and RSMA's commercial activities rests on the relationship between the two clauses specifying alternative commercial activity requirements, which bear repeating here:

> (3) in which [A] rights in property taken in violation of international law are in issue and [B] [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 … .

§ 1605(a)(3) (emphasis added).

Section 1603(d) offers a rather broad definition of commercial activity for purposes of the FSIA:

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

§ 1603(d). The phrase "commercial activity *carried on* in the United States," by contrast, is defined as "commercial activity carried on by such state and having substantial contact with the United States." § 1603(e) (emphasis added).

In the face of § 1603(d)'s hospitable language, Russia offers a rather subtle argument for a more demanding test. It suggests that since the first nexus clause in § 1605(a)(3) requires that the property be present in the United States in connection with a commercial activity carried on in the United States, it would be quite anomalous if the second clause, requiring neither physical presence in the United States nor such a link (between property physically present and the commercial activity), could be satisfied unless the level of commercial activity was at least "a level of activity equal to the standard established by the phrase 'carried on' of the first prong and, accordingly, require

'substantial contact' with the United States." Russia Br. 42.

To support this conclusion Russia stresses the language in § 1603(e) quoted above, which requires that for commercial activity to qualify as "*carried on* in the United States" it must have "*substantial contact* with the United States." Then, noting that among Webster's Third International's examples of "engaged" is to "begin and carry on an enterprise," Russia sprints to the conclusion that "engage in" in the second prong must mean "carry on"; thus, abracadabra, the second prong includes the first prong's cross-referenced substantiality requirement.

We need not decide whether Agudas Chasidei Chabad can satisfy this more demanding standard, for Russia's argument plainly cannot work. Congress took the trouble to use different verbs in the separate prongs, and to define the phrase in the first prong. Russia wants us to tum that upside down and obliterate the distinction Congress drew. Moreover, we see no anomaly in applying the "commercial activity" definition set forth in § 1603(d). While the first clause of § 1605(a)(3) and the definition in § 1603(e) are quite demanding in some respects, the clause applies to activities "carried on *by the foreign state*," whereas the second clause involves the commercial activities of the foreign state's agencies and instrumentalities. Congress might well have thought such entities' greater detachment from the state itself justified application of§ 1603(d)'s broad definition. (Russia concedes that both the RSL and the RSMA are "agencies or instrumentalities" of the Russian Federation for this purpose. Russia Reply Br. 38 n.8.) The substantiality requirement of § 1603(e) is thus inapplicable.

Section 1603(d)'s first sentence seems to set a low quantitative threshold and its second sentence a low qualitative one. As the Court said in *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992), the qualitative criterion asks "whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in 'trade and traffic or commerce,'" for "when a foreign government acts ... in the manner of a private player within [a market], the foreign sovereign's actions are 'commercial' within the meaning of the FSIA." *Id.* at 614. Thus "a foreign government's issuance of regulations limiting foreign currency exchange is a sovereign activity, because such authoritative control of commerce cannot be exercised by a private party." *Id.*

Both the RSMA and the RSL have entered transactions for joint publishing and sales in the United States easily satisfying these standards. At the time of the filing of the suit in November 2004, the RSMA had entered contracts with two American corporations for the reproduction and worldwide sale of RSMA materials, including in the United States. District Court Decision, 466 F. Supp. 2d at 21. One set of contracts was with Primary Source Media and allowed the American firm to publish, among other items, papers of Leon Trotsky and other documents relating to the Russian Civil War. The contracts include provisions waiving sovereign immunity, specifying that the activities described in the contract are "commercial in nature." Agreement on the Granting of Rights to Publish Archival Documents art. 14. By the year 2000 the RSMA had received $60,000 in advance royalties. See Declaration of Joseph Bucci ¶ 8; see also Royalty Advance Statements, Primary Source Microfilm.

Another contract with Yale University Press provides for the "joint preparation and publication of a volume of documents entitled *The Spanish Civil War*" and garnered RSMA a $10,000 royalty advance in the year of the contract.

The RSL has also contracted for cooperative commercial activities in the United States. For example, it entered into agreements with Norman Ross Publishing (later succeeded by ProQuest), arranging for that firm to sell an encyclopedia and to produce and distribute "microcopies" of various RSL materials (in exchange for a 10% royalty payment to the RSL). One such contract has already yielded RSL over $20,000 and another over $5000.

Thus § 1605(a)(3)'s second alternative commercial activity requirement is plainly satisfied.

4. *Exhaustion.* Russia contends that Agudas Chasidei Chabad's "taking claim as to the Archive must [] fail for the reason that Chabad has failed to pursue and exhaust remedies it has in the Russian Federation to recover the Archive." Russia Br. 34. (No such claim is made as to the Library, presumably in view of Agudas Chasidei Chabad's heroic—but ultimately frustrated—legal efforts with respect to those materials.) The district court held that Agudas Chasidei Chabad was not required to exhaust Russian remedies before litigating in the United States. 466 F. Supp. 2d at 21. We believe this is likely correct, but that in any event the remedy Russia identifies is plainly inadequate.

As a preliminary matter, nothing in § 1605(a)(3) suggests that plaintiff must exhaust foreign remedies before bringing suit in the United States. Indeed, the FSIA previously contained one exception with a local exhaustion requirement, § 1605(a)(7), which for certain

suits required that the foreign state be granted "a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration." Congress repealed that exception this year. See National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, div. A, § 1083(b)(1)(A)(iii), 122 Stat. 3, 341 (2008) (repealing 28 U.S.C. § 1605(a)(7)). Obviously before deletion of subsection (7) it would have been quite plausible to apply the standard notion that Congress's inclusion of a provision in one section strengthens the inference that its omission from a closely related section must have been intentional, see *United Mine Workers v. Mine Safety & Health Admin.*, 823 F.2d 608, 618 (D.C. Cir. 1987); we do not see that the inference is any weaker just because Congress has, for independent reasons, removed the entire exhaustion-requiring provision.

Russia invokes *Restatement (Third) of Foreign Relations Law of the United States*, which notes:

> *Exhaustion of remedies.* Under international law, ordinarily a state is not required to consider a claim by another state for an injury to its national until that person has exhausted domestic remedies, unless such remedies are clearly sham or inadequate, or their application is unreasonably prolonged.

Restatement § 713, cmt. *f*.

But this provision addresses claims of one state against another. Its logic appears to be that before a country moves to a procedure as full of potential tension as nation vs. nation litigation, the person on whose behalf the plaintiff country seeks relief should first attempt to resolve his dispute in the domestic courts of the putative defendant country (if they provide an adequate remedy).

But § 1605(a)(3) involves a suit that necessarily pits an individual of one state against another state, in a court that by definition cannot be in *both* the interested states. Here there is no apparent reason for systematically preferring the courts of the defendant state.

Russia advances a more compelling theory based upon Justice Breyer's concurrence in *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), which noted that a plaintiff seeking relief under § 1605(a)(3) "may have to show an absence of remedies in the foreign country sufficient to compensate for any taking" and that a "plaintiff who chooses to litigate in this country in disregard of the postdeprivation remedies in the 'expropriating' state may have trouble showing a 'tak[ing] in violation of international law.'" *Id.* at 714 (alteration in original). Thus Justice Breyer draws on a substantive constitutional theory—that there simply is no unlawful taking if a state's courts provide adequate postdeprivation remedies. *Id.* (citing *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 721 (1999), and alluding to cases applying that doctrine).

The substantive theory would seem to moot the argument from the language of the FSIA and is independent of Restatement § 713. Nonetheless, one may question whether it makes sense to extend such a requirement from the domestic context, in which state courts are already bound by the U.S. Constitution, to the foreign context, in which the courts that a plaintiff would be required to try may observe no such limit.

Assuming that an exhaustion requirement exists, however, the only remedy Russia has identified is on its face inadequate. Russia points to a law entitled "Federal Law on Cultural Valuables Displaced to the U.S.S.R. as a Result of World War II and Located on the Territory

of the Russian Federation," Federal Law N 64-FZ of April 15, 1998 ("Valuables Law"), *available at* http://docproj.loyola.edu/rlaw/r2.html, particularly Articles 12 and 16. But, even assuming the other prerequisites of relief were met, Article 19(2) of the statute authorizes return of property only on the claimant's "payment of its value as well as reimbursement of the costs of its identification, expert examination, storage, restoration, and transfer (transportation, etc.)," without specifying rules for calculating value. Whatever the valuation method, and assuming *arguendo* that Russia's *payment* of compensation would satisfy the requirements of international law, obviously Russia's mere willingness to *sell* the plaintiff's property back to it could not remedy the alleged wrong.

II. Russia's Defenses of Forum Non Conveniens and Act of State

Russia moved to dismiss the claims as to the Library and Archive on grounds of forum non conveniens, which the district court denied. Russia also moved to dismiss on the act of state doctrine, which the district court denied as to the Archive but accepted as an alternative grounds for dismissal as to the Library. The parties appeal the judgments adverse to them. As above, we have jurisdiction over Agudas Chasidei Chabad's appeal because the district court entered final judgment on the Library claims under Fed. R. Civ. P. 54(b). Russia properly asserts pendent appellate jurisdiction as to the Archive under *Gilda Marx, Inc. v. Wildwood Exercise, Inc.*, 85 F.3d 675, 679-80 (D.C. Cir. 1996), which allows a court with jurisdiction over one appeal also to exercise jurisdiction over issues "inextricably intertwined" with those raised by that appeal. We (and the plaintiff) agree that there is such intertwining here.

A. Forum Non Conveniens

Russia claims that the district court abused its discretion in denying its motion to dismiss the claims to the Library and Archive on grounds of forum non conveniens. We disagree and uphold the district court's decision, which applies to the entire Collection.

In deciding forum non conveniens claims, a court must decide (1) whether an adequate alternative forum for the dispute is available and, if so, (2) whether a balancing of private and public interest factors strongly favors dismissal. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 n.22 (1981). There is a substantial presumption in favor of a plaintiff's choice of forum. See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947); *TMR Energy Ltd. v. State Property Fund of Ukraine*, 411 F.3d 296, 303 (D.C. Cir. 2005). We review the district court's determination to see if it was a "clear abuse of discretion." *TMR Energy Ltd.*, 411 F.3d at 303.

The district court found that Russia had failed to meet its burden of demonstrating the adequacy of the Russian forum. 466 F. Supp. 2d at 28; see also *El-Fadl v. Cent. Bank of Jordan*, 75 F.3d 668, 677 (D.C. Cir. 1996). Our conclusion above that Russia's Valuables Law did not provide an adequate remedy with reference to any hypothetical exhaustion requirement for the Archive might seem to compel automatic affirmance of the forum non conveniens ruling solely on that ground. But in this context a foreign forum "is not inadequate merely because it has less favorable substantive law," *El-Fadl*, 75 F.3d at 678, so that the adequacy issue would be more complicated. In any event, the district court went on to resolve the balance of conveniences in favor of the plaintiff, and we find no abuse of discretion in that

balance; we can affirm on that basis without addressing the adequacy of the Russian forum in this context.

We need not rehearse the factors considered. We do note two areas where Russia particularly finds fault with the district court's reasoning. First, it says that while the court relied on the plaintiff's agreement to pay the airfare and hotel expenses of Russian witnesses needed for depositions here, 466 F. Supp. 2d at 29, in fact that agreement related solely to the jurisdictional discovery process. Russia's reading of the stipulation appears correct, see Parties' Stipulation Extending Time to Respond to the Complaint, Setting a Briefing Schedule, and Providing for Expedited Discovery of Elderly Witnesses, Apr. 13, 2005, and the plaintiff does not answer the objection. But the district court in the preceding sentence referred to practical cooperation on other aspects of jurisdictional discovery, and, when mentioning the witness agreement, referred to it as contained in an "earlier stipulation," *id.*; thus the context of the court's reference suggests its full awareness of the agreement's limits. Accordingly, it seems reasonable to suppose that the court simply regarded the witness agreement as a fact portending similar cooperation in the future.

Second, Russia argues that the district court "will likely be unable to afford Chabad the relief it seeks, possession of the Archive (and the Library)." Russia Br. 53. The district court saw the argument as a contention that a Russian court would not heed an American court's judgment in the plaintiff's favor, and called it an "affront" to the court. 466 F. Supp. 2d at 29. Some district courts have treated a United States forum's inability to provide relief directly as an argument for granting a defendant's forum non conveniens motion, see *McDonald's Corp. v. Bukele*, 960 F. Supp. 1311, 1319

(N.D. Ill. 1997); *Fluoroware, Inc. v. Dainichi Shoji K.K.*, 999 F. Supp. 1265, 1271-73 (D. Minn. 1997), though one might have thought that was simply the plaintiffs problem. In any event, Agudas Chasidei Chabad points to the FSIA provisions that allow attachment of certain Russian government property in the United States, 28 U.S.C. § 1610(a)(3), (b)(2), evidently believing that attachment of such property would give it significant leverage over the defendants, enhancing the likelihood that Russia or its courts would respect the judgment of a U.S. court. Russia does not reply to the point, and it seems plausible.

In short, we find no abuse of discretion.

B. Act of State

Russia invokes the act of state doctrine, under which "the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964). The doctrine rests on a view that such judgments might hinder the conduct of foreign relations by the branches of government empowered to make and execute foreign policy. *Id.* at 423-25; see also *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp.*, 493 U.S. 400, 404-05 (1990). The burden of proving an act of state rests on the party asserting the defense. See *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 691 (1976).

1. *The Archive.* Russia invoked the act of state doctrine by a motion under Fed. R. Civ. P. 12(b)(6), as the defendant had in *W.S. Kirkpatrick*, a procedure that

would be correct if its absence is part of the plaintiff's case but wrong if it is a defense. In any event, the district court reviewed the parties' extensive factual presentations before it ruled that "that the act of state doctrine does not apply to the taking of the Archive." 466 F. Supp. 2d at 26. The district court did not expressly convert Russia's Rule 12(b)(6) motion into a motion for summary judgment, see Fed. R. Civ. P. 12(d), but because Russia initially raised the matter and the disposition was to deny its motion, it seems appropriate to treat the ruling as the denial of a Russian motion for summary judgment. We affirm the district court's order; Russia has failed to show that it was entitled to judgment as a matter of law.

The act of state doctrine applies only when a seizure occurs within the expropriator's sovereign territory. *Sabbatino*, 376 U.S. at 428; *Riggs Nat'l Corp. & Subsidiaries v. Comm'r*, 163 F.3d 1363, 1367 (D.C. Cir. 1999). As to the Archive, Russia's theory is that it seized the Archive in German territory occupied by the Soviet Union, and that such occupation would be sovereignty enough. We need not consider the substantive validity of that theory, however, because Russia fails to demonstrate that it seized the Archive in occupied Germany rather than in Poland.

Far from placing the factual issue beyond dispute, Russia merely asserts that there is uncertainty as to the exact location of the Russian seizure. But even that claimed uncertainty appears trivial to non-existent. Records of the RSMA submitted in the course of discovery state that the Archive was received by the RSMA in September 1945 at "Welfelsdorf," in

"Germany."[5] Russia does not deny that "Welfelsdorf" is at most a misspelling of Wölfelsdorf,[6] nor does it claim that the scribe's reference to "Germany" undermines the fact that by September 1945 Wölfelsdorf was part of Poland as defined by the Potsdam Protocol. Jointly issued on August 1, 1945 by the United States, United Kingdom, and Soviet Union, that Protocol announced a tentative western border for Poland at the Oder-Neisse line, a border which has never since been disturbed. It is undisputed that Wölfelsdorf lies within Poland, as so defined.

Russia points to two items of evidence that it claims raise doubt. First, it refers to a statement in the district court's recitation of facts to the effect that the Archive had been taken to a "Gestapo-controlled castle in Germany." 466 F. Supp. 2d at 13 (quoting Pl.'s Opp'n to Defs.' Mot. to Dismiss at 7). Given that Wölfelsdorf was part of pre-World-War-II Germany, the statement is altogether consistent with RSMA records showing that the Russian acquisition occurred in post-war Poland.

Second, Russia points to a letter from the plaintiff to President Vladimir Putin, stating that the Archive was "seized by the Nazis and subsequently loaded on boxcars as they were losing the war, to be taken deep into Germany and evade the oncoming Russian liberators." As with the contention that the Nazis removed the

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[5] See Joint Appendix 4:3086 (referring to a July 6, 2005 delivery of documents bearing Bates Nos. DEF00168-218); *id.* at 4:3099-3103 (listing origins of certain RSMA materials and bearing Bates numbers encompassed in the prior reference); *id.* at 3:2253, :2255, :2265-67 (deposition testimony of Vladimir N. Kouzelenkov, director of the RSMA, referring to RSMA's book listing incoming materials).

[6] In fact, the Russian "e" is in many contexts pronounced "yo," so it is far from clear that there is even a misspelling.

Archive to a "Gestapo-controlled castle in Germany," the statement is not inconsistent with its later capture by the Russians at Wölfelsdorf. Moreover, the letter precedes the delivery to Agudas Chasidei Chabad of documents showing the RSMA's receipt of the materials at Wölfelsdorf in September 1945.

In any event, the burden of providing a factual basis for acts of state rests on Russia, see *Riggs*, 163 F.3d at 1367 n.5, and it has not met its burden with respect to the Archive.

2. *The Library*. We have two taking scenarios regarding the Library: the events of 1917-1925 and those of 1991-1992. Having mistakenly found itself without jurisdiction over the Library claim (a mistake in which it focused entirely on the 1991-1992 events), the district court said in a throwaway line that "even were [the court] to have jurisdiction [over the Library claims], these claims would be barred by the act of state doctrine." 466 F. Supp. 2d at 27.

The district court seemed to suggest that the 1991-1992 claims were barred because they challenged the decision of the Deputy Chief State Arbiter and the decree of the Supreme Soviet. *Id.* at 26-27. But the Second Hickenlooper Amendment, 22 U.S.C. § 2370(e)(2), normally bars application of the act of state doctrine to seizures occurring after January 1, 1959. Thus the doctrine poses no apparent barrier to the plaintiff's claim that the 1991-1992 events effected an unlawful taking.

As to the district court's apparent ruling that the doctrine bars any recovery of the Library based on the 1917-1925 events, we vacate the district court's order. The plaintiff argues that *Sabbatino* itself would except the 1917-1925 seizure from the doctrine. As we shall

explain, the argument poses both sensitive foreign policy and jurisprudential issues. If on remand the court finds that the 1991-1992 actions of Russia and the RSL constituted an actionable retaking of the property, it will be unnecessary to resolve those issues, which in any event have not yet been the subject of either factual development or thorough briefing. While of course the court might (as a matter of insurance) resolve the plaintiff's claimed exception even if it accepts the latter's theory as to 1991-1992, and is free to address non-jurisdictional issues in any order it chooses, we refrain from any final ruling and discuss the complications of the claimed exception merely to highlight the questions that the parties must address.

As the district court recognized, the events of 1917-1925 all occurred within Russia, and thus were official acts of a sovereign nation regarding property within its borders. We could not grant the requested relief without invalidating those acts. See 466 F. Supp. 2d at 27; see also *W.S. Kirkpatrick*, 493 U.S. at 405.

Agudas Chasidei Chabad contends that the *Sabbatino* decision allows relaxation of the doctrine in response to certain countervailing factors. It points to the following passage:

> It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice. It is also evident that

> some aspects of international law touch much more sharply on national nerves than do others; the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches. The balance of relevant considerations may also be shifted if the government which perpetrated the challenged act of state is no longer in existence, ... for the political interest of this country may, as a result, be measurably altered. Therefore, rather than laying down or reaffirming an inflexible and all-encompassing rule in this case, we decide only that the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.

376 U.S. at 428. The passage mentions a number of factors that might militate against application of the doctrine here. Most significant are the phrase requiring that the taking have been by a "sovereign government, extant and recognized by this country at the time of suit," and the earlier sentence saying that the relevant considerations may shift when the perpetrating government is no longer in existence. These suggest that whatever flexibility *Sabbatino* preserves is at its apex where the taking government has been succeeded by a radically different regime.

Other circuits have on occasion declined to apply the doctrine, or have directed consideration of

countervailing factors, in reliance on a change in regime. Two decisions involve suits *by* the government of the Philippines against its former President Ferdinand Marcos, seeking to recover property acquired by him in office. *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1361 (9th Cir. 1988) (en banc) (declining to apply the act of state doctrine); *Republic of the Philippines v. Marcos*, 806 F.2d 344, 359 (2d Cir. 1986) (ordering the district court to weigh *Sabbatino's* qualifying considerations). In a third, *Bigio v. Coca-Cola Co.*, 239 F.3d 440 (2d Cir. 2000), the court found the doctrine inapplicable to a suit by former Egyptian nationals against a foreign corporation for its possession of property nationalized by the defunct Nasser government; the sole expression of the current Egyptian government on the matter was a letter from the Minister of Finance *directing* the holder of the property to return it to the plaintiffs. *Id.* at 452-53; cf. *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 130 (E.D.N.Y. 2000) (holding the doctrine inapplicable to claims against banks that had taken assets in the accounts of Jewish victims and survivors of the Holocaust under the laws of Vichy France).

Here, of course, Russia and its agencies or instrumentalities are the defendants, not private corporations or defenestrated rulers. Plaintiff has pointed to statements in its favor by Russian officials as high as former President Boris Yeltsin; but the current Russian government, by its energetic defense of this lawsuit, appears unwilling to relinquish the Collection to Chabad. Thus, while no one doubts that the collapse of the Soviet Union has entailed radical political and economic changes in the territory of what is now the Russian Federation, application of *Sabbatino*'s invitation to flexibility would here embroil the court in a

seemingly rather political evaluation of the character of the regime change itself—in comparison, for example, to de-Nazification and other aspects of Germany's postwar history. It is hard to imagine that we are qualified to make such judgments. Moreover, our plunging into the process would seem likely, at least in the absence of an authoritative lead from the political branches, to entail just the implications for foreign affairs that the doctrine is designed to avert.

Agudas Chasidei Chabad also points to *Sabbatino's* suggestion that "the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it." 376 U.S. at 428. It asserts that the seizure of the Library occurred "in a campaign to suppress the practice of Judaism, not for any *bona fide* economic, academic, or other recognized governmental purpose. Hence the takings were plainly violations of *jus cogens* norms, just as is racial discrimination, and no less the subject of 'consensus' condemnation in the international community." Chabad Br. 63.

The argument is intuitively appealing. But it would require us to embark on a path of ranking violations of international law on a spectrum, dispensing with the act of state doctrine for the vilest. Further, as the *Sabbatino* Court refused to countenance an exception for violations of international law simpliciter, *id.* at 429-31, we are unsure what it intended in its references to different degrees of "consensus." While it would be heartening to believe that there is a nearly universal consensus against religious prejudice in general or anti-Semitism in particular, a glance around the world exposes glaring examples to the contrary in areas containing a large fraction of the human population.

Not only are the purely legal questions posed by Agudas Chasidei Chabad's argument difficult, but there are factual issues that might bear on the ultimate outcome. Agudas Chasidei Chabad argues that the 1917-1925 confiscation was driven by hostility to Judaism, and it maintained at oral argument that discovery would yield further evidence. Indeed, it is widely recognized that the Soviet government suppressed Jewish religious practice and persecuted Jews for their religious beliefs. But to the extent that the Soviet Union had embarked on a course of eradicating private property, religion, and civil society generally, the role of *selective* persecution in the Library's seizure in 1917-1925 is unclear on the current record. (On the other hand, perhaps there is a stronger consensus against non-selective than selective crushing of private property and civil society.) Without suggesting that plaintiff's proposed exception is necessarily valid in any circumstances, we defer ultimate resolution and simply vacate the ruling.

* * *

We therefore affirm the judgment of the district court finding jurisdiction over Agudas Chasidei Chabad's claims concerning the Archive; we reverse its finding of Russia's immunity as to the Library claims based on the events of 1917-1925 and 1991-1992; we affirm the court's rejection of Russia's forum non conveniens defense; we affirm its rejection of Russia's act of state defense to the Archive claims; and we vacate its application of the act of state doctrine to the Library claims.

So ordered.

KAREN LECRAFT HENDERSON, *Circuit Judge*, concurring in the judgment:

Although I concur in the judgment, I do not agree with the analysis of the jurisdictional issue contained in Part I.A of the majority opinion. The majority analyzes section 1605(a)(3),[1] the provision of the FSIA that allows the plaintiff's claims to survive dismissal, by dividing the section into two parts that, in its view, impose different burdens on the plaintiff. The portion of section 1605(a)(3) involving "rights in property taken in violation of international law" (labeled "A" by the majority) requires only that the plaintiff "assert a certain type of claim: that the defendant … has taken the plaintiff's rights in property … in violation of international law," which claim—to suffice—must not be " 'wholly insubstantial' or 'frivolous.' " Maj. Op. 8 (citing *Bell v. Hood*, 327U.S. 678, 682-83 (1946)). On the other hand, the majority posits, the remainder of section 1605(a)(3) (labeled "B" by the majority) requires the plaintiff to "present adequate supporting evidence," which "[f]or purely factual matters under the FSIA … is

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[1] Section 1605(a)(3) provides:

> A foreign state shall not be immune from the jurisdiction of the courts of the United States or of the States in any case—…
>
> > (3) in which rights in property taken in violation of international law are in issue and …; [] that property or any property exchanged for such property is 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).

only a burden of production;" *id.* at 6.[2] The majority differentiates the burdens based on whether the jurisdictional facts track "the plaintiff's ... claim," *id.* at 7, that is, "A," or are instead "particular factual propositions ... *independent* of the merits[]," *id.* at 6 (emphasis in original), that is, "B."

While all of this may be only dicta—after all, we all agree the plaintiffs claims to both the Library and the Archive survive dismissal—our court has yet to recognize such a construct (as is manifested by the majority's reliance on other circuits' precedent, Maj. Op. 7-10)[3] and I do not join in its adoption today. *Any* jurisdictional fact, once challenged, may require the district court to satisfy itself of its jurisdiction. How it does so should not be the subject of an elaborate proof

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[2] "B" sets forth two alternatives of the "commercial activity" tie between the United States and the defendants also needed to establish jurisdiction, the second of which the plaintiff relies on. *See* note 1 *supra*.

[3] I reject the majority's reliance on *Bell v. Hood*, 327 U.S. 678, 682-83 (1946), and *Arbaugh v. Y &H Corp.*, 546 U.S. 500, 513 & n.10 (2006), insofar as it suggests the High Court has embraced any similar bifurcation of subject-matter jurisdiction in those cases. *See* Maj. Op. 7. The focus of the cited discussion in *Bell v. Hood* is on the difference between a dismissal for "want of jurisdiction"—a Rule 12(b)(1) dismissal—and a dismissal "on the merits"-a Rule 12(b)(6) dismissal. 327 U.S. at 683; *see also Land v. Dollar*, 330 U.S. 731, 735 n.4 (1947). Indeed, the "immaterial," "wholly insubstantial" and "frivolous" exceptions the majority opinion takes from *Bell v. Hood* as the template for "A" jurisdictional facts were themselves problematic to the Court. *Id.* ("The accuracy of calling these dismissals jurisdictional has been questioned."). As for *Arbaugh*, in concluding that Title VII's 15-employee "prerequisite" is non-jurisdictional, the Court differentiated between jurisdictional and *non*-jurisdictional facts, not two types of jurisdictional facts as the majority opinion maintains with its "A" and "B" split.

scheme imposed on appellate review. *See Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1131 (D.C. Cir. 2004) (district court "retains considerable latitude in devising the procedures it will follow to ferret out the facts pertinent to jurisdiction" (quotations omitted)); *cf Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527,537 (1995). In my view, the plaintiff survives a Rule 12(b)(1) dismissal because it alleges that (1) it owns the Library and the Archive, (2) both of which were taken by the defendants or their predecessors in office based on the latters' intent" 'to suppress the practice of Judaism, not for any *bona fide* economic, academic, or other recognized governmental purpose,'" Maj. Op. 35 (quoting Chabad Br. 63); and, further, (3) each defendant asserts ownership of either the Library or the Archive and they both engage in commercial activity in the United States. While all of these jurisdictional facts were traversed by the defendants, the district court correctly, and without distinguishing between those jurisdictional facts "*independent* of the merits" of the plaintiffs claim and those "intertwined with the merits of the claim," Maj. Op. 6-7 (emphasis in original), assured itself of their existence—with the exceptions of the ownership of the Library and defendant RSL's commercial activity in the U.S. *vel non*, jurisdictional facts that it either did not reach and/or we today reverse—primarily *via* both parties' submissions supporting/opposing dismissal. *Agudas Chasidei Chabad of United States v. Russian Federation*, 466 F. Supp. 2d 6, 24-25 (D.D.C. 2006). "There is no need or justification, then, for imposing an additional ... hurdle in the name of jurisdiction." *Grubart*, 513 U.S. at 538.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23-7036
Consolidated with 23-7037
1:05-cv-01548-RCL

AGUDAS CHASIDEI CHABAD OF UNITED STATES,
A NON-PROFIT RELIGIOUS CORPORATION,
Appellee,

v.

RUSSIAN FEDERATION, A FOREIGN STATE, ET AL.,
Appellees

TENEX-USA INCORPORATED,
Appellant

Filed September 23, 2024

BEFORE:
Srinivasan, Chief Judge; Henderson, Millett, Pillard, Wilkins, Katsas, Rao, Walker, Childs, Pan, and Garcia, Circuit Judges

ORDER

Upon consideration of appellee's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

BY:	**FOR THE COURT** Mark J. Langer, Clerk /s/ Daniel J. Reidy Deputy Clerk

APPENDIX E

RELEVANT STATUTORY PROVISIONS

28 U.S.C.A. § 1603(a), (b)

§ 1603. Definitions

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is 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, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

* * *

28 U.S.C.A. § 1605(a)

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

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

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the

United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

* * *