No. 24-909

IN THE

Supreme Court of the United States

AGUDAS CHASIDEI CHABAD OF UNITED STATES,

Petitioner,

v.

RUSSIAN FEDERATION, *ET AL.*,

Respondents.

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

BRIEF FOR MEMBERS OF THE UNITED STATES HOUSE OF REPRESENTATIVES AND SENATE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amici curiae are members of the United States Senate and United States House of Representatives. They have a fundamental, institutional interest in safeguarding Congress's legislative prerogative to extend or deny immunity to foreign sovereigns in particular situations and in ensuring that the Foreign Sovereign Immunities Act is faithfully applied by the courts in accordance with the statute's text and purpose. The names of individual *amici* are listed in the Appendix.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 1976, Congress enacted the Foreign Sovereign Immunities Act ("FSIA") to institute a comprehensive legal framework through which the Judicial Branch would make sovereign immunity decisions free from case-by-case political and diplomatic considerations. Before enactment of the FSIA, the Executive typically considered such factors in recommending sovereign immunity, creating confusion and inconsistency. See *Republic of Austria* v. *Altmann*, 541 U.S. 677, 690 (2004) (noting "disarray" of Executive-driven "immunity determinations" prior to FSIA); *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 493 (1983) (FSIA

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[1] No counsel for a party authored this brief in whole or in part, and no person other than *Amici*'s counsel made a monetary contribution to fund the preparation or submission of this brief. Counsel of record received timely notice of the intent to file this brief under Sup. Ct. R. 37.2.

"comprehensively regulat[es] the amenability of foreign nations to suit in the United States.").

Although the FSIA generally embodies the "restrictive theory" of sovereign immunity, under which a sovereign's immunity is recognized with respect to public acts but not commercial acts, "the expropriation exception is 'unique' in how it departs from the restrictive theory." *Republic of Hungary* v. *Simon*, 145 S. Ct. 480, 494 (2025). It "provides that the general principle of immunity for these otherwise public acts should give way." *Bolivarian Republic of Venezuela* v. *Helmerich & Payne Int'l Drilling Co.*, 581 U.S. 170, 182 (2017).

Congress instituted the expropriation exception as part of its longstanding efforts "to protect the property of its citizens abroad as part of a defense of America's free enterprise system." *Fed. Republic of Germany* v. *Philipp*, 592 U.S. 169, 183 (2021). In particular, the "restrictive" theory proved inadequate in the face of the ascension of Communist states, which increasingly nationalized U.S. property interests without compensation. See *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964) (immunizing the Castro regime's expropriation of U.S. property).

For decades, Petitioner Agudas Chasidei Chabad ("Chabad") has sought the return of its sacred religious library and archive—taken at different times by and remaining in the possession of the Russian government—pursuant to the FSIA's expropriation exception. In a 2008 decision, the D.C. Circuit rejected Russia's sovereign immunity defense and held that

Chabad's claims against the state and several of its instrumentalities could proceed in the U.S. court. *Agudas Chasidei Chabad of U.S.* v. *Russian Fed'n*, 528 F.3d 934 (D.C. Cir. 2008) ("*Chabad I*"). Since the district court entered final judgment in 2010, Chabad has been striving to enforce the order.

In an about-face, the D.C. Circuit reversed its own prior decision and held that the Russian state is in fact immune from suit. *Agudas Chasidei Chabad of U.S.* v. *Russian Fed'n*, 110 F.4th 242 (D.C. Cir. 2024) ("*Chabad III*"). Relying on a textually unsupported interpretation of the FSIA, the D.C. Circuit held that a foreign state is immune even where the statute's U.S.-nexus requirement is met. Under the court's decision, a foreign state is immune so long as it gives expropriated property to an agency or instrumentality.

This reading of the statute is atextual and leads to precisely the outcome that Congress endeavored to avoid. If left undisturbed, the D.C. Circuit's interpretation of the expropriation exception will open the door to foreign sovereigns who wish to expropriate U.S. property while avoiding suit in U.S. courts.

ARGUMENT

I. The Holding Below Distorts The Text Of The Expropriation Exception.

In enacting the FSIA, Congress replaced a regime of ad hoc determinations with "a comprehensive framework for resolving any claim of sovereign immunity." *Altmann*, 541 U.S. at 699. "Thus, any sort of immunity defense made by a foreign sovereign in an

American court must stand on the Act's text." *Republic of Argentina* v. *NML Cap., Ltd.*, 573 U.S. 134, 141–42 (2014). The decision below effectively reads the statute's text to mean the opposite of its plain import, thereby undoing Congress's carefully crafted enactment.

A. The Statute's Plain Language Provides That The Expropriation Exception Applies To Foreign States Where Either of Two Nexus Requirements Is Met.

The expropriation exception provides that "[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 rights in property taken in violation of international law are in issue and" either:

"[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."

28 U.S.C. § 1605(a)(3) (emphases added).

As written, the exception thus provides two possible alternatives for satisfying the U.S.-nexus requirement—clause 2A or 2B. Whichever nexus test is satisfied, the result is the same: "A *foreign state* shall not

be immune." There can be no question that the term "foreign state" encompasses the state itself. Congress defined "foreign state" in the statute to "include[] a political subdivision of a foreign state *or* an agency or instrumentality of a foreign state," 28 U.S.C. § 1603(a) (emphasis added), and "[w]hen Congress takes the trouble to define the terms it uses, a court must respect its definition as 'virtually conclusive,'" *Dep't of Agric. Rural Dev. Rural Hous. Serv.* v. *Kirtz*, 601 U.S. 42, 59 (2024); see *Chabad I*, 528 F.3d 934 (allowing suit against Russian Federation to proceed).

Notwithstanding the plain text, the D.C. Circuit (relying on rulings in other cases that post-date *Chabad I*) held in the decision below that "clause 2A" was "the only path to jurisdiction over claims against a foreign state itself," while "clause 2B" is "the only basis for jurisdiction over claims against an agency or instrumentality of a foreign state." *Chabad III*, 110 F.4th at 250–51.

Thus, the Circuit held that—notwithstanding its own prior decision in *Chabad I*—"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." *Id.* at 252. The court ruled that because "the expropriated property giving rise to this suit—the Collection—is not present in the United States," Russia is immune from suit, the prior judgments against Russia "are void," and "the judgments may not be enforced through attachment" of "assets" belonging to

"companies the [Russian] Federation allegedly owns and controls." *Id.* at 245, 251, 255.

The D.C. Circuit's interpretation finds no support in the FSIA's text. Indeed, the court's reading "transforms the governing jurisdictional statute to mean the opposite of what it says." *De Csepel* v. *Republic of Hungary*, 859 F.3d 1094, 1110 (Randolph, J., concurring in part). "Although § 1605(a)(3) provides that a foreign state shall *not* be immune from suit," the D.C. Circuit "crosse[d] out the 'not' and holds that the foreign state shall be immune when its agencies or instrumentalities owning or operating the expropriated property engage in commercial activity in the United States." *Id.* at 1111.

B. The FSIA's Legislative History Confirms That The Expropriation Exception Applies To A Foreign State When Either Nexus Requirement Is Met.

The legislative history confirms that the plain language of the expropriation exception means what it says—immunity is stripped from the foreign state when either nexus requirement is met.

As the House Report makes clear, Section 1605 "sets forth the general circumstances in which a claim of sovereign immunity by a foreign state, as defined in [S]ection 1603(a), would not be recognized in a Federal or State court in the United States." H.R. Rep. No. 94-1487, at 18 (1976). There is thus no doubt that Congress intended for abrogation of immunity under Section 1605 to apply no less to the foreign state itself

than to its agencies and instrumentalities, per the term's definition in Section 1603. Indeed, discussing the expropriation exception specifically, the House Report expressly noted that the first nexus requirement can be based on "commercial activity carried on in the United States by the foreign state, or political subdivision, agency or instrumentality of the foreign state." *Id.* at 19.

Moreover, the House Report explains that the two nexus requirements were crafted with an eye to the *location* of the expropriated property (*i.e.*, in the United States or abroad), rather than to any distinction between the state and its agencies or instrumentalities. "The first category involves cases where the property in question or any property exchanged for such property is present in the United States. . . . Under the second category, the property need not be present in [the United States]." *Id.* Under either nexus, "a claim of sovereign immunity by a foreign state" is at issue. *Id.* at 18.

By contrast, where Congress intended to distinguish between the foreign state and its agencies and instrumentalities, it indicated as much expressly—both in the statute and accompanying legislative documents. Thus, the House Report noted, for example, that the definition of "foreign state" in Section 1603 is "used in all provisions of chapter 97, except section 1608," in which "the term 'foreign state' refers only to the sovereign state itself." *Id.* at 15.

II. The Expropriation Exception, Unlike The Commercial-Activity Exception, Applies To Quintessential Sovereign Public Acts.

In one of the prior cases the D.C. Circuit invoked below, the Circuit supported its interpretation of the expropriation exception by analogizing to the commercial-activity exception. There, the Circuit noted that "a foreign state loses its immunity under the commercial-activity exception only if the claim against the state—as opposed to the agency or instrumentality—satisfies that exception" and held "[t]he same is true for the expropriation exception." *De Csepel*, 859 F.3d at 1107. The D.C. Circuit overlooked a key distinction between the two exceptions: while the commercial-activity exception applies to "action[s] . . . based upon a commercial activity" of the foreign state, the expropriation exception targets the quintessentially public, sovereign act of expropriating property. 28 U.S.C. § 1605(a)(2), (3). Thus, in the latter case, even setting aside the text's plain command, there is no warrant to immunize the foreign state where expropriated property is given to an agency or an instrumentality.

The FSIA generally "codif[ies] the restrictive theory of sovereign immunity," under which "immunity extends to a sovereign's public but not its private acts." *Philipp*, 592 U.S. at 182. "Most of the FSIA's exceptions, such as the exception for 'commercial activity carried on in the United States,' comport with the overarching framework of the restrictive theory." *Id.* at 182–83. The commercial-activity exception is concerned exclusively with private acts; "[a] foreign state

engaging in commercial activities do[es] not exercise powers peculiar to sovereigns; rather, it exercise[s] only those powers that can also be exercised by private citizens." *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607, 614 (1992) (internal quotation marks omitted); see *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 358 n.4 (1993) ("where a claim rests entirely upon activities sovereign in character . . . jurisdiction will not exist under" the commercial-activity exception). In that context, where immunity is tied to an action "based upon a commercial activity" (28 U.S.C. § 1605(a)(2)), it may be sensible to distinguish between a foreign state and its agency or instrumentality for jurisdictional purposes.

By contrast, as is obvious, the act of expropriation is a public act that can be undertaken only by a sovereign. Thus, the expropriation exception is "unique" and "goes beyond even the restrictive view" because "it permits the exercise of jurisdiction over some public acts of expropriation." *Philipp*, 592 U.S. at 183. Indeed, the expropriation exception embodies the United States' longstanding commitment to "protect[ing] the property of its citizens abroad." *Id.*; see *id.* at 177 (noting Secretary of State Cordell Hull's 1938 letter to the Mexican ambassador protesting Mexico's "nationalization of American oil fields"); *Sabbatino*, 376 U.S. 398 (refusing to adjudicate Castro regime's expropriation of U.S. property and companies, which prompted congressional action). The exception reflects Congress's considered judgment that "the general principle of immunity for these otherwise public

acts should give way." *Helmerich & Payne*, 581 U.S. at 182.

As the expropriation exception targets quintessential public acts, there is no sound basis—let alone a compelling one—to depart from the plain text and shield foreign states from suit where one of the nexus requirements is met. As Congress understood, after expropriating property in violation of international law, a foreign state might transfer expropriated property to its agencies or instrumentalities. See, *e.g., Chabad III*, 110 F.4th at 246; *Philipp*, 592 U.S. at 174. In such circumstances, where the second nexus requirement is met, Congress instructed that U.S. courts are open to injured claimants: the "*foreign state* shall not be immune from the jurisdiction of courts of the United States or of the States." 28 U.S.C. § 1605(a) (emphasis added). If instead a foreign state can simply expropriate property and then transfer that property to an agency and thereby avoid U.S. jurisdiction, the state would be motivated to do just that in all cases, eviscerating the expropriation exception.

III. The Decision Below Will Invite Foreign Sovereigns To Expropriate U.S. Property Without Consequence.

The D.C. Circuit's decision below invites foreign sovereigns to expropriate foreign property without fear of being haled into U.S. court. If left undisturbed, the Circuit's interpretation of the FSIA will eviscerate the protections Congress has legislated for Americans who hold property abroad.

Under the Circuit's decision, courts have "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." *Chabad III*, 110 F.4th at 252. The court's ruling offers an attractive, easy-to-execute playbook to foreign sovereigns that wish to expropriate U.S. property while doing business in the United States. The foreign state need only expropriate U.S. property and then either retain it abroad (so that it or any property exchanged for it is not "present in the United States") or transfer it to an agency or instrumentality, even one "engaged in a commercial activity in the United States." 28 U.S.C. § 1605(a)(3). Per the decision below, that foreign state would retain immunity from suit.

That rule will unduly deny access to courts for wronged parties.[2] Consider this case. The foreign state—*i.e.*, the Soviet Union and its successor, the Russian Federation—expropriated the Collection, and then transferred it to the Russian State Library and the Russian State Military Archive, where it remains. See *Chabad I*, 528 F.3d at 938. Nearly 35 years ago, Chabad won a ruling from Russia's high court ordering its return, and an executive order likewise directed the Russian State Library to return a part of

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[2] The D.C. Circuit's FSIA decisions are particularly consequential because venue is deemed proper in the U.S. District Court for the District of Columbia for any action "brought against a foreign state or political subdivision thereof," while venue elsewhere has more demanding requirements. 28 U.S.C. § 1391(f)(1), (3), (4).

the Collection. *Id.* at 944–45. But for years, the Russian government refused to comply, and even purported to reverse the prior orders—events that the D.C. Circuit held to be a second expropriation. *Id.* at 945–46. Diplomatic channels, also, have been ineffective. In 1992, 2005, and 2017, all 100 U.S. Senators wrote letters to the Russian President calling for return of the Collection, to no avail. Now, the decision below holds that the doors of the U.S. courts are closed as well.

With little recourse available in the principal U.S. court for FSIA suits, victims of takings by foreign states will lack any real avenue for redress in the United States, and instead will seemingly have to pin their hopes on courts in the foreign state that expropriated their property. The all-too-likely result will be further expropriations and corresponding diminishment of critical U.S. investment abroad, harming U.S. economic and foreign policy interests.

The Court should intervene to correct the D.C. Circuit's misinterpretation of the FSIA and restore access to U.S. courts for those whose property is expropriated by foreign states.

CONCLUSION

For the reasons stated above, *Amici* respectfully submit that this Court should grant the petition for a writ of certiorari and reverse the decision of the Court of Appeals for the D.C. Circuit.

Respectfully submitted,

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APPENDIX

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