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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Tenex-USA does not defend the D.C. Circuit's interpretation of the expropriation exception based on the statutory text or legislative history. It cannot, because both squarely support Chabad's interpretation of the exception, which states that "a foreign state shall not be immune" in circumstances like those here. Instead, Tenex relies on U.S. amicus briefs, including one that concedes the main issue in this case—that under principles of "state responsibility" the "state" itself is "responsible" for "injury resulting from [] a taking by the state of the property of a national of another state." U.S. Br.5, *Garb* v. *Republic of Poland*, No. 02-7844 (2d Cir. Sept. 10, 2004) ("*Garb* Amicus Br."). Here, the Russian Federation is responsible, and the only question is whether the connection between the property taken and the United States is sufficient under either of two U.S.-nexus prongs. Tenex's argument that the second prong cannot establish jurisdiction over Russia contravenes the plain statutory language, legislative history, and the U.S. government's acknowledgment that the expropriation exception "parallels" the law of "state responsibility." *Id.*

Tenex protests that Chabad's interpretation would make the expropriation exception "an outlier" among the FSIA's immunity exceptions, Opp.7, but that is the point. The expropriation exception is unique in its focus on fundamentally sovereign conduct, *i.e.*, the state's sovereign act of taking property for public purposes, whereas the other exceptions concern acts of a commercial or private character.

There is a clear circuit split, and this case is an ideal vehicle for resolving it. Whereas the D.C. Circuit has

rewritten the expropriation exception to immunize foreign states that take property with a U.S. nexus, the Ninth and Eleventh Circuits have adhered to the text to exercise jurisdiction in such cases. This case is an ideal vehicle to resolve this split because there are no facts in dispute and the holding below has prevented Chabad's recovery. Moreover, the question here is important because the D.C. Circuit's atextual holding effectively eviscerates the exception by affording absolute immunity to foreign states that steal U.S. property abroad. The United States has recognized that this is an important question that may some day warrant the Court's review. U.S. Br.20, *de Csepel* v. *Republic of Hungary*, No. 17-1165 (U.S. Dec. 4, 2018) ("*de Csepel* Amicus Br."). The Court's intervention is warranted now.

I. THE D.C. CIRCUIT'S DECISION IS WRONG AND CONFLICTS WITH OTHER CIRCUITS

A. The D.C. Circuit's Decision Is Wrong

1. The expropriation exception provides that "[a] foreign state shall not be immune" if the expropriated property has the requisite nexus to the United States; that nexus is satisfied if the foreign state either brings the property to the United States or gives it to an agency or instrumentality that does business in the United States. Because, as Tenex admits (Opp.24-25), Russia gave the property it expropriated to instrumentalities that do business in the United States, the "foreign state" responsible for the taking—Russia—"shall not be immune."

a. Tenex's sole response on the text is that "the foreign state" is singular and "nothing in the text … suggest[s] that a *single* claim against an agency or instrumentality should proceed against *two* 'foreign state' defendants." Opp.29. This argument ignores the definition

of "foreign state," which includes both the state and any "political subdivision of a foreign state or an agency or instrumentality of a foreign state." 28 U.S.C. § 1603(a). Chabad is pursuing claims against Russia and its instrumentalities for their respective roles in the taking and use of Chabad's property. The expropriation exception provides jurisdiction over all parties because one of the two paths for establishing the requisite nexus between the property and the United States has been met. *See* Pet.16-17.

b. Tenex's reliance on a "presumption of separateness" between foreign states and their agencies and instrumentalities, Opp.29, is misplaced for a similar reason. The Russian Federation itself is responsible for the unlawful taking of Chabad's property. Indeed, in one of the U.S. briefs Tenex cites, the government acknowledged that the state itself has "state responsibility" for unlawful takings. The foreign state thus bears liability under the FSIA, which "parallels" that doctrine and provides recourse for victims of unlawful takings. *Garb* Amicus Br.5. Contrary to Tenex, the commercial activity of Russia's instrumentalities is not the basis for Chabad's claims; rather, as Tenex elsewhere acknowledges (Opp.26), that activity provides "the appropriate U.S. territorial nexus … as to the 'property or any property exchanged for such property'" that Russia expropriated. *See also Republic of Hungary* v. *Simon*, 145 S. Ct. 480, 488 (2025) ("[T]he expropriation exception requires that stolen property, or property exchanged for such property, have a commercial nexus to the United States.").

Because Russia itself is subject to jurisdiction for its own unlawful acts, it is irrelevant that Russia's instrumentalities—RSL and RSMA—enjoy a presumption of corporate separateness. Opp.27 (citing *First Nat'l City Bank* v. *Banco Para El Comercio Exterior de Cuba*

("*Bancec*"), 462 U.S. 611, 623, 626-627 (1983)). As the text of the statute makes clear, the requisite connection between the expropriated *property* and the United States can be established by the commercial activities of Russia's instrumentalities without imputing those activities to Russia. Moreover, this Court confirmed in *Bancec* that it would not "adhere blindly to the corporate form where doing so would cause [] an injustice," such as permitting a sovereign to avoid "answering for the seizure of [] assets." 462 U.S. at 632. Here, it would be a grave injustice to permit Russia to avoid liability by relying on the fiction of corporate separateness of RSL and RSMA, which Russia itself has repeatedly insisted are "integral part[s] of the government of the Russian Federation and may not be sued herein simply as an agency or instrumentality of the Russian Federation." Answer, Dkt. 37 at 2, 3; *see also* Amended Answer, Dkt. 63 at 2, 3.[1]

Tenex's cases are inapposite because they arose under different FSIA provisions involving "non-sovereign" acts. The courts considered whether the plaintiff had overcome the presumption of separateness between the foreign state and its instrumentality to establish liability. In *TransAmerica Leasing, Inc.* v. *La Republica de Venezuela*, 200 F.3d 843, 846, 848 (D.C. Cir. 2000), plaintiffs alleged that Venezuela used its instrumentality "as its 'alter ego'" and "[was] therefore liable" for its instrumentality's breach of contract. In *Doe* v. *Holy See*, 557 F.3d 1066, 1080 (9th Cir. 2009) (per curiam), plaintiff sought to establish the Holy See's "vicarious liability" for its corporations' negligence under the tort exception. In *First Inv. Corp. of Marshall Islands* v. *Fujian Mawei*

[1] All "Dkt." citations refer to the docket in the district court proceedings below.

Shipbuilding, Ltd., 703 F.3d 742, 756 (5th Cir. 2012), the Fifth Circuit denied jurisdiction over China under the arbitration exception because China was not an alter ego of its instrumentalities and therefore "not … a party to the arbitration agreement." Here, Chabad has sued Russia for Russia's own sovereign taking of property that has the requisite connection to the United States.

Tenex's reliance on Section 1610(g)(1) also falls flat. *See* Opp.29-30. That veil-piercing provision was enacted to ease the burden on victims of terrorism seeking to enforce judgments under Section 1605A. *Rubin* v. *Islamic Republic of Iran*, 583 U.S. 202, 211 (2018). The expropriation exception relates to jurisdiction, not enforcement. It allows courts to assert jurisdiction over a foreign state based upon the foreign state's own taking of property in violation of international law, provided the property is connected in one of two ways to the United States. The issue of jurisdiction is separate from the issue of whether, having established jurisdiction and prevailed, a victim of expropriation may enforce a judgment by attaching the assets of an instrumentality under Section 1610(a)(3) by showing that it is the alter ego of the foreign state.

c. Tenex's contention that the FSIA applies "more 'permissive procedures'" for exercising jurisdiction over instrumentalities than foreign states ignores the foreign state's central role in the sovereign act of taking property. Opp.30-31. Moreover, the text makes clear that an agency or instrumentality also can be sued if either U.S.-nexus prong is satisfied and, as Chabad explained and Tenex ignores, Congress elsewhere expressly set out different treatment for foreign states and their instrumentalities, but it chose not to do so with the expropriation exception. *See* Pet.20-21.

2. Although Tenex characterizes the expropriation exception as codifying "prior U.S. practice," Opp.33, the legislative history confirms that Congress intended the exception to depart from existing practice, and go beyond the "restrictive" theory of sovereign immunity, by opening U.S. courts to claims against foreign sovereigns that expropriate property abroad. Pet.7-9, 22. This Court has recognized that the "expropriation exception is 'unique.'" *Simon*, 145 S. Ct. at 488 (alteration in original); *see id.* at 494.

As Chabad explained (Pet.7-8), the expropriation exception departed from the restrictive theory specifically to allow claims like those here. Citing nothing, Tenex claims Congress was focused on permitting claims against foreign states when they divert the proceeds of their unlawful expropriations through the U.S. financial system. Opp.36-37. That is wrong. For the reasons set out in the petition (Pet.7-9), Tenex's construction disregards the plain text and fails to achieve Congress's intent to provide a remedy for unlawful takings by foreign states. Moreover, Tenex is wrong that Chabad's reading is a "radical departure" from the restrictive theory because it would subject foreign states to jurisdiction whenever any of its instrumentalities is subject to jurisdiction. Opp.34. As discussed *supra* pp.1, 3, expropriation is a sovereign act for which Congress enabled takings claims against the responsible sovereign, provided the property has a U.S.-nexus.

Tenex also is wrong that Chabad's reading would invite reciprocal treatment in foreign courts. Opp.37-38. The United States is not "going around expropriating the property of foreign nations." Oral Arg. Tr.33, *Republic of Hungary* v. *Simon*, No. 23-867 (U.S. Dec. 3, 2024).

3. Tenex overstates the relevance of *Philipp* and *Simon*. *See* Opp.34-36. *Philipp* concerned whether rights in property were taken "in violation of international law." *Federal Republic of Germany* v. *Philipp*, 592 U.S. 169, 180 (2021). In rejecting respondents' position that "international law" incorporates "any international norm," this Court expressed concern about "transforming the expropriation exception into an all-purpose jurisdictional hook for adjudicating human rights violations." *Id.* at 180; 183. Construing the exception to permit jurisdiction over a foreign state for its unlawful taking of property when that property has a nexus to the United States through the foreign state's instrumentality does not implicate that concern, and Tenex does not argue otherwise.

Simon addressed whether the property at issue was present in the United States as proceeds commingled with other funds. 145 S. Ct. at 489-490. Tenex argues that, under *Simon*, the expropriation exception's requirement that the stolen property have a nexus to the United States means that "Congress likewise must have understood § 1605(a)(3) to incorporate the traditional presumption of corporate separateness." Opp.36. Setting aside that Tenex does not explain *why* the U.S.-nexus requirement reflects a congressional intent to incorporate a presumption of corporate separateness, Chabad's position does not contravene any presumption of corporate separateness as discussed above. *See supra* pp.3-5.[2]

4. Tenex also relies on U.S. briefs that do not support its position. First, interpretation of the FSIA is "a

[2] As Tenex recognizes (Opp.16-17), any discussion in *Simon* that might be construed as addressing the question presented here is dicta.

'pure question of statutory construction … well within the province of the Judiciary.'" *Republic of Austria* v. *Altmann*, 541 U.S. 677, 701 (2004) (quoting *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 446 (1987)). "While the United States' views on such an issue are of considerable interest to the Court, they merit no special deference." *Id.* Second, only one of the three amicus briefs filed in this Court—the *de Csepel* brief—discussed the question presented in any detail. The amicus briefs in *Cassirer* and *Philipp* hardly discuss it. U.S. Br.15-16, *Kingdom of Spain* v. *Cassirer*, No. 10-786 (U.S. May 27, 2011); U.S. Br.22-23, *Federal Republic of Germany* v. *Philipp*, Nos. 19-351 & 19-520 (U.S. May 26, 2020). And as discussed, the U.S. amicus brief in *Garb* actually supports Chabad by highlighting the sovereign's "state responsibility" for unlawful takings. *See supra* p.1; *Garb* Amicus Br.5.

B. The Circuits Are Split

There is a clear, and acknowledged, circuit split.

1. Contrary to Tenex (Opp.20), the Ninth Circuit holds that jurisdiction over a foreign state can be established through either prong of the U.S.-nexus test in *Altmann* v. *Republic of Austria*, 317 F.3d 954, 968-969 (9th Cir. 2002), *aff'd on other grounds*, 541 U.S. 677 (2004). That *Altmann* "primarily concerned" a different issue does not mean it did not address this one. Opp.20. Nor does the limited analysis of this issue change that the Ninth Circuit necessarily decided it. Opp.20 (citing *de Csepel* Amicus Br.19). Austria challenged the district court's holding that Austria was subject to jurisdiction under the second prong of the U.S.-nexus test. Appellants' Brief, *Republic of Austria* v. *Altmann*, No. 01-56003, 2001 WL 34092857, at *39 (9th Cir. Oct. 2, 2001). In affirming the district court's exercise of jurisdiction over plaintiff's claims against Austria, even though the

property at issue was in Austria, the Ninth Circuit necessarily decided that Austria was subject to jurisdiction under the second U.S.-nexus test. 317 F.3d at 958-959, 974.

The Ninth Circuit continues to apply the correct interpretation of the expropriation exception. In *Cassirer* v. *Kingdom of Spain*, 616 F.3d 1019, 1032-1034, 1037 (9th Cir. 2010), the en banc court held that "the expropriation exception applies to Spain," and that the U.S. nexus was satisfied by the "many contacts" Spain's instrumentality had with the United States. The court explained:

> As the words and grammatical construct in § 1605(a)(3) are clear, we understand that Congress meant for jurisdiction to exist over claims against a foreign state whenever property that its instrumentality ends up claiming to own had been taken in violation of international law, so long as the instrumentality engages in a commercial activity in the United States.

Id. at 1028. Similarly, in *Sukyas* v. *Romania*, 765 F. App'x 179 (9th Cir. 2019), the Ninth Circuit did not "assum[e] without deciding that jurisdiction was satisfied as to Romania." Opp.21. It affirmed the district court's exercise of jurisdiction over Romania where the U.S. nexus was satisfied by the commercial activities of a Romanian instrumentality. *Sukyas*, 765 F. App'x at 180.

2. The Eleventh Circuit also has held that the expropriation exception authorizes jurisdiction over a foreign state if "at least one of the two statutory nexus requirements [of the expropriation exception] are satisfied." *Comparelli* v. *Republica Bolivariana De Venezuela*, 891 F.3d 1311, 1326 (11th Cir. 2018). That the Eleventh Circuit remanded the case to the district court to apply this holding, Opp.22-23, does not change its

binding status. Indeed, the Eleventh Circuit continues to cite *Comparelli* for this proposition. *See Agurcia* v. *Republica de Honduras*, No. 21-13276, 2022 WL 2526591, at *3 (11th Cir. July 7, 2022) (per curiam).[3]

3. The current legal landscape weighs in favor of, rather than against, granting Chabad's petition. *See* Opp.6. The United States predicted in *de Csepel* that the split would deepen, at which point this Court's review would be warranted, *see de Csepel* Amicus Br.20, but review is warranted now because there is already a clear split between the D.C. Circuit and the Ninth and Eleventh Circuits that will persist absent this Court's review. *See, e.g.*, *Arch Trading Corp.* v. *Republic of Ecuador*, 839 F.3d 193, 205-206 (2d Cir. 2016) (recognizing "confusion" on this issue and indicating agreement with D.C. Circuit).

II. This Case Is An Ideal Vehicle For The Important Question Presented

Tenex does not dispute that the question presented is important. *See* Pet.28-30. Nor has the United States ever disputed that this question warrants review. *See de Csepel* Amicus Br.20.

Contrary to Tenex (Opp.16-17), this case is a far better vehicle than *de Csepel* and *Philipp*. Chabad obtained a final judgment against Russia, and the only reason it cannot enforce it is because the D.C. Circuit, after 20

[3] The Middle District of Florida case Tenex cites is not to the contrary. The plaintiff did not cite *Comparelli* for the point that jurisdiction can be established over foreign states under either prong of the U.S.-nexus test. *See* Response to Mot. to Dismiss, *Dvoinik* v. *Republic of Austria*, No. 8:22-CV-1700, 2024 WL 5399943 (M.D. Fla. May 3, 2024). Thus, as Tenex concedes (Opp.22), the district court did not grapple with *Comparelli*, but only because it was not raised.

years of litigation and 14 years of post-judgment proceedings, reversed *itself*. In *de Csepel*, a pending motion to dismiss could have rendered a decision by this Court an advisory opinion. No. 17-1165 Opp.32. In *Philipp*, the question was raised in a conditional cross-petition, No. 19-520 Pet., and was mooted by the Court's decision in the related proceeding, *Philipp*, 592 U.S. 169 (2021).

Tenex also is wrong (Opp.17-18) that Chabad has alternative avenues for obtaining relief. Chabad's claims against RSL and RSMA cannot provide meaningful relief because those entities do not have assets in the United States and, even if they did, cultural assets are immune from attachment under 22 U.S.C. § 2459. To the extent Tenex suggests (Opp.2) it is not Russia's alter ego, that is both wrong and irrelevant to the question before this Court. In any event, if the Court grants certiorari and reverses, Chabad could enforce the judgment against VEB.RF or another alter ego of the Russian state. Russia's digitization of a "significant portion of the Library," Opp.18, is no substitute for return of the physical volumes of religious texts that possess a unique sanctity for Chabad. And as Chabad explained (Pet.10), it already has pursued "out-of-court dialogue" to no avail. Opp.18. A judgment against Russia, in U.S. courts, is Chabad's only viable path for relief.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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