No. 24-909

IN THE

Supreme Court of the United States

AGUDAS CHASIDEI CHABAD OF UNITED STATES,
Petitioner-Appellee,

v.

RUSSIAN FEDERATION, *et al.*,
Respondents,

TENEX-USA, INCORPORATED
Respondent-Appellant.

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

SUPPLEMENTAL BRIEF OF RESPONDENT-APPELLANT TENEX-USA

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SUPPLEMENTAL BRIEF OF TENEX-USA IN RESPONSE TO BRIEF OF THE UNITED STATES

Respondent-Appellant Tenex-USA, Incorporated ("Tenex-USA"), respectfully submits this response to the Brief for the United States as Amicus Curiae ("U.S. Br.").

The U.S. brief recommends that the Court grant certiorari to review the question presented in the Petition for a Writ of Certiorari ("Petition") of Agudas Chasidei Chabad of United States ("Chabad"). Namely, whether a foreign state itself can lose its presumptive immunity from suit under the Foreign Sovereign Immunities Act's ("FSIA") expropriation exception, 28 U.S.C. § 1605(a)(3), if the relevant property is located outside the United States.

The D.C. Circuit has consistently held that the answer to this question is no. *See Agudas Chasidei Chabad of United States v. Russian Federation ("Chabad III")*, 110 F.4th 242, 251-52 (D.C. Cir. 2024) (Pet.App.15a) ("[A]s 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."); *see also Republic of Hungary v. Simon*, 604 U.S. 115, 136 (2025) ("When a foreign sovereign is responsible for the expropriation, a suit may proceed only if the property is 'present in the United States.'" (quoting 28 U.S.C. § 1605(a)(3))). As Tenex-USA explained, the D.C. Circuit's holding accords with the FSIA's text and structure, legislative history, and purpose. *See generally* Br. in Opp'n of Tenex-USA ("BIO") 24-38. The latest brief of the United States on this issue

declines to take a position on the merits of the question presented at this time. *See* U.S. Br. 11. However, since at least 2004, the United States has presented a consistent and thoroughly reasoned interpretation of § 1605(a)(3)'s U.S.-nexus requirement that accords fully with the D.C. Circuit's decision. BIO 28 (discussing statutory interpretation positions advanced in *four* prior U.S. amicus briefs).

The current position of the United States—that certiorari should be granted on the issue of § 1605(a)(3)'s U.S.-nexus requirements—marks a pointed departure from recommendations in 2018 and 2020, when the United States, just like Hungary and Germany, urged this Court to deny certiorari on the same statutory-interpretation question at issue here. Br. for the United States as Amicus Curiae 22 ("2018 U.S. Br."), *de Csepel v. Republic of Hungary*, No. 17-1165 (U.S. Dec. 4, 2018); Br. for the United States as Amicus Curiae 24, *Philipp v. Fed. Republic of Germany* ("2020 U.S. Br."), Nos. 19-351 and 19-520 (U.S. May 26, 2020). In both *de Csepel* and *Philipp*, the Court denied certiorari on this issue. *Philipp v. Fed. Republic of Germany*, 141 S. Ct. 188 (2020) (denying writ of certiorari); *de Csepel v. Republic of Hungary*, 586 U.S. 1096 (2019) (same).

Respectfully, the views expressed by the United States in its latest brief are misguided and unreasoned, particularly in view of the history noted above. There is no split of authority necessitating this Court's intervention. The legal landscape of cases involving § 1605(a)(3)'s U.S.-nexus requirements

remains materially unchanged from when this Court denied review in *de Csepel* and *Philipp*. *See* BIO 5-6. And, even if the Court were to consider addressing this issue in the future, this case is an especially unsuitable vehicle for offering any interpretive guidance regarding § 1605(a)(3)'s U.S.-nexus requirements. Moreover, it should be emphasized that Petitioner here is not without a remedy, as its judgment against the Russian State Library ("RSL") and Russian State Military Archive ("RSMA") remains unaffected. For these reasons, as well as those set forth in Tenex-USA's BIO, the Petition should be denied.

I. The U.S. Brief Fails to Describe a Circuit Split

The U.S. brief contends that certiorari should be granted because Chabad "plausibly alleges confusion in the lower courts on the question presented." U.S. Br. 6. Specifically, the U.S. brief references the same decisions of the Ninth and Eleventh Circuits cited in Chabad's Petition. *Id.* at 6-8 (discussing *Cassirer v. Kingdom of Spain*, 616 F.3d 1019 (9th Cir. 2010), *cert. denied*, 564 U.S. 1037 (2011); *Altmann v. Republic of Austria*, 317 F.3d 954 (9th Cir. 2002), *aff'd on other grounds*, 541 U.S. 677 (2004); *Sukyas v. Romania*, 765 F. App'x 179 (9th Cir. 2019); *Comparelli v. República Bolivariana de Venezuela*, 891 F.3d 1311 (11th Cir. 2018)); *see also* Pet. 23-25 (discussing the same decisions).

To grant certiorari based on an alleged circuit split, the Court should await a "genuine conflict, as opposed to a mere conflict in principle"—that is, it should be

clear "with confidence that two courts have decided the same legal issue in opposite ways, based on their holdings in different cases with very similar facts." Stephen M. Shapiro, *et al.*, *Supreme Court Practice* Ch. 4.3 (11th ed. 2019). Here, there is no genuine conflict between the D.C. Circuit's settled precedents and the decisions of the Ninth and Eleventh Circuits. The U.S. brief's qualified statements (at 6-7) concerning Chabad's "plausibl[e]" allegations of "confusion in the lower courts," and "cases [which] are potentially inconsistent with the D.C. Circuit's decision below" are telling. As Tenex-USA explained, none of the cases cited in Chabad's Petition (and the U.S. brief) directly addressed the question presented; therefore, those decisions do not constitute holdings that "conflict" with the D.C. Circuit's ruling. BIO 19-22 (distinguishing *Altmann*, *Cassirer*, *Sukyas*, and *Comparelli*); *see generally Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998) (explaining that a "drive-by jurisdictional ruling[]" "ha[s] no precedential effect").

The U.S. brief's reference to "plausibl[e]" confusion between the circuits is especially perplexing in light of the United States' own prior interpretation of the *same* decisions cited in Chabad's Petition. The U.S. brief acknowledges (at 7) that in amicus briefs from 2018 and 2020, the United States expressly *denied* the existence of a circuit split between the D.C., Ninth, and Eleventh Circuits. *See* 2018 U.S. Br. 19 ("no reasoned decision of a court of appeals differs from" the D.C. Circuit's precedents); 2020 U.S. Br. 23 (again disclaiming any notion of a circuit split).

In explaining its revised position regarding the existence of a plausible circuit split, the U.S. brief notes that its 2020 amicus brief in *Philipp* "did not take account of the [Ninth Circuit's] *unpublished* decision in *Sukyas*." U.S. Br. 7 (emphasis added). But, this statement is inconsistent with the United States' 2020 *Philipp* amicus brief. In that submission, the United States reiterated its view from *de Csepel* that no circuit split exists, and it rebutted "inapposite cases" cited in the *Philipp* conditional cross-petition. 2020 U.S. Br. 23. Although the United States' *Philipp* brief does not directly mention the 2019 decision in *Sukyas*, the relevant cross-petition expressly cited *Sukyas*, as well as *Altmann*, *Cassirer*, and *Comparelli*, in arguing that a purported circuit split exists. *See* Conditional Cross-Pet. for Writ of Cert. 16-18, *Philipp v. Fed. Republic of Germany*, No. 19-520 (U.S. Oct. 18, 2019). Accordingly, in 2020, the United States was aware of the 2019 *Sukyas* decision, implicitly characterized *Sukyas* among "inapposite" cases, and nevertheless concluded that certiorari remained unwarranted.

The U.S. brief's latest analysis concerning *Comparelli* is likewise unpersuasive. The U.S. brief speculates that *Comparelli* could lead to uncertainty in district courts in the Eleventh Circuit. U.S. Br. 8. But, the United States acknowledges, as it must, that "*Comparelli* had no occasion to squarely address the question presented in this case." *Id.*

Moreover, there is no compelling basis to suggest that *Comparelli* conflicts with the decisions of the D.C.

and Second Circuits. In its discussion of § 1605(a)(3)'s U.S.-nexus clauses, the *Comparelli* court cited to *Garb v. Republic of Poland*, 440 F.3d 579, 588 (2d Cir. 2006).

> [Section 1605(a)(3)'s] nexus requirement is satisfied if the property in question or any property exchanged for such property is either (a) "present in the United States in connection with a commercial activity carried on in the United States by the foreign state;" *or* (b) "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."

Comparelli, 891 F.3d at 1319 (emphasis added) (quoting 28 U.S.C. § 1605(a)(3) and citing *Garb*, 440 F.3d at 588). *Comparelli*'s reference to *Garb* reflects the Eleventh Circuit's at least implicit alignment with the Second Circuit, which, as Chabad acknowledges, also aligns with the D.C. Circuit. *See* Pet. 25-26 ("The Second Circuit [in *Garb*] likewise has indicated agreement with the D.C. Circuit's current view.").

And, district court decisions from the Eleventh Circuit subsequent to *Comparelli* do not suggest confusion. For instance, as Tenex-USA noted (BIO 22), and the U.S. brief does not rebut, a recent decision from the Middle District of Florida, *Dvoinik v. Republic of Austria*, No. 8:22-cv-1700, 2025 WL 589250, at *5 (M.D. Fla. Feb. 24, 2025), aligns completely with the D.C. Circuit's approach. In

Dvoinik, the court held that "[b]ecause the Republic of Austria is the only defendant in this suit, [p]laintiff must satisfy [§ 1605(a)(3)'s] first nexus requirement." 2025 WL 589250, at *5; *see also id.* ("As is suggested by the disjunctive language of [§ 1605(a)(3)'s] commercial nexus requirements, the standard is different for a foreign state itself (like [Austria]), as opposed to a state's agencies and instrumentalities." (citing *de Csepel v. Republic of Hungary,* 859 F.3d 1094, 1104-05 (D.C. Cir. 2017))). Thus, there is no purported confusion in the Eleventh Circuit for this Court to reconcile.

The U.S. brief also asserts that "clarity as to jurisdictional issues can help to avoid needlessly protracted litigation." U.S. Br. 8. In support of this general proposition, the U.S. brief offers two examples. Neither example has merit.

First, the U.S. brief contends "that the D.C. Circuit in this very case upheld the exercise of jurisdiction against the Russian Federation in 2008, only to reverse itself more than a decade later based on intervening circuit precedent." *Id.* But, the D.C. Circuit itself has repeatedly explained that that is not what happened. In *de Csepel*, the D.C. Circuit confirmed that "[t]he issue of the Russian state's immunity was completely unaddressed by the district court" in 2006 "and neither raised nor briefed on appeal" in the earlier *Chabad* decision. 859 F.3d at 1105. And in the D.C. Circuit decision underlying the Petition here, the D.C. Circuit did not come close to suggesting it was "reversing" itself. *See* Pet.App.16a

(*Chabad III*) (explaining that *Chabad I* "did not create binding circuit law because it never held that a foreign state loses immunity if the second nexus requirement is met" (internal quotation marks and citation omitted)). Importantly, no evidence was ever presented that any U.S. nexus is met as to the Russian Federation itself. The only supposed lack of "clarity" derives from Petitioner—in the intervening years when the Russian defendants were absent from the case—opportunistically seeking to advance a default judgment, despite repeated rulings from the D.C. Circuit that clearly rejected any basis for interpreting § 1605(a)(3) as providing jurisdiction over the Russian Federation in this case.

Second, the U.S. brief notes that the *Comparelli* litigation remains ongoing despite multiple appeals to the Eleventh Circuit and jurisdictional discovery, and contends that at least some of this litigation "could prove to have been unnecessary" if this Court provides clear guidance on § 1605(a)(3)'s U.S.-nexus requirements. U.S. Br. 8-9. The U.S. brief's call for guidance cannot be squared with the fact that the pending *Comparelli* litigation does not turn on the question presented here, as the United States itself recognizes. *See id.* at 8 (noting that the *Comparelli* district court "opinion address[ed] *other* thorny FSIA requirements" (emphasis added)). The *Comparelli* district court decision presently on appeal before the Eleventh Circuit expressly *declined* to address § 1605(a)(3)'s nexus clause because "[p]laintiffs cannot show that [the relevant] seizure constitutes a taking in violation of international law." *Comparelli v.*

Bolivarian Republic of Venezuela, 655 F. Supp. 3d 1169, 1193 n.10 (S.D. Fla. 2023).

In sum, the state of the law is unchanged since the United States previously told this Court that the question presented did not warrant review. This Court's intervention is as unnecessary now as it was then.

II. The U.S. Brief Does Not Refute That This Case Is an Unsuitable Vehicle

Even if there were true confusion among the federal courts on the interpretation of § 1605(a)(3)'s U.S.-nexus requirements (there is not), this case presents a poor vehicle for this Court's review of that issue.

The U.S. brief asserts that this case merits review because the "sole basis for the decision below was that the district court lacked jurisdiction over the Russian Federation under the second clause of the expropriation exception," and thus "this Court's resolution of the question presented could be dispositive." U.S. Br. 9. Not so. The reasoning in the U.S. brief overlooks that this Court's intervention is not required in order for Chabad to proceed with its efforts to obtain the disputed property, as Tenex-USA has explained. *See* BIO 17-18. Regardless of whether this Court grants certiorari, the judgments Chabad seeks to enforce will remain intact against the RSL and RSMA—*i.e.*, the agency or instrumentality defendants that actually possess the property Chabad seeks. BIO 17; *see also* Pet.App.24a (*Chabad III*)

(emphasizing that the decision on Tenex-USA's appeal does not "disturb the district court's exercise of jurisdiction over, or entry of judgment against, the RSL and RSMA"). Accordingly, even if this Court grants review, regardless of the outcome of that review, it is unlikely to materially affect Chabad's ability to secure the relief it seeks.

Furthermore, Tenex-USA, a Maryland corporation engaged in the marketing of certain uranium products, reiterates that it is not involved in the underlying dispute and does not possess, nor does it have access to, the property Chabad seeks. The U.S. brief acknowledges as much, observing correctly that even if this Court were to grant certiorari and reverse the decision below, Chabad "still would have to establish the propriety under applicable principles of law of piercing the corporate veil through several levels of ownership to find that Tenex-USA is the alter ego of the Russian Federation." U.S. Br. 9. Thus, even if input from this Court means that Chabad could resume its efforts to enforce the default sanctions judgments, this is unlikely to materially advance Chabad's efforts to leverage attachment against Tenex-USA to obtain the disputed property.

In any case, this Court's precedents on § 1605(a)(3) have clearly articulated the exceedingly limited circumstances where U.S. courts may exercise jurisdiction over expropriation claims against foreign sovereigns. It is settled that the FSIA largely codified the "restrictive" theory of sovereign immunity under customary international law. *See Verlinden B.V. v.*

Cent. Bank of Nigeria, 461 U.S. 480, 488 (1983). Section 1605(a)(3)—which subjects foreign states to certain claims arising from their public acts, rather than their commercial acts—is a "unique" outlier to the restrictive theory, and "no other country has adopted a comparable limitation on sovereign immunity." *Fed. Republic of Germany v. Philipp*, 592 U.S. 169, 183 (2021). Consequently, this Court has cautioned repeatedly against expanding § 1605(a)(3)'s jurisdictional reach. *See, e.g.*, *id.* (no evidence that Congress "intended the expropriation exception to operate as a radical departure from the basic principles of the restrictive theory" (internal quotation marks and citation omitted)); *Simon*, 604 U.S. at 132 ("reading §1605(a)(3) as broadly as respondents do would undermine those principles by expanding greatly the circumstances in which foreign sovereigns can be brought into United States courts for their public acts").

The U.S. brief highlights an additional point that weighs *against* certiorari in this case. Specifically, the United States acknowledges that Justices Jackson and Kavanaugh have recused themselves from consideration of the Petition. U.S. Br. 9. If this Court grants certiorari, presumably only seven justices at most would participate in the proceeding, raising the prospect of a 4-3 decision and attendant concerns about the Court's ability to render a definitive and authoritative ruling on the question presented.

The U.S. brief also refers to the "sensitive foreign-policy" issues and "statutory balance between a U.S.

person's claims and the sovereign immunity of a foreign state." U.S. Br. 9-10. The U.S. brief asserts that "clarity" is needed on "[w]hether litigation in federal court represents a viable path" for the relief Chabad seeks. *Id.* at 10. The significant religious, historical, and geopolitical sensitivities embedded in this dispute, which has persisted for over a century, make this case an especially complex and challenging vehicle for certiorari (and perhaps judicial resolution altogether). In multiple statements of interest filed in the district court proceeding, the United States previously emphasized that "out-of-court dialogue with Russia presents the best means towards an ultimate resolution" of this dispute. Statement of Interest of the United States, Exh. B, Letter from Katherine D. McManus, Deputy Legal Advisor, U.S. Dep't of State, to Benjamin C. Mizer, Principal Assistant Att'y General, U.S. Dep't of Justice 2, *Agudas Chasidei Chabad of United States v. Russian Federation*, No. 05-cv-1548-RCL (D.D.C. Feb. 2, 2016), ECF No. 151-2. Indeed, the U.S. brief observes that portions of the disputed property were transferred to Chabad in 1941, 1974, and various points in the 1990s. U.S. Br. 2.

Finally, the U.S. brief (at 11) observes that, if this Court grants certiorari, "an affirmance of the decision below would at least bring certainty and potentially provide renewed impetus for diplomatic efforts." But denying certiorari—for the third time on the question presented—also will bring "certainty" (and more quickly than litigating the merits before this Court). The passage from *Simon*, 604 U.S. at 139, referenced

in the U.S. brief says nothing about triggering unnecessary proceedings in this Court in order to advance diplomatic efforts. By contrast, *Simon* cogently instructed that "respecting the limits in the FSIA" in fact *aids* the establishment of "appropriate redress and compensation mechanisms," including for Holocaust-era expropriation claims. *Id.* at 139-40 (internal quotation marks and citation omitted).

Although renewed diplomatic efforts may require time, this Court need not wade into these murky waters in the meantime.

CONCLUSION

For the foregoing reasons, and the reasons articulated in Tenex-USA's BIO, Chabad's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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