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

SUPPLEMENTAL BRIEF FOR PETITIONER

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STATEMENT

The United States correctly identifies three reasons the petition for a writ of certiorari should be granted: (1) lower courts' constructions of the Foreign Sovereign Immunities Act's (FSIA's) expropriation exception are in conflict and disarray; (2) this case is an appropriate vehicle to decide the correct interpretation of the expropriation exception; and (3) it is important that the Court provide clarity on this issue. The Solicitor General's candid report that the United States is now uncertain regarding the correctness of its own prior position on the proper construction of the exception underscores the importance of this Court's review.

The Ninth and Eleventh Circuits have maintained that a foreign state is not immune when it takes property in violation of international law and either of the two U.S.-nexus alternatives in the expropriation exception is satisfied. *See Cassirer* v. *Kingdom of Spain*, 616 F.3d 1019 (9th Cir. 2010); *Sukyas* v. *Romania*, 765 F. App'x 179 (9th Cir. 2019); *Comparelli* v. *República Bolivariana de Venezuela*, 891 F.3d 1311 (11th Cir. 2018). Though the D.C. Circuit previously shared that view in its 2008 ruling in this very case, the court reversed itself to take a new, erroneous view in its decision below. While respondent rejects the Solicitor General's observation that the D.C. Circuit "reversed itself" in its opinions in this case, *compare* U.S. Br. 8 *with* Respondent Suppl. Br. 7, Judge Randolph's *de Csepel* dissent catalogued how the D.C. Circuit's decision in *de Csepel* squarely conflicted with its earlier decision in *Chabad I*, *de Csepel* v. *Republic of Hungary*, 859 F.3d 1094, 1112-1114 (D.C. Cir. 2017). This Court's review is necessary to clarify the meaning and reach of this important provision of the FSIA in the face of these opposite opinions.

Respondent's assertion that "[t]he U.S. [b]rief [f]ails to [d]escribe a [c]ircuit [s]plit," Respondent Suppl. Br. 3, is incorrect: the cases cited by the United States are in fact "holdings" that conflict with the holding below. 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), for example, the Ninth Circuit considered and rejected Austria's contention that FSIA jurisdiction was lacking under the expropriation exception, holding that both Austria and its sovereign-owned art gallery were subject to jurisdiction for the alleged taking of artwork in violation of international law, notwithstanding that the artwork was located outside the United States and only the second U.S.-nexus prong had been satisfied by the commercial activities of the Austrian gallery. In so holding, the Ninth Circuit necessarily rejected the D.C. Circuit's contrary position. The same is true of the Ninth Circuit's holding in *Cassirer*, 616 F.3d at 1032-1034, where Spain contested jurisdiction under the FSIA expropriation exception and the Ninth Circuit held that such jurisdiction existed over *both* Spain and a sovereign foundation for an alleged taking in violation of international law, notwithstanding that only the second U.S.-nexus prong of the expropriation exception had been satisfied. *See also Comparelli*, 891 F.3d at 1326 (holding that jurisdiction over Venezuela can be established under the FSIA expropriation exception if "at least one of the two statutory nexus requirements is satisfied" and remanding to the district court for further proceedings). As these cases show, the United States has correctly identified a circuit split that requires resolution.

The need for resolution is real and important. The practical result of the decision below is to deprive Chabad of its right to redress in U.S. courts for Russia's

unlawful taking and, more broadly, to render the expropriation exception a dead letter as to foreign states that expropriate U.S.-owned property so long as they keep that property out of the United States. Accordingly, when a foreign state confiscates U.S.-owned real property—such as an overseas automobile factory, copper mine, sugar plantation, or oil field—U.S. owners no longer have recourse to U.S. courts under the FSIA. The very same is true for expropriated personal property so long as the confiscating state is not so foolish as to assign it to an instrumentality with assets in the United States. It is critical that this Court clarify and affirm the availability of U.S. jurisdiction and U.S. remedies plainly provided by the FSIA to American victims of expropriations by foreign states.

This case is an ideal vehicle to address the question presented. As the Solicitor General correctly observed: "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." U.S. Br. 9. Respondent's counter that petitioner already has a judgment against the Russian State Library and Russian State Military Archives ignores the likelihood that neither instrumentality has assets in the United States, and while Chabad successfully litigated its right to possession through the highest Russian courts, the Russian state has renounced those orders. Pet. 10.

As previously explained, *see* Pet. 15-23, the D.C. Circuit's interpretation below contradicts the text and legislative history of the expropriation exception. Despite acknowledging that the FSIA's plain text "begins '[a] foreign state shall not be immune'" when either of two U.S.-nexus alternatives has been met, the D.C. Circuit has nonetheless concluded "that the foreign state itself

does not lose immunity" under the second of the two U.S.-nexus alternatives. *de Csepel*, 859 F.3d at 1107. The court based that atextual conclusion on a mistaken analogy to the FSIA's commercial activity exception, 28 U.S.C. § 1605(a)(2), pursuant to which the foreign state itself loses its immunity only if the commercial activity of the state—as opposed to an agency or instrumentality—is the basis for the claim. *Id.* That analogy is inapt because claims under the expropriation exception are based in every instance on the *sovereign activity of the State*, *i.e.*, the state act of taking property in violation of international law—*not* on the commercial activity that provides the requisite a nexus between the expropriated property and the United States. *Compare* 28 U.S.C. § 1605(a)(3) (concerning claims based upon "rights in property taken in violation of international law") *with id.* § 1605(a)(2) (concerning claims based upon "a commercial activity"). The Solicitor General agrees that the expropriation exception is "unique" in "allowing claims against a foreign sovereign for its public, as opposed to commercial, acts." U.S. Br. 10. So, too, has the Solicitor General previously agreed that the international law doctrine of "state responsibility" holds the state itself accountable for takings in violation of international law. U.S. Letter Br. 5, *Garb* v. *Republic of Poland*, No. 02-7844 (2d Cir. Sept. 10, 2004).

The legislative history manifestly endorses this reading of the plain language. Congress enacted the FSIA to provide U.S. investors a forum to seek relief amidst a wave of uncompensated expropriations by foreign states, among them, communist states like Fidel Castro's Cuba. H. Comm. on Foreign Affairs, 88th Cong., *Report on Expropriation of American-Owned Property by Foreign Governments in the Twentieth Century* 12-13 (Comm. Print 1963). The House and Senate

Reports explained that in the circumstances described by either of the expropriation exception's two U.S.-nexus tests, courts would not recognize "a claim of sovereign immunity *by a foreign state*." H. Rep. No. 94-1487, at 18 (1976) (emphasis added); S. Rep. No. 94-1310, at 17 (1976) (emphasis added). The D.C. Circuit overlooked this history, which shows that when Congress said "a foreign state shall not be immune" in unlawful takings cases, it certainly intended to include the foreign state itself. The notion that a foreign state could take U.S.-owned property without paying for it and preserve its sovereign immunity in the United States simply by not bringing the expropriated property into the United States would have been viewed by the enacting Congress as completely contrary to Congress' intent, and the plain text Congress enacted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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