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1 P R O C E E D I N G S

2 (11:11 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear  
4 argument next in Case 16-534, Rubin versus the  
5 Islamic Republic of Iran.

6 Mr. Perlin.

7 ORAL ARGUMENT OF ASHER PERLIN

8 ON BEHALF OF THE PETITIONERS

9 MR. PERLIN: Mr. Chief Justice, and  
10 may it please the Court:

11 In 2008, Congress comprehensively  
12 overhauled the terrorism exception to foreign  
13 sovereign immunity to close gaps that had for  
14 years allowed foreign terror states to thumb  
15 their noses at U.S. judgments finding them  
16 liable for acts of terrorism while their  
17 victims were drawn into a long, bitter, and  
18 often futile search for scarce assets that  
19 would be subject to execution under the  
20 exceedingly narrow commercial exception to  
21 foreign sovereign immunity.

22 The centerpiece of that legislation is  
23 Section 1610(g). That provision provides that  
24 American terrorism victims can execute their  
25 judgments upon the property of a foreign state

1 that is subject -- against which a -- a  
2 judgment has been entered under 1605A, and it  
3 makes available the property of the state's  
4 agencies and instrumentalities.

5 JUSTICE GINSBURG: If -- if --

6 CHIEF JUSTICE ROBERTS: Well --

7 JUSTICE KENNEDY: As provided in the  
8 section.

9 MR. PERLIN: As provided in this  
10 section. The question is what that -- what  
11 that provision means. The Respondents would  
12 have the Court delete the three words between  
13 the word "execution" and the words "as provided  
14 in this section." What it actually says is  
15 that the property is subject to execution upon  
16 that judgment as provided in this section.

17 JUSTICE GINSBURG: We know what --  
18 that -- that Congress wanted to do away with  
19 what they call the Bancec factors, and this  
20 statute was written perfectly to do just that.  
21 You say it does something more.

22 MR. PERLIN: It has to do more, Your  
23 Honor.

24 JUSTICE GINSBURG: And why does it  
25 have to? What the statute did is it made more

1 assets available because you didn't have to  
2 worry whether it was the state itself, an  
3 instrumentality of the state, an agency. The  
4 -- the property of any of those entities was  
5 available.

6 So it swelled the assets that would be  
7 available. But it didn't say anything, not a  
8 word, about immunity.

9 MR. PERLIN: Well, there -- there's  
10 two questions there. It doesn't say anything  
11 about immunity, but those are magic words. It  
12 does say that the property is subject to  
13 execution.

14 JUSTICE SOTOMAYOR: Magic words under  
15 (a) and (b).

16 MR. PERLIN: I'm sorry?

17 JUSTICE SOTOMAYOR: In 1610 in (a) and  
18 (b), Congress knew how directly to say property  
19 is not or is subject, immune from attachment.  
20 But it used something very different here.  
21 Rather, it says that property is, quote,  
22 "subject to attachment as provided in this  
23 section." Those are two very distinct  
24 formulations.

25 MR. PERLIN: They are different.

1 Subsections (a) and (b) were part of the  
2 original Foreign Sovereign Immunity Act from  
3 1976. There were other amendments since then.  
4 If you look at subsection (f)(1), which the  
5 President has waived, it says "shall be subject  
6 to execution."

7 The -- the Terrorism Risk Insurance  
8 Act, which is codified as a note to subsection  
9 -- to Section 1610, also says shall be subject  
10 to execution to -- to execution. So the  
11 language -- when Congress sat down to write  
12 subsection (g), it was looking at the other  
13 terrorism exceptions to execution immunity that  
14 it had already passed, and those were (f) in  
15 TRIA, and it modeled (g) after -- after those  
16 sections.

17 JUSTICE BREYER: Can they execute,  
18 your clients, on the embassy?

19 MR. PERLIN: So --

20 JUSTICE BREYER: On the uniform -- on  
21 the uniforms that the people in the embassy  
22 wear, on -- on the papers that the ambassador  
23 keeps in his desk if, in fact, you read "as  
24 provided in this section," the answer is no.  
25 If you read it to include because it has to be

1 commercial, all right? Under your reading,  
2 where those words must mean something else,  
3 can't they do it?

4 MR. PERLIN: They cannot.

5 JUSTICE BREYER: Why not?

6 MR. PERLIN: Subsection -- Section  
7 1609 says that Section 1610 -- execution under  
8 1610 is subject to international agreements  
9 like the Vienna Convention which would protect  
10 diplomatic property, and Section 1611 protects  
11 military assets, certain central bank assets.

12 JUSTICE BREYER: Okay.

13 MR. PERLIN: Congress, when they  
14 enacted 1610(g), they did not completely  
15 abrogate foreign sovereign immunity for terror  
16 states. They wanted to provide a remedy for  
17 the victims, they wanted to punish and deter  
18 the terror states, but at the same time,  
19 Congress recognized that Iran and North Korea,  
20 Syria, Sudan, these are sovereign states, and  
21 they're entitled to a bare minimum of sovereign  
22 immunity, and Congress retained that bare  
23 minimum by protecting quintessentially  
24 sovereign assets while making everything else  
25 subject to execution.

1 JUSTICE ALITO: What does "as provided  
2 in this section" mean? Am I right you think it  
3 incorporates only procedural requirements?

4 MR. PERLIN: No, Your Honor there are  
5 a number of -- a number -- no, Your Honor. A  
6 number of --

7 JUSTICE ALITO: What does it -- what  
8 does it mean?

9 MR. PERLIN: It means, as provided --  
10 the way to read it is it refers to the judgment  
11 that's entered under 1605A. As provided in  
12 this section, it says, execution -- you can  
13 have execution upon the property -- upon that  
14 judgment as provided in this section.

15 "As provided in this section" modifies  
16 the judgment, "upon that judgment," and it --  
17 and it refers to the section -- Section 1605A,  
18 which is the only section mentioned in this  
19 sentence. It's referring back to the section,  
20 1605A, that was a couple lines above in the  
21 same sentence.

22 And what it says is that a judgment  
23 entered -- that Section 1610(g), which provides  
24 sweeping remedies for terrorism victims, is  
25 only applicable to those who hold judgments

1 entered under the statutory cause of action of  
2 1605A. It is not available to other plaintiffs  
3 holding terrorism judgments.

4 It also extends -- it also extends,  
5 "as provided in the -- this section," extends  
6 the remedies. The remedies -- remember, the  
7 remedies of 1605A, capital A, are very novel,  
8 to say the least. You -- you -- you don't have  
9 a private right of action anywhere else in the  
10 Sovereign -- Foreign Sovereign Immunities Act.  
11 You don't have any other provision that allows  
12 punitive damages against a sovereign state,  
13 which is a sure sign that Congress was not  
14 concerned about affronting the dignity of  
15 terror states.

16 They allowed punitive damages. They  
17 -- they expected those to be enforced. They  
18 allowed a pre-judgment lien of lis pendens to  
19 attach to all sovereign -- all of the state's  
20 property that is subject to execution under  
21 1610, that -- including property of any party  
22 that the plaintiff identifies as being  
23 controlled by -- by that terror state.

24 CHIEF JUSTICE ROBERTS: If -- if --  
25 JUSTICE ALITO: So "as provided in

1 this section" is really superfluous, isn't  
2 it --

3 MR. PERLIN: It's --

4 JUSTICE ALITO: -- under your  
5 interpretation?

6 MR. PERLIN: It's not. It refers --  
7 well, it's -- it emphasizes the centrality of  
8 the 1605 judgment to this provision. And it  
9 also -- there's -- there's no other way to read  
10 it. If you read it as -- as the Respondents  
11 would, there's no -- there's no provision  
12 within 1610 that can pair with 1610. They say  
13 that it must pair with another substantive  
14 provision of 1610.

15 But nothing works. Try to -- try to  
16 go through. It says that -- 1610(g) says that  
17 the property of a foreign state is subject to  
18 execution and the property of an agency or  
19 instrumentality.

20 Now, if this were only a veil-piercing  
21 mechanism, as the Respondents claim, there's no  
22 reason to mention the property of the foreign  
23 state.

24 You don't need to pierce the veil to  
25 reach the property of the -- of the judgment

1 debtor terror state. You just go straight for  
2 that property. And if you have a judgment  
3 against the agency or instrumentality --

4 JUSTICE SOTOMAYOR: I'm sorry. I  
5 thought that the University of Chicago had  
6 raised an interesting argument, that the  
7 definition of foreign state in the statute  
8 includes, by definition, an agency or  
9 instrumentality of a foreign state, so that the  
10 reference to foreign state that you're relying  
11 upon does include the concept of piercing the  
12 corporate veil in its very definition.

13 MR. PERLIN: Well, that would -- that  
14 would -- that itself would abrogate Bancec, the  
15 rationale that University --

16 JUSTICE SOTOMAYOR: Well, that -- not  
17 quite, because what -- I mean, this provision  
18 deals directly in aid of the plaintiffs in the  
19 Bancec case and in the others that had found  
20 against plaintiffs.

21 There are at least three cases where a  
22 class of plaintiffs were found not to be in a  
23 sufficiently tied relationship to the foreign  
24 state and the plaintiffs there couldn't  
25 recover, so there was a real issue this was

1     addressing, the fact that there were  
2     subsidiaries and agencies of foreign state who  
3     had commercial property, and it wasn't being  
4     made available to plaintiffs.

5             MR. PERLIN:  So the question would be  
6     to ask the Respondents why they don't mention  
7     those cases in their briefs.  We have  
8     maintained, consistently, that the property of  
9     the foreign state, those words, are completely  
10    not just superfluous but misleading if there --  
11    if this is just a veil-piercing mechanism.  If  
12    it's veil-piercing mechanism --

13            JUSTICE SOTOMAYOR:  Why?  It gave them  
14    what those three cases denied them.  It gives  
15    other plaintiffs with similar claims a lot --  
16    access to a lot of -- of property that they  
17    wouldn't have had under Bancec.

18            MR. PERLIN:  The provisions that allow  
19    execution upon the property of an agency or  
20    instrumentality gives access to -- to the  
21    agency or instrumentality's property.

22            JUSTICE BREYER:  Well, give an  
23    example.  I mean, there's a famous example  
24    which you probably know about, the -- the  
25    letter of Cyrus, saying to everybody throughout

1 the Middle East that the Jews are free and they  
2 can go back to Israel, Palestine, the temple,  
3 and that letter exists and Persia -- the  
4 Persian letter, and Iran has sent it around the  
5 world.

6 Now, in your view, they have -- and  
7 people have looked at it. And if it comes to  
8 the United States, you can seize it. Is that  
9 -- that's your view of it? Because if it is,  
10 of course, if Congress knew about it, then they  
11 -- they might have had a general idea, given  
12 the nature of the stuff in Chicago.

13 MR. PERLIN: Well --

14 JUSTICE BREYER: I -- I would be  
15 surprised that they'd want to do that.

16 MR. PERLIN: We -- you might be  
17 surprised, but Congress has addressed --

18 JUSTICE BREYER: Your view is, yes,  
19 you could seize it?

20 MR. PERLIN: It would depend on --  
21 yes, you could. It -- Congress has addressed  
22 this very question, twice, in 22 U.S.C. 2459,  
23 Congress provided a very specific and limited  
24 immunity for culturally significant objects  
25 being brought to the United -- culturally

1 significant objects being brought to the United  
2 States for display or exhibition.

3 There was a very specific immunity  
4 there that -- that the -- that somebody who  
5 wants to bring in that -- that property, those  
6 exhibits can apply to the State Department in  
7 advance and receive a letter immunizing those  
8 -- those assets from -- from judicial process.

9 And -- and last year --

10 JUSTICE GINSBURG: Did that -- did  
11 that exist in, what was it, 1939 --

12 MR. PERLIN: It did not. It did not.

13 JUSTICE GINSBURG: -- when Chicago got  
14 this?

15 MR. PERLIN: But Congress could have  
16 made that provision retroactive, and it didn't.  
17 And Congress --

18 JUSTICE GINSBURG: But what about the  
19 provision that Congress did enact in -- and  
20 we've been talking about (g) and so -- so this  
21 is subsection (3), refers to "nothing ... shall  
22 be construed to supersede the authority of a  
23 court to prevent ... the impairment of an  
24 interest held by a person who is not liable in  
25 the action."

1           Why isn't the University of Chicago  
2 such a person? They're certainly not liable in  
3 the action. And they got this property when  
4 Iran was not listed as a terrorist state.

5           MR. PERLIN: Uh-huh.

6           JUSTICE GINSBURG: The Shah was in  
7 control, not the Ayatollah.

8           MR. PERLIN: The University hasn't  
9 raised that as a defense. And because Section  
10 1610(g)(3) refers to a -- a party with an  
11 ownership interest, not just a -- some other  
12 intangible interest -- and -- and even to the  
13 extent that they do, that doesn't mean that the  
14 Court should not be able to transfer title to a  
15 -- to whatever party would be ready to -- to  
16 pay the price.

17           And we think it would be Iran, by the  
18 way. If -- if the Court would construe this  
19 statute as Congress, we think, as we read it,  
20 Congress would finally -- I mean Iran would  
21 finally pay attention to a judgment, and they  
22 would say, we're -- we're about to lose our --  
23 our -- our artifacts --

24           JUSTICE GINSBURG: Well, what are the  
25 terms of that? The University of Chicago has

1 had this since 1939. Iran has never tried to  
2 take it back. What are the terms of the lease?

3 MR. PERLIN: They have -- it's not a  
4 lease. It was a long-term loan for the -- for  
5 the study and cataloguing, publishing,  
6 photographing, cleaning, of these -- of these  
7 artifacts.

8 And University of Chicago does not  
9 assert an ownership interest. They -- they say  
10 that they're -- in the briefs, they say they're  
11 trustees, or they were entrusted -- they don't  
12 even call themselves trustees even; they say  
13 they were entrusted with this. Every -- they  
14 use language, but they never say we have a  
15 concrete right in these -- in these assets.

16 And if they do, the court can -- the  
17 district court, when it orders the sale, it can  
18 make accommodation for that. It can say that  
19 whoever buys it -- and we would be -- we're --  
20 my clients would be perfectly happy if --

21 JUSTICE GINSBURG: The University of  
22 Chicago --

23 MR. PERLIN: -- these artifacts  
24 remained in the University of Chicago.

25 JUSTICE GINSBURG: -- is not

1 interested in this property for the money --  
2 for money. It's interested in having these  
3 antiquities --

4 MR. PERLIN: I know.

5 JUSTICE GINSBURG: -- on display, to  
6 be researched, to be seen.

7 MR. PERLIN: But it doesn't belong to  
8 them. It's not theirs. And whoever it belongs  
9 to can decide whether they're the best  
10 university to study it.

11 JUSTICE GINSBURG: You're answering my  
12 question that, well, don't worry about  
13 University of Chicago, the district court can  
14 give them some money.

15 MR. PERLIN: No, not money. Not  
16 money. The district court, if they have a -- a  
17 right, to the extent that they have a right to  
18 retain the -- the artifacts and continue their  
19 work with them, the district court can say that  
20 the sale should be conducted subject to the  
21 rights of the University of Chicago. It  
22 doesn't -- it doesn't mean that it's all --

23 JUSTICE GINSBURG: But what would  
24 those rights --

25 MR. PERLIN: -- it's not all or

1 nothing. The property can be divided up.

2 JUSTICE GINSBURG: -- be? Their  
3 rights have been from 1939 on they have this  
4 property.

5 MR. PERLIN: Well, since 1980, they've  
6 had the property because Iran couldn't get it  
7 back, for a big part of that time. And for a  
8 big part of the time before that, every now and  
9 then, Iran was asking, when are you going to  
10 finish -- when are you going to finish studying  
11 these things. And -- and they were not very  
12 forthcoming.

13 When this lawsuit was filed, they  
14 moved into -- they expedited their study of the  
15 assets because they realized that they might  
16 lose them. And, now, again, University of  
17 Chicago is really an amicus here. They don't  
18 -- they have no interest in these assets.

19 They -- and to the extent that they  
20 do, the Court can protect that. It -- it can  
21 protect that interest in a -- in a sale.

22 CHIEF JUSTICE ROBERTS: Well, assuming  
23 you're right, does that mean, if you lose here,  
24 you think Iran will be able to repatriate the  
25 assets?

1           MR. PERLIN: Absolutely. There's  
2 nothing in their way. They did. They did. We  
3 lost -- we lost in the district court, and  
4 there was another collection of Iran --  
5 Iran-owned assets, and on the eve of the -- the  
6 argument in the court of appeals, they were  
7 shipped back to Iran after the court had denied  
8 our -- our motion to stay, but -- but they were  
9 shipped back to Iran. And they --

10           JUSTICE BREYER: They have other  
11 things in the United States. I mean, it seems  
12 to me so far, that the main difference between  
13 your interpretation and the other side as a  
14 practical matter is that if you're right, that  
15 private people will be able to take cultural  
16 assets from Persia and sell them and ship them  
17 back to Iran, and if they're right, you will  
18 have to limit your recovery to commercial  
19 objects because that's what the other parts of  
20 the statute provide.

21           MR. PERLIN: Well --

22           JUSTICE BREYER: Now -- now, that's  
23 not perhaps going to turn out to be relevant to  
24 the decision. I grant you that. But I -- I --  
25 I -- it's something I'm -- I'm -- like to have

1 in my mind.

2 MR. PERLIN: Okay. The -- the  
3 distinction under the foreign sovereign  
4 immunity -- let's put it this way. They want  
5 to cabin us into Section 1610(a)(7), which is  
6 the commercial use exception for property owned  
7 by the state.

8 That provision, as the Seventh Circuit  
9 held, requires not just use for a commercial  
10 activity, but it has to be used by the foreign  
11 state. And a number of courts of appeal have  
12 held, as did the Seventh Circuit and this Court  
13 did not accept review of this issue, that --  
14 that it has to be -- that the use must be by  
15 the foreign state itself, even though that's  
16 not in the -- those words are not in the  
17 statute.

18 But a number of courts of appeal have  
19 looked at financial assets -- let's take the,  
20 you know, proceeds of a -- of a commercial  
21 transaction between a state and private parties  
22 that are proceeds that are held in an account,  
23 that are intended for the foreign state, and  
24 the courts have said that's not commercial use  
25 property. Why? Not because it's the proceeds

1 of a commercial transaction, but because those  
2 proceeds belong -- have not yet been used by  
3 the foreign state for commercial activity.

4 They're just sitting in the account  
5 passively waiting to be used, but they haven't  
6 been used yet, and the state can say, we're  
7 going to put it in our general account --

8 JUSTICE SOTOMAYOR: That just seems  
9 like --

10 MR. PERLIN: -- in the Treasury.

11 JUSTICE SOTOMAYOR: -- an issue  
12 Congress has to address.

13 MR. PERLIN: Well, Congress --

14 JUSTICE SOTOMAYOR: And those courts  
15 may well be wrong. I don't know.

16 MR. PERLIN: What I'm saying is that  
17 the practical difference between our  
18 construction and the Respondents' construction  
19 is not antiquities. It's all of these cases  
20 dealing with -- with passive bank accounts.  
21 There's another case in California where there  
22 was a judgment obtained by the Ministry of  
23 Defense of Iran against a defense contractor,  
24 and the court said the money paid by the -- by  
25 the Ministry of Defense, that's not commercial

1 use property because it hasn't been used by  
2 Iran.

3           There -- there's -- there are  
4 countless cases like this, and this is the body  
5 -- these are the -- these are the -- the cases  
6 that this provision is -- is -- or one group of  
7 cases this provision is intended to cover.  
8 It's not intended to cover antiquities, and I  
9 don't think there's going to be a -- a mad rush  
10 to grab antiquities.

11           JUSTICE BREYER: That's what you're  
12 doing yourself in this case; that's what it is,  
13 isn't it?

14           MR. PERLIN: That's all that they've  
15 left. That's all -- this -- this proceeding  
16 below began in 2003. The -- the terror attack  
17 in this case was in 1997. My clients have been  
18 waiting 20 years to enforce their judgment  
19 against Iran. Iran does not pay judgments.

20           You know -- you know, it's not  
21 Argentina, they can't afford to pay the  
22 judgment. They just don't. And they don't --  
23 they don't care what the American courts say.  
24 And Congress finally said enough is enough, and  
25 -- and they said there's punitive damages and

1 we're going to waive res judicata, we're going  
2 to waive collateral estoppel, we're going to  
3 waive statutes of limitations; you can go back  
4 and convert your old judgments into a new 1605A  
5 judgment and use -- and use that tool under  
6 1610(g), under our provision to enforce it.

7 Congress said enough is enough. We  
8 want these judgments enforced. And it's not  
9 about antiquities. That's -- that's -- that's  
10 what the Respondents are writing about, but  
11 they will not tell you what the -- what the  
12 property of a foreign state applies to.

13 JUSTICE GINSBURG: Is there anything  
14 --

15 MR. PERLIN: The United States doesn't  
16 --

17 JUSTICE GINSBURG: Is -- is there  
18 anything in the legislative record that shows  
19 that Congress was intending to do anything  
20 other than dispense with the Bancec?

21 MR. PERLIN: Absolutely.

22 JUSTICE GINSBURG: Yes?

23 MR. PERLIN: Yes, it says that it  
24 applies -- that the provision will apply to any  
25 property in which the foreign state has a

1 beneficial ownership. That any property in  
2 which the foreign state has a beneficial  
3 ownership is subject to execution of that  
4 judgment. It says the -- the -- the sponsors  
5 -- the Senate sponsors said that it is intended  
6 to remove many of the barriers to execution of  
7 a judgment. And according to Respondents, it  
8 only addresses one of those barriers.

9           It says that the -- the right to the  
10 -- to the property is subject to a simple  
11 ownership test. A simple ownership test. When  
12 you start piercing veils and layers of veils,  
13 that is not a simple ownership test. That  
14 might have been intended to be included in --  
15 in the -- but that's not what was being  
16 addressed.

17           And, finally, what the -- what the  
18 statute does say, the legislative history --  
19 the House Report says that "although it  
20 subjects to execution any property in which the  
21 state has a beneficial -- beneficial interest,  
22 it does not extend to diplomatic property."

23           So once Congress is excluding  
24 specifically that narrow class of  
25 quintessentially sovereign property, diplomatic

1 property, you know that it's extending to -- it  
2 covers everything else. There's no reason --  
3 if it didn't cover commercial use property or  
4 non- -- sorry, non-commercial use property,  
5 there's no reason to specifically mention  
6 diplomatic property because, obviously, that's  
7 going to be included in non-commercial.

8 This applies to everything.  
9 Everything except diplomatic, military, and  
10 certain central bank assets. The idea that --  
11 that Congress would be concerned with  
12 affronting the dignity of a state sponsor of  
13 terrorism and would extend protection to their  
14 non-commercial assets for that reason, to avoid  
15 an affront to their dignity, is just  
16 preposterous.

17 JUSTICE GINSBURG: Do you have any  
18 other section that dispenses with the sovereign  
19 immunity then that doesn't mention -- doesn't  
20 say anything that refers to immunity?

21 MR. PERLIN: Well, I mentioned Section  
22 1610(f)(1). It says that the property shall be  
23 subject to execution. And the TRIA, Terrorism  
24 Risk Insurance Act, which is a note. I don't  
25 think I included it -- it was an oversight --

1 in the -- in the statutory appendix, but it's  
2 -- it's codified as a note to Section 1610, and  
3 that -- that provision -- these are the three  
4 terrorism provisions -- execution immunity  
5 provisions of the Foreign Sovereign Immunity  
6 Act, and not one of them uses the word immunity  
7 -- it says that we're abrogating immunity here  
8 or limiting immunity. So, again, it's not  
9 abrogating it wholesale; it's maintaining a --  
10 a -- a skeletal remain of sovereign immunity  
11 because -- in recognition of the fact that  
12 these states are sovereign.

13 JUSTICE ALITO: All right. In your  
14 brief, you offered several other  
15 interpretations of the phrase "as provided in  
16 this section," interpretations that are  
17 different from the one --

18 MR. PERLIN: Yes.

19 JUSTICE ALITO: -- you provided this  
20 morning. Are you disavowing those now?

21 MR. PERLIN: I think that the best  
22 construction is that it refers to the judgment  
23 entered under 1605A. I think that those are  
24 alternative constructions that are viable and  
25 certainly more viable than the Seventh

1 Circuit's.

2           Again, if you sit down and try to  
3 think of cases where -- where the property of a  
4 foreign state will have applicability --  
5 applicability under 1610(g) where it wouldn't  
6 -- where this property wouldn't be subject to  
7 execution under 1610(a)(7), right, according to  
8 the Respondents' construction, you won't find  
9 it. You will not come up with a case or you're  
10 going to have to work very, very hard and  
11 there's no reason Congress would have included  
12 -- if this were only meant to pierce a veil,  
13 Congress would have said subject to subsection  
14 (3), or paragraph (3), the property of an  
15 agency or instrumentality of a foreign state  
16 against which a judgment has been entered under  
17 1605A is subject to execution -- to attachment  
18 and execution.

19           It did not need to mention the  
20 property of the foreign state. Iran and the  
21 government both talk about how it had to  
22 mention the foreign state. Well, it's true, it  
23 had to mention the foreign state because a  
24 judgment was entered against the foreign state,  
25 but it does not need to single out the property

1 of the foreign state, if all this were -- was a  
2 veil-piercing mechanism.

3 It doesn't work. It doesn't -- you  
4 cannot pierce the veil of a company or a  
5 country to reach the property the country owns  
6 directly.

7 Now, let me just point out that none  
8 of the other provisions of 1610 work with (g)  
9 either. (b), which the Seventh Circuit relied  
10 on -- it said this section refers to subsection  
11 -- really refers to subsections (a) and (b).  
12 Subsection (b) applies only where there's a  
13 judgment entered against the agency or  
14 instrumentality.

15 If you have -- again, if you have a  
16 judgment against the agency or instrumentality,  
17 you don't need a veil-piercing mechanism to  
18 reach it because you go after -- you go after  
19 its property directly.

20 (c) is -- is -- specifically mentions  
21 (a) and (b) only, that an execution referenced  
22 under (a) and (b), and it doesn't mention (g).  
23 And Congress could have amended it to include  
24 executions under (g).

25 (d) is for prejudgment attachment

1 where there's an express waiver of immunity.

2 None of these provisions work. I'm  
3 going to -- I'd like to reserve the rest of my  
4 time for rebuttal, but if you -- if you sit  
5 down and try to -- they don't work. It just  
6 doesn't -- there's no way to read it according  
7 to the Seventh Circuit and -- and apply it.

8 CHIEF JUSTICE ROBERTS: Thank you,  
9 counsel.

10 Mr. Strauss.

11 ORAL ARGUMENT OF DAVID A. STRAUSS

12 ON BEHALF OF THE RESPONDENTS

13 MR. STRAUSS: Thank you, Mr. Chief  
14 Justice, and may it please the Court:

15 Let me first pick up on a piece of the  
16 legislative history that my friend quoted to  
17 the Court. Senator Specter, who introduced the  
18 precursor of what became 1610(g), did say that,  
19 as -- as Mr. Perlin said, that the provision  
20 was designed to eliminate many of the barriers  
21 which are preventing U.S. citizens from  
22 collecting on court-ordered damages. He then  
23 said it does this by changing the legal  
24 standard of the Bancec doctrine. So that was  
25 the way in which this exposed more assets --

1 more property to execution by terrorism  
2 plaintiffs.

3 In fact, the Petitioners' position  
4 about the construction of 1610(g) is wrong for  
5 four independently sufficient reasons. One is  
6 the language the Court has focused on, "as  
7 provided in this section." This section, is  
8 Section 1610, that is the section of which (g)  
9 is a subsection. So the phrase "as provided in  
10 this section" means the Petitioners have to  
11 satisfy the provisions of 1610, which means  
12 that only property used for commercial activity  
13 in the United States can be seized. And  
14 Petitioners, I think, have just not come up  
15 with a plausible alternative account of what  
16 "as provided in this section" means.

17 But there's a second reason. And it  
18 has to do with the difference between  
19 subsection (g) and the provisions of subsection  
20 1610 that really do abrogate sovereign  
21 immunity. The Foreign Sovereign Immunities Act  
22 says, in Section 1609, that the property of  
23 foreign states in the U.S. shall be immune from  
24 attachment, except as provided in 1610.

25 Then the subsections of 1610 say in

1 terms one after another that certain property  
2 shall not be immune. Subsection (a) says that,  
3 as does (b), as does (d), as does (e).  
4 Subsection (g) contains no such language. The  
5 relevant part of subsection (g) does not refer  
6 to immunity at all.

7 And there's a reason for that. The  
8 reason is that (g) is about Bancec, and the  
9 Bancec doctrine is not an immunity doctrine.  
10 The Court was very explicit about that in the  
11 decision, the Bancec decision itself.

12 CHIEF JUSTICE ROBERTS: Well, you do  
13 think -- agree with him, don't you, that the  
14 property of a foreign state in -- in (g)(1)  
15 is a -- is a strong indication at least that it  
16 is not limited to overturning the Bancec  
17 decision?

18 MR. STRAUSS: No, I -- I don't agree  
19 with that, Mr. Chief Justice. I think what's  
20 going on there is Congress wanted to make it  
21 very clear that Bancec was no longer -- no  
22 longer going to be a barrier in these cases.

23 And so it said property of the state,  
24 property of agencies, property of  
25 instrumentalities, property of separate

1     juridical entities, interests in separate  
2     juridical entities, all of these things are in  
3     the same basket, and all of them are subject to  
4     attachment and execution.

5             I think that's why you have that --  
6     that language in -- in (g)(1). It's not a --

7             CHIEF JUSTICE ROBERTS: But Bancec  
8     wasn't about property of a foreign state. It  
9     was about the agencies, instrumentalities, et  
10    cetera.

11            MR. STRAUSS: It's -- it is -- that is  
12    -- it's right that Bancec was not about the  
13    property of a state itself, but the way the  
14    section is written, property of a state  
15    including property that is in a separate  
16    juridical entity or is an interest held  
17    directly or indirectly in a separate juridical  
18    entity, what you see in the legislative history  
19    is a lot of concern that state judgment debtors  
20    would be arranging their assets in ways that  
21    would distance themselves from ownership.

22            JUSTICE BREYER: Is it the case there  
23    on that particular point -- I was trying to  
24    work out that does Bancec ever apply -- could  
25    it apply to funds or -- yeah, funds of the

1 foreign state itself? Is there anything that  
2 suggests it applies where the -- where the  
3 foreign state deposits some money in a bank?

4 And then they argue, we -- that isn't  
5 our money, that's the bank's money, and we're  
6 just the beneficial owner of that money. And  
7 Bancec might have said, yes, that's right, it's  
8 not their money, it's an agency -- it's an  
9 agent's money.

10 MR. STRAUSS: I'll -- I'll say two  
11 things to that, Justice --

12 JUSTICE BREYER: What about that  
13 argument?

14 MR. STRAUSS: -- Justice Breyer. I  
15 think the Bancec criteria are not very clear.  
16 The Court deliberately left the criteria vague.  
17 And I think Congress was concerned about that  
18 situation.

19 And I think that's why you see this  
20 language in (g)(1) that really tries to be  
21 comprehensive and cover every base. But what I  
22 think you don't get out of (g)(1) is anything  
23 about immunity because it even applies to  
24 separate juridical entities who would have no  
25 claim to --

1 CHIEF JUSTICE ROBERTS: Well, it  
2 doesn't want them to cover everything in every  
3 case. It's titled property in certain actions.  
4 And I think the other argument on the other  
5 side is that the certain actions are, you know,  
6 the ones in -- in -- don't include the ones  
7 governing the property of the foreign state.

8 MR. STRAUSS: Well, I think the  
9 certain actions, Mr. Chief Justice, are actions  
10 to execute judgments under 1605A. This is a  
11 special provision to make it easier for  
12 terrorism plaintiffs to get assets. It doesn't  
13 apply to ordinary judgment plaintiffs.

14 And I think that's the -- that's the  
15 property it's referring to. This is -- really  
16 was intended to make it much easier for  
17 plaintiffs who have terrorism-based judgments  
18 to get their hands on assets, but only those  
19 plaintiffs. And I think those are the actions,  
20 and that's why a judgment entered under 1605A  
21 -- but that doesn't mean that the rest of the  
22 section does not apply.

23 In fact, it says the rest of the  
24 section does apply upon -- as -- as provided in  
25 this -- in this section.

1 JUSTICE SOTOMAYOR: Mr. Strauss, I  
2 think you were cut off on three independent  
3 reasons. You went -- you went through one and  
4 two. What were three and four?

5 MR. STRAUSS: Two was the -- the  
6 repetition --

7 JUSTICE SOTOMAYOR: The one you were  
8 just talking about.

9 MR. STRAUSS: Not the repetition of --  
10 shall not be immune. The third is this: The  
11 Petitioners' position really would nullify a  
12 decision Congress made at the very same time it  
13 enacted 1610(g) in 2008. This is -- we go  
14 through this on page 25 and 26 of our brief.

15 The -- the statute that added  
16 subsection (g) also created 1605, the cause of  
17 action that -- the remedy the Petitioners  
18 invoke. That statute then amended the FSIA to  
19 say to parties like Petitioners, who are  
20 seeking to execute a 1605A judgment, must show  
21 that the property they want to seize is used  
22 for commercial activity of the United States.  
23 That same statute said that. It said that by  
24 inserting 1605A into subsection (a), which is a  
25 subsection that requires commercial activity.

1 So Congress did that. It created 1605 --  
2 1605A.

3 It said if you have a judge -- if you  
4 are trying to execute a 1605A judgment, here is  
5 how you do it. Section -- you go to section --  
6 subsection (a), subsection (a)(7) says you can  
7 execute a 1605A judgment, provided you can show  
8 that the property is used for commercial  
9 activity in the United States. That's what  
10 that statute does.

11 Then the next provision -- or a few  
12 lines later in the statute, really, it's not  
13 even the next provision, sets up, enacts  
14 subsection (g). So, as Petitioners would --  
15 would have it, Congress created this remedy,  
16 provided that if you want to execute a judgment  
17 based on this remedy, you go to subsection (a)  
18 and you show that the property you're seizing  
19 is used for commercial purpose -- commercial  
20 activity in the United States.

21 And then immediately Congress said,  
22 oh, never mind, you don't have to show  
23 commercial activity. That's Petitioners'  
24 story.

25 That's Petitioners' account of the

1     significance of 1610(g).  And I think that's  
2     just no way to read Congress's actions.  That  
3     just does not -- is not a plausible account of  
4     what Congress might have been doing.

5             And there's really a fourth reason as  
6     well, and it has to do with how central the  
7     commercial activity limit is to the FSIA and to  
8     foreign sovereign immunity generally.  The  
9     principle at stake here is the principle that  
10    commercial property may sometimes be subject to  
11    seizure, but non-commercial property is not.

12            And that principle is -- has the  
13    deepest roots in U.S. law and international  
14    law.  It's actually anticipated by Chief  
15    Justice Marshall's opinion in the Schooner  
16    Exchange.  It was the foundation of the Tate  
17    Letter, which led to the reorganization of  
18    foreign sovereign immunity doctrines.

19            That distinction between commercial  
20    and non-commercial property is stated  
21    explicitly in the FSIA itself in Section 1602.  
22    It's central to the U.N. Convention on  
23    Immunities of States.  It was the holding of a  
24    recent decision of the International Court of  
25    Justice which barred the seizure of, as it

1 happens, a cultural center. The ICJ barred the  
2 seizure of a cultural center because the  
3 cultural center is non-commercial, and that  
4 case actually involved the victims of Nazi  
5 crimes. So this is an extremely deeply rooted  
6 principle. Now, that's not to say Congress  
7 could not abrogate it. Of course, Congress  
8 could.

9 But the Court said, just last term, in  
10 Helmerich, the case involving the Venezuelan  
11 seizure of oil rigs, that the Court is not  
12 going to assume that Congress has made a quote,  
13 in the Court's words, "radical departure" from  
14 central principles like that one, unless  
15 Congress has made its determination very clear,  
16 and here what's really very clear is the  
17 opposite, that Congress did not intend to  
18 override sovereign immunity in Section 1610(g).

19 If the Court has no further questions?

20 CHIEF JUSTICE ROBERTS: Thank you,  
21 counsel.

22 MR. STRAUSS: Thank you very much.

23 CHIEF JUSTICE ROBERTS: Mr. Tripp.

24

25

1           ORAL ARGUMENT OF ZACHARY D. TRIPP ON BEHALF OF THE  
2           UNITED STATES, AS AMICUS CURIAE, SUPPORTING THE  
3           RESPONDENTS

4           MR. TRIPP: Mr. Chief Justice, and may  
5 it please the Court:

6           These ancient Persian artifacts are  
7 immune from execution under 1609, and nothing  
8 in 1610(g) lifts that immunity. And if I could  
9 just make three quick points about why that's  
10 right.

11           The first, as most of the questioning  
12 has already been focused on today, is it just  
13 can't be squared with the statutory text. The  
14 statute says that the property of these  
15 different entities is subject to execution "as  
16 provided in this section."

17           But the way Petitioners read it, it  
18 would work exactly the same way if it said the  
19 exact opposite. If it said that the property  
20 was subject to execution, regardless of what is  
21 provided in the section, and that just can't be  
22 right.

23           And then so, second, I think another  
24 thing that really drives home that they are  
25 misreading this law is that the way they read

1 it, it gives with one hand what it takes away  
2 with another.

3 So, as my brother was explaining,  
4 Congress added (g) at the same time it added  
5 (a)(7), and what (a)(7) says is that these very  
6 same people, victims of terrorism with  
7 judgments under 1605A, it says that they can  
8 execute against the property of a foreign  
9 state, but only if it's used in commercial  
10 activity.

11 But the way they read (g), those  
12 people can defeat that limitation just by  
13 invoking a different subsection of the same  
14 statute. They can get commercial,  
15 non-commercial property, whatever, and that's  
16 just not a sensible way --

17 JUSTICE SOTOMAYOR: Don't they --

18 MR. TRIPP: -- to draft a statute.

19 JUSTICE SOTOMAYOR: Don't they explain  
20 (a)(7) as being present to permit state law  
21 claims based on the same actions as the federal  
22 action?

23 MR. TRIPP: So --

24 JUSTICE SOTOMAYOR: That would render  
25 (a)(7) --

1           MR. TRIPP: So we -- we don't think  
2 that's right, and we also just don't think it  
3 really helps them.

4           JUSTICE SOTOMAYOR: I know you're  
5 saying it, but explain to me why.

6           MR. TRIPP: Yes. So the reason it's  
7 not right, we explain this on pages 24 and 25  
8 of our brief. It has to do with the language  
9 of 1605A itself. This is on 12A of our gray  
10 brief if you want to see it.

11           And what 1605A says is "The Court  
12 shall hear a claim under this section if" and  
13 then the prerequisites to jurisdiction are  
14 satisfied. So we think anytime a court gets  
15 jurisdiction and enters a judgment, it's a  
16 judgment under 1605A, regardless of what cause  
17 of action they happen to invoke.

18           I also think this doesn't really move  
19 the dial for them much because, in practice, in  
20 the mine-run application of 1605A, when  
21 somebody gets jurisdiction, they're also going  
22 to use the cause of action.

23           As Petitioners were -- were  
24 describing, it's very powerful, it's directly  
25 on point, punitive damages, vicarious

1 liability, and so it would still be true that,  
2 in the mine-run application of (g), they would  
3 be reading the law to give with one hand what  
4 it takes away with the other.

5           And then the last thing I'd just like  
6 to mention here is about the United States'  
7 competing interests in this case. I mean,  
8 obviously, we have a very strong interest in  
9 combatting state-sponsored terrorism. We also  
10 have concerns in these cases about the  
11 reciprocal -- reciprocal treatment of our own  
12 property abroad. And I think, particularly in  
13 light of those concerns which are quite  
14 weighty, if Congress was really going to take  
15 the step of allowing execution against property  
16 of a cultural and historic significance to  
17 another country and its people, that would be a  
18 big deal and it would not be the kind of thing  
19 that you expect to see buried in a conforming  
20 amendment without remark.

21           JUSTICE SOTOMAYOR: Well, how about  
22 the cases, the other cases he was talking  
23 about, the ones with proceeds in the bank from  
24 a commercial activity, et cetera?

25           His reading would take care of those

1 rulings, wouldn't they?

2 MR. TRIPP: I -- so I think one thing  
3 about -- the way we read the statute too, I  
4 think it does help to some extent with -- with  
5 the breadth of the using commercial activity,  
6 is that the way we read (g), once you -- if you  
7 have a judgment against the foreign state, you  
8 can pierce the veil down through to the agency  
9 or instrumentality, and then you can go after  
10 the agency or instrumentality's property under  
11 (b)(3). And (b)(3) does not require that the  
12 -- the property be used in commercial activity.  
13 It's enough that the instrumentality is engaged  
14 in commercial activity.

15 JUSTICE SOTOMAYOR: So you think those  
16 other courts were wrong?

17 MR. TRIPP: Those other -- I believe  
18 the other decisions that he was talking about  
19 were interpreted in (a)(7), not (b)(3). And so  
20 -- but as we understand it, the statute works  
21 together with -- with all of it. It works --  
22 1610, you can pierce the veil and use (a), (b),  
23 the procedures in (c) would apply, (d) could  
24 apply, (f) could apply if it weren't waived.  
25 And so I think a natural way for Congress to

1 pick up all of those -- all of those procedures  
2 was to say that the property is subject to  
3 execution as provided in this section.

4 And so what Congress did was to tether  
5 the extent of execution under this  
6 veil-piercing provision to all the protections  
7 that are already baked in elsewhere in 1610,  
8 and those protections ensure that you can't  
9 execute against the ancient Persian artifacts  
10 like these.

11 So, if there's no further questions,  
12 we're asking the Court to affirm.

13 CHIEF JUSTICE ROBERTS: Thank you,  
14 counsel.

15 Mr. Perlin, you have five minutes  
16 remaining.

17 REBUTTAL ARGUMENT OF ASHER PERLIN  
18 ON BEHALF OF THE PETITIONERS

19 MR. PERLIN: The first point I want to  
20 make is that the -- the government and the  
21 University claim that our reading would render  
22 this -- would render subsections (a)(7) and  
23 (b)(3) superfluous. That's -- that's not the  
24 case.

25 The private right of action under --

1 under Section 1605A(c) applies only where the  
2 plaintiffs are U.S. nationals, members of the  
3 military, or government contractors or  
4 employees.

5 The immunity waiver that's also in  
6 1605A, but subsection (a), so 1605A(a), applies  
7 where the claimant or the victim is a U.S.  
8 national, a member of the military, or a  
9 government employee or contractor.

10 It's a -- it applies to a broad -- it  
11 -- the immunity waiver reaches a broader class  
12 of plaintiffs. The remedy provided under  
13 1610(g) is limited to those who hold judgments  
14 under 1605A, and this judgment that's available  
15 under 1605A is a -- is the statutory judgment.

16 The provisions of 1610(a)(7) and  
17 (b)(3) apply where the judgment relates to a  
18 claim for which the foreign state is not immune  
19 under 1605A, which is explicitly referring to  
20 the immunity exception and it's explicitly  
21 referring to the broader class of plaintiffs.  
22 So we don't think that -- that there's -- there  
23 is some overlap, but it does -- that does not  
24 render (a) and (b) superfluous.

25 Second of all, (b), as Iran argues and

1 they argued below in -- in the Bennett case,  
2 which is Case 16-334, I believe, there, there  
3 was a case where VISA had collected money for  
4 Bank Melli, a bank -- an Iranian bank, and was  
5 holding it because -- because of the sanctions.  
6 It could not return that -- it could not pay  
7 that money out. Terrorism victims came and  
8 said we want to -- we want to enforce a  
9 judgment against that money that VISA collected  
10 on behalf of Bank Melli. And VISA filed an  
11 interpleader action.

12 Iran defended, and they said you can't  
13 -- you cannot enforce your judgment under  
14 1610(b)(3) because that applies only where the  
15 judgment is entered against the instrument --  
16 the agency or instrumentality, and Bank  
17 Melli -- there's no judgment here. That's what  
18 Iran -- that's what Iran's argument was. The  
19 -- and, right -- Iran continues to maintain  
20 that -- that it won't apply to (b)(3).

21 And I think that that's -- I mean,  
22 that's -- you would have to say that -- you  
23 would have to read out of (b)(3) the limitation  
24 that you need a judgment against the agency or  
25 instrumentality for it to apply to (b)(3).

1 Again, there's -- there's no way to read this  
2 through according to their construction, to  
3 read it through and apply it.

4 Now, again, just to make clear the  
5 point about the "as provided" -- "upon a  
6 judgment as provided in this section," if you  
7 look at the other substantive provisions of  
8 1610, they allow -- let's start with -- let's  
9 look at 1610(a). The opening paragraph says  
10 that the property of a foreign state "used for  
11 ... commercial activity in the United States,  
12 shall not be immune from attachment ... or from  
13 execution, upon a judgment entered by a court  
14 of the United States." Right?

15 There's "execution, upon a judgment"  
16 and then words that modify the judgment. Same  
17 thing in subsection (b). It's the exact same  
18 structure.

19 Subsection (f), it's not the exact  
20 same words, but it's the same structure again  
21 that -- that the property is subject to  
22 execution of any judgment relating to a claim  
23 for which the state is not immune. Again, the  
24 words following "judgment" are modifying the  
25 word "judgment," which makes sense under the

1 last antecedent rule, and it also makes sense  
2 here because we're -- we're talking about a  
3 particular judgment. Section 1610(g) applies  
4 to -- to a particular judgment.

5 The -- the word "execution" is  
6 separated from that phrase by a comma. The  
7 words "upon that judgment as provided in this  
8 section" do not contain a comma. Those words  
9 are meant to be read together, and the "as  
10 provided in this section" is modifying the word  
11 "judgment."

12 The U.S. concerns about foreign --  
13 about foreign -- foreign relations are  
14 misplaced. The explicit purpose -- one of the  
15 explicit purposes of the Foreign Sovereign  
16 Immunities Act was to remove foreign sovereign  
17 immunity decisions from the executive branch  
18 and -- and place them with the courts.

19 And that was for two reasons. One,  
20 that -- that plaintiffs, American plaintiffs,  
21 were being treated unequally based on whatever  
22 policy consideration was relevant at the time.  
23 And, two, the government was subject to foreign  
24 pressure. So to -- to remove this pressure  
25 from the government, Congress placed this

1 authority in the hands of the courts rather  
2 than the government.

3 CHIEF JUSTICE ROBERTS: Thank you,  
4 counsel.

5 MR. PERLIN: Your Honor.

6 CHIEF JUSTICE ROBERTS: The case is  
7 submitted.

8 (Whereupon, at 11:56 a.m., the case in  
9 the above-entitled matter was submitted.)

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## Official

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