No. 16-534

# In The
# Supreme Court of the United States

JENNY RUBIN, DEBORAH RUBIN, DANIEL MILLER, ABRAHAM MENDELSON, STUART HERSH, RENAY FRYM, NOAM ROZENMAN, ELENA ROZENMAN, and TZVI ROZENMAN,

*Petitioners,*

v.

ISLAMIC REPUBLIC OF IRAN, FIELD MUSEUM OF NATURAL HISTORY, and UNIVERSITY OF CHICAGO, THE ORIENTAL INSTITUTE,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

## REPLY FOR PETITIONERS

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## REPLY FOR PETITIONERS

Respondent Islamic Republic of Iran ("Iran") agrees with petitioners that the circuit split regarding the construction of 28 U.S.C. § 1610(g) presents an important question worthy of this Court's review. Iran.Resp. 1-2, 14-16. Both the *Rubin* majority and dissent expressly recognized the circuit conflict between the decision below and the Ninth Circuit's decision in *Bennett v. Islamic Republic of Iran*, 825 F.3d 950 (9th Cir. 2016). App. 35 n.6; App. 39. Only respondent, the University of Chicago (the "University"), the one party to this action with no claim to ownership of any of the assets at issue, denies the existence of the circuit split.[1]

The Seventh Circuit's construction of § 1610(a) departs sharply from both the statutory text and Supreme Court precedent. By erroneously declaring that its decision represents a "consensus," the Seventh Circuit would preclude further consideration of this question. Accordingly, review should be granted because this petition is likely the last chance for any court to review the Seventh Circuit's construction of § 1610(a).

[1] The petitioners agree with the Field Museum certiorari should be limited to the Persepolis Collection.

## I. THE COURT SHOULD REVIEW THE SEVENTH CIRCUIT'S NARROW CONSTRUCTION OF SECTION 1610(g).

### A. The Decision Below Created An Express Conflict With The Ninth Circuit's Decision In *Bennett*.

1. Iran agrees that the circuit conflict "could not be starker" between the decision below and *Bennett* regarding the construction of the Foreign Sovereign Immunities Act's ("FSIA") terrorism exception to executional immunity, 28 U.S.C. § 1610(g). Iran.Resp. 14-15. Iran "agrees that the proper interpretation of § 1610(g) is an important question that has divided the courts of appeals." Iran.Resp. 14. However, the University posits that because the Ninth Circuit's decision rested on alternative grounds, *Bennett* is not binding, and no circuit conflict exists. Univ.Opp. at 10-11.

The University fails to account for the reality that the Ninth Circuit entered ***three*** separate thorough and reasoned decisions authored by two different judges, *Bennett v. Islamic Republic of Iran*, 799 F.3d 1281, 1284 (9th Cir. 2015); 817 F.3d 1131 (9th Cir. 2016); and 825 F.3d 950 (9th Cir. 2016), each holding that section 1610(g) provides a freestanding execution immunity exception that enables terrorism judgment creditors to enforce their judgments against the property of a foreign state regardless of whether the property is used for commercial activity. In *Bennett*, Iran/Bank Melli moved for rehearing *en banc*, but not a single judge requested a vote, and the motion was denied. Pet. *Bank Melli v. Bennett*, No. 16-334, App. 3a.

In addition to *Bennett*, a previous Ninth Circuit panel construed section 1610(g) in the same way. *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1123 n.2 (9th Cir. 2010) ("judgment creditors can now reach any U.S. property in which Iran has any interest"). With four decisions uniformly construing § 1610(g) as providing an independent execution immunity exception, the question of whether these holdings are technically binding upon future Ninth Circuit panels is purely academic. As a practical matter, no Ninth Circuit panel will break with these precedents.

The University also argues that the *Rubin* decision is not binding. Univ.Opp. at 14-15. The University misunderstands the decision below and Seventh Circuit Rule 40(e). The court below overruled two prior Seventh Circuit decisions – *Gates v. Syrian Arab Republic*, 755 F.3d 568 (7th Cir. 2014), and *Wyatt v. Syrian Arab Republic*, 800 F.3d 331 (7th Cir. 2015) – both of which rejected Iran's preferred construction of section 1610(g). App. 35. In a footnote, the court explained that when a panel decision either overrules circuit precedent or creates a circuit split, Seventh Circuit Rule 40(e) requires that the decision be circulated for review by all active Seventh Circuit judges before it may be published. App. 35 n.6. Upon a majority vote of active judges, the court will *sua sponte* rehear the case *en banc*. Seventh Circuit Rule 40(e).

The court circulated the decision, but a majority of active judges had been disqualified, and there was no

quorum to consider *en banc* review. App. 35 n.6. Nothing in Rule 40(e) undermines the force of decisions under these circumstances. Judge Hamilton's dissenting opinion questioned both the wisdom and propriety of the panel's actions. App. 39, 42. However, Judge Hamilton conceded that the panel had in fact overruled circuit precedent and created a circuit split. App. 39. Thus, both the majority and dissent concluded that *Rubin* overruled *Gates* and *Wyatt* and created a circuit conflict. App. 35 n.6; App. 39.

2. The University argues that *Bennett*'s authority is doubtful because the Ninth Circuit "relied explicitly" upon *Gates* and *Wyatt*, which the *Rubin* court overruled. Univ.Opp. 12. In fact, *Bennett* interpreted section 1610(g) based upon the statutory text and purpose. *Bennett*, 825 F.3d at 960. Only after reaching its conclusion did the court observe that its holding was also consistent with *Gates* and *Wyatt*. *Id*. Thus, *Rubin*'s overruling of *Gates* and *Wyatt* does not detract from the force of the Ninth Circuit's holding.

3. The University argues that no court other than the Seventh Circuit below had to confront the "sweeping implications" of the Ninth Circuit's construction of § 1610(g). Univ.Opp. 14. This argument is factually incorrect. In its motions for reconsideration in *Bennett*, Iran argued the merits of the *Rubin* case to the Ninth Circuit. In response, the Ninth Circuit explicitly confronted the implications ***for the Artifacts at issue here***, and was not swayed from interpreting the statute consistently with its text and purpose. 825 F.3d at 960 n.6. "[I]t is not our province to decide

whether the policy choices embodied in a statute are wise or unwise; our task is, rather, to discern congressional intent." *Id*.

In his dissent below, Judge Hamilton also explicitly confronted the implications of *Bennett*'s interpretation of § 1610(g). He held that a true construction of § 1610(g) would allow "the *Rubin* plaintiffs to pursue broader categories of Iranian property, ***including the Persepolis Collection at the University of Chicago***." App. 42 (*emphasis supplied*). The University therefore errs when it claims that courts have not considered the implications of construing § 1610(g) as a freestanding execution immunity exception. Univ.Opp. 12-14. However, the University's concern over section 1610(g)'s long reach demonstrates that the question presented is extremely important and warrants review.

### B. The Terrorism Exception To Execution Immunity Should Not Be Interpreted Based Upon Policies Supporting Commercial Activities Exceptions.

Iran and the University argue that the interpretation of section 1610(g) adopted by the Ninth, Second, and D.C. Circuits[2] "represents a substantial departure

[2] *See Kirschenbaum v. 650 Fifth Ave*., 830 F.3d 107, 123 (2d Cir. 2016); *Weinstein v. Islamic Republic of Iran*, 831 F.3d 470, 483 (D.C. Cir. 2016). Pet. 22, 24.

from traditional immunity principles,"[3] and for this reason should be rejected. Pet. *Bank Melli*, No. 16-334, at 30-33; Univ.Opp. 13. Indeed, fundamental differences between the respective rationales underlying the terrorism exceptions and the commercial exceptions to foreign sovereign immunity *compel* different approaches.

Congress enacted the Foreign Sovereign Immunities Act in 1976 to remove the sovereign immunity protections from the commercial and other private conduct of foreign states, while retaining immunity for conduct that is "peculiar to sovereigns." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992). Twenty years later, Congress began legislating immunity exceptions for state-sponsored terrorism. These new provisions addressed a unique category of state conduct – terrorism – that was not neatly cabined with the existing categories of "commercial," "private," or "sovereign."

In the terrorism exceptions, Congress has decided that state-sponsored terrorism represents "a certain category of sovereign act[ ]" that is so "repugnant to the United States and the international community," that it does not deserve immunity. *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 12 (D.D.C. 1998). Despite, or possibly because of, the distinctly "sovereign" nature of state-sponsored terrorism, Congress decided to limit

[3] As Iran asserts in its Bennett petition, this "departure" demonstrates the importance of the question presented, and supports granting certiorari. Pet. *Bank Melli*, No. 16-334 at 30-33.

foreign sovereign immunity in this area. As the D.C. Circuit recently held, "the terrorism activity exception is, simply put, different." *Weinstein v. Islamic Republic of Iran*, 831 F.3d 470, 483 (D.C. Cir. 2016). "Those nations that operate in a manner inconsistent with international norms should not expect to be granted the privilege of immunity from suit. . . .". *Ministry of Def. & Support for the Armed Forces v. Cubic Def. Sys.*, 984 F. Supp. 2d 1070, 1080 (S.D. Cal. 2013). State-sponsored terrorism is fundamentally distinguishable from state commercial activity, and the two are not subject to the same policy considerations.

### C. The Seventh Circuit's Construction of Section 1610(g) is Wrong.

1. The Seventh Circuit rendered several lines of statutory text meaningless when it construed § 1610(g) as merely removing the *Bancec* barrier to enforcement of judgments against juridically independent agencies instrumentalities of foreign state judgment debtors. *See First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) ("*Bancec*"); Pet. 24-27. Specifically, if the only purpose of subsection (g) were to abrogate the separate entity rule, then subsection (g)'s references to property of the foreign sovereign itself and to property of agencies or instrumentalities that are *not* separate juridical entities would be entirely unnecessary and misleading. Congress did not enact a statute enabling plaintiffs to pierce the corporate veil between a foreign state defendant and *itself*, or between a foreign state defendant

and its instrumentalities that are *not* separate juridical entities (i.e., which *lacks* any corporate veil to be pierced). Respondents' silence on this point is tantamount to an admission that this language cannot be reconciled with the Seventh Circuit's construction of § 1610(g) as a mere veil-piercing provision.

Contrast the Ninth Circuit's construction of Section 1610(g) under which those lines mean what they say: Terror victim judgment creditors can now enforce their judgments against the "property" – even non-commercial property – of "a foreign state against which a judgment is entered under section 1605A," and against "the property of an agency or instrumentality of such a state," whether or not the agency or instrumentality is juridically independent. *And*, the *Bancec* factors listed in the statute are not an obstacle to any such enforcement.

The Seventh Circuit and respondents read the clause, "as provided in this section" as modifying the type of property to which § 1610(g) applies. This construction not only renders meaningless an entire swath of statutory language, as explained above, it also fails to account for the clause's placement within the statute. Thus, *Bennett* explained that the clause, "as provided in this section" refers, "at a minimum" to the rules contained in subsection (f), which like subsection (g), was enacted to facilitate enforcement of judgments entered under the terrorism exceptions to jurisdictional immunity found in § 1605A, and its predecessor, § 1605(a)(7). *Bennett*, 825 F.3d at 959-60 n.6. The Ninth Circuit accounts for every word in § 1610(g). *Rubin*, by

contrast, renders much of § 1610(g) meaningless or unintelligible.

2. Iran argues that under *Bennett*'s construction, "§ 1610(g) imposes no limitations at all on the types of property subject to execution . . . " and that even diplomatic property would be subject to attachment. Iran.Resp. 20. The University, however, recognizes that § 1611 limits the sovereign property subject to execution under § 1610(g) by immunizing certain foreign central bank or monetary authority property and certain property used in connection with military activity. Univ.Opp. 13 n.4.

Similarly, the Ninth Circuit's construction of § 1610(g) does not enable execution upon diplomatic assets in violation of the Vienna Convention on Diplomatic Relations ("VCDR"). *See* Iran.Resp. 20. Under 28 U.S.C. § 1609, FSIA immunity exceptions are "[s]ubject to existing international agreements to which the United States is a party at the time of enactment." *Wyatt v. Syrian Arab Republic*, 83 F. Supp. 3d 192, 195 (D.D.C. 2015). "[P]roperty exempt under the VCDR is also exempt under the FSIA, regardless of how it would be treated under sections 1610 and 1611." *Id*. Finally, as petitioners explained previously, Pet. 13, 30, and as this Court observed in *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1318 n.2 (2016), section 1610(g) does not take precedence over other laws. Therefore, where some other basis for immunity lies, execution may be prohibited even if otherwise permitted under § 1610(g). *See, e.g., Harrison v. Republic of Sudan*, 838

F.3d 86, 98 (2d Cir. 2016) (§ 1610(g) does not override limitations on execution against blocked assets).

## II. THE SEVENTH CIRCUIT'S INTERPRETATION OF SECTION 1610(a) IS WRONG AND WARRANTS REVIEW.

1. The Seventh Circuit's construction of § 1610(a) presents an important question of federal law that, even in the absence of an ***express*** circuit split, warrants immediate review. Pet. 36-38. The court below misstated decisions of three other courts of appeals and declared a false "consensus" supporting its own interpretation of § 1610(a). Pet. 36-38. Rather than engaging the facts of these putative "precedents," Iran quotes excerpts divorced from context, cites the Seventh Circuit's decision as authority for itself, and repeats the *mantra* that "as the Seventh Circuit noted, every circuit to have addressed the issue has agreed with its interpretation." Iran.Resp. 21. The fact remains that none of the "precedents" addressed the question of third-party use of property owned by a foreign sovereign.

2. The Seventh Circuit's holding that section 1610(a) allows execution only where the foreign state itself uses its property for commercial activity flatly defies the statutory text. Section 1610(a) does not specify whether a particular party must use the property; it merely specifies that the property must be "used." In *Dean v. United States*, 556 U.S. 568, 572 (2009), the

Court held that this form of statutory construct "focuses on an event that occurs without respect to a specific actor. . . ." *Id*. *See also, Harrison v. Republic of Sudan*, 838 F.3d 86, 91 (2d Cir. 2016) (applying *Dean* to hold the FSIA does not require that service of process be made *in the foreign county* where the statute does not provide explicitly). Applying the rule of *Dean* to § 1610(a), use by ***anyone*** triggers the immunity exception. Rather than following *Dean*, to preempt ambiguity, the Seventh Circuit rejected *Dean* and construed the passive voice as creating ambiguity.

3. Having created ambiguity, the Seventh Circuit referred to the statutory findings and declaration of purpose of § 1602. This Court has held that § 1602 describes the two purposes of the FSIA as (a) codifying the restrictive theory of sovereign immunity, and (2) transferring primary responsibility for deciding claims of immunity from the State Department to the courts. *Samantar v. Yousuf*, 560 U.S. 305, 313 (2010). As discussed in the petition, and contrary to *Samantar*, the Seventh Circuit selectively italicized the words in § 1602 and based upon that emphasis, concluded that the purpose of the FSIA was to ensure a foreign sovereign's property loses immunity only when the foreign sovereign itself uses the property for commercial activity. App. 17-18. The University argues that this "purpose" is "the core principle of the FSIA." Univ.Opp. 19. Iran claims that the "petitioners' construction of § 1610(a) puts the provision at war with the statute's explicitly stated purpose." Iran.Resp. 23.

On the contrary, the Seventh Circuit's construction of § 1610(a) puts it "at war" with the statutory text, which plainly states that ***anyone's*** use of foreign state property for a commercial activity establishes the immunity exception of § 1610(a). The Seventh Circuit's construction is also "at war" with numerous Supreme Court precedents, as well as the Ninth Circuit's *en banc* decision in *Cassirer v. Kingdom of Spain*, 616 F.3d 1019 (9th Cir. 2010), and the Second Circuit's decision in *Harrison*, 838 F.3d at 91, *supra*, 11. Pet. 6-8, 33-35. Specifically, the Seventh Circuit's decision is methodologically in conflict with *Dean*, *Cassirer*, and *Harrison*. Against this backdrop, the Court should review *Rubin*'s construction of § 1610(a), and prevent it from establishing a "consensus" that is "at war" with the text of the statute and numerous decisions of this Court and others.

4. Iran refers to 28 U.S.C. § 1605(a)(2) which provides that under one jurisdictional immunity exception, the commercial activity must be carried on "by the foreign state." Resp. 24. Iran argues that the specificity of § 1605(a)(2) should be read into § 1610(a). But the contrast cuts the other way. Congress conspicuously omitted this restrictive language in § 1610(a). And, this omission demonstrates Congress's intent to allow attachment of a foreign state's property regardless of who uses it for commercial activity. Even if executional immunity exceptions tend to be more limited than jurisdictional immunity exceptions, that *trend* cannot be used to alter statutory language. Moreover, historical,

pre-FSIA jurisprudence does not trump express statutory provisions.

Finally, Iran relies upon the Seventh Circuit's "skepticism" that the museums' use of the Artifacts constitutes "commercial activity." Resp. 25-6. However, like the Seventh Circuit, Iran fails to consider this Court's holding in *Republic of Argentina v. Weltover, Inc*., 504 U.S. 607 (1992) or its progeny. *Weltover* instructed: "[W]hen a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are 'commercial' within the meaning of the FSIA." 504 U.S. at 614. *Malewicz v. City of Amsterdam*, 362 F. Supp. 2d 298, 314 (D.D.C. 2005) held, "There is nothing 'sovereign' about the act of lending art pieces, even though the pieces themselves might belong to a sovereign." Finally, *Sun v. Taiwan*, 201 F.3d 1105, 1108-09 (9th Cir. 2000) held that "a non-profit cultural tour to foster ties with individuals of Chinese descent overseas and promote understanding of Chinese culture" conducted by Taiwan, and the "compilation of a comprehensive linguistic treatise" by the Australian government, were commercial activities under the FSIA, because they are the types of activities sometimes performed by non-sovereigns).

## CONCLUSION

The petition should be granted.

Respectfully submitted,

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