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

SUPPLEMENTAL BRIEF FOR PETITIONERS

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Respondent, Islamic Republic of Iran ("Iran") and the Solicitor General both join the Petitioners in urging the Court to grant review of the Seventh Circuit's decision construing the Terrorism Exception to execution immunity, 28 U.S.C. § 1610(g). Petitioners reiterate their position that the Court should review the Seventh Circuit's erroneous construction of this provision and resolve the circuit split regarding this important question.

Petitioners submit this supplemental brief to respectfully urge the Court to also grant review of the Seventh Circuit's second holding – that the commercial use exception to execution immunity, codified at 28 U.S.C. § 1610(a), allows attachment and execution upon a foreign sovereign judgment debtor's property located in the United States only when the property is used by the foreign state itself. The Seventh Circuit's holding represents a significant deviation from the text of the statute, which, by its terms, requires merely that the property be ***used*** in the United States; the statute does not specify that the use must be by the foreign state. *See* 28 U.S.C. § 1610(a).

The Seventh Circuit's construction of section 1610(a) also conflicts with numerous decisions of this Court cautioning lower courts not to judicially expand foreign sovereign immunity beyond the specific immunities conferred under the Foreign Sovereign Immunities Act ("FSIA"). *See* Pet.6-8 (citing cases). Finally, the decision below conflicts with Supreme Court and other decisions holding that foreign state-owned property is not immune when the property is used by

third parties. *See Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 699 (1976); *Republic of Mexico v. Hoffman*, 324 U.S. 30 (1945) (citing cases).

A. The Seventh Circuit's decision conflicts with holdings of this Court and of the lower courts of appeals.

The government argues that review of the Seventh Circuit's section 1610(a) holding is not warranted because, in the Solicitor General's words, "[t]hat holding does not conflict with any decision of this Court or another court of appeals. . . ." AC.Br.18-19. While neither this Court nor the lower appellate courts may have had the opportunity to construe the particular aspect of section 1610(a)'s "used for a commercial activity" clause at issue here, the Seventh Circuit's construction conflicts with several decisions of this Court and others construing statutes that are syntactically comparable to section 1610(a). *See* Pet.32-34; Rep.Br.10-12.

For example, the Seventh Circuit's holding conflicts with (and, if given effect, would dramatically restrict) this Court's holding in *Dean v. United States*, 556 U.S. 568, 572 (2009). In *Dean*, the Court held that Congress's use of the passive voice indicates that the statute operates "without respect to a specific actor." *Id*. The Court reaffirmed that "we ordinarily resist reading words or elements into a statute that do not appear on its face." *Id*., *quoting Bates v. United States*, 522 U.S. 23, 29 (1997).

The Seventh Circuit dismissed the Petitioners' argument that *Dean* controls the construction of section 1610(a). The appellate court reasoned: "It's true that a legislature's use of the passive voice ***sometimes*** reflects indifferences to the actor . . . But attributing indifference to Congress in this instance would be inconsistent with the FSIA's statutory declaration of purpose." Pet.App.17 (*emphasis supplied*). *Dean* held that the passive voice ***affirmatively indicates*** that a statute is concerned with "whether something happened – not how or why it happened." 522 U.S. at 29. By qualifying the *Dean* rule with the word "*sometimes*," and then holding that the passive voice in section 1610(a) *creates ambiguity*, the Seventh Circuit effectively overruled this Court's holding in *Dean*, and limited it to the specific statute there at issue. Left intact, the Seventh Circuit's holding would set a precedent empowering other courts to dismiss at will *Dean*'s holding that a statutory use of the passive voice indicates that the statute operates "without respect to a specific actor." *See* 556 U.S. at 572.

Moreover, while the court of appeals said that the *Dean* rule only "sometimes" applies, the Seventh Circuit failed to cite a single instance where a court has construed a statute written in the passive voice to refer to a specific actor. And, it failed to articulate any standard by which to determine when *Dean* applies and when it does not. The Solicitor General similarly fails to identify any authority that would support or limit the Seventh Circuit's implicit rejection of *Dean*. AC.Br.21-22.

Meanwhile, numerous decisions from other appellate courts demonstrate that the *Dean* rule should be applied to construction of the Foreign Sovereign Immunities Act as well as other statutes. *See* Pet.34; Rep.Br.9, 11-12 (*discussing Cassirer and Harrison*); *Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1028 (9th Cir. 2010), *cert. den.*, 564 U.S. 1067 (2011); *Harrison v. Republic of Sudan*, 838 F.3d 86, 91 (2d Cir. 2016); *United States v. Jungers*, 702 F.3d 1066, 1073-74 and n. 6 (8th Cir. 2013) (the language "would be caused" did not limit the application of the statute to a particular class of defendants); *see also*, *United States v. Burkholder*, 816 F.3d 607, 614 (10th Cir. 2016) (citing cases and relying on *Dean* to hold proximate cause is not an element of a sentencing enhancement provision because the passive voice indicates that Congress was concerned with "whether something happened – not how or why it happened"). The Seventh Circuit's treatment of *Dean* conflicts with these holdings, and the Solicitor General makes no effort to address this conflict other than to state that neither *Dean* nor *Cassirer* announced an across-the-board rule." AC.Br.22.

Contrary to the Solicitor General's argument, Petitioners do not suggest that *Dean* articulated an absolute rule that applies in all instances regardless of statutory counter-indications. Petitioners maintain that in the absence of such counter-indications (such as textual ambiguity or inconsistency), the rule articulated in *Dean* must be given effect. *See, e.g.*, Pet.4-8, 32-33 Rep.Br.11-13. As discussed in the Petition (Pet.34-35) and Reply (Rep.Br.11), the statutory Findings and

Declaration of Purpose codified at 28 U.S.C. § 1602 do not provide any basis to deviate from *Dean*. Thus, in the absence of any statutory indications compelling an alternative reading, the statute must be construed as it is written – to accommodate the use by anyone, and not only use by the foreign sovereign.

B. Other provisions of the FSIA demonstrate that the execution immunity exception of section 1610(a) applies where foreign state property is used by third parties.

Neither the FSIA as a whole nor section 1610(a) itself provides any basis to restrict the commercial use to that of the foreign state judgment debtor alone. Moreover, other sections of the FSIA support the plain reading of section 1610(a), which allows execution upon assets that are used by ***anyone*** for commercial activity within the United States.

In its definitional section, the FSIA defines the term, "commercial activity carried on in the United States ***by a foreign state***" as "commercial activity carried on ***by such state*** and having substantial contact with the United States." 28 U.S.C. § 1603(e) (*emphasis supplied*). Congress understood that where it intended to limit commercial activity to that of the subject foreign state, it needed to specify that the foreign state itself must engage in the activity. It is further noteworthy that Congress felt the need to indicate that the activity must be performed by the foreign state itself, not only in the term being defined, but in the definition as

well. Congress must have understood that without this repetition, courts would likely understand that activities of third parties suffice.

Again, in section 1605(a)(2), using the defined term from section 1603(e), Congress specified that the commercial activity necessary to establish jurisdictional immunity must be "carried on in the United States ***by the foreign state***." (*emphasis supplied*). Congress knew the language it needed to use when it sought to limit the application of a provision to conduct by the foreign state and to exclude the conduct of others.

Petitioners do not suggest that Congress should have used the defined term from section 1603(e) in section 1610(a). That would not have worked, because in 1610(a) Congress limited execution to property ***located in*** the United States, not property that has a mere "substantial contact with the United States." Rather, Petitioners refer the Court to the explicit language used in sections 1603(e) and 1605(a)(2) requiring use by the foreign state, to demonstrate that Congress understood that when it intended to limit the use of property to that of the foreign state, it needed to do so explicitly – and did exactly that.

Section 1610(a) conspicuously omits any language restricting the use to that of the foreign state judgment debtor. The only reasonable inference to be drawn from this omission, especially when viewed in contrast with the explicit limitations found in sections 1603(e) and

1605, is that 1610(a) does not require use by the foreign state, itself.

C. This Court's precedents hold that foreign state-owned property is subject to execution when it is used by third parties.

Citing the plurality opinion in *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 703-704 (1976), the Solicitor General argues that judicial seizure of a foreign state's property that is used by a third party increases the risk of affronting the dignity of the foreign state beyond any affront that would be perceived if the foreign state itself were using the property. AC.Br.20. The Solicitor General then cites the Seventh Circuit's decision as authority for itself, when the government posits: "a foreign state cannot lose its immunity based on the commercial activity of a third party." AC.Br.21, citing Pet.App.20.

Alfred Dunhill focused on the distinction between commercial and other private conduct of a foreign state on one hand, and distinctly governmental conduct on the other. 425 U.S. at 698 (discussing the shift from the absolute theory of foreign sovereign immunity to the restrictive theory). Significantly, and contrary to the Solicitor General's reasoning (and that of the Seventh Circuit) *Alfred Dunhill* indicates that where a third party uses property that is owned by a foreign state the rationale supporting immunity is minimized rather than enhanced. *Id*. at 699. The Court discussed its earlier decision in *Republic of Mexico v. Hoffman*, 324

U.S. 30 (1945). There, despite applying the absolute theory of foreign sovereign immunity, the Court unanimously denied immunity to a Mexican owned ship ***precisely because*** it was in the possession and use of a third party. *See Alfred Dunhill*, 425 U.S. at 699-700 and n. 13.

In *Republic of Mexico*, the Court noted that while the State Department conceded that the ship was owned by the government of Mexico, it refrained from requesting immunity because the ship was not in the foreign state's possession. *Republic of Mexico*, 324 U.S. at 37. The Court held that mere ownership by a foreign state does not render property immune. Rather, the Court held, property of a foreign state becomes immune only when it is devoted to the public use ***and*** "employed in carrying on the operations of the government." *Id*. (*citations omitted*). The Court recognized that the "overwhelming weight of authority" supported its conclusion that foreign sovereign immunity claims based upon title without possession fail. *Id*. at 37-38 (citing cases).

If mere possession by a third party of foreign state-owned property precluded immunity under the absolute theory of immunity, surely, the possession and use by a third party should negate any immunity under the restrictive theory. Thus, rather than supporting the Seventh Circuit's decision, *Alfred Dunhill* and *Republic of Mexico v. Hoffman* demonstrate that the Seventh Circuit's construction of the passive voice in section 1610(a) conflicts with a basic and long-standing premise of foreign sovereign immunity. And, as the Court

reaffirmed in *Samantar v. Yousuf*, 560 U.S. 305, 320 (2010), the Foreign Sovereign Immunities Act was intended to codify international practice and relevant common law in effect at the time of the FSIA's enactment. *See also Republic of Argentina v. Weltover, Inc*., 504 U.S. 607, 613-14 (1992) (observing that the FSIA was enacted less than six months after the decision was rendered in *Alfred Dunhill* and concluding that this decision is of "significant assistance" in construing the FSIA).

D. The University's use of the assets constitutes use of a commercial nature under the FSIA and any uncertainty as to this question does not preclude review.

The government asserts that this case would be a poor vehicle for review of the Seventh Circuit's construction of section 1610(a) because the court of appeals was "skeptical" as to whether the University's use of the artifacts constitutes "commercial use" under the FSIA. AC.Br.22. The government also relies upon Iran's "belief" that no party has used the artifacts for commercial activity. *See ibid*. The government claims to take no position on this issue. But, the government argues that the mere uncertainty makes this case a poor vehicle for review. *Ibid*.

The government is wrong. The question presented under section 1610(a) is a pure question of law. Moreover, the Court often grants review notwithstanding a need for the lower court to address collateral issues

upon remand. *See, e.g.*, *CRST Van Expedited, Inc. v. EEOC*, 136 S. Ct. 1642, 1653 (2016).

Finally, the University's activities are commercial, as that term is applied under the FSIA. In *Weltover*, 504 U.S. at 614, the Court explained that conduct is "commercial" under the FSIA when it is the type of activity that ***can*** be engaged in by private citizens. The Petitioners demonstrate in their Petition (Pet.5-6, 15) and Reply Brief (Rep.Br.13) that the University's use of the artifacts constitutes "commercial" used under the FSIA. *See* Rep.Br.13, *citing Malewicz v. City of Amsterdam*, 362 F. Supp. 2d 298, 314 (D.D.C. 2005) ("There is nothing 'sovereign' about the act of lending art pieces, even though the pieces themselves might belong to a sovereign."), and *Sun v. Taiwan*, 201 F.3d 1105, 1108-09 (9th Cir. 2000) (conducting a non-profit cultural tour and compiling a linguistic treatise found to be commercial activities under the FSIA, because they are the types of activities sometimes performed by non-sovereigns).

CONCLUSION

For the reasons stated above as well as those stated in the Petition and Reply Brief, the Petition should be granted as to both questions presented.

Respectfully submitted,

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