No. 16-545

In the Supreme Court of the United States

JENNY RUBIN, ET AL.,
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

BRIEF IN OPPOSITION FOR RESPONDENT FIELD MUSEUM OF NATURAL HISTORY

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CORPORATE DISCLOSURE STATEMENT

The Field Museum of Natural History has no parent corporation, and no publicly traded company owns 10% or more of its stock.

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INTRODUCTION

Respondent Field Museum of Natural History submits this brief in opposition principally to advise the Court of a material omission from the petition for certiorari "that bears on what issues properly would be before the Court if certiorari were granted." S. Ct. Rule 15.2.

Petitioners—judgment creditors of the Islamic Republic of Iran—sought to attach, seize, and sell four collections of antiquities in the possession of the Field Museum or the University of Chicago's Oriental Institute (together, "the Museums"). The courts below rejected that effort, and Petitioners now seek review of two legal issues—"questions of federal law pertaining to two separate executional immunity provisions of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602, *et seq*. (the 'FSIA')." Pet. 1-2.

But Petitioners neglect to advise this Court that, before turning to those FSIA issues in the decision below, the Seventh Circuit ruled as a threshold matter that two of the collections at issue—including the Field Museum's Herzfeld Collection—"*are not Iranian property*" *at all*. Pet. App. 9 (emphasis added). Indeed, the Seventh Circuit was explicit: "we confine our merits review to the Persepolis Collection." Pet. App. 10.

In now seeking certiorari as to that "merits review," the petition neither discloses nor challenges the separate ruling on ownership, which is outside the scope of the questions presented. Further, no such challenge could succeed in any event because this Court generally does not review matters of fact, and because Petitioners did not meaningfully dispute ownership in the court below. Accordingly, certiorari should be denied or expressly limited to the Persepolis Collection.

STATEMENT

Holding an unsatisfied monetary judgment against Iran, Petitioners initiated collection proceedings in federal court in Chicago seeking to attach four separate collections of Persian artifacts owned and/or possessed by the Field Museum and/or the University of Chicago's Oriental Institute. As the case has been brought to this Court, however, only one collection remains at issue—the Persepolis Collection.

A. The Persepolis Collection consists of tablets and tablet fragments with incised cuneiform inscriptions in the ancient Elamite language, recovered in excavations in Iran in the 1930s. It is owned by the National Museum of Iran, and has been on long-term loan to the Oriental Institute for scholarly study since 1935.

Petitioners also sought to attach a second collection owned by the National Museum of Iran—the Chogha Mish Collection, which consists of a relatively small number of clay seal impressions, recovered in excavations in Iran in the 1960s and entrusted to the Oriental Institute for study by Iranian governmental authorities. The Oriental Institute returned the last of these artifacts to Iran in 2015.

In addition, Petitioners sought to attach two collections of antiquities that do *not* belong to Iran on the incorrect theory that those items had been improperly removed from Iran and thus remained Iranian property. One such collection, the so-called "Herzfeld Collection," consists of roughly 1,200 prehistoric Persian artifacts purchased by the Field Museum in April 1945 from Dr. Ernst Herzfeld, a German archeologist who lived and worked in Persia from 1905 to 1936. In October 1945, the Field Museum sold approximately one-third of this collection to the Oriental Institute.

The fourth and final "collection" at issue—the "Oriental Institute Collection"—is not really a collection at all, but rather various artifacts of Persian origin acquired by the Oriental Institute over the course of several decades through division with Iran or gift from third parties.

(For ease of reference, the Herzfeld and Oriental Institute Collections have been, and are herein, referred to as "the Museum Collections.")

B. After discovery was complete in the district court, the Museums moved for summary judgment, showing that they own the Museum Collections and that, even if Iran were the owner, those Collections would be immune from attachment in any event. Iran also moved for summary judgment as to its Persepolis and Chogha Mish Collections.

The district court agreed that Petitioners had failed to establish any basis to attach any of the artifacts. See generally Pet. App. 49-70. Although the court found it unnecessary to definitely resolve the ownership issues (see *id.* at 70 n.14), in rejecting one of Petitioners' theories of attachment, it relied in part on the record showing that Iran has never claimed to own the Museum Collections (*id.* at 69-80)—and, indeed, has repeatedly *disclaimed* ownership of those artifacts.[1]

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[1] *E.g.*, Doc. 647 at 8, No. 03-9370 (N.D. Ill.) (filed Aug. 23, 2013) ("Iran claims no legal interest in those objects [*i.e.*, the Museum Collections] … the museums address their artifacts in their motion"); Doc. 272 at 8 (filed April 30, 2007) ("Iran has never claimed these items."); see also Doc. 39 at 3, No. 14-1935 (7th Cir.) (filed Aug. 29, 2014) ("Plaintiffs sought to execute on… the 'Museum Collections', which the Museums own (and to which Iran lays no claim).").

C. On the ensuing appeal, the Museums argued for affirmance on two grounds: the Museum Collections are not owned by Iran, and, even if they were, they still would not be subject to attachment. On ownership, the Museums raised four independently fatal problems with Petitioners' theory: (1) Iranian law does not automatically vest any ownership rights in Iran; (2) U.S. courts would not enforce another sovereign's regulatory interests; (3) the Museums are bona fide purchasers or recipients and own their respective collections as a matter of Illinois property law; and (4) the statute of limitations would defeat any claim to the contrary in any event. See Museums' Resp. Br. at 26-41, No. 14-1935 (7th Cir.) (filed Nov. 10, 2014).[2]

Petitioners, however, declined to address these issues, offering little more than terse, sweeping, references to supposed evidence of antiquities having been removed from Iran illegally—and no argument what-

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[2] For example, Petitioners argued that the Field Museum was on notice that Dr. Herzfeld could not pass good title because he was supposedly a "notorious thief" of artifacts and was fired on that basis after a series of problems *with the Persian authorities*. At the same time, however, Petitioners' sole argument against the Illinois statute of limitations was the discovery rule—that "Iran obviously had no way of knowing that antiquities were illegally removed without its knowledge or consent." Pls.' Opp. to Sum. J., Doc. 655 at 69, No. 03-9370 (N.D. Ill.) (filed Nov. 20, 2013). But if the Field Museum was on notice in the 1940s, then so too was Iran. In other words, given Petitioners' "evidence" (which was also problematic for various other reasons), it would have been impossible to defeat the Museum's bona fide purchaser status without simultaneously confirming that the limitations period had long since expired.

soever on Iranian or Illinois law. See Br. for Appellants at 16-18, 59-60, No. 14-1935 (7th Cir.) (filed July 21, 2014); Reply Br. at 32 (filed Dec. 4, 2014).

For its part, the Seventh Circuit found the matter of ownership dispositive as to the Museum Collections. The court explained:

> There's no dispute that the Persepolis Collection is owned by Iran and is in the physical possession of the University. The three other collections, however, are outside the reach of this proceeding for reasons relating to their present location or the absence of Iranian ownership.

Pet. App. 8. After explaining that the Chogha Mish Collection had been returned to Iran while the appeal was pending (*id.* at 8-9), the court continued:

> The Herzfeld and the Oriental Institute Collections remain within the court's territorial jurisdiction, *but they are not Iranian property*. The plaintiffs have tried to cast doubt on the legitimacy of their removal from Iran, arguing that Dr. Herzfeld is regarded by some in the academic community as a plunderer and that the artifacts in these collections are covered by Iran's National Heritage Protection Act of 1930, which gives the government of Iran an option to exercise control over certain antiquities unearthed in the country. The Museums, on the other hand, maintain that they were bona fide purchasers or recipients of these collections; *the plaintiffs have not meaningfully contested this point*.
>
> We don't need to resolve any questions about the provenance of the Herzfeld and Oriental Institute Collections or explore the circumstances under which the Museums acquired them. *As the plain-*

> *tiffs concede, Iran has expressly disclaimed any legal interest in the two collections, and the district judge found that no evidence supports Iranian ownership of these artifacts.*
>
> *The plaintiffs have not given us any reason to disturb this ruling, and we see none ourselves.* Because the Chogha Mish Collection is no longer within the territorial jurisdiction of the district court and Iran has disclaimed ownership of the Herzfeld and Oriental Institute Collections, *we confine our merits review to the Persepolis Collection.*

Pet. App. 9-10 (emphasis added)

D. In seeking certiorari, Petitioners do not challenge the ruling that "the absence of Iranian ownership" puts the Museum collections "outside the reach of this proceeding." Pet. App. 8. Rather, the petition presents two questions involving the proper interpretation of the FSIA. Pet. i-ii. As Petitioners explain: "Both questions present pure questions of law. And, both pertain to the range of assets of a foreign state that are subject to attachment and execution by judgment creditors of the foreign state." *Id.* at 2.

REASONS FOR DENYING THE PETITION

For three reasons, the Court should deny the petition or limit review to the Persepolis Collection.

First, the petition does not challenge the Seventh Circuit's ruling on ownership, which is plainly a separate and independent ground for rejecting Petitioners' efforts to attach the Field Museum's Herzfeld Collection. Indeed, it is the *only* ground reached by the decision below: "Because … Iran has disclaimed ownership of the Herzfeld and Oriental Institute Collections,

we confine our merits review to the Persepolis Collection." Pet. App. 10 (emphasis added).

The court below was perfectly clear as to the bases for its decision—and the petition is equally clear that it challenges only certain FSIA issues that were part of the "merits review" with respect to the Persepolis Collection. *E.g.*, Pet. i-ii (questions presented); see also *id.* at 28 ("the Iranian property upon which the petitioners seek to execute are antiquities that have been in the possession of the University of Chicago for eighty years"—*i.e.*, the Persepolis Collection).

"Only the questions set out in the petition, or fairly included therein, will be considered by the Court." S. Ct. Rule 14.1(a). Here, the petition does not even purport to provide any basis for this Court to reopen the judgment as to the Field Museum's Herzfeld Collection. See also *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 510 U.S. 27, 32-34 (1993) (dismissing writ where it would have been necessary to resolve a threshold question that was "quite distinct, both analytically and factually," from the question presented); *Bd. of Trustees* v. *Garrett*, 531 U.S. 356, 360 n.1 (2001) (dismissing portion of writ where a constitutional question turned on a threshold issue of statutory interpretation the parties had not briefed).

Second, even if it had been presented, ownership of the Herzfeld Collection would raise a number of fact-bound issues that are inappropriate for this Court's review. See S. Ct. Rule 10 (certiorari is "rarely granted when the asserted error consists of erroneous factual findings"); *Rudolph* v. *United States*, 370 U.S. 269, 270 (1962) (dismissing writ because review of a factual matter "would be of no importance save to the litigants themselves"). In fact, if certiorari is granted as to the

Museum Collections, this case would likely turn out just like *Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U.S. 508 (1924), where this Court dismissed the writ upon determining that "the controverted question was … primarily a question of fact," which was "not the ground upon which we granted the petition, and, if sufficiently developed, would not have moved us thereto." *Id.* at 509.

Notably, factual issues figure in each of the ownership arguments raised by the Field Museum in the court below—all of which would be properly raised in this Court as alternative grounds for affirmance. *Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979).

Third, Petitioners declined to engage the Museums' claims of ownership on appeal. See *supra* 4-5 (summarizing issues and appellate briefing); Pet. App. 9-10 (explaining that the Museums "maintain that they were bona fide purchasers or recipients of [the Museum Collections]" and plaintiffs "have not meaningfully contested this point"); *id.* at 10 (ruling that "the district judge found that no evidence supports Iranian ownership of these artifacts" and "plaintiffs have not given us any reason to disturb this ruling").

Accordingly, even if Petitioners had tried to challenge ownership in this Court (and they have not), and even if such issues were appropriate for this Court's review and disposition (and they are not), any such challenge would be waived. See *Bath Iron Works Corp.* v. *Director, Office of Workers Comp. Programs*, 506 U.S. 153, 162 n.12 (1993) ("Petitioners did not raise the issue below and the Court of Appeals considered it waived. We do as well.") (internal citation omitted); *Fontaine* v. *United States*, 411 U.S. 213, 215 n.2 (1973)

(declining to express any view on issue that "was not raised in the Court of Appeals or in the petition for certiorari"); also *cf. Granite Rock Co.* v. *Int'l B'hd of Teamsters*, 561 U.S. 287, 306 (2010) (holding that respondent had waived argument raised in the district court, but not in the appellate court or brief in opposition).

In short, as to the Field Museum and its Herzfeld Collection, the basis for the judgment below is the separate, unchallenged, and fact-bound ruling that the artifacts in the Herzfeld Collection "are not Iranian property." Pet. App. 9. Because that ruling is plainly outside the scope of the questions presented by the petition, and inappropriate for review in any event, any grant of certiorari should be limited to the Persepolis Collection—and exclude the Field Museum.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied, or any review by this Court of the FSIA questions presented should be expressly limited to the Persepolis Collection.

Respectfully submitted.

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