No. 24-909

In the Supreme Court of the United States

AGUDAS CHASIDEI CHABAD OF UNITED STATES,
PETITIONER

v.

RUSSIAN FEDERATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1330, 1441(d), 1602 *et seq.*, provides that foreign states generally are immune from civil lawsuits in state and federal courts, save for limited exceptions. The statute defines "'foreign state'" to "include[] * * * an agency or instrumentality of a foreign state." 28 U.S.C. 1603(a). Under the "expropriation exception" to immunity, a "foreign state shall not be immune" in certain cases involving rights in property if the property either (i) "is present in the United States in connection with a commercial activity carried on in the United States by the foreign state"; or (ii) "is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States." 28 U.S.C. 1605(a)(3).

The question presented is whether property that satisfies the second condition above may be a basis for jurisdiction not just over the agency or instrumentality, but over the foreign state itself.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted.

STATEMENT

1. Petitioner is "a religious movement of Russian origin" that, over many decades, "accumulated a library of more than 12,000 volumes containing its history and central teachings." Pet. App. 3a. Petitioner "also compiled an archive of the writings of its spiritual leaders." *Ibid.* The parties refer to those collections as the Library and the Archive, respectively, which together constitute the Schneerson Collection. Petitioner alleges that "Russia's Bolshevik government seized [the Library] during the October Revolution of 1917" and

"stored the materials at its Lenin Library, which later became the Russian State Library," a respondent here. *Id.* at 54a-55a. Petitioner explains that after being exiled from the Soviet Union, its leader eventually resettled in Poland with the Archive, which he was forced to leave behind when he fled the Nazis a few years later. *Id.* at 55a. Petitioner alleges that "Soviet military forces commandeered the Archive in September 1945" and "carr[ied] [it] away to Moscow," where it is "now held by the Russian State Military Archive," also a respondent here. *Ibid.*

With the U.S. government's diplomatic and political support, petitioner has "made various efforts to recover" the Schneerson Collection for more than eight decades, to little avail. Pet. App. 55a. Portions of the Archive were returned to petitioner in 1941 and 1974; and in the 1990s, "seven books [from the Library] were indefinitely loaned to the Library of Congress and then to [petitioner]," and an eighth "was given to Vice President Gore, who then gave it to [petitioner]." D. Ct. Doc. 1, at 2 (July 29, 2005). Petitioner also sought the return of the materials through the Soviet court system, but those efforts ultimately proved unfruitful. See 466 F. Supp. 2d 6, 13-14; Pet. App. 66a-70a.

In 2004, petitioner turned to federal court in the United States, suing the Russian Federation, the Russian State Library, the Russian State Military Archive, and the Russian Ministry of Culture and Mass Communication (collectively, defendants), seeking return of the Schneerson Collection. In the ensuing two decades, this case has accumulated an extensive procedural history. The most relevant events for the current dispute are the following:

- In 2008, the D.C. Circuit held that defendants lacked sovereign immunity from petitioner's claims to recover the Library and the Archive. Pet. App. 53a-92a.
- Defendants thereafter stopped participating in the lawsuit, asserting that "further participation in the case would be inconsistent with [Russia's] 'sovereignty.'" Pet. App. 5a (citation omitted).
- In 2010, the district court entered a default judgment and ordered defendants to surrender the Schneerson Collection. 729 F. Supp. 2d 141.
- In 2013, the district court imposed civil contempt sanctions, payable to petitioner, of $50,000 per day until the Collection is returned. 915 F. Supp. 2d 148. Those sanctions have periodically been reduced to interim judgments that currently "total more than $175 million." Pet. App. 5a; see, *e.g.*, 128 F. Supp. 3d 242.

In order to satisfy those outstanding judgments, petitioner now seeks to attach the assets of respondent Tenex-USA, a Maryland corporation that petitioner alleges is the "alter ego of the Russian Federation." Pet. App. 19a; see *id.* at 5a. Tenex-USA asserts that it is a subsidiary of JSC Techsnabexport, which is a subsidiary of JSC Atomenergoprom, which is a subsidiary of the State Atomic Energy Corporation ROSATOM, which is owned by the Russian Federation. 20-7080 C.A. Doc. 1864239, at 1-2 (D.C. Cir. Sept. 30, 2020).

The district court denied petitioner's motion for attachment without prejudice because petitioner had not served notice to the Russian Federation of the sanctions judgments. Pet. App. 25a-51a.

2. On petitioner's appeal, the court of appeals held that petitioner's motion for attachment should be denied on an alternative ground. Notwithstanding its 2008 decision, the court reasoned that, under the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1330, 1441(d), 1602 *et seq.*, the district court lacked jurisdiction over petitioner's claims against the Russian Federation in the first place—thereby rendering the judgments against it (including the sanctions judgments) void and unenforceable. Pet. App. 1a-24a; see *id.* at 22a-23a.

The FSIA provides that as a general matter, a "'foreign state'"—which is defined to "include[] * * * an agency or instrumentality of a foreign state," 28 U.S.C. 1603(a)—"shall be immune from the jurisdiction of the courts of the United States and of the States." 28 U.S.C. 1604. The FSIA further provides, however, that "[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States" where suit is expressly permitted by certain international agreements or by exceptions enumerated in the FSIA. 28 U.S.C. 1605(a). When one of those exceptions applies, "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances," subject to certain limitations on punitive damages not relevant here. 28 U.S.C. 1606.

Petitioner relies on the "expropriation exception" to immunity set forth in 28 U.S.C. 1605(a)(3). Section 1605(a) provides that "[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case— * * * (3) in which rights in property taken in violation of international law are in issue" and "that property or any property exchanged for such property" has a specified connection

to commercial activity in the United States. *Ibid.* The requisite connection is established when "that property or any property exchanged for such property" either (i) "is present in the United States in connection with a commercial activity carried on in the United States by the foreign state," or (ii) "is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States." *Ibid.*

Here, it is undisputed that the first clause of Section 1605(a)(3) is not satisfied because the Collection is not present in the United States. But petitioner asserts that the second clause is satisfied because the Library and Archive are owned or operated by the Russian State Library and Russian State Military Archive, respectively, both of which are instrumentalities of the Russian Federation that engage in commercial activity in the United States. See Pet. 9-10. And petitioner emphasizes that the FSIA's plain text provides that a "*foreign state* shall not be immune" if either clause is satisfied (and the expropriation exception's other requirements are met), 28 U.S.C. 1605(a) (emphasis added), from which petitioner concludes that the Russian Federation itself is not immune here.

In the decision below, the court of appeals rejected that argument, holding that while the second clause provides a "basis for jurisdiction over claims against an agency or instrumentality of a foreign state," the first clause is "the only path to jurisdiction over claims against a foreign state itself." Pet. App. 13a. The court acknowledged that its 2008 decision in this case had "apparently" held that the Russian Federation was not immune from petitioner's claims, but it explained that its subsequent decisions in *Simon* v. *Republic of Hungary*,

812 F.3d 127 (D.C. Cir. 2016), and *de Csepel* v. *Republic of Hungary*, 859 F.3d 1094 (D.C. Cir. 2017), cert. denied, 586 U.S. 1096 (2019), had made clear that "the Russian Federation ought to have been dismissed" from this case. Pet. App. 13a; see *id.* at 13a-15a. The court observed that *de Csepel* in particular had "definitively settled the matter," explaining that the 2008 decision in this case "never held 'that a foreign state loses immunity if the second nexus requirement is met,'" but instead made only a "passing remark about 'Russia's immunity'" that "had 'no precedential effect.'" *Id.* at 16a (citations omitted).

The court of appeals concluded that "[b]ecause the district court lacked jurisdiction over [petitioner's] claims against the Russian Federation when it entered the default judgments and sanctions judgments, those judgments are void as against the Federation" and thus "may not be enforced through attachment" of Tenex-USA's assets. Pet. App. 22a. The court of appeals vacated the district court's order and remanded with instructions to dismiss the Russian Federation as a defendant. *Id.* at 24a.

DISCUSSION

The petition for a writ of certiorari should be granted. The proper interpretation of the FSIA is often of substantial foreign-policy importance, especially when (as here) the question involves the sovereign immunity of a foreign state itself. And petitioner plausibly alleges confusion in the lower courts on the question presented. This Court's intervention would resolve that confusion and definitively settle the issue.

1. Petitioner plausibly alleges confusion in the lower courts on the question presented. As petitioner explains (Pet. 24), the Ninth Circuit has twice upheld ju-

risdiction over foreign states under the expropriation exception in 28 U.S.C. 1605(a)(3) where only the second clause was alleged to be satisfied. See *Cassirer* v. *Kingdom of Spain*, 616 F.3d 1019 (2010), cert. denied, 564 U.S. 1037 (2011); *Altmann* v. *Republic of Austria*, 317 F.3d 954 (2002), aff'd, 541 U.S. 677 (2004). And more recently, the Ninth Circuit in an unpublished opinion appeared to follow the same course again. See *Sukyas* v. *Romania*, 765 Fed. Appx. 179 (2019). The outcomes in those cases are potentially inconsistent with the D.C. Circuit's decision below.

To be sure, the United States has previously observed that neither *Cassirer* nor *Altmann* "analyzed or explained the basis for exercising jurisdiction over the foreign state itself," and that "the Ninth Circuit apparently could conclude, after full consideration," that the D.C. Circuit's interpretation of the FSIA is correct. U.S. Amicus Br. at 19, *de Csepel* v. *Republic of Hungary*, 586 U.S. 1096 (2019) (No. 17-1165). But that observation came in a brief filed before the 2019 decision in *Sukyas*, which suggests that the Ninth Circuit is not necessarily inclined to revisit the issue. And although in 2020 the government asserted in a brief that "there have been no meaningful developments" in the lower courts on the question presented since *de Csepel*, that brief did not take account of the unpublished decision in *Sukyas*. U.S. Amicus Br. at 22, *Federal Republic of Germany* v. *Philipp*, 141 S. Ct. 188 (2020) (No. 19-520).

Petitioner also observes (Pet. 24-25) that the Eleventh Circuit has framed the inquiry in terms that could suggest a conflict with the decision below. In *Comparelli* v. *República Bolivariana de Venezuela*, 891 F.3d 1311 (2018), the Eleventh Circuit stated, in a case involving a foreign state defendant, that the plaintiffs

could satisfy the expropriation exception by showing, among other things, "that *at least one of the two* statutory nexus requirements are satisfied." *Id.* at 1319 (emphasis added). Although *Comparelli* had no occasion to squarely address the question presented in this case, that framing could lead district courts within the Eleventh Circuit to conclude that a foreign state could lose immunity under the second clause of the expropriation exception. Cf., *e.g.*, *Agurcia* v. *República de Honduras*, No. 21-13276, 2022 WL 2526591, at *3 (11th Cir. July 7, 2022) (per curiam) (quoting *Comparelli* without addressing the question).

And more generally, that the D.C. Circuit in this very case upheld the exercise of jurisdiction against the Russian Federation in 2008, only to reverse itself more than a decade later based on intervening circuit precedent, suggests that the issue warrants this Court's intervention. As this case illustrates, FSIA cases can drag on for decades, and clarity as to jurisdictional issues can help to avoid needlessly protracted litigation.

For example, *Comparelli* itself (which was filed in 2014) remains pending on appeal to the Eleventh Circuit (for the second time) after the district court ordered extensive jurisdictional discovery and issued a comprehensive opinion addressing other thorny FSIA requirements. See *Comparelli* v. *Boliviarian Republic of Venezuela*, 655 F. Supp. 3d 1169 (S.D. Fla. 2023), appeal pending, No. 23-10633 (11th Cir. argued June 12, 2024). At least some of those efforts could prove to have been unnecessary if the Eleventh Circuit were to clarify that it agrees with the D.C. Circuit's resolution of the question presented here notwithstanding the ambiguous language in the 2018 *Comparelli* decision. Alternatively, if the Eleventh Circuit were to interpret that

2018 decision as having held that a foreign state can lose immunity based on the second clause of the expropriation exception, that would create a square conflict with the D.C. Circuit's holdings in *Simon* v. *Republic of Hungary*, 812 F.3d 127 (2016), *de Csepel* v. *Republic of Hungary*, 859 F.3d 1094 (2017), cert. denied, 586 U.S. 1096 (2019), and this case. Either way, this Court's review would dispel the confusion in the lower courts.

2. This case is, on balance, an appropriate vehicle in which to address the question presented. The sole basis for the decision below was that the district court lacked jurisdiction over the Russian Federation under the second clause of the expropriation exception. Accordingly, this Court's resolution of the question presented could be dispositive.

It is true, of course, that if this Court were to reverse the judgment below, petitioner still would have to establish the propriety under applicable principles of law of piercing the corporate veil through several levels of ownership to find that Tenex-USA is the alter ego of the Russian Federation. Cf. *First Nat'l City Bank* v. *Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983). But neither of the courts below addressed that issue, which would therefore best be left for remand in that event. We also acknowledge that both Justices Kavanaugh and Jackson are recused from this case, apparently in light of their prior judicial service. But that would still leave the Court with an odd number of Members and thereby avoid the prospect of an equally divided court.

3. Finally, the question presented is important. Cases under the FSIA often involve sensitive foreign-policy matters, especially where (as here) the statutory balance between a U.S. person's claims and the sover-

eign immunity of a foreign state is at issue. Comity, respect for a fellow sovereign, and the risk of reciprocal actions against the United States in foreign courts all highlight the importance of the issue. Congress nonetheless enacted a unique expropriation exception allowing claims against a foreign sovereign for its public, as opposed to commercial, acts. See *Republic of Hungary* v. *Simon*, 604 U.S. 115, 122 (2025). This Court's construction and application of the exception's statutory text would provide much needed clarity.

The question presented is important for case-specific reasons as well. The United States reiterates its strong support for petitioner's bid to recover possession of the Library and Archive, which the government has raised at the presidential level under several administrations, as well as in cabinet-, ambassadorial-, and working-level diplomatic discussions throughout the last several decades. See, *e.g.*, D. Ct. Doc. 97, at 6-7 (June 15, 2011); D. Ct. Doc. 1, at 2-3; *The Schneerson Collection and Historical Justice: Hearing Before the Commission on Security and Cooperation in Europe*, 109th Cong., 1st Sess. 5-14 (2005). Members of the Legislative Branch have also long supported petitioner's claim—including by sending letters signed by all one hundred Senators to Russian Federation Presidents Yeltsin and Putin in 1992, 2005, and 2017, requesting that the Collection be returned to petitioner. As with other instances of expropriation during the Holocaust, the return of the materials here would provide at least some small measure of justice to petitioner and its members. Cf. *Simon*, 604 U.S. at 139. Whether litigation in federal court represents a viable path to that outcome is thus a question of critical importance.

In amicus briefs filed in response to this Court's invitations in *de Csepel* and *Philipp*, see p. 7, *supra*, the United States took the position that the D.C. Circuit's current interpretation of the second clause of the expropriation exception is correct. In the course of preparing this brief, the United States has not determined whether it maintains that position on the merits. That said, even an affirmance of the decision below would at least bring certainty and potentially provide renewed impetus for diplomatic efforts to secure the Collection's return to petitioner. Cf. *Simon*, 604 U.S. at 139.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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