No. 16-534

In the Supreme Court of the United States

JENNY RUBIN, *et al.*,
Petitioners,

v.

ISLAMIC REPUBLIC OF IRAN, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION FOR RESPONDENT THE UNIVERSITY OF CHICAGO

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QUESTIONS PRESENTED

The Foreign Sovereign Immunities Act (FSIA) provides foreign states with a jurisdictional immunity against civil actions and a separate execution immunity that protects foreign states' property from execution upon a judgment. Section 1605A of the FSIA abrogates the jurisdictional immunity when a foreign state that is a state sponsor of terrorism provides material support for a terrorist act.

Petitioners seek to enforce a judgment entered pursuant to Section 1605A by executing on ancient artifacts that are the property of respondent Islamic Republic of Iran but are in the possession of a museum owned by respondent the University of Chicago. The questions presented are:

1. Whether Section 1610(g) of the FSIA abrogates the execution immunity in all cases in which a party seeks to enforce a judgment entered pursuant to Section 1605A, notwithstanding other provisions of the FSIA that provide for a more limited abrogation of execution immunity in such cases.

2. Whether Section 1610(a)(7) of the FSIA, which abrogates the execution immunity when a party holding a judgment entered pursuant to Section 1605A seeks to execute upon "[t]he property of a foreign sovereign * * * used for a commercial activity in the United States" extends to property that is not used for a commercial activity by the foreign sovereign itself.

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1. The Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. §§ 1330, 1602 *et seq.*, codifies the "legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities." *Verlinden B.V. v. Central Bank of Nigeria,* 461 U.S. 480, 488 (1983). Subject to certain exceptions, foreign states are "immune from the jurisdiction of the courts of the United States and of the States." 28 U.S.C. § 1604. In addition to that jurisdictional immunity, the FSIA provides an execution immunity: even if a court has lawfully asserted jurisdiction over a foreign state and entered judgment against it, the FSIA specifies that "the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided" in Section 1610 of the FSIA, 28 U.S.C. § 1610.[1] This case concerns two of the exceptions to execution immunity listed in Section 1610, Section 1610(a)(7) and Section 1610(g), both of which refer to judgments entered in cases involving state-sponsored terrorism.

2. Petitioners are individuals who were injured by a terrorist attack carried out by Hamas in Jerusalem in 1997. Pet. App. 1-2. They sued respondent the Islamic Republic of Iran in the United States District Court for the District of Columbia, alleging that Iran provided material support to the attackers. Id. at 2. Petitioners

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[1] Section 1609 also refers to Section 1611 of the FSIA, which provides that "[n]otwithstanding the provisions of section 1610" certain property of foreign states remains immune from attachment and execution. See 28 U.S.C. § 1611 (a), (b), (c).

invoked an exception to jurisdictional immunity, now codified at 28 U.S.C. 1605A, for damages actions against state sponsors of terrorism that provided material support for a terrorist attack.[2] The district court entered a default judgment for $71.5 million against Iran. Pet. App. 2.

Petitioners registered the judgment in the Northern District of Illinois and sought to attach and execute on the Persepolis Collection, a collection of Persian artifacts that are in the possession of respondent the University of Chicago. Pet. App. 6, 8.[3] Iran had lent the Persepolis Collection to the Oriental Institute at the University of Chicago in 1937 for research, translation, and cataloguing, and nearly all of the collection has remained in the possession of the Oriental Institute since then. See id. at 4-5, 46. The collection consists of approximately 30,000 clay tablets and fragments. Id. at 4. The tablets and fragments contain some of the oldest examples of human writing in the world. Id. at 4-5.

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[2] Petitioners initially invoked 28 U.S.C. § 1605(a)(7), which provided this exception to jurisdictional immunity when petitioners sued in 2003. Congress later repealed Section 1605(a)(7) and replaced it with 28 U.S.C. § 1605A, which codifies a similar immunity. Pet. App. 5-6. Petitioners converted their Section 1605(a)(7) judgment to a Section 1605A judgment. See Pet. App. 6 n.1, 15, 22.

[3] Petitioners initially tried to attach four collections of artifacts, but the court of appeals ruled that three of those collections were not subject to the attachment proceeding, either because they were outside the territorial jurisdiction of the district court or because they were not Iran's property. See Pet. App. 8-10. Petitioners have not challenged that ruling in this Court.

In order to overcome the execution immunity provided by 28 U.S.C. § 1609, petitioners first invoked Section 1610(a)(7), which provides that "[t]he property in the United States of a foreign state . . . used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered in a court of the United States" if the judgment "relates to a claim for which the foreign state is not immune" under the terrorism exception now codified by Section 1605A. In addition, petitioners invoked the exception to execution immunity specified in Section 1610(g), which, they asserted, is "an independent exception to the execution immunity available to victims of state-sponsored terrorism." Pet. App. 7.

3. The district court granted respondents' motion for summary judgment. Pet. App. 71. The district court reasoned that the Section 1610(a)(7) exception for "property * * * used for a commercial activity in the United States" applied only to property used by the foreign state itself for a commercial purpose. Pet. App. 50-57. Because Iran did not use the Persepolis Collection for a commercial purpose, the Section 1610(a)(7) exception did not apply to that property, and the property was immune from attachment and execution. See Pet. App. 57. The district court also rejected petitioners' argument that Section 1610(g) is an independent exception to execution immunity. Id. at 60-62.

3.a. The United States Court of Appeals for the Seventh Circuit affirmed. Pet. App. 1-38. The court of appeals, like the district court, rejected petitioners' argument that the "commercial activity" exception in

Section 1610(a)(7) applied to the Persepolis Collection. The court of appeals said it was "skeptical that academic study qualifies as a commercial use" but that it would "put that question aside" because "§ 1610(a) applies only when *the foreign state itself* has used its property for a commercial activity in the United States." Pet. App. 20 (emphasis in original). The court noted that petitioners did not contend that Iran had used the Persepolis Collection for a commercial activity in the United States. Id. at 20-21.

The court of appeals explained that Section 1610(a)(7) should be interpreted in light of Section 1602 of the FSIA, the statute's declaration of purpose, which "explicitly invokes the international law understanding of foreign sovereign immunity" and treats the foreign state's own commercial activity as the basis for overcoming immunity:

> "Under international law, states are not immune from the jurisdiction of foreign courts insofar as *their* commercial activities are concerned, and *their* commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with *their* commercial activities."

Pet. App. 17, quoting and adding emphasis to 28 U.S.C. § 1602. The court of appeals rejected petitioners' contention that Section 1602 was equivalent to legislative history and should therefore be disregarded in light of what petitioners characterized as the unambiguous language of Section 1616(a)(7). The court pointed out that Section 1602 was not, in fact, legislative history, but had been enacted into law as part of the FSIA. The court also said that, in any event,

Section 1610(a)(7) was at least ambiguous on the question of which entity's commercial activity mattered. See Pet. App. 18.

The court also reasoned that "[t]he FSIA starts with a baseline rule of execution immunity" so that "the exceptions are few and 'narrowly drawn.'" Pet. App. 19, quoting *Autotech Technologies LP v. Integral Research & Development Corp.*, 499 F.3d 737, 749 (7th Cir. 2007). "Given the broad protective stance of the statutory scheme in general," the court concluded, any ambiguity in Section 1610(a)(7) had to be construed to apply the exception only to the foreign state's own commercial activities. Pet. App. 19.

In reaching this conclusion, the court of appeals explicitly agreed with the decisions of three other courts of appeals—the Second, Fifth, and Ninth Circuits—all of which, the Seventh Circuit said, had limited the Section 1610(a)(7) exception to commercial activity by the foreign state itself. See Pet. App. 16-17, citing *Connecticut Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 256 n.5 (5th Cir. 2002); *Aurelius Capital Partners v. Republic of Argentina*, 584 F.3d 120, 131 (2d Cir. 2009); *Af-Cap, Inc. v. Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1090-91 (9th Cir. 2007). The court accordingly "join[ed] the emerging consensus of our sister circuits" to "hold that a third party's commercial use of a foreign state's property does not trigger the § 1610(a) exception to execution immunity. Rather, § 1610(a) applies only when *the foreign state itself* has used its property for a commercial activity" (Pet. App. 20; emphasis in original).

3.b. The Seventh Circuit also rejected petitioners' argument that Section 1610(g) provided an independent exception to execution immunity in terrorism cases. Section 1610(g) provides in part:

> (1) * * * [T]he property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of—
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> (A) the level of economic control over the property by the government of the foreign state;
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> (B) whether the profits of the property go to that government;
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> (C) the degree to which officials of that government manage the property or otherwise control its daily affairs;
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> (D) whether that government is the sole beneficiary in interest of the property; or
>
> (E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

The court of appeals explained (Pet. App. 4, 22-26) that this provision was a response to this Court's decision in *First National City Bank v. Banco Para El Comercio*

Exterior de Cuba ("Bancec"), 462 U.S. 611 (1983). *Bancec* held that a judgment against a foreign sovereign cannot be executed on property owned by a juridically separate instrumentality of the foreign government. Id. at 626-29. *Bancec* allowed, however, that a judgment creditor could execute on the property of an instrumentality if the instrumentality and the sovereign were alter egos, or if refusing to allow execution would work an injustice. Id. at 628-33.

In the wake of this Court's decision in *Bancec*, courts of appeals "began to coalesce around a set of five factors for determining when the exceptions" to the *Bancec* rule applied. Pet. App. 23. The court below showed that the five subsections of Section 1610(g)(1) corresponded closely to the five factors that the lower courts developed. See Pet. App. 25-26. The court concluded that "Congress drafted subsection (g) to abrogate the *Bancec* doctrine for terrorism-related judgments." Id. at 26.

The court of appeals rejected petitioners' contention that Section 1610(g) went further and abrogated execution immunity entirely for such judgments. The court noted that Section 1610(g) made property "subject to attachment in aid of execution, and execution * * * *as provided in this section*" (28 U.S.C. 1610(g)(1) (emphasis added); see Pet. App. 27). The italicized phrase dictated that petitioners had to come within one of the other exceptions in Section 1610, such as Section 1610(a)(7), in order to execute upon Iran's property; Section 1610(g) just meant that if petitioners came within another provision in Section 1610, *Bancec* would not be a barrier to executing upon the property of an instrumentality of Iran. But petitioners'

construction of Section 1610(g) effectively read the italicized phrase out of the statute entirely. See Pet. App. 27, 35.

In addition, Section 1610 contains two other exceptions to execution immunity for terrorism-related judgments, both of which are limited to commercial activity: Section 1610(a)(7), which applies to property of a foreign state used for commercial activity in the United States; and Section 1610(b)(3), which applies to the property of an agency or instrumentality of a foreign state engaged in commercial activity in the United States. See Pet. App. 27-28, citing 28 U.S.C. §§ 1610(a)(7), 1610(b)(3). Petitioners' interpretation of Section 1610(g) would make those provisions superfluous. See Pet. App. 27-28. In any event, the court of appeals reasoned, the recitation of the five *Bancec*-related factors in Section 1610(g) was evidence that that provision was "a corrective measure * * * plainly aimed at eliminating the *Bancec* barrier" rather than "creating a new and independent exception to execution immunity for all terrorism-related judgments." Pet. App. 26.

Petitioners had invoked two previous 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, petitioners said, treated Section 1610(g) as a freestanding exception to execution immunity. The court below acknowledged that there was language in the opinions in those cases that supported petitioners' argument. Pet. App. 28, 31. But the court below noted that in *Gates*, any holding on the scope of Section 1610(g) was unnecessary to the decision, see Pet. App.

29; that *Wyatt* had simply relied on the discussion in *Gates*, Pet. App. 31; and that neither opinion had "grappled with the fundamental interpretive question presented" by Section 1610(g). Pet. App. 31. "To the extent that *Gates* and *Wyatt* can be read as holding that § 1610(g) is a freestanding exception to execution immunity for terrorism-related judgments," the court said, "they are overruled." Pet. App. 34-35 (footnote omitted). The court also disagreed with the Ninth Circuit's conclusion, in *Bennett v. Islamic Republic of Iran*, 799 F.3d 1281 (9th Cir. 2015), petition for certiorari pending, No. 16-334 (filed Sept. 12, 2016), that Section 1610(g) established a freestanding exception to execution immunity. See Pet. App. 32-34. The court noted that the Ninth Circuit's decision in *Bennett* had relied on *Gates* and *Wyatt*. Pet. App. 34.

4. Judge Hamilton, who was not on the panel that decided the case, filed a dissent from the denial of rehearing en banc. Pet. App. 39-40. Seventh Circuit Rule 40(e) provides that a panel opinion that "would overrule a prior decision of this court or create a conflict between or among circuits shall not be published unless it is first circulated among the active members of this court" so that they may consider whether to rehear the case en banc. The panel noted that it had circulated its opinion, but five active judges did not participate in considering the case for rehearing en banc "so a majority did not vote" for en banc rehearing. Pet. App. 35 n.6. Judge Hamilton said that the panel's decision "to overrule circuit precedent and create a circuit split without meaningful Rule 40(e) review" was "a mistake." Id. at 39. "In this rare situation" in which the recusal of a number of judges made it "impossible to hear this case en banc," Judge

Hamilton concluded, "one panel's decision to overrule another's decision should not be treated as settling the legal issue in this circuit." Ibid.

ARGUMENT

The decision of the court of appeals is correct. Whatever disagreement exists among the courts of appeals concerning the interpretation of Section 1610(g) does not warrant this Court's review. Petitioners do not even assert that there is a disagreement among the courts of appeals on the interpretation of Section 1610(a), and that issue, also, does not merit further review.

I. The Court of Appeals' Holding that Section 1610(g) Does Not Establish a Freestanding Exception To Immunity Does Not Warrant Further Review

A. This Court's Review Is Not Needed To Resolve a Disagreement Among the Courts of Appeals

Petitioners assert (Pet. 21-22) that the decision of the court below on the scope of Section 1610(g) conflicts with the Ninth Circuit's decision in *Bennett*, and with the decisions of two other courts of appeals, in a way that calls for this Court's intervention. For a number of reasons, petitioners are mistaken.

1. In each of the cases petitioners cite, the court's resolution of the Section 1610(g) issue was unnecessary to the disposition of the case. Indeed, petitioners effectively concede as much, asserting only that the Section 1610(g) issue "was case dispositive in the Seventh Circuit." Pet. 22. In each of the instances that

petitioners invoke, therefore, the courts of appeals may not consider themselves bound by the conclusion that Section 1610(g) establishes a freestanding exception to execution immunity.

In *Bennett*, the Ninth Circuit's conclusion that the Section 1610(g) established a freestanding exception to execution immunity was an alternative ground for the holding. The Ninth Circuit considered Section 1610(g) only after it had held that the assets in question were subject to attachment under Section 201(a) of the Terrorism Risk Insurance Act of 2002 (TRIA), Pub. L. No. 107-297, 116 Stat. 2322, codified at 28 U.S.C. § 1610 note. See *Bennett v. Islamic Republic of Iran*, 825 F.3d 950, 957-58 (9th Cir. 2016). After reaching that conclusion, which was sufficient to decide the case, the Ninth Circuit went on to assert that "subsection (g) contains a freestanding provision for attaching and executing against assets of a foreign state or its agencies or instrumentalities." 825 F.3d at 959. The *Bennett* panel could have reached the same result—a holding that the property in question could be executed upon—without addressing Section 1610(g) at all.

Petitioners also mention, in passing, *Weinstein v. Islamic Republic of Iran*, 831 F.3d 470 (D.C. Cir. 2016), and *Kirschenbaum v. 650 Fifth Avenue and Related Properties*, 830 F.3d 107 (2d Cir. 2016). See Pet. 22. In each of those cases, the courts' statements about Section 1610(g) were dicta; the courts held that the property in question could *not* be attached. See *Weinstein*, 831 F.3d at 472-73; *Kirschenbaum*, 830 F.3d at 141-42. Perhaps more important, in both cases, the courts merely asserted, in a single sentence with no analysis, that Section 1610(g) reached all property of a

foreign state in an attachment proceeding pursuant to a judgment entered under Section 1605A; after that conclusory assertion, the courts proceeded to a thorough explanation of why the property at issue could not be attached for other reasons. See *Weinstein*, 831 F.3d at 483; *Kirschenbaum*, 830 F.3d at 123. When those courts made their assertions about Section 1610(g), they were in effect assuming arguendo that the FSIA execution immunity did not bar attachment, before addressing the central question in the case--whether attachment was barred on other grounds—and concluding that it was. Future panels in those circuits may well feel free to disregard the conclusory statements about Section 1610(g).

2. Even in the Ninth Circuit—the only other court of appeals, besides the court below, that engaged in any analysis of the issues raised by Section 1610(g)—*Bennett*'s conclusion may be ripe for reconsideration. That is because the *Bennett* court, having acknowledged that Section 1610 "is ambiguous" (825 F.3d at 961), relied explicitly on the Seventh Circuit's decisions in *Wyatt* and *Gates*. See 825 F. 3d at 960-61. The Seventh Circuit has now ruled that those decisions, to the extent they support the notion that Section 1610(g) establishes a freestanding exception to immunity, are no longer good law. A significant underpinning of the *Bennett* court's conclusion has therefore been removed.

3. There is a reason that no court has endorsed petitioners' interpretation of Section 1610(g) in any case in which that interpretation mattered. Petitioners' interpretation of Section 1610(g) is extremely far-reaching. As Judge Benson, who dissented from the

Bennett court's ruling about the scope of Section 1610(g), pointed out, the interpretation embraced by *Bennett* and petitioners would "open the floodgates and allow terrorism plaintiffs to attach any and all Iranian property in the United States." *Bennett*, 825 F.3d at 969 (Benson, J., concurring in part and dissenting in part).

If petitioners' interpretation of Section 1616(g) were to prevail, for example, a foreign state's property might be seized even if the state were using it entirely in a sovereign, non-commercial, capacity.[4] That is well beyond the historical understandings of the power of a state over the property of a foreign state. As this Court has explained, when the FSIA was adopted, the "then-prevailing restrictive theory of sovereign immunity"—the theory that, the Court said, "is of significant assistance in construing the scope of the Act" -- was based on "the distinction between state sovereign acts, on the one hand, and state commercial and private acts, on the other" (*Republic of Argentina v. Weltover*, 504 U.S. 607, 613-14 (1992)). And as the court below said, that distinction is embraced by Section 1602 of the FSIA, the statute's declaration of purpose. See 28 U.S.C. § 1602. Petitioners' view of Section 1610(g) would run roughshod over that distinction.

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[4] Section 1611(b) of the FSIA provides that the Section 1610 exceptions to sovereign immunity do not apply to certain property of foreign states' central banks, or to certain military property. See 28 U.S.C. § 1611(b). But on petitioners' view, the FSIA would not protect other forms of sovereign property from seizure pursuant to Section 1610(g).

In all the cases that petitioners cite as disagreeing with the Seventh Circuit, the courts did not have to confront the sweeping implications of the view that Section 1610(g) establishes a freestanding exception to immunity.[5] The one case in which those implications were clear is this case: where petitioners' view would allow the seizure of ancient artifacts from a museum to which they have been lent for study and research. This Court should wait until petitioners' expansive view of Section 1610(g) is adopted by a court that is prepared actually to authorize the seizure of foreign government assets that would otherwise be immune. So far no court has done so.

4. For reasons we give below, we believe that the Seventh Circuit's interpretation of Section 1610(g) in this case is plainly correct. But the uncertain status of the law in the Seventh Circuit is nonetheless relevant to this Court's determination whether to grant review. Because so many active judges were unable to participate in the decision whether to rehear the decision of the panel in this case, the panel's disapproval of the earlier Seventh Circuit decisions in *Gates* and *Wyatt* has not yet been accepted by the en banc court. Judge Hamilton, who wrote the opinions in *Gates* and *Wyatt*, was emphatic in stating both that he

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[5] This is also true of *Gates* and *Wyatt*, the Seventh Circuit decisions with which the panel below disagreed. In those cases, the dispute to which Section 1610(g) was relevant concerned not whether certain assets could be executed upon, but whether judgment creditors had to comply with the notice requirement of Section 1610(c). That requirement applies to attachment and execution under Sections 1610(a) and (b) but does not refer to subsection (g). See 28 U.S.C. § 1610(c).

disagreed with the panel in this case and that the panel's decision "should not be treated as settling the legal issue in this circuit." Pet. App. 39.

In sum, even the decision of the court below cannot be regarded as having finally settled the interpretation of Section 1610(g) in the Seventh Circuit; no other court of appeals has decided the issue in a case in which the decision affected the holding of the case; there is reason to think that other courts, if confronted with the implications of their dicta, would hesitate to embrace petitioners' far-reaching claim; and even in the Ninth Circuit, the only other court that discussed the issue in anything other than a conclusory fashion, the ruling was unnecessary to the disposition of the case and rested, to a degree, on precedential foundations that have eroded. In these circumstances, no true circuit split exists. This Court's intervention is not warranted.

B. The Court of Appeals' Decision Is Manifestly Correct

Petitioners' interpretation of Section 1610(g) is irreconcilable with both the language of that provision and other provisions of the FSIA—another reason to believe that other courts of appeals will not accept that interpretation when the issue is squarely posed. As the court below explained, Section 1610(g) removes a barrier that *Bancec* imposed to executing upon assets belonging to instrumentalities of a foreign state against which a Section 1605A judgment has been entered. But Section 1610(g) only removes that barrier in cases in which the judgment plaintiff otherwise has a right to execute upon the property in question. Section 1610(g)

does not constitute a freestanding abrogation of sovereign immunity.

The language of Section 1610(g) makes this explicit: when a judgment has been entered against a foreign state under Section 1605A, Section 1610(g) makes the property of that state and its instrumentalities "subject to attachment in aid of execution, and execution * * * *as provided in this section*." 28 U.S.C. § 1610(g) (emphasis added). The "section" is Section 1610, which the FSIA specifically identifies as the locus of exceptions to execution immunity. See 28 U.S.C. § 1609. A judgment creditor proceeding under Section 1610(g) must, therefore, be able to invoke another provision of Section 1610 that authorizes execution. Neither petitioners nor the Ninth Circuit, in *Bennett*, provides any coherent explanation of how the contrary view can be reconciled with the phrase "as provided in this section."

That is only one of the textual problems with petitioners' view. Other provisions of Section 1610—Section 1610(a)(7) and Section 1610(b)(3)—specifically abrogate the immunity of, respectively, foreign states and their instrumentalities, in cases involving judgments based on Section 1605A and its predecessor. But both of those provisions contain limitations. Section 1610(a)(7) abrogates execution immunity, in terrorism-related cases, only with respect to "property in the United States of a foreign state * * * used for a commercial activity in the United States." 28 U.S.C. § 1610(a)(7). Section 1610(b)(3) abrogates execution immunity, in terrorism-related cases, only with respect to "property in the United States of an agency or instrumentality of a foreign state engaged in

commercial activity in the United States." 28 U.S.C. § 1610(b)(3). Petitioners' interpretation of Section 1610(g) would simply cast aside those limits.

Finally, petitioners' interpretation of Section 1610(g) does not just read the phrase "as provided in this section" out of Section 1610(g) and make Sections 1610(a)(7) and (b)(3) otiose; petitioners' view makes the bulk of Section 1610(g) itself superfluous. Section 1610(g) lists the factors that lower courts had considered in establishing exceptions to the *Bancec* rule and states that execution against foreign property may proceed "regardless of" those factors. 28 U.S.C. 1610(g). If petitioners' interpretation is correct, Congress engaged in a pointless exercise when it listed those factors. Section 1610(g) could simply have ended with the phrase "execution, upon that judgment." That is an implausible way to read the provision.[6]

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[6] Should the Court, contrary to our submission, determine that the question concerning Section 1610(g) warrants further review, we respectfully submit that this case provides a more appropriate vehicle than *Bennett*. (A certiorari petition, No. 16-334, is pending in *Bennett*.) As we noted, the ruling on Section 1610(g) in *Bennett* was an alternative ground for decision. The Court would, therefore, have to grant both questions presented in the petition in *Bennett*, and rule in favor of petitioner on both issues, in order to overturn the judgment of the court of appeals. In this case, by contrast, the Court need grant only the question raising the Section 1610(g) issue.

In addition, for reasons we have given, this case reflects a factual context in which petitioners' interpretation of Section 1610(g) has concrete consequences. That is because here, unlike in *Bennett*, interpreting Section 1610(g) as a freestanding exception would permit execution upon property that would otherwise be immune. We note, in this connection, that Judge Benson, in his

II. The Court of Appeals' Interpretation of Section 1610(a)(7) Does Not Merit Further Review

Section 1610(a)(7) abrogates execution immunity in terrorism-related cases when a judgment creditor seeks to execute upon "property in the United States of a foreign state * * * used for a commercial activity in the United States." 28 U.S.C. § 1610(a)(7). The court of appeals held that the immunity is abrogated only when the foreign state itself uses the property for commercial activity, not when a third party does so. This ruling is correct and is consistent with the decisions of every other court of appeals that has considered the issue. While petitioners disagree with these decisions, it is undisputed that no court of appeals has adopted the petitioners' construction, and petitioners provide no basis for this Court's review.

Even apart from the context provided by the FSIA, the most straightforward reading of the language of Section 1610(a)(7) is that execution immunity is abrogated only when the property is used for a commercial activity by the foreign state. The phrase "a foreign state's property used for a commercial activity" normally implies that the foreign state—the owner of the property-- is using it that way. If the authors of the phrase meant it to be more inclusive, they would add a qualifier to that effect, such as "irrespective of whether

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partial dissent from the *Bennett* court's ruling on Section 1610(g), specifically referred to the artifacts at issue in this case in describing what he considered to be the untoward effects of the *Bennett* panel's (and petitioners') interpretation of Section 1610(g). See *Bennett*, 825 F.3d at 969.

the commercial activity is that of the foreign state or of another party."

In the context of the FSIA, the limitation to the commercial activity of the foreign state itself becomes even clearer. As the court of appeals explained, the core principle of the FSIA, reflected in the language of the statute itself, reflects the international law understanding that states lack jurisdictional immunity "insofar as their commercial activities are concerned" and that "their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities." 28 U.S.C. § 1602. That statutory provision explains why Congress thought it unnecessary to spell out that Section 1610(a)(7) referred to property used by the state itself—the crucial question is always the nature of the state's activity, not the nature of a third party's activity. See also *Republic of Argentina v. Weltover*, 504 U.S. at 613-14 (referring to "the distinction between state sovereign acts, on the one hand, and state commercial and private acts, on the other" as a guide in interpreting the FSIA).[7]

As the Seventh Circuit noted, every other court of appeals that has addressed this issue has agreed. See

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[7] Moreoever, the FSIA's jurisdictional immunity exceptions expressly require activity "by the foreign state" itself. 28 U.S.C. 1605(a)(2). Interpreting 1610(a) to eliminate execution immunity on the basis of third-party acts would run counter to the this Court's plain and repeated statements that execution immunity exceptions are "narrower" that jurisdictional immunity exceptions. *See, e.g., Republic of Aregntina v. NML Capital, Ltd.*, 134 S.Ct. 2250, 2256 (2014).

Pet. App. 16-17. The Ninth Circuit explained the effects that a contrary interpretation would have:

> [T]o allow a private party's commercial use of the property to waive a foreign sovereign's immunity would not only frustrate "one of the principal goals of the FSIA"—to restrain, to the extent practicable, "judicial interference with the *jus imperii*, or sovereign acts, of a foreign state"—but would also effectively eviscerate the protections of the FSIA by placing the power to waive the foreign sovereign's immunity in the hands of private parties.

Af-Cap, Inc. v. Chevron Overseas (Congo) Ltd., 475 F. 3d 1080, 1091 (9th Cir. 2007) (citations omitted). See also *Connecticut Bank of Commerce v. Republic of Congo*, 309 F. 3d 240, 256 n.5 (5th Cir. 2002); *Aurelius Capital Partners v. Republic of Argentina*, 584 F.3d 120, 131 (2d Cir. 2009). The Seventh Circuit's ruling, which follows the ordinary meaning of Section 1610(a)(7), is even more clearly correct in light of the statutory context, and it avoids the perverse effects that would result from having a third party's behavior determine whether a sovereign state's property could be seized. Petitioners do not even assert that there is a conflict in the circuits. Further review is therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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