THE PERSEPOLIS COMPLEX: A CASE FOR MAKING THE COLLECTIONS PROCESS EASIER UNDER SECTION 1610(G) OF THE FOREIGN SOVEREIGN IMMUNITIES ACT FOR VICTIMS OF FOREIGN STATE-SPONSORED TERRORISM

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ABSTRACT

In Rubin v. Islamic Republic of Iran*, the Seventh Circuit recently concluded that § 1610(g) of the Foreign Sovereign Immunities Act does not provide a freestanding exception to attachment and execution immunity for the property of a foreign state-sponsor of terrorism. Rather, the Seventh Circuit held that in order for victims to avail themselves of § 1610(g), all sought-after property must be used for commercial activity within the United States. In so ruling, the court overruled two prior cases and created a circuit split with the Ninth Circuit, which understood § 1610(g) as allowing for any property in the United States owned by the foreign sovereign to be used for attachment and execution purposes.*

The case now sits before the Supreme Court, which needs to provide a definitive ruling as to how § 1610(g) applies. Numerous victims who hold judgments against foreign state-sponsors of terrorism have yet to see satisfaction as many assets are otherwise unavailable to them. In amending the Foreign Sovereign Immunities Act to include § 1610(g), Congress sought to expand the range of assets available to victims and alleviate the problems many victims faced in achieving relief. Because the Supreme Court has the power to make foreign sovereign immunity determinations under the Act, the Court should give relief to the Rubin *plaintiffs and others*

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similarly situated by holding that § 1610(g) allows victims to use any *property owned by the foreign sovereign and located within the United States for judgment satisfaction.*

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INTRODUCTION

On September 4, 1997, three suicide bombers strategically targeted a crowded Jerusalem mall.[1] By detonating suitcases filled with shards of glass, screws, nails, and poisonous chemicals, the bombers killed five people and grievously injured approximately 200 other innocents.[2] Hamas, the Palestinian terrorist organization[3] that Iran has historically outfitted and funded,[4] claimed responsibility for the horrific attack.[5] In 2000 and 2001, two groups of American citizens—consisting of those who were either physically wounded in the attack or who suffered emotionally—brought separate suits against Iran and its agencies in the federal district court in

1. *See* Campuzano v. Islamic Republic of Iran, 281 F. Supp. 2d 258, 261 (D.D.C. 2003).

2. *See id.* (noting that by filling the suitcases with sharp objects and poisons, the bombers sought "to cause maximum pain, suffering, and death").

3. *See Hamas*, NAT'L COUNTERTERRORISM CTR., https://www.dni.gov/nctc/groups/hamas.html [https://perma.cc/X3TQ-WKAB] (last visited Oct. 9, 2017). Hamas has conducted "many anti-Israel attacks" over the years, including "large-scale bombings against Israeli civilian targets, small-arms attacks, improvised roadside explosives, and rocket attacks." *Id. See also Ch. 6 Foreign Terrorist Organizations*, COUNTRY REP. ON TERRORISM 2015, U.S. DEP'T STATE, http://www.state.gov/j/ct/rls/crt/2015/257523.htm [https://perma.cc/CNR2-2PKB] (last visited Oct. 9, 2017) (noting the history of Hamas).

4. *See* Rachel Brandenburg, *Iran and the Palestinians*, IRAN PRIMER, http://iranprimer.usip.org/resource/iran-and-palestinians [https://perma.cc/XQ9U-HXWG] (last visited Sept. 2, 2017). In the 1990s, the Iranian government allegedly gave Hamas about $30 million annually in military and financial support and provided Hamas fighters with "advanced military training," courtesy of the Iranian Revolutionary Guard. *See id.*

5. *See Campuzano*, 281 F. Supp. 2d at 262.

Washington, D.C.[6] The plaintiffs sought to sue Iran for its alleged involvement in the attacks as a provider of military training, weaponry, and financial support to Hamas.[7] After finding an exception to Iran's foreign sovereign immunity,[8] the court held Iran liable for the plaintiffs' injuries and entered a default judgment of $71.5 million in compensatory damages.[9] However, Iran refused to pay the judgment, which has resulted in a decade-long succession of attempts by the plaintiffs to execute their judgment on various Iranian assets located within the United States.[10]

Recently, the *Rubin* group of plaintiffs registered their 2003 judgment in the Northern District of Illinois, seeking to attach four collections of ancient Persian artifacts for the purpose of satisfying their default judgment against Iran.[11] On July 19, 2016, the Seventh

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6. *See id.* at 261. The plaintiffs consisted of the *Campuzano* parties and the *Rubin* parties. *See id.*

7. *See id.* at 260.

8. *See id.* at 271-72 (finding that the plaintiffs properly established an exception to Iran's sovereign immunity); *see also infra* Section I.B (explaining this exception to foreign sovereign immunity).

9. *See* Rubin v. Islamic Republic of Iran, 830 F.3d 470, 473 (7th Cir. 2016).

10. *See id.* (discussing some of the cases the *Rubin* plaintiffs have brought against Iranian assets).

11. *See id.* Though artifacts in the possession of the Field Museum of Natural History were also sought, the Seventh Circuit only ruled on the availability of the Persepolis Collection, housed at the University of Chicago on a long-term academic loan for study of Elamite writing. *See* Rubin v. Islamic Republic of Iran, 637 F.3d 783, 787 (7th Cir. 2011). This has unnerved many academics who argue that cultural property should not be subjected to lawsuits for purposes of fulfilling a court-ordered judgment for damages; they claim that this would detrimentally affect the practice of foreign nations loaning their cultural heritage to museums, universities, and the like. *See, e.g.*, Sebastian Heath & Glenn M. Schwartz, *Legal Threats to Cultural Exchange of Archaeological Materials*, 113 AM. J. ARCHAEOLOGY 459, 460-61 (2009); Alicia M. Hilton, *Terror Victims at the Museum Gates: Testing the Commercial Activity Exception Under the Foreign Sovereign Immunities Act*, 53 VILL. L. REV. 479, 517 (2008); *On the Attachment of Cultural Objects to Compensate Victims of Terrorism*, ARCHAEOLOGICAL INST. AM. (Feb. 9, 2009), https://www.archaeological.org/pdfs/AIAAttachment.pdf [https://perma.cc/42P8-YBRK]. Academics also argue that allowing such a practice would violate the UNESCO Cultural Property Convention. *See* Claire R. Thomas, *"That Belongs in a Museum!"* Rubin v. Iran*: Implications for the Persian Collection of the Oriental Institute of the University of Chicago*, 31 LOY. L.A. INT'L & COMP. L. REV. 257, 288 (2009); *see also* Constitution of the United Nations Educational, Scientific and Cultural Organisation art. 1(2)(c), Nov. 16, 1945, 61 Stat. 2495, 4 U.N.T.S. 275 [hereinafter UNESCO Constitution]; Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property

Circuit Court of Appeals affirmed the lower court's ruling that the plaintiffs could not satisfy their judgment against Iran through the attachment of the Persian artifacts in question.[12] The court held that the use of the Persepolis Collection by the University of Chicago did not qualify as "commercial activity" engaged in by Iran, and therefore the artifacts could not be attached under § 1610(g) of the Foreign Sovereign Immunities Act (the FSIA).[13] Thus, the court held that § 1610(g) does not offer a freestanding exception to execution immunity in cases of terrorism-related judgments,[14] creating a circuit split with the Ninth Circuit and overruling two prior decisions by the Seventh Circuit.[15] Presently, the case sits in the hands of the Supreme Court, where the justices must make the ultimate decision—Does § 1610(g) limit terror victims' recovery to only "commercial" property, or is § 1610(g) a freestanding exception?[16]

What scholarship does exist on the Foreign Sovereign Immunities Act tends to focus primarily on what kinds of property constitute "commercial activity" under the commercial use exception to attachment and execution immunity.[17] This Note does not discuss whether scholarly use of ancient artifacts constitutes commercial activity.[18] Instead, this Note focuses on the language and legislative history of § 1610(g) and why the statute arguably abrogates the need for the sought-after property to be used for commercial activity in the United States.[19] The Seventh Circuit's decision in *Rubin v. Islamic Republic of Iran* has the effect of making it nearly impossible for victims of state-sponsored terrorism to recover on judgments in cases where the foreign sovereign has few available assets.[20] Rather,

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art. 1, Nov. 14, 1970, 27 U.S.T. 37, 823 U.N.T.S. 231 [hereinafter UNESCO Cultural Property Convention].

12. *See Rubin*, 830 F.3d at 473-74 (upholding the lower court's finding that the plaintiffs had "no statutory basis to execute on the artifacts").

13. *See id.*; *see also* 28 U.S.C. § 1610(a) (2012).

14. *See Rubin*, 830 F.3d at 487; *see also infra* Section II.B (discussing the Seventh Circuit's holding in further detail).

15. *See Rubin*, 830 F.3d at 489 (Hamilton, J., dissenting).

16. *See id.* (majority opinion), *cert. granted*, 85 U.S.L.W. 3594 (U.S. June 27, 2017) (No. 16-534).

17. *See generally* Hilton, *supra* note 11.

18. Though, necessarily, some discussion of the commercial use exceptions will be provided.

19. *See infra* Section IV.A (analyzing 28 U.S.C. § 1610(g) (2012) and what it means for terrorism victims).

20. *See Rubin*, 830 F.3d at 489 (Hamilton, J., dissenting) (finding that the majority's interpretation of § 1610(g) "shelters from execution a wide range of assets of state sponsors of terrorism").

§ 1610(g) of the FSIA should be interpreted by the Supreme Court—as it has been in prior Seventh and Ninth Circuit cases—as a freestanding exception for terrorism-related judgments, which would allow victims to fulfill their judgments against a broader range of foreign assets.[21]

Part I of this Note provides an overview of the Foreign Sovereign Immunities Act and the statutes involving state-sponsored terrorism. Part II discusses the history of the *Rubin* plaintiffs' quest to hold Iran accountable for the attack by Hamas and the Seventh Circuit's most recent ruling against the *Rubin* plaintiffs; Part II also briefly analyzes the cases that were consequently overruled by the Seventh Circuit's decision. Part III provides an overview of policy regarding the legislative purpose and history of § 1610(g). Finally, Part IV analyzes and ultimately proposes why the Supreme Court should hold that § 1610(g) provides a freestanding exception to attachment and execution immunity in terrorism-related judgments.

I. OVERVIEW OF THE FOREIGN SOVEREIGN IMMUNITIES ACT

For much of American history, foreign countries were practically untouchable in the courtroom; United States citizens and the government alike could not bring any actions against foreign sovereigns.[22] However, in the last sixty years there has been a great shift[23]—foreign countries, while enjoying the initial presumption of immunity, can now be sued in American courts under certain enumerated exceptions.[24] One such exception may apply when the foreign sovereign is found to have sponsored and supported terrorist organizations and activities that harm American citizens.[25] Nonetheless, hurdles remain; while American plaintiffs may succeed in suing a country for sponsoring terrorism and causing injury, the plaintiffs must further establish that the property they seek to fulfill their awarded judgments also satisfies additional statutory requirements.[26] While certain provisions allow foreign property located within the United States to be collected upon, they fall short

21. *See infra* Section IV.A.
22. *See infra* Section I.A.
23. *See infra* Section I.A.
24. *See infra* Section I.B.
25. *See infra* Section I.B.
26. *See infra* Section I.B.

of completely ensuring that injured American plaintiffs will see any tangible relief.[27]

A. Concept and History of Foreign Sovereign Immunity in the United States

In the United States, foreign sovereign nations have generally enjoyed and been granted complete immunity from civil suits filed in United States courts.[28] In the past, the Supreme Court went so far as to interpret this concept of foreign sovereign invulnerability as granting "virtual[] absolute immunity" to other foreign nations.[29] However, this changed in 1952 when the State Department issued the so-called Tate Letter, in which the Department announced it would be abandoning its recognition of foreign countries' absolute sovereign immunity.[30] Following the issuance of the Tate Letter, federal courts began adopting a "restrictive view" of sovereign immunity, holding that foreign sovereigns could only be liable to suit

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27. *See infra* Section I.B.

28. *See* Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 486 (1983); *see also* William P. Hoye, *Fighting Fire With . . . Mire? Civil Remedies and the New War on State-Sponsored Terrorism*, 12 DUKE J. COMP. & INT'L L. 105, 114 (2002) (indicating that "[s]overeign states historically enjoyed absolute immunity from civil liability under international law for all actions"). "The doctrine of foreign sovereign immunity developed as a matter of common law." Samantar v. Yousuf, 560 U.S. 305, 311 (2010).

29. *Verlinden*, 461 U.S. at 486. The Supreme Court was referring to its ruling in *Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812), which held that the United States lacked jurisdiction over a foreign country's war ship that had come to port. *See id.* (citing *Schooner Exchange*, 11 U.S. (7 Cranch) at 116).

30. *See* Robert M. Jarvis, *The Tate Letter: Some Words Regarding Its Authorship*, 55 AM. J. LEGAL HIST. 465, 465 (2015). During a speech in front of the Association of the Bar of the City of New York in 1954, Jack B. Tate, the State Department's acting legal adviser, explained that this change in policy was made after the Supreme Court delivered its opinion in *Republic of Mexico v. Hoffman*, 324 U.S. 30 (1945). *See id.* at 471. In *Hoffman*, Chief Justice Harlan Stone said that "it is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize." *Hoffman*, 324 U.S. at 35. In his speech, Mr. Tate indicated that with this language, the State Department felt there was "now support in policy and in law justifying a holding that the result should be in accordance with the restrictive theory, according to which trading states could no longer assert immunity to suits in our courts growing out of commercial activities." Jarvis, *supra* note 30, at 471 (quoting Jack B. Tate, Remarks to the Association of the Bar of the City of New York (Apr. 15, 1954)).

in the United States for their private or commercial activity.[31] Nonetheless, because the Supreme Court narrowly held in *Schooner Exchange v. M'Faddon* that foreign sovereign immunity was not governed by the Constitution,[32] federal courts generally deferred to the Executive Branch's expertise on matters regarding whether to exercise personal jurisdiction over foreign countries.[33]

In the time period between the issuance of the Tate Letter and the passing of the Foreign Sovereign Immunities Act in 1976, a two-step procedure emerged for determining whether a foreign country was entitled to sovereign immunity.[34] First, a diplomat representing the foreign country could formally entreat a "suggestion of immunity" from the State Department.[35] If the Department granted such a request, then the foreign nation was immune from suit.[36] But, if the Department declined to grant such immunity, then federal courts had the authority to decide if the foreign nation met all the criteria for sovereign immunity.[37] In so determining, the federal courts would inquire as to whether the grounds for immunity were previously established and recognized by the State Department.[38]

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31. *See* Republic of Austria v. Altmann, 541 U.S. 677, 709 (2004) (citing Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State, Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments (May 19, 1952), *reprinted in* 26 DEP'T. ST. BULL., June 1952, at 984-85).

32. *See Verlinden*, 461 U.S. at 486 (noting that in *Schooner Exchange*, the Court made clear that the immunity of foreign sovereigns "is a matter of grace and comity on the part of the United States").

33. *See id.* at 487 (noting that even after the issuance of the Tate Letter, "initial responsibility for deciding questions of sovereign immunity fell primarily upon the Executive acting through the State Department"); *see also Ex parte* Republic of Peru, 318 U.S. 578, 586-87 (1943) ("The case involves the dignity and rights of a friendly sovereign state, claims against which are normally presented and settled in the course of the conduct of foreign affairs by the President and by the Department of State."). The foundation for Executive power over matters of international concern is rooted in Article II of the U.S. Constitution, which provides the President with the power "to make Treaties . . . [and] appoint Ambassadors," as well as imposing the duty to "receive Ambassadors and other public Ministers." U.S. CONST. art. II, §§ 2-3.

34. *See* Samantar v. Yousuf, 560 U.S. 305, 311 (2010) (describing the procedure).

35. *Id.* (quoting *Ex parte Peru*, 318 U.S. at 581).

36. *See id.*

37. *See Ex parte Peru*, 318 U.S. at 587. The federal courts also had the authority to determine whether foreign sovereign immunity applied when foreign nations failed to make a request for immunity from the State Department. *See* Hoye, *supra* note 28, at 115.

38. *See Samantar*, 560 U.S. at 312 (citing Republic of Mexico v. Hoffman, 324 U.S. 30, 36 (1945)).

However, this procedure was extremely cumbersome and led to non-uniform decisions among the various district and circuit courts.[39] Therefore, Congress passed the FSIA in 1976, which both codified the restrictive view of the Tate Letter and transferred determinations of immunity from the Executive Branch to the federal courts.[40]

B. Statutory Framework of the Foreign Sovereign Immunities Act

Under the FSIA, foreign countries are presumed to be immune from lawsuits in the United States;[41] however, this presumption is subject to certain enumerated exceptions.[42] These exceptions primarily concern a foreign nation's commercial activities that either occur in or directly affect the United States.[43] Unlike those exceptions that deal with commercial activities, § 1605A of the FSIA, enacted in 2008,[44] grants plaintiffs a cause of action against certain state-sponsors of terrorism so designated by the State Department.[45] This section provides that a foreign nation will not be immune from suit if found by the courts to be responsible for personal injuries or death caused by a government agent committing acts of torture, extrajudicial killings, the sabotage of aircraft, taking

39. *See* Hoye, *supra* note 28, at 115. "[Because the] initial responsibility for deciding questions of sovereign immunity fell primarily to the executive branch . . . foreign nations seeking immunity often placed diplomatic pressure on the U.S. State Department. Consequently, political considerations led to suggestions of immunity where immunity should not have been available." *Id.*

40. *See id.*

41. *See* 28 U.S.C. § 1604 (1976).

42. *See id.* ("Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in [28 U.S.C. §§] 1605 to 1607 of this chapter.").

43. *See* Hoye, *supra* note 28, at 116; *see also* 28 U.S.C. § 1605(a)(2)-(3).

44. *See* Rubin v. Islamic Republic of Iran, 830 F.3d 470, 474 (7th Cir. 2016) (stating that Section 1083 of the National Defense Authorization Act of 2008 replaced 28 U.S.C. § 1605(a)(7) (repealed 2008)—the former terrorism exception—with 28 U.S.C. § 1605A (2008)); *see also* National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083, 122 Stat. 3, 338-44.

45. *See* § 1605A(a)(2)(A)(i)(I). As of December 13, 2016, the State Department designates three countries as state-sponsors of terrorism: Iran, Sudan, and Syria. *See State Sponsors of Terrorism*, U.S. DEP'T ST., https://www.state.gov/j/ct/list/c14151.htm [https://perma.cc/W5ZZ-F72N] (last visited Oct. 9, 2017). Additionally, in order for plaintiffs to have a cause of action against a foreign nation, the plaintiffs must have been U.S. nationals, members of the U.S. armed forces, or the employees or contractors of the U.S. government at the time the terrorist act occurred. *See* § 1605A(a)(2)(ii).

hostages, or providing material support or resources for such acts.[46] It also creates a private right of action for money damages.[47] If plaintiffs succeed in their suit against a state-sponsor of terrorism and are awarded a judgment for money damages, the plaintiffs may then seek to "attach" the foreign nation's property.[48] In attaching the foreign nation's property, the plaintiffs may, under § 1610(g), use the property in order to execute and collect on their awarded judgment.[49]

Section 1610(g) allows plaintiffs to attach and execute their judgment upon the foreign sovereign's property or property of the state's agencies or instrumentalities.[50] This section does away with the so-called *Bancec* doctrine, a policy in which a foreign state and

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46. *See* § 1605A(a)(1). The foreign government agent must have been "acting within the scope of his or her office, employment, or agency" at the time of the act for the terrorism exception to apply. *See id.*

47. *See* § 1605A(c); *see also* Debra M. Strauss, *Reaching Out to the International Community: Civil Lawsuits as the Common Ground in the Battle Against Terrorism*, 19 DUKE J. COMP. & INT'L L. 307, 328-29 (2009) (describing the provisions of § 1605A in detail).

48. S*ee* § 1605A(g)(1) ("[T]he filing of a notice of pending action pursuant to [§ 1605A] . . . shall have the effect of establishing a lien of lis pendens upon any real property or tangible personal property that is (A) subject to attachment in aid of execution, or execution under [28 U.S.C. §] 1610 [2012]; (B) located within that judicial district; and (C) titled in the name of any defendant, or titled in the name of any entity controlled by any defendant if such notice contains a statement listing such controlled entity."); Strauss, *supra* note 47, at 331-32 (explaining how § 1605A(g)(1) protects and preserves a foreign nation's property for purposes of attachment). Like sovereign immunity, a foreign nation's property is presumed to be immune from attachment and execution; however, this is subject to certain enumerated exceptions. *See* § 1609 ("Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in [§] 1610.").

49. *See* § 1610(g) ("[T]he property of a foreign state against which a judgment is entered under [§] 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."). If plaintiffs previously received a judgment under § 1605(a)(7)—the former terrorism exception—the National Defense Authorization Act of 2008 provides that plaintiffs can have their judgments converted under § 1605A "so that judgment creditors [can] access the benefits of § 1610(g)." *Rubin*, 830 F.3d at 481.

50. *See* § 1610(g)(1); *see also Rubin*, 830 F.3d at 481 (explaining that Section 1610(g) "applies to execution proceedings to enforce judgments obtained under § 1605A and eases the collection process for victims of state-sponsored terrorism"). The National Defense Authorization Act of 2008 amended § 1610 to include § 1610(g). *See* National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083, 122 Stat. 3, 341-42.

its subsidiaries were presumed to be separate for execution purposes.[51] Ordinarily, this presumption could only be rebutted if the plaintiffs successfully demonstrated that the foreign state was the alter ego of the instrumentality and that a recognition of separate corporate status for the instrumentality would either defraud or work an injustice on the plaintiffs.[52] Now, under § 1610(g), the *Bancec* doctrine is lifted for holders of judgments related to terrorism.[53] Therefore, if a foreign sovereign is subject to a judgment granted under § 1605A, any property held in the United States by the foreign sovereign or its agencies and instrumentalities may be subject to attachment and execution, regardless of whether there is an alter ego relationship between the foreign sovereign and the agency or instrumentality, or whether the plaintiffs would suffer an injustice or be defrauded if the agency or instrumentality was given a separate corporate status.[54]

However, § 1610(g) allows plaintiffs who have an outstanding § 1605A judgment to attach and execute on property of the foreign country "as provided in this section."[55] It is the "as provided in this section" language that Iran and the *Rubin* plaintiffs argued over in their most recent case; while Iran argued that this phrase limits the scope of § 1610(g) to only property that fulfills a commercial use exception elsewhere under § 1610,[56] the *Rubin* plaintiffs argued it does no such thing and that § 1610(g) establishes a freestanding

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51. *See* Phillip Riblett, *A Legal Regime for State-Owned Companies in the Modern Era*, 18 J. TRANSNAT'L L. & POL'Y 1, 14 n.65 (2008). The *Bancec* doctrine is derived from *First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983). *Id.* at 13. This case established a presumption that instrumentalities of foreign sovereigns were distinct and independent from the foreign sovereign itself. *Id.* (citing Hyatt Corp. v. Stanton, 945 F. Supp. 675, 681 (S.D.N.Y. 1996)).

52. *See id.* at 13-14 (citing *Hyatt*, 945 F. Supp. at 629).

53. *See Rubin*, 830 F.3d at 474.

54. *See* § 1610(g)(1); *see also Rubin*, 830 F.3d at 481-83.

55. *See* § 1610(g)(1). Plaintiffs can attach and execute on such property:

> as provided in this section, regardless of[:] (A) the level of economic control over the property by the government of the foreign state; (B) whether the profits of the property go to that government; (C) the degree to which officials of that government manage the property or otherwise control its daily affairs; (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.

Id.

56. *See Rubin*, 830 F.3d at 484.

exception to execution immunity for terrorism-related judgments.[57] While arguably vague and ambiguous,[58] there is no real consensus among the courts on what this language actually does.[59] These five words are the lynchpin in deciding whether the *Rubin* plaintiffs can attach and execute their judgment upon the Persepolis Collection.[60]

II. HISTORY OF *RUBIN* AND THE FIGHT TO HOLD IRAN ACCOUNTABLE FOR HAMAS

For the last twenty years, the *Rubin* plaintiffs have persistently sought to hold the Iranian government responsible and accountable for causing their physical and emotional injuries.[61] Facing hurdles and pitfalls along the way, the *Rubin* plaintiffs have not yet seen any tangible relief.[62] In their latest attempt to satisfy their unfulfilled judgment against Iran, the Seventh Circuit ruled against the *Rubin* plaintiffs and held that the Foreign Sovereign Immunities Act cannot grant them the particular relief they seek.[63] In so doing, the Seventh Circuit overruled two of its own prior cases[64] and created a circuit split,[65] making the need for a definitive answer by the Supreme Court all the more pressing.[66]

A. *Campuzano v. Islamic Republic of Iran*: The Initial Quest

In the aftermath of the deadly suicide bombing carried out by Hamas at a Jerusalem mall in September 1997, two groups of injured

57. *See* Reply Brief for the Judgment Creditors–Appellants at 24-25, Rubin v. Islamic Republic of Iran, 830 F.3d 470 (7th Cir. 2016) (No. 14-1935).

58. *See Rubin*, 830 F.3d at 489-90 (Hamilton, J., dissenting) ("The details of the textual arguments are laid out well in [Bennett v. Islamic Republic of Iran, 825 F.3d 949 (9th Cir. 2016)] and [Rubin v. Islamic Republic of Iran, 637 F.3d 783 (7th Cir. 2011)], and I will not repeat them. Both readings of the text, I believe, are reasonable, meaning that the text is ambiguous. The courts must choose between two statutory readings: one that favors state sponsors of terrorism, and another that favors the victims of that terrorism."); *see also Bennett*, 825 F.3d at 961 ("We acknowledge that § 1610 as a whole is ambiguous.").

59. *See infra* Section II.B (discussing in depth how different federal courts have come to conflicting conclusions about this issue).

60. *See infra* Section IV.A.

61. *See infra* Sections II.A, II.B.

62. *See infra* Section II.A.

63. *See infra* Section II.B.

64. *See infra* Subsections II.C.1, II.C.2.

65. *See infra* Section II.C.

66. *See infra* Section IV.A.

American citizens—the *Campuzano* and *Rubin* parties—brought separate suits against Iran and its government agencies and officials for their responsibility in providing training and support to Hamas.[67] The *Campuzano* plaintiffs sought to sue the Government of Iran, the Ministry of Information and Security (MOIS), and the Iranian Revolutionary Guards; the *Rubin* plaintiffs brought suit against the Government of Iran and MOIS, as well as Ayatollah Ali Hoseini Khamenei, Ali Akbar Hashemi-Rafsanjani, and Ali Fallahian-Khuzetani.[68] Both groups of plaintiffs sued the Iranian defendants under § 1605(a)(7) of the FSIA, which waives sovereign immunity for state-sponsors of terrorism.[69] The Iranian defendants, though served with proper notice, failed to respond or appear in either case; accordingly, the plaintiffs were awarded default judgments by the Clerk of the Court.[70] However, because the FSIA requires a court to conduct an evidentiary hearing prior to the entrance of a default judgment,[71] the D.C. District Court consolidated the *Campuzano* and *Rubin* cases and held such a hearing.[72]

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67. *See* Campuzano v. Islamic Republic of Iran, 281 F. Supp. 2d 258, 260-61 (D.D.C. 2003).

68. *See id.* at 261. Although not spelled out in *Campuzano*, the three Iranian officials were the Supreme Leader, the Iranian President, and the Iranian Minister of Information and Security, respectively. *See* Petitioners–Appellants' Petition for Panel Rehearing and Rehearing *En Banc*, Weinstein v. Islamic Republic of Iran, 831 F.3d 470 (D.D.C. 2016) (No. 14-7193) (indicating in caption the offices that these individuals held). Rafsanjani, also holding the title of Ayatollah, died on January 8, 2017; in an article lauding Rafsanjani's career as an Iranian statesman and former president, a CNN contributor hailed him as "a man of peace." Seyed Hossein Mousavian, *Death of Iran's Rafsanjani: Ex-President Was a Man of Peace*, CNN (Jan. 12, 2017, 8:13 AM), http://www.cnn.com/2017/01/10/opinions/rafsanjani-seyed-hossein-mousavian/index.html [https://perma.cc/JY3J-WMBD].

69. *See Campuzano*, 281 F. Supp. 2d at 269. Section 1083 of the National Defense Authorization Act of 2008 replaced 28 U.S.C. § 1605(a)(7) (repealed 2008) with 28 U.S.C. § 1605A (2008). *See* Rubin v. Islamic Republic of Iran, 830 F.3d 470, 481 (7th Cir. 2016).

70. *See Campuzano*, 281 F. Supp. 2d at 261.

71. *See* 28 U.S.C. § 1608(e) (1976) ("No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.").

72. *See Campuzano*, 281 F. Supp. 2d at 261. The court consolidated the two cases because they both arose out of the same incident—the bombing in Jerusalem—and involved common questions of law and fact. *See id.*; *see also* FED. R. CIV. P. 42(a).

At this hearing, the district court—looking to the elements of § 1605(a)(7)[73]—determined the following: (1) the bombing was an extrajudicial killing; (2) Hamas, a non-state actor receiving material support or resources from Iran, was the group responsible for the deliberate bombing; (3) MOIS, along with senior Iranian leaders, provided such support to Hamas with the specific purpose that Hamas carry out the bombing; (4) Iran was a State Department-recognized sponsor of terrorism at the time of the bombing; (5) the FSIA did not require that the plaintiffs afford Iran the opportunity to arbitrate because the attack did not occur in Iran; (6) the plaintiffs were American citizens on the day of the bombing; and (7) if a U.S. official, in his or her official capacity, provided material support to a terrorist organization like Hamas, he or she would be liable and unable to claim qualified immunity.[74] The district court held that both the *Campuzano* and *Rubin* parties properly established a right to relief and granted default judgments against the Iranian defendants.[75] The nine *Rubin* plaintiffs[76] were collectively awarded $71.5 million

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73. At the time of the *Campuzano* decision, the D.C. Circuit interpreted § 1605(a)(7) as requiring plaintiffs to prove with satisfactory evidence the following elements:

> (1) that personal injury or death resulted from an act of torture, extrajudicial killing, aircraft sabotage, or hostage taking; (2) that the act was either perpetrated by a foreign state directly or by a non-state actor which receives material support or resources from the foreign state defendant; (3) the act or provision of material support or resources is engaged in by an agent, official, or employee of the foreign state while acting within the scope of his or her office, agency, or employment; (4) that the foreign state be designated as a state sponsor of terrorism either at the time the incident complained of occurred or was later so designated as a result of such act; (5) that if the incident complained of occurred within the foreign state defendant's territory, plaintiff has offered the defendants a reasonable opportunity to arbitrate the matter; (6) that either the plaintiff or the victim was a United States national at the time of the incident; (7) that similar conduct by United States agents, officials, or employees within the United States would be actionable.

Campuzano, 281 F. Supp. 2d at 269 (citing § 1605(a)(7) and § 1605 note); *see also* Elahi v. Islamic Republic of Iran, 124 F. Supp. 2d 97, 106-07 (D.D.C. 2000) (explaining what a claim under § 1605(a)(7) must contain "[i]n order to establish subject matter jurisdiction and state a claim").

74. *See Campuzano*, 281 F. Supp. 2d at 269-70 (explaining how each element was fulfilled).

75. *See id.* at 279.

76. *See id.* at 261. The plaintiffs were Jenny Rubin, Daniel Miller, Abraham Mendelson, Stuart Hersh, Noam Rozenman, Deborah Rubin, Renay Frym, Elena Rozenman, and Tzvi Rozenman. *See id.* Some of the plaintiffs' injuries were

in compensatory damages; the five actually present at the bombings were also granted $37.5 million each in punitive damages.[77] The three *Campuzano* plaintiffs[78] were collectively awarded $39 million in compensatory damages, in addition to $37.5 million in punitive damages.[79] But, nearly fifteen years after the D.C. Circuit awarded the default judgments, the *Campuzano* and *Rubin* parties have yet to see relief.[80] However, the quest to hold Iran truly accountable for their sponsorship of terrorism continues to this day.[81]

B. Which *Rubin*? A Plethora of Collections Cases

Following the decision in *Campuzano*, the *Rubin* plaintiffs have brought numerous cases against Iran over the last decade, each time trying to attach and execute on various Iranian assets within the United States to fulfill their multi-million dollar judgment.[82] The *Rubin* plaintiffs have tried—and failed—to attach and execute on domestic bank accounts used in the United States by Iranian consulates,[83] as well as on Iranian antiquities in possession of the

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traumatic; Noam Rozenman, for example, suffered burns over forty percent of his body and suffered over 100 shrapnel wounds. *See id.* at 267.

77. *See* Rubin v. Islamic Republic of Iran, 456 F. Supp. 2d 228, 230 (D. Mass. 2006). Deborah Rubin, Renay Frym, Elena Rozenman, and Tzvi Rozenman were not present at the Jerusalem bombing, but were family members who suffered emotional injuries. *See Campuzano*, 281 F. Supp. 2d at 267-68.

78. *See Campuzano*, 281 F. Supp. 2d at 261. The three *Campuzano* plaintiffs—Diana Campuzano, Avi Elishis, and Gregg Salzman—likewise suffered traumatic injuries; Diana Campuzano suffered such a severe skull fracture that her brain was leaking cerebral spinal fluid and required a craniotomy in which her skull was repaired with "mini plates, bone cement, and her own harvested tissue." *See id.* at 263-65.

79. *See id.* at 274-75, 279.

80. *See* Rubin v. Islamic Republic of Iran, 830 F.3d 470, 473 (7th Cir. 2016). Admittedly, it is not exactly clear if the *Campuzano* plaintiffs have ever sought to collect on their judgment; cases following the 2003 decision of the D.C. District Court were filed on behalf of "Jenny Rubin et al." and made no mention of the three *Campuzano* plaintiffs. *See, e.g.*, *Rubin*, 456 F. Supp. 2d at 228; Rubin v. Islamic Republic of Iran, 408 F. Supp. 2d 549, 549 (N.D. Ill. 2005); Rubin v. Islamic Republic of Iran, No. Civ.A. 01-1655(RMU), 2005 WL 670770, at *1 (D.D.C. Mar. 23, 2005), *vacated*, 563 F. Supp. 2d 38 (D.D.C. 2008).

81. *See infra* Section II.B.

82. *See Rubin*, 830 F.3d at 473; *see also* cases cited *supra* note 80.

83. *See Rubin*, 563 F. Supp. 2d at 39. The two accounts were held by Bank of America under the names "Consulate General of the Islamic Republic of Iran in Chicago" and "Consolate General Iran." *Rubin*, 2005 WL 670770, at *1.

Boston Museum of Fine Arts and Harvard University.[84] They have been consistently impeded in their efforts to fully satisfy their judgments.[85] The *Rubin* plaintiffs have even been hindered by other injured victims who hold judgments against Iran.[86] However, it is their most recent courtroom endeavor that has caused such tumult and confusion over the proper interpretation of § 1610(g) of the FSIA.[87]

The most recent setback for the *Rubin* plaintiffs was handed down in July 2016 by the Seventh Circuit Court of Appeals.[88] The plaintiffs proposed three ways in which they could attach and execute upon Iranian artifacts located at the University of Chicago and the Field Museum of Natural History: (1) § 1610(a) of the FSIA, the commercial activity exception; (2) § 1610(g) of the FSIA, the terrorism exception; or (3) § 201 of the Terrorism Risk Insurance Act of 2002 (TRIA).[89] However, the Seventh Circuit found that there was no statutory basis to support the attachment and execution of the contested artifacts.[90]

Among their failed arguments, the *Rubin* plaintiffs contended that § 1610(g) provides a freestanding exception to attachment and execution immunity and thus does not impose the same limitations under § 1610(a) and (b); in other words, § 1610(g) does not require the plaintiffs to establish that the property at issue is being used for

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84. *See* Rubin v. Islamic Republic of Iran, 709 F.3d 49, 51 (1st Cir. 2013). The antiquities in possession of the Museum of Fine Arts and Harvard included "stone reliefs, sculptures, and archeological specimens" that originated near or within the current borders of Iran. *Id.*

85. *See* James A. Wawrzyniak, Jr., Rubin v. The Islamic Republic of Iran*: A Struggle for Control of Persian Antiquities in America*, *in* YEARBOOK OF CULTURAL PROPERTY LAW 223, 226-27, 229-30 (Sherry Hutt & David Tarler eds., 2008) (describing in further detail how the *Rubin* plaintiffs were unsuccessful in their efforts to attach and execute upon Iranian property).

86. *See* Plaintiffs' Consolidated Memorandum of Law at 5 n.2, Rubin v. Islamic Republic of Iran, 408 F. Supp. 2d 549 (N.D. Ill. 2005) (No. 1:03-CV-09370) (noting that while the D.C. District Court had granted the *Rubin* plaintiffs' motion for a writ of execution in *Rubin*, 2005 WL 670770, at *1-2, the plaintiffs were unable to receive any of the funds because they were "subject to a prior lien").

87. *See infra* Section II.B.

88. *See* Rubin v. Islamic Republic of Iran, 830 F.3d 470 (7th Cir. 2016).

89. *See id.* at 473; *see also supra* note 11 and accompanying text (noting that the Seventh Circuit only ruled on the applicability of the Persepolis Collection at the University of Chicago).

90. *Rubin*, 830 F.3d at 473-74. While the court analyzed the three proposed avenues for relief, this Note focuses solely on the court's analysis of the *Rubin* plaintiffs' argument under 28 U.S.C. § 1610(g) (2012).

commercial activity.[91] The plaintiffs came to this conclusion by looking to a recent Seventh Circuit ruling.[92] Using *Gates v. Syrian Arab Republic*, the *Rubin* plaintiffs argued that the court already determined § 1610(g) to be a freestanding exception.[93] In *Gates*, the Seventh Circuit held that judgment holders who try to attach and execute under § 1610(g) do not have to comply with the procedural requirements of § 1610(c).[94] Section 1610(c), by its own language, exclusively pertains to the attachment and execution of commercial property under § 1610(a) and (b).[95] In holding that § 1610(c) does not apply, the court in *Gates* recognized that § 1610(g) is substantially different from § 1610(a) and (b).[96] The *Rubin* plaintiffs stressed this point, arguing that because the court had recognized that the execution process of § 1610(g) "is entirely distinct" from the processes under § 1610(a) and (b), the court had established § 1610(g) as a freestanding exception.[97]

The *Rubin* plaintiffs also argued that if Congress intended to limit § 1610(g), Congress would have overtly and clearly referred to § 1610(a) and (b), either by cross-referencing to those subsections or by explicitly limiting § 1610(g) to property used in commercial activity.[98] Furthermore, they argued that interpreting § 1610(g) as a freestanding exception unlimited by § 1610(a) and (b) would be consistent with the legislative history and purpose of § 1610(g).[99] To support this, the *Rubin* plaintiffs pointed to a 2007 report from the

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91. Reply Brief for the Judgment Creditors–Appellants, *supra* note 57, at 25.

92. *See id.* at 23 (citing Gates v. Syrian Arab Republic, 755 F.3d 568 (7th Cir. 2014)).

93. *See id.* ("Contrary to the Appellees' arguments, this Court recently affirmed in *Gates v. Syrian Arab Republic* . . . that [§] 1610(g) is, in fact, a free-standing exception that waives [execution] immunity for all terrorist-state assets.").

94. *See Gates*, 755 F.3d at 575 ("Section 1610(g) is not mentioned in § 1610(c). By its terms, then, § 1610(c) simply does not apply to execution or attachment under § 1610(g). That conclusion is also consistent with the more general tools of statutory interpretation and the structure of the FSIA.").

95. *See* § 1610(c) ("No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.").

96. *See Gates*, 755 F.3d at 576 ("Section § 1610(g) differs substantially from § 1610(a) and (b).").

97. *See* Reply Brief for the Judgment Creditors–Appellants, *supra* note 57, at 24.

98. *See id.* at 27-28.

99. *See id.* at 24.

United States House of Representatives, which states that § 1610(g) was intended and written to subject "any property interest" that a foreign country may hold to attachment and execution.[100]

However, the Seventh Circuit did not agree with the *Rubin* plaintiffs' arguments.[101] The court noted that *Gates* never discussed whether § 1610(g) actually was a freestanding exception.[102] Furthermore, in analyzing the "as provided in this section" language, the court found that this language would be superfluous if § 1610(g) stood alone.[103] Thus, the court held that interpreting § 1610(g) as a freestanding exception would violate the "cardinal principle" of statutory construction—that is, a statute should be interpreted so as to not render any clause, sentence, or word superfluous.[104] In so doing, the court overruled *Gates* and another similar Seventh Circuit case[105] and created a circuit split with the Ninth Circuit.[106] The *Rubin* plaintiffs have since appealed to the Supreme Court,[107] asking the Court to determine if the Seventh Circuit got it right.[108]

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100. *See id.* (quoting H.R. REP. NO. 110-477, at 1001 (2007) (Conf. Rep.)).

101. *See* Rubin v. Islamic Republic of Iran, 830 F.3d 470, 487 (7th Cir. 2016) ("Section 1610(g) is not itself an exception to execution immunity for terrorism-related judgments . . . . [Terrorism victims] must satisfy an exception to execution immunity found elsewhere in § 1610—namely, subsections (a) or (b).").

102. *Id.* at 485 ("*Gates* assumes rather than decides the crucial antecedent question—that is, whether § 1610(g) is itself a freestanding exception to execution immunity. Instead, it simply describes subsection (g) in a way that implies an affirmative answer. . . . But nowhere does the *Gates* opinion grapple with the fundamental interpretive question presented here.").

103. *See id.* at 484; *see also* Brief for the United States as Amicus Curiae Supporting Appellees at 23, Rubin v. Islamic Republic of Iran, 830 F.3d 470 (7th Cir. 2016) (No. 14-1935) (arguing that the "as provided in this section" language integrates "by reference the other requirements for attaching foreign state property provided under [§] 1610").

104. *Rubin*, 830 F.3d at 484 (quoting TRW, Inc. v. Andrews, 534 U.S. 19, 31 (2001)).

105. *See id.* at 487 ("To the extent that [*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)] can be read as holding that § 1610(g) is a freestanding exception to execution immunity for terrorism-related judgments, they are overruled.").

106. *See id.* at 489 (Hamilton, J., dissenting).

107. *See id.*, *cert. granted*, 85 U.S.L.W. 3594 (June 27, 2017) (No. 16-534).

108. *See* Petition for a Writ of Certiorari at 21, *Rubin*, 85 U.S.L.W. 3594 (No. 16-534). On June 27, 2017, the Court granted this petition. *See* Rubin v. Islamic Republic of Iran, SCOTUSBLOG, http://www.scotusblog.com/case-files/cases/rubin-v-islamic-republic-of-iran-2/ [https://perma.cc/W5Q5-JYEN] (last visited Oct. 9, 2017).

C. Overruled!: How Other Courts Interpreted Section 1610(g) Prior to *Rubin*

In holding that § 1610(g) does not provide a freestanding exception to attachment and execution immunity, the Seventh Circuit "turned the car around"—the court overruled two of its own previous cases and came to the opposite conclusion of another circuit.[109] In *Gates* and *Wyatt v. Syrian Arab Republic*, the Seventh Circuit had previously ruled that a § 1610(g) action did not need to comply with certain procedural requirements of the FSIA.[110] The decision in *Rubin* also significantly deviated from the Ninth Circuit, which explicitly held that § 1610(g) was a freestanding exception in *Bennett v. Islamic Republic of Iran*.[111] The Seventh Circuit's ruling has created much confusion and must be addressed.[112]

1. *Seventh Circuit:* Gates v. Syrian Arab Republic

In arguing that § 1610(g) is a freestanding exception to attachment and execution immunity, the plaintiffs in *Rubin* relied on the Seventh Circuit's prior holding in *Gates*.[113] The *Gates* case stemmed from a dispute between two separate groups of terrorism victims—the *Gates* and *Baker* parties—each seeking to satisfy their own judgments against Syria.[114] The judgment awarded to the *Gates* party stemmed from the kidnapping and murder of two American civilian contractors in 2004 by the terrorist group al-Qa'ida in Iraq, who received support from the Syrian government.[115] The *Baker*

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109. *Rubin*, 830 F.3d at 489 (Hamilton, J., dissenting).

110. *See infra* Subsections II.C.1, II.C.2.

111. *See infra* Subsection II.C.3.

112. *See* Case Comment, *Foreign Relations Law–Foreign Sovereign Immunities Act Terrorism Exceptions–Seventh Circuit Holds that FSIA Does Not Provide Freestanding Basis to Satisfy Judgment Against State Sponsors of Terrorism.*–Rubin v. Islamic Republic of Iran*, 830 F.3d 470 (7th Cir. 2016)*, 130 HARV. L. REV. 761, 761 (2016) [hereinafter *Seventh Circuit Holds*] (noting the "lack of clarity" surrounding this issue).

113. *See* Gates v. Syrian Arab Republic, 755 F.3d 568, 576 (7th Cir. 2014); *see also supra* notes 92-97 and accompanying text.

114. *See Gates*, 755 F.3d at 570. This Note will not delve into the details and analysis of the competing claims. Such analysis would detract from this Author's focus on 28 U.S.C. § 1610(g) (2012) and its applicability as a freestanding exception to attachment and execution immunity.

115. *See id.*; *see also Ch. 6 Foreign Terrorist Organizations*, *supra* note 3 (noting that al-Qa'*ida* in Iraq renamed themselves in 2013 to the Islamic State in Iraq and the Levant—ISIL or ISIS for short).

party's judgment was awarded after the hijacking of an EgyptAir flight in 1985 by the Abu Nidal Organization,[116] a Palestinian terrorist organization that also received support from Syria.[117] Both parties sought to attach and execute their § 1605A judgments on Syrian assets located in the Northern District of Illinois.[118]

In the court's analysis of § 1610(g) and its applicability to attachment and execution, the Seventh Circuit noted that the exception allowed a "much broader range" of foreign assets to be used for § 1605A judgment purposes.[119] The court held that under § 1610(g), attachment of foreign sovereign assets is allowed irrespective of whether the sovereign retains economic control over the assets, profits from the assets, manages the assets, dictates its "daily affairs," or is the sole beneficiary.[120] In holding that terrorism victims need not comply with the procedural notice requirements of § 1610(c),[121] the court understood that § 1610(g) was substantially different and provided for the attachment of a foreign sovereign's assets regardless of whether the assets were used for commercial activity in the United States.[122] In addition, the court stated that its interpretation of the law—that victims trying to attach and execute under § 1610(g) do not have to comply with the notice requirement

116. *See Gates*, 755 F.3d at 570; *see also* Judith Miller, *From Takeoff to Raid: The 24 Hours of Flight 648*, N.Y. TIMES (Nov. 27, 1985), http://www.nytimes.com/1985/11/27/world/from-takeoff-to-raid-the-24-hours-of-flight-648.html [https://perma.cc/7TGS-W7S3] (describing the hijacking in detail).

117. *See Gates*, 755 F.3d at 570; *Abu Nidal Organization (ANO), aka Fatah Revolutionary Council, the Arab Revolutionary Brigades, or the Revolutionary Organization of Socialist Muslims*, COUNCIL ON FOREIGN REL., http://www.cfr.org/israel/abu-nidal-organization-ano-aka-fatah-revolutionary-council-arab-revolutionary-brigades-revolutionary-organization-socialist-muslims/p9153 [https://perma.cc/QN5Q-VQZF] (last updated May 27, 2009).

118. *Gates*, 755 F.3d at 570. The assets in question were bank accounts held at JP Morgan Chase Bank; one was an AT&T account that contained frozen funds owned by Syrian Telecom, and two others "contain[ed] blocked electronic funds transfers belonging to the Banque Centrale de Syrie." *Id.* at 573-74.

119. *Id.* at 576.

120. *Id.* (citing 28 U.S.C. § 1610(g)(1) (2012)).

121. *See supra* notes 94-96 and accompanying text (explaining that because § 1610(c) was specific in its applicability to only the commercial use exceptions of § 1610(a) and (b), it did not apply to § 1610(g)).

122. *See Gates*, 755 F.3d at 576. ("Section 1610(g) differs substantially from § 1610(a) and (b) . . . . Section 1610(g) provides that in cases of state-sponsored terrorism, assets of the defendant's agencies and instrumentalities are subject to attachment and execution regardless of factors that would ordinarily insulate such assets in other contexts governed by § 1610(a) and (b).").

of § 1610(c)[123]—was consistent with the "broader legislative purpose" for which § 1610(g) was enacted in 2008.[124] Such purpose was "to make it easier" for victims to satisfy their judgments against state-sponsors of terrorism.[125]

2. *Seventh Circuit:* Wyatt v. Syrian Arab Republic

Shortly after the Seventh Circuit ruled on *Gates*, the court once again addressed the question of how § 1610(g) should be properly interpreted.[126] In *Wyatt*, the *Gates* party made a return appearance, this time being challenged by the *Wyatt* victims; both parties were seeking to attach the same Syrian assets located in the Northern District of Illinois.[127] The *Wyatt* group's judgment stemmed from the 1991 kidnapping of two biblical archaeologists in Turkey by the Kurdistan Workers' Party,[128] a terrorist organization that has a historically close relationship with the Syrian government.[129] In a

123. *See id.* at 575-76 (holding that only those trying to attach and execute under § 1610(a) and (b) need satisfy the requirements of § 1610(c)). "Surrounded by other references, Congress' silence is a strong textual indication that § 1610(c) does not apply to efforts to enforce judgments under [28 U.S.C.] § 1605A [2008] through § 1610(g)." *Id.* at 576.

124. *Id.* "Exempting attachments under § 1610(g), that is, attachments stemming from terrorism-related judgments, from § 1610(c)'s solicitous notice requirements is entirely consistent with the liberalizing purpose of the 2008 Amendments." *Id.* at 576-77.

125. *Id.* at 576 (citing *In re* Islamic Republic of Iran Terrorism Litig., 659 F. Supp. 2d at 58-63 (D.D.C. 2009)).

126. *See* Wyatt v. Syrian Arab Republic, 800 F.3d 331, 333 (7th Cir. 2015).

127. *See id.* at 334-35. In fact, the assets being fought over in *Wyatt* were the same assets fought over in *Gates*. *See id.* at 335-36; *supra* note 118 and accompanying text.

128. *See Wyatt*, 800 F.3d at 335. The archaeologists were on an "expedition searching for the remains of Noah's Ark in eastern Turkey" when they were kidnapped. *Five Kidnap Victims Fly Home After "Harrowing Experience"*, UNITED PRESS INT'L (Sept. 23, 1991), http://www.upi.com/Archives/1991/09/23/Five-kidnap-victims-fly-home-after-harrowing-experience/5441685598400/ [https://perma.cc/55R4-3273].

129. *See Wyatt*, 800 F.3d at 335; *see also* Damien McElroy, *Syria and Iran "Backing Kurdish Terrorist Group," Says Turkey*, TELEGRAPH (Sept. 3, 2012), http://www.telegraph.co.uk/news/worldnews/europe/turkey/9518194/Syria-and-Iran-backing-Kurdish-terrorist-group-says-Turkey.html [https://perma.cc/D6VX-CJDC] ("'It [is] known that the [Kurdistan Workers' Party] works arm in arm with Syria's intelligence organisation,' said Huseyin Celik, the deputy chairman of Turkey's AK party. '[Bashar al-Assad, the President of Syria] is inclined to view Turkey's foe, the [Kurdistan Workers' Party], as a friend.' . . . 'Assad has been

move to usurp the *Gates* party's attachment of the Syrian assets in question, the *Wyatt* group claimed that the *Gates* party failed to serve the Syrian government with notice of its judgment, as required under § 1608(e).[130] If this were true, it would mean that the *Gates* party could not correctly follow the procedural requirements of § 1610(c), and thus the *Wyatt* group would hold the only valid claim to the assets at issue.[131]

However, the Seventh Circuit pointed out that the *Gates* party was not seeking to execute its judgment under § 1610(c); rather, the party sought to execute under § 1610(g).[132] Reaffirming its holding from *Gates*, the court reiterated that the procedural requirements of § 1610(c) do not apply to attachment and execution under § 1610(g); rather, § 1610(c) only applies to judgments being executed under the commercial use exceptions—§ 1610(a) and (b).[133] Once again, the Seventh Circuit stated that it came to this conclusion by looking to the language and structure of the FSIA, its legislative history, and the legislative purpose of the 2008 FSIA amendments.[134] In short, the court reaffirmed its recognition of the substantial differences between § 1610(g) and the commercial use exceptions.[135]

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cultivating the [Kurdistan Workers' Party] since the 1980s to provide just this level of protection for his regime.'").

130. *See Wyatt*, 800 F.3d at 342; *see also* 28 U.S.C. § 1608(e) (1976) ("A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.").

131. *See Wyatt*, 800 F.3d at 342. "The statutory consequence of failing to satisfy the service requirement in § 1608(e) is that plaintiffs with a judgment against a foreign state cannot obtain authorization under [28 U.S.C.] § 1610(c) [2012] to proceed to attachment and execution of that judgment." *Id.* "If the Gates plaintiffs' judgment, attachment, and execution are valid, then they plainly have priority over the Wyatt plaintiffs, who did not register a judgment and serve a citation to discover assets until nearly three years later." *Id.*

132. *See id.* at 343 ("The Gates plaintiffs are seeking to execute a judgment for state-sponsored terrorism, so they may proceed through the execution provision specifically enacted for terrorism judgments, § 1610(g).").

133. *See id.* ("As we held in *Gates* [*v. Syrian Arab Republic*, 755 F.3d 568 (7th Cir. 2014)], '§ 1610(c) simply does not apply to the attachment of assets to execute judgments under § 1610(g) for state-sponsored terrorism.'").

134. *See id.*

135. *See id.*; *see also Gates*, 755 F.3d at 576 (recognizing that § 1610(g) "differs substantially" from the commercial use exceptions).

3. *Ninth Circuit:* Bennett v. Islamic Republic of Iran

Utilizing the holdings in *Gates* and *Wyatt*—that § 1610(g) and the commercial use exceptions are substantially different—the Ninth Circuit went even further, holding that § 1610(g) was a completely freestanding exception to attachment and execution immunity.[136] In *Bennett v. Islamic Republic of Iran*, ninety United States citizens and estate executors brought suit in order to seek fulfillment of their unsatisfied terrorism-related judgments against Iran.[137] The sought-after Iranian property was money contractually owed by Visa and Franklin Resources Inc. to Bank Melli, an instrumentality of Iran.[138] Bank Melli, in attempts to defeat attachment and execution, argued that the "as provided in this section" language of § 1610(g) meant that the sought-after property needed to also fulfill the commercial use requirements of § 1610(a) and (b).[139]

The Ninth Circuit was not persuaded by Bank Melli's argument.[140] The court specifically held that § 1610(g) is a freestanding exception to attachment and execution immunity; therefore, the sought-after property in a § 1610(g) action does not need be used for a commercial activity within the United States.[141] The Ninth Circuit reached this conclusion by looking to the subject matter that § 1610(g) covers.[142] By its own express terms, § 1610(g) only applies in actions where the outstanding judgments were

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136. *See* Bennett v. Islamic Republic of Iran, 825 F.3d 949, 959-61 (9th Cir. 2016) ("Two Seventh Circuit cases support our conclusion in this regard.").

137. *See id.* at 954. The four parties—the Bennetts, the Greenbaums, the Acostas, and the Heisers—had been harmed by Iran in different terrorist events: (1) the Bennetts sued for a 2002 bombing at Hebrew University in Jerusalem; (2) the Greenbaums sued for a bombing of a Jerusalem restaurant in August 2001; (3) the Acostas sued for a 1990 shooting; and (4) the Heisers sued for the bombing of the Khobar Towers in Saudi Arabia in 1996. *See* Bennett v. Islamic Republic of Iran, 927 F. Supp. 2d 833, 835-36 (N.D. Cal. 2013).

138. *See Bennett*, 825 F.3d at 954.

139. *See id.* at 959 ("Bank Melli reasons that [§ 1610](g) applies only if some other part of § 1610 provides for attachment and execution. Bank Melli argues that its assets cannot be attached or executed upon because the assets at issue in this case were not 'used for a commercial activity in the United States,' a requirement in § 1610(a), and Bank Melli has not itself 'engaged in commercial activity in the United States,' a requirement in § 1610(b).").

140. *See id.*

141. *See id.* ("We hold that [§ 1610](g) contains a freestanding provision for attaching and executing against assets of a foreign state or its agencies or instrumentalities. . . . To the extent that [§ 1610](g) is inconsistent with [§ 1610](a) or (b), [§ 1610](g) governs because the particular . . . controls over the general.").

142. *See id.*

entered under § 1605A.[143] In turn, § 1605A revokes a foreign state's sovereign immunity for claims of personal injury or death caused by extrajudicial killings or the provision of material support to a terrorist organization.[144] The Ninth Circuit reasoned that because such claims do not arise from commercial activity, but rather from terrorist acts, § 1610(g) is not governed by the commercial use requirements of § 1610(a) and (b).[145]

Bank Melli also argued that reading § 1610(g) as a freestanding exception would render other subsections of § 1610 superfluous; however, the Ninth Circuit did not agree.[146] Rather, the court held that if § 1610(g) was interpreted as to require a foreign state's property be used for commercial activity, or that the foreign state's instrumentality be engaged in commercial activity in the United States, then courts would have to read in a limitation to § 1610(g) that Congress itself did not place.[147] Section 1610(g) specifically states that "the property" of a foreign state or its agencies or instrumentalities is subject to attachment and execution.[148] Given this exclusive language, the Ninth Circuit understood this to mean that

143. *See id.*; *see also* § 1610(g).

144. *See* § 1605A(a)(1); *see also supra* notes 44-48 and accompanying text.

145. *See Bennett*, 825 F.3d at 959-61.

146. *See id.* at 960 ("Bank Melli argues . . . that our reading of § 1610(g) renders § 1610(a)(7) and (b)(3) superfluous. But the tension works in the opposite direction."). Section 1610(a)(7) reads:

> The 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 by a court of the United States or of a State after the effective date of this Act, if . . . the judgment relates to a claim for which the foreign state is not immune under section 1605A . . . regardless of whether the property is or was involved with the act upon which the claim is based.

§ 1610(a)(7). Section 1610(b)(3) reads:

> In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if . . . the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605A of this chapter . . . regardless of whether the property is or was involved in the act upon which the claim is based.

§ 1610(b)(3).

147. *See Bennett*, 825 F.3d at 960 (citing United States v. Temple, 105 U.S. (9 Otto) 97, 99 (1881)).

148. *See* § 1610(g)(1).

Congress did not intend § 1610(g) to be limited only to commercially related property.[149] Thus, in light of the Seventh Circuit's holdings in *Gates* and *Wyatt*, the text of § 1610, and the congressional purpose of easing the recovery process for victims with unfulfilled judgments,[150] the Ninth Circuit held that § 1610(g) is clearly a freestanding exception to attachment and execution immunity.[151]

And so lies the confusion: While *Gates* and *Wyatt* both recognize that § 1610(g) is substantially different from the commercial use exceptions and is not subject to the same procedural requirements,[152] and *Bennett* expressly held that § 1610(g) does not require the sought-after property to be used for commercial activity in the United States,[153] the Seventh Circuit came to the opposite conclusion.[154] With its decision in *Rubin*, the Seventh Circuit turned over the tables upon which the *Rubin* plaintiffs relied.[155] This

149. *See Bennett*, 825 F.3d at 960 ("Section 1610(g)(1) provides that '*the property of a foreign state* against which a judgment is entered under [§] 1605A, and *the property of an agency or instrumentality* of such a state, . . . is subject to attachment in aid of execution, and execution.' . . . Thus, Congress did not limit the type of property subject to attachment and execution under § 1610(g) to property connected to commercial activity in the United States. The only requirement is that property be 'the property of' the foreign state or its instrumentality.").

150. *See id.* at 961-62. The court acknowledged that "§ 1610 as a whole is ambiguous," and thus considered the legislative history behind its passing. *See id.* at 961. The court held that it was "quite clear that Congress meant to expand successful plaintiffs' options for collecting judgments against state sponsors of terrorism." *Id.* For further discussion of the legislative history and purpose behind § 1610(g), see *infra* Section III.A.

151. *See Bennett*, 825 F.3d at 960. Bank Melli has subsequently appealed the Ninth Circuit's decision and filed a petition for a writ of certiorari with the Supreme Court. Bennett v. Islamic Republic of Iran, 825 F.3d 949 (9th Cir. 2016), *petition for cert. filed sub nom.* Bank Melli v. Bennett (U.S. Sept. 12, 2016) (No. 16-334). In its petition, Bank Melli asks the Court to decide:

> Whether § 1610(g) establishes a freestanding exception to sovereign immunity, as the Ninth Circuit held below, or instead merely supersedes *Bancec*'s presumption of separate status while still requiring a plaintiff to satisfy the criteria for overcoming immunity elsewhere in § 1610, as the Seventh Circuit has held and the United States has repeatedly urged.

Id. at (i). Following the Ninth Circuit ruling in *Bennett*, the D.C. Circuit held that § 1610(g) permits the execution of *all* property owned by a foreign state-sponsor of terrorism. *See* Weinstein v. Islamic Republic of Iran, 831 F.3d 470, 483 (D.C. Cir. 2016).

152. *See supra* Subsections II.C.1, II.C.2.

153. *See supra* Subsection II.C.3.

154. *See supra* Section II.B.

155. *See Seventh Circuit Holds*, *supra* note 112, at 766 ("[T]error victims' already-fraught path to recovery becomes if anything more complicated, expensive, and painful when the availability of assets turns on the current positions of different

important statutory provision—intended to ease victims' plight[156]—is currently in judicial limbo.[157] Now that the issue lies in the lap of the Supreme Court,[158] the *Rubin* plaintiffs and other victims may finally have an answer.

III. LEGISLATIVE HISTORY, POLICY, AND A NEW HOPE

While the Seventh Circuit did not look to the legislative history and purpose of § 1610(g) in *Rubin*,[159] the decisions in *Gates*, *Wyatt*, and *Bennett* were couched in such analysis.[160] In passing the amendment that codified § 1610(g), members of Congress were concerned about how difficult it was for victims to satisfy their outstanding terrorism-related judgments.[161] By introducing § 1610(g), Congress sought to facilitate the process and afford victims a wider range of assets to attach and execute upon.[162] This mission of Congress—to help victims hold state-sponsors of terrorism truly accountable—continues to this day.[163] The Supreme Court has also seemed to recognize this mission[164]—a ray of hope for the *Rubin* plaintiffs.

A. Section 1610(g) Was Intended to "Significantly Expand" the Number and Types of Assets Available to Satisfy Terrorism-Related Judgments

Prior to the enactment of § 1610(g) of the FSIA, most victims of terrorism who held judgments against foreign state-sponsors were

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courts in different jurisdictions rather than on the nature of the assets or the nature of the victims' claims.").

156. *See infra* Section III.A.

157. *See Seventh Circuit Holds*, *supra* note 112, at 761 ("The lack of clarity in attachment provisions of the FSIA has forced courts to provide piecemeal solutions to an important policy question, to the detriment of all the objectives underlying the statute.").

158. *See* Rubin v. Islamic Republic of Iran, 830 F.3d 470 (7th Cir. 2016), *cert. granted*, 85 U.S.L.W. 3594 (U.S. June 27, 2017) (No. 16-534).

159. *See Rubin*, 830 F.3d at 481-87.

160. *See supra* Section II.C (noting that the courts in all three decisions found that the history and purpose of 28 U.S.C. § 1610(g) (2012) supported their conclusions).

161. *See infra* Section III.A.

162. *See infra* Section III.A.

163. *See infra* Section III.B.

164. *See infra* Section III.C.

engaged in "a long, bitter, and often futile quest for justice."[165] What § 1605A and its predecessor statute created was an anomaly—while state-sponsors of terrorism were no longer immune from judgment, they were practically and essentially immune from collection.[166] This was due primarily to two factors: (1) state-sponsors of terrorism owned little property that was both located within the United States and satisfied the commercial use requirements of § 1610,[167] and (2) those few assets that met those requirements were blocked by the United States government and thus were out of reach to plaintiffs.[168] Victims of state-sponsored terrorism were thus stuck between a rock and a hard place—they could either be content solely with the fact that Iran and other foreign sponsors were held legally responsible for such horrific acts of terrorism, or they could fight a potentially fruitless war for any number of years in order to see even a dime of their justly received judgments.[169] Without an ability to recover their

165. *In re* Islamic Republic of Iran Terrorism Litig., 659 F. Supp. 2d 31, 45-46, 49 (D.D.C. 2009). *See Seventh Circuit Holds*, *supra* note 112, at 761 (noting that the Court in *In re Islamic Republic of Iran Terrorism Litigation* coined this "The Never-Ending Struggle to Enforce Judgments Against Iran" (citation omitted)).

166. *See In re Iran*, 659 F. Supp. 2d at 53; *see also* Bennett v. Islamic Republic of Iran, 799 F.3d 1281, 1284 (9th Cir. 2015).

167. *See In re Iran*, 659 F. Supp. 2d at 52-53 ("The relevant exceptions to the general rule of immunity from the attachment or execution are listed in [28 U.S.C.] § 1610 [2012]. Prior to the enactment of [the 2008 FSIA amendments], however, these exceptions to the general rule of immunity for foreign government property were limited almost exclusively to property relating to the commercial activities of the foreign sovereign within the United States. . . . Given the lack of formal relations between the United States and Iran, these provisions have been of little utility to the judgment creditors of Iran in FSIA terrorism cases.").

168. *See id.* at 52 ("What few assets of Iran that might be found within jurisdiction of the United States . . . are a subject to a dizzying array of statutory and regulatory authorities . . . [M]uch like the assets of other state sponsors of terrorism, most of Iran's known property or interests in property are blocked, i.e., frozen, or otherwise regulated under any number of United States sanctions programs."). Congress enacted the Terrorism Risk Insurance Act of 2002 (TRIA) to free those blocked assets for use to satisfy unfulfilled 28 U.S.C. § 1605(a)(7) (repealed 2008) and 28 U.S.C. § 1605A (2008) judgments. *See id.* at 57-58.

169. *See id.* at 55 ("Allowing plaintiffs to go forward with suits under § 1605(a)(7) [or § 1605A] while not freeing up Iran's assets to satisfy those judgments under § 1610, or through the release of blocked assets under United States' control, was a quintessential example of the federal government promising with one hand what it takes away with the other.").

judgments from state-sponsors of terrorism, victims would often languish for years in a purgatorial state.[170]

In attempts to fix this frustrating problem and alleviate the migraine for victims of state-sponsored terrorism, Congress amended the FSIA in 2008 by adding § 1610(g), the core purpose of which was to "significantly expand" the number of assets available for attachment and execution purposes.[171] Because the purpose of the original terrorism exception itself was to deter state-sponsors of terrorism[172] and compensate victims,[173] these 2008 amendments no doubt further strengthened those ideals. Senator Frank Lautenberg, a Democrat from New Jersey,[174] authored four of the 2008 FSIA amendments, including what became § 1610(g);[175] in the Senator's statements regarding the passage of the amendments, Senator Lautenberg repeatedly emphasized that the primary purpose of § 1610(g) was to "provid[e] justice" to victims who suffered as a result of terrorist actions.[176] According to Senator Lautenberg,

170. *See* Hilton, *supra* note 11, at 480 (noting that "more than ten years after the [terrorist attack], the plaintiffs in [*Rubin*] have yet to realize any meaningful recovery").

171. Estate of Heiser v. Islamic Republic of Iran, 807 F. Supp. 2d 9, 26 (D.D.C. 2011). *See also* Bank Markazi v. Peterson, 136 S. Ct. 1310, 1318 n.2 (2016).

172. *See* Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 12 (D.D.C. 1998) (discussing how Congress allowed for punitive damages so that "the exception for immunity [would] have the desired deterrent effect"); *see also* Thomas, *supra* note 11, at 283 (discussing that "one of the main reasons for the terrorist state exception to FSIA [was] that terrorist states should be forced to pay for their action in order to deter them from future terrorist acts").

173. *See* Ilana Arnowitz Drescher, Note, *Seeking Justice for America's Forgotten Victims: Reforming the Foreign Sovereign Immunities Act Terrorism Exception*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 791, 796 (2012).

174. *See* Adam Clymer, *Frank Lautenberg, New Jersey Senator in His 5th Term, Dies at 89*, N.Y. TIMES (June 3, 2013), http://www.nytimes.com/2013/06/04/nyregion/frank-lautenberg-new-jersey-senator.html [https://perma.cc/B79U-GQVY].

175. *See* 154 CONG. REC. 499-500 (2008) (statement of Sen. Lautenberg). The other three amendments sought to "increase oversight of our country's economic and security assistance to Afghanistan by creating a Special Inspector General," "prevent military health care fees through the TRICARE program from rising," and "increase accountability and planning for safety and security at the Warren Grove Gunnery Range in New Jersey." *Id.* Section 1083 of the Act amended 28 U.S.C. § 1610 (2012) to include § 1610(g). *See also* Pub. L. No. 110-181, § 1083, 122 Stat. 338, 338-341 (2008).

176. *See* 154 CONG. REC. 500 (2008) (statement of Sen. Lautenberg). According to Senator Lautenberg, the impetus for this legislation was an attack on a U.S. Marine compound at the Beirut International Airport in Lebanon on October

another impetus and goal of the amendment was to "facilitate" the collection of damages awarded to victims.[177] Furthermore, Senator Lautenberg stated that § 1610(g) would allow for the attachment of assets if the property at issue and the foreign state-sponsor of terrorism satisfied a "simple ownership" test.[178] In another statement given by co-author Senator Carl Levin, a Democrat from Michigan,[179] the intent of § 1610(g) was to "strengthen[] mechanisms" so that victims could collect on their judgments.[180] A Conference Report from the House of Representatives[181] went even further, indicating that the Senate's amendment permitted all property that the foreign country had "a beneficial ownership" in to be targeted for execution and fulfillment of terrorism-related judgments.[182]

The 2008 FSIA amendments, including § 1610(g), enjoyed widespread, bipartisan support in Congress.[183] Academics lauded the amendments as a "novel approach" to the challenge of terrorism and

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23, 1983. *See id.* at 501. The attack was carried out by Hezbollah, again funded by Iran, and killed 241 military personnel. *See id.*

177. *Id.* at 500. Indeed, the need for facilitation is arguably urgent and necessary. *See Seventh Circuit Holds*, *supra* note 112, at 766 (noting that the *Rubin* plaintiffs' saga has lasted decades, having "litigated three major efforts at attachment through three district and two appeals courts").

178. *See* 154 CONG. REC. 500 (2008) (statement of Sen. Lautenberg).

179. *See* MJ Rosenberg, *Carl Levin Retires: The Senate's Last of the Just*, HUFFINGTON POST (Dec. 16, 2014, 03:07 PM), http://www.huffingtonpost.com/mj-rosenberg/carl-levin-retires-the-se_b_6335662.html [https://perma.cc/WNP9-7CUR] (last updated Feb. 15, 2015) (noting Senator Levin is "the longest serving senator in Michigan's history").

180. 154 CONG. REC. 499 (2008) (statement of Sen. Levin).

181. *See* H.R. REP. 110-477, at 1001 (2007) (Conf. Rep.).

182. *Id.* While this amendment was not included in the House's version of the National Defense Authorization Act for Fiscal Year 2008, H.R. 1585, 110th Cong. (2007), the House adopted the Senate's language into their own bill with limited changes. *Id.* The only limitation the House gave the provision, regarding how "any property" could be subject to execution, was that "the provision would not supersede the court's authority to appropriately prevent impairment of interests in property held by other persons who are not liable to the claimants in connection with the terrorist act." *Id.* at 1001-02. In other words, third parties who may be innocent joint venture partners with the foreign sovereign would not have their property taken in aid of fulfilling a judgment against the foreign state-sponsor of terrorism. *See id.*

183. *See* Danica Curavic, Note, *Compensating Victims of Terrorism or Frustrating Cultural Diplomacy – The Unintended Consequences of the Foreign Sovereign Immunities Act's Terrorism Provisions*, 43 CORNELL INT'L L.J. 381, 389 (2010) (citing David M. Herszenhorn, *After Veto, House Passes a Revised Military Policy Measure*, N.Y. TIMES, Jan. 17, 2008, at A28) (noting that the bill passed by wide margins in both houses).

even suggested that countries around the world should adopt similar legislation.[184] Furthermore, with regards to § 1610(g), academics understood the section as rendering any foreign-owned property within the United States capable of being attached and executed upon, including cultural artifacts.[185] Similarly, § 1610(g) has been understood by courts to "significantly ease[]" the enforcement of § 1605A judgments.[186] Furthermore, courts have recognized the "broad remedial purposes" Congress wanted to realize through enacting the 2008 amendments to the FSIA.[187]

B. Congress Continues Its Mission to End "The Never-Ending Struggle"

Since the introduction of the 2008 FSIA amendments, Congress has passed several additional bills relating to victims of state-sponsored terrorism. Most recently, Congress passed the Justice Against Sponsors of Terrorism Act (JASTA), a measure meant to significantly narrow the scope of a foreign sovereign's immunity when the nation is found responsible for acts of international terrorism and for torts committed by its officials and employees.[188]

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184. Debra M. Strauss, *Reaching Out to the International Community: Civil Lawsuits as the Common Ground in the Battle Against Terrorism*, 19 DUKE J. COMP. & INT'L L. 307, 307-08 (2009).

185. *See* Curavic, *supra* note 183, at 390 (citing *On the Attachment of Cultural Objects*, *supra* note 11) (understanding that 28 U.S.C. §1610(g) (2012) "renders any grant of immunity by the State Department to loans of cultural objects from a foreign state sponsor of terrorism ineffectual"); *see also* Heath & Schwartz, *supra* note 11, at 459-61 (discussing how the MET Museum believed the 2008 amendments would allow for cultural artifacts to be attached by those with claims against Syria); Andrew Lyubarsky, Note, *Clearing the Road to Havana: Settling Legally Questionable Terrorism Judgments to Ensure Normalization of Relations Between the United States and Cuba*, 91 N.Y.U. L. REV. 458, 465 (2016) (Section 1610(g) "subject[s] virtually all property of a foreign state and its agencies or instrumentalities to attachment and execution pursuant to terrorism judgments").

186. Calderon-Cardona v. Democratic People's Republic of Korea, 723 F. Supp. 2d 441, 458 (D.P.R. 2010). *See also* Estate of Heiser v. Islamic Republic of Iran, 807 F. Supp. 2d 9, 16 (D.D.C. 2011).

187. *In re* Islamic Republic of Iran Terrorism Litig., 659 F. Supp. 2d 31, 64 (D.D.C. 2009). *See also Estate of Heiser*, 807 F. Supp. 2d at 23.

188. *See* Justice Against Sponsors of Terrorism Act, Pub. L. No. 114-222 (2016); *see also* Jennifer Steinhauer, Mark Mazzetti & Julie Hirschfeld Davis, *Congress Votes to Override Obama Veto on 9/11 Victims Bill*, N.Y. TIMES (Sept. 28, 2016), http://www.nytimes.com/2016/09/29/us/politics/senate-votes-to-override-obama-veto-on-9-11-victims-bill.html [https://perma.cc/8K6G-X8CL] ("'This is a decision I do not take lightly,' said Senator Chuck Schumer, Democrat of New

Furthermore, in recognizing that victims of terrorism still struggle to satisfy their awarded judgments, Congress established the U.S. Victims of State Sponsored Terrorism Fund, which provides compensation to certain eligible victims.[189] By passing these and other laws similarly dedicated to alleviating the suffering of victims,[190] Congress has continued to demonstrate its support for the plight of victims of state-sponsored terrorism.

C. A New Hope for *Rubin*: The Triumph of *Bank Markazi v. Peterson*

The fact remains that even with congressional efforts to alleviate the problem, most victims have not yet successfully seen fulfillment of their terrorism-related judgments;[191] plaintiffs have faced many "practical and legal difficulties" in trying to enforce their judgments.[192] However, in *Bank Markazi v. Peterson*, the Supreme Court gave relief to over 1,000 victims who were killed or wounded, or who suffered as the result of various terrorist acts sponsored by Iran.[193] Though the Court's decision was primarily rooted in a

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York, one of the legislation's authors. 'This bill is near and dear to my heart as a New Yorker, because it would allow the victims of 9/11 to pursue some small measure of justice, finally giving them a legal avenue to pursue foreign sponsors of the terrorist attack that took from them the lives of their loved ones.'").

189. *See* 34 U.S.C. 20144 (2015); *United States Victims of State Sponsored Terrorism Fund*, U.S. DEP'T JUST., https://www.justice.gov/criminal-mlars/usvsst [https://perma.cc/D8QW-D6RL] (last updated Jan. 26, 2017). The fund establishes "for the first time a victims' fund of $1 billion, which will be drawn from penalties paid by the Paris-based BNP Paribas for violating sanctions against Iran, Sudan, and Cuba." Jonathan Broder, *U.S. State-Sponsored Terrorism Victims Can Finally Expect Some Compensation*, NEWSWEEK (Jan. 5, 2016, 8:44 AM), http://www.newsweek.com/2016/01/15/dont-kill-these-lawyers-411566.html [https://perma.cc/FG24-9S5Y].

190. *See, e.g.*, S. 2909, 114th Cong. (2016); H.R. 3394, 114th Cong. (2016). Both are titled "Clarifying Amendment to Provide Terrorism Victims Equity Act," and they each seek to amend § 201(d) of the Terrorism Risk Insurance Act of 2002—codified as 28 U.S.C. § 1610 note (2012)—so as to allow seized or frozen assets to be attached for judgment execution. *See* S. 2909; H.R. 3394. While the future of these bills remains uncertain in this new Congressional session, Representative Bill Posey plans on reintroducing the House bill this session. Telephone Interview with Brian, Staff Member, Office of Representative Bill Posey (Feb. 7, 2017).

191. *See supra* notes 165-170 and accompanying text.

192. *See* Bank Markazi v. Peterson, 136 S. Ct. 1310, 1317-18 (2016).

193. *See id.* at 1316. The question before the Supreme Court was whether a provision in the Iran Threat Reduction and Syria Human Rights Act of 2012, 22 U.S.C. § 8772 (2012)—which would allow plaintiffs to attach $1.75 billion in bonds

separation-of-powers question,[194] the Supreme Court may have given the *Rubin* plaintiffs a ray of light in their own quest against Iran. In the Court's majority opinion,[195] the Court recognized that when the terrorism exception to the FSIA was originally enacted, the only property plaintiffs could attach for execution purposes had to be owned by the foreign state, located within the United States, and used for commercial activities.[196] However, the Court noted that with the passing of § 1610(g), Congress expanded the availability of assets owned by the foreign state-sponsor of terrorism or the sovereign's agencies or instrumentalities.[197] This, combined with the Court's recognition that victims who hold terrorism-related judgments face many "practical and legal difficulties" in enforcing their judgments, gives the impression that the Supreme Court will, at the very least, grant the *Rubin* plaintiffs' petition for a writ of certiorari. [198]

By passing consistent legislation aimed at aiding victims of terrorism, members of Congress have made it their mission to ensure foreign state-sponsors of terrorism are held truly accountable.[199] Congress, with the passage of § 1610(g), sought to allow for a wider range of foreign property to be attached for execution purposes, thus alleviating many victims' problems in achieving relief.[200] In recognizing that Congress has continually sought to expand the relief available to victims of state-sponsored terrorism,[201] the Supreme Court has arguably signaled that they are open to entertaining the *Rubin* plaintiffs' argument—that § 1610(g) is a freestanding

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belonging to Bank Markazi, the Central Bank of Iran—violated the separation of powers "by purporting to change the law for, and directing a particular result in, a single pending case." *Id.* at 1316-17.

194. *See id.* at 1317. The Court held that § 8772 did not violate the separation of powers because it was not directed at one particular judgment against Iran, but rather allowed for those particular bonds to be used "to satisfy *any* judgment" against Iran for judgments awarded under 28 U.S.C. § 1605A (2012) and its predecessor. *Id.* (citing § 8772(a)(1)).

195. The Court's majority opinion was authored by Justice Ruth Bader Ginsburg. *See id.* at 1316.

196. *See id.* at 1318 (citing 28 U.S.C. §§ 1610(a)(7), (b)(3) (2012)).

197. *See id.* at 1318 n.2 ("Again expanding the availability of assets for postjudgment execution, Congress, in 2008, amended the FSIA to make available for execution the property (whether or not blocked) of a foreign state sponsor of terrorism, or its agency or instrumentality, to satisfy a judgment against that state.").

198. *See id.* at 1317-18.

199. *See supra* Section III.B.

200. *See supra* Section III.A.

201. *See supra* Section III.C.

exception to attachment and execution immunity and allows plaintiffs to fulfill their outstanding judgments upon non-commercial property.[202]

IV. SECTION 1610(G) SHOULD PROVIDE A FREESTANDING EXCEPTION FOR TERRORISM-RELATED CASES

At the moment, the *Rubin* plaintiffs are waiting to present their case and cause to the Supreme Court.[203] Because the Seventh Circuit so drastically split with the Ninth Circuit in its interpretation of § 1610(g)—that § 1610(g) is not a freestanding exception to attachment and execution immunity, and all sought-after foreign property should be used for commercial activity in the United States—the Supreme Court must intervene.[204] In deciding this case, the Court needs to give substantial weight to the intent of Congress and the purpose for which § 1610(g) was dedicated[205] and should conclude that § 1610(g) does allow for the attachment of non-commercial property.[206] While there are compelling counterarguments against such a reading, they are ultimately unconvincing.[207] Furthermore, this is an opportune moment for the Supreme Court to clarify and decide this issue, for the question as to how § 1610(g) best serves languishing victims of state-sponsored terrorism will not be one that goes quietly into that good night.[208]

A. The Seventh Circuit's Current Interpretation of § 1610(g) Fails to Fulfill the Stated Purpose for the 2008 FSIA Amendments; The Supreme Court Must Rectify This

The law is missing a definitive ruling on whether § 1610(g) establishes a freestanding exception for execution on judgments awarded under § 1605A,[209] or if the "as provided in this section" language limits the subsection's scope.[210] As it stands, victims of

202. *See* SCOTUSBLOG, *supra* note 108.
203. *See id.*
204. *See supra* Sections II.B, II.C.
205. *See supra* Section III.A; *see also infra* Section IV.A.
206. *See infra* Section IV.A.
207. *See infra* Section IV.B.
208. *See infra* Section IV.C.
209. *See* Rubin v. Islamic Republic of Iran, 830 F.3d 470, 489 (7th Cir. 2016) (Hamilton, J., dissenting).
210. *See* 28 U.S.C. § 1610(g) (2012); *see also* Brief for the United States, *supra* note 103, at 13 ("By its plain text, [28 U.S.C. §] 1610(g) [2012] makes clear

terrorism who seek to satisfy their outstanding judgments are able to do in one Circuit what they cannot in another.[211] A Supreme Court ruling as to the proper interpretation of § 1610(g) will affect the lives of those who have been seeking for years to collect from foreign state-sponsors of terrorism and those who have been consistently thwarted in their efforts to do so.[212] Such a decision may also make the lives of future victims—for in this day and age, there will unfortunately be future victims of terrorism[213]—easier to seek retribution from such sponsoring countries.[214]

In *Rubin*, Iran and the United States Executive Branch argued that § 1610(g) is limited by the "as provided in this section" language to include only property used for commercial activity in the United States.[215] However, the *Rubin* plaintiffs argued against such an interpretation, instead asserting that § 1610(g) applies to *any* property owned by the foreign state-sponsor of terrorism.[216] Given the differing opinions and the circuit split between the various lower courts as to how § 1610(g) and the "as provided in this section" language should be interpreted,[217] the text of § 1610(g) is ambiguous

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that it applies only where property is otherwise attachable 'as provided in this section.'").

211. *See Seventh Circuit Holds*, *supra* note 112, at 766 (noting that the circuit split "renders many assets unavailable for seizure in terrorism cases in the Seventh Circuit—though not in the Ninth").

212. *See Rubin*, 830 F.3d at 489 (Hamilton, J., dissenting) ("As dry and technical as that sounds, the issue has important practical consequences for victims of state-sponsored terrorism."); Gates v. Syrian Arab Republic, 755 F.3d 568, 571 (7th Cir. 2014) (rev'd by *Rubin*, 830 F.3d at 487) (noting the confusion over the exceptions to attachment and execution immunity, and how "victims of terror can then find themselves pitted in a cruel race against each other—a race to attach any available assets to satisfy the judgments . . . [that] can be satisfied only at the expense of other terrorism victims"); *Seventh Circuit Holds*, *supra* note 112, at 765 (noting "The Never-Ending Struggle" victims are forced to undergo in order to enforce judgments against state-sponsors of terrorism).

213. *See Ch. 6 Foreign Terrorist Organizations*, *supra* note 3 (listing fifty-eight foreign organizations as "U.S. Government Designated Foreign Terrorist Organizations").

214. *See supra* note 212 and accompanying text.

215. *See Rubin*, 830 F.3d at 484 (quoting § 1610(g)). The same argument was made by Bank Melli in *Bennett*. *See* Bennett v. Islamic Republic of Iran, 825 F.3d 949, 959 (9th Cir. 2016).

216. *See* Reply Brief for the Judgment Creditors–Appellants, *supra* note 57, at 2.

217. § 1610(g). *See also supra* Sections II.B, II.C.

at best.[218] In such a situation, the Supreme Court should look to the legislative history and statutory purpose behind § 1610(g).[219]

Based upon the legislative history and statutory purpose of § 1610(g), Congress intended § 1610(g) to allow for the attachment of any property owned by the foreign sovereign or its instrumentality.[220] In amending the FSIA in 2008 to include § 1610(g), Congress sought to alleviate the many difficulties victims face in satisfying their outstanding terrorism-related judgments.[221] The senators who sponsored the amendments made it clear that § 1610(g) was intended not only to facilitate the collections process for victims, but to significantly expand the amount and type of assets available to them.[222] Based on the record, there is nothing that would indicate Congress's intent to limit § 1610(g) to only commercial property.[223] In addition, given that § 1605A and its predecessor statute were intended to deter foreign nations from sponsoring terrorist organizations,[224] allowing victims to attach and execute upon

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218. *See Rubin*, 830 F.3d at 489 (Hamilton, J., dissenting) ("Both readings of the text, I believe, are reasonable, meaning that the text is ambiguous."); *Bennett*, 825 F.3d at 961 ("We acknowledge that [28 U.S.C.] § 1610 [2012] . . . is ambiguous."); *Seventh Circuit Holds*, *supra* note 112, at 765 (making note that Congress "fail[ed] to specify the other parts of the section to which § 1610(g) refers" and the general "lack of clarity in § 1610(g)").

219. *See Bennett*, 825 F.3d at 961 ("We acknowledge that § 1610 . . . is ambiguous. In that circumstance, we may consider legislative history."); United States v. Pub. Utils. Comm'n, 345 U.S. 295, 315 (1953) ("Where the words [of the questioned statute] are ambiguous, the judiciary may properly use the legislative history to reach a conclusion.").

220. *See Bennett*, 825 F.3d at 961 ("That history suggests that §1610(g) was meant to allow attachment and execution with respect to any property *whatsoever* of the foreign state or its instrumentality.") (emphasis added); *see also supra* Section III.A.

221. *See In re* Islamic Republic of Iran Terrorism Litig., 659 F. Supp. 2d 31, 53 (D.D.C. 2009) ("The relevant exceptions to the general rule of immunity from the attachment or execution are listed in § 1610. Prior to the enactment of [the 2008 FSIA amendments], however, these exceptions to the general rule of immunity for foreign government property were limited almost exclusively to property relating to the commercial activities of the foreign sovereign within the United States. . . . Given the lack of formal relations between the United States and Iran, these provisions have been of little utility to the judgment creditors of Iran in FSIA terrorism cases."); *Seventh Circuit Holds*, *supra* note 112, at 761.

222. *See supra* Section III.A (explaining how the senators intended § 1610(g) to allow victims to attach and execute upon property which the foreign sovereign had beneficial ownership).

223. *See supra* Section III.A.

224. *See* Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 12 (D.D.C. 1998) (discussing how Congress allowed for punitive damages so that "the

any property owned by the foreign nation—regardless of whether it also satisfies the commercial use exceptions—would arguably have a more significant deterrent effect.[225]

The framework of the FSIA and § 1610 also supports the *Rubin* plaintiffs' position.[226] As the Seventh Circuit held in *Gates* and *Wyatt*, § 1610(g) allows for a "much broader range" of assets to be used for attachment and execution purposes.[227] The court made this conclusion on the basis that § 1610(g) is substantially different from the other subsections of § 1610,[228] and that § 1610(g) provides for the attachment of a foreign sovereign's property irrespective of the commercial use exceptions.[229] Further, the Ninth Circuit in *Bennett* found that the subject matter of § 1610(g) is unique compared to the other subsections of § 1610.[230] Because § 1610(g) only applies to judgments awarded under § 1605A[231]—which revokes a foreign nation's immunity to suit for instances of terrorism, and not its commercial activity within the United States[232]—§ 1610(g) should not be limited in its application to only covering property which also falls under the commercial use exceptions.[233]

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exception for immunity [would] have the desired deterrent effect"); *see also* Thomas, *supra* note 11, at 283 (discussing that "one of the main reasons for the terrorist state exception to FSIA" was "that terrorist states should be forced to pay for their actions in order to deter them from future terrorist acts").

225. *See* Curavic, *supra* note 183, at 398-401 (analyzing and concluding that the FSIA and § 1610(g), as they stand, have done little to deter foreign state-sponsors of terrorism).

226. *See supra* Section II.C (noting how in *Gates*, *Wyatt*, and *Bennett*, the courts looked to the statutory framework of § 1610 in concluding that § 1610(g) was substantially different from the other subsections).

227. *See* Wyatt v. Syrian Arab Republic, 800 F.3d 331, 343 (7th Cir. 2015) (affirming the holding in *Gates*); Gates v. Syrian Arab Republic, 755 F.3d 568, 576 (7th Cir. 2014).

228. *See Gates*, 755 F.3d at 576.

229. *See id.* ("Section 1610(g) provides that in cases of state-sponsored terrorism, assets of the defendant's agencies and instrumentalities are subject to attachment and execution regardless of factors that would ordinarily insulate such assets in other contexts governed by § 1610(a) and (b).").

230. *See* Bennett v. Islamic Republic of Iran, 825 F.3d 949, 959 (9th Cir. 2016).

231. *See* § 1610(g)(1) ("[T]he property of a foreign state against which a judgment is entered under [28 U.S.C. §] 1605A [2008] . . . is subject to attachment in aid of execution, and execution, upon that judgment.").

232. *See* § 1605A(a)(1).

233. *See Bennett*, 825 F.3d at 959 ("Section 1610(g) requires only that a judgment under § 1605A have been rendered against the foreign state; in that event, both the property of the foreign state *and* the property of an agency or instrumentality of that state are subject to attachment and execution.").

On the other hand, the Seventh Circuit in *Rubin* held that interpreting § 1610(g) as a freestanding exception would violate canons of statutory construction, particularly the canon against surplusage.[234] However, the Supreme Court does not need to use canons of statutory construction in making its determination, for the canons are not mandatory rules, and they are only "designed to help judges determine the Legislature's intent as embodied in particular statutory language."[235] Furthermore, other facts demonstrating legislative intent can trounce the force of such canons.[236] Moreover, interpreting § 1610(g) as demanding the sought-after property be used for commercial activity would require the Court to read in a limitation that Congress itself did not place.[237] Given the congressional intent—that the 2008 FSIA amendments were to make it easier for victims to collect on their terrorism-related judgments[238]—an interpretation that limits the scope of § 1610(g) to only apply to property used for commercial activity would pervert the stated purpose.[239] In short, § 1610(g) is open to two reasonable

234. *See* Rubin v. Islamic Republic of Iran, 830 F.3d 470, 484 (7th Cir. 2016) (citing TRW, Inc. v. Andrews, 534 U.S. 19, 31 (2001)).

235. Chickasaw Nation v. United States, 534 U.S. 84, 94 (2001). Even if the Court were to use canons of statutory construction in deciding this issue, and even though the Court has previously said that it has a duty "to give effect, if possible, to every clause and word of a statute," Inhabitants of Montclair Twp. v. Ramsdell, 107 U.S. 147, 152 (1883), this may be offset by "the canon that permits a court to reject words 'as surplusage' if 'inadvertently inserted or if repugnant to the rest of the statute,'" *Chickasaw*, 534 U.S. at 94 (citing KARL L. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 525 (1960)). Furthermore, the canon allowing the removal of surplus words "has particular force here where the surplus words consist simply of a numerical cross-reference in a parenthetical." *Id.* (citing Cabell Huntington Hosp., Inc. v. Shalala, 101 F.3d 984, 990 (4th Cir. 1996)). Given the ambiguous nature of the "as provided in this section" language, one could argue that this phrase is as good as a parenthetical and should be rejected as surplusage. *See* § 1610(g)(1).

236. *See Chickasaw*, 534 U.S. at 94.

237. *See Bennett*, 825 F.3d at 960 (citing United States v. Temple, 105 U.S. (9 Otto) 97, 99 (1881)).

238. *See id.* at 961 ("That history suggests that § 1610(g) was meant to allow attachment and execution with respect to any property whatsoever of the foreign state or its instrumentality."); 154 CONG. REC. 500 (2008) (statement of Sen. Lautenberg) (Section 1610(g) would "[allow] attachment of the assets of a state sponsor of terrorism to be made upon the satisfaction of a 'simple ownership' test"); *supra* Section III.A.

239. *See Rubin*, 830 F.3d at 490 (Hamilton, J., dissenting) ("[I]n interpreting an ambiguous statutory text, we can and should draw on statutory purpose and legislative history. We must choose one side or the other. The balance here should weigh in favor of the reading that favors the victims. We should not attribute to

interpretations, and the Court must make a decision: either support foreign state sponsors of terrorism or support innocent victims.[240] And because it was the clear, bipartisan, bicameral intent of Congress to make it easier for lamenting victims to fulfill their outstanding judgments against those responsible for death, injury, and loss by "significantly expanding" the quantity and accessibility of property,[241] the Court must uphold such purpose.

A definitive ruling by the Supreme Court—holding that § 1610(g) is indeed a freestanding exception to attachment and execution immunity and allows for the use of *any* property owned by the foreign sovereign and its instrumentalities—would fulfill Congress's intent and purpose.[242] Such a ruling would also square neatly within the statutory framework of the FSIA and § 1610 as a whole.[243] As it stands, the lower courts have created a patchwork of decisions and solutions to an important statutory question and have thus totally defeated the underlying statutory objectives.[244] Therefore, the Supreme Court should provide a firm solution for victims who have yet to see the satisfaction of their terrorism-related judgments by holding that § 1610(g) affords victims the ability to attach and execute upon *any* property located within the United States that the foreign sovereign owns.[245]

B. Political, Diplomatic, and Cultural Considerations that May Cut Against a Finding of a Freestanding Exception Should Have No Bearing on the Court's Decision-Making

There are, of course, those who do not agree that the Supreme Court should make such a ruling.[246] Some argue that the Supreme Court has no right to decide such an issue because of its foreign policy implications.[247] Others argue that interpreting § 1610(g) as a freestanding exception could strain relations with Iran and other

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Congress an intent to be so solicitous of state sponsors of terrorism, who are also undeserving beneficiaries of the unusual steps taken by the *Rubin* panel.").

240. *See id.* at 489-90 (Hamilton, J., dissenting).

241. *See supra* Section III.A.

242. *See supra* notes 220-225 and accompanying text.

243. *See supra* notes 227-233 and accompanying text.

244. *See Seventh Circuit Holds*, *supra* note 112, at 761.

245. *See supra* notes 220-225 and accompanying text.

246. *See, e.g.*, *Seventh Circuit Holds*, *supra* note 112, at 765 (arguing that Congress, rather than the Supreme Court, should decide the scope of 28 U.S.C. § 1610(g) (2012)).

247. *See infra* Subsection IV.B.1.

state-sponsors of terrorism.[248] In addition, some argue that such a ruling would detrimentally harm institutes of higher learning and violate international treaties.[249] Ultimately, these arguments should hold no weight with the Supreme Court.[250]

1. *This Is a Determination that Should Be Left to Congress and the Executive Branch*

Given the patchwork of decisions regarding the correct interpretation of § 1610(g), some argue that Congress and the Executive Branch should be the ones to fix the problem, not the Supreme Court.[251] Because § 1610(g) is in essence a codification of foreign policy, some contend it should fall upon the political branches of the U.S. government to correct and clarify the language of § 1610(g).[252] However, while this argument may have some merit, it is not so persuasive; as the Supreme Court itself noted in *Bank Markazi*, when the Foreign Sovereign Immunities Act was enacted in 1976, Congress conveyed the responsibility for determining a foreign state's immunity from the Executive to the Judicial Branch.[253] Furthermore, determining the *Rubin* case and its issues presented is not a political question outside of the Court's authority to decide; rather, the Court must decide whose interpretation of § 1610(g) is correct, the *Rubin* plaintiffs' or Iran's—certainly a "familiar judicial

248. *See infra* Subsection IV.B.2.

249. *See infra* Subsection IV.B.3.

250. *See infra* Subsections IV.B.1-B.3.

251. *See Seventh Circuit Holds*, *supra* note 112, at 768 ("There are, then, substantial arguments to be made on both sides of the question of foreign sovereign asset immunity in terrorism cases – but they are not arguments to be directed to the courts.").

252. *See id.* ("[B]ecause terrorism is a foreign policy problem, it is best dealt with by the political branches of government rather than by a wide array of courts and judges engaging in their own foreign policy experiments.") (quoting Daveed Gartenstein-Ross, Note, *A Critique of the Terrorism Exception to the Foreign Sovereign Immunities Act*, 34 N.Y.U. J. INT'L L. & POL. 887, 888 (2002)). Others also suggest that Congress should establish a victim's compensation fund similar to, but more expansive than, the U.S. Victims of State Sponsored Terrorism Fund. *See generally* Claire E. Stephens, Note, *Storming the Persian Gates: The Seventh Circuit Denies Attachment to Iranian Antiquities*, 12 SEVENTH CIR. REV. 164 (2016).

253. *See* Bank Markazi v. Peterson, 136 S. Ct. 1310, 1329 (2016); Hoye, *supra* note 28, at 115 (noting that the FSIA "transfers immunity determinations from the Department of State to the judiciary") (citation omitted).

exercise."[254] Thus, the Court would only be exercising its power under the Constitution and utilizing its expertise on statutory interpretation to determine whether § 1610(g) is a freestanding exception; it would not be superseding foreign policy assessments of Congress and the Executive Branch with its own "unmoored determination" of what such policy should be.[255]

2. *Relations with Iran and Other State-Sponsors of Terrorism Could Become Further Strained*

Assuming that one of the main purposes of § 1605A is to deter foreign sovereigns from providing any funding or support to terrorist organizations,[256] a Supreme Court ruling which holds that § 1610(g) allows for *any* property of a foreign sovereign to be subject to attachment and execution could possibly damage relations with Iran and other state-sponsors of terrorism.[257] As the Seventh Circuit noted in *Rubin*, attachment and seizure of a foreign sovereign's assets located in the United States is perceived as a "serious affront" to that

254. *See* Zivotofsky *ex rel.* Zivotofsky v. Clinton, 132 S. Ct. 1421, 1427 (2012) ("The lower courts ruled that this case involves a political question because deciding Zivotofsky's claim [that the U.S. Department of State wrongfully denied his right to have Israel as his place of birth on his passport] would force the Judicial Branch to interfere with the President's exercise of constitutional power committed to him alone. . . . This misunderstands the issue presented. Zivotofsky does not ask the courts to determine whether Jerusalem is the capital of Israel. He instead seeks to determine whether he may vindicate his statutory right . . . to choose to have Israel recorded on his passport as his place of birth. . . . The existence of a statutory right . . . is certainly relevant to the Judiciary's power to decide Zivotofsky's claim. . . . Zivotofsky requests that the courts enforce a specific statutory right. To resolve his claim, the Judiciary must decide if Zivotofsky's interpretation of the statute is correct. . . . This is a familiar judicial exercise.").

255. *See id.* at 1427 ("The federal courts are not being asked to supplant a foreign policy decision of the political branches with the courts' own unmoored determination of what United States policy toward Jerusalem should be.").

256. *See supra* note 172 and accompanying text.

257. *See Seventh Circuit Holds*, *supra* note 112, at 767 ("[F]oreign assets present in the United States are useful leverage in negotiations, these assets could assist in normalizing relations with countries not currently U.S. allies, and countries facing seizure of their property by U.S. courts might retaliate with their own similar legislation, putting American assets abroad at risk.") (citation omitted); *see also supra* note 45 and accompanying text. *See generally* Troy C. Homesley III, Note, *"Towards a Strategy of Peace": Protecting the Iran Nuclear Accord Despite $46 Billion in State-Sponsored Terror Judgments*, 95 N.C. L. Rev. 795 (2017).

state's sovereignty.[258] As such, the U.S. government has regularly opposed efforts by victims to collect from foreign nations.[259] In fact, the U.S. Department of Justice filed an amicus curiae brief in *Rubin*, supporting Iran in its arguments.[260] It cannot be denied that the Executive Branch has a legitimate interest and control over the country's international relations with state-sponsors of terrorism and other foreign sovereigns; therefore, it has somewhat compelling reasons for supporting Iran and other countries that have failed to fulfill their outstanding judgments to victims of terrorism.[261]

However, the fact that the United States allows foreign sovereigns to be sued in our country at all lessens the impact of that argument.[262] It seems rather cruel and hypocritical to allow victims the right to sue a foreign state-sponsor of terrorism, while putting forth substantial effort in making it nearly impossible for victims to collect.[263] In addition, though the government may seek to convince

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258. Rubin v. Islamic Republic of Iran, 830 F.3d 470, 480 (7th Cir. 2016). The *Rubin* court held that attachment and seizure "of a foreign state's property carries potentially far-reaching implications for American property abroad." *Id.*

259. *See Seventh Circuit Holds*, *supra* note 112, at 767. ("Indeed the executive branch has consistently opposed efforts to collect assets from foreign governments to satisfy terrorism judgments. As it has in similar cases, the U.S. government under the Obama Administration filed a brief supporting Iran's position in *Rubin*. The Clinton and Bush Administrations both opposed similar efforts to seize foreign assets.") (citation omitted). *See generally* Brief for the United States, *supra* note 103.

260. *See* Brief for the United States, *supra* note 103, at 22-26; *see also* Brief for the United States as Amicus Curiae, Rubin v. Islamic Republic of Iran, No. 16-534 (U.S. May 23, 2017). The government never discussed the legislative intent or statutory purpose of 28 U.S.C. § 1610(g) (2012) and portends that "litigation against foreign states in U.S. courts can have significant foreign affairs implications for the United States and can affect the reciprocal treatment of the United States in the courts of other nations." Brief for the United States, *supra* note 103, at 1.

261. *See Seventh Circuit Holds*, *supra* note 112, at 767. "Given the executive branch's role as the day-to-day manager of the United States' international relations, its reasons for such opposition make sense." *Id.* (citation omitted).

262. *See* 28 U.S.C.A. §§ 1605 (2016), 1605A (2008), 1605B (2016) (listing the exceptions to a foreign state's sovereign immunity).

263. The U.S. Department of Justice admits that the government encouraged University of Chicago to transfer the Chogha Mish collection, one in which the *Rubin* plaintiffs sought to execute their judgment upon, back to Iran in accordance with other Executive Branch orders. *See* Brief for the United States, *supra* note 103, at 8-9. This re-routing of assets by the U.S. government happens often when those assets are blocked by the President and removed from "the pool of funds" available to victims. *See* Strauss, *supra* note 47, at 322. For example, during the Iraq War, President George W. Bush transferred approximately $1.73 billion in previously frozen Iraqi assets into the Development Fund for Iraq held by the U.S. government;

the Supreme Court that these foreign policy considerations are worth finding in favor of Iran and other foreign state-sponsors of terrorism with outstanding judgments, the Court should give the government no "special deference."[264]

3. *Allowing Victims to Attach and Execute upon Cultural Artifacts Is Reprehensible and Violates UNESCO Conventions*

Though the Supreme Court may only base its ruling on existing law, many suggest that if the Court allows the *Rubin* plaintiffs to execute and collect on the Persepolis Collection at the University of Chicago—or any historical and cultural institute, for that matter—it would set a dangerous precedent and do irreparable harm to the future of American museums and cultural institutions.[265] Courts have not yet decided whether cultural property loaned from foreign countries to such institutes is amenable to attachment and execution under § 1610(g).[266] Museums and other cultural institutes that house foreign, cultural artifacts argue that such property must be excused from attachment and execution.[267] If not, foreign sovereigns would likely stop lending their cultural artifacts to American institutions.[268]

"[t]hese and other subsequent actions of the President have made Iraq's frozen assets unavailable to victims who obtain judgments against Iraq for its connection with terrorism." *Id.* at 324-25 n.73 (citation omitted). As the District Court for Washington, D.C. put it, this is a "quintessential example of the federal government promising with one hand what it takes away with the other." *In re* Islamic Republic of Iran Terrorism Litig., 659 F. Supp. 2d 31, 55 (D.D.C. 2009).

264. *See* Republic of Austria v. Altmann, 541 U.S. 677, 701 (2004) ("The issue now before us, to which the Brief for United States as *Amicus Curiae* is addressed, concerns interpretation of the FSIA's reach—a 'pure question of statutory construction . . . well within the province of the Judiciary.' . . . While the United States' views on such an issue are of considerable interest to the Court, they merit no special deference.") (internal citation omitted). This Author uses the phrase "may seek to convince" because the United States did not discuss foreign policy implications in its amicus curiae brief it submitted in response to the petition for a writ of certiorari. *See* Brief for the United States as Amicus Curiae, *supra* note 260.

265. *See* Heath & Schwartz, *supra* note 11, at 460-61; Hilton, *supra* note 11, at 517; *On the Attachment of Cultural Objects*, *supra* note 11.

266. *See* Hilton, *supra* note 11, at 482, 517 ("Loans of art from a foreign government to an American museum have been found to constitute commercial activity. . . . [But] [n]o court has yet decided whether cultural property in a [museum] exhibit is amenable to attachment under the FSIA[].").

267. *See id.* at 517; *see also On the Attachment of Cultural Objects*, *supra* note 11 ("[The Archaeological Institute of America] believe[s] that archaeological artifacts should not be sold to satisfy a court judgment, *regardless of the actions of a*

However, this argument is tenuous at best. Foreign states may avail themselves of the protections under the Immunity From Seizure Act (IFSA) if the state is genuinely concerned for its artifacts.[269] The IFSA provides recourse for foreign states to protect their cultural artifacts from being seized while they are on loan to American museums and institutions.[270] If the requirements for an IFSA application are met by the foreign state, and the State Department grants immunity for the cultural property, then a judgment creditor—such as the *Rubin* plaintiffs and others with outstanding judgments against state-sponsors of terrorism—cannot seize that foreign state's property that is in the United States while on a "cultural exchange."[271]

Another argument for excusing the Persepolis Collection at the University of Chicago—or any cultural artifact or property—from being subject to attachment and execution is that the United States has a duty under the UNESCO Cultural Property Convention to act

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particular regime, and that it should be possible for nations to share their cultural heritage without fear of loss. . . . [Such legal actions] therefore pose a serious threat to cultural exchange and cultural diplomacy, which are extremely important in building understanding among peoples.").

268. *See On the Attachment of Cultural Objects*, *supra* note 11 ("If the United States is in the practice of confiscating artifacts that belong to other nations, then other nations will be unlikely to lend objects to U.S. cultural institutions. In addition, the U.S. will make itself vulnerable to the confiscation of its own cultural objects on loan in foreign nations."); *see also* Heath & Schwartz, *supra* note 11, at 460-61 (discussing how the Metropolitan Museum of Art, which was to put on an exhibit featuring artifacts on temporary loan from Syria, was unable to borrow those objects for fear that they would be subject to attachment in cases where Syria had not paid their outstanding, terrorism-related judgments).

269. *See* 22 U.S.C. § 2459(a) (1965); Hilton, *supra* note 11, at 517.

270. *See* § 2459(a) ("Whenever any work of art or other object of cultural significance is imported into the United States from any foreign country, pursuant to an agreement entered into between the foreign owner . . . and the United States or one or more cultural or educational institutions within the United States providing for the temporary exhibition or display thereof within the United States at any cultural exhibition . . . administered, operated, or sponsored, without profit, by any such cultural or educational institution, no court of the United States . . . may issue or enforce any judicial process, or enter any judgment, decree, or order, for the purpose or having the effect of depriving such institution . . . of custody or control of such object if before the importation of such object the President or his designee has determined that such object is of cultural significance and that the temporary exhibition or display thereof within the United States is in the national interest, and a notice to that effect has been published in the Federal Register."); Hilton, *supra* note 11, at 517 (discussing the IFSA).

271. Hilton, *supra* note 11, at 520 (citing Malewicz v. Amsterdam, 362 F. Supp. 2d 298, 311 (D.D.C. 2005)).

in coordination with other signatory nations to protect and preserve cultural property as "a finite, depletable and nonrenewable resource."[272] The United States accepted this Convention in 1983, which defines cultural property as that which has been designated by the signatory states to be important to "archaeology, prehistory, history, literature, art or science" and belongs to categories such as archeological excavations, antiquities over a century old, and property of ethnological interest.[273] The Persepolis Collection at the University of Chicago is on a long-term academic loan for study of Elamite writing.[274] Given what the Convention claims to protect, these tablets might qualify as being of ethnological interest and of importance to history and literature.[275]

However, while such a collection might be qualified under the UNESCO Convention, allowing the tablets to return to Iran may result in their loss or destruction.[276] Fundamentalist administrations that provide support to terrorist organizations, such as Iran, have a reputation for being ill-suited at protecting ancient and cultural artifacts.[277] Therefore, the attachment and execution of the Persepolis

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272. Thomas, *supra* note 11, at 288 (citing PATTY GERSTENBLITH, ART, CULTURAL HERITAGE, AND THE LAW: CASES AND MATERIALS 642 (2004)). *See also* UNESCO Constitution, *supra* note 11, at art 1(2)(c) ("To realize this purpose the Organization will: maintain, increase and diffuse knowledge; by assuring the conservation and protection of the world's inheritance of books, works of art and monuments of history and science, and recommending to the nations concerned the necessary international conventions; by encouraging co-operation among the nations in all branches of intellectual activity, including the international exchange of persons active in the fields of education, science and culture and the exchange of publications, objects of artistic and scientific interest and other materials of information; by initiating methods of international co-operation calculated to give the people of all countries access to the printed and published materials produced by any of them.").

273. UNESCO Cultural Property Convention, *supra* note 11. This designation may be made on either religious or secular grounds. *See id.*

274. *See* Rubin v. Islamic Republic of Iran, 637 F.3d 783, 787 (7th Cir. 2011).

275. *See supra* notes 272-273 and accompanying text.

276. *See* Hilton, *supra* note 11, at 484.

277. *See id.* at 484-85 (discussing how in Iran and Afghanistan, the governments failed to protect ancient archaeological sites from being attacked and destroyed). Furthermore, ISIS has made it one of its propagandist missions to cause mass-destruction at dozens of archaeological sites and museums, including the ancient Syrian city of Palmyra and the Mosul Museum of Iraq, to name a few. *See* Andrew Curry, *Here Are the Ancient Sites ISIS Has Damaged and Destroyed*, NAT'L GEOGRAPHIC (Sept. 1, 2015), http://news.nationalgeographic.com/2015/09/150901-isis-destruction-looting-ancient-sites-iraq-syria-archaeology/ [https://perma.cc/3XE2-ABDD].

Collection—which would require the tablets to be sold in order for the *Rubin* plaintiffs to satisfy their monetary judgment—would more than likely save the tablets; the Persepolis Collection could be purchased by the United States government, American museums and institutes, or foreign museums and institutes.[278] This solution would thus serve all parties involved: Victims of state-sponsored terrorism would be able to satisfy their outstanding judgments, and cultural artifacts and property would be in the hands of those most capable of preservation.[279]

In short, the worries and concerns of those who believe that § 1610(g) is not a freestanding terrorism exception should hold no weight with the Supreme Court.[280] Determining the correct interpretation of § 1610(g) is a "familiar judicial exercise" for the Court.[281] Congress conveyed to the Court the power and authority to determine a foreign sovereign's immunity;[282] thus, the Court should uphold the intent of Congress and hold that § 1610(g) allows victims to attach and execute upon any property of the state-sponsor of terrorism.[283]

C. Interpreting § 1610(g) Correctly Is Imperative and Needs to Be Addressed as Soon as Possible

Because the most recent decision in *Rubin* created a circuit split between the Seventh and Ninth Circuits, and overruled two prior decisions in the Seventh Circuit, the Supreme Court granted the *Rubin* plaintiffs' petition for a writ of certiorari.[284] However, if the Court chooses not to decide this issue now, the Court will likely be forced to in the near future.[285] As it stands, victims of state-sponsored

278. *See* Hilton, *supra* note 11, at 485.
279. *See supra* notes 276-278 and accompanying text.
280. *See supra* Subsections IV.B.1-B.3.
281. *See supra* note 254 and accompanying text.
282. *See supra* note 253 and accompanying text.
283. *See supra* Section IV.A.
284. *See* Petition for a Writ of Certiorari, *supra* note 108, at 22 (noting that "[this] issue is ripe for Supreme Court review"). It is unclear as of this publication whether the Court will merge the petitions of the *Rubin* plaintiffs and of the Iranian government from *Bennett. See* Bennett v. Islamic Republic of Iran, 825 F.3d 949 (9th Cir. 2016), *petition for cert. filed sub nom*. Bank Melli v. Bennett (U.S. Sept. 12, 2016) (No. 16-334) (asking the Court to determine whether § 1610(g) is a freestanding exception to attachment and execution immunity).
285. *See supra* Section III.B (discussing some of the legislation passed after the 2008 FSIA amendments which seeks to aid victims of terrorism).

terrorism are rarely able to satisfy their outstanding judgments against foreign sovereigns.[286] What few commercial assets these foreign nations have within the United States have been subjected not only to a complicated collection of statutory and regulatory authorities,[287] but also conflicting actions by competing victims.[288] While Congress attempted to broaden the range of assets that victims could use for judgment satisfaction,[289] the Seventh Circuit chose to limit those victims' ability to collect.[290]

The Supreme Court must affirm the statutory objectives of § 1610(g).[291] Doing so would not only fulfill the congressional intent and purpose of § 1610(g), but would also fit within the statutory framework of the FSIA and § 1610.[292] Because Congress transferred the power to make immunity determinations from the Executive to the Judiciary Branch,[293] it is well within the Supreme Court's authority to make this decision.[294] Thus, the Supreme Court should give relief to the *Rubin* plaintiffs and others like them and hold that § 1610(g) is a freestanding exception to attachment and execution immunity and allows victims to use *any* property owned by the foreign sovereign and located within the United States for judgment satisfaction.[295]

CONCLUSION

The language of § 1610(g) is unclear as to how this section truly applies, and there has been no definitive ruling on whether § 1610(g) provides a freestanding basis for the execution of terrorism-related judgments, which would abrogate the need for the sought-after property to be used commercially.[296] Ignoring prior precedent in its own circuit, the Seventh Circuit's decision in *Rubin*

286. *See supra* note 165 and accompanying text.
287. *See supra* notes 167-168 and accompanying text.
288. *See supra* note 212 and accompanying text.
289. *See supra* Section III.A.
290. *See supra* Section II.B.
291. *See supra* Section IV.A.
292. *See supra* Section IV.A.
293. *See supra* note 253 and accompanying text.
294. *See supra* notes 254-255 and accompanying text.
295. *See supra* Section IV.A.
296. *See* Rubin v. Islamic Republic of Iran, 830 F.3d 470, 489 (7th Cir. 2016) (Hamilton, J., dissenting) (finding that the majority's interpretation of 28 U.S.C. § 1610(g) (2012) "shelters from execution a wide range of assets of state sponsors of terrorism"); *supra* Sections II.B, II.C.

has the effect of making it nearly impossible for victims of state-sponsored terrorism to recover their unfulfilled judgments.[297] Looking to the background and framework of the FSIA[298] the history of the *Rubin* plaintiffs' plight,[299] the differing circuit interpretations,[300] and the legislative history of the 2008 FSIA amendments,[301] § 1610(g) should be interpreted as a freestanding exception to attachment and execution immunity, allowing for any property owned by the state-sponsor of terrorism and located within the United States to be used for judgment satisfaction.[302] Doing so would allow victims of state-sponsored terrorism to hold foreign sovereigns truly accountable for their actions, and would allow victims to recover against a broader category of foreign-owned property, ultimately making recovery practicable for persons deemed worthy by Congress.[303]

297. *See supra* notes 101-104 and accompanying text.
298. *See supra* Part I.
299. *See supra* Sections II.A, II.B.
300. *See supra* Section II.C.
301. *See supra* Section III.A.
302. *See supra* Section IV.A.
303. *See supra* Section IV.A.