

No. _____

**In The
Supreme Court of the United States**

—◆—
ALEXANDER KHOCHINSKY,

Petitioner,

v.

REPUBLIC OF POLAND, A FOREIGN STATE,

Respondent.

—◆—
**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit**

—◆—
PETITION FOR WRIT OF CERTIORARI

—◆—
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QUESTION PRESENTED

Whether a foreign state that seeks to resolve title to moveable personal property because it is owned by an individual of a particular religion or ethnicity by targeting him for a concededly bad-faith extradition is nonetheless immune from suit under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-1611 (the “FSIA”).

PARTIES TO THE PROCEEDING

This petition is brought by Plaintiff Alexander Khochinsky (“Khochinsky”) against Defendant the Republic of Poland (“Poland”).

RELATED CASES

Alexander Khochinsky v. Republic of Poland, 19-7160, U.S. Court of Appeals for the District of Columbia Circuit. Judgment affirmed June 18, 2021. Petition for rehearing denied August 9, 2021.

Alexander Khochinsky v. Republic of Poland, Case No. 1:18-cv-01532-DLF, U.S. District Court for the District of Columbia. Judgment entered November 9, 2019.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
PARTIES TO THE PROCEEDING.....	ii
RELATED CASES.....	ii
OPINIONS BELOW	1
BASIS FOR THIS COURT’S JURISDICTION	1
STATUTES INVOLVED IN THE CASE.....	1
INTRODUCTION	3
STATEMENT OF THE CASE.....	5
A. Factual Background	5
B. Procedural Background.....	9
REASONS FOR GRANTING THE PETITION.....	14
I. THE COURT OF APPEALS’ DECISION THREATENS AMERICANS PURSUED IN BAD FAITH OVER TITLE TO PERSONAL PROPERTY BASED ON RELIGIOUS AND ETHNIC DISCRIMINATION.....	14
A. A Foreign State that Seeks to Coerce Surrender of Personal Property Waives its Right to Immunity.....	14
B. The Court of Appeals’ Decision on Counterclaim Immunity Is at Odds with Congress on a Matter of Great Importance	19
1. Two of Khochinsky’s claims arise out of the same circumstances as the extradition complaint.....	20

TABLE OF CONTENTS—Continued

	Page
2. Khochinsky’s property claims function as counterclaims to Poland’s attempts to use U.S. courts to address the rightful ownership of the Painting	21
C. The Holding That Poland Is Immune from Suit for Noncommercial Torts because the Extradition Process Is not “Exclusively Diplomatic” Conflicts with the Lower Court’s Own Ruling on Implicit Waiver.....	23
CONCLUSION.....	25

APPENDIX

Judgment, United States Court of Appeals for the District of Columbia Circuit (filed June 18, 2021)	App. 1
Opinion, United States Court of Appeals for the District of Columbia Circuit (filed June 18, 2021)	App. 3
Order, United States District Court for the District of Columbia (filed November 6, 2019)	App. 21
Memorandum Opinion, United States District Court for the District of Columbia (filed November 6, 2019)	App. 23
Order Denying Rehearing, United States Court of Appeals for the District of Columbia Circuit (filed August 9, 2021)	App. 42

TABLE OF AUTHORITIES

	Page
U.S. CASES	
<i>Cabiri v. Government of Republic of Ghana</i> , 165 F.3d 193 (2d Cir. 1999)	19, 21, 22
<i>In re Extradition of Khochinsky</i> , 116 F. Supp. 3d 412 (S.D.N.Y. 2015)	8, 9, 10, 20
<i>Khochinsky v. Republic of Pol.</i> , Case No. 1:18-cv-01532-DLF, 2019 U.S. Dist. LEXIS 192630 (D.D.C. Nov. 6, 2019)	1
<i>Khochinsky v. Republic of Pol.</i> , 1 F.4th 1 (D.C. Cir. 2021)	1
<i>Khochinsky v. Republic of Pol.</i> , No. 19-7160, 2021 U.S. App. LEXIS 23616 (D.C. Cir. Aug. 9, 2021)	14
<i>Lord Day & Lord v. Socialist Republic of Viet.</i> , 134 F. Supp. 2d 549 (S.D.N.Y. 2001)	16, 21
<i>Price v. United States (In re Price)</i> , 42 F.3d 1068 (7th Cir. 1994).....	21
<i>Scott v. District of Columbia</i> , 101 F.3d 748 (D.C. Cir. 1996)	24
<i>Siderman de Blake v. Republic of Arg.</i> , 965 F.2d 699 (9th Cir. 1992).....	16, 17
INTERNATIONAL CASES	
<i>The Minister for Justice and Equality v. Celmer</i> , [2018] IEHC 484, 12 March 2018	11

TABLE OF AUTHORITIES—Continued

	Page
STATUTES	
28 U.S.C. § 1254(1).....	1
28 U.S.C. §§ 1602-1611	i
28 U.S.C. § 1605	1, 3
28 U.S.C. § 1605(a).....	15
28 U.S.C. § 1605(a)(1)	5
28 U.S.C. § 1605(a)(5)	5, 23
28 U.S.C. § 1607	2
28 U.S.C. § 1607(b).....	21
MISCELLANEOUS	
H.R. Rep. No. 94-1487 (1976), reprinted in 1976 U.S.C.C.A.N. 6604.....	19, 22
Hague Convention Arts. 3, 5–6, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163	10
Press Release, Secretary of State Antony J. Blinken, <i>Poland’s Troubling Legislation</i> (Aug. 11, 2021), https://www.state.gov/polands-troubling- legislation/	6
Press Release, Court of Justice of the European Union, <i>Poland must immediately suspend the application of the national provisions on the powers of the Disciplinary Chamber of the Su- preme Court with regard to disciplinary cases concerning judges</i> (Apr. 8, 2020), https://curia. europa.eu/jcms/upload/docs/application/pdf/2020- 04/cp200047en.pdf	13

OPINIONS BELOW

The district court granted Poland’s motion to dismiss on November 6, 2019. The decision is reported at 2019 U.S. Dist. LEXIS 192630 (D.D.C. Nov. 6, 2019), and reproduced at App. 23. The court of appeals affirmed the district court on June 18, 2021. The decision of the court of appeals is reported at 1 F.4th 1 (D.C. Cir. 2021) and reproduced at App. 1. The court of appeals denied Khochinsky’s petition for rehearing *en banc* on August 9, 2021. The order denying Khochinsky’s petition for rehearing *en banc* is reported at 2021 U.S. App. LEXIS 23616 (D.C. Cir. Aug. 9, 2021) and reproduced at App. 42.



BASIS FOR THIS COURT’S JURISDICTION

This is a petition by Khochinsky pursuant to Supreme Court Rule 12. On June 18, 2021, the United States Court of Appeals for the District of Columbia Circuit entered an Order that affirmed the judgment of the district court dated November 6, 2019 that allowed the motion to dismiss by Poland. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).



STATUTES INVOLVED IN THE CASE

This case is brought under the FSIA, which provides at 28 U.S.C. § 1605 (“General exceptions to the jurisdictional immunity of a foreign state”):

A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

[]

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights;

and at 28 U.S.C. § 1607 (“Counterclaims”):

In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim—

- (a) for which a foreign state would not be entitled to immunity under section 1605 or 1605A of this chapter [28 USCS § 1605 or 1605A] had such claim been brought in a separate action against the foreign state; or
- (b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or
- (c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.



INTRODUCTION

The FSIA sets out the exclusive set of circumstances in which a foreign sovereign may be sued in the courts of the United States. Underlying those exceptions to sovereign immunity is a simple, motivating principle: when a sovereign stays within the bounds of characteristics understood to be unique to sovereigns, the United States will extend the foreign nation the grace and comity of immunity from suit and process. But when a foreign sovereign steps outside of the terrain of the state and instead acts as a private—often commercial—actor would, it may not claim immunity

for claims that arise out of those facts and circumstances.

This is such a case. In Poland's effort to coerce Khochinsky—because he is Jewish and an advocate for Holocaust restitution—into relinquishing title to a Painting that he inherited from his father, Poland targeted Khochinsky in bad faith here in the United States for extradition and destroyed his life and business. Poland has earned neither grace and comity in general, nor FSIA immunity specifically.

Since 2010, Poland has pursued Khochinsky around the world for discriminatory and anti-Semitic reasons to litigate what is, in fact, a commercial dispute over title to a painting. The question is whether, *contra* the court of appeals, Poland's knowing misuse of the extradition process—in a case that the United States described as “for and on behalf of the Government of Poland”—abrogates its entitlement to sovereign immunity pursuant to the FSIA. Respectfully, the court of appeals erred in concluding that Poland retains its sovereign immunity for Khochinsky's claims. The Court should grant this petition to address a grave threat to American liberty—on American soil—cloaked in the guise of sovereign immunity.

The ruling by the court of appeals exposes every resident or citizen of the United States to discriminatory extradition attempts by nations that lack due process when a sovereign is seeking an American's property. Conversely, finding jurisdiction over Poland for these claims poses no threat to either the ability of

the United States to defend itself, or to other countries' good-faith use of the important extradition system.

The logic of the court of appeals is effectively this: extradition is “fundamentally diplomatic” (App. 15) and therefore ineligible for the implicit waiver exception of the FSIA (28 U.S.C. § 1605(a)(1)), yet at the same time extradition is “process” that is excluded from the FSIA’s noncommercial tort exception for Khochinsky’s First Amendment retaliation claim (28 U.S.C. § 1605(a)(5)) because extradition is not “exclusively diplomatic.” App. 15. In other words, the court of appeals concluded that extradition is too diplomatic, and yet somehow not diplomatic enough. This inconsistency in the court of appeals most likely to hear FSIA claims merits the Court’s review.



STATEMENT OF THE CASE

A. Factual Background

For more than a decade, Poland has pursued Khochinsky around the world for one, simple reason: when discussing title to a Painting that he inherited from his father, Khochinsky also sought to discuss the restitution of property stolen from his mother during the Holocaust in Poland. When Khochinsky dared to speak of restitution, Poland turned the title dispute into an international campaign of intimidation, seeking to coerce Khochinsky into relinquishing title to moveable personal property. Poland’s anti-Semitic policies, while deplorable, do not in and of themselves

abrogate sovereign immunity. But its illegal plotting against Khochinsky, in pursuit of personal property, does.

Poland's government in the last decade has been singularly focused on denying restitution to Jews. It has even sought to criminalize various aspects of speaking the truth about the violence and depredation faced by Jews during the Holocaust on Polish territory. In 2018, Poland floated legislation that would prevent most Holocaust victims and their heirs from obtaining restitution. That same year, Poland criminalized speech regarding Polish responsibility for the Holocaust. Within days of the court of appeals' ruling in this case—now in the belief that Poland was safe from review for its persecutory pursuit of American property—Poland's lower house of parliament passed a law to eliminate restitution of Jewish property categorically. The Polish law has been condemned. *See* Press Release, Secretary of State Antony J. Blinken, *Poland's Troubling Legislation* (Aug. 11, 2021) <https://www.state.gov/polands-troubling-legislation/>.

Khochinsky's mother Maria lived in the city of Przemyśl. Maria was lucky enough to travel further east to Lviv (then in the USSR, now in Ukraine) to be with her relatives for the Sabbath two days before Germany invaded the USSR at the start of Operation Barbarossa, the beginning of the war on the Eastern Front. This trip saved her life. By the time the Red Army retook Przemyśl in 1944, nine in ten of the city's Jewish residents had been murdered. None of Maria's relatives in Przemyśl survived.

Many years after he discovered that his mother's home had been destroyed, Khochinsky believed that he saw an opening for a fruitful discussion with Poland about his restitution claim. In or around 2010, Khochinsky learned that a Painting reported missing from Poland was similar to a Painting, *Girl with Dove* (the "Painting"), that he had inherited from his father in 1991 (who acquired it after World War II). Poland claimed that the Painting had been removed from a Polish museum during World War II for protection, and that it was subsequently looted by the Nazis. Khochinsky believed that if he offered an exchange, instead of simply demanding payment for the stolen land, Poland would come to the table to discuss restitution.

Notably, Poland's own initial communications confirm that Poland knew the Painting was personal property that it would need to acquire by negotiation or purchase, not coercion. Poland's first communication to Khochinsky when he initiated contact was a request to purchase the Painting. Poland stated its "intention to negotiate" with Khochinsky "regarding the acquisition" of the Painting. Further logistical discussions ensued about viewing the Painting as part of the negotiation. No foreign state that believed its counterparty had stolen state property would make such statements.

Instead, on January 25, 2013, Poland reversed course because it had devised a different strategy. A Polish court accused Khochinsky of purchasing the Painting unlawfully, and of knowing that the Painting

had been obtained illegally when he acquired it. This accusation had no possible factual basis and was fundamentally illogical because Khochinsky never purchased the Painting. Poland knew this—it was explicit in the negotiations for the commercial transaction concerning the Painting into which Poland (briefly) entered.

Raising the ante further in this private property dispute, Poland then used this criminal charge to seek Khochinsky’s extradition from the United States, where he was a lawful permanent resident (Khochinsky is now a U.S. citizen). On February 25, 2015, the U.S. Department of Justice (“DOJ”) filed a petition for a certificate of extraditability in the U.S. district court for the Southern District of New York “for and on behalf of the Government of Poland.”

Early the next morning, eight FBI agents arrived at Khochinsky’s New York home and arrested him in front of his crying daughter. Khochinsky was imprisoned from February 26 to March 9, 2015, and then subject to house arrest and electronic monitoring.

Throughout the entirety of the extradition attempt, Poland was the party seeking relief, using the DOJ as a pass-through. In February of 2015, the DOJ reached out to Poland for input on the claimed offense, *i.e.*, title to the Painting, input that Poland provided. *In re Extradition of Khochinsky*, 116 F. Supp. 3d 412, 421 (S.D.N.Y. 2015). On April 2, 2015, Poland sent a package of additional documents to the DOJ’s criminal division for use in the extradition proceeding. On April

9, 2015, Poland sent yet another package of documents to the DOJ's criminal division, again for use in the extradition proceeding.

The district court rejected the extradition request. *In re Extradition of Khochinsky*, 116 F. Supp. 3d at 415. The district court held that Poland's theory of criminal wrongdoing was illogical, noting "the only evidence in the record tended to corroborate Khochinsky's claim that he inherited 'Girl with Dove' from his father and only learned that Poland was seeking it in 2010. . . . This behavior is inconsistent with someone who knows his property is sought by a foreign sovereign." *Id.* at 421-22. The district court concluded: "In sum, the Government failed to adduce *any* evidence that Khochinsky knew 'Girl with Dove' was stolen at the time he acquired it." *Id.* at 422 (emphasis added).

B. Procedural Background

Khochinsky brought the present action against Poland on June 27, 2018. He brought five claims: (I) First Amendment retaliation for Poland's actions against him in response to his speech regarding the Holocaust; (II) quiet title to establish his ownership to the Painting; (III) tortious interference with advantageous relations for the harm his business suffered when he was in jail and on house arrest during the extradition process; (IV) Poland's aiding and abetting trespass, by the Catholic church, to his mother's property in Przemysl; and (V) abuse of process regarding the extradition process.

In his Complaint, Khochinsky alleged, and Poland has never challenged, that Poland initiated the proceeding in which it failed to adduce “*any* evidence that Khochinsky knew ‘Girl with Dove’ was stolen at the time he acquired it” (*id.* at 422, emphasis added) *because* Khochinsky is Jewish and because he raised questions about property taken from his mother because she was Jewish.

Khochinsky promptly proceeded with service under the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the “Hague Convention”), arts. 3, 5–6, Nov. 15, 1965, 20 U.S.T. 361-67, 658 U.N.T.S. 163, and served the papers in July of 2018. Khochinsky re-served the papers on October 8, 2018. Poland ignored the Complaint and the valid service. On January 30, 2019, Khochinsky’s counsel contacted a Polish representative regarding the missing certificate of service. Poland refused to provide the required certificate under the Hague Convention until April of 2019.

Just weeks after this communication from Khochinsky’s counsel, Poland retaliated again. Khochinsky, now a U.S. citizen, had a business trip to France in February of 2019. As he waited for his flight home at Charles de Gaulle Airport, he was arrested. Poland was, for the second time, seeking Khochinsky’s extradition, again using the Painting as a pretext. Meanwhile, Poland continued to ignore the U.S. Complaint, and the district court entered Poland’s default on March 12, 2019.

This latest retaliation attempt came as Europe has increasingly, and formally, recognized Poland's descent into utter abandonment of the rule of law. As Ireland's High Court wrote in 2018, when considering a request by Poland to extradite another individual, the Reasoned Proposal of the European Commission regarding Poland is "a shocking indictment of the status of the rule of law in a European country in the second decade of the 21st Century. It sets out in stark terms what appears to be the deliberate, calculated and provocative legislative dismantling by Poland of the independence of the judiciary, a key component of the rule of law." *The Minister for Justice and Equality v. Celmer*, [2018] IEHC 484, 12 March 2018, ¶ 123. The High Court found: "The recent changes in Poland have been so damaging to the rule of law that this Court must conclude that the common value of the rule of law in Poland has been breached." *Id.* at ¶ 135.

While Khochinsky was trapped overseas at Poland's behest, Poland moved to vacate its default and to dismiss the action on the basis of sovereign immunity. Khochinsky opposed those motions and moved for a partial default judgment establishing liability. On November 6, 2019, the U.S. district court vacated Poland's default, dismissed the case, and denied the motion for default judgment. Khochinsky appealed from those three rulings to the court of appeals.

Meanwhile, on October 2, 2019, the French court denied Poland's extradition request. The French court found that "it is to be feared that he would not be able to benefit from a fair trial[.]" The court explained:

[I]t should be noted that the Republic of Poland . . . adopted, on February 06, 2018, a law aimed at penalizing any person challenging the involvement of Poland in the Nazi crimes committed by the Third Reich, KHOCHINSKY Alexander, having clearly stated his desire to make the Republic of Poland recognize its responsibility as a co-author of the abuses committed against the Jewish populations in Poland during the World War II, it is to be feared that he would not be able to benefit from a fair trial[.]

The French court also found that “the extradition appears disproportionate in view of the market value of the painting[.]”

On February 17, 2020, the Higher Regional Court of Karlsruhe, Germany, entertained an appeal of a lower court’s enforcement of a European arrest warrant issued by Poland for alleged fraud—just like the one Poland issued against Khochinsky. The German appellate court revoked the order enforcing extradition because “it is currently highly probable that extradition of the suspect to Poland for criminal prosecution will prove to be, at the very least currently, inadmissible due to the current ‘judicial reform’ developments in Poland.” Those “judicial reform” developments, spelled out in the decision (and relying on the 2018 European Court of Justice opinion cited in the French case) fundamentally include the destruction of an independent judiciary that issues such arrest warrants—like those that Poland has tried to use against Khochinsky around the world.

The European Court of Justice (the “ECJ”) has underscored the gravity of the situation in a statement entitled “Poland must immediately suspend the application of the national provisions on the powers of the Disciplinary Chamber of the Supreme Court with regard to disciplinary cases concerning judges.” See Press Release, Court of Justice of the European Union, *Poland must immediately suspend the application of the national provisions on the powers of the Disciplinary Chamber of the Supreme Court with regard to disciplinary cases concerning judges* (Apr. 8, 2020), <https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-04/cp200047en.pdf>. The ECJ noted that Poland’s judicial crisis is “likely to cause serious damage to the EU legal order and thus to the rights which individuals derive from EU law and to the values, set out in Article 2 TEU, on which the EU is founded, in particular the rule of law.” *Id.*

In short, nothing about Poland’s claim to sovereign immunity for its actions can be taken at face value because Poland is fundamentally a bad-faith actor in the international arena with respect to extradition requests. Its fellow European states could not have said so more clearly. Poland does not use the extradition process in the legitimate exercise of sovereign law enforcement; it uses extradition as a tortious weapon where it lacks the courage of its convictions to bring what is in reality a civil dispute about personal property.

The court of appeals affirmed the district court’s ruling on June 18, 2021. *Khochinsky v. Republic of Pol.*,

No. 19-7160, 2021 U.S. App. LEXIS 18166 (D.C. Cir. June 18, 2021) (App. 1). The court of appeals denied Khochinsky's petition for rehearing *en banc* on August 9, 2021. *Khochinsky v. Republic of Pol.*, No. 19-7160, 2021 U.S. App. LEXIS 23616 (D.C. Cir. Aug. 9, 2021) (App. 42).



REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS' DECISION THREATENS AMERICANS PURSUED IN BAD FAITH OVER TITLE TO PERSONAL PROPERTY BASED ON RELIGIOUS AND ETHNIC DISCRIMINATION.

A. A Foreign State that Seeks to Coerce Surrender of Personal Property Waives its Right to Immunity.

Poland never contested Khochinsky's presentation of the facts—because those facts are true. The implications are bracing. Under the decision below, a foreign sovereign would face no consequence for attempts to haul an American to prison abroad for ulterior and persecutory purposes related to a property dispute. To allow this decision to stand is a threat to any American. What if, for example, Turkey pursued a Christian American in similar fashion motivated by religious animus about owning a particular kind of art from the Ottoman Empire? What if the Taliban, now the *de facto* government of Afghanistan, declared a worldwide intention to find Jews in possession of Pashto cultural

property? What if China declared American intellectual property to be revolutionary patrimony?

The court of appeals here framed the risk posed by the interpretation of the FSIA backwards: the court of appeals presented its ruling as a cautious one, in light of concern about whether the U.S. government might have to defend claims for damages abroad (which it has the resources to do), but the lower court's interpretation subjects U.S. residents and citizens—here in the United States—to the whims of dictatorial and discriminatory regimes. This is terrifying. No American would be safe from the risk of defending forcible expulsion from their homeland to face persecution or worse in countries that lack due process or the rule of law simply because that American has a kind of property that the foreign state deems him ineligible to hold for discriminatory reasons.

When Poland pursued Khochinsky's extradition in the United States to obtain title to the Painting, Poland invoked the jurisdiction of American courts over the property dispute initiated by Poland—over the whole dispute, not merely the part Poland wanted. This constituted a waiver of immunity under the FSIA, which provides: "A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver[.]" 28 U.S.C. § 1605(a). The implied waiver exception encompasses

“factually and legally related causes of action.” *Lord Day & Lord v. Socialist Republic of Viet.*, 134 F. Supp. 2d 549, 558 (S.D.N.Y. 2001).

The court of appeals should have followed the analogous *Siderman de Blake v. Republic of Argentina* case that parallels Khochinsky’s plight. 965 F.2d 699 (9th Cir. 1992). As the Ninth Circuit explained, the *Siderman* record told “a horrifying tale of the violent and brutal excesses of an anti-Semitic military junta that ruled Argentina.” *Id.* at 703. Khochinsky is the victim of uncontested anti-Semitic persecution. The Sidermans fled to the United States, but Argentina did not relent. Khochinsky was a lawful permanent resident of the U.S. in 2010. Argentina fabricated a baseless criminal action against Jose Siderman; authorities even altered official records to support these false accusations. *Id.* at 722. Poland’s criminal accusation against Khochinsky is likewise based on fiction, which Poland has never denied. Argentina then “sought the assistance of our courts in obtaining jurisdiction over his person, requesting via a letter rogatory that the Los Angeles Superior Court serve him with documents relating to the action.” *Id.* at 703. Poland did not merely envision United States court participation its persecution of Khochinsky to litigate a property dispute; Poland ensured that persecution.

The Ninth Circuit held that Argentina’s conduct constituted an implied waiver: “Here, we confront a situation where Argentina apparently not only envisioned United States court participation in its persecution of the Sidermans, but by its actions deliberately

implicated our courts in that persecution.” *Id.* at 721-22. This precise logic applies here.

In the present case, the court of appeals described the extradition process as follows: “a foreign sovereign operates at a level of remove when it seeks our assistance in extradition[.]” Yet that description denies the basic essence of extradition. The entire process is commenced and pursued because of the direct approach by one government to another. The lower court’s description is akin to describing the litigants in this matter as operating “at a level of remove” because only their attorneys appear before the Court. It ignores for what, and for whom, the entire process exists. As the DOJ itself stated, the extradition case was “for and on behalf of the Government of Poland.”

The court of appeals concluded that “[t]here is good reason to doubt that a foreign state’s effort to exercise its agreed-upon treaty rights exhibits an intent to relinquish its immunity from suit.” The lower court’s conclusion overlooks the fundamental nature of this lawsuit, however. Khochinsky does not seek a ruling that any extradition request “exhibits an intent to relinquish [a sovereign’s] immunity from suit.” He seeks a ruling that *this* extradition, through which Poland itself put certain property issues before a United States court in bad faith and with discriminatory animus, provided the United States courts with jurisdiction over Poland for those same issues. Reviving Khochinsky’s claims makes a subset of the tiny fraction of extradition requests that are rejected in any way eligible for FSIA jurisdiction—at most. And few, if

any, governments have made this kind of discrimination a function of their international policy, such that the reciprocal concern expressed by the court of appeals is diminished even further.

Lastly, the court of appeals considered the consequence of its ruling on the relative interests involved. With respect, however, the court of appeals reached the wrong conclusion and ignored the paramount interest: Americans targeted by rogue regimes. The court of appeals put the issue this way: “And were we to find that a foreign state’s extradition request implies a waiver of immunity in the United States, we might expect that, as a reciprocal matter, the United States would subject itself to suit in foreign proceedings whenever it requests extradition assistance.” This balance is lopsided—against the lower court’s ruling. On the one hand, there is the theoretical increase in risk of a suit for damages against the United States itself in a foreign court if the United States wrongfully weaponized the extradition process. But our Nation does not initiate transparently bad-faith extradition requests to coerce private parties to surrender title to moveable personal property. On the other hand is Khochinsky’s life and liberty, pursued by a government that, its European states have acknowledged, has abandoned the rule of law. Between these two options, there is no real choice.

B. The Court of Appeals' Decision on Counterclaim Immunity Is at Odds with Congress on a Matter of Great Importance.

The Court should also review the dismissal of Khochinsky's invocation of the counterclaim exception because the lower court's conclusion puts different Congressional pronouncements into impermissible conflict.

Congress enacted the counterclaim exception because "if a foreign state brings or intervenes in an action based on a particular transaction or occurrence, it should not obtain the benefits of litigation before U.S. courts while avoiding legal liabilities claimed against it and arising from that same transaction or occurrence." *Cabiri v. Government of Republic of Ghana*, 165 F.3d 193, 197 (2d Cir. 1999) (quoting H.R. Rep. No. 94-1487, at 23 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6622). That rationale perfectly encapsulates why Poland cannot avoid this suit. Poland brought an extradition proceeding that arose out of its ongoing dispute with Khochinsky over *Girl with Dove*. It pursued extradition to obtain multiple illicit benefits, including punishing Khochinsky and thereby warning others not to speak about the Polish Holocaust. Poland may not opt into the courts for these benefits, and then opt out when it faces liability based on the same dispute.

Poland initiated this legal dispute when it invoked the cooperation of the U.S. government to haul Khochinsky to a Polish prison over title to *Girl with Dove*. The case was "for and on behalf of the

Government of Poland.” Here, Poland did everything in its power to begin and support the extradition case by answering the questions of the Court and providing additional “evidence” to the DOJ. *In re Extradition of Khochinsky*, 116 F. Supp. 3d at 421. It was, fundamentally, Poland’s case and Poland’s case alone, to which Khochinsky’s claims respond and for which Poland has relinquished sovereign immunity.

1. Two of Khochinsky’s claims arise out of the same circumstances as the extradition complaint.

The court of appeals erred in concluding that the extradition and Khochinsky’s claims do not arise out of the same circumstances. App. 17-18. Poland’s extradition attempt was its disproportionate response to an ongoing dispute regarding *Girl with Dove* and the property in Przemysl. One led directly to the other. With the extradition attempt, Poland moved the entire dispute into the judicial system, and it specifically asked the court to consider the ownership of *Girl with Dove*. In other words, Poland brought a dispute about ownership of the Painting to the courts of the United States. The district court in the extradition case acknowledged the full context of the dispute, including the land in Przemysl, in its decision. *In re Extradition of Khochinsky*, 116 F. Supp. 3d at 415. Khochinsky’s claim for quiet title to *Girl with Dove* and his claim for aiding and abetting trespass to his family land in Przemysl are counterclaims because they “aris[e] out of the transaction or occurrence that is the subject

matter of the claim of the foreign state,” 28 U.S.C. § 1607(b), a liberally-construed standard that is easily satisfied here. *Cabiri*, 165 F.3d at 197; *see also Price v. United States (In re Price)*, 42 F.3d 1068, 1073 (7th Cir. 1994).

2. Khochinsky’s property claims function as counterclaims to Poland’s attempts to use U.S. courts to address the rightful ownership of the Painting.

The court of appeals erred further in applying an overly formalistic requirement that immunity is lost only for claims in the same docket number (App. 15). In fact, the counterclaim exception to sovereign immunity has never been limited to literal counterclaims. Instead, it encompasses analogous situations. Another case brought under the counterclaim exception, *Lord Day & Lord*, did not involve a single counterclaim. 134 F. Supp. 2d at 557. Instead, the foreign sovereign brought a claim in interpleader, and co-defendants brought cross-claims. The district court held that the counterclaim exception applied, explaining: “the parties’ interests are analogous making the application of the counterclaim exception appropriate.” *Id.* at 557.

Khochinsky did not have a procedural opportunity to bring a counterclaim during the extradition proceeding. Instead, his claims regarding *Girl with Dove* (Count II) and the land in Przemysl (Count IV)

function as counterclaims. Khochinsky's property-based claims arise out of the discussions between Khochinsky and Poland regarding their respective property rights, which was also the sole basis for the extradition attempt. As discussed above, Congress has determined a foreign state "should not obtain the benefits of litigation before U.S. courts while avoiding legal liabilities claimed against it and arising from that same transaction or occurrence." *Cabiri*, 165 F.3d at 197 (quoting H.R. Rep. No. 94-1487, at 23 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6622).

The court of appeals reviewed Khochinsky's procedural handicap as dispositive of the counterclaim exception, but reviving his claims serves the very policy that the counterclaim exception was enacted to protect: to prevent sovereigns from picking and choosing by misusing tools like extradition. To claim title to the Painting, Poland's only real option would have been a civil action, yet that action would have lacked any basis or evidentiary support. Lacking legitimate options, Poland deliberately avoided that proceeding to hide in bad faith behind an assertion of sovereign immunity. Poland crossed our borders to pursue Khochinsky advisedly, it must now face the consequences.

C. The Holding That Poland Is Immune from Suit for Noncommercial Torts because the Extradition Process Is not “Exclusively Diplomatic” Conflicts with the Lower Court’s Own Ruling on Implicit Waiver.

Finally, the Court should grant the petition to review the conclusion by the court of appeals that the non-commercial tort exception of the FSIA (28 U.S.C. § 1605(a)(5)) does not apply to certain of Khochinsky’s claims. App 18.

Sovereigns are not immune for actions regarding “damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state[.]” 28 U.S.C. § 1605(a)(5). This basis for jurisdiction applies to the torts of First Amendment Retaliation (Count I) and tortious interference with business relations (Count III). The court of appeals erred by finding that these two claims were barred as ones “arising out of . . . abuse of process.” App. 19. First Amendment retaliation and tortious interference with business relations are separate torts, each with their own elements. The U.S. tort exception excludes only certain enumerated causes of action. That list does not include either of these torts.

Moreover, the lower court’s analysis of the U.S. tort exception directly conflicted with its analysis of the other FSIA provisions. Abuse of process claims arise only from judicial proceedings, and elsewhere, the court of appeals was emphatic that Poland did not

participate in any judicial process. *See Scott v. District of Columbia*, 101 F.3d 748, 756 (D.C. Cir. 1996) (an abuse of process claim requires “a ‘perversion of the judicial process’”). Khochinsky has not disputed the existence of criminal proceedings in Poland and does not bring claims arising out of the Poland criminal charges. It is Khochinsky’s speech in seeking restitution that is the gravamen of his First Amendment retaliation claim. Nor, even though those proceedings’ discriminatory motivation has never been challenged by Poland, does Khochinsky bring claims arising out of those Polish proceedings for malicious prosecution or abuse of process.

Poland retaliated by abusing the respect that the United States grants to it as part of the diplomatic process. The court of appeals first waves away Khochinsky’s implicit waiver argument on the theory that extradition is a diplomatic event based on comity and cooperation. App. 14. Yet later, the court of appeals concludes that Khochinsky’s claims are effectively abuse of process causes of action because extradition is not exclusively diplomatic. App. 19-20. The Court should grant certiorari to resolve this internal inconsistency in the ruling below.



CONCLUSION

The petition for a writ of certiorari should be granted.

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