

App. No. ____

In the Supreme Court of the United States

David L. de Csepel, Angela Maria Herzog, and Julia Alice Herzog,

Petitioners,

v.

Republic of Hungary, a foreign state, et al.,

Respondents.

PETITIONERS' APPLICATION TO EXTEND TIME TO
FILE PETITION FOR A WRIT OF CERTIORARI

To the Honorable Chief Justice Roberts, as Circuit Justice for the United States Court of Appeals for the District of Columbia Circuit:

Pursuant to 28 U.S.C. § 2101(c) and Supreme Court Rules 13.5, 22, and 30.3, petitioners David L. de Csepel, Angela Maria Herzog, and Julia Alice Herzog (petitioners) respectfully request that the time to file a Petition for a Writ of Certiorari in this case be extended for fifty-nine days to and including March 2, 2018. The court of appeals issued its opinion on June 20, 2017. *See App. A, infra.* The court denied a timely petition for rehearing and rehearing en banc on October 4, 2017. *See App. B, infra.* Absent an extension of time, the petition therefore would be due on January 2, 2017. Petitioners are filing this application at least ten days before that date. *See Sup. Ct. R. 13.5.* This Court has jurisdiction under 28 U.S.C. § 1254(1) to review this case.

Background

This case involves a family's decades-long struggle to recover a valuable art collection that was stolen from them by the World-War-II-era Hungarian government and its Nazi collaborators. The court of appeals held that the Republic of Hungary is immune from this suit pursuant to the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1602 *et seq.*

1. Petitioners are the heirs to what is known as the "Herzog Collection," a body of artwork that was once "one of Europe's great private collections of art, and the largest in Hungary." App. A at 2. The collection was amassed by Baron Mór Lipót Herzog, a passionate Jewish art collector in pre-War Hungary. Following Herzog's death in 1934 and his wife's death shortly thereafter, their three children inherited the collection. *Ibid.*

In March 1944, after Hungary joined the Axis Powers, Adolf Hitler sent German troops into Hungary, and SS Commander Adolph Eichmann established a headquarters in Budapest. App. A at 3. The government of Hungary then subjected Hungarian Jews to a campaign of terror and discrimination: Jews were deported to German concentration camps and were made to adhere to anti-Semitic laws that restricted their economic and cultural participation in Hungarian society. *Ibid.* The Hungarian government carried out a campaign to strip Jews of their property, including by cataloguing and confiscating artwork and other valuable property belonging to Jews. *Ibid.* Although the Herzogs attempted to safeguard their art collection by hiding it, the works were discovered by the Hungarian government and their Nazi collaborators, and the collection was taken directly to Eichmann's headquarters. After Eichmann selected some of the best pieces for display near Gestapo headquarters and for eventual transport to Germany, the Hungarian government gave the rest of the collection to its Museum of Fine Arts for safekeeping. *Ibid.*

Fearing for their lives, the Herzog family was forced to flee Hungary or face extermination. Herzog's daughter (Erzsébet Weiss de Csepel following her marriage) fled with her children to eventually settle in the United States where she became a U.S. citizen in 1952. App. A at 4. Herzog's son István Herzog narrowly escaped being sent to Auschwitz and was interned while his wife and disabled son fled to Switzerland. István later died in 1966, leaving a wife and two sons. Herzog's other son András Herzog was sent into forced labor in 1942 and died on the Eastern Front in 1943, leaving two daughters who eventually settled in Italy. *Ibid.* Following the conclusion of World War II, more than 40 works of art from the Herzog collection remained in Hungary in the possession of the Museum of Fine Arts in Budapest, the Hungarian National Gallery, the Museum of Applied Arts in Budapest, and Budapest University of Technology and Economics. *de Csepel v. Republic of Hungary*, 714 F.3d 591 (D.C. Cir. 2013).

2. In July 2010, after decades of unsuccessful efforts to secure the return of the stolen works of art (including by filing suit in Hungary seeking return some of the art), petitioners filed this suit in the District Court for the District of Columbia. Petitioners sued the Republic of Hungary, the three museums, and the Budapest University of Technology and Economics, seeking the return of (or fair compensation for) 44 stolen works of art that remain in the defendants' possession. App. A at 4-5. Petitioners allege that Hungary's taking of the works of art constituted an express or implied bailment contract, that Hungary breached that contract when it failed to return the pieces to the family, and that the failure to return the pieces as promised constituted a conversion and unjust enrichment. *Id.* at 5. Petitioners seek imposition of a constructive trust, an accounting, a declaration of their ownership of the collection – and ultimately either a return of the works to the family or compensation to the family of more than \$100 million. *Ibid.*

Hungary filed a motion to dismiss, arguing that the suit was barred by the FSIA, which authorizes federal-court jurisdiction over civil actions against foreign states in only limited circumstances. App. A at 5. The FSIA establishes a general principal that, “except as provided in” 28 U.S.C. §§ 1605 to 1607, “a foreign state shall be immune from the jurisdiction of the United States and of the States.” 28 U.S.C. § 1604. The FSIA sets out several “exceptions to the jurisdictional immunity of a foreign state in 28 U.S.C. § 1605. As relevant here, petitioners invoked the exception in Section 1605(a)(3), which provides in full:

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

* * *

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.

28 U.S.C. § 1605(a)(3).

The district court denied the motion to dismiss, concluding that the expropriation exception in Section 1605(a)(3) applies to petitioners’ claims and further rejecting Hungary’s contention that exercising jurisdiction in this case would be inconsistent with agreements between the United States and Hungary. App. A at 5. Hungary appealed and, “without ruling on the availability of the expropriation exception” in Section 1605(a)(3), the D.C. Circuit held that petitioners’ claims satisfied that Section’s commercial-activity exception. *Ibid.*

3. On remand to the district court and after the close of discovery, Hungary renewed its motion to dismiss. The district court agreed with Hungary that, based on the post-discovery record, petitioners had not satisfied the commercial-activity exception, but held that the expropriation exception applies and that no treaty forecloses its application here. App. A at 5-6.

The district court therefore denied the motion to dismiss, except as to two paintings that Hungary acquired from third parties after the conclusion of the war. *Id.* at 6.

4. Hungary appealed again, seeking dismissal of the claims relating to the remaining 42 works of art. Hungary argued both that the claims are barred by a 1947 treaty between Hungary and the Allied powers and that the expropriation exception does not apply. The court of appeals rejected Hungary's treaty argument, App. A at 8-10, but two members of the panel agreed with Hungary that the expropriation exception does not apply to Hungary itself, *id.* at 10-23. As noted, the text of Section 1605(a)(3) states in relevant part that "[a] foreign state shall not be immune from the jurisdiction of the courts of the United States ... in any case ... in which rights in property taken in violation of international law are in issue and ... that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States." The court of appeals agreed with petitioners that this is a case in which rights in property taken in violation of international law are at issue and that the Hungarian museums currently in possession of the works are agencies or instrumentalities of Hungary that are engaged in commercial activity in the United States. App. A at 11-14, 16; *see de Csepel v. Republic of Hungary*, 168 F. Supp. 3d 143, 167 (D.D.C. 2016).

The court of appeals nevertheless held that, although the commercial activities of Hungary's agencies and instrumentalities are sufficient to defeat the immunity of those entities, the Republic of Hungary retains its immunity. App. A at 16-23. The court held that a foreign state itself – as opposed to an agency or instrumentality of a foreign state – can be immune from suit under Section 1605(a)(3) only if the property "is present in the United States in connection with a commercial activity carried on in the United States by the foreign state." Here, because the

artworks at issue are all located in Hungary, petitioners could not satisfy that requirement. The court acknowledged that Section 1605(a)(3) provides that “[a] foreign state shall not be immune” based on the U.S.-based commercial activities of “an agency or instrumentality of the foreign state,” but held that that clause applies to the immunity only of agencies or instrumentalities of the foreign state and not to the immunity of the foreign state itself. App. A at 16-23.

The court of appeals remanded the case to the district court for further proceedings with instructions to, *inter alia*, dismiss the Republic of Hungary as a defendant. App. A at 26-27.

Judge Randolph concurred in part, but dissented from the panel majority’s holding that the expropriation exception does not defeat Hungary’s immunity in this case. App. A at 28-36. In Judge Randolph’s view, “the majority’s opinion transforms the governing jurisdictional statute to mean the opposite of what it says.” *Id.* at 28.

Petitioners filed a petition for rehearing and rehearing en banc. The court of appeals denied the petition. App. B. Judges Griffin and Kavanaugh voted to grant the petition for rehearing en banc. *Ibid.*

Reasons For Granting An Extension Of Time

The time to file a Petition for a Writ of Certiorari should be extended for fifty-nine days, to March 2, 2018, for several reasons:

1. The forthcoming petition is likely to be granted. As explained in Judge Randolph’s separate opinion (dissenting in relevant part), the panel majority’s construction of the FSIA’s expropriation exception “transforms” 28 U.S.C. § 1605(a)(3) “to mean the opposite of what it says” in a “distortion of the English language.” App. A at 28. The plain text of the expropriation exception provides that “[a] foreign state shall not be immune” in an expropriation case when the relevant property is owned or operated by “an agency or instrumentality of the foreign state

and that agency or instrumentality is engaged in a commercial activity in the United States.” 28 U.S.C. § 1605(a)(3) (emphasis added). The panel majority construed the phrase “[a] foreign state” to mean “*not* [a] foreign state.” The panel’s error is important and should be corrected by this Court because it undermines Congress’s intent that “foreign state[s]” be subject to this type of suit in the United States in these circumstances, and because it provides perverse incentives to foreign states who possess illegally expropriated property and wish to avoid liability in the United States. Because federal law designates the District Court for the District of Columbia as the default venue in which to bring an action against a foreign state, the D.C. Circuit’s holding has outsized significance. That decision also conflicts with decisions from the Ninth Circuit, which have maintained jurisdiction over a foreign state under the expropriation exception based on the U.S.-based commercial activities of a state agency or instrumentality. *See, e.g., Altmann v. Republic of Austria*, 317 F.3d 954, 968-969 (9th Cir. 2002), *aff’d on other grounds, Republic of Austria v. Altmann*, 514 U.S. 677 (2004). That circuit conflict warrants this Court’s review because the rules that govern the immunity of foreign states to suit in federal court should be uniform throughout the Nation.

2. Petitioners have only recently retained Supreme Court counsel for the filing of a petition for a writ of certiorari. Additional time is necessary and warranted for counsel to, among other things, review the record in the case, research case law in other circuits, and prepare a clear and concise petition for certiorari for the Court’s review.

3. No prejudice would arise from the extension. Whether the extension is granted or not, the petition will be considered during this Term – and, if the petition is granted, the case will be heard and decided in the Court’s next Term.

4. The press of other matters before this Court makes the submission of the petition difficult absent an extension. Petitioners' counsel is counsel or co-counsel in several other cases in which petitions or other filings are due in this Court in the next two months.

Conclusion

For the foregoing reasons, the time to file a Petition for a Writ of Certiorari in this matter should be extended for fifty-nine days to and including March 2, 2018.

Respectfully submitted,



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