No. 17-___

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, HUNGARIAN NATIONAL GALLERY, MUSEUM OF FINE ARTS, MUSEUM OF APPLIED ARTS, BUDAPEST UNIVERSITY OF TECHNOLOGY AND ECONOMICS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Foreign Sovereign Immunities Act provides that:

> A *foreign state* shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which rights in property taken in violation of international law are in issue and [i] 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* [ii] 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) (emphasis added). The question presented is:

Whether a foreign state itself is immune from suit in the United States in a case in which rights in property taken in violation of international law are in issue, the property is located outside the United States, the property is owned or operated by an agency or instrumentality of the foreign state, and that agency or instrumentality is engaged in commercial activity in the United States.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners David L. de Csepel, Angela Maria Herzog, and Julia Alice Herzog respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-39a) is reported at 859 F.3d 1094. An earlier opinion of the court of appeals is reported at 714 F.3d 591. The most recent opinion of the district court (Pet. App. 40a-89a) is reported at 169 F. Supp. 3d 143.

JURISDICTION

The judgment of the court of appeals was entered on June 20, 2017. Pet. App. 1a. The court of appeals denied petitioners' timely petition for rehearing and rehearing en banc on October 4, 2017. Pet. App. 90a-91a. On December 12, 2017, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including March 2, 2018. No. 17A629. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are reproduced at Pet. App. 92a-95a.

INTRODUCTION

In the Foreign Sovereign Immunities Act, Congress used unambiguous language to establish the criteria for subjecting "[a] foreign state" to the "jurisdiction of courts of the United States" "in any case" "in which rights in property taken in violation of

international law are in issue." 28 U.S.C. § 1605(a)(3). When such a claim exists and the property at issue is located outside the United States (as here), Congress declared that "[a] foreign state" is amenable to suit in the United States when "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." *Ibid.*

Defying common sense, the unambiguous statutory text, and ordinary English-language usage, the D.C. Circuit interpreted the statutory term "foreign state" to *exclude* a foreign state in those circumstances. That counter-textual holding cemented a direct circuit conflict that is unlikely to resolve itself or to deepen because the FSIA establishes the District of Columbia as the default venue for suing a foreign sovereign and erects barriers to suing a foreign sovereign elsewhere in expropriation cases. As long as that circuit conflict remains, the rules governing a foreign state's amenability to suit in the United States will vary among jurisdictions—perpetuating a lack of uniformity that is untenable in areas implicating foreign relations.

The question presented is important and recurring, potentially arising in any case in which an individual or U.S. business has a valid claim that a foreign sovereign illegally expropriated property and maintains that property outside the United States through an agency or instrumentality. The D.C. Circuit's decision creates a huge loophole in the FSIA by permitting foreign states to avoid liability by maintaining expropriated property with an agency or instrumentality and then simply reacquiring the subject property in

response to an adverse judgment against the agency or instrumentality. As explained in Judge Randolph's dissenting opinion—and as reflected in the votes of Judges Kavanaugh and Griffith to rehear this case en banc—the D.C. Circuit's decision is simply wrong. This Court's immediate intervention is warranted to restore the judicial-access rights Congress intended to bestow on victims of foreign expropriations.

STATEMENT OF THE CASE

This case involves a family's decades-long struggle to recover a valuable art collection that the World-War-II-era Hungarian government and its Nazi collaborators stole from them. Pet. App. 1a. The court of appeals held that Hungary is immune from this suit pursuant to the Foreign Sovereign Immunities Act of 1976 (FSIA or Act), 28 U.S.C. § 1602 *et seq.* *Id.* at 1a-29a.

1. The FSIA establishes "a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488 (1983). The Act sets out a general rule that a foreign state and its agencies and instrumentalities "shall be immune from the jurisdiction" of federal and state courts except as provided by certain international agreements and by the exceptions enumerated in the statute. 28 U.S.C. § 1604; *see id.* §§ 1605-1607. It also provides that federal district courts shall have jurisdiction over "any nonjury civil action against a foreign state as defined in [28 U.S.C. § 1603(a)] as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-

1607 of this title or under any applicable international agreement." *id.* § 1330(a).[1]

This case involves the FSIA's "expropriation exception" to immunity, which is set out in 28 U.S.C. § 1605(a)(3). That exception 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—
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> * * *
>
> (3) in which rights in property taken in violation of international law are in issue and [i] 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* [ii] 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) (emphasis added).

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[1] As relevant here, the FSIA provides that venue shall be proper in "[a] civil action against a foreign state" or against an agency or instrumentality of a foreign state "in the United States District Court for the District of Columbia if the action is brought against a foreign state" or "in any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state." 28 U.S.C. § 1391(f)(3)-(4). *See* pp. 19-23, *infra*.

2. a. 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." Pet. App. 2a (internal quotation marks omitted). 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, Adolf Hitler sent German troops into Hungary (a member of the Axis Powers), and SS Commander Adolph Eichmann established a headquarters in Budapest. Pet. App. 2a. 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. *Id.* at 2a-3a. 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 Hungarian government and their Nazi collaborators discovered the works and took the collection directly to Eichmann's headquarters. *Id.* at 3a. After Eichmann selected some of the best pieces for display near Gestapo headquarters and for eventual transport to Germany, the Hungarian government gave the remaining items in 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. Pet.

App. 4a. 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. *Ibid.* Herzog's son István Herzog narrowly escaped being sent to Auschwitz and was interned. *Ibid.* István later died in 1966, leaving a wife and two sons. *Ibid.* 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, the Hungarian National Gallery, the Museum of Applied Arts, and the Budapest University of Technology and Economics. *de Csepel v. Republic of Hungary*, 714 F.3d 591, 595 (D.C. Cir. 2013).

b. In July 2010, after decades of unsuccessful efforts to secure the return of the stolen works of art (including by filing suit in Hungary), petitioners filed this suit in the District Court for the District of Columbia. Pet. App. 4a-5a, 42a. Petitioners sued respondents the Republic of Hungary,[2] as well as the three museums and the university with possession of the property at issue, seeking the return of (or fair compensation for) 44 stolen works of art that remain in respondents' possession. *Id.* at 4a-5a. Petitioners alleged that respondents are not immune to suit because, *inter alia*, respondents expropriated petitioners' property in

[2] In 2012, the Republic of Hungary adopted a new constitution that, *inter alia*, changed the name of the country to Hungary. Magyarország Alaptörvénye, art. A ("The name of OUR COUNTRY shall be Hungary.").

violation of international law. *Id.* at 5a-6a. In particular, petitioners alleged in their complaint that Hungary held the works of art pursuant to various express or implied bailment contracts, that Hungary breached those contracts 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 5a. 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 and did not fall within any of the FSIA's exceptions to immunity for foreign states. Pet. App. 5a. 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. *Ibid.* 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 the commercial-activity exception in Section 1605(a)(2). *Ibid.* (internal quotation marks omitted).

c. On remand to the district court and after the close of discovery, Hungary renewed its motion to dismiss. Pet. App. 5a. The court agreed with Hungary that, based on the post-discovery record, petitioners had not satisfied Section 1605(a)(2)'s commercial-activity exception, but held that the expropriation exception in Section 1605(a)(3) applies and that no treaty

forecloses its application here. *Id.* at 5a-6a, 61a-89a. The court therefore denied Hungary's motion to dismiss, except as to two paintings that Hungary acquired from third parties after the conclusion of the War. *Id.* at 6a.

d. Hungary appealed again, seeking dismissal of the claims relating to the remaining 42 works of art. Pet. App. 6a. Hungary argued both that a 1947 treaty between Hungary and the Allied powers bars petitioners' claims and that the expropriation exception does not apply. *Ibid.* The court of appeals rejected Hungary's treaty argument, *id.* at 8a-10a, and sustained jurisdiction over the museums and the university (each an agency or instrumentality of Hungary), but two members of the panel agreed with Hungary that the expropriation exception does not apply to Hungary itself in this case, *id.* at 10a-23a.

The court of appeals first held that petitioners' claims satisfy the first requirement in the expropriation exception because they involve "rights in property taken in violation of international law," as required by Section 1605(a)(3), at least with respect to the works of art that were not returned to the family and then reacquired by Hungary. Pet. App. 11a-16a. Relying on circuit precedent, the court held that "Hungary's seizures of Jewish property during the Holocaust constituted genocide and were therefore takings in violation of international law." *Id.* at 11a (citing *Simon v. Republic of Hungary*, 812 F.3d 127, 142-146 (D.C. Cir. 2016)). The court further concluded that petitioners' claims "involve a tight legal, factual, and temporal connection to Hungary's expropriation of the [Herzog] collection," and that "Hungary's possession of the

Herzog collection stems directly from its expropriation of the collection during the Holocaust." *Id.* at 13a.

The court of appeals then considered whether petitioners' claims satisfy Section 1605(a)(3)'s commercial-activity nexus requirement. Pet. App. 16a-25a. Section 1605(a)(3) provides two alternative avenues to establish the requisite commercial activity. A foreign sovereign loses its immunity to a claim that property was expropriated in violation of international law if either (1) "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" (the "first clause") or (2) "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 "second clause"). 28 U.S.C. § 1605(a)(3); Pet. App. 17a. Only the second clause of the expropriation exception is at issue in this case because neither the stolen art works nor any property exchanged for those works are present in the United States.

On appeal, no party challenged the district court's holding that the second exception was satisfied with respect to at least some defendants because the museums and university (1) are agencies or instrumentalities of Hungary, (2) possess (and therefore "operate") the works at issue, and (3) engage in commercial activity in the United States. Pet. App. 17a. Hungary argued, however, that it should be dismissed as a defendant because, although satisfaction of the second commercial-activity requirement was sufficient to establish jurisdiction over the relevant agencies or

instrumentalities, it was not sufficient to establish jurisdiction over the foreign sovereign itself. *Ibid.* A majority of the court of appeals panel agreed, relying on an earlier D.C. Circuit decision holding that a claim against Hungary could be maintained under the expropriation exception only if the first clause of the commercial-activity nexus requirement were satisfied—and that the second clause of the nexus requirement could support jurisdiction only over an agency or instrumentality of a foreign state. *Id.* at 17a-18a (citing *Simon*, 812 F.3d at 146-148). The panel majority rejected petitioners' argument that the decision in *Simon* is not binding because an even earlier decision had held the opposite. *Id.* at 18a-22a (discussing *Simon* and *Agudas Chasidei Chabad of U.S. v. Russian Federation*, 528 F.3d 934 (D.C. Cir. 2008)).

In addition, the court explained that, "even were [the panel] not bound by *Simon*, [the panel majority] would hold that a foreign state retains its immunity unless the first clause of the commercial-activity nexus requirement is met." Pet. App. 22a. The court acknowledged that the text of the expropriation exception provides that "[*a*] *foreign state* shall not be immune" "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." 28 U.S.C. § 1605(a)(3) (emphasis added); *see* Pet. App. 22a-23a. But the panel majority relied on circuit precedent holding that "a foreign state loses its immunity under the commercial-activity exception [in 28 U.S.C. § 1605(a)(2)] only if the claim against the

state—as opposed to the agency or instrumentality—satisfies that exception"—and concluded that the result should be the same for the expropriation exception. Pet. App. 23a (citing *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 446 (D.C. Cir. 1990)). The court of appeals therefore ordered that Hungary be dismissed as a defendant. *Id.* at 29a.

e. Judge Randolph filed a separate opinion concurring in part, but dissenting from the panel's holding that Hungary is immune from petitioners' suit for two reasons. Pet. App. 30a-39a.

First, Judge Randolph disagreed with the panel's conclusion that it was bound by the decision in *Simon*. Pet. App. 30a, 35a-39a. He would have held that the panel was bound by the D.C. Circuit's earlier decision in *Chabad*, which (in Judge Randolph's view) held that Russia was not immune to suit pursuant to the expropriation exception based on the U.S.-based commercial activities of its agencies or instrumentalities. *Id.* at 35a-39a.

Second, Judge Randolph disagreed with the majority's rationale for the result it felt bound to follow. Pet. App. 31a-35a. Relying first on the text of Section 1605(a)(3), Judge Randolph explained:

> Hungary's immunity thus should have depended on three easily-answered questions: Is the Republic of Hungary a "foreign state"? Of course it is. Are "rights in property taken in violation of international law" "in issue"? The answer is clearly yes. And is "that property" "owned or operated by an agency or instrumentality of the foreign state . . . engaged

> in a commercial activity in the United States"? Once again—yes.

Id. at 31a-32a (alteration in original) (internal citations omitted). "Although § 1605(a)(3) provides that a foreign state shall *not* be immune from suit" when those criteria are satisfied, he went on, "the majority crosses out the 'not' and holds that the foreign state shall be immune when its agencies or instrumentalities owning or operating the expropriated property engage in commercial activity in the United States." *Id.* at 32a. Judge Randolph rejected the majority's reliance on other provisions of the FSIA and other circuit precedent, concluding that none of those sources suggests "that the term 'foreign state' in § 1605(a)(3) somehow does not include a 'foreign state.'" *Id.* at 33a; *see id.* at 32a-33a.

f. On October 4, 2017, the court of appeals denied petitioners' timely petition for rehearing and rehearing en banc. Pet. App. 90a-91a. Judges Kavanaugh and Griffith voted to grant the petition for rehearing en banc. *Id.* at 91a.

REASONS FOR GRANTING THE WRIT

The courts of appeals are divided about an important and recurring question of foreign sovereign immunity. Such questions implicate foreign relations concerns and should be uniform throughout the Nation. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n.25 (1964) (emphasizing the importance of "uniformity in this country's dealings with foreign nations"). But the D.C. Circuit's decision, if permitted to stand, means that a plaintiff with a valid claim that a foreign sovereign illegally expropriated property that remains outside the United States

cannot bring suit against the foreign state unless the property is owned or operated by an agency or instrumentality of the foreign state and the agency or instrumentality is engaged in commercial activity *in the Ninth Circuit*, which has reached the opposite conclusion as the court below. That situation is untenable from a foreign-relations perspective.

This Court's immediate intervention to resolve the circuit conflict is warranted because the circuit split is unlikely to deepen. The FSIA provides that the District of Columbia is the appropriate venue in all suits against a foreign state—and the only venue in most cases alleging that a foreign state expropriated property in violation of international law. As a consequence, the erroneous decision below will have an outsized effect on this important category of claims against foreign sovereigns and will deprive expropriation victims of the U.S. judicial forum that Congress intended to make available when the expropriated property remains outside the United States.

This Court should grant the Petition to reverse the D.C. Circuit's counter-textual conclusion that the term "foreign state" in the FSIA's expropriation exception does not include a foreign state. If permitted to stand, that erroneous decision will have devastating consequences for U.S. citizens and businesses with expropriation claims against a foreign sovereign. Even when a claimant can obtain a judgment against a foreign state from an international tribunal—or against an agency or instrumentality from a U.S. court—such a judgment will have little value if a claimant cannot *enforce* it against the foreign state that expropriated the property in question. Congress gave such claimants the right to seek relief in a U.S. court when they

meet the statutory criteria in the FSIA. The D.C. Circuit erred when it ignored the plain text of the statute and took that right away.

I. The Courts Of Appeals Are Divided Over An Important Question Of Foreign Sovereign Immunity.

Congress enacted the FSIA to address the "urgent[]" need for "firm standards as to when a foreign state may validly assert the defense of sovereign immunity." H.R. Rep. No. 94-1487, at 7 (1976) (1976 House Report). Those firm standards have been considerably eroded with respect to expropriation claims because the courts of appeals are directly divided over the question presented. Although the circuit split is confined to a few circuits, this Court's immediate intervention is warranted because the FSIA's venue provision gives the decision below outsized importance and renders it unlikely that other courts of appeals will have occasion to weigh in on this important and recurring question. National uniformity is particularly important in the application of rules governing foreign sovereigns' immunity to suit because of the delicate foreign-policy implications of that area of law. *See, e.g.*, *The Federalist No. 44*, at 299 (James Madison) (Jacob E. Cooke ed., 1961) (emphasizing "the advantage of uniformity in all points which relate to foreign powers"); *id. No. 42*, at 279 (James Madison) ("If we are to be one nation in any respect, it clearly ought to be in respect to other nations.").

A. 1. The decision below directly conflicts with decisions of the Ninth Circuit. In *Altmann v. Republic of Austria*, the Ninth Circuit considered an immunity claim asserted by the Republic of Austria and the state-owned Austrian Gallery. 317 F.3d 954, 958 (9th

Cir. 2002), *amended on denial of reh'g*, 327 F.3d 1246 (9th Cir. 2003), *aff'd*, 541 U.S. 677 (2004). The plaintiff in that case was the heir of a Czech Jew whose valuable Gustav Klimt paintings were expropriated by the Nazi-collaborating Austrian government as part of the World War II campaign of terror against Jews in Nazi-occupied territories. *Id.* at 959-961. The plaintiff filed suit in federal court in California seeking the return of the paintings, and the defendants filed a motion to dismiss arguing, *inter alia*, that they were immune from suit under the FSIA. *Id.* at 958, 961. The district court denied the motion, and the Ninth Circuit affirmed. *Id.* at 962, 974.[3]

As relevant here, the Republic of Austria asserted immunity under precisely the same theory the D.C. Circuit embraced in the instant case and in functionally identical circumstances. The plaintiff in *Altmann* argued that the defendants were not immune under the FSIA because the plaintiff asserted "rights in property taken in violation of international law." 28 U.S.C. § 1605(a)(3); 317 F.3d at 967-968. The property at issue in *Altmann* was located outside the United States and was "owned or operated by an agency or instrumentality of the foreign state" that was alleged to have expropriated the property in violation of international law. 317 F.3d at 968-969. And the plaintiff in *Altmann* sued both the foreign state and the agency or instrumentality, relying on the second commercial-activity nexus requirement in Section 1605(a)(3) that

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[3] This Court granted a petition for a writ of certiorari, limited to the question whether the FSIA applies retroactively, and affirmed the Ninth Circuit's conclusion that it does. 541 U.S. at 681, 692-702.

applies when the illegally expropriated 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); 317 F.3d at 968-969. *Unlike* in this case, however, the Ninth Circuit affirmed that the foreign state was not immune under the expropriation exception (and that the federal courts therefore had jurisdiction over the claims against Austria) based on the museum's commercial contacts with the United States. 317 F.3d at 968-969; *id.* at 974 (upholding application of the FSIA's expropriation exception to "the Republic of Austria and the national Austrian Gallery").

The precedential decision in *Altmann* directly conflicts with the decision below. The district court had expressly rejected the Republic of Austria's contention that the court could not assert jurisdiction over it based on the Gallery's commercial activity because a court in the United States "may exercise jurisdiction over a foreign sovereign under only the first clause of the expropriation exception, which requires that the property be present in the United States." *Altmann v. Republic of Austria*, 142 F. Supp. 2d 1187, 1205 (C.D. Cal. 2001) (explaining that the foreign state's view of the expropriation exception "ignores the language of § 1605(a)"). On appeal, the Republic of Austria repeated its argument that "the second disjunctive of section 1605(a)(3) does not provide a basis for jurisdiction over the Republic." Appellants' Opening Br., 2001 WL 34092857, at *39; *id.* at *41 ("To assert jurisdiction against the Republic under the FSIA, [the plaintiff] must satisfy the requirements of the *first* disjunctive of section 1605(a)(3), which she cannot."). The Ninth

Circuit nevertheless affirmed the district court's exercise of jurisdiction over the Republic of Austria under the expropriation exception based on the commercial activity of the Gallery alone. *Altmann*, 317 F.3d at 962-969.

More recently, the en banc Ninth Circuit relied on the decision in *Altmann* when subjecting Spain to suit under the expropriation exception in Section 1605(a)(3) based only on the commercial activity of a foundation that is an agency or instrumentality of Spain. *Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1032-1034 (9th Cir. 2010), *cert. denied*, 564 U.S. 1037 (2011). The en banc court stated quite plainly that, because the property at issue was not present in the United States, only the "second clause" (requiring commercial activity by the agency or instrumentality that owns or operates the property) was "applicable." *Id.* at 1033 n.19. After concluding that the commercial activity of the foundation was sufficient to satisfy the second clause, the court held that, because "the statutory criteria" in Section 1605(a)(3) "are met, the expropriation exception applies to Spain." *Id.* at 1037. That decision is consistent with the Ninth Circuit's earlier decision in *Siderman de Blake v. Republic of Argentina*, which held that the district court may have jurisdiction over the Republic of Argentina under Section 1605(a)(3) based on the U.S.-based commercial activities of an agency or instrumentality of the state, and remanded for development of the factual issues necessary to such a determination. 965 F.2d 699, 711-713 (9th Cir. 1992), *cert. denied*, 507 U.S. 1017 (1993).

2. Before the decision below in this case (and setting aside the arguably conflicting D.C. Circuit decisions in *Agudas Chasidei Chabad of United States v.*

Russian Federation, 528 F.3d 934 (D.C. Cir. 2008) and *Simon v. Republic of Hungary*, 812 F.3d 127 (D.C. Cir. 2016)), only the Second Circuit had opined on the question presented. In *Garb v. Republic of Poland*, that court held that the plaintiffs could not maintain their suit against the Republic of Poland under the expropriation exception because the property at issue was not located in the United States (making the first commercial-activity nexus inapplicable) and because the entity alleged to own or operate the property was not in fact an agency or instrumentality of Poland (making the second commercial-activity nexus inapplicable). 440 F.3d 579, 589-598 (2d Cir. 2006). In so holding, the court suggested that the second clause would provide jurisdiction over only an agency or instrumentality of a foreign state, not the foreign state itself. *See id.* at 589-590. Because that suggestion was not necessary to the holding of the case (due to the absence of an agency or instrumentality defendant), at least one court has viewed it as *dictum*, *Freund v. Republic of France*, 592 F. Supp. 2d 540, 561 n.10 (S.D.N.Y. 2008), *aff'd sub nom. Freund v. Société Nationale des Chemins de Fer Français*, 391 Fed. Appx. 939 (2d Cir. 2010), and the Second Circuit appears to view the question presented as open, *see Arch Trading Corp. v. Republic of Ecuador*, 839 F.3d 193, 205-206 (2d Cir. 2016).

3. Significantly, the circuit conflict is well recognized by experts in foreign relations law. In a recent iteration of the Restatement of Foreign Relations Law, the reporters acknowledged a division of authority on the question presented, noting the conflict between Ninth Circuit caselaw and the Second Circuit's decision in *Garb*. Restatement (Fourth) of Foreign

Relations Law: Sovereign Immunity § 455 reporters' note 6 (Tentative Draft No. 2, 2016). In particular, the Restatement notes that "[s]ome courts have allowed actions under the second 'prong' of [the expropriation] exception to be brought against the foreign state in question rather than the agency or instrumentality" while "[o]thers have disagreed." *Ibid.* A panel of the Second Circuit has also recognized that the Ninth Circuit's decision in *Cassirer* conflicts with district court decisions adhering to the *dictum* in *Garb*. *Arch Trading Corp.*, 839 F.3d at 206.

B. This Court's immediate intervention is warranted, moreover, because the established circuit conflict is unlikely to deepen. The FSIA's venue provision creates a strong presumption that suits against a foreign sovereign will be filed in the United States District Court for the District of Columbia—and raises significant obstacles to suing a foreign state in any other jurisdiction. 28 U.S.C. § 1391(f). Particularly in the context at issue here—where neither the events nor property giving rise to the claims were or are situated in the United States, the D.C. district court will often be the only U.S. jurisdiction in which a foreign state is amenable to suit. That limitation gives the D.C. Circuit's opinion outsized importance in comparison to the views of other courts of appeals. For that reason, awaiting further percolation is unlikely to result in further development of the important legal issues at stake and would serve only to leave in place an erroneous interpretation of the FSIA that is inconsistent with the statute's plain text—and consequently to deprive U.S. citizens of their statutory right to seek redress against foreign states in U.S. courts.

The FSIA's venue provision, 28 U.S.C. § 1391(f), establishes four means of showing proper venue in which to bring "[a] civil action against a foreign state as defined in" 28 U.S.C. § 1603(a), three of which are potentially relevant in a non-admiralty expropriation case like this. *See id.* § 1391(f). Section 1391(f)(4) provides that a suit may be filed "in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof." *Id.* § 1391(f)(4). Under that provision, the D.C. district court is *always* a proper venue for suits against a foreign sovereign. When enacting the FSIA, Congress explained that it established the D.C. district court as the default venue in which to file suit against a foreign state because "[i]t is in the District of Columbia that foreign states have diplomatic representatives and where it may be easiest for them to defend." 1976 House Report 32. That decision makes sense—but it means that the D.C. Circuit's view of when or whether a foreign sovereign is immune to suit under the FSIA will govern nearly all civil suits against a foreign state.

An examination of the two remaining venue options strongly suggests that the D.C. district court will quite often be the *only* place in which a plaintiff can assert an expropriation claim against a foreign sovereign, at least when the property at issue is located outside the United States. Section 1391(f)(1) provides that a suit against a foreign state, as defined in the FSIA, "may be brought . . . in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated." 28 U.S.C. § 1391(f)(1). That provision could apply to a

claim that property was illegally expropriated outside the United States, but only if a plaintiff can rely on the first commercial-activity nexus in Section 1605(a)(3) by establishing that the expropriated property (or a substantial portion of it) is located in the United States. That provision therefore *cannot* apply in situations in which the question presented here arises—because the question arises only when a plaintiff cannot rely on that commercial-activity nexus.

That leaves Section 1391(f)(3), which provides that a suit against a foreign state "may be brought . . . in any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state as defined in" 28 U.S.C. § 1603(b). 28 U.S.C. § 1391(f)(3). That provision may apply in *some* expropriation cases in which a plaintiff relies on the U.S.-based commercial activity of an agency or instrumentality that owns or operates the property at issue—but it will *not* apply in many such cases because the standard for establishing that an agency or instrumentality is "engaged in a commercial activity in the United States" under Section 1605(a)(3) is materially easier to satisfy than the standard for establishing that an agency or instrumentality "is licensed to do business or is doing business" in a jurisdiction under Section 1391(f)(3).

The FSIA defines the term "commercial activity" to "mean[] either a regular course of commercial conduct or *a particular commercial transaction or act*." 28 U.S.C. § 1603(d) (emphasis added). A plaintiff can therefore establish that an agency or instrumentality of a foreign state that owns or operates illegally expropriated property is engaged in a commercial activity in

the United States for purposes of Section 1605(a)(3)'s expropriation exception by identifying a *single* commercial transaction or act in the United States. *See* 1976 House Report 16 ("[A] single contract, if of the same character as a contract which might be made by a private person, could constitute a 'particular transaction or act.'"). But such a showing would likely not be sufficient to establish that venue is proper in the jurisdiction where that single commercial transaction occurred. The venue provision requires a higher showing—*i.e.*, that the agency or instrumentality is "licensed to do business or is doing business" in the judicial district where suit is brought. 28 U.S.C. 1391(f)(3). Congress explained that Section 1391(f)(3) was "based on 28 U.S.C. 1391(c)," 1976 House Report 32, which at the time provided that "[a] corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business." 28 U.S.C. § 1391(c) (1976). Courts generally agreed that, under that standard, "[m]ore than a single or casual transaction was required before [a] corporation was regarded as doing business in [a] district for federal venue purposes." 14D Charles Alan Wright & Arthur R. Miller et al., *Federal Practice and Procedure* § 3811 (4th ed.).[4] Although some agencies or

[4] In *Altmann*, the Ninth Circuit noted that the district court had held that Section 1391(f)(3)'s "doing business" standard is coextensive with Section 1605(a)(3)'s "engaged in a commercial activity" standard. 317 F.3d at 971-972. Although the Ninth Circuit affirmed the holding that venue was proper in the Central District of California, it neither endorsed nor rejected the district court's legal standard; instead, the court simply stated that the Austrian Gallery's multiple commercial activities in the district were sufficient to establish that it was doing business there. *Ibid.*

instrumentalities of a foreign state engage in sufficient commercial activity in a non-D.C. jurisdiction to qualify as "doing business" there, many do not—and when they do not, D.C. is the only venue in which a plaintiff may sue to redeem rights in illegally expropriated property.

In sum, the D.C. Circuit's erroneous and countertextual view of Section 1605(a)(3)'s application to a foreign sovereign both conflicts with the Ninth Circuit's view and will govern the lion's share of suits raising that question throughout the country. Because the circuit split on this important question is unlikely to deepen—and because the lack of uniformity among the circuits is untenable from a foreign-relations perspective—this Court's immediate intervention is warranted.

II. The Question Presented Is Important And Recurring.

The question presented is vitally important to the untold number of individuals and corporations whose property has been (and will be) expropriated by a foreign state in violation of international law. In such cases, U.S. courts are often the only forum in which a U.S. victim can seek justice and obtain restitution of the property or other compensation. The FSIA neither creates a cause of action against a foreign state nor declares an expropriation to be illegal when it otherwise would not be. But the FSIA is designed to ensure that, when a victim has a valid claim that a foreign state expropriated property in violation of international law, the victim has a forum in which to pursue a claim, at least when the foreign state has vested operational control over the expropriated property in an agency or

instrumentality that engages in commercial activity in the United States.

A. As illustrated by this case, the question presented is crucial to victims of the Holocaust and their heirs. The horrors of the Nazi regime are well understood and continue to have very real consequences. Those horrors were visited on Hungarian Jews with particular vengeance. "Nowhere was the Holocaust executed with such speed and ferocity as it was in Hungary" where, "[w]ithin a period of three months in 1944, nearly half a million Hungarian Jews were murdered." *Simon*, 812 F.3d at 133 (internal quotation marks omitted). An important aspect of the Nazis' campaign of terror—inside Hungary and throughout Nazi-occupied territory—was the systematic confiscation and looting of property owned by Jews. *Id.* at 133-134; Pet. App. 2a-3a. Although the Allies attempted after World War II to restore looted property to surviving Jews and their heirs, petitioners' experience illustrates that such efforts fell far short and that victims had little success in seeking redress in or from the countries that expropriated their property. As a result, suits seeking redress for Nazi-era expropriations continue to arise with surprising frequency even seven decades later. *See, e.g.*, *Simon*, 812 F.3d 127; *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661 (7th Cir. 2012); *Cassirer*, 616 F.3d 1019; *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954 (9th Cir. 2010); *Chabad*, 528 F.3d 934; *Whiteman v. Dorotheum GmbH & Co. KG*, 431 F.3d 57 (2d Cir. 2005); *Garb*, 440 F.3d 579; *Altmann*, 317 F.3d 954; *Philipp v. Federal Republic of Germany*, 248 F. Supp. 3d 59 (D.D.C. 2017); *Hammerstein v. Federal Republic of Germany*,

2011 WL 9975796 (E.D.N.Y. Aug. 1, 2011); *Freund*, 592 F. Supp. 2d 540.

Nor is there anything to suggest that Holocaust-era expropriation claims will soon fade away. To the contrary, decades of significant obstacles to resolving such claims have ensured that the opposite is true. It is no surprise, then, that "[s]ince World War II ended, the United States has pursued policies to help restore artwork and other cultural property lost in the Holocaust to its rightful owners." S. Rep. No. 114-394, at 2 (2016). Particularly in recent years, the U.S. Congress and State Department have engaged in repeated efforts to facilitate the resolution of such claims. To that end, the United States has participated in multiple international conferences to address remaining obstacles to restoration of looted property—including legal rules that prevent resolution of such claims on the facts and merits rather than on legal technicalities. *Id.* at 3-4. In pursuit of those goals, Congress has enacted multiple laws intended to remove remaining obstacles to the just resolution of those claims. *See, e.g.*, Foreign Cultural Exchange Jurisdictional Immunity Clarification Act, Pub. L. No. 114-319, 130 Stat. 1618 (2016); Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, 130 Stat. 1524; U.S. Holocaust Assets Commission Act of 1998, Pub. L. No. 105-186, 112 Stat. 611; Holocaust Victims Redress Act, Pub. L. No. 105-158, 112 Stat. 15 (1998). In light of Congress's and the State Department's active and recent efforts to facilitate Holocaust-era expropriation claims, the question presented will continue to arise with some frequency. The D.C. Circuit's counter-textual reading of the FSIA's expropriation exception significantly undermines those efforts by granting

immunity to Nazi-collaborating sovereigns who expropriated property in violation of international law, refuse even now to restore that property to its rightful owners, and know enough to keep the looted property out of the United States.

B. Although this case highlights the importance of the question presented to Holocaust survivors and their heirs, the issue is also important to U.S. businesses that have property or otherwise do business abroad. When a foreign state expropriates the property of a U.S. business in a manner that violates international law (by, *e.g.*, doing so for discriminatory reasons or failing to provide just compensation), the business should be able to pursue relief in a U.S. court to the full extent intended by Congress.

Stretching back to Cuba's large-scale expropriation of U.S.-owned assets 60 years ago and beyond, *see First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 614 (1983), history is replete with examples of foreign governments' profiting through illegal expropriation of property held by U.S. companies. More recent examples confirm that the risk of foreign expropriation is not a thing of the past: the World Bank recently found that Venezuela owes more than $180 million to ExxonMobil Corp. for expropriation of certain ExxonMobil property, *see Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela*, 863 F.3d 96, 108-111 (2d Cir. 2017), and concluded that Ecuador owes $380 million to U.S.-based ConocoPhillips for unlawfully expropriating the company's oil assets, *see* Int'l Centre for Settlement of Inv. Disputes, *Burlington Res. Inc. v. Republic of Ecuador*, Decision on Reconsideration Award, ICSID Case No. ARB/08/5 (Feb. 7, 2017),

http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C300/DC9892_En.pdf. Because U.S. companies rarely, if ever, find effective recourse in foreign tribunals for expropriation claims, it is vital that they are able to seek redress in U.S. courts to the full extent Congress intended—and that they are able to use U.S. courts to enforce favorable awards obtained in international tribunals. Even when a U.S. company can obtain a judgment from a U.S. court against a foreign agency that has operational control over its assets, the D.C. Circuit's ruling establishes significant roadblocks to executing such a judgment. Because the judgment would run against the agency of the foreign state rather than the state itself (even when as here, the state *owns* the property at issue), it would have little practical effect if the agency were judgment-proof or ceased to exist post-judgment. And it would not be difficult for a foreign state seeking to avoid liability to set up a judgment-proof agency or to dissolve an agency with a judgment against it and reacquire the disputed property.

Moreover, this case perfectly illustrates that the D.C. Circuit's decision will be a practical barrier to the resolution of expropriation claims—even when the property is maintained by an agency or instrumentality that engages in commercial activity in the United States. As a result of the court of appeals' countertextual interpretation of the FSIA, that court ordered the district court to dismiss Hungary as a defendant on remand—even though Hungary illegally expropriated and currently owns the property at issue. In the district court, the remaining defendant museums and university now argue that the case cannot proceed at all without Hungary because Hungary (as perpetrator

of the illegal acts and owner of the expropriated property) is a necessary party under Federal Rule of Civil Procedure 19. Dist. Ct. Doc. 148, at 22-29 (Feb. 9, 2018). Those defendants contend that petitioners' claims cannot be resolved unless Hungary is a party. *Ibid.* Congress could not have intended simultaneously to abrogate foreign states' immunity to expropriation suits and to create a giant loophole that could prevent adjudication of such claims.

The stakes of the question presented are high. As explained in Part III, *infra*, Congress has plainly expressed its intent that "[a] foreign state" that has expropriated property in violation of international law (whether as part of a genocide or otherwise) should be subject to suit in the United States when it has vested operational control over that property in an agency or instrumentality that engages in commercial activity in the United States. 28 U.S.C. § 1605(a)(3). The D.C. Circuit's erroneous decision holding to the contrary, if allowed to stand, will have far-reaching consequences for individual and business victims of illegal expropriations by foreign sovereigns. This Court's immediate intervention is therefore warranted.

III. The Decision Below Is Incorrect.

Review of the question presented is warranted in this case because the court of appeals' decision is incorrect and, absent this Court's intervention, will effectively eliminate jurisdiction of U.S. courts over nearly all expropriation claims against foreign sovereigns. Such a result is inconsistent with the statute and should be overruled.

The question presented is a question of statutory interpretation—and its answer must therefore be

rooted in the text of the FSIA. That text is unambiguous: it provides that "[a] *foreign state* shall not be immune from the jurisdiction of courts of the United States or the 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." 28 U.S.C. § 1605(a)(3) (emphasis added). In other words, it provides that a foreign entity lacks immunity when (1) it is a foreign state, (2) rights in property taken in violation of international law are in issue, and (3) the relevant property is owned or operated by an agency or instrumentality of the foreign state that is engaged in commercial activity in the United States. The D.C. Circuit correctly held that each of those three conditions was satisfied. Pet. App. 11a-17a. That should have been the end of the matter—under the plain text of the statute, when those conditions are satisfied, the "foreign state shall not be immune from the jurisdiction of courts of the United States." 28 U.S.C. § 1605(a)(3). Instead, the court of appeals held that the "foreign state" *is* immune from suit. That conclusion has no basis in the statutory text, congressional purpose, or common sense.

Congress was clear when it drafted Section 1605: a "foreign state" is not immune to a claim that property was expropriated in violation of international law when "an agency or instrumentality of the foreign state" satisfies the commercial-activity nexus. 28 U.S.C. § 1605(a)(3). Rather than giving the operative terms their ordinary—or statutory—meaning, the

panel majority concluded that the term "foreign state" does not include *the foreign state* when a plaintiff relies on the commercial activity of its agency or instrumentality to establish jurisdiction under the expropriation exception. But the FSIA defines the term "foreign state" to include *both* the foreign state *and* its agencies and instrumentalities. 28 U.S.C. § 1603(a). Nothing in Section 1605(a)(3) purports to give the term "foreign state" a more restrictive meaning (that, ironically, excludes the foreign state) for purposes of the expropriation exception's second commercial-activity nexus requirement only. To the contrary, the natural reading of the text is that neither the foreign state nor its agency or instrumentality is immune from suit when the second commercial-activity nexus requirement is satisfied.

In reaching the opposite conclusion, the D.C. Circuit noted that two *other* provisions of the FSIA "carefully distinguish[] foreign states from their agencies and instrumentalities" when establishing rules governing available remedies and procedures for property execution. Pet. App. 22a-23a (citing 28 U.S.C. §§ 1606, 1610).[5] Neither of those provisions governs whether a foreign state is immune from suit—and neither requires a court to read the term "foreign state" to exclude a foreign state. Section 1606 uses the phrase "a foreign state *except for* an agency or instrumentality thereof" when specifying that a foreign state shall not

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[5] The panel majority also noted that the FSIA's definition provision distinguishes between a foreign state and its agencies or instrumentalities. Pet. App. 22a-23a (citing 28 U.S.C. § 1603(a)-(b)). That reference is puzzling because that section defines "foreign state" to "*include*[] . . . an agency or instrumentality of a foreign state." 28 U.S.C. § 1603(a) (emphasis added).

be subject to punitive damages. 28 U.S.C. § 1606 (emphasis added). It is true that that language indicates a departure from the statutory definition of "foreign state"—but a departure that unambiguously excludes the agency or instrumentality from the definition, not the foreign state itself. Section 1610 also does not support the panel majority's view. That provision establishes additional means of attaching property in aid of execution when that property belongs to "an agency or instrumentality of a foreign state engaged in commercial activity in the United States," 28 U.S.C. § 1610(b)—but it does not require a court to construe the term "foreign state" to exclude a foreign state.

Finally, the panel majority's conclusion makes little sense. By enacting the expropriation exception in Section 1605(a)(3), Congress plainly intended to provide U.S. citizens with a judicial forum in which to pursue claims that a foreign sovereign illegally expropriated the citizen's property. But under the D.C. Circuit's erroneous interpretation of the expropriation exception, a foreign state could retain its immunity to suit merely by refraining from bringing the expropriated property (or any property exchanged for the expropriated property) to the United States in connection with a commercial activity. The panel majority's interpretation thus renders toothless a provision that purports to remove a foreign state's immunity—based on a contorted view of the term "foreign state" that excludes foreign states. Congress could not have intended that bizarre result.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

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