No. 17-1165

# In the Supreme Court of the United States

DAVID L. DE CSEPEL, *et al.*,
*Petitioners*,

v.

REPUBLIC OF HUNGARY, *et al.*,
*Respondents*.

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

## BRIEF IN OPPOSITION


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## PARTIES TO THE PROCEEDING

Petitioners are David L. de Csepel, Angela Maria Herzog, and Julia Alice Herzog. Petitioner de Csepel is a United States citizen who resides in Los Angeles, California. Petitioners Angela and Julia Herzog are Italian citizens who reside in Rome, Italy.

Respondents are the Republic of Hungary ("Hungary"), the Hungarian National Gallery, the Museum of Fine Arts, the Museum of Applied Arts, and the Budapest University of Technology and Economics. Hungary is a foreign sovereign. The Hungarian National Gallery, the Museum of Fine Arts, the Museum of Applied Arts, and the Budapest University of Technology and Economics are agencies or instrumentalities of Hungary.

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## INTRODUCTION

The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602 *et seq*. ("FSIA") "provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country." *Argentine Republic v. Amerada Hess Shipping Corp*., 488 U.S. 428, 443 (1989). Under the FSIA, a foreign state is presumptively immune from the jurisdiction of United States courts; unless a specified exception applies, a federal court lacks subject-matter jurisdiction over a claim against a foreign state. 28 U.S.C. §§ 1604-1605(a); *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488-489 (1983).

The FSIA defines a "foreign state" to include "a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b)." 28 U.S.C. § 1603(a). "Agency or instrumentality," is defined separately in Section 1603(b) as a juridically distinct entity which: (1) is a "separate legal person, corporate or otherwise," (2) is "an organ of a foreign state or political subdivision thereof," and (3) is "neither a citizen of a State of the United States * * * nor created under the laws of any third country." 28 U.S.C. § 1603(b)(1)-(3). The FSIA, its legislative history, and interpretative case law recognize that foreign sovereigns are presumed to be separate from their agencies or instrumentalities. These sources also recognize that foreign sovereigns are entitled to greater protections than their mere agencies and instrumentalities.

Relevant here, the FSIA's expropriation exception permits a court to strip a "foreign state" of its presumptive immunity only if "rights in property taken

in violation of international law are in issue," and if the exception's commercial-activity nexus requirement is satisfied. 28 U.S.C. § 1605(a)(3). To satisfy this requirement, a claimant must demonstrate:

> [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; 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.

*Id.* Lower courts recognize that where the claimed property is not located in the United States, the first clause cannot apply to strip a foreign sovereign of its presumptive sovereign immunity. *See, e.g., Garb v. Republic of Poland*, 440 F.3d 579, 588-589 (2d Cir. 2006). In this case, after a thorough analysis and in accord with circuit precedent, the court of appeals held that the second clause cannot apply to strip a foreign sovereign of its sovereign immunity where the first clause is not satisfied. Pet. App. 16a-25a.

Petitioners assert that if the second clause applies to allow a court to strip an agency or instrumentality of its sovereign immunity, the foreign sovereign's presumptive immunity can be stripped as well, even though the first clause has not been satisfied. Petitioners' faulty interpretation – which has not been adopted by any court of appeals – was rejected by the court below, having been rejected previously by the Second Circuit and the United States. It was rejected because it would require a court to disregard the clear

presumption of separation between sovereigns and their agencies or instrumentalities, would discount the greater protections afforded to foreign sovereigns, and would ignore the distinct clauses of the commercial-activity nexus requirement, as written by Congress.

There is no circuit split. Rather, the majority's holding aligns with interpretations from other courts and with the official position of the United States. As such, review by this Court is not warranted. Further, because the district court's ruling on a fully briefed and currently under-submission motion to dismiss could render a decision by this Court merely advisory, this case is a poor vehicle by which to address the question presented.

## STATEMENT OF THE CASE

1. This case involves adverse-ownership claims to artworks, once attributed to the collection of Baron Mór Lipót Herzog, that have been in Respondents' possession and on public display in Budapest for approximately fifty to seventy years. Following the death of Baron Herzog (in 1934) and his wife (in 1940), the Herzog collection was divided among their three children: Erzsébet (Herzog) Weiss de Csepel, István Herzog, and András Herzog. Pet. App. 2a.

During World War II, in response to widespread looting of Jewish property, the Herzogs "attempted to save their art works from damage and confiscation by hiding the bulk of [them] in the cellar of one of the family's factories." *Id.* at 3a. In March 1944, Germany invaded Hungary. *Id.* at 2a. Shortly thereafter, "the Hungarian government and their Nazi[ ] collaborators

discovered the hiding place" and confiscated the artworks. *Id.* at 3a.

Some artworks were "taken directly to Adolf Eichmann's headquarters at the Majestic Hotel in Budapest for his inspection," for display near Gestapo headquarters and for eventual transport to Germany. *Ibid.* "The remainder was handed over by the Hungarian government to the Museum of Fine Arts for safekeeping." *Ibid.*

Erzsébet Weiss de Csepel fled Hungary with her children, eventually settling in the United States, where she became a U.S. citizen in 1952. *Id.* at 4a. István Herzog, who had remained in Hungary, died in 1966. *Ibid*. András Herzog died on the Eastern Front in 1943. *Ibid.* His daughters, Angela and Julia Herzog, fled to Argentina and eventually settled in Italy. *Ibid*.

In the years between the end of World War II and the start of Communist rule (1946-1948), the post-war coalition government in Hungary made efforts to return property confiscated during the Holocaust to its rightful owners. *Id.* at 44a. In 1948, a one-party Communist dictatorship came to power, beginning a period during which Hungary did not recognize individual property rights. *Ibid.* After the fall of Communism in 1989, Erzsébet Weiss de Csepel obtained from Hungary several artworks that once belonged to the Herzog Collection. *de Csepel v. Republic of Hungary*, 714 F.3d 591, 595 (D.C. Cir. 2013). Following Ms. Weiss de Csepel's death in 1992, her daughter, Martha Nierenberg, negotiated with the Hungarian government for the return of other artworks. *Ibid*.

In 1999, Ms. Nierenberg filed suit in Hungary. Pet. App. 49a. Shortly after that litigation began, one artwork was returned to her. *Ibid*. To ensure that the interests of all three Herzog heirs were properly represented, the heirs of András and István Herzog were brought into the lawsuit as co-defendants. *Ibid*. "The Budapest Metropolitan Court initially found in Martha Nierenberg's favor, ordering that all but one of the artworks be returned to her." *de Csepel*, 714 F.3d at 596. After several appeals and many more years of litigation, the Metropolitan Appellate Court dismissed the action in 2008, rejecting Ms. Nierenberg's claims under several different theories, including that: (1) a 1973 bilateral agreement between Hungary and the United States extinguished Ms. Nierenberg's claims, and (2) Hungary was the lawful owner of certain artworks under Hungarian law. *Ibid*.

2. In 2010, Petitioners David L. de Csepel (grandson of Ms. Weiss de Csepel and nephew of Martha Nierenberg) and Angela and Julia Herzog filed a complaint, seeking the release of forty-four artworks. Dist. Ct. Dkt. 1. The complaint named Respondents Hungary, three museums, and one university as defendants. *Ibid.* Respondents moved to dismiss the complaint, asserting that no FSIA exception applied to strip them of their presumptive sovereign immunity. Dist. Ct. Dkt. 15. The district court granted in part and denied in part Respondents' motion. *de Csepel v. Republic of Hungary*, 808 F. Supp. 2d 113 (D.D.C. 2011). The district court found that the complaint alleged "substantial and non-frivolous" claims of a taking in violation of international law. *Id.* at 130. The court also recognized that international-comity applied to claims litigated previously in Hungary,

dismissing claims to the eleven artworks litigated by Martha Nierenberg. *See id.* at 144-145. Both parties appealed.

The court of appeals reversed the international-comity finding as premature. *de Csepel*, 714 F.3d at 598-599. The court affirmed the denial of the remainder of the motion to dismiss, finding that the FSIA's commercial-activity exception's requisite "direct effect" could be inferred because the complaint "alleged facts that, if true," *might* demonstrate jurisdiction under the FSIA's commercial-activity exception. *Id.* at 601.

Following completion of fact depositions and the exchange of thousands of documents by the parties, Respondents filed a renewed motion to dismiss the complaint. Dist. Ct. Dkt. 106. The district court granted the motion in part, recognizing that it could not take jurisdiction over Respondents under the FSIA's commercial-activity exception because Petitioners could not demonstrate the requisite "direct effect" in the United States. Pet. App. 5a-6a. The district court dismissed claims to two artworks that were not expropriated during World War II and concluded that the FSIA's expropriation exception allows it to take jurisdiction over all Respondents as to the remaining forty-two artworks. *Id.* at 6a.

Respondents appealed. Affirming the district court in part, the court of appeals found that the expropriation exception's commercial-activity nexus requirement may allow jurisdiction over the Respondent museums and university. *Id.* at 17a. Recognizing that the district court may lack jurisdiction over claims to artworks: (1) physically and

legally returned to the family after the close of World War II, or (2) taken from Ms. Weiss de Csepel after she became a U.S. citizen, the court of appeals directed the district court to consider on remand whether it lacked jurisdiction over certain artworks. *Id.* at 13a-16a, 25a-26a. The court of appeals also granted Petitioners' request to amend their complaint to allege that their claims were timely under the recently enacted Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, 130 Stat. 1524 (2016) ("HEAR Act"). Pet. App. 27a-29a.

Relevant to the petition, the court of appeals examined separately whether either clause of the commercial-activity nexus requirement could provide jurisdiction over Hungary. Acknowledging that the first clause could not apply, as the claimed property is not located in the United States, the panel split as to proper interpretation of the second clause. The majority considered, analyzed, and held that the second clause could not apply to strip Hungary of its presumptive sovereign immunity. *Id.* at 16a-25a. It found that its recent decision in *Simon v. Republic of Hungary*, 812 F.3d 127 (D.C. Cir. 2016), provided the applicable rule of decision. There, the court of appeals held that it could not take jurisdiction over Hungary under the expropriation exception, Pet. App. 17a-18a (citing *Simon*, 812 F.3d at 147-148), because there was insufficient evidence that the property was located in the United States. The court of appeals explained that the commercial-activity nexus requirement for obtaining jurisdiction over foreign sovereigns "differs," from the requirement for taking jurisdiction over agencies or instrumentalities, Pet. App. 17a (citing *Simon*, 812 F.3d at 146), recognizing that for the

expropriation exception to apply to a foreign sovereign, the claims must satisfy the first clause.

The majority rejected Judge Randolph's dissenting argument that *Simon* conflicted directly with the court's prior decision in *Agudas Chasidei Chabad of United States v. Russian Federation*, 528 F.3d 934 (D.C. Cir. 2008), because the *Chabad* court had assumed, without analyzing or holding, that jurisdiction could be had over the sovereign where the second clause provided jurisdiction over the agency or instrumentality. Pet. App. 16a-22a. Although the court in *Simon* did not consider Petitioners' "precise textual argument" here, the *Simon* panel affirmatively considered whether *Simon* and *Chabad* created an intra-circuit conflict when it reviewed – and summarily rejected – that argument in the *Simon* plaintiffs' petition for rehearing. *Id.* at 22a. Applying well-established principles that "[b]inding circuit law comes only from the *holdings* of a prior panel," *id.* at 19a (citations omitted), the majority recognized that *Chabad*'s assumption was not controlling.

The majority went on to explain that, even if it were not bound by *Simon*, it would be compelled to reach the same result. *Id.* at 22a-25a. The majority explained that the FSIA carefully distinguishes between sovereigns and their agencies or instrumentalities. *Id.* at 22a-23a (citing 28 U.S.C. §§ 1603(a)-(b), 1605, 1606, 1610). And interpretative case law recognizes the FSIA's "presumption" that agencies and instrumentalities have "independent status" from the foreign sovereign itself. Pet. App. 23a (quoting *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 446 (D.C. Cir. 1990). The majority thus

explained that to conclude that a sovereign could be stripped of its presumptive immunity by either clause would be to "collaps[e] the well-worn distinction" between sovereigns and their agencies or instrumentalities. Pet. App. 24a. Because Petitioners' "expansive reading of the expropriation exception makes little sense given that the provision targets specific expropriated property," *id.* at 25a, and because no other FSIA exception applied, the majority remanded the action with specific instructions for the district court to dismiss Hungary. *Id.* at 29a.

Petitioners filed a petition for rehearing and rehearing en banc. Relying heavily on Judge Randolph's dissent, Petitioners repeated the assertion that the majority misread the commercial-activity nexus requirement and erred by following *Simon* instead of *Chabad*. App. Ct. Dkt. 1685172. Petitioners also asserted, as they do now, that the majority's holding "conflicted" with "substantial Ninth Circuit precedent." *Id.* at 11. After Respondents filed an opposition, the court of appeals denied the petition. Pet. App. 90a-91a.

In keeping with the dates proposed by the parties and adopted by the district court, on December 18, 2017, Petitioners filed a First Amended Complaint ("FAC"). The FAC continues to name Hungary, asserting (for the first time in this lengthy litigation) that a court can take jurisdiction over Hungary under a principal/agent theory. Dist. Ct. Dkt. 141. The FAC also names a new defendant, Magyar Nemzeti Vagyonkezelő Zrt. (the "Hungarian State Asset Management Company" or "MNV"). *Id.* ¶ 3. On February 9, 2018, Respondents and MNV moved to

dismiss the FAC asserting, *inter alia*, that the retention of Hungary and the inclusion of MNV were beyond the scope of the court of appeals' mandate. Dist. Ct. Dkt. 148 at 10-14. Respondents also asserted that, under Federal Rule of Civil Procedure 19, Hungary is a necessary party to the action. *Id.* at 22-30. Petitioners responded that Hungary is not an indispensable party to the action. Dist. Ct. Dkt. 153 at 31-36. Briefing on the motion to dismiss was completed on April 23, 2018, and a decision is pending.

Meanwhile, Petitioners persist in their efforts to seek this Court's review.

## REASONS FOR DENYING THE PETITION

The question presented by the petition fails to satisfy this Court's criteria for granting review. Contrary to Petitioners' erroneous assertion, no court of appeals has adopted the interpretation of the commercial-activity nexus requirement's second clause that Petitioners advocate here. By definition, therefore, there is no circuit conflict. The purported conflict with the Ninth Circuit is wholly manufactured, as that court merely *assumed* – without analyzing or deciding – that jurisdiction existed over the sovereign in the cases Petitioners reference.

Second, while the majority's decision does not conflict with any holding from this Court or from any court of appeals, it is in accord with the court of appeals' own prior precedent (*Simon*), and it aligns with the Second Circuit's decision in *Garb v. Republic of Poland*, 440 F.3d 579 (2d Cir. 2006), the first – and only other – court of appeals to consider the question presented. The majority's holding is also fully

consistent with the United States' interpretation of the commercial-activity nexus requirement, as advocated in this Court by the Solicitor General and by the Department of Justice in the Second Circuit.

Further, this Court is not a court of correction. But even if it were, review would not be appropriate because the majority carefully and correctly interpreted the expropriation exception's commercial-activity nexus requirement and properly recognized, as the panel in *Simon* had done previously, that the second clause of the commercial-activity nexus requirement cannot apply to permit a court to strip a foreign sovereign of its presumptive immunity. Moreover, because it is the role of Congress to write laws (and to re-write them if they are not being interpreted as Congress intended), Petitioners would be better served by advocating their reading of the commercial-activity nexus requirement to Congress, instead of asking this Court to re-imagine the interpretation of a statute in a way that conflicts with the FSIA's text and legislative history.

Finally, review of the majority's holding would be premature. The case is proceeding in the district court, where Petitioners advance the alternative theories: (1) that the court can take jurisdiction over Hungary under a principal/agent theory, and (2) that Hungary is not a necessary party for proper resolution of Petitioners' claims. Acceptance by the lower courts of either theory could render any decision by this Court an advisory opinion. If Petitioners' new theories are rejected, then Petitioners can raise these challenges together, avoiding piecemeal litigation.

For these many reasons, further review is not warranted.

## I. The Court of Appeals' Holding Does Not Conflict with the Holding of Any Other Circuit

1. Petitioners urge the Court to review this case to resolve a "circuit split," but that split is wholly illusory. The petition analyzes one case, *Altmann v. Republic of Austria*, 317 F.3d 954 (9th Cir. 2002), *amended on denial of reh'g*, 327 F.3d 1246 (9th Cir. 2003), *aff'd*, 541 U.S. 677 (2004), which Petitioners contend is in accord with two other Ninth Circuit decisions, *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992), *Cassirer v. Kingdom of Spain*, 616 F.3d 1019 (9th Cir. 2010), *cert. denied sub nom. Kingdom of Spain v. Estate of Cassirer*, 564 U.S. 1037 (2011), in holding that a foreign sovereign can be subject to the courts' jurisdiction under the second clause of the commercial-activity nexus requirement. Pet. 15-17. Critically, the Ninth Circuit has never analyzed whether the second clause can apply to strip a foreign sovereign of its presumptive immunity, or affirmatively held that it does. Accordingly, there is no "untenable" tension among the courts of appeal to be resolved.

In *Altmann v. Republic of Austria*, 142 F. Supp. 2d 1187 (C.D. Cal. 2001), the district court ruled on two challenges to the application of the commercial-activity nexus requirement raised by Austria and an Austrian gallery, an agency or instrumentality of Austria. First, the district court found that the plaintiffs had alleged sufficient commercial activity by the Austrian gallery to satisfy the second clause. *Id.* at 1204-1205. Second, the district court rejected Austria's assertion that

jurisdiction could be had over it only if the first clause was satisfied. *Id.* at 1205. The Ninth Circuit affirmed the district court's finding that the commercial activities of the Austrian gallery satisfied the second clause. *See Altmann*, 317 F.3d at 969. As with the district court, the Ninth Circuit made no reference to any purported commercial activities by Austria itself. But more importantly, the Ninth Circuit made no reference to the district court's second finding – that a court could take jurisdiction over a sovereign under the second clause.

Thus, while the Ninth Circuit in *Altmann* appears to have assumed that the first clause need not be satisfied to take jurisdiction over a sovereign, there was no discussion, no analysis, and no holding. *Altmann*, therefore, does not establish the circuit conflict that Petitioners assert. *See, e.g., Hagans v. Lavine*, 415 U.S. 528, 533, n.5 (1974) ("[W]hen questions of jurisdiction have been passed on in prior decisions sub silentio, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us"); *Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.").

The remaining decisions cited by Petitioners similarly lack precedential import to establish a circuit split worthy of this Court's intervention. *See Siderman de Blake*, 965 F.2d at 711-712 (finding that "[t]he final requirement under clause two – that the agency or instrumentality must be engaged in a commercial activity in the United States" is met, without analyzing

whether the second clause specifically permitted jurisdiction over Argentina); *Cassirer*, 616 F.3d at 1027 (assuming, without considering or deciding, that the court could take jurisdiction over Spain under the second clause). Thus, there is no "holding" from the Ninth Circuit or any other court of appeals to present a conflict.

The only court of appeals to consider, analyze, and deliver a holding that formally addresses the question presented is the court of appeals below. It did so first in *Simon* and then, with more thorough analysis, in this case. Because neither the Ninth Circuit – nor any other court of appeals – has adopted Petitioners' faulty reading of the commercial-activity nexus requirement and *held* that jurisdiction can be had over the sovereign under the second clause, there is no circuit split, shallow or otherwise, to warrant review by this Court.

2. Notwithstanding the absence of a circuit split, Petitioners assert that this Court's "immediate" intervention is warranted because other jurisdictions are unlikely to address the question presented and, thus, the court of appeals' decisions will have an "outsized effect." Pet. 13. This argument is a red herring. Sections 1391(f)(3) and (f)(4) contain the two venue provisions relevant where, as here, there is little connection between the "foreign state," the causes of action, and the claimed property. 28 U.S.C. § 1391(f)(3)-(4). Section 1391(f)(3) 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" Section 1603(b). *Id.*

§ 1391(f)(3). Section 1391(f)(4), in contrast, provides that such 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). Because the District of Columbia provides a default venue for actions against a foreign sovereign, Petitioners assert 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." Pet. 20 (emphasis added). This is clearly hyperbole.

Actions against foreign sovereigns are *routinely* brought in other jurisdictions. In fact, of the nine cases identified by Petitioners as purported evidence that Nazi-related takings cases continue to arise "with surprising frequency," Pet. 24, only two were filed in the U.S. District Court for the District of Columbia. Of the remaining seven cases (filed in district courts within the Second, Seventh, and Ninth Circuits), not one was transferred for improper venue. This is not surprising as the appropriate venue for an agency or instrumentality may often be different from the venue appropriate for a foreign sovereign. Congress anticipated this, noting that venue challenges could be waived, something that has happened again and again. *See* H.R. REP. NO. 94-1487, at 32 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6631 ("As with other provisions in 28 U.S.C. 1391, venue in any court could be waived by a foreign state, such as by failing to object to improper venue in a timely manner."). Thus, it is unlikely that decisions coming from courts within the

District of Columbia Circuit will have the "out-sized effect" that Petitioners portend.[1]

## II. The Court of Appeals' Holding Aligns with the Second Circuit's Interpretation

In an apparent concession that the Ninth Circuit *has not* ruled on the question presented here,

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[1] Petitioners' lengthy venue discussion is instructive, but for a different reason. Both Sections 1605(a)(3) and 1391(f) reference Section 1603(a) of the FSIA and, therefore, define "foreign state" to include sovereign, its political subdivisions, and agencies and instrumentalities. And like the commercial-activity nexus requirement's two clauses, Sections 1391(f)(3) and (f)(4) impose different bars for determining whether venue is proper: venue is proper for an agency or instrumentality in *any district* where there is a business connection with the agency or instrumentality, 28 U.S.C. § 1391(f)(3), but is proper in the District of Columbia when the defendant is a foreign sovereign, *id.* § 1391(f)(4). This later limitation was specifically added to provide additional protections to the sovereign, because Congress recognized that "[i]t is in the District of Columbia that foreign states have diplomatic representatives and where it may be easiest for them to defend." H.R. REP. No. 94-1487, at 32, 1976 U.S.C.C.A.N. 6604, 6631.

Notably, while Petitioners contend that either commercial-activity nexus requirement clause can apply to a foreign sovereign, they recognize that Section 1391(f)(3) applies only to agencies or instrumentalities while Section 1391(f)(4) applies only to foreign sovereigns (and their political subdivisions), even though both venue provisions apply to the "foreign state." But if "foreign state" necessarily includes the sovereign *and* the agency or instrumentality – as Petitioners advocate – then Section 1391 should also be read to designate venue in an action against a sovereign *in any district* where there is a business connection with the agency or instrumentality, *see* 28 U.S.C. § 1391(f)(3), and venue would be proper for a suit against an agency or instrumentality in the District of Columbia, *see id.* § 1391(f)(4), notwithstanding Congress's clear statement that this was special treatment to be afforded to the sovereign.

Petitioners acknowledge that prior to the court of appeals' decisions in this case and in *Simon*, "only the Second Circuit had opined on the question presented." Pet. 17-18. In *Garb*, the Second Circuit discussed at length the distinctions between the commercial-activity nexus requirement's two clauses. In that case, Jewish claimants sued Poland and the Ministry of the Treasury of Poland over the expropriation of property in Poland following World War II. Assuming that the other elements of the expropriation exception were satisfied, the Second Circuit turned its attention to the commercial-activity nexus requirement. The court noted that the first clause "sets a higher threshold of proof for suing foreign states in connection with alleged takings by requiring that the property at issue be 'present in the United States.'" 440 F.3d at 589 (quoting 28 U.S.C. § 1605(a)(3)). But because the claimed property – land in Poland – was not "present in the United States," the Second Circuit recognized that the first clause of the commercial-activity nexus requirement could not apply. *Ibid*.

The Second Circuit then acknowledged that the second clause "permits a plaintiff to bring suit against an '*agency or instrumentality of [a] foreign state*,' provided that the agency or instrumentality 'own[s] or operate[s]' the property in question and 'is engaged in a commercial activity in the United States.'" *Ibid*. (quoting 28 U.S.C. § 1605(a)(3)) (emphasis added). Understanding that the second clause does not afford jurisdiction over a foreign sovereign and because "Poland is not an 'agency or instrumentality' of a foreign state," but rather is "the foreign state itself," the Second Circuit recognized that the second clause

was not implicated. *Ibid*. (quoting *Garb v. Republic of Poland*, 207 F. Supp. 2d 16, 34 (E.D.N.Y. 2002)).

Courts within the Second Circuit have since relied on *Garb*'s interpretation of the expropriation exception's commercial-activity nexus requirement. *See, e.g., Chettri v. Nepal Bangladesh Bank, Ltd.*, No. 10 Civ. 8470(PGG), 2014 WL 4354668, at *17 (S.D.N.Y. Sept. 2, 2014); *Hammerstein v. Fed. Republic of Germany*, No. 09-CV-443 (ARR)(RLM), 2011 WL 9975796, at *5 (E.D.N.Y. Aug. 1, 2011), *aff'd* 488 F. App'x 506, 507 (2d Cir. 2012) ("When the property at issue is not in the United States, and the defendant is a foreign sovereign and not an agency or instrumentality, the takings exception does not provide jurisdiction."); *Freund v. Republic of France*, 592 F. Supp. 2d 540, 553 (S.D.N.Y. 2008), *aff'd sub nom. Freund v. Société Nationale des Chemins de Fer Français*, 391 F. App'x 939 (2d Cir. 2010) (recognizing that the second clause of the commercial-activity nexus requirement did not permit jurisdiction over France).[2]

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[2] Despite the Second Circuit's thorough analysis, *Garb*'s interpretation of the commercial-activity nexus requirement's separate clauses is not a directly applicable holding. After it determined that the Ministry was a political subdivision of Poland, not an agency or instrumentality as the plaintiffs had alleged, the Second Circuit recognized that only the first clause was relevant. As a result, that court made no holding as to whether the second clause permitted jurisdiction over a sovereign. But the Second Circuit recognized in *Garb*, just as the majority held below, that the commercial-activity nexus requirement applies differently, depending on whether the defendant is a sovereign or a mere agency or instrumentality.

### III. The Court of Appeals' Holding Accords with the Stated Position of the United States

1. Notably absent from the petition's discussion of *Cassirer* is an acknowledgement that Spain was voluntarily dismissed from the action shortly after the U.S. Solicitor General's explicit pronouncement that the second clause cannot provide jurisdiction over a sovereign. In a brief *amicus curiae* to this Court, the Solicitor General stated:

> Where a plaintiff alleges that the property at issue "is present in the United States in connection with a commercial activity carried on in the United States by the foreign state," 28 U.S.C. 1605(a)(3), then there is jurisdiction over the foreign state itself based on its own commercial activities within this country. But where a plaintiff alleges that the property is "owned or operated by an agency or instrumentality of the foreign state * * * engaged in a commercial activity in the United States," *then there is jurisdiction over only the foreign agency or instrumentality that has availed itself of American markets, not the foreign state*.

Brief for the United States as *Amicus Curiae* at 15 in *Kingdom of Spain v. Estate of Claude Cassirer* (2011) (No. 10-786)[3] (citations omitted) (emphasis added); *see also id*. at 16 (noting that "other foreign states should not be subject to the jurisdiction of United States

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[3] Available at: https://www.justice.gov/sites/default/files/osg/briefs/2010/01/01/2010-0786.pet.ami.inv.pdf.

courts based on the possession of expropriated property by their agencies and instrumentalities"). Thus, the U.S. Solicitor General's stated position on the proper scope of the commercial-activity nexus requirement is in full agreement with the majority's holding here. And this is not the only evidence that the United States agrees with the court of appeals' holdings and the Second Circuit's interpretation of the second clause.

2. In September 2004, the Second Circuit received an *amicus curiae* letter from the U.S. Department of Justice in connection with *Garb*. Resp. App. 1a-16a.[4] Under the heading "*Section 1605(a)(3) provides jurisdiction over a foreign state only where its own connections with the United States satisfy the statutory criteria under the first prong of the statutory exception*," Resp. App. 11a, the letter anticipates – and dismantles – Petitioners' interpretation of the commercial-activity nexus requirement. The letter states,

> *Section 1605(a)(3) is properly interpreted to strip immunity from a foreign state only if its own contacts satisfy the requirements for jurisdiction under the provision's first prong. That prong, which specifically addresses jurisdiction based on the contacts of the "foreign state," requires a much closer nexus with the United States than does the second prong*, which provides for jurisdiction based on the contacts of "an agency

[4] Available at: https://www.state.gov/documents/organization/78200.pdf. By regulation and Department of Justice policy, the U.S. Solicitor General reviewed (and approved) the letter before it was submitted to the Second Circuit. *See* 28 C.F.R. § 0.20(b), (c); Dep't of Justice, United States Attorneys' Manual § 9-2.100 (2011).

> or instrumentality of the foreign state." *It would turn the provision on its head to permit these lesser contacts of the agency or instrumentality to support jurisdiction over the foreign sovereign itself.* Instead, the second prong should be understood as overriding the immunity only of the agency or instrumentality with the contacts at issue.

Resp. App. 13a (emphasis added). The Department of Justice rightly found support for its reading in the FSIA itself, referencing the different treatment afforded sovereigns and their agencies and instrumentalities in the FSIA's attachment provision (28 U.S.C. § 1610), Resp. App. 13a-14a, and in the "historic treatment of expropriation claims prior to the enactment of the FSIA," *Id.* at 14a-15a, noting that sovereigns have long had immunity protections far greater than those afforded agencies or instrumentalities.

Notably, the Department of Justice also took particular issue with the argument – now advanced by Petitioners here – that defining "foreign state" to necessarily include the sovereign *and* its agencies or instrumentalities is somehow compelled by the text:

> [U]nder a literalistic reading of that text, together with the definition of "foreign state" in § 1603(a), the second prong of the takings exception would strip immunity to *all* of a foreign state's agencies and instrumentalities whenever *any one* of them owns seized property and engages in commercial activity in the United States. *This result is plainly absurd, and is flatly at odds with the FSIA's legislative*

> *history, which makes clear that Congress did not intend to permit the sort of corporate veil-piercing advocated by plaintiffs*. *See* H.R. REP. NO. 94-1487, at 29 (statute intended to "respect the separate juridical identities of different [foreign state] agencies or instrumentalities"). * * * In sum, the text, structure, and history of the FSIA's taking exception show that it is most reasonably interpreted to require that, before a foreign state will be denied immunity, the seized property must be present in the United States in connection with a foreign state's own commercial activities."

Resp. App. 15a (first and second emphasis in original, later emphasis added). Petitioners' interpretation of the commercial-activity nexus requirement thus conflicts with the clearly articulated position advocated at least twice by the United States – in two different administrations – providing yet another reason to deny the petition.

## IV. The Court of Appeals' Holding Is Correct

1. There can be little dispute that this Court is not a court of correction. "Even the casual student of this Court is aware that '[t]his Court's review * * * is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review.'" *Superintendent, Mass. Corr. Inst., Walpole v. Hill*, 472 U.S. 445, 460-461 (1985) (quoting *Ross v. Moffitt*, 417 U.S. 600, 616-617 (1974)). Nor does this Court "grant a certiorari to review evidence and discuss specific facts." *Id*. (quoting *United States v. Johnston*, 268 U.S. 220, 227 (1925)); *see also Martin v. Blessing*, 571 U.S. 1040, 1045 (2013) (recognizing that,

"[u]nlike the courts of appeals, we are not a court of error correction"). But even if this Court were to suspend this practice and elect to review decisions for error, review would not be appropriate here as the court of appeals' holding – which properly analyzes the FSIA as a whole, the FSIA's legislative history, and the practical and clearly unintended consequences of Petitioners' faulty interpretation – is correct.

Section 1603(a) defines a "foreign state" to include "a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b)." 28 U.S.C. § 1603(a).[5] In addition to the foreign sovereign and its political subdivision, a "foreign state" can include "an agency or instrumentality," defined as "any entity" which: (1) is a "separate legal person, corporate or otherwise," (2) is "an organ of a foreign state or political subdivision thereof," and (3) is "neither a citizen of a State of the United States * * * nor created under the laws of any third country." 28 U.S.C. § 1603(b)(1)-(3). The House Report on the FSIA, to which courts refer frequently when addressing questions relating to "agencies and instrumentalities," notes that

[5] Case law interprets a political "subdivision" (or a political "organ") to include sovereign entities with "core functions" that are "governmental," rather than "commercial." *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 151-153 (D.C. Cir. 1994); *see also Wye Oak Tech., Inc. v. Republic of Iraq*, 666 F.3d 205, 214 (4th Cir. 2011); *Garb v. Republic of Poland*, 440 F.3d 579, 590-95 (2d Cir. 2006). These entities are entitled to the same level of immunity as the sovereign itself. *See, e.g., Wye Oak Tech., Inc.*, 666 F.3d at 214; *Garb*, 440 F.3d at 594-595; *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 234-235 (D.C. Cir. 2003).

> [a]s a general matter, entities which meet the definition of an "agency or instrumentality of a foreign state" could assume a variety of forms, including a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, an export association, a governmental procurement agency or a department or ministry which acts and is suable in its own name.

H.R. REP. NO. 94-1487, at 15-16, 1976 U.S.C.C.A.N. 6604, 6614. Thus, the expansive bucket that is the "foreign state" *can include* a sovereign, and/or a political organ, and/or an agency or instrumentality.

But the FSIA, its legislative history, and interpretive case law all make clear that within this expansive bucket, sovereigns (and their political subdivisions) are to be treated differently from their juridically distinct agencies or instrumentalities. *See, e.g.,* 28 U.S.C. § 1603(b); 28 U.S.C. §§ 1391, 1606, 1608, 1610[6]; H.R. REP. NO. 94-1487, at 29-30, 1976

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[6] Section 1606, which addresses the extent of the "foreign state's" liability where jurisdiction has been found, provides that, except in very limited circumstances involving death, the agency or instrumentality may be liable for punitive damages, while the sovereign cannot. *See* 28 U.S.C. § 1606 (noting that "a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages"). Section 1610 identifies the property of the "foreign state" that is not immune from attachment or execution. *Id.* § 1610. Subsection (a) identifies certain property of "a foreign state" located in the United States that is not immune to satisfy a judgment. *Id.* § 1610(a). But it identifies *additional* types of property – property belonging to an agency or instrumentality and located in the United States – that are not

U.S.C.C.A.N. 6604, 6628-6629 ("If U.S. law did not respect the separate juridical identities of different agencies or instrumentalities, it might encourage foreign jurisdictions to disregard the juridical divisions between different U.S. corporations or between a U.S. corporation and its independent subsidiary."); *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 626-627 (1983) (recognizing presumption of juridical separateness between sovereigns and their agencies or instrumentalities); *Foremost-McKesson, Inc.*, 905 F.2d at 446; 1 Restatement (Third) of the Foreign Relations Law of the United States § 452 cmt. c (Am. Law Inst. 1987).

Moreover, because foreign sovereigns occupy a more significant role in foreign affairs than their agencies or instrumentalities, they are entitled to greater protections. *See Singh ex rel. Singh v. Caribbean Airlines Ltd.*, 798 F.3d 1355, 1359 (11th Cir. 2015) ("The lesser protections the FSIA offers to agencies or instrumentalities of foreign states reflect the significance of its distinction between traditional governmental activities and commercial activities."); *see also Wye Oak Tech., Inc.*, 666 F.3d at 214 ("The distinction [between sovereign and agencies and instrumentalities] has consequences in terms of an entity's rights and responsibilities under the FSIA."); *Connecticut Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 253-254 (5th Cir. 2002); Brief for the United States as *Amicus Curiae* at 13-15 in *Ministry of*

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immune from attachment if there is a judgment against the agency or instrumentality. *Id.* § 1610(b). And Section 1608 discusses, at length, the different requirements to effect service of process on a sovereign or an agency or instrumentality. *See id.* § 1608(a)-(b).

*Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Elahi* (2005) (No. 04-1095)[7] (noting distinctions between foreign sovereigns and their "mere" agencies or instrumentalities).

For this reason, the first clause of the commercial-activity nexus requirement, with its higher bar requiring *commercial conduct by the sovereign in the United States* in connection with property (or property exchanged for that property) *located in the United States*, can apply to permit jurisdiction over the sovereign (or its political subdivision) alone. *See, e.g., Garb*, 440 F.3d at 588-589. This makes sense, as it is well recognized in the FSIA and case law that sovereigns are presumed immune and are entitled to greater respect and protection then lesser sovereign entities.

The second clause, in contrast, requires analysis of facts that relate solely to the more expansive commercial activities of agencies or instrumentalities, without any geographic limitations. *See* 28 U.S.C. § 1605(a)(3). This clause offers a much lower bar, as it limits immunity whenever the agency or instrumentality is engaged in commercial activity in connection with the claimed property anywhere in the world. Thus, the majority's holding – that a clause providing lesser protections and relating solely to the commercial activities of an agency or instrumentality can apply solely to the agency or instrumentality – similarly makes sense.

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[7] Available at: https://www.justice.gov/sites/default/files/osg/briefs/2005/01/01/2004-1095.pet.ami.inv.pdf

2. On a practical level, Petitioners' expansive interpretation of the commercial-activity nexus requirement would no longer serve to strip a specific, targeted sovereign defendant of its immunity – *i.e.*, the entity that is tied to (or responsible for) the alleged wrong – it would strip *all* political organs and agencies or instrumentalities of their presumptive immunity, without any reference or regard to actions, involvement, or juridical identity. In other words, if agencies and instrumentalities are necessarily swept up into the "foreign state" as Petitioners advocate, then by permitting the second clause to strip the sovereign of its sovereign immunity, a federal court would also strip the presumptive immunity of the sovereign's political subdivisions, including its governmental ministries and armed forces.

And where the first clause is satisfied, all of the sovereigns' agencies and instrumentalities – its "state trading corporation[s], [] mining enterprise[s], [] transport organization[s] * * *, [] steel compan[ies], [] central bank, [] export association[s], [] governmental procurement agenc[ies]" and all other government-related or created entities "which act[] and [are] suable in [their] own name," H.R. REP. NO. 94-1487, at 16, 1976 U.S.C.C.A.N. 6604, 6614 – would be stripped of their presumptive immunity, even though these entities may have no legal or factual connection to the dispute. Such an expansive reading defies logic and Congress's intentions, as the FSIA's exceptions to sovereign immunity are "narrowly drawn," *McKesson Corp. v. Islamic Republic of Iran*, 672 F.3d 1066, 1075 (D.C. Cir. 2012), and should be "narrowly construed," *Haven v. Polska*, 215 F.3d 727, 731 (7th Cir. 2000).

The flaws in Petitioners' interpretation are further apparent in examining the facts of this case. It is not disputed that Hungary – not Respondent museums or university – owns the claimed artworks; Respondent museums and university merely display the artworks.[8]

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[8] Most of the brief *amicus curiae* submitted by Ambassador Stuart E. Eizenstat ("Eizenstat Amicus") recites the recent evolution of post-war agreements and describes several significant post-war compensation funds. Mr. Eizenstat's participation in the creation of many of these agreements and compensation funds is laudable and demonstrates what can be accomplished by engaging foreign sovereigns through diplomacy, rather than litigation. However, neither the agreements nor the funds advocate, much less require, that that U.S. courts take jurisdiction over sovereigns. In fact, the Washington Principles and the Terezin Declaration encourage alternative dispute resolution, rather than litigation in U.S. courts, and advocate respect for the legal systems of other nations. *See* http://www.holocausteraassets.eu/ program/conference-proceedings/ (Terezin Declaration); https://www.state.gov/p/eur/rt/hlcst/270431.htm (Washington Principles).

Moreover, the brief's limited analysis *of this case* misstates and misinterprets the majority's holding below. The brief opines that "[t]he D.C. Circuit's immunization of a foreign state *when expropriated art is owned by its agency or instrumentality (rather than by the State itself)* is inconsistent with the broad international consensus reflected in the multilateral declarations discussed above that State play a key role in facilitating just and fair solutions for victims of Holocaust-era expropriation." Eizenstat Amicus at 15 (emphasis added); *see also id.* at 16 (stating "[d]espite this plain text, the decision below holds that the foreign State itself *is* immune from the jurisdiction of courts of the United States *even when* artwork taken in violation of international law is in issue, the artwork is owned by an agency or instrumentality of that State, and that agency or instrumentality is engaged in a commercial activity in the United States") (emphasis in original); *id.* at 23-24 ("The D.C. Circuit's *holding*, by its terms, bars suit against a foreign State in an important category of cases: those involving takings in violation of international law where the

Thus, it cannot be disputed that if the artworks were displayed elsewhere in Hungary – in a private school, for example, or in a home, or in the office of the Prime Minister – the commercial-activity nexus requirement would not permit jurisdiction over either Hungary *or* its agencies or instrumentalities, as neither clause could be satisfied.

But simply because the artworks are *displayed* on the walls of Respondent museums and university, it is Petitioners' argument that Congress *intended* and the FSIA *affirmatively permits* a U.S. court to strip both the agencies or instrumentalities *and* Hungary of their presumptive sovereign immunity. It is this expansive reading of the FSIA – to permit jurisdiction over a sovereign, where it cannot exist independently, simply because the court can take jurisdiction over agencies or instrumentalities that are subject to a lower bar – that defies common sense as applied here and would create an untenable situation with wide-ranging foreign relations implications.

3. Petitioners ask this Court to blur the two distinct clauses of the commercial-activity nexus

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property is located outside the United States, and the *property is owned by an agency or instrumentality of the foreign State*.") (emphasis added).

The majority made no such holding. It is not disputed that Hungary *owns* the artworks and that the museum and university Respondents *operate* (display) the artworks. Therefore, the facts did not present, and the court of appeals did not consider, how the commercial-activity nexus would apply *if* the agency or instrumentality – not the sovereign – owned the claimed property. Because the Eizenstat brief's entire analysis is premised on a fundamentally flawed understanding of this majority's holding, it is of limited value.

requirement and to ignore the well-recognized distinctions between sovereigns and their agencies or instrumentalities that exist elsewhere in the FSIA. This violates settled rules of construction, as courts are bound to construe statutes as written. *See, e.g., Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992) (noting that this Court "ha[s] stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there"); *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). Thus, at bottom, Petitioners would have this Court rewrite the FSIA to conform to their interpretation.

But this Court is not charged with rewriting laws or reinterpreting Congressional intent. As this Court has recognized,

> Enacting the FSIA in 1976, Congress transferred from the Executive to the courts the principal responsibility for determining a foreign state's amenability to suit. *But it remains Congress' prerogative to alter a foreign state's immunity and to render the alteration dispositive of judicial proceedings in progress.*

*Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1329 (2016) (citations omitted) (emphasis added). The balancing of interests competing here – of claimants, foreign sovereigns, and foreign affairs – is a legislative function, *see Diamond v. Chakrabarty*, 447 U.S. 303, 317 (1980), and this Court should not grant review to substitute its own judgment for that of Congress.

If Congress had wanted the two-clause commercial-activity nexus requirement to be read expansively –

ignoring the well-recognized distinctions between sovereigns and agencies or instrumentalities to permit jurisdiction over a sovereign where the lower standard is satisfied by the agency or instrumentality, and permitting jurisdiction over all agencies and instrumentalities (and political subdivisions) whenever a sovereign is subject to the court's jurisdiction – then Congress would have written it differently. *See id.* at 318 (recognizing that certiorari should not be granted to correct what may be perceived to be an "error of judgment" by Congress). And if Congress now believes that the commercial-activity nexus requirement should be read expansively, then it can re-write the FSIA to comport with Petitioners' interpretation.[9]

Because neither the FSIA, its legislative history, nor case law support the "counter-textual," Pet. 13, reading advocated by Petitioners, review by this Court is not warranted.

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[9] As Petitioners note, since the FSIA was enacted, Congress has enacted numerous laws in effort to remove "significant obstacles" so that Holocaust-era expropriation claims are not dismissed immediately on procedural grounds. Pet. 25; *see also* Eizenstat Amicus at 13-14. But in doing so, it has addressed "technical" defenses, like the applicable statute of limitations. *See* HEAR Act, Sec. 5; *see also* S. 447, 115th Cong. (2017) - Justice for Uncompensated Survivors Today (JUST) Act of 2017. Congress has, however, made no effort to re-write the commercial-activity nexus requirement to alter or expand jurisdiction. This Court should decline Petitioners' invitation to do so here. *See Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2039 (2014) (recognizing that to find jurisdiction where it is not permitted by the statute's language is to usurp Congress's judgment); *Dodd v. United States*, 545 U.S. 353, 359-360 (2005).

### V. This Case Is a Poor Vehicle to Decide the Question Presented

1. Finally, this case is an unsuitable vehicle for resolving the question presented. This case is currently being actively litigated in the district court, where Respondents' (and MNV's) motion to dismiss the FAC is pending. Under this Court's usual practice, the case's interlocutory posture "alone furnishe[s] sufficient ground for denial" of the petition. *Hamilton-Brown Shoe Co. v. Wolf Bros*. & Co., 240 U.S. 251, 258 (1916); *see also Virginia Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia., J., respecting the denial of the petition for writ of certiorari); Stephen M. Shapiro et al., *Supreme Court Practice* § 41.8, at 282-283 & n.72 (10th ed. 2013). That usual practice should be employed here, as review of the majority's decision is premature and could result in piecemeal litigation.

The district court is currently adjudicating two theories, the adoption of either one of which could render a decision by this Court an advisory opinion. First, Petitioner's FAC asserts that the district court can take jurisdiction over MNV, as a purported agency or instrumentality of Hungary, and that because MNV has "a close relationship" with Hungary, the court can take jurisdiction over Hungary as well. If the district court accepts Petitioners' principal/agent theory, then the question presented here will be of no import. If the lower courts reject Petitioners' new theory, they will have a second question to present in a future petition.

Second, in opposition to the pending motion to dismiss, Petitioners assert that Hungary is not a necessary party to this litigation, and assert that MNV, long-known to Petitioners, can provide the relief

Petitioners seek. Dist. Ct. Dkt. 153 at 30-36. If Hungary is not a necessary party and Petitioners can get relief from another defendant, then the majority's holding does not "prevent adjudication" of Petitioners' claims. Pet. 28 ("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*.") (emphasis added).[10] Thus, if the lower courts agree that this case can proceed without Hungary, then the question presented is moot or, at best, this Court's resolution of it would be advisory. If the lower courts reject Petitioners' theory, then it too can be included in a later petition to this Court.

Because ongoing district court proceedings may obviate the need for this Court to decide the question presented, this Court should decline Petitioners'

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[10] The brief *amicus curiae* submitted by AJC (formally the American Jewish Committee), B'nai B'rith International and the Raoul Wallenberg Centre for Human Rights ("AJC Amicus") asserts that allowing the court of appeals' decision to stand would "deny [Petitioners] the ability to bring an action against Hungary * * * and permit one of the perpetrators of the Holocaust to escape liability for some of its terrible crimes." AJC Amicus at 30. But while the court of appeals' decisions may preclude a *United States* court from taking jurisdiction over Hungary, Petitioners are not barred from raising claims against Respondents in a Hungarian court. Hungary cannot claim sovereign immunity in a Hungarian court and Hungarian courts do not recognize a statute of limitations for Petitioners' claims. Moreover, courts have recognized that remedies available to claimants like Petitioners in Hungarian courts are "sufficiently promising" to warrant the dismissal of U.S. actions. *Fischer v. Magyar Államvasutak Zrt.*, 777 F.3d 847, 861 (7th Cir. 2015); *see also Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 681 (7th Cir. 2012).

request to issue a decision that may well become an advisory opinion. *See Clinton v. Jones*, 520 U.S. 681, 690 n.11 (1997) (recognizing that it has long been this Court's "considered practice not to decide abstract, hypothetical or contingent questions").

2. Ostensibly acknowledging that the question presented could be rendered moot by the parallel proceedings, Petitioners advance various policy arguments in support of their interpretation. None, however, provides a basis for review by this Court. Petitioners try, for example, to extend the relevance of the question presented far beyond the facts of this case to actions involving U.S. corporations seeking to enforce international arbitration awards. Pet. 26-27. But Petitioners are not U.S. businesses asserting jurisdiction under Section 1605(a)(6), the FSIA's arbitration exception. These examples highlight, instead, that there are alternative fora – beyond a U.S. court – for adjudicating and resolving property disputes with foreign sovereigns.

Petitioners also contend that the majority's decision regarding the reach of *jurisdiction* "establishes significant roadblocks to executing [] a judgment" against a foreign sovereign and/or its agency or instrumentality. Pet. 27. But questions relating to liability and attachment are addressed by wholly separate sections of the FSIA, *see supra* at 24 (discussing 28 U.S.C. §§ 1606, 1610), which acknowledge the distinctions between the sovereign and its agencies or instrumentalities. If, as Petitioners contend, the interpretation of the second clause of the commercial-activity nexus requirement presents a

"recurring" question, Pet. 2, 23-24, then surely a better vehicle than this one will soon come before this Court.

## CONCLUSION

For the forgoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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# APPENDIX

## APPENDIX

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## APPENDIX 1

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September 9, 2004

**Via Federal Express**
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Re: *Garb v. Republic of Poland*, No. 02-7844 (2d Cir.)

Dear Ms. MacKechnie:

Amicus curiae the United States of America respectfully submits this letter brief in response to the Court's July 27, 2004, Order directing the submission of briefs on the question "[w]hether, and if so how, the United States Supreme Court's decision in *Republic of*

*Austria v. Altmann*, 541 U.S. ___ (June 7, 2004) is relevant to the issue of subject matter jurisdiction in this case." *Altmann* makes clear that the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 *et seq.* (FSIA), should be applied to determine a court's jurisdiction in all post-enactment suits against a foreign sovereign. As we demonstrate, under the FSIA's takings exception, § 1605(a)(3), jurisdiction is limited to expropriations of aliens' property, such as those claims that were the subject of the 1960 Agreement between the United States and Poland, and does not encompass the broader range of property deprivations in violation of international human rights law. That exception also permits jurisdiction over a foreign state only where its own contacts with the United States satisfy the first prong of the exception, *i.e.*, the state holds seized property in the United States in connection with its own commercial activity here. A court may not base jurisdiction over the state itself on the less extensive contacts of a juridically distinct instrumentality, on the basis that those contacts would allow jurisdiction over the instrumentality under the terms of the exception's second prong.

I. Background

The plaintiffs are former Polish citizens or their heirs, who allege that Poland engaged in a pogrom against surviving Jewish citizens following World War II, confiscating Jewish citizens' property, encouraging violence against Jewish citizens, and otherwise discriminating against Poland's remaining Jews in an effort to drive them in to exile. Although the FSIA imposes a general rule of immunity for claims against foreign sovereigns and their instrumentalities, 28

U.S.C. § 1604, it creates exceptions to immunity where, *inter alia*, the action is based on a foreign state's commercial activity in or directly affecting the United States; or the action involves property rights "taken in violation of international law" and the property is in the United States in connection with a foreign state's commercial activity or is owned or operated by a foreign instrumentality engaged in commercial activity in the United States. *Id.* § 1605(a)(1)-(3).

The district court held that the FSIA's takings exception could not be applied to pre-FSIA conduct. *Garb v. Republic of Poland*, 207 F. Supp.2d 16, 28-30 (E.D. N.Y. 2004). The court also held that the commercial activity exception, although potentially available, was not satisfied because plaintiffs' claims were based on the "quintessentially sovereign act" of Poland's expropriation of its citizens' property, which also lacked any direct effect on the United States. *Id.* at 31-33. Finally, the court suggested that the takings exception would not be satisfied even if it were available, reasoning that numerous courts have held that international law is not violated by a sovereign's expropriation of its own nationals' property, and further that the Ministry of Treasury appears to be part of the Polish state rather than an agency or instrumentality. *Id.* at 34-38.

This Court vacated and remanded for further proceedings. *Garb v. Republic of Poland*, No. 02-7844, 2003 WL 21890843, at *2 (Aug. 6, 2003). The Court held that jurisdiction turned on "whether the plaintiffs *** could have legitimately expected to have their claims adjudicated in the United States" prior to enactment of the FSIA, and ordered the district court

to determine the State Department's pre-FSIA policy with respect to sovereign immunity for claims against Poland arising out of post-War conduct. *Id.* at 2-*3 & n.1.

The Supreme Court granted defendants' petition for certiorari, and vacated and remanded for further consideration in light of *Altmann*. 124 S. Ct. 2835 (2004). *Altmann*, which was decided after this Court's decision, involved claims against Austria arising out of World War II-era conduct. *See id*. at 2243-2246. The claimed basis for jurisdiction was the FSIA's takings exception, although no such exception to the rule of foreign state immunity had existed at the time of the alleged wrongdoing. *See id.* at 2245-2247. The Supreme Court held that courts should apply the FSIA's principles of foreign state immunity to conduct pre-dating the statute's enactment. *Id.* at 2252-2255.

II. Discussion

*Altmann* holds that the FSIA should be applied to determine a court's jurisdiction in all post-enactment suits against a foreign sovereign. The FSIA grants sovereign immunity to a foreign state sued in a United States court unless the claim against it falls within the exceptions defined by statute. *See* 28 U.S.C. § 1604-1605. In our prior brief to this Court, the United States explained that the commercial activity exception to the FSIA does not provide a basis for subject matter jurisdiction over plaintiffs' claims against Poland because the "expropriation of property by a foreign government by sovereign act is not the type of 'commercial activity' that Congress intended to fall within that exception to the FSIA." U.S. Am. Br. 13-14. *Altmann* did not alter that analysis.

However, we have not previously addressed the scope of the takings exception, which *Altmann* holds applies to all claims brought after the FSIA's enactment. That exception denies sovereign immunity in cases "in which rights in property taken in violation of international law are at 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). As we explain below, plaintiffs' claims do not involve "rights in property taken in violation of international law" within the meaning of the statute. Nor, where the stringent nexus requirements of the exception's first prong are not satisfied, does the provision strip a state of its immunity based solely on the lesser class of contacts of an instrumentality that would confer jurisdiction over that instrumentality under the second prong of the exception.

1. *Section 1605(a)(3) applies only to takings in violation of the international law of state responsibility and expropriation.* The FSIA's takings exception was intended to deny immunity for violations of the international law of state responsibility and expropriation, which governs a state's seizure of property belonging to nationals of another state. Absent a clear directive from Congress, the exception should not be interpreted to substantially expand the universe of legal principles relating to property rights that can serve as a basis for U.S. courts' jurisdiction, to

include the full range of international human rights law affecting nationals as well as aliens.

The legislative history of the FSIA explains that the takings exception was intended to govern "Expropriation claims," encompassing "the nationalization or expropriation of property without payment of the prompt adequate and effective compensation required by international law," as well as "takings which are arbitrary or discriminatory in nature." *Foreign Sovereign Immunities Act of 1976,* H.R. Rep. No. 94-1487, at 19, *reprinted in* 1976 U.S.C.C.A.N. 6604, 6618. This characterization of the exception's scope parallels the Restatement's description of the international law principles of state responsibility, which bar a state's discriminatory expropriation of the property of aliens and its expropriation of foreign nationals' property without the payment of adequate, reasonably prompt, and effective compensation. *See* Restatement (2d) of Foreign Relations Law §§ 165-166, 185-187 (1965); *see also* Restatement (3d) of Foreign Relations Law § 712 (1986) ("A state is responsible under international law for injury resulting from (1) a taking by the state of the property of a national of another state that * * * (b) is discriminatory, or (c) is not accompanied by provision for just compensation."). As the Restatement makes clear, international law of state responsibility does not regulate a state's treatment of its own nationals, but rather is limited to certain "taking[s] by the state of the property of a *national of another state*." Restatement (3d) § 712(1) (emphasis added). There is no evidence that Congress intended to confer jurisdiction over the entire range of potential deprivations of property in violation of international human rights principles.

Consistent with this, the takings exception has been interpreted by every court to have considered the question not to apply to the expropriation by a country of the property of its own nationals. *E.g.*, *Beg v. Islamic Republic of Pakistan*, 353 F.3d 1323, 1328 n.3 (11th Cir. 2003); *Altmann v. Republic of Austria*, 317 F.3d 954, 968 (9th Cir. 2002); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 711-712 (9th Cir. 1992); *De Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1395-1398 (5th Cir. 1985); *see also Altmann*, 124 S. Ct. at 2262 (Breyer, J., concurring) (noting lower courts' "consensus view * * * that § 1605(a)(3)'s reference to 'violation of international law' does not cover expropriations of property belonging to a country's own nationals").[1] Notably, Congress has never overridden that uniform interpretation.

In their prior briefs, plaintiffs relied on the legislative history reference to "discriminatory" takings as evidence that the takings exception was intended to encompass a sovereign's racial or religious discrimination against its own nationals. *E.g.*, Appellants' Br. at 54. When viewed in context,

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[1] A number of courts have based their holdings on a conclusion that a foreign state's seizure of the property of its own national does not, even if motivated by religious or racial discrimination, violate international law. *Cf. Dreyfus v. Von Finck*, 534 F.2d 24, 30-31 (2d Cir. 1976) (holding, under Alien Tort Statute, that Nazi Germany's discriminatory seizure of Jewish citizen's property did not violate international law). As we explain in the text, the proper question before the court is *not* whether the discriminatory taking of Jewish property violated international human rights norms, but whether that conduct is within the class of cases against foreign states that Congress intended U.S. courts to hear under the takings exception. It is not.

however, the reference in the legislative history is to discrimination against aliens — *i.e.*, the very subject on which the law of state responsibility and expropriation is focused. See Restatement (2d) § 166. Indeed, many of the sources cited by plaintiffs as evidence of the customary international law norm against "discriminatory" expropriations address the taking of non-nationals' property, and thus lend support to a more limited interpretation of the takings exception. *See, e.g.*, Appellants' Reply at 14 ("to comply with international law, nationalization 'must not discriminate against *aliens* or any particular kind of *alien*'" (emphasis added)); *ibid.* ("the minimum standard of justice * * * means the right of *foreign nationals* to receive full compensation" (emphasis added)).

The interpretation of § 1605(a)(3) as limited to the international law of expropriation is further confirmed by the statutory backdrop against which it was enacted — in particular, the Second Hickenlooper Amendment, 22 U.S.C. § 2370(e)(2). That statute, originally enacted in 1964, bars a federal court from invoking the "act of state" doctrine to dismiss a suit challenging a state "taking * * * in violation of the principles of international law, including the principles of compensation and the other standards set out in this subsection." The statute has consistently been interpreted to apply only in cases involving the taking of alien property, not that of a state's own national. *E.g.*, *Fogade v. ENB Revocable Trust*, 263 F.3d 1274, 1294 (11th Cir. 2001) (collecting cases). The FSIA takings exception was intended to harmonize the scope of foreign sovereign immunity with the act of state doctrine under U.S. law. *See Canadian Overseas Ores*

*Ltd. v. Compania de Acero del Pacifico, S.A.*, 528 F. Supp. 1337, 1346 (S.D.N.Y. 1982), *aff'd*, 727 F.2d 274 (2d Cir. 1984).

Limiting the takings exception to a foreign government's seizure of aliens' property is also consistent with courts' general reluctance to construe the FSIA exceptions to confer jurisdiction over claims that a foreign state violated human rights, particularly where the conduct took place within the state's own borders. *See, e.g., Saudi Arabia v. Nelson*, 507 U.S. 349, 361-363 (1993) (commercial activity exception does not confer jurisdiction over claims involving torture by foreign government's police and penal officers); *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1173-1176 (D.C. Cir. 1994) (waiver exception does not confer jurisdiction over Nazi-era slave labor case); *cf. Smith v. Socialist People's Libyan Arab Hamahiriya*, 101 F.3d 239, 244-245 (2d Cir. 1996) (waiver exception does not confer jurisdiction over terrorism bombing alleged to violate *jus cogens* norms). Congress has also set careful limits on federal jurisdiction over tort claims against foreign sovereigns arising out of conduct occurring outside of the United States, providing that, as a general matter, noncommercial tort claims can be brought against foreign states only if the damage or injury occurred in this country. *See* 28 U.S.C. § 1605(a)(5); *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439-441 (1989). Although Congress amended the FSIA in 1996 to allow for certain extraterritorial tort claims relating to terrorism, it strictly limited and defined the permissible claims and the class of potential defendants. *See id.* § 1605(a)(7). Construing

§ 1605(a)(3) to allow for international human rights claims would undermine these careful limitations.

Finally, courts' consensus interpretation of the takings exception as not encompassing claims against a state by its nationals is consistent with international expropriation law, which was the premise of numerous claims settlement agreements entered into by the United States over the last century, including a 1960 agreement between the United States and Poland. As we described in our supplemental amicus filing on May 2, 2003, the United States and Poland entered into that agreement to settle claims arising out of the Polish government's nationalization of property. *See* Agreement Between the Government of the United States of America and the Government of the Polish People's Republic Regarding Claims of Nationals of the United States (July 16, 1960), U.S.T. 1953. Although the United States undertook in that agreement to settle the claims of U.S. nationals, it did not purport to settle or address claims relating to property that was not owned at the time of the taking by a U.S. national. The limited scope of the U.S.-Poland settlement agreement reflects the circumscribed nature of international law and practice concerning state responsibility for the expropriation of aliens' property. At that time, the sole recourse for expropriation claims was espousal. It was a well-established principle of international law that states could espouse only claims relating to wrongs done to their own citizens, absent the consent of the state both of the third-party national and also the respondent state. Congress removed immunity in certain cases, but there is no indication — much less a clear one — that it intended to include

nationals of the expropriating state among those whose claims could be asserted in U.S. courts.

To the extent that there is any remaining ambiguity about the scope of the takings exception, the foreign policy interests of the United States weigh against inferring the dramatic expansion of federal court jurisdiction that plaintiffs seek. As the Supreme Court recognized in its post-*Altmann* decision in *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004), serious "risks of adverse foreign policy consequences" are created when U.S. courts attempt to set "limit[s] on the power of foreign governments over their own citizens." *Id.* at 2763. As the Court held, "the potential implications for the foreign relations of the United States of recognizing" causes of action for violations of customary international law should make courts reluctant to exercise jurisdiction over such claims absent a "clear mandate" from Congress to do so. *Id.* at 2763. The FSIA contains no such "clear mandate"; to the contrary, Congress enacted the FSIA with the statement that it was intended to "codify" sovereign immunity principles "presently recognized in international law." H.R. Rep. No. 94-1487, at 7, *reprinted in* 1976 U.S.C.C.A.N. at 6605. This Court should reject the suggestion that Congress nonetheless intended to significantly expand U.S. courts' jurisdiction over previously-barred claims brought by foreign citizens against their own governments.

2. *Section 1605(a)(3) provides jurisdiction over a foreign state only where its own connections with the United States satisfy the statutory criteria under the first prong of the statutory exception.* In addition to requiring a taking "in violation of international law" for

jurisdiction to exist, § 1605(a)(3) requires certain minimum connections to the United States: (i) the seized property or property exchanged for it "is present in the United States in connection with a commercial activity carried on in the United States by the foreign state"; or (ii) the seized property or property exchanged for it "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 district court correctly found that there was no basis for jurisdiction under the exception. Plaintiffs do not assert that the limited circumstances for jurisdiction under the first prong are satisfied, because they have not alleged that Poland or its Ministry of the Treasury have brought expropriated property into the United States. Nor, as the court suggested, is the second prong of the statute met, because that prong grants jurisdiction only over the agency or instrumentality that has the requisite jurisdictional contacts.

We continue to adhere to the view articulated in the United States's amicus brief in *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 151 (D.C. Cir. 1994), and accepted by the district court in this case, that the test for determining the status of a foreign governmental entity as an agency or instead as the state itself should "look to the 'core function'" of the entity, and whether it "is the type of entity that is an integral part of a foreign state's political structure, or rather an entity whose structure and function is predominantly commercial." *Transaero*, 30 F.3d at 151. Under that standard, the Ministry of the Treasury was

part of the Polish state itself, not an agency or instrumentality.

Even if the Ministry *were* an agency or instrumentality, however, the takings exception still would not confer jurisdiction over the Republic of Poland because the seized property is not present in this country and the contacts of its agency or instrumentality under the second prong of the takings exception are not a proper basis for stripping the state itself of sovereign immunity. Section 1605(a)(3) is properly interpreted to strip immunity from a foreign state only if its own contacts satisfy the requirements for jurisdiction under the provision's first prong. That prong, which specifically addresses jurisdiction based on the contacts of the "foreign state," requires a much closer nexus with the United States than does the second prong, which provides for jurisdiction based on the contacts of "an agency or instrumentality of the foreign state." It would turn the provision on its head to permit these lesser contacts of the agency or instrumentality to support jurisdiction over the foreign sovereign itself. Instead, the second prong should be understood as overriding the immunity only of the agency or instrumentality with the contacts at issue.

Interpreting § 1605(a)(3) to require that the foreign state's own contacts, and not those of its agency or instrumentality, meet the requirements of the first prong of the provision is buttressed by the differential treatment accorded foreign states and their agencies and instrumentalities in the FSIA's attachment provision, 28 U.S.C. § 1610. That provision modifies only partially the "traditional view" that "the property of foreign states is absolutely immune from execution,"

while providing for more expansive rights of execution against the property of a foreign agency or instrumentality. *See* H.R. Rep. No. 94-1487, at 27, *reprinted in* 1976 U.S.C.C.A.N. 6626. A litigant who receives a judgment of unlawful taking by a foreign state may execute the judgment against property owned by the state only if the property relates to the taking; in contrast, a similar judgment against a foreign agency or instrumentality may be executed against *any* property owned by that agency or instrumentality. *See* 28 U.S.C. § 1610(a)(3), (b). Congress clearly envisioned that the attachment provisions would parallel the immunity provisions of § 1605(a)(3). *See* H.R. Rep. No. 94-1487, at 27, *reprinted in* 1976 U.S.C.C.A.N. at 6626.

Further, the historic treatment of expropriation claims prior to enactment of the FSIA supports its interpretation as providing jurisdiction over foreign states only where the seized property is present in this country in connection with the foreign state's commercial activity, while providing for jurisdiction over foreign state agencies or instrumentalities in a broader set of circumstances. Prior to enactment of the FSIA, foreign states enjoyed immunity from suit arising out of the expropriation of property within their own territory, *see, e.g., Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198, 1200 (2d Cir. 1971), with the possible exception of *in rem* cases in which U.S. courts took jurisdiction to determine rights to property in the United States. *E.g.*, *Stephen v. Zivnostenska Banka*, 15 A.D.2d 111, 119 (N.Y. App. Div. 1961), *aff'd*, 186 N.E. 2d 676 (1952). In contrast, separately incorporated state-owned companies engaged in commercial activities of a private nature

were generally not accorded foreign sovereign immunity. *See, e.g., United States v. Deutsches Kalisyndikat Gesellschaft*, 31 F.2d 199, 201-203 (S.D.N.Y. 1929). In creating for the first time an exception to the *in personam* immunity of a foreign state, Congress adopted an incremental approach granting jurisdiction over foreign states that paralleled those few cases in which title to property in the United States had been in issue, while permitting, as had historically been the case, a broader class of cases against agencies and instrumentalities.

Plaintiffs contend that their interpretation of the takings exception is compelled by the text of the takings provision, asserting that, under § 1605(a), "a foreign state shall not be immune" in the specified circumstances, including the second prong of (a)(3), which confers jurisdiction based upon the commercial contacts of "an agency or instrumentality of a foreign state." Notably, under a literalistic reading of that text, together with the definition of "foreign state" in § 1603(a), the second prong of the takings exception would strip immunity to *all* of a foreign state's agencies and instrumentalities whenever *any one* of them owns seized property and engages in commercial activity in the United States. This result is plainly absurd, and is flatly at odds with the FSIA's legislative history, which makes clear that Congress did not intend to permit the sort of corporate veil-piercing advocated by plaintiffs. *See* H.R. Rep. No. 94-1487, at 29 (statute intended to "respect the separate juridical identities of different [foreign state] agencies or instrumentalities"), *reprinted at* 1976 U.S.C.C.A.N. at 6628; *see also, e.g., First National Bank v. Banco para el Comercio Exterior de Cuba*, 462 U.S. 611, 620-621 (1983). It would have

made little sense for Congress to require that the instrumentality that owns or operates the seized property be the same instrumentality engaged in commercial activity in the United States in order for jurisdiction to exist under the second prong, if, once the test were satisfied, the state itself and all its instrumentalities would have been subject to suit.

In sum, the text, structure, and history of the FSIA's takings exception show that it is most reasonably interpreted to require that, before a foreign state will be denied immunity, the seized property must be present in the United States in connection with a foreign state's own commercial activities.

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