No. 17-1165

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

SUPPLEMENTAL BRIEF FOR PETITIONERS

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INTRODUCTION

The United States agrees that the circuits are divided about an important and recurring question of foreign sovereign immunity. The circuit split is real, entrenched, and unlikely to deepen. This Court's immediate intervention is warranted to restore uniformity to this area of foreign relations. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n.25 (1964).

I. Circuit Courts Are Split On The Question Presented.

After devoting ten pages to defending the merits of the decision below, the United States spares only four paragraphs to address whether review of the important question presented is warranted based on the existing circuit conflict. And none of the reasons the United States offers against further review holds water.

The United States concedes that the Ninth Circuit has twice exercised "jurisdiction over a foreign state when only the second clause of the expropriation exception was satisfied." U.S. Br. 19 (citing *Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1028-1034 (9th Cir. 2010) (en banc), *cert. denied*, 564 U.S. 1037 (2011); *Altmann v. Republic of Austria*, 317 F.3d 954, 968-969 (9th Cir. 2002), *amended on denial of reh'g*, 327 F.3d 1246 (9th Cir. 2003), *aff'd*, 541 U.S. 677 (2004)). That should have been the end of the discussion about whether there is a circuit conflict warranting this Court's review—there is. Instead, the United States contends (*ibid.*), that the circuit conflict need not be resolved because a future panel of the Ninth Circuit could take the opposite view. That is wrong. As ex-

plained in Petitioners' previous filings (Pet. 14-17; Reply 2-5), the Ninth Circuit faced precisely the same question in *Altmann*, *supra*, had the benefit of full and adversarial briefing on the question, and reached precisely the opposite result from the D.C. Circuit's in a published and precedential opinion. That is a paradigmatic circuit conflict.

The United States suggests (U.S. Br. 19) that the holding in *Altmann* should not count in determining whether a conflict exists because the Ninth Circuit did not explain its reasoning. But the relative robustness of the Ninth Circuit's explanation of its jurisdictional holding does not undermine its status as a binding holding. The foreign state defendant in *Altmann* argued to the district court precisely what Hungary and the United States argue here—and the district court expressly *rejected* those arguments. *Altmann v. Republic of Austria*, 142 F. Supp. 2d 1187, 1205 (C.D. Cal. 2001). On appeal, the Republic of Austria repeated its argument that "the second disjunctive of [28 U.S.C. §] 1605(a)(3) does not provide a basis for jurisdiction over the Republic." Appellants' Opening Br., 2001 WL 34092857, at *39; *id.* at *41. The Ninth Circuit nevertheless *expressly held* that the suit could proceed under the expropriation exception of the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. § 1602 *et seq.*, because that provision's "jurisdictional prerequisites [were] met" with respect to both "the Republic of Austria and the national Austrian Gallery." 317 F.3d at 974; *id.* at 962-969.

The panel below correctly noted this Court's practice of not following "drive-by jurisdictional ruling[s]." Pet. App. 21a (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998)). But in relying on that

practice (U.S. Br. 19), the United States misunderstands its meaning—*viz*., that the Court does not feel bound by an earlier exercise of jurisdiction when no party brought to the Court's attention a potential jurisdictional flaw. *Steel Co.*, 523 U.S. at 91; *Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1996); *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 97 (1994); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952). There was nothing "drive-by" about the jurisdictional holding in *Altmann*. The Ninth Circuit had all the "benefits of the adversarial system" in the parties' full briefing of the issue. Pet. App. 19a (citing *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.)). And the court held that the FSIA's "jurisdictional prerequisites [were] met" with respect to both Austria and its museum. *Altmann*, 317 F.3d at 974. Indeed, after granting certiorari in *Altmann* to decide a different question, this Court expressly recognized that "[t]he District Court agreed with [the plaintiff] that the FSIA's expropriation exception covers [Austria's] alleged wrongdoing, and the Court of Appeals affirmed that holding." *Altmann*, 541 U.S. at 692 (internal citations omitted); *see id.* at 700 ("[T]he District Court and Court of Appeals determined that § 1605(a)(3) covers this case[.]"). The United States ignores all of those essential details.

The United States contends (U.S. Br. 19) that a future panel of the Ninth Circuit could disregard the jurisdictional holding in *Altmann*, "just as the court of appeals here determined that it was not bound by the earlier but unreasoned D.C. Circuit decision in" *Agudas Chasidei Chabad of United States v. Russian Federation*, 528 F.3d 934 (D.C. Cir. 2008). But that is not so. Critical to the panel's determination in this

case that the court's jurisdictional holding in *Simon v. Republic of Hungary*, 812 F.3d 127 (D.C. Cir. 2016), trumped its earlier exercise of jurisdiction in *Chabad* was the fact that "[t]he issue of the Russian state's immunity [in *Chabad*] was completely unaddressed by the district court and neither raised nor briefed on appeal." Pet. App. 19a. As explained, that was not the case in *Altmann*. This Court has held that a court does not render a binding jurisdictional holding merely by exercising jurisdiction when a potential jurisdictional flaw is "neither brought to the attention of the court nor ruled upon." *Webster v. Fall*, 266 U.S. 507, 511 (1925). But the potential jurisdictional flaw was *both* brought to the attention of the Ninth Circuit in *Altmann and* ruled upon. *Altmann*'s jurisdictional ruling on the question presented is therefore binding precedent in the Ninth Circuit—and directly conflicts with the decision below.

But this Court need not take Petitioners' word for it—the Court can rely on the en banc Ninth Circuit's actual treatment of *Altmann*'s jurisdictional ruling on the question presented here. In *Cassirer*, *supra*, the en banc court relied on *Altmann* to exert jurisdiction over Spain under the FSIA's expropriations clause, based only on the commercial contacts of its agency or instrumentality. 616 F.3d at 1032-1033, 1037. The en banc court held that, because all of "the statutory criteria" in Section 1605(a)(3) were "met, the expropriation exception applies to Spain," *id.* at 1037—even though the court had already made clear that only the "second clause" of Section 1605(a)(3) (relying on the commercial activities of Spain's agency) was applicable, *id.* at 1033 n.19.

The en banc Ninth Circuit has spoken. And there is no reason to believe that the D.C. Circuit will reconsider its views as it denied Petitioners' rehearing petition, despite Judge Randolph's dissent, Pet. App. 30a-39a, and over the objection of Judge Griffith and then-Judge Kavanaugh, *id.* at 91a. In short, the Ninth and D.C. Circuits are intractably divided.

The existing conflict is also unlikely to deepen. First, as explained in the Petition (Pet. 19-23), the FSIA's venue provisions designate the District of Columbia as the default venue for suits against a foreign sovereign and erect material barriers to filing such suits elsewhere in the country. Second, going forward, any plaintiff who can file in the Ninth Circuit in these circumstances will do so. In cases involving wrongfully expropriated art held in foreign museums (of which there remain many, *see* Pet. 24-25), the commercial activity alleged is most often (as here) advertising and tourist-solicitation by the museums. The Ninth Circuit is a big place, and any museum that engages in such conduct in the United States will surely do so in the Ninth Circuit. Thus, although the circuit split is unlikely to deepen, it is very likely to remain as entrenched as it is today.

Permitting a circuit conflict on a jurisdictional question to linger promotes forum shopping. The United States devotes nearly three quarters of its argument pages to supporting the result below—but future plaintiffs in Petitioners' position will be able to evade that result by filing in the Ninth Circuit whenever possible. Although those plaintiffs may be able to obtain a measure of justice that has so far been denied to Petitioners, that type of forum shopping would undermine Congress's goal of creating "firm standards as

to when a foreign state may validly assert the defense of sovereign immunity" when it enacted the FSIA. H.R. Rep. No. 94-1487, at 7 (1976). Permitting the conflict to linger in this context also erodes the "uniformity in this country's dealings with foreign nations" that this Court has held is so important. *Banco Nacional de Cuba*, 376 U.S. at 427 n.25.

This Court recently granted a certiorari petition—at the United States' urging—to address an FSIA question based on a similar circuit conflict (there, between the Ninth and Seventh Circuits). *Rubin v. Islamic Republic of Iran*, 137 S. Ct. 2326 (2017); *see* United States *Amicus Curiae* Br., *Rubin*, 2017 WL 2275824, at *13-15. It should do the same here.

II. The Erroneous Decision Below Should Not Govern This Important Question.

Notably, the United States does not contest that the question presented is important and recurring. Instead, the United States devotes a surprising number of pages to defending the result below—without actually addressing head-on Petitioners' plain-text argument. The question presented "concerns interpretation of the FSIA's reach—a 'pure question of statutory construction . . . well within the province of the Judiciary.'" *Altmann*, 541 U.S. at 701 (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446, 448 (1987)) (ellipsis in original). "While the United States' views on such an issue are of considerable interest to the Court, they merit no special deference." *Ibid.* And in this case, the Court should reject those views on plenary review for the reasons set out in Petitioners' earlier filings (Pet. 28-31; Reply 7-10).

In brief, Petitioners' argument is that the text of the FSIA means what it says: "[a] foreign state shall not be immune from the jurisdiction of courts of the United States" when, as here, "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). Hungary is a foreign state; it expropriated property in violation of international law; and that property is controlled by agencies or instrumentalities of Hungary that are engaged in commercial activity in the United States. Because Hungary is "[a] foreign state," it is not immune to Petitioners' suit. Yet, as Judge Randolph explained in his dissenting opinion, the panel below held "that the term 'foreign state' in § 1605(a)(3) somehow does not included a 'foreign state.'" Pet. App. 33a. This Court should grant the Petition to correct that error.

The United States' arguments to the contrary miss the mark. Rather than relying on the text of the statute, the United States relies (U.S. Br. 11) on its view of the "context, history, and purpose" of the FSIA. In addition to relying on the reasons set forth in Petitioners' earlier briefing (Pet. 28-31; Reply 7-10), we offer brief responses to some of the points raised by the United States.

First, the United States relies (U.S. Br. 11-12) on cases addressing due process limits on federal courts' exercise of personal jurisdiction, noting that in that context, jurisdiction over a parent corporation does not automatically confer jurisdiction over a subsidiary. That argument is misplaced in this case. The district

court had jurisdiction over Hungary not because of anything "automatic," but because the FSIA expressly provides for jurisdiction over the "foreign state" in precisely these circumstances. 28 U.S.C. § 1605(a)(3). The United States does not argue that Congress lacks authority to provide for jurisdiction in this situation; the only question is whether it did, and the plain text of the statute is the best answer to that question. In addition, the due process concerns the United States relies on do not apply here because a foreign sovereign is not a "person" entitled to due process protections. *See Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 694 (7th Cir. 2012); *Frontera Res. Azerbaijan Corp. v. State Oil Co. of the Azerbaijan Republic,* 582 F.3d 393, 398-399 (2d Cir. 2009); *I.T. Consultants, Inc. v. Islamic Republic of Pakistan*, 351 F.3d 1184, 1191 (D.C. Cir. 2003).

Second, the United States' professed concern (U.S. Br. 13) about "veil piercing" is misplaced because Section 1605(a)(3) has nothing to say about attributing *liability* for one entity's wrongdoing to a distinct juridical entity—which is the concern addressed in *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 823 (2018); *Dole Food Co. v. Patrickson*, 538 U.S. 468, 476 (2003); and *First National City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 629-630 (1983) (all cited at U.S. Br. 13). Here, Petitioners seek to hold Hungary responsible for *its own* illegal acts.

Third, the United States draws (U.S. Br. 14-17) precisely the wrong conclusion from 28 U.S.C. § 1610, which sets out exceptions to the general grant of immunity from attachment of property in execution of an adverse judgment. The United States is correct that the exceptions to immunity from execution are broader

for property of an agency or instrumentality than for property of a foreign sovereign. *Ibid.* But Congress accomplished that goal *expressly* in Section 1610, not through reliance on the unstated presumptions and alleged "common sense" the United States relies on (U.S. Br. 13-14). And the fact that Congress knows how to separately establish broad immunity exceptions for an agency or instrumentality and narrow immunity exceptions for a foreign sovereign by doing so in distinct subsections, *see* 28 U.S.C. § 1610(a) and (b), strongly suggests that Congress's failure to do that in Section 1605(a)(3) requires a *different* interpretation of that exception, not a "parallel" one (U.S. Br. 16-17).

Fourth, the United States' reliance on pre-FSIA immunity practices is unavailing. The purpose of the FSIA was to displace existing "ambiguous and politically charged" principles that governed decisions on foreign-state immunity. *Altmann*, 541 U.S. at 699. The United States asserts (U.S. Br. 18)—without support—that its view should prevail because "Congress adopted an incremental approach [to] granting jurisdiction over foreign states" when it adopted the FSIA. But surely the language Congress actually enacted is the most accurate evidence of what it intended.

Finally, although the United States offers a nod (U.S. Br. 8) to Hungary's deplorable participation in the Holocaust, it otherwise ignores established U.S. policy that a foreign sovereign should be responsible for restoring property looted during the Holocaust, even when that property is under the control of a state agency or instrumentality. Indeed, less than a week before the United States filed its brief, the Executive Branch—in conjunction with Germany, which hosted an international conference on Nazi-looted art—

reaffirmed its commitment to the 1998 Washington Principles on Nazi-Confiscated Art, wherein signatories pledged to eliminate legal obstacles to the restoration of looted art. *See* Joint Declaration Concerning the Implementation of the Washington Principles from 1998 (Nov. 27, 2018), https://www.deutschland.de/en/washington-principles-joint-declaration-by-germany-and-the-usa; Pet. 25-26. In so doing, Ambassador Eizenstat (*amicus* in this case and one of the United States' representatives at the conference) specifically called out Hungary (a signatory to the Washington Conference) for its failure to return works it stole from its Jewish citizens during the war, even though it has restituted some property from state museums to its non-Jewish people. William D. Cohan, *Five Countries Slow to Address Nazi-Looted Art, U.S. Expert Says*, N.Y. Times (Nov. 26, 2018), https://www.nytimes.com/2018/11/26/arts/design/five-countries-slow-to-address-nazi-looted-art-us-expert-says.html. Even more recently, a former U.S. Ambassador to Hungary criticized the Hungarian government's failure to return the very works of art at issue in this case. Donald Blinken, Opinion, *Looted Art in Hungary*, N.Y. Times (Dec. 10, 2018), https://www.nytimes.com/2018/12/09/opinion/letters/looted-art-hungary.html.

In an effort to paper over the inequities that will flow from the decision below, the United States offers (U.S. Br. 20-21) its view that the respondent museums should not prevail on remand on their argument that the case should be dismissed because Hungary is an indispensable party. But the United States' explanation in fact confirms that the D.C. Circuit's reading of Section 1605(a)(3) creates an enormous loophole that

is inconsistent with congressional policy. The United States opines (U.S. Br. 21) that Hungary "would not be bound by a money judgment against the museums or university" and would not lose "its ownership interest" in the stolen works. That result is the opposite of what U.S. policy would dictate.

* * *

All that being said, it is *this Court* that should decide who has the better of the argument: the Ninth Circuit and Petitioners on one hand or the D.C. Circuit, Hungary, and the United States on the other. The Nation should speak with one voice on the question presented—but it need not be the Solicitor General's voice. One of the principal purposes of the FSIA was to "transfer[] from the Executive to the courts the principal responsibility for determining a foreign state's amenability to suit." *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1329 (2016). This Court routinely disagrees with the Solicitor General's interpretation of the FSIA. *See*, *e.g.*, *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250, 2258 (2014) (rejecting the position of the United States); *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 204 (2007) (Stevens, J., dissenting) (noting that, unlike the majority, he would have adopted the views of the Solicitor General); *Altmann*, 541 U.S. at 701-702. The Court should grant the Petition and disagree with the United States in this case as well.

CONCLUSION

For the foregoing reasons, and for the reasons expressed in the Petition and Reply Brief, the Petition should be granted.

Respectfully submitted,

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