No. 19-520

In The
Supreme Court of the United States

ALAN PHILIPP, et al.,

Conditional Cross-Petitioners,

v.

FEDERAL REPUBLIC OF GERMANY, a foreign state, and STIFTUNG PREUSSICHER KULTURBESITZ,

Conditional Cross-Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The D.C. Circuit

BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

DAVID L. HALL
WIGGIN AND DANA LLP
Two Liberty Place
50 S. 16th Street
Suite 2925
Philadelphia, PA 19102
(215) 998-8310

JONATHAN M. FREIMAN
Counsel of Record
TAHLIA TOWNSEND
TADHG DOOLEY
BENJAMIN M. DANIELS
DAVID R. ROTH
WIGGIN AND DANA LLP
265 Church Street
P.O. Box 1832
New Haven, CT 06508-1832
(203) 498-4400
jfreiman@wiggin.com

Counsel for Conditional Cross-Respondents

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Conditional Cross-Respondents are Federal Republic of Germany ("Germany") and Stiftung Preussischer Kulturbesitz ("SPK"), a German governmental institution comprising museums, archives, and research institutions in Berlin. Neither is a corporation, has a corporate parent, or is owned in whole or part by any publicly held company. Conditional Cross-Petitioners are U.K. citizen Alan Philipp and U.S. citizens Gerald Stiebel and Jed Leiber.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

STATEMENT

I. Introduction

In their conditional cross-petition for certiorari, Plaintiffs ask this Court to review a question that the Court declined to review less than a year ago and to reverse a holding that is both consistent with the reasoned views of other circuits and in accord with the longstanding position of the United States. Although this Court should review other aspects of the decision below—*see* Defendants' Petition for Certiorari, No. 19-351 (Sept. 16, 2019)—the Question Presented in Plaintiffs' conditional cross-petition does not warrant review.

The Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. § 1602 *et seq.*, provides the sole basis for obtaining jurisdiction over foreign states and their instrumentalities in United States courts. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434–35 (1989). Under the FSIA, a "foreign state"—defined to include both a foreign sovereign and its "agenc[ies] or instrumentalit[ies]," 28 U.S.C. § 1603(a)—is presumptively immune from suit in the United States, unless a specific exception to immunity applies. *Id.* § 1604. This case concerns the "expropriation exception," which permits a U.S. court to exercise jurisdiction over a foreign state if "rights in property taken in violation of international law are in issue" and if there is a sufficient commercial nexus to the United States. 28 U.S.C. § 1605(a)(3); *see generally de Csepel v. Republic of Hungary*, 859 F.3d 1094, 1101 (D.C. Cir.

2017) ("A claim satisfies the [expropriation] exception if (1) 'rights in property taken in violation of international law are in issue,' and (2) there is an adequate commercial nexus between the United States and the defendants.") (quoting *Agudas Chasidei Chabad of U.S. v. Russian Federation*, 528 F.3d 934, 940 (D.C. Cir. 2008)).

To satisfy the commercial-nexus requirement, a claimant must show:

> 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 a foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.

Id. (quoting 28 U.S.C. § 1605(a)(3)). Lower courts have found in this language two separate requirements. For a suit to proceed against a foreign sovereign, the property at issue must be "present in the United States in connection with a commercial activity carried on in the United States by [the] foreign state." *Id.* at 1104. But for a suit to proceed against an "agency or instrumentality of the foreign state," it is enough that the agency or instrumentality is engaged in a commercial activity within the United States, even if the property at issue is abroad. *Id.*; *see generally Simon v. Republic of*

Hungary, 812 F.3d 127, 146 (D.C. Cir. 2016); *Garb v. Republic of Poland*, 440 F.3d 579, 589 (2d Cir. 2006).

In this case, Plaintiffs sued Defendants, the Federal Republic of Germany ("Germany") and its alleged instrumentality, the Stiftung Preussischer Kulturbesitz ("SPK"), claiming that Defendants had taken a collection of relics in violation of international law. *See generally* Supp. App. 1–92.[1] Though there is no dispute that the collection is not present in the United States, *see* Supp. App. 13, ¶ 26.iv, Plaintiffs contend that the District Court could exercise jurisdiction over Germany under the FSIA's expropriation exception because of *SPK's* commercial activities in the United States.

In its decision below, the D.C. Circuit rejected that assertion, adhering to earlier decisions holding that, "with respect to foreign states (but not their instrumentalities), the expropriation exception's [commercial-nexus] requirement . . . is satisfied only when the property is present in the United States." *Philipp v. Fed. Rep. of Germany*, 894 F.3d 406, 414 (D.C. Cir. 2018) (citing *Simon*, 812 F.3d at 146).

Plaintiffs now ask this Court to review that aspect of the D.C. Circuit's holding if it decides to grant Defendants' petition for certiorari, which raises separate

---

[1] Citations to "Supp. App." are to the Supplemental Appendix filed by Plaintiffs in support of their Conditional Cross-Petition for Certiorari in No. 19-520. Citations to "App." are to the Appendix filed in support of Defendants' Petition for Certiorari in No. 19-351.

questions. Though the Court should grant Defendants' petition, Plaintiffs' conditional cross-petition does not raise a question worthy of review. Just last term, the Court denied a petition for certiorari raising the same question about the scope of the expropriation exception's commercial-nexus requirement. *See de Csepel v. Republic of Hungary*, 139 S. Ct. 784 (Jan. 7, 2019) (No. 17-1165). It did so after receiving an amicus brief from the Solicitor General, which recommended against granting certiorari because the D.C. Circuit's decision was correct, consistent with the views of the United States, and did not stray from the reasoned decisions of other circuits. *See generally* Br. for the United States as Amicus Curiae, *de Csepel v. Republic of Hungary*, No. 17-1165 (Dec. 4, 2018) ("*de Csepel* SG Br."), 2018 WL 6382956, at *8.

Just as the Court denied certiorari last term in *de Csepel*, it should deny certiorari on the identical question here. Plaintiffs have pointed to no intervening development that warrants a different outcome. There is still no reasoned split among the circuits about this question and there is no indication that the United States has changed its "longstanding position" that "[t]he expropriation exception permits courts to exercise jurisdiction over a foreign state for expropriating property only when the property is in the United States in connection with the foreign state's *own* commercial activities in the United States." *Id*. Accordingly, Plaintiffs' conditional cross-petition should be denied.

II. Factual Background[2]

1. This case concerns ownership of about half of a collection of medieval reliquaries called the Welfenschatz, or Guelph Treasure ("the Collection"). Plaintiffs allege that they are the descendants of German Jews who owned art dealerships that created a "Consortium" to buy the Collection in October 1929, weeks before the global stock market crash. App. 39–40. During the global Great Depression that ensued, the Consortium was unable to sell the entire collection, as they'd hoped. *See* App. 40. In 1934, after the Nazi party came to power in Germany, the Dresdner Bank offered to purchase the remaining pieces of the Collection on behalf of an unidentified client, which turned out to be the (German) state of Prussia. *See* App. 42; Supp. App. 52–55. The parties to the sale negotiated for over a year before agreeing on a price of 4,250,000 RM (about $1,700,000 in 1935 U.S. dollars), roughly halfway between the two sides' opening positions, and about half what the Consortium had paid for the complete collection in 1929. *See* App. 44; Supp. App. 52.

2. The Collection has been on display in German public museums almost continuously since the sale. *See* App. 4; Supp. App. 26. For more than sixty years after World War II, neither the Consortium nor the constituent art dealerships—or any of the dealerships' owners or their heirs—challenged the sale. Then, in

---

[2] Defendants have set forth additional background in their own Petition for Certiorari. *See* Petition for Writ of Certiorari at 6–12, *Fed. Republic of Germany v. Philipp* (No. 19-351) (Sep. 16, 2019).

2008, Plaintiffs—who are successors-in-interest of some (but not all) Consortium participants—contacted SPK, claiming the sale occurred under duress and was invalid. In accordance with Germany's commitments under the Washington Conference Principles on Nazi Confiscated Art ("Washington Principles"), SPK investigated the history of the sale and determined that it was a voluntary, fair-market transaction. *See* App. 44–45 Plaintiffs disagreed and, at their request, the parties submitted the dispute to the "Advisory Commission for the Return of Cultural Property Seized as a Result of Nazi Persecution, Especially Jewish Property" (the "Commission"), an alternative dispute resolution mechanism established by Germany under the Washington Principles to hear restitution claims. *See id*.

The Commission reviewed documentary evidence and held a hearing at which witnesses testified. App. 45. Although the Commission has recommended restitution in other cases, here it concluded that the Collection was sold for fair-market value, after arm's-length negotiations, at a price reflecting the effect of the global economic crisis on the art market. *Id.* It therefore recommended against restitution. *Id.*

III. Procedural Background

1. Plaintiffs sued both Germany and SPK in the District Court for the District of Columbia. They invoked the FSIA's expropriation exception as the jurisdictional basis for asserting common-law claims seeking restitution for the remaining pieces of the

Collection, or $250 million in damages. *See* Supp. App. 9–18, 91. They alleged that "Germany and the SPK are engaged in commercial activity within the United States, within the meaning of 28 U.S.C. § 1605(a)(3)." Supp. App. 12 ¶ 26. Yet aside from a conclusory allegation that "[o]n information and belief, Germany engages in a broad range of commercial activity in the United States," *id.* at 17 ¶ 27, the alleged commercial activities that Plaintiffs identify in their complaint involve SPK alone. *See id.* at 12–16 ¶ 26. They acknowledge, moreover, that the Collection itself remains in Germany, on permanent display in the Museum of Decorative Arts in Berlin. *Id.* ¶ 26.iv. They do not allege that any part of the Collection is present in the United States.

2. Defendants moved to dismiss. Among other grounds for dismissal, Defendants argued that Plaintiffs had failed to adequately plead a commercial nexus for Germany because they did not allege that the Collection was present in the United States. *See* App. 58–59.

Addressing this argument, the District Court observed that "[t]he FSIA provides two avenues for establishing jurisdiction under the expropriation exception, one that addresses the commercial activity requirements for a foreign state, like Germany, and one that addresses the requirements for an instrumentality of a foreign state, like the SPK." App. 59. The District Court acknowledged that the D.C. Circuit in *Simon* held "that to proceed on claims against a foreign state like Germany, Plaintiffs must meet the requirements

of the first clause [of § 1605(a)(3)] and to proceed on claims against an instrumentality such as the SPK, Plaintiffs must meet the requirements of the second clause." App. 61. The court nevertheless "allow[ed] the claims against Germany to proceed," albeit without precluding the parties "from raising this issue at a later juncture with more fulsome briefing." App. 62.

3. On appeal, the D.C. Circuit largely affirmed the District Court's denial of Defendants' Motion to Dismiss as to SPK. *See Philipp v. Federal Republic of Germany*, 894 F.3d 406 (D.C. Cir. 2018). But it reversed the District Court's decision to allow Plaintiffs' claims to go forward against Germany. *Id.* at 414. "In *Simon*," the court noted, "we held that, with respect to foreign states (but not their instrumentalities), the expropriation exception's [commercial-nexus] requirement . . . is satisfied only when the property is present in the United States." *Id.* Because there was no dispute that the Collection remains in Berlin, not the United States, the Court of Appeals ordered the District Court on remand to grant the motion to dismiss with respect to Germany, but not SPK. *Id.*

After the Court of Appeals denied Defendants' petition for rehearing en banc, Defendants filed a petition for certiorari with this Court. Along with their brief in opposition, Plaintiffs filed this conditional cross-petition, asking the Court to review the D.C. Circuit's holding that Germany should be dismissed from the case.

REASONS FOR DENYING THE CROSS-PETITION

Although Defendants' Petition for Certiorari should be granted, Plaintiffs' conditional cross-petition should be denied. As it relates to the scope of the commercial-nexus requirement, the D.C. Circuit's decision is correct and consistent with the reasoned opinions of other circuits. As the United States argued in opposing certiorari in the recent *de Csepel* case, "[t]he expropriation exception permits courts to exercise jurisdiction over a foreign state for expropriating property only when the property is in the United States in connection with the foreign state's *own* commercial activities in the United States." *de Csepel* SG Br., 2018 WL 6382956, at *8. Just as this Court denied the plaintiffs' petition for certiorari in *de Csepel*, it should deny review of the same question here.

I. The D.C. Circuit's holding on this question is correct.

The Court of Appeals correctly determined that Plaintiffs' lawsuit could not proceed against Germany in a U.S. court, because the property at issue is not present in the United States in connection with Germany's commercial activities in the United States. This holding tracks the text of the FSIA's expropriation exception, as well as the purpose of the FSIA.

1. Under the FSIA, a foreign state is presumptively immune from the jurisdiction of U.S. courts, unless a specified exception applies. 28 U.S.C. §§ 1604–1605;

Verlinden V.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 488–89 (1983). A "foreign state," as defined in the FSIA, includes "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). An "agency or instrumentality," in turn, is defined 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." *Id.* § 1603(b)(1)–(3).

As this Court has recognized, the text, structure, and purpose of the FSIA make clear that foreign sovereigns are presumed to be separate from their agencies or instrumentalities. *See*, *e.g.*, *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba (Bancec)*, 462 U.S. 611, 623, 626–27 (1983) ("[G]overnment instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such."); *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 822 (2018) (recognizing "default" presumption that agencies and instrumentalities of a foreign state are "to be considered separate legal entities" from the foreign state itself). The FSIA reinforces this distinction across various provisions, treating foreign states differently from their subordinate entities and affording them greater protection from suit. *See*, *e.g.*, 28 U.S.C. § 1606 (permitting punitive damages against agencies and instrumentalities but not, with certain exceptions,

against foreign states); *id.* § 1608 (adopting less exacting service requirements for agencies and instrumentalities than for foreign states); *id.* § 1610 (providing greater immunity against execution on the property of foreign states than on the property of agencies and instrumentalities).

"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." *Singh ex rel. Singh v. Caribbean Airlines Ltd.*, 798 F.3d 1355, 1359 (11th Cir. 2015). And, as the United States has previously observed, the FSIA's distinction reflects "the common-sense point that it is more delicate for a court to exercise jurisdiction over a foreign state than over an agency or instrumentality." *de Csepel* SG Br., 2018 WL 6382956, at *14.

2. This background rule informs the proper reading of the expropriation exception's commercial-nexus requirement, § 1605(a)(3). The expropriation exception reads:

> (a) A foreign state shall not be immune from [suit] in any case—
>
> * * *
>
> (3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the

> United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.

28 U.S.C. § 1605(a)(3). Plaintiffs contend that the disjunctive language in subsection (a)(3) means that a claimant can establish a commercial nexus against a "foreign state" *either* by showing that the property in question is present in the United States in connection with a commercial activity carried on in this country by the foreign state *or* by showing that the property is owned or operated by an agency or instrumentality of the foreign state that is engaged in a commercial activity in the United States. *See* Cross-Pet. at 11. That reading ignores the context, structure, and purpose of the FSIA and would lead to absurd results.

To begin, Plaintiffs' reading ignores the "background rule" against which the FSIA is to be construed. *See de Csepel* SG Br., 2018 WL 6382956, at *8, 14. While both foreign sovereigns and their agencies and instrumentalities qualify as "foreign states" under the Act, they are "to be considered separate legal entities" with different protections. *Rubin*, 138 S. Ct. at 822. The reading adopted by the Court of Appeals below (consistent with the views of other circuits, *see infra* at 16–18, and of the United States, *see infra* at 21–25) follows the background rule in that it recognizes "two distinct nexus tests." *de Csepel* SG Br., 2018 WL 6382956, at *9.

"The first (addressing the link to U.S. activities of 'the foreign state') is much more demanding than the second (addressing the link to U.S. activities of 'an agency or instrumentality')." *Id.* And the Court of Appeals's reading makes sense. As the Government has pointed out, "the statute is naturally read to require that the entity that loses its immunity (the 'foreign state' in the introductory paragraph) must be the same entity whose commercial activities in the United States subject it to jurisdiction of a U.S. court." *Id.* at *11.

By contrast, Plaintiffs' reading of the commercial-nexus requirement erases the distinction between foreign states and their agencies and instrumentalities and would subject a foreign sovereign to jurisdiction in the United States based on the commercial activities of its subsidiary, even if it engaged in no such activity itself. This violates the "*Bancec* presumption" that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." *Bancec*, 462 U.S. at 626–27. It also strays from the general rule that "jurisdiction over a parent corporation [does not] automatically establish jurisdiction over a wholly owned subsidiary," and vice versa. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n. 13 (1984); *see also*, *e.g.*, *Escude Cruz v. Ortho Pharm. Corp.*, 619 F.2d 902, 905 (1st Cir. 1980) ("The mere fact that a subsidiary company does business within a state does not confer jurisdiction over its nonresident parent, even if the parent is sole owner of the subsidiary.").

3. Plaintiffs' reading of the statute would lead to results that Congress could not have intended. Under their reading, a foreign state and its agency or instrumentality would be equally subject to jurisdiction, so long as the agency or instrumentality is engaged in commerce in the United States. If that is the case, then *every* time an agency or instrumentality is subject to suit, the foreign state would be as well, defeating the distinction that Congress drew throughout the FSIA.

Taken to its logical conclusion, Plaintiffs' reading would also permit U.S. courts to exercise jurisdiction over any and every "political subdivision" and "agency or instrumentality" of a foreign nation, so long as one of them is engaged in commercial activity in the United States. That's because every political subdivision and agency or instrumentality of a foreign sovereign falls under the FSIA's definition of a "foreign state." *See* 28 U.S.C. § 1603(a) ("A 'foreign state' . . . includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state. . . ."). So if Germany is subject to jurisdiction as a "foreign state" because of SPK's commercial activity in the United States, so too (under Plaintiffs' reading) is Bavaria (a "political subdivision" of Germany) and the Bavarian owned Hofbräu brewery (an "agency" of Germany)—even if neither of these entities has a connection to the property at issue and even if neither have engaged in commercial activity in the United States.[3] As the

[3] The House Committee Report accompanying the FSIA explains that "entities which meet the definition of an 'agency or instrumentality of a foreign state' could assume a variety of

United States has argued, "it is very unlikely that Congress intended for jurisdiction to be 'dispensed in gross,' particularly given the background rule respecting the separate juridical status of each agency or instrumentality." *de Csepel* SG Br., 2018 WL 6382956, at *16.

4. Plaintiffs' reading of § 1605(a)(3) would also cause conflicts with other provisions of the FSIA. The FSIA addresses both immunity from suit and immunity from execution, *see Republic of Argentina v. NML Capital, Ltd.*, 573 U.S. 134, 141-42 (2014), and the exceptions to immunity from suit mirror the exceptions to immunity from execution. As the House Report explains, the FSIA provisions on execution were intended to "partially lower[] the barrier of immunity from execution, so as to make this immunity conform more closely with the provision on jurisdictional immunity in the bill." H.R. REP. No. 94-1487, at 27 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6626, 1976 WL 14078. But the exceptions to immunity from execution are narrower for instrumentalities and agencies than for foreign states. *Compare* 28 U.S.C. § 1610(a) *with id.* § 1610(b). Given the parallels within the FSIA, it is most natural to read the expropriation exception likewise to

---

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. Under Plaintiffs' reading, any one, or all, of these entities would be subject to suit in the United States any time a different agency or instrumentality of a foreign state engages in commercial activity in the U.S.

recognize narrower exceptions to the presumptive immunity of a foreign sovereign than to the immunity of its agencies and instrumentalities. By contrast, under Plaintiffs' reading, a U.S. court could exercise jurisdiction over a foreign sovereign, but would then be unable to execute on its property.

5. Because the property at issue here is in Berlin, and not present in the United States, the Court of Appeals correctly concluded that the commercial-nexus requirement was not satisfied with respect to Germany.

II. There is no reasoned split over this question among the Courts of Appeals.

1. Plaintiffs maintain that the D.C. Circuit's reading of the commercial-nexus requirement conflicts with the holdings of "[m]ultiple other circuits." Cross-Pet. at 16. This is, to say the least, an overstatement. As the Government pointed out the last time a petitioner grasped for a circuit split on this question, the D.C. Circuit's reading of § 1605(a)(3)—first in *Simon*, then in *de Csepel*, and now in *Philipp*—is "in accord with the only other court of appeals decision to discuss the question." *de Csepel* SG Br., 2018 WL 6382956, at *18 (citing *Garb v. Republic of Poland*, 440 F.3d 579, 589 (2d Cir. 2006)). No reasoned circuit split has emerged since the Court denied certiorari in *de Csepel* in January 2019.

In *Garb*, the Second Circuit considered whether the commercial-nexus requirement had been satisfied

in a suit brought by Jewish claimants alleging expropriation of their property by the Polish Government following World War II. The District Court had held that the plaintiffs failed to satisfy the commercial-nexus requirement of the expropriation exception because "they have not shown that the property at issue is either (a) 'present in the United States in connection with a commercial activity carried on in the United States by the foreign state,' or (b) '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.* (quoting 28 U.S.C. § 1605(a)(3)). Examining the statute, the Second Circuit observed that "[t]he first of these alternative showings 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.'" *Id.* The plaintiffs could not satisfy that showing because the property at issue remained in Poland. Turning to the second clause of § 1605(a)(3), the court noted that "the Republic of Poland is not an agency or instrumentality of a foreign state, because it is the foreign state itself." *Id.* (internal quotation marks omitted).

The Second Circuit in *Garb* did not have occasion to conclude that a foreign state cannot be subject to U.S. jurisdiction on the basis of commercial activity in the United States conducted by an agency or instrumentality of the foreign state. That said, district courts following *Garb* have done just that, in accord with the decision of the D.C. Circuit below. *See*, *e.g.*, *Hammerstein v. Fed.*

Republic of Germany, No. 09-CV-443 (ARR/RLM), 2011 WL 9975796, at *5 (E.D.N.Y. Aug. 1, 2011) ("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."), *aff'd*, 488 F. App'x 506, 507 (2d Cir. 2012).

2. In search of a circuit split, Plaintiffs look mainly to the Ninth Circuit. To be sure, that court has three times permitted the exercise of jurisdiction over a foreign state when only the second clause of the commercial-nexus requirement is satisfied. *See Sukyas v. Romania*, 765 F. App'x 179 (9th Cir. 2019); *Cassirer v. Kingdom of Spain*, 616 F.3d 1019 (9th Cir. 2010); *Altmann v. Republic of Austria*, 317 F.3d 954 (9th Cir. 2002). But none of these decisions engage the statute and explain the basis for exercising jurisdiction over the foreign state. Instead, in each case, the Ninth Circuit has analyzed the basis for jurisdiction over an agency or instrumentality and then *assumed*, without further analysis, that the basis of jurisdiction applied equally to the foreign state.

In *Altmann*, for example, the Ninth Circuit concluded that "the Austrian Gallery is engaged in commercial activity in the United States," based on its publication and sale of books in the United States. 317 F.3d at 968–69. But it did not explain why its conclusion—that "*the Gallery* is engaging in commercial activity sufficient to justify jurisdiction under the FSIA"—satisfied the commercial-nexus requirement for Austria, the foreign state. *Id.* at 969. Similarly, in

Cassirer, the Ninth Circuit assumed, without considering or deciding, that a court could exercise jurisdiction over Spain as long as its instrumentality engaged in commercial activity in the United States. 616 F.3d at 1037. But the issue before the court in *Cassirer* was not whether an instrumentality's commercial activities in the United States could subject a foreign state to jurisdiction, but whether the expropriation exception applies at all when neither the foreign state nor the instrumentality was responsible for the allegedly illegal taking. *Id.*[4]

Most recently, in *Sukyas*, the Ninth Circuit—in an unpublished non-precedential memorandum, *see* 9th Cir. R. 36-3—held that a Romanian instrumentality's past licensing of U.S. films to screen in Romania satisfied the commercial-nexus clause of § 1605(a)(3). 765 F. App'x at 180. It did not, however, explain whether or why that commercial activity would also subject Romania itself to jurisdiction. In fact, the plaintiffs in *Sukyas* did not assert jurisdiction over Romania under the expropriation exception and never argued that the foreign state should face jurisdiction based on the commercial activities of its instrumentality in the United

---

[4] As discussed below, *infra* at 23–24, after Spain petitioned for certiorari on *that* question, the United States submitted an amicus brief in which it affirmatively argued that Spain should have been dismissed from the case because the first clause of § 1605(a)(3) had not been satisfied. Br. for the United States as Amicus Curiae, *Kingdom of Spain v. Estate of Claude Cassirer*, No. 10-786, (May 27, 2011) ("*Cassirer* SG Br."), 2011 WL 2135028, at *15. "That assumption," the Acting Solicitor General clarified, "is erroneous." *Id.*

States. *See* Brief of Appellants, *Sukyas v. Romania*, No. 17-56557 (9th Cir. Jan. 25, 2018), 2018 WL 679187, at *54–64 (Jan. 25, 2018) (arguing that the court had jurisdiction over Romania under the commercial-activity exception § 1605(a)(2), not the expropriation exception, § 1605(a)(3)).

Because the Ninth Circuit has not expressed a reasoned disagreement with the D.C. Circuit on the scope of the commercial-nexus requirement of § 1605(a)(3), there is no pressing circuit split.

3. The cases Plaintiffs cite from outside the Ninth Circuit are even more tenuous, for none of them even permits the exercise of jurisdiction over a foreign state based on the domestic commercial activities of its agency or instrumentality. *See Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 671 (7th Cir. 2012) (setting forth test for expropriation exception in case brought solely against instrumentalities of Hungary); *Comparelli v. Republica Boliviariana de Venezuela*, 891 F.3d 1311, 1326 (11th Cir. 2018) (holding that expropriation exception may apply to an extraterritorial taking of property belonging to foreign nationals, but remanding for consideration of whether commercial-nexus requirement is satisfied given heightened pleading requirement recognized in *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312 (2017)); *Sequeira v. Republic of Nicaragua*, No. 16-25052-CIV, 2017 WL 8772507, at *1 (S.D. Fla. Aug. 1, 2017) (recommended ruling that "Nicaragua and [its instrumentality] are sovereign defendants immune from suit"); *Amorrortu v. Republic of Peru*, 570

F. Supp. 2d 916, 924 (S.D. Tex. 2008) (finding allegations "insufficient to support a finding that either of the two nexus requirements is satisfied").

This Court has "often said that drive-by jurisdictional rulings of this sort . . . have no precedential effect." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 91 (1998). Because no circuit court has expressed disagreement with the D.C. Circuit in a case in which the issue was both squarely raised and would make a difference to the outcome, there is no reasoned circuit split requiring resolution by this Court.

III. The D.C. Circuit's holding on this question aligns with the longstanding position of the United States.

1. In *de Csepel v. Republic of Hungary*, No. 17-1165 (2019), this Court denied a petition for certiorari raising the same question about the scope of the expropriation exception's commercial-nexus requirement, after inviting the views of the Solicitor General. The Solicitor General's views on this question were clear and forceful: "The expropriation exception permits courts to exercise jurisdiction over a foreign state for expropriating property only when the property is in the United States in connection with the foreign state's *own* commercial activities in the United States." *de Csepel* SG Br., 2018 WL 6382956, at *8. The Solicitor General recommended that the petition be denied, both because the D.C. Circuit's decision was

correct and because it did "not conflict with any reasoned decision of any other court of appeals." *Id.*

2. The amicus brief in *de Csepel* was not the first time the United States expressed its view that a foreign state can be subjected to jurisdiction only under the first clause of § 1605(a)(3). *See id.* (noting that the D.C. Circuit's ruling was "consistent with the United States' longstanding position"). Back in 2004, the Department of Justice submitted an amicus curiae letter to the Second Circuit, arguing that "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." Letter Brief of the United States as Amicus Curiae at 11, *Garb v. Republic of Poland*, No. 02-7844 (2d Cir. Sept. 9, 2004), reproduced at App. 149.

> 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.

Id., App. 149–50. The Government drew support for its reading of § 1605(a)(3) from its context as well as "the

historic treatment of expropriation claims prior to enactment of the FSIA." *Id.*, App. 150. And it forcefully rejected the plaintiffs' argument that the contrary interpretation was compelled by the plain meaning of the text:

> 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.

Id., App. 152.

3. Six years later, in a new administration, the United States again expressed its view that "foreign states should not be subject to the jurisdiction of United States courts based on the possession of expropriated property by their agencies and instrumentalities." *Cassirer* SG Br., 2011 WL 2135028, at *16. In *Cassirer*, the Court invited the Acting Solicitor General to express the views of the United States on, *inter alia*, whether the expropriation exception applies when a party other than the foreign state or its instrumentalities is responsible for the expropriation of property. After sharing its views on that question, the

Government addressed the "apparent[] assum[ption]" of the parties that "if Section 1605(a)(3) permits jurisdiction over the [instrumentality], it also permits jurisdiction over the Kingdom of Spain." *Id.* at *15. "That assumption is erroneous." *Id.* Instead, the Government argued, "where a plaintiff alleges that the property is 'owned or operated by an agency or instrumentality of the foreign state . . . engaged in 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." *Id.*

4. In 2017, under yet another administration, the Government reaffirmed the position it had expressed in *Garb* and *Cassirer* when it filed an amicus brief with the D.C. Circuit in *Simon v. Republic of Hungary*. In *Simon*, the Court of Appeals invited the Government to express its views on the doctrines of international comity and forum non conveniens. The Government declined to "take a position on the specific application of those doctrines," but affirmatively opined on the scope of the commercial-nexus requirement: "In order for the Republic of Hungary to be subject to the district court's subject matter jurisdiction," the Government wrote, "plaintiffs must establish that expropriated 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.' " Br. for Amicus Curiae the United States, *Simon v. Republic of Hungary*, No. 17-7146 (D.C. Cir. June 1, 2018), 2018 WL 2461996, at *22.

5. The Government filed its amicus brief in *Simon* while a petition for certiorari was pending in *de Csepel*. After Hungary alerted the Court to the filing in *Simon*, the Court invited the Solicitor General to express the views of the United States on whether a foreign state is subject to jurisdiction under the expropriation exception based solely on the commercial activities of an agency or instrumentality in the United States. *See de Csepel* SG Br., 2018 WL 6382956, at I. The Government accepted the invitation and reiterated "the United States' longstanding position" that "[t]he expropriation exception permits courts to exercise jurisdiction over a foreign state for expropriating property only when the property is in the United States in connection with the foreign state's *own* commercial activities in the United States." *Id.* at *8. The Government urged the Court to deny the petition, which presented the same question that Plaintiffs here now advance. *See id.* at *1.

6. In sum, the view of the United States could not be clearer. For at least fifteen years and three administrations, the United States has consistently maintained that the expropriation exception permits jurisdiction over a foreign state only if the allegedly expropriated property 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).

CONCLUSION

Because the holding of the Court of Appeals on the scope of the expropriation exception's commercial-nexus requirement was correct, consistent with the reasoned views of other circuits and the longstanding position of the United States, the Court should deny Plaintiffs' conditional cross-petition for certiorari, just as it did in January when the identical question was presented in *de Csepel*.

Respectfully submitted,

JONATHAN M. FREIMAN
Counsel of Record
TAHLIA TOWNSEND
TADHG DOOLEY
BENJAMIN M. DANIELS
DAVID R. ROTH
WIGGIN AND DANA LLP
265 Church Street
P.O. Box 1832
New Haven, CT 06508-1832
(203) 498-4400
jfreiman@wiggin.com

DAVID L. HALL
WIGGIN AND DANA LLP
Two Liberty Place
50 S. 16th Street
Suite 2925
Philadelphia, PA 19102
(215) 998-8310

Counsel for Conditional Cross-Respondents

December 13, 2019