No. 23-867

IN THE

Supreme Court of the United States

REPUBLIC OF HUNGARY, *et al.*,

Petitioners,

v.

ROSALIE SIMON, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONERS' OPENING BRIEF

JOSHUA SCOTT GLASGOW
Counsel of Record for Petitioners
CHRISTOPHER D. BARRAZA
PHILLIPS LYTLE LLP
620 Eighth Avenue, 38th Floor
New York, NY 10018
(212) 759-4888
jglasgow@phillipslytle.com
cbarraza@phillipslytle.com

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COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

A foreign sovereign is generally immune from suit in domestic courts, subject to the specific exceptions of the Foreign Sovereign Immunities Act ("FSIA"). Under the expropriation exception, claims involving rights in property taken in violation of international law may be heard if "property or any property exchanged for such property" has a commercial nexus with the United States. 28 U.S.C. § 1605(a)(3). Specifically, the property or its proceeds must be either "present in the United States in connection with a commercial activity" or "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.*

The Questions Presented are:

(1) Whether historical commingling of assets suffices to establish that proceeds of seized property have a commercial nexus with the United States under the expropriation exception to the FSIA.

(2) Whether a sovereign defendant bears the burden of producing evidence to affirmatively disprove that the proceeds of property taken in violation of international law have a commercial nexus with the United States under the expropriation exception to the FSIA.

(3) Whether a plaintiff must make out a valid claim that an exception to the FSIA applies at the pleading stage, rather than merely raising a plausible inference.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioner the Republic of Hungary is a sovereign nation. Petitioner Magyar Államvasutak Zrt. ("MÁV") is the Hungarian national railway company. MÁV is 100% owned by Hungary. MÁV has no parent corporations. No publicly traded company holds a 10% or greater ownership interest in MÁV.

Respondents are Rosalie Simon, Helen Herman, Charlotte Weiss, Helena Weksberg, Rose Miller, Magda Kopolovich Bar-Or, Zehava (Olga) Friedman, Yitzhak Pressburger, Alexander Speiser, Ze'ev Tibi Ram, Vera Deutsch Danos, Ella Feuerstein Schlanger, Moshe Perel, Yosef Yogev, Asher Yogev, Esther Zelikovitch, and the Estate of Tzvi Zelikovitch.

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BRIEF FOR THE PETITIONERS

INTRODUCTION

Jurisdiction in this case turns on whether property seized from Respondents during World War II was "exchanged for" current property that has a commercial nexus with the United States. 28 U.S.C. § 1605(a)(3). But the D.C. Circuit held that Respondents can defeat foreign sovereign immunity merely by alleging the proceeds of expropriated items were historically commingled with a sovereign's general revenues. *Simon v. Republic of Hungary*, 77 F.4th 1077, 1118 (D.C. Cir. 2023) ("*Simon III*"). This novel commingling theory is inconsistent with the text, structure, and history of the FSIA. This Court should reverse.

The FSIA establishes a baseline presumption that domestic courts lack jurisdiction over foreign nations and their instrumentalities. 28 U.S.C. § 1604. It provides a narrow exception for claims concerning rights in property taken in violation of international law, but only if "that property or any property exchanged for such property" has a commercial nexus with the United States. 28 U.S.C. § 1605(a)(3). The property at issue must be either present in the United States in connection with a commercial activity or owned by an instrumentality of a foreign state engaged in commercial activity in this country. *Id.* The commercial nexus requirement provides a critical guardrail in furtherance of the FSIA's "effort to preserve a dichotomy between private and public acts" of foreign nations, consistent with the "restrictive view" of sovereign immunity. *Federal Republic of Germany v. Philipp*, 592 U.S. 169, 183 (2021).

Respondents have not even attempted to show that any particular property of Hungary or MÁV, its national railway, was exchanged for items seized from them in 1944. They simply allege that Petitioners "liquidated stolen property, mixed the resulting funds with their general revenues, and devoted the proceeds to funding various governmental and commercial operations." (J.A. 33 ¶ 97). The D.C. Circuit ruled this allegation was enough to establish jurisdiction absent an affirmative showing by Petitioners "that their current resources do *not* trace back to the property originally expropriated." *Simon III*, 77 F.4th at 1119. Under the commingling theory, every item of property owned by a sovereign defendant was "exchanged for" any piece of expropriated property, no matter how distant in time or geography.

The commingling theory departs impermissibly from the FSIA's statutory text. In ordinary usage, one would not describe property as being "exchanged for" another item simply because proceeds were not segregated. Other courts have thus consistently rejected the commingling theory on text alone. *See, e.g.*, *Rukoro v. Federal Republic of Germany*, 976 F.3d 218, 225-26 (2d Cir. 2020).

The theory is also inconsistent with the FSIA's structure. If human rights violations can be repackaged as property claims and pursued under the expropriation exception, Congress' carefully crafted restrictions in other FSIA provisions would be rendered meaningless. "And there is no reason to suppose Congress thought acts of genocide or other human rights violations to be especially deserving of redress only when accompanied by infringement of property rights." *Philipp*, 592 U.S. at 184.

The historical context of the expropriation exception confirms that Congress intended it to be

applied narrowly to specifically identifiable property. The exception was patterned on an earlier statute, known as the Second Hickenlooper Amendment, 22 U.S.C. § 2370(e)(2), which was passed in response to an incident involving property present in the United States traceable to an expropriated shipload of goods. Congress knew that such incidents would be rare and intentionally drafted the statute narrowly. It recognized that a broader statute would be contrary to the United States' "reciprocal self-interest" in the doctrine of foreign sovereign immunity. *Nat'l City Bank of N.Y. v. Republic of China*, 348 U.S. 356, 362 (1955).

The D.C. Circuit's adoption of the commingling theory was accompanied by two procedural errors. First, it imposed a burden of production on sovereign defendants in contravention of well-settled precedent. *See, e.g.*, *Cargill Int'l S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1016 (2d Cir. 1993). Respondents, as the parties asserting jurisdiction, were responsible for producing evidence in support of their theory.

Second, the D.C. Circuit failed to correctly apply this Court's decision in *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 581 U.S. 170 (2017). It held that a foreign state loses immunity "only if no plausible inferences can be drawn from the facts alleged that, if proven, would bring plaintiffs' claims within an exception." *Simon III*, 77 F.4th at 1106. But under *Helmerich*, "the relevant factual allegations must make out a legally valid claim that" the elements of the exception are satisfied. 581 U.S. at 174.

The commingling theory threatens to "subject all manner of sovereign public acts to judicial scrutiny under the FSIA by transforming the expropriation exception into an all-purpose jurisdictional hook for

adjudicating human rights violations." *Philipp*, 592 U.S. at 183. This Court should reject it.

OPINIONS BELOW

The opinion below (Pet. App. 1a) is published at 77 F.4th 1077. The district court's opinion (Pet. App. 93a) is published at 579 F. Supp. 3d 91.

JURISDICTION

The D.C. Circuit entered judgment on August 8, 2023 and denied rehearing on October 12, 2023. The Chief Justice extended the time within which to file a petition for a writ of certiorari to and including February 9, 2024. A timely petition was filed on February 7, 2024. This Court granted certiorari on June 24, 2024 and has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The expropriation exception of the FSIA provides:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case--
>
> . . .
>
> in which rights in property taken in violation of international law are in issue and 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), (a)(3).

STATEMENT

A. Legal Background

At common law, foreign sovereign immunity was a matter of executive discretion. Cases concerning "the dignity and rights of a friendly sovereign state" were "normally presented and settled in the course of the conduct of foreign affairs by the President and by the Department of State." *Ex parte Republic of Peru*, 318 U.S. 578, 586-87 (1943). When cases were filed in domestic courts, "the Executive Branch followed a policy of requesting immunity in all actions against friendly sovereigns." *Republic of Austria v. Altmann*, 541 U.S. 677, 689 (2004). "In such cases the judicial department of this government follow[ed] the action of the political branch, and w[ould] not embarrass the latter by assuming an antagonistic jurisdiction." *United States v. Lee*, 106 U.S. 196, 209 (1882).

In 1952, the Executive Branch took a somewhat narrower view of foreign sovereign immunity by adopting the "restrictive theory." Under the restrictive theory, "the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*)." *Altmann*, 541 U.S. at 690

(quoting Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State, to Acting U.S. Attorney General Philip B. Perlman (May 19, 1952), *reprinted in* 26 Dep't State Bull. 984-85 (1952)).

During the Cold War, issues related to the justiciability of foreign sovereign acts became politically salient because of disputes surrounding communist countries' expropriation of American assets abroad. In *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), this Court held that the act of state doctrine "precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory." *Id.* at 401. That case concerned the proceeds of a shipload of sugar that had been expropriated by the Cuban government, which were present in the United States. *Id.* at 404, 406.

Congress quickly responded to the *Sabbatino* decision by passing the Second Hickenlooper Amendment to the Foreign Assistance Act of 1964. It provides that the act of state doctrine does not apply "in a case in which a claim of title or other right to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking . . . by an act of that state in violation of the principles of international law." 22 U.S.C. § 2370(e)(2). "Courts and commentators understood the Amendment to permit adjudication of claims *Sabbatino* had avoided deciding, *i.e.*, claims against other countries for expropriation of American-owned property." *Philipp*, 592 U.S. at 170.

In 1976, Congress enacted the FSIA, 28 U.S.C. §§ 1330, 1602-11, which now "provides the sole basis for obtaining jurisdiction over a foreign state in federal court." *Argentine Republic v. Amerada Hess*

Shipping Corp., 488 U.S. 428, 439 (1989). "In enacting the FSIA, Congress intended to codify the restrictive theory's limitation of immunity to sovereign acts." *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 199 (2007). It provides that "foreign states shall be immune from the jurisdiction of the courts of the United States and of the States," subject to specific, narrow exceptions. 28 U.S.C. § 1604.[1] "Under the Act, 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." *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993).

The FSIA provides exceptions for actions based upon waiver, 28 U.S.C. § 1605(a)(1), commercial activity, § 1605(a)(2), rights in property in the United States acquired by succession or gift, or in immovable property, § 1605(a)(4), certain tortious conduct in the United States, § 1605(a)(5), and arbitration agreements, § 1605(a)(6). Congress subsequently added an exception relating to terrorist acts. 28 U.S.C. § 1605A. This case concerns the expropriation exception, which "used language nearly identical to that of the Second Hickenlooper Amendment." *Philipp*, 592 U.S. at 179. It provides that a defendant lacks immunity in any case:

> in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a

[1] A "foreign state" is defined to include "an agency or instrumentality of a foreign state." 28 U.S.C. § 1603(a).

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

28 U.S.C. § 1605(a)(3).

The expropriation exception thus requires proof of the following elements: that "(1) rights in property are in issue; (2) that the property was 'taken'; (3) that the taking was in violation of international law; and (4) that one of the two nexus requirements is satisfied." *Zappia Middle E. Constr. Co. v. Emirate of Abu Dhabi*, 215 F.3d 247, 251 (2d Cir. 2000); *see also France.com, Inc. v. French Republic*, 992 F.3d 248, 254 (4th Cir. 2021); *Comparelli v. Republica Bolivariana de Venezuela*, 891 F.3d 1311, 1319 (11th Cir. 2018). "A foreign state loses its immunity if the claim against it satisfies the exception by way of the first clause of the commercial-activity nexus requirement; by contrast, an agency or instrumentality loses its immunity if the claim against it satisfies the exception by way of the second clause." *de Csepel v. Republic of Hungary*, 859 F.3d 1094, 1107 (D.C. Cir. 2017).

As this Court has observed, "[m]ost of the FSIA's exceptions . . . comport with the overarching framework of the restrictive theory." *Philipp*, 592 U.S. at 182-83. The expropriation exception is an outlier in this regard, stretching the bounds of the restrictive theory "because it permits the exercise of jurisdiction over some public acts of expropriation." *Id.* at 183. Nonetheless, "the expropriation exception on its face

emphasizes conformity with international law by requiring . . . a commercial connection with the United States" and there is "nothing in the history of the statute that suggests Congress intended a radical departure" from the restrictive theory. *Helmerich*, 581 U.S. at 181.

B. Prior Procedural History

Much of the lengthy procedural history of this case is not directly relevant to the questions presented and is summarized here only briefly. Respondents filed this case in 2010—decades after the end of World War II—as a putative class action on behalf of a worldwide class seeking compensation for personal property seized during the Holocaust. *See Simon III*, 77 F.4th at 1091-92. Most of the named plaintiffs are foreign nationals. *See Simon v. Republic of Hungary*, 37 F. Supp. 3d 381, 385 (D.D.C. 2014). They claim that their property was seized by Hungary or MÁV in 1944 when they were forcibly transported as part of the Nazi-led assault on the Jewish people. *Id.* at 386.

The district court initially dismissed under the FSIA's treaty exception, holding that the 1947 Treaty of Peace with Hungary provided an exclusive dispute-resolution process. *Id.* at 420. The D.C. Circuit reversed. *Simon v. Republic of Hungary*, 812 F.3d 127 (D.C. Cir. 2016) ("*Simon I*"). It held that the 1947 Treaty's process was not exclusive. *Id.* at 137. The D.C. Circuit further ruled that the expropriation exception did not incorporate the "domestic takings rule," under which a sovereign's taking of property from its own nationals falls outside the scope of international law. *Id.* at 144-45. And it concluded that Respondents' allegations of historical commingling of proceeds permitted the plausible

inference "that the defendants retain the property or proceeds thereof, absent a sufficiently convincing indication to the contrary." *Id.* at 147.

On remand, the district court again dismissed, this time based on prudential exhaustion and *forum non conveniens*. *See Simon v. Republic of Hungary*, 277 F. Supp. 3d 42, 67 (D.D.C. 2017). The D.C. Circuit again reversed. *Simon v. Republic of Hungary*, 911 F.3d 1172 (D.C. Cir. 2018) ("*Simon II*"). It held that the FSIA precludes operation of the prudential exhaustion doctrine and that the district court erred in weighing the various *forum non conveniens* factors. *Id.* at 1181-86.

This Court granted Hungary's petition for certiorari following *Simon II*. *Republic of Hungary v. Simon*, 141 S. Ct. 187 (2020). It also granted certiorari in a case raising similar issues regarding the expropriation exception. *Federal Republic of Germany v. Philipp*, 141 S. Ct. 185 (2020). In *Philipp*, the Court unanimously held that the expropriation exception "refers to violations of the international law of expropriation and thereby incorporates the domestic takings rule." *Philipp*, 592 U.S. at 187. The Court vacated and remanded this case for further proceedings consistent with *Philipp*. *Republic of Hungary v. Simon*, 592 U.S. 207, 208 (2021).

C. This Appeal

Prior to this Court's first grant of certiorari, the district court ruled on Petitioners' motion to dismiss Respondents' Second Amended Complaint. *See Simon v. Republic of Hungary*, 443 F. Supp. 3d 88 (D.D.C. 2020). In that pleading, Respondents alleged that this action "concerns rights in property, including but not limited to cash, jewelry, heirlooms, art, valuable

collectibles, gold and silver, taken by Defendants from their rightful owners, the Named Plaintiffs." (J.A. 31 ¶ 91). As to the commercial nexus prong, Respondents made the following conclusory allegations:

> 97. Defendants own and/or operate property that they stole from Hungarian Jewish deportees during the Holocaust, or property exchanged for such stolen property. Defendants liquidated stolen property, mixed the resulting funds with their general revenues, and devoted the proceeds to funding various governmental and commercial operations.
>
> 98. The stolen property or property exchanged for such stolen property is owned and operated by Hungary and MÁV and/or other agencies and instrumentalities of Hungary that are engaged in commercial activity in the United States. Some of the stolen property, or property exchanged for such property, is present in the United States in connection with commercial activity carried on in the United States by Hungary.

(J.A. 33 ¶¶ 97-98).

In assessing whether these allegations were sufficient, the district court expressed concern "that the theory advanced by the plaintiffs" regarding commingling of assets, which "was upheld in *Simon I*, arguably broadens the already expanded scope of the expropriation exception." *Simon*, 443 F. Supp. 3d at

103 n.10. Nonetheless, the district court concluded, "*Simon I* is binding on this Court." *Id.*

Constrained by its reading of *Simon I*, the district court held that allegations of historical commingling were sufficient "to raise a plausible inference that the defendants retain some portion of the expropriated property." *Id.* at 104. That alone was not enough to defeat the motion to dismiss, however, since Hungary and MÁV raised a factual challenge to the veracity of Respondents' jurisdictional allegations.[2] Petitioners submitted declarations from "three scholars with knowledge of Hungarian state archival records related to the Holocaust." *Simon*, 443 F. Supp. 3d at 104.

Dr. János Botos, who served as the academic secretary of the Holocaust Documentation Center and Memorial Collection Public Foundation in Budapest and director of the Budapest Holocaust Institute, explained that he led two research initiatives "in an attempt to trace the property and proceeds of the property taken from Hungarian nationals during World War II." *Id.* at 105. Dr. Botos concluded "it is impossible for one to trace the current location or to identify who now has possession of the property identified in Plaintiffs' Second Amended Complaint as items allegedly having been taken during World War II by Hungarian state officials and MÁV employees or

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[2] "[I]f subject-matter jurisdiction turns on contested facts, the trial judge may be authorized to review the evidence and resolve the dispute on her own." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006). Accordingly, courts distinguish between "facial" Rule 12(b)(1) motions, which accept the allegations of a complaint as true but challenge jurisdiction in light of those allegations, and "factual" Rule 12(b)(1) motions, which contest the veracity of a pleading's allegations. *See, e.g.*, *Apex Digit., Inc. v. Sears, Roebuck & Co.*, 572 F.3d 440, 443-44 (7th Cir. 2009).

the proceeds thereof." *Id.* Similarly, Dr. László Csősz, the chief archivist of the Statewide Archives of the Hungarian National Archives, also determined that "it is impossible for one to trace the current location or to identify who now has possession of the property identified in Plaintiffs' Second Amended Complaint as items allegedly having been taken during World War II by Hungarian state officials and MÁV employees or the proceeds thereof." *Id.* And Tamás Kovács, the deputy head of the Statewide Archives of the Hungarian National Archives, confirmed that he "considers it impossible to trace, using available archival records, ongoing possession of the plaintiffs' expropriated property." *Id.*[3]

The district court held that "[t]hese declarations fail to meet the defendants' burden" because the D.C. Circuit required defendants to "'demonstrate[] conclusively that the value of the expropriated property is not traceable to their present day cash and other holdings.'" *Id.* (quoting *Simon I*, 812 F.3d at 147).

Hungary and MÁV appealed the district court's 2020 decision, but in light of this Court's remand following *Philipp*, the D.C. Circuit summarily returned the case to the district court. *See Simon v. Republic of Hungary*, 579 F. Supp. 3d 91, 109 (D.D.C. 2021). On remand, the district court concluded that some of the original plaintiffs had "adequately alleged facts supporting reasonable inferences of Czechoslovakian nationality and a lack of Hungarian nationality." *Id.* at 115. As to those plaintiffs, the court denied Petitioners' motion to dismiss. *Id.* The district court declined to revisit its prior ruling

[3] These declarations were filed as district court docket entries 138-3, 138-4, and 138-5.

regarding the "commingling logic" it "derived from a holding in *Simon I*." *Id.* at 122 n.22.

The parties cross-appealed that decision and the D.C. Circuit largely affirmed. It held that some of the remaining plaintiffs plausibly alleged Czechoslovakian nationality and permitted others an opportunity to amend their allegations on that issue. *Simon III*, 77 F.4th at 1088-89.[4] As to the expropriation exception, the D.C. Circuit concluded that the district court erred in failing to "go beyond the pleadings and resolve [the] disputed issues of fact," and remanded for fact-finding. *Id.* at 1115 (quoting *Phoenix Consulting, Inc. v. Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000)). However, the D.C. Circuit affirmed the district court's rulings with respect to the framework to be used in assessing whether the commercial nexus prong was satisfied.

The D.C. Circuit rejected the position that Respondents were obligated to make out a "valid claim" that the expropriation exception governs following this Court's decision in *Helmerich*. 581 U.S. at 174. It held that "nothing in *Helmerich* affects the familiar standard we have consistently applied to review the plaintiffs' factual allegations in FSIA cases like *Simon I*." *Simon III*, 77 F.4th at 1104. Accordingly, it held that "[d]ismissal is warranted only if no plausible inferences can be drawn from the facts alleged that, if proven, would bring plaintiffs' claims within an exception to sovereign immunity under the FSIA." *Id.* at 1106. It thus declined to

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[4] In a separate action, the district court dismissed similar claims brought by other Hungarian nationals. *Heller v. Republic of Hungary*, No. 21-CV-1739, 2022 WL 2802351, at *6 (D.D.C. July 18, 2022). The D.C. Circuit consolidated those appeals. *Simon III*, 77 F.4th at 1087. It affirmed the dismissal in *Heller*, *id.* at 1089, and those claims are not at issue here.

assess Petitioners' argument that the commingling theory fails under the *Helmerich* standard, stating that "the defendants misread *Helmerich*." *Simon III*, 77 F.4th at 1118.

Next, the D.C. Circuit addressed Petitioners' contention "that, in any event, they are entitled to reversal because the *Simon* plaintiffs failed to produce evidence tracing property in the United States or possessed by MÁV to property expropriated from them during World War II." *Id.* (internal quotation marks omitted). It held that this "argument fails at the gate: The plaintiffs had no such burden here." *Id.*

The D.C. Circuit ruled that "the 'burden of proof in establishing the inapplicability of [the FSIA's] exceptions is upon the party claiming immunity.'" *Id.* at 1116 (alteration in original) (quoting *Transam. S.S. Corp. v. Somali Democratic Republic*, 767 F.2d 998, 1002 (D.C. Cir. 1985)). "In keeping with the parties' respective burdens, evidence that 'merely confirm[s] the difficulty of tracing individual paths of exchange,' will—as the district court observed—'hurt[] rather than help[] the defendants' in that endeavor." *Id.* at 1119 (alterations in original) (quoting *Simon*, 443 F. Supp. 3d at 105). Under this standard, "defendants who wish to disclaim property they seized and liquidated must at least affirmatively establish by a preponderance of the evidence that their current resources do *not* trace back to the property originally expropriated." *Id.*

In adopting the commingling theory, the D.C. Circuit relied heavily on perceived policy considerations. It stated that once property is sold or commingled, "proceeds ordinarily become untraceable to any specific future property or transaction" and thus a tracing requirement would "thwart most claims under the expropriation exception." *Id.* The court

held that "plaintiffs need not produce evidence directly tracing the liquidated proceeds of their stolen property to funds retained by the defendants in order to survive the defendants' factual challenge to the court's jurisdiction under the FSIA's expropriation exception." *Id.* at 1119.

This Court granted the Petition for Certiorari filed by Hungary and MÁV.

SUMMARY OF ARGUMENT

I. The commingling theory adopted by the D.C. Circuit is inconsistent with the text, structure, and history of the FSIA. The expropriation exception requires a commercial nexus between the United States and property "exchanged for" items taken in violation of international law. 28 U.S.C. § 1605(a)(3). In ordinary usage, no person would describe current assets as "exchanged for" items taken decades prior simply because the proceeds of those items were commingled with general revenues. And the likelihood that any particular asset currently held by Hungary or MÁV can be traced to items seized from fourteen individuals in 1944 is infinitesimal given the innumerable transactions that have occurred in the intervening decades. Other courts have thus applied a plain-text reading of the statute to reject the commingling theory.

Indulging in the legal fiction that every asset held by a foreign sovereign or its instrumentality was exchanged for any item seized throughout history is incompatible with the structure of the FSIA. Congress intended to codify the restrictive theory of sovereign immunity by enacting the FSIA, not to open the doors of domestic courts to all manner of human rights claims. By creating a gaping loophole in the

statute, the D.C. Circuit's commingling theory would undermine important restrictions contained in other portions of the statute. The commercial tort exception permits property claims, but only for conduct "occurring in the United States." 28 U.S.C. § 1605(a)(5). The terrorism exception permits claims if the plaintiff is a U.S. national or government employee, but only if the defendant has been designated as a state sponsor of terrorism. 28 U.S.C. § 1605A(a)(2)(A). These limitations would be rendered meaningless if claims for human rights violations could be heard in federal court simply by recharacterizing them as property claims and alleging historical commingling.

Further, the commingling theory cannot be squared with the history of the expropriation exception, which is the jurisdictional counterpart to an earlier statute known as the Second Hickenlooper Amendment, 22 U.S.C. § 2370(e)(2). Congress passed the Second Hickenlooper Amendment to overrule, in part, this Court's decision in *Sabbatino*, 376 U.S. 398, a case that concerned specifically identifiable property present in the United States. Congress was repeatedly and explicitly advised that the Second Hickenlooper Amendment would apply only to a narrow category of cases involving traceable property, and contemporary court decisions reflect that understanding. When enacting the expropriation exception twelve years later, Congress used nearly identical language, confirming its intent to limit the reach of the statute to specifically identifiable property.

The D.C. Circuit adopted the commingling theory based on its concern that applying the plain text of the statute would exclude most expropriation claims. But that narrow scope is by design. The

United States' reciprocal self-interest in the doctrine of sovereign immunity counsels against an overly expansive view of the FSIA's exceptions. That interest is particularly acute with respect to the expropriation exception, which is already an outlier under international law. Congress did not intend that provision to work a radical departure from the restrictive view of foreign sovereign immunity, or to allow domestic courts to resolve international human rights claims generally.

II. The D.C. Circuit's substantive decision flowed from two related procedural errors. First, it imposed a burden of production on sovereign defendants to disprove a commercial nexus with the United States. That ruling contradicts well-established case law placing the burden of production on plaintiffs, which is consistent with the FSIA's House and Senate Reports and generally applicable rules regarding the burden to establish jurisdictional facts. Flipping the burden of production improperly saddles foreign sovereigns with the burdens of litigation, effectively stripping them of immunity from suit.

Rather than imposing a burden of production on defendants, plaintiffs bear the burden of producing evidence sufficient to support a finding that current assets were exchanged for expropriated items. Claims that the proceeds of expropriated items were commingled with general revenues, without more, fall well short of meeting that burden.

III. The D.C. Circuit's second procedural error concerns its failure to follow this Court's decision in *Helmerich*, 581 U.S. 170. There, the Court held "the relevant factual allegations must make out a legally valid claim that" the prongs of the expropriation exception are satisfied. *Id.* at 174. Yet the D.C.

Circuit ruled that *Helmerich* had no impact on the FSIA pleading standard, and that sovereign immunity would be defeated unless no plausible inference could be drawn in favor of an exception. But *Helmerich* demands that the district court itself make a determination on jurisdiction rather than hypothesizing how some other factfinder might decide. Under the proper standard, plaintiffs must make a valid claim that an FSIA exception applies, not an arguable or plausible one.

ARGUMENT

I. Historical commingling of assets is insufficient to show that proceeds of seized property have a commercial nexus with the United States

A. In ordinary usage, current assets would not be described as having been "exchanged for" expropriated property simply as a result of commingling

The expropriation exception confers jurisdiction only if "rights in property taken in violation of international law are in issue and that property or any property exchanged for such property" has a commercial nexus with the United States. 28 U.S.C. § 1605(a)(3). Only the latter portion of the statutory language is at issue here. Respondents have not identified any particular property expropriated during World War II that is present in the United States or currently owned by MÁV. Accordingly, the question is whether "property exchanged for [expropriated] property" has a commercial nexus with the United States. *Id.*

Under the common meaning of "exchanged for," the commingling theory fails. "Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009) (internal quotation marks omitted). Undefined terms are thus given "their ordinary meaning." *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995).

The term "exchange" means "[t]he act of transferring interests, each in consideration for the other." *Exchange*, Black's Law Dictionary (12th ed. 2024). Determining that current assets were "exchanged for" expropriated property, in ordinary usage, would thus require a plaintiff to identify the expropriated assets, identify the current assets at issue, and show that they were transferred in consideration for each other. Respondents have not done so, nor can they.

The operative pleading describes certain categories of property allegedly expropriated, but not specifically identifiable items. (J.A. 31 ¶ 91). As to MÁV, an instrumentality of Hungary, Respondents have not identified any particular property currently "owned or operated by" the railway that they contend was exchanged for the expropriated items. 28 U.S.C. § 1605(a)(3). As to Hungary, the D.C. Circuit found that the issuance of bonds in 2005 and 2010 provided the requisite commercial activity in the United States. *Simon III*, 77 F.4th at 1122. Accordingly, to fall within the expropriation exception, a court would have to conclude that these bonds, or the interest payments made on them, constitute property that was exchanged for property seized from Respondents more than sixty years earlier.

The sole support for the inference that current assets were exchanged for expropriated property is Respondents' conclusory allegation that "Defendants liquidated stolen property [and] mixed the resulting funds with their general revenues." (J.A. 33 ¶ 97).[5]

But it is extraordinarily unlikely that these bonds or MÁV's current assets were exchanged for property seized during World War II from the handful of individuals who filed this action. In the intervening decades, both Hungary and MÁV have engaged in countless transactions and made countless expenditures. Respondents themselves allege that Petitioners "devoted the proceeds to funding various governmental and commercial operations." (J.A. 33 ¶ 97). And they do not even claim that Hungary or MÁV are the specific entities in possession of proceeds. Instead, they allege that "property exchanged for such stolen property is owned and operated by Hungary and MÁV *and/or other agencies and instrumentalities* of Hungary." (J.A. 33 ¶ 98 (emphasis added)).

Hungary's history further undermines any purported link between current assets and the proceeds of Respondents' property. In the immediate aftermath of World War II, Hungary's "[e]stablished state institutions collapsed as their officials fled in the face of the Red Army's advance, forcing the country's new occupiers to construct a new state almost from

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[5] Respondents also cited to generalized information regarding commingling of assets seized during World War II, none of which relates to property owned by a named plaintiff. *See Simon III*, 77 F.4th at 1117 . To the extent Respondents seek to rely on property owned by putative class members, it is well-established that jurisdiction must be established by named plaintiffs themselves. *See Frank v. Gaos*, 586 U.S. 485, 492 (2019); *Simon v. E. Kentucky Welfare Rts. Org.*, 426 U.S. 26, 40 n.20 (1976).

scratch." *Simon I*, 812 F.3d at 152 (Henderson, J., concurring) (quoting Mark Pittaway, *The Politics of Legitimacy and Hungary's Postwar Transition*, in 13 Contemp. Eur. Hist. 453, 455 (2004)). The war caused "the destruction of '40 percent of Hungary's national wealth,' damage to 90 per cent of Hungary's industrial plants and loss of 40 per cent of Hungary's rail network and 70 per cent of Hungary's railway vehicles." *Id.* (quoting László Borhi, *Hungary in the Cold War, 1945-1956: Between the United States and the Soviet Union* 53-54 (2004)).

A decades-long period of communist rule began in 1948. *See de Csepel v. Republic of Hungary*, 169 F. Supp. 3d 143, 149 (D.D.C. 2016), *aff'd in part, rev'd in part*, 859 F.3d 1094 (D.C. Cir. 2017). During this era, Hungary's government coffers were "frequently raided by the Communists for financing their own political projects." (J.A. 55 ¶ 142). Hungary underwent a second significant regime change after the downfall of the communist government in 1989-90.[6] In light of this history, as Petitioners' experts have explained, "it is impossible for one to trace the current location or to identify who now has possession of the property identified in Plaintiffs' Second Amended Complaint." *Simon*, 443 F. Supp. 3d at 105.

Although Respondents have not produced any evidence tracing the property of a named plaintiff,

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[6] Following the end of communist rule, Hungary enacted the Second Compensation Act, which provided approximately $38 million to thousands of claimants who suffered property losses during World War II. (Dist. Ct. Dkt. No. 120-25 ¶¶ 82-83). A separate statute provided approximately $178 million in compensation for the deprivation of life or liberty. (*Id.* ¶ 84). And in 1997, Hungary provided approximately $14 million to create the Hungarian Jewish Heritage Fund, which distributes monthly benefits to Holocaust victims. (*Id.* ¶¶ 86-87).

even the general historical information they submitted in support of their theory demonstrates the unlikelihood that any specific assets were retained. A book excerpt Respondents filed notes that by late 1944, "state and party agencies were plundering Jewish property without any restrictions whatsoever" and in "territories under military threat, the government gave complete freedom to local authorities to distribute Jewish assets among the population at their own discretion." Zoltán Vági et al., *The Holocaust in Hungary: Evolution of a Genocide* 197 (2013).[7] At the same time, fascist party leaders and "German agencies organized the large-scale looting of the whole country, directing tens of thousands of trucks, freight cars, and barges westward loaded with Jewish and non-Jewish property." *Id.*[8] "The Nazi plunder of Hungary continued until the very last German troops left the country in April 1945, only to be replaced by Soviet looting." Vági et al., *supra* at 197. Even setting aside the presence of foreign troops, "theft became an everyday affair" and "[m]any citizens broke into the former ghettos and plundered abandoned houses where Jews had lived." *Id.* at 200.

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[7] This excerpt was filed by Respondents as district court docket entry 122-19.

[8] Much of the property taken by German troops was loaded onto the infamous "Gold Train," which was halted in Austria by U.S. Army forces in 1945. *See Rosner v. United States*, 231 F. Supp. 2d 1202, 1204 (S.D. Fla. 2002). Some of that property was looted from a warehouse in Salzburg, while some was sold or distributed by the Army Exchange Service. *Id.* at 1205. The United States eventually settled a class action regarding Gold Train property by establishing a $25.5 million settlement fund. *Rosner v. United States*, No. 01-1859-CIV, 2005 WL 8155968, at *2 (S.D. Fla. Oct. 3, 2005), *amended*, 2009 WL 10697241 (S.D. Fla. Jan. 22, 2009).

Under a plain-text reading of the expropriation exception, it would be illogical for a court to find that particular property present in the United States or held by MÁV was "exchanged for" the property allegedly taken from Respondents based solely on historical commingling. By way of analogy, no person would describe a car purchased in 2005 as "exchanged for" a car stolen in 1944 simply because an individual commingled proceeds of the stolen vehicle with other personal funds. Doing so in the context of a sovereign state would be even more attenuated and absurd. In addition to obvious differences in scale, sovereigns and their instrumentalities are unlike private entities, for which assets are often transferred for other value. Instead, sovereigns and their instrumentalities exist for the purpose of conferring public benefits without the receipt of anything in return.

The D.C. Circuit's adoption of the commingling theory is an outlier in FSIA jurisprudence; other courts have had no difficulty in applying the plain text of the expropriation exception. The Second Circuit has correctly rejected the proposition that plaintiffs can satisfy the commercial nexus prong merely by asserting a "'reasonable presum[ption]' that comingled funds were used to buy the properties" present in the United States. *Rukoro*, 976 F.3d at 225 (alteration in original) (citation omitted). It read the expropriation exception in a manner consistent with its common meaning, holding that plaintiffs were required to "trace the proceeds a sovereign received from expropriated property to funds spent on property present in the United States." *Id.* at 225-26. And it concluded that commingling did "not suffice to make a valid argument that property converted into currency and comingled with other monies in Germany's

general treasury account can be traced to the purchase of property in New York decades later." *Id.*

The Second Circuit reached the same conclusion in *Sheafen Kuo v. Gov't of Taiwan*, 802 F. App'x 594 (2d Cir. 2020). There, the court explained, "the fact that Taiwan purchased and exported goods did not establish that property derived from the 2009 sale of [plaintiffs'] property was located in the United States" or that "any of the properties owned by the defendants in the United States could be traced to the proceeds from [plaintiffs'] property." *Id.* at 597; *see also Freund v. Republic of France*, 592 F. Supp. 2d 540, 560 (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) (holding an absence of evidence regarding the fate of proceeds "provides no support for an inference that the expropriated property, or property derived therefrom, is 'owned or operated' by" defendant but instead "serves to underscore Plaintiffs' failure to offer evidence, or even to allege, that the property taken by [defendant] is in fact presently 'owned or operated' by [defendant] in any way" (quoting 28 U.S.C. § 1605(a)(3))).

The Ninth Circuit reached the same common-sense conclusion in *Alperin v. Vatican Bank*, 365 F. App'x 74 (9th Cir. 2010). It held the expropriation exception does not apply based on allegations that "property was *in the past* laundered, converted, and retained" without information "as to the *current* location of that property or property exchanged for that property." 365 F. App'x at 76.[9]

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[9] The Restatement (Third) of Foreign Relations Law of the United States also recognized that particular property must be identified to fit within the expropriation exception. It noted

The D.C. Circuit's contrary approach treats every asset held by a sovereign or its instrumentality as "exchanged for" any property ever expropriated, unless the foreign sovereign can conclusively demonstrate the absence of a commercial nexus. This sort of analysis, based on constructive rather than actual presence, is inconsistent with the statutory text and with this Court's jurisprudence. More than a century ago, the Court held that when "the existence of the property within the jurisdiction is essentially necessary to the exertion of the power of the court," it is insufficient to deem "property as constructively present and subject to its jurisdiction." *Chase v. Wetzlar*, 225 U.S. 79, 86, 89 (1912).[10] That is, when a statute grants jurisdiction based on the location of property, a plaintiff must show that its jurisdictional case "rests upon a real, not an imaginary, base." *Id.* at 89; *see also Norton v. Larney*, 266 U.S. 511, 515 (1925) ("It is quite true that the jurisdiction of a federal court must affirmatively and distinctly appear and cannot be helped by presumptions or by argumentative inferences drawn from the pleadings."). The D.C. Circuit eschewed this

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that the exception would apply if "something exchanged for the property taken comes into the United States—for instance, when a bill of lading or comparable document of title identifiable with the property is negotiated in the United States." Restatement (Third) of Foreign Relations Law of the United States § 455 cmt. c (1987). The Restatement (Fourth) of Foreign Relations Law of the United States remains in progress, with selected topics published in 2018. The relevant section describes the "expansive view" taken by the D.C. Circuit. Restatement (Fourth) of Foreign Relations Law of the United States § 455 n.7 (2018).

[10] The *Chase* decision concerned a predecessor to 28 U.S.C. § 1655, which conferred jurisdiction over certain lien claims as to "real or personal property within the district where such suit is brought." *Chase*, 225 U.S. at 88.

approach, and deemed all property of Hungary and MÁV to be "exchanged for" items seized from fourteen individuals in 1944. That is simply not a proper reading of the plain text of the expropriation exception.

B. The structure of the FSIA demonstrates the limited scope of the expropriation exception

In "ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). The expropriation exception sits at the outer bounds of the restrictive theory codified by the FSIA "because it permits the exercise of jurisdiction over some public acts of expropriation." *Philipp*, 592 U.S. at 183. But it too requires "a commercial connection with the United States." *Helmerich*, 581 U.S. at 181. As Congress explained in the FSIA's House and Senate Reports, "each of the immunity provisions in the bill, sections 1605-1607, requires some connection between the lawsuit and the United States, or an express or implied waiver," which "prescribe the necessary contacts which must exist before our courts can exercise personal jurisdiction." H.R. Rep. No. 94-1487, at 13 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6612; S. Rep. No. 94-1310, at 13 (1976).

This Court has emphasized the need to "take seriously the Act's general effort to preserve a dichotomy between private and public acts." *Philipp*, 592 U.S. at 183. "It would destroy that distinction were we to subject all manner of sovereign public acts to judicial scrutiny under the FSIA by transforming

the expropriation exception into an all-purpose jurisdictional hook for adjudicating human rights violations." *Id.*

The commingling theory would do just that and allow the exception to swallow the rule. It would permit essentially any dispute concerning an international conflict to be heard in the courts of the United States because human rights claims can invariably be "packaged as violations of property rights." *Id.* at 184. And in "virtually all claims involving liquidation . . . proceeds ordinarily become untraceable." *Simon III*, 77 F.4th at 1118. It is difficult to imagine an international conflict that would not be subject to review by domestic courts under the D.C. Circuit's commingling theory.

In *Philipp*, this Court rejected an attempt to expand the scope of the expropriation exception by permitting claims involving domestic takings. The Court explained that doing so "would circumvent the reticulated boundaries Congress placed in the FSIA with regard to human rights violations." *Philipp*, 592 U.S. at 183. For example, the non-commercial tort exception to the FSIA permits certain property claims, but only if "the relevant conduct 'occurr[ed] in the United States.'" *Id.* at 184 (quoting 28 U.S.C. § 1605(a)(5)). Such "restrictions would be of little consequence" if the expropriation exception broadly permitted property claims. *Id.* "And there is no reason to suppose Congress thought acts of genocide or other human rights violations to be especially deserving of redress only when accompanied by infringement of property rights." *Id.*

The same logic applies here. Permitting claims to proceed under the expropriation exception based on historical commingling would undermine the rigid boundaries Congress established with respect to non-

commercial torts under 28 U.S.C. § 1605(a)(5). Similarly, the D.C. Circuit's commingling theory would undercut the limits set forth in the terrorism exception, 28 U.S.C. § 1605A. That exception permits suits based on acts of torture or extra-judicial killings, but only if the plaintiff is a U.S. national, member of the armed forces, or an employee of the United States or a government contractor. § 1605A(a)(1), (a)(2)(A)(ii). And it permits suits only if "the foreign state was designated as a state sponsor of terrorism." § 1605A(a)(2)(A)(i). These limits would be meaningless if terrorist acts "could be packaged as violations of property rights and thereby brought within the expropriation exception," *Philipp*, 592 U.S. at 184, merely because assets were commingled.[11]

Correctly interpreted and applied, the expropriation exception permits a narrow class of property claims when a commercial nexus with the United States is present. The commingling theory espoused by the D.C. Circuit effectively reads the commercial nexus requirement out of the statute and thus allows the expropriation exception to swallow the general rule of foreign sovereign immunity.

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[11] As this Court explained in *Philipp*, various targeted statutes relating to Nazi-era claims do not provide for a broad exception to generally applicable rules of sovereign immunity. 592 U.S. at 185-86. Most statutes promoting restitution for Holocaust victims "generally encourage redressing those injuries outside of public court systems." *Id.* at 186.

C. The history of the expropriation exception confirms that Congress intended it to be narrowly applied when specific assets are traceable to seized items

"Congress drafted the expropriation exception and its predecessor, the [Second] Hickenlooper Amendment, against" a specific "legal and historical backdrop." *Philipp*, 592 U.S. at 181; *see also de Sanchez v. Banco Cent. de Nicaragua*, 770 F.2d 1385, 1395 (5th Cir. 1985) (explaining that the expropriation exception "parallels the so-called 'Hickenlooper Exception' to the act of state doctrine"). The Second Hickenlooper Amendment, originally passed in 1964, directs that the act of state doctrine does not apply to "a claim of title or other right to property" that was taken "in violation of the principles of international law." 22 U.S.C. § 2370(e)(2).[12]

As this Court observed, "Congress used language nearly identical to that of the Second Hickenlooper Amendment 12 years later in crafting the FSIA's expropriation exception." *Philipp*, 592 U.S. at 179. It would have made little sense for Congress to remove the act of state doctrine as a bar to adjudicating expropriation claims, then neglect to grant jurisdiction over such claims when crafting the

[12] The act of state doctrine holds that "'the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory." *Underhill v. Hernández*, 168 U.S. 250, 252 (1897). Although the doctrine differs from the concept of foreign sovereign immunity, the two are similar in that they are based on "the need to respect the sovereignty of foreign states." *Int'l Ass'n of Machinists & Aerospace Workers (IAM) v. Org. of Petroleum Exporting Countries (OPEC)*, 649 F.2d 1354, 1359 (9th Cir. 1981).

FSIA. The expropriation exception thus withdraws foreign sovereign immunity for claims that would be covered by the Second Hickenlooper Amendment, those "in which rights in property taken in violation of international law are in issue." 28 U.S.C. § 1605(a)(3). Indeed, both the House and Senate Reports on the expropriation exception specifically refer to the Second Hickenlooper Amendment. *See* H.R. Rep. No. 94-1487, at 20 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6618 (citing 22 U.S.C. § 2370(e)(2)); S. Rep. No. 94-1310, at 19 (1976) (same).

The scope of the Second Hickenlooper Amendment thus clarifies Congress' intent in drafting the expropriation exception. *See Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979) (where statutes cover the same subject matter, their language "is almost *in haec verba*" and legislative history shows the prior statute was the source of the later one, "we may properly conclude that Congress intended that the construction of" the statutes be in accord); *Allen v. Grand Cent. Aircraft Co.*, 347 U.S. 535, 551 (1954) (holding "the specific language of [a subsequent statute] should receive the same construction now that was placed on similar language in" a prior statute covering the same subject); *see also Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1521 (D.C. Cir. 1984) (Scalia, J.) (looking to "the legislative history and understanding of the purposes of the FSIA" as the basis for a narrow reading of an FSIA exception).[13]

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[13] Where the language of the two statutes differs, the expropriation exception is even more restrictive than the Second Hickenlooper Amendment. Rather than permitting claims when the property at issue is merely "based upon (or traced through)" a taking, 22 U.S.C. § 2370(e)(2), the expropriation exception

It is clear that the purpose of the Second Hickenlooper Amendment was to overturn, in part, the *Sabbatino* decision. *See Philipp*, 592 U.S. at 179. The statute was thus limited to claims like those at issue in *Sabbatino*, where funds could be traced directly to expropriated property. In that case, the property at issue was "the sum of $175,250.69" which was "received [in] payment for the sugar" expropriated by Cuba, and which was subject to an injunction preventing the funds from leaving New York State. *Sabbatino*, 376 U.S. at 405-06.

Contemporary court decisions recognized that the Second Hickenlooper Amendment was "restricted, manifestly, to the kind of problem exemplified by the *Sabbatino* case itself, a claim of title or other right to *specific property* which had been expropriated abroad." *French v. Banco Nacional de Cuba*, 242 N.E.2d 704, 712 (N.Y. 1968) (emphasis added); *see also Hunt v. Coastal States Gas Producing Co.*, 583 S.W.2d 322, 330 (Tex. 1979) ("Although the amendment does not refer specifically to proceeds, it is clear that it was intended to apply to the property *as long as it is traceable*." (emphasis added)). As the New York Court of Appeals explained, "to eliminate any possibility that the original language, adopted in 1964, might be construed to cover or encompass ordinary contract rights, or anything other than *specific and identifiable and 'traceable' property*, Congress amended the statute in 1965." *French*, 242 N.E.2d at 714 (emphasis added).

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demands "property exchanged for [expropriated] property" have a commercial nexus with the United States, 28 U.S.C. § 1605(a)(3).

Congress was repeatedly informed that the statute would apply narrowly, and only to specifically identifiable property:

- "Where oil, sugar, or other commodities have been expropriated, it is very difficult to trace them in international commerce" and thus "[a]ny recoveries that might be made by American claimants against expropriated property coming into the United States would be small, and haphazard." *Foreign Assistance Act of 1965: Hearings on H.R. 7750 Before the H. Comm. on Foreign Affairs*, 89th Cong. 1002 n.53 (1965) (Stanley D. Metzger, *Act-of-State Doctrine Refined: The Sabbatino Case* (quoting Executive Branch Views in Opposition to 'Sabbatino' Amendment to Foreign Aid Legislation (July 28, 1964))).[14]
- Attorney General Katzenbach advised that the amendment governed "a very isolated, infrequent occurrence which is when American property that has been nationalized in some way or another finds its way back into the United States." *Id.* at 1235. He noted that the amendment would cover "a fraction of 1 percent of the property which may be nationalized" and would not govern "99 percent of the property, because it will never come into the

[14] The Executive Branch Statement was issued prior to passage of the original version of the Second Hickenlooper Amendment, which occurred without "thorough study and full hearings on the subject" and "with the understanding that the congressional committees concerned will make a full review and study of the matter during next Congress and make a determination on the need for permanent legislation." *Id.* at 1003 (quoting H.R. Rep. No. 88-1925, at 16 (1964)). The other testimony cited here was offered in the subsequent 1965 hearings that led to the current version of the statute.

United States at all. It will not be affected by this amendment." *Id.* (Statement of Nicholas deB. Katzenbach, Att'y Gen. of the United States).[15]

- "On its face, I do not think it would apply except to property which was itself expropriated in violation of international law; or to that property so long as it is still identifiable; one might change its form somewhat and still identify it." *Id.* at 1070 (Statement of Louis Henkin, Prof. of Int'l L. and Diplomacy, Columbia Univ.).

The D.C. Circuit worried that "[a] foreign sovereign would need only commingle the proceeds from illegally taken property with general accounts to insulate itself from suit under the expropriation exception." *Simon III*, 77 F.4th at 1118. As a result, it adopted the commingling theory based on the concern that a contrary rule would "thwart most claims under the expropriation exception." *Id.* at 1118. These policy concerns suffer several defects. First, they fail to account for the FSIA's "baseline

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[15] Although the Second Hickenlooper Amendment is not expressly limited to property in the United States, Congress' background assumption was that suits would be limited to such property because, before the enactment of the FSIA, jurisdiction over foreign states was based on attachment of assets located within the territory of a domestic court. *See, e.g.*, *Ex parte Republic of Peru*, 318 U.S. at 587 ("Here the district court acquired jurisdiction in rem by the seizure and control of the vessel . . . ."). The House Committee Report for the FSIA explains that one of the purposes of the statute was to "provide a statutory procedure for making service upon, and obtaining in personam jurisdiction over, a foreign state," thereby "render[ing] unnecessary the practice of seizing and attaching the property of a foreign government for the purpose of obtaining jurisdiction." H.R. Rep. No. 94-1487, at 8 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6606.

presumption of immunity from suit." *Philipp*, 592 U.S. at 176.

Second, the FSIA was never intended to incentivize foreign nations in the ordering of their affairs. It is not a conduct-regulating statute. And "the principal purpose of foreign sovereign immunity has never been to permit foreign states and their instrumentalities to shape their conduct in reliance on the promise of future immunity from suit in United States courts." *Altmann*, 541 U.S. at 696.

Third, the D.C. Circuit failed to recognize that the expropriation exception was not intended to cover most expropriation claims that arise around the world. Instead, as the foregoing history makes clear, Congress intended the expropriation exception to cover only a narrow category of cases concerning specifically identifiable property having a commercial nexus with the United States. The commingling theory thus expands the expropriation exception beyond the bounds intended by Congress in a manner inconsistent with the FSIA's text, history, and structure.

D. The commingling theory is contrary to the interests of the United States

The United States has a strong "reciprocal self-interest" in the doctrine of foreign sovereign immunity. *Nat'l City Bank of N.Y.*, 348 U.S. at 362. As this Court has recognized, granting sovereign immunity to foreign nations "dovetails with our own interest in receiving similar treatment." *Helmerich*, 581 U.S. at 183. Indeed, many countries explicitly base foreign sovereign immunity in their courts on the concept of reciprocity. *See Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 841 (D.C. Cir. 1984).

Reciprocity concerns are especially important in the context of the expropriation exception because that provision already departs in some respects from the restrictive theory. "In this way, the exception is unique; no other country has adopted a comparable limitation on sovereign immunity." *Philipp*, 592 U.S. at 183 (citing Restatement (Fourth) of Foreign Relations Law of the United States § 455 n.15).

In an amicus curiae brief submitted at the request of the D.C. Circuit prior to its decision in *Simon II*, the United States explained:

> [D]eeming allegations that the Republic of Hungary seized and liquidated property abroad and commingled it with general revenues in its treasury abroad many decades ago to be sufficient to treat any state-owned property in the United States as "exchanged" for expropriated property would expand the expropriation exception far beyond its intended limits . . . .
>
> Similar concerns are raised by application of a rationale that allegations that a foreign state agency or instrumentality has historically commingled the proceeds of seized and liquidated assets among its assets are sufficient to establish jurisdiction over the agency or instrumentality if it does unrelated business in the United States.

Brief for *Amicus Curiae* the United States at 23-24, *Simon II*, 911 F.3d 1172, 2018 WL 2461996.

This Court has held that an expansive interpretation of the expropriation exception "would

'affron[t]' other nations, producing friction in our relations with those nations and leading some to reciprocate by granting their courts permission to embroil the United States in 'expensive and difficult litigation, based on legally insufficient assertions that sovereign immunity should be vitiated.'" *Helmerich*, 581 U.S. at 183 (quoting Brief for the United States as *Amicus Curiae* Supporting Petitioners at 21-22).

In this case, Respondents, most of whom are foreign nationals, *Simon*, 37 F. Supp. 3d at 385, have asserted claims against Hungary, a member of the European Union and a NATO ally, seeking class-wide damages that could be "so large as to be economically destabilizing." *Simon*, 579 F. Supp. 3d at 99 n.2. In addressing analogous claims previously asserted by a different set of plaintiffs, the Seventh Circuit explained the obvious foreign affairs tension cases such as this present:

> We should consider how the United States would react if a foreign court ordered the U.S. Treasury or the Federal Reserve Bank to pay a group of plaintiffs 40 percent of U.S. annual gross domestic product, which would be roughly $6 trillion, or $20,000 for every resident in the United States. And consider further the reaction if such an order were based on events that happened generations ago in the United States itself, without any effort to secure just compensation through U.S. courts. If U.S. courts are ready to exercise jurisdiction to right wrongs all over the world, including those of past generations, we should not

> complain if other countries' courts decide to do the same.

Abelesz v. Magyar Nemzeti Bank, 692 F.3d 661, 682 (7th Cir. 2012).[16]

The United States government would rightly object if the courts of France sought to adjudicate the United States' liability for slavery reparations, or if the courts of India asserted the authority to resolve claims based on the internment of Japanese residents during World War II. Having U.S. courts resolve claims for Hungarian expropriation of assets from foreign nationals many decades ago is no different. *See Philipp*, 592 U.S. at 185 ("As a Nation, we would be surprised—and might even initiate reciprocal action—if a court in Germany adjudicated claims by Americans that they were entitled to hundreds of millions of dollars because of human rights violations committed by the United States Government years ago.").

"United States law governs domestically but does not rule the world." *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 115 (2013) (quoting *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454 (2007)). Consistent with the United States' reciprocal interest in foreign sovereign immunity, the D.C. Circuit's commingling theory must be rejected.

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[16] In *Philipp*, the United States also explained that it "has urged foreign partners to establish appropriate redress and compensation mechanisms for Holocaust victims" and "[t]he exercise of jurisdiction by U.S. courts in some such cases may undermine the ability of the United States to advance its foreign-policy objectives." Brief for the United States as *Amicus Curiae* at 21, *Philipp*, 592 U.S. 169, 2020 WL 2840336.

II. Plaintiffs bear the burden of production to establish a commercial nexus with the United States

A. Plaintiffs must produce evidence to establish a commercial nexus

In addition to its substantive error regarding commingling, the D.C. Circuit incorrectly shifted the burden of production to sovereign defendants. It held that sovereigns "must at least affirmatively establish by a preponderance of the evidence that their current resources do *not* trace back to the property originally expropriated." *Simon III*, 77 F.4th at 1120. It compounded this erroneous ruling by holding that an absence of tracing evidence would "'hurt[] rather than help[] the defendants' in that endeavor." *Id.* (quoting *Simon*, 443 F. Supp. 3d at 105).

The imposition of a duty on sovereign defendants to produce evidence disproving a connection between current assets and expropriated property is a clear misapplication of the law. Numerous decisions describe a burden-shifting approach under the FSIA: "Once the defendant presents a prima facie case that it is a foreign sovereign, the plaintiff has the burden of going forward with evidence showing that, under exceptions to the FSIA, immunity should not be granted, although the ultimate burden of persuasion remains with the alleged foreign sovereign." *Cargill Int'l S.A.*, 991 F.2d at 1016 (citation omitted); *see also Keller v. Cent. Bank of Nigeria*, 277 F.3d 811, 815 (6th Cir. 2002), *abrogated on other grounds by Samantar v. Yousuf*, 560 U.S. 305 (2010); *Byrd v. Corporacion Forestal y Indus. de Olancho S.A.*, 182 F.3d 380, 388

(5th Cir. 1999), *abrogated on other grounds by Samantar*, 560 U.S. 305 (2010).

This approach is consistent with the FSIA's House and Senate Reports, which explain the burden as follows:

> [E]vidence must be produced to establish that a foreign state or one of its subdivisions, agencies or instrumentalities is the defendant in the suit and that the plaintiff's claim relates to a public act of the foreign state--that is, an act not within the exceptions in sections 1605-1607. Once the foreign state has produced such prima facie evidence of immunity, *the burden of going forward would shift to the plaintiff to produce evidence establishing that the foreign state is not entitled to immunity*. The ultimate burden of proving immunity would rest with the foreign state.

H.R. Rep. No. 94-1487, at 17 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6616 (emphasis added); *see also* S. Rep. No. 94-1310, at 17 (same).

Placing the burden of production on the party asserting a statutory exception is consistent with the general rule, which this Court has applied for more than a century, "that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits." *N.L.R.B. v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 711 (2001) (quoting *FTC v. Morton Salt Co.*, 334 U.S. 37, 44-45 (1948)); *see also Javierre v. Cent. Altagracia*, 217 U.S. 502, 508 (1910)

("When a proviso like this carves an exception out of the body of a statute or contract, those who set up such exception must prove it."); *Ryan v. Carter*, 93 U.S. 78, 83 (1876) ("The general rule of law is, that a proviso carves special exceptions only out of the body of the act; and those who set up any such exception must establish it, as being within the words as well as the reason thereof.").

This allocation of the burden is also consistent with the rule that "the party asserting federal jurisdiction when it is challenged has the burden of establishing it." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006); *see also Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) ("It is to be presumed that a cause lies outside this limited jurisdiction [of federal courts], and the burden of establishing the contrary rests upon the party asserting jurisdiction." (citation omitted)). Thus, "[w]hen challenged on allegations of jurisdictional facts, the parties must support their allegations by competent proof." *Hertz Corp. v. Friend*, 559 U.S. 77, 96-97 (2010).

Flipping the burden of production to sovereign defendants ignores the FSIA's "baseline presumption of immunity from suit." *Philipp*, 592 U.S. at 176. The FSIA was designed to "give foreign states and their instrumentalities some protection from the inconvenience of suit." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 479 (2003). And immunity from suit "is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). Accordingly, disputes regarding the FSIA should be resolved "as near to the outset of the case as is reasonably possible," *Helmerich*, 581 U.S. at 187, which is why orders denying foreign sovereign immunity are subject to interlocutory review, *see Fed.*

Ins. Co. v. Richard I. Rubin & Co., 12 F.3d 1270, 1282 (3d Cir. 1993) (collecting cases).

The D.C. Circuit's approach imposes an onerous, if not insurmountable, burden on sovereign defendants to produce negative evidence based on the bald allegation of historical commingling. And it permits a court to exercise jurisdiction based on an absence of evidence, rather than a finding that the commercial nexus prong is satisfied. As described in greater detail in Part III, *infra*, such a procedure is contrary to this Court's decision in *Helmerich*. *See* 581 U.S. at 187 (holding "facts bring the case within the scope of the expropriation exception only if they do show (and not just arguably show)" that the relevant factors are satisfied).

Respondents, as the parties seeking to establish jurisdiction through a statutory exception to the FSIA, are the parties who bear the burden of production.

B. Plaintiffs must produce evidence sufficient to support a finding of jurisdiction

Respondents' burden of production requires them to produce evidence that allows the court to determine current assets were exchanged for expropriated property. Simply producing some evidence that assets may have been commingled decades ago falls far short of that standard.

The evidence adduced by the party with the burden of production "must be legally sufficient to justify a judgment." *Texas Dep't of Cmty. Affs. v. Burdine*, 450 U.S. 248, 255 (1981); *see also Precise Imports Corp. v. Kelly*, 378 F.2d 1014, 1018 n.4 (2d Cir. 1967) (holding "the plaintiff should bear the

initial burden of producing evidence sufficient to justify a judgment in his favor"). In other words, the party with the burden of production must submit evidence "which, if believed by the trier of fact, would support a finding" of the fact in issue. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993) (emphasis omitted).[17]

In general, courts require "the party alleging jurisdiction justify his allegations by a preponderance of evidence." *McNutt v. Gen. Motors Acceptance Corp. of Indiana*, 298 U.S. 178, 189 (1936). As to the commercial nexus prong, a plaintiff must produce evidence to support the finding that assets exchanged for expropriated property are either present in the United States in connection with a commercial activity or possessed by an agency or instrumentality of a foreign state that is engaged in a commercial activity in the United States. 28 U.S.C. § 1605(a)(3).

Hungary and MÁV acknowledge that the burden of persuasion remains with the sovereign defendant. *See Pablo Star Ltd. v. Welsh Gov't*, 961 F.3d 555, 560 (2d Cir. 2020). But the burden of persuasion, in the context of factual findings made by a court, "should rarely be outcome determinative."

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[17] The D.C. Circuit has incorrectly held that a plaintiff's burden of production in FSIA cases is "rather modest." *Owens v. Republic of Sudan*, 864 F.3d 751, 784 (D.C. Cir. 2017). The decision affirmed in *Owens* stressed that "the bar is relatively low" and held that "even a meager showing by the plaintiff will suffice." *Owens v. Republic of Sudan*, 174 F. Supp. 3d 242, 276 (D.D.C. 2016). Other cases from within the D.C. Circuit have improperly indicated that a plaintiff's burden is merely to produce "at least some facts." *See, e.g.*, *Agudas Chasidei Chabad of U.S. v. Russian Federation*, 466 F. Supp. 2d 6, 15 (D.D.C. 2006), *aff'd in part, vacated in part, rev'd in part*, 528 F.3d 934 (D.C. Cir. 2008).

Goldman Sachs Grp., Inc. v. Ark. Tchr. Ret. Sys., 594 U.S. 113, 117 (2021). As this Court explained, when the court is the factfinder, "[t]he defendant's burden of persuasion will have bite only when the court finds the evidence in equipoise—a situation that should rarely arise." *Id.* at 126; *see also Medina v. California*, 505 U.S. 437, 449 (1992) (noting the burden of persuasion will be outcome determinative "only in a narrow class of cases where the evidence is in equipoise"). Accordingly, in the face of a factual challenge, the expropriation exception requires a plaintiff to produce evidence showing it is at least as likely as not that the commercial nexus prong is satisfied.

Respondents have not produced such evidence, nor even advanced factual allegations that a commercial nexus with the United States is present. They merely claim that "Defendants liquidated stolen property, mixed the resulting funds with their general revenues, and devoted the proceeds to funding various governmental and commercial operations." (J.A. 33 ¶ 97). No court could conclude that any particular asset owned by Hungary or MÁV was "exchanged for" items taken from named plaintiffs in 1944 based solely on these allegations, even accepting them as true.

When presented with a factual challenge, Respondents failed to produce any evidence tracing the property of a named plaintiff. Instead, they relied on general historical information regarding assets seized from putative class members, which does not give rise to jurisdiction over the claims of Respondents. *See Frank*, 586 U.S. at 492. And even that general information demonstrates that much of the property seized during World War II was taken by German and Russian troops, embezzled, or

distributed to the general populace. Vági et al., *supra* at 197, 200.

Nothing in the record suggests, let alone establishes, that assets taken from Respondents, or property exchanged for those assets, were retained by Hungary or MÁV. The mere commingling of proceeds does not provide a substitute basis upon which Respondents can carry their burden of production.

III. Plaintiffs must establish a valid claim that an exception to the FSIA applies at the pleading stage, rather than merely raising a plausible inference

The FSIA provides that district courts possess subject matter jurisdiction over an action against a foreign sovereign only if "the foreign state is not entitled to immunity." 28 U.S.C. § 1330(a). Otherwise, "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States." 28 U.S.C. § 1604. The FSIA directs that "[c]laims of foreign states to immunity should henceforth be decided by courts of the United States." 28 U.S.C. § 1602. Accordingly, a district court cannot exercise jurisdiction unless it finds that an exception to the FSIA applies. The statutory text demands a determination as to whether a foreign sovereign is "entitled" to sovereign immunity, not a hypothetical analysis. 28 U.S.C. § 1330(a).

In *Helmerich*, this Court held that "the expropriation exception grants jurisdiction only where there is a valid claim that 'property' has been 'taken in violation of international law.' A nonfrivolous argument to that effect is insufficient." 581 U.S. at 178 (citation omitted). Accordingly, "the relevant factual allegations must make out a legally valid

claim" that the prongs of the exception are satisfied. *Id.* at 174. When facts are undisputed, "those facts bring the case within the scope of the expropriation exception only if they do show (and not just arguably show) a taking of property in violation of international law." *Id.* at 187. "If a decision about the matter requires resolution of factual disputes, the court will have to resolve those disputes, but it should do so as near to the outset of the case as is reasonably possible." *Id.*

The *Helmerich* decision built on *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983). There, the Court explained that the question of foreign sovereign immunity must be resolved at the beginning of an action. "At the threshold of every action in a district court against a foreign state, . . . the court must satisfy itself that one of the exceptions applies—and in doing so it must apply the detailed federal law standards set forth in the Act." *Id.* at 493-94.

The Second and Eleventh Circuits have correctly held that the *Helmerich* standard governs all elements of the expropriation exception, including the commercial nexus requirement. *Rukoro*, 976 F.3d at 225; *Comparelli*, 891 F.3d at 1326 (holding *Helmerich* requires courts to determine "whether the nexus requirement is, in fact, established"). District court decisions are in accord. *See Ghebreyesus v. Federal Democratic Republic of Ethiopia*, No. 22-CV-1717, 2023 WL 6392611, at *19 (D. Nev. Sept. 30, 2023); *Kumar v. Republic of Sudan*, No. 10-CV-171, 2019 WL 13251350, at *11 (E.D. Va. July 31, 2019). Applying that standard, the Second Circuit has correctly concluded a plaintiff cannot defeat sovereign immunity by resting on the commingling theory. *Rukoro*, 976 F.3d at 222, 225.

But the D.C. Circuit failed to apply this Court's teachings in *Helmerich*, ruling that "nothing in *Helmerich* affects the familiar standard we have consistently applied to review the plaintiffs' factual allegations in FSIA cases." *Simon III*, 77 F.4th at 1104; *see also Ambar v. Federal Republic of Germany*, 596 F. Supp. 3d 76, 89 (D.D.C. 2022). Under the pre-*Helmerich* standard, "[d]ismissal is warranted only if no plausible inferences can be drawn from the facts alleged that, if proven, would bring plaintiffs' claims within an exception to sovereign immunity under the FSIA." *Simon III*, 77 F.4th at 1106.

The D.C. Circuit's approach is erroneous. The FSIA requires that "entitle[ment]" to sovereign immunity be "decided." 28 U.S.C. §§ 1330(a), 1602. Under *Helmerich*, the district court must itself make a determination on jurisdiction rather than hypothesizing what a different factfinder could determine. Merely ruling that an exception might plausibly apply is insufficient under this Court's directive in *Helmerich* that "facts bring the case within the scope of the expropriation exception only if they do show (and not just arguably show)" that the relevant prongs have been satisfied. 581 U.S. at 187. And it is inconsistent with *Verlinden*'s requirement that "the court must satisfy itself that one of the exceptions applies." 461 U.S. at 494.

This heightened standard makes good sense when viewed against the general rule that waivers of sovereign immunity—including those in the FSIA—are to be "narrowly construed in favor of the sovereign" and "not enlarged beyond what the language requires." *Architectural Ingenieria Siglo XXI, LLC v. Dominican Republic*, 788 F.3d 1329, 1338 (11th Cir. 2015). And as described above, a foreign sovereign is stripped of immunity from suit when it is

forced to endure protracted litigation. *See Dole Food Co.*, 538 U.S. at 479; *Mitchell*, 472 U.S. at 526.

Although the D.C. Circuit's commingling theory fails under any standard, its adoption of that theory demonstrates the mischief a plausibility standard can work. The D.C. Circuit did not address the sufficiency of Respondents' pleadings in the most recent appeal. *See Simon III*, 77 F.4th at 1118. But in a prior appeal it held that allegations of historical commingling "suffice to raise a plausible inference that the defendants retain the property or proceeds thereof." *Simon I*, 812 F.3d at 147 (internal quotation marks and alterations omitted).

The D.C. Circuit's treatment of Respondents' nationality allegations further demonstrates the inadequacy of the pre-*Helmerich* standard. To avoid the domestic takings rule, Respondents attempted to establish that they were Czechoslovakian nationals at the time of the alleged takings. Yet the D.C. Circuit did not ask whether Respondents' allegations demonstrated such nationality, but instead whether they "plausibly alleged the minimum requirements for Czechoslovakian nationality." *Simon III*, 77 F.4th at 1101.

As the district court noted, "[t]he relevant citizenship laws of Czechoslovakia and Hungary at the time were, to put it mildly, complicated." *Simon*, 579 F. Supp. 3d at 129. The D.C. Circuit based its nationality rulings on the St. Germain Treaty, which provided for Czechoslovakian nationality for individuals born in Czechoslovakian territory "who are not born nationals of another State." *Simon III*, 77 F.4th at 1106 (quoting Treaty Between the Principal Allied and Associated Powers and Czechoslovakia art. 6, Sept. 10, 1919, S. Treaty Doc. No. 67-348 (1923)). The court recognized that if

Respondents "were born nationals of another state (*e.g.*, by descent), even proof that they were born in Czechoslovakian territory would not, per Article 6, have made them Czechoslovakian nationals." *Id.* at 1108. It nonetheless ruled that Respondents claiming to "have been born in Czechoslovakia after its formation . . . thereby adequately alleged Czechoslovakian nationality." *Id.* at 1106.

Neither the district court nor the D.C. Circuit actually found that Respondents' allegations demonstrated Czechoslovakian rather than Hungarian nationality. Instead, those courts ruled that some Respondents might plausibly be Czechoslovakian nationals. That sort of hypothesizing is not enough to confer jurisdiction. The FSIA permits courts to hear claims against foreign sovereigns only when factual allegations, taken as true, demonstrate that the elements of the expropriation exception are met. That standard requires a "valid" argument, not an "arguable" or a plausible one. *See Helmerich*, 581 U.S. at 178, 187.

To the extent the D.C. Circuit attempted to distinguish between facts and legal theories, that distinction makes no difference in this case. Nationality is a legal question. And whether commingling taints all future assets of a sovereign is not a factual issue, but a legal one. Indeed, Respondents could satisfy the commercial nexus prong only if courts indulge the legal fiction that all of a sovereign's property was "exchanged for" expropriated assets because the fate of those assets cannot be traced. That theory finds no support in the text or history of the FSIA, and runs counter to the United States' interests.

CONCLUSION

Hungary and MÁV respectfully request this Court reverse the D.C. Circuit's decision in *Simon III* and remand the case with instructions to dismiss.

Respectfully submitted,

Joshua Scott Glasgow
Counsel of Record
Christopher D. Barraza
Phillips Lytle LLP
620 Eighth Avenue
38th Floor
New York, New York 10018
(212) 759-4888
jglasgow@phillipslytle.com
cbarraza@phillipslytle.com
Doc #1795354