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' REPLY BRIEF

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INTRODUCTION

Respondents confirm the boundless scope of their commingling theory. They contend that all funds held by Hungary or its instrumentalities were "exchanged for," 28 U.S.C. § 1605(a)(3), items taken from fourteen individuals in 1944. Under their commingling theory, every one of the billions of dollars expended by Hungary since World War II was "exchanged for" the specific items taken from those individuals. This theory stretches the text of the Foreign Sovereign Immunities Act ("FSIA") far beyond its breaking point.

Respondents' extreme position stems from their failure to present evidence connecting their property to Petitioners' current assets. Despite their repeated assertions, Respondents have not shown what happened to their property in 1944, nor what happened to any property exchanged for it in the ensuing 66 years. While they provide hypotheticals in which funds are traceable to a specific account, those facts are not present in this case. Instead, Respondents simply assert that all revenues of Hungary and its instrumentalities are a single, indistinguishable mass. They fail to identify any context in which all fungible assets of an entity, much less a nation, are deemed to be exchanged for particular property.

History verifies what the plain text of the expropriation exception requires: identifiable property traceable to seized items. Respondents acknowledge that the expropriation exception arose from Congressional opposition to a particular decision of this Court, *Banco Nacional de Cuba v. Sabbatino*,

376 U.S. 398 (1964). Congress chose to partially overrule *Sabbatino* with a narrowly drawn statute, knowing it would rarely apply. Respondents' resort to general purposes cannot overcome the plain text. Nor can their argument that the jurisdictional laws of the United States should be used to incentivize the behavior of other countries.

Respondents' position on the procedural issues is even more radical. They claim that the burden of production is irrelevant because their commingling theory is impervious to actual tracing evidence. (Resp'ts Br. 16-17). The Court should reject that argument. Plaintiffs bear the burden of producing evidence sufficient to support a finding of jurisdiction. In this case, Respondents were obligated to come forward with evidence sufficient to prove that their property was exchanged for current assets with a commercial nexus to the United States. They failed to do so.

Finally, this Court should reaffirm that in FSIA cases "the relevant factual allegations must make out a legally valid claim." *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 581 U.S. 170, 174 (2017). The D.C. Circuit misapplied that standard in assessing Respondents' allegations of commingling, as well as Respondents' nationality allegations. Because Respondents have not raised a valid argument that the expropriation exception applies, this case should be dismissed for lack of jurisdiction.

ARGUMENT

I. Respondents' expansive theory is inconsistent with the text, structure, and history of the FSIA

A. Respondents incorrectly contend that all sovereign funds are "exchanged for" any seized item

Respondents rest their case on a staggeringly expansive theory. They allege that Petitioners mixed proceeds of their property with "general revenues." (J.A.33 ¶ 97). And Respondents repeatedly assert that "those commingled funds" have a commercial nexus with the United States. (Resp'ts Br. i, 2, 4, 6, 16, 31). The word "those" is usually used to define or restrict the antecedent; to distinguish "those" funds from funds in general. But Respondents mean precisely the opposite. In their view, "those" funds constitute every fungible asset held by Hungary or its instrumentalities since 1944. Clarifying that point lays bare the atextual nature of Respondents' argument. Their commingling theory is valid only if all funds possessed by a sovereign nation were "exchanged for" any item ever seized. That is simply not what "exchanged for" means.

Mixing the relatively small amount of proceeds from the individual Respondents' property into the much larger pot of "general revenues" many decades ago is a far cry from the type of account-specific transactions that arise in other contexts. The facile hypothetical Respondents offer illustrates this distinction. They posit a scenario in which a customer deposits $100 in a bank one day and withdraws $100 the next. (*Id.* at 2). If the account at issue were

otherwise empty, one could say that the withdrawn funds were "exchanged for" the deposit. Petitioners are not arguing that fungible items can never be traced. Indeed, a withdrawal of $100 could be traced to the deposit even if it was commingled with other funds, so long as the withdrawal necessarily included a part of the deposit (*i.e.*, the account had a previous balance of less than $100). But Respondents' hypothetical bears no relation to this case.

Initially, as described below, Respondents have not shown that the proceeds of their property were deposited into any particular government fund, but instead claim commingling with "general revenues." (J.A.33 ¶ 97). If one were to analogize to an individual customer, this allegation would not equate to a bank deposit. It would simply mean that the customer had $100 and did not segregate it from her total net worth. Respondents' hypothetical also omits the innumerable sources of other funds and subsequent transactions at issue here. The total amount of Hungary's general revenues over the course of six decades dwarfs the value of items taken from the individual Respondents. And Petitioners engaged in countless transactions and expenditures since 1944. Respondents' analogy would require that the $100 be mixed with billions of dollars, followed by billions of additional transactions.

Only by disregarding the intervening transactions can Respondents seek to elide the logical inconsistency of their argument. If a $100 withdrawal is "exchanged for" a $100 deposit made many years earlier, the same would be true of every withdrawal. Indeed, Respondents assert that such withdrawals "always stem from the additional $100, no matter what other deposits or withdrawals [a customer] might later make." (Resp'ts Br. 14). On the scale of a national economy, and over the course of six decades,

the single $100 deposit would be "exchanged for" trillions of dollars under Respondents' extreme theory. Yet they concede that the plain meaning of "'exchange' is to give one thing and get another in return." (*Id.* at 21). Respondents thus argue that trillions of dollars spent by a sovereign nation would be given "in return" for a deposit of $100. Further still, Respondents offer no reason to treat a specific deposit as the source of all subsequent withdrawals. Every withdrawal is "exchanged for" every prior deposit under their theory.

Rather than making an argument rooted in text, Respondents rely on a legal fiction that all fungible assets are exchanged for all others. But jurisdiction cannot be based on the treatment of "property as constructively present." *Chase v. Wetzlar*, 225 U.S. 79, 89 (1912). In crafting the Constitution, the framers were well aware that some English courts had extended their jurisdiction through the use of legal fictions and feared federal courts would do the same. Among the resolutions during the debates on Article III was one that "'Resolved, as the opinion of this committee, that the jurisdiction of the Supreme Court of the United States, or of any other court to be instituted by the Congress, ought not, in any case, to be increased, enlarged, or extended, by any fiction, collusion, or mere suggestion.'" *Nat'l Mut. Ins. Co. of D.C. v. Tidewater Transfer Co.*, 337 U.S. 582, 634 n.14 (1949) (Vinson, J., dissenting) (quoting 2 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 409 (Jonathan Elliot ed., 1836)); *see also* Michael G. Collins, *Jurisdictional Exceptionalism*, 93 Va. L. Rev. 1829, 1879 (2007) (noting the framers expressed "fears that federal courts, by the use of falsehoods, 'fictions' and

'ingenious sophisms,' would make hash of their limited jurisdiction in a way that certain English courts were known to have expanded their own jurisdiction." (footnotes omitted)).

For this reason, federal courts must "scrupulously confine their own jurisdiction to the precise limits which the statute has defined." *Healy v. Ratta*, 292 U.S. 263, 270 (1934); *see also Cheng Fan Kwok v. Immigr. & Naturalization Serv.*, 392 U.S. 206, 212 (1968) (jurisdictional statutes "must be construed both with precision and with fidelity to the terms by which Congress has expressed its wishes"). Accordingly, "this Court has time and again declined to construe federal jurisdictional statutes more expansively than their language, most fairly read, requires." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 578 U.S. 374, 389 (2016). Respondents' commingling theory impermissibly seeks to reach beyond the statutory language.

B. The record does not indicate what happened to the proceeds of any Respondent's property

Although Respondents make a number of unsupported assertions regarding their evidentiary submissions, nothing in the record would permit a finding that proceeds of their property are connected with any present-day assets. Respondents have not shown that their property was liquidated. Even assuming it was liquidated, they have not shown proceeds were deposited into any specific governmental account. And assuming even further that proceeds had been deposited into a specific account, Respondents have not presented evidence

regarding subsequent transactions in the six decades that followed.

Respondents seek to generalize as to the aggregated assets of all putative class members. (*See, e.g.*, Resp'ts Br. 9). But they do not dispute that named plaintiffs must themselves establish jurisdiction. *Frank v. Gaos*, 586 U.S. 485, 492 (2019). Looking to the specific assets at issue demonstrates the incompatibility of Respondents' theory with the plain meaning of the expropriation exception.

At one end of the claimed "exchange" are the items seized from the individual Respondents. Alexander Speiser alleges that MÁV officials seized certain valuables, including a diamond ring, from his family in June 1944. (J.A.18 ¶ 44). Yitzhak Pressburger alleges that MÁV officials confiscated five wagons of dried prunes from his father in the Spring of 1944. (J.A.16 ¶ 40).[1]

At the other end of the alleged "exchange" are present-day assets with a nexus to the United States. Respondents have not identified any specific asset of MÁV. As to Hungary, they rely on interest payments made on $1.5 billion in bonds issued between 2005 and

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[1] The D.C. Circuit affirmed the denial of Petitioners' motion to dismiss as to four named plaintiffs, while permitting others an opportunity to amend their nationality allegations. *Simon v. Republic of Hungary*, 77 F.4th 1077, 1088 (D.C. Cir. 2023) ("*Simon III*"). Two of the four plaintiffs who were not required to re-plead subsequently discontinued their claims. (Dist. Ct. Dkt. 203, 204). Respondents thus focus on the two named plaintiffs whose claims remain active without the need to amend their allegations. Importantly, the Third Amended Complaint Respondents filed prior to the grant of certiorari in this case contains the same threadbare allegations of commingling. (*Compare* J.A.33 ¶¶ 97-98, *with* Dist. Ct. Dkt. 196 ¶¶ 117-18).

2010. (*See* Dist. Ct. Dkt. 147 ¶¶ 22, 45). Those payments were disbursed from a "USD account" held by Hungary's Government Debt Management Agency (referred to as "ÁKK"). (*Id.* ¶¶ 1, 77). ÁKK is a corporation, legally distinct from Hungary itself. (*Id.* ¶ 8).[2]

Thus, to establish jurisdiction, Respondents would need to show that the interest payments were "exchanged for" Mr. Speiser's ring. Those payments would also have to be "exchanged for" Mr. Pressburger's prunes. And all of the funds in any MÁV account would have to be "exchanged for" that same ring and those same prunes. But Respondents have not provided any meaningful link between the seized items and those assets. Even assuming proceeds reached government coffers, Respondents fail to explain why Mr. Speiser's ring was not exchanged for salaries for government employees, or why Mr. Pressburger's prunes were not exchanged for pension payments. Nor do they identify the evidence they contend connects their property to present funds.

As to MÁV, Respondents claim they "have shown that MÁV expropriated their property, liquidated it, and deposited the proceeds into commingled accounts that MÁV owns today." (Resp'ts Br. 31 (citing *Simon v. Republic of Hungary*, 443 F.

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[2] Respondents also point to funds "in a U.S. Treasury account designated by the U.S. Government and supervised by the Defense Finance Accounting Service" used by Hungary to purchase military equipment. (*Id.* ¶ 100). But the purchase of military equipment is not a commercial activity, and thus these funds do not qualify. *See Blenheim Cap. Holdings Ltd. v. Lockheed Martin Corp.*, 53 F.4th 286, 294 (4th Cir. 2022), *cert. denied*, 144 S. Ct. 2656 (2024). In any event, the same reasoning that applies to the interest payments would apply to these funds.

Supp. 3d 88, 112 (D.D.C. 2020))). They have made no such showing. The cited passage from the district court simply quotes Respondents' conclusory allegation "that '[t]he 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.'" *Simon*, 443 F. Supp. 3d at 112 (alteration in original) (quoting J.A.33 ¶ 98).[3] There is no evidence that the proceeds of any individual Respondent's property was deposited into an account owned by MÁV today, only bare allegations.

As to Hungary, Respondents rely on three items. (*See, e.g.*, Resp'ts Br. 3, 11, 29). First, they point to records from the Holocaust Museum in Washington, D.C. (Dist. Ct. Dkt. 122-17, 122-18). None of these records refers to a named plaintiff. Instead, they provide inventories of property taken from other individuals in Hungary in 1944. These documents provide no information regarding the disposition of that property or their proceeds. (*See, e.g.*, Dist. Ct. Dkt. 122-18, at 1).

Second, Respondents rely on a book excerpt generally describing the Hungarian Holocaust, Zoltán Vági *et al.*, *The Holocaust in Hungary: Evolution of a Genocide* (2013). (Dist. Ct. Dkt. 122-19). Nothing in this document identifies a named plaintiff. Although it mentions an account into which some funds seized during the Holocaust were deposited, it states that this account was spent on "plunder, ghettoization, and deportation." (*Id.* at 190). And as noted in Petitioners'

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[3] Respondents repeatedly refer to their allegations as "undisputed." (*See, e.g.*, Resp'ts Br. 3, 15). But Petitioners have not yet filed an answer.

Opening Brief, this excerpt explains that much of the property seized from Jewish citizens was looted by Nazi and Soviet troops, stolen by residents, or distributed among the general population. (*Id.* at 197, 200).[4]

Third, Respondents cite a 1993 ruling of the Hungarian Constitutional Court. (Dist. Ct. Dkt. 122-1, Ex. 8, at 75-100). Again, nothing in this document identifies a named plaintiff. The decision describes the general confiscation of assets from Jewish citizens under Decree 1600/1944 ME, and the chaotic aftermath. (*Id.* at 81). In the summer of 1944 a commission placed some seized valuables "into the storage rooms of various finance institutes," part of which "ended up, without receipts, at the city branches or local offices of the Arrow Cross Party." (*Id.* at 83). In 1945, a shipment of valuables was captured by French troops and sent to Paris. (*Id.* at 84). At the same time, "the complete gold and foreign exchange reserves of the Hungarian State" and other valuables held by the Hungarian National Bank were transported to Austria "because of the worsening military situation." (*Id.*). Those assets were captured by American forces and transported to Frankfurt.

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[4] Historical sources cited by the amicus brief of the 1939 Society, *et al.*, confirm that much of the expropriated items were distributed. *See* Borbála Klacsmann, *Neglected Restitution: The Relations of the Government Commission for Abandoned Property and the Hungarian Jews, 1945-1948*, The Hungarian Historical Review, 9(3) 512-29, 513, 515 (2020) (noting that "many of the properties in question had been given to people in need" and "[a]fter the authorities had taken inventories of the items left in locked-up Jewish houses, the gendarmes and policemen, who were in charge of the process of redistribution, often took these items"). Thus, these sources show that much of the stolen property was not liquidated.

(*Id.*).[5] A shipment of valuables was returned from Paris but "[t]he possibility of identifying their owners no longer existed." (Dist. Ct. Dkt. 122-1, Ex. 8, at 91). A shipment returned from Frankfurt likely contained some items seized from Jewish citizens, but because "deposits authorized by Decree 1600/1944 ME were entrusted to 'any financial institute which is a member of the Finance Institute Centre' and not to the Hungarian National Bank, it is likely that the Frankfurt shipment did not contain deposits taken into custody pursuant to Decree 1600/1944 ME." (*Id.*).[6]

Setting aside the obvious evidentiary issues with these documents, they do not demonstrate the fate of any individual Respondent's property. Even if one assumed that Respondents' property was liquidated, and further assumed that proceeds were deposited into some governmental account (despite Respondents' own sources identifying numerous other destinations), there is no evidence regarding the location of those funds over the next six decades. And Petitioners established that "no records or documentary evidence exists that would connect any property taken from the Plaintiffs during World War II to any property of or funding from Hungary present in the United States." (Dist. Ct. Dkt. 138-3 ¶ 5; *see also* Dist. Ct. Dkt. 138-4 ¶¶ 5-7; Dist. Ct. Dkt. 138-5 ¶¶ 5-6). Respondents' commingling theory treats all

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[5] As noted in the Opening Brief, this shipment is referred to as the "Gold Train," and some of its contents were looted and sold, resulting in the United States' creation of a settlement fund. (Pet'rs Br. 23 n.8).

[6] Respondents refer to registration and deposit requirements, which, as this ruling shows, related to commercial banks ("account[s] at post offices, banks or other financial institutions" (*id.* at 82)).

funds held by Hungary and its instrumentalities as a single mass, with each dollar "exchanged for" every item. That theory cannot be squared with the text of the expropriation exception.

C. Respondents' attempts to analogize to other contexts are unavailing

The analogies Respondents and their amici seek to draw do not support their expansive theory. Initially, they are largely beside the point. As noted above, federal courts are not free to create constructive tracing rules to generate jurisdiction. Whatever tools a court might employ in a dispute that it has the power to adjudicate, it cannot manufacture a basis for that power in the first instance. Further, the issue in this case is one of statutory construction. Regardless of how courts have dealt with commingling elsewhere, Respondents must show that their property or "property exchanged for such property" has a commercial nexus with the United States. § 1605(a)(3). They have failed to do so.

Respondents analogies are also inapt. They argue that *in rem* jurisdiction can be shown if assets are deposited in an account within the jurisdiction. (Resp'ts Br. 36). That is precisely the type of tracing that is lacking in this case. Respondents' own authorities illustrate this point. In *United States v. $46,588.00 in U.S. Currency & $20.00 in Canadian Currency*, 103 F.3d 902 (9th Cir. 1996), the government exchanged seized currency for a cashier's check. *Id.* at 904. This "cashier's check was an appropriate, fungible surrogate for the seized currency" because "[t]he *res* remained identifiable and within the court's jurisdiction." *Id.* at 905. Here, there

is no current property that is similarly identifiable and traceable to the expropriated items.

Respondents' reliance on a federal money laundering statute, 18 U.S.C. § 1957(a), likewise misses the mark. That statute makes it a crime "to engage in a monetary transaction in criminally derived property." *Id.* The term "criminally derived property" is defined to include both "proceeds obtained from a criminal offense" as well as property "derived from" such proceeds. § 1957(f)(2). This language is far broader than "exchanged for," but even that statute lends no support to Respondents' theory.

The sole case Respondents cite, *United States v. Moore*, 27 F.3d 969 (4th Cir. 1994), concerned a deposit following the sale of certain condominiums. *Id.* at 972. The court held that the funds qualified because "[t]he overwhelming bulk of the purchase money for the condominiums, which [defendant] would otherwise have been unable to acquire," were traceable to criminal conduct. *Id.* at 977. But "[t]he statute does not create a presumption that any transfer of cash in an account tainted by the presence of a small amount of fraudulent proceeds must be a transfer of these proceeds." *United States v. Rutgard*, 116 F.3d 1270, 1292-93 (9th Cir. 1997). Instead, courts have applied the statute when the transaction at issue could not have occurred without unlawful proceeds. *See United States v. Mooney*, 401 F.3d 940, 947 (8th Cir.), *on reh'g en banc in part*, 425 F.3d 1093 (8th Cir. 2005) ("[Defendant] was only able to withdraw the funds from his [commingled] account without going below his margin limit because the account contained the proceeds from the [fraud]."); *United States v. Dazey*, 403 F.3d 1147, 1164 (10th Cir. 2005) (noting that without fraudulent funds, defendant's "account did not have sufficient funds to

wire the $100,000"); *United States v. Loe*, 248 F.3d 449, 467 (5th Cir. 2001) ("[W]here an account contains clean funds sufficient to cover a withdrawal, the Government can not prove beyond a reasonable doubt that the withdrawal contained dirty money.").

The amicus brief filed by seven members of Congress cites 18 U.S.C. § 984(a), which provides specific procedures for the forfeiture of non-traceable property. It permits the seizure of "any identical property found in the same place or account as the property involved in the offense." § 984(a)(2). This is one of several provisions allowing for forfeiture when it is impossible to trace specific assets. *See also* 21 U.S.C. § 853(p) (permitting seizure of "any other property of the defendant" when property "has been commingled with other property"); 18 U.S.C. § 982(b)(1) (applying § 853(p) in money laundering cases). These provisions support Petitioners' position. They demonstrate Congressional concern that prior forfeiture statutes "failed to address the problem posed by commingled property." *United States v. Voigt*, 89 F.3d 1050, 1085 (3d Cir. 1996). And they show that when Congress does not intend to require tracing, it says so explicitly. But in the expropriation exception, Congress did not provide for jurisdiction based on substitute assets untraceable to seized items or set forth special rules for fungible property.[7]

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[7] This amicus brief also cites to other statutes that are unlike the expropriation exception, including several terrorism-related statutes, none of which requires a commercial nexus with any specific property. And under 18 U.S.C. § 1956(a), tracing is not required because "[t]he broad language of the statute suffices to reach transactions that 'involve[ ]' illegal proceeds" and "money need not be derived from crime to be 'involved' in it." *United States v. Braxtonbrown-Smith*, 278 F.3d 1348, 1352-53

Respondents mistakenly rely on cases in which funds are traceable to a specific account. But the law is clear that account-specific tracing tools cannot be applied to the total net worth of an entity. In *St. Louis & S.F.R. Co. v. Spiller*, 274 U.S. 304 (1927), the plaintiff argued in favor of an equitable lien on funds held by a receiver because illegal exactions were "mingled when collected with other money" spread across several accounts. *Id.* at 310. Although equitable liens sometimes arise as to commingled accounts, "[a]n illegal exaction does not impress an indelible trust upon all funds which the wrongdoer and his successors may thereafter have on deposit in their banks. For aught that appears, all the money illegally exacted may have been spent for current operating expenses." *Id.*

This Court has explained that equitable remedies arise "only against specifically identified funds that remain in the defendant's possession or against traceable items that the defendant purchased with the funds (*e.g.*, identifiable property like a car)." *Montanile v. Bd. of Trs. of Nat'l Elevator Indus. Health Benefit Plan*, 577 U.S. 136, 144-45 (2016). Thus, at common law, "[i]t is insufficient to show that trust property went into the general estate and increased the amount and the value thereof." *In re United Cigar Stores Co. of Am.*, 70 F.2d 313, 316 (2d Cir. 1934). Instead, proceeds "must be clearly traced and identified in specific property." *Id.*; *see also* George Gleason Bogert *et al.*, Bogert's The Law of Trusts and Trustees § 921 ("The generally adopted view denies the remedy of tracing where the proof of

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(D.C. Cir. 2002) (second alteration in original) (quoting § 1956(a)(1) and *United States v. $448,342.85*, 969 F.2d 474, 477 (7th Cir. 1992)).

the beneficiary-claimant merely shows the receipt of trust property by the defendant and makes no case as to its subsequent history or its existence among the present assets of the defendant."). As these authorities demonstrate, there is nothing unusual about the expropriation exception's requirement of specifically identifiable property.

Further, even if a nation's treasury could be treated as a single account, common law rules would be ill-suited to the task of tracing funds from the sum total of national assets.[8] The scale of a national treasury is many times larger than an individual bank account. And as the Republic of Germany explained in its amicus brief, governmental appropriations have unique characteristics. (Br. 20-21). The property seized from the individual Respondents during World War II comprises a vanishingly small portion of total government funds. There is no common-law doctrine that would permit a finding that any particular property is traceable under these circumstances.

Respondents' theory does not attempt to trace property, but to eliminate a tracing requirement. This Court should reject it.

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[8] To be clear, the record would not support the supposition that Hungary's national treasury was held in a single account between 1944 and 2010. As noted above, the historical sources cited by Respondents refer to different accounts among the many potential destinations of proceeds. *See* Vági *et al.*, *supra* at 190 (Dist. Ct. Dkt. 122-19); (Dist. Ct. Dkt. 122-1, Ex. 8, at 91).

D. Respondents' general legislative purposes and policy arguments cannot overcome plain text

Petitioners rely on the ordinary meaning of the term "exchanged for." This Court need go no further than the plain text. *See BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) ("[O]ur inquiry begins with the statutory text, and ends there as well if the text is unambiguous."). Nonetheless, Petitioners rely on history for a limited purpose. Given the narrow scope of the expropriation exception, it is natural to wonder why Congress would have enacted a provision that would so rarely apply. The answer is found not in logic, but in history.

As Respondents acknowledge, (Resp'ts Br. 28), the expropriation exception arises from Congressional efforts to overrule this Court's decision in *Sabbatino*. Congress was looking backward, seeking to alter the outcome of a particular case, not attempting to transform international law. Respondents note that Congress was aware of tracing issues when it enacted the Second Hickenlooper Amendment. But that is precisely the point. Congress was advised that the statute would cover "a fraction of 1 percent of the property which may be nationalized" because it would not govern untraceable assets. *Foreign Assistance Act of 1965: Hearings on H.R. 7750 Before the H. Comm. on Foreign Affairs*, 89th Cong. 1235 (1965) (Statement of Nicholas deB. Katzenbach, Att'y Gen. of the United States). Congress was determined to overrule *Sabbatino* even though the provision would seldom govern future cases. Expanding the expropriation exception to cover all claims "packaged as violations of property rights" under the commingling theory would thus contravene Congressional intent and

"circumvent the reticulated boundaries Congress placed in the FSIA with regard to human rights violations." *Fed. Republic of Germany v. Philipp*, 592 U.S. 169, 183-84 (2021).

Respondents, in contrast, argue for a result far beyond the statutory text because the United States has historically opposed expropriation. They cite a 1938 letter warning Mexico against nationalizing American-owned oil fields and this Court's statement that the United States has "sought to protect the property of its citizens abroad." (Resp'ts Br. 26-27 (quoting *Philipp*, 592 U.S. at 183)). Of course, none of the Respondents were American citizens at the time of the takings. Regardless, this Court has long eschewed the notion that amorphous legislative goals can defeat statutory language. "[V]ague notions of a statute's 'basic purpose' are nonetheless inadequate to overcome the words of its text regarding the *specific* issue under consideration." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 261 (1993).

Respondents also argue that the Court should treat all funds of a sovereign as tainted to incentivize certain behaviors. This argument presumes that the FSIA provides substantive prohibitions on expropriation. For example, they argue that Congress did not intend to "immunize foreign states" that expropriate property. (Resp'ts Br. 15). The D.C. Circuit similarly referred to "a safe harbor." *Simon III*, 77 F.4th at 1118.

But the FSIA does not establish an international prohibition on expropriation. It "was never 'intended to affect the substantive law determining the liability of a foreign state or instrumentality' deemed amenable to suit." *Cassirer v. Thyssen-Bornemisza Collection Found.*, 596 U.S. 107, 113-14 (2022) (quoting *First Nat'l City Bank v.*

Banco Para el Comercio Exterior de Cuba, 462 U.S. 611, 620 (1983)). Instead, Congress intended to codify existing international law. *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 199 (2007).

Whether an act is unlawful is not determined by the FSIA, and thus it makes no sense to describe the statute as providing a safe harbor. One would not say that 28 U.S.C. § 1332 immunizes those who commit torts against citizens of their own state. Likewise, foreign sovereigns are not being punished when a claim properly covered by the FSIA is heard in federal court. The policy arguments offered by Respondents and their amici conflate substantive prohibitions with jurisdictional limits.

The FSIA's text, structure, and history confirm that "exchanged for" means just what it says. The expropriation exception requires that specifically identifiable assets traceable to seized property have a commercial nexus with the United States. Respondents' commingling theory fails.

II. Respondents bear the burden of production

Respondents offer little in defense of the D.C. Circuit's erroneous imposition of the burden of production on sovereign defendants. Indeed, they concede that the Circuit Courts have nearly uniformly imposed that burden on plaintiffs in FSIA cases. (Resp'ts Br. 38 & n.*).[9] The D.C. Circuit did not apply

[9] At one point, Respondents appear to argue that Congress intended sovereign nations would retain a burden to produce evidence. (Resp'ts Br. 37). But the legislative history they quote merely indicates that a sovereign must show it "is the defendant in the suit and that the plaintiff's claim relates to a

that burden-shifting framework. It held that an absence of evidence would "hurt[] rather than help[] the defendants" and that Petitioners must "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 1119 (alterations in original) (quoting *Simon*, 443 F. Supp. 3d at 105).

Rather than defending the decision below, Respondents improperly attempt to challenge the D.C. Circuit's remand on traceability. Respondents did not seek certiorari on this issue and thus it is not presented. Regardless, this argument merely demonstrates the invalidity of their commingling theory. Only by asserting that all funds of an entire nation are tainted can Respondents claim that commingling raises an irrebuttable presumption of jurisdiction. For example, if a sovereign defendant could prove that proceeds were deposited into an account that was subsequently liquidated, and the money spent on consumable goods, that would plainly establish that proceeds are not present in the United States. Respondents, however, did not bear the burden of producing such evidence.

With the burden of production properly placed on Respondents, this case should be dismissed. Even

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public act of the foreign state." H.R. Rep. No. 94-1487, at 17 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6616. Once that "prima facie" production is made, "the burden of going forward would shift to the plaintiff to produce evidence establishing that the foreign state is not entitled to immunity." *Id.*

The amicus brief of seven members of Congress argues that foreign states bear the burden of production because sovereign immunity is an affirmative defense. This Court rejected that argument in *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493-94 & n.20 (1983).

assuming that Respondents' meager offer of proof qualifies as some evidence, they ignore the showing necessary to satisfy their burden of production. The evidence presented "must be legally sufficient to justify a judgment." *Texas Dep't of Cmty. Affs. v. Burdine*, 450 U.S. 248, 255 (1981); *see also* Christopher B. Mueller & Laird C. Kirkpatrick, 1 Federal Evidence § 3:4 (4th ed. 2013) ("A party carries the burden of production by introducing evidence sufficient to support the findings of fact that are necessary if she is to prevail.").

Respondents' offer of proof falls well short of this standard. They allege that certain items were taken from them in 1944, and they cite historical sources noting that property taken from hundreds of thousands of Jewish citizens met a wide variety of fates (*e.g.*, looting by Nazi and Soviet troops, theft from ordinary citizens, distribution to local fascist party offices). Such evidence would not permit a reasonable factfinder to conclude that Mr. Speiser's ring or Mr. Pressburger's prunes were exchanged for interest payments made in 2005. Indeed, this evidence does not even demonstrate that Respondents' items were liquidated and commingled with other assets. Respondents bore the burden of production and failed to carry it.

III. Respondents must establish a valid claim rather than merely raising a plausible inference

Respondents are correct that if this Court holds the commingling theory is invalid, it need not decide whether the D.C. Circuit misapplied *Helmerich*. In that instance, Respondents appear to concede that the case should be dismissed. But they are incorrect in

claiming the issue is not presented. First, the Court could pursue a decisional path in which it confirms that *Helmerich* requires a valid argument at the pleading stage. That path may be appropriate given the clear Circuit split. *Compare Simon III*, 77 F.4th at 1104, *with Rukoro v. Fed. Republic of Germany*, 976 F.3d 218, 225 (2d Cir. 2020). Because Respondents' allegations of commingling fail to satisfy that standard, dismissal would be required even before reaching Petitioners' factual attack on jurisdiction.

Second, if this Court were to hold that the commingling theory provides a means of avoiding the "exchanged for" prong of the expropriation exception, it would then need to resolve the *Helmerich* question more generally. As noted in the Petition for Certiorari, "while this split arose in the context of the FSIA's expropriation exception, it extends far more broadly. The reasoning of *Helmerich*, and the lower courts' dueling interpretations of it, apply to any dispute over jurisdiction under the FSIA." (Pet. 23).

Specifically, the D.C. Circuit applied an incorrect standard when assessing both Respondents' commingling and nationality allegations. As to the latter, the court did not ask whether the allegations validly demonstrated Czechoslovakian nationality but whether they "plausibly alleged the minimum requirements for Czechoslovakian nationality." *Simon III*, 77 F.4th at 1101. While Respondents distinguish between legal theories and factual allegations, nationality is a question of law. *See, e.g.*, *Alwan v. Ashcroft*, 388 F.3d 507, 510 (5th Cir. 2004).

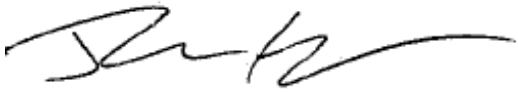
Under *Helmerich*, "the relevant factual allegations must make out a legally valid claim." 581 U.S. at 174. Being born in Czechoslovakian territory makes it plausible that a person might be a

Czechoslovakian national, but it does not suffice to establish a legally valid claim to such nationality. Neither the D.C. Circuit nor the district court actually drew the inference that Respondents satisfied the expropriation exception despite the FSIA's requirement that "entitle[ment]" to sovereign immunity be "decided." 28 U.S.C. §§ 1330(a), 1602. Accordingly, the case should not proceed beyond the pleading stage.

CONCLUSION

Respondents' commingling theory finds no support in the text, structure, or history of the expropriation exception. And it would require domestic courts to resolve all manner of disputes concerning international conflicts with no real connection to the United States. Hungary and MÁV respectfully request this Court reverse and remand with instructions to dismiss.

Respectfully submitted,



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