No. 17-1165

IN THE

Supreme Court of the United States

DAVID L. DE CSEPEL, ANGELA MARIA HERZOG, AND JULIA ALICE HERZOG,

Petitioners,

v.

REPUBLIC OF HUNGARY, A FOREIGN STATE, HUNGARIAN NATIONAL GALLERY, MUSEUM OF FINE ARTS, MUSEUM OF APPLIED ARTS, BUDAPEST UNIVERSITY OF TECHNOLOGY AND ECONOMICS,

Respondents.

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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

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

Respondent Hungary does not contest that the question presented is important and recurring. Congress plainly provided that "[a] foreign state shall" be subject to the jurisdiction of U.S. courts "in any case" "in which rights in property taken in violation of international law are in issue" and the 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). There is no dispute that each of those criteria is satisfied in this case. The only dispute is whether the phrase "[a] foreign state" includes a foreign state. It obviously does, and the D.C. Circuit's contrary conclusion should be reversed—as expressed in Judge Randolph's dissenting views and as reflected in the votes of Judges Kavanaugh and Griffith to rehear this case en banc.

Hungary participated in a horrendous genocide against European Jews during World War II. While committing those crimes, Hungary stole untold numbers of valuable art works—including works owned by Petitioners' family. In spite of its repeated commitments to restore Nazi-looted art to its rightful owners, Hungary continues to assert ownership over Petitioners' works while displaying the works in its state-

owned museums and reaping financial benefits through its museums' commercial contacts in the United States. Hungary should have to answer for its illegal expropriation—and Congress has provided that it should make that answer in a U.S. court. This Court should grant the Petition and reverse the decision below.

I. Circuit Courts Are Directly Divided On The Question Presented.

A. As explained in the Petition (Pet. 14-17), the decision below directly conflicts with decisions of the Ninth Circuit. Hungary's attempt to wiggle out of that conflict is creative but divorced from reality.

The question presented here arose in *Altmann v. Republic of Austria* in precisely the same way: the heir of a European Jew whose paintings were expropriated by Nazi-collaborating Austria filed suit against Austria and the state-owned museum that displayed the paintings. 317 F.3d 954, 958 (9th Cir. 2002), *amended on denial of reh'g*, 327 F.3d 1246 (9th Cir. 2003), *aff'd*, 541 U.S. 677 (2004). Like Petitioners, the *Altmann* plaintiff invoked the FSIA's expropriation exception, relying exclusively on the state-owned museum's commercial activity. *Id.* at 968-969. But *directly contrary to this case*, the Ninth Circuit *held* that the suit could proceed under the FSIA's expropriation exception because that provision's "jurisdictional prerequisites [were] met" with respect to both "the Republic of Austria and the national Austrian Gallery." *Id.* at 974. This Court *expressly recognized* that "[t]he District Court agreed with [the plaintiff] that the FSIA's expropriation exception covers [Austria's] alleged wrongdoing, and the Court of Appeals affirmed that

holding." *Altmann*, 541 U.S. at 692 (internal citations omitted); *see id.* at 700 ("[T]he District Court and Court of Appeals determined that § 1605(a)(3) covers this case[.]"). The conflict between *Altmann* and the decision below therefore could not be more direct.

Ignoring this Court's characterization of the Ninth Circuit's jurisdictional holding in *Altmann*, Hungary tries to wave off the conflict by complaining (BIO 13) that the Ninth Circuit did not sufficiently explain its jurisdictional holding and must have "assumed" that it had jurisdiction over Austria under the second commercial-nexus requirement without so holding. That is incorrect.

To be sure, a court does not render a binding jurisdictional holding merely by exercising jurisdiction when a potential jurisdictional flaw is "neither brought to the attention of the court nor ruled upon." *Webster v. Fall*, 266 U.S. 507, 511 (1925), *quoted in* BIO 13. In the decision below, for example, the D.C. Circuit held that it was not bound by a prior panel's exercise of jurisdiction over Russia in similar circumstances because "[t]he issue of the Russian state's immunity was completely unaddressed by the district court and neither raised nor briefed on appeal." Pet. App. 19a. But as explained in the Petition (Pet. 15-17), that was not the situation in *Altmann*. Not even close. The *Altmann* district court expressly rejected Austria's argument that it was not subject to the expropriation exception based on its museum's commercial activities. *Altmann v. Republic of Austria*, 142 F. Supp. 2d 1187, 1205 (C.D. Cal. 2001). Austria appealed that holding, arguing that "the second disjunctive of section 1605(a)(3) does not provide a basis for jurisdiction over the Republic." Appellants' Opening Br., 2001 WL

34092857, at *39. The Ninth Circuit necessarily rejected Austria's jurisdictional challenge by holding that the FSIA's "jurisdictional prerequisites [were] met" with respect to both Austria and its museum. *Altmann*, 317 F.3d at 974. That assertion of jurisdiction was a "holding," not an assumption, *Altmann*, 541 U.S. at 692, and it directly conflicts with the decision below.

The en banc Ninth Circuit later relied on *Altmann* to exert jurisdiction over Spain in *Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1032-1034 (9th Cir. 2010), *cert. denied*, 564 U.S. 1037 (2011). The court held that, because all of "the statutory criteria" in Section 1605(a)(3) were "met, the expropriation exception applies to Spain," *id.* at 1037—even though the court had made clear that only the "second clause" of Section 1605(a)(3) (relying on the commercial activities of Spain's agency) was applicable, *id.* at 1033 n.19. *Cassirer* also conflicts with the decision below.

The only other circuit court to opine on this question is the Second Circuit, which agreed with the approach adopted below, albeit in *dictum*. *Garb v. Republic of Poland*, 440 F.3d 579, 589-598 (2d Cir. 2006). Significantly, both experts in foreign-relations law and the Second Circuit itself have recognized that the Ninth Circuit's holdings on the question presented conflict with the Second Circuit's approach in *Garb*. Restatement (Fourth) of Foreign Relations Law: Sovereign Immunity § 455 reporters' note 6 (Tentative Draft No. 2, 2016); *Arch Trading Corp. v. Republic of Ecuador*, 839 F.3d 193, 205-206 (2d Cir. 2016).

The existing circuit conflict is untenable. National uniformity is vital in rules governing foreign sovereigns' immunity to suit because of the delicate

foreign-policy implications of that area of law. *See, e.g.*, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n.25 (1964); *The Federalist No. 44*, at 299 (James Madison) (Jacob E. Cooke ed., 1961); *id. No. 42*, at 279 (James Madison). This Court recently granted a certiorari petition to address an FSIA question based on a similar circuit conflict (there, between the Ninth and Seventh Circuits). *Rubin v. Islamic Republic of Iran*, 137 S. Ct. 2326 (2017); *see* United States *Amicus Curiae* Br., *Rubin*, 2017 WL 2275824, at *13-15. It should do the same here.

B. As explained in the Petition (Pet. 19-23), this Court's immediate intervention is warranted because the FSIA's venue provisions make it unlikely that the circuit conflict will deepen. The venue provisions declare the D.C. district court to be the default venue for suits against a foreign state and erect obstacles to suing a foreign state in other jurisdictions, at least where neither the activities nor property that give rise to a suit are or were located in the United States. *See ibid.*; 28 U.S.C. § 1391(f). Because Hungary cannot refute what is plain on the face of the FSIA's venue provision, it attempts to change the subject, asserting (BIO 15) that "[a]ctions against foreign sovereigns are *routinely* brought in other jurisdictions." That is true as a general statement—but untrue about claims invoking the FSIA's expropriation exception when the property at issue is outside the United States.

C. Hungary goes on at surprising length (BIO 19-22) to explain that the United States has previously taken the position adopted below. That is true as far as it goes—but it neither erases the direct circuit conflict nor fixes the analytical errors in the decision below.

The question presented "concerns interpretation of the FSIA's reach—a 'pure question of statutory construction . . . well within the province of the Judiciary.'" *Altmann*, 541 U.S. at 701 (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446, 448 (1987)) (ellipsis in original). "While the United States' views on such an issue are of considerable interest to the Court, they merit no special deference." *Ibid.* If this Court grants the Petition, the United States will be free to share its views on the question presented. But the one time the Solicitor General shared his views with this Court on that question, he simply asserted a conclusion without even a whisper of analysis or support. *See* United States *Amicus Curiae* Br., *Kingdom of Spain v. Estate of Cassirer*, 2011 WL 2135028, at *15. If the Solicitor General participates in this case, he may or may not adhere to that unreasoned position. And in any case, this Court routinely disagrees with the Solicitor General's interpretation of the FSIA. *See, e.g.*, *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250, 2258 (2014) (rejecting the position of the United States); *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 204 (2007) (Stevens, J., dissenting) (noting that, unlike the majority, he would have adopted the views of the Solicitor General); *Altmann*, 541 U.S. at 701-702. In any case, one of the principal purposes of the FSIA was to "transfer[] from the Executive to the courts the principal responsibility for determining a foreign state's amenability to suit." *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1329 (2016).

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

Notably, Hungary makes no effort to dispute Petitioners' argument (Pet. 23-28) that the question presented is important and recurring. That concession, combined with the stark circuit conflict, provides a sufficient reason to grant the Petition. This Court should also grant the Petition because the decision below is wrong. Hungary's efforts to defend the D.C. Circuit's counter-textual conclusion that the term "foreign state" excludes the foreign state are unavailing.

Hungary's primary argument (BIO 22-26) is that various FSIA provisions afford different treatment to a foreign state than to its agencies and instrumentalities. Hungary extrapolates from those provisions a free-floating principle that a foreign sovereign should always be afforded more favorable treatment under the FSIA than its agencies or instrumentalities, even when the FSIA provides otherwise. *See* BIO 25. Hungary does not identify *any* other FSIA provision where the term "foreign state" has been (or even arguably could be) interpreted to exclude the foreign state. That is not surprising because that is not how Congress writes statutes. Congress specified *in the text* of the FSIA the circumstances in which a plaintiff will have greater recourse against an agency or instrumentality than against a foreign state. But it did the opposite in Section 1605(a)(3) by providing that "[a] foreign state shall not be immune" from suit in the United States under the expropriation exception based on the commercial activities of "an agency or instrumentality of the foreign state." 28 U.S.C. § 1605(a)(3).

Hungary makes no effort to parse the text of that provision or to explain how the term "foreign state"

could be interpreted to exclude the foreign state. As Hungary concedes (BIO 30), "courts are bound to construe statutes as written." Here, the statute authorizes this type of suit against a "foreign state." 28 U.S.C. § 1605(a). Hungary is a foreign state. Hungary argues (BIO 31) that, if Congress had intended to subject a foreign state to suit in these circumstances, it would have written the FSIA to reflect that. But that is *exactly* what Congress did in Section 1605(a)(3). It is Hungary that is pushing a counter-textual interpretation of the FSIA. The D.C. Circuit's decision adopting that counter-textual view should not be permitted to stand. *See* Pet. App. 30a ("[T]he majority's opinion transforms the governing jurisdictional statute to mean the opposite of what it says.") (Randolph, J., dissenting in relevant part).

Hungary's reliance on uncodified background principles that allegedly pre-date the FSIA—at the expense of the text of the statute—is misplaced. The point of the FSIA was to *displace* the pre-existing "ambiguous and politically charged" principles that governed decisions on foreign-state immunity. *Altmann*, 541 U.S. at 699. If Hungary believes that Congress should not subject a foreign state to suit under the expropriations clause in these circumstances, Hungary should take its own advice (BIO 11) "by advocating [its] reading of the commercial-activity nexus requirement to Congress, instead of asking this Court to reimagine the interpretation of a statute in a way that conflicts with the FSIA's text." Hungary ignores the long-held policy of the United States—reflected in numerous international agreements and federal statutes, and eloquently explained in Ambassador Eizenstat's *amicus* brief—that a foreign sovereign should be

responsible for restoring property looted during the Holocaust, even when that property is under the control of a state agency or instrumentality.

Hungary's parade of horribles (BIO 27-29)—suggesting that, under Petitioners' view, a foreign sovereign and all of its agencies will be on the hook for the actions of one agency even when the sovereign or an agency "ha[s] no legal or factual connection to the dispute"—misunderstands the role of the FSIA. The FSIA neither creates a cause of action nor declares any conduct to be illegal. When the FSIA authorizes jurisdiction over an expropriation claim against a foreign sovereign based on the commercial activities of the sovereign's agency or instrumentality, it does not—cannot—subject a foreign sovereign to liability for a dispute to which the sovereign has no connection. And that is not what Petitioners seek. Here, Hungary illegally expropriated the property and continues to claim ownership of it. That Hungary has vested operational control of the property in its state-owned museums does not defeat Petitioners' substantive claims against Hungary. The FSIA's recognition that Hungary should not be immune from Petitioners' claims is therefore perfectly consistent with the applicable substantive law. Notably, Hungary has no answer to Petitioners' explanation (*see* Pet. 26-28) that the D.C. Circuit's view of the expropriation exception provides a how-to manual for foreign states to deprive expropriation victims of the U.S. judicial forum provided by Congress.

Hungary's suggestion (BIO 29) that recognizing jurisdiction over Hungary in this case would be unfair because the stolen artwork just happens to hang on the walls of state-owned museums rather than "in a

private school, for example, or in a home, or in the office of the Prime Minister" (as it used to hang in the offices of the Third Reich) is disingenuous. It is not happenstance that the stolen pieces hang in state-owned museums. Hungary placed them there. And as a result, Hungary can reap the financial benefits that flow to the state-owned museums through their affirmative marketing efforts in the United States. There is nothing unfair about permitting the surviving members of the Herzog family to sue Hungary in the United States for the return of the family's stolen property.

III. This Case Is An Ideal Vehicle To Decide The Question Presented.

Finally, Hungary's contention (BIO 32-35) that this case is an unsuitable vehicle to decide the question presented is meritless. The erroneous decision below creates a circuit conflict on an important question of foreign-relations law. That conflict alone is sufficient to warrant this Court's review. The Solicitor General recently recommended that the Court grant the certiorari petition in *Kumar v. Republic of Sudan*, No. 17-1269 (filed Mar. 9, 2018)—an FSIA case that arises in a similarly interlocutory posture—explaining that the conflict between the Second and Fourth Circuits on that question presented warrants review. United States *Amicus Curiae* Br., *Republic of Sudan v. Harrison*, 2018 WL 2357724, at *7-8. The direct conflict presented in this Petition similarly warrants this Court's review.

The time for resolving the circuit conflict on the question presented is now. Because most expropriation claims against a foreign sovereign must come

through the D.C. Circuit, the erroneous decision below controls the question presented for nearly all plaintiffs with valid expropriation claims against a foreign sovereign. Hungary therefore errs in suggesting (BIO 35) that this Court can decide the question presented at some future date. Even worse, after actively resisting for *more than 70 years* the restitution to Petitioners of what is rightfully theirs, Hungary now callously suggests that Petitioners expend additional time and resources pursuing alternative theories that would be unnecessary absent the D.C. Circuit's erroneous final decision. Equally empty is Hungary's suggestion (BIO 33) that the question presented will be moot in this case if the district court permits the matter to proceed without Hungary. Petitioners included Hungary as a defendant for good reason: not only is Hungary the primary wrongdoer in this case, but Petitioners will face serious obstacles to enforcing a favorable judgment if Hungary is dismissed from the suit. *See* Pet. 26-28.

Contrary to Hungary's contentions, the interlocutory status of a case is no bar to certiorari review when it presents an "important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari." Stephen M. Shapiro et al., *Supreme Court Practice* § 4.18, at 283 (2013). The immunity holding is final as to Hungary, and further proceedings on remand will not change that holding. Immunity questions are inherently interlocutory—and do not become any riper for adjudication as other portions of a matter proceed. This Court's FSIA cases frequently arise in a similar posture. Resolving this important question of federal law now would *eliminate* piecemeal litigation in this

case rather than foster it. If the Court reverses the decision below, the underlying suit can proceed with Hungary as a defendant, thereby avoiding wasted or duplicative efforts in the district court.

CONCLUSION

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

Respectfully submitted,

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