No. 23-1075

In the

Supreme Court of the United States

ZEHAVA FRIEDMAN, ET AL.,
Petitioners,

v.

REPUBLIC OF HUNGARY, ET AL.,
Respondents.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Foreign sovereigns are generally immune from suit in domestic courts, subject to specific exceptions contained in the Foreign Sovereign Immunities Act ("FSIA"). This case concerns the expropriation exception, which permits certain claims if "rights in property taken in violation of international law are in issue." 28 U.S.C. § 1605(a)(3). Just three years ago, the Court unanimously held that this phrase "refers to violations of the international law of expropriation and thereby incorporates the domestic takings rule." *Fed. Republic of Germany v. Philipp*, 592 U.S. 169, 187 (2021). Under this rule, "what a country does to property belonging to its own citizens within its own borders is not the subject of international law" and falls outside the scope of the expropriation exception. *Id.* at 176.

Seeking to avoid the domestic takings rule, Petitioners crafted a new theory following *Philipp*. They concede they were Hungarian nationals prior to World War II and that Hungary did not denationalize its Jewish population as a matter of law. But they claim to have been "*de facto* stateless" at the time of the alleged takings.

The questions presented are:

1. Did the court of appeals correctly hold that Petitioners failed to demonstrate the taking of a "*de facto* stateless" person's property violates the international law of expropriation?

2. Did the court of appeals correctly hold that certain provisions of the Treaty of Trianon regarding protection of minorities are not part of the international law of expropriation?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE PETITION 8

I. Petitioners fail to identify any conflict 8

II. Petitioners forfeited their primary argument 10

III. The D.C. Circuit did not definitively rule on Petitioners' primary argument 12

IV. The Petitioners were not stateless 15

V. Petitioners' secondary argument presents a fact-bound issue not properly raised here 18

CONCLUSION 20

TABLE OF AUTHORITIES

Page

Cases

Abelesz v. Magyar Nemzeti Bank,
692 F.3d 661 (7th Cir. 2012) 9

Ambar v. Fed. Republic of Germany,
596 F. Supp. 3d 76 (D.D.C. 2022) 16

Argentine Republic v. Amerada Hess Shipping Corp.,
488 U.S. 428 (1989) 10

Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.,
581 U.S. 170 (2017) 17

Comparelli v. Republica Bolivariana De Venezuela, 891 F.3d 1311 (11th Cir. 2018) 16

Davoyan v. Republic of Turkey,
116 F. Supp. 3d 1084 (C.D. Cal. 2013), *aff'd on other grounds sub nom. Bakalian v. Cent. Bank of Republic of Turkey*, 932 F.3d 1229 (9th Cir. 2019) 16, 17

de Csepel v. Republic of Hungary,
__ F. Supp. 3d __, No. CV 10-1261, 2023 WL 6313576 (D.D.C. Sept. 28, 2023) 12, 13, 14

de Csepel v. Republic of Hungary,
808 F. Supp. 2d 113 (D.D.C. 2011) 9

de Sanchez v. Banco Cent. De Nicaragua, 770 F.2d 1385 (5th Cir. 1985) 8, 9

Dickson Car Wheel Company (U.S.A.) v. United Mexican States, 4 R.I.A.A. 669 13

Federal Republic of Germany v. Philipp,
592 U.S. 169 (2021) 1, 4, 5, 7, 9, 10, 14, 17-20

Heller v. Republic of Hungary,
No. 21-CV-1739 (BAH), 2022 WL 2802351 (D.D.C. July 18, 2022) 5, 16

Mezerhane v. Republica Bolivariana de Venezuela,
785 F.3d 545 (11th Cir. 2015) 1, 7, 8

Physicians for Soc. Resp. v. Wheeler,
956 F.3d 634 (D.C. Cir. 2020) 6

Republic of Argentina v. NML Capital, Ltd., 573 U.S. 134 (2014) 9, 10

Republic of Hungary v. Simon,
141 S. Ct. 187 (2020) 4

Republic of Hungary v. Simon,
592 U.S. 207 (2021) 4

Saudi Arabia v. Nelson,
507 U.S. 349 (1993) 3

Simon v. Republic of Hungary,
277 F. Supp. 3d 42 (D.D.C. 2017) 3

Simon v. Republic of Hungary,
37 F. Supp. 3d 381 (D.D.C. 2014) 3

Simon v. Republic of Hungary,
579 F. Supp. 91 (D.D.C. 2021) 4, 5, 17

Simon v. Republic of Hungary,
77 F.4th 1077 (D.C. Cir. 2023)
.....1, 2, 5-7, 9-12, 15, 18, 19

Simon v. Republic of Hungary,
812 F.3d 127 (D.C. Cir. 2016) 3

Simon v. Republic of Hungary,
911 F.3d 1172 (D.C. Cir. 2018) 4

Toren v. Fed. Republic of Germany,
No. 22-7127, 2023 WL 7103263 (D.C.
Cir. Oct. 27, 2023) 14, 15

U.S. AirWaves, Inc. v. F.C.C.,
232 F.3d 227 (D.C. Cir. 2000) 11

United States v. Bradshaw,
935 F.2d 295 (D.C. Cir. 1991) 11

United States v. Wong Kim Ark,
169 U.S. 649 (1898) 15, 16

Verizon Communications, Inc. v. F.C.C.,
535 U.S. 467 (2002) 11, 12

Statutes

28 U.S.C. § 1604 3

28 U.S.C. § 1605(a)(3).....3, 8

Other Authorities

1 Oppenheim, International Law: A Treatise (2d ed. 1912).....13

Bradley & Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 Harv. L. Rev. 815 (1997) 9

Convention Relating to the Status of Stateless Persons, Sept. 28, 1954, 360 U.N.T.S. 117 16

Convention on Certain Questions Relating to the Conflict of Nationality Laws Nationality Laws, Apr. 12, 1930, 179 U.N.T.S. 89 16

Restatement (Second) of Foreign Relations Law (Am. L. Inst. 1965) 2, 4-6, 9, 11, 16

Restatement (Third) of the Foreign Relations Law of the United States § 713 cmt. d (Am. L. Inst. 1987) 14

Treaty of Peace with Hungary, 113
B.F.S.P. 486, 12 Martens (3rd) 423,
17 Am. J. Int'l L. Supp. 46 (1923).....20

United Nations, *A Study of Statelessness*
(1949).....14

INTRODUCTION

The Petition for Certiorari attempts to evade this Court's decision in *Federal Republic of Germany v. Philipp*, 592 U.S. 169 (2021). It does so without identifying any conflict among the circuits. Further, it presents an argument that the D.C. Circuit correctly found was forfeited, and it seeks review of an issue that was not finally resolved. Finally, it rests on a faulty factual assumption. In short, Petitioners fail to advance any meritorious basis for a grant of certiorari.

In *Philipp*, this Court made clear that the expropriation exception of the FSIA incorporates the "domestic takings rule," under which "a foreign sovereign's taking of its own nationals' property remains a domestic affair." *Fed. Republic of Germany v. Philipp*, 592 U.S. 169, 176 (2021). Petitioners, who admit they were Hungarian nationals living in Hungary prior to World War II, nonetheless seek to pierce the sovereign immunity of the Republic of Hungary and Magyar Államvasutak Zrt. ("MÁV") under the expropriation exception. Hoping to sidestep this Court's ruling in *Philipp*, Petitioners claim that they were "*de facto* stateless."

The D.C. Circuit properly held that Petitioners "have not demonstrated that their legal theory . . . has jelled into a binding rule of customary international law." *Simon v. Republic of Hungary*, 77 F.4th 1077, 1102, 1098 (D.C. Cir. 2023) ("*Simon III*"); *see also Mezerhane v. Republica Bolivariana de Venezuela*, 785 F.3d 545, 551 (11th Cir. 2015) (rejecting *de facto* statelessness theory). And it correctly found that Petitioners had forfeited the argument they now seek to present to this Court, "that a state's taking of a

stateless person's property may *violate* the international law of expropriation even if stateless persons are 'without remedy.'" *Simon III*, 77 F.4th at 1098 (quoting Restatement (Second) of Foreign Relations Law § 175 cmt. d (Am. L. Inst. 1965) (the "Second Restatement")).

Further, the D.C. Circuit expressly did "not foreclose the possibility that such support [for Petitioners' theory] exists in sources of international law not before us in this case or based on arguments not advanced here." *Id.* It thus left the door open to such an argument if properly presented and preserved. Further still, it did not find that Petitioners were actually stateless; it merely assumed so for the sake of argument. *Id.* at 1097. Yet recognizing a "*de facto*" statelessness theory would contravene the fundamental principle that nations decide who is a citizen under their own laws.

Finally, in addition to their *de facto* statelessness theory, Petitioners assert a second argument regarding two specific articles of the 1920 Treaty of Trianon. The D.C. Circuit correctly ruled that these provisions concerned protection of minority groups, not the international law of expropriation. And in any event, this fact-bound issue is not deserving of certiorari.

Hungary and MÁV respectfully request this Court deny the Petition.

STATEMENT OF THE CASE

Petitioners are a subset of plaintiffs from two related cases who claim their property was seized by Hungary or MÁV (the Hungarian national railway)

during World War II when they were forcibly transported as part of the Nazi-led assault on the Jewish people. Decades after the end of World War II, they filed the present suits.

Hungary and MÁV are generally entitled to foreign sovereign immunity. *See* 28 U.S.C. § 1604 (directing that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States" subject to statutory exceptions); *see also Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993) ("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."). Petitioners seek to avoid sovereign immunity under the expropriation exception to the FSIA, which permits certain claims regarding "property taken in violation of international law." 28 U.S.C. § 1605(a)(3).

The procedural history of this case is lengthy. 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. *Simon v. Republic of Hungary*, 37 F. Supp. 3d 381, 420 (D.D.C. 2014). The D.C. Circuit reversed. *Simon v. Republic of Hungary*, 812 F.3d 127 (D.C. Cir. 2016) ("*Simon I*"). It held that the treaty's process was not exclusive and (prior to *Philipp*) that the expropriation exception did not incorporate the domestic takings rule. *Id.* at 137, 144-45.

On remand, the district court again dismissed, this time based on prudential exhaustion and *forum non conveniens*. *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 prudential exhaustion doctrine did not apply in FSIA cases 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 *Philipp*, 141 S. Ct. 185 (2020), where it 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. Under that rule, "[a] 'taking of property' could be 'wrongful under international law' only where a state deprived 'an alien' of property." *Id.* at180 (quoting Second Restatement § 185). The Court vacated and remanded *Simon* for further proceedings consistent with *Philipp*. *Republic of Hungary v. Simon*, 592 U.S. 207, 208 (2021).

Back in the district court, some plaintiffs argued they were citizens of Czechoslovakia rather than Hungary at the time of the alleged takings. *See Simon v. Republic of Hungary*, 579 F. Supp. 91, 121 (D.D.C. 2021). Petitioners here made no such argument. Instead, they claimed that the atrocities committed against Jewish Hungarians as part of the Holocaust rendered them "*de facto* stateless." As Petitioners acknowledge, they were "Hungarian nationals before the Holocaust, residing in Trianon Hungary." (Pet. for Cert. 9).

The district court noted that "fact-specific determinations of which instances of abhorrent historical conduct are *de facto* denationalizing and which are not" would be a "fraught exercise . . . that

courts would do well to avoid." *Id.* at 117. It rejected Petitioners' "*de facto* statelessness" argument as inconsistent with *Philipp*. "The logical result of plaintiffs' argument," the district court explained, "is that any program of genocidal conduct of which expropriations are a part—because it inherently entails a loss of nationality—falls outside the domestic takings rule and can be prosecuted using the expropriation exception." *Id.* at 118. "That is precisely what *Philipp* forecloses, only without articulating the intermediate 'loss of nationality' step." *Id.*

Around the time of the district court's decision in *Simon*, two additional plaintiffs filed a separate action asserting similar claims in *Heller*. The district court dismissed that action for the same reason: "*Philipp* 'precludes reliance on the egregiousness or genocidal nature of expropriative conduct as a means to escape the limitation of the domestic takings rule" and "*Philipp* is also irreconcilable with plaintiffs' argument that statelessness induced by genocidal conduct removes such conduct from the confines of the domestic takings rule." *Heller v. Republic of Hungary*, No. 21-CV-1739 (BAH), 2022 WL 2802351, at *7 (D.D.C. July 18, 2022) (quoting *Simon*, 579 F. Supp. at 115).

The D.C. Circuit consolidated the two appeals. *Simon III*, 77 F.4th at 1087. It affirmed the district court's dismissal of Petitioners' claims, although on a somewhat different basis. The D.C. Circuit looked to "the customary international law of expropriation" in place when congress enacted the FSIA, principally as reflected in the Second Restatement. *Id.* at 1097.

Under the Second Restatement, "[t]he responsibility of [a] state under international law for

an injury to an alien cannot be invoked directly by the alien against the state" absent specific circumstances not present here. *Simon III*, 77 F.4th at 1097 (quoting Second Restatement § 175) (second alteration in original). Accordingly, "[u]nder traditional principles of international law, a state, being responsible only to other states, could not be responsible to anyone for an injury to a stateless alien." *Id.* at 1097-98 (quoting Second Restatement § 175 cmt. d).

The D.C. Circuit expressly relied on Petitioners' failure to address this key point in their briefing. It noted that after "defendants pointed out the limits set forth in section 175 [of the Second Restatement] on when a stateless person has a remedy, the Survivors abandoned reliance on that section in their reply and failed to explain why the defendants' point was not fatal to their theory." *Id.* at 1098 (citations omitted). At oral argument, Petitioners attempted to raise the theory upon which their Petition rests: "that a state's taking of a stateless person's property may *violate* the international law of expropriation even if stateless persons are 'without remedy' under international law for such violation." *Id.* But the court explained that Petitioners "nowhere argue in their briefing" this point and "arguments raised for the first time at oral argument are forfeited." *Id.* (quoting *Physicians for Soc. Resp. v. Wheeler*, 956 F.3d 634, 647 (D.C. Cir. 2020)).

The D.C. Circuit took pains to highlight the fact that it did "not foreclose the possibility that such support [for Petitioners' unpreserved argument] exists in sources of international law not before us in this case or based on arguments not advanced here." *Id.* Rather than rejecting the theory outright, its "holding

[wa]s more limited: On this record, the Survivors have not demonstrated that their legal theory—that a state's taking of a *de facto* stateless person's property violates the international law of expropriation—has jelled into a binding rule of customary international law." *Id.*

The D.C. circuit also rejected the secondary argument asserted by Petitioners. With respect to the 1920 Treaty of Trianon, Petitioners claimed that certain articles regarding free exercise of religion and equal treatment of religious minorities provided an international law basis for their claims. *Id.* at 1110. The court held that under *Philipp*, "only violations of 'the international law of expropriation' count for purposes of the FSIA's expropriation exception." *Simon III*, 77 F.4th at 1110 (quoting *Philipp*, 592 U.S. at 187). "Neither provision relied on by the Survivors even mentions property or takings. Rather, both provisions govern 'protection of minorities' in post-war Hungary." *Id.* at 1111.

The D.C. Circuit thus affirmed the dismissal of Petitioners' claims. It permitted the claims of other Plaintiffs in the *Simon* case to move forward, which is the subject of a separate Petition for Certiorari filed by Hungary and MÁV. (Dkt. No. 23-867).

REASONS FOR DENYING THE PETITION

I. Petitioners fail to identify any circuit split

Petitioners do not identify a circuit split. Nor could they, because the only two circuits to have considered the "*de facto* statelessness" theory agree that it lacks merit.

The Eleventh Circuit rejected this theory in *Mezerhane v. Republica Bolivariana de Venezuela*, 785 F.3d 545 (11th Cir. 2015). That case concerned a Venezuelan plaintiff, Mezerhane, who alleged that the Chávez regime persecuted him in an effort to gain control over his media companies. *Id.* at 547. Like Petitioners here, Mezerhane alleged that "he was stripped of 'all indicia of citizenship,' including the rights to travel in and outside of Venezuela, 'to live in a non-incarcerated state in Venezuela,' to 'earn a livelihood,' and to acquire, sell, and convey property." *Id.*

The Eleventh Circuit squarely rejected the argument that "*de facto* statelessness" allowed Mezerhane to escape the domestic takings rule:

> Even if we were to accept that Mezerhane was *de facto* stateless, the FSIA exception to sovereign immunity found in § 1605(a)(3) does not apply to his claims because his claims do not implicate multiple states—they relate entirely to Venezuela. We note with approval the Fifth Circuit's statement in *de Sanchez* that "[i]njuries to individuals have been cognizable only where they

> implicate two or more different nations: if one state injures the national of another state, then this can give rise to a violation of international law since the individual's injury is viewed as an injury to his state."

Id. at 551 (quoting *de Sanchez v. Banco Cent. De Nicaragua*, 770 F.2d 1385, 1396 (5th Cir. 1985).[1]

Both the D.C. and Eleventh Circuits recognized that stateless persons are not the subject of the international law of expropriation. This conclusion flows from the principle that "only states have rights under international law." Second Restatement § 174 cmt. b. As this Court noted in *Philipp*, a taking "was an affront to the sovereign, and 'therefore the alien's state alone, and not the individual, could invoke the remedies of international law.'" 592 U.S. at 177 (quoting Bradley & Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 Harv. L. Rev. 815, 831, n. 106 (1997)).

Unable to rely on a circuit split, Petitioners assert that *Simon III* conflicts with this Court's opinion in *Republic of Argentina v. NML Capital, Ltd.*,

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[1] The Eleventh Circuit distinguished pre-*Philipp* cases in which courts held the domestic takings rule did not bar claims that "involved the taking of property in the context of genocide." *Id.* (citing *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 674 (7th Cir. 2012) and *de Csepel v. Republic of Hungary*, 808 F. Supp. 2d 113, 129 (D.D.C. 2011)). This Court rejected that theory in *Philipp*. 592 U.S. at 182 (holding the expropriation exception "references the international law governing property rights, rather than the law of genocide").

573 U.S. 134 (2014). No such conflict exists. In that case, the Court held that the pre-FSIA "executive-driven, factor-intensive, loosely common-law-based immunity regime" was displaced by the FSIA such that foreign sovereign immunity "must stand on the Act's text." *Id.* The decision in *Simon III* accords with this principle. The D.C. Circuit expressly held that the FSIA "provides 'the sole basis for obtaining jurisdiction over a foreign state in our courts.'" *Simon III*, 77 F.4th at 1090 (quoting *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989)).

The D.C. Circuit did not apply pre-FSIA standards in rejecting Petitioners' argument. Instead, it looked to the plain text of the expropriation exception and this Court's decision in *Philipp*. Petitioners' disagreement with the result of that interpretation does not constitute a conflict with this Court. Nor have they identified any other conflict warranting a grant of certiorari. *See* Sup. Ct. R. 10.

II. Petitioners forfeited their "*de facto* stateless" argument

The D.C. Circuit correctly held that the main argument Petitioners seek to present was forfeited. In their Petition for Certiorari, Petitioners assert that the D.C. Circuit erred in failing to distinguish between a violation of international law and a remedy for such violation. (*See, e.g.*, Pet. for Cert. 17, 18, 19, 20, 21). But the D.C. Circuit properly held this argument was forfeited: "We note that the Survivors nowhere argue in their briefing that a state's taking of a stateless person's property may *violate* the international law of

expropriation even if stateless persons are 'without remedy' under international law for such violation." *Simon III*, 77 F.4th at 1098 (quoting Second Restatement § 175 cmt. d).

The court explained that after Defendants highlighted Second Restatement § 175, "the Survivors abandoned reliance on that section in their reply and failed to explain why the defendants' point was not fatal to their theory." *Id.*[2] Rather than raise this newfound distinction in their briefing, Petitioners waited until oral argument to "impl[y] as much when, in response to probing from the bench on the point, they contended that the FSIA's expropriation exception itself provides the necessary remedy for expropriations from stateless persons in violation of international law." *Id.* The D.C. Circuit thus "decline[d] to reach that late-raised argument and t[ook] no position here on its potential merit." *Id.*

Petitioners seek to excuse this forfeiture by referencing other arguments they made under Second Restatement §§ 171 and 185. (Pet. for Cert. 21-22 n.10). But an issue is not preserved unless a litigant sets forth the specific argument they seek to press; general arguments of a similar nature are insufficient. *See generally U.S. AirWaves, Inc. v. F.C.C.*, 232 F.3d 227, 236 (D.C. Cir. 2000); *United States v. Bradshaw*, 935 F.2d 295, 303 (D.C. Cir. 1991).

Petitioners also contend their new argument is properly raised before this Court because it was "passed upon below." (Pet. for Cert. 21-22 n.10 (quoting *Verizon Communications, Inc. v. F.C.C.*, 535

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[2] Petitioners' reply brief is available on Westlaw at 2023 WL 1927538. It does not cite Second Restatement § 175.

U.S. 467, 530 (2002)). Not so. The D.C. Circuit expressly declined to rule on this issue, stating it "t[ook] no position here on its potential merit." *Simon III*, 77 F.4th at 1098. This Court should not grant certiorari on a forfeited issue.

III. The D.C. Circuit did not definitively resolve whether Petitioners' were *de facto* stateless at the time of the takings

The D.C. Circuit did not decide a stateless plaintiff in a future case could rely on the expropriation exception. Instead, its "holding [wa]s more limited." *Simon III*, 77 F.4th at 1098. The court merely held that Petitioners "have not mustered adequate support for their contention that a state's taking of a *de facto* stateless person's property violates the international law of expropriation." *Simon III*, 77 F.4th at 1097. The D.C. Circuit emphasized that it did "not foreclose the possibility that such support [for this theory] exists in sources of international law not before us in this case or based on arguments not advanced here." *Id.* at 1098.

Subsequent cases from within the D.C. Circuit have recognized that the stateless plaintiff issue was not conclusively resolved in *Simon III*. First, in *de Csepel v. Republic of Hungary*, __ F. Supp. 3d __, No. CV 10-1261, 2023 WL 6313576 (D.D.C. Sept. 28, 2023), the district court ordered the parties "to submit limited supplemental briefing addressing whether support exists in sources of international law that were not before the D.C. Circuit in *Simon* or based on arguments not advanced there." *de Csepel*, 2023 WL 6313576, at *21 (internal quotation marks and

alterations omitted). Following consideration of that supplemental briefing, the court concluded "that plaintiffs have not presented a winning argument." *Id.* at *22.

In rejecting the argument Petitioners seek to present here, the court identified "plentiful sources that counsel against adopting such a rule." *Id.* at *24. It summarized these sources as follows:

> Prior to World War II, L.F.L. Oppenheim's renowned treatise on international law explained that "[s]uch individuals as do not possess any nationality enjoy no protection whatever, and if they are aggrieved by a State they have no way of redress, there being no State which would be competent to take their case in hand." (1 Oppenheim, International Law: A Treatise (2d ed. 1912)) § 291; *see id.* ("As far as the Law of Nations is concerned, apart from morality, there is no restriction whatever to cause a State to abstain from maltreating to any extent such stateless individuals."). Positive international law from a 1931 arbitral decision by the Mexico-USA General Claims Commission voiced a similar sentiment, stating that "[a] State . . . does not commit an international delinquency in inflicting an injury upon an individual lacking nationality." (*Dickson Car Wheel Company (U.S.A.) v. United Mexican States*, 4 R.I.A.A. 669, 678 (Mex.-U.S.

> General Claim Comm'n (July 1931)). Shortly after the war, a 1949 United Nations study conducted in the lead-up to the seminal 1954 Stateless Persons Convention described how, under the "existing situation in regard to the protection of stateless persons," "[t]he provisions of international law which determine the status of foreigners are designed to apply to foreigners having a nationality." (United Nations, *A Study of Statelessness* (1949)), intro. §§ I.1., V.1.1. The U.N. concluded that "[s]tateless persons, not being nationals of any country, are deprived of protection in all its forms." *Id.*, part 1, § I, ch. 3(2).

de Csepel, 2023 WL 6313576 at *25 (docket citations omitted).[3]

The D.C. Circuit itself recognized in *Toren v. Fed. Republic of Germany*, No. 22-7127, 2023 WL 7103263 (D.C. Cir. Oct. 27, 2023), that the "*de facto* stateless" theory remained unresolved as a matter of circuit precedent. There, the court noted that "[i]n *Simon*, we left open 'the possibility that . . . sources of

[3] Although the Court looks to international law as it existed at the time of the FSIA's enactment, *see Philipp*, 592 U.S. at 180, it is notable that this rule has been carried forward in more recent sources of international law. *See* Restatement (Third) of the Foreign Relations Law of the United States § 713 cmt. d (Am. L. Inst. 1987) (explaining that because responsibility for a taking "is to the state of nationality, the principles stated in these sections provide no protection for persons who have no nationality").

international law not before us' in that case could provide support for the proposition that a state's taking of property from a stateless person 'violates the customary international law of expropriation.'" *Toren*, 2023 WL 7103263, at *3 (quoting *Simon III*, 77 F.4th at 1098). But the plaintiff in that case had "not identified any such sources of international law" and thus the court reached the same conclusion as in *Simon*. *Id.*

Because the D.C. Circuit has expressly recognized that a plaintiff with valid international law support for the statelessness theory could prevail in a different case, there is no need for this Court to grant certiorari.

IV. The Petitioners were not stateless at the time of the takings

Whether a stateless individual may rely on the expropriation exception is not a question properly raised in this case. Although Petitioners assert the theory that they are stateless "*de facto*," they "do not claim that Hungary had formally denationalized its Jewish population *de jure* by the time of the alleged takings." *Simon III*, 77 F.4th at 1095. Further, they offer no valid support for the proposition that a sovereign can lose immunity under the expropriation exception on a "*de facto*" theory.

Petitioners' claim of statelessness also is inconsistent with the rule "that it is the inherent right of every independent nation to determine for itself, and according to its own constitution and laws, what classes of persons shall be entitled to its citizenship." *United States v. Wong Kim Ark*, 169 U.S. 649, 668

(1898). Under that rule, "[i]t is for each State to determine under its own law who are its nationals[,]" and "[a]ny question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State." *Ambar v. Fed. Republic of Germany*, 596 F. Supp. 3d 76, 83 (D.D.C. 2022) (quoting Convention on Certain Questions Relating to the Conflict of Nationality Laws, art. 1, 2, Apr. 12, 1930, 179 U.N.T.S. 89); *see also Comparelli v. Republica Bolivariana De Venezuela*, 891 F.3d 1311, 1321 (11th Cir. 2018) ("International law recognizes that it is generally up to each state (i.e., country) to determine who are its nationals.").

Indeed, even the sources cited by Petitioners are in accord with this bedrock principle of international law. Under the 1954 Convention Relating to the Status of Stateless Persons, a "stateless person" means "a person who is not considered a national by any State *under the operation of its law*." Convention Relating to the Status of Stateless Persons, art. 1, Sept. 28, 1954, 360 U.N.T.S. 117) (emphasis added). Under this definition, Petitioners were not stateless and could not qualify as aliens under the Second Restatement § 171.

Plaintiffs do not, and cannot, argue that they lost citizenship under Hungarian law at the time of the alleged takings. As the district court recognized in *Heller*, "unlike Germany, Hungary never revoked the citizenship of Hungarian Jews." 2022 WL 2802351, at *8 n.7; *see also Davoyan v. Republic of Turkey*, 116 F. Supp. 3d 1084, 1099-1100 (C.D. Cal. 2013), *aff'd on other grounds sub nom. Bakalian v. Cent. Bank of Republic of Turkey*, 932 F.3d 1229 (9th

Cir. 2019) (distinguishing between "ethnic Armenians living in the Ottoman Empire [who] were treated as *de facto* non-citizens" and Jewish Germans who "had been stripped of their citizenship as a result of the Reichsbürgergesetz [Reich Citizenship Law]."). Further, opening the door to this type of argument would contravene the United States' interests. As the district court aptly observed, domestic courts are ill-suited to determine "which instances of abhorrent historical conduct are *de facto* denationalizing." *Simon*, 579 F. Supp. at 117. That "fraught exercise" is one "that courts would do well to avoid." *Id.* Yet Petitioners would have domestic courts make those very determinations, which surely "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.'" *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 581 U.S. 170, 183 (2017) (alteration in original) (quoting Brief for United States as Amicus Curiae 21-22).

Although this case presents horrific historical facts, it bears noting that every plaintiff relying on the expropriation exception claims that a foreign sovereign disregarded their property rights. Permitting domestic litigation against a sovereign to proceed based on allegations that the sovereign's actions towards its own citizens were effectively denationalizing would "subject all manner of sovereign public acts to judicial scrutiny under the FSIA." *Philipp*, 592 U.S. at 183.

The D.C. Circuit merely assumed, for purposes of argument, that Petitioners were stateless. *Simon III*, 77 F.4th at 1097 ("Even assuming the Trianon Survivors were *de facto* stateless at the time of the alleged takings, the Survivors have not mustered adequate support for their contention that a state's taking of a *de facto* stateless person's property violates the international law of expropriation."). Thus, a grant of certiorari would result in a purely academic exercise on the question of statelessness.

V. Petitioners' secondary argument presents a fact-bound issue not properly raised here

In addition to the question of statelessness, Petitioners seek certiorari on a secondary issue regarding the interpretation of two articles of the 1920 Treaty of Trianon. This secondary argument is not worthy of certiorari for several reasons.

First, the question is fact-specific and does not involve any issue of general applicability. This Court explained in *Philipp* that "the expropriation exception is best read as referencing the international law of expropriation rather than of human rights." 592 U.S. at 180; *see also id.* at 182 ("A statutory phrase concerning property rights most sensibly references the international law governing property rights, rather than the law of genocide."). The lower courts have had no difficulty in applying this rule.

The D.C. Circuit correctly held that the specific articles at issue could not be "characterized as international law of expropriation." *Simon III*, 77 F.4th at 1111. The Treaty of Trianon formally

concluded hostilities between Hungary and the Allied and Associated Powers in world War I. *Id.* at 1110. Article 55 of that treaty refers to "protection of life and liberty" without regard for "birth, nationality, language, race or religion," and establishes a right "to the free exercise, whether public or private, of any creed, religion or belief." *Id.* at 1111 (quoting Treaty of Trianon art. 55). Article 58 states that "Hungarian nationals who belong to racial, religious or linguistic minorities shall enjoy the same treatment and security in law and in fact as the other Hungarian nationals." *Id.* (quoting Treaty of Trianon art. 58).

In holding that these provisions were not part of the international law of expropriation, the D.C. Circuit emphasized that "[t]he absence of any mention of property in Articles 55 and 58—which protect Hungarian inhabitants and nationals—is notable given that other provisions of the Trianon Treaty explicitly address property rights of foreign nationals." *Id.* And it rejected the argument that these articles "encompass protection for property rights" because "[t]he same could be said of many principles of human rights law." *Id.* Plaintiffs thus failed to "show that the international legal obligation on which they rely falls within the 'international law of expropriation *rather than* of human rights." *Id.* at 1111-12 (quoting *Philipp*, 592 U.S. at 180). No court has issued a ruling in conflict with this straightforward reading of the relevant treaty provisions.

Second, Petitioners have not shown that treaty-based claims, even if they relate to property rights, can override the domestic takings rule. In *Philipp*, this Court expressly rejected the argument that the

expropriation exception incorporates "other areas of international law [that] do not shield a sovereign's actions against its own nationals." 592 U.S. at 181. Instead, the expropriation exception is limited to alleged violations of the customary international law of expropriation. The Treaty of Trianon is not part of that law.

Third, even if the Treaty of Trianon were part of the international law of expropriation, it could not be invoked by Petitioners. Articles 55 and 58 were "placed under the guarantee of the League of Nations," the predecessor to the United Nations. (Treaty of Trianon art. 60).[4] Those articles were enforceable by "any Member of the Council of the League of Nations," not individual citizens. (*Id.*). And any disputes regarding the articles at issue were to be heard by "the Permanent Court of International Justice," not American courts. (*Id.*).

As this Court stressed in *Philipp*, the expropriation exception cannot be transformed "into an all-purpose jurisdictional hook for adjudicating human rights violations." 592 U.S. at 183. Petitioners' efforts to circumvent that ruling should be rejected.

CONCLUSION

Hungary and MÁV respectfully request this Court deny the Petition.

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[4] Treaty of Peace with Hungary, 113 B.F.S.P. 486, 12 Martens (3rd) 423, 17 Am. J. Int'l L. Supp. 46 (1923).

Respectfully submitted,

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