No. 23-1075

IN THE
Supreme Court of the United States

ZEHAVA FRIEDMAN, *ET AL.*,
Petitioners,

v.

REPUBLIC OF HUNGARY, *ET ANO.*,
Respondents.

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

REPLY BRIEF

Charles S. Fax
Counsel of Record
RIFKIN WEINER
LIVINGSTON, LLC
7700 Wisconsin Avenue,
Suite 320
Bethesda, MD 20814
(301) 951-0150
cfax@rwllaw.com

L. Marc Zell
ZELL, ARON & CO.
34 Ben Yehuda Street
Jerusalem 9423001 Israel
011-972-2-633-6300
mzell@fandz.com

Counsel for Petitioners
(additional counsel listed on inside cover)

Additional Counsel for Petitioners

David H. Weinstein
WEINSTEIN KITCHENOFF & ASHER LLC
24 West Lancaster Ave., Suite 201
Ardmore, PA 19003
(215) 545-7200
weinstein@wka-law.com

Paul G. Gaston
LAW OFFICES OF PAUL G. GASTON
1101 Connecticut Ave., NW, Suite 450
Washington DC 20036
(202) 296-5856
paul@gastonlawoffice.com

Noam Shreiber, Esq.
Of counsel

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PETITIONERS' REPLY

I. This Case Presents an Issue of National and International Importance.

The importance of the questions presented here cannot be overstated. As Hungary[1] has observed, "[t]he scope of the expropriation exception [28 U.S.C. § 1605(a)(3)] is a matter of national, and international, importance." Petition for Writ of Certiorari, No. 23-867 (Feb. 7, 2024), at 29. The need to define that scope correctly "strongly militates in favor of this Court's review." *Id.* at 30. What's more, the D.C. Circuit—which is central in FSIA cases, because foreign-state venue is always proper in the District of Columbia, *id.* at 29; 28 U.S.C. § 1391(f)(4)—has "acknowledge[d] the immense gravity of the claims" here—claims that depend on a proper immunity ruling. 84a. The impact of the decision below is already being felt in the D.C. District Court. *See* Brief in Opposition ("Opposition") at 12-14. Thus, while the courts are not divided, just as in *Philipp*,[2] the statelessness issue is one of national and international importance, also like the issue the Court resolved in *Philipp*.

Petitioners and the Survivors they seek to represent are in their 90's or older. They are entitled to some measure of justice for Hungary's atrocities now, while some of them may still live to see it. *See* Petition at 32-33. As the government has explained, "the moral imperative" is "to provide some measure of justice to the victims of the Holocaust, *and to do so in their remaining lifetimes*." U.S. Brief at 9-10, Document #1733875,

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[1] Petitioners use herein the definitions of terms stated in their Petition for a Writ of Certiorari.

[2] *Fed. Republic of Germany v. Philipp*, 592 U.S. 168 (2021).

Simon v. Republic of Hungary, No. 17-7146 (D.C. Cir.) (emphasis added).

Petitioners thus respectfully submit that the entire litigation—both this matter, No. 23-1075, and No. 23-867—presents important issues that the Court should review together.

II. Hungary's Procedural Objections to Question #1 are Unfounded.

In its Opposition, Hungary never disputes that expropriation from a stateless person is a "violation of international law" within the meaning of § 1605(a)(3). *See* Petition Points I., B. and I, C, at 17-27. Instead, Hungary focuses solely on procedural objections to Petitioners Question #1. Those objections lack merit.

A. Petitioners did *not* forfeit their primary argument, as Hungary contends.

Hungary falsely asserts that "Petitioners forfeited their '*de facto* stateless' argument" and that "Petitioners forfeited their primary argument." Opposition at 10, ii. Petitioners did *not* forfeit the statelessness issue, and the courts below never ruled that they had.

1. "Any issue pressed or passed upon below by a federal court … is subject to this Court's broad discretion over the questions it chooses to take on certiorari …." *Verizon Communications, Inc. v. F.C.C.*, 535 U.S. 467, 530 (2002) (citation and internal quotation marks omitted). "[T]his rule operates … in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon …." *U.S. v. Williams,* 504 U.S. 36, 41 (1992). Established precedent is even more lenient regarding arguments on reviewable issues:

> Our traditional rule is that once a federal claim is properly presented, a party can make *any argument* in support of that claim; parties are *not limited to the precise arguments they made below*.

Lebron v. National R.R. Passenger Corp., 513 U.S. 374, 379 (1995) (citations, brackets, and quotation marks omitted; emphasis added). *Accord, Hemphill v. New York*, 595 U.S. 140, 149 (2022).

2. The D.C. Circuit confirmed that Petitioners "argue that, because Hungary rendered them *de facto* stateless by the time of the alleged takings, the domestic takings rule poses no bar to their claims against Hungary." 16a. *See*, *also*, Petitioners Brief at 18, Document #1978581, and Reply Brief at 2, Document #1985531, *Simon v. Republic of Hungary*, No. 22-7010, (D.C. Cir.). Petitioners argued, the court recounted, that under the authoritative Second Restatement, "a 'taking by a state of property of an alien' … [is] 'wrongful under international law' when certain conditions are met … [a]nd … the term 'alien' encompasses both foreign nationals and stateless persons 'for purposes of the responsibility of a state for injury' to an individual." 24a.

Clearly, Petitioners did not forfeit their statelessness opposition to Hungary's asserted immunity.

The D.C. Circuit's ruling was much narrower than Hungary portrays. The court said that Petitioners did not explain in their reply brief the distinction they drew under the Second Restatement between provisions establishing the substantive violation of international law and the separate provisions addressing remedies under international procedural law. The court declined to consider Petitioners' argument about that

distinction, because it was not articulated in the briefs. 25a-27a.

3. Under *Verizon* and *Williams*, the circuit court's ruling, affirming the dismissal of Petitioners' claims with prejudice, is fully reviewable in this Court.

Moreover, the only forfeiture the D.C. Circuit identified was of a legal argument to support Petitioners' clear and consistent opposition, based on their stateless status, to Hungary's immunity. Under *Lebron* and *Hemphill*, that argument is presentable in this Court.

Petition Question #1—whether Hungary violated the international law of expropriation by its seizure of stateless persons' property—is thus fully reviewable by the Court.

B. The lower courts properly accepted that Petitioners were stateless when Hungary seized their property.

1. Respondents maintain that "Hungary never revoked the citizenship of Hungarian Jews," and that Petitioners "do not, and cannot argue that they lost citizenship under Hungarian law at the time of the alleged takings." Opposition at 16. That is false. Petitioners have consistently asserted that Hungary's actions *de jure* and *de facto* stripped them of their Hungarian nationality.

a. Hungary never seriously challenged this fact. The District Court found that Respondents only "nominally dispute that Hungary's actions rendered plaintiffs stateless, but do not advance any substantive arguments for this position." *Simon v. Republic of Hungary*, 579 F. Supp. 3d 91, 117 (D.D.C. 2021). Throughout the 14-year history of this litigation Respondents produced extensive declarations and documents on numerous issues,

but no evidence to refute Petitioners' allegations concerning the deprivation of Jews' rights as Hungarian nationals.

b. Without evidence or law, Hungary nevertheless maintains that Petitioners were not stateless. It argues that a sovereign cannot "lose immunity under the expropriation exception on a '*de facto*' theory." Opposition at 15. If intended to differentiate between *de jure* and *de facto* denationalization, that argument is irrelevant here.

Petitioners presented abundant record evidence that Hungarian legislation, regulations, and administrative actions systematically and comprehensively deprived Jews of every indicium of Hungarian nationality, *e.g.,* the right to vote; to hold public office; to be employed by the state, any municipality, state-run institution, or government company, or any public body; to engage in a profession, trade or occupation; to attend public schools, colleges, and universities; to marry or fraternize with non-Jews of the opposite or same sex; to possess radios or other telecommunications devices; to serve as editors or publishers of any periodical or similar publications; to buy or sell land; to obtain Hungarian citizenship through marriage or naturalization; to serve in the military; to hire non-Jewish employees; to hold or own property outside Hungary; to own or possess motor vehicles; to use public transportation; etc. Hungary's anti-Jewish legislation expressly authorized the government to take further anti-Jewish measures by executive decree. Using this authority, the government promptly issued numerous decrees culminating in the complete expropriation of all Jewish-owned property, as well

as all Jewish businesses.[3] Ultimately, Hungary prohibited Jews from residing in any dwelling, evicted them from their homes, and forced them to dwell in factories, abandoned warehouses, and such until it deported them from Hungary and handed them over to Nazi authorities to murder or enslave the deportees. In short, Hungary stripped the Jews of all their rights as citizens, exiled them from their country, and deprived many of them of the most fundamental right of all, the right to life. *See generally* Declaration of Gavriel Bar-Shaked, Ph.D., ECF-167-2 in *Simon v. Republic of Hungary,* No. 1:10-cv-01770-BAH (D.D.C., May 21, 2021).

Having committed these atrocities and failed to compensate its victims, Hungary has now unapologetically changed its view to avoid liability. It now asserts that Petitioners were its citizens with whom it could do whatever it wished with complete immunity.

2. Hungary asserts that a "state is free to establish nationality law and confer nationality as it sees fit." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 211 cmt. *c* (1987). But this principle is not boundless.

Other states may decline to recognize the nationality conferred upon (or deprived from) individuals, where the supposed nationality is not "based on an accepted 'genuine link'" between the putative citizen and the state. *Id.* cmts. *c*, *d*, & *e*.

> [A] State cannot claim that the rules it has thus laid down are entitled to recognition

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[3] Prime Minister's Decree no. 3840/1944 on the Nationalization of Jewish Assets, Budapesti Közlöny, November 3, 1944, whereby Hungary took "[a]ll assets of the Jews" and "transferred [them] to the state." Declaration of Charles S. Fax, Esq., ¶ 22, ECF 122-2, filed in *Simon*, October 31, 2016 (D.D.C.).

> by another State unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual's *genuine connection* with the State, which assumes the defense of its citizens by means of protection against other States.

Nottebohm Case, Liechtenstein v. Guatemala, 1955 I.C.J. Rep. 4 (Apr. 6, 1955) at 23 (emphasis added). *See Comparelli v. Republica Bolivariana de Venezuela,* 891 F.3d 1311, 1323 (11th Cir. 2018); Robert D. Sloane, *Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality,* 50 HARV. INT'L L. J. 1, 11 (2009).

By severing that "genuine connection" through wholesale deportations, enslavement, and murder, Hungary denationalized its Jews; the U.S. and other states may—and should—recognize such denationalization.

It is immaterial that Hungary elected to accomplish this severance by a series of laws, regulations, and administrative directives rather than by a single statute explicitly nullifying the Jews' citizenship. *See* Declaration of Professor Dr. Tamás Lattmann, ECF 22-24 in *de Csepel v. Hungary,* No. 10–1261 (ESH) (D.D.C. May 2, 2011) ("[T]he collective effect of the series of anti-Semitic laws enacted by Hungary between 1938 and 1944 was to strip Jews of their citizenship rights and privileges, while insisting on their obligations, not as citizens but as objects of law.").

Hungary concedes (Opposition at 16) that a "stateless person" is a "person who is not considered a national by any State under the operation of its law." But Hungary has produced no evidence or authority—other than its own *ipse dixit*—showing that, between 1938 and 1945, *it* considered Jews

(including Petitioners) its citizens under *the operation* of its law. Petitioners showed that the facts are contrary.

3. Respondents warn that allowing U.S. courts to assess claimants' nationality would contravene U.S. interests by entangling our courts in determining "which instances of abhorrent historical conduct are *de facto* denationalizing." Opposition at 17. This argument is meritless.

First, Congress made that policy decision in enacting § 1605(a)(3).

Second, the government informed the District Court in *Simon* that "the United States takes no position on the merits of the underlying legal claims or arguments advanced by plaintiffs or by defendants." Statement of Interest of the United States of America, ECF 42 (July 15, 2011) at 1, 16. Although raising foreign policy concerns in other regards not relevant here, the United States expressed no such concerns regarding the parties' nationality.

Third, no foreign state has threatened to reciprocate against the United States because our courts adjudicate Holocaust or other expropriation cases. Rather, such litigation has led to agreements with countries like Germany, Switzerland, and France regarding Holocaust claims.

Fourth, to our knowledge, the FSIA is the only statute in the world allowing a court to remove a foreign sovereign's immunity in cases of takings violating international law. No foreign state has enacted a similar exception to sovereign immunity even in statutes modelled after the FSIA.

III. Hungary's Opposition Does Not Contest the Merits of the Stateless-Persons Issue.

Hungary's Opposition fails to address the substantive expropriation issue. Because the D.C. Circuit affirmed dismissal of Petitioners' claims without deciding whether stateless persons are regarded as aliens outside the domestic takings rule, it is imperative that this Court resolve the matter now. The question affects the rights of approximately a half-million Jews from Trianon Hungary, many of whom became U.S. citizens.

The FSIA expropriation exception to foreign sovereign immunity requires a showing that "rights in property taken in violation of international law are in issue." 28 U.S.C. § 1605(a)(3). In addressing whether a "violation of international law" occurred, the D.C. Circuit mistakenly confused the question whether expropriation of a stateless alien's property is a *violation* of international law with whether stateless aliens have a *remedy* for that violation *in international tribunals*.

Normally, only states are parties to disputes under international law. States espouse the claims of their nationals, who are not parties to the proceedings. *See* Second Restatement § 174, cmt. *b* (under international law, "persons have generally not had standing to initiate their own claims."), 96a. That's true of both nationals and aliens.

The appellate court said it did not have enough evidence that international law had "jelled," 27a, principally because it misread a comment in the Second Restatement describing the limited circumstances when a stateless alien has a remedy under customary international law. The court acknowledged that the Second Restatement "bears authoritative weight" as the restatement in effect

when Congress enacted the FSIA. 23a-24a. The Second Restatement establishes that (i) a state's expropriation of an alien's property can be wrongful under customary international law in certain circumstances, and (ii) a stateless person, i.e., one who is not a national of the expropriating state, is included in the definition of an alien. 24a (citing Second Restatement §§ 185 and 171, 97a, 95a). Under these provisions, Hungary violated international law and hence lost its immunity.

Without explaining its logic, however, the D.C. Circuit found these provisions insufficient merely because another provision of the Second Restatement (§ 175, 96a-97a) describes the limited remedies available for such violation. In this process, moreover, the court apparently misread a comment to the provision as saying a stateless victim of expropriation is "without remedy" and surmising that this somehow overrode the explicit statement that international law had been violated. 26a. Equally puzzling, the court ignored the full provision which explicitly cited circumstances, albeit limited, when an alien would have a remedy. Given that there are some limited instances when remedies are available, how does that provision about remedies transmute into a statement substantively undermining that a violation of international law has occurred? The court did not explain this logical lacuna. Petitioners respectfully submit that the court's reasoning is faulty.

Actually, Congress enacted the FSIA to provide a remedy where customary international legal remedies are inadequate. The FSIA's expropriation exception allows private litigants to assert their claim against a foreign state in a U.S. court without involving a state espousing it for

them. Whether stateless claimants are among such litigants is the crucial question this Court should resolve.

IV. The Force of the Trianon Treaty is a Legal Question, Not One of Fact, as Hungary Contends.

A. Hungary opposes certiorari on Question #2 regarding the Trianon Treaty, arguing that it "presents a fact-bound issue not properly raised here." Opposition at 18. This premise is false.

Treaties are sources of law. *Jaber v. U.S.*, 861 F.3d 241, 249 (D.C. Cir. 2017) ("courts have the authority to construe treaties ... and to address other purely legal questions") (internal quotation marks and brackets omitted), quoting *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 229-30 (1986).

B. Question #2 concerns the important legal issue whether a treaty violation may constitute a "violation of international law" under § 1605(a)(3). That is a matter of statutory construction clearly appropriate for the Court to resolve. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987) ("question of statutory construction [is] for the courts to decide").

1. Hungary claims—without citation—that *Philipp* limited § 1605(a)(3) to violations of the "customary" international law of expropriation. Opposition at 20. But the Court's language is broader. "[T]he expropriation exception is best read as referencing the international law of expropriation," 592 U.S. 180, without differentiating between treaty-based and customary international law. In the Trianon Treaty Hungary undertook binding international commitments. The important legal question here is

whether § 1605(a)(3) deprives Hungary of immunity regarding its expropriations in violation of those treaty commitments.

2. The Court enforced the domestic takings rule in *Philipp* because the taking "did not interfere with relations among states." *Id.* at 177. That rationale is absent when the taking *does* interfere with relations among states under their treaty. *Philipp* thus provides no reason to immunize the expropriating state from enforcement in foreign courts of that state's treaty commitments to other nations.

Additionally, Hungary's treaty violation also violated its domestic law imposed as "obligations of international concern" by the Trianon Treaty.[4] Arts. 54, 60, Petition at 3, 4. Can a domestic taking exception be applied to excuse a taking that is contrary to domestic legal obligations required by international commitments? That is an important legal issue which the Court should resolve.

Finally, as with the statelessness issue above, treaty *remedies* reserved to sovereign contracting states (Opposition at 20) are irrelevant to whether the treaty constitutes international law under § 1605(a)(3). Also, those remedies are not expressly exclusive and thus have "no bearing on any claims arising outside the treaty's auspices." *Simon v. Republic of Hungary*, 812 F.3d 127, 137 (D.C. Cir. 2016). *See* 58a-64a (treaty remedies are no bar where they are not exclusive).

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[4] These "obligations of international concern" constitute international law. *See Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 137 (2d Cir. 2010), *aff'd*, 569 U.S. 108 (2013) (treaties are proper evidence of customary international law).

CONCLUSION

For the above reasons, and those previously stated, the Petition should be granted.

Respectfully submitted,

L. Marc Zell
ZELL, ARON & CO.
34 Ben Yehuda Street
Jerusalem 9423001
Israel
011-972-2-633-6300
mzell@fandz.com

Charles S. Fax
Counsel of Record
RIFKIN WEINER
LIVINGSTON, LLC
7700 Wisconsin Avenue,
Suite 320
Bethesda, MD 20814
(301) 951-0150
cfax@rwllaw.com

David H. Weinstein
WEINSTEIN KITCHENOFF
& ASHER LLC
24 West Lancaster Ave.,
Suite 201
Ardmore, PA 19003
(215) 545-7200
weinstein@wka-law.com

Paul G. Gaston
LAW OFFICES OF
PAUL G. GASTON
1101 Connecticut Ave.,
N.W., Suite 450
Washington, D.C. 20036
(202) 296-5856
paul@gastonlawoffice.com

Noam Shreiber, Esq.
Of counsel

Counsel for Petitioners

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