No. 23-867

In the Supreme Court of the United States

REPUBLIC OF HUNGARY, ET AL., PETITIONERS

v.

ROSALIE SIMON, ET AL.

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

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Under the Foreign Sovereign Immunities Act's expropriation exception, a foreign state is not immune from federal- or state-court jurisdiction "in any case … in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property" has a commercial nexus with the United States. *Id.* § 1605(a)(3).

The D.C. Circuit below held that Respondents' allegations and evidence—that Hungary expropriated their property during the Holocaust, "sold it, and mixed the proceeds with the general state funds" later "used in connection with Hungary's commercial activity in the United States"—satisfy the expropriation exception unless Hungary can "affirmatively establish by a preponderance of the evidence that their current resources do *not* trace back to the property originally expropriated." App. 69-70, 74. The Second Circuit, in contrast, holds that commingling alone is not a "valid argument," and the exception applies only when plaintiffs can "trace the proceeds a sovereign received from expropriated property to funds spent on property present in the United States." *Rukoro v. Federal Republic of Germany*, 976 F.3d 218, 225-26 (2d Cir. 2020).

The question presented is whether allegations or evidence that a foreign state or its instrumentality sold stolen property and commingled the proceeds with other funds, and that the commingled funds are either in the United States in connection with the foreign state's commercial activity in the United States, or that the instrumentality with the funds does commerce in the United States, meets the expropriation exception unless the foreign state shows that the property does *not* trace back to the expropriated property.

PARTIES TO THE PROCEEDING AND RELATED PROCEEDINGS

Respondents are Rosalie Simon; Gary Herman and William Herman (as heirs to Helen Herman); Renee Weiss Chase, Florence Weiss Weinstein and Judith Weiss Mangel (as heirs to Charlotte Weiss); Rosanna Weksberg and Alfred Weksberg (as heirs to Helena Weksberg); Rose Miller; Magda Kopolovich Bar-Or; Yitzhak Pressburger; Alexander Speiser; Ze'ev Tibi Ram; Rose Miller and Thomas Schlanger (as heirs to Ella Feuerstein Schlanger); Moshe Perel; and Esther Zelikovitch, Asher Yogev, and Yosef Yogev (as heirs to Tzvi Zelikovitch).

Petitioners' statement (at iii) that Zehava Friedman and the late Vera Deutsch Danos (whose heir is Thomas F. Danos) are Respondents is incorrect. Zehava Friedman and Thomas F. Danos are instead petitioners in *Friedman v. Republic of Hungary*, No. 23-1075 (U.S.), along with Steven Heller and Charles Heller.

Petitioners' list of directly related proceedings is complete and correct.

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INTRODUCTION

Respondents agree that this Court's review is warranted, and respectfully suggest that the Court grant certiorari on their reformulated question presented, which best addresses the dispute and the parties' arguments. Although the D.C. Circuit's holding on the expropriation exception to the Foreign Sovereign Immunities Act (FSIA) is correct, it conflicts with the rule in the Second Circuit and the view the United States has expressed in an amicus brief in this very case. The question is critically important, because it determines whether U.S. courts have a role to play in resolving claims of "immense gravity." App. 84. And if the Court doesn't intervene now, Respondent Holocaust survivors and many of those in the class they seek to represent are unlikely to see justice in their lifetimes, because Petitioners likely will continue fighting jurisdiction—just as they have done *for the last 14 years*. Indeed, if the Court doesn't intervene now, Petitioners will bring this certworthy question back to the Court after the district court inevitably rules against them on remand given their admitted inability to show that their property doesn't trace to the property they stole from Respondents—and, if necessary, again after Respondents ultimately prevail on the merits.

The Court should step in now and make clear that U.S. courts have jurisdiction to provide remedies, even if "profoundly inadequate," for "[t]he atrocities committed … during the Holocaust." *Id.* Where a foreign state or its instrumentality has expropriated property in violation of international law as part of a "genocidal campaign," liquidated it, commingled the resulting proceeds with other funds, and either the commingled

funds are now in the United States in connection with the foreign state's commercial activity in the United States, or the instrumentality with the funds does commerce in the United States, U.S. courts have jurisdiction under the FSIA's expropriation exception. *Id.* It is exceedingly important that this Court intervene now and say so.

* * *

This case arises from "probably the greatest and most horrible crime ever committed in the history of the world." *Simon v. Republic of Hungary*, 812 F.3d 127, 132 (D.C. Cir. 2016) (*Simon I*). Petitioners, the Republic of Hungary and its national railway, Magyar Államvasutak Zrt. (MÁV), acted, like Nazi Germany, to dehumanize and exterminate the Jewish People during World War II. *Id.* at 133. "History does not record a crime ever perpetrated against so many victims or one ever carried out with such calculated cruelty." Opening Statement of Justice Robert H. Jackson, Chief Counsel for the United States, before the International Military Tribunal (Nov. 21, 1945), https://tinyurl.com/Nuremberg-Statement. And Petitioners were the Nazis' cruelest and most zealous accomplices. "Nowhere was the Holocaust executed with such speed and ferocity as it was in Hungary." *Simon v. Republic of Hungary*, 911 F.3d 1172, 1175 (D.C. Cir. 2018) (*Simon II*).

Respondents are survivors or heirs of survivors of the Hungarian Holocaust seeking to represent the thousands of other surviving victims and heirs of victims of the Hungarian Holocaust. They initiated this action in 2010. But for the last *14 years*, Petitioners have been claiming immunity and fighting subject-

matter jurisdiction under the FSIA, depriving Respondents of their right to seek justice.

The question now before the Court concerns the scope of the FSIA's expropriation exception. 28 U.S.C. § 1605(a)(3). That exception makes clear that a foreign state isn't immune from suit in the United States when it has taken property in violation of international law and retains a sufficient connection to that property or the proceeds of that property. Specifically, a foreign state isn't immune where the expropriated "property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state," or where "that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States." *Id.* That "commercial-activity nexus requirement" thus has a property element (a connection to expropriated property or property exchanged for such property) and a commercial element (a connection to commerce in the United States).

The question here concerns the property element, specifically whether it is satisfied under a commingling theory—where the plaintiff produces allegations or evidence that the foreign state or its instrumentality sold stolen property and commingled the proceeds with other funds, and either the commingled funds are in the United States in connection with the foreign state's commercial activity in the United States, or the instrumentality with the funds does commerce in the United States. Given the fungibility of money and the statute's clear text, the D.C. Circuit says "yes," unless the foreign state can "affirmatively establish by a

preponderance of the evidence that [its] current resources do *not* trace back to the property originally expropriated." App. 74. But the Second Circuit says "no." In its view, commingling allegations "do not suffice," because the expropriation exception only applies when the plaintiff can "trace the proceeds a [foreign] sovereign received from expropriated property to funds spent on property present in the United States." *Rukoro v. Federal Republic of Germany*, 976 F.3d 218, 225-26 (2d Cir. 2020). The split is outcome-determinative. There's no question that the Second Circuit, unlike the D.C. Circuit, would have dismissed Respondents' claims for lack of jurisdiction, because "it is impossible to trace the current location of the property Hungary allegedly seized or the proceeds thereof." App. 69.

The Court should grant review now to resolve that disagreement and definitively decide whether commingling satisfies the property element of the expropriation exception's commercial-activity nexus requirement. Further percolation won't help, because plaintiffs can always sue foreign sovereigns in the D.C. Circuit. 28 U.S.C. § 1391(f)(4). And the United States has made clear in this very case that it agrees with the Second Circuit's view, U.S. Br. 23, *Simon II*, No. 17-7146 (D.C. Cir.), so there is no need or warrant to seek the Solicitor General's views and thus further delay Respondents' right to know whether they can seek justice in federal court. Indeed, as the government itself has recognized, "urgency" matters in cases like this, because "the moral imperative" is "to provide some measure of justice to the victims of the Holocaust, *and to do so in their remaining lifetimes*." *Id.* at 9-10 (emphasis added). Again, Respondents are Holocaust survivors or heirs of Holocaust survivors

seeking to represent the many victims or their heirs of the Hungarian Holocaust. Every survivor Respondent is now over 90 years old. Yet their attempt to obtain justice has been delayed for nearly 14 years. If the Court denies review, Petitioners will surely raise the same certworthy commingling question again after the district court makes factual findings supporting jurisdiction or if Respondents prevail on the merits. Respondents deserve to know now whether "[t]he role of the courts of the United States" includes providing any remedy for the atrocities committed against them and humanity. App. 84.

Respondents respectfully suggest that the Court grant review limited to their reformulated question presented. Petitioners try to create three separate questions presented out of the single question that resolves this dispute and on which the D.C. and Second Circuits have split—the validity of the commingling theory. Petitioners' questions are confusing and will not aid the Court in its review. Respondents' reformulated question will allow the parties to make, and the Court to consider, arguments about the proper pleading standard (the subject of Petitioners' second question presented) and the allocation of burdens (the subject of Petitioners' third question presented) without introducing unnecessary conceptual confusion on abstract questions.

The Court should grant review and affirm.

STATEMENT

A. Legal background

The FSIA governs immunity and thus subject-matter jurisdiction in cases involving foreign states. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989); *see* 28 U.S.C. § 1603(a)

(defining "foreign state" to include "an agency or instrumentality of a foreign state"). Under the FSIA, federal and state courts "lack[] subject-matter jurisdiction over a claim against a foreign state" "unless a specified exception applies." *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993); *see* 28 U.S.C. §§ 1604–1605.

This case concerns the FSIA's expropriation exception, which provides:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case … in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.

28 U.S.C. § 1605(a)(3).

The expropriation exception thus contains two requirements. *First*, "the claim must put in issue 'rights in property taken in violation of international law.'" App. 10. *Second*, that property must meet a "commercial-activity nexus requirement," *id.*, the particulars of which vary depending on whether the defendant is a "foreign state" or "an agency or instrumentality of the foreign state," 28 U.S.C. § 1605(a)(3). "Generally speaking," the requirement is met when there is "an adequate connection between the defendant and both the expropriated property and some form of commercial activity in the United States." App. 10. This case

specifically concerns the "property element" of the commercial-activity nexus requirement—*i.e.*, the "'requisite connection between the defendant and … the expropriated property or proceeds thereof," App. 65—and it raises the question whether the commingling theory can meet it.

B. Factual background

1. During World War II, Hungary, just like Nazi Germany, dehumanized and attempted to exterminate the Jewish People. *Simon I*, 812 F.3d at 133. "Nowhere was the Holocaust executed with such speed and ferocity as it was in Hungary." *Simon II*, 911 F.3d at 1175. Indeed, Winston Churchill said that the Hungarian Holocaust was "probably the greatest and most horrible crime ever committed in the history of the world." *Simon I*, 812 F.3d at 132.

Hungary and its national railway, MÁV, committed "unspeakable and undeniable" atrocities in pursuing the "total destruction" of the Jewish population. *Id.* at 132-33. "First came persecution," such as forbidding "Jews from traveling" and forcing them "to wear the identifying yellow star." *Id.* at 133. "Next came property confiscation." *Id.* "Hungarian officials went home to home, inventorying and confiscating Jewish property." *Id.* "MÁV officials robbed [Jews] of all their possessions" before transporting them to concentration camps. *Simon II*, 911 F.3d at 1176. And in November 1944, "the Hungarian government declared all valuable objects owned by Jews—except for their most personal items—part of the national wealth of Hungary. Hungary confiscated and liquidated much of that property." App. 8.

"Finally came extermination in the death camps." *Simon I*, 812 F.3d at 133. Hungary participated in the

murder of "over 560,000 Hungarian Jews," "more than two-thirds" of the pre-war Hungarian Jewish population. *Id.* at 132, 134. The "overwhelming majority" of those murders occurred within a three-month stretch in 1944, *id.* at 134, after it "became clear" that the Nazis "would lose the war," App. 8. "With tragic efficiency, Hungarian government officials, including MÁV employees," shipped hundreds of thousands of Jews to their deaths. *Simon II*, 911 F.3d at 1176. Four times a day, Petitioners packed "3,000 to 3,500 Hungarian Jews" into cattle cars destined for death camps. *Id.* "Ninety percent" of those Jews "were murdered upon arrival." *Simon I*, 812 F.3d at 134.

2. Respondents are survivors or heirs of survivors of the Hungarian Holocaust. App. 3. "Many were teenagers when [MÁV] delivered them to concentration camps in cattle cars." App. 11. They survived, but "never received compensation for the personal property" Petitioners stole from them, "often while they were being transported to concentration camps or killing fields." *Id.*

C. Procedural background

In 2010, on behalf of themselves and other survivors, Respondents brought a class action against Hungary and MÁV (and a third defendant not relevant here), seeking compensation for the seizure and expropriation of their property during the Hungarian Holocaust. *See* App. 11-12. Nearly 14 years have passed and Petitioners are *still* fighting subject-matter jurisdiction under the FSIA. *See* App. 11-15. While the procedural history is complex, the petition before the Court concerns the court of appeals' holding that the FSIA's expropriation exception can apply when a plaintiff alleges a commingling theory, as

Respondents do here. *See* App. 64-75. That holding directly conflicts with the Second Circuit's decision in *Rukoro*, 976 F.3d at 225-26.

1. In 2014, the district court granted Petitioners' first motion to dismiss, ruling "that the FSIA's treaty exception immunized [Petitioners] from suit." App. 12. Under the treaty exception, a foreign state is immune from suit, notwithstanding the applicability of a statutory exception to immunity, when there is an "express conflict" between "the FSIA exception" and "international agreements to which the United States was a party at the time of enactment of the FSIA." *de Csepel v. Republic of Hungary*, 714 F.3d 591, 601 (D.C. Cir. 2013) (alterations adopted). Hungary claimed that it was immune under "the 1947 Peace Treaty between Hungary and the Allied Powers (including the United States)," because that treaty "expressly obligates Hungary to provide compensation or restitution for property rights and interests taken from Hungarian Holocaust victims." *Simon I*, 812 F.3d at 136.

The court of appeals reversed, holding "that the treaty exception did not divest the court of jurisdiction," App. 12-13, because the 1947 treaty doesn't establish "the *exclusive* means by which Hungarian Holocaust victims can seek compensation for (or restoration of) property taken from them during the War." *Simon I*, 812 F.3d at 137. The court also held "that jurisdiction over [Respondents'] property-based claims exists under the FSIA's expropriation exception," *id.* at 149, because Petitioners' taking of property "amounted to the commission of genocide" "in violation of international law." App. 13.

2. On remand, the district court granted Petitioners' second motion to dismiss, relying this time on

forum non conveniens and international comity. *See id.* The court of appeals "again reversed." App. 13-14; *see Simon II*, 911 F.3d at 1176.

This Court, in turn, vacated the court of appeals' decision and remanded for further proceedings consistent with *Federal Republic of Germany v. Philipp*, 592 U.S. 169 (2021). *See* App. 14-15. *Philipp* held that, under the domestic takings rule, the FSIA's expropriation exception does not cover "a country's alleged taking of property from its own nationals," even if the taking constituted an act of genocide. 592 U.S. at 173, 176-80. Because *Philipp* partially abrogated *Simon I*, specifically its holding on "genocidal takings," the court of appeals "remanded the case to the district court for further proceedings consistent with *Philipp*." App. 14-15.

3. a. Before this Court had decided *Philipp*, the district court denied Petitioners' third motion to dismiss, which "focused on whether [Respondents'] claims satisfied the expropriation exception's commercial-activity nexus requirement." App. 14. The court ruled that it had jurisdiction, relying specifically on Respondents' commingling allegations: "the Hungarian defendants liquidated the stolen property, mixed the resulting funds with their general revenues, and devoted the proceeds to funding various governmental and commercial obligations." *Simon v. Republic of Hungary*, 443 F. Supp. 3d 88, 103 (D.D.C. 2020).

After the court of appeals remanded following *Philipp*, the district court granted in part and denied in part Petitioners' fourth motion to dismiss, with the outcome turning on each Respondent's nationality. *See* App. 4-5, 14-15. The court declined to "revisit" its

earlier ruling on the commercial-activity nexus requirement. App. 152 n.22; *see* App. 66-71.

b. In the decision below, the court of appeals "largely affirm[ed]" the district court's resolution of Petitioners' fourth motion to dismiss. App. 4.

i. Given *Philipp*'s holding on the domestic takings rule, the court of appeals held that certain Respondents could proceed with their claims because they "had plausibly alleged they were Czechoslovakian nationals at the time of the takings." App. 4-5. The court further held that several other Respondents would have an opportunity to replead Czechoslovakian nationality. *Id.* But those Respondents who were stateless at the time of the takings could not proceed with their claims, in the court's view. App. 5-6. That holding as to the stateless Respondents is the subject of the petition in *Friedman v. Republic of Hungary*, No. 23-1075 (U.S.). (Just as Respondents agree with Petitioners that this Court should review the commingling issue, Respondents urge the Court to also review the stateless issue presented in *Friedman*. Doing so would help provide meaningful justice to the entire class of Hungarian Jewish survivors and their heirs.)

ii. On the question presented here, the court of appeals held that the commingling theory can satisfy the FSIA's expropriation exception. *See* App. 64-75. Specifically, the court held that Respondents presumptively satisfied the expropriation exception given their allegations and evidence "that 'Hungary nationalized the expropriated property, sold it, and mixed the proceeds with the general state funds, which are used to fund various governmental commercial operations'" in the United States. App. 69. The court of

appeals remanded for the district court to resolve the question as a factual matter, giving Petitioners an opportunity to escape the exception by "affirmatively establish[ing] by a preponderance of the evidence that their current resources do *not* trace back to the property originally expropriated." App. 74. Given that burden, the court continued, "evidence that 'merely confirm[s] the difficulty of tracing individual paths of exchange,' will—as the district court observed—'hurt[] rather than help[] [Respondents] in that endeavor.'" *Id.*

In reaching that conclusion, the court of appeals rejected Petitioners' argument that Respondents were required to "produce evidence tracing property in the United States or possessed by MÁV to property expropriated from them during World War II." App. 71. "Congress … included language in the FSIA to enable plaintiffs to satisfy the expropriation exception's jurisdictional nexus requirements" in circumstances where, as here, "an expropriating foreign state" has "liquidate[d] the stolen property—*i.e.* convert[ed] it to cash or cash equivalents." App. 72. But Petitioners' proposed rule, the court explained, "would render the FSIA's expropriation exception a nullity for virtually all claims involving liquidation." *Id.* That's because "money is 'fungible.'" App. 73. "[O]nce a foreign sovereign sells stolen property and mixes the proceeds with other funds in its possession, those proceeds ordinarily become untraceable to any specific future property or transaction." App. 72. Thus, if Petitioners were correct, then a "foreign sovereign would need only commingle the proceeds from illegally taken property with general accounts to insulate itself from suit under the expropriation exception." *Id.* Because nothing in 28 U.S.C. § 1605(a)(3) reflects "an intent to create a

safe harbor for foreign sovereigns who choose to commingle rather than segregate or separately account for the proceeds from unlawful takings," the court of appeals "decline[d]" to amend the law to include such a safe harbor. *Id.* Petitioners' allocation-of-burden argument also failed, the court concluded, "because the sovereign defendant bears the burden of proving that the plaintiff's allegations do not bring its case within a statutory exception." App. 74 (internal quotation marks omitted); *see* App. 68.

The panel also rejected Petitioners' argument that a "heightened pleading standard" applies under *Bolivarian Republic of Venezuela v. Helmerich & Payne International Drilling Co.*, 581 U.S. 170, 186-87 (2017). App. 68-71. In *Helmerich*, this Court held that for jurisdiction to exist under the FSIA's expropriation exception, "the relevant factual allegations must make out a legally valid claim that a certain kind of right is at issue (*property* rights) and that the relevant property was taken in a certain way (in violation of international law)." 581 U.S. at 174.

First, the court of appeals explained that while *Helmerich* clarifies that "a party's nonfrivolous, but ultimately incorrect, argument that property was taken in violation of international law is insufficient to confer jurisdiction," "nothing in *Helmerich*" displaces "the ordinary plausible-pleading standard otherwise applicable on a motion to dismiss." App. 35, 38-39. That's because *Helmerich* concerns the "validity of a *legal* theory," whereas the "plausible-pleading standard clarified in *Twombly* and *Iqbal* 'concerns the *factual* allegations a complaint must contain to survive a motion to dismiss." App. 39 (first emphasis added; alteration adopted). Because the issues are

"distinct," the court held that "*Helmerich* did not alter the plausible-pleading standard." App. 38-39.

Second, Respondents went beyond pleading "by citing evidence in the record" that Hungary did in fact expropriate and liquidate their property, that the commingled funds are in the United States in connection with Hungary's commercial activity there, and that MÁV's agent does commerce in the United States. App. 69-70, 76-77. "In this posture, resolving the Hungarian defendants' motion to dismiss" isn't a question of mere pleadings, but instead "require[s] resolving the 'dispute over the factual basis of the court's subject matter jurisdiction.'" App. 70. The court of appeals thus remanded for the district court to "'go beyond the pleadings' and make findings of fact germane to the expropriation exception's property element—namely, whether property [Petitioners] received in exchange for [Respondents'] confiscated property is present in the United States in connection with Hungary's commercial activity there or is possessed by MÁV." *Id.* The court cautioned that "evidence that merely confirms the difficulty of tracing individual paths of exchange will … hurt rather than help" the sovereign, underscoring that evidence, not pleadings, is the issue. App. 74 (alterations adopted and internal quotation marks omitted).

iii. Turning to the commercial component of the commercial-activity-nexus requirement, the court of appeals held that "Hungary's issuance of bonds" in the United States provided the required link based on Hungary's use of commingled funds to make interest payments. App. 79-83. As to MÁV, the court remanded for the district court to make factual determinations regarding whether MÁV engages in commercial activity in the United States. App. 76-77.

Petitioners do not challenge either of those rulings before this Court.

ARGUMENT

Respondents respectfully submit that the Court should grant review now limited to their reformulated question presented on whether commingling can satisfy the FSIA's expropriation exception. The D.C. and Second Circuits have split on that issue; further percolation is unwarranted and unlikely because plaintiffs can always sue in the D.C. District Court, where venue lies against foreign sovereigns, 28 U.S.C. § 1391(f)(4), to obtain the D.C. Circuit's favorable rule; and the United States has already articulated its view on the question presented. The question is also critically important: it controls whether Respondents and countless others like them will be able to seek justice in U.S. courts for the atrocities committed against them. Although Respondents prevailed on the question presented below, they deserve definitive resolution of the question now, after nearly 14 years of litigation. Failing to intervene now only means that Petitioners will bring this issue back to this Court after the district court rules against them on remand, or again later, too, if Respondents prevail on the merits.

1. While the court of appeals' decision is correct, it conflicts with the rule in the Second Circuit. In the D.C. Circuit, allegations or evidence of commingling can satisfy the expropriation exception, because a plaintiff is not required to "trac[e] property in the United States … to property expropriated from them." App. 71. In the Second Circuit, however, commingling allegations "do not suffice," because a plaintiff must "trace the proceeds a [foreign] sovereign received from expropriated property to funds spent on property

present in the United States." *Rukoro*, 976 F.3d at 225-26.

The split is outcome-determinative, as this case shows. The D.C. Circuit made clear here that Petitioners are not immune unless on remand they "affirmatively establish by a preponderance of the evidence that their current resources do *not* trace back to the property originally expropriated," App. 74—which the parties agree they cannot do. The conflict won't resolve itself, and percolation won't change anything because plaintiffs can always bring their claims in the D.C. Circuit. *See* 28 U.S.C. § 1391(f)(4). There's also no need (or warrant) to call for the views of the United States, which has already made clear its (erroneous) agreement with the Second Circuit on the commingling issue.

The Court should grant review on Respondents' reformulated question presented on the commingling issue. Petitioners present two other standalone questions about the pleading standard and allocation of the burden of persuasion. But those abstract questions are confusing and not squarely raised; most importantly, the issues they raise are subsumed in Respondents' reformulated question presented. Deciding whether commingling can satisfy the expropriation exception also involves determining what a plaintiff or foreign sovereign must show.

2. The court of appeals correctly held that the FSIA's expropriation exception can apply when a plaintiff alleges a commingling theory, as Respondents do here. The statutory text covers stolen "property *or any property exchanged for such property*," 28 U.S.C. § 1605(a)(3) (emphasis added), making clear that Congress knew that expropriating

foreign states might sell the stolen property and that Congress didn't want liquidation to let those foreign states claim immunity. Indeed, because money is fungible, and thus untraceable when commingled, Petitioners' contrary argument "would render the FSIA's expropriation exception a nullity for virtually all claims involving liquidation," thus "thwart[ing] most claims." App. 72.

3. Although the court of appeals correctly answered the question presented, this Court's prompt intervention is exceedingly important to decisively resolve the question for Respondents and other similarly situated parties. "[T]he FSIA [is] the sole basis for obtaining jurisdiction over a foreign state in" federal or state court, *Amerada Hess*, 488 U.S. at 434, so determining the proper scope of the expropriation exception is critical. If this Court fails to grant review now, Petitioners will almost certainly seek certiorari again after the district court finds jurisdiction, and, if necessary, again after Respondents ultimately prevail on the merits. But Respondents have been seeking justice in this case for nearly 14 years—during which time some of the survivors have passed away. The Court should not make them wait any longer to learn definitively whether they can invoke U.S. courts' jurisdiction to seek recognition of and justice for the Holocaust crimes Petitioners committed against them and so many others.

I. Respondents agree that there is an outcome-determinative circuit split.

Although the court of appeals' decision is correct, as discussed below (at 26-27), it conflicts with the rule in the Second Circuit. Unlike the D.C. Circuit, the Second Circuit holds that the FSIA's expropriation

exception *cannot* apply when a plaintiff alleges a commingling theory. *Rukoro*, 976 F.3d at 225-26. A plaintiff must instead "trace the proceeds," even though "money is fungible." *Id.* The split is outcome-determinative: had Respondents brought their case within the Second Circuit, they would be unable to proceed under the expropriation exception. And the split won't resolve itself, and there's no need for percolation given the outsized importance of the D.C. and Second Circuits in FSIA cases. Moreover, the United States has already expressed its (erroneous) view on the commingling issue, siding squarely with the Second Circuit in an amicus brief before the D.C. Circuit in this case. The Court should intervene now.

A. The D.C. Circuit and the Second Circuit have split over the commingling issue.

For the expropriation exception to apply, there must be a "connection between the defendant and … the expropriated property or proceeds thereof." App. 65. In the words of the statute, the expropriated "property or any property exchanged for such property" must be "present in the United States" or "owned or operated by [a foreign state's] agency or instrumentality … engaged in a commercial activity in the United States." 28 U.S.C. § 1605(a)(3). The D.C. and Second Circuits have split over what suffices to satisfy this property element of the commercial-activity nexus requirement.

1. The D.C. Circuit holds that the commingling theory satisfies the property element of the commercial-activity nexus requirement, unless the sovereign can prove that its property does *not* trace to the expropriated property.

In the D.C. Circuit, the commingling theory can satisfy the expropriation exception. *See* App. 64-75. A plaintiff is not required to "produce evidence tracing property in the United States … to property expropriated from them." App. 71. Instead, once the plaintiff has produced allegations or evidence that commingled funds have the requisite commercial nexus with the United States, the foreign state can avoid the expropriation exception only by "affirmatively establish[ing] by a preponderance of the evidence that their current resources do *not* trace back to the property originally expropriated." App. 74. That determination may require a factual inquiry, but "evidence that merely confirms the difficulty of tracing individual paths of exchange will … hurt rather than help" the sovereign. *Id.* (alterations and internal quotation marks omitted).

2. The Second Circuit holds that commingling is not a "valid" theory and that the plaintiff must "trace the proceeds" of expropriated property.

In contrast to the D.C. Circuit, the Second Circuit holds that simply showing a foreign sovereign's use of commingled funds is not a "valid" theory and cannot get a plaintiff past the pleading stage. *Rukoro*, 976 F.3d at 225. Instead, a plaintiff in the Second Circuit must "trace the proceeds a [foreign] sovereign received

from expropriated property to funds spent on property present in the United States." *Id.* at 225-26. Allegations that a foreign state sold stolen property, commingled the proceeds with other state-controlled funds, and used "those comingled funds … to purchase property" present in the United States "do not suffice." *Id.* at 225. Based on that reasoning, the Second Circuit in *Rukoro* rejected the plaintiffs' contentions that Germany's use of funds with commingled sums from theft and liquidation of their property in German South West Africa (now Namibia) could satisfy the property element of the commercial-activity nexus requirement. *See id.* at 222, 225-26.

3. The split is outcome-determinative.

As this case shows, the conflict between the D.C. and Second Circuits is outcome-determinative. Unless Petitioners here can show on remand that their property does *not* trace back to the property they expropriated from Respondents, the expropriation exception applies. And there is no chance they can make that showing. Indeed, the parties agree, as Petitioners argued below, that "it is impossible to trace the current location of the property Hungary allegedly seized or the proceeds thereof." App. 69. In the D.C. Circuit's view, that impossibility "hurt[s]" the sovereign. App. 74. But had Respondents sued in the Second Circuit rather than in the D.C. Circuit, their claims would have been dismissed for lack of jurisdiction, because a commingling theory isn't legally viable there.

B. The clear conflict won't resolve itself and there's no need for percolation.

Neither the D.C. Circuit nor Second Circuit is likely to overrule its precedent to resolve the split. Indeed, each circuit expressly disagrees with the other.

The D.C. Circuit here stated that *Rukoro* "is incorrect" in adopting a "heightened standard of pleading" under *Helmerich*, App. 40, before going on to reject Petitioners' *Helmerich*-based arguments on the question presented, *see* App. 68-71. And *Rukoro* stated that *Helmerich* "call[s] into question" the D.C. Circuit's application "of a plausibility standard," *Rukoro*, 976 F.3d at 225—the approach the D.C. Circuit reaffirmed here. *See also infra* pp. 23-25. Only this Court can resolve the disagreement.

What's more, there is no reason to wait for other circuits to decide the issue, because the split already has complete outcome-determinative effect. A plaintiff can always choose to sue a foreign sovereign in an expropriation case within the D.C. Circuit, because a "civil action against a foreign state" may always be brought "in the United States District Court for the District of Columbia." 28 U.S.C. § 1391(f)(4). Section 1391(f)(4) thus "reduces the prospect of substantial further percolation in the courts of appeals," U.S. Br. 11 (cert), *Republic of Hungary v. Simon*, No. 18-1447 (U.S.), because a plaintiff can avoid the Second Circuit's rule or the risk of a different circuit's siding with the Second Circuit. There is thus no reason to delay review of the question presented.

C. The United States has already made its (erroneous) view clear, so there is no reason to seek the government's views on whether to grant review.

Although the Court often calls for the views of the Solicitor General in cases potentially implicating foreign policy concerns, and Petitioners here suggest (at 31 n.4) that if the Court doesn't grant review outright it should ask the government for its views, there is no

need to wait for the government's views, and good reason not to. The government has already expressed its view on the question presented before the D.C. Circuit in this very case in an amicus brief requiring the Solicitor General's approval. *See* 28 C.F.R. § 0.20(c) (Solicitor General "supervise[s]" "whether a brief amicus curiae will be filed by the Government … in any appellate court").

In the United States' view, "deeming allegations that the Republic of Hungary seized and liquidated property abroad and commingled it with general revenues in its treasury abroad many decades ago to be sufficient to treat any state-owned property in the United States as 'exchanged' for expropriated property would expand the expropriation exception far beyond its intended limits." U.S. Br. 23, *Simon II*, No. 17-7146 (D.C. Cir.). "Similar concerns" arise in the context of "a foreign state agency or instrumentality" that has "commingled the proceeds of seized and liquidated assets among its assets." *Id.* at 24.

To be clear, that view is wrong for the reasons articulated by the court of appeals and discussed below (at 26-27), and because it's driven by "the historic backdrop of the FSIA" and "the foreign policy interests of the United States," *id.* at 1, 23, rather than the statutory text. Indeed, the government has told this Court that foreign-policy concerns guide its litigating position: "The United States has a paramount interest in ensuring that its foreign partners establish appropriate domestic redress and compensation mechanisms for Holocaust victims, and therefore *seeks to prevent litigation in U.S. courts* that could undermine that objective." U.S. Br. 2 (merits), *Simon*, No. 18-1447 (U.S.) (emphasis added). Such "policy-talk," *Niz-Chavez v. Garland*, 593 U.S. 155, 171

(2021), "cannot supersede the clear statutory text," *United States ex rel. Schutte v. SuperValu Inc.*, 598 U.S. 739, 757-58 (2023).

The important point, however, is that there is no reason to delay review to seek the Solicitor General's views, which the government has already expressed. To the contrary, as explained below (at 29), imminent review is critical to ensure the opportunity for meaningful justice for Respondents and other Holocaust survivors.

D. The Court should grant review on Respondents' reformulated question presented, on which the D.C. and Second Circuits have split and which determines the outcome here, and not on Petitioners' three questions presented.

As explained, the question over which the circuits have split is whether the property component of the expropriation exception's commercial-activity nexus requirement can be satisfied by allegations or evidence of commingling. Answering that question will determine whether this suit can proceed and whether Respondents can seek justice, including compensation for the mass expropriation of their property and the property of the other Holocaust survivors and their heirs that they seek to represent.

In addition to presenting a question on this commingling issue, however, Petitioners seek review (Pet. at ii) of two discrete questions—one about the pleading standard in FSIA cases and another about whether the foreign sovereign bears a burden (as the D.C. Circuit held here) to show that its property isn't traceable to the expropriated property. But those abstract, standalone questions do not implicate any

circuit conflict and are not independently certworthy. Instead, questions about pleading sufficiency and who bears the burden, as Petitioners' arguments make clear, are *part* of the commingling question. Petitioners' suggestion to take up three questions simply produces confusion. Respondents' reformulated question presented allows the parties to make arguments about the pleading standard and which party bears the burden as part of addressing whether the commingling theory is valid (as the D.C. Circuit holds) or cannot satisfy the expropriation exception as a matter of law (as the Second Circuit holds).

To see the confusion, start with *Helmerich* and Petitioner's second question presented. Petitioners argue that the Second Circuit holds that commingling allegations cannot trigger the expropriation exception, because *Helmerich* requires a "valid argument," whereas the D.C. Circuit holds that commingling allegations can trigger the expropriation exception because *Helmerich* leaves room for "plausible allegations." Pet. 23; *see also* Pet. 20-23. But no purported dispute over *Helmerich* is doing any work in the analysis. In the Second Circuit, the commingling theory is not "valid" as a matter of law, *see Rukoro*, 976 F.3d at 225, so of course it cannot satisfy *Helmerich*'s pleading standard, which requires "a legally valid claim," 581 U.S. at 174. Because the commingling theory is valid in the D.C. Circuit, in contrast, a plaintiff can proceed on the claim with sufficient factual allegations, as the D.C. Circuit explained. *See* App. 38-39. There's no question that Respondents have shown enough, because they have produced not just allegations but *record evidence*. *See, e.g.*, App. 69-70. Thus, the only aspect of Petitioners' pleading-standard question is

baked into the commingling question Respondents present.

To support their third question presented, Petitioners also argue that the decision below, which held that the foreign state carries the ultimate "burden of proof in establishing the inapplicability of the FSIA's exceptions," App. 68 (alteration adopted), "created a third circuit split" with *Rukoro*. Pet. 24. There is no split, because the Second Circuit has long applied the same standard: the foreign state has "the ultimate burden,'" *Robinson v. Government of Malaysia*, 269 F.3d 133, 141 (2d Cir. 2001), "of proving, by a preponderance of the evidence, that the alleged exception does not apply," *Rukoro*, 976 F.3d at 224. Again, the disagreement is about whether a commingling theory is valid such that it can keep that ultimate burden of proving an exception on the foreign state. There is thus no need or reason to treat the burden-shifting issue as a standalone question. The parties' respective burdens will depend on how the Court answers the commingling question.

II. The decision below is correct, and it is crucially important for this Court to intervene now and affirm.

Although the D.C. Circuit split from the Second Circuit in holding that commingling can satisfy the expropriation exception's commercial-activity nexus requirement, the D.C. Circuit's conclusion is correct. Even so, Respondents agree that the court's decision warrants review now, because the issue is certworthy and will not be settled, including in this very case, until this Court intervenes. The D.C. Circuit's remand to the district court to make factual findings—even though the forthcoming findings are all but

preordained—means that Petitioners will have another opportunity to seek this Court's review, and then a third if Respondents prevail on the merits. This litigation has dragged on for nearly 14 years already. Respondents shouldn't have to continue waiting to learn whether they can really bring their claims seeking recognition of and compensation for what Petitioners did to them.

A. The D.C. Circuit correctly concluded that commingling can satisfy the property element of the commercial-activity nexus requirement.

The court of appeals correctly held that the FSIA's expropriation exception can apply when, as here, a plaintiff alleges a commingling theory. The expropriation exception covers stolen "property *or any property exchanged for such property*," 28 U.S.C. § 1605(a)(3) (emphasis added). "Congress knew that an expropriating foreign state" might "liquidate the stolen property" and commingle the proceeds with other state-controlled funds. App. 72. It also knew that money is "fungible," *Holder v. Humanitarian Law Project*, 561 U.S. 1, 31 (2010), and "untraceable" when commingled, App. 72. Congress thus "included language in the FSIA to enable plaintiffs to satisfy" the requisite nexus requirement by alleging that the foreign state liquidated her expropriated property and commingled the proceeds with its other funds. *Id.*

There's no textual basis for Petitioners' assertion that a plaintiff must "trace the proceeds a sovereign received from expropriated property to funds spent on property present in the United States." Pet. 2. Indeed, that "would render the FSIA's expropriation exception a nullity for virtually all claims involving liquidation."

App. 72. "Given the fungibility of money," "[a] foreign sovereign would need only commingle the proceeds from illegally taken property with general accounts to insulate itself from suit." *Id.* "Congress could [not] have intended to create such a large and obvious loophole." *County of Maui v. Hawaii Wildlife Fund*, 590 U.S. 165, 178-79 (2020).

Notably, the petition lacks a section dedicated to the merits. Petitioners thus ignore the commonsense, text-oriented reasoning supporting the D.C. Circuit's decision: Congress knew that a foreign state stealing property in violation of international law would have no qualms (and likely ample reason for) exchanging that stolen property for cash. And because money is fungible and untraceable when commingled, Congress could not have wanted to limit the expropriation exception to circumstances where the foreign state kept "careful bookkeeping records." App. 73-74 (quoting *Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1130 (D.C. Cir. 2004)). Indeed, if the expropriation exception cannot cover a case like this one—where Petitioners committed countless clear violations of international law as part of the greatest crime the world has ever seen—it's hard to know *what* the exception might cover. Petitioners' only response (Pet. 29-34) appears to be rooted in their view that foreign-policy concerns dictate the analysis and supersede the statutory text. That's the same argument the government has made, and it fails for the same reason: no amount of policy authorizes a court to override a duly enacted statute. *Supra* pp. 22-23.

B. Review now of the certworthy commingling question is crucial.

This Court's prompt resolution of the circuit split is exceedingly important for all parties.

First, the government has already indicated that the commingling issue is important. In its view, the commingling theory that the D.C. Circuit adopted "expand[s] the expropriation exception far beyond its intended limits." U.S. Br. 23, *Simon II*, No. 17-7146 (D.C. Cir.). More generally, the United States has participated in this litigation before both the D.C. Circuit and this Court and opined on a number of issues that have arisen. *See id.*; U.S. Br. (cert-stage), *Simon*, No. 18-1447 (U.S.); U.S. Br. (merits), *Simon*, No. 18-1447 (U.S.). That participation reflects the government's view that this case and FSIA cases more generally can implicate "sensitive foreign-policy question[s]" warranting this Court's definitive resolution. U.S. Br. 11 (cert-stage), *Simon*, No. 18-1447 (U.S.).

Second, and relatedly, the scope of the expropriation exception is critical because "the FSIA [is] the sole basis for obtaining jurisdiction over a foreign state in" America. *Amerada Hess*, 488 U.S. at 434. The commingling question is particularly important because, as the decision below explained, Petitioners' proposed rule "would render the FSIA's expropriation exception a nullity for virtually all claims involving liquidation." App. 72. The correct answer to the commingling question is likely to determine whether Respondents and all those Hungarian Holocaust survivors they seek to represent can achieve any meaningful recovery. It is also likely to determine whether the victims of other expropriations in violation of international law can seek justice in U.S. courts.

Third, "urgency" matters. U.S. Br. 9, *Simon II*, No. 17-7146 (D.C. Cir.). Despite the government's position on the commingling question presented, "[t]he policy of the United States Government with regard to claims for restitution or compensation by Holocaust survivors and other victims of the Nazi era has consistently been motivated by the twin concerns of justice and urgency." *Id.* Respondents are victims of "probably the greatest and most horrible crime ever committed in the history of the world." *Simon I*, 812 F.3d at 132. And 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. Br. 9-10, *Simon II*, No. 17-7146 (D.C. Cir.) (emphasis added).

Putting off review only means that Petitioners will bring these very same arguments back to this Court again later—whether after the district court makes its findings on remand against them, or if Respondents later prevail on the merits. Review so long delayed is thus justice denied. Respondents have been fighting to establish jurisdiction for nearly *14 years*, with Petitioners fighting them every step of the way. *See* App. 12. Some Respondents have passed away during that time—without ever receiving *any* measure of justice, monetary or otherwise. And each of the survivor Respondents are now at least 90 years old. Although the D.C. Circuit got it right, Respondents—more so than Petitioners—deserve definitive resolution of the commingling question presented. They deserve to know once and for all whether they will be able to pursue in this Nation's courts recognition of and justice for the crimes Petitioners committed against them and humanity.

CONCLUSION

The Court should grant review limited to Respondents' question presented and affirm.

Respectfully submitted.

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