No. 23-867

In the

Supreme Court of the United States

REPUBLIC OF HUNGARY AND
MAGYAR ALLAMVASUTAK ZRT.,
Petitioners,

v.

ROSALIE SIMON, ET AL.,
Respondents.

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

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Other Authorities

REPLY BRIEF FOR PETITIONERS

I. The parties agree that certiorari is warranted

All parties agree on the principal considerations in favor of granting certiorari. Respondents acknowledge that the Second and D.C. Circuits have split on an important, dipositive issue. (Resp. Br. 18-20); *compare Simon v. Republic of Hungary*, 77 F.4th 1077, 1102, 1104 (D.C. Cir. 2023) ("*Simon III*"), *with Rukoro v. Fed. Republic of Germany*, 976 F.3d 218, 225-26 (2d Cir. 2020). They concede that the United States has already expressed its disagreement with the D.C. Circuit's position in this case, because the commingling theory "would expand the expropriation exception far beyond its intended limits." (Resp. Br. 22 (quoting Brief for Amicus Curiae the United States at 23, *Simon v. Republic of Hungary*, 911 F.3d 1172 (D.C. Cir. 2018) (No. 17-7146), 2018 WL 2461996)). And Respondents themselves request that this Court grant certiorari. (*Id.* at 1).

Hungary and MÁV also agree with Respondents that there is no reason for delay. Further percolation in the courts of appeals is unlikely because FSIA cases can always be filed in the D.C. Circuit. 28 U.S.C. § 1391(f)(4). Accordingly, plaintiffs in future cases will file in the District of Columbia to take advantage of the massive loophole in the FSIA created by the D.C. Circuit's commingling theory.

Nor is there any reason to await further proceedings in this case. Respondents highlight the fourteen-year delay in resolving this matter (despite having waited more than sixty years to file suit). (Resp. Br. 29). In addition to any impact on Respondents, further proceedings, including a

potential trial, would effectively deny Hungary and MÁV immunity from suit. The FSIA was designed to "give foreign states and their instrumentalities some protection from the inconvenience of suit." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 479 (2003). And immunity from suit "is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). Accordingly, disputes regarding the FSIA should be resolved "as near to the outset of the case as is reasonably possible," *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 581 U.S. 170, 187 (2017), and orders denying foreign sovereign immunity are subject to interlocutory review, *see Fed. Ins. Co. v. Richard I. Rubin & Co.*, 12 F.3d 1270, 1282 (3d Cir. 1993) (collecting cases).

Hungary and MÁV thus join Respondents in requesting this Court grant certiorari without delay.

II. This Court should grant certiorari on the questions presented as stated in the Petition

While the parties agree that the primary issue concerns the impact of historical commingling on the expropriation exception, Respondents urge this Court to grant certiorari on a reformulated question. Respondents' new question suffers two key defects. First, it assumes that Hungarian property present in the United States or held by MÁV constitutes "the commingled funds" in which proceeds were allegedly mixed. (Resp. Br. i). Second, it ignores the key procedural issues that underlie the D.C. Circuit's faulty conclusion.

A. Respondents' reformulated question improperly assumes that funds commingled with the proceeds of their property are present in the United States or held by MÁV

Respondent' reformulated question attempts to assume away the core issue. The expropriation exception asks whether "property exchanged for [expropriated] property is present in the United States in connection with a commercial activity" or "owned or operated by an agency or instrumentality of the foreign state" that "is engaged in a commercial activity in the United States." 28 U.S.C. § 1605(a)(3). The D.C. Circuit's commingling theory sidesteps that inquiry, as does Respondents' reformulated question.

Looking to the property at issue in this case lays bare the atextual and ahistorical nature of their approach. The D.C. Circuit concluded that Hungary engages commercial activity in the United States because it issued bonds in 2005 and 2010. *Simon III*, 77 F.4th at 1122. Accordingly, to fall within the expropriation exception, a court would have to conclude that these bonds, or the interest payments made on them, constitute property that was "exchanged for" property seized from Respondents more than sixty years earlier. 28 U.S.C. § 1605(a)(3).

As a matter of common sense, it is extraordinarily unlikely that these bond transactions involve the proceeds of property seized during World War II from the handful of individuals who filed this action. In the intervening decades, the government of Hungary has engaged in innumerable governmental expenditures. Indeed, as Respondents themselves allege, Hungary "devoted the proceeds to funding various governmental and commercial operations."

Simon v. Republic of Hungary, 579 F. Supp. 3d 91, 98 (D.D.C. 2021) (quoting Second Am. Compl. ¶ 97).

The historical record further undermines any purported link between current assets and the proceeds of Respondents' property. In the immediate aftermath of World War II, Hungary's "[e]stablished state institutions collapsed as their officials fled in the face of the Red Army's advance, forcing the country's new occupiers to construct a new state almost from scratch." *Simon v. Republic of Hungary*, 812 F.3d 127, 152 (D.C. Cir. 2016) (Henderson, J., concurring) (quoting Mark Pittaway, The Politics of Legitimacy and Hungary's Postwar Transition, in Contemporary European History 453, 455 (Cambridge Univ. Press 2004)). The war caused "the destruction of '40 percent of Hungary's national wealth,' damage to 90 per cent of Hungary's industrial plants and loss of 40 per cent of Hungary's rail network and 70 per cent of Hungary's railway vehicles." *Id.* (quoting László Borhi, Hungary in the Cold War, 1945-1956: Between the United States and the Soviet Union 53-54 (Cent. European Univ. Press 2004)).

"A one-party Communist dictatorship would eventually come to power in 1948, beginning a period during which Hungary did not recognize individual property rights." *de Csepel v. Republic of Hungary*, 169 F. Supp. 3d 143, 149 (D.D.C. 2016), *aff'd in part, rev'd in part*, 859 F.3d 1094 (D.C. Cir. 2017) (internal quotation marks omitted). During this era, Hungary's government coffers were "frequently raided by the Communists for financing their own political projects." *Simon*, 579 F. Supp. 3d at 98 (quoting Second Am. Compl. ¶¶ 141-42). And Hungary underwent a second significant regime change after the downfall of the communist government in 1989-90. *Id.*

The likelihood that proceeds of Respondents' property remained in government coffers for more than sixty years, and were then used in relation to bond offerings in the United States in 2005 and 2010, is infinitesimal. Under a plain-text reading of the expropriation exception, it would be illogical for a court to find that particular property present in the United States or held by MÁV was "exchanged for" the property allegedly taken from Respondents based solely on historical commingling. 28 U.S.C. § 1605(a)(3).

The commingling theory is also inconsistent with the structure of the FSIA. Like the domestic takings issue this Court addressed in *Federal Republic of Germany v. Philipp*, 592 U.S. 169 (2021), the commingling theory would allow the expropriation exception to swallow the general rule of foreign sovereign immunity. Human rights claims can invariably be "packaged as violations of property rights." *Id.* at 184. And in "virtually all claims involving liquidation . . . proceeds ordinarily become untraceable." *Simon III*, 77 F.4th at 1118. The commingling theory thus "would circumvent the reticulated boundaries Congress placed in the FSIA with regard to human rights violations." *Philipp*, 592 U.S. at 183. For example, the non-commercial tort exception to the FSIA permits certain property claims, but only if "the relevant conduct 'occurr[ed] in the United States.'" *Id.* at 184 (quoting § 1605(a)(5)). This limitation would be "of little consequence," *id.*, if commingling sufficed to permit any and all claims under the expropriation exception. "And there is no reason to suppose Congress thought acts of genocide or other human rights violations to be especially deserving of redress only when accompanied by infringement of property rights." *Id.*

Legislative history confirms the limited scope of the expropriation exception. The "historical and legal background" of that exception concerns Congress' passage of the Second Hickenlooper Amendment, which "used language nearly identical to" the expropriation exception. *Philipp*, 592 U.S. at 179.[1] And the Second Hickenlooper Amendment was passed in response to this Court's decision in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). *See Philipp*, 592 U.S. at 179.

The *Sabbatino* case is thus the type of dispute Congress had in mind when enacting the expropriation exception—one in which property in the United States could be readily traced to expropriated property. There, an American commodity broker contracted to purchase sugar from an American-owned Cuban company. *Sabbatino*, 376 U.S. at 401. The government of Cuba expropriated the sugar, forcing the broker to enter into a new contract with an instrumentality of the foreign government. *Id.* at 404. When the shipment was accepted, the broker was faced with competing demands for payment from the Cuban instrumentality and the original owner. *Id.* at 405-06. The funds to be exchanged for the sugar were frozen by court order. *Id.* at 406. This Court ultimately dismissed the original owner's conversion claim based on the act of state doctrine. *Id.* at 436.

Congress sought to overrule *Sabbatino* in part by passing the Second Hickenlooper Amendment, which exempts from the act of state doctrine claims in

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[1] Indeed, both the House and Senate Reports on the expropriation exception specifically refer to the Second Hickenlooper Amendment. *See* H.R. Rep. No. 94-1487, at 20 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6618 (citing 22 U.S.C. § 2370(e)(2)); S. Rep. No. 94-1310, at 19 (1976) (same).

which a "right[] to property is asserted . . . based upon (or traced through) a confiscation or other taking . . . by an act of that state in violation of the principles of international law." 22 U.S.C. § 2370(e)(2). As that language and the facts of *Sabbatino* demonstrate, Congress was concerned with claims to funds that could be traced to expropriated property. And as this Court recognized in *Philipp*, the expropriation exception and the Second Hickenlooper Amendment are to be construed *in pari materia*. 592 U.S. at 179; *see also Taggart v. Lorenzen*, 139 S. Ct. 1795, 1801 (2019) (when statutory language is "obviously transplanted" from another source, it brings the "old soil with it"). Thus, as a matter of both text and history, the expropriation exception demands evidence connecting expropriated items to property present in the United States or possessed by an instrumentality.

Respondents' reformulated question, however, simply assumes an identity of all funds held by a foreign government or its instrumentalities, no matter how distant in geography or time. It presupposes that the funds in which proceeds were mixed during World War II are the very same "commingled funds" that are currently present in the United States or held by MÁV. (Resp. Br. i). In Respondents' view, historical commingling has the effect of tainting every government asset located anywhere in the world for all time. Because the reformulated question includes a groundless assumption regarding the identity of various funds without any limiting principles, this Court should grant certiorari on the questions presented as stated in the Petition.

B. Respondents' reformulated question ignores the procedural circuit splits on the FSIA's pleading standard and burden-shifting framework

Respondents' reformulated question also elides the important procedural missteps bound up with the D.C. Circuit's adoption of the comingling theory. The question is not solely "whether commingling can satisfy the FSIA's expropriation exception." (Resp. Br. 15). Instead, the Court should also decide whether a mere allegation of commingling is sufficient to impose a burden of production on a sovereign defendant.

The D.C. Circuit's ruling includes two related procedural errors. First, it rejected the valid claim standard set forth in *Helmerich*, holding that "nothing in *Helmerich* affects the familiar standard we have consistently applied to review the plaintiffs' factual allegations in FSIA cases." *Simon III*, 77 F.4th at 1104. This ruling is contrary to the rules established in the Second and Eleventh Circuits. *Rukoro*, 976 F.3d at 225; *Comparelli v. Republica Bolivariana de Venezuela*, 891 F.3d 1311, 1326 (11th Cir. 2018).

Respondents argue that this circuit split is irrelevant here "[b]ecause the commingling theory is valid in the D.C. Circuit." (Resp. Br. 24). But that argument ignores two important issues. First, as Hungary and MÁV explained in their Petition, the *Helmerich* standard applies to all jurisdictional disputes under the FSIA, not just the commercial nexus requirement. (Pet. 23). Even in this case, the D.C. Circuit applied the lower plausibility standard to both the commercial nexus issue and questions regarding the nationality of various plaintiffs. *See* S*imon III*, 77 F.4th at 1106.

Second, it is far from clear that the court in *Rukoro* would have reached the same result had it interpreted *Helmerich* in the same manner as the D.C. Circuit. There, the Second Circuit stated that commingling "allegations may satisfy a plausibility standard, but not a valid argument standard." *Rukoro*, 976 F.3d at 225. Denying certiorari on the second question presented would thus leave an important circuit split unresolved.

Nor have Respondents offered a valid basis to deny certiorari on the third question presented, whether commingling allegations create a burden of production on sovereign defendants. Respondents seek to blur the distinction between the burden of production and the burden of persuasion, (Resp. Br. 25), as did the D.C. Circuit, *see Simon III*, 77 F.4th at 1119 (stating a "defendant bears the burden of proving that the plaintiff's allegations do not bring its case within a statutory exception to immunity") (quoting *Price v. Socialist People's Libyan Arab Jamahiriya*, 389 F.3d 192, 197 (D.C. Cir. 2004)).[2] But it cannot be disputed that the Second and D.C. Circuits have split on the question of which party bears the burden of production when commingling is alleged.

The D.C. Circuit rejected Hungary and MÁV's argument that they should prevail because "plaintiffs failed to produce evidence tracing property in the

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[2] "The term 'burden of proof' is one of the 'slipperiest member[s] of the family of legal terms.'" *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56 (2005) (quoting 2 J. Strong, McCormick on Evidence § 342, p. 433 (5th ed. 1999)). That term was historically used to identify "two distinct burdens: the 'burden of persuasion,' *i.e.*, which party loses if the evidence is closely balanced, and the 'burden of production,' *i.e.*, which party bears the obligation to come forward with the evidence at different points in the proceeding." *Id.*

United States or possessed by MÁV," holding that "plaintiffs had no such burden." *Simon III*, 77 F.4th at 1118 (internal quotation marks omitted). Instead, it imposed a burden on sovereign defendants to "affirmatively establish by a preponderance of the evidence that their current resources do *not* trace back to the property originally expropriated" and held that an absence of evidence will "hurt rather than help the defendants in that endeavor." *Id.* at 1119 (internal quotation marks and alterations omitted). In so ruling, the D.C. Circuit imposed a burden of production on sovereign defendants.

In contrast, the Second Circuit has held that the plaintiff bears the "burden of production." *Rukoro*, 976 F.3d at 224; *see also Sheafen Kuo v. Gov't of Taiwan*, 802 F. App'x 594, 597 (2d Cir. 2020) (holding plaintiffs "failed to meet th[eir] burden" because they "offered no evidence" that properties in the United States "were specifically purchased using proceeds from the sale of [plaintiffs'] home").

The Second Circuit's approach is consistent with the FSIA's legislative history. Both the House and Senate Reports explain that once a defendant establishes it is a sovereign, "the burden of going forward would shift to the plaintiff to produce evidence establishing that the foreign state is not entitled to immunity." H.R. Rep. No. 94-1487, at 17 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6616; *see also* S. Rep. No. 94-1310, at 17 (same). Placing the burden of production on the party asserting a statutory exception is consistent with the general rule "that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits." *N.L.R.B. v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 711 (2001) (quoting *FTC v. Morton Salt Co.*, 334 U.S.

37, 44-45 (1948)). This allocation of the burden is also consistent with the rule that "the party asserting federal jurisdiction when it is challenged has the burden of establishing it." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006). Thus, "[w]hen challenged on allegations of jurisdictional facts, the parties must support their allegations by competent proof." *Hertz Corp. v. Friend*, 559 U.S. 77, 96-97 (2010).

This Court should grant review of this question and make clear that Respondents bear the burden of producing evidence sufficient to support a finding that the expropriation exception applies, *see generally Tex. Dep't of Cmty. Affs. v. Burdine*, 450 U.S. 248, 255 (1981), and that this burden is not satisfied by allegations of commingling or "a meager showing" to that effect, *Owens v. Republic of Sudan*, 174 F. Supp. 3d 242, 276 (D.D.C. 2016).

The D.C. Circuit's procedural decisions concerning the application of *Helmerich* and the appropriate burden-shifting framework effectively require foreign sovereigns to provide an accounting in domestic courts anytime a plaintiff alleges that proceeds of expropriated property were commingled with other assets. These rulings contravene the Court's warning to avoid "transforming the expropriation exception into an all-purpose jurisdictional hook for adjudicating human rights violations." *Philipp*, 592 U.S. at 183.

The Court should grant certiorari on all three questions presented in the Petition.

CONCLUSION

Hungary and MÁV respectfully request this Court grant certiorari and reverse the D.C. Circuit's decision in *Simon III*.

Respectfully submitted,

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