No. 23-867

In the Supreme Court of the United States

REPUBLIC OF HUNGARY, ET AL., PETITIONERS

v.

ROSALIE SIMON, ET AL.

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

BRIEF FOR RESPONDENTS

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QUESTIONS 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. 28 U.S.C. § 1605(a)(3).

The questions presented are:

1. Whether the expropriation exception applies when the defendant sold the expropriated property, commingled the proceeds with other funds, and (for an agent or instrumentality of a foreign sovereign) continued to own the commingled funds or (for a foreign sovereign) used the commingled funds in a way that satisfies the commercial-nexus requirement.

2. Whether plausible commingling allegations satisfy *Bolivarian Republic of Venezuela v. Helmerich & Payne International Drilling Co.*, 581 U.S. 170, 174 (2017), which simply requires plaintiffs to plausibly allege "a legally valid claim."

3. Whether a plaintiff satisfies any burden of production it may have by showing that the defendant sold the expropriated property and commingled the proceeds with other funds, and those commingled funds have or the instrumentality has a sufficient commercial nexus with the United States.

PARTIES TO THE PROCEEDINGS 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; Thomas Schlanger (as heir to Ella Feuerstein Schlanger); Moshe Perel; and Esther Zelikovitch, Asher Yogev, and Yosef Yogev (as heirs to Tzvi Zelikovitch).

Petitioners' statement (at ii) 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, along with Steven Heller and Charles Heller, were petitioners in *Friedman v. Republic of Hungary*, No. 23-1075 (U.S.). The Court denied review. *Friedman v. Republic of Hungary*, 144 S. Ct. 2686 (2024).

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INTRODUCTION

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*). Like Nazi Germany, Petitioners Republic of Hungary and its national railway, Magyar Államvasutak Zrt. (MÁV), engaged in a ruthless campaign during World War II to steal from and exterminate the Jewish People. *Id.* at 133. "History does not record a crime ever perpetrated against so many victims or one ever carried out with such calculated cruelty." Justice Robert H. Jackson, Opening Statement Before the International Military Tribunal (Nov. 21, 1945), https://www.roberthjackson.org/speech-and-writing/opening-statement-before-the-international-military-tribunal/. 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 themselves and other victims of the Hungarian Holocaust. They initiated this action in 2010. Since then, Petitioners have been claiming immunity and resisting subject-matter jurisdiction under the Foreign Sovereign Immunity Act (FSIA), depriving Respondents of their right to seek justice.

The sole question before the Court—despite Petitioners' attempt to triple count—concerns the scope of the FSIA's expropriation exception. Under that exception, a foreign state or its instrumentality isn't immune from suit in U.S. court if "property taken

in violation of international law," or "any property exchanged for such property," either "is present in the United States in connection with a commercial activity carried on in the United States by the foreign state," or is owned by an instrumentality of a foreign state "engaged in a commercial activity in the United States." 28 U.S.C. § 1605(a)(3).

This case concerns the "any property exchanged" requirement of the expropriation exception—the requirement of a connection between the defendant and the expropriated property or proceeds of that property. Specifically, the question is whether that requirement is satisfied when, as here, the defendant sold the expropriated property, commingled the proceeds with other funds, and those commingled funds have (or the state-owned instrumentality has) a sufficient commercial nexus with the United States.

The answer is "yes." Commingling satisfies the "any property exchanged" requirement—the only aspect of the exception at issue. And there is no reason to address Petitioners' second and third questions, which present no independent issues.

1. Commingling satisfies the "any property exchanged" requirement. The key is the simple, ordinary meaning of "exchanged." When fungible property like money is commingled, it is exchanged. For example, a customer who deposits $100 in a bank one day and withdraws $100 the next has "exchanged" Monday's deposit for Tuesday's withdrawal (exchanging the $100 for a bank credit and then exchanging the bank credit for the $100 withdrawal). That's how money (and other fungible property) works. The rule is no different when the deposits and withdrawals are years apart, or where there have been multiple intermediate

exchanges. A plaintiff who shows that expropriated property was liquidated and the proceeds commingled with other funds has necessarily shown an exchange.

Holding otherwise would contravene the statute's text and disregard the acknowledged reality in other areas of the law that money is fungible. It would also enable foreign states to nullify the exception. Acknowledging that commingling satisfies § 1605(a)(3), in contrast, honors Congress's foreign-policy choices and preserves the guardrails on lawsuits against foreign states.

History and context confirm that Congress didn't want foreign states to get away with stealing property in violation of international law, *especially* by the simple expedient of commingling funds. Indeed, despite concerns articulated in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 434 & n.39 (1964), about tracing fungible property, Congress enacted a law—with the same language it would later use in the FSIA—authorizing courts to decide claims arising out of a foreign state's taking of a non-national's property, including fungible property.

2. Respondents' undisputed allegations and evidence satisfy the "any property exchanged" requirement. Respondents showed, using evidence from the Hungarian Constitutional Court, the Holocaust Museum, and a historical study, that Hungary and MÁV stole their property, liquidated it, and commingled the proceeds into state accounts. As to Hungary, Respondents further showed that the commingled funds are "present in the United States in connection with [Hungary's] commercial activity" in the United States, 28 U.S.C. § 1605(a)(3), because Hungary used those funds to issue commercial bonds

and to pay interest and purchase military equipment in the United States. As to MÁV, Respondents showed that the "instrumentality is engaged in a commercial activity in the United States," *id.*, because it sold tickets and booked reservations in the United States.

3. Petitioners' remaining questions are not presented. The Court should not reach them because they make no difference to the outcome.

Petitioners ask the Court to opine on the scope of *Bolivarian Republic of Venezuela v. Helmerich & Payne International Drilling Co.*, 581 U.S. 170, 174 (2017), but there is no reason to elaborate on that ruling: *Helmerich* requires a plaintiff to plead a valid legal theory as the basis for meeting the expropriation exception, and Petitioners' first question concerns whether commingling is a valid legal theory for meeting the expropriation exception. Petitioners' second question does no separate work, and the United States agrees. Respondents satisfied any factual requirement with their uncontroverted allegations and evidence that Hungary expropriated their property in violation of international law, that it sold that property and commingled it with state funds, and that those commingled funds had a nexus to the United States. There is thus nothing for the Court to decide as to Petitioners' second question.

The Court need not reach the third question presented, either. Commingling satisfies the "any property exchanged" requirement, and Respondents introduced unrefuted evidence of commingling before the district court. Contrary to the court of appeals' reasoning, there is no basis for remanding to let Petitioners try to disprove traceability, because the exchange principles commingling involves establish

the exchange the statute requires. Based on the undisputed evidence and allegations, the "any property exchanged" requirement is satisfied, and the allocation of burden makes no difference.

The Court should affirm and remand for the case to proceed.

STATEMENT

A. Legal background

Foreign states and their instrumentalities "are presumptively immune from the jurisdiction of United States courts." *Federal Republic of Germany v. Philipp*, 592 U.S. 169, 173 (2021); *see* 28 U.S.C. § 1603(a). Unless an exception applies, U.S. courts "lack[] subject-matter jurisdiction over a claim against a foreign state." *Philipp*, 592 U.S. at 176.

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 has several requirements. The claim must concern "rights in property."

See Helmerich, 581 U.S. at 178. That property must have been taken "in violation of international law"—specifically, "the international law of expropriation." *Philipp*, 592 U.S. at 176, 180.

Moreover, the property must meet a "commercial-activity nexus requirement." Pet. App. 10. *First*, there must be a connection between the defendant and the expropriated property or its proceeds. *See* 28 U.S.C. § 1605(a)(3). *Second*, there must be a connection between the defendant and commercial activity in the United States, with particulars depending on whether the defendant is a "foreign state" or the state's "agency or instrumentality." *Id.*

This case concerns whether the nexus requirement is met if the defendant commingled the proceeds from expropriated property with other government funds and those commingled funds have, or the instrumentality has, a sufficient commercial connection to the United States.

B. Factual background

1. During World War II, Hungary abetted the murder of over 500,000 Jews, leaving just a fraction of Hungary's pre-war Jewish population. "Nowhere was the Holocaust executed with such speed and ferocity as it was in Hungary." *Simon II*, 911 F.3d at 1175. In Justice Ginsburg's words, Hungary committed these "atrocities" "with brutal speed." Speech on the National Commemoration of the Days of Remembrance (Apr. 22, 2004), https://www.supremecourt.gov/publicinfo/speeches/viewspeech/sp_04-22-04. Winston Churchill called the Hungarian Holocaust "probably the greatest and most horrible crime ever committed in the history of the world." *Simon I*, 812 F.3d at 132.

Petitioners were responsible for these "unspeakable and undeniable" atrocities. *Id.* at 132-34. "First came persecution," including 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. Then, "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." Pet. App. 8.

"Finally came extermination in the death camps." *Simon I*, 812 F.3d at 133. Hungary participated in murdering "over 560,000 Hungarian Jews," "more than two-thirds" of its pre-war Jewish population. *Id.* at 132, 134. The "overwhelming majority" of those murders occurred in three months in 1944, *id.* at 134, after it "became clear" that the Axis "would lose the war," Pet. 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 3,000-3,500 Jews into cattle cars destined for death camps. *Id.* "Ninety percent" "were murdered upon arrival." *Simon I*, 812 F.3d at 134.

2. Respondents are survivors or heirs of survivors of the Hungarian Holocaust. Pet. App. 3. "Many were teenagers when" MÁV "delivered them to concentration camps in cattle cars." Pet. App. 11. They "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, Respondents brought a class action on behalf of themselves and other survivors, seeking compensation for Petitioners' expropriation of their property. *See* Pet. App. 11-12. While the procedural history is complex, the question here is whether the FSIA's expropriation exception applies where the defendant stole and liquidated the plaintiff's property and commingled the proceeds with other funds, and the commingled funds have or the instrumentality has a sufficient commercial nexus to the United States.

1. In 2014, the district court ruled "that the FSIA's treaty exception immunized [Petitioners] from suit," Pet. App. 12, because "the 1947 Peace Treaty between Hungary and the Allied Powers" conflicts with the FSIA by "expressly obligat[ing] 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, Pet. App. 12-13, reasoning that the 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." Pet. App. 13.

2. On remand, the district court dismissed the case on *forum non conveniens* and comity grounds. *See id.* The court of appeals reversed. Pet. App. 13-14; *see*

Simon II, 911 F.3d at 1176. This Court then vacated and remanded for further proceedings consistent with *Philipp*. *See* Pet. App. 14-15. *Philipp* held that the expropriation exception doesn't cover "a country's alleged taking of property from its own nationals," even through genocide. 592 U.S. at 173, 176-80. Because *Philipp* abrogated *Simon I*'s holding on "genocidal takings," the court of appeals "remanded the case to the district court for further proceedings." Pet. App. 14-15.

3. a. Before this Court decided *Philipp*, the district court denied a motion to dismiss arguing that Respondents' claims don't satisfy the expropriation exception. Pet. App. 14. The court ruled that it had jurisdiction, relying specifically on Respondents' commingling allegations and record evidence.

The district court weighed the evidence submitted by both parties. Respondents submitted a declaration from a Hungarian attorney describing and attaching a 1993 decision of the Hungarian Constitutional Court detailing Hungary's expropriation of Jewish property during the Holocaust; microfilm archives from the Holocaust Museum recording Hungary's confiscation, processing, and distribution of Jewish property; and a study describing Hungary's national accounts where the proceeds from the liquidated Jewish assets were deposited. *See* Pet. App. 69-70.

Petitioners didn't dispute that Hungary expropriated Jewish property, liquidated it, and commingled it with government funds. Instead, they argued only that the funds from the liquidated property weren't traceable to present-day funds used in the United States. Petitioners submitted three declarations arguing that it is "impossible to trace … ongoing

possession of the plaintiffs' expropriated property." *Simon v. Republic of Hungary*, 443 F. Supp. 3d 88, 105 (D.D.C. 2020).

The court found Respondents' evidence persuasive. *Id.* at 103. It also found Petitioners' evidence not probative, because the "difficulty of tracing individual paths of exchange" is not a fact that defeats the application of the expropriation exception. *Id.* at 105. Thus, the court concluded that "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." *Id.* at 103.

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* Pet. App. 4-5, 15. The court declined to "revisit" its earlier ruling on the "any property exchanged" requirement. Pet. App. 152 n.22; *see* Pet. App. 66-72.

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

i. Given *Philipp*, 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." Pet. 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. Pet. App. 5-6.

ii. The court of appeals also held that commingling satisfies the expropriation exception. *See* Pet.

App. 64-75. The court held that Respondents presumptively satisfied the exception with proof "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. Pet. App. 69. The court pointed to the Hungarian Constitutional Court decision, the Holocaust Museum archives, and the report detailing Hungary's treasury accounts. Pet. App. 69-70.

Although the court of appeals recognized that the district court examined "evidence submitted by the parties," it nevertheless concluded that the district court did not "appear to have undertaken the requisite factfinding to support its jurisdiction." Pet. App. 70. The court of appeals thus remanded for the district court to allow Petitioners to "affirmatively establish by a preponderance of the evidence that their current resources do *not* trace back to the property originally expropriated." Pet. App. 74.

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." Pet. 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." Pet. 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.'" Pet. 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." Pet. App. 72. Thus, if Petitioners were correct, 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 § 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 "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." Pet. App. 74 (quotation marks omitted); *see* Pet. App. 68.

The court of appeals also rejected Petitioners' argument that a "heightened pleading standard" applies under *Helmerich*. Pet. 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 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." Pet. 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." Pet. App. 39 (first emphasis added; alteration adopted). Because the issues are "distinct," "*Helmerich* did not alter the plausible-pleading standard." Pet. 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. Pet. 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.'" Pet. 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.*

iii. The court of appeals then 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. Pet. App. 79-83. As to MÁV, the court remanded for the district court to determine whether MÁV engages in commercial activity in the United States. Pet.

App. 76-77. Petitioners do not challenge either of those rulings before this Court.

SUMMARY OF ARGUMENT

I. Commingling satisfies the "any property exchanged" element of the expropriation exception.

A. The expropriation exception applies when, as here, the defendant sold the expropriated property and commingled the proceeds with other funds, and those funds have or the instrumentality has a sufficient commercial connection to the United States.

1. The expropriation exception, which covers "any property exchanged for" expropriated property, 28 U.S.C. § 1605(a)(3), broadly covers "any" property that was exchanged for money drawn from an account with commingled funds, including money that was exchanged for the expropriated property. Statutory text, the nature of fungible property, and common sense all support that reading.

To "exchange" means to give one thing and get another thing in return; "to swap." *Exchange*, Black's Law Dictionary 505 (5th ed. 1979). An "exchange" thus occurs when fungible property is commingled. For instance, if a customer deposits $100 into her bank account in exchange for an unsecured claim—a bank credit that, in effect, is an IOU from the bank—of $100 plus any preexisting account balance. After that deposit, the account balance—and the IOU—always stem from the additional $100, no matter what other deposits or withdrawals she might later make. Thus, when the customer later withdraws money, she has exchanged it for the $100 she initially deposited. That's the nature of the fungible property. The same goes for the proceeds from stolen property: depositing those proceeds into a commingled account and later

withdrawing funds constitutes an exchange for the value of earlier deposits, including the proceeds from the stolen property.

Holding otherwise would contravene the statutory text and depart from the recognition in other areas of the law that the money's fungibility is an important consideration. Petitioners' approach would also invite foreign states to nullify the exception. Recognizing that commingling satisfies § 1605(a)(3), in contrast, honors Congress's foreign-policy choices and preserve the guardrails on lawsuits against foreign states.

2. History and context confirm that Congress didn't want to immunize foreign states that steal property in violation of international law, *especially* when the property is fungible and can easily be laundered through commingling. Indeed, despite concerns this Court expressed in *Sabbatino* about tracing fungible property, 376 U.S. at 434 & n.39, Congress enacted a law—using the same language it would later use in the expropriation exception—enabling U.S. courts to decide claims arising out of a foreign state's taking of a non-national's property, including fungible property.

B. Respondents' undisputed allegations and evidence satisfy the "any property exchanged" element of the expropriation exception as to Hungary and MÁV.

1. As to Hungary, Respondents' unrebutted allegations and evidence show that Hungary stole their property, liquidated it, and commingled the proceeds with national funds. That commingling means that Hungary's funds contain "property exchanged" for the expropriated property. Respondents further showed that Hungary used the commingled funds to issue bonds and pay bond interest in the United States.

That conduct put "property exchanged for [the expropriated] property … in the United States in connection with [Hungary's] commercial activity carried on in the United States," 28 U.S.C. § 1605(a)(3), satisfying the commercial-nexus requirement.

2. As to MÁV, Respondents' undisputed allegations and evidence likewise showed that MÁV stole their property, liquidated it, and deposited the proceeds into its accounts, satisfying the "any property exchanged" requirement for MÁV. Respondents further showed that MÁV "is engaged in a commercial activity in the United States," *id.*, because it sold tickets and booked reservations here.

C. Petitioners' second and third questions are not presented here, because Respondents' unrefuted proof satisfied the expropriation exception.

1. *Helmerich* requires a plaintiff to plead a valid legal theory. Respondents did just that, because commingling is a valid legal theory. There is no separate work for *Helmerich* to do, because, as the United States agrees (Br. 28), if commingling is a valid legal theory, *Helmerich* is satisfied. To the extent *Helmerich* speaks to *facts* (and not just legal theories), there's still no question presented here, because Respondents presented unrebutted evidence that Petitioners sold their property and commingled it with state funds, and that those commingled funds have a nexus to the United States.

2. The Court need not reach the third question presented, either. Respondents introduced unrefuted evidence of commingling. Petitioners' evidence was nonresponsive, as the district court correctly ruled, so Respondents satisfied the expropriation exception. Contrary to the court of appeals' view, there is no

question left to address on remand, because traceability or non-traceability doesn't change the fact that money in a commingled account is "exchanged for" other money. The allocation of the burden of persuasion or production thus played no role here, and the Court shouldn't reach Petitioners' burden-shifting question.

II. Petitioners' and the government's counterarguments fail.

A. Petitioners and the United States argue that "any property exchanged for" expropriated property, 28 U.S.C. § 1605(a)(3), requires a plaintiff to identify dollar-to-dollar the exchanges between the money exchanged for the expropriated property and money connected to the United States. That argument ignores the statutory text and the nature of fungible property—that it is freely exchangeable. The argument would allow foreign states to nullify § 1605(a)(3), and it overlooks key historical indicators of congressional intent. Additionally, Petitioners' and the United States' foreign-policy arguments lack merit and cannot override the text.

B. The court of appeals correctly applied *Helmerich* in resolving the commingling issue, as the government agrees. While the government seeks reversal on a *different* issue involving *Helmerich*, that new issue—which concerns a nationality question that Petitioners did not raise in their petition and do not now press—is not properly before the Court.

C. This case also presents no occasion to disturb the established burden-shifting framework governing FSIA cases. Contrary to the court of appeals' reasoning that Petitioners should have (another) opportunity to show non-traceability, the

commingling theory establishes the exchanges and nexus to commercial activity that the statute requires. And the relevant facts are undisputed. Indeed, Respondents introduced unrebutted evidence of commingling, so the allocation of the burden of proof played no role in this case, and the Court should not reach it.

ARGUMENT

I. Commingling satisfies the expropriation exception's "any property exchanged" requirement.

A. The expropriation exception applies when the defendant sold the expropriated property and commingled the proceeds with other funds, and those funds have or the instrumentality has a commercial nexus to the United States.

The expropriation exception is satisfied if "property taken in violation of international law," "or any property exchanged for such property," either "is present in the United States in connection with a commercial activity carried on in the United States by the foreign state," or is owned by an instrumentality of a foreign state "engaged in a commercial activity in the United States." 28 U.S.C. § 1605(a)(3). That statutory text—and specifically the clause "property exchanged for such property"—confers jurisdiction where a defendant liquidated stolen property and deposited the proceeds into accounts either used for commercial activity in the United States (for a foreign state) or held by a foreign state's instrumentality that does commerce in the United States.

The point rests on the simple, ordinary meaning of "exchanged": If expropriated jewelry is exchanged

for cash, and that cash is deposited into an account, the expropriated jewelry has been exchanged for the money in the account.

Money-for-money exchanges through a bank work similarly. A customer exchanges a deposit into an account for a bank credit (an unsecured claim) for the money in her account. The bank may then use the money as it pleases (*e.g.*, to loan or invest it); the bank does not put the customer's cash in a lockbox. And when the customer withdraws money, she exchanges part of her unsecured claim for cash, leaving a smaller bank balance. In each case, the bank balance is, in effect, an IOU from the bank to the customer. *See Marine Bank v. Fulton Bank*, 69 U.S. 252, 255-56 (1865). Deposits increase the size of the bank balance and withdrawals decrease it, but a withdrawal is always "exchanged" for the IOU that was itself "exchanged" for earlier deposits. Put in context of the expropriation exception, a plaintiff who shows that expropriated property has been liquidated and the liquidated proceeds have been commingled with other funds has necessarily shown that the commingled funds have been "exchanged" for the expropriated property, and that later withdrawn funds have been "exchanged" for earlier deposits, including the proceeds of expropriated property, within the meaning of § 1605(a)(3).

Holding otherwise would contravene the text of the statute and disregard the acknowledged reality across the law and in economics that money is fungible and constantly exchanged with other money. Holding otherwise would also invite foreign states to nullify the exception by the simplest of expedients—for example, putting money in banks or investment funds, or otherwise blending money with other assets.

Acknowledging that commingling meets the expropriation exception, in contrast, honors Congress's foreign-policy choices while preserving guardrails on lawsuits against foreign states.

History and context confirm that Congress didn't want foreign states to get away with stealing property in violation of international law, *especially* when the property is fungible and can easily be commingled. Indeed, despite *Sabbatino*'s concerns about tracing fungible property, 376 U.S. at 434 & n.39, Congress enacted a law—using the same language it later used in the FSIA—enabling American courts to decide claims arising out of a foreign state's taking of property, including fungible property.

1. Statutory text, the fungibility of money, and common sense all make clear that commingling satisfies the expropriation exception's "any property exchanged" requirement.

a. The expropriation exception applies

> 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 exception places repeated emphasis on property and property-related rights," *Philipp*, 592 U.S. at 182, and it does so using

"expansive" language, *Patel v. Garland*, 596 U.S. 328, 338 (2022). Specifically, § 1605(a)(3) covers "property taken in violation of international law" or "*any property exchanged* for such property." 28 U.S.C. § 1605(a)(3) (emphasis added).

To "exchange" is to give one thing and get another in return; "to swap." *Exchange*, Black's Law Dictionary 505 (5th ed. 1979); *see also Exchange*, The American Heritage Dictionary 473 (2d College ed. 1982). In ordinary English, there's no limit to what kinds of property can be exchanged: a horse for an ox, a laptop for a tablet. One can even "exchange … cash for small objects," like drugs. *Pennsylvania v. Dunlap*, 555 U.S. 964, 966 (2008) (Roberts, C.J., dissenting from the denial of certiorari). And money is exchanged for property or other money all the time—indeed, it's "a medium of exchange." *Wisconsin Central Ltd. v. United States*, 585 U.S. 274, 277-78 (2018).

Property can also be "exchanged for" other property in a chain of transactions, as the United States agrees (Br. 13-14). When a collector trades one baseball card for another, then sells that second card and uses the proceeds to buy a third card, he has "exchanged" the first card for the third, despite—indeed, *through*—the intervening sale. But the nature of "exchange" is different for money and commodities, precisely because money and commodities are fungible—that is, "interchangeable with other property of the same kind" because all the units are "equivalent." *Fungible*, Black's Law Dictionary (12th ed. 2024).

There's no relevant difference between that exchange and the bank scenario discussed above—a $100 withdrawal by the banking customer in exchange for IOUs exchanged for earlier deposits. As the

United States recognizes (Br. 13-14), it doesn't matter how many steps there are in a chain of exchanges. In the case of money, it makes no difference whether the customer deposited $100 all at once on Monday and withdrew $100 all at once on Tuesday, or made a series of deposits amounting to $100 years before, while the bank loaned and invested that money, all before the customer withdrew $100 years later in exchange for the money he deposited.

b. "Exchange" isn't the only legal concept that makes fungibility relevant. Other areas of law also recognize fungibility's significance. For example, when a district court asserts *in rem* jurisdiction over currency in a forfeiture proceeding, it doesn't lose jurisdiction just because the money has been deposited in a bank. The courts of appeals unanimously agree that the district court's *in rem* jurisdiction continues when currency seized in the district is deposited into a fund in another district. *See, e.g.*, *United States v. $46,588.00 in U.S. Currency & $20.00 in Canadian Currency*, 103 F.3d 902, 905 (9th Cir. 1996). Those courts reject the argument advanced by Petitioners and the United States here—that jurisdiction ceases because the currency "disappeared into the banking system and is no longer identifiable." *Id.* "[B]ank credit of fungible dollars constitute[s] an appropriate substitute for the original *res*," *United States v. $57,480.05 U.S. Currency & Other Coins*, 722 F.2d 1457, 1459 (9th Cir. 1984), courts recognize, because "[c]urrency, cashier's checks, and bank deposits are simply surrogates for each other, and in modern society are certainly regarded as 'fungible.'" *Madewell v. Downs*, 68 F.3d 1030, 1042 n.14 (8th Cir. 1995).

The same distinction between fungible money and tangible property applies in the Eleventh Amendment

immunity context. In *Florida Department of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 682 (1982), for example, the Court held that plaintiffs could maintain an *in rem* admiralty suit against Florida to obtain possession of artifacts. Crucial to the Court's decision was that the plaintiffs sought not money but the return of specific property within the jurisdiction of the district court, allowing an *in rem* suit to proceed: "The arrest warrant [to return the artifacts] sought possession of specific property. It did not seek any attachment of state funds and would impose no burden on the state treasury." *Id.* at 698. If fungible property (there, money) were treated like tangible property, "the Eleventh Amendment could easily be circumvented; an action for damages [against a state] could be brought simply by first attaching property that belonged to the State and then proceeding *in rem*." *Id.* at 699.

Likewise, in *Robers v. United States*, 572 U.S. 639, 640 (2014), the Court construed a statute requiring "certain offenders to restore property lost by their victims as a result of the crime." The Court explained that when the lost property is money, "'the property … returned' need not be the very same bills," precisely because money is "fungible" and the statute requires only a return of equal value. *Id.* at 643.

In short, fungibility plays an important role throughout the law, just as it is relevant to the statutory concept of "exchange" here. As other legal contexts make clear, money's fungibility is exactly what allows money to substitute for money—the very characteristic that means money can be and is constantly exchanged for other money.

c. The expropriation exception contains another important textual clue supporting the commingling

theory: it applies to "*any* property exchanged for [expropriated] property." 28 U.S.C. § 1605(a)(3) (emphasis added). The word "any," this Court has "repeatedly explained," is "expansive." *Patel*, 596 U.S. at 338. Section 1605(a)(3) broadly covers *any* property that has been exchanged for the stolen property, no matter how many exchanges have occurred in between.

Taking everything together, the most natural reading of "any property exchanged for" expropriated property, 28 U.S.C. § 1605(a)(3), is that it covers multiple exchanges of fungible property. Thus, the expropriation exception can apply when the foreign state's property is money that was commingled with the proceeds of the expropriated property. "Congress knew that an expropriating foreign state" might "liquidate the stolen property" and commingle the proceeds with other funds; it also knew that money is "fungible" and "untraceable" when commingled. Pet. App. 72-73. By specifying that "any property exchanged" for expropriated property can trigger the expropriation exception, Congress "included language in the FSIA to enable plaintiffs to satisfy" the requisite nexus requirement "in those circumstances." Pet. App. 71-72 (emphasis omitted).

d. That interpretation aligns with common sense. "[T]his Court generally avoids reading statutes in a way that would permit easy circumvention." U.S. Br. 13. But unless the Court holds that commingling satisfies the "any property exchanged" requirement, foreign states will have at least two easy ways to nullify § 1605(a)(3). *See* Pet. App. 71-72.

First, "[g]iven 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 under the expropriation exception." Pet. App. 72. "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).

Second, a foreign state could force victims to aid in commingling by requiring individuals to deposit their money into the state's bank accounts. Given the fungibility of money, the expropriated property would become untraceable the moment the expropriation occurs. This is exactly what Hungary did. As the Hungarian Constitutional Court explained, during the Hungarian Holocaust, the "Jewish population was … required to register or deposit into a cheque or savings account at post offices, banks or other financial institutions all sums in excess of 3000 pengő." Dist. Ct. Doc. 122-1 at 82.

e. This interpretation also honors Congress's foreign-policy choices while preserving the high guardrails for lawsuits against foreign states. Congress conditioned the expropriation exception not just on the "any property exchanged" requirement, but also on a legally meritorious showing of a taking in violation of the "international law of *expropriation*," *Philipp*, 592 U.S. at 180 (emphasis added). Indeed, the "number of lawsuits will be further limited," *Republic of Austria v. Altmann*, 541 U.S. 677, 713 (2004) (Breyer, J., concurring), given *Philipp*'s holding that the expropriation exception doesn't apply when a foreign state took property from its own nationals, 592 U.S. at 176-80. Taken "[i]n its entirety," *id.* at 181, the expropriation exception is not easy to satisfy.

2. History and context confirm that commingling satisfies the "any property exchanged" requirement.

Foreign sovereign immunity has a long history in U.S. law, dating back to the early years of our republic. *See Altmann*, 541 U.S. at 688-89. Until 1952, the Executive Branch had favored immunity "in all actions" involving friendly foreign sovereigns. *Id.* at 689. In 1952, however, it adopted the "restrictive theory," under which "the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*)." *Id.* at 689-90; *see also Philipp*, 592 U.S. at 182. When Congress enacted the FSIA in 1976, it generally incorporated "the overarching framework of the restrictive theory." *Philipp*, 592 U.S. at 182-83. But in enacting the expropriation exception, Congress went even farther, crafting a "unique" exception that "goes beyond even the restrictive view" "because it permits the exercise of jurisdiction over some public acts of expropriation." *Id.* at 183. "History and context explain this nonconformity." *Id.*

Congress enacted the expropriation exception despite the restrictive theory, because "the United States has long sought to protect the property of its citizens abroad as part of a defense of America's free enterprise system." *Id.* Two examples show that the property Congress sought to protect includes property that, like money, can easily be commingled and washed clean.

The first is a letter from Secretary of State Hull, in which he "famously" informed the Mexican Ambassador that the United States "could not 'accept the idea' that 'these plans'"—Mexico's nationalization of

American oil fields—"can be carried forward at the expense of our citizens." *Id.* at 177. Secretary Hull specifically noted that the American owners lost not only the land itself, but also "its use and proceeds," *i.e.*, the sale of the oil extracted from the land. Letter from Cordell Hull, U.S. Secretary of State, to Castillo Nájera, Ambassador of Mexico to the United States (July 21, 1938), reprinted in 5 Department of State, *Foreign Relations of the United States Diplomatic Papers: The American Republics* 675 (1956).

The second is Congress's disagreement with *Sabbatino* in enacting the Second Hickenlooper Amendment. *See* Pub. L. No. 88-633, § 301(d)(4), 78 Stat. 10009, 1013 (Oct. 7, 1964) (codified at 22 U.S.C. § 2370(e)(2)). *Sabbatino* involved "claims arising out of Cuba's nationalization of American sugar interests in 1960." *Philipp*, 592 U.S. at 178. Cuba had expropriated sugar owned by an American-owned company; afterwards, an American broker resold the sugar and deposited the proceeds in a New York escrow account. *Sabbatino* 376 U.S. at 401-07. "Hesitant to delve into this controversy," the Court in *Sabbatino* "invoked the act of state doctrine, which prevents United States courts from determining the validity of the public acts of a foreign sovereign." *Philipp*, 592 U.S. at 178-79. In doing so, *Sabbatino* rejected the view that U.S. courts should decide whether a foreign state's taking of a non-national's property is "invalid under international law," particularly because of the "adverse consequences" that would flow from such a task. 376 U.S. at 430-31. One such consequence, *Sabbatino* stated, would be the "difficulty [of] determining after goods had changed hands several times whether the particular articles in question were the product of an ineffective state act." *Id.* at 434. The

Court specifically noted "the difficult tasks of ascertaining the origin of fungible goods, of considering the effect of improvements made in a third country on expropriated raw materials, and of determining the title to commodities subsequently grown on expropriated land or produced with expropriated machinery." *Id.* at 434 n.39.

Roughly six months later, Congress enacted the Second Hickenlooper Amendment, which bars American courts from applying the act of state doctrine where a "right[] to property is asserted … based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law." 22 U.S.C. § 2370(e)(2). The Amendment abrogated *Sabbatino*'s holding that courts could not adjudicate the legality of a foreign state's taking of property. *See Philipp*, 592 U.S. at 179; S. Rep. No. 88-1188, at 24 (1964). And Congress enacted the Amendment despite *Sabbatino*'s tracing concerns. Indeed, the Executive initially *opposed* the Amendment, specifically because "it is very difficult to trace" certain property, like "oil, sugar, or other commodities." *Foreign Assistance Act of 1965: Hearing Before the House Committee of Foreign Affair*s, 89th Cong. 1002 n.53 (1965). Congress enacted the Amendment anyway, and the President signed it into law.

Twelve years later, with the Executive's support, Congress enacted the FSIA. *See, e.g.*, H.R. Rep. No. 94-1487, at 6 (Sept. 9, 1976). Congress used "language nearly identical to that of the Second Hickenlooper Amendment," *Philipp*, 592 U.S. at 179, except that the exception applies no matter the date of taking, and thus reaches Holocaust-era claims.

These examples show that the United States has long been concerned with unlawful expropriations of fungible property. Given this history and context, coupled with the statutory text and established principle of fungibility, there is every reason to hold that commingling satisfies the expropriation exception's "any property exchanged" requirement.

B. Respondents satisfied the expropriation exception as to both Hungary and MÁV.

1. Hungary commingled proceeds from the expropriated property and then used the commingled funds for commercial activity in the United States.

Respondents' undisputed allegations and evidence satisfy the expropriation requirement as to Hungary. As Respondents' evidence before the district court—including a decision from the Constitutional Court of Hungary, records from the Holocaust Museum's archives, and a study from a Hungarian scholar—shows, Hungary expropriated Respondents' property, liquidated that property, and commingled the proceeds with state funds. And the parties jointly stipulated that Hungary issued bonds, paid interest on those bonds, and purchased military equipment, all in the United States. So when Hungary withdrew money in the United States to pay interest on its bonds and when it deposited U.S. dollars into a U.S. Treasury account to pay for military equipment, Dist. Doc. 147 ¶ 100, it "exchanged" the withdrawn money for the proceeds from the liquidated expropriated property. In short, the withdrawn money is "exchanged" for the value of Hungary's deposits into the commingled fund,

including the value of the proceeds from the expropriated property.

Petitioners do not deny that Hungary commingled the proceeds from Respondents' expropriated property into Hungarian national accounts, and they admit that Hungary issued bonds and purchased equipment in the United States. Respondents have thus satisfied the expropriation exception as to Hungary.

2. The expropriation exception applies to MÁV because MÁV owns "property exchanged for [the expropriated] property" and is "engaged in a commercial activity in the United States."

The expropriation exception likewise applies to Respondents' claims against MÁV, and the analysis is even simpler.

As the court of appeals in this case twice correctly recognized, the expropriation exception treats instrumentalities and states differently, *see Simon I*, 812 F.3d at 146; *Simon II*, 911 F.3d at 1178-79, though both Petitioners (Br. 20) and the United States (Br. 32) ignore this point. For MÁV, the questions are whether the instrumentality owns the expropriated "property or any property exchanged for such property," and whether MÁV is "engaged in a commercial activity in the United States." 28 U.S.C. § 1605(a)(3). Unlike with foreign states, there need not be any connection between the expropriated property and the United States. That makes sense: Congress "might well have thought [agencies' and instrumentalities'] greater detachment from the state itself justified" a higher bar for immunity. *Agudas Chasidei Chabad of United States v. Russian Federation*, 528 F.3d 934,

947 (D.C. Cir. 2008). Indeed, before the FSIA, courts did not grant immunity to "the purely commercial conduct of foreign governments." *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 697-98 (1976); *accord Philipp*, 592 U.S. at 182-83.

Respondents have shown that MÁV expropriated their property, liquidated it, and deposited the proceeds into commingled accounts that MÁV owns today. *Simon*, 443 F. Supp. 3d at 112. And Respondents showed that MÁV is "engaged in commercial activity in the United States" because it sold tickets and booked reservations in the United States. *Id.* at 112-16. MÁV is not entitled to sovereign immunity.

C. The remaining questions are not presented because Respondents' proof satisfied the expropriation exception.

Petitioners' second and third questions are not presented here, and the Court should not answer them because they make no difference to the outcome. Respondents satisfied the expropriation exception on the commingling theory with evidence that Hungary and MÁV expropriated their property in violation of international law, that it sold that property and commingled it with state funds, and that those commingled funds had, and MÁV has, a nexus to the United States. Petitioners' second question, about the scope of *Helmerich*, is not presented because *Helmerich* requires only that plaintiffs plead a valid legal theory, and the first question presented is whether commingling is a valid legal theory. There is thus no separate work for *Helmerich* to do. That's why the United States agrees (Br. 28) that there is no *Helmerich* issue with the lower courts' commingling rulings. And even assuming *Helmerich* says

something about facts rather than legal theories (it doesn't), there's still no *Helmerich* issue, because Respondents have presented unrebutted evidence of commingling.

The Court should likewise not address Petitioners' third question. Commingling satisfies the "any property exchanged" requirement, and Respondents introduced unrefuted evidence of commingling before the district court. There is no question left for remand, contrary to the court of appeals' view. It's not only practically impossible for Petitioners to show that their funds do not trace to expropriated property; it's also legally impossible. That's because, as explained (at 20-23), commingling means that dollars in and withdrawn from the commingled accounts have been "exchanged for" the expropriated property. Petitioners' evidence about the difficulty of tracing was thus nonresponsive, as the district court explained; with no further dispute, the district court correctly found that Respondents satisfied the expropriation exception. Given the undisputed evidence, the allocation of the burden of persuasion or production played no role, and the Court should not accept Petitioners' invitation, especially where the issue isn't relevant, to disturb the nearly unanimous view of the courts of appeals.

1. The *Helmerich* question isn't presented because commingling is a valid legal theory satisfying the "any property exchanged" requirement, and Respondents provided proof of commingling.

a. This case presents no actual dispute about the application of *Helmerich* to the commingling issue, as the United States agrees (Br. 28). If the commingling

theory is valid—the first question presented—then there is no need to decide any issue related to *Helmerich*, which merely requires a valid legal theory at the pleading stage.

Under *Helmerich*, the plaintiff's "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. *Helmerich* rejected the contention that a "party need only make a 'nonfrivolous' argument that the case falls within the scope of the [expropriation] exception." *Id.* at 173. Instead, a party must plead a "legally valid claim." *Id.* at 174. That standard, the United States agrees (Br. 27-28), is no different from the familiar plausible pleading standard under Federal Rule of Civil Procedure 12(b)(6) or 12(b)(1). *Helmerich* simply required the district court to assess (1) whether commingling is a legally valid theory; and (2) whether Respondents' factual allegations plausibly support that theory.

The district court did just that. It held that commingling was legally valid, and that Respondents' evidence—not a mere allegation, as the court of appeals wrongly thought—was sufficient. *Simon*, 443 F. Supp. 3d at 104-05. The district court weighed Respondents' evidence (a Hungarian Constitutional Court decision, archives from the Holocaust Museum, and a report from a Hungarian scholar) against Petitioners' evidence (declarations from current and former Hungarian officials). *Id.* The court also relied on a joint stipulation of facts confirming that Hungary issued more than $13 billion in U.S. bonds, paid interest on those bonds, and purchased equipment in the United States. *Id.* at 107-111; *supra* pp. 29-30.

That's all *Helmerich* requires. The district court (and then the court of appeals) found the commingling theory legally valid, and the validity of that theory is the issue before this Court. To be sure, the cert petition argued (at 20-23) that the courts are divided over how to apply *Helmerich* to commingling allegations. But as Respondents explained in their cert-stage brief (at 24-25), the split turned on whether the commingling theory is legally valid, not on the pleading standard. There's no separate role for Petitioners' second question.

b. That remains true even assuming *Helmerich* says anything about resolving factual disputes, because there were no factual disputes related to commingling. The parties disputed the *legal* validity of the commingling theory, but as to the *facts*, Respondents produced unrebutted evidence of commingling. Petitioners' only evidence is that tracing is difficult, but the entire point of the commingling theory is that traceability questions do not disrupt the flow of exchange where funds have been commingled. *Supra* pp. 20-23. So as in *Helmerich*, the parties here essentially stipulated "to all relevant facts," leaving "purely a legal [question]" before the district court.

2. The Court should not decide any burden-shifting question because Respondents' unrefuted evidence of commingling means the allocation of burdens makes no difference.

a. As with the *Helmerich* question, Petitioners' burden-shifting question isn't presented here. If the commingling theory is legally valid, there is no work for burden-shifting to do. Once there is evidence of

commingling, *see supra* pp. 29-31, the defendant may dispute it with evidence, for instance, that the property actually wasn't liquidated (as the district court hypothesized, *see Simon*, 443 F. Supp. 3d at 105), or that it was never expropriated in the first place. Alternatively, the defendant might try to show that the expropriation didn't violate the international law of expropriation. But commingling leaves no room for the burden to shift to the defendant as to traceability, contrary to the court of appeals' reasoning here. And whether the burden can shift for other reasons isn't presented, because the parties already submitted their evidence to the district court, leaving Respondents' evidence satisfying the "any property exchanged" requirement unrebutted.

To reiterate: To satisfy the expropriation exception under the commingling theory, the plaintiff's property must have been taken in violation of the international law of expropriation and must have been liquidated and commingled with funds with a nexus to the United States. The defendant can defeat the exception's application by disputing that the property was taken in violation of international law, or that the property was ever liquidated, or that the commingled funds have the requisite nexus to the United States. But Petitioners didn't make those arguments or produce any evidence relevant to them.

On the other hand, the defendant cannot claim immunity by showing the impossibility of tracing, because the commingling theory satisfies the statute's "any property exchanged" requirement. *Supra* pp. 20-25. For that reason, the court of appeals was wrong to remand for Petitioners to disprove traceability. Petitioners cannot escape the commingling theory, because Respondents' unrebutted evidence proves

that the money with a nexus to the United States was property "exchanged for" the proceeds of the property expropriated from Respondents in Hungary. The Court thus has no reason to decide any burden-shifting question here.

b. There's nothing unusual about the point that a foreign sovereign cannot defeat the expropriation exception by showing non-traceability. Traceability arguments do not change the result in other contexts, either. For instance, in the asset forfeiture context, the defendant in a case involving forfeited money deposited into a bank doesn't get an opportunity to defeat jurisdiction by tracing the seized bills dollar-for-dollar into an account outside the district court's jurisdiction. *See, e.g.*, *$46,588.00*, 103 F.3d at 905. The government need only show that the assets were seized and deposited into a bank with an account in the jurisdiction. *Id.*; *supra* pp. 22-23.

Or take money laundering cases. It is a crime to make a "monetary transaction in criminally derived property." 18 U.S.C. § 1957(a). The statute defines "criminally derived property" as any property "constituting, or derived from, proceeds obtained from a criminal offense." *Id.* § 1957(f)(2). Courts apply the commingling theory: When the unlawful transaction is made from an account commingling illegally and legally acquired funds, the government "is not required to prove that no 'untainted' funds were involved." *United States v. Moore*, 27 F.3d 969, 976 (4th Cir. 1994). The burden does not shift to the money laundering defendant to prove that his transaction from a commingled fund involved *only* lawful proceeds. Such proof, beyond likely being impossible, cannot alter the result. That is the nature of the commingling theory: If the tainted and untainted funds are combined in an

account, the law (across many areas) treats the funds as combined.

In short, commingling doesn't leave room for burden-shifting. Thus, there was no reason for the court of appeals to remand to give Petitioners a chance to meet their burden to disprove commingling. Petitioners already had an opportunity to do so—by presenting rebuttal evidence that they didn't commingle the expropriated funds—but failed. They aren't entitled to a second opportunity.

c. Regardless, the district court's approach to the evidence of commingling was consistent with the law governing proof under the FSIA. The FSIA presumes foreign states are immune. *Philipp*, 592 U.S. at 176. Thus, the ordinary rules governing evidentiary presumptions apply. Under Federal Rule of Evidence 301, "the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption." Thus, the "burden of *production*" "shifts" to the party seeking to overcome the presumption. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507 (1993). "But this rule does not shift the burden of persuasion, which remains on the party who had it originally." Fed. R. Evid. 301. Put simply, the party invoking the presumption carries the ultimate burden of persuasion. That was likewise Congress's vision in the FSIA: "the burden will remain on the foreign state to produce evidence in support of its claim of immunity." H.R. Rep. No. 94-1487, at 17.

Thus, in FSIA cases, a "defendant seeking sovereign immunity bears the burden of establishing a prima facie case that it is a foreign sovereign." *Pablo Star Ltd. v. Welsh Government*, 961 F.3d 555, 559-60 (2d Cir. 2020). "Once the defendant makes that

showing, the burden shifts to the plaintiff to make an initial showing that an enumerated exception to sovereign immunity applies." *Id.* at 560. "Determining whether that burden is met involves a review of the allegations in the complaint and any undisputed facts, and resolution by the district court of any disputed issues of fact." *Id.* "Once the plaintiff has met its initial burden of production, the defendant bears the burden of proving, by a preponderance of the evidence, that the alleged exception does not apply. In other words, the ultimate burden of persuasion remains on the party seeking sovereign immunity." *Id.* The courts of appeals nearly uniformly apply this burden-shifting framework to the FSIA.*

The decision below faithfully applied this framework. The parties agree that Petitioners are "foreign states" and "instrumentalities" under the FSIA. And Respondents plausibly alleged and produced record evidence showing that Petitioners expropriated Respondents' property and liquidated it, that they commingled the proceeds with other state-controlled funds, and that those funds are either

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* *See* Pet. App. 68-70 (D.C. Cir.); *Universal Trading & Investment Co. v. Bureau for Representing Ukrainian Interests in International & Foreign Courts*, 727 F.3d 10, 17 (1st Cir. 2013); *Pablo Star*, 961 F.3d at 559-60; *Aldossari ex rel. Aldossari v. Ripp*, 49 F.4th 236, 249-50 (3d Cir. 2022); *Gerding v. Republic of France*, 943 F.2d 521, 525-26 (4th Cir. 1991); *Frank v. Commonwealth of Antigua & Barbuda*, 842 F.3d 362, 367 (5th Cir. 2016); *O'Bryan v. Holy See*, 556 F.3d 361, 376 (6th Cir. 2009); *Enahoro v. Abubakar*, 408 F.3d 877, 882 (7th Cir. 2005); *United States v. Pangang Group Co.*, 6 F.4th 946, 954 (9th Cir. 2021); *Hansen v. PT Bank Negara Indonesia (Persero), TBK*, 601 F.3d 1059, 1062 (10th Cir. 2010); *GDG Acquisitions LLC v. Government of Belize*, 849 F.3d 1299, 1305-06 (11th Cir. 2017).

(a) "present in the United States in connection with a commercial activity carried on in the United States by" Hungary, or (b) "owned or operated by" MÁV and that MÁV "is engaged in a commercial activity in the United States." 28 U.S.C. § 1605(a)(3); *see* Pet. App. 69-70. Petitioners didn't dispute the allegations and evidence of expropriation, liquidation, or commingling, or produce any legally relevant evidence as to commingling. So when the district court weighed the evidence before it in deciding Petitioners' motion to dismiss, it correctly found the expropriation exception satisfied.

In sum, there is no reason to remand to allow Petitioners to disprove traceability. Because the commingling theory is valid and there's no dispute of relevant fact, this case presents no burden-shifting question, and it should proceed on the commingling theory under the expropriation exception.

II. Petitioners' and the government's counterarguments fail.

A. The expropriation exception applies when a foreign sovereign liquidates expropriated property and commingles the proceeds in an account, and there's no basis to hold otherwise.

Petitioners and the United States argue that when expropriated property is sold and the proceeds are deposited and commingled in an account, the commingled funds are not "any property exchanged for" expropriated property. 28 U.S.C. § 1605(a)(3). That argument ignores the statutory text, would create a massive loophole, and overlooks key indicators of congressional intent.

1. Petitioners' argument finds no support in the statutory text and would allow foreign states to easily nullify the expropriation exception.

a. Despite invoking ordinary meaning and plain text, Petitioners and the government lack an ordinary-meaning, text-driven argument.

i. Petitioners purport to ground their "no commingling" argument in "ordinary usage," asserting that "no person would describe current assets as 'exchanged for' items taken decades prior simply because the proceeds of those items were commingled with general revenues." Br. 16. But Petitioners' only support for that argument is an "analogy" involving a car purchased in 2005 with funds that were commingled with the proceeds from the sale of a car stolen in 1944. Br. 24.

Petitioners' analogy fails. As the United States recognizes, "the last piece of property obtained after a chain of transactions may reasonably be viewed as having been 'exchanged for' the first property in that chain under [the expropriation exception]." Br. 13-14. That follows from the plain meaning of "exchanged for." The clause "any property exchanged for such property" doesn't impose a time limit or a maximum exchange limit. There is thus no textual basis supporting Petitioners' attempt (Br. 16) to exclude from § 1605(a)(3) a decades-long chain of transactions.

Petitioners' analogy also fails to account for the exchangeability of fungible property. *See* Pet. App. 72; *supra* pp. 20-23. Whistling past those points, Petitioners rely instead (Br. 24-26) on a handful of lower court decisions that fail to address these interpretive cues. Again, the FSIA's text doesn't limit

the number of, or duration between, exchanges, and the fungibility of money means the property ultimately exchanged for money deposited in a commingled account falls within the exception. It's thus not "illogical," Pet. Br. 24, to conclude that the funds from the 1944 car sale were "exchanged for" the 2005 car.

Petitioners next say the commingling theory is "absurd," because foreign states, "unlike private entities," "exist for the purpose of conferring public benefits without the receipt of anything in return." Pet. Br. 24. That's not a "plain-text" argument. It also makes no sense. Foreign states exchange assets "for other value," *id.*, all the time. Indeed, Petitioners stipulated that Hungary issued bonds in exchange for over $1 billion. *See* Pet. App. 80-81. Moreover, Hungary abetted the murder of more than half a million Jews and took their property into its coffers, making its argument about "public benefits" and "the receipt of [no]thing" impossible to comprehend.

Lastly, Petitioners claim that the commingling theory would let courts review claims against foreign states based on "an imaginary" or "constructive" connection between the defendants and the stolen property. Pet. Br. 26. That's wrong, too. Commingling creates a "real" connection. *Chase v. Wetzlar*, 225 U.S. 79, 88-89 (1912). When a foreign state sells stolen property, commingles the proceeds, and uses those funds to buy different property, the bills used to buy the new property "need not be the very same bills" acquired from the sale of the stolen property. *Robers*, 572 U.S. at 643. That's because money is fungible. The "dirty" bills were swapped—*i.e.*, exchanged—for "clean" bills, which were then swapped for the new property. The connection is real. If Petitioners were

right, money launderers seeking to evade prosecution and defendants seeking to evade jurisdiction in forfeiture proceedings would also be correct. *Supra* pp. 22-23.

ii. The government too cloaks its policy arguments in the guise of textualism. First, the government agrees (Br. 12-14) that an "exchange" can involve money, and that one piece of property is exchanged for another even if there are intermediary exchanges. So the government ultimately agrees that "any property exchanged for" expropriated property, 28 U.S.C. § 1605(a)(3), covers money and multiple exchanges.

Then the government's purportedly textual reading takes a turn. The government relies on analogies to *nonfungible* property, claiming (Br. 14) that if an expropriated necklace is traded for a ring, which is then traded for a bracelet, the necklace has been "exchanged for" the bracelet, but not for another bracelet in the same jewelry box. If that's true, the government says, then why not the same result for fungible goods?

Because the text says otherwise. The exception reaches "any property exchanged for" expropriated property, 28 U.S.C. § 1605(a)(3), including, the government concedes, exchanges for money. Property includes money, and once the exchanged-for money enters a commingled account, it doesn't lose its status as "property exchanged for" the expropriated property. *Supra* pp. 20-23. The connection to the stolen property remains. And when money is withdrawn, an "exchange" occurs, because fungible property is freely exchangeable. Congress's chosen

expansive term "any" underscores this interpretation. *Supra* pp. 23-24.

Even on its own terms, the government's interpretation fails for the simple reason that courts (including this Court) treat fungible property differently in a number of legal contexts. The government's bald assertion (Br. 14) that "[t]here is no reason the same principles should not apply when dealing with fungible property like money" is inconsistent with basic principles of *in rem* jurisdiction and with this Court's decisions in cases like *Treasure Salvors* and *Robers*. In each of those cases, the fungibility of money was a significant consideration. But rather than account for fungibility and its wide-ranging legal significance, the government appears to think Congress wrote the expropriation exception to apply only to foreign states with barter economies.

Perhaps realizing the problems with its good-for-the-FSIA-only view of money, the government suggests that in the "future," "[t]racing rules developed in other contexts" might help "plaintiffs in respondents' position." Br. 25. But that suggestion, aside from being illusory—after all, Hungary's central argument is that it cannot possibly trace the stolen property dollar-for-dollar—rewrites the rules. Congress wrote the expropriation exception to reach expropriated "property or any property exchanged for such property." 28 U.S.C. § 1605(a)(3). "Any property exchanged" reaches money in a commingled account.

b. Petitioners and the government have no persuasive response to the consequence of their interpretation: that it would allow foreign states to nullify § 1605(a)(3). Moreover, their arguments that

the commingling theory would "allow the exception to swallow the rule," Pet. Br. 28, are meritless.

i. Petitioners ignore the "large and obvious loophole," *Hawaii Wildlife Fund*, 590 U.S. at 178-79, that their interpretation would create. Unless the Court holds that commingling can satisfy the "any property exchanged" requirement, foreign states will be able to nullify § 1605(a)(3). *Supra* pp. 24-25.

The government claims that this "parade of horribles" "cannot 'surmount the plain language of the statute.'" Br. 23. But the plain language supports *Respondents*, and the government's contrary argument finds no support in the statutory text. The government also argues that its limited interpretation "does not create a 'safe harbor' for foreign sovereigns," because "they remain liable for their actions in whatever forums or proceedings are otherwise available." *Id.* That argument proves too much: The FSIA rests on the belief that victims should be able to seek justice *in a U.S. court*. And while this Court has recognized that the expropriation exception is "unique," *see Philipp*, 592 U.S. at 183, so too is America's commitment to rectifying the harms the exception covers. Even taking the government's argument on its own terms, FSIA jurisprudence *already* allows foreign states to argue that claims should be resolved in an adequate alternative forum. *See, e.g.*, *Simon II*, 911 F.3d at 1181-82. There is no need to fetter the expropriation exception to entertain a policy concern that is addressed elsewhere.

ii. Petitioners argue that "*every* asset" and "*every* item of property owned by a sovereign defendant" can trigger the expropriation exception if the commingling theory is valid. Br. 2, 16, 26-27 (emphases added).

Similarly, the government argues (Br. 16, 23-24) that the commingling theory makes the expropriation exception too easy to satisfy and may render certain parts of the exception superfluous. Those arguments lack merit.

First, it's not true that the commingling theory reaches "*every* asset held by a foreign sovereign or its instrumentality." Pet. Br. 16 (emphasis added). Plaintiffs can recover only the value of their expropriated property. So if a foreign state unlawfully expropriates $10,000 worth of property, liquidates it, and commingles it in a $100,000,000 fund, the maximum the plaintiff can recover is still just $10,000. Petitioners' argument is wrong, too, because the commingling theory reaches only fungible property that can be commingled.

Second, the commingling theory doesn't make the expropriation exception too easy to satisfy. Section 1605(a)(3) has many requirements. *Supra* pp. 5-6, 25. But commingling concerns *only* the "any property exchanged" element. Even if that element is satisfied, plaintiffs must show a property interest and a violation of the international law of expropriation. The 14-year litigation history of this case just proves how difficult it is for plaintiffs to win justice.

Third, the commingling theory doesn't create superfluity. Petitioners focus on the FSIA's noncommercial tort and terrorism exceptions, arguing that the "rigid boundaries" limiting their application "would be meaningless" if commingling suffices. Br. 28-29. That's incorrect. "The noncommercial tort exception provides jurisdiction over claims 'in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of

property,' but only where the relevant conduct 'occurred in the United States.'" *Philipp*, 592 U.S. at 183-84 (alteration adopted; quoting 28 U.S.C. § 1605(a)(5)). That exception covers conduct, like individual violence, that is different from the property crimes covered by the expropriation exception. Likewise, the terrorism exception applies in different circumstances—it "eliminates sovereign immunity for state sponsors of terrorism but only for certain human rights claims, brought by certain victims, against certain defendants." *Id.* at 184 (citing 28 U.S.C. §§ 1605A(a), (h)). Again, that's far afield from conduct covered by the expropriation exception.

The government, for its part, focuses only on the expropriation exception, arguing that the "commercial activity" element "would be rendered effectively superfluous" if commingling suffices. Br. 16. But Hungary chose to engage in commercial activity in the United States. Not all countries do so. And the "commercial activity" element still has work to do in cases that don't involve commingling—if the foreign sovereign expropriates artwork that never establishes a connection with the United States, the exception doesn't apply. Commingling applies only when the foreign sovereign liquidates stolen property and deposits the proceeds in funds used in the United States, or when the foreign state's instrumentality owns the funds and does business in the United States. Regardless, "even if" the commingling theory "threatens to leave" the "commercial activity" element "with little to do, that's hardly a reason" to hold that the theory, which is supported by the statute's plain meaning, is invalid. *Wisconsin Central*, 585 U.S. at 282.

2. Petitioners' historical account overlooks key indicators of congressional intent, and their foreign-policy arguments lack merit.

a. The parties agree that Congress departed from the "restrictive theory" by enacting the expropriation exception, and that Congress's disagreement with *Sabbatino* sheds light on the commingling issue. *Supra* pp. 26-29; Pet. Br. 6-7, 30-34; U.S. Br. 19-22. Where they diverge is how to understand Congress's disagreement with *Sabbatino*.

Petitioners and the government argue that Congress wanted to allow courts to review *only* "claims like those at issue in *Sabbatino*," Pet. Br. 32—that is, claims "where specific proceeds from the sale of the expropriated property indisputably were present in the United States, clearly identified as such, and segregated," U.S. Br. 21-22. That's not the best reading of Congress's intent. To start, there's no evidence that Congress intended the expropriation exception to cover only *Sabbatino's exact facts*. Congress responded to *Sabbatino* with the text it wrote, not with a fact-specific fix. The statutory text reflects concern with expropriation of property *generally*, not only with the expropriation of tangible, nonfungible property. Otherwise there would be no need to include the phrase "any property exchanged for such property." The argument also ignores Congress's post-*Sabbatino* actions, including the Second Hickenlooper Amendment, which was enacted despite *Sabbatino*'s and the Executive's concerns about tracing fungible property. *Supra* pp. 26-29. Additionally, it ignores the United States' longstanding concerns with unlawful expropriations of fungible

property, as Secretary Hull's letter and the Second Hickenlooper Amendment show. *Id.*

b. Petitioners and the government argue that the "United States' reciprocal self-interest in the doctrine of sovereign immunity" justifies rejection of the commingling theory. Pet. Br. 17-18; *see* Pet. Br. 35-38; U.S. Br. 17-18. Those are real concerns. But so is nullifying the expropriation exception. Regardless, reciprocity concerns don't supersede clear statutory text, which creates jurisdiction to hear claims from the victims of expropriation. Congress (with the Executive's support) made a specific foreign policy decision: individual justice for victims was worth the risk.

B. This case presents no *Helmerich* issue, including on the nationality question, which is not before the Court.

1. Petitioners argue that *Helmerich* requires courts to "make a determination on jurisdiction rather than hypothesizing what a different factfinder could determine." Br. 47. Therefore, they reason, when all a plaintiff has is "allegations of historical commingling," *Helmerich* requires dismissal. Br. 48.

The Court need not, and should not, decide that question, because it isn't presented here. Respondents provided more than allegations of historical commingling. They provided evidence of commingling, and Petitioners did not dispute it, despite their opportunity to do so. The district court considered the evidence, including the stipulated facts, and sided with Respondents. That's all that was required. *Supra* pp. 33-34. Indeed, the government agrees that the lower courts' resolution of the commingling issue "did not contravene *Helmerich*." Br. 28.

2. The government nevertheless suggests *Helmerich* error on a different issue, one Petitioners never hinted at, much less raised, in the petition. According to the government, although the court of appeals read *Helmerich* correctly, it misapplied *Helmerich* when deciding whether, as a factual matter, Respondents have satisfied the "in violation of international law" requirement of § 1605(a)(3)—namely whether they "were not Hungarian nationals at the time of the takings" such that the domestic takings rule doesn't apply. Br. 29-30. The decision below held that certain Respondents "had plausibly alleged they were Czechoslovakian nationals at the time of the takings." Pet. App. 4-5. The government argues that the court "should have disposed of the factual dispute over nationality in the same way it did the factual dispute over the property element," by remanding for factfinding. Br. 29-30.

But the nationality issue is not before the Court. *First*, Petitioners have not sought reversal on the nationality issue. *See* Pet. Br. 48-49. To the contrary, Petitioners make clear that "[o]nly the latter portion of the statutory language is at issue here," referring to whether "'property or any property exchanged for such property' has a commercial nexus with the United States." Pet. 19. *Second*, the Court denied Respondents' separate petition seeking review of the court of appeals' resolution of nationality issues. *Friedman v. Republic of Hungary*, No. 23-1075, 144 S. Ct. 2686 (2024). *Third*, the petition here raised the *Helmerich* question only in the context of commingling, narrowly arguing that the courts of appeals disagree about how to apply *Helmerich* to commingling allegations. *See* Pet. 20-23. Nowhere in the petition or in their opening brief did Petitioners suggest that they sought review

of the nationality issue. In short, the nationality issue is outside the scope of the questions presented here.

C. The Court should not address the established burden-shifting framework in a case that doesn't even present the question.

1. As with the supposed *Helmerich* question, there is no reason to decide any burden-shifting question. The court of appeals was wrong to allow Petitioners an opportunity to disprove traceability, because traceability cannot change the result under the commingling theory. And because Respondents have established the factual predicates for the commingling theory and there is no dispute of *relevant* fact, there is no work for any burden-shifting rule to do. *Supra* pp. 34-37.

If the Court reaches burden shifting, however, it should reject Petitioners' argument. Petitioners agree that a "burden-shifting approach" governs FSIA cases, with the party invoking the presumption of immunity (Petitioners here) bearing "the ultimate burden of persuasion." Br. 39-40. But Petitioners disagree with the court of appeals' statement that, on remand, Petitioners "must at least affirmatively establish by a preponderance of the evidence that their current resources do *not* trace back to the property originally expropriated." Pet. App. 74. Petitioners are wrong.

First, Petitioners misrepresent the burden the court of appeals placed on them. Their burden of persuasion is proof by a "preponderance of the evidence." *Id.* The court thus did not say Petitioners had to "*conclusively* demonstrate the absence of a commercial nexus." Pet. Br. 26 (emphasis added). Additionally, the court never said "that Respondents can *defeat*

foreign sovereign immunity *merely by alleging* the proceeds of expropriated items were historically commingled with a sovereign's general revenues." Pet. Br. 1 (emphases added). Instead, the court remanded for factfinding, observing that Respondents "countered" the factual challenge "by citing *evidence* in the record 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.'" Pet. App. 69.

Second, Petitioners argue that the court of appeals, by requiring them to show "that their current resources do *not* trace back" to the stolen property, erroneously placed on them the burden of production, rather than just the burden of persuasion. Br. 39. That's wrong, too. As in other cases involving presumptions and shifting burdens, who bears what burden "is unlikely to make much difference on the ground." *Goldman Sachs Group, Inc. v. Arkansas Teacher Retirement System*, 594 U.S. 113, 126 (2021). The parties submit competing evidence, and the "district court's task is simply to assess all the evidence … and determine whether it is more likely than not that" Petitioners sold the expropriated property, commingled the proceeds with other funds, and used those funds in a way that satisfies the commercial-nexus requirement. *Id.* at 126-27.

2. The government argues that Petitioners, Respondents, and nearly every circuit are wrong about the burden-shifting framework, because plaintiffs (Respondents) bear the burdens of both production and persuasion. *See* Br. 30-33 & n.*. That novel argument is incorrect. The burden-shifting framework governing "all presumptions," *St. Mary's*

Honor Center, 509 U.S. at 507, including the FSIA's presumption of foreign sovereign immunity, *see Philipp*, 592 U.S. at 176.

CONCLUSION

The Court should hold that commingling satisfies the "any property exchanged" requirement, and that Respondents have satisfied that requirement here.

Respectfully submitted.

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