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

BRIEF FOR MEMBERS OF THE UNITED STATES HOUSE OF REPRESENTATIVES AND SENATE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE* [1]

Amici curiae are Members of the United States Senate and United States House of Representatives. They have a fundamental, institutional interest in safeguarding Congress's legislative prerogative to extend or deny immunity to foreign sovereigns in particular situations and in ensuring that the Foreign Sovereign Immunities Act is faithfully applied by the courts in accordance with Congress's intent. The names of individual *amici* are listed in the Appendix.

INTRODUCTION AND SUMMARY OF ARGUMENT

By enacting the Foreign Sovereign Immunities Act ("FSIA"), Congress instituted a comprehensive legal framework through which the Judicial Branch—not the Executive Branch, as was the case prior to the FSIA—would make sovereign immunity decisions free from case-by-case political and diplomatic considerations. In doing so, Congress provided greater jurisdictional certainty and put the burden on the sovereign defendant to affirmatively plead and prove the defense of sovereign immunity.

Consistent with Congress's conception of the FSIA, the D.C. Circuit below correctly approved Respondents' "commingling" theory under the FSIA's expropriation exception, correctly held that the burden to prove immunity rests with the defendant, and correctly rejected the notion that the FSIA imposes a

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[1] *Amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

heightened pleading standard on plaintiffs. That decision should be affirmed.

Petitioners' contrary positions are diametrically opposed to Congress's intent and the FSIA's purpose. Petitioners marshal an incorrect reading of the FSIA's purported predecessor statute, the Second Hickenlooper Amendment, as the supposed source of the expropriation exception's prohibition on Respondents' commingling theory. There is simply no suggestion in the legislative history that the expropriation exception imported any supposed traceability requirement, nor is there any textual commonality between the two statutes that would lead to such a reading.

Moreover, if Petitioners' rejection of the commingling theory were correct, it would render the expropriation exception a nullity. Because money is fungible, "once 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." *Simon* v. *Republic of Hungary*, 77 F.4th 1077, 1118 (D.C. Cir. 2023) ("*Simon III*"). Thus, unless a foreign sovereign carefully segregated its ill-gotten gains from its general treasury, no sovereign would ever be subject to the expropriation exception in any case involving liquidation. This cannot possibly have been Congress's intent in drafting the expropriation exception. Indeed, in numerous other contexts—for example, in the FSIA's terrorism exception, forfeiture, and money laundering—Congress has made clear, as recognized by the courts, that strict traceability requirements are not necessary in circumstances similar to those here.

Petitioners' insistence that it is the plaintiff's burden to prove that one of the FSIA's exceptions applies is also contrary to congressional intent. As reflected in the FSIA's legislative history, Congress could not have been clearer that sovereign immunity is an affirmative defense that must be pled—or it is waived—by the sovereign defendant, who also bears the burden of proving that an exception does *not* apply. *See* H.R. Rep. No. 94-1487, at 17 (1976); S. Rep. No. 94-1310, at 17 (1976). There is likewise nothing in the text or history of the FSIA that remotely suggests Congress intended to alter familiar notice pleading requirements for plaintiffs.

Federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them." *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800, 817 (1976). Particularly in light of Congress's extensive legislative efforts to facilitate redress for victims of the Holocaust, it would be perverse to close the courthouse doors in a case such as this. The Court should respect Congress's intent and permit Holocaust victims the opportunity to seek justice in this nation's courts.

ARGUMENT

I. CONGRESS ENACTED THE FSIA TO REPLACE AD HOC SOVEREIGN IMMUNITY DECISIONS BY THE EXECUTIVE WITH A COMPREHENSIVE LEGAL FRAMEWORK TO BE APPLIED BY THE COURTS

Through enactment of the FSIA in 1976, Congress sought to replace an ad hoc regime of foreign sovereign immunity—which at the time was riddled with uncertainties and subject to the political motivations

of the Executive Branch—with an objective, apolitical framework that could be uniformly applied by the judiciary to determine whether and when foreign sovereigns would be subject to suits by private litigants in United States courts.

A. The Pre-FSIA Sovereign Immunity Regime Was in a State of Disarray

From the very beginnings of the Republic, it was understood that foreign sovereign immunity is neither a constitutional command, nor a matter of right. *See Schooner Exch.* v. *McFaddon*, 11 U.S. (7 Cranch) 116, 136–137 (1812). Rather, "as a matter of comity, members of the international community ha[ve] implicitly agreed to waive the exercise of jurisdiction over other sovereigns in certain classes of cases." *Republic of Austria* v. *Altmann*, 541 U.S. 677, 688 (2004) (citing *Schooner Exch.*, 7 Cranch at 137)). Sovereign immunity is thus afforded foreign sovereigns only at the "grace" of the United States. *Id.* at 689.

Accordingly, courts historically "resolved questions of foreign sovereign immunity by deferring to the 'decisions of the political branches . . . on whether to take jurisdiction.'" *Id.* at 696 (citation omitted). Until 1952, this largely meant deferring to the Executive Branch's "policy of requesting immunity in all actions against friendly sovereigns." *Id.* at 689.

That year, however, the State Department abandoned what effectively had been a regime of complete immunity from suit in favor of the "restrictive theory" of sovereign immunity. *Id.* at 689–690. This evolution in sovereign immunity policy, born of the so-called "Tate Letter" sent by the State Department to the Attorney General in 1952, heralded a regime in which

immunity would be reserved for actions involving the foreign sovereign's public acts, but not its "private" commercial acts. *Ibid.*; *see* Letter from Jack B. Tate, Acting Legal Adviser, Department of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), *reprinted in* 26 Dep't of State Bull. 984, 984–985 (1952) ("Tate Letter").

The Tate Letter, however, was "very general in its terms" and did not "provide any criterion to distinguish commercial from public transactions." Hazel Fox & Philippa Webb, *Law of State Immunity* 145–146 (3d ed. 2013).

Therefore, while the Tate Letter changed the baseline theory against which sovereign immunity decisions were being made, it did not change who made them or offer clear guidance on how to make such decisions: courts continued to defer to the State Department's case-by-case "suggestions of immunity," *Altmann*, 541 U.S. at 678, which "appeared to turn more on political considerations than legal principle." Fox & Webb, *supra*, at 146.

This regime led to ad hoc "disarray," as "foreign nations often placed diplomatic pressure on the State Department, and political considerations sometimes led the Department to file suggestions of immunity in cases where immunity would not have been available under the restrictive theory." *Altmann*, 541 U.S. at 690. Complicating matters further, foreign nations did not always make immunity requests to the State Department, leaving the courts to determine whether immunity existed in a given case, "generally by reference to prior State Department decisions." *Ibid.*; Fox & Webb, *supra*, at 146 ("The initiative rested with the

foreign State whether to plead immunity and whether to pursue it through the courts or to refer it to the State Department, and if so whether to apply diplomatic influence.").

With no clearly defined or uniformly applicable legal standards, sovereign immunity decisions were thus "politically and foreign policy motivated" and "subject to . . . diplomatic pressures." Michael D. Murray, *Jurisdiction Under the Foreign Sovereign Immunities Act for Nazi War Crimes of Plunder and Expropriation*, 7 N.Y.U. J. Legis. & Pub. Pol'y 223, 254 (2004); *Verlinden B.V.* v. *Centr. Bank of Nigeria*, 461 U.S. 480, 487 (1983). Private litigants were consequently "left in great uncertainty as to whether [their] legal dispute would be decided by 'non-legal considerations through the foreign government's intercession with the Department of State.'" Fox & Webb, *supra*, at 146 (citation omitted).

It was precisely this "bedlam" which motivated Congress to codify a "comprehensive set of legal standards" that would "govern[] claims of immunity in every civil action against a foreign state." *Republic of Argentina* v. *NML Cap.*, 573 U.S. 134, 141 (2014).

B. Congress Enacted the FSIA to Provide a Uniform, Apolitical Framework Governing Sovereign Immunity Claims

It is "undisputed" that Congress has the prerogative and power "to decide, as a matter of federal law, whether and under what circumstances foreign nations should be amenable to suit in the United States." *Verlinden*, 461 U.S. at 493. In 1976, Congress exer-

cised that power and brought order to the chaos of foreign sovereign immunity determinations by passing the FSIA. *Ibid.*

A "principal purpose" of the FSIA was "to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds." H.R. Rep. No. 94-1487 at 7; S. Rep. No. 94-1310 at 9 (same); *see also* 122 Cong. Rec. 33532 (1976) (statement of Rep. George E. Danielson) ("To reduce foreign policy implications of immunity decisions and to assure judicial safeguards for all litigants, the bill would leave immunity determinations exclusively to the courts."). Congress recognized that "decisions on claims by foreign states to sovereign immunity are best made by the judiciary," and "free[] from" diplomatic "pressures from foreign governments to recognize their immunity from suit." H.R. Rep. No. 94-1487 at 7, 14; S. Rep. No. 94-1310 at 9, 14.

To be clear, this was not a matter of Congress transferring discretionary, case-by-case decision-making from the Executive Branch to the Judiciary. The FSIA did not empower courts to make foreign policy decisions, to determine sovereign immunity based on their own weighing of diplomatic considerations, as if judges were simply enrobed State Department officials. Rather, the FSIA was designed to ensure that immunity decisions would be purely *legal* decisions and governed by a "uniform body of law" to be applied consistently across cases. H.R. Rep. No. 94-1487, at 32; *see also* Fox & Webb, *supra*, at 238–239 (the FSIA

"minimize[d] the foreign policy implications," provided "clearer legal standards," and established immunity "as a predictable certain rule, if at times substantively unfavourable" to a sovereign).

The State Department welcomed this transference of decision-making power from its own halls to the courts, acknowledging that the pre-FSIA regime put "the United States at a disadvantage" by providing foreign states political leverage to manipulate sovereign immunity decisions. *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearing on H.R. 11315 Before the H. Comm. On the Judiciary, Subcomm. on Administrative Law and Government Relations*, 94th Cong. 29 (1976) ("House Hearing"), at 26–27 (testimony of Monroe Leigh, Legal Adviser, Department of State). The Justice Department agreed, stressing that the FSIA was "designed to depoliticize the area of sovereign immunity by placing the responsibility for determining questions of immunity in the courts." *Id.* at 31 (testimony of Bruno A. Ristau, Chief, Foreign Litigation Section, Civil Division, Department of Justice). The Executive Branch thus recognized that "the advantages of having a judicial determination greatly outweigh[ed] the advantage of [its] being able to intervene in a lawsuit." *Id*. at 34.

In enacting the FSIA, Congress necessarily considered the foreign policy considerations inherent in the "grace" that the United States should afford foreign sovereigns. *Altmann*, 541 U.S. at 689. The end result of those considerations lies in the codified text of the statute, which the Judiciary must consistently and faithfully apply, free of additional ad hoc foreign policy considerations and the "interven[tion]" of the Executive. House Hearing at 34.

Despite Congress's clear intent to remove foreign policy considerations from the Judiciary's sovereign immunity determinations, Petitioners and the United States as *amicus*—representing the interests of the Executive Branch—attempt to raise the specter of adverse foreign policy outcomes should this Court affirm the decision below. The United States, for example, invokes concerns over "reciprocal actions against the United States in foreign courts" and the risk of "offending the dignity of foreign states." U.S. Br. at 22; Pet. Br. at 35–38 (same). But of course, such considerations have undergirded the entire doctrine of sovereign immunity from the beginning, and Congress was well aware of these considerations when it enacted the FSIA. *See, e.g.*, *Nat'l City Bank of New York* v. *Republic of China*, 348 U.S. 356, 362 (1955) ("[T]he doctrine . . . deriv[es] from standards of public morality, fair dealing, reciprocal self-interest, and respect for the 'power and dignity' of the foreign sovereign." (citing *Schooner Exchange*, 11 U.S. (7 Cranch) at 136–137, 143–144)); *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 184–185 (1988) (Congress is presumed to be "knowledgeable about existing law pertinent to the legislation it enacts"). The task for the Judicial Branch is to apply the statute Congress enacted, not to determine on a case-by-case basis which outcome may or may not benefit the foreign policy of the United States, and only then back into an immunity decision—that is precisely the kind of ad hoc, politicized regime the FSIA did away with.

Here, Congress meant what it said, in plain and mandatory terms. Under the FSIA's expropriation exception, foreign sovereigns "*shall not be immune*" when the statutory requirements are met. 28 U.S.C.

§ 1605(a) (emphasis added). Congress did not direct courts to determine immunity based on what a foreign sovereign or the Executive Branch believes to be the right or wrong outcome as a political matter. Indeed, for a court to do so—as Petitioners and the United States' brief suggest—would countermand Congress's "principal purpose" in enacting the FSIA—"to transfer the determination of sovereign immunity from the executive branch to the judicial branch" and "thereby reduc[e] the foreign policy implications of immunity determinations" in favor of decisions made on "purely legal grounds." H.R. Rep. No. 94-1487 at 7; S. Rep. No. 94-1310 at 9.

II. THE SECOND HICKENLOOPER AMENDMENT DOES NOT CABIN THE REACH OF THE FSIA'S EXPROPRIATION EXCEPTION

In an attempt to discredit Respondents' "commingling" theory, Petitioners (and the United States as *amicus*) place great emphasis on the Second Hickenlooper Amendment. *See* Pet. Br. at 30–34; *see also* U.S. Br. at 20–22. But the Second Hickenlooper Amendment cannot bear the interpretive weight the Petitioners place upon it.

Congress enacted the Second Hickenlooper Amendment in the wake of this Court's decision in *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964), which applied the act of state doctrine to a case involving "Cuba's nationalization of American sugar interests." *Federal Republic of Germany* v. *Philipp*, 592 U.S. 169, 178 (2021). In response, Congress passed the Amendment, which prohibits United States courts from applying the act of state doctrine

"in a case in which a claim of title or other right to property is asserted by any party . . . 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 Respondents explain, the Second Hickenlooper Amendment was enacted *despite* the tracing concerns raised in *Sabbatino* and by the Executive. *See* Resp. Br. 27–29. Viewed through that lens, there is no reason to construe the subsequent enactment of the FSIA as incorporating any nonexistent tracing limitation, as Petitioners contend. *See* Pet. Brief at 32; *see also* U.S. Br. at 21–22.

But even if this Court accepts Petitioners' view that the Second Hickenlooper Amendment applied only to cases involving specifically identifiable and traceable property, there is zero indication that the FSIA's expropriation exception shares that same purported limitation. The Second Hickenlooper Amendment did not address foreign sovereign immunity, but rather the act of state doctrine. The "act of state doctrine is distinct from immunity," *Samantar* v. *Yousuf*, 560 U.S. 305, 322 (2010), and provides that "courts . . . will not question the validity of public acts . . . performed by other sovereigns within their own borders, even when such courts have jurisdiction over [the] controversy," *Altmann*, 541 U.S. at 700.

While Petitioners are correct that the "House and Senate Reports on the expropriation exception specifically refer to the Second Hickenlooper Amendment," Pet. Br. at 31, those passing references served *only* to emphasize that the sovereign immunity and act of state doctrines are distinct, and that the FSIA "deals solely with issues of immunity" and "in no way affects

existing law" on the act of state doctrine. H.R. Rep. No. 94-1487 at 20 (citing Second Hickenlooper Amendment, 22 U.S.C. § 2370(e)(2)); S. Rep. No. 94-1310 at 19 (same); *see also* House Hearing at 34 ("[W]e have been careful . . . to make it clear that the [FSIA] applies only to the defense of sovereign immunity and does not extend to the act of state doctrine."). If anything, therefore, Congress was clear that the FSIA was not narrowed in any way by the Second Hickenlooper Amendment—there is simply no suggestion that Congress intended to graft onto the FSIA's expropriation exception the Amendment's purported traceability requirement.

Nor is there any such shared text between the two statutes. While this Court previously stated that "Congress used language nearly identical to that of the Second Hickenlooper Amendment . . . in crafting the FSIA's expropriation exception," it is clear that the Court was referring specifically to the FSIA's reference to cases "in which rights in property taken in violation of international law are in issue." *Philipp*, 592 U.S. at 179 (quoting 28 U.S.C. § 1605(a)(3)); *compare id. with* 22 U.S.C. § 2370(e)(2) (referring to "taking[s] . . . in violation of the principles of international law"). Review of the two statutory provisions reveals no other textual commonalities, much less "nearly identical" language. Thus, even if the shared "violation of international law" language reflects, as this Court held, a consensus that domestic takings are not covered by such language, *Philipp*, 592 U.S. at 179, there is no other shared language that suggests that the FSIA incorporates the Amendment's purported traceability requirement. The expropriation exception's commercial nexus requirement was not at issue

in *Philipp*, and nothing in that decision indicates in the slightest that the minimal textual overlap between the Amendment and the expropriation exception negates the viability of Respondents' commingling theory.

Had Congress intended to limit the FSIA to the Second Hickenlooper Amendment's purported traceability requirement, it could have easily done so using specific language to that effect. It did not, and this Court should refrain from interpreting the expropriation exception as if it did.

III. RESPONDENTS' COMMINGLING THEORY SATISFIES THE EXPROPRIATION EXCEPTION'S COMMERCIAL NEXUS REQUIREMENT, JUST AS ITS ANALOGUES ARE RECOGNIZED IN VARIOUS OTHER AREAS OF FEDERAL STATUTORY LAW

With the history and purpose of the FSIA properly understood, it is evident that the D.C. Circuit was correct in holding that Respondents' commingling theory satisfied the expropriation exception's commercial nexus requirement.

As the Court of Appeals explained, adopting Petitioners' contrary interpretation would render the expropriation exception a "nullity." *Simon III*, 77 F.4th at 1118. Because money is fungible, "once 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." *Ibid.* Thus, a foreign sovereign could "thwart most claims" under the expropriation exception by simply "commingl[ing] proceeds

from illegally taken property with [its] general accounts." *Ibid.*

Unless a foreign sovereign were to carefully segregate its ill-gotten gains from the rest of its expansive coffers, *no* sovereign defendant would *ever* be subject to the expropriation exception in any case involving liquidation. It is impossible to believe, as Petitioners contend, that Congress drafted the expropriation exception to be a useless appendage to the FSIA. The D.C. Circuit's reading, unlike Petitioners', is the only interpretation that prevents the expropriation exemption—"an unnerving amount of statutory text"—from becoming "mere surplusage." *Fisher* v. *United States*, 144 S. Ct. 2176, 2190 (2024).[2]

Petitioners express concern that adopting the commingling theory would lead to "any dispute concerning an international conflict to be heard in the courts of the United States." Pet. Br. at 28. But this is unfounded hyperbole. The vast majority of international conflicts do not involve alleged expropriations of property by a sovereign in violation of international law. In addition, this Court has already ruled in *Philipp* that the expropriation exception is limited by the domestic takings rule and does not reach all "acts of genocide and other human rights violations" as such. 592 U.S. at 184. And, of course, any claim must still satisfy the FSIA's other requirements, as well as

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[2] The United States' *amicus* brief seems to acknowledge that the position it and Petitioner espouse on this issue would contravene the statute's basic purpose. Its solution appears to be to simply ignore that purpose. *See* U.S. Br. at 24. But it is the task of the courts to "give effect to the intent of Congress," not undermine it. *United States v. American Trucking Ass'ns*, 310 U.S. 534, 543 (1940).

those of the substantive law governing the underlying cause of action, and will be limited by common-law doctrines such as forum non conveniens. *See Verlinden*, 461 U.S. at 490 n.15 (recognizing the applicability of other "traditional" federal common law doctrines like forum non conveniens in FSIA cases). Similarly, insofar as the United States' *amicus* brief expresses a concern that affirming the decision below would raise political and diplomatic concerns, deference to the Executive Branch's case-by-case political preferences, as discussed above, is not part of the FSIA regime. *Supra* pp. 6–9.

Fundamentally, these concerns amount to an argument that Congress should have enacted a different set of rules that are more protective of foreign sovereigns and that, as a result, the statute it *did* pass should be interpreted in a manner that defeats its plain purpose. This kind of judicial nullification is not an acceptable mode of statutory interpretation.

Tellingly, a direct tracing requirement has been rejected in cases involving another provision of the FSIA—the terrorism exception. *See* 28 U.S.C. § 1605A. As the D.C. Circuit explained in *Kilburn* v. *Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1130 (D.C. Cir. 2004), because money is "fungible," a foreign state's "material support" under that provision did not have to be "directly traceable" to the particular terrorist act causing the injury. "[T]errorist organizations," the Court of Appeals noted, "can hardly be counted on to keep careful bookkeeping records." *Ibid.* Therefore, imposing a traceability re-

quirement "would likely render [the terrorism exception's] material support provision ineffectual." *Ibid.*[3] A commingling theory of liability is thus a sensible and acknowledged solution to the issue of how to treat the fungibility of money, an asset that will most likely be commingled in general coffers.

Congress has employed these same principles in other areas of the law, as this and other courts have repeatedly recognized. For example, Congress has made it a federal crime to "knowingly provide[] material support or resources to a foreign terrorist organization." 18 U.S.C. § 2339B. In *Holder* v. *Humanitarian Law Project*, this Court addressed a First Amendment challenge to the statute, in which the plaintiffs argued that the statute unconstitutionally criminalized support that was intended only to "advance . . . the legitimate activities of the designated terrorist organizations, not their terrorism." 561 U.S. 1, 28–29 (2010). The Court rejected that view, stating that "[m]oney is fungible," and Congress was justified in prohibiting "any contribution" to "designated terrorist organizations." *Id.* at 29–31.

Similarly, Congress enacted 18 U.S.C. § 2333(a), which provides a civil remedy for those injured "by reason of" an act of "international terrorism," which includes violations of 18 U.S.C. § 2339B. *See Strauss* v. *Credit Lyonnais, S.A.*, 925 F. Supp. 2d 414, 426 (E.D.N.Y. 2013). Under that statute, the "by reason of" requirement does not require a showing that the

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[3] The *Kilburn* decision referred to 28 U.S.C. § 1605(a)(7), the former location of the terrorism exception. Since that decision, the exception was relocated to 28 U.S.C. § 1605A. *See Simon III*, 77 F.4th at 1119 n.2.

defendant's contributions to a terrorist organization "was used to fund the attacks at issue or even used to support violence." *Id.* at 433. Plaintiffs "are not required to trace specific dollars to specific attacks . . . . Such a task would be impossible and would make the [legislation] practically a dead letter because money is fungible." *Ibid.*

Congress also included commingling principles in forfeiture statutes. For example, specifically recognizing the problem of tracing fungible assets like money, Congress in 18 U.S.C. § 984 provided that in any forfeiture action where "the subject property" is simply fungible "funds deposited in an account in a financial institution," "it shall not be necessary for the Government to identify the specific property involved in the offense that is the basis for the forfeiture," and "it shall not be a defense that the property involved in such an offense has been removed and replaced by identical property." 18 U.S.C. § 984(a)(1). In other words, Congress recognized that the fungibility of money should free the government from having to trace funds in an account back to the underlying offense. *See, e.g.*, *Marin Midland Bank, N.A.* v. *United States*, 11 F.3d 1119, 1126 (2d Cir. 1993) (under § 984, "the government no longer is required to show that money in a bank account is the specific money involved in the underlying offense").

Congress utilized similar principles in 18 U.S.C. § 1956, which addresses the laundering of monetary instruments. Under § 1956, "the mere commingling of legitimate funds [with illicit funds]" cannot be used "to defeat a money laundering conviction," because that would "undermine Congress's intent and effec-

tively nullify the offense." *United States* v. *Braxtonbrown-Smith*, 278 F.3d 1348, 1355 (D.C. Cir. 2002). As such, courts of appeal have declined to require that the government be able to "trace the origin of all funds deposited into a bank account to determine exactly which funds were used for what transaction." *Ibid*. In fact, the "commingling . . . [may] itself [be] suggestive of a design to hide the source of ill-gotten gains." *United States* v. *Jackson*, 935 F.2d 832, 840 (7th Cir. 1991).

The notion that the proceeds of illicit acts do not need be directly traced where they have been commingled with other funds has thus been ingrained as an integral component of federal law in various contexts. Interpreting the FSIA's expropriation exception to require direct tracing of specific funds, even where funds have been commingled, would call into question any number of court decisions in these important areas of law. Conversely, rejecting such an interpretation is the only way to give effect to the FSIA's expropriation exception without rendering it a nullity.

IV. SOVEREIGN IMMUNITY IS AN AFFIRMATIVE DEFENSE AND THE BURDEN IS ON DEFENDANTS TO PROVE IMMUNITY

Despite conceding that the sovereign defendant bears the ultimate burden of proof, Petitioners argue that it is the plaintiff who must prove by a preponderance of the evidence that one of the FSIA's exceptions applies. *See* Pet. Br. at 43–44. The United States, as *amicus*, goes even further, contending that the plaintiff bears the ultimate burden of proof, as well. *See* U.S. Br. at 30–31 & 31 n.*. These positions are diametrically opposed to Congress's explicit intent.

Congress could not have been clearer that under the FSIA, "sovereign immunity is an affirmative defense which must be specially pleaded." H.R. Rep. No. 94-1487, at 17; *see also* S. Rep. No. 94-1310, at 17 (same). Therefore, "*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 (emphasis added); *see also* S. Rep. No. 94-1310, at 17 (same). The evidence with which the foreign state must come forward includes evidence establishing that "plaintiff's claim relates to . . . *an act not within the exceptions* in section 1605–1607." H.R. Rep. No. 94-1487, at 17 (emphasis added); *see also* S. Rep. No. 94-1310, at 17 (same). Only after "the foreign state has produced such prima facie evidence of immunity"—that is, only *after* the foreign defendant has produced evidence establishing, *inter alia*, that the act complained of falls outside of the FSIA's exceptions—does the burden "shift to the plaintiff" to produce evidence establishing the contrary. H.R. Rep. No. 94-1487, at 17; *see also* S. Rep. No. 94-1310 at 17 (same). But "[t]he *ultimate burden of proving immunity would rest with the foreign state*." H.R. Rep. No. 94-1487, at 17 (emphasis added); *see also* S. Rep. No. 94-1310, at 17 (same).

In other words, by Congress's unequivocally expressed understanding of its own legislation, the party asserting immunity is the party that bears the initial burden of producing sufficient evidence to prove that the act complained of does *not* fall within one of the FSIA's exceptions, and also bears the ultimate burden of persuasion on the immunity defense.

This explicit direction is consistent with Congress's decision to permit waiver of immunity under

the FSIA. *See* 28 U.S.C. § 1605(a)(1). Indeed, Congress was clear that "[a]n implicit waiver would . . . include a situation where a foreign state has filed a responsive pleading in an action without raising the defense of sovereign immunity." H.R. Rep. No. 94-1487, at 18; *see also* S. Rep. No. 94-1310, at 18 (same). That is, sovereign immunity is not a default hurdle for plaintiffs to prove by a preponderance of the evidence, but a *defense* that must be pled by the defendant, or it may be waived.

To endorse Petitioners' (and the United States') position would be to flagrantly spurn Congress's clear commands.[4] But of course, the "function of the courts" in the interpretation of statutes is to "give effect to the intent of Congress," not disregard it. *American Trucking*, 310 U.S. at 542. The United States' contention that this Court has previously "repudiated" Congress's "description of sovereign immunity as an affirmative defense," U.S. Br. at 32, is neither accurate nor possible—this Court is not free to "repudiate" otherwise lawful congressional action. In *Verlinden*, on which the United States relies, this Court simply noted in dicta that if a foreign defendant does not make an appearance, then to assure itself of subject matter jurisdiction, a district court "still must determine that immunity is unavailable under the Act." *Verlinden*, 461 U.S. at 493 n.20. This is consistent with 28 U.S.C. § 1608(e), enacted as part of the FSIA, which provides that a court may not enter default judgment against a foreign state "unless the claimant

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[4] The United States' brief focuses on the House Report, but the Senate Report professes the exact same understanding of immunity as an affirmative defense, and the allocation of burdens. *Supra* p. 18.

establishes his claim or right to relief by evidence satisfactory to the court." 28 U.S.C. § 1608(e). Neither *Verlinden*'s dicta nor Section 1608(e) nullifies Congress's clearly stated directive that where, as here, a sovereign defendant *does* appear, it bears the burden of alleging and proving its entitlement to the defense of immunity. The United States' suggestion that the House (and Senate) reports were mistaken about their own legislation does not withstand scrutiny and should be rejected.[5]

Petitioners' view of the appropriate burdens is thus incorrect. Similarly flawed is their apparent position that the FSIA requires plaintiffs to satisfy a heightened pleading standard. *See* Pet. Br. at 47. Although somewhat ambiguous, Petitioners appear to be arguing that the FSIA departs from normal notice pleading, and requires instead that plaintiffs meet some sort of unarticulated "heightened" evidentiary standard at the outset. *See id.* at 45–49. But again,

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[5] The characterization of sovereign immunity as an affirmative defense was not some slip of the tongue. In addition to its consistency with the FSIA's waiver provision and the House and Senate Reports' discussion thereof, *supra* p. 19, the State Department echoed the exact same conception of sovereign immunity in committee hearings on the prior version of the bill. *See Immunity of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims & Gov't Rels. of the H. Comm. on the Judiciary* 32, U.S. Cong. Serial No. 93-10 (June 7, 1973). There, Charles Brower, legal advisor to the State Department, stated that a number of foreign states "follow our system, namely, that immunity exists unless there is an exception. However, it is incumbent upon the defendant to raise the defense of sovereign immunity rather than the plaintiff being required to establish lack of immunity." *Id.* at 1, 32. Congress's characterization of immunity as a defense, and its allocation of burdens, was clearly purposeful and considered.

it is *defendants* who must plead and prove the *defense* of sovereign immunity. There is no basis whatsoever in the text or legislative history of the FSIA to suggest that Congress intended *plaintiffs* to have to plead some amorphous "heightened standard," *id.* at 47, or that the FSIA otherwise alters familiar notice pleading requirements.

Indeed, Congress has legislated extensively to facilitate, not hinder, the righting of wrongs stemming from the Holocaust. On the particular subject of Nazi-era expropriation claims, Congress specifically amended the FSIA to ensure that such claims would see their day in court. In 2016, Congress passed the Foreign Cultural Exchange Jurisdictional Immunity Clarification Act, which added subsection (h) to 28 U.S.C. § 1605. Pub. L. No. 114-319, § 2, 130 Stat. 1618, 1618–1620 (2016). The new subsection (h) provides that the temporary exhibition in the United States of artworks owned by a foreign state is not, under certain circumstances, "commercial activity" by that State for purposes of the FSIA, and thus the exhibition of that artwork will not result in the denial of immunity to the foreign sovereign under the expropriation exception. 28 U.S.C. § 1605(h)(1). However, Congress created an express carve-out for property that is the subject of "Nazi-era" expropriation claims. 28 U.S.C. § 1605(h)(2)(A). Under that exception, immunity will nevertheless be denied in cases concerning property taken in violation of international law between January 30, 1933 and May 8, 1945 by the government of Germany or any government in Europe

that was occupied by, assisted, or allied with Germany. 28 U.S.C. § 1605(h)(2)(A), (3)(B)–(C).[6]

Congress also passed the Holocaust Expropriated Art Recovery Act of 2016 "[t]o ensure that claims to artwork and other property stolen or misappropriated by the Nazis are not unfairly barred by statutes of limitations but are resolved in a just and fair manner." Pub. L. No. 114-308, § 3(2) 130 Stat. 1524, 1526. In doing so, Congress specifically acknowledged that "litigation may be used to resolve claims to recover Nazi-confiscated art." *Id.* § 2(8), 130 Stat. at 1524.

Congress has also enacted legislation intended to encourage Holocaust-victim plaintiffs to seek restitution from the Holocaust's perpetrators. Section 803 of the Economic Growth and Tax Relief Reconciliation Act of 2001 excluded from certain income calculations "restitution received by victims of the Nazi regime or their heirs or estates." Pub. L. No. 107-16, § 803, 115 Stat. 38, 149–150 (capitalization altered). Although Section 803 was originally relevant only to a single tax year, the Holocaust Restitution Tax Fairness Act of 2002 removed the one-year sunset provision with respect to Section 803, thus removing any end date on the tax relief related to these restitution payments.

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[6] Underscoring Congress's expansive intent, that carve-out also extends beyond "Nazi-era claims" to include an array of expropriation claims involving property that was taken "after 1900" "in connection with the acts of a foreign government as part of a systematic campaign of coercive confiscation and misappropriation of works from members of a targeted and vulnerable group." 28 U.S.C. § 1605(h)(2)(B).

See Pub. L. No. 107-16, § 901, 115 Stat. at 150; Holocaust Restitution Tax Fairness Act of 2002, Pub. L. No. 107-358, § 2, 116 Stat. 3015, 3015.

Additionally, Congress has acted to enable research that would substantiate Holocaust restitution claims. For example, the Nazi War Crimes Disclosure Act required the President to establish the Nazi War Criminal Records Interagency Working Group, enabling public disclosure of Nazi war criminal records. Nazi War Crimes Disclosure Act Pub. L. No. 105-246, § 2(b)–(c), 112 Stat. 1859, 1859–1860 (1998). The Holocaust Victims Redress Act authorized the appropriation of funds to be used for research and translation services to further the restitution of assets to Holocaust victims. Pub. L. No. 105-158, § 103(b), 112 Stat. 15, 17 (1998). The U.S. Holocaust Assets Commission Act of 1998 established the Presidential Advisory Commission on Holocaust Assets in the United States, charged with developing a historical record of the collection and disposition of assets seized from victims of the Holocaust. Pub. L. No. 105-186, §§ 2, 3(a)–(b), 112 Stat. 611, 611–614.

The horrors of the Holocaust continue to reverberate through today. The victims of Nazi-era crimes and their families can never be fully compensated through economic redress, but Congress has repeatedly made clear that efforts at restitution should be encouraged and facilitated. The FSIA and its exceptions should not be interpreted and applied in a manner contrary to the intent of Congress so as to erect barricades against the vindication of these claims.

CONCLUSION

This Court should affirm the judgment of the D.C. Circuit.

Respectfully submitted,

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APPENDIX

Table of Contents

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