No.________

In the
Supreme Court of the United States

REPUBLIC OF HUNGARY AND
MAGYAR ALLAMVASUTAK ZRT.,
Petitioners,

v.

ROSALIE SIMON, ET AL.,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

JOSHUA GLASGOW
Counsel of Record
CHRISTOPHER D. BARRAZA
JOHN G. SCHMIDT JR.
PHILLIPS LYTLE LLP
620 Eighth Avenue
38th Floor
New York, New York 10018
(212) 759-4888
jglasgow@phillipslytle.com
cbarraza@phillipslytle.com
jschmidt@phillipslytle.com

February 7, 2024 *Counsel for Petitioners*

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

A foreign sovereign is generally immune from suit in domestic courts, subject to the specific exceptions of the Foreign Sovereign Immunities Act. Under the expropriation exception, claims involving rights in property taken in violation of international law may be heard if "property or any property exchanged for such property" has a commercial nexus with the United States. 28 U.S.C. § 1605(a)(3). Specifically, the property or its proceeds must be either "present in the United States in connection with a commercial activity" or "owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States." *Id.* The circuit courts have split as to the showing required to meet the commercial nexus requirement.

The Questions Presented are:

(1) Whether historical commingling of assets suffices to establish that proceeds of seized property have a commercial nexus with the United States under the expropriation exception to the Foreign Sovereign Immunities Act.

(2) Whether a plaintiff must make out a valid claim that an exception to the Foreign Sovereign Immunities Act applies at the pleading stage, rather than merely raising a plausible inference.

(3) Whether a sovereign defendant bears the burden of producing evidence to affirmatively disprove that the proceeds of property taken in violation of international law have a commercial nexus with the United States under the expropriation exception to the Foreign Sovereign Immunities Act.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioner Hungary is a sovereign nation. Petitioner Magyar Államvasutak Zrt. is the Hungarian national railway company. Magyar Államvasutak Zrt. is 100% owned by Hungary. Magyar Államvasutak Zrt. has no parent corporations. No publicly traded company holds a 10% or greater ownership interest in Magyar Államvasutak Zrt.

Respondents are Rosalie Simon, Helen Herman, Charlotte Weiss, Helena Weksberg, Rose Miller, Magda Kopolovich Bar-Or, Zehava (Olga) Friedman, Yitzhak Pressburger, Alexander Speiser, Ze'ev Tibi Ram, Vera Deutsch Danos, Ella Feuerstein Schlanger, Moshe Perel, Yosef Yogev, Asher Yogev Esther Zelikovitch, and the Estate of Tzvi Zelikovitch.

RELATED PROCEEDINGS

United States Supreme Court:

- *Republic of Hungary v. Simon*, No. 18-1447 (Feb. 3, 2021).

United States Court of Appeals for the District of Columbia Circuit:

- *Simon v. Republic of Hungary*, No. 22-7010 (Aug. 8, 2023), petition for reh'g denied (Oct. 12, 2023), motion to stay mandate denied (Oct 31, 2023);
- *Simon v. Republic of Hungary*, No. 20-7025 (Mar. 16, 2021);
- *Simon v. Republic of Hungary*, No. 17-7146 (Dec. 28, 2018), petition for reh'g denied (Feb.

15, 2019), on remand from the Supreme Court (Mar. 16, 2021); and

- *Simon v. Republic of Hungary*, No. 14-7082 (Jan. 29, 2016).

United States District Court for the District of Columbia:

- *Simon v. Republic of Hungary*, No. 10-cv-1770 (Dec. 30, 2021) (granting in part, denying in part, motion to dismiss);
- *Simon v. Republic of Hungary*, No. 10-cv-1770 (Mar. 11, 2020) (denying motion to dismiss);
- *Simon v. Republic of Hungary*, No. 10-cv-1770 (Sept. 30, 2017) (granting motion to dismiss); and
- *Simon v. Republic of Hungary*, No. 10-cv-1770 (May 9, 2014) (granting motion to dismiss).

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT iii

RELATED PROCEEDINGS..................................... iii

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

JURISDICTION... 1

STATUTORY PROVISIONS INVOLVED 1

INTRODUCTION 2

STATEMENT.. 5

- A. Background 5
- B. Prior Procedural History 9
- C. This Appeal 10

REASONS FOR GRANTING THE PETITION....... 16

I. This Court should grant certiorari to resolve important circuit splits regarding the FSIA's expropriation exception 16

- A. The Circuits disagree on whether historical commingling satisfies the commercial nexus requirement.................................. 16
- B. The D.C. Circuit expressly recognized it created a split with the Second regarding the pleading standard for the FSIA's exceptions.................................... 20

C. The D.C. Circuit created a split on the parties' respective burdens regarding the commercial nexus requirement............... 24

D. Resolving these circuit splits is particularly important because the D.C. Circuit is the primary venue for FSIA litigation.. 28

II. The scope of the expropriation exception is a matter of national, and international, importance.. 29

CONCLUSION... 34

APPENDIX.. 1a

Appendix A, Court of Appeals Decision............. 1a

Appendix B, District Court Order..................... 91a

Appendix C, District Court Decision 93a

Appendix D, Order Denying Panel Rehearing... 193a

Appendix E, Order Denying Rehearing En Banc... 195a

TABLE OF AUTHORITIES

Page

Cases

Abelesz v. Magyar Nemzeti Bank,
692 F.3d 661 (7th Cir. 2012) 20, 34

Agudas Chasidei Chabad of U.S. v. Russian Fed'n,
466 F. Supp. 2d 6 (D.D.C. 2006), *aff'd in part, vacated in part, rev'd in part*, 528 F.3d 934 (D.C. Cir. 2008)..................... 27

Alinejad v. Islamic Republic of Iran,
No. 19-CV-3599, 2023 WL 4684929
(D.D.C. July 6, 2023) 27

Alperin v. Vatican Bank,
365 F. App'x 74 (9th Cir. 2010) 19

Alperin v. Vatican Bank,
No. C-99-04941, 2007 WL 4570674
(N.D. Cal. Dec. 27, 2007) 19

Ambar v. Fed. Republic of Germany,
596 F. Supp. 3d 76 (D.D.C. 2022) 20, 23

Amirentezam v. Islamic Republic of Iran,
No. 19-CV-2066, 2023 WL 5724121
(D.D.C. Sept. 5, 2023).. 27

Apex Digit., Inc. v. Sears, Roebuck & Co.,
572 F.3d 440 (7th Cir. 2009) 11

Arbaugh v. Y&H Corp.,
546 U.S. 500 (2006) 11

Architectural Ingenieria Siglo XXI, LLC v. Dominican Republic, 788 F.3d 1329 (11th Cir. 2015) 22

Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989) 6

Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co., 581 U.S. 170 (2017) 3, 8, 14, 20, 21, 22, 23, 29, 30, 31, 32

Byrd v. Corporacion Forestal y Indus. de Olancho S.A., 182 F.3d 380 (5th Cir. 1999) 26

Cabiri v. Gov't of Republic of Ghana, 165 F.3d 193 (2d Cir. 1999)................................ 26

Cargill Int'l S.A. v. M/T Pavel Dybenko, 991 F.2d 1012 (2d Cir. 1993)........................ 26, 27

Comparelli v. Republica Bolivariana de Venezuela, 891 F.3d 1311 (11th Cir. 2018) 3, 7, 21, 22

de Csepel v. Republic of Hungary, 808 F. Supp. 2d 113 (D.D.C. 2011), *aff'd in part, rev'd in part*, 714 F.3d 591 (D.C. Cir. 2013)... 27

De Csepel v. Republic of Hungary, 859 F.3d 1094 (D.C. Cir. 2017)............................. 8

Ex parte Republic of Peru, 318 U.S. 578 (1943) 6

Fed. Republic of Germany v. Philipp, 141 S. Ct. 185 (2020) 10

Fed. Republic of Germany v. Philipp,
592 U.S. 169 (2021) 4, 8, 10, 13, 27, 29, 31, 32

France.com, Inc. v. French Republic,
992 F.3d 248 (4th Cir. 2021) 7

Freund v. Republic of France,
592 F. Supp. 2d 540 (S.D.N.Y. 2008) 19, 25

Freund v. Societe Nationale des Chemins de fer Francais,
391 F. App'x 939 (2d Cir. 2010)......... 18, 19, 25, 28

Ghebreyesus v. Fed. Democratic Republic of Ethiopia,
No. 22-CV-1717, 2023 WL 6392611
(D. Nev. Sept. 30, 2023)...................................... 22

Heller v. Republic of Hungary,
No. 21-CV-1739 (BAH), 2022 WL
2802351 (D.D.C. July 18, 2022) 13

Jesner v. Arab Bank, PLC,
138 S. Ct. 1386 (2018) 30

Kar v. Islamic Republic of Iran,
Nos. 19-CV-2070, 19-CV-2602, 2022
WL 4598671 (D.D.C. Sept. 30, 2022) 27

Keller v. Cent. Bank of Nigeria,
277 F.3d 811 (6th Cir. 2002) 26

Kumar v. Republic of Sudan,
No. 10-CV-171, 2019 WL 13251350
(E.D. Va. July 31, 2019) 22

Mohammad Hilmi Nassif & Partners v. Republic of Iraq,
No. 17-CV-02193, 2021 WL 6841848
(D.D.C. July 29, 2021) 27

Nat'l City Bank of N.Y. v. Republic of China,
348 U.S. 356 (1955) 30

Owens v. Republic of Sudan,
174 F. Supp. 3d 242 (D.D.C. 2016) 27

Owens v. Republic of Sudan,
864 F.3d 751 (D.C. Cir. 2017), *vacated on other grounds sub nom. Opati v. Republic of Sudan*, 140 S. Ct. 1601 (2020)... 27, 28

Pablo Star Ltd. v. Welsh Gov't,
961 F.3d 555 (2d Cir. 2020)................................. 25

Permanent Mission of India to the United Nations v. City of N.Y.,
551 U.S. 193 (2007) 6

Peterson v. Islamic Republic Of Iran,
627 F.3d 1117 (9th Cir. 2010) 28

Republic of Hungary v. Simon,
592 U.S. 207 (2021) 10, 15, 33

Phoenix Consulting, Inc. v. Republic of Angola,
216 F.3d 36 (D.C. Cir. 2000) 14

Precise Imports Corp. v. Kelly,
378 F.2d 1014 (2d Cir. 1967).............................. 28

Republic of Austria v. Altmann,
541 U.S. 677 (2004) 6

Rukoro v. Fed. Republic of Germany,
976 F.3d 218 (2d Cir. 2020) 2, 3, 4, 14, 17, 21, 23, 25, 28

S.K. Innovation, Inc. v. Finpol,
854 F. Supp. 2d 99 (D.D.C. 2012) 27

Saudi Arabia v. Nelson,
507 U.S. 349 (1993) 7

Schubarth v. Fed. Republic of Germany,
891 F.3d 392 (D.C. Cir. 2018) 7

Sheafen Kuo v. Gov't of Taiwan,
802 F. App'x 594 (2d Cir. 2020)........... 4, 18, 25, 28

Simon v. Republic of Hungary,
141 S. Ct. 187 (2020) 2, 10

Simon v. Republic of Hungary,
277 F. Supp. 3d 42 (D.D.C. 2017) 10

Simon v. Republic of Hungary,
37 F. Supp. 3d 381 (D.D.C. 2014) 9, 33

Simon v. Republic of Hungary,
443 F. Supp. 3d 88 (D.D.C. 2020)
....10, 11, 12, 15, 18, 24

Simon v. Republic of Hungary,
579 F. Supp. 3d 91 (D.D.C. 2021)
....1, 5, 13, 20, 33

Simon v. Republic of Hungary,
77 F.4th 1077 (D.C. Cir. 2023)
.........2, 3, 4, 9, 13, 14, 16, 18, 23, 24, 26, 28, 29, 32

Simon v. Republic of Hungary,
812 F.3d 127 (D.C. Cir. 2016)
....9, 10, 11, 12, 13, 14, 17

Simon v. Republic of Hungary,
911 F.3d 1172 (D.C. Cir. 2018).................. 5, 10, 31

Sosa v. Alvarez-Machain,
542 U.S. 692 (2004) 30

St. Mary's Honor Ctr. v. Hicks,
509 U.S. 502 (1993) 28

Stalley ex rel. U.S. v. Orlando Reg'l Healthcare Sys., Inc.,
524 F.3d 1229 (11th Cir. 2008) 22

Texas Dep't of Cmty. Affs. v. Burdine,
450 U.S. 248 (1981) 28

Transam. S.S. Corp. v. Somali Democratic Republic,
767 F.2d 998 (D.C. Cir. 1985) 14, 24, 26

United States v. Lee,
106 U.S. 196 (1882) 6

Westfield v. Fed. Republic of Germany,
633 F.3d 409 (6th Cir. 2011) 26

Wye Oak Tech., Inc. v. Republic of Iraq,
24 F.4th 686 (D.C. Cir. 2022) 26

Zappia Middle E. Constr. Co. v. Emirate of Abu Dhabi,
215 F.3d 247 (2d Cir. 2000) 7, 8

Statutes

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1391(f)(4) 5, 29

28 U.S.C. §§ 1602-11 6

28 U.S.C. § 1604 7

28 U.S.C. § 1605(a) 2

28 U.S.C. § 1605(a)(2) 8

28 U.S.C. § 1605(a)(3) 7, 9, 11, 16, 19, 32

Other Authorities

Fed. R. Civ. P. 12(b)(1) 11, 22

Brief for *Amicus Curiae* the United States, *Simon v. Republic of Hungary*, 911 F.3d 1172 (D.C. Cir. 2018) (No. 17-7146), 2018 WL 2461996 .... 4, 5, 31

Brief for the United States as *Amicus Curiae*, *Fed. Republic of Germany v. Philipp*, 592 U.S. 169 (2021) (Nos. 19-351, 19-520), 2020 WL 2840336 32

PETITION FOR A WRIT OF CERTIORARI

The Republic of Hungary and Magyar Államvasutak Zrt. ("MÁV") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion below (Pet. App. 1a) is published at 77 F.4th 1077. The district court's opinion (Pet. App. 93a) is published at 579 F. Supp. 3d 91.

JURISDICTION

The D.C. Circuit entered judgment on August 8, 2023 and denied rehearing on October 12, 2023. The Chief Justice extended the time within which to file a petition for a writ of certiorari to and including February 9, 2024. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The expropriation exception of the FSIA 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), (a)(3).

INTRODUCTION

This Court previously granted certiorari in this case to resolve a circuit split concerning the expropriation exception of the Foreign Sovereign Immunities Act ("FSIA"). *Simon v. Republic of Hungary*, 141 S. Ct. 187 (2020). On remand, the D.C. Circuit created new circuit splits regarding the same provision, while recognizing that the case presents issues that are "both important and likely to recur in future FSIA cases." *Compare Simon v. Republic of Hungary*, 77 F.4th 1077, 1102, 1104 (D.C. Cir. 2023) ("*Simon III*"), *with Rukoro v. Fed. Republic of Germany*, 976 F.3d 218, 225-26 (2d Cir. 2020). The Second Circuit has correctly held that the expropriation exception requires a plaintiff to "trace the proceeds a sovereign received from expropriated property to funds spent on property present in the United States." *Rukoro*, 976 F.3d at 225-26. Plaintiffs cannot rely on conclusory allegations that property converted into currency and commingled with other funds in a sovereign's treasury was used for commercial activity in the United States decades later. *See id.* The D.C. Circuit reached the opposite

conclusion, holding that plaintiffs need not "produce evidence tracing property in the United States or possessed by MÁV to property expropriated from them." *Simon III*, 77 F.4th at 1118. Under the D.C. Circuit's rule, the type of allegations that the Second Circuit rejected as conclusory suffice.

The D.C. Circuit's expansive view of the expropriation exception flows from two underlying circuit splits regarding the proper analytical framework in FSIA cases. The Second and Eleventh Circuits have interpreted this Court's decision in *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 581 U.S. 170 (2017), to require a "valid claim" or "valid argument" that the expropriation exception applies at the pleading stage. *Rukoro*, 976 F.3d at 225; *Comparelli v. Republica Bolivariana de Venezuela*, 891 F.3d 1311, 1326 (11th Cir. 2018). The D.C. Circuit held to the contrary, ruling that "nothing in *Helmerich* affects the familiar standard we have consistently applied to review the plaintiffs' factual allegations in FSIA cases." *Simon III*, 77 F.4th at 1104. It recognized a direct circuit split on this issue, stating "*Rukoro* does not bind us, and to the extent it is inconsistent with our approach, we believe it is incorrect." *Id.*

Along with this lowered pleading standard, the D.C. Circuit also imposes a burden on sovereign defendants to "affirmatively establish by a preponderance of the evidence that their current resources do *not* trace back to the property originally expropriated." *Simon III*, 77 F.4th at 1119. The Second Circuit disagrees on this front too. It has recognized that plaintiffs bear the burden of production in tracing proceeds, not sovereign defendants. *See Rukoro*, 976 F.3d at 224-25; *see also*

Sheafen Kuo v. Gov't of Taiwan, 802 F. App'x 594, 597 (2d Cir. 2020).

The D.C. Circuit's departure from other circuits on these issues is a matter of national, indeed international, importance. The FSIA establishes a presumption of immunity for foreign sovereigns, subject to certain narrowly drawn exceptions. Under the expropriation exception, plaintiffs may assert claims concerning rights in property taken in violation of international law, but only if they establish that the property, or its proceeds, have a commercial nexus with the United States. The commercial nexus requirement provides a critical limitation, necessary to avoid "transforming the expropriation exception into an all-purpose jurisdictional hook for adjudicating human rights violations." *Fed. Republic of Germany v. Philipp*, 592 U.S. 169, 183 (2021).

Under the D.C. Circuit's approach, however, a plaintiff can overcome sovereign immunity merely by alleging that the proceeds of expropriated property were commingled with government assets at some distant point in the past and used for commercial activity in the United States. Although the D.C. Circuit recognized that "proceeds ordinarily become untraceable to any specific future property or transaction" under these circumstances, it nonetheless held that sovereign defendants bear the burden of disproving a commercial nexus with the United States. *Simon III*, 77 F.4th at 1118, 1119. Accordingly, in direct contravention of the Second Circuit's decision in *Rukoro*, 976 F.3d at 225-26, the absence of tracing evidence defeats a foreign nation's sovereign immunity. As the United States explained in an *amicus* brief earlier in this case, this commingling theory "expand[s] the expropriation exception far beyond its intended limits." Brief for

Amicus Curiae the United States at 23, *Simon v. Republic of Hungary*, 911 F.3d 1172 (D.C. Cir. 2018) (No. 17-7146), 2018 WL 2461996, at *23.

By permitting plaintiffs to easily overcome foreign sovereign immunity, the D.C. Circuit's approach threatens to disrupt key foreign relations. The class-wide damages Plaintiffs seek from Hungary are "so large as to be economically destabilizing." *Simon v. Republic of Hungary*, 579 F. Supp. 3d 91, 99 n.2 (D.D.C. 2021). Permitting plaintiffs, most of whom are foreign nationals, to hale foreign sovereigns into domestic courts with conclusory allegations unsupported by evidence is inconsistent with the restrictive view of foreign sovereign immunity long-held by the United States and other nations and codified in the FSIA. And it threatens the United States' interest in receiving reciprocal treatment from other nations when it asserts immunity in foreign courts. Such an approach would permit claims against the United States to proceed in foreign courts without any proof of a connection to the forum state.

Worse still, because any action against a foreign sovereigns may be brought in the District of Columbia, 28 U.S.C. § 1391(f)(4), plaintiffs from around the world can take advantage of *Simon III* to litigate historical grievances in domestic courts with no relationship to the dispute.

This Court should grant certiorari and reverse the judgment of the D.C. Circuit.

STATEMENT

A. Background

For most of this nation's history, foreign sovereign immunity was a matter of executive

discretion. Cases concerning "the dignity and rights of a friendly sovereign state" were "normally presented and settled in the course of the conduct of foreign affairs by the President and by the Department of State." *Ex parte Republic of Peru*, 318 U.S. 578, 586-87 (1943). "In such cases the judicial department of this government follow[ed] the action of the political branch, and w[ould] not embarrass the latter by assuming an antagonistic jurisdiction." *United States v. Lee*, 106 U.S. 196, 209 (1882).

"Until 1952 the Executive Branch followed a policy of requesting immunity in all actions against friendly sovereigns." *Republic of Austria v. Altmann*, 541 U.S. 677, 689 (2004). That year, however, the Department of State issued the "Tate Letter," explaining that the United States had adopted the "restrictive theory" of sovereign immunity 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 690 (quoting Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State, to Acting U.S. Attorney General Philip B. Perlman (May 19, 1952), *reprinted in* 26 Dep't State Bull. 984-85 (1952)).

In 1976, Congress enacted the FSIA, 28 U.S.C. §§ 1602-11, which now "provides the sole basis for obtaining jurisdiction over a foreign state in federal court." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989). "In enacting the FSIA, Congress "intended to codify the restrictive theory's limitation of immunity to sovereign acts." *Permanent Mission of India to the United Nations v. City of N.Y.*, 551 U.S. 193, 199 (2007). The FSIA provides a blanket grant of immunity: "a foreign state shall be immune from the jurisdiction of the courts of

the United States and of the States," subject to specific statutory exceptions. 28 U.S.C. § 1604. "Under the Act, a foreign state is presumptively immune from the jurisdiction of United States courts; unless a specified exception applies, a federal court lacks subject-matter jurisdiction over a claim against a foreign state." *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993).

This case concerns the expropriation exception, under which a defendant lacks immunity 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 thus requires proof of the following elements: "(1) rights in property are in issue; (2) that the property was 'taken'; (3) that the taking was in violation of international law; and (4) that one of the two nexus requirements is satisfied." *Zappia Middle E. Constr. Co. v. Emirate of Abu Dhabi*, 215 F.3d 247, 251 (2d Cir. 2000); *see also France.com, Inc. v. French Republic*, 992 F.3d 248, 254 (4th Cir. 2021); *Comparelli*, 891 F.3d at 1319; *Schubarth v. Fed. Republic of Germany*, 891 F.3d 392, 399 (D.C. Cir. 2018).

The commercial nexus requirement may be met by showing either that "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 is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity." *Zappia*, 215 F.3d at 251. "A foreign state loses its immunity if the claim against it satisfies the exception by way of the first clause of the commercial-activity nexus requirement; by contrast, an agency or instrumentality loses its immunity if the claim against it satisfies the exception by way of the second clause." *De Csepel v. Republic of Hungary*, 859 F.3d 1094, 1107 (D.C. Cir. 2017).

Consistent with the historical development of the foreign sovereign immunity doctrine, "[m]ost of the FSIA's exceptions, such as the exception for 'commercial activity carried on in the United States,' comport with the overarching framework of the restrictive theory." *Philipp*, 592 U.S. at 182-83 (quoting § 1605(a)(2)). The expropriation exception is an outlier in this regard, stretching the bounds of the restrictive theory "because it permits the exercise of jurisdiction over some public acts of expropriation." *Id.* Nonetheless, "the expropriation exception on its face emphasizes conformity with international law by requiring . . . a commercial connection with the United States." *Helmerich*, 581 U.S. at 181. And given this Court's admonition to "take seriously the Act's general effort to preserve a dichotomy between private and public acts," courts must be cautious not to "destroy that distinction." *Philipp*, 592 U.S. at 183.

B. Prior Procedural History

This case has been the subject of three opinions from the D.C. Circuit, and another from this Court. Much of that lengthy procedural history is not directly relevant to the questions presented and is summarized here only briefly. Plaintiffs filed this case in 2010—decades after the end of World War II—as a putative class action on behalf of a worldwide class seeking compensation for personal property seized during the Holocaust. *See Simon III*, 77 F.4th at 1091-92. Most of the named plaintiffs are foreign nationals. *See Simon v. Republic of Hungary*, 37 F. Supp. 3d 381, 385 (D.D.C. 2014). They allege that their property was seized by Hungary or MÁV (the Hungarian national railway) in 1944 when they were forcibly transported as part of the Nazi-led assault on the Jewish people. *Id.* at 386. Plaintiffs claim the proceeds of this property "were transferred to the Hungarian government treasury and co-mingled with other Hungarian government revenues." *Id.* at 387. Plaintiffs alleged that the District Court had jurisdiction under 28 U.S.C. § 1605(a)(3).

The district court initially dismissed under the FSIA's treaty exception, holding that the 1947 Treaty of Peace with Hungary provided an exclusive dispute-resolution process. *Id.* at 420. The D.C. Circuit reversed. *Simon v. Republic of Hungary*, 812 F.3d 127 (D.C. Cir. 2016) ("*Simon I*"). It held that the 1947 Treaty's process was not exclusive. *Id.* at 137. The D.C. Circuit further ruled that the expropriation exception did not incorporate the "domestic takings rule," under which a sovereign's taking of property from its own nationals falls outside the scope of international law. *Id.* at 144-45. And it concluded that plaintiffs' allegations of historical commingling of

proceeds permitted the plausible inference "that the defendants retain the property or proceeds thereof, absent a sufficiently convincing indication to the contrary." *Id.* at 147.

On remand, the district court again dismissed, this time based on prudential exhaustion and *forum non conveniens*. *See Simon v. Republic of Hungary*, 277 F. Supp. 3d 42, 67 (D.D.C. 2017). The D.C. Circuit again reversed. *Simon v. Republic of Hungary*, 911 F.3d 1172 (D.C. Cir. 2018) ("*Simon II*"). It held that the FSIA precludes operation of the prudential exhaustion doctrine and that the district court erred in weighing the various *forum non conveniens* factors. *Id.* at 1181-86.

This Court granted Hungary's petition for certiorari following *Simon II*. *Republic of Hungary v. Simon*, 141 S. Ct. 187 (2020). It also granted certiorari in a case raising similar issues regarding the expropriation exception. *Fed. Republic of Germany v. Philipp*, 141 S. Ct. 185 (2020). In *Philipp*, the Court resolved a circuit split by unanimously holding that the expropriation exception "refers to violations of the international law of expropriation and thereby incorporates the domestic takings rule." *Philipp*, 592 U.S. at 187. The Court vacated and remanded this case for further proceedings consistent with *Philipp*. *Republic of Hungary v. Simon*, 592 U.S. 207, 208 (2021).

C. This Appeal

While the case was pending before this Court, the district court resolved another motion to dismiss. *See Simon v. Republic of Hungary*, 443 F. Supp. 3d 88 (D.D.C. 2020). The court expressed concern "that the theory advanced by the plaintiffs" regarding

commingling of assets, which "was upheld in *Simon I*, arguably broadens the already expanded scope of the expropriation exception." *Id.* at 103 n.10. "*Simon I* broadened the scope of both the second prong of the expropriation exception—that property be taken 'in violation of international law'—and the third—that such property be 'present in the United States in connection with a commercial activity.'" *Id.* (quoting 28 U.S.C. § 1605(a)(3)). Nonetheless, the district court concluded, "*Simon I* is binding on this Court." *Id.*

Constrained by its reading of *Simon I*, the district court held that plaintiffs' allegations of historical commingling were sufficient "to raise a plausible inference that the defendants retain some portion of the expropriated property." *Id.* at 104. That alone was not enough to defeat the motion to dismiss, however, since Hungary and MÁV raised a "factual challenge" to the veracity of plaintiffs' jurisdictional allegations.[1] They submitted declarations from "three experienced scholars with knowledge of Hungarian state archival records related to the Holocaust." *Id.* at 104.

Dr. János Botos, who served as the academic secretary of the Holocaust Documentation Center and Memorial Collection Public Foundation in Budapest and director of the Budapest Holocaust Institute, explained that he led two research initiatives "in an

---

[1] "[I]f subject-matter jurisdiction turns on contested facts, the trial judge may be authorized to review the evidence and resolve the dispute on her own." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006). Accordingly, courts distinguish between "facial" Rule 12(b)(1) motions, which accept the allegations of a complaint as true but challenge jurisdiction in light of those allegations, and "factual" Rule 12(b)(1) motions, which contest the veracity of a pleading's allegations. *See, e.g.*, *Apex Digit., Inc. v. Sears, Roebuck & Co.*, 572 F.3d 440, 443-44 (7th Cir. 2009).

attempt to trace the property and proceeds of the property taken from Hungarian nationals during World War II." *Id.* at 105. Dr. Botos concluded "it is impossible for one to trace the current location or to identify who now has possession of the property identified in Plaintiffs' Second Amended Complaint as items allegedly having been taken during World War II by Hungarian state officials and MÁV employees or the proceeds thereof." *Id.* Dr. László Csösz, the chief archivist of the Statewide Archives of the Hungarian National Archives, also determined that "it is impossible for one to trace the current location or to identify who now has possession of the property identified in Plaintiffs' Second Amended Complaint as items allegedly having been taken during World War II by Hungarian state officials and MÁV employees or the proceeds thereof." *Id.* And Tamás Kovács, the deputy head of the Statewide Archives of the Hungarian National Archives, confirmed that he "considers it impossible to trace, using available archival records, ongoing possession of the plaintiffs' expropriated property." *Id.*

The district court held that "[t]hese declarations fail to meet the defendants' burden" because the D.C. Circuit required defendants to "'demonstrate[] conclusively that the value of the expropriated property is not traceable to their present day cash and other holdings.'" *Id.* (quoting *Simon I*, 812 F.3d at 147). Evidence regarding "the difficulty of tracing" proceeds, the court held, thus "hurts rather than helps the defendants, since the burden rests on the defendants to show that the expropriated property never reached Hungary's treasury or was otherwise disposed of in some other fashion." *Id.* The court thus denied the motion to dismiss.

Defendants appealed the district court's 2020 decision, but in light of this Court's remand following *Philipp*, the D.C. Circuit summarily returned the case to the district court. *See Simon*, 579 F. Supp. 3d at 109. On remand, the district court concluded that some of the original plaintiffs had "adequately alleged facts supporting reasonable inferences of Czechoslovakian nationality and a lack of Hungarian nationality, and the history of this litigation does not preclude them from asserting as much at this juncture." *Id.* at 115. As to those plaintiffs, the court denied defendants' motion to dismiss based on the expropriation exception. *Id.* It declined to revisit its prior ruling regarding the "commingling logic" it "derived from a holding in *Simon I*" regarding the possession of proceeds. *Id.* at 122 n.22.

The D.C. Circuit largely affirmed the district court's decisions, concluding that some of the remaining plaintiffs plausibly alleged Czechoslovakian nationality and permitting others an opportunity to amend to potentially strengthen their allegations on that issue. *Simon III*, 77 F.4th at 1088-89.[2] As to the expropriation exception, the D.C. Circuit concluded that the district court erred in failing to "go beyond the pleadings and resolve [the] disputed issues of fact" and remanded for fact-finding.

---

[2] Judge Randolph dissented in part, concluding that four of the plaintiffs "did not preserve a claim that they were nationals of a country other than Hungary when the takings occurred." *Simon*, 77 F.4th at 1126 (Randolph, J., dissenting).

In a separate action, the district court dismissed similar claims brought by other Hungarian nationals. *Heller v. Republic of Hungary*, No. 21-CV-1739 (BAH), 2022 WL 2802351, at *6 (D.D.C. July 18, 2022). The D.C. Circuit consolidated those appeals. *Simon III*, 77 F.4th at 1087. It affirmed the dismissal in *Heller*, *id.* at 1089, and those claims are not at issue here.

Id. at 1115 (quoting *Phoenix Consulting, Inc. v. Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000)). However, the D.C. Circuit affirmed the district court's rulings with respect to framework in assessing plaintiffs' allegations and Hungary and MÁV's burden.

Initially, the D.C. Circuit rejected the position that plaintiffs were obligated to make out a "valid claim" that the expropriation exception governs following this Court's decision in *Helmerich*. 581 U.S. at 174. It held that "nothing in *Helmerich* affects the familiar standard we have consistently applied to review the plaintiffs' factual allegations in FSIA cases like *Simon I*." *Simon III*, 77 F.4th at 1104; *see also id.* at 1118 (reiterating the court's conclusions regarding *Helmerich* as to the commercial nexus prong). Accordingly, it held that "[d]ismissal is warranted only if no plausible inferences can be drawn from the facts alleged that, if proven, would bring plaintiffs' claims within an exception to sovereign immunity under the FSIA." *Id.* at 1106.

The D.C. Circuit expressly recognized that it was creating a circuit split on this issue. It acknowledged that the Second Circuit read *Helmerich* as requiring plaintiffs "to make a valid argument" on the expropriation exception at the pleading stage. *Id.* at 1104 (quoting *Rukoro*, 976 F.3d at 225). But it held that "*Rukoro* does not bind us, and to the extent it is inconsistent with our approach, we believe it is incorrect." 77 F.4th at 1104.

As to the parties' burdens, the court ruled that "the 'burden of proof in establishing the inapplicability of [the FSIA's] exceptions is upon the party claiming immunity.'" *Id.* at 1116 (alteration in original) (quoting *Transam. S.S. Corp. v. Somali Democratic Republic*, 767 F.2d 998, 1002 (D.C. Cir.

1985)). It rejected the argument that Hungary and MÁV were "entitled to reversal because the *Simon* plaintiffs failed to produce evidence tracing property in the United States or possessed by MÁV to property expropriated from them during World War II." *Id.* at 1118 (internal quotation marks omitted). The court held "plaintiffs had no such burden here." *Id.*

The D.C. Circuit relied heavily on perceived policy considerations in reaching this conclusion. It stated that once property is sold or commingled, "proceeds ordinarily become untraceable to any specific future property or transaction" and thus a tracing requirement would "thwart most claims under the expropriation exception." *Id.* Based on these policy concerns, the court held that "plaintiffs need not produce evidence directly tracing the liquidated proceeds of their stolen property to funds retained by the defendants in order to survive the defendants' factual challenge to the court's jurisdiction under the FSIA's expropriation exception." *Id.* at 1119. Instead, "defendants who wish to disclaim property they seized and liquidated must at least affirmatively establish by a preponderance of the evidence that their current resources do *not* trace back to the property originally expropriated." *Id.*

The D.C. Circuit explicitly affirmed the district court's conclusion regarding the evidentiary burdens: "In keeping with the parties' respective burdens, evidence that 'merely confirm[s] the difficulty of tracing individual paths of exchange,' will—as the district court observed—'hurt[ ] rather than help[ ] the defendants' in that endeavor." *Id.* (alterations in original) (quoting *Simon*, 443 F. Supp. 3d at 105).

Hungary and MÁV now seek certiorari.

REASONS FOR GRANTING THE PETITION

I. This Court should grant certiorari to resolve important circuit splits regarding the FSIA's expropriation exception

A. The Circuits disagree on whether historical commingling satisfies the commercial nexus requirement

The decision below created circuit splits on three interrelated issues of national importance. First, the D.C. Circuit created a circuit split on a critical question regarding the substantive requirements of the expropriation exception. To satisfy the commercial nexus prong of that exception, the property at issue or its proceeds must be either present in the United States in connection with a sovereign's commercial activity, or controlled by an instrumentality of a sovereign that engages in commercial activity in the United States. 28 U.S.C. § 1605(a)(3). Thus, the exception requires proof regarding the present location of any proceeds.

The D.C. Circuit has recognized that, in the usual case, the proceeds of an allegedly unlawful taking will have been commingled with other governmental assets. In "virtually all claims involving liquidation," it noted, "proceeds ordinarily become untraceable." *Simon III*, 77 F.4th at 1118. Nonetheless, the D.C. Circuit held that "plaintiffs need not produce evidence directly tracing the liquidated proceeds of their stolen property to funds retained by the defendants in order to survive the defendants' factual challenge to the court's jurisdiction under the FSIA's expropriation exception." *Id.* at 1119. Instead, a plaintiff may move

forward with claims against a sovereign based on a historical commingling theory unless the defendant can "affirmatively establish by a preponderance of the evidence that their current resources do *not* trace back to the property originally expropriated." *Id.*

The Second Circuit has rejected the proposition that plaintiffs can satisfy the commercial nexus prong merely by asserting a "'reasonable presume[ption]' that comingled funds were used to buy the properties" present in the United States. *Rukoro*, 976 F.3d at 225 (alteration in original) (citation omitted). In *Rukoro*, plaintiffs sought redress for property seized by Germany from indigenous peoples in what is now Namibia. *Id.* at 222. The Second Circuit held that plaintiffs were required to "trace the proceeds a sovereign received from expropriated property to funds spent on property present in the United States" to meet the commercial nexus prong. *Id.* at 225-26. It expressly recognized that the D.C. Circuit in this case had "allowed plaintiff to proceed based on allegations that the sovereign 'liquidated the stolen property, mixed the resulting funds with their general revenues, and devoted the proceeds to funding various governmental and commercial operations.'" *Id.* at 225 (quoting *Simon I*, 812 F.3d at 147). But it concluded that commingling did "not suffice to make a valid argument that property converted into currency and comingled with other monies in Germany's general treasury account can be traced to the purchase of property in New York decades later." *Id.*

These two decisions present a clear circuit split. In both cases, the court was tasked with deciding whether the expropriation exception applies in the absence of evidence tracing the proceeds of seized items based on a commingling theory. The Second Circuit held that the sovereign defendant prevails in

the absence of such evidence even if a plaintiff contends proceeds were commingled with other property. *Id.* The D.C. Circuit held the exact opposite: if there is historical commingling, the absence of tracing evidence will "'hurt[ ] rather than help[ ] the defendants.'" *Simon III*, 77 F.4th at 1119 (quoting *Simon*, 443 F. Supp. 3d at 105).

Several other Second Circuit decisions have recognized the commonsense proposition that more than commingling is required to satisfy the commercial nexus prong. In *Kuo*, the Second Circuit held that the expropriation exception did not apply to claims regarding the taking of property by Taiwan even though the proceeds "became part of Taiwan's general revenue, which could be used for any legitimate purpose, including commercial activities in the United States." 802 F. App'x at 596 (internal quotation marks omitted). As the court explained, "the fact that Taiwan purchased and exported goods did not establish that property derived from the 2009 sale of [plaintiff's] property was located in the United States" or that "any of the properties owned by the defendants in the United States could be traced to the proceeds from [plaintiffs'] property." *Id.* at 597. Thus, in the absence of "facts sufficient to allow a court to determine that the proceeds of the 2009 sale were used in the United States, let alone used to buy specific property that remained in the United States," the defendant was entitled to foreign sovereign immunity. *Id.*

The Second Circuit reached a similar conclusion in *Freund v. Societe Nationale des Chemins de fer Francais*, 391 F. App'x 939 (2d Cir. 2010). That case also concerned alleged expropriations during World War II, with plaintiffs claiming that the French national railway "retained

and converted the [stolen] Property and its derivative profits into their own property" and "wrongfully concealed from the Plaintiffs information about the Property and the value and profits derived theref[rom]." *Id.* at 941 (alteration in original). The court held that the expropriation exception did not apply because plaintiffs' allegations failed to suggest that proceeds remained in the possession of the defendant rather than other "various contingencies—loss, destruction, [or] sale." *Id.* As the district court there aptly explained, an absence of evidence regarding the fate of proceeds "provides no support for an inference that the expropriated property, or property derived therefrom, is 'owned or operated' by" defendant but instead "serves to underscore Plaintiffs' failure to offer evidence, or even to allege, that the property taken by [defendant] is in fact presently 'owned or operated' by [defendant] in any way." *Freund v. Republic of France*, 592 F. Supp. 2d 540, 560 (S.D.N.Y. 2008) (quoting 28 U.S.C. § 1605(a)(3)).

The Ninth Circuit agrees with the Second. *See Alperin v. Vatican Bank*, 365 F. App'x 74 (9th Cir. 2010). In *Alperin*, plaintiffs advanced claims based on World War II-era expropriations by the Independent State of Croatia, alleging that proceeds of seized items were used to establish a gold trading program that operated in the United States. *Alperin v. Vatican Bank*, No. C-99-04941, 2007 WL 4570674, at *1 (N.D. Cal. Dec. 27, 2007). The Ninth Circuit held the expropriation exception did not apply because allegations that "property was *in the past* laundered, converted, and retained" does not permit an inference "as to the *current* location of that property or property exchanged for that property." 365 F. App'x at 76.

But in the D.C. Circuit, plaintiffs can skip the effort to trace the expropriated property to the

sovereign defendant's commercial activities altogether, simply by invoking the theory that the defendant "commingled the proceeds of" the property "with its general budget revenues and then used those funds for 'commercial activities' in the United States." *Ambar v. Fed. Republic of Germany*, 596 F. Supp. 3d 76, 88 (D.D.C. 2022) (quoting *Simon*, 579 F. Supp. 3d at 108).[3] Under *Simon III*, plaintiffs can thus in effect pierce sovereign immunity and subject sovereign defendants to suit in domestic courts without any showing that proceeds have a commercial nexus with the United States.

B. The D.C. Circuit expressly recognized it created a split with the Second regarding the pleading standard for the FSIA's exceptions

The foregoing substantive circuit split is intertwined with two related disagreements regarding the appropriate framework for assessing pleadings when the expropriation exception is at issue. The first concerns the allegations required at the pleading stage and stems from the circuit courts' contrary understandings of this Court's decision in *Helmerich*. In *Helmerich*, this Court held that "the expropriation exception grants jurisdiction only where

---

[3] In a pre-*Helmerich* decision, the Seventh Circuit endorsed a similar view. *See Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 689 (7th Cir. 2012) (holding that plaintiffs' allegations regarding the proceeds of expropriated property "are not so implausible as to permit resolution on the pleadings alone" and noting that "defendants have offered no case or fact that demonstrates conclusively that the value of the expropriated property is not traceable to their present day cash and other holdings").

there is a valid claim that 'property' has been 'taken in violation of international law.' A nonfrivolous argument to that effect is insufficient." 581 U.S. at 178 (citation omitted). Thus, when facts are undisputed, "those facts bring the case within the scope of the expropriation exception only if they do show (and not just arguably show) a taking of property in violation of international law." *Id.* at 187. "If a decision about the matter requires resolution of factual disputes, the court will have to resolve those disputes, but it should do so as near to the outset of the case as is reasonably possible." *Id.*

The Second Circuit held in *Rukoro* that this standard governs all elements of the expropriation exception, including the commercial nexus requirement. 976 F.3d at 225. In rejecting application of the expropriation exception, it noted that the D.C. Circuit previously reached a contrary result, but explained that *Simon II*, "predates *Helmerich*, calling into question its use of a plausibility standard." *Id.* The Second Circuit held that a plaintiff cannot overcome sovereign immunity by resting on mere allegations of commingling: "Such allegations may satisfy a plausibility standard, but not a valid argument standard." *Id.* Pursuant to *Helmerich*, such "allegations [are] insufficient to trace the proceeds from property expropriated more than a century ago to present-day property owned by Germany in New York." *Id.* at 222.

The Eleventh Circuit has similarly held that "*Helmerich* heightened the proof required of [plaintiffs] to establish jurisdiction under the expropriation exception of the FSIA." *Comparelli*, 891 F.3d at 1328. It held that the *Helmerich* "standard notably departs from the usual pleading standards" and directs that "challenges to jurisdiction under the

expropriation exception, like other factual challenges to subject-matter jurisdiction under Rule 12(b)(1), may be resolved by looking to 'material extrinsic from the pleadings, such as affidavits or testimony.'" *Id.* at 1319-20 (quoting *Stalley ex rel. U.S. v. Orlando Reg'l Healthcare Sys., Inc.*, 524 F.3d 1229, 1233 (11th Cir. 2008)). Accordingly, to determine "whether the nexus requirement is, in fact, established[,] mere allegations are no longer sufficient." *Id.* at 1326 (citing *Helmerich*, 581 U.S. at 174).

Other district court decisions similarly recognize that *Helmerich* raised the bar that a plaintiff must clear to move beyond the pleading stage. *See Ghebreyesus v. Fed. Democratic Republic of Ethiopia*, No. 22-CV-1717, 2023 WL 6392611, at *19 (D. Nev. Sept. 30, 2023) ("In *Helmerich & Payne*, the Supreme Court established a heightened jurisdictional standard for pleading that a foreign sovereign's actions fall under the expropriation exception."); *Kumar v. Republic of Sudan*, No. 10-CV-171, 2019 WL 13251350, at *11 (E.D. Va. July 31, 2019) (" In *Helmerich*, the Supreme Court held that, before assuming jurisdiction in a FSIA case, the trial court must find that all factual prerequisites to the relevant exception to sovereign immunity are actually satisfied."). This heightened standard makes good sense when situated against the general background rule that waivers of sovereign immunity—including in the FSIA—are to be "narrowly construed in favor of the sovereign" and "not enlarged beyond what the language requires." *Architectural Ingenieria Siglo XXI, LLC v. Dominican Republic*, 788 F.3d 1329, 1338 (11th Cir. 2015).

But the D.C. Circuit reached the opposite conclusion in this case, holding "nothing in *Helmerich* affects the familiar standard we have consistently

applied to review the plaintiffs' factual allegations in FSIA cases." *Simon III*, 77 F.4th at 1104; *see also Ambar*, 596 F. Supp. 3d at 89 (holding the argument that *Helmerich* "created a 'heightened standard' for pleading the 'commercial activity' prong of the FSIA's 'expropriation exception' is misplaced"). Under the pre-*Helmerich* standard, "[d]ismissal is warranted only if no plausible inferences can be drawn from the facts alleged that, if proven, would bring plaintiffs' claims within an exception to sovereign immunity under the FSIA." *Simon III*, 77 F.4th at 1106. In so holding, the D.C. Circuit expressly disagreed with the Second. It ruled that "*Rukoro* erroneously implies that *Helmerich*'s requirement of a legally valid (not just nonfrivolous) legal theory equates to a more demanding standard of pleading" and concluded "*Rukoro* does not bind us, and to the extent it is inconsistent with our approach, we believe it is incorrect." *Simon III*, 77 F.4th at 1104.

Accordingly, the D.C. Circuit created and acknowledged a circuit split on the showing necessary to defeat a motion to dismiss: in the Second and Eleventh Circuits, a plaintiff must make out a valid argument showing jurisdiction, while in the D.C. Circuit, a plaintiff can rest on plausible allegations. And while this split arose in the context of the FSIA's expropriation exception, it extends far more broadly. The reasoning of *Helmerich*, and the lower courts' dueling interpretations of it, apply to any dispute over jurisdiction under the FSIA. This Court should resolve this acknowledged circuit split.

C. The D.C. Circuit created a split on the parties' respective burdens regarding the commercial nexus requirement

Finally, after embracing the historical commingling theory and concluding that sovereign immunity may be defeated under a plausibility standard rather than a valid claim standard, the D.C. Circuit further compounded its error by flipping the burden of production. It ruled that "the 'burden of proof in establishing the inapplicability of [the FSIA's] exceptions is upon the party claiming immunity.'" *Id.* at 1116 (quoting *Transam. S.S. Corp.*, 767 F.2d at 1002). In response to Hungary and MÁV's argument that plaintiffs "failed to 'produce evidence tracing property in the United States or possessed by MÁV to property expropriated from them during World War II,'" the D.C. Circuit held that "plaintiffs had no such burden." *Id.* at 1118 (citation omitted).

Instead, the D.C. Circuit created a third circuit split by holding a sovereign defendant bears the burden of proving a negative: "defendants who wish to disclaim property they seized and liquidated must at least affirmatively establish by a preponderance of the evidence that their current resources do *not* trace back to the property originally expropriated." *Simon III*, 77 F.4th at 1119. And the court made clear that the absence of evidence on this point would inure to the befit of the plaintiffs: "[i]n keeping with the parties' respective burdens, evidence that 'merely confirm[s] the difficulty of tracing individual paths of exchange,' will—as the district court observed—'hurt[ ] rather than help[ ] the defendants' in that endeavor." *Id.* (quoting *Simon*, 443 F. Supp. 3d at 105).

This allocation of the burden is directly contrary to the rule of decision in the Second Circuit.

In *Rukoro*, that court explained: "'A defendant seeking sovereign immunity bears the burden of establishing a prima facie case that it is a foreign sovereign.' The burden next shifts to Plaintiffs to demonstrate a FSIA exception applies." 976 F.3d at 224 (quoting *Pablo Star Ltd. v. Welsh Gov't*, 961 F.3d 555, 559-60 (2d Cir. 2020)) (citations omitted). Although the plaintiff bears the "burden of production" as to the exception, the ultimate burden of persuasion remains with the defendant. *Id.*; *see also Pablo Star Ltd.*, 961 F.3d at 560 ("In other words, the ultimate burden of persuasion remains on the party seeking sovereign immunity.").

In *Kuo*, the Second Circuit held that plaintiffs were required to satisfy the "requirement that the allegedly taken property, or the proceeds from its sale, were present in the United States in connection with commercial activity" but "failed to meet this burden." 802 F. App'x at 597. Because they "offered no evidence" showing that properties in the United States "were specifically purchased using proceeds from the sale of [plaintiffs'] home," the commercial nexus prong was not met. *Id.*

Similarly, in *Freund*, the district court rejected plaintiffs' argument that an absence of tracing evidence aided them because "[p]laintiffs bear the burden of demonstrating that SNCF is *not* entitled to sovereign immunity" and "the absence of any such reference in [a report regarding the expropriated property] serves to underscore [p]laintiffs' failure to offer evidence" on the commercial nexus prong. 592 F. Supp. 2d at 560. The plaintiffs bore the "burden of going forward with evidence," the court explained, and thus "the absence of such evidence does not permit the Court to draw an inference in [p]laintiffs' favor." *Id.*

at 559, 561 (quoting *Cabiri v. Gov't of Republic of Ghana*, 165 F.3d 193, 196 (2d Cir. 1999)).

This circuit split reflects broader confusion among the lower courts regarding the FSIA's burdens. Numerous decisions have described a burden-shifting approach: "Once the defendant presents a prima facie case that it is a foreign sovereign, the plaintiff has the burden of going forward with evidence showing that, under exceptions to the FSIA, immunity should not be granted, although the ultimate burden of persuasion remains with the alleged foreign sovereign." *Cargill Int'l S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1016 (2d Cir. 1993) (citation omitted); *see also Keller v. Cent. Bank of Nigeria*, 277 F.3d 811, 815 (6th Cir. 2002), *abrogated on other grounds by Samantar v. Yousuf*, 560 U.S. 305 (2010); *Byrd v. Corporacion Forestal y Indus. de Olancho S.A.*, 182 F.3d 380, 388 (5th Cir. 1999), *abrogated on other grounds by Samantar*, 560 U.S. 305. Even the D.C. Circuit has held that some form of burden-shifting framework is "well established." *Wye Oak Tech., Inc. v. Republic of Iraq*, 24 F.4th 686, 696 (D.C. Cir. 2022). But courts have summarized the burden in opposite terms. *Compare Simon III*, 77 F.4th at 1116 (stating "the 'burden of proof in establishing the inapplicability of [the FSIA's] exceptions is upon the party claiming immunity") (alteration in original) (quoting *Transam. S.S. Corp.*, 767 F.2d at 1002), *with Westfield v. Fed. Republic of Germany*, 633 F.3d 409, 413 (6th Cir. 2011) ("The plaintiff has the burden of proving that one of the statutorily defined exceptions applies and the court has jurisdiction.").

This confusion stems from the interaction of the plaintiff's burden of production and the sovereign defendant's burden of persuasion. Once a defendant establishes that it is a foreign sovereign, the FSIA

provides "a baseline presumption of immunity from suit," *Philipp*, 592 U.S. at 176, shifting the burden of production to the plaintiff, *see Cargill Int'l S.A.*, 991 F.2d at 1016. The D.C. Circuit has expressly held that this burden of production is "rather modest." *Owens v. Republic of Sudan*, 864 F.3d 751, 784 (D.C. Cir. 2017), *vacated on other grounds sub nom. Opati v. Republic of Sudan*, 140 S. Ct. 1601 (2020). The decision affirmed in *Owens* stressed that "the bar is relatively low" and held that "even a meager showing by the plaintiff will suffice." *Owens v. Republic of Sudan*, 174 F. Supp. 3d 242, 276 (D.D.C. 2016).

Taking their lead from *Owens*, other decisions from the District Court for the District of Columbia similarly hold that the plaintiff's burden of production is minimal. *See, e.g.*, *Amirentezam v. Islamic Republic of Iran*, No. 19-CV-2066, 2023 WL 5724121, at *13 (D.D.C. Sept. 5, 2023); *Alinejad v. Islamic Republic of Iran*, No. 19-CV-3599, 2023 WL 4684929, at *11 (D.D.C. July 6, 2023); *Kar v. Islamic Republic of Iran*, Nos. 19-CV-2070, 19-CV-2602, 2022 WL 4598671, at *4 (D.D.C. Sept. 30, 2022); *Mohammad Hilmi Nassif & Partners v. Republic of Iraq*, No. 17-CV-02193, 2021 WL 6841848, at *8 (D.D.C. July 29, 2021). Still others have indicated that a plaintiff's burden is merely to produce "at least some facts." *Agudas Chasidei Chabad of U.S. v. Russian Fed'n*, 466 F. Supp. 2d 6, 15 (D.D.C. 2006), *aff'd in part, vacated in part, rev'd in part*, 528 F.3d 934 (D.C. Cir. 2008); *see also de Csepel v. Republic of Hungary*, 808 F. Supp. 2d 113, 127 (D.D.C. 2011), *aff'd in part, rev'd in part*, 714 F.3d 591 (D.C. Cir. 2013); *S.K. Innovation, Inc. v. Finpol*, 854 F. Supp. 2d 99, 107-08 (D.D.C. 2012).

But the evidence adduced by the party bearing the burden of production "must be legally sufficient to

justify a judgment." *Texas Dep't of Cmty. Affs. v. Burdine*, 450 U.S. 248, 255 (1981); *see also Precise Imports Corp. v. Kelly*, 378 F.2d 1014, 1018 n.4 (2d Cir. 1967) (holding "the plaintiff should bear the initial burden of producing evidence sufficient to justify a judgment in his favor"). In other words, the party with the burden of production must submit evidence "which, if believed by the trier of fact, would support a finding" of the fact in issue. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993) (emphasis omitted). The Second Circuit correctly recognized that the burden of production carries real force in *Rukoro*, *Kuo*, and *Freund*. And the Ninth Circuit has similarly held that the burden-shifting approach "puts most of the weight on the plaintiff." *Peterson v. Islamic Republic Of Iran*, 627 F.3d 1117, 1125 (9th Cir. 2010).

Under the appropriate burden-shifting framework, a plaintiff cannot escape the defense of foreign sovereign immunity by making a "rather modest" showing, as the D.C. Circuit has expressly held. *Owens*, 864 F.3d at 784. And under no circumstances is a sovereign defendant obligated to produce evidence to "affirmatively establish" that the commercial nexus prong is inapplicable. *Simon III*, 77 F.4th at 1119. This Court should grant certiorari to resolve this circuit split and clarify the parties' respective burdens.

D. Resolving these circuit splits is particularly important because the D.C. Circuit is the primary venue for FSIA litigation

A ruling from this Court is needed to settle the foregoing disagreements among the circuits and

clarify the appropriate framework for addressing the expropriation exception and the applicability of the FSIA. "And clarity is doubly important here where foreign nations and foreign lawyers must understand our law." *Helmerich*, 581 U.S. at 183.

Resolving these circuit splits is a matter of exceptional importance given the D.C. Circuit's central role in deciding FSIA cases. Because venue over a foreign state is always proper in the District of Columbia, *see* 28 U.S.C. § 1391(f)(4), plaintiffs can always choose to file suit there to take advantage of the D.C. Circuit's expansive view of the expropriation exception. Indeed, this Court previously described the district courts in the D.C. and Second Circuits as "the principal district courts in which these cases are brought." *Helmerich*, 581 U.S. at 186.

Further, the commingling issue is likely to arise regularly in FSIA cases. As the D.C. Circuit recognized, "proceeds ordinarily become untraceable to any specific future property or transaction" in cases concerning historical expropriation claims. *Simon III*, 77 F.4th at 1118. The commingling logic endorsed in *Simon III* offers a ready playbook for plaintiffs from around the world to evade the commercial nexus requirement and "subject all manner of sovereign public acts to judicial scrutiny under the FSIA by transforming the expropriation exception into an all-purpose jurisdictional hook for adjudicating human rights violations." *Philipp*, 592 U.S. at 183.

II. The scope of the expropriation exception is a matter of national, and international, importance

While a direct circuit split and confusion among the lower courts are sufficient bases to grant

certiorari, a third reason strongly militates in favor of this Court's review. The FSIA is no ordinary statute setting forth the rights and responsibilities of private parties; rather, the FSIA heavily impacts the United States' relationship with foreign nations. Misapplication of the expropriation exception threatens friction in foreign affairs and will lead to similar suits in foreign nations against the United States.

This Court has frequently explained that "[t]he political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns." *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1403 (2018); *see also Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004) (holding courts must be "particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs"). These concerns are highly salient in the context of foreign sovereign immunity because of the United States' "reciprocal self-interest" in that doctrine. *Nat'l City Bank of N.Y. v. Republic of China*, 348 U.S. 356, 362 (1955). Granting sovereign immunity to foreign nations "dovetails with our own interest in receiving similar treatment." *Helmerich*, 581 U.S. at 183.

It is unsurprising, then, that the United States counseled the D.C. Circuit against adopting the commingling theory. In an *amicus curiae* brief submitted at the request of the court prior to *Simon II*, the United States explained:

> [D]eeming allegations that the Republic of Hungary seized and liquidated property abroad and commingled it with general revenues in its treasury abroad many decades ago to be sufficient to treat

> any state-owned property in the United States as "exchanged" for expropriated property *would expand the expropriation exception far beyond its intended limits* . . . .
>
> Similar concerns are raised by application of a rationale that allegations that a foreign state agency or instrumentality has historically commingled the proceeds of seized and liquidated assets among its assets are sufficient to establish jurisdiction over the agency or instrumentality if it does unrelated business in the United States.

Simon, 2018 WL 2461996, at *23-24 (emphasis added) (Brief for *Amicus Curiae* the United States).[4]

Adopting an expansive interpretation of the expropriation exception "would 'affron[t]' other nations, producing friction in our relations with those nations and leading some to reciprocate by granting their courts permission to embroil the United States in 'expensive and difficult litigation, based on legally insufficient assertions that sovereign immunity should be vitiated.'" *Helmerich*, 581 U.S. at 183 (alteration in original) (quoting Brief for United States as *Amicus Curiae* 21-22). Although the expropriation exception is "unique" in permitting suits against sovereign nations for some public acts, courts must "take seriously the Act's general effort to preserve a dichotomy between private and public acts" embodied by the restrictive view of foreign sovereign immunity. *Philipp*, 592 U.S. at 183.

---

[4] This Court may, of course, call for the view of the Solicitor General regarding this petition for certiorari.

The commercial nexus requirement provides that backstop. It demands "a commercial connection with the United States" for all cases brought under the expropriation exception. *Helmerich*, 581 U.S. at 181. But the D.C. Circuit's ruling in *Simon III* effectively reads the most critical part of that requirement out of the statute. In the D.C. Circuit, a plaintiff need not adduce evidence sufficient to demonstrate that the proceeds of expropriated property are "present in the United States in connection with a commercial activity" or "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 *Simon III* Court squarely held that "plaintiffs had no such burden." *Simon III*, 77 F.4th at 1118. Instead, where commercial activity is present, a plaintiff need only make a conclusory allegation that the proceeds of seized assets were commingled with other funds sometime in the past, and a sovereign nation loses its immunity from suit.

Curtailing that overly expansive view of the expropriation exception is necessary to avoid creating serious tension in foreign affairs. As the United States urged in its *amicus* brief to this Court in *Phillip*, "uncertainty regarding the scope of the [expropriation] exception warrants this Court's intervention . . . because of the foreign policy implications of" a broad reading. Brief for the United States as *Amicus Curiae* at 12, *Philipp*, 592 U.S. 169 (Nos. 19-351, 19-520), 2020 WL 2840336, at *12. The United States explained that it "has urged foreign partners to establish appropriate redress and compensation mechanisms for Holocaust victims" and "[t]he exercise of jurisdiction by U.S. courts in some

such cases may undermine the ability of the United States to advance its foreign-policy objectives." *Id.* at *21.

In this case, plaintiffs, most of whom are foreign nationals, *Simon*, 37 F. Supp. 3d at 385, have asserted claims against Hungary, a member of the European Union and a NATO ally, seeking class-wide damages that could be "so large as to be economically destabilizing." *Simon*, 579 F. Supp. 3d at 99 n.2. In addressing analogous claims previously asserted by a different set of plaintiffs, the Seventh Circuit explained the obvious foreign affairs tension such cases present:

> The sum of damages sought by plaintiffs would amount to nearly 40 percent of Hungary's annual gross domestic product in 2011. Divided among Hungary's current population of 10 million people, that is more than $7500 per person. We should consider how the United States would react if a foreign court ordered the U.S. Treasury or the Federal Reserve Bank to pay a group of plaintiffs 40 percent of U.S. annual gross domestic product, which would be roughly $6 trillion, or $20,000 for every resident in the United States. And consider further the reaction if such an order were based on events that happened generations ago in the United States itself, without any effort to secure just compensation through U.S. courts. If U.S. courts are ready to exercise jurisdiction to right wrongs all over the world, including those of past

> generations, we should not complain if other countries' courts decide to do the same.

Abelesz, 692 F.3d at 682.

The D.C. Circuit's approach permits plaintiffs to evade foreign sovereign immunity merely by alleging that funds were historically commingled. Thus, in the absence of any supporting evidence, foreign nations can be haled into domestic courts to face trial for decades-old conduct that occurred in their own jurisdictions. Absent intervention by this Court, *Simon III* will serve as a beacon for plaintiffs around the world to litigate all manner of historical grievances in domestic courts, and needlessly entangle the United States in disputes in which it has no legitimate connection. That is not the standard embodied by the restrictive view of foreign sovereign immunity and codified by the FSIA, nor is it a standard consistent with the national interests of the United States.

CONCLUSION

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

Respectfully submitted,

Joshua Glasgow
Counsel of Record
Christopher D. Barraza
John G. Schmidt Jr.
Phillips Lytle LLP
620 Eighth Avenue
38th Floor
New York, New York 10018
(212) 759-4888
jglasgow@phillipslytle.com
cbarraza@phillipslytle.com
jschmidt@phillipslytle.com