No. 17-1165

In the Supreme Court of the United States

DAVID L. DE CSEPEL, ET AL., PETITIONERS

v.

REPUBLIC OF HUNGARY, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a foreign state is subject to jurisdiction under the expropriation exception of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1605(a)(3), based not on any connection between the expropriated property and the foreign state's own commercial activities in the United States, but instead on a connection to the U.S. commercial activities of an agency or instrumentality of the foreign state.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. This case arises from the Holocaust-era taking of artworks collected by Baron Mór Lipót Herzog, a Hungarian Jewish art collector who amassed over 2000 paintings and other artworks (the "Collection"). Pet. App. 2a. The Collection was "'one of Europe's great private collections of art,'" and "included works by renowned artists such as El Greco, Diego Velázquez, Pierre-Auguste Renoir, and Claude Monet." *Ibid.* (citation omitted).

By the time of the Second World War, Baron Herzog had died and his children had inherited the Collection.

Pet. App. 2a. Hungary then aligned itself with the Axis Powers, and Jews in Hungary faced horrific persecution, including deportation to German concentration camps and confiscation of their property and valuables. *Id.* at 2a-3a. Baron Herzog's children tried to hide the Collection, but the Hungarian government and its Nazi allies discovered and confiscated many of the artworks. *Id.* at 3a. One of Baron Herzog's sons was killed during the war, and much of the rest of the family fled Hungary. *Id.* at 3a-4a.

After the war, the heirs attempted to reclaim the Collection. Pet. App. 4a, 48a-50a. This suit is the most recent of those attempts: In 2010, petitioners sued in the U.S. District Court for the District of Columbia. *Id.* at 4a, 55a. The complaint alleged that the Collection had been expropriated in violation of international law, and named as defendants the Republic of Hungary, three state museums (the Budapest Museum of Fine Arts, the Hungarian National Gallery, and the Museum of Applied Arts), and the Budapest University of Technology and Economics. *Id.* at 4a-5a.

2. The Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1330, 1602 *et seq.*, provides the sole basis for civil suits against foreign states and their agencies or instrumentalities in United States courts. See *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-435 & n.3 (1989). It provides (subject to certain international agreements) that "a foreign state shall be immune" from the jurisdiction of U.S. courts, except as provided in 28 U.S.C. 1605 to 1607. 28 U.S.C. 1604. The Act defines "foreign state" to include "an agency or instrumentality of a foreign state." 28 U.S.C. 1603(a).

This case involves the FSIA's expropriation exception to immunity from suit. It provides:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
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> * * * * *
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> (3) 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). Because this sentence is dense, it helps to break it into its components.

First, a court needs to identify the entity that is the "foreign state" whose immunity is at stake. As noted above, that term is defined to include both the state itself and an agency or instrumentality of the foreign state. See 28 U.S.C. 1603(a). Hungary is a foreign state, and the lower courts held that respondent museums and university are agencies or instrumentalities of Hungary. Pet. App. 17a-18a. Those determinations are not at issue here.

Second, "rights in property taken in violation of international law" must be "in issue." 28 U.S.C. 1605(a)(3). Again, the lower courts held that this requirement is satisfied, and that determination is not at issue here. See Pet. App. 11a.

Third, there must be an adequate nexus between the entity, the expropriated property, and U.S. commercial activity. See 28 U.S.C. 1605(a)(3).[1] The exception sets forth two distinct nexus tests. The first requires a particularly tight nexus between the expropriated property and a foreign state's own commercial activities in the United Sates: It permits jurisdiction over a foreign state when the property "is present in the United States in connection with a commercial activity carried on in the United States by the foreign state." *Ibid.* The second exception allows a more attenuated nexus between the property and the U.S. commercial activities of an agency or instrumentality: It allows for jurisdiction when an agency or instrumentality "own[s] or operate[s]" the expropriated property and "engage[s] in a commercial activity in the United States." *Ibid.*

The question in this case is whether a court can rely on the second "agency or instrumentality" clause to exercise jurisdiction not only over the agency or instrumentality that is engaged in those U.S. commercial activities, but also to establish jurisdiction over the foreign state itself. That is, does the entity whose immunity is at stake need to be the same entity whose U.S. commercial activities give rise to U.S. jurisdiction?

3. After the close of discovery, Hungary moved to dismiss for lack of jurisdiction, arguing that it is immune from suit under the FSIA. Pet. App. 5a.[2] The district court denied Hungary's motion. *Id.* at 40a-89a.

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[1] The provision reaches the expropriated property "or any property exchanged for such property," 28 U.S.C 1605(a)(3), but that addition is not relevant here and is omitted for simplicity.

[2] Hungary had filed an earlier motion to dismiss that was denied. See 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).

As relevant here, the court concluded that the expropriation exception permitted suit, including against Hungary itself. *Id.* at 74a-88a.

The court of appeals reversed in relevant part, concluding that Hungary is immune from the jurisdiction of U.S. courts in this suit. Pet. App. 1a-29a. On appeal, it was undisputed that the first "foreign state" nexus test is not satisfied, because none of the artworks in question are inside the United States. See *id.* at 7a. It was also undisputed that the second "agency or instrumentality" nexus was satisfied as to the respondent museums and university, due to their possession of the artworks and their book sales and other commercial activities in the United States. *Id.* at 17a. The court of appeals held, however, that those same U.S. commercial activities by the museums and university did not provide a basis for stripping Hungary itself of its immunity from suit, and thus the court concluded that Hungary remained immune.

First, the court of appeals determined that it was bound by circuit precedent establishing that, under Section 1605(a)(3), the immunity of the foreign state itself from suit is abrogated only if the more stringent requirements of the first "foreign state" nexus test are satisfied; the foreign state's immunity is not abrogated simply because the second "agency or instrumentality" nexus test was satisfied by another entity (namely, an agency or instrumentality). Pet. App. 17a-22a; see *Simon* v. *Republic of Hungary*, 812 F.3d 127, 146 (D.C. Cir. 2016). In reaching that result, the court found that it was not bound by an earlier circuit decision that had reached the opposite result, but that included "no explanation at all" and thus was a "'drive-by jurisdictional ruling[]'" with "'no precedential effect.'" Pet. App. 20a-

21a (quoting *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 91 (1998)) (brackets in original). See *Agudas Chasidei Chabad of U.S.* v. *Russian Fed'n*, 528 F.3d 934, 955 (D.C. Cir. 2008).

Second, the court of appeals determined that, even if it were not bound by *Simon*, it would still "hold that a foreign state retains its immunity unless the first clause of the commercial-activity nexus requirement is met." Pet. App. 22a. The court emphasized "the well-worn distinction between foreign states and agencies and instrumentalities." *Id.* at 24a. As the court observed, "[t]he FSIA carefully distinguishes foreign states from their agencies and instrumentalities," as evidenced in its definitional provision, 28 U.S.C. 1603(a)-(b), the provision concerning punitive damages, 28 U.S.C. 1606, and procedures for executing a judgment, 28 U.S.C. 1610. Pet. App. 22a-23a. The court also explained that there is a presumption under the FSIA that agencies and instrumentalities have separate juridical status from the foreign state itself. See *id.* at 23a. Accordingly, although the list of exceptions in Section 1605(a) begins "[a] foreign state shall not be immune," 28 U.S.C. 1605(a), circuit precedent had relied on that presumption to "explain[] that the foreign state does not lose immunity merely because one of its agencies and instrumentalities satisfies an FSIA exception." Pet. App. 23a. The court thus noted that under the FSIA's general commercial-activity exception, 28 U.S.C. 1605(a)(2), a foreign state becomes subject to suit "only if the claim against the state—as opposed to the agency or instrumentality—satisfies that exception." Pet. App. 23a.

The court of appeals further identified "anomalous" results that would flow from a contrary view. Pet. App. 24a. The court observed that 28 U.S.C. 1603, the FSIA's

definitional provision, generally permits the term "foreign state" to stand for both a sovereign and its agencies and instrumentalities. Pet. App. 24a. Yet applying that understanding here would leave petitioners with no way to sue the agencies or instrumentalities that actually possess the artworks at issue because those "agencies or instrumentalities would fail to satisfy *either* of the expropriation exception's two clauses if considered to be the relevant 'foreign state' throughout the exception." *Ibid.* "[B]ecause the collection is not 'present in the United States' (clause one)" but also is not "'owned or operated by an agency or instrumentality' of the museums and the university (clause two)," neither clause would confer jurisdiction over the university and museums named as defendants here. *Ibid.* The court thus concluded that "the expropriation exception's two clauses make sense only if they establish alternative thresholds a plaintiff must meet depending on whether the plaintiff seeks to sue a foreign state or an agency or instrumentality of that state." *Ibid.* The court also noted that the only other court of appeals to have opined on the question had reached a similar conclusion. *Id.* at 25a (citing *Garb* v. *Republic of Poland*, 440 F.3d 579, 589 (2d Cir. 2006)).

Judge Randolph dissented in relevant part. Pet. App. 30a-39a. In his view, the court of appeals was bound by the earlier *Chabad* decision, not the later *Simon* decision. *Ibid.* He also disagreed with the majority's interpretation, and would have concluded that Hungary is subject to suit because of the U.S. commercial activities of the museums and university. *Id.* at 31a-32a.

The court of appeals denied a petition for rehearing and rehearing en banc. Pet. App. 90a-91a.

DISCUSSION

The United States deplores the acts of oppression committed against the Herzog family, and supports efforts to provide them with a measure of justice for the wrongs they suffered. Nevertheless, consistent with the United States' longstanding position, the court of appeals' decision is correct. The respondent museums and university that possess the artworks are not immune from suit under the FSIA's expropriation exception because of their book sales and other commercial activities in the United States. But those commercial activities of the state museums and university provide no basis for haling Hungary itself into court. The expropriation exception permits courts to exercise jurisdiction over a foreign state for expropriating property only when the property is in the United States in connection with the foreign state's *own* commercial activities in the United States. The court of appeals' decision also does not conflict with any reasoned decision of any other court of appeals. Further review is unwarranted.

I. THE COURT OF APPEALS' DECISION IS CORRECT

The court of appeals correctly determined that, under the FSIA's expropriation exception, U.S. book sales or other commercial activities by Hungarian state museums and a university may provide a basis for exercising jurisdiction over those entities—but provide no basis for exercising jurisdiction over Hungary itself. A foreign state is a legal entity separate from its agencies or instrumentalities. A foreign state is subject to suit only if the expropriated property is present in the United States in connection with its own commercial activities in the United States. Here, the artworks remain in Hungary, so Hungary is immune from suit.

A. The resolution of the question presented depends on interpreting the "rather abstruse" text of Section 1605(a)(3). Pet. App. 10a. It provides, in relevant part:

> (a) A foreign state shall not be immune from [suit] in any case—
>
> * * * * *
>
> (3) in which [expropriated property is] in issue and 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 in the United States.

28 U.S.C. 1605(a)(3). The exception thus contains two distinct nexus tests. The first (addressing the link to U.S. activities of "the foreign state") is much more demanding than the second (addressing the link to U.S. activities of "an agency or instrumentality"). *Ibid.* The first is satisfied only when the property is present in the United States in connection with commercial activities "carried on in the United States by the foreign state" itself. *Ibid.* The second can be satisfied even if the property is still abroad, and even if the property itself is not being used in the U.S. commercial activities of the agency or instrumentality. See, *e.g.*, *Agudas Chasidei Chabad of U.S.* v. *Russian Fed'n*, 528 F.3d 934, 947-958 (D.C. Cir. 2008) (concluding the second clause's "commercial activity" requirement was satisfied by contracts for publication of materials unrelated to the allegedly expropriated property).

As this case comes to the Court, it is undisputed that the "foreign state" nexus has not been satisfied. The artworks are in Hungary, not the United States. See Pet. App. 7a. It is also undisputed that the "agency or instrumentality" nexus has been satisfied as to respondent museums and university, on the basis that those entities possess the artworks and engage in U.S. commercial activities, including through selling books in the United States. *Id.* at 17a. The only question is whether the U.S. commercial activities of the museums and university also provide a basis for suing *Hungary itself* under the second nexus. That is, do the U.S. book sales by a state museum or university provide a basis for subjecting Hungary itself to the jurisdiction of U.S. courts? The court of appeals correctly determined that the answer is no.

B. 1. The statutory text and structure are properly read to support the court of appeals' interpretation. Section 1605(a), which sets forth the general exception to immunity, opens with introductory language indicating the entity that could lose its immunity from suit ("[a] foreign state shall not be immune from" suit"), 28 U.S.C. 1605(a), and the statutory definition of "foreign state" establishes that the entity can be either a foreign state or an agency or instrumentality, see 28 U.S.C. 1603(a). The introduction is then followed by separate paragraphs setting forth each of those exceptions. Subsection (a)(3) addresses expropriation claims, which contains two distinct commercial-nexus requirements: a more demanding test depending on U.S. activities of "the foreign state," and a more forgiving test depending on U.S. activities of an "agency or instrumentality. 28 U.S.C. 1605(a)(3).

That text and structure as a whole is most naturally read as establishing two distinct tracks for obtaining jurisdiction, depending on the kind of entity whose immunity is at stake. If the entity is the foreign state itself, then the stricter "foreign state" nexus must be satisfied; if the entity is an agency or instrumentality, then the looser "agency or instrumentality" nexus must be satisfied. To put it another way, the statute is naturally read to require that the entity that loses its immunity (the "foreign state" in the introductory paragraph) must be the same entity whose commercial activities in the United States subject it to jurisdiction of a U.S. court. On that understanding, an entity's exposure to suit in U.S. courts depends on the connection between the expropriated property and *that entity's own* U.S. commercial activities. A plaintiff thus cannot mix and match, using the looser "agency or instrumentality" standard to bootstrap jurisdiction over the foreign state itself. See Pet. App. 17a-18a.

2. The statutory context, history, and purpose powerfully support that interpretation. At the outset, it is natural to understand a U.S. court's jurisdiction over a foreign defendant to depend on that entity's contacts with the United States—and not the contacts of some other, separate entity. If a private foreign museum engaged in commercial activity in the United States, for example, then that activity would naturally be expected to provide a basis for suing that museum on related claims in a U.S. court. Cf. *J. McIntyre Mach., Ltd.* v. *Nicastro*, 564 U.S. 873, 881 (2011) (opinion of Kennedy, J.); *id.* at 887-888 (Breyer, J., concurring in the judgment). But that activity would not ordinarily provide a basis for suing a separate corporate parent (like a foundation that owns the museum) that did not itself engage

in those activities itself. See *Keeton* v. *Hustler Magazine, Inc.*, 465 U.S. 770, 781 n.13 (1984) ("[J]urisdiction over a parent corporation [does not] automatically establish jurisdiction over a wholly owned subsidiary"); *Holland Am. Line, Inc.* v. *Wärsilä N. Am., Inc.*, 485 F.3d 450, 459 (9th Cir. 2007) ("[A]s a general rule, where a parent and a subsidiary are separate and distinct corporate entities, the presence of one" in a forum "may not be attributed to the other."); *Escude Cruz* v. *Ortho Pharm. Corp.*, 619 F.2d 902, 905 (1st Cir. 1980) ("The mere fact that a subsidiary company does business within a state does not confer jurisdiction over its nonresident parent, even if the parent is sole owner of the subsidiary."); see also *Daimler AG* v. *Bauman*, 571 U.S. 117, 134-136 (2014) (rejecting argument that a court may exercise general jurisdiction over a corporate parent merely because an in-state subsidiary is engaged in business the parent would do by other means if the subsidiary did not exist).

The expectation that jurisdiction over a foreign entity depends on that entity's own contacts with the United States is particularly strong in the FSIA, a statute addressing the immunity of foreign sovereigns from suit in U.S. courts. As this Court has long recognized, "[d]ue respect for the actions taken by foreign sovereigns and for principles of comity between nations" support a background rule "that government instrumentalities established as juridical entities distinct and independent from their sovereign *should normally be treated as such*." *First Nat'l City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 623, 626-627 (1983) (*Bancec*) (emphasis added); see H.R. Rep. No. 1487, 94th Cong., 2d Sess. 29 (1976) (House Report) (noting the interest in "respect[ing] the separate juridical

identities of different [foreign state] agencies or instrumentalities"); Pet. App. 22a-23a.

Accordingly, "as a default" under the FSIA, agencies and instrumentalities of a foreign state are "to be considered separate legal entities" from the foreign state itself, and veil piercing is limited to relatively unusual circumstances. *Rubin* v. *Islamic Republic of Iran*, 138 S. Ct. 816, 822 (2018); see *id.* at 823 (discussing the *Bancec* test for overcoming the presumption and allowing veil piercing); see also *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 476 (2003); *Bancec*, 462 U.S. at 629-630. The "conduct of an agency or instrumentality" in turn "ordinarily may not be imputed to the foreign state" itself. See Restatement (Fourth) of the Foreign Relations Law of the United States § 452 cmt. g (2018).

When applying other FSIA exceptions to immunity from suit, the courts of appeals have consistently recognized that a foreign state "does not lose immunity merely because one of its agencies and instrumentalities satisfies an FSIA exception." Pet. App. 23a. For example, under the FSIA's commercial activity exception, 28 U.S.C. 1605(a)(2), the courts of appeals have applied the presumption to hold that "a foreign sovereign is not amenable to suit based upon the acts" of an instrumentality, unless the *Bancec* presumption is overcome. *Transamerica Leasing, Inc.* v. *La Republica de Venezuela*, 200 F.3d 843, 848 (D.C. Cir. 2000); accord *Hester Int'l Corp.* v. *Federal Republic of Nigeria*, 879 F.2d 170, 175-179 (5th Cir. 1989). Courts of appeals have likewise applied the presumption of separateness in addressing claims under other FSIA exceptions. See *First Inv. Corp. of Marshall Islands* v. *Fujian Mawei Shipbuilding, Ltd.*, 703 F.3d 742, 756 (5th Cir. 2012) (ap-

plying *Bancec* factors to the FSIA's arbitration exception, 28 U.S.C. 1605(a)(6)); *Doe* v. *Holy See*, 557 F.3d 1066, 1078-1079 (9th Cir. 2009) (per curiam) (same under tortious act exception, 28 U.S.C. 1605(a)(5)), cert. denied, 561 U.S. 1024 (2010). The court of appeals' interpretation here is consistent with that approach, whereas petitioners' is not.

Moreover, when Congress has departed from that background rule under the FSIA, it has done so expressly. In 28 U.S.C. 1610(g)(1), Congress expressly abrogates the background rule respecting the separateness of different entities, and facilitates veil piercing between the foreign state and its agencies or instrumentalities—but only for the limited purpose of enabling victims of state-sponsored terrorism to enforce certain money judgments. See *Rubin*, 138 S. Ct. at 823 (Section 1610(g) "abrogate[s] *Bancec* with respect to the liability of agencies and instrumentalities of a foreign state where a [terrorism] judgment holder seeks to satisfy a judgment held against the foreign state."). The expropriation exception to immunity from suit, by contrast, includes no language that is even remotely similar. That silence is properly understood to indicate that Congress did not intend to depart from the background rule, and thus did not intend for U.S. courts to assert jurisdiction over a foreign state based on U.S. activities of an agency or instrumentality.

3. The court of appeals' interpretation finds further support in the common-sense point that it is more delicate for a court to exercise jurisdiction over a foreign state than over an agency or instrumentality. See Pet. App. 22a-23a. This theme permeates the FSIA. For example, the FSIA generally makes the property of a foreign state, agency, or instrumentality immune from

execution. See 28 U.S.C. 1609. But the exceptions to immunity from execution are broader for property of an agency or instrumentality. See 28 U.S.C. 1610(b). It is therefore more difficult to execute against the property of the foreign state itself. Similarly, the FSIA permits punitive damages only against agencies or instrumentalities, but not foreign states themselves (with limited exceptions). See 28 U.S.C. 1606. And it provides more permissive procedures for effecting service against an agency or instrumentality than against the foreign state itself. See 28 U.S.C. 1608.

The court of appeals' interpretation of the expropriation exception is consistent with that basic statutory structure, because it provides greater immunity for a foreign sovereign than for an agency or instrumentality. Petitioners' interpretation, by contrast, would break from that framework: A foreign state and an agency or instrumentality would be equally subject to suit under the second exception. Indeed, so long as an agency or instrumentality is subject to suit, the foreign state would be automatically subject to suit as well. It is very unlikely that Congress adopted in the FSIA such a means for enabling U.S. courts to engage in the delicate task of exercising jurisdiction over a foreign state.

Even more oddly, under petitioners' interpretation, the "agency or instrumentality" nexus would apparently strip immunity from *every* agency or instrumentality whenever *one* such entity owns or operates expropriated property and engages in commercial activity in the United States: That agency or instrumentality would be a "foreign state" under the introductory language in Section 1605(a), and there would be no evident need for that to be the same entity whose contacts satisfy the commercial-nexus requirement. See 28 U.S.C.

1605(a)(3). Accordingly, so long as a plaintiff established jurisdiction over one agency or instrumentality, it could also sue the foreign state itself *and every other agency or instrumentality*, even if they do not "own[] or operate[]" the expropriated property or engage in any "commercial activity" in the United States. *Ibid.* Again, it is very unlikely that Congress intended for jurisdiction to be "dispensed in gross," *Gill* v. *Whitford*, 138 S. Ct. 1916, 1934 (2018) (citation omitted), particularly given the background rule respecting the separate juridical status of each agency or instrumentality.

4. The FSIA's provisions for execution immunity further support the court of appeals' interpretation. The FSIA comprehensively addresses both immunity from suit and immunity from execution. *Republic of Argentina* v. *NML Capital, Ltd.*, 134 S. Ct. 2250, 2255-2256 (2014). For execution, the FSIA provides (subject to certain international agreements) that the property in the United States of a foreign state, agency, or instrumentality is immune from execution, except as provided in 28 U.S.C. 1610 and 1611. See 28 U.S.C. 1609. In general, the FSIA's exceptions to execution immunity parallel its exceptions to jurisdictional immunity. See House Report 27 (noting that Section 1610 was drafted to make execution immunity "conform more closely with the provisions on jurisdictional immunity"). Like Section 1605 for jurisdictional immunity, Section 1610 includes exceptions to execution immunity for cases involving expropriation: a narrower exception for the property of a foreign state, agency, or instrumentality, and a broader exception for the property of an agency or instrumentality. See 28 U.S.C. 1610(a)(3) and (b).

Under the court of appeals' interpretation, Section 1610's execution provisions parallel Section 1605's jurisdictional immunity provisions. For the foreign state itself, there is a narrow exception for both immunity from suit and immunity from execution, which applies if the foreign state brings the expropriated property to the United States in connection with the state's own commercial activity here; the state could be sued and that property executed against when in the United States. 28 U.S.C. 1605(a)(3), 1610(a)(3). For an agency or instrumentality, the exceptions are somewhat broader but still parallel to each other: If an agency or instrumentality owns or operates the expropriated property and it engages in U.S. commercial activities, regardless of whether there is a further connection between the two, then the entity would be subject to suit and its U.S. property would be subject to execution. 28 U.S.C. 1605(a)(3), 1610(b).

Under petitioner's interpretation, however, the parallelism would break down: A plaintiff could hale a foreign state into court based on the U.S. commercial activities of one of its agencies or instrumentalities—but the U.S. commercial activities of the agency or instrumentality would provide no basis for executing against the property of the foreign state.

5. Finally, the historical treatment of expropriation claims before Congress enacted the FSIA supports the court of appeals' view. Before the FSIA, foreign states enjoyed immunity from suit arising out of the expropriation of property within their own territory, see, *e.g.*, *Isbrandtsen Tankers, Inc.* v. *President of India*, 446 F.2d 1198, 1200 (2d Cir.), cert. denied, 404 U.S. 895 (1971), with the possible exception of in rem cases in which U.S. courts took jurisdiction to determine rights to property

in the United States. *E.g.*, *Stephen* v. *Zivnostenska Banka*, 15 A.D.2d 111, 119 (N.Y. App. Div. 1961), aff'd, 186 N.E.2d 676 (1962) (per curiam). In contrast, the State Department had expressed the view that "agencies of foreign governments engaged in ordinary commercial transactions in the United States enjoyed no privileges or immunities not appertaining to other foreign corporations, agencies, or individuals doing business here." *United States* v. *Deutsches Kalisyndikat Gesellschaft*, 31 F.2d 199, 200 (S.D.N.Y. 1929). In creating for the first time an exception to the in personam immunity of a foreign state for cases involving expropriated property, Congress adopted an incremental approach granting jurisdiction over foreign states that paralleled those few cases in which title to property in the United States had been in issue, while permitting, as had previously been the case, a broader class of suits against agencies and instrumentalities. The court of appeals' interpretation is consistent with that incremental approach, whereas petitioners' interpretation would mark a dramatic shift from prior practice.

II. THIS COURT'S REVIEW IS NOT WARRANTED

1. As discussed above, the court of appeals correctly determined that a foreign state is not subject to the jurisdiction of U.S. courts under the FSIA's expropriation exception based solely on the U.S. commercial activities of one of its agencies or instrumentalities. That decision is also in accord with the only other court of appeals decision to discuss the question. See *Garb* v. *Republic of Poland*, 440 F.3d 579, 589 (2d Cir. 2006) (concluding, albeit in dicta, that the first clause of the expropriation exception "sets a higher threshold of proof for suing foreign states in connection with alleged takings").

Petitioners correctly note (Pet. 14-17) that the Ninth Circuit has twice permitted the exercise of jurisdiction over a foreign state when only the second clause of the expropriation exception was satisfied. See *Cassirer* v. *Kingdom of Spain*, 616 F.3d 1019, 1022, 1028-1034 (2010) (en banc), cert. denied, 564 U.S. 1037 (2011); *Altmann* v. *Republic of Austria*, 317 F.3d 954, 968-969 (2002), aff'd, 541 U.S. 677 (2004). But neither of those decisions analyzed or explained the basis for exercising jurisdiction over the foreign state itself; they instead examined jurisdiction only as to the agency or instrumentality defendants. See *Arch Trading Corp.* v. *Republic of Ecuador*, 839 F.3d 193, 206 (2d Cir. 2016) (noting that *Cassirer* provided no "independent analysis" of jurisdiction over the foreign state itself). In *Altmann*, for example, the Ninth Circuit concluded that the publication and marketing of books and an art exhibition in the United States by the Austrian Gallery (an agency or instrumentality of Austria) qualified as U.S. commercial activities, and in turn provided a basis for jurisdiction over the Gallery. 317 F.3d at 968-969. But the court did not address why the Gallery's books sales and other U.S. commercial activities rendered Austria itself subject to jurisdiction.

Thus, no reasoned decision of a court of appeals differs from the decision below. A panel of the Ninth Circuit apparently could conclude, after full consideration, that the view taken by the court of appeals in this case is correct—just as the court of appeals here determined that it was not bound by the earlier but unreasoned D.C. Circuit decision in *Chabad*. Pet. App. 20a-21a (such a "drive-by jurisdictional ruling[]" has "no precedential effect") (quoting *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 91 (1998)) (brackets in original).

In pressing for review now, petitioners suggest (Pet. 19-23) that the FSIA's venue provisions make it unlikely that other courts will consider suits against foreign sovereigns under the expropriation exception. See 28 U.S.C. 1391(f). But that concern does not appear to be reflected in practice. Petitioners themselves identify multiple suits against foreign sovereigns invoking the expropriation exception that have reached the Second, Ninth, and D.C. Circuits, see, *e.g.*, *Arch Trading*, 839 F.3d at 196; *Simon* v. *Republic of Hungary*, 812 F.3d 127, 132 (D.C. Cir. 2016); *Cassirer*, 616 F.3d at 1022; *Garb*, 440 F.3d at 581; *Altmann*, 317 F.3d at 958, and similar suits have reached other circuits, see *Mezerhane* v. *República Bolivariana de Venezuela*, 785 F.3d 545, 547-548 (11th Cir. 2015), cert. denied, 136 S. Ct. 800 (2016); *Vencedora Oceanica Navigacion, S.A.* v. *Compagnie Nationale Algerienne de Navigation (C.N.A.N.)*, 730 F.2d 195, 196, 204 (5th Cir. 1984) (per curiam). Over time, it is likely that other courts of appeals will have the opportunity to consider the question presented here. If a square circuit conflict develops, this Court could determine at that point whether review is warranted, and make that determination with the benefit of a reasoned decision from a court of appeals explaining why it agreed with petitioners' contentions. At this time, however, further review is unwarranted.

2. Finally, after the court of appeals' decision, respondents moved in the district court to dismiss the suit even as to the respondent museums and university, on the ground that Hungary is a required party under Federal Rule of Civil Procedure 19 without whom the entire case should be dismissed. See D. Ct. Doc. 148, at 22-30 (Feb. 9, 2018); see also *Republic of Philippines* v. *Pimentel*, 553 U.S. 851, 867 (2008). That motion remains

pending and raises a variety of contentions. In its current posture in this Court, this case does not present any question about Rule 19.

It is important to note, however, that Hungary's separateness weighs against its contention that a suit against the museums or university would "as a practical matter impair or impede [Hungary's] ability to protect [its] interest[s]," Fed. R. Civ. P. 19(a)(1)(B)(i), particularly in the context of petitioners' tort claims essentially asserting that those entities have wrongfully profited in the United States from exploitation of the artworks. Under the decision below, Hungary will no longer be a party to this suit, and thus would not be bound by a money judgment against the museums or university. And unlike in *Pimentel*, which was an interpleader action to resolve ownership of a bank account inside the United States, see 553 U.S. at 854, 857, resolution of the damages claims here would not have the practical effect of depriving Hungary of its ownership interest, because Hungary would not be a party and the artworks are abroad. Hungary's separate status may also be relevant to deciding whether, "in equity and good conscience, the action should proceed" notwithstanding its absence. Fed. R. Civ. P. 19(b). In any event, the court of appeals' decision is correct and does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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