No. 23-867

In the Supreme Court of the United States

REPUBLIC OF HUNGARY, ET AL., PETITIONERS

v.

ROSALIE SIMON, ET AL.

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

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONERS

BRIAN H. FLETCHER
Acting Solicitor General
Counsel of Record
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
SOPAN JOSHI
Assistant to the Solicitor General
SHARON SWINGLE
LEWIS S. YELIN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

RICHARD C. VISEK
Principal Deputy Legal Adviser
Department of State
Washington, D.C. 20520

QUESTIONS PRESENTED

The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1330, 1441(d), 1602 *et seq.*, provides that foreign states, including their agencies and instrumentalities, generally are immune from civil lawsuits in state and federal courts, save for limited exceptions. Under the "expropriation exception," federal and state courts have jurisdiction over certain cases involving rights in property if, among other things, "that property *or any property exchanged for such property*" has a specified connection to commercial activity carried on in the United States. 28 U.S.C. 1605(a)(3) (emphasis added). The questions presented are:

1. Whether the entirety of a foreign sovereign's treasury may be treated as "property exchanged for [expropriated] property," 28 U.S.C. 1605(a)(3), if the sovereign disposed of the expropriated property and deposited the proceeds in its general treasury.

2. Whether, in the course of determining if the plaintiff has made out a legally valid claim that an exception to sovereign immunity applies, a court should resolve contested facts underlying the claimed exception at the outset of the case instead of relying on the complaint's allegations.

3. Whether a plaintiff suing a foreign state has the burden to prove that an exception to sovereign immunity applies, or whether instead the defendant has the burden to prove that the claimed exception does not apply.

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INTEREST OF THE UNITED STATES

This case concerns the substantive and procedural standards for establishing subject-matter jurisdiction in a civil action against a foreign state under the expropriation exception to sovereign immunity in the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1330, 1441(d), 1602 *et seq.* Civil litigation against foreign sovereigns in U.S. courts can have significant foreign-relations implications for the United States and can affect the reciprocal treatment of the United States in the courts of other nations. The United States thus has a substantial interest in this case.

Although the United States agrees with petitioners that the court of appeals erred in interpreting and applying the FSIA's expropriation exception, the United States deplores the atrocities committed by the Nazi re-

gime and its allies and supports efforts to provide their victims with remedies for the egregious wrongs they have suffered. Since Hungary's transition from Communism, the United States has worked in numerous ways to achieve a measure of justice for victims of the Hungarian Holocaust and their heirs, and—with the United States' encouragement—the Hungarian government has provided some relief to compensate Holocaust survivors and other victims of the Nazis. See Office of the Special Envoy, Bureau of European and Eurasian Affairs, U.S. Department of State, *JUST Act Report* 84-88 (Mar. 2020), www.state.gov/wp-content/uploads/2020/02/JUST-Act5.pdf. The United States has a paramount interest in ensuring that its foreign partners establish appropriate domestic redress and compensation mechanisms for Holocaust victims and seeks to prevent litigation in U.S. courts that could undermine that objective.

STATEMENT

1. Respondents are, or are heirs to, Jewish survivors of the Hungarian Holocaust. Pet. App. 3; see Br. in Opp. ii. Respondents filed suit in the United States District Court for the District of Columbia against petitioners—the Republic of Hungary and the state-owned Hungarian railway, Magyar Államvasutak Zrt. (MÁV)—on behalf of a putative class of Hungarian Holocaust survivors and their heirs. Pet. App. 12. Respondents allege that Hungary collaborated with the Nazis to exterminate Hungarian Jews and expropriate their property, and that MÁV assisted that effort both by transporting Hungarian Jews to death camps and by stripping them of their personal property at the point of embarkation. See *id.* at 11, 96-97. As relevant here, respondents seek "compensation for the seizure of their property during

the Holocaust." *Id.* at 3. To that end, the operative complaint alleges various common-law property torts, including conversion and unjust enrichment, as well as other claims. *Id.* at 99-100.

The FSIA provides that as a general matter, a foreign state, including its agencies and instrumentalities, "shall be immune from the jurisdiction" of federal and state courts. 28 U.S.C. 1604; see 28 U.S.C. 1603(a) (defining "foreign state" to include "an agency or instrumentality of a foreign state"). The FSIA further provides, however, that "[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States" where suit is expressly permitted by certain international agreements or by exceptions enumerated in the FSIA. 28 U.S.C. 1605(a). If one of those exceptions applies, "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances," subject to certain limitations on punitive damages not relevant here. 28 U.S.C. 1606.

Respondents asserted that the district court had subject-matter jurisdiction because their claims fell within the expropriation exception to immunity set forth in 28 U.S.C. 1605(a)(3). Section 1605(a)(3) provides that "[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" has a specified connection to commercial activity in the United States. *Ibid.* Specifically, that connection can be established if "that property or any property exchanged for such property" is either "present in the United States in connection with a commercial ac-

tivity carried on in the United States by the foreign state," 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." *Ibid.*

The principal substantive dispute now before this Court involves the meaning of the phrase "any property exchanged for such property" in 28 U.S.C. 1605(a)(3). Respondents do not allege that any of the actual property allegedly taken from them has the requisite connection to commercial activity in the United States. Instead, they allege that Hungary's general treasury funds have the requisite connection, and that those general treasury funds qualify as "property exchanged for [respondents'] property" because at some point in time Hungary sold the expropriated property and deposited the proceeds into its general treasury. *Ibid.*; see J.A. 33-35. The parties call that basis for establishing the connection to commercial activity the "commingling theory." Pet. Br. 1; Br. in Opp. 5.

2. This case was filed in 2010 and has accumulated a lengthy and complex procedural history. Petitioners have filed four motions to dismiss, which have given rise to multiple trips to the court of appeals and a previous grant of certiorari by this Court. Pet. App. 12-15, 100-129 (recounting the history); see 592 U.S. 207.

a. Two prior rulings are most relevant here. First, in 2016, the D.C. Circuit endorsed the commingling theory. See 812 F.3d 127, 147. The court explained that allegations "that the Hungarian defendants liquidated the stolen property, mixed the resulting funds with their general revenues, and devoted the proceeds to funding various governmental and commercial operations * * * suffice to raise a 'plausible inference' that

the defendants retain the property or proceeds thereof" for purposes of the expropriation exception's property requirement. *Ibid.* (brackets and citation omitted). And consistent with circuit precedent, the court explained that "the defendants [*i.e.*, petitioners] will bear the burden of persuasion to 'establish the *absence* of the factual basis [of commingling] by a preponderance of the evidence.'" *Ibid.* (emphasis added; citation omitted).

Second, in 2020, this Court granted certiorari to review the D.C. Circuit's holding that international comity did not preclude adjudication of this case, 141 S. Ct. 187, but ultimately issued a per curiam order vacating and remanding in light of *Federal Republic of Germany* v. *Philipp*, 592 U.S. 169 (2021), which held that the expropriation exception does not encompass claims based on "a foreign sovereign's taking of its own nationals' property," *id.* at 176. See 592 U.S. at 208.

b. The case was then remanded to the district court, which granted in part and denied in part petitioners' fourth motion to dismiss. Pet. App. 93-192.

As relevant here, the district court reaffirmed its previous determination that respondents had, under the commingling theory, adequately alleged that funds from Hungary's general treasury were "present in the United States in connection with" Hungary's commercial activities here (issuing certain bonds and purchasing military equipment), and that MÁV "own[s]" a portion of those funds and likewise engages in commercial activity here (maintaining an agency to book reservations, sell tickets, and the like), 28 U.S.C. 1605(a)(3). See Pet. App. 118-120 (citing 443 F. Supp. 3d 88, 99-116); *id.* at 152 n.22.

The district court also explained that, notwithstanding their previous suggestion that they were Hungarian nationals, some respondents had sufficiently alleged that they or their family members were *not* Hungarian nationals at the time their property was allegedly taken, and their claims thus could proceed notwithstanding this Court's decision in *Philipp*. See Pet. App. 151-179.

3. The court of appeals affirmed in part and reversed in part. Pet. App. 1-90.

a. As relevant here, the court of appeals reiterated its endorsement of the commingling theory, rejecting petitioners' contention that respondents were required to "produce evidence tracing property in the United States or possessed by MÁV to property expropriated from them during World War II." Pet. App. 71 (citation omitted); see *id.* at 71-75. The court explained that respondents "had no such burden" and that "[r]equiring plaintiffs whose property was liquidated to allege and prove that they have traced funds in the foreign state's or instrumentality's possession to proceeds of the sale of their property would render the FSIA's expropriation exception a nullity for virtually all claims involving liquidation" of property. *Id.* at 71-72. The court observed that "[g]iven the fungibility of money, once a foreign sovereign sells stolen property and mixes the proceeds with other funds in its possession, those proceeds ordinarily become untraceable to any specific future property or transaction." *Id.* at 72.

The court of appeals concluded that "because the sovereign defendant bears the burden of proving that the plaintiff's allegations do not bring its case within a statutory exception to immunity," petitioners "must at least affirmatively establish by a preponderance of the evidence that their current resources do *not* trace back

to the property originally expropriated." Pet. App. 74 (citations and internal quotation marks omitted). Nevertheless, because the district court had relied on respondents' allegations rather than engage in its own factfinding on this issue of jurisdictional fact, the court of appeals remanded to the district court "to make the necessary factual findings" about "whether property [petitioners] received in exchange for [respondents'] confiscated property is present in the United States in connection with Hungary's commercial activity there or is possessed by MÁV." *Id.* at 70-71.

With respect to whether respondents or their family members were nationals of Hungary when the alleged takings occurred, the court of appeals likewise understood petitioners' challenge to involve "jurisdictional facts." Pet. App. 44 (citation omitted). But instead of requiring factfinding (as it had done with the property issue), the court applied "the plausible-pleading standard" used "for assessing factual allegations in a complaint" on a motion to dismiss for failure to state a claim. *Id.* at 38-39; see *id.* at 42. The court rejected petitioners' argument that applying that standard contravened *Bolivarian Republic of Venezuela* v. *Helmerich & Payne International Drilling Co.*, 581 U.S. 170 (2017), which held that to establish jurisdiction under the expropriation exception, "the relevant factual allegations must make out a legally valid claim" that the exception applies. *Id.* at 174. The court understood that language to address only "the degree to which plaintiffs' *legal* theories must be correct on their merits," not "'the *factual* allegations a complaint must contain to survive a motion to dismiss.'" Pet. App. 39 (citation omitted); see *id.* at 67, 71. Applying the plausible-pleading standard, the court found that some respondents had adequately

alleged a lack of Hungarian nationality at the time of the takings. See *id.* at 42-53.

b. Judge Randolph concurred in part and dissented in part. Pet. App. 85-90. In his view, none of the respondents had adequately preserved their argument that they or their family members "were nationals of a country other than Hungary when the takings occurred." *Id.* at 89.

SUMMARY OF ARGUMENT

I. The FSIA's text, context, history, and purposes indicate that a foreign sovereign's commingling of the proceeds from the sale of expropriated property with its general treasury funds does not transform all of those funds into property "exchanged for" the expropriated property within the meaning of 28 U.S.C. 1605(a)(3).

A. The ordinary meaning of the verb "exchange" is to give or transfer one thing and receive something else in return. Statutory context indicates that "exchanged for" in Section 1605(a)(3) should be read broadly enough to encompass a sale—and not just a barter or trade—as well as to encompass a series of transactions, and not just a single exchange. But specific property cannot be said to have been "exchanged for" expropriated property through such a series of transactions unless it can actually be traced back through that chain of transactions to the expropriated property. Such tracing obviously would be required when the exchanges involve tangible things like artwork or jewelry; there is no textual basis for applying a different rule when the exchanges involve fungible property like money. When expropriated property is sold and the proceeds are deposited and commingled with funds in the sovereign's general treasury, there may be no set of funds in the treasury that could be identified as funds that were spe-

cifically exchanged for the proceeds. And the difficulty in tracing specific funds back to the expropriated property only becomes more pronounced over time as additional funds are deposited in and withdrawn from the treasury. And even if *some* portion of general treasury funds could be viewed as having been "exchanged for" the expropriated property, there is no plausible textual basis for deeming *all* of those funds to have been "exchanged for" the expropriated property—yet that is what the commingling theory holds.

B. The FSIA's history and purposes reinforce that plain textual reading. This Court has recognized that the FSIA largely codifies the so-called "restrictive" theory of sovereign immunity adopted by the Executive Branch in 1952, and that the expropriation exception—which no other country has adopted—goes beyond that theory for the limited purpose of allowing courts to adjudicate takings claims of the sort at issue in *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964). But the claim in *Sabbatino* involved specifically identifiable proceeds from the sale of expropriated property that had been segregated in a New York escrow account. Reading the expropriation exception to encompass claims that do not seek to recover from such traceable property would go far beyond the claim in *Sabbatino* and the restrictive theory of sovereign immunity. Doing so would undermine the exception's conformity with customary international law, would risk offending the dignity of foreign states, and would invite reciprocal actions against the United States in foreign courts.

C. The court of appeals largely rested its contrary holding on its policy concern that without the commingling theory, a sovereign that liquidated expropriated property and did not segregate the proceeds could es-

cape liability under the expropriation exception. But the court failed to appreciate that applying the commingling theory would mean that virtually every claim alleging liquidation would satisfy the expropriation exception, contrary to the FSIA's purposes and the limited and unique nature of the expropriation exception. Although it will be difficult for some plaintiffs to trace their expropriated property to the defendant's current property, tracing is not impossible; indeed, courts apply tracing rules in various areas of the law.

II. In *Bolivarian Republic of Venezuela* v. *Helmerich & Payne International Drilling Co.*, 581 U.S. 170 (2017), this Court made clear that when a foreign state defendant challenges the factual basis for a claimed exception to sovereign immunity, the court should resolve the factual dispute "as near to the outset of the case as is reasonably possible" rather than simply accept the plaintiff's well-pleaded allegations. *Id.* at 174. Although the court of appeals remanded for resolution of the factual disputes concerning the commingling theory, the court incorrectly accepted respondents' factual allegations underlying their contention that the survivors were nationals of Hungary at the time of the takings, even though petitioners challenged those facts as well. That contravened *Helmerich*'s plain directive.

III. The FSIA's text makes clear that sovereign immunity is jurisdictional, and the burden of establishing subject-matter jurisdiction always rests with the party asserting jurisdiction. It follows that when a plaintiff suing a foreign state invokes one of the FSIA's exceptions to sovereign immunity, the plaintiff bears the ultimate burden of proving that the exception applies. The court of appeals' contrary holding that the sovereign defendant bears the burden to disprove the exception's

applicability apparently rests on legislative history describing sovereign immunity as an affirmative defense under the FSIA. But legislative history cannot override the explicit text of the statute.

ARGUMENT

I. THE DEPOSIT OF PROCEEDS FROM THE SALE OF EXPROPRIATED PROPERTY IN A SOVEREIGN'S GENERAL TREASURY DOES NOT ESTABLISH THAT ALL GENERAL TREASURY FUNDS WERE "EXCHANGED FOR" THE EXPROPRIATED PROPERTY

If a foreign sovereign deposits proceeds from the sale of expropriated property in its general treasury, where they are commingled with other funds, that does not mean that all of the treasury funds should be deemed to have been "exchanged for" the expropriated property within the meaning of 28 U.S.C. 1605(a)(3). Instead, the text, context, history, and purposes of the FSIA establish that only those funds that are traceable to, and thus the identifiable proceeds of, the sale of expropriated property are properly viewed as having been "exchanged for" the expropriated property. The court of appeals erred in holding otherwise.

A. The Commingling Theory Is Inconsistent With The FSIA's Text And Context

The most natural reading of the FSIA's text precludes treating the entirety of a foreign state's general treasury as having been "exchanged for [the expropriated] property" simply because proceeds from the sale of the expropriated property were deposited in the state's general treasury and became commingled with the funds there. 28 U.S.C. 1605(a)(3). "It is a 'fundamental canon of statutory construction' that, 'unless otherwise defined, words will be interpreted as taking

their ordinary, contemporary, common meaning.'" *Sandifer* v. *United States Steel Corp.*, 571 U.S. 220, 227 (2014) (citation omitted). That principle applies to interpreting the FSIA, where this Court generally has adopted "the most natural" reading of the statutory text, in light of its "ordinary meaning." *Republic of Sudan* v. *Harrison*, 587 U.S. 1, 8, 15 (2019).

The critical phrase in Section 1605(a)(3) is "exchanged for." In this context, the natural, ordinary, and contemporaneous meaning of the verb "exchange" is "to give and receive in a reciprocal manner"; "to relinquish (one thing for another)"; or "to provide or transfer (goods or services, for example) in return for something of equal value." *The American Heritage Dictionary* 457 (1975) (*American Heritage*) (capitalization omitted); see *Black's Law Dictionary* 505 (5th ed. 1979) (*Black's*) ("To barter; to swap. To part with, give or transfer for an equivalent."); see also 5 *The Oxford English Dictionary* 502 (2d ed. 1989) (*OED*) ("To change away; to dispose of (commodities, possessions, etc.) by exchange or barter; to give, relinquish, or lose (something) whilst receiving something else in return.") (noting consistent usage since 1484); *Webster's New International Dictionary* 889 (2d ed. 1934) (*Webster's Second*) ("To part with, give, or transfer to another in consideration of something received as an equivalent.").

Those definitions could be read to suggest that the term "exchange" refers only to a trade of one property for another—not to a *sale* of that property. Cf. *Black's* 505 ("To barter; to swap."); *OED* 502 ("by exchange or barter"). Indeed, in many other contexts, an "exchange" is contradistinguished from a "sale." *E.g.*, *Preston* v. *Keene*, 39 U.S. 133, 136 (1840) (describing a state law defining "exchange" to mean to "give to one

another one thing for another, whatever it be, except money; for in that case, it would be a sale") (citation omitted); see *Black's* 505 (citing multiple cases defining "exchange" to mean a transaction for consideration "other than money"); cf. *Helvering* v. *William Flaccus Oak Leather Co.*, 313 U.S. 247, 249 (1941) (analyzing "sale" and "exchange" separately under a tax provision). If that strict definition applied here, it would mean that if a foreign state ever sold the allegedly expropriated property, the "property" element of the expropriation exception could never be satisfied. As explained below, however, the context and history of the FSIA indicate that Congress was not using the word "exchanged" in Section 1605(a)(3) in so strict a manner. See pp. 21-22, *infra*. Accordingly, if a foreign state sells expropriated property, the specific proceeds qualify as "property exchanged for [the expropriated] property" under 28 U.S.C. 1605(a)(3).

Similarly, one could view "exchanged for" as referring only to the initial trade of property, not to subsequent trades. That is, if a person trades A for B and later trades B for C, one might say that C was "exchanged for" B but that C was not "exchanged for" A. Again, though, context weighs against that reading; this Court generally avoids reading statutes in a way that would permit easy circumvention. See *Abramski* v. *United States*, 573 U.S. 169, 185 (2014). Just as a statute addressing the sale of firearms to particular individuals is best read to encompass such sales when accomplished in two steps (using a straw purchaser) rather than one, see *id.* at 179-185, the last piece of property obtained after a chain of transactions may reasonably be viewed as having been "exchanged for" the first property in that chain under 28 U.S.C. 1605(a)(3), as

long as the properties exchanged in each transaction remain identifiably distinct.

Even that plaintiff-friendly interpretation of "exchanged for," however, necessarily requires *tracing* the property involved in a series of transactions. In the example above, one might say that C was exchanged for A even though the exchange took two steps. But no speaker of English would say that *other* property held by C's owner—say, D—was "exchanged for" A. And that would remain true even if D were equivalent in value to C—indeed, even if D were identical to C and they were stored together. By hypothesis, D would have been obtained through some independent means and thus would have no relevant connection to A. In those circumstances, no reasonable interpretation of "exchanged for" would permit saying that D was "exchanged for" A simply because D is held as part of the owner's overall pool of assets.

That straightforward tracing principle thus flows from the most natural reading of Section 1605(a)(3) in context, and would seem to be both obvious and uncontroversial when dealing with identifiable property, such as artwork or jewelry: If a necklace is expropriated and traded for a ring, which is later traded for a bracelet, that bracelet has been "exchanged for" the necklace within the meaning of Section 1605(a)(3)—but a different bracelet in the owner's collection has not. There is no reason the same principles should not apply when dealing with fungible property like money; certainly, nothing in the FSIA suggests that the two should be treated differently. If an object is sold and the proceeds deposited in their own segregated account, the funds in that account obviously have been "exchanged for" the object. If the proceeds are instead deposited in a gen-

eral account and commingled with other funds there, the proceeds (like other deposits) generally have lost their distinct identity. The difficulty in tracing any particular funds in the account back to the expropriated property would only become increasingly pronounced over time as additional funds are deposited and withdrawn over the years. And even if some portion of the funds in the account might still be regarded as having been "exchanged for" the object despite the commingling, the *other funds* in the account cannot be said to have been "exchanged for" the object, any more than D can said to have been "exchanged for" A in the example above.

Yet the commingling theory would allow just that: it would hold that *all* funds that are (or ever were) in a commingled account may be treated as having been "exchanged for" the expropriated property—including funds that have no relationship to that property other than that they are (or once were) in the same general account into which proceeds from the sale of the property were once deposited. That stretches the term "property exchanged for [the expropriated] property" far beyond any reasonable reading. 28 U.S.C. 1605(a)(3). Indeed, many common definitions of "exchange" emphasize that the "something" being obtained in the trade is usually "of equal value." *American Heritage* 457; see *Black's* 505 ("equivalent"); *Webster's Second* 889 ("equivalent"). The commingling theory, however, would taint all commingled funds, even if they were orders of magnitude larger than the proceeds from the sale of the expropriated property.

Other contextual indications reinforce that straightforward and natural reading of "exchanged for" in Section 1605(a)(3). For example, the expropriation excep-

tion requires that the identified property of the foreign state (either the expropriated property or property exchanged for it) be present in the United States "in connection with" the foreign state's commercial activity here. 28 U.S.C. 1605(a)(3). But almost by definition, the "commercial activity" (*ibid.*) of a foreign state is bound to use or generate money that will be present in the United States, and those expenses or revenues almost certainly will ultimately be drawn from or deposited into the foreign state's treasury. As a result, if the entirety of a foreign state's treasury into which the proceeds of an exchange for expropriated property were once deposited were deemed to satisfy the "property" requirement in Section 1605(a)(3)—as necessarily would be the case under the commingling theory—the "in connection with" requirement would be rendered effectively superfluous. The same would be true of the requirement that an agency or instrumentality "own[] or operate[]" the relevant property, *ibid.*, at least when (as is likely often the case) the agency or instrumentality has ever received funds from, or deposited revenues into, the state's treasury. The Court should avoid an interpretation of "exchanged for" that would have the effect of rendering those other statutory provisions effectively superfluous. See *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 476-477 (2003) (explaining that absent some contrary indication in the statute, courts should "not construe the [FSIA] in a manner that is strained and, at the same time, would render a statutory term superfluous").

B. The Commingling Theory Is Inconsistent With The FSIA's History And Purposes

The FSIA's enactment history confirms what its text indicates: the entirety of a foreign state's general treas-

ury cannot be deemed to have been "exchanged for" allegedly expropriated property simply because proceeds from the sale of that property were once deposited in the general treasury and commingled with the funds there.

1. For much of the Nation's history, the United States adhered to the "classical" or "absolute" theory of foreign sovereign immunity, under which foreign states were not subject to civil suit without their consent. See, *e.g.*, *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 486 (1983). Accordingly, "foreign states were 'generally granted complete immunity from suit' in United States courts, and the Judicial Branch deferred to the decisions of the Executive Branch on such questions." *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 n.1 (1989) (citation and ellipsis omitted); see *Verlinden*, 461 U.S. at 486 (explaining that because "foreign sovereign immunity is a matter of grace and comity on the part of the United States, * * * this Court consistently has deferred to the decisions of the political branches—in particular, those of the Executive Branch—on whether to take jurisdiction").

Providing foreign states with immunity from civil suit serves important national interests: It preserves the dignity of foreign sovereigns, avoids damaging potentially sensitive international relations, and promotes comity between nations. See, *e.g.*, *Bolivarian Republic of Venezuela* v. *Helmerich & Payne International Drilling Co.*, 581 U.S. 170, 179 (2017) ("To grant [foreign] sovereign entities an immunity from suit in our courts both recognizes the absolute independence of every sovereign authority and helps to induce each nation state, as a matter of international comity, to respect the independence and dignity of every other, including our

own.") (brackets, citations, and internal quotation marks omitted); *National City Bank* v. *Republic of China*, 348 U.S. 356, 362 (1955) (sovereign immunity derives from concerns that include "respect for the 'power and dignity' of the foreign sovereign") (citation omitted).

In addition, sovereign immunity serves the "reciprocal self-interest" of the United States. *National City Bank*, 348 U.S. at 362. The United States engages in extensive activities in support of its worldwide diplomatic, security, and law-enforcement missions, and it is not infrequently sued in foreign courts. See Department of Justice, *Office of Foreign Litigation*, www.justice.gov/civil/office-foreign-litigation ("At any given time, foreign lawyers under OFL's direct supervision represent the United States in approximately 1,800 lawsuits pending in the courts of over 100 countries."). Because "some foreign states base their sovereign immunity decisions on reciprocity," *Persinger* v. *Islamic Republic of Iran*, 729 F.2d 835, 841 (D.C. Cir.), cert. denied, 469 U.S. 881 (1984), protecting foreign states from civil suits in U.S. courts can help to avoid embroiling the United States in expensive and difficult litigation abroad. Cf. *Boos* v. *Barry*, 485 U.S. 312, 323 (1988) (highlighting importance of "concept of reciprocity" in international law and diplomacy and explaining that respecting diplomatic immunity of foreign states "ensures that similar protections will be accorded" to the United States).

In 1952, the Department of State adopted what is called the "restrictive" theory of foreign sovereign immunity, under which a foreign state generally is immune from civil suit for sovereign or public acts but not for its commercial acts. See *Verlinden*, 461 U.S. at 486-487; see also *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 711-715 (1976) (reproducing 1952

State Department letter). The Department observed that an emerging consensus had developed among nations in favor of the restrictive rather than absolute theory of sovereign immunity. *Alfred Dunhill*, 425 U.S. at 714. The Department further observed that the United States had long declined to claim immunity for its merchant vessels abroad, and that "the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts." *Ibid.* (citation omitted). The Department thus announced a "policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity." *Ibid.* (citation omitted).

Just as before adoption of the restrictive theory, "initial responsibility for deciding questions of sovereign immunity fell primarily upon the Executive acting through the State Department, and the courts abided by 'suggestions of immunity' from the State Department." *Verlinden*, 461 U.S. at 487. But because "foreign nations often placed diplomatic pressure on the State Department in seeking immunity," Congress eventually enacted the FSIA, in part "to free the Government from the case-by-case diplomatic pressures." *Id.* at 487-488. "For the most part, the [FSIA] codifies, as a matter of federal law, the restrictive theory of sovereign immunity." *Id.* at 488.

2. One exception to that wholesale codification of the restrictive theory as previously applied by the Executive is the FSIA's expropriation exception. Under the restrictive theory, a foreign state's expropriation of property is deemed to be a public act, not a commercial

act, and the foreign state would thus be immune from civil suits for such expropriations. See, *e.g.*, *Victory Transport Inc.* v. *Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 360 (2d Cir. 1964) (explaining that under the restrictive theory, "legislative acts, such as nationalization," are public acts), cert. denied, 381 U.S. 934 (1965). Accordingly, "the expropriation exception, because it permits the exercise of jurisdiction over some public acts of expropriation, goes beyond even the restrictive view" of foreign sovereign immunity. *Federal Republic of Germany* v. *Philipp*, 592 U.S. 169, 183 (2021). "In this way, the exception is unique; no other country has adopted a comparable limitation on sovereign immunity." *Ibid.*

In interpreting the scope of the expropriation exception's departure from the restrictive view, courts should be informed by the exception's origins and history, which are rooted in Cuba's nationalization of certain American property interests in 1960. See *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 401-406 (1964). Asked to review the validity of that expropriation under international law, this Court in *Sabbatino* held that the act of state doctrine—which prevents courts in the United States from determining the validity of the public acts of a foreign sovereign within its own territory—required the Court to "presume[the] validity" of Cuba's expropriation. *Id.* at 438; see *id.* at 416-439.

Congress responded to *Sabbatino* by enacting the Second Hickenlooper Amendment to the Foreign Assistance Act of 1964; that Amendment "prohibits United States courts from applying the act of state doctrine where a 'right to property is asserted' based upon a 'taking by an act of that state in violation of the principles

of international law.'" *Philipp*, 592 U.S. at 179 (brackets, citation, and ellipsis omitted); see 22 U.S.C. 2370(e)(2). The Amendment was broadly understood "to permit adjudication of claims the *Sabbatino* decision had avoided." *Philipp*, 592 U.S. at 179. "But nothing in the Amendment purported to alter any rule of international law." *Ibid.* Congress then "used language nearly identical to that of the Second Hickenlooper Amendment 12 years later in crafting the FSIA's expropriation exception." *Ibid.*; see 28 U.S.C. 1605(a)(3).

The expropriation exception is thus best understood to extend as far as—but no farther than—the similarly worded Second Hickenlooper Amendment. And more generally, this Court has "reject[ed] the suggestion that Congress intended the expropriation exception to operate as a 'radical departure' from the 'basic principles' of the restrictive theory." *Philipp*, 592 U.S. at 183 (citation omitted); see *Helmerich*, 581 U.S. at 181.

3. The commingling theory would go far beyond what the Second Hickenlooper Amendment—and thus the expropriation exception—was intended to permit, and would mark a radical departure from the restrictive theory. As noted, the Amendment was understood as a narrow extension of the restrictive theory "to permit adjudication of claims the *Sabbatino* decision had avoided." *Philipp*, 592 U.S. at 179.

The claim that was "avoided" in *Sabbatino* involved Cuba's expropriation of sugar owned by an American-owned company, where the sugar had been resold by an American broker and the proceeds ultimately deposited in a New York escrow account. See 376 U.S. at 401-407. *Sabbatino* thus involved a claim where specific proceeds from the sale of the expropriated property indisputably were present in the United States, clearly identified as

such, and segregated. That is why the expropriation exception's reference to "property exchanged for [the expropriated] property," 28 U.S.C. 1605(a)(3), is properly read to encompass money for which the expropriated property was sold. See p. 13, *supra*. Were it otherwise, the expropriation exception would *not* "permit adjudication of claims the *Sabbatino* decision had avoided," *Philipp*, 592 U.S. at 179, contrary to the purposes of the Second Hickenlooper Amendment.

At the same time, however, *Sabbatino* did not involve an expropriation claim where the United States funds establishing the connection to commercial activity were simply funds that once had been in an overseas account into which proceeds from the sale of the expropriated sugar had been deposited. Accordingly, there is no basis to read the expropriation exception as extending even further beyond the restrictive theory of sovereign immunity to encompass such a claim, as the commingling theory would require. Cf. *Badgerow* v. *Walters*, 596 U.S. 1, 18 (2022) ("[I]t is one thing to make an exception, quite another to extend that exception everywhere.").

Indeed, such a broad reading of the expropriation exception would undermine the exception's conformity with customary international law, especially given that no other country has adopted an equivalent exception; would risk offending the dignity of foreign states; and would invite reciprocal actions against the United States in foreign courts. See pp. 17-18, *supra*. None of those consequences would be consistent with the purposes of the FSIA in general and the expropriation exception in particular.

C. The Court Of Appeals' Contrary Reasoning Lacks Merit

The court of appeals appeared to accept the commingling theory largely to alleviate its policy concerns about the tracing rule reflected in Section 1605(a)(3)'s text. The court's 2016 decision neither provided any rationale for accepting the theory nor attempted to grapple with the text, context, or history of the FSIA and the expropriation exception. See 812 F.3d 127, 147. In its most recent decision, the court reasoned that given "the fungibility of money," the commingling theory was necessary because without it, a foreign sovereign could "commingle the proceeds from illegally taken property with general accounts" and thereby "insulate itself from suit under the expropriation exception." Pet. App. 72. The court "decline[d] to ascribe to Congress an intent to create a safe harbor for foreign sovereigns who choose to commingle rather than segregate or separately account for the proceeds from unlawful takings." *Ibid.*

Such "a 'parade of horribles' argument generally cannot 'surmount the plain language of the statute.'" *Truck Insurance Exchange* v. *Kaiser Gypsum Co.*, 144 S. Ct. 1414, 1427 (2024) (citation omitted). And more fundamentally, rejection of the commingling theory does not create a "safe harbor" for foreign sovereigns; they remain liable for their actions in whatever forums or proceedings are otherwise available. Rather, rejection of the commingling theory simply honors the terms and scope, in light of the unique nature and history, of the limited expropriation exception to the general rule of immunity of a foreign state for its actions abroad—a rule followed in this context by every nation other than the United States.

Indeed, while the court expressed concern that without the commingling theory, "virtually all claims involv-

ing liquidation" will fail to satisfy the expropriation exception, Pet. App. 72, the court failed to appreciate that applying the commingling theory would have the opposite effect: "virtually all claims involving liquidation" *would* satisfy that exception. See pp. 15-16, *supra*. That scenario raises the troubling concerns described above for foreign relations, conformity with customary international law, and reciprocity. See pp. 17-18, *supra*; see also *Philipp*, 592 U.S. at 183 (cautioning against a reading that would "transform[] the expropriation exception into an all-purpose jurisdictional hook for adjudicating human rights violations"). Such dilemmas underscore why courts should simply "follow the text even if doing so will supposedly 'undercut a basic objective of the statute.'" *Baker Botts L.L.P.* v. *ASARCO LLC*, 576 U.S. 121, 135 (2015) (citation omitted).

It might well be difficult for a plaintiff whose property was expropriated and liquidated decades ago to trace it through a chain of transactions to specifically identifiable property in the foreign state's possession today. But it is not necessarily impossible; "[t]here may be circumstances where it is possible to trace the proceeds a sovereign received from expropriated property to funds spent on property present in the United States," *Rukoro* v. *Federal Republic of Germany*, 976 F.3d 218, 225-226 (2d Cir. 2020), cert. denied, 141 S. Ct. 2724 (2021). And even if the tracing requirement means that some claims cannot go forward, that is what Congress required in the FSIA. Nor is that an unusual requirement in the law; for example, a constructive trust or equitable lien requires that the "money or property identified as belonging in good conscience to the plaintiff c[an] clearly be traced to particular funds or property in the defendant's possession." *Great-West Life &*

Annuity Insurance Co. v. *Knudson*, 534 U.S. 204, 213 (2002); see *Luis* v. *United States*, 578 U.S. 5, 22 (2016) (plurality opinion) ("Courts use tracing rules in cases involving fraud, pension rights, bankruptcy, trusts, etc.").

If this Court rejects the commingling theory, it would still be open to plaintiffs in respondents' position to attempt to trace their allegedly expropriated property to property currently in the foreign state's possession. Tracing rules developed in other contexts might well be instructive in developing the applicable principles. Cf. *Luis*, 578 U.S. at 22 (plurality opinion) (referring to "tracing rules governing commingled accounts" in the trust-law context). But any tracing rule in this context would have to respect both the general rule of immunity under the FSIA and the unique nature and history of the limited expropriation exception. In any event, this Court need not address those questions here. Respondents appear to have disclaimed any ability to trace the proceeds of the expropriated property at issue here. Br. in Opp. 20. Because they have not attempted to make that showing, and because the court of appeals did not address what an appropriate tracing rule might be, the Court should leave that issue to a future case in which the question has been squarely addressed and factually developed. Cf. *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view.").

* * *

The United States deplores the acts of violence that were committed against respondents and their family members and supports efforts to provide them with a remedy for the wrong they suffered. The policy of the United States on claims for restitution or compensation by Holocaust survivors and other victims of the Nazi era

has consistently been motivated by the twin concerns of justice and urgency. No amount of money could provide compensation for the suffering that the victims of Nazi-era atrocities endured. But the moral imperative has been and continues to be to provide some measure of justice to the victims of the Holocaust, and to do so in their remaining lifetimes. The United States has advocated that concerned parties, foreign governments, and nongovernmental organizations act to resolve matters of Holocaust-era restitution and compensation through dialogue, negotiation, and cooperation, thereby avoiding the prolonged uncertainty and delay that accompany litigation. Cf. *American Insurance Association* v. *Garamendi*, 539 U.S. 396, 420-423 (2003). Respecting the limits in the FSIA aids in the United States' efforts to persuade foreign nations to establish appropriate redress and compensation mechanisms for human-rights violations, including the horrendous human-rights violations perpetrated during the Holocaust.

II. IN DETERMINING WHETHER A PLAINTIFF HAS A VALID CLAIM THAT AN EXCEPTION TO SOVEREIGN IMMUNITY APPLIES, THE COURT SHOULD RESOLVE FACTUAL DISPUTES AT THE OUTSET OF THE CASE

In the second question presented in the petition for a writ of certiorari, petitioners contend that the court of appeals failed to enforce the pleading requirements set forth in *Helmerich*, *supra*. There, this Court held that when a plaintiff invokes the expropriation exception, "the relevant factual allegations must make out a legally valid claim that a certain kind of right is at issue (property rights) and that the relevant property was taken in a certain way (in violation of international law)." *Helmerich*, 581 U.S. at 174 (emphasis omitted). The Court rejected the contention that "a party need only

make a 'nonfrivolous' argument that the case falls within the scope of the exception." *Id.* at 173. Petitioners contend (Br. 47) that *Helmerich* thus imposed a "heightened standard" at the pleading stage and that the court of appeals erred in applying a "plausible-pleading standard," Pet. App. 39; see *id.* at 71.

Petitioners' contention appears to rest on a view that under the "plausible-pleading standard" (Pet. App. 39), a court determines whether the alleged facts, taken as true, would amount to a *plausibly* legally valid claim (instead of an *actually* legally valid claim). If that is what the court of appeals meant, it would indeed contradict *Helmerich*. But the court indicated (*ibid.*) that it was applying the pleading standard applicable to a motion to dismiss for failure to state a claim for relief under Rule 12(b)(6) of the Federal Rules of Civil Procedure, as described in cases like *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544 (2007), and *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009). Those cases "concern the *factual* allegations a complaint must contain to survive a motion to dismiss," *Johnson* v. *City of Shelby*, 574 U.S. 10, 12 (2014) (per curiam), not the validity of the plaintiff's *legal* theory. To survive a Rule 12(b)(6) motion, the plaintiff is still required to plead a "legally cognizable claim," 5B Charles Alan Wright et al., *Federal Practice and Procedure* § 1357 (4th ed. West 2024), no different from *Helmerich*'s requirement to plead a "legally valid claim," 581 U.S. at 174. And because "the facts [we]re not in dispute" in *Helmerich* as a result of the parties' "stipulations," there was no occasion for the Court to address the standard for evaluating disputed factual allegations in a case involving the FSIA. *Id.* at 187.

That said, there is an important difference between a motion to dismiss for failure to state a claim under

Rule 12(b)(6) and one for lack of subject-matter jurisdiction under Rule 12(b)(1). Courts addressing a Rule 12(b)(6) motion *must* "assume[] the truth of 'well-pleaded factual allegations' and 'reasonable inferences' therefrom," *National Rifle Association* v. *Vullo*, 602 U.S. 175, 181 (2024) (brackets and citation omitted), but "subject-matter jurisdiction can be called into question *either* by challenging the sufficiency of the allegation *or* by challenging the accuracy of the jurisdictional facts alleged," *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 68 (1987) (Scalia, J., concurring in part and concurring in the judgment).

As *Helmerich* suggests, when a foreign state defendant makes the former type of challenge, a court may—just as it would when addressing a motion to dismiss on the merits—"tak[e] all of the plaintiffs' well-pleaded allegations as true," "construe[] the complaint in the light most favorable to the plaintiffs," and then evaluate whether those facts would "make out a legally valid claim"—that is, whether an exception to sovereign immunity would apply—as a matter of law. 581 U.S. at 174-176; see *FBI* v. *Fikre*, 601 U.S. 234, 237 n.* (2024) (similar, for other jurisdictional claims). The decision below thus did not contravene *Helmerich* by stating that where "'the defendant challenges only the legal sufficiency of the plaintiff's jurisdictional allegations,'" "[t]he Rule 12(b)(1) standard in this context 'is similar to that of Rule 12(b)(6),'" Pet. App. 67 (citation omitted); see *id.* at 39.

Instead, the decision below contravened *Helmerich* in a different way. *Helmerich* explained that "where jurisdictional questions turn upon further factual development, the trial judge may take evidence and resolve relevant factual disputes," and "should normally resolve

those factual disputes and reach a decision about immunity as near to the outset of the case as is reasonably possible." 581 U.S. at 174; see *id.* at 187. Making such findings at the outset of litigation is particularly important in cases involving sovereign immunity, whose "basic objective" is "to free a foreign sovereign from *suit*," not merely liability. *Id.* at 174; see *Republic of Austria* v. *Altmann*, 541 U.S. 677, 696 (2004) (the "principal purpose of foreign sovereign immunity" is to "give foreign states and their instrumentalities some *present* 'protection from the inconvenience of suit as a gesture of comity'") (citation omitted). Deciding sovereign immunity questions at the outset is thus necessary to ensure that the foreign state actually receives the protections of immunity if no exception applies, to preserve the dignity of the foreign state and comity between nations, and to safeguard the reciprocal interests of the United States when it is sued in foreign courts. See pp. 17-18, *supra*.

Here, the court of appeals correctly recognized that because petitioners challenged the factual basis underlying the expropriation exception, the district court should have made "findings of fact germane to the expropriation exception's property element." Pet. App. 70. Yet when it came to addressing nationality, the court of appeals asked only whether respondents had "adequately alleged" that they or their family members were not Hungarian nationals at the time of the takings, rather than remanding for factfinding on that issue. *Id.* at 53; see *id.* at 42-53. That was error. The issue of nationality affects whether the alleged taking was "in violation of international law," 28 U.S.C. 1605(a)(3), and thus whether the expropriation exception furnishes a basis for jurisdiction. See *Philipp*, 592 U.S. at 187. The

court thus should have disposed of the factual dispute over nationality in the same way it did the factual dispute over the property element: by requiring the district court to make findings of fact with respect to each survivor's nationality at the time of the alleged expropriations, instead of simply accepting respondents' well-pleaded allegations.

III. UNDER THE FSIA, THE PLAINTIFF BEARS THE BURDEN TO PROVE THAT AN EXCEPTION TO SOVEREIGN IMMUNITY APPLIES

In line with its precedent, the court of appeals held that where a plaintiff suing a foreign state invokes one of the FSIA's exceptions to sovereign immunity, "the sovereign defendant bears the burden of proving that the plaintiff's allegations do not bring its case within a statutory exception to immunity." Pet. App. 68 (citation and internal quotation marks omitted); see *id.* at 74; see also, *e.g.*, *Belize Social Development Ltd.* v. *Government of Belize*, 794 F.3d 99, 102 (D.C. Cir. 2015) ("[T]he defendant state 'bears the burden of proving that the plaintiff's allegations do *not* bring its case within a statutory exception to immunity.'") (emphasis added; citation omitted), cert. denied, 580 U.S. 1046 (2017); *Transamerican Steamship Corp.* v. *Somali Democratic Republic*, 767 F.2d 998, 1002 (D.C. Cir. 1985) ("[T]he burden of proof in establishing the inapplicability of these exceptions is upon the party claiming immunity."). For example, the court held in this case that petitioners have the burden to show that the general treasury funds used in connection with Hungary's commercial activities or owned by MÁV do *not* trace back to the expropriated property. Pet. App. 74.

That holding and the precedent on which it relied are incorrect. "[T]he burden of establishing" that a federal

court has subject-matter jurisdiction always "rests upon the party asserting jurisdiction." *Kokkonen* v. *Guardian Life Insurance Co.*, 511 U.S. 375, 377 (1994); see *Hertz Corp.* v. *Friend*, 559 U.S. 77, 96 (2010). And "unless a specified exception [to immunity] 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); see 28 U.S.C. 1330(a) (granting district courts subject-matter jurisdiction in civil actions against foreign states only for claims "with respect to which the foreign state is not entitled to immunity"). It follows that the plaintiff, not the sovereign defendant, bears the burden of establishing that an exception to sovereign immunity applies to her claim.*

The court of appeals appears to have derived its contrary view from a statement in the FSIA's legislative history describing sovereign immunity as an "affirmative defense which must be specially pleaded" and stating that "the burden will remain on the foreign state to produce evidence in support of its claim of immunity." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 17 (1976) (House Report); see *Transamerican*, 767 F.2d at 1002 (relying on the House Report). But "legislative history is not the law," *Azar* v. *Allina Health Services*, 587 U.S. 566, 579 (2019) (citation omitted), and the House Report's description of sovereign immunity as an affirmative defense cannot be reconciled with the "explicit statutory language" in the FSIA that makes the existence of sovereign immunity a bar to subject-matter jurisdic-

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* Petitioners argue that the plaintiff bears the burden of production, but seem willing to accept that the foreign sovereign bears the ultimate burden of proof. Pet. Br. 43-44. In the government's view, both burdens properly rest with the plaintiff invoking federal jurisdiction.

tion, *Helmerich*, 581 U.S. at 177. Indeed, this Court long ago repudiated the House Report's description of sovereign immunity as an affirmative defense, emphasizing that because "subject-matter jurisdiction turns on the existence of an exception to foreign sovereign immunity, * * * even if the foreign state does not enter an appearance to assert an immunity defense, a district court still must determine that immunity is unavailable under the [FSIA]." *Verlinden*, 461 U.S. at 493 n.20 (citation omitted). The court of appeals' holding that the sovereign defendant bears the burden of disproving subject-matter jurisdiction thus cannot be squared with the plain text of the FSIA or with this Court's precedents on subject-matter jurisdiction in general or on the FSIA and sovereign immunity in particular.

Contrary to respondents' suggestion at the certiorari stage (Br. in Opp. 25), the question of who bears the ultimate burden to prove (or disprove) the applicability of an exception to sovereign immunity is important irrespective of whether the commingling theory is accepted. Even if this Court were to accept that theory, correcting the court of appeals' error as to the burden of proof would at least require respondents to demonstrate that their expropriated property was in fact liquidated for cash that was commingled with funds now present in the United States in connection with Hungary's commercial activities or owned by MÁV. Conversely, if this Court were to reject the commingling theory but not address the burden of proof, the court of appeals might still require petitioners to "affirmatively establish by a preponderance of the evidence that their current resources do *not* trace back to the property originally expropriated," Pet. App. 74—a burden that could be effectively impossible, depending on how the

court of appeals applied it. In addition, the district court noted a "dearth of facts" regarding the nationality of some survivors, *id.* at 173, suggesting that the burden of proof might be dispositive on that issue as well.

More generally, the court of appeals' rule that foreign sovereign defendants bear the burden to disprove subject-matter jurisdiction has the potential to upset foreign relations and the United States' own reciprocal interests by too permissively abrogating foreign sovereign immunity. See pp. 17-18, *supra*. And given that venue for civil actions against foreign states always lies in the District of Columbia, see 28 U.S.C. 1391(f)(4), it is especially important to correct the court's egregiously wrong interpretation of the FSIA.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

BRIAN H. FLETCHER
*Acting Solicitor General**
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
SOPAN JOSHI
Assistant to the Solicitor General
SHARON SWINGLE
LEWIS S. YELIN
Attorneys

RICHARD C. VISEK
Principal Deputy Legal Adviser
Department of State

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* The Solicitor General is recused in this case.