No. 18-1447

IN THE

Supreme Court of the United States

REPUBLIC OF HUNGARY, ET AL.,

Petitioners,

v.

ROSALIE SIMON, ET AL.,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Foreign Sovereign Immunities Act (FSIA) provides that "[a] foreign state shall not be immune from the jurisdiction of the courts of the United States or of the States in any case" in which one of the enumerated exceptions to immunity applies. 28 U.S.C. § 1605(a). The questions presented are:

1. Whether a district court can effectively extend immunity to a foreign sovereign based on comity-based common-law principles when the FSIA expressly provides that the foreign sovereign "shall not be immune."

2. Whether the court of appeals correctly applied settled legal principles governing the doctrine of *forum non conveniens* to the facts of this case.

RELATED PROCEEDINGS

United States District Court (D.D.C.):

Simon v. Republic of Hungary, No. 10-cv-1770 (Sept. 30, 2017) (order on motion to dismiss)

Simon v. Republic of Hungary, No. 10-cv-1770 (May 9, 2014) (order on motion to dismiss)

United States Court of Appeals (D.C. Cir.):

Simon v. Republic of Hungary, No. 17-7146 (Dec. 28, 2018)

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

United States Supreme Court:

Republic of Hungary v. Simon, No. 18A942 (Apr. 3, 2019) (order denying application for a stay)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF THE CASE

This long-running case was filed by 14 of the very few survivors of Hungary's genocidal campaign against its Jewish population during World War II. As the D.C. Circuit has twice explained, "'[n]owhere was the Holocaust executed with such speed and ferocity as it was in Hungary.'" Pet. App. 2a (quoting *Simon v. Republic of Hungary*, 812 F.3d 127, 133 (D.C. Cir. 2016) (*Simon II*)). Respondent Survivors, four of whom are United States citizens, seek compensation from petitioner Hungary[1] and from Hungary's state-owned railway company Magyar Államvasutak Zrt. (MÁV) for the seizure and expropriation of Survivors' property as part of Hungary's genocidal campaign. The district court dismissed Survivors' claims on grounds of international comity and *forum non conveniens*, *id.* at 48a-95a, and the court of appeals reversed, *id.* at 1a-47a.

1. The Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. § 1602 *et seq.*, establishes "a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488 (1983). "The key word . . . is *comprehensive*"; this Court has "used that term often and advisedly to describe the Act's sweep." *Republic of Argentina v. NML Capital, Ltd.*, 573 U.S. 134, 141

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[1] In 2012, the Republic of Hungary adopted a new constitution that, *inter alia*, changed the name of the country to Hungary. Magyarország Alaptörvénye, art. A ("The name of OUR COUNTRY shall be Hungary.").

(2014). Enacted in 1976, the FSIA displaced the existing system under which courts would defer to determinations of the Executive Branch about whether and when to exercise jurisdiction over foreign sovereigns. Pet. App. 5a; *Republic of Austria v. Altmann*, 541 U.S. 677, 689-691 (2004). With enactment of the FSIA, Congress "transfer[red] primary responsibility for immunity determinations from the Executive to the Judicial Branch." *Altmann*, 541 U.S. at 691. That "means that '[a]fter the enactment of the FSIA, the Act—and not the pre-existing common law—indisputably governs the determination of whether a foreign state is entitled to sovereign immunity.'" *NML Capital*, 573 U.S. at 141 (quoting *Samantar v. Yousuf*, 560 U.S. 305, 313 (2010)) (brackets in original). "Thus," as this Court has explained, "any sort of immunity defense made by a foreign sovereign in an American court must stand on the Act's text. Or it must fall." *Id.* at 141-142.

The FSIA sets out a general rule that a foreign state and its agencies and instrumentalities "shall be immune from the jurisdiction" of federal and state courts except as provided by certain international agreements and by the exceptions enumerated in the statute. 28 U.S.C. § 1604; *see id.* §§ 1605-1607. It also provides that federal district courts shall have jurisdiction over "any nonjury civil action against a foreign state as defined in [28 U.S.C. § 1603(a)] as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement." *Id.* § 1330(a).

This case involves the FSIA's "expropriation exception" to immunity, which is set out in 28 U.S.C. § 1605(a)(3). That exception provides in full:

> (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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> * * *
>
> (3) in which rights in property taken in violation of international law are in issue and [i] 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* [ii] 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) (emphasis added).

2. a. This case arises out of some of the worst atrocities ever committed in human history. As the court of appeals explained in the first appeal in this case, "[t]he wartime wrongs inflicted upon Hungarian Jews by the Hungarian government are unspeakable and undeniable." *Simon II*, 812 F.3d at 132. Beginning in 1941, "Hungary 'began a systematic campaign of [official] discrimination' against its Jewish population," including sending tens of thousands of Jews "to internment camps near the Polish border." Pet. App. 4a (quoting *Simon II*, 812 F.3d at 133). Hungarian officials also forcibly deported Jews via train to Nazi-

occupied Ukraine, where many of them were promptly murdered. C.A. J.A. 6-7, 25. During the course of those forcible deportations, Hungarian officials and MÁV personnel confiscated property from the exiled Jews. *Id.* at 6, 25. Throughout World War II, Hungary cooperated with its Nazi allies to murder more than two-thirds of the more than 800,000 Jews who lived in Hungary at the start of the war. *Simon II*, 812 F.3d at 132. Most of those murders happened at Auschwitz in a three-month period during 1944. *Ibid.* In the words of Winston Churchill (and the court of appeals), "the brutal, mass deportation of Hungarian Jews for extermination at Nazi death camps [w]as 'probably the greatest and most horrible crime ever committed in the history of the world.'" *Ibid.*

With what the court of appeals called "tragic efficiency," "Hungary rounded up more than 430,000 Jews for deportation to Nazi death camps" in the summer of 1944. Pet. App. 4a. Government officials—including MÁV employees—organized four daily trains to shuttle Hungarian Jews to their deaths. *Ibid.* Before cramming between 70 and 90 people into each freight car, MÁV officials robbed those people of all of their possessions. *Id.* at 4a-5a. Each of the four daily trains carried between 3,000 and 3,500 human beings to the Nazi death camps. *Id.* at 4a. Survivors allege in this case that, "[w]ithout the mass transportation provided by [MÁV], the scale of the Final Solution in Hungary would never have been possible." *Id.* at 5a (quoting Second Am. Compl. ¶ 133) (first brackets in original).

Respondents are 14 of the very few Jewish survivors of the Hungarian Holocaust. Pet. App. 2a. All 14 of the Survivors were Hungarian nationals during

World War II but have adopted other nationalities since escaping the atrocities of the Hungarian government. *Simon II*, 812 F.3d at 134. Twelve of the Survivors were among the hundreds of thousands who were transported to Auschwitz—and among the very few who survived. *Ibid.* Four of the Survivors (Rosalie Simon, Charlotte Weiss, Rose Miller, and Ella Feuerstein Schlanger) are United States citizens, two are citizens of Canada, seven are citizens of Israel (or their heirs), and one is a citizen of Australia. Pet. App. 7a & n.1.

b. In 2010, Survivors filed this action in the United States District Court for the District of Columbia against Hungary, MÁV, and Rail Cargo Hungaria Zrt., a private railway company that is the successor-in-interest to the former cargo division of MÁV. Pet. App. 7a-8a; C.A. J.A. 1. Survivors—who seek to represent a class of Hungarian Holocaust survivors who have been injured in similar ways—seek restitution for the possessions taken from them and their families by petitioners as Survivors were forced to board trains destined for concentration camps. Pet. App. 8a. Survivors contend that jurisdiction is proper under the FSIA's expropriation exception, 28 U.S.C. § 1605(a)(3).

At an earlier stage of this litigation, the United States filed a "Statement of Interest" in the district court, urging the court to dismiss Rail Cargo Hungaria Zrt. from the case because it is now nearly 100% owned by an Austrian company. Pet. App. 8a. The United States explained that dismissal of the Austrian company was appropriate because of the United States' "strong support for international agreements with Austria involving Holocaust claims against Austrian companies." *Ibid.* In light of the United States' long-

term collaboration with Austria to develop compensation funds for victims of the Holocaust, the United States asserted that maintaining the suit against Rail Cargo Hungaria Zrt. would be "contrary" to "enduring United States foreign policy interests." *Id.* at 8a-9a. The United States said nothing in that filing—or in any other filing in this case—urging dismissal of Hungary or MÁV or contending that allowing this suit to proceed against them would impair any foreign-policy interest of the United States. *Id.* at 9a.

The district court later dismissed Rail Cargo Hungaria Zrt. for lack of personal jurisdiction. Pet. App. 9a. The court separately dismissed Hungary and MÁV for lack of subject matter jurisdiction, holding that, because the Treaty of Peace with Hungary, Feb. 10, 1947, 61 Stat. 2065, 41 U.N.T.S. 135, provided the exclusive mechanism to resolve Survivors' claims, the court was "constrained by the FSIA to recognize [petitioners'] sovereign immunity." Pet. App. 9a (quoting *Simon v. Republic of Hungary*, 37 F. Supp. 3d 381, 420 (D.D.C. 2014)).

c. The D.C. Circuit reversed the district court's dismissal of Survivors' property claims against Hungary and MÁV. *Simon II*, 812 F.3d at 151. The court of appeals held that the 1947 Treaty did not preempt Survivors' suit and that the FSIA's expropriation exception encompasses the types of common-law claims that Survivors assert. Pet. App. 9a-10a. The court specifically held that the expropriation exception applies because petitioners' "expropriations of the Survivors' property were '*themselves genocide*,' in violation of fundamental tenets of international law." *Id.* at 10a (quoting *Simon II*, 812 F.3d at 142). The court further

held that Survivors had pleaded a sufficient commercial nexus to MÁV to bring it within the FSIA's expropriation exception and remanded to give Survivors an opportunity to amend their complaint to establish a similar showing with respect to Hungary. *Ibid.* The court of appeals also "le[ft] it to the district court to consider on remand" both "whether, as a matter of international comity, it should refrain from exercising jurisdiction over those claims until the plaintiffs exhaust their domestic remedies in Hungary" and petitioners' "*forum non conveniens* arguments." *Simon II*, 812 F.3d at 151.

d. On remand, Survivors amended their complaint to allege specific facts about Hungary's ongoing commercial activity in the United States. Pet. App. 11a. Rather than consider the adequacy of those new allegations, the district court instead dismissed the case on other grounds. *Id.* at 48a-95a.

First, the district court dismissed Survivors' claims based on common-law principles of international comity. Pet. App. 64a-83a. The court relied on what it described as a rule of customary international law that a plaintiff must exhaust domestic remedies before it may assert a claim for expropriation in violation of international law unless doing so would be futile. *Id.* at 65a-66a. The court concluded that "comity considerations counsel in favor of dismissal," *id.* at 72a, because of concerns about "international friction," *id.* at 71a (citation omitted). The court went on to conclude that exhaustion of Survivors' claims in Hungarian courts would not be futile—in spite of Survivors' arguments about the rise of anti-Semitism in Hungary, limitations on the independence of Hungary's judiciary, and the absence of meaningful remedies for

their claims. *Id.* at 72a-82a. The court therefore dismissed Survivors' claims without prejudice. *Id.* at 82a-83a.

Second, the district court dismissed Survivors' claims on the alternative grounds of *forum non conveniens*. Pet. App. 83a-95a. Stating that Survivors' choice of forum was entitled to only "minimal deference," *id.* at 87a, the court reasoned that pursuit of those claims in Hungary would be more convenient—even though none of the plaintiffs lives there—because the evidence and many witnesses are located there. *Id.* at 87a-90a. The court explained that Survivors' "emotional distress or even trauma in returning to Hungary" was "not sufficient to" outweigh the other factors pointing to Hungary as the more appropriate forum. *Id.* at 91a. And the court relied on Hungary's interest in having claims against it adjudicated in its own courts. *Id.* at 92a-94a.

e. Survivors appealed. After the court of appeals heard argument in the case, it invited the United States "to file a brief amicus curiae, expressing the views of the United States on this case, which raises questions of what the parties refer to as 'prudential exhaustion' and *forum non conveniens* in a lawsuit against the Republic of Hungary and one of its instrumentalities." C.A. Order (Apr. 20, 2018). In its amicus brief, the United States argued that a district court "may" dismiss a case brought pursuant to the FSIA's expropriation exception on grounds of international comity or *forum non conveniens*, but declined to "express a view as to whether it would be in the foreign policy interests of the United States for plaintiffs to have sought or now seek compensation in Hungary." U.S. C.A. Br. 9, 11.

A divided panel of the D.C. Circuit reversed the district court's dismissal of Survivors' claims. Pet. App. 1a-47a.

Turning first to Hungary's argument that Survivors should be required to exhaust their claims in Hungarian courts before filing suit in the United States, the court of appeals explained that genuine "exhaustion" requires a plaintiff to press her claims "through a decisional forum . . . whose decision is then subject to the review of a federal court." Pet. App. 13a. In contrast, the panel explained, what Hungary seeks is dismissal of Survivors' claims without the right to seek later review in the courts of the United States. *Id.* at 14a. What Hungary seeks, the court noted, is "a judicial grant of immunity from jurisdiction in United States courts." *Ibid.* "But," the court held, "the FSIA admits of no such bar." *Ibid.*

The court of appeals relied on its recent decision in *Philipp v. Federal Republic of Germany*, 894 F.3d 406 (D.C. Cir. 2018), which held that the enactment of the FSIA displaced "the pre-existing common law" by requiring that "any sort of immunity defense made by a foreign sovereign in an American court must stand on the Act's text. Or it must fall." *Id.* at 415 (citation omitted); *see* Pet. App. 15a. The court explained that "[t]here is no room in" the FSIA's "'comprehensive' standards governing 'every civil action' for the extra-textual, case-by-case judicial reinstatement of immunity that Congress expressly withdrew." Pet. App. 15a (quoting *Philipp*, 894 F.3d at 415). The court further explained that "Hungary's exhaustion-cum-immunity argument has no anchor in the FSIA"—and that, in fact, "the text points against it." *Ibid.* "When Con-

gress wanted to require the pursuit of foreign remedies as a predicate to FSIA jurisdiction," the court explained, "it said so explicitly." *Ibid.* Instead, the court held, "the FSIA is explicit that, if a statutory exception to immunity applies—as we have squarely held it does at least as to MÁV—'a foreign state *shall not be immune* from the jurisdiction of courts of the United States or of the States.'" *Ibid.* (internal citation and brackets omitted) (quoting 28 U.S.C. § 1605(a)). The court distinguished the comity theory the district court relied on from "those historical legal doctrines, like *forum non conveniens*, that Congress chose to preserve when it enacted the FSIA." *Id.* at 16a. Explaining that "*[f]orum non conveniens* predates the FSIA by centuries" and "was an embedded principle of the common-law jurisprudential backdrop against which the FSIA was written," the court reasoned that "Hungary's theory, by contrast, lacks any pedigree in domestic or international common law." *Ibid.*

Reversing the district court's dismissal on comity grounds, the court of appeals held that "[c]ourts cannot end run" the FSIA's "congressional command by just relabeling an immunity claim as 'prudential exhaustion.'" Pet. App. 15a-16a. "Under the FSIA," the court explained, "courts are duty-bound to enforce the standards outlined in the statute's text, and when jurisdiction exists (as it does at least over MÁV), courts 'have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them.'" *Id.* at 16a (quoting *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l*, 493 U.S. 400, 409 (1990)).

Turning next to the district court's dismissal on *forum non conveniens* grounds, the court of appeals explained that, although that "ancient doctrine . . . is not

displaced by the FSIA," Pet. App. 17a, the district court "clear[ly]" abused its discretion in dismissing Survivors' claims on that basis, *id.* at 18a. The court of appeals explained that "[t]he district court committed legal error at the first step by affording the Survivors' choice of forum only 'minimal deference.'" *Id.* at 19a (quoting *id.* at 87a). Emphasizing that Hungary bears a "'heavy burden in opposing'" Survivors' choice of forum, the court of appeals explained that "[d]eference to the plaintiffs' choice is magnified where, as here, United States citizens have chosen their home forum." *Ibid.* (citation omitted). Emphasizing that the district court "set the scales wrong from the outset," *ibid.*, the court of appeals explained that the lower court erred by (1) disregarding the "weighty interest of Americans seeking justice in their own courts," even when they join forces with non-U.S.-citizen co-plaintiffs; (2) concluding that requiring *some* plaintiffs to travel to the United States would be less convenient than requiring *all* plaintiffs to travel to Hungary, "the country that committed the mass murder of [Survivors'] families and the genocidal theft of their every belonging"; and (3) minimizing how "indisputably inconvenient" it would be "to further delay the elderly Survivors' almost decade-long pursuit of justice." *Id.* at 20a-21a.

The court of appeals went on to explain that the district court misallocated the burden of proof, which should rest with Hungary—instead requiring Survivors to demonstrate that Hungary would *not* be a proper forum. Pet. App. 23a. The court of appeals faulted the district court for failing to "analyze[] the critical question of the availability and adequacy of the Hungarian forum," even though "the United States

government lacks 'a working understanding of the mechanisms that have been or continue to be available in Hungary with respect to such claims.'" *Id.* at 24a (quoting U.S. C.A. Br. 11). The court of appeals went on to explain various ways in which the district court incorrectly applied the governing legal standards to the facts of this case in balancing the competing public and private interests in the two potential fora. *Id.* at 25a-35a.

The court of appeals therefore reversed and remanded, explaining that "[t]he district court erred in declining to exercise statutorily conferred jurisdiction over the Survivors' effort to obtain some measure of reparation for those injuries both by wrongly requiring them to adjudicate their claims in Hungary first, and by misapplying the law governing the *forum non conveniens* analysis." Pet. App. 36a.

Judge Katsas dissented from the panel's *forum non conveniens* holding. Agreeing that the district court "correctly stated the relevant legal principles," Judge Katsas would have held that the district court correctly applied those principles here by "permissibly assess[ing] the weight owed to the plaintiffs' choice of a United States forum," Pet. App. 37a-38a; by correctly assessing whether Hungary is an adequate alternative forum, *id.* at 40a-42a; and by "reasonably balanc[ing] the private and public interests involved," *id.* at 43a.

f. The court of appeals denied petitioners' petition for rehearing en banc, Pet. App. 96a-97a, and their subsequent motion to stay the mandate.[2]

g. This Court also denied petitioners' motion for a stay. No. 18A942.

THE PETITION SHOULD BE DENIED

Petitioners seek this Court's review of the court of appeals' holdings (1) that the FSIA does not permit a federal court effectively to grant immunity based on principles of international comity where the statute expressly provides that the foreign sovereign shall not be immune and (2) that the district court erred in applying settled principles of *forum non conveniens* to the facts of this case. Review of those questions is unwarranted because the court of appeals correctly resolved them and its decision does not implicate a circuit conflict warranting this Court's intervention.

I. The First Question Presented Does Not Warrant Review.

Petitioners seek this Court's review of the D.C. Circuit's holding that, when the FSIA plainly provides for jurisdiction over a foreign state or its agency or instrumentality, a federal court may not refrain from exercising that jurisdiction based on common-law principles of international comity. Review of that question is unwarranted because the court of appeals' decision is correct and does not implicate a cert-worthy circuit conflict.

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[2] After the petition for a writ of certiorari was filed in this case, the D.C. Circuit also denied a petition for rehearing en banc in *Philipp*, over the dissent of Judge Katsas. *Philipp v. Federal Republic of Germany*, 925 F.3d 1349 (D.C. Cir. 2019) (per curiam).

A. *The Decision Below Does Not Implicate a Circuit Conflict Warranting This Court's Intervention.*

Petitioners misleadingly suggest that a widespread circuit conflict exists on whether courts may abstain from exercising jurisdiction provided by the FSIA for reasons of international comity, stating both that the decision below "conflicts with the law of other circuits" and that "[t]here is an entrenched, acknowledged conflict *among* the courts of appeals" on that question. Pet. 13 (emphasis added; capitalization altered). In fact, petitioners identify only *one* other circuit that they contend has adopted a legal rule in conflict with the D.C. Circuit's, relying on the Seventh Circuit's decisions (arising out of the same case) in *Fischer v. Magyar Államvasutak Zrt.*, 777 F.3d 847 (7th Cir. 2015), and *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661 (7th Cir. 2012). Although the Seventh Circuit's decision in *Fischer* does conflict with the decision below and in *Philipp v. Federal Republic of Germany*, 894 F.3d 406 (D.C. Cir. 2018), that shallowest-possible circuit conflict does not warrant this Court's intervention.

The Seventh Circuit's first attempt to address the international-comity question presented does not conflict with the decision below because it did not actually address that question. In *Abelesz*, the court held that a plaintiff cannot establish that property was "taken in violation of international law"—which is required in order to invoke the FSIA's expropriation exception, 28 U.S.C. § 1605(a)(3)—unless the plaintiff can show either that she first exhausted domestic remedies or that she has a legally compelling reason for not doing so. 692 F.3d at 678-684. That court reasoned that

such exhaustion is required because an expropriation of property does not violate international law unless and until the expropriating state declines to provide just compensation. *Id.* at 675-684. The court thus held that the plaintiffs had "not sufficiently alleged a violation of international law because they ha[d] not exhausted the Hungarian remedies available to them." *Id.* at 671. In other words, the Seventh Circuit held in *Abelesz* that a non-exhausted takings claim does not qualify as a claim for "property taken in violation of international law," 28 U.S.C. § 1605(a)(3), and is therefore insufficient to invoke the FSIA's expropriation exception to immunity. That holding is wrong—but it does not speak to the first question presented and does not conflict with the D.C. Circuit's comity holding in this case.

In the earlier appeal in this case, the D.C. Circuit held that the takings alleged here violated international law because "the alleged takings" were "*themselves genocide*," *Simon II*, 812 F.3d at 142, not because they were *uncompensated*. Because the alleged takings violated international law the moment they occurred, no exhaustion is necessary to satisfy the requirements of the expropriation exception. Hungary did not seek (and is not now seeking) review of that holding. The question presented now is: *assuming* that a plaintiff has established the elements of the expropriation exception, can a court abstain from exercising jurisdiction on comity grounds in contravention of the FSIA's command that the foreign state shall not be immune. The Seventh Circuit in *Abelesz* did not—at least, not expressly in that opinion—reach that question because it held that the plaintiffs had not established the elements of the expropriation exception.

That decision therefore does not conflict with the decision below.

Perhaps because the exhaustion ruling in *Abelesz* is obviously wrong in a case where genocidal takings are alleged, the Seventh Circuit "clarif[ied its] earlier opinion" in a second appeal in the same case. *Fischer*, 777 F.3d at 856. That so-called clarification was in fact a new holding that, "even if plaintiffs can allege a violation of international law," "customary international law" requires that the plaintiffs first exhaust remedies in Hungary or demonstrate that it would not be worthwhile to do so.[3] *Id.* at 857. The court explained that "the comity at the heart of international law required [the] plaintiffs either to exhaust domestic remedies in Hungary or to show a powerful reason to excuse the requirement." *Id.* at 858. In so holding, the panel relied on the same flawed reasoning the *Abelesz* panel had relied on, citing a supposedly "well-established international law principle" of "requiring exhaustion of domestic remedies." *Id.* at 859. As noted, that principle applies to claims that a government expropriated property without just compensation—and no such claims were presented in that case or in this one. That principle has also generally applied only in the context where an individual's claim has been

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[3] The panel's statement in *Fischer* that the earlier decision in *Abelesz* "did not hold that plaintiffs failed to allege violations of international law in the first instance," 777 F.3d at 857, cannot be reconciled with the statements in *Abelesz* that the plaintiffs had "not sufficiently alleged a violation of international law because they ha[d] not exhausted the Hungarian remedies available to them or provided a legally compelling explanation for their failure to do so," 692 F.3d at 671.

adopted by the state of his citizenship or residence in a nation-to-nation proceeding ("diplomatic protection") of the sort typified by the Interhandel case before the International Court of Justice—*Interhandel (Switzerland v. United States)*, Preliminary Objections, 1959 I.C.J. 6, 26-27 (Mar. 21)—the principal case the Seventh Circuit relied on in *Abelesz*, 692 F.3d at 679-681.[4]

Hungary is therefore correct that the holding in *Fischer* conflicts with the decision below—because the Seventh Circuit imposed a comity-based exhaustion requirement where plaintiffs had satisfied the requirements of the FSIA's expropriation exception, and the D.C. Circuit held that such comity-based "exhaustion-cum-immunity," Pet. App. 15a, is not permitted in those circumstances. That shallow and nascent circuit conflict does not warrant this Court's intervention. No other court of appeals has relied on—or even favorably cited—the Seventh Circuit's comity-based exhaustion holding in *Fischer*. The *Fischer* plaintiffs did not seek rehearing en banc, but the full Seventh Circuit might

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[4] Claims based on the types of genocidal claims at issue here arise only in connection with the FSIA's expropriation exception. The purpose of including that exception in the FSIA was to provide a U.S. forum for victims of state-sponsored expropriations that occur within the territorial jurisdiction of the expropriating state. *See* Mark B. Feldman, *Cultural Property Litigation and the Foreign Sovereign Immunities Act of 1976: The Expropriation Exception to Immunity*, 2011 A.B.A. Sec. Int'l L., Art & Cultural Heritage L. Comm. 9, 13 (Summer, Vol. III, Issue No. 2), https://law.depaul.edu/about/centers-and-institutes/center-for-art-museum-cultural-heritage-law/resources/Documents/ABA%20Newsletters/VolumeIII_IssueII.pdf. Applying the plain text of the expropriation exception in this context does not open the federal judiciary as a forum to redress violations of human rights, including genocide, more generally.

decide to reconsider its outlier decision if the opportunity ever arises. In the meantime, other courts of appeals should have the opportunity to consider the D.C. Circuit's two well-reasoned decisions on this question. Hungary asserts (Pet. 14) that the first question presented is unlikely to arise in other courts of appeals. But similar Holocaust-era expropriation claims have arisen in other circuits. *See*, *e.g.*, *Cassirer v. Kingdom of Spain*, 616 F.3d 1019 (9th Cir. 2010) (en banc); *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954 (9th Cir. 2010); *Garb v. Republic of Poland*, 440 F.3d 579 (2d Cir. 2006); *Whiteman v. Dorotheum GmbH & Co. KG*, 431 F.3d 57 (2d Cir. 2005); *Altmann v. Republic of Austria*, 317 F.3d 954 (9th Cir. 2002); *Hammerstein v. Federal Republic of Germany*, 2011 WL 9975796 (E.D.N.Y. Aug. 1, 2011); *Freund v. Republic of France*, 592 F. Supp. 2d 540 (S.D.N.Y. 2008). This Court's consideration of the first question presented would be premature at this time.

B. The Decision Below Is Correct.

Review is also unwarranted because the D.C. Circuit's holdings on comity-based exhaustion-cum-immunity in this case and in *Philipp* are correct.

The plain text of the FSIA provides that, when the requirements of the expropriation exception are satisfied, the foreign sovereign defendant "*shall not be immune* from the jurisdiction of courts of the United States." 28 U.S.C. § 1605(a) (emphasis added). For purposes of deciding the first question presented, it is conceded that plaintiffs have properly invoked the FSIA's expropriation exception, at least with respect to MÁV. "As the Act itself instructs, '[c]laims of foreign states to immunity should henceforth be decided

by courts . . . in conformity with the principles *set forth in this [Act].*'" *Republic of Argentina v. NML Capital, Ltd.*, 573 U.S. 134, 141 (2014) (quoting 28 U.S.C. § 1602) (alterations in original). But nothing in the text of the FSIA permits a court to refuse the textual mandate that, in those circumstances, the sovereign defendant shall not be immune. When Congress intended to require a plaintiff to pursue foreign remedies before invoking jurisdiction under the FSIA, it did so expressly. *See* 28 U.S.C. § 1605A(a)(2)(A)(iii). No such requirement applies here.

Tellingly, petitioners do not even purport to rely on the text of the FSIA, appealing instead to pre-FSIA common-law principles of comity among nations. Those are precisely the principles that governed foreign sovereign immunity determinations *before* the enactment of the FSIA—and those are precisely the principles that Congress intended to *displace* with the clear rules set out in the FSIA. As this Court explained in *NML Capital*, Congress enacted the FSIA in order to "abate[] the bedlam" by "replacing the old executive-driven, factor-intensive, loosely common-law-based immunity regime with the [FSIA's] 'comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state.'" 573 U.S. at 141 (quoting *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488 (1983)). The Court emphasized that "[t]he key word there . . . is *comprehensive*," explaining that, "'[a]fter the enactment of the FSIA, the Act—and not the pre-existing common law—indisputably governs the determination of whether a foreign state is entitled to sovereign immunity.'" *Ibid.* (quoting *Samantar v. Yousuf*, 560 U.S.

305, 313 (2010)) (second brackets in original). Petitioners assert (Pet. 21) that their version of comity-based immunity need not apply in "[t]he mine-run of FSIA cases"—but they offer no limiting principle that would prevent that, particularly with respect to expropriation claims. The arguments petitioners offer might have been a reason not to adopt an expropriation exception in the FSIA—but Congress *did* adopt such an exception, and the D.C. Circuit correctly rejected petitioners' proposed end-run around the FSIA's plain statutory mandate. The FSIA itself reflects Congress's view of how to balance comity principles and other U.S. interests, in the expropriation context and more generally.

Accepting petitioners' view of the law would be tantamount to a wholesale reversion to the pre-FSIA regime of comity-based immunity. Except it would be worse than that in at least one respect because it would permit courts to grant immunity based on comity when the Executive Branch has determined that such immunity would *not* serve the United States' foreign-policy interests. Petitioners gloss over the United States' decision *not* to ask the district court or court of appeals to dismiss this case on comity grounds, suggesting (Pet. 15 n.12) that the United States Department of State somehow lacked access to the same expert information that the district court had. That suggestion is laughable. Although the United States may be understandably reluctant to call the judicial system of a NATO ally corrupt or inadequate, its repeated refusals in this case to endorse that system speak volumes. And the United States' determination not to seek a comity-based dismissal of this case can mean only one thing: the United States does not view the

exercise of jurisdiction in this case as contrary to its foreign-relation interests.[5] Thus, even under the old (displaced) regime, Hungary would not be entitled to the relief it seeks. And it is absurd to think that the federal foreign sovereign immunity regime is *more* permissive now than it was before the FSIA was enacted.

Petitioners attempt to evade this Court's clear instruction that "any sort of immunity defense made by a foreign sovereign in an American court must stand on the Act's text[, o]r it must fall," *NML Capital*, 573 U.S. at 141-142, by arguing (Pet. 35) that its asserted right not to be subject to suit in U.S. courts as a matter of comity is not "immunity" to suit. Of course it is. As this Court has explained, under the foreign-sovereign-immunity regime that was *displaced* by the FSIA, U.S. courts declined to exercise jurisdiction over foreign sovereigns as a matter of "comity." *Republic of Austria v. Altmann*, 541 U.S. 677, 689, 694 (2004). Indeed, "the objective of the 'sovereign immunity' doctrine . . . is simply to give foreign states and instrumentalities some protection, at the time of suit, from the inconvenience of suit as a gesture of comity." *Id.* at 709 (Breyer, J., concurring) (internal quotation marks omitted). That is exactly what Hungary seeks now—to escape the jurisdiction of U.S. courts on comity grounds.

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[5] Notably, the cases petitioners rely on (Pet. 1-2) as examples of courts' granting comity-based immunity differ from this case in two critical respects: (1) the FSIA did not even arguably apply in those cases because the defendants were not foreign states, and (2) the United States expressly sought dismissal of those cases on the basis of international comity. *Mujica v. AirScan Inc.*, 771 F.3d 580, 609-610 (9th Cir. 2014); *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1231-1232 & n.6 (11th Cir. 2004).

"[T]he legal concept of sovereign immunity, as traditionally applied, is about a defendant's *status* at the time of suit." *Id.* at 708. And Hungary's argument for comity-based dismissal is equally (and solely) based on its status as a sovereign. The D.C. Circuit correctly rejected petitioners' arguments.

Finally, petitioners contend (Pet. 19-21) that the decision below must be wrong because it supposedly provides greater "comity" protection to foreign individuals than it does to foreign sovereigns. That assertion is wrong and misleading. Some courts have extended the abstention doctrine this Court articulated in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), to allow district courts to dismiss a suit "in favor of a pending and parallel foreign proceeding upon a showing of exceptional circumstances." Restatement (Fourth) of Foreign Relations Law § 424 reporters' note 9 (2018) (collecting cases). Petitioners cite (Pet. 20) two cases that permitted comity-based abstention without expressly requiring that showing. Those cases are the exception, not the rule. And those cases involved claims against non-sovereign entities where the disposition of the claims against those entities would affect important interests of the *absent* foreign sovereign. *Mujica v. AirScan Inc.*, 771 F.3d 580, 609-614 (9th Cir. 2014); *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1238-1240 (11th Cir. 2004); *see also Republic of Philippines v. Pimentel*, 553 U.S. 851, 865-866 (2008). Any comity concerns that arise in that context—where the FSIA does *not* provide jurisdiction over the foreign sovereign and the U.S. litigation would dispose of the foreign sovereign's interests without such jurisdiction—are simply not

relevant where, as here, the FSIA expressly *does* supply jurisdiction over the foreign sovereign.[6]

II. The Second Question Presented Does Not Warrant Review.

Petitioners also seek this Court's review of the D.C. Circuit's holding that the district court erred in dismissing Survivors' claims under the doctrine of *forum non conveniens* because, the court of appeals held, the district court gave insufficient weight to the U.S.-citizen Survivors' choice of forum and failed to hold petitioners to their burden. That issue also does not warrant review because it does not conflict with any decision of this Court or of any other court of appeals. The court of appeals correctly applied settled legal principles to the facts of this case—and its fact-bound holding is not cert-worthy.

A. The Court of Appeals' Forum Non Conveniens *Holding Does Not Implicate Any Circuit Conflict.*

Petitioners contend (Pet. 24-28) that the courts of appeals are "split" about how much deference to apply to a plaintiff's choice of forum when she sues a foreign defendant in a U.S. court. That could not be further

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[6] Survivors note that this case is in an interlocutory posture, which ordinarily would provide an additional reason to deny the petition even if the Court were inclined to review the question presented at some point. Survivors do not present that argument, however, because of Survivors' overwhelming interest in having their claims resolved as expeditiously as possible. The elderly Survivors have pursued this action for nearly a decade. If this question is one this Court wishes to resolve, Survivors would prefer that that happen sooner rather than later.

from the truth. As illustrated by the decisions petitioners rely on, every court of appeals applies the same legal principles when determining whether to dismiss a case under the doctrine of *forum non conveniens*. Application of those principles in different cases naturally leads to varying results—but that is just the ordinary consequence of applying a multi-factor legal test to disparate circumstances.

In reversing the district court's dismissal based on *forum non conveniens*, the D.C. Circuit correctly set out the governing law. Pet. App. 17a-18a, 26a, 29a. As this Court has instructed, a plaintiff's choice of forum is entitled to "a strong presumption" in its favor, particularly when the plaintiff chooses her home forum. *Id.* at 17a (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 (1981); citing *Atl. Marine Constr. Co. v. U.S. Dist. Court*, 571 U.S. 49, 66 n.8 (2013)). In contrast, when a foreign plaintiff chooses to litigate in the United States, that choice is entitled to "less deference." *Id.* at 18a (quoting *Piper*, 454 U.S. at 256). When a defendant seeks dismissal on grounds of *forum non conveniens*, the defendant bears the burden of establishing that a different forum is available and adequate and that there are strong reasons to prefer the alternative forum. *Ibid.* Whether a defendant has met that burden in a particular case must be determined with reference to "private-interest factors" (including, *e.g.*, relative ease of access to sources of proof and availability of compulsory process for attendance of unwilling witnesses), *id.* at 26a, and "public-interest factors" (including, *e.g.*, court congestion, local interest in having controversies decided at home, and avoiding conflicts in the application of foreign law), *id.* at 29a.

When applying those legal rules, this Court has repeatedly emphasized, "[e]ach case turns on its facts." *Piper*, 454 U.S. at 249 (brackets in original).

Petitioners assert (Pet. 24-25) that the court of appeals applied an overly "rigid" form of deference to Survivors' choice of forum rather than the "sliding scale" form of deference applied in the First, Second, Third, Sixth, Seventh, and Ninth Circuits. Petitioners are simply incorrect. Every one of those circuits applies precisely the same legal principles the D.C. Circuit applied in this case. Like the D.C. Circuit, the circuits petitioners rely on hold that a plaintiff's choice of forum is ordinarily entitled to deference, that a defendant must make a strong showing to overcome that deference, that the degree of deference due is less when the plaintiff is himself foreign, and that whether a defendant has overcome the degree of deference due must be determined with reference to the same set of private-interest and public-interest factors. *See Interface Partners Int'l Ltd. v. Hananel*, 575 F.3d 97, 101-102 (1st Cir. 2009); *Iragorri v. United Techs. Corp.*, 274 F.3d 65, 70-72 (2d Cir. 2001) (en banc); *Kisano Trade & Invest Ltd. v. Lemster*, 737 F.3d 869, 873-874 (3d Cir. 2013); *Hefferan v. Ethicon Endo-Surgery Inc.*, 828 F.3d 488, 493 (6th Cir. 2016); *In re Ford Motor Co.*, 344 F.3d 648, 651-653 (7th Cir. 2002); *Vivendi SA v. T-Mobile USA Inc.*, 586 F.3d 689, 695-696 (9th Cir. 2009). In other words, every court of appeals that petitioners identify agrees with the D.C. Circuit on the legal rules applicable to *forum non conveniens* determinations. That is the definition of *no* circuit split.

Petitioners would disregard the U.S. citizenship of four of the named plaintiffs, suggesting that they have "little connection to the United States" and should be

treated for these purposes as if they were still Hungarian citizens. Pet. 27 (citation omitted). That suggestion is both legally wrong and deeply offensive. The reason a plaintiff's choice of forum is entitled to deference when she chooses her home forum is because it is presumed to be convenient for the plaintiff. The reason a foreign plaintiff's choice of a U.S. forum is not entitled to the same degree of deference is because that presumption does not apply with the same force—and to prevent forum shopping. *See*, *e.g.*, *Kisano*, 737 F.3d at 874; *Iragorri*, 274 F.3d at 72. Here, where the plaintiff group includes citizens of several countries—including the United States—there is every reason to believe that the plaintiffs' collective choice of forum is convenient and to defer on that basis. Any suggestion by petitioners that Survivors are somehow forum shopping by becoming U.S. citizens and opting to sue in their home forum is beyond the pale. All of the named plaintiffs obtained citizenship of new countries after World War II *not* because they sought a new forum for litigation but because, after Hungary deported them to a Nazi death camp, they understandably sought a new home country. Far from being a reason to afford *less* deference to their choice of forum, that is a reason to afford *more* deference when the alternative is to force Survivors to return to Hungary, the country that attempted to exterminate them. All of petitioners' assertions (Pet. 1, 18, 24, 31) that this is a "foreign-cubed" case should therefore be disregarded.

Petitioners' further contention (Pet. 28-30) that the court of appeals' *forum non conveniens* holding conflicts with the Seventh Circuit's approach to that question in *Fischer*, *supra*, is just a rehash of their arguments about comity-based immunity. Both courts

applied the same legal principles, balancing the relevant "public and private interests." *Fischer*, 777 F.3d at 868; *see* Pet. App. 26a-35a. The primary difference in their respective analyses was their view of the adequacy of Hungary's alternative forum. *Compare Fischer*, 777 F.3d at 867-868, *with* Pet. App. 30a. But that difference is easily explained by the presence of the United States in this case and its absence in *Fischer*. As the court of appeals explained in this case, the United States expressly declined to endorse Hungary's allegedly available alternatives, "advised th[e] court that it has no specific foreign policy or international comity concerns that warrant dismissal in favor of a Hungarian (or any other) forum," and "emphasized" instead the United States' "governmental interest in the timely resolution of the Survivors' claims during their lifetimes." Pet. App. 34a. In contrast, the United States said nothing in *Fischer*. The fact that different litigating postures lead to disparate outcomes is not surprising—and it does not suggest any conflict in applicable law. Because every court of appeals applies the same legal principles when considering whether to dismiss a case on *forum non conveniens* grounds, this Court's review is unwarranted.

B. The Decision Below Is Correct.

The court of appeals also correctly applied the settled legal principles governing the doctrine of *forum non conveniens* to the facts of this case.

Initially, the court of appeals correctly deferred to Survivors' choice of forum because four of the named Survivors are U.S. citizens. Pet. App. 19a-20a. Petitioners discount what the court described as "the weighty interest of Americans seeking justice in their own courts," *id.* at 20a, because some of the Survivors

are citizens of other countries. But petitioners cannot identify any case in which the inclusion of foreign plaintiffs with American plaintiffs was found to diminish or erase the deference owed to the American plaintiffs' choice of forum. More to the point, *none* of the Survivors resides in Hungary, and the court of appeals correctly concluded that "[t]he presence of foreign plaintiffs certainly does not justify the preference for a forum—Hungary—in which *no* plaintiff resides." *Ibid.* Making every single plaintiff travel internationally would hardly be more convenient than allowing them to choose the home forum of a quorum of plaintiffs. Petitioners now make much of the fact that Survivors seek to represent a class of individuals who survived Hungary's genocidal campaign against them. *See* Pet. 23, 26. But, as the court of appeals explained, those concerns are both premature and too late: no class has yet been certified, and petitioners failed to assert that any such class might include more Hungarians than Americans until after the regular briefing in the D.C. Circuit was complete. Pet. App. 22a.

The court of appeals also correctly weighed the relevant private-interest and public-interest factors. Pet. App. 26a-35a. Indeed, petitioners do not offer any actual argument to the contrary. *See* Pet. 36. In brief, the court explained that the U.S. Holocaust Memorial Museum in Washington, D.C. has amassed an extensive collection of records that are relevant to Survivors' claims; that Hungary had not identified even a single witness in Hungary who would need to testify; that allowing the suit to proceed in Survivors' home forum would not interfere with Hungary's ability to provide reparations to Survivors of its own accord; and that the United States has repeatedly displayed its strong

interest in facilitating the resolution of Holocaust-era claims such as Survivors'. Pet. App. 26a-35a. That holding is correct and does not warrant further review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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