No. 18-1447

IN THE

Supreme Court of the United States

REPUBLIC OF HUNGARY AND
MAGYAR ÁLLAMVASUTAK ZRT.,

Petitioners,

v.

ROSALIE SIMON, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE D.C. CIRCUIT

REPLY BRIEF

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INTRODUCTION

After Hungary filed this *certiorari* petition, the D.C. Circuit finally denied *en banc* review in *Philipp*—the case that first rejected comity-based abstention in FSIA cases.[1] Judge Katsas's dissent from the denial of rehearing *en banc* underscores the reasons why this petition should be granted.

As Judge Katsas explained, *Simon* and *Philipp* "create a clear split with the Seventh Circuit, are in tension with decisions from the Ninth and Eleventh Circuits, disregard the views of the Executive Branch on a matter of obvious foreign-policy sensitivity, and make" foreign sovereigns "more amenable" to litigation in U.S. courts than "private defendants abetting the sovereigns." *Philipp*, 925 F.3d at 1350 (Katsas, J., dissenting). "Moreover, they clear the way for a wide range of litigation against foreign sovereigns for public acts committed within their own territories." *Id.*

Plaintiffs contest none of these points. They concede the circuit split. They admit that private defendants benefit from comity-based abstention that the D.C. Circuit has now categorically barred for sovereign defendants. The government is already on record disagreeing with the D.C. Circuit and emphasizing the critical roles of comity-based abstention and *forum non conveniens* for U.S. foreign policy interests.

This Court's review is clearly needed, and even Plaintiffs urge the Court to act "sooner rather than

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[1] *Philipp v. Federal Republic of Germany*, 925 F.3d 1349 (D.C. Cir. 2019) (per curiam).

later." Opp. 23 n.6. The Court should grant the petition and reverse the D.C. Circuit's decision.

ARGUMENT

I. This Court Should Resolve the Acknowledged Circuit Split as to Whether Comity-Based Abstention is Available in FSIA Cases

A. This Court's Intervention on Comity-Based Abstention Is Needed

The circuit split is undisputed. As Plaintiffs acknowledge, "Hungary is . . . correct that the holding in *Fischer* conflicts with the decision below." *Id.* at 17.

Plaintiffs' only quibble is whether the D.C. Circuit's rule conflicts with both *Fischer* and *Abelesz*, or just with *Fischer*.[2] It conflicts with both.[3] But nothing comes of Plaintiffs' hair-splitting anyway. It is beyond dispute that the circuit courts considered essentially identical cases and reached opposite results based solely on inconsistent interpretations of federal law and this Court's decision in *Rep. of Argentina v. NML Capital, Ltd.*, 573 U.S. 134 (2014).

Unless this Court intervenes, the D.C. Circuit's interpretation will be the only one that matters.

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[2] *See Fischer v. Magyar Allamvasutak Zrt.*, 777 F.3d 847 (7th Cir. 2015); *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661 (7th Cir. 2012).

[3] *Abelesz* required plaintiffs to exhaust Hungarian remedies "based on the . . . comity between sovereign nations," and it held that the failure to exhaust could be excused by reasons "sufficient to overcome the comity due between nations." *Id.* at 684, 697. Plaintiffs' unsuccessful efforts to overcome Hungary's comity interests on remand resulted in *Fischer*.

Plaintiffs can—and from now on will—choose a D.C. forum for all cases against foreign states. *See* Pet. 14.

And those cases will proliferate, now that sovereign defendants have been stripped of comity protections available to private litigants. As Judge Katsas explained, "most modern ATS claims could be recast as FSIA ones." *Philipp*, 925 F.3d at 1358 (Katsas, J., dissenting). "For example, ATS claims that a [private] defendant had abetted crimes against humanity by Papua New Guinea must be exhausted," but "the same lawsuit would face no exhaustion requirement if filed directly against Papua New Guinea." *Id.* Similarly, "ATS claims of abetting atrocities committed by a foreign sovereign are impermissibly extraterritorial." *Id.* (citing *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013)). Yet plaintiffs could—as in this case—assert common law tort claims directly against foreign sovereigns for atrocities committed on foreign soil in past generations. "Such results are perverse, for FSIA actions against foreign sovereigns raise even greater foreign-policy concerns than do ATS actions against private parties who may abet them." *Id.*; *see also* Pet. 14–15.

Plaintiffs suggest the United States tacitly approved this result in this case but did not say so to avoid offending a NATO ally. *See* Opp. 20–21. "Although the United States may be understandably reluctant" to become directly adverse to Holocaust victims, what "speak[s] volumes" is the government's unequivocal disagreement with the D.C. Circuit's analysis. *Id.* As Judge Katsas explained, "[i]n *Simon* [*IV*], the United States argued at length that dismissal on international comity grounds was

consistent with the FSIA and can play a critical role in ensuring that litigation in U.S. courts does not conflict with or cause harm to the foreign policy of the United States." *Philipp*, 925 F.3d at 1357–58 (Katsas, J., dissenting) (internal quotation omitted). Despite these foreign policy implications, the D.C. Circuit squarely "rejected the position advanced by the United States." *Id.* at 1357.

And then there is the profound effect of this litigation on Hungary—and the reciprocity concerns that follow from it. On behalf of a putative worldwide class, Plaintiffs lay claim to a substantial portion of Hungarian GDP, and they hope to send most of it outside Hungary. Plaintiffs have not identified a single case decided by a U.S. court that imposes consequences of these proportions directly upon a foreign nation, let alone a NATO ally. This Court should be heard before a U.S. court proceeds with what could be "the nearly existential threat of a $75 billion lawsuit" against another sovereign nation. *Id.* If the Court allows this suit to go forward, the unavoidable implication is that other nations' courts may now hear similar claims against the United States, applying their own domestic law to require reparations for historic injustices committed in this country.

B. The Decision Below Is Incorrect

The Court should also grant review because the D.C. Circuit's decision is plainly wrong. The FSIA's "key word" for this appeal is "immunity." *Cf.* Opp. 1, 19. "[F]oreign sovereign *immunity*—which eliminates subject-matter *jurisdiction*—is distinct from non-jurisdictional defenses such as exhaustion and

abstention. . . . [T]hese defenses are available to private defendants no less than to foreign sovereigns." *Philipp*, 925 F.3d at 1356 (Katsas, J., dissenting).

It is undisputed that every other comity-based abstention doctrine—abstention in deference to state and local governments, to Tribes, and even to foreign sovereigns in cases against private defendants—does *not* involve a jurisdictional immunity. The decision below rests on the false premise that comity-based abstention in FSIA cases is the sole abstention defense that creates a jurisdictional defect. And the feature that supposedly makes it a jurisdictional immunity—that it would likely preclude further litigation in U.S. courts—is equally true of all prudential defenses. *See* Pet. 34. In reality, comity-based abstention is "less akin to immunity than to generally applicable, judge-made defenses such as *forum non conveniens*, the act-of-state doctrine, and the political-question doctrine—none of which is mentioned in the text of the FSIA, but all of which survived its enactment." *Philipp*, 925 F.3d at 1356 (Katsas, J., dissenting).

To be certain, the FSIA does not explicitly refer to comity-based abstention, like it does not refer to other prudential defenses undisputedly available in FSIA cases. But Plaintiffs are wrong to contend that Hungary does not "rely on the text of the FSIA." Opp. 19. As Hungary explained, the FSIA provides that foreign states that lack sovereign immunity "'shall be liable in the same manner and to the same extent as a private individual under like circumstances.'" Pet. 33–34 (quoting 28 U.S.C. § 1606). And "[p]rivate defendants . . . may seek comity-based abstention." *Philipp*, 925 F.3d at 1356 (Katsas, J., dissenting). Two

courts of appeals have so held without contradiction, and four Justices of this Court have concurred without disagreement from any other member of the Court. *See* Pet. 19–20 (citing cases).

Because comity-based abstention is available to *private* defendants, too, this defense is not, as Plaintiffs contend, "solely[] based on [Hungary's] status as a sovereign." Opp. 22. It is based, instead, on the compelling comity and reciprocity interests that this unprecedented litigation raises—interests that would still be present, though not as powerful, if the defendants were private entities. Plaintiffs act as if this were a garden-variety tort action for conversion of property. In fact, there has never been a case like this one and *Fischer*, its sibling in the Seventh Circuit. The closest parallels are foreign-cubed ATS suits against *private* foreign defendants. In *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), *Kiobel*, 569 U.S. at 108, and *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018), this Court carefully circumscribed these ATS claims because of foreign policy and reciprocity concerns. But, according to Plaintiffs, it is now open season to bring essentially the same claims directly against foreign nations, seeking reparations—under U.S. or D.C. common law—for another nation's historic misconduct against its own nationals within its own borders.

Plaintiffs never dare even to acknowledge the looming question their position begs: What "if the shoe were on the other foot"? *Philipp*, 925 F.3d at 1355 (Katsas, J., dissenting); *cf. Kiobel*, 569 U.S. at 122 (plaintiffs' "view would imply that other nations . . . could hale our citizens into their courts for alleged violations of the law of nations occurring in the United

States"). Judge Katsas described a situation "that is a precise mirror image of *Simon*." *Philipp*, 925 F.3d at 1355 (Katsas, J., dissenting). "Imagine the United States' reaction if a European trial court undertook to adjudicate a claim for tens of billions of dollars for property losses suffered by a class of American victims of slavery or systemic racial discrimination." *Id.* The Seventh Circuit made the same point: "[C]onsider how the United States would react if a foreign court ordered the U.S. Treasury . . . to pay a group of plaintiffs 40 percent of U.S. annual gross domestic product . . . . based on events that happened generations ago in the United States itself . . . ." *Abelesz*, 692 F.3d at 682.

Do Plaintiffs really believe that foreign courts, applying their own domestic law, should hear mass reparations cases against the United States? *See* Opp. 22. Hopefully not. But as soon as one articulates a principle that explains why those litigations should not go forward, the same principle halts this litigation, too.

II. The Court Should Resolve the Circuit Split on Two Important *Forum Non Conveniens* Issues

A. This Court's Intervention on *Forum Non Conveniens* Is Needed

The Court should also grant review to address the D.C. Circuit's conflicting views on two of the "ground rules" that should apply to a *forum non conveniens* analysis. Pet. App. 17a. The stakes are high. "[I]f it was an abuse of discretion to dismiss on *forum non conveniens* grounds the foreign-cubed claims in *Simon* [*IV*], then few of these human-rights

cases will qualify for that defense." *Philipp*, 925 F.3d at 1359 (Katsas, J., dissenting).

The first issue is how much deference to afford a plaintiff's chosen forum. The D.C. Circuit declined to follow the prevailing "sliding scale" approach—which called for less deference if the plaintiff's or case's connection to the forum is attenuated. *See* Pet. 24–25. Nor did the D.C. Circuit follow the approach advocated by the United States in other foreign-cubed cases—which called for courts "not [to] apply a strong presumption" in favor of a plaintiff's chosen forum and to instead "presumptively dismiss" under *forum non conveniens*. *Id.* at 27 (internal quotations omitted). Instead, the D.C. Circuit embraced a rigid deference approach, holding that Plaintiffs' chosen forum was entitled to "magnified" deference solely because some of the Plaintiffs had become U.S. citizens after the time relevant to the complaint. Pet. App. 19a; *see* Pet. 25–26.

If the D.C. Circuit's rigid deference rule is left intact, then foreign-cubed cases will virtually never be dismissed on *forum non conveniens* grounds. The U.S. residency or citizenship of a single plaintiff suing for a worldwide class—citizenship acquired, as in this case, long after the events in question—will trap foreign-centered controversies in U.S. courts.

This outcome is not, as Plaintiffs contend, "just the ordinary consequence of applying a multi-factor legal test." Opp. 24. The issue is a purely legal one decided at the threshold stage—how much deference to afford Plaintiffs' chosen forum *prior* to balancing the factors. The D.C. Circuit held that, by applying only minimal deference under the sliding-scale

approach, the district court committed "legal error at the first step," "set the scales wrong from the outset," and "materially distorted" the entire *forum non conveniens* analysis. Pet. App. 18a–19a; *see* Pet. 26. And it reached this legal conclusion over the dissent of Judge Katsas, who, like the district court and other circuits, would have applied less deference because the case has few if any connections to the United States. *See* Pet. App. 39a; Pet. 26.

The second *forum non conveniens* issue that merits this Court's attention is how to weigh a defendant's international comity interests. Faced with virtually identical facts, the Seventh Circuit and D.C. Circuit provided opposite answers to this question. The Seventh Circuit concluded it was "hard to see how the district court might have reached any other result" than dismissal "given the weight of international comity concerns." *Fischer*, 777 F.3d at 869.[4] By contrast, the D.C. Circuit not only ignored these comity concerns but ruled that "the district court erred in assigning such significant weight to Hungary's asserted interest." Pet. App. 29a.

Plaintiffs downplay this divide by arguing that it is "just a rehash of [Hungary's] arguments about comity-based immunity," which they claim are foreclosed by the FSIA. Opp. 26. But as Plaintiffs acknowledge, the *forum non conveniens* doctrine survived the enactment of the FSIA. Plaintiffs, therefore, cannot use their FSIA arguments to avoid

[4] Likewise, the United States' position in this case—that *forum non conveniens* is a "critical" tool for dismissing cases with an attenuated connection to the United States—was motivated by concerns for international comity. Pet. 28–29.

confronting the role of comity in a *forum non conveniens* analysis—an issue wholly distinct from the FSIA.

To divert the focus away from international comity, Plaintiffs claim that the "primary difference" between the circuits was their views about whether Hungary was an adequate alternate forum. *Id.* at 27. But the adequacy of an alternate forum is supposed to be left to the "sound discretion" of the district court. *Wilmot v. Marriott Hurghada Mgmt., Inc.*, 712 F. App'x 200, 204 (3d Cir. 2017); *accord Stromberg v. Marriott Int'l, Inc.*, 256 F. App'x 359, 360 (D.C. Cir. 2007) ("Under our familiar standard for *forum non convenie*ns analyses, the District Court did not abuse its discretion in finding that the [foreign forum] is an adequate alternative forum."). The district court in this case—like the district court and the Seventh Circuit in *Fischer*—determined that Hungary *is* an adequate forum. The D.C. Circuit then reversed as a matter of law. Hungary's adequacy should not depend on the circuit in which the case is filed—particularly since both cases had essentially the same factual records, containing substantial evidence that Hungary is, indeed, a suitable alternative forum.

Unable to attribute the circuit split to any meaningful differences between the factual records in either case, Plaintiffs argue that the United States' failure to opine below on the adequacy of a Hungarian forum "easily explain[s]" why the D.C. Circuit reached a different conclusion from the Seventh Circuit. Opp. 27. But the fact that the United States, which appeared as an amicus at the D.C. Circuit's request, declined to address the merits of this issue in its brief below makes its position no different from its position

on the merits in *Fischer*, where it submitted no brief whatsoever. As Judge Katsas correctly recognized, "the government's failure to address that question hardly suggests that the district court, in assessing the detailed submissions made to it on that very point, committed legal error or otherwise abused its discretion." Pet. App. 42a.

B. The D.C. Circuit's *Forum Non Conveniens* Rulings Are Incorrect

The D.C. Circuit's decision is also wrong on the merits. As the Second Circuit held in *Iragorri v. United Techs. Corp.*, 274 F.3d 65 (2d Cir. 2001) (en banc), a U.S. citizen's choice of a U.S. forum should receive less deference when the lawsuit or the plaintiff has a weak connection to the United States. *See* Pet. 24–25. This suit involves Hungarians taking other Hungarians' property inside Hungary in 1944. The district court did not err as a matter of law when it held that Plaintiffs' forum choice deserved less deference because only four Plaintiffs now reside here and "none of the underlying facts . . . relate to the United States in any way." Pet. App. 86a–87a.

The district court also properly considered Hungary's comity interests. As the dissent below explained, *id.* at 46a, this Court has recognized that "events of historical and political significance" trigger "a comity interest in allowing a foreign state to use its own courts for a dispute." *Rep. of Philippines v. Pimentel*, 553 U.S. 851, 866 (2008). The district court correctly applied this principle and concluded that Hungary has a far stronger interest than the United States in this controversy. Pet. App. 92a–93a.

Plaintiffs argue, like the court below, *id.* at 32a–33a, that this case belongs in a U.S. forum because the United States "displayed its strong interest in facilitating the resolution of Holocaust-era claims." Opp. 28–29. But, as the dissent pointed out, "the government seeks to further that interest by encouraging parties to 'resolve matters of Holocaust-era restitution and compensation through dialogue, negotiation, and cooperation,' not by sweeping foreign-centered cases into United States courts." Pet. Ap. 46a (quoting U.S. Amicus Br. 10).

CONCLUSION

The Court should grant the petition for a writ of *certiorari*, reverse the court of appeals' *Simon IV* decision, and remand with instructions to affirm the district court's decision in *Simon III*.

Respectfully submitted,

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