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

SUPPLEMENTAL BRIEF FOR RESPONDENTS

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RESPONSE TO BRIEF OF THE UNITED STATES

Respondents are 14 of the very few survivors of Hungary's genocidal campaign against the Jewish population within its borders during World War II. Survivors—who seek to represent a class of Hungarian Holocaust survivors and their heirs who have been injured in similar ways—seek compensation for the seizure and expropriation of all of their property as part of that genocide.

The United States urges (U.S. Br. 9-13) the Court to grant certiorari to review the first question presented in Hungary's petition for a writ of certiorari, addressing the availability of comity-based abstention under the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. § 1602 *et seq.*—but to do so in *Federal Republic of Germany v. Philipp*, No. 19-351, rather than in this case. The United States also urges (U.S. Br. 12; 19-351 U.S. Br. 4-14) the Court to grant certiorari on the other question presented in the primary petition in *Philipp*: whether the genocidal taking of property qualifies as the taking of "rights in property" "in violation of international law" for purposes of the FSIA's expropriation exception in 28 U.S.C. § 1605(a)(3).

The United States is wrong on each of those fronts.[1] Neither question warrants this Court's review.

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[1] The United States is correct, however, that the second question presented in this case—about whether the courts below correctly applied the doctrine of *forum non conveniens* to the facts of this case—does not warrant this Court's review. U.S. Br. 13-16. Survivors refer the Court to the arguments in Survivors' brief in

The comity-based abstention question, which is expressly presented in both cases, is the subject of the narrowest possible circuit conflict; and the genocidal-taking question is not the subject of any circuit conflict at all. If, however, this Court opts to review the comity-based abstention question, it should do so in this case, which is a superior vehicle in which to consider that question, or in both this case and in *Philipp*.

1. As explained in Survivors' brief in opposition, the comity-based abstention question is the subject of a conflict between only two courts of appeals: the D.C. Circuit and the Seventh Circuit. Pet. App. 13a-16a; *Fischer v. Magyar Államvasutak Zrt.*, 777 F.3d 847, 856-859 (7th Cir. 2015). Under the Court's ordinary practice, that narrowest-possible circuit conflict does not warrant certiorari review and this case is no exception. *See* Stephen M. Shapiro, et al., *Supreme Court Practice*, Ch. 4.4(b), at 4-16 (11th ed. 2019).

The United States provides no convincing reason for the Court to intervene now rather than waiting for additional courts of appeals to consider the arguments on both sides. The United States' contention (U.S. Br. 11) that the circuit conflict is unlikely to deepen is meritless. The D.C. Circuit—unlike some other courts of appeals—has severely limited the ability of plaintiffs with expropriation claims to sue a foreign sovereign, as discussed in the cross-petition in *Philipp*. When a plaintiff with an expropriation claim *can* pursue a foreign sovereign in a different jurisdiction, it has every incentive to do so. As the United States argued in its invited *amicus* brief in *de Csepel v. Republic*

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opposition for a fuller discussion of why the Court should deny the petition with respect to that question.

of Hungary, No. 17-1165, plaintiffs have filed "multiple suits against foreign sovereigns invoking the expropriation exception" outside of the D.C. Circuit—"[o]ver time, it is [therefore] likely that other courts of appeals will have the opportunity to consider" the comity-based abstention question. 17-1165 U.S. Br. 20.

Because the comity-based abstention argument does not meet the traditional criteria for certiorari review, the Court should deny Hungary's petition in this case and Germany's petition in *Philipp* with respect to that overlapping question.

2. If, however, the Court prefers to consider the comity-based abstention question, it should do so either in this case or in *Philipp* and this case together. The United States' contention (U.S. Br. 12-13) that *Philipp* is a better vehicle for considering that question is incorrect.

a. The United States argues (U.S. Br. 11-12) that this Court should review the court of appeals' comity-based abstention holding because that holding allegedly threatens U.S. "foreign-policy concerns." As explained in Survivors' brief in opposition, Congress intended the FSIA to displace the then-existing system under which courts would defer to determinations of the Executive Branch about whether and when to exercise jurisdiction over foreign sovereigns based on purported foreign-policy concerns. Pet. App. 5a; *Republic of Austria v. Altmann*, 541 U.S. 677, 689-691 (2004). By enacting 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.'" *Republic of Argentina v. NML Capital, Ltd.*, 573 U.S. 134, 141 (2014) (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.

If there is to be any comity-based departure from the FSIA's abrogation of immunity to accommodate the Executive Branch's foreign-policy concerns (and, to be clear, there should not be), it should be limited to cases where the Executive Branch has actually requested abstention based on those concerns. This is not such a case. In its brief filed in the court of appeals, the United States explained that, "[i]n circumstances in which the United States has expressed its foreign policy interests in connection with a particular subject matter or litigation, a court should give substantial weight to the United States' views that those interests support (or weigh against) abstention in favor of a foreign forum that can resolve the dispute." U.S. C.A. Br. 17. In this case, the United States has expressly *declined*—even when invited by the court of appeals—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." *Id.* at 11.

And all indications are that it would *not* be in the United States' foreign-policy interests to dismiss Survivors' claims. As the United States notes (U.S. Br. 11-12), the Executive Branch is committed to supporting foreign-based claims-resolution tribunals and pro-

cedures that the United States has played a role in establishing. But no such tribunal or procedure has been established in Hungary. Where effective tribunals have been established, the Executive Branch has participated in settling private claims filed in U.S. courts when such claims could be resolved in those tribunals. *E.g.*, *In re Nazi Era Cases Against German Defendants Litig.*, 198 F.R.D. 429, 434-436 (D.N.J. 2000). Hungary has *never* partnered with the United States or any other country to establish an effective means of addressing and redressing the claims of Holocaust survivors and their heirs. Indeed, Hungary has never reckoned with its wretched acts in any forum in any part of the world.

In the court of appeals, the United States filed a brief declaring that it had no "working understanding of the mechanisms that have been or continue to be available in Hungary with respect to" claims such as Survivors'. U.S. C.A. Br. 11. The United States now vaguely—and without citation—contends (U.S. Br. 7-8) that "the Hungarian government has provided some relief to compensate Holocaust survivors and other victims of the Holocaust." Notably, the United States does not contend that it has obtained a working understanding of mechanisms for relief since the last brief it filed in this case; and it does not endorse the efficacy of any mechanisms that may exist in Hungary. Most significantly, the United States does not contend that comity-based abstention would be appropriate in this case or that comity-based abstention would be in the foreign-policy interests of the United States. Indeed, the *only* foreign-policy interest the United States has ever identified in this case is the "moral imperative . . . to provide some measure of justice to the victims of the

Holocaust, and to do so in their remaining lifetimes." U.S. C.A. Br. 9-10. That interest counsels against abstention.

b. If the Court opts to consider the comity-based abstention issue, it should do so in a case where the United States has never endorsed the foreign sovereign's alleged alternative forum and has never asserted a foreign-policy interest in comity-based dismissal. The very foundation of the United States' argument on the merits is that courts must recognize an exception to the FSIA's grant of jurisdiction that can accommodate the Executive Branch's foreign-policy interests. The Court's consideration of the comity-based abstention question would be incomplete if it did not consider the issue in a case where the Executive Branch has never asserted a sovereign-specific or case-specific foreign-policy concern.

Survivors are the named representatives of a class of very elderly survivors of the Holocaust. To be blunt, there is precious little time in which they can realize some measure of justice in their lifetimes. If the Court were to address the comity-based abstention issue without deciding whether abstention is appropriate when the United States does not request it based on its foreign-policy interests and has not endorsed any alternative foreign forum, that question will remain open and Survivors will have to endure yet another round of contentious litigation on an immunity issue before their claims can even be heard.

The United States agrees (U.S. Br. 8) that this case is an appropriate vehicle to consider the comity-based abstention question. The Court should deny certiorari on that question in this case and in *Philipp*—

but if it does not, it should consider the question in this case or in both cases together.

c. The United States' only argument (U.S. Br. 8, 12-13) that *Philipp* is a better vehicle for considering the comity-based abstention question is that Germany has also sought review of the genocidal-taking question while Hungary has not. But that circumstance does not make *Philipp* a better vehicle to consider the comity-based abstention question for three reasons.

First, the Court should deny certiorari with respect to the genocidal-taking question because it is not the subject of *any* circuit conflict at all.

In a departure from its usual practice, the United States does not engage in its own analysis in its brief in *Philipp* of whether the courts of appeals are divided on that question. *See* 19-351 U.S. Br. 7-14. Nor does the United States ever contend that the courts of appeals are divided on that question—because they are not. The United States implicitly acknowledges (*id.* at 13) that the only two courts of appeals that have addressed that question—the D.C. Circuit and the 7th Circuit—agree that a genocidal taking is a taking of rights in property in violation of international law for purposes of the FSIA. *Simon v. Republic of Hungary*, 812 F.3d 127, 142-146 (D.C. Cir. 2016); *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 673-677 (7th Cir. 2012). The United States identifies (19-351 U.S. Br. 13 n.1) only one additional court of appeals that has even mentioned the issue—and that court appeared to assume that a genocidal taking can be the basis of jurisdiction under 28 U.S.C. § 1605(a)(3). *Mezerhane v. Republica Bolivariana de Venezuela*, 785 F.3d 545, 551 (11th Cir. 2015), *cert. denied*, 136 S. Ct. 800 (2016).

In other words, there is not even an arguable circuit split on the genocidal-taking question.

The United States vaguely notes (19-351 U.S. Br. 12) that "[b]oth parties acknowledge . . . that the courts of appeals have adopted varying approaches to the application of the expropriation exception." In truth, neither party contends that the courts of appeals are divided on whether a genocidal taking of property qualifies as a taking of property rights in violation of international law for purposes of the FSIA's expropriation exception. The United States is instead referring to passages in the *Philipp* parties' briefs (19-351 Pet. 23-24; 19-351 BIO 23 n.10) noting that courts of appeals have adopted conflicting approaches to *other* aspects of how the expropriation exception applies. But that is no reason to grant certiorari on the genocidal-taking question, on which no conflict exists. If such a conflict did exist, we can be sure that the United States would have identified it; it did not. Because the only two courts of appeals to decide whether a genocidal taking of property satisfies Section 1605(a)(3) agree that it does, the genocidal-taking question presented in *Philipp* does not warrant this Court's review.

The genocidal-taking claim is not cert-worthy for the additional reason that both Survivors and the *Philipp* plaintiffs can rely on a separate argument to overcome the foreign sovereign's immunity under the FSIA's expropriation exception. The United States acknowledges (19-351 U.S. Br. 7-8) that the FSIA's expropriation exception applies to claims that a state discriminatorily expropriated foreign nationals' property without just compensation. As explained in the brief in opposition in *Philipp*, by the time of the taking

at issue, the plaintiffs' ancestors were no longer regarded by Germany as citizens. 19-351 BIO 23-24. The same is true of Survivors—as Survivors argued in the first appeal (which decided the takings question in this case), by the time Hungary expropriated all of their property, they had already been stripped of their Hungarian citizenship.[2] Reply Brief for Appellants Rosalie Simon, et al. at 10-12, *Simon v. Republic of Hungary*, No. 14-7082 (D.C. Cir. Nov. 21, 2014), 2014 WL 6603413. Resolution of the genocidal-taking claim in either case would therefore not resolve whether the FSIA provides immunity to the foreign states.

Second, if the Court opts to consider whether a genocidal taking of property is a taking of property rights in violation of international law, Survivors' claims present a superior context in which to consider that question than the claims of the plaintiffs in *Philipp*.

Survivors allege—and at this stage, their allegations must be taken as true even if the historical record had not already established them as such—that petitioners rounded up Survivors and their fellow Jews, robbed them of all of their possessions, and deported them to Nazi death camps for extermination. Pet. App. 4a-5a; *Simon*, 812 F.3d at 133-134. Every aspect of that scheme—including the deprivation of *all* of their possessions—was an act of genocide. *Simon*,

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[2] The United States asserts (U.S. Br. 2) that Survivors were "Hungarian nationals at the time of the events giving rise to their claims." That is not accurate. Although some (but not all) of the Survivors were Hungarian nationals during the early parts of the war, by the time of the takings at issue in this case, Hungary had rendered even those Survivors stateless by stripping them of their nationality and citizenship.

812 F.3d at 142-143. As the D.C. Circuit explained in the first appeal in this case, the legal definition of genocide includes "[d]eliberately inflicting on" "a national, ethnical, racial or religious group, as such," "conditions of life calculated to bring about its physical destruction in whole or in part." *Id.* at 143 (quoting Convention on the Prevention and Punishment of the Crime of Genocide, art. 2, Dec. 9, 1948, 78 U.N.T.S. 277). Depriving Jews of literally *all of their property*, as Hungary did during World War II, certainly qualifies as inflicting on that religious group conditions of life calculated to bring about its physical destruction. The deprivation of property for which Survivors seek compensation itself falls within the definition of genocide and was a violation of international law. The *Philipp* plaintiffs are heirs to several German Jewish art dealers who were forced to sell several valuable pieces of art to the Nazi-controlled state of Prussia. 19-351 U.S. Br. 2. Those pieces were returned to Germany after the war, but were never returned to the *Philipp* plaintiffs' ancestors. *Id.* at 2-3. Although the plaintiffs in *Philipp* also allege a deplorable deprivation of property in service of a genocidal campaign against Jews, the allegations in this case more directly present the genocidal-taking claim because of the very scope of the deprivation at issue here.

Finally, if the Court does choose to address the comity-based abstention question *and* the genocidal-taking question, it can do so in this case despite Hungary's failure to raise the genocidal-taking question in its petition for a writ of certiorari. Whether the FSIA's expropriation exception to the ordinary rule of foreign sovereign immunity applies in this case implicates the

jurisdiction of federal courts. The United States explains (U.S. Br. 12) that Survivors' "allegations in this case implicate the jurisdictional question whether a state's taking of property from its own nationals amounts to a taking 'in violation of international law' under the FSIA's expropriation exception." This Court has authority to add a question presented when granting a writ of certiorari, particularly when the additional question implicates the jurisdiction of federal courts to hear the matter. *E.g.*, *Hollingsworth v. Perry*, 568 U.S. 1066 (2012); *Dep't of Health & Human Servs. v. Florida*, 565 U.S. 1034 (2011); *Powerex Corp. v. Reliant Energy Servs., Inc.*, 549 U.S. 1178 (2007); *Kansas v. Marsh*, 544 U.S. 1060 (2005). There is no question that the genocidal-taking question is squarely at issue in this case—the D.C. Circuit first held that a genocidal taking satisfies Section 1605(a)(3) in the first appeal in this case. *Simon*, 812 F.3d at 142-146. Thus, although the genocidal-taking question is not cert-worthy, this case is an appropriate (and superior) vehicle to consider it if the Court is inclined to do so.

CONCLUSION

For the reasons set out in the briefs in opposition and in this brief, the petitions for a writ of certiorari should be denied in this case and in *Philipp*. If the Court does choose to review the first question presented in this case, it should do so in this case or in *Philipp* and this case together.

Respectfully submitted,

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