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 Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit

SUPPLEMENTAL BRIEF OF PETITIONERS

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The United States agrees that this Court should review the comity question presented in Hungary's petition, which has divided the courts of appeals. U.S. Br. 8. The government's invitation brief explains why the decision below is incorrect on this "important question, which may have significant foreign-policy consequences." *Id.* The government also agrees that this case is an appropriate vehicle to consider the comity issue.

The government recommends, however, that the Court hold this petition and instead grant the petition in *Philipp* (No. 19-351)—solely because *Philipp* also presents a separate question about whether subject-matter jurisdiction exists under the Foreign Sovereign Immunities Act. U.S. Br. 8. The Court should reject the recommendation to hold this case. To ensure the comity issue is fully presented and resolved, the Court must grant Hungary's petition, for three reasons:

First, the comity question assumes that subject-matter jurisdiction is *present*, and asks if courts should abstain from exercising jurisdiction on prudential grounds in particular cases. But if the Court agrees with the petitioner and the United States on the first question presented in *Philipp*, it would determine that subject-matter jurisdiction is *lacking* in that case. The Court would then have little reason to go on and assume counter-factually that subject-matter jurisdiction existed, to decide whether, and under what circumstances, the district court could abstain from exercising that hypothetical jurisdiction.

Second, a ruling for petitioners in *Simon* on the comity question would be case-dispositive and the record is fully developed. The district court in *Simon* dismissed

the complaint on the ground of comity, after reviewing evidence and making factual findings. In *Philipp*, on the other hand, the district court held (like the D.C. Circuit) that comity-based abstention is unavailable in FSIA cases. It also stated that, if it had the option to abstain, it would "decline to do so based on [the existing] record," and would instead require further briefing on available remedies in Germany. *Philipp v. Fed. Republic of Germany*, 248 F. Supp. 3d 59, 82 (D.D.C. 2017).

Third, while Germany's comity interests in *Philipp* are formidable, they are simply not on the same scale as Hungary's comity interests in this case. The plaintiffs here have sued the nation of Hungary and a Hungarian instrumentality on behalf of a putative worldwide class of current and former Hungarian nationals, including the "countless heirs and estates" of approximately 850,000 individuals. Pet. App. 54a. They seek damages equivalent to a significant portion of Hungary's annual gross domestic product. And they ask a United States court to award those damages for conduct that occurred in Hungary in 1944, without first seeking redress in Hungarian courts. The magnitude of the comity interests implicated by these claims—and the corresponding reciprocity interest in forestalling analogous claims against the United States in foreign courts—makes this case the most compelling vehicle to consider comity-based abstention.

This Court should also grant review on the second question presented in Hungary's petition concerning *forum non conveniens*. If the Court concludes, like the D.C. Circuit, that the FSIA forecloses comity-based abstention, then *forum non conveniens* may be the only doctrine available that gives district courts case-specific discretion to dismiss foreign-centered controversies. The

D.C. Circuit held that the district court abused its discretion in dismissing the claims against Hungary on *forum non conveniens* grounds, even though the claims involve conduct by the Hungarian government against Hungarian nationals in Hungary. This holding by the court of appeals effectively forecloses a *forum non conveniens* defense in similar cases. This Court should have the *forum non conveniens* question before it so that—especially if it determines comity defenses are unavailable in FSIA cases—it can provide guidance to the lower courts on how to approach cases, like this one, where foreign interests predominate over U.S. interests.

ARGUMENT

I. This Case Presents a Better Vehicle to Ensure the Comity Question is Addressed

The government agrees that the first question in Hungary's petition warrants this Court's review. Only by granting this petition in *Simon* can the Court ensure that the comity issue will be squarely presented and resolved.

1. The comity question arises only when FSIA jurisdiction is—or is assumed to be—present.[1] The D.C. Circuit's holding that comity is unavailable rests on the premise that, once the FSIA's jurisdictional requirements are satisfied, Congress has directed a district court to exercise jurisdiction and the court has no discretion to do

[1] As this Court held in *Sinochem International Co. v. Malaysia International Shipping Corp.*, 549 U.S. 422, 432, 436 (2007), federal courts may bypass jurisdictional questions in order to dismiss claims on prudential abstention grounds. The district court did so here, dismissing on the grounds of comity and *forum non conveniens*, before considering whether subject-matter jurisdiction exists under the FSIA. *See* Pet. App. 61a n.6.

otherwise. Pet. App. 14a-16a. Hungary maintains, in contrast, that international comity permits a district court to abstain from exercising jurisdiction for prudential reasons in appropriate cases.

Hungary's petition presents the international comity issue first, and does not raise any question in this Court concerning subject-matter jurisdiction. The *Philipp* petition presents (first) a question going to subject-matter jurisdiction, and (second) the international comity question. The United States recommends holding Hungary's petition and granting *Philipp* "to ensure that the Court has both the jurisdictional and the comity questions before it." U.S. Br. 13.

But if this Court concludes in *Philipp* that FSIA subject-matter jurisdiction is *lacking* in that case, it would have little reason to go on and decide whether the district court could abstain from exercising jurisdiction on comity grounds (if it had jurisdiction). *Cf. Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Aurelius Inv., LLC*, 590 U.S. ___, ___ (2020) (slip op., at 22) (declining to address application of *de facto* officer doctrine given decision holding appointments complied with the Appointments Clause). Only if this Court affirms the D.C. Circuit's holding that jurisdiction is present in *Philipp* would the comity question be pertinent there.

By contrast, Hungary's petition presents the comity issue directly, and does not pose any subject-matter jurisdiction issue in this Court. To ensure that the comity issue is before it, the Court should therefore grant the petition in *Simon*.[2]

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[2] To be certain, should this Court hold in *Philipp* that a state's taking of property from its own nationals cannot satisfy the FSIA's

2. *Simon* is also a superior vehicle because comity is a case-dispositive issue that was decided below on a fully developed record. The district court dismissed this case after reviewing the parties' evidentiary submissions and determining that comity interests favor abstention and that "Hungary is an adequate alternative forum for the plaintiffs' claims." Pet. App. 75a. The extensive record addresses, among other things, "features of the Hungarian court system to highlight the remedies available to the plaintiffs in Hungary," *id.* at 74a, and facts concerning the Compensation Acts that Hungary enacted to compensate victims of World War II- and Communist-era injustices.

Thus, this case presents a concrete factual backdrop against which the comity question is best resolved. *See* Pet. App. 72a-82a; *Massachusetts v. Painten*, 389 U.S. 560, 561 (1968) (per curiam) (recognizing the Court's decision-making is best undertaken in concrete cases with fully developed records); *Hidalgo v. Arizona*, 138 S. Ct. 1054, 1057 (2018) (Breyer, J., respecting the denial of certiorari) ("[T]he issue presented in this petition will be better suited for certiorari with such a record."). And a decision in Hungary's favor would dispose of the case without need

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expropriation exception, it would vitiate the asserted grounds for subject-matter jurisdiction in *Simon*. But Hungary would then, if necessary, present that independent ground for dismissal first in the lower courts. Hungary's petition to this Court assumes—as the D.C. Circuit assumed when dismissing on comity grounds below—that subject-matter jurisdiction is present. *See supra* n.1. The parties are currently litigating subject-matter jurisdiction in the lower courts. *See Simon v. Republic of Hungary*, No. 10-1770 (BAH), 2020 WL 1170485 (D.D.C. Mar. 11, 2020) (finding that jurisdiction is present), *appeal filed*, No. 20-7025 (D.C. Cir. Mar. 24, 2020).

for further proceedings or consideration by the lower courts. *See Wrotten v. New York*, 560 U.S. 959, 959 (2010) (Sotomayor, J., respecting the denial of certiorari) (favoring review when this Court has "the benefit of the [lower] courts' full consideration").

By contrast, a ruling on the comity question in *Philipp* would not end the proceedings. The district court there held that a prudential comity defense is not available in cases where jurisdiction is founded on the FSIA. *See Philipp*, 258 F. Supp. 3d at 83. It also noted that, even if it could abstain, "it would decline to do so based on [the existing] record without first affording the parties an opportunity to provide further, targeted briefing on the adequacy of available remedies in Germany." *Id.* Thus, a decision in Germany's favor on the comity issue in *Philipp* would likely send the case back for further proceedings in the district court on whether comity-based abstention would be appropriate there.

3. Another reason *Simon* is the best vehicle to consider international comity is the surpassing importance of the comity interests presented here. The World War II-era events that give rise to plaintiffs' claims are of profound historical and political consequence. The potential financial and foreign policy stakes in this litigation are also enormous. The plaintiffs have sued the nation of Hungary and a Hungarian instrumentality on behalf of a putative worldwide class of current and former Hungarian nationals, seeking class-wide damages for not only survivors but also the "countless heirs and estates" of approximately 850,000 individuals. Pet. App. 54a. In a virtually identical lawsuit, the Seventh Circuit calculated that plaintiffs sought damages equal to "nearly 40 percent of Hungary's annual gross domestic product." *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 682 (7th Cir. 2012).

The foreign policy ramifications of a U.S. court entering a judgment like this against a foreign sovereign for historical injustices committed within its own borders cannot be overstated: "[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, which would be roughly $6 trillion … based on events that happened generations ago in the United States itself, without any effort to secure just compensation through U.S. courts." *Id.*

To be certain, *Philipp* also implicates weighty comity interests. But they are not on the same scale as Hungary's interests in *Simon*.[3] Nor are the reciprocity interests for the United States—the other side of the comity coin—as compelling in *Philipp* as they are here. If the claims in *Simon* can proceed to adjudication on the merits, it implies that foreign courts can adjudicate analogous claims against the United States and award damages to redress, for example, systematic racial discrimination in this country.

To consider international comity-based abstention in FSIA cases, the Court should have before it the full weight of comity interests that favor dismissal. And it

[3] Plaintiffs in *Philipp* are three individuals bringing claims on their own behalf as successors and heirs of certain estates. *See Philipp*, 248 F. Supp. 3d at 64 n.3. Their claims concern 42 pieces of art acquired by the State of Prussia in 1935, which were formerly owned by a consortium of art dealers. *See id.* They allege that the sale of the art was coerced, in exchange for payment equal to "barely 35% of its actual value." *Philipp v. Fed. Republic of Germany*, 894 F.3d 406, 409 (D.C. Cir. 2018). They seek return of the art or "250 million dollars." *Id.* at 410.

should consider the comity question on a fully developed record, where the issue is case-dispositive.

4. For these reasons, the Court should grant certiorari on the comity question presented in this petition. If the Court also grants the petition in *Philipp*, it should consolidate *Simon* and *Philipp* for argument to ensure the comity question is fully presented and answered.[4] Alternatively, if the Court prefers to hear the subject-matter jurisdiction and comity issues in a single case and concludes that *Simon* is the better vehicle, it could direct the parties in *Simon* to address the jurisdictional question in their briefs on the merits.

II. Review Is Also Warranted to Resolve the Important *Forum Non Conveniens* Issues

The Court should also grant review on the second question presented in Hungary's petition concerning *forum non conveniens*. The *forum non conveniens* question is especially important if this Court determines, like the D.C. Circuit, that the FSIA forecloses international comity-based abstention. In that event, *forum non conveniens* may be the only case-specific doctrine that allows courts to decline jurisdiction in foreign-centered litigation against sovereign defendants.

Cases like this one have significant foreign policy ramifications. As the United States' invitation brief explains, "U.S. interests may be particularly sensitive

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[4] *See Aurelius Inv.*, No. 18-1334, 590 U.S. ___ (slip op., at 22) ("In light of the importance of the questions, we granted certiorari in all petitions and consolidated them for argument.") (citing 139 S. Ct. 2738 (2019)); *Granholm v. Heald*, 544 U.S. 460, 471 (2005) (consolidating two separate cases raising issue under dormant Commerce Clause).

where, as here, the claims allege serious human-rights abuses on the part of a foreign state," U.S. Br. 11, especially when all relevant conduct occurred overseas.

The international comity doctrine is the most direct means to address these concerns, but *forum non conveniens* also comes into play. Although comity and *forum non conveniens* "proceed from a similar premise," they are informed by "markedly" different considerations. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 722-23 (1996). Abstention doctrines, like comity, "arise out of deference to the paramount interests of another sovereign." *Id.* "Dismissal for *forum non conveniens*, by contrast, has historically reflected a far broader range of considerations." *Id.* Thus, while comity-based abstention is a more direct response to claims implicating important foreign sovereign interests, as the United States previously explained, "*forum non conveniens* can play an additional, and critical, role in a case brought against a foreign state defendant."[5]

If this Court holds, like the district court, that the claims against Hungary must be dismissed on the ground of comity, then it may not wish to reach the *forum non conveniens* question. But if the Court determines, like the D.C. Circuit, that comity-based abstention is unavailable in FSIA cases, it should review the D.C. Circuit's decision overturning the *forum non conveniens* basis for dismissal. As Judge Katsas recognized, the D.C. Circuit's ruling effectively forecloses a *forum non conveniens* defense in other cases similar to *Simon*. *See Philipp v. Fed. Republic of Germany*, 925 F.3d 1349, 1359 (D.C. Cir.

[5] Brief of the United States as Amicus Curiae at 26, *Simon v. Republic of Hungary*, No. 17-7146 (D.C. Cir. June 1, 2018), Doc. No. 1733875.

2019) (Katsas, J., dissenting) (under the *Simon* panel majority's analysis, "few of these human-rights cases will qualify for that defense").

Without comity or *forum non conveniens*, foreign sovereigns are left more exposed to United States courts for foreign-centered litigation than are foreign *non-governmental* defendants. Pet. 19-22, 30. That cannot be right. To ensure that it may address the entire scope of foreign policy issues presented in this case, this Court should grant Hungary's petition in full.

The United States allows that there is "some doubt" about whether the ruling below is correct on *forum non conveniens*, and agrees that Hungary's petition raises "substantial arguments," yet recommends denying certiorari on the second question presented. U.S. Br. 13, 16. But the *forum non conveniens* issue is not, as the government contends, a "factbound claim of error." *Id.* at 9. The D.C. Circuit held that the sliding scale approach applied by the district court was "legal error" that "set the scales wrong from the outset," leading to a "materially distorted" *forum non conveniens* analysis. Pet. App. 18a-19a. Yet the district court's *forum non conveniens* analysis in this case was the same as the Seventh Circuit's in *Fischer*, a virtually identical lawsuit. There, the court of appeals explained that "it is hard to see how the district court might have reached any other result [except dismissal for *forum non conveniens*,] given the weight of the international comity concerns in this case." *Fischer v. Magyar Államvasutak Zrt.*, 777 F.3d 847, 869 (7th Cir. 2015). The D.C. Circuit, however, did exactly that.

In doing so, the court of appeals created two circuit splits. First, it eschewed the prevailing "sliding scale" approach adopted by a majority of the circuits and instead

adopted a rigid rule that U.S. citizens' chosen forum deserves "magnified" deference, even though they became citizens long after the time relevant to their complaint and the case has no other connection to the United States. Pet. App. 19a; *see also* Pet. 24-26. Second, in direct contrast to the Seventh Circuit, it ignored the application of international comity concerns. *Compare* Pet. App. 29a, *with Fischer*, 777 F.3d at 869.

This Court has long recognized the "local interest in having localized controversies decided at home," particularly where the claims "'arise from events of historical and political significance' to the home forum." Pet. App. 46a (Katsas, J., dissenting) (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947) and *Republic of Philippines v. Pimentel*, 553 U.S. 851, 866 (2008)). If both comity and *forum non conveniens* are unavailable in the D.C. Circuit, there may be no case-specific tools available to direct foreign-centered disputes to the foreign tribunals that have a paramount interest in resolving them. This, in turn, could subject the United States to the same treatment in foreign courts "if the shoe [is] on the other foot." *Philipp*, 925 F.3d at 1355 (Katsas, J., dissenting).

The *forum non conveniens* question presented in Hungary's petition merits this Court's review to permit full consideration of the prudential defenses available to foreign sovereigns sued in U.S. courts.

CONCLUSION

The Court should grant Hungary's petition in its entirety.

Respectfully submitted,

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