No. 18-1447 and No. 19-351

IN THE

Supreme Court of the United States

REPUBLIC OF HUNGARY and
MAGYAR ÁLLAMVASUTAK ZRT.,
Petitioners,
v.
ROSALIE SIMON, *et al.*,
Respondents.

FEDERAL REPUBLIC OF GERMANY, *et al.*,
Petitioners,
v.
ALAN PHILLIP, *et al.*,
Respondents.

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

BRIEF OF PROFESSORS SAMUEL ESTREICHER AND THOMAS H. LEE AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

AMELIA L. B. SARGENT
Counsel of Record
EMILY B. VIGLIETTA
WILLENKEN LLP
707 Wilshire Boulevard
Suite 3850
Los Angeles, CA 90017
(213) 955-9240
asargent@willenken.com

Counsel for Amici Curiae Professors Samuel Estreicher and Thomas H. Lee

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INTEREST OF *AMICI CURIAE*[1]

Amici Curiae are law professors who teach and write about international litigation, U.S. foreign relations law, and the U.S. judicial system. They have no interest in this case, or in the parties, except in their capacities as teachers and scholars. This brief represents the individual views of *amici* and not necessarily the views of any institution with which they are affiliated. They are filing this brief in support of neither party to call the Court's attention to the continuing importance of principles of international comity in helping U.S. courts tread carefully in cases implicating U.S. relations with foreign states.

Samuel Estreicher is the Dwight D. Opperman Professor of Law at New York University School of Law, director of its Center for Labor and Employment Law, and co-director of its Institute of Judicial Administration. He has taught and lectured widely on matters of federal jurisdiction, international arbitration, and litigation in U.S. courts. In recent years, he has published a series of articles on customary international law and the laws of armed conflict. He regularly teaches a course on U.S. foreign

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party, or any other person other than *amici curiae* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented in writing to the filing of this brief.

relations law. He also served as the chief reporter of the Restatement of Employment Law. In 2016, he was appointed by the U.N. Secretary-General to serve as a member of the U.N.'s Internal Justice Council.

Thomas H. Lee is the Leitner Family Professor of International Law at Fordham University School of Law. He recently returned to Fordham following service as Special Counsel to the General Counsel of the U.S. Department of Defense. From 2006 to 2019, he also served as Director of Graduate and International Studies at Fordham and has been a Visiting Professor at Columbia, Harvard, and the University of Virginia law schools. He has taught and lectured on matters of federal jurisdiction, U.S. foreign relations law, international arbitration, and international litigation in U.S. courts. He has published many articles and book chapters about the federal courts, international litigation in U.S. courts, international law, and international arbitration.

In June 2020, the Southern California Law Review published an article by *amici* that defended in principle the federal courts' widespread practice of international comity abstention. *See* Samuel Estreicher & Thomas H. Lee, *In Defense of International Comity*, 93 S. CAL. L. REV. 169 (2020) (hereinafter "Estreicher & Lee"). Professors Lee and Estreicher also filed an *amicus* brief with this Court in *Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865 (2018), another case that raised important questions related to international comity.

INTRODUCTION

The doctrine of foreign sovereign immunity bars suits against unconsenting foreign states in U.S. courts. The Court has long recognized that foreign sovereign immunity is a matter of "grace and comity." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983); *Republic of Austria v. Altmann*, 541 U.S. 677, 689 (2004) (same). For nearly a century and a half, the Court's own decisions shaped foreign sovereign immunity doctrine, starting with Chief Justice Marshall's landmark opinion in *Schooner Exchange v. McFaddon*, 11 U.S. 116 (1812).

In *Schooner Exchange*, the Court held that a U.S. district court should refrain from exercising *in rem* jurisdiction over a French public vessel in a U.S. port that U.S. claimants alleged had been seized on the high seas in violation of the law of nations. Chief Justice Marshall, writing for a unanimous Court, declared it "to be a principle of public law, that national ships of war, entering the port of a friendly power . . . are to be considered as exempted by the consent of that power from its jurisdiction." *Schooner Exchange,* 11 U.S. at 145–46. The Court declined to extend jurisdiction, notwithstanding the Judiciary Act of 1789's explicit provision of "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction" in the district courts. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77 (1789) (current version at 28 U.S.C. § 1333). Chief Justice Marshall reasoned that "statutory provisions . . . descriptive of

the ordinary jurisdiction of the judicial tribunals, which give an individual whose property has been wrested from him, a right to claim that property in the courts of the country, in which it is found, ought not, in the opinion of this Court, to be construed as to give them jurisdiction" in light of the background "principle of public law" and the sensitive foreign policy interests implicated. *Schooner Exchange,* 11 U.S. at 146 (such matters being more "questions of policy than of law . . . ").

Today, a statute regulates foreign state immunity in U.S. courts: the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. §§ 1330, 1441(d), 1602 *et seq*. Consequently, the provisions of the FSIA, not Supreme Court decisions, now define the metes and bounds of the U.S. law of foreign sovereign immunity. But the FSIA addresses foreign state immunity in U.S. courts, not grounds for abstaining from exercising jurisdiction in appropriate cases, as *Schooner Exchange* illustrates. One 1976 statute, enacted to track generally prevailing customary international law norms of foreign state immunity five decades ago, cannot answer all the myriad questions implicated in the types of suits brought against foreign states in U.S. courts today.[2]

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[2] The two major recent amendments to the FSIA relate to terrorism claims against foreign states, which are inapposite to these cases presently before the Court. 28 U.S.C. § 1605A, § 1605B; *see also Opati v. Republic of Sudan*, 140 S. Ct. 1601 (2020).

For instance, the FSIA's expropriation exception at issue in these cases originally enabled suits in U.S. courts seeking compensation for takings of American property in violation of international law by foreign communist and socialist regimes, not Holocaust era-related "foreign cubed" suits—litigation against foreign states for misdeeds in a foreign land against foreign persons. A U.S. forum was viewed as essential for expropriation claims in 1976 because it was unlikely that the pre-1989 expropriating governments would afford adequate justice to American property-owners after having violated international law to take their property in the first place. To assert, as the D.C. Circuit maintained below, that the same statute today prohibits U.S. courts from using discretion they have exercised since the Founding to require private suitors to resort to other means first—whether alternative remedial schemes, foreign courts, or diplomacy—before bringing their foreign-cubed claims in U.S. courts misinterprets the FSIA and ignores history.

At the same time, *amici* share Respondents' concerns about how the lower courts are exercising this longstanding judicial discretion in the shadow of the FSIA. Accordingly, *amici* file this brief in support of neither party, cognizant of the confusion and uncertainty in the lower courts regarding how to apply international comity considerations.[3]

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[3] For instance, some courts of appeal have dismissed claims virtually identical to the claims in these cases using a multivariate comity analysis that is too easily manipulated. *See,*

SUMMARY OF THE ARGUMENT

The Foreign Sovereign Immunities Act (FSIA) defines the cases in which foreign states cannot invoke immunity from suit in U.S. courts. The statute does not foreclose courts from abstaining from exercising their jurisdiction in appropriate cases, with one possible exception. A 1996 amendment to the FSIA created a new exception to immunity for foreign states that support terrorism. *See* Antiterrorism and Effective Death Penalty Act of 1996 (original version at 28 U.S.C. § 1605(a)(7) (2006)). Congress substantially revised this exception in 2008, most notably by minting a new private right of action against foreign state sponsors of terrorism. 28 U.S.C. § 1605A(c); *see also Opati*, 140 S. Ct. at 1606. The measure now provides that the "court *shall hear a claim* under this section if" certain conditions are met, 28 U.S.C. § 1605A(a)(2) (emphasis added), indicating that Congress knew how to make clear when it wanted to *require* federal courts to exercise jurisdiction in cases in which it had declared foreign states "shall not be immune."

The expropriation exception to the original FSIA at issue in these cases has no such mandatory language. Indeed, this Court has recognized that the "FSIA *in no way affects application of the act of state doctrine*," *Altmann*, 541 U.S. at 701 (emphasis added);

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e.g., Fischer v. Magyar Allamvasutak Zrt., 777 F.3d 847, 852 (7th Cir. 2015).

nor other "traditional" federal common law doctrines like *forum non conveniens*, *Verlinden*, 461 U.S. at 490. Judicial discretion to refrain from exercising statutory jurisdiction because of sensitive foreign governmental interests has an even longer and more distinguished pedigree in this Court's precedents, going back two centuries to Chief Justice Marshall's holding in *Schooner Exchange*.

However, the modern factual contexts courts face in exercising this discretion are far more complicated than they used to be, and the rules of customary international law are no longer as seemingly clear or universally accepted. Consequently, in Part II, *amici* respectfully urge the Court to draw from its settled precedents to frame clearer guidance for lower courts to address international comity concerns, underscoring the importance of: (1) deference to the reasoned statements of the Executive branch, (2) reciprocal foreign practices, (3) other applicable statutes and treaties, and (4) alternative remedial schemes or parallel proceedings. Such a focused framework distills and organizes existing precedent into a modern test that promises greater objectivity and consistency, unlike the free-form, multivariate balancing test that lower courts are currently using. Applied correctly, international comity considerations can allow courts to bolster, not undermine, the United States' support for foreign nations' legal, restitutive, or reconciliation-based justice initiatives to address historical wrongs.

Comity considerations cut across ideological lines, spanning cases brought by victims of human rights atrocities to suits brought by corporate hedge funds leveraging foreign sovereign debt investments. This brief is not oriented toward achieving a particular outcome in the cases presently before the Court, and *amici* support full and fair restitution for victims and survivors of the Holocaust. But litigation in U.S. courts cannot always be the right answer. To put the shoe on the other foot, we would not tolerate foreign countries telling our government how and whether to make reparations for the United States' historical acts of alleged expropriation—say, a lawsuit brought in Japanese court by relations of Japanese-American internees during World War II, or slavery/slave-trade reparations claims against the United States in African courts. Furthermore, members of this Court have repeatedly emphasized the importance of considering international comity in foreign-cubed suits brought in U.S. courts under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, against a foreign private defendant. *See Daimler AG v. Bauman*, 571 U.S. 117, 141 (2014); *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1431 (2018) (Sotomayor, J., dissenting). It is hard to understand why U.S. courts cannot weigh the same international comity concerns when the suit is against a foreign state defendant under the FSIA.

ARGUMENT

I. THE FSIA DEFINES CASES IN WHICH FOREIGN STATES CANNOT INVOKE SOVEREIGN IMMUNITY FROM SUIT IN U.S. COURTS BUT DOES NOT FORECLOSE COURTS FROM REFRAINING TO EXERCISE JURISDICTION IN APPROPRIATE CASES.

The text and history of the FSIA compel the conclusion that established doctrines of judicial abstention, including international comity, still remain within the discretion of the courts.

A. The FSIA Restrains Executive, Not Judicial, Discretion.

Prior to the adoption of a "restrictive," as opposed to an "absolute," theory of sovereign immunity foreclosing immunity as to commercial activities, the Executive branch "ordinarily requested immunity in all actions against friendly sovereigns." *Verlinden*, 461 U.S. at 486. But after the Department of State issued the so-called Tate Letter (named after Jack Tate, the State Department Legal Adviser) in 1952 adopting the restrictive theory, the Executive branch continued to receive and bend to pressure from friendly nations seeking immunity for commercial acts. *See id.* at 487. Furthermore, when foreign nations did not seek immunity suggestions from the State Department, U.S. courts were left to determine whether to dismiss on immunity grounds without any

guidance from the Executive. Courts would typically decide what to do by reference to prior State Department suggestions that the Department on occasion disavowed in subsequent cases, despite identical circumstances. *Id.* Thus, "sovereign immunity determinations were made in two different branches, subject to a variety of factors, sometimes including diplomatic considerations"—and were "neither clear nor uniformly applied." *Id.* at 488.

Congress passed the FSIA in 1976 "to free the Government from case-by-case diplomatic pressures, to clarify the governing standards, and to 'assure litigants that . . . decisions are made on purely legal grounds and under procedures that insure due process.'" *Verlinden*, 461 U.S. at 488 (quoting H.R. Rep. No. 94-1487, at 7 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6606); *see also Republic of Argentina v. NML Capital, Ltd.*, 573 U.S. 134, 141 (2014) (describing the "bedlam" of "the old executive-driven, factor-intensive, loosely common-law-based immunity regime . . ."). Thus, Congress passed the FSIA to provide *courts* with a statutory framework to decide claims of immunity, free from the "bedlam" of Executive branch calls often triggered by diplomatic pressure, and thereby insulating the Executive from the tyranny of its own discretion. *Verlinden*, 461 U.S. at 488. We turn, then, to the language of the statute.

B. The FSIA Does Not Require U.S. Courts to Hear Every Case in which A Foreign State "Shall Not Be Immune."

The Foreign Sovereign Immunities Act lays down a default rule of immunity—"a foreign state shall be immune," 28 U.S.C. § 1604, and then specifies exceptions for cases where a foreign state "shall not be immune from the jurisdiction of courts of the United States or of the State." *Id.* § 1605(a)–(d); *see also id.* § 1605A, § 1605B ("shall not be immune" for certain terrorism-related acts); § 1607 ("shall not be accorded immunity" as to certain counterclaims when the foreign state has sued or intervened in a suit in a U.S. court). The FSIA further provides that "[a]s to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607, the foreign state shall be liable in the same manner and to the same extent as a private individual under the circumstances." *Id.* § 1606. The statute separately states that "the property in the United States of a foreign state shall be immune from attachment[,] arrest[,] and execution[,]except as provided in sections 1610 and 1611 of this chapter." *Id.* § 1609. Finally, the FSIA includes an omnibus jurisdictional provision: "The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state . . . as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity . . . under sections 1605–1607 of this title." *Id.* § 1330. The cases presently before the Court implicate what is called the expropriation exception: "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 rights in property taken in violation of international law are in issue." *Id.* § 1605(a)(3).

As this Court has noted, the FSIA "provides the 'sole basis' for *obtaining* jurisdiction over a foreign sovereign in the United States." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 611 (1992) (emphasis added). In other words, if a plaintiff wishes to bring an *in personam* suit against a foreign state in U.S. federal district court, he or she must allege that one or more of the exceptions enumerated in 28 U.S.C. §§ 1605, 1605A, 1605B, 1606, or 1607 apply to trigger original jurisdiction under 28 U.S.C. § 1330. That is what the late Justice Scalia meant when he asserted on behalf of the Court that "*any sort of immunity defens*e 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 141–42 (2014) (emphasis added). Justice Scalia surely did not mean that a federal court *must* hear any and every case in which a foreign sovereign's claim to immunity under the statute fails.

Indeed, it does not necessarily follow from the fact that the FSIA is the only way for a plaintiff to obtain jurisdiction over a foreign state defendant in U.S. court, that a U.S. court may not, for international comity reasons, *decline* the statutory subject-matter jurisdiction afforded by 28 U.S.C. § 1330. *Schooner Exchange* provides an early and telling antecedent. Section 9 of the 1789 Judiciary Act had provided for

"exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction" in the newly created district courts. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77 (1789) (current version at 28 U.S.C. § 1333). The U.S. claimants to the Schooner Exchange had filed an *in rem* libel asserting title to the ship while it was docked in the port of Philadelphia—a fact pattern that plainly fell within the scope of Section 9. Chief Justice Marshall reasoned, nonetheless, that "statutory provisions . . . descriptive of the ordinary jurisdiction of the judicial tribunals, which give an individual whose property has been wrested from him, a right to claim that property in the courts of the country, in which it is found, ought not, in the opinion of this Court, to be construed as to give them jurisdiction" in that case. *Schooner Exchange*, 11 U.S. at 146 (the subject matter being more "questions of policy than of law . . ."). Whether we characterize Marshall's reasoning as a creative interpretation of a clear jurisdictional statute or as international comity abstention despite on-point original jurisdiction is beside the point. The upshot is the same: The Court declined to exercise federal court jurisdiction over an alleged expropriation case implicating sensitive foreign sovereign interests despite a strong claim to such jurisdiction under an existing statute.

Finally, it is worth recalling that the FSIA is not a typical subject-matter jurisdiction statute, like section 9 of the Judiciary Act of 1789 in *Schooner Exchange*, presently codified at 28 U.S.C. § 1333 ("The district courts shall have original jurisdiction, exclusive of the courts of the States, of: any civil case

of admiralty or maritime jurisdiction, saving to suitors in all cases other remedies to which they are otherwise entitled"). The FSIA's jurisdictional measure provides that the district courts have jurisdiction only as to claims for which "the foreign state is not entitled to immunity . . . under sections 1605–1607 of this title." 28 U.S.C. § 1330. By contrast to suits within the admiralty and maritime jurisdiction, the default rule under the FSIA is not the extension of jurisdiction, but immunity therefrom: "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter." *Id.* § 1604.

C. Congress Explicitly Required Courts to Exercise Jurisdiction as to Certain Terrorism Claims Against Foreign States but Did Not Use the Same Language with Respect to Expropriation Claims.

A recent amendment to the FSIA demonstrates even more clearly that if Congress meant for the FSIA to require courts to exercise jurisdiction against foreign states whenever a "general exception" set forth in Section 1605 is satisfied, it could have done so expressly. A 1996 amendment to the FSIA created a new exception to immunity for foreign states that supported terrorism. *See* Antiterrorism and Effective Death Penalty Act of 1996 (original version at 28 U.S.C. § 1605(a)(7) (2006)). Congress substantially revised this exception in 2008, most notably by

minting a new private right of action against foreign state sponsors of terrorism. 28 U.S.C. § 1605A(c); *see also Opati*, 140 S. Ct. at 1606.

The amended terrorism measure provides that the "court *shall hear a claim* under this section if" certain conditions are met, 28 U.S.C. at § 1605A(a)(2) (emphasis added), indicating that Congress knew how to make clear when it wanted to *require* federal courts to exercise jurisdiction in cases in which it had declared foreign states "shall not be immune." At least one federal court has interpreted this language to require courts to exercise jurisdiction over any qualifying claim. *See Doe v. Democratic People's Republic of Korea Ministry of Foreign Affairs Jungsong-Dong*, 414 F. Supp. 3d 109, 123 (D.D.C. 2019) (interpreting the words "shall hear a claim" in section 1605A(a)(2) to mean that "[n]ot only does the Court have subject matter jurisdiction, it must exercise that jurisdiction").

The expropriation exception to the original FSIA at issue in these cases has no such mandatory language. Congress's decision to add mandatory language in Section 1605A that is missing from Section 1605 suggests that the grant of jurisdiction set forth in Section 1605 is not intended to be mandatory. The Court, last Term, unanimously applied similar reasoning based on the textual difference between Section 1606—like Section 1605, part of the original FSIA enactment—and Section 1605A to hold that punitive damages were available against foreign states sued under section 1605A, although

unavailable as to suits under Section 1605. *See Opati*, 140 S. Ct. at 1608–1609. In light of Section 1605A, it would be inappropriate to conclude that Congress meant for section 1605 to mandate the exercise of jurisdiction. *See, e.g.*, *Kimbrough v. United States*, 552 U.S. 85, 103 (2007) ("Drawing meaning from silence is particularly inappropriate . . . [when] Congress has shown that it knows how to [address an issue] in express terms"); *United States v. Morton*, 467 U.S. 822, 828 (1984) ("We do not . . . construe statutory phrases in isolation; we read statutes as a whole.").

D. The FSIA Specifies that Foreign States Should Be Treated the "Same" as Private Defendants, Not Made Worse Off.

Section 1606 provides that when one of the FSIA's "exceptions" is met, "the foreign state shall be liable *in the same manner and to the same extent as* a private individual under like circumstances." 28 U.S.C. § 1606 (emphasis added). In other words, the foreign state is treated as a private litigant. Logically, therefore, federal courts may still apply comity-based abstention to foreign states in the "same manner" and to the same "extent" as the courts apply this doctrine to individuals. Because the FSIA does not immunize individuals such as foreign officials or ex-officials, their amenability to suit in the United States is determined according to federal common law, including doctrines predating the FSIA. *See Samantar v. Yousuf*, 560 U.S. 305, 325 (2010). In passing the FSIA, Congress could not possibly have meant to create a rule that would make foreign states

more vulnerable to litigation in U.S. courts than foreign officials or ex-officials. Nor should this Court abide an interpretation of the FSIA that creates such an absurd result. *See Armstrong Paint & Varnish Works v. Nu–Enamel Corp.*, 305 U.S. 315, 333 (1938) ("[T]o construe statutes so as to avoid results glaringly absurd, has long been a judicial function.").

More generally speaking, members of this Court have asserted repeatedly the importance of considering international comity in "foreign-cubed" suits—litigation against foreign persons for misdeeds in a foreign land visited upon foreign victims—brought in U.S. courts under the Alien Tort Statute, 28 U.S.C. § 1350 (ATS), including against foreign private defendants. *See, e.g.*, *Daimler AG v. Bauman*, 571 U.S. 117, 141 (2014); *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1431 (2018) (Sotomayor, J., dissenting). Once again, it is absurd to say that U.S. courts cannot weigh the same international comity concerns when the foreign-cubed suit is against a foreign state defendant under the FSIA. At the very least, foreign states should be afforded the same treatment as foreign private defendants, including due consideration of international comity.

E. The Court Has Already Recognized Other Federal Common Law Grounds to Refrain from Exercising Jurisdiction Despite an Applicable Exception to the FSIA.

This Court has already recognized that the "FSIA in no way affects application of the act of state

doctrine," *Altmann*, 541 U.S. at 701; nor other "traditional" federal common law doctrines like *forum non conveniens*, *Verlinden*, 461 U.S. at 491. Judicial discretion to refrain from exercising statutory jurisdiction because of sensitive foreign governmental interests has an even longer and more distinguished pedigree in this Court's precedents, going back two centuries to Chief Justice Marshall's holding in *Schooner Exchange*, as noted above. Indeed, "other sources of law" may bear on the conduct of cases with foreign sovereign defendants, including "settled doctrines of privilege and *the discretionary determination [of the courts], which may appropriately consider comity interests . . . .*" *NML Capital*, 573 U.S. at 145 n. 6 (citations omitted; emphasis added).

There is no principled basis on which to distinguish abstention on international comity grounds, which overlaps but is not entirely subsumed by other doctrines like *forum non conveniens* and act-of-state. Indeed, district courts routinely consider these doctrines, including comity and justiciability, in addition to the FSIA at the motion to dismiss stage. *See, e.g.*, *Usoyan v. Republic of Turkey*, 438 F. Supp. 3d 1 (D.D.C. 2020) (*appeal filed*); *Leibovich v. Islamic Republic of Iran*, 297 F. Supp. 3d 816 (N.D. Ill. 2018); *Freund v. Republic of France*, 592 F. Supp. 2d 540 (S.D.N.Y. 2008), *aff'd sub nom. Freund v. Société Nationale des Chemins de Fer Français*, 391 F. App'x 939 (2d Cir. 2010), *cert. denied Freund v. Société Nationale des Chemins de Fer Français*, 565 U.S. 816 (2011).

Perhaps more critically, as noted above, courts frequently consider comity outside the immunity context when grappling with claims under the Alien Tort Statute, *Mujica v. AirScan Inc.,* 771 F.3d 580, 596–615 (9th Cir. 2014), or involving foreign bankruptcy, *JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V.*, 412 F.3d 418, 424 (2d Cir. 2005). If the FSIA has filled the field with respect to international comity, on what basis may courts consider, for example, a foreign sovereign's interest in resolving any particular dispute, which may often be communicated via diplomatic channels through the Executive branch? A traditional *forum non conveniens* analysis, which emphasizes litigation convenience, does not encompass such affirmative factors. Indeed, in *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1238–39 (11th Cir. 2004), the Eleventh Circuit noted that *forum non conveniens* informed but one factor of a broader international comity abstention analysis. Additionally, it is passing strange that a foreign sovereign's regulatory interest may be considered as one factor in a *forum non conveniens* analysis but may not be considered at all when the foreign state itself is a defendant. Without the availability of international comity abstention, courts would be deprived of a critical discretionary tool to navigate questions of foreign policy in circumstances far beyond an immunity context.

"The FSIA was adopted . . . to address 'a modern world where foreign state enterprises are every day [sic] participants in commercial activities,' and to assure litigants that decisions regarding claims

against states and their enterprises 'are made on purely legal grounds.'" *Samantar*, 560 U.S. at 323 (quoting H.R. Rep. No. 94-1487, at 7 (1976), as *reprinted in* 1976 U.S.C.C.A.N. 6604, 6605–06)). And yet even a nation's "every day [sic] commercial activities" can implicate political questions or sensitive issues of diplomacy. Thus, the view that the FSIA occupies the field of adjudicative comity disserves the important interests in harmony and keeping U.S. law in line with international standards. On these grounds, *amici* urge that federal judges should continue to do what Chief Justice Marshall did in *Schooner Exchange* in exercising discretion to decline jurisdiction when important foreign governmental interests are at stake. Estreicher & Lee, *supra*, at 197, 212–214.

II. THE COURT SHOULD LOOK TO ITS PRECEDENTS AND ARTICULATE A CONCISE FRAMEWORK FOR APPLYING INTERNATIONAL COMITY ABSTENTION TO GUIDE THE LOWER COURTS.

"The basic debate about international comity is whether it is truly a coherent, independent legal doctrine or rather a theme or a dodge to support a decision to dismiss a case reached on other, inchoate grounds." Estreicher & Lee, *supra*, at 206. Indeed, comity has been criticized by some judges and academics in large part because the lower courts have developed "sprawling, unworkable doctrinal formulations" for its application. *Id.* at 171. These multivariate balancing tests—most notoriously, the

eight-factor analysis set out in *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 614–15 (9th Cir. 1976)—have caused some legal scholars to condemn the doctrine altogether. *See, e.g.*, Michael D. Ramsey, *Escaping "International Comity,"* 83 IOWA L. REV. 893, 897 (1998).

Amici disagree with those commentators who would throw out the baby with the bathwater—just because the test is unworkable does not mean the function the test serves is unimportant or should be abandoned. *Amici* urge this Court, instead, to replace the lower courts' various, multi-factor balancing tests with a more concise and workable framework based on the Court's precedents. The framework *amici* propose, set forth in more detail in Estreicher & Lee, distills the existing federal common law on adjudicative comity into a straightforward test that leads to predictable, principled results.

First, a court must afford deference to the well-considered views of the Executive branch. *Second*, the court must consider the general practice of other nations—particularly the reciprocal practice of any nation directly implicated. *Third*, the court must respect applicable U.S. statutes or treaties that demonstrate a strong U.S. sovereign interest or authorization to ignore or displace foreign sovereign acts or interests. *Finally*, the court must assess whether parallel proceedings have been commenced or concluded in alternative foreign forums, including non-litigation, alternative dispute resolution approaches. This proposed framework allows courts to

weigh the words of the Executive, the reciprocal practices of other countries, other germane acts of Congress and treaties of the United States, and the presence of foreign judicial process or other alternative remedial schemes when deciding issues of international comity abstention.

A. Deference to Well-Considered Executive Statements

Although deference to the Executive branch on matters of foreign relations is an entrenched principle that dates back as far as *Schooner Exchange*, "[s]uch deference is not automatic and not always conclusive." Estreicher & Lee, *supra*, at 198. To the contrary, the extent of deference accorded depends on the strength and clarity of the Executive branch's suggestion of immunity or other form of intervention.

Courts have and should accord the most deference to an express Statement of Interest or *amicus* brief by the State Department, filed before a court in a particular case through the Department of Justice. *See, e.g.*, *Mujica*, 771 F.3d at 609–610 (according deference to statement of State Department because it "articulated several reasons why . . . 'the adjudication of this case [would] have an adverse impact on the foreign policy interests of the United States'," including that parallel proceedings were ongoing in Colombia, the U.S. defendant had consented to jurisdiction there, and that a U.S. court hearing the case could "give the impression that the U.S. government 'does not recognize the legitimacy'" of judicial institutions in Colombia, a vital U.S. ally).

The State Department is the "central repeat player in matters affecting this country's affairs," Estreicher & Lee, *supra*, at 200; as a result, it is simply better situated than the judiciary to judge the importance of the United States' relationships with foreign countries from a national security perspective. Likewise, the State Department is better situated than the judiciary to assess the fairness of a foreign judicial system—a factor that weighs heavily in any comity analysis.

Executive statements in other contexts, such as executive agreements with other nations, may also be accorded deference in appropriate cases. *See e.g.*, *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 421 (2003); *Ungaro-Benages*, 379 F.3d at 1239 (abstaining on comity grounds based on executive agreement supporting resolution of Holocaust-era claims through alternative forum in Germany).

So, too, can a court consider the Executive's non-binding policy statements on relevant matters. For Holocaust-era claims, for example, international resolutions to which the United States is a signatory such as the Washington Conference Principles on Nazi-Confiscated Art, or the 2009 Terezin Declaration on Holocaust Era Assets and Related Issues, may be quite pertinent to the comity inquiry. Both resolutions urge nations to ensure just and fair solutions for Holocaust victims, survivors, and their heirs, and to create, as appropriate, non-litigation solutions. *See* U.S. Dep't of State, Washington Conference on Principles on Nazi-Confiscated Art (Dec. 3, 1998),

https://www.state.gov/washington-conference-principles-on-nazi-confiscated-art/; U.S. Dep't of State, 2009 Terezin Declaration on Holocaust Era Assets and Related Issues (June 30, 2009), https://www.state.gov/prague-holocaust-era-assets-conference-terezin-declaration/.

B. Consideration of Reciprocal Foreign Practices

Courts should next consider the practices of foreign nations, with special attention to whether the foreign country at issue has a reciprocal practice of respect for, and deference to, the United States' dispute resolution procedures and institutions.

This focus on mutual reciprocity is consistent with this Court's longstanding jurisprudence. Indeed, mutual reciprocity was the single determinative factor in *Hilton v. Guyot*, 159 U.S. 113 (1895), perhaps this Court's most well-known decision on international comity. In *Hilton*, Justice Gray, writing on behalf of the majority, performed an encyclopedic survey of the laws of other countries and determined that, almost uniformly, foreign judgments were not deemed conclusive in forum state proceedings unless forum judgments were reciprocally respected in the other foreign state. *Id.* at 215–228. The majority thus adopted the same position for U.S. law, and, as a result, refused to accord conclusive deference to the French judgment at issue. *Id.* at 228.

Mutual reciprocity between courts of different nations is not simply a tit-for-tat tactic. Instead, the practice of considering reciprocity reflects and

promotes a strategic, long-term goal of ensuring maximum mutual respect and restraint. Importantly, it contextualizes the foreign forum's interest in a particular case within a broader framework of international law. This consideration arose in *Animal Science Prods., Inc. v. Hebei Welcome Pharm. Co.*, when Justice Kagan queried counsel at oral argument, "[H]ow can you say that the only thing that shows respect to foreign governments is to do something that we don't know that any other foreign nation does?" Transcript of Oral Argument at 54, *Animal Science Prods., Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865 (2018) (No. 16-1220), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-1220_4hd5.pdf. When considered against the backdrop of the practices of other nations, courts may more easily distinguish between opportunistic arguments and the reciprocal practice of nations.[4]

C. Respect for Conflicting U.S. Treaties and Statutes

International comity is a federal common law doctrine and cannot override a conflicting federal statute or treaty. If Congress has spoken, or the President ratifies a self-executing treaty with Senatorial advice and consent, "the resultant positive law suspends the reciprocity analysis on international

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[4] *Amici* understand that a number of nations have submitted diplomatic notes to the State Department regarding immunity and comity principles raised in the present dispute, which may be relevant to reciprocity issues.

comity . . . [and the] question of the level of respect for foreign acts and actors becomes a question of statutory or treaty interpretation." Estreicher & Lee, *supra*, at 202.

But courts should not assume that the mere presence of a statute automatically precludes all independent judicial weighing of international comity. To the contrary, it is only when Congress or the President has directly prescribed a result that is incompatible with adjudicative comity that federal common law is displaced. *See, e.g.*, 9 U.S.C. §§ 201–208 (implementing New York Convention into Federal Arbitration Act without requiring reciprocity from other nations). As discussed above, the FSIA codified immunity—historically, a function of comity, but now one of statutory interpretation. Where the statute covers the issue, the role for federal common law is diminished. But the FSIA left undisturbed other judicial doctrines that may operate as a defense to suit.

D. Assessment of Parallel Proceedings in Foreign Forums and Alternative Remedial Schemes

Finally, when considering whether to stay or dismiss a case for international comity reasons, courts should ask whether any foreign country where the claim's "center of gravity" lies has a legitimate interest in redressing the claim locally. If so, the court should consider whether the foreign country provides an adequate forum to the plaintiff, and whether

parallel proceedings have been initiated there. *See* Estreicher & Lee, *supra*, at 206.

The United States typically has some level of interest in adjudicating claims filed on its shores, even when a claim's center of gravity lies elsewhere. For example, whenever the interests of its citizens or permanent residents are implicated, the United States has an interest in vindicating their rights. Even when citizen/resident interests are not implicated, the United States always has an important interest in upholding international norms and human rights laws. *See, e.g.*, *Mujica*, 771 F.3d at 609. In accordance with comity, however, the strength of U.S. interests in adjudicating such claims must be weighed against foreign states' interests in "regulating conduct that occurs within their borders, involves their nationals, impacts their public and foreign policies, and implicates universal norms." *Id.* at 607.

When a foreign state has a significant interest in adjudicating a claim locally, courts must ask whether the foreign state would provide an adequate forum. This question is part-and-parcel of the federal common law interest-weighing analysis, since a decision to dismiss or stay a U.S. proceeding in favor of a foreign proceeding that is essentially a sham would trample upon the United States' interests in upholding international norms and promoting justice. But if the foreign forum is adequate, comity counsels in favor of resolving the claim where its "center of gravity" exists.

As the courts of appeals have explained, international comity does not require that foreign proceedings be cast from the same mold as the U.S. justice system. To the contrary, foreign proceedings may be deemed "adequate" even if they differ from U.S. procedures in meaningful respects. For example, the Eleventh Circuit has explained that a foreign judgment should be entitled to comity in the U.S. provided it (1) was not "rendered via fraud"; 2) "was rendered by a competent court utilizing proceedings consistent with civilized jurisprudence"; and (3) is not "prejudicial, in the sense of violating American public policy because it is repugnant to fundamental principles of what is decent and just." *Belize Telecom, Ltd. v. Gov't of Belize*, 528 F.3d 1298, 1306 (11th Cir. 2008) (*quoting Turner Ent. Co. v. Degeto Film GmbH*, 25 F.3d 1512, 1519 (11th Cir. 1994)). Likewise, in *Mujica*, the Ninth Circuit held that Colombian proceedings were adequate because, among other reasons, the plaintiffs had not shown that the Colombian courts' decisions resulted in "'manifest injustice" or "violat[ed] 'fundamental standards of procedural fairness.'" *Mujica*, 771 F.3d at 608 (quoting *JP Morgan*, 412 F.3d at 428).

III. WHEN A FOREIGN COUNTRY HAS ESTABLISHED AN ADEQUATE JUDICIAL OR RESTITUTIVE PROCESS TO RIGHT A HISTORICAL WRONG,

ADJUDICATIVE COMITY WEIGHS IN FAVOR OF ABSTENTION

As explained above, there are four primary factors that any court grappling with international comity should consider. The fourth factor, however, is particularly important in cases, such as those presently before the Court, in which victims of historical atrocities perpetrated by foreign nations on foreign persons seek restitution in U.S. courts. Where the "center of gravity" of a claim rests entirely abroad, *amici*'s proposed test counsels U.S. courts to abstain from exercising jurisdiction, subject to verifying that the foreign forum meets the baseline level of fairness and adequacy set forth in cases like *Belize Telecom* and *Mujica*.[5] If the promise of fairness and adequacy that warranted abstention ultimately proves illusory, the U.S. court may exercise its jurisdiction in the future.

This principle has a long history in federal common law, and the reasons are myriad. First, allowing a foreign state to adjudicate such claims as a matter of comity reduces friction between the U.S. and foreign states. As this Court explained in *Oetjen v. Cent. Leather Co.*: "To permit the validity of the acts of one

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[5] *Amici* do not proffer any opinion regarding whether the restitutive processes of Hungary or Germany are "adequate" under these standards. *Amici* simply contend that the standard for adequacy set forth in *Belize Telecom* and *Mujica* strikes the right balance between humility toward our own unique system of justice, on the one hand, and the need to demand fundamental procedural fairness from foreign forums before relinquishing claims that fall within our courts' jurisdiction, on the other.

sovereign state to be reexamined and perhaps condemned by the courts of another would very certainly imperil the amicable relations between governments and vex the peace of nations." 246 U.S. 297, 304 (1918). The Second Circuit also applied this principle in *Bi v. Union Carbide Chemicals and Plastics Co. Inc.*, a case in which victims of a "devastating industrial disaster" in Bhopal, India filed a class-action in U.S. district court. 984 F.2d 582, 583 (2d Cir. 1993). In affirming the district court's dismissal of the case on grounds of *forum non conveniens*, the Second Circuit noted that India had "chosen a system to deal efficiently with a problem of mass proportions that occurred within its borders," which was set forth in "an act passed by its democratic parliament." *Id.* at 586. Allowing a separate class-action to move forward in U.S. federal court, the Second Circuit opined, "would disrupt our relations with that country and frustrate the efforts of the international community to develop methods to deal with problems of this magnitude in the future." *Id.*

Second, by abstaining from exercising jurisdiction only in those instances where a U.S. judge deems a foreign forum to be "adequate," our government places appropriate pressure on foreign countries to create meaningful, fair processes of reconciliation and restitution. Equity does not require a futile act; nor should the United States require litigants to subject themselves to sham proceedings in nations that lack legitimate procedures for restitution. This principle comports with the U.S.'s foreign policy of encouraging foreign countries to implement fair, local, justice-

based initiatives to mitigate the injustices caused by historical wrongs.

Third, requiring foreign litigants to seek redress in their home courts before availing themselves of the U.S. justice system will reduce so-called "foreign-cubed" litigation, where alleged harms were visited upon foreign persons, the defendants are foreign, and the relevant conduct occurred abroad. *See, e.g.*, *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 283, n. 11 (2010) (Stevens, J. concurring).

Exhaustion or abstention, where appropriate, allows a foreign state the opportunity to address a claim first, to consider whether its laws can be invoked to resolve the underlying dispute. Consistent with the FSIA, this accords a level of respect for that state's processes that we would expect courts in other countries to accord our own processes. Moreover, while sovereign immunity results in a dismissal with prejudice, application of adjudicative comity in some contexts may result in a dismissal *without* prejudice, affording litigants a chance to return to U.S. courts if justice is denied in foreign forums.[6]

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[6] As the Seventh Circuit emphasized in dismissing claims similar to those here:

> [W]hile the doors of United States courts are closed to these claims for now, they are not locked forever. All dismissals are without prejudice. If plaintiffs find that future attempts to pursue remedies in [the foreign state] are frustrated unreasonably or arbitrarily, a United States court could once again hear these claims.

Fischer, 777 F.3d at 852.

CONCLUSION

Amici urge the Court to hold that courts may decline to exercise jurisdiction in appropriate cases on the basis of international comity, even when jurisdiction is granted by one of the FSIA's exceptions to immunity. *Amici* further urge the Court to consider their proposed framework to guide courts as to when to abstain to exercise jurisdiction in matters of sensitive international interest.

Respectfully submitted,

AMELIA L. B. SARGENT
Counsel of Record
EMILY B. VIGLIETTA
WILLENKEN LLP
707 Wilshire Boulevard,
Suite 3850
Los Angeles, CA 90017
(213) 955-9240
asargent@willenken.com

Counsel for Amici Curiae Professors Samuel Estreicher and Thomas H. Lee

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