No. 18-1447

IN THE

Supreme Court of the United States

REPUBLIC OF HUNGARY, ET AL.,

Petitioners,

v.

ROSALIE SIMON, ET AL.,

Respondents.

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

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

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

1. Whether a district court can abstain from exercising jurisdiction Congress conferred in the FSIA based on the court's own assessment of the United States' foreign-policy interests and international comity.

2. Whether a foreign sovereign's taking of property qualifies as a taking "in violation of international law" for purposes of the FSIA's expropriation exception, 28 U.S.C. § 1605(a)(3), when the taking is itself an act of genocide.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

Respondents are 14 survivors of some of the worst atrocities known to humankind. In the Foreign Sovereign Immunities Act (FSIA), Congress gave U.S. courts jurisdiction over Survivors' claims that petitioners took all of their property as a means of deliberately inflicting on Jews conditions of life calculated to bring about their physical destruction, in violation of international law. But ten years after the first complaint was filed, Survivors remain stuck at the motion-to-dismiss stage because Hungary and the district court have ignored the plain language of the FSIA. Survivors deserve their day in court.

The Constitution commits questions of foreign policy to the political branches of government—and those branches agreed in 1976 that diplomatic pressures and case-by-case considerations of comity and foreign policy should be eliminated from decisions about whether federal courts should exercise jurisdiction over foreign sovereigns. The FSIA provides clear and comprehensive standards that reflect the full extent of comity's role in determining when U.S. courts should exercise such jurisdiction. Hungary and the United States seek a return to the pre-FSIA regime by allowing courts to refrain from exercising statutory jurisdiction based on *the court's* assessment of U.S. foreign-policy concerns. Nothing in the FSIA or in any recognized abstention doctrine allows that.

STATEMENT OF THE CASE

This long-running case was filed by 14 survivors of Hungary's genocidal campaign against Jews during World War II. Survivors seek to represent a class of Hungarian Holocaust victims who have been injured

in similar ways and their heirs. J.A. 172-176. "Nowhere was the Holocaust executed with such speed and ferocity as it was in Hungary." Pet. App. 2a (quoting *Simon v. Republic of Hungary*, 812 F.3d 127, 133 (D.C. Cir. 2016)). Respondent Survivors, four of whom are U.S. citizens, seek compensation from petitioners, Hungary and its state-owned railway company Magyar Államvasutak Zrt. (MÁV), for the seizure and expropriation of all of Survivors' property as part of Hungary's genocidal campaign. *Ibid.*

1. The Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. §§ 1330, 1441(d), 1602 *et seq.*, establishes "a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488 (1983). With enactment of the FSIA in 1976, Congress "transfer[red] primary responsibility for immunity determinations from the Executive to the Judicial Branch." *Republic of Austria v. Altmann*, 541 U.S. 677, 691 (2004). "[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 Cap., Ltd.*, 573 U.S. 134, 141 (2014) (quoting *Samantar v. Yousuf*, 560 U.S. 305, 313 (2010)).

The FSIA establishes a general rule that foreign sovereigns "shall be immune from the jurisdiction" of federal and state courts except as provided by certain international agreements and by the exceptions enumerated in the statute. 28 U.S.C. § 1604; *see id.* §§ 1605-1607. This case involves the FSIA's so-called "expropriation exception" to immunity, which provides

that "[a] foreign state shall not be immune from the jurisdiction of courts of the United States" in any case "in which rights in property taken in violation of international law are in issue" and one of two requirements of a commercial nexus between the expropriated property and the United States is satisfied. 28 U.S.C. § 1605(a)(3).

2. a. "The wartime wrongs inflicted upon Hungarian Jews by the Hungarian government are unspeakable and undeniable." *Simon*, 812 F.3d at 132. Beginning in 1941, "Hungary 'began a systematic campaign of [official] discrimination' against its Jewish population," Pet. App. 4a (brackets in original; citation omitted), including a "'pattern of expropriation and ghettoization'" that amounted to "a 'wholesale plunder of Jewish property'" that was intended "'to deprive Hungarian Jews of the resources needed to survive as a people,'" *id.* at 10a (citation omitted).

Throughout World War II, Hungary cooperated with its Nazi allies to murder more than two-thirds of the more than 800,000 Jews who lived in Hungary at the start of the war. *Simon*, 812 F.3d at 132. Starting early in the war, Hungary sent tens of thousands of Jews "to internment camps near the Polish border," Pet. App. 4a, and forcibly deported Jews via train to Nazi-occupied Ukraine, where many were promptly murdered, J.A. 128-129, 154-155. In the summer of 1944 alone—with "tragic efficiency"—"Hungary rounded up more than 430,000 Jews for deportation to Nazi death camps." Pet. App. 4a. During those mass deportations, Hungarian government officials organized four daily trains, each packed with between 3,000 and 3,500 human beings, to shuttle Jews to their deaths in Nazi death camps. *Ibid.* In the words of

Winston Churchill, "the brutal, mass deportation of Hungarian Jews for extermination at Nazi death camps [w]as 'probably the greatest and most horrible crime ever committed in the history of the world.'" *Simon*, 812 F.3d at 132.

"[T]he Nazi regimentation of inhumanity we characterize as the Holocaust, marked most horrifically by genocide and enslavement, also entailed widespread destruction, confiscation, and theft of property belonging to Jews." *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 430 (2003) (Ginsburg, J., dissenting). As part of its systematic ghettoization of Jews, Hungarian officials went house to house, inventorying and expropriating the property of Jews who were forced to live in ghettos without even protective clothing. J.A. 156-157; *Simon*, 812 F.3d at 133. While forcibly deporting Jews throughout the war, Hungarian officials and MÁV personnel confiscated what little property Jews had left before exiling them. J.A. 129, 154-155; Pet. App. 4a-5a.

When this suit was filed, Respondents were 14 Jewish survivors of the Hungarian Holocaust. Pet. App. 2a. Because of their advanced age, some Survivors have died (and their heirs substituted as plaintiffs) during the long life of this case. *E.g.*, J.A. 128. Before the war, Survivors were either Hungarian nationals or resided in parts of other countries (including the former Czechoslovakia and Yugoslavia) that Hungary annexed. J.A. 127-146; *Simon*, 812 F.3d at 134. Twelve of the Survivors were among the hundreds of thousands who were transported to Auschwitz. *Simon*, 812 F.3d at 134. Survivors have adopted other nationalities since escaping the atrocities of the Hungarian government, becoming citizens of the United

States, Canada, Israel, and Australia. Pet. App. 7a & n.1.

b. In 2010, Survivors filed this action in the United States District Court for the District of Columbia against Hungary, MÁV, and Rail Cargo Hungaria Zrt. (RCHZ), "a private railway company that is the successor-in-interest to the former cargo division of MÁV." Pet. App. 7a-8a; J.A. 4. Survivors seek compensation for the possessions forcibly taken from them and their families by petitioners as part of petitioners' campaign to eradicate Jews. Pet. App. 8a.

Early in this litigation, the United States filed an uninvited "Statement of Interest" urging the district court to dismiss RCHZ from the case because it is now nearly 100% owned by an Austrian company. Pet. App. 8a. The United States relied on its role in creating "international agreements with Austria involving Holocaust claims against Austrian companies." *Ibid.* The United States asserted that maintaining the suit against RCHZ would be "contrary" to "enduring United States foreign policy interests" and recommended dismissal of claims against that Austrian defendant. *Id.* at 8a-9a. The United States said nothing in that filing, *id.* at 9a—or in any other filing in this case—urging dismissal of Hungary or MÁV or contending that allowing this suit to proceed against them would impair any United States foreign-policy interest.

The district court later dismissed RCHZ for lack of personal jurisdiction. Pet. App. 9a. The court separately dismissed Hungary and MÁV for lack of subject matter jurisdiction, holding that the Treaty of Peace with Hungary, Feb. 10, 1947, 61 Stat. 2065, 41

U.N.T.S. 135, provided the exclusive mechanism to resolve Survivors' claims. *See* Pet. App. 9a.

c. The D.C. Circuit reversed in relevant part. *Simon*, 812 F.3d at 151. The court held that the 1947 Treaty did not preempt Survivors' suit and that the FSIA's expropriation exception encompasses common-law claims like Survivors'. Pet. App. 9a-10a. The court held that the expropriation exception applies because petitioners' "expropriations of the Survivors' property were '*themselves genocide*,' in violation of fundamental tenets of international law." *Id.* at 10a (quoting *Simon*, 812 F.3d at 142). The court further held that Survivors had pleaded a sufficient commercial nexus to MÁV to bring it within the FSIA's expropriation exception and remanded to give Survivors an opportunity to do the same with respect to Hungary. *Ibid.*

d. On remand, the district court again dismissed the case. Pet. App. 48a-95a.

First, the district court dismissed Survivors' claims based on purported common-law principles of international comity. Pet. App. 64a-83a. Relying on "comity considerations," *id.* at 72a, the court held that a plaintiff must exhaust domestic remedies before it may assert a claim for expropriations in violation of international law unless doing so would be futile, *id.* at 65a-66a. The court concluded that exhaustion of Survivors' claims in Hungarian courts would not be futile—in spite of Survivors' arguments about the rise of anti-Semitism in Hungary. *Id.* at 72a-83a.

Second, the district court dismissed Survivors' claims on the alternative ground of *forum non conveniens*, reasoning that pursuit of Survivors' claims in

Hungary would be more convenient—even though none of the plaintiffs lives there—and explaining that Hungary's interests outweighed Survivors' "emotional distress or even trauma in returning to Hungary." Pet. App. 83a-95a.

e. A divided panel of the D.C. Circuit reversed. Pet. App. 1a-47a. After oral argument, the court invited the United States to file an amicus brief addressing the application of "'prudential exhaustion' and *forum non conveniens*" in this case. C.A. Order (Apr. 20, 2018). The United States argued that district courts "may" dismiss a case brought pursuant to the FSIA's expropriation exception on grounds of international comity or *forum non conveniens*, but declined to "express a view as to whether it would be in the foreign policy interests of the United States" to do so in this case. U.S. C.A. Br. 9, 11.

The court of appeals rejected Hungary's exhaustion argument, explaining that genuine "exhaustion" requires a plaintiff to press her claims "through a decisional forum . . . whose decision is then subject to the review of a federal court," and that Hungary seeks dismissal of Survivors' claims without the right to seek later review in the courts of the United States—"a judicial grant of immunity from jurisdiction in United States courts" that the FSIA does not allow. Pet. App. 13a-14a. The court relied on its recent decision in *Philipp v. Federal Republic of Germany*, 894 F.3d 406 (D.C. Cir. 2018), *cert. granted*, No. 19-351 (oral argument scheduled for Dec. 7, 2020), which held that the enactment of the FSIA displaced "the pre-existing common law" by requiring that all immunity determinations be made through the FSIA. *Id.* at 415; *see* Pet. App. 15a. The court explained that "[t]here is no room

in" the FSIA's "'comprehensive' standards governing 'every civil action'" "for the extra-textual, case-by-case judicial reinstatement of immunity that Congress expressly withdrew." Pet. App. 15a (quoting *Philipp*, 894 F.3d at 415). Reversing the district court's dismissal on comity grounds, the court of appeals held that "[c]ourts cannot end run" the FSIA's "congressional command by just relabeling an immunity claim as 'prudential exhaustion.'" *Id.* at 15a-16a.

The court of appeals also reversed the district court's dismissal on *forum non conveniens* grounds, holding that the lower court had committed legal errors in its analysis. Pet. App. 17a-36a. Judge Katsas dissented from the panel's *forum non conveniens* holding. *Id.* at 37a-47a. The court of appeals denied petitioners' petition for rehearing en banc. *Id.* at 96a-97a.

f. This Court denied Hungary's request to review the *forum non conveniens* question.[1]

SUMMARY OF ARGUMENT

I. A. When Congress enacted the FSIA in 1976, it codified the doctrine of international comity in the exercise of jurisdiction over foreign sovereigns.

1. The pre-FSIA regime required case-by-case determinations of foreign sovereign immunity by the Executive Branch—which was regularly persuaded to depart from its immunity standards based on diplomatic pressure—or by courts. The result was a body

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[1] The district court has since held that Survivors have established jurisdiction over petitioners pursuant to 28 U.S.C. § 1605(a)(3). *Simon v. Republic of Hungary*, 443 F. Supp. 3d 88, 99-116 (D.D.C. 2020), *appeal pending*, No. 20-7025 (D.C. Cir. docketed Mar. 24, 2020).

of inconsistent and unclear immunity determinations. The FSIA did away with that bedlam by codifying in clear and comprehensive terms when a U.S. court should exercise jurisdiction over a foreign sovereign. When an exception to the FSIA's grant of immunity applies, a foreign sovereign is subject to the jurisdiction of U.S. courts.

2. Hungary and the United States argue that courts may evade FSIA jurisdiction by relying on a common-law doctrine of international comity. Not so. The pre-FSIA foreign-sovereign-immunity doctrine was itself a common-law international-comity doctrine. And when Congress enacted the FSIA, it displaced the common-law international-comity doctrine. That was the point of the FSIA. Congress's determinations about when comity calls for immunity—and when it does not—are reflected in the FSIA, which is the final word on that question.

The governments ask the Court to breathe new life into a common-law doctrine that the FSIA displaced. Their proposed regime would return foreign-sovereign-immunity determinations to the pre-FSIA bedlam that Congress and the Executive sought to end—because it would layer discretionary and largely standardless jurisdiction determinations over the FSIA's clear and comprehensive regime. In one respect, that regime would be worse than the pre-FSIA regime, because it would rely on *courts*, rather than the Executive, to make decisions about the United States' foreign-policy interests.

3. The governments rely on 28 U.S.C. § 1606, which provides that foreign sovereigns with no FSIA immunity shall be liable to the same extent and in the

same manner as private parties in similar circumstances. The governments contend that, because private parties are entitled to international-comity-based abstention, sovereigns must be as well. They are wrong about what Section 1606 means and about whether any abstention doctrine would be available to private parties in like circumstances.

By its terms, Section 1606 governs the substantive law of liability and the extent and allocation of damages that applies in FSIA cases. It does not address jurisdiction.

The governments are equally wrong that any abstention doctrine would apply here if petitioners were private parties. The governments rely primarily on cases that apply the doctrine now known as *forum non conveniens*. Although comity concerns also animated the development of that doctrine, it is substantively distinct from any abstention doctrine. When, as here, neither *forum non conveniens* nor foreign sovereign immunity applies, there is no separate doctrine of international-comity-based abstention to turn to.

None of the other abstention doctrines the governments rely on applies. Adjudicatory comity applies only when a suit is concurrently pending in a foreign jurisdiction; no such suit is pending. Even when adjudicatory comity applies, it is generally not available in a suit (like this one) for money damages. And the governments simply misunderstand this Court's holdings about the substantive scope of the Alien Tort Statute (ATS). The FSIA provides clear rules about the types of cases over which it grants jurisdiction. In marked contrast, the ATS provides *no rules* governing the types of cases it covers. This Court is accordingly cautious when interpreting the scope of the ATS. But

those decisions are about the substantive scope of that statute; they have nothing to do with abstention.

4. If the Executive were genuinely concerned that the type of claims at issue here interfere with foreign relations, it could formally settle the claims through a state-to-state agreement with Hungary. Such an agreement, this Court has held, does not affect a court's jurisdiction under the FSIA, instead effecting a change in the applicable substantive law. But Hungary and the United States have never attempted to resolve claims like Survivors' through bilateral or multilateral agreements.

B. If the Court disagrees with Survivors' argument that courts may not abstain from exercising FSIA jurisdiction based on international comity, it should hold instead that international-comity-based abstention is available *only* when the Executive expressly requests that a case be dismissed based on specific foreign-policy concerns. Foreign relations is the province of the Executive, not the Judicial Branch. When, as here, (1) the Legislative Branch has provided jurisdiction over a suit against a foreign sovereign and (2) the Executive Branch has expressly declined to request that the suit be dismissed *or even* to say that continuation of the suit harms U.S. foreign-policy interests, a court has no power to ignore congressionally bestowed jurisdiction based on *its own* assessment of U.S. foreign-policy interests.

C. Even under the governments' preferred approach, abstention was not warranted here. The United States has a strong interest in the resolution of these claims in U.S. courts; Hungary's interest in resolving these claims in its courts is particularly weak;

and even the State Department has suggested that the alternative remedies Hungary touts are inadequate.

D. Hungary's reliance on prescriptive comity is misplaced, as the United States agrees. On its face, the FSIA applies to claims arising from conduct that occurred abroad.

II. The FSIA's expropriation exception provides jurisdiction over any case in which "rights in property" are "taken in violation of international law." 28 U.S.C. §1605(a)(3). In *Republic of Germany v. Philipp*, *supra*, the Court will determine whether that text means what it says. Because that question goes to subject matter jurisdiction in this case—and because the nature of Survivors' claims may assist the Court in resolving it—we briefly address it.

Survivors allege that Hungary took all their property in order to deliberately inflict a condition of life calculated to bring about the destruction of Jews, in violation of international law banning genocide. Because Survivors therefore allege that their "rights in property" were "taken [by Hungary] in violation of international law," the plain text of Section 1605(a)(3) encompasses Survivors' claims. The text of Section 1605(h)—which contemplates that Holocaust-era takings are covered by the expropriation exception—confirms that Section 1605(a)(3) means what it says.

Hungary and the United States' arguments to the contrary sound in policy, not statutory text. The expropriation exception is quite limited, applying only to claims that property was taken in violation of international law—and only when the foreign sovereign exploits that property for a commercial purpose in connection with the United States.

ARGUMENT

The FSIA provides jurisdiction where, as here, a plaintiff alleges that property rights were taken in violation of international law. 28 U.S.C. § 1605(a)(3). The FSIA codifies—to the full extent Congress deemed appropriate—principles of international comity with respect to U.S. courts' exercise of jurisdiction over foreign sovereigns. When the FSIA provides jurisdiction, judges—who "possess no special expertise or authority to declare for [them]selves what a self-governing people should consider just or wise," *Bostock v. Clayton County*, 140 S. Ct. 1731, 1753 (2020)—have no independent authority to make a *different* determination about whether exercising jurisdiction sufficiently reflects international comity. Because there is no basis for international-comity-based abstention in this case, and because Survivors plainly allege takings in violation of international law, the Court should affirm the court of appeals' reinstatement of jurisdiction. Survivors have established their legal entitlement to a day in court.

I. The District Court Lacked Discretion To Dismiss This Action Based On International Comity.

The FSIA establishes clear and comprehensive rules governing federal jurisdiction over suits against foreign sovereigns. Hungary and the United States would have this Court upend that careful scheme by holding that district courts may decline to exercise FSIA jurisdiction based on their own assessment of international comity. The court of appeals' rejection of that approach best reflects the text and purpose of the FSIA and should be affirmed. In the alternative, this

Court should hold that a court may not refrain from exercising FSIA jurisdiction unless the Executive Branch formally asks the court to dismiss a particular case based on specific foreign-policy concerns. Because nothing like that happened in this case, the district court did not have discretion to dismiss this action based on international comity.

A. When the FSIA Provides Jurisdiction, Courts May Not Abstain from Exercising Jurisdiction Based on International Comity.

When Congress enacted the FSIA in 1976, it codified the doctrine of international comity as it applies to suits against foreign sovereigns. If the FSIA provides jurisdiction over such a suit, then Congress has already decided that international comity does not stand in the way of a U.S. court's exercise of jurisdiction. In codifying comity principles, Congress specifically intended to do away with case-by-case determinations of whether federal courts should exercise jurisdiction over suits against foreign sovereigns based on the foreign-policy concerns of the moment. The court of appeals correctly held that, when the FSIA provides such jurisdiction, a district court may not refrain from exercising it on international-comity grounds.

1. The FSIA required the district court to exercise jurisdiction in this case.

a. The history of foreign-sovereign-immunity determinations in this country is familiar to the Court. "For more than a century and a half, the United States generally granted foreign sovereigns complete immunity from suit in the courts of this country" as "a matter of grace and comity on the part of the United States."

Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 486 (1983). Immunity determinations were primarily committed to the Executive Branch for most of the Nation's history. "Until 1952, the State Department ordinarily requested immunity in all actions against friendly foreign sovereigns." *Ibid.* In that year, the Department adopted the "'restrictive theory' of sovereign immunity," as embodied in the so-called Tate Letter, which afforded immunity for a sovereign's public acts, but not its private or commercial acts. *Republic of Austria v. Altmann*, 541 U.S. 677, 689-690 (2004). Immunity determinations remained committed to the Executive Branch in the first instance, "and courts continued to 'abide by' [the State] Department's 'suggestions of immunity.'" *Id.* at 690 (quoting *Verlinden*, 461 U.S. at 487) (alteration omitted).

The Executive's shift to the restrictive theory of immunity increased the politicization of immunity determinations and "thr[e]w immunity determinations into some disarray, as 'foreign nations often placed diplomatic pressure on the State Department,' and political considerations sometimes led the Department to file 'suggestions of immunity in cases where immunity would not have been available under the restrictive theory.'" *Altmann*, 541 U.S. at 690 (citation omitted). "Complicating matters further, when foreign nations failed to request immunity from the State Department[, t]he responsibility fell to the courts to determine whether sovereign immunity existed, generally by reference to prior State Department decisions." *Ibid.* (internal quotation marks omitted). Thus, "sovereign immunity decisions were being made in two different branches, subject to a variety of factors, sometimes including diplomatic considerations." *Republic*

of Argentina v. NML Cap., Ltd., 573 U.S. 134, 141 (2014) (brackets omitted). "Not surprisingly, the governing standards were neither clear nor uniformly applied." *Ibid.*

In 1973, the Executive Branch sought to eliminate the existing system by proposing a draft bill that would eventually become the FSIA. *Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims & Governmental Rels. of the H. Comm. on the Judiciary*, 93d Cong. 33 (1973). The twin purposes of the bill were to eliminate the Executive Branch from immunity determinations and to establish clear rules governing the right of private parties to sue foreign sovereigns in U.S. courts. *Id.* at 34. In 1976, Congress enacted "the FSIA, a comprehensive statute containing a 'set of legal standards governing claims of immunity in every civil action against a foreign'" sovereign. *Altmann*, 541 U.S. at 691 (citation omitted). The FSIA "transfers primary responsibility for immunity determinations from the Executive to the Judicial Branch," *ibid.*, and largely "codifies, as a matter of federal law, the restrictive theory of sovereign immunity," *Verlinden*, 461 U.S. at 488.

b. The FSIA "establishes a comprehensive framework for determining whether a court in this country, state or federal, may exercise jurisdiction over a foreign state." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 610 (1992). "[A]ny sort of immunity defense made by a foreign sovereign in an

American court must stand on the Act's text. Or it must fall." *NML Cap.*, 573 U.S. at 141-142.[2]

"The FSIA is explicit that, if a statutory exception to immunity applies," "'a foreign state *shall not be immune* from the jurisdiction of courts of the United States or of the States.'" Pet. App. 15a (quoting 28 U.S.C. § 1605(a)) (brackets omitted). "Courts cannot end run that congressional command by just relabeling an immunity claim as 'prudential exhaustion.'" *Id.* at 15a-16a. Hungary argues (Pet. Br. 16) that the comity-based abstention it now seeks has nothing to do with immunity. But Hungary's own arguments belie that claim. Every reason Hungary offers to justify abstention relies on Hungary's *status* as a foreign sovereign. *Id.* at 35-40. Hungary urges abstention "[b]ecause sovereignty is bound up with territory" and the events at issue took place in Hungary; because claims challenging "'the power of foreign governments over their own citizens'" should not be heard in U.S. courts; because Survivors' claims would disrupt Hungary's "sensitive" sovereign choices about how (if at all) to remedy such claims; and because Survivors' damages action would disrupt the public fisc. *Ibid.* (citation omitted).

Each contention is an argument that Hungary's *status as a sovereign* entitles it to protection from the

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[2] In the lower courts, Hungary argued that the district court correctly dismissed this action because Survivors failed to exhaust any remedies available in Hungary. *See generally* Pet. C.A. Br. In this Court, Hungary barely acknowledges its exhaustion argument, which the court of appeals correctly rejected. Pet. App. 13a-16a. When Congress intended exhaustion as a prerequisite to jurisdiction under the FSIA, it said so expressly. *See* 28 U.S.C. § 1605A(a)(2)(A)(iii).

jurisdiction of U.S. courts and from having to pay damages. And each contention is therefore an argument for sovereign immunity, regardless of what label Hungary uses. As members of this Court have explained, "[s]overeign immunity accords a defendant exemption from suit by virtue of its *status*." *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 725-726 (1976) (Marshall, J., dissenting) (emphasis added); *Altmann*, 541 U.S. at 708 (Breyer, J., concurring) ("[T]he legal concept of sovereign immunity, as traditionally applied, is about a defendant's *status* at the time of suit[.]"). Claims that a defendant's status as a foreign sovereign entitle it to protection from jurisdiction *are* arguments that the defendant is entitled to foreign sovereign immunity. But "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." *NML Cap.*, 573 U.S. at 141-142. Here, it must fall.

2. The FSIA displaced any common-law doctrine of international-comity-based abstention.

a. Hungary and the United States argue (Pet. Br. 25-31; U.S. Br. 20-25) that the FSIA does not affect courts' ability to abstain on international-comity grounds because comity is a separate common-law doctrine from sovereign immunity. That is wrong. Comity is a consideration that informed pre-FSIA determinations of foreign sovereign immunity; comity is not a stand-alone doctrine courts may apply notwithstanding the FSIA's grant of jurisdiction.

In enacting the FSIA, Congress codified principles of international comity as they apply to the exercise of jurisdiction over foreign sovereigns. When the FSIA

provides immunity to a foreign sovereign, it is because Congress determined that principles of international comity called for immunity in those circumstances. When the Act provides jurisdiction over a foreign sovereign, it is because Congress determined that international comity does *not* call for immunity in *those* circumstances. Congress left no room for application of a discretionary and atextual doctrine of international-comity-based abstention when the FSIA provides jurisdiction.

This Court has long held that foreign sovereign immunity is not compelled by the Constitution, but is a voluntary expression of international comity. *Altmann*, 541 U.S. at 688, 694-695, 696; *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283, 352-355 (1822). That comity-based doctrine is now codified in the FSIA. International-comity concerns were no doubt important to Congress and the Executive Branch when they decided what types of claims against foreign sovereigns would be subject to the jurisdiction of U.S. courts. The State Department's pre-FSIA determinations of immunity reflected principles of "grace and comity on the part of the United States"—and the FSIA in large part codified the State Department's extant "restrictive" theory of immunity, thereby codifying the prevailing views of comity. *Verlinden*, 461 U.S. at 486-487; *see* H.R. Rep. No. 94-1487, at 7 (1976) (*House Report*). The standards set out in the FSIA reflect the *full extent* to which Congress and the Executive intended international-comity concerns to play a role in whether U.S. courts would exercise jurisdiction over foreign sovereigns.

b. By arguing for dismissal based on international comity when the FSIA provides jurisdiction,

Hungary is attempting an end-run around the FSIA's careful and comprehensive scheme. Hungary argues (at 19) that the FSIA must be interpreted against the common-law background. That general principle of statutory interpretation has no place here—because Congress unambiguously *displaced* "the old executive-driven, factor-intensive, loosely common-law-based immunity regime with the [FSIA]'s 'comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state.'" *NML Cap.*, 573 U.S. at 141 (quoting *Verlinden*, 461 U.S. at 488). "[A]fter the enactment of the FSIA, the Act—and not the pre-existing common law—indisputably governs the determination of whether a foreign state is entitled to sovereign immunity." *Ibid*. The common-law treatment of foreign-sovereign-immunity determinations had one purpose: to reflect the comity of nations and respect for foreign sovereigns. When Congress codified that precise purpose in the FSIA, it displaced the common-law regime, including a court's discretion to refrain from exercising jurisdiction over foreign sovereigns based on international comity.

Hungary's resort to displaced common-law principles conflicts with the purposes of the FSIA. As discussed, one purpose was to standardize determinations of foreign sovereign immunity. Equally important, the FSIA was intended to "insure" that the immunity standards in the Act were in fact "applied in litigation before U.S. courts." *House Report* 7. Too often, pre-FSIA litigants who were entitled to proceed in a U.S. court under the restrictive theory of immunity found their cases dismissed because the foreign sovereign defendant brought diplomatic pressure to bear on

the Executive. Congress intended the FSIA to eliminate that uncertainty for litigants.

c. Hungary and the United States urge this Court to hold that district courts have discretion to abstain from exercising jurisdiction under the FSIA based on *their own* largely standardless assessment of international-comity concerns. In so doing, the governments seek to return to a regime that Congress expressly eliminated with the FSIA.

The concept of international "comity" is famously vague, "responsible for much . . . trouble," and "fertile in suggesting a discretion unregulated by general principles." *Loucks v. Standard Oil Co. of N.Y.*, 120 N.E. 198, 201-202 (N.Y. 1918) (Cardozo, J.). As this Court explained in *Hilton v. Guyot*, "the comity of nations . . . is, and ever must be, uncertain" and "it must necessarily depend on a variety of circumstances which cannot be reduced to any certain rule." 159 U.S. 113, 164 (1895). The pre-FSIA regime perfectly illustrated the unruliness of the doctrine. This Court has described that regime as "troublesome," *Verlinden*, 461 U.S. at 487, "muddl[ed]," and resulting in "bedlam," *NML Cap.*, 573 U.S. at 141. As a practical matter, "the governing standards" for deciding whether international comity allowed a U.S. court to exercise jurisdiction over a foreign sovereign were "neither clear nor uniformly applied." *Opati v. Republic of Sudan*, 140 S. Ct. 1601, 1605 (2020) (quoting *Verlinden*, 461 U.S. at 488). "Congress passed the [FSIA] . . . to clarify the governing standards" in determining whether a court may exercise jurisdiction over a foreign sovereign. *Verlinden*, 461 U.S. at 488 (citing *House Report* 7). Hungary and the United States would return us to

the unprincipled pre-FSIA regime through largely undefined district court discretion to abstain from exercising FSIA jurisdiction—on grounds that are already accounted for in the FSIA. Nothing in law or logic favors that result.

This Court has declined to adopt the type of regime Hungary and the United States urge in two analogous contexts. First, in *Altmann*, the Court declined to hold that the immunity of foreign sovereigns for pre-FSIA conduct should be judged according to the pre-FSIA regime. The Court explained that, "[q]uite obviously, Congress' purposes in enacting such a comprehensive jurisdictional scheme would be frustrated if, in postenactment cases concerning preenactment conduct, courts were to continue to follow the same ambiguous and politically charged 'standards' that the FSIA replaced." 541 U.S. at 699. Second, in determining the extraterritorial reach of the Sherman Act, 15 U.S.C. § 1 *et seq.*, in *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, the Court rejected the view that courts should make that determination "case by case, abstaining where comity considerations so dictate." 542 U.S. 155, 168 (2004). In the Court's view, that approach would be "too complex to prove workable." *Ibid.* So, too, here. Layering international-comity-based abstention over the comity principles codified in the FSIA would frustrate Congress's comprehensive scheme by restoring uncertainty and inconsistency "to the most sensitive area of foreign relations." *Altmann*, 541 U.S. at 715 (Kennedy, J., dissenting).

d. In one respect, Hungary and the United States' preferred scheme is *worse* than the muddled pre-FSIA regime. The governments ask the Court to reinstate a largely standardless regime governing the

exercise of jurisdiction over foreign sovereigns because, they argue, decisions about whether to exercise such jurisdiction are politically sensitive, implicating complex foreign-policy issues. Remarkably, the governments would have the Judicial Branch—the only Branch that is unelected, apolitical, and lacking in policy-making authority—decide those fraught questions on its own.

In enacting the FSIA, Congress and the Executive Branch recognized that the Judicial Branch is uniquely competent to make jurisdictional determinations "on purely legal grounds" such as those codified in the FSIA. *Verlinden*, 461 U.S. at 488 (quoting *House Report* 7). But this Court has repeatedly recognized that the Judicial Branch is uniquely *unsuited* to make decisions based on vague and potentially shifting foreign-policy concerns. As Justice Scalia explained in *NML Capital*, Congress "forced [federal courts'] retirement from the immunity-by-factor-balancing business [more than] 40 years ago." 573 U.S. at 146. That "retirement" decision reflected a consensus that having courts make some immunity determinations pursuant to amorphous comity considerations resulted in "bedlam." *Id.* at 141; *see Altmann*, 541 U.S. at 690-691; *Verlinden*, 461 U.S. at 488. *Amici* Professors Estreicher and Lee argue (at 19) that without "international comity abstention, courts would be deprived of a critical discretionary tool to navigate questions of foreign policy." Exactly—that is what Congress and the Executive intended the FSIA to achieve. "[J]udges should not be the expositors of the Nation's foreign policy." *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 442 (2003) (Ginsburg, J., dissenting). But that is

what Hungary and the United States now urge this Court to allow.

3. Section 1606 does not permit courts to abstain from exercising jurisdiction based on international comity.

Hungary and the United States' only textual argument relies on 28 U.S.C. § 1606, which provides that, when a foreign state is not immune, it "shall be liable in the same manner and to the same extent as a private individual under like circumstances." They argue that Section 1606 authorized the district court to ignore Section 1605(a)(3)'s jurisdictional grant because private parties would be entitled to abstention in similar circumstances. Hungary and the United States are wrong about what Section 1606 means and about whether any abstention doctrine would apply if petitioners were private entities.

a. As this Court and the Congress that enacted the FSIA have explained, Section 1606 addresses the substantive law governing liability and the extent and allocation of damages in FSIA cases. *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 620 (1983); *House Report* 22; *see Verlinden*, 461 U.S. at 488-489 & n.12. Section 1606—which is titled "Extent of liability"—mandates that a foreign sovereign that is not immune is not entitled to any special limits on its substantive liability. But nothing in Section 1606 suggests that it limits the circumstances in which a U.S. court should exercise *jurisdiction* over a foreign sovereign defendant. When a court abstains from exercising its jurisdiction in deference to another forum, that has no effect on the manner or extent of the defendant's liability. Abstention removes the question of a defendant's liability from the U.S. forum,

but does not affect the existence or extent of such liability. Section 1606 has nothing to do with abstention.

b. Hungary and the United States are equally wrong that any existing abstention doctrine would allow a private party to seek dismissal in these circumstances.

i. The governments err in arguing that this Court has long applied a doctrine of international-comity-based abstention that is untethered from the distinct doctrines of *forum non conveniens* and foreign sovereign immunity. They rely principally on this Court's decisions in *The Belgenland*, 114 U.S. 355 (1885)—in which the Court retained jurisdiction over a dispute between two foreign parties—and *Canada Malting Co. v. Paterson Steamships, Ltd.*, 285 U.S. 413 (1932)—in which the Court affirmed dismissal of a suit between foreign parties in deference to an earlier-filed parallel suit pending in a foreign jurisdiction. Neither case establishes a practice of international-comity-based abstention akin to what Hungary and the United States now seek.

As the United States quietly concedes (at 12 n.2), this Court has repeatedly described both *The Belgenland* and *Canada Malting* as applying the doctrine now known as *forum non conveniens*. *Am. Dredging Co. v. Miller*, 510 U.S. 443, 449 (1994); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 247, 248 n.13 (1981); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 504 (1947). Decisions applying *forum non conveniens* cannot establish a practice of applying a separate doctrine of international-comity-based abstention. As the Court explained in *Quackenbush v. Allstate Insurance Co.*, "our abstention doctrine is of a distinct historical pedigree"

from *forum non conveniens*, "and the traditional considerations behind dismissal for *forum non conveniens* differ markedly from those informing the decision to abstain." 517 U.S. 706, 722-723 (1996). In this case, the court of appeals held that the district court abused its discretion in dismissing the action on *forum non conveniens* grounds—and this Court declined to review that holding. The question here is therefore whether a federal court may abstain from exercising jurisdiction over a foreign sovereign when the FSIA provides jurisdiction and the doctrine of *forum non conveniens* does *not* support dismissal. Allowing comity-based dismissal in these circumstances is just an end-run around the FSIA.

The fact that comity concerns played a role in developing the distinct doctrines of *forum non conveniens* and of foreign sovereign immunity does not suggest that "international comity" is itself an independent basis for abstention when those doctrines do not apply. This Court rejected a similar argument in considering the "act of state" doctrine, which also reflects concerns about international comity and provides a rule of decision in some cases challenging the legality of a foreign sovereign's acts. *W.S. Kirkpatrick & Co. v. Env't Tectonics Corp., Int'l*, 493 U.S. 400, 408-409 (1990); *see First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 765 (1972). In *W.S. Kirkpatrick*, the Court rejected the argument "that the policies underlying [the] act of state cases—international comity, respect for the sovereignty of foreign nations on their own territory, and the avoidance of embarrassment to the Executive Branch in its conduct of foreign relations—" provide an *independent* basis for abstention where the act-of-state doctrine does not apply. 493 U.S. at 408.

The Court acknowledged that those underlying concerns are relevant in deciding when the act-of-state doctrine should be invoked, but explained that "it is something quite different to suggest that those underlying policies are a doctrine unto themselves, justifying expansion of the act of state doctrine (or, as the United States puts it, unspecified 'related principles of abstention') into new and uncharted fields." *Id.* at 409. The Court should reject the United States' similar arguments here.

ii. None of the other abstention doctrines Hungary and the United States rely on supports the new international-comity-based abstention doctrine they ask this Court to recognize. To the contrary, the limited nature of existing abstention doctrines illustrates that the doctrine the governments seek is wholly out of step with this Court's approach to abstention.

This Court has repeatedly held that district courts have a "virtually unflagging obligation" "to exercise the jurisdiction given them." *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). The Court's "cases have long supported the proposition that federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred," except in the narrowest of circumstances. *New Orleans Public Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 358 (1989). No such circumstances exist here.

First, although Hungary and the United States purport to rely on "adjudicatory comity" abstention, they ignore that this Court has allowed abstention based on adjudicatory comity *only* when there is a pending or completed parallel proceeding in a different forum. In *Colorado River*, the Court explained that a

federal court may abstain from exercising its jurisdiction when a parallel action is pending in a state court—but even then, only when exceptional circumstances (in addition to the pending parallel litigation) favor of abstention. 424 U.S. at 817-819; *see Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 72 (2013). The Court explained that "considerations of proper constitutional adjudication" and regard for non-federal domestic sovereigns "govern in situations involving the *contemporaneous* exercise of concurrent jurisdictions." *Colo. River*, 424 U.S. at 817 (emphasis added). We need not inquire whether the required exceptional circumstances exist here because there is no parallel litigation pending in Hungary. The "tribal exhaustion" cases Hungary relies on (at 27-29) similarly apply only when parallel litigation is pending in a tribal court. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 15-20 (1987); *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 853-856 (1985). Even the decision applying *forum non conveniens* in *Canada Malting*—on which Hungary and the United States rely so heavily—abstained in the face of pending parallel litigation in a foreign jurisdiction. 285 U.S. at 417, 419-420.

Most of the court of appeals decisions Hungary and the United States rely on (Pet. Br. 23, 28, 30; U.S. Br. 14-17 & n.3) similarly approve of adjudicatory-comity abstention only when a parallel proceeding is concurrently pending in a foreign jurisdiction. *See*, *e.g.*, *EMA Garp Fund, L.P. v. Banro Corp.*, 783 Fed. Appx. 82, 83-84 (2d Cir. 2019); *JP Morgan Chase Bank v. Altos Hornos de Mex., S.A. de C.V.*, 412 F.3d 418, 423-424 (2d Cir. 2005); *Posner v. Essex Ins. Co.*, 178 F.3d 1209, 1223 (11th Cir. 1999); *Turner Ent. Co. v.*

Degeto Film GmbH, 25 F.3d 1512, 1518 (11th Cir. 1994); *accord Royal & Sun All. Ins. Co v. Century Int'l Arms, Inc.*, 466 F.3d 88, 93 (2d Cir. 2006). Adjudicatory comity has no place in this case.

Second, even when extraordinary circumstances suggest abstention is appropriate, abstention is generally available *only* with respect to a court's equitable or other discretionary jurisdiction—not with respect to damages claims. "[I]t has long been established that a federal court has the authority to decline to exercise its jurisdiction when it 'is asked to employ its historic powers as a court of equity'" and in other "cases in which the court has discretion to grant or deny relief." *Quackenbush*, 517 U.S. at 717, 718 (citation omitted). But "federal courts have the power to dismiss or remand cases based on abstention principles only where the relief being sought is equitable or otherwise discretionary." *Id.* at 731.[3]

When abstention is warranted in a damages case, the Court has "permitted" lower courts "to enter a stay, but" not "to dismiss the action altogether." *Quackenbush*, 517 U.S. at 730. Because this suit is primarily a suit for damages, the district court lacked authority to dismiss it even if an existing abstention doctrine applied (none does). Although Survivors do seek some forms of equitable relief, Survivors' primary claims are for damages—and the equitable claims are

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[3] The United States relies on *Société Nationale Industrielle Aérospatiale v. United States District Court*, which addressed the role of comity in enforcing discovery requests against a foreign entity. 482 U.S. 522, 524-525, 543-546 (1987). The Court's recognition that comity may play a role there merely reflects the enormous discretion district courts have over discovery. *See Crawford-El v. Britton*, 523 U.S. 574, 598 (1998).

intended to facilitate obtaining those damages. *See* J.A. 179-186. Hungary's own brief confirms that it perceives the nature of Survivors' suit to be primarily one for money damages. Pet. Br. 3-4, 5, 37-40.

Hungary relies (at 20-21 & n.13) on this Court's holding in *Levin v. Commerce Energy, Inc.*, that federal courts should abstain from exercising jurisdiction in cases seeking to enjoin a State's collection of taxes. 560 U.S. 413, 421-422 (2010). The Court has also held that courts should abstain in cases seeking damages pursuant to 42 U.S.C. § 1983 for the collection of state taxes. *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 112-113 (1981). Although that holding permits abstention in a limited number of damages actions, its reasons for doing so do not apply here: abstention was warranted because the plaintiff could not prevail without first obtaining a declaratory judgment that a state tax is invalid, which the Court viewed as the functional equivalent of equitable relief preventing a State from collecting taxes. *Id.* at 113. No such concern arises here.

iii. The governments also err in relying on this Court's decisions interpreting the scope of the Alien Tort Statute (ATS), which provides district courts with "jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. Hungary and the United States argue (Pet. Br. 29-34; U.S. Br. 15) that because non-sovereign foreign defendants are sometimes entitled to dismissal of ATS suits based on comity concerns (or exhaustion), foreign sovereigns are entitled to the same under Section 1606. Hungary and the United States simply misunderstand the role

that comity and exhaustion play in ATS cases—the decisions they rely on are about the substantive scope of the statute, not about abstention.

As discussed, the FSIA provides clear and comprehensive rules governing the jurisdiction of U.S. courts over foreign sovereigns: jurisdiction exists only when one of the exceptions to immunity applies. The ATS is also a jurisdictional statute, but unlike the FSIA, it does not specify in clear terms what *types* of claims fall within its grant of jurisdiction. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 713-714 (2004). "The grant of jurisdiction" in the ATS is "'best read as having been enacted on the understanding that the common law would provide a cause of action for [a] modest number of international law violations.'" *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 115 (2013) (quoting *Sosa*, 542 U.S. at 724) (brackets in original). Because Congress left to the *courts* the job of determining which causes of action are encompassed within the ATS's jurisdictional grant, this Court has cautioned that courts should be wary of expanding the substantive scope of the ATS beyond a few limited categories of cases recognized as justiciable when the ATS was enacted in 1789. *Sosa*, 542 U.S. at 720. Hungary relies (at 24) on Justice Sotomayor's statement in her dissenting opinion in *Jesner v. Arab Bank, PLC* that courts can "dismiss ATS suits" based on "failure to exhaust" or "for reasons of international comity." 138 S. Ct. 1386, 1430-1431 (2018). That is true with respect to *ATS* claims precisely because Congress did not define the substantive scope of the ATS; because the opposite is true with respect to the FSIA, those types of judicial-restraint doctrines do not apply.

The reason for the Court's caution about expanding the scope of the ATS is highly relevant here—and illustrates why Hungary and the United States' reliance on the ATS is misplaced. The Court explained in *Kiobel* that "the danger of unwarranted judicial interference in the conduct of foreign policy is magnified in the context of the ATS, because the question is not what Congress has done but instead what courts may do." 569 U.S. at 116. Because the ATS requires *courts* to determine whether a cause of action falls within the ATS's grant of jurisdiction, the potential foreign-policy implications of recognizing new causes of action under the ATS "should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." *Ibid.* No such risk exists when the FSIA grants jurisdiction to a federal court and that court exercises its jurisdiction. To the contrary, courts risk trampling on the foreign-policy choices of the Legislative and Executive Branches when they *abstain from* exercising jurisdiction that Congress has unambiguously bestowed. *See Bostock*, 140 S. Ct. at 1753 ("[T]he same judicial humility that requires us to refrain from adding to statutes requires us to refrain from diminishing them.").

4. The Executive Branch has not settled Survivors' claims.

For the reasons set out above, federal courts may not decline to exercise jurisdiction under the FSIA based on international comity. But that does not mean the Executive Branch is out of luck when a plaintiff's claim against a foreign sovereign raises real foreign-policy concerns. Consistent with the notion that authority over foreign relations is the province of the Executive, this Court has held that the Executive Branch

can formally settle claims falling within the FSIA's grant of jurisdiction through state-to-state agreements.

In *Dames & Moore v. Regan*, the Court upheld the constitutionality of "various Executive Orders and regulations by which the President," *inter alia*, "suspended claims against Iran that may be presented to an International Claims Tribunal." 453 U.S. 654, 660 (1981). The Court explained that, because "claims by nationals of one country against the government of another country are 'sources of friction' between the two sovereigns," nations—including the United States—"have often entered into agreements settling the claims of their respective nationals." *Id.* at 679; *see United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937). The Court rejected arguments that the President was precluded from settling a claim that fell within the jurisdictional grant of the FSIA—explaining that the Executive's settlement of a claim does not affect a district court's *jurisdiction* over the claim, but instead "simply effect[s] a change in the substantive law governing the lawsuit." 453 U.S. at 684-685.

The Executive has never conclusively settled the type of Holocaust-era claims at issue here through a state-to-state agreement. But the Executive has cooperated with several former Axis (or Axis-abetting) countries to establish special foreign mechanisms for resolving such claims against foreign entities. *See Garamendi*, 539 U.S. at 405-406. In so doing, the United States has committed to recommending dismissal of any case filed in U.S. courts that could be resolved through a special tribunal, *ibid.*—as the United States did in this case with respect to the Austrian-

owned defendant, *see* Pet. App. 8a-9a. But the United States has stopped short of actually settling such claims or otherwise requiring that they be heard in the foreign tribunal, as was the case in *Dames & Moore*. And even when agreeing to recommend dismissal of claims, the United States has warned its foreign partners that U.S. foreign-policy interests may not "in themselves provide an independent legal basis for dismissal." *Garamendi*, 539 U.S. at 406.

It remains open to the Executive to cooperate with Hungary to establish a fair and effective mechanism to resolve Holocaust-era claims, including Survivors'. But it has not done that—and nothing in any of this Court's decisions suggests that courts may decline to resolve Holocaust-era claims authorized by the FSIA based on foreign-policy concerns that the Executive itself has not acted on.

There is, moreover, every reason to think that accepting Hungary's invitation to dismiss actions like Survivors' in the *absence* of any formal Executive action supporting such a resolution would undermine the efficacy of claims-resolution mechanisms like those discussed in *Garamendi*. As Justice Ginsburg (writing for herself and Justices Scalia, Thomas, and Stevens) explained in her dissenting opinion in *Garamendi*, U.S.-based class-action suits such as this one "provided a spur to action" that resulted in the multilateral negotiations that produced the foreign claims-resolution mechanisms. 539 U.S. at 431. Accepting Hungary's proposed end-run around the FSIA when it has shown zero interest in cooperatively resolving Holocaust-era claims would remove any incentive it might have to do so now. "[J]udges should not be the expositors of the Nation's foreign policy, which is the role

they play by acting when the President himself has not taken a clear stand." *Id.* at 442-443.

B. The Executive Branch Has Not Recommended Dismissal of Survivors' Claims.

For the reasons set out above, international-comity-based abstention is not available when the FSIA provides jurisdiction. But if this Court disagrees with that view, it should at least limit the circumstances in which abstention is allowed to cases in which the Executive Branch seeks dismissal based on specific foreign-policy concerns. To be clear, such a regime is not what Survivors seek—and is not consistent with Congress's intent that the FSIA would eliminate case-by-case determinations of jurisdiction over foreign sovereigns based on foreign-policy concerns. But as an alternative, if some international-comity-based abstention is allowed, it should be the Executive Branch that determines when abstention is appropriate, not courts.

The United States does not appear to disagree with that proposition. Although it argues strongly against a rule that *no* international-comity-based abstention is allowed in FSIA cases, it relies (at 19-20) on this Court's indications that courts *might* be able to defer to requests by the Executive Branch to dismiss a particular case based on foreign-policy interests specific to the foreign defendant. In particular, it relies on the Court's statement in *Altmann* that, "should the State Department choose to express its opinion on the implication of exercising jurisdiction over *particular* [defendants] in connection with *their* alleged conduct, that opinion might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy." 541 U.S. at 702; *see id.* at

714 (Breyer, J., concurring). Even then, the Court expressly declined to hold "that executive intervention could or would trump considered application of the FSIA's more neutral principles." *Id.* at 702 n.23 (majority opinion).

If international-comity-based abstention is permitted in any FSIA cases, it should be available *only* when the Executive Branch expressly recommends dismissal based on specific foreign-policy concerns particular to that case. Requiring the Executive Branch to state expressly and in good faith that it believes a court should not exercise its jurisdiction in a particular case would maintain some measure of accountability for the branch vested with power over foreign affairs. Nothing even close to that has happened in this case.

The United States filed an amicus brief in support of Hungary—the *only* amicus brief filed in support of Hungary—but it was careful never to argue that international-comity-based abstention was appropriate in this case. U.S. Br. 9 ("[T]he United States takes no position as to whether the district court's dismissal of this particular suit was warranted on international-comity grounds."). Nor does the United States ever suggest either that allowing this suit to proceed would harm U.S. foreign-policy interests or that dismissing it would advance those interests. In these circumstances, it was wholly inappropriate for the district court to dismiss this action based on *its own* assessment of the foreign-policy interests of the United States.

In the district court, the United States filed an uninvited amicus brief recommending dismissal of an Austrian-owned company based on the United States'

strong support for international agreements governing resolution of Holocaust-era claims against Austrian companies. Pet. App. 8a. The United States conspicuously declined to recommend dismissal of the claims against petitioners or to say anything about the foreign-policy implications of those claims. After the court of appeals invited the United States to express its views on Survivors' remaining claims, the United States *again* declined to recommend dismissal of any claims against petitioners. The United States explained that, "in contrast to the United States' involvement in the establishment of certain Holocaust claims processes in a number of other European countries," "the United States has not participated in efforts of the Republic of Hungary towards establishing a claims mechanism for" Holocaust victims. U.S. C.A. Br. 11. The United States stated then—and again in its brief to this Court (at 27 n.4)—that because it lacks "a working understanding of the mechanisms that have been or continue to be available in [Hungary] with respect to [such] claims," it cannot "express a view as to whether it would be in the foreign policy interests of the United States for [Survivors] to have sought or now seek" compensation in Hungary. *Ibid.*

In spite of the United States' refusal to recommend dismissal of Survivors' claims based on foreign-policy interests, the district court made its own determination that those interests supported dismissal. That was error, even under the United States' view that international-comity-based abstention is sometimes available in FSIA cases. Far from deferring to the United States' recommendation, as contemplated in *Altmann*, the district court ignored the United

States' express refusal to recommend dismissal or even to say that this suit would harm U.S. foreign-policy interests. The foundation of the governments' comity arguments is that courts must recognize an exception to FSIA jurisdiction that can accommodate the Executive Branch's foreign-policy interests. But when the Executive Branch declines to articulate *any* foreign-policy interest supporting dismissal, a district court cannot decline to exercise its FSIA jurisdiction.

C. Even if a Court Could Abstain Based on Its Own Assessment of Foreign-Policy Concerns, No Abstention Is Permitted Here.

Even if the district court had discretion to abstain, abstention is not appropriate here. Hungary and the United States urge (Pet. Br. 34-35; U.S. Br. 14) that an international-comity-based abstention doctrine would weigh the strength of the United States' interest in using a foreign forum, the strength of the foreign sovereign's interest in using its own forum, and the adequacy of the alternative forum. Those factors merely reiterate the pre-FSIA factors courts considered in making immunity determinations, underscoring that the governments' rule would herald a return to the immunity scheme Congress displaced. In any event, those factors unambiguously preclude abstention.

First, 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. In this Court, the United States reiterated that it "deplores the atrocities committed by the Nazi regime and its allies, and supports efforts to provide their victims with remedies

for the egregious wrongs they have suffered." U.S. Br. 1-2. Particularly because Hungary has failed to establish a mechanism for resolving Holocaust-era claims, the only possible means of providing some measure of relief to Survivors in their lifetime is through litigation outside of Hungary. The foreign-policy interests of the United States therefore weigh against abstention.

Hungary argues (at 35-40) that it has an interest in resolving these claims in its own courts. That claim is substantially weaker in these circumstances than a foreign sovereign's usual assertion of such an interest. As part of its murderous campaign against Jews within its borders, Hungary banished Survivors from Hungary on packed trains bound for death camps. In the decades since those atrocities, Hungary (unlike several of its former Axis allies) has not established any special mechanism for resolving claims of Hungary's victims. Any interest Hungary might have in being sued in its own courts is vastly outweighed by Survivors' interests in obtaining real relief and in not being forced to return to the scene of Hungary's atrocious crimes.

Finally, the alternative remedies Hungary purports to rely on are inadequate. The Justice for Uncompensated Survivors Today (JUST) Act of 2017, Pub. L. No. 115-171, 132 Stat. 1288, requires the State Department to report on "the nature and extent of national laws and enforceable policies of" various countries, including Hungary, "regarding the identification and the return of or restitution for wrongfully seized or transferred Holocaust era assets." *Id.* at 1288. In its most recent report, the State Department described the inadequacy of the domestic remedies Hungary

touts. The Report emphasizes that claimants with Holocaust-era property claims have "faced numerous procedural challenges," including the inadequacy of the compensation offered, the lack of an available restitution remedy, limits on who may present claims, and the fact that the only compensation Hungary issued was in the form of self-serving vouchers to purchase state property. U.S. Dep't of State, *The JUST Act Report* 84-86 (Mar. 2020). The district court erred in finding Hungary's remedial scheme to be adequate when not even the United States recognizes or endorses that scheme. *See* Pet. App. 30a. Under any applicable rule of law, the district court erred in dismissing Survivors' claims.[4]

D. Hungary's Arguments About Prescriptive Comity Are Misplaced.

Finally, Hungary argues (at 46-51) for the first time in the long history of this case that abstention is warranted under principles of prescriptive comity, which limits the substantive extraterritorial reach of a country's laws. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 817 (1993) (Scalia, J., dissenting). That is wrong, as even the United States acknowledges (at 11). Prescriptive comity "is exercised by legislatures when they enact laws, and courts assume it has been exercised when they come to interpreting the scope of the laws their legislatures have enacted." *Hartford*

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[4] During the decade that this case has been pending, several Survivors have passed away. The remaining original plaintiffs are now quite old. If the Court adopts a different legal approach to abstention than the D.C. Circuit's, Survivors respectfully urge the Court to definitively resolve whether abstention was appropriate *in this case* rather than remanding for the lower courts to do so in the first instance.

Fire, 509 U.S. at 817 (Scalia, J., dissenting). Prescriptive comity is embodied in the ordinary presumption against extraterritoriality that our courts apply when interpreting ambiguous statutory text. *Kiobel*, 569 U.S. at 116. That doctrine has no place in interpreting a statute that unambiguously *does* apply to conduct that occurred abroad.

It is plain on the face of the FSIA that it applies to claims arising from conduct that occurred abroad. The expropriation exception in particular is designed to apply to conduct that occurred abroad, including, *inter alia*, "the nationalization or expropriation of property without" just compensation. *House Report* 19-20. Because Survivors' takings allegations fall within the scope of the expropriation exception, *see* § II, *infra*, prescriptive comity has no work to do here. Hungary's protests that Survivors rely on common-law causes of action is also misplaced: the FSIA is intended to reach foreign conduct, and this Court has recognized that it is "the norm" for FSIA plaintiffs to rely on common-law causes of action that do not overlap with the elements of the jurisdictional inquiry. *Bolivarian Republic of Venezuela v. Helmrich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1324 (2017).

Finally, Hungary is wrong that this is a so-called "foreign-cubed case." Four of the named plaintiffs are U.S. citizens. Although their status as U.S. citizens may be meaningless to Hungary, it is quite meaningful to Survivors, who were forced to seek a new home country not on a whim or for forum-shopping purposes, but because Hungary stripped them of all attributes of Hungarian nationality and citizenship before deporting them (along with their friends and families) to Nazi death camps.

II. The FSIA's Expropriation Exception Applies To All Takings "In Violation Of International Law."

In *Federal Republic of Germany v. Philipp*, *cert. granted*, No. 19-351 (oral argument scheduled for Dec. 7, 2020), the Court will review the D.C. Circuit's holding (originally in this case) that the FSIA's expropriation exception applies when a foreign sovereign takes the property rights of its own nationals and that taking is itself a violation of international law. Because that question implicates federal courts' subject matter jurisdiction in this case as well, Survivors briefly address that question.[5]

A. The FSIA's expropriation exception provides that "[a] foreign sovereign shall not be immune" "in any case" "in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property" is used by the foreign sovereign for commercial purposes in connection with the United States. 28 U.S.C. § 1605(a)(3). Germany and the United States argue (Germany Br. 14-40; 19-351 U.S. Br. 9-30) that Section 1605(a)(3) does not apply to any "domestic takings"—*i.e.*, any "takings by a foreign sovereign of its own national's property within its own borders," Germany Br. 9—even when a domestic taking is "in violation of international law," 28 U.S.C. § 1605(a)(3). Because that

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[5] Although Hungary did not present that question in its cert. petition, it contested this question of subject matter jurisdiction below and has represented to this Court that it intends to reap the benefits if Germany prevails. Pet. Supp. Br. 4. Because the nature of the takings alleged in this case differ from those alleged in *Philipp*, it may be helpful to the Court in resolving that question to consider its application in this case.

argument has no basis in the text, structure, or history of the FSIA, the court of appeals correctly rejected it.

1. We begin with the text of the expropriation exception because "only the words on the page constitute the law adopted by Congress and approved by the President." *Bostock*, 140 S. Ct. at 1738. And the text of the expropriation exception is plain: in order to invoke jurisdiction under that provision, a plaintiff must allege sufficient facts to "make out a legally valid claim that a certain kind of right is at issue (*property* rights) and that the relevant property was taken in a certain way (in violation of international law)." *Helmrich & Payne*, 137 S. Ct. at 1316. There is no dispute that Survivors have alleged sufficient facts to make out a legally valid claim that property rights are at issue—it is hard to think of allegations that could do so more plainly than allegations that a government took *all* of a people's property.

There is also little room for debate in this case about whether the taking of Survivors' property violated international law. "It is undisputed that genocide itself is a violation of international law." *Simon v. Republic of Hungary*, 812 F.3d 127, 142 (D.C. Cir. 2016). And the D.C. Circuit correctly held the expropriations alleged here are "*themselves genocide*." *Ibid.* The legal definition of "genocide," as codified in the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), includes "[d]eliberately inflicting on" "a national, ethnical, racial or religious group" "conditions of life calculated to bring about its physical destruction in whole or in part." Genocide Convention, art. 2, Dec. 9, 1948, 78 U.N.T.S. 277, 280. The Convention's definition is

"generally accepted for purposes of customary [international] law." Restatement (Third) of Foreign Relations Law of the United States § 702 cmt. d (1987); *see id.* § 702 ("A state violates international law if, as a matter of state policy, it practices, encourages, or condones" "genocide.").

Survivors allege that Hungary systematically confiscated all property belonging to Jews in Hungary and its occupied territories in the course of isolating, ghettoizing, and ultimately deporting them for mass murder. J.A. 153-162; *Simon*, 812 F.3d at 143-144. Hungary's genocidal intent is not a matter of debate; it is a fact of history. And by taking all of Survivors' belongings—including the clothes off their backs, *Simon*, 812 F.3d at 133—while forcing them from their homes and ultimately from Hungary, petitioners plainly intended to bring about the physical destruction of Jews. Because expropriations undertaken for the purpose of bringing about the physical destruction of a religious, national, or ethnic group *are genocide*, Survivors allege takings in violation of international law.[6]

The real point of dispute on the genocidal-taking question is whether a genocidal taking in violation of international law qualifies as a taking "in violation of international law" for purposes of Section 1605(a)(3).

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[6] The parties in *Philipp* debate whether the allegations in that case establish that the alleged takings qualify as genocide. Survivors have no position on that question—but if the Court were to decide that the *Philipp* plaintiffs' claims do not fall within the expropriation exception because the takings they allege were not acts of genocide or otherwise in violation of international law, the Court could dismiss the writ of certiorari on the genocidal-taking question—which is not the subject of any circuit conflict and was not raised by Hungary—as improvidently granted.

It does. "This Court has explained many times over many years that, when the meaning of the statute's terms is plain, our job is at an end. The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration." *Bostock*, 140 S. Ct. at 1749. Here, the question is whether a taking in violation of international law is a "taking" "in violation of international law." Of course it is.

The governments' primary argument is that the phrase "in violation of international law" means instead "in violation of the international law of expropriations," which they say does not encompass a sovereign's taking of property from its own nationals. But if that were what Congress had intended the law to mean, that is what Congress would have written the law to say. Instead, Congress used a more general phrase—"in violation of international law"—that encompasses all takings that violate international law, including takings that violate the international ban on genocide.[7]

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[7] The House Report explains that "[t]he term 'taken in violation of international law' would include" "takings which are arbitrary or discriminatory in nature." *House Report* 19-20. Survivors allege discriminatory takings—and the Report's use of the word "include" indicates that the provision would encompass other violations as well. Even if the Court were to hold that Section 1605(a)(3) does not apply to a country's expropriation of its nationals' property, moreover, Survivors are entitled to establish on remand that Section 1605(a)(3) applies here because Hungary had stripped Survivors of all indicia of Hungarian nationality, and because Hungary treated the Survivors who lived in annexed territories as stateless.

The text of Section 1605(h) confirms that the expropriation exception applies here. That section generally provides that when a foreign state agrees to allow the temporary exhibition of a work of art in the United States, the Executive Branch may declare that the exhibit does not qualify as "commercial activity" for purposes of the FSIA's expropriation exception. 28 U.S.C. § 1605(h)(1). But Section 1605(h) expressly does *not* apply "in any case asserting jurisdiction under [Section 1605(a)(3)] in which rights in property taken in violation of international law are in issue" and the "action is based upon a claim that" the artwork in question was taken by a Nazi or Nazi-collaborating government during World War II. *Id.* § 1605(h)(2), (3). Although it remains open in every case for a plaintiff to prove that her claim falls within the expropriation exception, Section 1605(h)(2) indicates that Congress views this *type* of claim—*i.e.*, a claim that a Nazi-collaborating government took property from a European Jew—as encompassed within Section 1605(a)(3). And if an Axis country's taking of works of art can qualify as a taking in violation of international law, then surely Hungary's taking of *everything* Survivors owned can as well.

2. Germany and the United States suggest that the drafters of the FSIA would not have intended to encompass all takings in violation of international law when they used the general phrase "property taken in violation of international law." That is not how this Court interprets statutory text. "Some think that when courts confront generally worded provisions, they should infer exceptions for situations the drafters never contemplated and did not intend their general

language to resolve." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 101 (2012). "Traditional principles of interpretation reject" that approach "because the presumed point of using general words is to produce general coverage—not to leave room for courts to recognize ad hoc exceptions." *Ibid.*

Members of this Court have already recognized that customary international law condemns acts of genocide and ("consistent with principles of international comity") "that universal jurisdiction exists to" "adjudicate" tort claims alleging "foreign conduct involving foreign parties" that amounts to genocide. *Sosa*, 542 U.S. at 762 (Breyer, J., concurring). The Court recently noted that "there are fair arguments to be made that a sovereign's taking of its own nationals' property sometimes amounts to an expropriation that violates international law" within the meaning of Section 1605(a)(3). *Helmerich & Payne*, 137 S. Ct. at 1321. The statutory phrase "international law" in Section 1605(a)(3) "is a general rather than specific reference" "to an external body of potentially evolving law." *Jam v. Int'l Fin. Corp.*, 139 S. Ct. 759, 769 (2019). Whether the 1976 Congress had genocidal takings in mind is irrelevant. "[T]he fact that [a statute] has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity; instead, it simply demonstrates [the] breadth of a legislative command." *Bostock*, 140 S. Ct. at 1749 (internal quotation marks omitted; brackets in original).

3. Germany argues (at 31) that "the language of the expropriation exception should not be read to create an implicit and unlimited exception to immunity

for human-rights claims." That is a strawman. Section 1605(a)(3)'s immunity exception is *explicit*, is quite limited, and applies to claims that rights in property were taken in violation of international law, not to "human-rights claims." The fact that some covered claims may arise out of human-rights violations does not remove those claims from the plain text of Section 1605(a)(3). That is not how we read statutory text. We read the words on the page—and when they apply, we do not then ask whether their application in a particular case is what we think Congress had in mind. There is no "such thing as a 'canon of donut holes,' in which Congress's failure to speak directly to a specific case that falls within a more general statutory rule creates a tacit exception." *Bostock*, 140 S. Ct. at 1747.

Germany argues (at 30) that there is "no reason to think that Congress meant to subject foreign states to suit in the United States for human-rights violations only when a plaintiff seeks compensation for the loss of property, but to leave them immune for genocide committed through murder or forced sterilization." The question is not whether we can think of violations of international law that are not encompassed within an FSIA exception and that seem worse in some metaphysical sense than those that are. The FSIA does not purport to provide jurisdiction for all violations of international law. It does not provide jurisdiction for all expropriations of rights in property in violation of international law—or even all uncompensated expropriations of property of aliens, which Germany concedes are covered. Jurisdiction is available under Section 1605(a)(3) *only* when a foreign sovereign takes property rights in violation of international law *and*

then exploits the property in connection with commercial activity with or in the United States. There is no reason for this Court to create artificial exceptions to that already constrained grant of jurisdiction.

B. The structure of the FSIA confirms that the expropriation exception means what it says. Germany relies (at 31) on 28 U.S.C. § 1605A and § 1605B, which authorize jurisdiction over certain claims for death or injury, including some occurring abroad. Germany argues that Congress's inclusion of provisions governing those types of injuries must indicate that Congress did not intend the expropriation exception to encompass the types of claims at issue here. But notably absent from Sections 1605A and 1605B is coverage of any claims sounding in property rights. The most natural reading of the FSIA's structure is that claims sounding in personal injury or death abroad are governed by Sections 1605A and 1605B while claims alleging the taking of property rights abroad are governed by Section 1605(a)(3).

C. Eventually, Germany and the United States "fall back to the last line of defense for all failing statutory interpretation arguments: naked policy appeals." *Bostock*, 140 S. Ct. at 1753. The governments warn that interpreting Section 1605(a)(3) to mean what it says will put the United States out of step with other countries' approach to foreign sovereign immunity—and will risk subjecting the United States to reciprocal treatment in foreign courts. But that ship sailed with enactment of the expropriation exception. As Germany concedes (at 34), Congress's inclusion of the expropriation exception is itself a departure from the restrictive theory of immunity—and "[n]o provision comparable to § 1605(a)(3) has yet been adopted

in the domestic immunity statutes of other countries." Restatement (Fourth) of Foreign Relations Law of the United States § 455, reporters' note 15 (2018). Congress is not constrained by the choices other countries make—and when, as here, Congress has decided to depart from other countries' approach to foreign sovereign immunity, domestic courts must give effect to that choice. "The place to make new legislation, or address unwanted consequences of old legislation, lies in Congress." *Bostock*, 140 S. Ct. at 1753.

CONCLUSION

For the foregoing reasons, the court of appeals' decision should be affirmed.

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