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 OF FORMER STATE DEPARTMENT ATTORNEY MARK B. FELDMAN AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Mark B. Feldman has been practicing U.S. foreign relations law in government and private practice since 1965 and has been immersed in foreign sovereign immunity issues much of that time.[2] He also teaches at Georgetown University Law Center. As Deputy and Acting Legal Adviser (1974-1981), he was the State Department officer primarily responsible for preparing the revised bill submitted to Congress by President Ford that became the Foreign Sovereign Immunities Act of 1976 ("FSIA" or "the Act"), 28 U.S.C. §§ 1330, 1441(d), 1602 *et seq*. In 1974-75, he held extensive consultations with stakeholders, other U.S. agencies, academics, and practicing attorneys to coordinate a consensus draft that Congress would consider.

Professor Feldman was also deeply involved, as Assistant Legal Adviser for Inter-American Affairs, 1968-1974, in managing the U.S. diplomatic, legisla-

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[1] Pursuant to Supreme Court Rule 37.3(a), all parties have lodged letters granting blanket consent to the filing of amicus curiae briefs. Pursuant to Rule 37.6, amicus certifies that no counsel for a party authored this brief in whole or in part, and no persons other than amicus curiae made a monetary contribution to its preparation or submission.

[2] At State, he issued the first suggestion of immunity for foreign official acts in 1976, *see Greenspan v. Crosbie*, No. 74 Civ. 4734, 1976 WL 841 (S.D.N.Y. Nov. 23, 1976). After leaving government service, Professor Feldman chaired an ABA committee on foreign sovereign immunity that developed the 1988 amendments to the FSIA, testified before Congress on the proposed amendments, and was the prime mover of the arbitration exception to immunity adopted by Congress as 28 U.S.C. § 1605(a)(6). *See* Mark B. Feldman, International Law, www.markfeldmaninternationallaw.com.

tive and litigation response to dozens of foreign expropriations of American investments in Cuba, Peru, Panama, Chile, Jamaica, and other countries. The expropriation exception to immunity, 28 U.S.C. § 1605(a)(3), was part of that response.

Amicus' interest is to explain and support the decision by the political branches of government in the Nixon-Ford Administrations (1) to depoliticize determinations of foreign state immunity by transferring responsibility from the Department of State to the courts, and (2) to provide a judicial remedy in the United States for property takings by foreign states in violation of international law having specified commercial links to the United States. The case before the Court involves genocidal takings some years ago, but the abstention doctrine proposed by petitioners would affect every plaintiff whose property may be confiscated by a foreign state.

SUMMARY OF ARGUMENT

The jurisdiction of the federal courts in this case is not before the Court. Petitioners ask the Court to establish a new rule that would allow courts to abstain from exercising jurisdiction in all FSIA cases on grounds of international comity and U.S. foreign relations. The Solicitor General does not suggest that such concerns exist in this case, but argues that allowing for judicial dismissal on international comity grounds could help ensure that litigation in U.S. courts does not conflict with the foreign policy of the United States.

There is no textual basis for petitioners' position, and it contradicts the raison d'être of the Act—to transfer determinations of immunity from the Department of State to the courts. "The overriding purpose

of the FSIA was to remove discretionary and policy-driven considerations from the sovereign immunity calculus and replace them with concrete statutory rules to be applied by the federal courts." Brief of Former State Department Attorneys John Norton Moore and Edwin D. Williamson as Amici Curiae in Support of Respondent at 2, *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312 (2017) (No. 15-423).

Petitioners' argument fails for several reasons: (1) comity precedents in litigation against private parties and those arising under other U.S. statutes have no relevance to the FSIA. The Act establishes a distinct regime for litigation against foreign states designed to eliminate *ad hoc* foreign policy considerations from justiciability determinations. The definitional and nexus requirements stated in each exception to immunity incorporate the comity considerations proposed by the Executive and reflect the congressional judgment as to the appropriate balance with the interests of plaintiffs;[3] (2) international law doctrines requiring or favoring exhaustion of local remedies do not apply to litigation in domestic courts; (3) Congress did not authorize comity abstention in cases brought under the expropriation exception to immunity, 28 U.S.C. § 1605(a)(3).

Abstention in expropriation cases would negate the express intent of the Executive and Congress to provide a remedy in U.S. courts for seizure of property

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[3] *See* Mark B. Feldman, *Foreign Sovereign Immunity in the United States Courts 1976-1986*, 19 Vand. J. Transnat'l L. 19, 21-22 & n.12 (1986), explaining how "comity considerations are reflected in the FSIA."

in violation of international law by foreign states in their own territory in two narrowly circumscribed situations involving commercial exploitation of the property or its fruits in the United States. Protection of American investment abroad was a priority for the U.S. government mandated by statute when the Act was being drafted. When the jurisdictional requirements prescribed by Congress are present, claimants are entitled to the remedy provided in law.

There should be no illusion that a decision allowing case-by-case judicial abstention on foreign policy grounds can be limited to disfavored human rights litigation. Rather, it would restore the pre-FSIA pressures for State Department intervention that motivated the Executive to propose the FSIA in the first place.

ARGUMENT

I. International comity is not grounds for judicial abstention in cases brought under the FSIA.

The Foreign Sovereign Immunities Act of 1976 had two fundamental objectives: (1) to transfer responsibility for immunity determinations from the Department of State to the judiciary, and (2) to provide a comprehensive, uniform regime for litigation against foreign states and governmental agencies, including such matters as jurisdiction, immunity, service of process, pre-judgment attachment, and execution of judgment.[4] The statutory text was drafted mainly by State and

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[4] Mark B. Feldman, *The United States Foreign Sovereign Immunities Act of 1976 in Perspective: A Founder's View*, 35 Int'l & Compar. L.Q. 302 (1986).

Justice Department attorneys, and the section-by-section analysis submitted by the Executive was adopted in large part in the House and Senate committee reports. *See generally* H.R. Rep. No. 94-1487 (1976) (House Report).

When the first bill submitted by the Executive in 1973 drew objections, the Nixon Administration was told that Congress could not process a measure of this scope and complexity unless the bill commanded a broad consensus. Charles N. Brower, Acting Legal Adviser in the Nixon-Ford transition, asked Amicus to coordinate the effort to forge that consensus. After two years of work, State and Justice developed a new bill and a revised section-by-section analysis that the Ford Administration submitted to Congress on October 31, 1975. Congress made some adjustments, but accepted both the basic structure of the bill and the specific language proposed by the Executive for 28 U.S.C. § 1605(a)(3). *See generally* House Report.

A. The FSIA was enacted to ensure that immunity determinations are based on impartial application of legal rules, not *ad hoc* foreign policy.

As Justice Scalia noted in *Republic of Argentina v. NML Capital Ltd.*, "[t]o understand the effect of the Act, one must know something about the regime it replaced." 573 U.S. 134, 140 (2014). For many years foreign states were granted absolute immunity from suit in the United States. After the State Department adopted the restrictive theory of immunity in 1952 allowing suit in commercial cases, immunity determinations were made by either the courts or by State depending on whether the defendant state requested intervention by the Department. In cases where State

recognized immunity, the courts generally deferred. *See Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 487 (1983).

This practice became a serious problem for the State Department. There were tensions with foreign governments and mounting criticism from the private sector. In many cases, the Department was not competent to make immunity determinations on legal grounds, and foreign governments often would pressure the Department to grant immunity in cases where immunity was not legally justified. "On occasion, political considerations led to suggestions of immunity in cases where immunity would not have been available under the restrictive theory." *Verlinden*, 461 U.S. at 487.

Secretary of State William P. Rogers put the problem bluntly in the 1973 transmittal letter:

> The central principle of the draft bill is to make the question of a foreign state's entitlement to immunity an issue justiciable by the courts, without participation by the Department of State…. [T]ransfer of this function to the courts will also free the Department from pressures by foreign states to suggest immunity and from any adverse consequences resulting from the unwillingness of the Department to suggest immunity.

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. 34 (1973) (letter from the Secretary of State and the Attorney General to the Speaker of the House, Jan. 16, 1973) (1973 Hearings).

Congress understood the import of this change and questioned State Department witnesses closely during the 1976 hearings on the Ford bill. Legal Adviser Monroe Leigh responded at length: "as stated in the [1976] letter of transmittal to the Speaker of the House … the broad purposes of the bill are 'to facilitate and depoliticize litigation against foreign states and to minimize irritations in foreign relations arising out of such litigation.'" *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Admin. Law & Governmental Rels. of the H. Comm. on the Judiciary*, 94th Cong. 28-29 (1976) (1976 Hearings).

> [T]he advantages of having a judicial determination greatly outweigh the advantage of being able to intervene in a lawsuit. … [I]t's much better to forgo a system in which some government is putting strong pressure on the Department of State to decide a lawsuit—we would much rather see it handled by the courts. … [T]o my way of thinking, this consideration of political factors is, in fact, the very antithesis of the rule of law which we would like to see established.

Id. at 34-35.

Forty-four years later, petitioners and the government are asking this Court to override Congress and to return to the pre-statutory practice of *ad hoc* determination based on State Department assessment of the policy trade-offs. As this Court has recognized in three major decisions, allowing *ad hoc* foreign policy considerations to determine whether a party can sue a foreign state in the United States would undermine

the basic purpose of the FSIA—to have immunity determinations made by the courts on the basis of rules prescribed by Congress:

> In 1976, Congress passed the Foreign Sovereign Immunities Act in order to free the Government from the 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 (citations and alterations omitted);

> [A]pplying the FSIA to all pending cases … is most consistent with two of the Act's principal purposes: clarifying the rules that judges should apply in resolving sovereign immunity claims and eliminating political participation in the resolution of such claims. … Congress' purposes in enacting such a comprehensive jurisdictional scheme would be frustrated if … courts were to continue to follow the same ambiguous and politically charged "standards" that the FSIA replaced.

Republic of Austria v. Altmann, 541 U.S. 677, 699 (2004);

> Congress abated the bedlam in 1976, replacing the old executive-driven, factor-intensive, loosely common-law-based immunity regime with the Foreign Sovereign Immunities Act's "comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state." …. [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." … As the Act itself instructs, "[c]laims of foreign states to immunity should henceforth be decided by courts . . . in conformity with the principles *set forth in this [Act].* 28 U.S.C. § 1602 (emphasis added).

NML, 573 U.S. at 141 (some citations and alterations omitted).

B. The comity and reciprocity interests of the United States were built into the Act.

The statutory scheme includes a long-arm feature designed to ensure "that only those disputes which have a relation to the United States are litigated in the courts of the United States." 1976 Hearings at 31 (testimony of Bruno A. Ristau, Chief, Foreign Litigation Section, Civil Division, Department of Justice).

> Congress was aware of concern that our courts might be turned into small international courts of claims, open to all comers to litigate any dispute which any private party may have with a foreign state anywhere in the world. … As the language of the statute reveals, Congress protected against this danger not by restricting the class of potential plaintiffs, but rather by enacting substantive provisions requiring some form of substantial contact with the United States. … If an action satisfies the substantive standards of the Act, it may be brought in federal court regardless of the citizenship of the plaintiff.

Verlinden, 461 U.S. at 490-91 (internal quotation marks and alterations omitted).

To this end, the exceptions to immunity stipulated in the Act are defined by two factors—the character of the activity and a specified nexus to U.S. territory particular to each exception to immunity. If both criteria are met, immunity is not allowed and subject matter jurisdiction exists under 28 U.S.C. § 1330. Following this scheme, the Act retains the immunity of foreign states from jurisdiction in expropriation cases unless plaintiff demonstrates both that (1) the property rights at issue were taken in violation of international law, and (2) the property seized by the foreign state (or property exchanged for it) is either (a) present in the United States in connection with a commercial activity of the foreign state or (b) is held by an agency of the foreign state engaged in commercial activity in the United States. 28 U.S.C. § 1605(a)(3).

As explained in Part II below, this provision was a priority for the Executive that proposed it and for the Congress that adopted the FSIA. Deference to the courts of a foreign state that takes property in violation of international law when the stipulated contacts have been established would frustrate the purpose of the expropriation exception and render it nugatory. Presidents Nixon and Ford proposed the FSIA to minimize foreign policy problems resulting from State Department determination of foreign requests for immunity, and to meet private sector concerns that the existing system failed to afford due process and was subject to undue diplomatic pressures. If the State Department has changed its position on this fundamental matter, an Act of Congress would be required to modify the law the courts are obliged to enforce.

C. Abstention on comity grounds would be inconsistent with the text and structure of the FSIA.

There is no textual support for comity deference to foreign courts in FSIA cases. Congress stipulated, and this Court has consistently affirmed, that "[c]laims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter." 28 U.S.C. § 1602. The court of appeals found additional textual evidence against petitioners' position in the fact that Congress has allowed for foreign remedies (arbitration) in another provision of the Act— the terrorism exception to immunity. "[N]o such requirement appears in the expropriation exception, and we have long recognized 'the standard notion that Congress's inclusion of a provision in one section strengthens the inference that its omission from a closely related section must have been intentional.'" *Philipp v. Federal Republic of Germany*, 894 F.3d 406, 415 (D.C. Cir. 2018) (quoting *Agudas Chasidei Chabad of U.S. v. Russian Federation*, 528 F.3d 934, 948 (D.C. Cir. 2008)).

The Solicitor General also cited the terrorism exception in advising this Court that Section 1605(a)(3) does not require exhaustion of local remedies: "Congress knows how to require plaintiffs to seek other remedies before bringing suit under Section 1605(a), and it has not done so in Section 1605(a)(3)." Brief for the United States as Amicus Curiae at 16, *Kingdom of Spain v. Estate of Claude Cassirer*, 564 U.S. 1037 (2011) (No. 10-786). The same reasoning applies with equal force to the judge-made "prudential exhaustion"

theory that the government supports. As the court below stated, "[c]ourts cannot end run that congressional command by just relabeling an immunity claim as 'prudential exhaustion.'" Pet. App. 16a.

Petitioners' argument that 28 U.S.C. § 1606 authorizes deference to Hungarian courts on foreign relations grounds misconstrues that provision and ignores the special regime established by Congress to govern litigation against foreign states and state-owned enterprises. Section 1606 has nothing to do with jurisdiction or justiciability. As stated in its title, "Extent of liability," that text relates to the measure of liability for defendants in cases proceeding to judgment under the FSIA.[5] As noted in the section-by-section analysis, the main purpose of this provision is to align a foreign state's exposure to damages with that of private defendants held to account in U.S. courts with the important exception of punitive damages.[6] An agency or instrumentality is treated differently, because that category is defined to include state-owned commercial enterprises. *See* 28 U.S.C. § 1603(a), (b).

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[5] Liable is defined as "[r]esponsible or answerable in law; legally obligated." *Liable*, *Black's Law Dictionary*, Westlaw (11th ed. 2019) (first definition).

[6] Section 1606 makes clear that if the foreign state, political subdivision, agency or instrumentality is not entitled to immunity from jurisdiction, liability exists as it would for a private party under like circumstances. However, the tort liability of a foreign state itself, and of its political subdivision (but not of an agency or instrumentality of a foreign state) does not extend to punitive damages." House Report at 12.

> § 1606. Extent of liability
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> As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; ….

28 U.S.C. § 1606.

Further, it is false to argue that all justiciability theories available in private litigation necessarily apply under the FSIA. As described above, the FSIA was designed, rightly or wrongly, to establish a jurisdictional scheme distinct, and markedly different, from the regime that applies to other litigation in U.S. courts. "The draftsmen also considered that the adjudication of disputes between private parties and foreign sovereigns presents different questions of international order than the exercise of jurisdiction over private foreign parties."[7] There is no language in the text, and no suggestion in the legislative history, that Section 1606 was meant to override that elaborate scheme. Depending on the facts of each case, some claimants against foreign states may have an easier time bringing suit in this country under the long-arm system adopted in the FSIA than would plaintiffs suing private parties; others will find it more difficult than parties suing private defendants.

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[7] Feldman, *supra* n.3, at 22.

Comity cases arising under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, are simply irrelevant. After extensive consideration, this Court concluded that the presumption against extraterritorial application[8] applies to the ATS. *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013). In sharp contrast, the FSIA expressly provides jurisdiction over foreign public acts in a narrowly defined set of circumstances. The effort to transplant the novel "prudential" exhaustion doctrine developed by the Ninth Circuit under the ATS, *see Sarei v. Rio Tinto, PLC*, 550 F.3d 822, 824 (9th Cir. 2008), is a transparent attempt to rewrite the expropriation exception as decreed by Congress. Finally, as demonstrated above, allowing a case-by-case disposition based on foreign relations considerations would be inconsistent with the purpose of the FSIA to terminate that practice, and with the congressional decision to provide a remedy in U.S. courts for foreign expropriations in violation of international law in defined situations.

Forum non conveniens (*FNC*) is not an issue in this case. Petitioners were heard on that theory below and lost on the merits. Now they seek to reargue the same equities on a novel theory of prudential deference to foreign courts. The court of appeals was right to deny this second bite of the apple. Unlike the comity doctrine espoused by petitioners, *FNC* carries a well-developed body of neutral principles and precedents that can be applied by courts without reference to diplomatic pressures. In contrast, the government supports petitioners in this case, because it seeks to cabin the jurisdiction established by Congress by restoring

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[8] *See Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247 (2010).

the pre-FSIA practice of case-by-case foreign policy determinations.

Moreover, it should not be assumed that *FNC* is available in actions brought under Section 1605(a)(3). This Court has never addressed the scope of that doctrine in FSIA cases, *see Verlinden*, *supra*; there are substantial differences in the considerations at play among the several exceptions to immunity stipulated by Congress. For the reasons described in Part II below, the authors of the FSIA would be astonished to see a court refuse the remedy prescribed by Congress for takings in violation of international law in favor of the courts of the country taking the property.

II. Section 1605(a)(3) was enacted to provide a remedy in U.S. courts for foreign expropriations in violation of international law. Deference to the courts of the state violating international law would frustrate the intent of Congress.

A. The expropriation exception to immunity was adopted as part of U.S. policy to help claimants obtain just compensation for expropriated property as required by international law.[9]

Foreign expropriation of U.S. investment was a major foreign policy issue for the U.S. government and a focus of Congressional concern throughout the period the FSIA was being considered in the Executive

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[9] The classic U.S. position that international law requires "prompt, adequate, and effective payment" was stated in an August 22, 1938 note from Secretary of State Cordell Hull to the Mexican Minister of Foreign Affairs. 3 Green Haywood Hackworth, *Digest of International Law* § 288, at 658-59 (1942).

Branch, 1965-1976. Beginning with the wholesale seizure of private property in Cuba following the Castro revolution, there were dozens of uncompensated expropriations in Latin America and other countries involving billions of dollars.[10] In addition, petroleum companies came under increasing pressure in Saudi Arabia and the Gulf to transfer ownership and control to host countries. These developments hurt U.S. economic interests, precipitated litigation in U.S. courts, and caused a strong political reaction in the business community and in Congress demanding diplomatic protection by the State Department.

Congress adopted the Hickenlooper Amendment in 1962 requiring the President to suspend foreign aid to any country taking American property failing "to take appropriate steps … to discharge its obligations under international law … including speedy compensation … equivalent to the full value thereof." 22 U.S.C. § 2370(e)(1). Two years later, Congress enacted the Second Hickenlooper Amendment, 22 U.S.C. § 2370(e)(2),[11] limiting the decision in *Banco Nacional*

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[10] In May 1971, the State Department estimated that 56 cases involving American investments remained unresolved. Memorandum from Acting Secretary of State John Irwin to President Nixon (May 8, 1971), *in* IV U.S. Dep't of State, *Foreign Relations of the United States, 1969-1976: Foreign Assistance, International Development, Trade Policies, 1969-1972*, Doc. 153, at 392-93, https://history.state.gov/historicaldocuments/frus1969-76v04/d153.

[11] "[N]o court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law" in taking cases arising after January 1, 1959 unless the President advises the court "that application of the act of state doctrine is

de Cuba v. Sabbatino, 376 U.S. 398 (1964), which blocked effective litigation of some expropriation claims in U.S. courts.

Political and bureaucratic tensions around expropriation policy came to a boil early in the Nixon Administration when the State Department persuaded the President not to formally apply sanctions to Peru following its uncompensated expropriation of an Exxon oil-field,[12] and exploded in 1971 when the Allende regime confiscated large American investments, including copper mines, in Chile without compensation. In January 1972, President Nixon announced a new expropriation policy—to be implemented from the White House—based on a presumption that the United States would henceforth respond to uncompensated expropriations by withholding U.S. financial assistance and voting against loans from international development banks.[13]

An agitated Congress made that policy mandatory in the Gonzalez Amendment(s) requiring the President to instruct U.S. representatives to three international financial institutions to vote against loans to foreign countries that expropriated U.S. investment without compensation unless they entered good faith negotiations aimed at providing prompt, adequate,

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required in that particular case by the foreign policy interests of the United States." 22 U.S.C. § 2370(e)(2).

[12] The International Petroleum Company case is discussed in Jessica Pernitz Einhorn, *Expropriation Politics* (1974).

[13] White House, Policy Statement: Economic Assistance and Investment Security in Developing Nations (Jan. 19, 1972), 11 I.L.M. 239, 241 (1972).

and effective compensation in accord with international law.[14] In consequence, every significant expropriation of U.S. foreign direct investment pending in 1972-76, when the FSIA was being drafted, became a foreign policy issue requiring inter-agency debate and White House engagement.

This was also a period of intense multi-lateral diplomacy for the State Department. International law principles accepted in the West were challenged by the Communist bloc, and developing countries campaigned aggressively in the United Nations to establish a new international legal order that would recognize their right to nationalize natural resources owned by foreign investors without international accountability. The United States and like-minded countries voted against such resolutions, but could not prevent their adoption.[15] U.S. relations with Latin America became so inflamed that Secretary of State Kissinger launched a new dialogue with Latin American foreign ministers in 1974 outside the traditional framework of the Organization of American States. U.S. Dep't of State, Conference of Foreign Ministers, Declaration of

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[14] *See* Pub. L. No. 92-246, § 21, 86 Stat. 59, 59 (1972) (amendments to the Inter-American Development Bank Act, 22 U.S.C. § 283 *et seq.*); Pub. L. No. 92-247, § 12, 86 Stat. 60, 60 (1972) (amendments to the International Development Association Act, 22 U.S.C. § 284 *et seq.*); Pub. L. No. 92-245, § 18, 86 Stat. 57, 58 (1972) (amendments to the Asian Development Bank Act, 22 U.S.C. § 285 *et seq.*).

[15] *See, e.g.*, G.A. Res. 3171 (XXVII), Permanent Sovereignty over Natural Resources (Dec. 17, 1973); G.A. Res. 3201 (S-VI), Declaration on the Establishment of a New International Economic Order (May 1, 1974); G.A. Res. 3281 (XXIX), Charter of Economic Rights and Duties of States (Dec. 12, 1974).

Tlatelolco, Mexico City, Mexico (Feb. 24, 1974), 13 I.L.M. 465, 465-70 (1974). Kissinger tried to broker a compromise standard of compensation for expropriated property with Mexico to no avail.

Section 1605(a)(3) was drafted during the Nixon Administration and was submitted to Congress in January 1973 at the height of political focus on expropriation in both political branches. American investors could not obtain justice in the courts of the countries concerned, and few of those states would accept impartial settlement of investment disputes. Many Latin American governments clung to the "Calvo" doctrine holding that expropriation claims were the exclusive province of domestic courts.[16]

Faced with this challenge to American interests, Congress and the Executive agreed to provide a U.S. forum for expropriation claims against foreign states in the narrowly circumscribed cases stated in the expropriation exception:

> A foreign state shall not be immune from the jurisdiction of courts of the United State or of the States 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 present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is

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[16] *See* U.S. Dep't of State, *Digest of United States Practice in International Law 1976*, at 435 (1977).

> owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.

28 U.S.C. § 1605(a)(3).[17]

This language limits jurisdiction over foreign takings to two situations involving commercial connections with the U.S. territory that the drafters believed would meet objections based on emerging international law principles. The first prong is extremely narrow. A foreign state that chooses to bring expropriated property or its fruits into the United States for commercial purposes invites judicial review of the foreign taking under applicable principles of international law. Taken alone, that provision would seldom be useful to claimants as few foreign governments would take the risk.

The second prong was added to deal with another situation of great concern to U.S. policy makers. Foreign states who expropriate foreign investments, particularly those in natural resources such as petroleum and mining, often transfer those properties to government agencies or state enterprises who use them in world commerce, including the United States. The second prong was drafted to allow claims against a foreign state when a government agency or instrumentality that owns or operates the property taken in violation of international law (or property exchanged for the seized property) is engaged in a commercial activity in

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[17] This text is the same submitted by the Nixon Administration in 1973 with one exception. Amicus deleted the phrase "political subdivision" from the second prong in the 1976 version.

the United States. "Under the second category, the property need not be present in connection with a commercial activity of the agency or instrumentality." House Report at 19.

The State Department hoped a judicial remedy would provide relief for some claimants and leverage for U.S. diplomacy. That strategy worked well for U.S. investors in Ethiopia when the Mengistu regime confiscated foreign property without compensation following the overthrow of Emperor Haile Selassie. The State Department supported adjudication of these claims in U.S. courts, and the Sixth Circuit agreed that the act of state doctrine did not apply. *Kalamazoo Spice Extraction Co. v. Provisional Mil. Gov't of Socialist Eth.*, 729 F.2d 422 (6th Cir. 1984). Once U.S. courts accepted jurisdiction in this case, 616 F. Supp. 660 (W.D. Mich. 1985),[18] the State Department was able to negotiate a comprehensive settlement of all U.S. property claims against Ethiopia.[19]

Given this history, it is clear that Congress did not authorize deference to foreign courts in cases brought under Section 1605(a)(3) and would have summarily rejected any such proposal. Congress was inflamed by the situation facing American investors and dictated an aggressive U.S. response in the Hickenlooper and Gonzalez amendments, *supra*. The FSIA provides jurisdiction over the public acts of foreign states in the narrow circumstances prescribed in this section because there was no prospect of compensation in the

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[18] Amicus argued these cases for Kalamazoo Spice.

[19] Compensation Agreement, Eth.-U.S., Dec. 19, 1985, T.I.A.S. No. 11,193.

countries concerned. Often, the governments nationalizing foreign investment were revolutionary or populist regimes operating under permissive legal regimes. To compel resort to foreign courts—*where the foreign state would be claimant's adversary and the judge of its own case*—would subvert the basic purpose of Section 1605(a)(3).

B. International law requirements for exhaustion of local remedies do not apply in national courts.

The Seventh Circuit decisions relied on by petitioners to establish a conflict of circuits in this case held, erroneously, that international law requires exhaustion of local remedies as a precondition to suit under Section 1605(a)(3). Those principles do not apply to litigation in national courts. The first error, in *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661 (7th Cir. 2012), was that a plaintiff could not allege a taking in violation of international law, as required by Section 1605(a)(3), without prior exhaustion of local remedies. The Seventh Circuit reconsidered that proposition and restated its theory in *Fischer v. Magyar Államvasutak Zrt.*, 777 F.3d 847, 857 (7th Cir. 2015):

> [E]ven if plaintiffs can allege a violation of international law, customary international law may impose an exhaustion requirement that limits plaintiffs' ability to bring that claim outside the country against which they bring suit. To bring that claim in courts outside of the potentially offending nation—here, Hungary—plaintiffs would need to demonstrate that they exhausted remedies or that it could not be worthwhile to bring suit in that nation.

> To be clear, our prior decision invoked the second form of exhaustion.

This, too, is wrong both as a matter of international law and of statutory construction. The international law doctrine requiring prior exhaustion of adequate local remedies applies only to claims of state responsibility asserted by one state against another either by diplomatic espousal or before an international tribunal. It does not apply to claims brought by private parties in national courts. "There is no international law rule requiring the exhaustion of local remedies before a claim is brought in another domestic court." William S. Dodge, *International Comity in American Law*, 115 Colum. L. Rev. 2071, 2111 n.243 (2015); *see* Restatement (Fourth) of Foreign Relations Law of the United States § 455, reporters' note 11 (2018) (noting that the Seventh Circuit decisions "add a substantive requirement for jurisdiction that is not supported by the statute or its legislative history").

Further, as the Solicitor General advised this Court in the *Cassirer* case, the local remedies doctrine does not apply to discriminatory takings—illegal *per se* under international law: "where, as here, the taking violated international law because it was not for a public purpose or was discriminatory, the taking claim does not depend upon a showing that the plaintiff has sought and been denied just compensation." Brief for the United States as Amicus Curiae, *Cassirer*, *supra*, at 17-18. It is indisputable that the acts alleged in this case were discriminatory, and murderous, violations of international law.

C. An Act of Congress would be required to authorize a discretionary defense of prudential exhaustion of local remedies.

As demonstrated above, judicial discretion informed by Executive foreign relations concerns is a blunt instrument that would undermine the expropriation exception decreed by Congress and, potentially, subordinate all immunity determinations under the Act to *ad hoc* policy considerations—the very process the FSIA was enacted to replace. This process would not be limited to disfavored human rights issues.

Judge Katsas, dissenting from the denial of rehearing en banc in *Philipp v. Federal Republic of Germany*, 925 F.3d 1349 (D.C. Cir. 2019), takes a more direct approach. On the theory that Congress did not contemplate any "violations of international law" involving citizens of foreign states, he would add a word to the statutory text: "In my judgment, [Section 1605(a)(3)] encompasses only property taken in violation of international *takings* law." *Id.* at 1351 (emphasis added). In fact, the issue of retroactive application to claims based on historical wrongs to foreign nationals was flagged in the 1973 hearings on the Nixon bill, 1973 Hearings at 21-22, but the Ford Administration chose not to address this controversial question in the revised bill. The drafters had been told that Congress would not act on the measure unless the Administration submitted a consensus bill.

Further, Congress must have understood that discriminatory takings of property, including discrimination based on religion or ethnicity, would violate basic principles of international law. The question before this Court, of course, is one of U.S. law, but Congress

has instructed the courts in unmistakable words to decide jurisdiction under this provision on the basis of international law. *Helmerich & Payne Int'l Drilling Co.*, *supra*.

Finally, this Court has made clear that speculation as to the Congressional imagination cannot compete with the plain meaning of the statutory text: "When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1737 (2020). There are two better solutions to the government's concerns about future human rights litigation in U.S. courts: (1) an Act of Congress; (2) reliance on established judicial doctrines, where applicable, including the political question doctrine, the federal act of state doctrine, and *forum non conveniens.*[20]

[20] The incidence of uncompensated foreign takings declined in the late twentieth century due to growing international reliance on private capital and wide-spread embrace of international arbitration in bilateral and multilateral agreements. That may be changing. Given the heightened economic stress and increasing resistance to international investment arbitration, protection of property rights may reemerge as a significant issue in U.S. foreign relations and in the courts.

CONCLUSION

The Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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