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 VICTIMS OF THE HUNGARIAN HOLOCAUST *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae Victims of the Hungarian Holocaust are all Jewish victims (or the heirs of such victims) of illegal discriminatory expropriations by Appellant Magyar Államvasutak ("MAV") which were carried out in Hungary as part of Hungary's participation in the final phases of the Holocaust. MAV was an indispensable instrumentality of the final solution: transporting victims from Budapest to Auschwitz, expropriating the last of their worldly goods along the way.

The Victims of the Hungarian Holocaust is a shorthand moniker for the Plaintiffs in a lawsuit filed in the Northern District of Illinois in 2010 against MAV. Northern District of Illinois Case No. 1:10-cv-00868. Many of the original Plaintiffs have died as this case has wound its way through the District Court and up to the Seventh Circuit three times in the last ten years. The second appeal in 2015 led to the Seventh Circuit's dismissal of *amici*'s lawsuit without prejudice with the requirement that *amici* exhaust judicial remedies in Hungary. *Fischer v. Magyar Államvasutak Zrt.*, 777 F.3d 847, 872 (7th Cir. 2015). The identity of the

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1. Pursuant to Rule 37.6 of the Rules of this Court, the undersigned hereby states that no counsel for a party wrote this brief in whole or in part, and that, other than amicus curiae or its counsel, no one contributed money to fund the preparation or submission of this brief except for The Cardozo Law Institute for Holocaust and Human Rights Studies (CLIHHR) of the Cardozo Law School, which contributed the funds used to pay for the printing of this *amicus* brief. Pursuant to Rule 37.3(a) of the Rules of this Court, counsel for all parties have filed with the Clerk letters of blanket consent to the filing of amicus briefs in these cases.

Chicago plaintiff natural persons who are the *amici* styled as Victims of the Hungarian Holocaust are Yehudit Bara, Joseph Bernat, George Donath, Esti Elkin, Gabriel Erem, Miriam Fashchik, Paul Chaim Shlomo Fischer, Irene Gati, Shlomo Goldberg, Jack Jacobs, Shalom Jakubovics, Lea (Adler) Kohn, Agnes Klein Lieberman, Elizabeth Brummer Reich, Chaim Ronai, Joseph Schwartz, Yehudit Aron Shalom, Hajnalka Somlo, Istvan Somogyi, Alex (Sandor) Varnai, Elisheva Zimet,

All *amici* have a direct and critical interest in whether U.S. courts may abstain from exercising jurisdiction under the expropriation exception to the Foreign Sovereign Immunities Act as a matter of international comity. Indeed, as discussed herein, *amici*, after the exhaustion effort of another victim of expropriation (one Irene Kellner, now deceased), have been trying to have their case in the Northern District of Illinois reopened. The most recent motion to reopen and to file an amended complaint was denied by the District Court because of the pendency of this Court's consideration of the exhaustion issue from the D.C. Circuit's decision in *Simon v. Republic of Hungary*, 911 F.3d 1172 (D.C. Cir. 2018). *See* Docket Entry No. 177, N.D. Ill. Case No. 1:10-cv-00868.

This Court's answer to the exhaustion question will determine whether *amici* can reopen their case as of right or will have to persuade the District Court that the exhaustion efforts of Ms. Kellner meet the Seventh Circuit's exhaustion requirement. In short, *amici* and the *Simon* Plaintiffs have nearly identical interests in the outcome of this appeal.

INTRODUCTION & SUMMARY OF THE ARGUMENT

This Court has been asked to resolve a Circuit conflict as to whether Plaintiffs suing a foreign sovereign in an American court who seek to utilize the expropriation exception to the Foreign Sovereign Immunities Act (28 U.S.C. § 1605(a)(3)) in pursuit of redress for discriminatory takings must exhaust foreign remedies and establish the inadequacy of such foreign remedies before being permitted to pursue claims in American courts.

Amici, all Jews who suffered Holocaust-related expropriations at the hands of the Hungarian national railroad Magyar Államvasutak ("MAV"), respectfully submit this brief as *amicus curiae* to inform the Court of the practical consequences of an exhaustion requirement. All *amici* had cases pending in the Seventh Circuit which adopted a "prudential exhaustion" requirement in *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661 (7th Cir. 2012),[2]

2. Plaintiffs in the *Abelesz* case originally styled their case under the plaintiff name Victims of the Hungarian Holocaust. When the Seventh Circuit decided the first appeal in 2012, it ordered Plaintiffs to restyle their future pleadings by referring to the plaintiffs by name. *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 661 n.* (7th Cir. 2012). The Seventh Circuit then renamed the case in the 2012 opinion by referring to the plaintiff whose name came alphabetically first, which is Erno Kalman Abelesz. On remand, the Plaintiffs filed an amended complaint where Plaintiff Paul Fischer was the first name in the caption, and when the Seventh Circuit decided the second appeal, it styled the case as *Fischer v. Magyar Àllamvasutak Zrt*. Accordingly, when *Amici* refer to *Abelesz* they are referring to the 2012 opinion and when they refer to *Fischer*, they are referring to the 2015 opinion. When *amici* refer to *Abelesz/Fischer*, they are referring to the collective doctrine set forth in the 2012 and 2015 opinions.

to which *amici* were parties. *Amici* submit that their experience, and the legal and practical considerations discussed herein, demonstrate that this Court should affirm the D.C. Circuit in the above captioned case and refuse to impose a prudential exhaustion requirement.

Since the 2015 denial of *certiorari* in the case captioned as *Fischer v. Magyar Államvasutak Zrt.*, et al., 576 U.S. 1006 (2015), the *amici* Plaintiffs have attempted to exhaust remedies and then return to an American court in compliance with the Seventh Circuit's *Abelesz/ Fischer* guidance. The purpose of this *amicus* filing is to inform the Court of the actual consequences of the Seventh Circuit's prudential exhaustion judicial creation. In a sense, the experience of the *amici* constitutes a "natural experiment"[3] testing the wisdom of the *Abelesz* prudential exhaustion rule. *Amici* respectfully submit that the Seventh Circuit's exhaustion doctrine actually creates the very problem it was intended to avoid: international comity concerns are heightened when American courts are required to pass on the adequacy and fairness of foreign judicial and administrative remedies.

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3. A "natural experiment" is a term used by researchers in many scientific fields. A National Bureau of Economic Research working paper defined natural experiments "as historical episodes that provide observable, quasi-random variation in treatment subject to a plausible identifying assumption. The 'natural' in natural experiments indicates a researcher did not consciously design the episode to be analyzed, but can nevertheless use it to learn . . . ." Nicola Fuchs-Schuendeln & Tarek Hassan, *Natural Experiments in Macroeconomics*, NBER Working Paper No. 21228, at 4–5 (Issued June 2015, Revised Jan. 2016), found at https://www.nber.org/system/files/working_papers/w21228/w21228.pdf.

In addition to setting forth the results of *amici*'s "natural experiment," *amici* respectfully submit that, whatever the wisdom of a prudential exhaustion requirement may be in a general sense, such a requirement is particularly inappropriate to apply as the Defendant, MAV, is an instrumentality of a foreign sovereign. Nor should such an exhaustion requirement apply to victims residing in territories forcibly occupied by the Axis, including Hungary.

ARGUMENT

I *AMICI*'S EXPERIENCE IN HUNGARY DEMONSTRATES THE IMPROPRIETY OF REQUIRING EXHAUSTION

A. The Procedural History of the *Abelesz/Fischer* Case Led to the Seventh Circuit's Invention of the Prudential Exhaustion Requirement.

The *Abelesz* case was brought by *amici* against MAV alleging Holocaust-related, genocidal wrongdoing. In a companion case, many of the same Plaintiffs brought discriminatory expropriation claims against the Hungarian national bank and several private banks. At the District Court, Plaintiffs defeated an extensive set of motions to dismiss alleging a wide variety of grounds for dismissal.

In 2011, the Hungarian governmental entities took interlocutory appeals on the jurisdictional questions and sought appellate jurisdiction under the collateral order doctrine for non-jurisdiction-based issues. The private banks sought writs of mandamus. The Seventh

Circuit issued an opinion in 2012 that resolved a wide-ranging series of issues raised in the appeals. As part of the 2012 opinion, the Seventh Circuit held that the plaintiffs' complaint had adequately set forth grounds for jurisdiction under the FSIA's expropriation exception, but nonetheless "remand[ed] the cases to the district court with instructions that both sets of plaintiffs either exhaust any available Hungarian remedies identified by the national bank and national railway or present to the district court a legally compelling reason for their failure to do so." *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 666 (7th Cir. 2012), *aff'd sub nom. Fischer v. Magyar Allamvasutak Zrt.*, 777 F.3d 847 (7th Cir. 2015).

The Seventh Circuit elucidated the following standard to guide the district court in determining whether exhaustion has occurred or whether "legally compelling reasons" exist for not requiring exhaustion:

> On remand, it will be defendants' burden to be specific about what the national bank calls the "variety of laws that Hungary has enacted to provide compensation to individuals in [plaintiffs'] position," that is, the remedies defendants claim are (or were) available to plaintiffs. Plaintiffs will then have three options. (1) They can voluntarily dismiss their claims against the national bank and national railway without prejudice and pursue their claims in Hungary using the remedies identified by defendants, with a possibility that they might refile their case in a U.S. court if and when they exhaust their remedies in Hungary. (2) They can ask the district court to stay their cases

> against the national bank and national railway while they pursue the Hungarian remedies identified by defendants. (3) They can ask the district court for an opportunity to develop further their arguments regarding the actual adequacy and availability of those remedies and the applicability of the domestic exhaustion rule.

Id. at 684.

On remand, the Hungarian instrumentalities presented numerous "remedies" they maintained were available in Hungary for the *Fischer* Plaintiffs to pursue. These Hungarian laws were extensively briefed and analyzed. In 2013, the District Court found that a civil action in Hungarian courts might be available and adequate given that Hungary has a civil justice system and that, therefore, "Plaintiffs can bring a civil action in the Hungarian courts to seek a remedy for the wrongs allegedly committed by MAV . . ." 2013 U.S. Dist. LEXIS 124027 (N.D. Ill. Aug. 20, 2013). The case was dismissed without prejudice.

The *Fischer* Plaintiffs appealed and on January 23, 2015, the Seventh Circuit affirmed the dismissal, again without prejudice, noting that

> while the doors of the United States courts are closed to these claims for now, they are not locked forever. All dismissals are without prejudice. If plaintiffs find that future attempts to obtain remedies in Hungary are frustrated unreasonably or arbitrarily, a United States court could once again hear these claims….

777 F.3d at 852.

The court reasoned as follows:

> The national defendants also identified judicial remedies that may be available in a civil action in Hungary. These primarily include property-based claims and contractual claims that plaintiffs could assert against the banks. Hungarian courts will also entertain international law claims. . . . To the extent that plaintiffs worry that their claims may be time-barred, Hungary appears to have formally extended the statute of limitations for Holocaust-related claims. . . . Moreover, *counsel for the national defendants told us at oral argument that if plaintiffs bring these claims in Hungary, the national defendants would not assert any statute of limitations defenses.* The parties have not presented nor could we find any reason to think that Hungarian courts would not enforce such a waiver… We emphasize, however, that the district court's dismissal of claims against the national railway and bank was properly without prejudice. *If plaintiffs attempt to bring suit in Hungary and are blocked arbitrarily or unreasonably, United States courts could once again be open to these claims against the national railway and bank.*

Id. at 861, 862, 865, 866 (emphasis added).

B. The Exhaustion Experiment by Irene Gittel Kellner.

There was an unsurprising reluctance on the part of many Hungarian Holocaust survivors to pursue any remedy in Hungary. The trauma of past events, the likely need to travel to Hungary as part of the trial of any claim, and the rising specter of antisemitism in Hungary all played a role.

One survivor, Irene Gittel Kellner, stepped forward. Briefly stated, Kellner was a 92-year old survivor of the Holocaust who was forced to board MAV's trains to Auschwitz in 1944 and had all her valuables in her suitcase stolen from her. She was willing to subject herself to this experiment in Hungarian "justice." Ms. Kellner had not filed a lawsuit against Hungary in a U.S. court. Instead, she was a member of the putative class that Mr. Fischer and others sought to represent in the case that was filed in the Northern District of Illinois. The undersigned served as her American counsel and sought to undertake finding her a lawyer in Hungary. This was difficult. Few Hungarian counsel were willing to take on such a controversial case in a country well recognized in the European Union as slipping into an autocracy.

After a lengthy search, Hungarian counsel was finally secured, and on February 16, 2016, Ms. Kellner filed a Complaint in the Budapest Capital Regional Court/ Metropolitan Tribunal seeking economic and non-economic damages alleging the same core of operative facts as alleged in the Fischer complaint filed in the Northern District of Illinois.

Kellner's Hungarian complaint was supported by her detailed affidavit, which recounted that she was forcibly transported to Auschwitz on MAV trains, the horrific conditions, and her treatment by MAV workers during the journey. MAV employees expropriated, among other things, her luggage containing family valuables, money, jewelry, silverware, vases, and her diamond ring. Kellner's Hungarian attorney also prepared a brief which set out the facts and Hungarian law to support her expropriation and personal injury claims.

On October 7, 2016, the Hungarian court summarily dismissed the Kellner Complaint in its entirety and ordered Ms. Kellner to pay MAV's legal expenses (a certified translation of the decision is attached to the Petition to Reopen as Exhibit C, found as Docket Entry 163-2, pp. 86–90, in the Northern District of Illinois case docketed as Case No. 1:10-cv-00868.). The court gave two principal reasons for the dismissal:

(a) all non-economic claims for Holocaust related injuries including wrongful death, personal injury and genocide were barred as untimely, since the relevant Hungarian statute stated that no such claims could be based upon any actions or conduct that occurred before March 1, 1978; and

(b) the sworn unrebutted testimony of an eyewitness (i.e., the claimant him/herself) was insufficient as a matter of Hungarian law to establish a prima facie case for economic damages without documentary corroboration or additional eyewitness testimony. *See* Petition, Exhibit C.

Specifically, the Hungarian court stated in material part:

> Lacking any proof for these facts, the court is unable to assess the claim based on Hungarian law. Within this scope, plaintiff failed to present any evidence except her own statement expressed in a notarial document. Considering that according to the Act on Civil Procedure, the statement of the party in itself is not proof—regardless of the form…--regarding the facts disputed by the defendants, meaning all the facts of the case, the presentation of the plaintiff is insufficient. In view of this, it shall be determined that the plaintiff failed to prove the factual basis for her claim.

Id. The Court then assessed court costs and MAV's attorney's fees to Ms. Kellner as part of the judgment.[4]

Following the Hungarian court's dismissal of the Kellner claim, her attorney prepared an affidavit, which includes the following additional detail concerning the Hungarian court's ruling:

> Hungarian courts do not consider the testimony of Kellner as competent evidence to support making a claim. In order for her to pursue her

4. The Hungarian court also ordered Kellner to pay filing fees of $1,232.69, and $4,500 for MAV's attorney's fees (which the court reduced from $13,500) because her claim was dismissed by the court. She also had to assume her own legal fees in excess of $25,000 since Hungarian law did not permit her to retain an attorney to handle her plaintiff's case on a contingent fee basis.

> claim, she would have had to present receipts, evidence, photographs, documents or testimony from another person who could testify that Kellner had a suitcase, that the suitcase had specific valuable things in it, and that MAV personnel stole those valuables. She was unable to present any eye witness testimony other than her own due to the fact that everyone else on the train was, on information and belief, killed at one of the Nazi death camps.

See Affidavit of Istvan Fekete, attached to Petition as Exhibit D, found as Docket Entry 163-2 in the Northern District of Illinois case docketed under Case No. 1:10-cv-00868. Kellner's Hungarian counsel further advised that neither he nor, he believed, any other Hungarian counsel would handle an appeal on her behalf since there is "no reasonable chance that the order would have been reversed on appeal" and that an appeal would expose Ms. Kellner to further sanctions and payment of MAV's additional legal expenses. *Id.* The Hungarian court barred Kellner from bringing a pro se appeal (*see* Exhibit C to Petition, found as D.E. 163-2, pp. 86–90), so without counsel willing to bring a hopeless appeal, she was effectively barred from filing an appeal of the judgment in Hungary.

The Hungarian court repeatedly emphasized Kellner's failure to search for documentary evidence of the taking of the property on her person by MAV employees. It did so as support for the conclusion that she failed to establish the veracity of her claim. This reasoning is remarkable because the property at issue—jewelry and the last of Ms. Kellner's valuables that had not previously been expropriated from her by the Hungarian Arrow Cross

men or the Gestapo—were all small chattel without title. It was, by its very nature, *undocumented* property, the sort of personal property deemed always to belong to its possessor absent contrary proof of rightful ownership. The Hungarian court asked the impossible of the survivors, whom the concentration camps deprived of the means to prove with written documentation the property that was stolen from them.

C. The Attempt to Reopen the Case in the Northern District of Illinois Further Demonstrates the Impropriety of Prudential Exhaustion.

The *Fischer* Plaintiffs have thus far not been able to reopen their case to get an assessment by the District Court as to whether the effort to exhaust met the Seventh Circuit's exhaustion requirements. The District Court mistakenly rejected the motion to reinstate, wrongly identifying Ms. Kellner, a non-party, as the movant. In fact, the movant was Paul Fischer. The case remains dismissed without prejudice. No court has yet passed on whether the case can proceed based on the experience of Ms. Kellner. A second District Court judge (the first having retired) has denied the most recent motion to reopen pending the decision of this Court.

D. *Amici*'s Efforts to Meet the Seventh Circuit's Exhaustion Requirement Demonstrate How the Requirement Undermines Both Comity and the Comprehensive Structure of the FSIA.

Should this Court decide to reverse the D.C. Circuit and embrace some form of the Seventh Circuit's prudential exhaustion requirement, the District Court in the

Northern District of Illinois will have to pass judgment on the Hungarian judicial system's treatment of Ms. Kellner's claim as part of *amici*'s motion to reopen the case. Putting District Courts in this position actually undermines comity, and it could result in court opinions criticizing the fairness of a foreign sovereign's approach to restitution or the judicial or administrative practices it employs.

In this sense, the exhaustion requirement can actually be seen as an anti-comity rule. Few Plaintiffs who suffered discriminatory takings would turn to courts in the United States for redress without having made some substantial effort to seek recompense in the foreign nation in the first place. Nor would such plaintiffs file in the United States if they did not expect that the foreign forum would not treat them equitably. Thus, one can expect that virtually every Plaintiff required to prudentially exhaust will eventually seek to reopen the case they filed in the United States. Every such future court will have to evaluate the very evidence the Northern District of Illinois will be required to evaluate, which includes

- Evidence about whether the rules and procedures employed in Hungary "unreasonably frustrated" the effort to exhaust;

- Whether the judge who heard Ms. Kellner's claim was politically influenced,[5] given the extensive

5. The idea of Holocaust restitution is deeply unpopular in Hungary and the Hungarian Constitution explicitly disclaims responsibility for the wrongs of the Holocaust by claiming that Hungary "lost" its "self-determination" on the date it invited the Nazis the enter into Hungary. *See* Magyarország Alaptörvénye

> evidence of Hungary's current lack of respect for the rule of law which has led to the European Union opening proceedings against Hungary.[6]

As stated in the brief of the *Simon* Plaintiffs, the FSIA folded comity concerns into its comprehensive structure. This structure would be undone by the Seventh Circuit's exhaustion requirement.

Unintentionally or not, the Seventh Circuit in *Fischer* passed judgment on Hungary's judicial system as the opinion went out of its way to note that "Hungary, a modern republic and member of the European Union,

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[Constitution] Apr. 18, 2011, Pmbl. (Hung.) ("We date the restoration of our country's self-determination, lost on the nineteenth day of March 1944, from the second day of May 1990, when the first freely elected body of popular representation was formed.").

6. The District Court will have to evaluate evidence as to whether the Hungarian legal system is fair or is corruptible through political influence. This is not theoretical. Hungary has been slipping towards authoritarian rule, and changes it has made in its constitution concerning the judiciary have led the European Union to institute formal proceedings against Hungary for its lack of respect for the rule of law. The first such actions were initiated in January of 2012. See *Unlawful Constitution: EU Takes Legal Action Against Hungary*, Spiegel – International (Jan. 17, 2012, 5:32 PM), http://www.spiegel.de/international/europe/unlawful-constitution-eu-takes-legal-action-against-hungary-a-809669.html.

More recent "Reforms" of the judicial system led the European Parliament in September 2018 to initiate procedures under Article 7 of the Treaty on European Union to evaluate whether Hungary is in breach of the EU's principles concerning the Rule of Law.

deserves a chance to address these claims." *Abelesz*, 692 F.3d at 682 (7th Cir. 2012). That statement is no more than free-ranging judicial speculation presuming that Hungary has fair judicial and administrative processes. *Amici* respectfully submit that any court deciding whether to employ a prudential exhaustion requirement would necessarily have to make similar normative judgments on the fairness of the forum in which Plaintiffs would be required to exhaust.

In addition, surely a Plaintiff that could otherwise establish jurisdiction in an American court would not be forced to exhaust remedies in North Korea or in other dictatorships. Such a blanket rule would be absurd. Therefore, a court in the U.S. also has to evaluate how close a country is to the authoritarian line to even decide whether exhaustion should be required in the first place. Such a determination necessarily forces American courts to pass judgment on the fairness of other nations' court dispute resolution systems. This ad hoc approach is entirely contrary to the comprehensive nature of the FSIA, which was created precisely to replace the ad hoc approach to foreign sovereign immunity represented by the Tate Letter regime.

This is already occurring within the Seventh Circuit itself. Another case pending in the Northern District of Illinois, dismissed without prejudice, further reveals the pitfalls of prudential exhaustion. The case presents claims by Vichy France victims against the French National Railroad SNCF. Plaintiffs are now being required to exhaust French administrative remedies. *See Scalin v. Société Nationale des Chemins de Fer Français*, Case No.

15-cv-03362, 2018 WL 1469015 (N.D. Ill. Mar. 26, 2018).[7] Following the prudential exhaustion doctrine, the District Court has been forced to wade into the applicability and adequacy of a French compensation commission known by the acronym CIVS. *Id.* at *5. The plaintiffs argued that the CIVS was an inadequate alternative forum with a far less workable framework than that claimed by the French government. *Id.* In support, plaintiffs submitted the affidavit of a scholar who had represented 1,200 victims before the CIVS and who stated that the CIVS "is not in a position to pay compensation to Plaintiffs or others in their situation." *Id.* The District Court was thus forced to engage in weighing the facial adequacy of the French process. Of course there is nothing in the FSIA that requires a District Court to engage in such a case-by-case scrutiny of foreign administrative processes. In fact, as discussed by other *amicus* filings, the comprehensive scheme of the FSIA was intended to avoid such entanglements.

II. THE SEVENTH CIRCUIT'S REQUIREMENT TO EXHAUST JUDICIAL REMEDIES CONFLICTS WITH THE UNIFORM FOREIGN JUDGMENTS RECOGNITION ACT.

In addition to assessing the fairness of the exhaustion process, the District Court will have to address an aspect of the Seventh Circuit's prudential creation that was not considered or discussed: MAV and its *amici* have made

7. The *Scalin* plaintiffs timely appealed to the Seventh Circuit, and that appeal is currently stayed pending the outcome of these consolidated appeals. Seventh Circuit Case No. 18-1887, Docket Entry 72, July 29, 2020.

clear that any Plaintiff that exhausts judicial remedies in Hungary will be confronted with res judicata upon return to the United States. If MAV is correct, although the Seventh Circuit explicitly stated that the dismissal and requirement to exhaust were *without* prejudice, the District Court would be required to dismiss *amici with* prejudice.

A Plaintiff seeking to return to the United States after exhausting a judicial (as opposed to an administrative) process will, in addition to all of the hurdles embedded in the prudential exhaustion rule, also have to overcome the sovereign's invocation of laws requiring recognition of foreign judgments. *See generally* Restatement (Fourth) of Foreign Relations Law of the United States: Jurisdiction § 407, Am. Law Inst., Tentative Draft No. 1 (2014) ("A foreign judgment entitled to recognition . . . is given the same preclusive effect by a court in the United States as the judgment of a sister State entitled to full faith and credit."). In fact, under the Uniform Foreign-Country Money Judgments Recognition Act (2005), a foreign judgment entitled to recognition is "[c]onclusive between the parties to the same extent as the judgment of a sister state entitled to full faith and credit." D.C. Code § 15-367(1).[8] The grounds for non-recognition under the

8. In the United States, state law generally governs the recognition and enforcement of foreign judgments. State law is relatively uniform, however, because a majority of states have adopted one of two uniform acts: the 2005 Uniform Foreign-Country Money Judgments Recognition Act (adopted in 21 states and the District of Columbia), http://www.uniformlaws.org/Act.aspx?title=Foreign-Country%20Money%20Judgments%20Recognition%20Act, or the earlier 1962 Uniform Foreign Money-Judgments Recognition Act (still in force in 13 additional states), http://uniformlaws.org/Act.aspx?title=Foreign Money Judgments Recognition Act. *See*

Act are very narrow. *See id.* § 15-364 (listing grounds for non-recognition).

The fact that foreign judgments are recognized in the United States may well render moot much of the Seventh Circuit's guidance to a District Court evaluating whether the effort at exhaustion was fair or unreasonably frustrated. Instead, the focus would be on a factor the Seventh Circuit did not consider or address – res judicata.

III. A PRUDENTIAL EXHAUSTION REQUIREMENT SHOULD NOT APPLY TO CASES BROUGHT AGAINST INSTRUMENTALITIES OF A FOREIGN SOVEREIGN.

Under the FSIA, MAV, the national railroad of Hungary, is an instrumentality of the sovereign. The distinction between an instrumentality and the sovereign and its organs is ingrained in the wording and structure of the FSIA. *Amici* submit that, because MAV is an instrumentality in the district court, the comity-based considerations that could possibly support a prudential exhaustion requirement have a lesser quantum of significance. Although it is clear that the FSIA does not permit courts to impose an exhaustion of remedies requirement, it is clearer still that such a requirement could not possibly be in order as concerns lawsuits against instrumentalities.[9]

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generally Restatement (Fourth – Tent. Draft No. 1): Jurisdiction §§ 401-409 (restating U.S. law on the recognition and enforcement of foreign judgments).

9. *Amici* do not in any way concede that exhaustion is appropriate when the sovereign itself is the Defendant. The principal

Most prominently, the FSIA specifically excludes foreign states from liability for punitive damages while preserving the claims of punitive damages against instrumentalities. Section 1606 states:

> 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 (emphasis added).

Similarly, the FSIA provides broader venue for instrumentalities which can be sued where personal jurisdiction can be obtained, whereas foreign nations themselves can only be sued under the FSIA in the district court for the District of Columbia. *See* 28 U.S.C. § 1391(f).

There is also a distinction in the FSIA between the manner of serving instrumentalities as compared to foreign states themselves. *See* 28 U.S.C. § 1608(a) and (b). Service on an instrumentality under Section 1608(b) is far

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reason the Court should reject the exhaustion requirement remains the reasons argued more extensively by other *amici*: as made clear in the Restatement (Fourth) of Foreign Relations Law of the United States, prudential exhaustion applies only to proceedings in international tribunals, not to domestic ones such as those in which FSIA cases are heard. In addition, as also made clear in the Fourth Restatement, prudential exhaustion has no place under international law when the taking at issue is discriminatory.

more lenient than the requirements for service on a foreign state. *See Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 154 (D.C. Cir. 1994) ("The Committee Report [for the FSIA] states that section 1608(a) 'sets forth the exclusive procedures for service on a foreign state,' but contains no such admonition for section 1608(b). *See* H.R. Rep. No. 94-1487, at 24, *reprinted in* 1976 U.S.C.C.A.N. at 6623. Section 1608(b)(3) allows simple delivery 'if reasonably calculated to give actual notice,' showing that Congress was there concerned with substance rather than form; but the analogous subsection of section 1608(a) says nothing about actual notice. The distinction is neatly tailored to the differences between 'foreign states' and 'agencies or instrumentalities.'").

Finally, the property of instrumentalities located in the United States is more easily attached than is the property of a foreign state itself. *Compare* 28 U.S.C. § 1610(a) and (b).

The very characteristics of an instrumentality are more those of a "private individual" (§ 1606, *supra*) than those of a government. As this Court has explained:

> Increasingly during th[e] [20th] century, governments throughout the world have established separately constituted legal entities to perform a variety of tasks. The organization and control of these entities vary considerably, but many possess a number of common features. A typical government instrumentality, if one can be said to exist, is created by an enabling statute that prescribes the powers and duties of the instrumentality, and specifies that it is to be

> managed by a board selected by the government in a manner consistent with the enabling law. The instrumentality is typically established as a separate juridical entity, with the powers to hold and sell property and to sue and be sued. Except for appropriations to provide capital or to cover losses, the instrumentality is primarily responsible for its own finances. The instrumentality is run as a distinct economic enterprise; often it is not subject to the same budgetary and personnel requirements with which government agencies must comply.
>
> These distinctive features permit government instrumentalities to manage their operations on an enterprise basis while granting them a greater degree of flexibility and independence from close political control than is generally enjoyed by government agencies.

First Nat. City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 624–25, 103 S. Ct. 2591, 2598–99 (1983). Given the largely commercial character of an instrumentality such as MAV, and its juridical independence from the Republic of Hungary itself, comity is simply a lesser concern.

Indeed, the creation of a public corporation instrumentality often represents an explicit decision by the foreign sovereign to expose that instrumentality to the international legal system in order to facilitate the commercial activities of the public corporation. As this Court has noted,

> [p]rovisions in the corporate charter stating that the instrumentality may sue and be sued have been construed to waive the sovereign immunity accorded to many governmental activities, thereby enabling third parties to deal with the instrumentality knowing that they may seek relief in the courts. Similarly, the instrumentality's assets and liabilities must be treated as distinct from those of its sovereign in order to facilitate credit transactions with third parties.

Banco, 462 U.S. at 625–26, 103 S. Ct. at 2599.

There is simply no reason to require plaintiffs to exhaust their claims in Hungary when the claims are against a public corporation instrumentality that advantages itself in international commerce by taking the instrumentality form. Comity makes little sense and has a lesser quantum of significance in this context. If, as Respondent and his *amici* have argued, the FSIA does not allow the sovereign additional immunities based upon international comity, a fortiori, such additional immunities should not be allowed its instrumentality.

IV. TAKINGS BY HUNGARY AND MAV WERE NOT "DOMESTIC" TAKINGS.

The *Philipp* case presents the issue of whether § 1605(a)(3) applies to domestic takings, i.e., takings from a sovereign's own nationals. *Amici* firmly believe that the FSIA does provide for redress in American courts for domestic takings in accord with international law. This issue is ably briefed by others. However, *amici* feel it is

also critical to point out that, as concerns the allegations against Hungary specifically, the takings alleged cannot be seen as *domestic* takings. There are two reasons.

First, the Hungarian takings in Hungary proper were not domestic takings because Hungary had stripped its Jews of Hungarian citizenship. They were thus alien immigrants without legal status or protection in the eyes of the 1944 Hungarian government. *Amici* Scholars of International Law ably lay out the history, but they do not note the fact this issue has been litigated and uniformly resolved against Hungary by the lower courts. The district court in *de Csepel v. Republic of Hungary*, 808 F. Supp. 2d 113 (D.D.C. 2011) explained the issue well:

> Plaintiffs . . . argue that Hungary did not consider Ms. Nierenberg and Ms. Weiss de Csepel to be Hungarian citizens at the time of the seizures, as evidenced by the anti-Semitic laws passed by Hungary during World War II. Specifically, plaintiffs argue that as of 1944, Hungarian Jews could not acquire citizenship by means of naturalization, marriage, or legalization; vote or be elected to public office; be employed as civil servants, state employees, or schoolteachers; enter into enforceable contracts; participate in various industries and professions; participate in paramilitary youth training or serve in the armed forces; own property; or acquire title to land or other immovable property. Moreover, all Hungarian Jews over the age of six were required to wear distinctive signs identifying themselves as Jewish, and were ultimately subject to complete forfeiture of all assets,

> forced labor inside and outside Hungary, and ultimately genocide . . . . Notwithstanding the fact that Ms. Nierenberg still considered herself to be a Hungarian citizen in 1944, it is clear that under these extraordinary facts, the government of Hungary thought otherwise and had *de facto* stripped her, Ms. Weiss de Csepel, and all Hungarian Jews of their citizenship rights. Consequently, the alleged Hungarian "citizenship" of plaintiffs' predecessors does not preclude the application of the expropriation exception in this case.

de Csepel, 808 F. Supp. 2d, at 129–30. *See also Cassirer v. Kingdom of Spain,* 461 F. Supp. 2d 1157, 1165–66 (C.D. Cal. 2006) (applying expropriation exception to Nazi Germany's seizure of German national's property where plaintiff argued that Nazi citizenship laws precluded citizenship for Jews), *aff'd in part,* 616 F.3d 1019 (9th Cir. 2010) ("By [1939], German Jews had been deprived of their civil rights, including their German citizenship."). *Cf. Roboz v. Kennedy,* 219 F. Supp. 892, 894 (D.D.C. 1963) (finding that plaintiffs were not "domiciled in, or a subject, citizen or resident of" Hungary under the International Claims Settlement Act, because they had a firm intent to leave Hungary, had lost their home, had no rights in law, and could not vote); *Kaku Nagano v. McGrath,* 187 F.2d 759, 768 (7th Cir. 1951) (noting that under the Trading with the Enemy Act, "our concept of a citizen is one who has the right to exercise all the political and civil privileges extended by his government" and that "[c]itizenship conveys the idea of membership in a nation").

Second, Petitioners herein and in *Philipp* would have this Court extend the domestic taking doctrine to the Jews

of the occupied territories. For example, *amicus* Fischer's family resided in World War II occupied Yugoslavia at the time of the taking. Is it not simply chutzpah to ask this Court to so extend the doctrine?

CONCLUSION

Amici Victims of the Hungarian Holocaust ask this Court to affirm the judgment of the court of appeals in both *Simon* and *Philipp*.

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