No. 18-1447

IN THE

Supreme Court of the United States

REPUBLIC OF HUNGARY, ET ANO.,

Petitioners,

v.

ROSALIE SIMON, ET AL.,

Respondents.

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

REPLY BRIEF FOR PETITIONERS

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November 23, 2020

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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INTRODUCTION

Plaintiffs' position has no limiting principle. It would compel U.S. courts to adjudicate countless suits by foreigners against foreign sovereigns for foreign wrongdoing with minimal connection to the United States. The only safety valve Plaintiffs would allow—that the Executive could settle private claims against foreign governments—is not up to the task, as this case shows. The Executive *did* settle claims against Hungary by the U.S. government and U.S. nationals for Holocaust-era expropriations. *See* J.A. 83-84. But the United States cannot settle cases, like this one, brought by foreign plaintiffs.

Since at least 1885, this Court has recognized an abstention principle that avoids these foreign entanglements: In cases alleging that foreigners harmed other foreigners in foreign countries, U.S. courts may abstain in favor of foreign tribunals. This principle is easy for courts to administer and demands nothing from the Executive. It is Plaintiffs, not Hungary, who would bring back the bedlam the FSIA abated. In their view, private foreign parties can require U.S. courts to hear foreign-centered disputes against other sovereigns, even though the same claims would be dismissed if asserted against private defendants. And Plaintiffs propose that the Executive must take a stance in every FSIA case alleging harm to foreigners—either actively seeking dismissal or, by inaction, ensuring the case will proceed.

Plaintiffs are conspicuously silent about what their position would mean for suits against the United States. But the implication is obvious: If U.S. courts must hear cases like this one against foreign

governments, then the United States should be prepared to defend analogous suits in foreign courts.

ARGUMENT

I. ABSTENTION ON INTERNATIONAL-COMITY GROUNDS IS AVAILABLE IN FSIA CASES

A. Before and After the FSIA, Courts Have Declined to Exercise Jurisdiction for Reasons of International Comity

International comity is not a "new … abstention doctrine." Resp. Br. 27. In 1885, this Court observed: "[W]here the subjects of a particular nation invoke the aid of our tribunals to adjudicate between them and their fellow-subjects as to matters of contract or tort solely affecting themselves, and determinable by their own laws, such tribunals will exercise their discretion whether to take cognizance of such matters or not." *The Belgenland*, 114 U.S. 355, 365 (1885). Courts did so "not on the ground that [they lacked] jurisdiction, but that, from motives of convenience, or international comity," they would "use [their] discretion whether to exercise jurisdiction or not." *Id.* at 363-64.

Likewise, in 1932, this Court reiterated "[t]he rule recognizing an unqualified discretion to decline jurisdiction in suits in admiralty between foreigners." *Can. Malting Co. v. Paterson S.S., Ltd.*, 285 U.S. 413, 421 (1932). And not just in admiralty: "Courts of equity and of law also occasionally decline, in the interest of justice, to exercise jurisdiction, where the suit is between aliens or nonresidents, or where for

kindred reasons the litigation can more appropriately be conducted by a foreign tribunal." *Id.* at 423.

International comity-based abstention was part of "the common-law background against which" the FSIA was enacted. *Setser v. United States*, 566 U.S. 231, 235 (2012) (citation omitted). And courts continue today to decline jurisdiction on international-comity grounds. *See* Pet. Br. 23-24 (citing cases).

B. Comity-Based Abstention Is Distinct from Sovereign Immunity and *Forum Non Conveniens* and Is Available for These Claims

1. Plaintiffs contend (at 18) that, "regardless of what label Hungary uses," comity-based abstention is a sovereign immunity. That is wrong on both counts: Abstention is not limited to sovereigns and it is not an immunity.

Abstention on comity grounds is available in cases alleging that *foreigners* (not necessarily sovereigns) harmed *other foreigners*.[1] As Plaintiffs acknowledge (at 31), had they asserted these claims against private foreign defendants under the Alien Tort Statute, a court could decline jurisdiction for reasons of international comity. *See also, e.g.*, *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227 (11th Cir. 2004) (abstaining on international-comity grounds where plaintiff alleged state-law claims for

[1] Usually, but not always, these allegations also involve extraterritorial conduct. In *Canada Malting*, the Court held that "the bare circumstance of where the cause of action arose" is not "determinative of the power of the court to exercise discretion whether to take jurisdiction." 285 U.S. at 422.

Holocaust-era property takings by private German banks). Because abstention is available in cases against *non-governmental* defendants, it cannot be a *sovereign* immunity.

Indeed, comity-based abstention is not an immunity doctrine at all. The FSIA concerns, as its plain text states, "immun[ity] from … *jurisdiction*." 28 U.S.C. § 1604 (emphasis added). Prudential doctrines that do not affect jurisdiction, like abstention or *forum non conveniens*, are therefore not immunity defenses, even though they may deny plaintiffs a U.S. forum. As this Court has explained—and numerous courts have reiterated since, *see* Pet. Br. 28—courts "having jurisdiction" may "decline jurisdiction on the ground that the litigation is between foreigners." *Can. Malting*, 285 U.S. at 419-23; *see also The Belgenland*, 114 U.S. at 365-66 ("The existence of jurisdiction in all such cases is beyond dispute; the only question will be whether it is expedient to exercise it."). Because comity-based abstention does not immunize defendants from jurisdiction, it is not a jurisdictional immunity.

2. Abstention on international-comity grounds also is not, as Plaintiffs contend (at 25-26), the same as *forum non conveniens*. Comity and *forum non conveniens* share certain common features but pursue different ends. Both concern litigation with foreign connections and both provide prudential grounds for declining jurisdiction. But *forum non conveniens* chiefly addresses "the convenience to the parties and the practical difficulties that can attend the adjudication of a dispute in a certain locality." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 723

(1996). In contrast, comity-based abstention, like other abstention doctrines, reflects "deference to the paramount interests of another sovereign." *Id.*

As this Court has explained, "the doctrine of *forum non conveniens* was not fully crystallized until [the Court's] decision in" *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 248 (1981). True, this Court has cited pre-*Gilbert* cases, including *Canada Malting* and *The Belgenland*, as early progenitors of *forum non conveniens*, *see, e.g.*, *id.* at 247, and that description is correct as far as it goes. But the Court's pre-FSIA decisions do not restrict courts' discretion to decline jurisdiction to grounds concerning convenience or the practicalities of litigating in a certain forum—the principal focus of *forum non conveniens*.

Rather, courts used "discretion whether to exercise jurisdiction" out of "motives of convenience, *or international comity*." *The Belgenland*, 114 U.S. at 363-64 (emphasis added). Thus, as Justice Kennedy observed, "[d]ismissals for *reasons of comity* and *forum non conveniens* were commonplace in the 19th century." *Am. Dredging Co. v. Miller*, 510 U.S. 443, 464 (1994) (Kennedy, J., dissenting) (emphasis added). In other words, courts had—and still have—discretion to decline jurisdiction in cases between foreigners not just for reasons of practical convenience, but because the litigation implicates comity with other sovereigns.[2]

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[2] *W.S. Kirkpatrick & Co. v. Env't Tectonics Corp.*, 493 U.S. 400, 408-09 (1990) did not consider these comity precedents or otherwise address comity-based abstention. *Cf.* Resp. Br. 26-27. It concerned only the act-of-state doctrine.

For example, in *The Carolina*, 14 F. 424 (La. 1876), the court dismissed "a suit brought by a foreigner springing out of a voyage on the ship of a friendly nation … against the subjects of that nation." *Id.* at 426. Noting that "[t]he exercise of jurisdiction in such a case is discretionary," the court observed that adjudicating the claims "might seriously and uselessly embarrass the commerce of a friendly power." *Id.* Accordingly, it determined that the dispute "can far better be settled by the tribunals of [the foreign] country," which "afford adequate redress." *Id.* Similarly, in *The Infanta*, 13 F. Cas. 37 (No. 7,030) (S.D.N.Y. 1848), the court "decline[d] jurisdiction" over a claim "prosecuted between foreigners" that would "embarrass commercial transactions and relations between this country and others in friendly relations with it." *Id.* at 38-39.

And still today, when courts decline jurisdiction in recognition of a foreign sovereign's interest in the controversy, they rely on comity, not *forum non conveniens*. *See* Pet. Br. 23-24.

3. This is a paradigmatic case for the application of international comity-based abstention: It involves foreigners taking property from other foreigners in a foreign country. Plaintiffs contend, though, that if comity-based abstention is permissible at all, it should apply only when foreign proceedings are already pending or it should permit courts to dismiss only cases seeking equitable relief. The Court should not impose these new restrictions.

a. If private plaintiffs did not assert claims that undermined international comity, there would be no need for comity-based abstention. But they do:

"[P]rivate plaintiffs often are unwilling to exercise … self-restraint and consideration of foreign governmental sensibilities." *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 171 (2004). So it would make no sense to prevent a *court* from considering international-comity interests merely because *private plaintiffs* choose to sue only in the United States.

Yet that is what Plaintiffs propose (at 27-28), based on a mistaken analogy to *Colorado River* abstention, which applies only when there are parallel state and federal proceedings. *Colorado River* has no bearing here because it "rest[s] not on considerations of state-federal comity" but on "conservation of judicial resources and comprehensive disposition of litigation." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 14-15 (1983) (citation omitted).

The reasons for abstaining here, in contrast, are based on international comity, not efficiency or finality. The closest U.S.-state abstention doctrines (and none is identical) are ones that also reflect comity concerns relating to the independence of other sovereigns. Take the concern that animated this Court in *Levin*: That "the National Government will fare best if the States and their institutions are left free to perform their separate functions in separate ways." *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 421 (2010) (citation omitted). To protect these interests, the Court held that "comity precludes the exercise of *original* federal-court jurisdiction." *Id.* at 426 (emphasis added). International comity should do the same here, without regard to parallel foreign proceedings.

b. Dismissal on international-comity grounds is not limited to cases seeking equitable relief, either. This Court already squarely addressed this question in *Canada Malting*: "Courts of equity *and of law* … occasionally decline … to exercise jurisdiction, where the suit is between aliens or nonresidents." 285 U.S. at 423 (emphasis added). Similarly, *The Belgenland* explained that courts "will exercise their discretion whether to take cognizance of" "*matters of contract or tort*" between foreigners. 114 U.S. at 365 (emphasis added).

Plaintiffs nonetheless argue (at 29-30) that courts can *dismiss* only cases seeking equitable relief, and can merely *stay* cases at law. But that rule, applicable to certain federal-state abstention doctrines, "reflects the common-law background against which the statutes conferring jurisdiction were enacted." *Quackenbush*, 517 U.S. at 717 (citation omitted). For international comity-based abstention, the common-law background is otherwise.

In any event, this *is* an action for equitable relief. Plaintiffs seek "an accounting," "compensation for unjust enrichment, and/or restitution," "a declaratory judgment," and a "permanent injunction." J.A. 186-87. These are all equitable remedies. *See Liu v. Sec. & Exch. Comm'n*, 140 S. Ct. 1936, 1941-43 (2020) (identifying "accounting," "restitution," and "prevent[ing] unjust enrichment" as equitable relief).

C. The FSIA Did Not Abrogate Comity-Based Abstention

The FSIA did not, as Plaintiffs contend (at 18), "displace[] any common-law doctrine of international-comity-based abstention." Plaintiffs (at 18-20) and

their *amici* reason that, because sovereign immunity is an expression of comity, the FSIA's codification of sovereign immunity exhausted *all* international-comity interests in U.S. litigation. That view is inconsistent with the statute's text, purpose, and this Court's FSIA precedent.

1.a. As its plain text states, the FSIA addresses *jurisdictional immunity*. It first sets out the default rule that "a foreign state shall be immune from the jurisdiction of the courts." 28 U.S.C. § 1604. The expropriation exception to this rule sits within a section of the FSIA titled "General exceptions to the jurisdictional immunity of a foreign state." *Id.* § 1605. The opening words of this section clearly state the exceptions' reach: "A foreign state shall not be immune from the jurisdiction of [U.S.] courts …." *Id.* § 1605(a)(1).

But according to Plaintiffs and their *amici*, these exceptions to jurisdictional immunity extend well beyond what their plain text allows. Where the FSIA says a sovereign is *not immune* from jurisdiction, Plaintiffs read it to "*require*[] the district court to exercise jurisdiction." Resp. Br. 14 (emphasis added). There is no textual basis for this displacement of non-jurisdictional abstention doctrines, and no presumption or canon of interpretation supports it.

On the contrary, all relevant presumptions point the other way. "In order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law." *United States v. Texas*, 507 U.S. 529, 534 (1993) (citation omitted). Jurisdiction-conferring statutes, in particular, should be interpreted in light of the common-law background

and with sensitivity to wise judicial administration. *See* Pet. Br. 19-20. The FSIA speaks only to immunity from jurisdiction for sovereign defendants, not to common-law abstention principles that apply when foreign parties injure other foreign parties.

It is not enough, as Plaintiffs argue (at 20), that the FSIA displaced the common-law background of *immunity*. The question is whether the FSIA reached *beyond* jurisdictional immunity and also eliminated the separate, prudential doctrine that courts may "decline jurisdiction on the ground that the litigation is between foreigners"—while paradoxically leaving the prudential *forum non conveniens* doctrine still intact. *Can. Malting*, 285 U.S. at 422. For that proposition, Plaintiffs have no support.

The far-reaching consequences of Plaintiffs' interpretation make it even more implausible that Congress tacitly displaced common-law abstention. As this case illustrates, Plaintiffs' extra-textual construction is not, as they put it, "quite limited." Resp. Br. 12. In their view, as soon as a foreign nation purchases military equipment from the U.S. government or its bonds are sold in U.S. capital markets, *see* Pet. Br. 14, 42 n.23, U.S. courts *must* hear claims alleging that a foreign sovereign injured foreign parties in a foreign country decades earlier.

If Congress had truly intended this sea change, it would have said so. It would have stated, for example, that section 1605 applies "without regard to concerns relating to international comity" (as it did in 22 U.S.C. § 8772(a)(1)). Or it would have made the exercise of jurisdiction mandatory by providing "[t]he court shall hear a claim under this section" (as it did

in the neighboring provision, section 1605A(a)(2)). But the section containing the expropriation exception deals only with jurisdictional immunity and nothing else. It contains not a word about abstention or mandatory jurisdiction. There is not even a mousehole to conceal this elephant.[3]

b. It is not just that the FSIA's text does not displace comity-based abstention. "[T]he FSIA affirmatively accommodates" it by providing that "'the foreign state shall be liable in the same manner and to the same extent as a private individual.'" *Philipp v. Federal Republic of Germany*, 925 F.3d 1349, 1355 (D.C. Cir. 2019) (Katsas, J., dissenting from the denial of rehearing *en banc*) (quoting 28 U.S.C. § 1606). In other words, the FSIA, like the "restrictive" theory of sovereign immunity it codifies, "treat[s] nations acting in a commercial capacity like other commercial entities." *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1320 (2017).

But contrary to the plain text of section 1606, Plaintiffs claim that Congress intended to treat sovereign defendants *worse* than commercial entities in the same circumstances: Congress denied sovereign defendants (but no one else) the ability to challenge a U.S. forum because those challenges supposedly have "no effect" on liability. Resp. Br. 24. This novel reading of the FSIA is flatly inconsistent with the D.C. Circuit decisions Plaintiffs are defending. *See Philipp v. Federal Republic of Germany*, 894 F.3d 406, 416 (D.C.

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[3] *Cf. Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (Congress "does not … hide elephants in mouseholes.").

Cir. 2018) ("[S]ection 1606 …. permits … defenses, such as forum non conveniens, that are equally available to 'private individuals.'"); Pet. App. 16a (same). It is also inconsistent with the arguments made by Plaintiffs' *amici*. *See* Amicus Br. of Profs. William S. Dodge and Maggie Gardner at 5 ("[A]ny doctrine adopted here must be equally available to private parties.").

Plaintiffs' reading is also incorrect. Section 1606 clearly refers to liability *in a U.S. court*, so if a U.S. court would not reach the claim at all for private defendants, it should not do so for sovereign defendants either. That is why foreign sovereigns can assert *forum non conveniens*, just as private defendants can. Plaintiffs cannot explain why *forum non conveniens* survived the FSIA, while in their view comity-based abstention did not. Like abstention, *forum non conveniens* concerns the forum for the litigation, not "the substantive law governing liability." Resp. Br. 24.

Consistent with the statute's plain text, this Court has already determined that courts may consider comity interests when the FSIA does not provide immunity. In *Republic of Argentina v. NML Capital, Ltd.*, the Court held that foreign sovereigns are not immune from post-judgment discovery in aid of execution. 573 U.S. 134 (2014). The Court went on to explain, though, that courts "may appropriately consider comity interests and the burden that the discovery might cause to the foreign state." *Id.* at 146 n.6 (citation omitted). Since sovereign defendants may assert *post-judgment* comity interests, which obviously do not change the extent of liability, they

likewise may assert pre-judgment comity interests favoring abstention.

2. Displacing comity-based abstention also would not advance the FSIA's purposes. As Plaintiffs' own *amicus* recounts at length, Congress' concern when enacting the expropriation exception was "[f]oreign expropriation of *U.S. investment*." Amicus Br. of Former State Dep't Attorney Mark B. Feldman at 15-16 (emphasis added). Then-recent confiscations—including "56 cases involving *American investments*" in Latin America; "expropriation of an *Exxon oil-field*" in Peru; and takings of "large *American investments*" in Chile—had "hurt *U.S. economic interests*." *Id.* at 16-17 (emphasis added). In other words, Congress was understandably concerned with expropriations *from Americans*.

But expropriations of American-owned property would not give rise to comity-based abstention. It is expropriation claims, like this one, alleging that foreign states took *foreigners'* property that courts may decline to hear on comity grounds. There is no indication that Congress wanted to sweep those foreign-centered controversies into U.S. courts by displacing courts' longstanding discretion to "decline jurisdiction on the ground that the litigation is between foreigners." *Can. Malting*, 285 U.S. at 422.

D. Comity-Based Abstention Is Not a Return to the Pre-FSIA Regime

Plaintiffs and their *amici* portray comity-based abstention as a return to the chaotic pre-FSIA era, when the Executive "was regularly persuaded to depart from its immunity standards based on diplomatic pressure." Resp. Br. 8-9, 14-16, 21-24. That

is incorrect. Comity-based abstention is easy for courts to administer and requires no foreign-policy expertise nor any involvement by the Executive. It is Plaintiffs, not Hungary, who would bring back the bedlam. They would permit private foreign parties to *compel* U.S. courts to adjudicate rancorous disputes with friendly foreign nations. Only if the Executive affirmatively acted to resolve the case could the litigation be avoided—and even that might not be enough.

1. Comity-based abstention proceeds from a simple premise: An allegation that foreign parties harmed other foreign parties is sometimes better directed to a foreign tribunal, especially when the harm occurred in a foreign country. As this Court has explained, "providing a private civil remedy for foreign conduct creates a potential for international friction." *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2106 (2016). Among other considerations, adjudicating foreign-centered disputes "impl[ies] that other nations … could hale our citizens into their courts" in analogous circumstances. *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 124 (2013).

Courts need not assess any specialized "foreign-policy concerns of the moment" to appreciate these risks. Resp. Br. 14. They need only recognize that "impos[ing] the sovereign will of the United States onto conduct occurring within the territorial jurisdiction of another sovereign"—especially in a dispute *between foreigners*—has "foreign policy consequences." *Kiobel*, 569 U.S. at 121. So when courts are asked to adjudicate claims like these, they may abstain from exercising jurisdiction in favor of a foreign tribunal.

Declining jurisdiction on comity grounds does not *make* foreign policy. It *avoids* making foreign policy by standing aside when foreign interests are paramount. Courts have this discretion when the conduct alleged to be wrongful involves foreigners harming other foreigners. In exercising their discretion, courts may then consider any other circumstances showing that foreign interests predominate over American interests (or vice versa). In this case, these circumstances include:

- Plaintiffs allege that Hungary took property from Hungarians in Hungary;
- Plaintiffs seek restitution that would equal a substantial share of Hungary's annual gross domestic product;
- Plaintiffs did not attempt to exhaust available Hungarian remedies;
- Plaintiffs' claims "arise from events of historical and political significance" for Hungary, and "[t]here is a comity interest in allowing [Hungary] to use its own courts" to address them, *Republic of Philippines v. Pimentel*, 553 U.S. 851, 866 (2008); and
- The United States previously settled all claims against Hungary by the U.S. government and U.S. nationals for Holocaust-era expropriations, *see* J.A. 83-84.

There is no need for the Executive to take any stance on abstention in FSIA cases. But, as this Court has explained, the Executive may "fil[e] statements of interest suggesting that courts decline to exercise jurisdiction in particular [FSIA] cases," and those

"opinion[s] might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy." *Republic of Austria v. Altmann*, 541 U.S. 677, 701-02 (2004).[4] For example, the Executive could advise a court of foreign-policy sensitivities not immediately apparent in a complaint. This opportunity for the Executive to be heard on the foreign-policy consequences of U.S. litigation—approved by this Court in *Altmann*—does not restore the pre-FSIA regime. It leaves abstention to the courts and sensibly permits the government to share pertinent information.

2. It is Plaintiffs and their *amici* who would make litigation against foreign sovereigns chaotic and politicized. Their incorrect interpretation of the FSIA creates a foreign-relations problem that never previously existed: Private foreign parties can require U.S. courts to decide contentious lawsuits against foreign nations. The only way out, Plaintiffs say (at 32-33), is for the Executive to enter into state-to-state settlement agreements. But even if the Executive wanted to negotiate such agreements, they wouldn't work.

To be sure, the Executive can settle claims by the U.S. government and *U.S. nationals*—it already has settled all such claims against Hungary for World War II-era expropriations. *See* J.A. 82-83. But the United States cannot settle claims held by *foreigners* against a foreign state. *See Dames & Moore v. Regan*,

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[4] Plaintiffs say (at 22) that *Altmann* "declined to adopt the type of regime Hungary and the United States urge," but Plaintiffs ignore *Altmann*'s explicit suggestion that courts could decline jurisdiction because of foreign-policy concerns.

453 U.S. 654, 679 (1981) (The Executive has "authority to settle the claims of *its nationals* against foreign countries." (emphasis added)).[5]

Plaintiffs' fallback position (at 35-36) is that courts should abstain on comity grounds *only* if the Executive requests it. That proposal would force the Executive into controversies it might prefer to sit out (like disputes between Holocaust survivors and a NATO ally). And by placing the abstention decision before the Executive instead of the courts, Plaintiffs would ensure that political pressure will be exerted on the Executive whenever foreign parties sue foreign countries in U.S. courts.

II. THE DISTRICT COURT PROPERLY DISMISSED THIS CASE ON COMITY GROUNDS

All parties agree that, if comity-based abstention is available, this Court should "definitively resolve whether abstention was appropriate *in this case* rather than remanding for the lower courts to do so." Resp. Br. 40 n.4. The district court did not clearly abuse its discretion when it abstained on comity grounds, so the Court should direct the D.C. Circuit to affirm the judgment of dismissal.

A. Principles of Adjudicative Comity Support Dismissal

1. Plaintiffs allege that Hungary expropriated property from Hungarians in Hungary during World

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[5] *Dames & Moore* cited the 1973 Agreement with Hungary as an example of this authority to "enter binding settlements with foreign nations." *Id.* at 680 & n.9.

War II. They seek tens of billions of dollars in restitution on behalf of a putative worldwide class of current and former Hungarian nationals, but they never pursued available Hungarian remedies. Hungary, not the United States, should resolve these claims within the framework of its own legal system.

Plaintiffs say if "the type of claims at issue here interfere[d] with foreign relations," the Executive could "formally settle the claims through a state-to-state agreement with Hungary." Resp. Br. 11. True—and that is exactly what the Executive did. It entered into a "full and final settlement and … discharge of all claims of the Government and nationals of the United States" against Hungary and Hungarian nationals.[6] J.A. 83. This 1973 Agreement expressly settled claims for Holocaust-era expropriations, like those asserted here.[7]

The 1973 Agreement is an appropriate means of resolving these claims, and of vindicating American interests in the property-restoration provisions of the 1947 Peace Treaty. The 1973 Agreement is also consistent with the Executive's longstanding policy of

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[6] Hungary entered into similar settlement agreements with Great Britain, France, Canada, and other nations. *See* Pet. Br. 37 n.20 (listing settlements).

[7] The 1973 Agreement "settled and discharged" claims for "property, rights and interests affected by Hungarian measures of nationalization, compulsory liquidation, expropriation, or other taking on or before the date of this Agreement." *Id.* It also discharged claims based on Hungary's "obligations … under article[] … 27 of the Treaty of Peace," *id.* at 84, which provides for restitution for "property" subject to "measures of sequestration, confiscation or control on account of … racial origin or religion" after 1939, *id.* at 52.

"resolv[ing] matters of Holocaust-era restitution and compensation through dialogue, negotiation, and cooperation," instead of "litigation." U.S. D.C. Cir. Amicus Br. at 10; *see also Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 421 (2003) ("[T]he consistent Presidential foreign policy has been to encourage European governments and companies to volunteer settlement funds in preference to litigation or coercive sanctions.").

And one would think that a "full and final settlement" and "discharge of all claims" by the U.S. government and U.S. nationals would free Hungary from the specter of economy-crushing litigation over the same occurrences in U.S. courts. But the United States could not settle *this* lawsuit because the Plaintiffs are foreigners.

2. More specifically, all fourteen Plaintiffs were Hungarian nationals at the time of the takings, and ten still reside outside the United States. Four Plaintiffs became U.S. citizens sometime after the war. Hungary—a sovereign itself—does not believe citizenship is "meaningless." Resp. Br. 41. But for three reasons, the *current* U.S. citizenship of these four Plaintiffs does not prevent abstention on comity grounds.

First, it is Plaintiffs' nationality at *the time of the wrongdoing* that matters for abstention. Because all Plaintiffs were foreign nationals at the time relevant to the complaint, this case involves, for abstention purposes, a dispute between foreigners. International comity "would be a craven watchdog indeed if it retreated to its kennel whenever" a foreign party later acquired U.S. nationality. *Morrison v. Nat'l*

Austl. Bank Ltd., 561 U.S. 247, 266 (2010). And if current citizenship mandated the exercise of U.S. jurisdiction, foreign courts presumably could impose liability on the United States for conduct occurring in this country merely because U.S. nationals subsequently emigrated to other nations.

Second, Hungary believes the U.S.-citizen Plaintiffs' claims were discharged by the 1973 Agreement. But even if they were not, the agreement expressly discharged claims by the U.S. government and U.S. nationals generally for these same expropriations. Having resolved expropriation claims against Hungary through diplomacy and agreement, as specifically contemplated by the 1947 Peace Treaty, the United States has no residual interest that would require this foreign-centered dispute to be decided by a U.S. court.

Third, at most the current U.S. citizenship of four Plaintiffs could preclude comity-based abstention as to *their* claims. It could not prevent the court from abstaining as to the ten Plaintiffs who are citizens of other countries, let alone the hundreds of thousands of foreign putative class members.

3. Plaintiffs do not seriously contest the district court's finding, based on an extensive factual record, that Hungary is an adequate, alternative forum—the same finding made by the Chicago district court and the Seventh Circuit in the parallel litigation there. *See* Pet. App. 72a-82a; *Fischer v. Magyar Államvasutak Zrt.*, 777 F.3d 847, 861 (7th Cir. 2015) (Hungarian "judicial remedies are sufficiently promising that plaintiffs should be required to bring suit in Hungary.").

Plaintiffs selectively cite the 2020 JUST Act Report (at 39-40), but the full report points to numerous payments that Hungary made over decades to compensate Holocaust victims. *See* Pet. Br. 37 n.20. Hungary also entered into various state-to-state agreements to resolve claims for Holocaust-era expropriations, including the 1973 Agreement, under which Hungary paid the United States $18,900,000 (approximately $110,000,000 adjusted for inflation). Plaintiffs criticize Hungary (at 40) for making payments under the Compensation Acts in the form of vouchers that could be exchanged for state-owned property. But using those vouchers—in addition to direct cash payments—allowed Hungary to pay *more* compensation to victims, because in the 1990s Hungary had little cash on hand but was able to privatize property nationalized during its communist era.[8]

As the district court found, Hungarian courts are perfectly competent to hear Plaintiffs' claims. And Plaintiffs' opportunities for redress would not be limited to the courts of Hungary. If Plaintiffs believed they had been treated unfairly after exhausting Hungarian remedies, they could apply to the European Court of Human Rights. Among other protections, Article 6(1) of the European Convention on Human Rights guarantees all litigants before courts of the members of the Council of Europe the right "to a fair and public hearing" by "an independent

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[8] Plaintiffs are simply wrong when they assert (at 39) that Hungary "has not established any special mechanism for resolving claims of Hungary's victims." *See* Pet. Br. 36-37 & nn.19-20; J.A. 22-25, 245-48.

and impartial tribunal." *See* Eur. Ct. H.R. art. 6(1), https://www.echr.coe.int/documents/convention_eng.pdf (last visited Nov. 23, 2020).

B. Principles of Prescriptive Comity Support Dismissal

Prescriptive comity also supports dismissal because Plaintiffs seek to apply American common law to regulate Hungary's conduct within its own territory that harmed its own nationals. *See* Pet. Br. 46-51.

Plaintiffs note (at 41) that the FSIA creates *jurisdiction* over claims involving conduct that occurred abroad. But the FSIA says nothing about applying American *substantive law*—let alone judge-made *common law*—to foreign conduct that affected only foreigners. This Court ordinarily interprets ambiguous statutes to avoid unreasonable interference with foreign sovereigns' authority. *See Empagran*, 542 U.S. at 164. The application of common law to regulate another sovereign's conduct in its own territory affecting its own nationals presents an even greater "danger of unwarranted judicial interference in the conduct of foreign policy." *Kiobel*, 569 U.S. at 116. As in ATS cases, "the question [here] is not what Congress has done but instead what courts may do." *Id.*

Plaintiffs acknowledge that "'courts can dismiss ATS suits … for reasons of international comity.'" Resp. Br. 31 (quoting *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1430-31 (Sotomayor, J., dissenting)). This is so, Plaintiffs say, "because Congress did not define the substantive scope of the ATS." *Id.* But Congress never defined the FSIA's substantive scope either. It withdrew sovereign immunity when "rights in

property taken in violation of international law are in issue." 28 U.S.C. § 1605(3). But when, as in this case, FSIA plaintiffs choose not to assert international-law violations as a substantive ground for liability, Congress did not say that American law should apply to a foreign sovereign's extraterritorial conduct harming other foreigners.

This Court has held that ATS claims are limited to a "modest number of international law violations." *Kiobel*, 569 U.S. at 115 (citation omitted). As Plaintiffs interpret the FSIA, the available theories of liability are far broader. They include, apparently, any common-law claim that might apply if all the relevant conduct occurred in the United States and all parties were Americans. For example, Plaintiffs allege not only unjust enrichment and other property claims but also breaches of special duties imposed on common carriers. *See* J.A. 179-80. None of these common-law claims was developed to apply to foreign conduct. None was developed to regulate other sovereigns. And none was developed to impose rules of decision in disputes between foreigners.

Courts would have to decide how to adapt these causes of action to serve as substantive international norms that govern foreign sovereigns acting in respect of foreigners overseas. "Each of these decisions carries with it significant foreign policy implications." *Kiobel*, 569 U.S. at 117. And courts would be left to answer these questions without any guidance from Congress or any input from the international community that would be subject to these rules. "Where Congress has not spoken at all, the likelihood of impinging on its foreign affairs authority is especially acute."

Hernandez v. Mesa, 140 S. Ct. 735, 748 (2020). As in *Empagran*, it is not "reasonable to apply those laws to foreign conduct insofar as that conduct causes independent foreign harm and that foreign harm alone gives rise to the plaintiff's claim." 542 U.S. at 165.[9]

C. Recommendations by the Executive Branch Should Not Be Required for Abstention

The United States has taken no position on whether this case should be dismissed on comity grounds. Hungary reads the government's silence for what it is: silence, and nothing more. Plaintiffs, in contrast, fault the district court (at 37-38) for "ignor[ing] the United States' express refusal to recommend dismissal." That is the wrong way to look at it. The government may have sound reasons why it does not want to take sides in a politically charged dispute. If the Executive chooses to weigh in on comity-based abstention, its views "might well be entitled to deference." *Altmann*, 541 U.S. at 701-02. But if it chooses *not* to weigh in, its silence should not become a pocket veto.

Plaintiffs' view would require the Executive to get in the middle of every lawsuit between foreign

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[9] Plaintiffs point to *Empagran*'s observation that "case by case" comity determinations may prove too complex. Resp. Br. 22 (citing 542 U.S. at 168). But the Court did not suggest that comity should therefore be *ignored*. It held "*across the board*" that prescriptive comity principles precluded a federal statute from applying to foreign conduct causing foreign injury. *Id.* The Court could make the same categorical ruling about common-law claims in FSIA cases alleging that foreign sovereigns expropriated property from foreigners.

plaintiffs and a foreign sovereign. That would bring back the politically motivated decision-making the FSIA sought to abate. Abstention decisions should remain, as they always were, in the sound discretion of the district court, not of the Executive Branch.

III. THE DOMESTIC-TAKINGS ISSUE IS NOT BEFORE THE COURT IN THIS APPEAL

Plaintiffs devote a substantial portion of their brief to the domestic-takings question, which they acknowledge is not presented here. *See* Resp. Br. 42-50 & n.5. The Court will decide that jurisdictional issue in *Federal Republic of Germany v. Philipp*, No. 19-351 (oral argument scheduled Dec. 7, 2020). In this appeal, the Court should decide the international-comity question it granted *certiorari* to review. *See Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 425 (2007) ("[A] court need not resolve whether it has … subject-matter jurisdiction … if it determines that … a foreign tribunal is plainly the more suitable arbiter of the merits of the case.").

CONCLUSION

This Court should reverse the court of appeals' decision and remand with instructions to affirm the district court's dismissal on the ground of comity.

Respectfully submitted,

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November 23, 2020