No. _____

In The
Supreme Court of the United States

FEDERAL REPUBLIC OF GERMANY, a foreign state, and STIFTUNG PREUSSICHER KULTURBESITZ,

Petitioners,

v.

ALAN PHILIPP, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The D.C. Circuit

PETITION FOR WRIT OF CERTIORARI

DAVID L. HALL
WIGGIN AND DANA LLP
Two Liberty Place
50 S. 16th Street
Suite 2925
Philadelphia, PA 19102
(215) 998-8310

JONATHAN M. FREIMAN
Counsel of Record
TAHLIA TOWNSEND
BENJAMIN M. DANIELS
DAVID R. ROTH
WIGGIN AND DANA LLP
265 Church Street
P.O. Box 1832
New Haven, CT 06508-1832
(203) 498-4400
jfreiman@wiggin.com

Counsel for Petitioners

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

The questions presented are:

1. Whether the "expropriation exception" of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(3), which abrogates foreign sovereign immunity when "rights in property taken in violation of international law are in issue," provides jurisdiction over claims that a foreign sovereign has violated international human-rights law when taking property from its own national within its own borders, even though such claims do not implicate the established international law governing states' responsibility for takings of property.

2. Whether the doctrine of international comity is unavailable in cases against foreign sovereigns, even in cases of considerable historical and political significance to the foreign sovereign, and even where the foreign nation has a domestic framework for addressing the claims.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioners are Federal Republic of Germany ("Germany") and Stiftung Preussischer Kulturbesitz ("SPK"), a German governmental institution comprising museums, archives, and research institutions in Berlin. Neither is a corporation, has a corporate parent, or is owned in whole or part by any publicly held company. Respondents are U.K. citizen Alan Philipp and U.S. citizens Gerald Stiebel and Jed Leiber.

RELATED CASES

- *Philipp, et al. v. Federal Republic of Germany, et al.*, No. 1:15-cv-00266, U.S. District Court for the District of Columbia. Judgment entered March 31, 2017.
- *Philipp, et al. v. Federal Republic of Germany, et al.*, No. 1:15-cv-00266, U.S. District Court for the District of Columbia. Judgment entered May 18, 2017.
- *Philipp, et al. v. Federal Republic of Germany, et al.*, Nos. 17-7064 and 17-7117 (consolidated), U.S. Court of Appeals for the District of Columbia Circuit. Judgment entered July 10, 2018.
- *Philipp, et al. v. Federal Republic of Germany, et al.*, Nos. 17-7064 and 17-7117 (consolidated), U.S. Court of Appeals for the District of Columbia Circuit. Judgment entered June 18, 2019.
- *Federal Republic of Germany, et al. v Philipp, et al.*, No. 19A118, Supreme Court of the United States. Stay Application denied without prejudice July 30, 2019.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

OPINIONS BELOW

The District Court's order denying the motion to dismiss is reported at 248 F. Supp. 3d 59 and reproduced at App.37–93. The panel opinion of the court of appeals is reported at 894 F.3d 406 and reproduced at App.1–24. The order denying petitioners' petition for rehearing en banc, along with Judge Katsas's dissent, is reported at 925 F.3d 1349 and reproduced at App.96–118.

JURISDICTION

The court of appeals entered judgment on July 10, 2018. It denied rehearing en banc on June 18, 2019. Jurisdiction is proper under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Foreign Sovereign Immunities Act ("FSIA") of 1976, 28 U.S.C. § 1605, provides:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
>
> . . .
>
> (3) 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 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.

STATEMENT OF THE CASE

A. Introduction

This case presents two related questions. The first is whether, contrary to the practice of every other nation, the FSIA's "expropriation exception," 28 U.S.C. § 1605(a)(3), forces foreign sovereigns to defend themselves in U.S. courts against claims that they unlawfully took property from their own nationals within their own territory. The second is whether, if the expropriation exception permits such claims, a court may decline to exercise jurisdiction, when deciding such a claim risks grave offense to international comity. This Court should resolve both questions.

No other nation has an expropriation exception to sovereign immunity. *See Bolivarian Republic of Venez. v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1321 (2017) (noting the lack of any comparable provision in other states' domestic immunity statutes). That's because the restrictive theory of sovereign immunity—followed by nearly all other states and established as customary international law—deprives states of sovereign immunity only for their *commercial* acts, not for sovereign acts, such as takings of property within their own borders. *See id.*

For decades, courts held that the expropriation exception only applied if a foreign sovereign violated the international law of takings. *See* Restatement (Third) of Foreign Relations Law of the United States § 712 (1987) ("Restatement Third"). That law addresses when a state is liable for taking property from another state's national. Because international law does not address a state's takings of property from its *own* nationals—a subject governed by domestic law—U.S. courts universally held that the expropriation exception did not provide jurisdiction for "domestic takings" claims. *See, e.g.*, *de Sanchez v. Banco Central de Nicar.*, 770 F.2d 1385, 1395–98 (5th Cir. 1985); *Siderman de Blake v. Republic of Arg.*, 965 F.2d 699, 711 (9th Cir. 1992). Members of this Court have recognized this "consensus view" of the expropriation exception. *Republic of Austria v. Altmann*, 541 U.S. 677, 713 (2004) (Breyer, J., concurring). That established interpretation limited both the extraterritorial reach of the exception and U.S. divergence from the practice of other nations. And it prevented U.S. courts from infringing principles of international comity and harming U.S. foreign relations by adjudicating the lawfulness of foreign sovereign takings of their own nationals' property within their own borders.

In 2012, the Seventh Circuit discarded this consensus, holding that the expropriation exception provides jurisdiction over claims that foreign sovereigns took property from their own nationals within their own territory, if the taking furthered or was closely related to the state's violation of some *other* principle of

international law. *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 674–77 (7th Cir. 2012) (holding that the expropriation exception provided jurisdiction over alleged domestic takings "integral" to violations of the international law of genocide). Without the domestic takings rule, the expropriation exception was transformed into a vehicle for suing foreign states for alleged domestic human-rights abuses whenever a plaintiff could also allege some taking of property.

The Seventh Circuit partly blunted the consequences of its jurisdictional expansion of the FSIA by simultaneously holding that international comity requires U.S. courts to abstain until plaintiffs have exhausted domestic remedies in the foreign sovereign's courts. *Abelesz*, 692 F.3d at 679–85; *Fischer v. Magyar Allamvasutak Zrt.*, 777 F.3d 847, 856–59 (7th Cir. 2015).

In the decision below, the D.C. Circuit went much further. It expanded the Seventh Circuit's already broad and untenable interpretation of the expropriation exception. And it held that U.S. courts must hear suits brought against foreign states for their treatment of their own nationals within their own borders no matter the consequence to international comity. In doing so, the D.C. Circuit explicitly disagreed with the Seventh Circuit and rejected the position of the United States as amicus curiae. And because venue over a foreign state is always proper in the District of Columbia, *see* 28 U.S.C. § 1391(f)(4), plaintiffs can choose to sue foreign states in D.C., making the Circuit's radical

abrogation of both sovereign immunity and comity a *de facto* national rule.

This new national rule destabilizes longstanding understandings of foreign sovereign immunity and international comity, risks endangering U.S. foreign relations, and invites foreign states to allow suits against the U.S. in their courts for this nation's own historical wrongs. Recognizing those risks, the U.S. previously urged adherence to the traditional interpretation of the expropriation exception—in a suit alleging genocidal takings from Polish Jews. Brief of U.S. as Amicus Curiae at 4–10, *Garb v. Republic of Pol.*, 440 F.3d 579 (2d Cir. 2006) (No. 02-7844), reproduced at App.137–54 ("[T]he FSIA's takings exception . . . is limited to expropriation of *aliens'* property . . . and does not encompass the broader range of property violations in violation of human rights law"). And it argued as amicus below that comity must remain a basis to dismiss FSIA suits "where litigation would be at odds with the foreign policy interests of the United States and the sovereign interests of a foreign government." Brief of U.S. as Amicus Curiae at 9, *Philipp v. Fed. Republic of Ger.*, 925 F.3d 1349 (D.C. Cir. 2019) (No. 17-7064), 2018 WL 4385094, at *2, reproduced at App.119–36.

The new national rule is also at odds with this Court's precedents, which have repeatedly recognized the dangers of U.S. courts adjudicating extraterritorial disputes involving injury to foreign parties outside the U.S., even in suits against private parties. *See, e.g.*, *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1404, 1407 (2018) ("[S]ignificant foreign-policy implications

require the courts to draw a careful balance in defining the scope of actions" under the Alien Tort Statute, and "judicial caution . . . guards against our courts triggering . . . serious foreign policy consequences.") (internal quotation marks omitted); *Helmerich*, 137 S. Ct. at 1322 (rejecting pleading standard for FSIA expropriation exception claims that would "produc[e] friction in our relations with [other] nations and lead[ ] some to reciprocate"); *accord Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 133 (2013) (noting that "limiting principles such as exhaustion, . . . comity[,] . . . and giving weight to the views of the Executive Branch" help to "minimize international friction") (Breyer, J., concurring). Those dangers are even greater in suits brought directly against foreign sovereigns. Yet, as Judge Katsas warned in dissent from the denial of rehearing en banc, the D.C. Circuit's panel decision "clear[s] the way for a wide range of litigation against foreign sovereigns for public acts committed within their own territories." App.98.

This Court should grant certiorari to determine both whether Congress intended the FSIA to allow such suits and whether courts may abstain when such suits conflict with international comity.

B. Factual Background

This case concerns ownership of about half of a collection of medieval reliquaries called the Welfenschatz or Guelph Treasure ("the Collection"). In 1929, several German art dealerships owned by German Jews

created a consortium ("the Consortium") that purchased the Collection weeks before the October 1929 global stock market crash. App.39–40.

In the ensuing global Great Depression, the Consortium managed to sell only half the pieces, and stored the remainder in the Netherlands. App.40. Then, in 1934, about a year after the Nazi party came to power in Germany, the Dresdner Bank made an offer for the remaining pieces on behalf of an unidentified client: the (German) state of Prussia. App.40–42.

The Consortium and the Bank negotiated for over a year before agreeing on a price of 4,250,000 RM (or approximately $1,700,000 in 1935 dollars) ("the Sale"), about halfway between the two sides' opening positions, and over half of what the Consortium paid for the complete Collection in 1929. App.44.

The Collection has been on display in German public museums almost continuously since the Sale. App.4. Yet for more than sixty years after World War II, neither the Consortium nor the constituent art dealerships—or any of the dealerships' owners or their heirs—challenged the Sale. App.40. Then, in 2008, some successors-in-interest of some (but not all) Consortium participants contacted SPK, claiming the Sale occurred under duress and was invalid.

Germany takes such claims very seriously. As the United States has observed, "the German government has provided roughly $100 billion (in today's dollars) to compensate Holocaust survivors and other victims of the Nazi era." App.125. Germany has played a central

role in the restitution of Nazi-looted art. In 1998, it joined the U.S. and forty-two other nations in signing the Washington Conference Principles on Nazi Confiscated Art ("Washington Principles"), which call on signatories to establish domestic alternative dispute resolution mechanisms for resolving Nazi-looted art claims, on the merits, in a manner consistent with each nation's traditions, without the expense and delay of litigation. *See* U.S. Dept. of State, Washington Conference Principles on Nazi-Confiscated Art (1998), http://www.lootedart.com/web_images/pdf/WashingtonConferencePrinciples_Original_080630.pdf.

In accordance with Germany's commitments under the Washington Principles, SPK has investigated the provenance of pieces in its collections and has restituted hundreds of works. *See* Luise Wank, "Germany Returns Two Nazi-Confiscated Old Masters to the Heirs of a Renowned Jewish Art Collector," *artnet News*, Sept. 3, 2019 (reporting SPK's restitution of two important medieval works to the heirs of a Frankfurt art dealer and noting previous SPK restitutions to those heirs). It investigated the history of the Sale and determined that it was a voluntary, fair-market transaction. Claimants disagreed. At their request, the parties submitted the dispute to the "Advisory Commission on the return of cultural property seized as a result of Nazi persecution, especially Jewish Property" ("Commission"), an alternative dispute resolution mechanism established by Germany under the Washington Principles to hear restitution claims. App.44–45.

The Commission, chaired by Jutta Limbach, the former chief justice of Germany's Federal Constitutional Court and including the former head of the German Parliament and a former President of Germany, reviewed documentary evidence and held a hearing on the merits at which witnesses testified. Although the Commission has recommended restitution in other cases, here it concluded that the Collection was sold for fair-market value, after arms-length negotiations, not under duress, at a price reflecting the effect of the world economic crisis on the art market. It therefore recommended against restitution. *Id*.

C. Procedural History

Dissatisfied with the Commission's recommendation, Respondents sued. Though they could have filed suit in Germany, they sued in D.C., invoking the expropriation exception as the jurisdictional basis for common-law claims seeking restitution of the remaining pieces of the Collection, or a quarter billion dollars. App.5. The complaint focused not only on the Sale, but also on the Commission, which Respondents attacked as a "sham," Am. Compl. at 2, 54–69, ECF No. 14 (Jan. 14, 2016), and which they argued on appeal serves as a "rubber stamp" and "a political fig leaf to disguise Germany's hostility to bona fide restitution claims." Appellees' Br. at 35, 45, *Philipp v. Fed. Republic of Ger.*, 894 F.3d 406 (D.C. Cir. 2018) (No. 17-7064), 2018 WL 5098952, at *35, *45.

Petitioners moved to dismiss, and the District Court denied in relevant part. App.37–93. After Respondents appealed as of right on sovereign immunity,

the District Court stayed the case and certified the comity issue for appeal, recognizing that there were "substantial grounds for difference of opinion with respect to these issues." *Philipp v. Fed. Republic of Ger.*, 253 F. Supp. 3d 84, 87–88 (D.D.C. 2017), reproduced at App.27-34.

On appeal, Petitioners argued that the expropriation exception does not apply to a foreign state's alleged taking of its own nationals' property, and that even if it applied to allegedly genocidal domestic takings, the Sale was not a genocidal taking. App.6–16. Petitioners also argued that international comity does not allow Respondents to sue in the U.S. over an allegedly coerced Sale, by German art dealers, to a German state, in Germany. App.16–21.

A panel of the D.C. Circuit affirmed in relevant part on July 10, 2018. App.1–24. It recognized that "although an intrastate taking—a foreign sovereign's taking of its own citizens' property—does not violate the international law of takings, an intrastate taking can nonetheless subject a foreign sovereign and instrumentalities to jurisdiction in the United States where the taking amounted to the commission of genocide." App.7 (internal quotation marks omitted). It then held that the Sale bore a sufficient connection to genocide—despite the fact that the Consortium negotiated the price for a year and was paid millions of Reichsmarks for property located outside Germany—because Respondents had alleged that Prussia viewed the Consortium members as enemies of the state, that it wished to "Aryanize" the Collection, and paid a price below market value. This, the panel concluded, meant that the Sale itself amounted to an act of genocide, and

therefore constituted a taking in violation of international law within the meaning of the expropriation exception. App.9–15.[1]

The panel also held that if the expropriation exception provides jurisdiction, courts cannot abstain based on international comity, regardless of the depth of the foreign sovereign's interest, the diplomatic sensitivity, or the foreign sovereign's own domestic efforts to address such claims. App.16–21. In so holding, the panel expressly rejected "the contrary position advanced by the United States," and acknowledged that it was splitting from the Seventh Circuit. App.19–20.

Petitioners sought rehearing en banc, which the U.S. supported. App.119–36.

On June 18, 2019, the court denied en banc review. App.97. Judge Katsas dissented. App.97-118. In his view, the panel's interpretation of the expropriation exception is an unreasonable reading of the statutory language, at odds with the broader statutory context, and itself violates international law because it denies foreign states immunity where customary international law requires it. App.101–07. Judge Katsas also warned that the decision would have "grave consequences," App.107, as it requires U.S. courts to "sit as a war crimes tribunal to adjudicate claims of genocide

[1] The expropriation exception also requires "an adequate commercial nexus between the United States and the defendant." App.15 (internal quotation marks omitted). The D.C. Circuit concluded that this requirement was met as to SPK, but not Germany, and thus ordered the claims against Germany dismissed. App.15–16.

arising in Europe during World War II," and does so based "not [on] any federal statute authorizing a private right of action for victims of foreign genocide," but "on a statute abrogating the jurisdictional immunity of foreign sovereigns from claims for unlawful takings of property," App.97. "This remarkable scheme," he warned, "clear[s] the way for a wide range of litigation against foreign sovereigns for public acts committed within their own territories," far wider than the FSIA has ever been read to provide, and wider even than the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS") allows for human-rights abuses by private defendants. App.98. In so doing, the D.C. Circuit's decisions "create a clear split with the Seventh Circuit, are in tension with decisions from the Ninth and Eleventh Circuits, [and] disregard the views of the Executive Branch on a matter of obvious foreign policy sensitivity." *Id.*

REASONS FOR GRANTING THE PETITION

The decision below misinterprets the FSIA's expropriation exception, discarding the previous consensus view that the exception does not apply to a foreign state's actions toward the property of its own nationals within its own borders. This dramatically expands U.S. courts' jurisdiction to hear extraterritorial disputes and turns the expropriation exception into a vehicle for litigation against foreign states for alleged human-rights violations occurring entirely abroad. It is hard to imagine an assertion of extraterritorial authority more likely to offend sovereign dignity, strain foreign

relations, and expose the U.S. to reciprocal abrogation of immunity in foreign courts.

Despite those dangers, the decision below also strips federal courts of the ability to abstain based on comity, no matter how great the foreign sovereign's interest in addressing the matter domestically or how grave the risk to foreign relations.

Because D.C. is always a proper venue for claims against foreign states, plaintiffs worldwide can now opt in to the D.C. Circuit's broad approach. For that reason, this case does not involve a single circuit gone awry but a *de facto* new national rule radically upending traditional understandings of the FSIA's expropriation exception and the doctrine of international comity. This Court should grant certiorari to restore those doctrines.

I. THE D.C. CIRCUIT INCORRECTLY DECIDED A VITALLY IMPORTANT QUESTION OF SOVEREIGN IMMUNITY.

A. The decision below erroneously discarded the consensus view of the expropriation exception.

1. In 1952, the U.S State Department issued the Tate Letter, which "announced the United States' decision to join the majority of other countries by adopting the 'restrictive theory' of sovereign immunity, under which the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of the state, but not with respect to private acts (*jure*

gestionis)." *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 199 (2007) (internal quotation marks omitted).

Two-and-a-half decades later, Congress codified the restrictive theory in the FSIA. *See* 28 U.S.C. § 1602; *Helmerich*, 137 S. Ct. at 1320 (recognizing that the FSIA "by and large continues to reflect basic principles of international law, in particular those principles embodied in what jurists refer to as the 'restrictive' theory of sovereign immunity").

The FSIA "starts from a premise of immunity and then creates exceptions to the general principle." *Id.* (internal quotation marks omitted); *see* 28 U.S.C. § 1604. Consistent with the restrictive theory, "[a]lmost all the exceptions involve commerce or immovable property located in the United States." *Helmerich*, 137 S. Ct. at 1320.

Congress narrowly departed from the restrictive theory by enacting the expropriation exception. Because expropriations are quintessentially sovereign acts, the restrictive theory generally makes states immune from suit in foreign courts alleging unlawful takings. Accordingly, no other nation lets foreign sovereigns be sued for allegedly improper takings occurring abroad. *See, e.g.*, Restatement (Fourth) of Foreign Relations Law of the United States § 455, reporters' note 12 (Tentative Draft No. 2, Mar. 22, 2016) ("Restatement Fourth") ("No provision comparable to [the expropriation exception] has yet been adopted in

the domestic immunity statutes of other countries."); *accord Helmerich*, 137 S. Ct. at 1321.

For decades, the expropriation exception was rarely invoked and caused few tensions with foreign states. This was so largely because federal courts consistently interpreted the phrase "taken in violation of international law" to refer to the established body of international law addressing states' responsibility for economic injuries to foreign nationals, often referred to as the international law of takings. *See* Restatement Third § 712. Because that body of law addresses states' actions toward *foreign nationals only*, it is not implicated by a state's alleged taking of its own nationals' property, which remains the concern of the state's *domestic* law. Accordingly, the federal courts consistently dismissed FSIA claims for domestic takings. *See, e.g.*, *Altmann*, 541 U.S. at 713 (Breyer, J., concurring) (recognizing the "consensus view" of the lower courts regarding domestic takings); *Abelesz*, 692 F.3d at 674 (collecting cases).

Courts applied this rule even in cases involving serious human-rights abuses. For example, in *Siderman de Blake v. Republic of Argentina*, the Ninth Circuit dismissed Argentinian nationals' claims that their property was taken as part of an anti-Semitic campaign by the military junta because "[e]xpropriation by a sovereign state of the property of its own nationals does not implicate settled principles of international law." 965 F.2d at 711 (internal quotation marks and citation omitted).

The U.S. agreed with this consensus view, including in cases involving alleged takings in violation of international human-rights legal norms. In *Garb v. Republic of Poland*, 440 F.3d 579, 582 (2d Cir. 2006), plaintiffs sued Poland over property allegedly expropriated from Jews during anti-Semitic violence in post-World War II Poland. They argued that these domestic takings fell within the expropriation exception because they violated international human-rights law. *Id.* at 589. The U.S. urged the Second Circuit to reject this argument because the expropriation exception "is limited to expropriation of *aliens'* property . . . and does not encompass the broader range of property deprivations in violation of international human rights law." App.137–38.[2]

The D.C. Circuit has now departed entirely from this consensus.[3] It recognized that a foreign state's

---

[2] The Second Circuit did not reach this question, dismissing because the commercial nexus requirement of the expropriation exception was not met. *Garb*, 440 F.3d at 590.

[3] The Seventh Circuit first departed from the consensus view in *Abelesz*, where plaintiffs sued Hungary for seizure of Jewish Hungarian nationals' remaining worldly goods in 1944, allegedly to fund the Holocaust. 692 F.3d at 666. *Abelesz* recognized that the domestic takings rule would ordinarily bar these claims but found the rule inapplicable because the alleged takings were an "integral part" of, and "effectuated" a violation of, *other* principles of international law, namely genocide. *Id.* at 674–77. Soon after *Abelesz*, plaintiffs brought similar claims against Hungary in D.C. Like the Seventh Circuit, the D.C. Circuit interpreted the expropriation exception's reference to takings "in violation of international law" to encompass takings that violate principles of international law beyond the international law of takings. *Simon v. Republic of Hungary*, 812 F.3d 127, 142–46 (D.C. Cir. 2016). But the D.C. Circuit used a different analysis, which looks to

taking of its own nationals' property "does not violate the international law of takings." App.7. Because the Consortium and its art dealer firms were German nationals, the alleged taking of the Collection by a German state was a domestic taking, and would fall outside the expropriation exception under the previous consensus view. But the D.C. Circuit concluded that domestic takings fall within the expropriation exception when the taking is alleged to violate some other international law norm governing a sovereign's actions towards its own nationals. *Id*. Noting that genocide is one such norm, the panel held that Respondents had adequately pleaded a genocidal taking by alleging that in 1935 Prussia had pressured the Consortium to sell the Collection (then in storage outside Germany, in free and independent Netherlands) for a below-market price "as part of their effort to drive Jewish people out of their ability to make a living." App.15 (internal quotation marks omitted). That brought Respondents' common-law property claims within the FSIA expropriation exception. *Id*.

2. The D.C. Circuit's rationale for discarding the consensus domestic takings rule misunderstands and misinterprets the relevant statutory language. As Judge Katsas recognized, the exception provides jurisdiction only over alleged violations of international takings law. Since a domestic taking does not implicate

---

whether the taking was *itself* a violation of the international law of genocide, rather than whether the taking furthered genocide. *Id.* at 144.

the international law of takings, it is not actionable under the FSIA.

a. First, the decision incorrectly interpreted the text of the expropriation exception. The terms of a statute should ordinarily be given their "natural reading." *Republic of Sudan v. Harrison*, 139 S. Ct. 1048, 1056 (2019). International law has a well-established, century-old body of law addressing when a state is responsible under international law for takings of property. *See* Restatement (Third) § 711 & reporters' note 1. The expropriation exception's reference to "takings in violation of international law" is naturally read to abrogate sovereign immunity for takings that violate that defined body of international law. Reading the phrase to abrogate sovereign immunity for a taking that violates *any* principle of international law, as the D.C. Circuit has, gives the term a broad and ever-evolving scope. If Congress intended to abrogate foreign states' immunity for violations of the international law of human rights, one would have expected it to clearly say so. *See, e.g.*, *Whitman v. Am. Trucking Assocs.*, 531 U.S. 457, 468 (2001) (noting that Congress should not be presumed to "hide elephants in mouseholes").

The D.C. Circuit's expansive reading is also inconsistent with the exception's express textual focus on *property rights*: It requires that rights in property be "in issue," that property have been taken in violation of international law, and that there be a jurisdictional connection between the property and the U.S. *See* 28 U.S.C. § 1605(a)(3). But, as Judge Katsas recognized below, genocide and related international

human-rights norms are "not about the taking of property." App.102. They are fundamentally tort claims, concerned with injuries to persons and groups. If Congress intended to provide a remedy for violations of the rights of persons, it would not have expressed it in the language of property rights.

b. The context of the remainder of the FSIA underscores this. *See, e.g.*, *Republic of Sudan*, 139 S. Ct. at 1057 (noting that individual provisions of the FSIA must be interpreted in light of the FSIA's full statutory context). Courts have long recognized that the FSIA contains no explicit exception to immunity for states' violations of human rights or *jus cogens* norms. *See, e.g.*, *Siderman*, 965 F.2d at 718–19 ("The fact that there has been a violation of *jus cogens* does not confer jurisdiction under the FSIA."); *accord Princz v. Fed. Republic of Ger.*, 26 F.3d 1166, 1174 (D.C. Cir. 1994). But under the D.C. Circuit's interpretation, Congress *did* abrogate foreign sovereigns' immunity for claims they violated the human rights of their nationals within their borders, but only to the extent a claim seeks compensation for an injury to *property*; foreign states remain immune for claims seeking compensation for death, or serious mental, or physical harm. As Judge Katsas recognized, that makes no sense. App.103 (noting that the decision "approve[s] an exceedingly odd type of genocide claim—one for property harms but *not* for personal injury or death," and one that includes commercial nexus requirements that "would make little sense in a provision addressed to human rights

abuses such as genocide, rather than to purely economic wrongdoing.").

It is also inconsistent with two other FSIA exceptions that directly address tortious injuries to persons or property. The first abrogates immunity for claims of "personal injury or death, or damage to or loss of property . . . caused by the tortious act or omission of [a] foreign state." 28 U.S.C. § 1605(a)(5). But that provision only applies to injuries "occurring in the United States." *Id*. The second abrogates immunity for "personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support" for such an act. 28 U.S.C. § 1605A(a)(1). But it is limited to claims brought by U.S. nationals or government employees against states designated as sponsors of terror. 28 U.S.C. § 1605A(a)(2). Thus, when Congress addressed foreign sovereigns' liability for torts causing injuries to persons, including human-rights violations, it did not abrogate immunity for foreign states' treatment of their own nationals overseas. The D.C. Circuit decision transgresses those carefully crafted limits.

c. Further statutory context provides additional evidence that Congress intended the expropriation exception to address only violations of the international law of takings. The expropriation exception's reference to "takings in violation of international law" was drawn from another statute, commonly referred to as the Second Hickenlooper Amendment, 22 U.S.C. § 2370(e)(2), addressing the act of state doctrine. In the years before the FSIA's enactment in 1976, the federal

courts interpreted that statute's nearly identical phrase as referring to the international law of takings and thus excluding domestic takings claims. *See, e.g.*, *F. Palicio y Compania, S.A. v. Brush*, 256 F. Supp. 481, 487 (S.D.N.Y. 1966) ("[C]onfiscations by a state of the property of its own nationals, no matter how flagrant and regardless of whether compensation has been provided, do not constitute violations of international law."). By using nearly identical language in the expropriation exception, Congress intended to adopt the established interpretation of that phrase. *See, e.g.*, *Merck & Co., Inc. v. Reynolds*, 559 U.S. 633, 648 (2010) (noting that when Congress uses a phrase with an established meaning it ordinarily intends to adopt that meaning).

d. The D.C. Circuit's interpretation of the expropriation exception is also inconsistent with international law. No other nation recognizes an exception to sovereign immunity for violations of human-rights law. *See* Restatement Fourth § 455, reporters' note 12. Indeed, Italy was found to have violated international law by permitting claims in its courts against Germany over World War II-era violations of human rights. *See Jurisdictional Immunities of the State (Ger. v. It.: Greece Intervening)*, Judgment, 2012 I.C.J. 99, 136–42, ¶¶81–97 (Feb. 3) (cited in *Helmerich*, 137 S. Ct. at 1321). Statutes should be read consistently with international law whenever possible, *see Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804), and the FSIA should not be read to violate clearly established international law absent a clear

command from Congress. Nothing in the text of the expropriation exception provides such a command.

e. Finally, the legislative history confirms the error of the D.C. Circuit's approach. Nothing in the legislative history of the 1976 FSIA suggests that Congress intended the expropriation exception to abrogate foreign states' immunity for conduct within their own borders directed at their own nationals, or more generally for human-rights claims. To the contrary, Congress discussed the expropriation exception in terms that match the standard for violations of the international law of takings set forth in the then-existing Restatement of Foreign Relations. *Compare* Restatement (Second) of Foreign Relations Law § 185 (1965) *with* H.R. Rep. 94-1487, at 19–20 (1976). Similarly, when Congress considered amending the FSIA to create limited human-rights exceptions, it did so because "the FSIA does not currently allow U.S. citizens to sue for gross human rights violations committed by a foreign sovereign on its own soil." H.R. Rep. 103-702, at 4 (1994). Yet according to the D.C. Circuit, Congress misunderstood its own statute, because the expropriation exception permitted such claims all along.[4]

f. Unsurprisingly in light of the above, the U.S. previously urged the Second Circuit to reject the

---

[4] These proposals, which were not adopted, were limited to claims by U.S. nationals. *See* Jennifer A. Gergen, Note, *Human Rights and the Foreign Sovereign Immunities Act*, 36 Va. J. Int'l L. 765, 794–98 (1996) (discussing proposals).

precise interpretation of the expropriation exception that the D.C. Circuit now adopts. App.141–48.

B. The D.C. Circuit's decision creates uncertainty as to the scope of the FSIA.

The D.C. Circuit's decision creates profound uncertainty as to the scope of the expropriation exception. Both the D.C. Circuit and Seventh Circuit have read the expropriation exception as permitting claims that do not amount to a violation of the international law of takings. But their approaches to the exception are meaningfully different. The Seventh Circuit test announced in *Abelesz* asks whether the alleged taking was "an integral part" of and "funded" some separate violation of international law, such as genocide. 692 F.3d at 675. The D.C. Circuit approach, by contrast, asks whether the alleged taking is *itself* an act of genocide or some comparable principle of international law. App.7.

This difference matters a great deal in a case like this one, where the alleged taking did not "fund" anything at all. To the contrary, in this case, the state of Prussia *spent* millions to purchase the Collection, which Germany still displays. Under the Seventh Circuit approach in *Abelesz*, there would be no jurisdiction here.

The law in other circuits is even less settled. Recently, the Ninth Circuit declined to decide "whether there is a 'genocidal takings' exception in the FSIA and, if so, whether the plaintiffs' claims qualify under

that exception." *Bakalian v. Cent. Bank of Republic of Turk.*, 932 F.3d 1229, 1235–36 (9th Cir. 2019). While the Ninth Circuit acknowledged *Helmerich*'s "directive that the substantive issue of foreign sovereign immunity . . . should generally be addressed as near to the outset of the case as is reasonably possible," it dismissed on statute of limitations grounds in order to avoid the "difficult exploration" of the scope of the expropriation exception. *Id.* Other circuits appear to continue to follow the view that the exception does not apply to domestic takings. *See, e.g.*, *Mezerhane v. Republica Bolivariana de Venez.*, 785 F.3d 545, 549–50 (11th Cir. 2015) (finding no jurisdiction under expropriation exception for domestic takings alleged to violate certain international human-rights treaties but declining to state whether alleged genocidal takings would provide jurisdiction).

This Court should resolve uncertainty on this "jurisdictional matter where clarity is particularly important," indeed "doubly important here where foreign nations and foreign lawyers must understand our law." *Helmerich*, 137 S. Ct. at 1321–22.

C. The D.C. Circuit's decision will have grave foreign-affairs consequences, giving rise to a wave of human-rights lawsuits against foreign states over events occurring entirely abroad.

As Judge Katsas warned below, the panel's decision is not only incorrect but likely to have "grave

consequences." App.107. These consequences strongly counsel granting certiorari.

1. The decision below permits suits against foreign sovereigns alleging that property was taken in violation of a fundamental and universal human-rights norm. App.7. Genocide-based takings claims could subject many foreign states to suit in the U.S. Nazi-era claims could be brought not only against Germany but also against other Axis powers, such as Italy, Hungary, Romania, Slovakia, and Bulgaria, as well as collaborating governments such as Vichy France. *See, e.g.*, *Abelesz*, 692 F.3d 661 (Hungary); *Fischer*, 777 F.3d 847 (Hungary); *Simon*, 812 F.3d 69 (Hungary); *Scalin v. Société Nationale des Chemins de Fer Français*, No. 15-CV-03362, 2018 WL 1469015 (N.D. Ill. Mar. 26, 2018) (France); *Freund v. Republic of Fr.*, 592 F. Supp. 2d 540 (S.D.N.Y. 2008), *aff'd sub nom. Freund v. Société Nationale des Chemins de fer Français*, 391 F. App'x 939 (2d Cir. 2010) (France). And allegations of genocide unrelated to the Second World War have been made against dozens of countries, large and small. After the decision below, many of those allegations will be made again, this time in a U.S. court. *See, e.g.*, *Bakalian*, 923 F.3d 1229 (claims against Turkey arising out of allegedly genocidal takings by the Ottoman Empire from ethnic Armenians).

The decision below shows how broadly the D.C. Circuit's rule sweeps. Respondents allege that their predecessors, professional art dealers, sold an art collection—stored outside Germany—for millions of Reichsmarks. They allege that their predecessors were

paid less than market value in the Sale and assert that they were deprived of their ability to make a living. That is dramatically different from *Abelesz*, *Fischer*, and *Simon*, where Holocaust victims claim seizures of their last remaining possessions as they were being transported to death camps in 1944–45.

The D.C. Circuit nevertheless concluded that Respondents alleged a genocidal taking. App.12–15. Similar allegations could be made regarding allegedly coercive commercial transactions in nearly any nation where allegations of genocide have been made. As Judge Katsas's dissent noted, left to stand, the D.C. Circuit decision will require U.S. courts to engage in "case-by-case adjudications of which commercial transactions were sufficiently coercive, unfair, and improperly motivated to be genocide," merely in order to establish jurisdiction over common-law property claims. App.108.

2. Equally importantly, as Judge Katsas recognized, the panel's reasoning "cannot be limited to genocide." *Id*. Under customary international law, other human-rights norms also constrain the conduct of a sovereign towards its own nationals, including slavery; extra-judicial killing; torture or other cruel, inhuman, or degrading treatment; prolonged arbitrary detention; and systematic racial discrimination. App.109 (citing Restatement Third § 702). Because most of these "can involve harms to property," they too "could be the subject of litigation through the expropriation exception." *Id*.

Each one of these norms could form the basis for a flood of federal claims. For example, the prohibition against systematic racial discrimination alone would expose foreign states and their political subdivisions to a wide variety of U.S. suits based on purely foreign conduct, such as claims that a program to develop a highway through eminent domain targeted neighborhoods inhabited by a particular racial group, or that a foreign municipality systematically underpaid owners of certain ethnic backgrounds for property acquired through eminent domain. It is hard to believe that Congress intended the expropriation exception to extend so far.

3. This Court has repeatedly made clear that federal statutes should not lightly be read to extend U.S. jurisdiction to foreign nations' actions in their own territory, particularly where such claims could precipitate diplomatic tension and provoke reciprocal assertions of jurisdiction against U.S. defendants abroad. *See Kiobel*, 569 U.S. at 109, 117 (warning against "the danger of unwarranted judicial interference in the conduct of foreign policy"); *Jesner*, 138 S. Ct. at 1404, 1407 (noting that "significant foreign-policy implications require the courts to draw a careful balance in defining the scope of actions under the ATS") (internal quotation marks omitted); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004) ("It is one thing for American courts to enforce constitutional limits on our own State and Federal Governments' power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or

its agent has transgressed those limits."). These concerns are not hypothetical. As this Court has noted, important U.S. allies registered objections even to the extraterritorial application of the ATS against *non*-sovereigns. *Kiobel*, 569 U.S. at 124 (noting objections to extraterritorial applications of the ATS by Canada, Germany, Indonesia, Papua New Guinea, South Africa, Switzerland, and the United Kingdom).

The decision below ignores those concerns, and will result in a wave of suits this Court has consistently rejected under the ATS. For example, in *Kiobel*, plaintiffs alleged that Dutch and British companies aided and abetted Nigeria in human-rights abuses. This Court held that the ATS did not provide jurisdiction because "all the relevant conduct took place outside the United States." 569 U.S. at 124. Under the decision below, plaintiffs could simply sue Nigeria itself for the same conduct. *Id.* at 112 (noting allegations that Nigerian forces were "destroying or looting property").

Similarly, suits that once targeted foreign officials will be brought instead against foreign governments to avoid the prudential considerations that attend suits against foreign officials. Cases such as *Matar v. Dichter*, 563 F.3d 9 (2d Cir. 2009), where plaintiffs sued the former director of Israel's General Security Service in connection with a military attack on an apartment building in Gaza, will instead be brought directly against Israel, seeking damages for property destroyed instead of deaths or injuries. And the court's first job—essential to its determination of jurisdiction—will be

to determine whether the allegations sufficiently allege that Israel committed war crimes or violated the international law of summary execution.[5] *See generally* John B. Bellinger III, "Lawsuits Force Foreign Governments to Navigate U.S. Court System," *The Washington Diplomat*, May 3, 2016 (noting the dozens of suits filed against foreign heads of state). Under the decision below, courts would have jurisdiction over such suits, and comity could not be a basis for dismissal.

4. In short, the decision below requires district courts to judge foreign sovereigns' actions towards their own nationals within their own borders. That endangers Executive Branch conduct of foreign affairs and risks reciprocal measures against the U.S. in foreign courts. Unsurprisingly, the Executive Branch has previously warned about such consequences when urging the Court not to construe the expropriation exception too broadly. *See* Brief of the U.S. as Amicus Curiae, *Bolivarian Republic of Venez. v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312 (2017) (No. 15-423), 2016 WL 4524346, at *32 (warning that a "permissive approach [to the expropriation exception] could result in adverse foreign-relations consequences and reciprocal adverse treatment of the United States in foreign courts"). As Judge Katsas noted below: "Imagine the United States' reaction if a European trial court undertook to adjudicate a claim for tens of billions of dollars for property losses suffered by a class of American victims of slavery or systemic racial discrimination."

---

[5] Petitioners express no opinion on the allegations in *Matar*.

App.109. This is exactly the type of suit the D.C. Circuit's decision permits to be brought against foreign states in U.S. courts.

II. THE D.C. CIRCUIT STRIPPED COURTS OF THEIR TRADITIONAL POWER TO ABSTAIN FROM CASES THAT RAISE SENSITIVE DIPLOMATIC ISSUES.

A. The D.C. Circuit's holding that courts may not abstain from suits against foreign sovereigns on international comity grounds creates an explicit circuit split and rejects the views of the Executive Branch.

Whatever the scope of the expropriation exception, courts traditionally have been able to dismiss cases against foreign sovereigns based on international comity. The D.C. Circuit held that this longstanding rule of abstention is not available in suits against foreign sovereigns, reasoning that because foreign sovereign immunity is a form of comity, and the FSIA codifies foreign sovereign immunity, comity cannot exist outside the FSIA's text. App.16–21; *see also Simon v. Republic of Hung.*, 911 F.3d 1172, 1180–81 (D.C. Cir. 2018) (reiterating the holding in a later case). That holding "create[d] a clear split with the Seventh Circuit . . . [and] disregard[ed] the views of the Executive Branch on a matter of obvious foreign policy sensitivity." App.98.

Contrary to the D.C. Circuit, the Seventh Circuit has twice held that "principles of international comity make clear" that plaintiffs alleging takings in violation of international human-rights law "must attempt to exhaust domestic remedies before foreign courts can provide remedies." *Fischer*, 777 F.3d at 856–59; *accord Abelesz*, 692 F.3d at 678–85 (7th Cir. 2012). It recognized that "[i]nternational law favors giving a state accused of taking property in violation of international law an opportunity to redress it by its own means, within the framework of its own legal system, before the same alleged taking may be aired in foreign courts." *Fischer*, 777 F.3d at 854 (internal quotation marks omitted).

The D.C. Circuit expressly rejected the Seventh Circuit's opposing view. App.19–20. It also rejected the "contrary position advanced by the United States," App.20, which "argued at length [as amicus] that dismissal on international comity grounds was consistent with the FSIA and can play a critical role in ensuring that litigation in U.S. courts does not conflict with or cause harm to the foreign policy of the United States." App.116 (internal quotation marks and alterations omitted).

B. The availability of comity-based abstention is an important question that warrants this Court's attention now.

Comity lets courts avoid trampling on foreign sovereigns' "unique interest in resolving" disputes about their own actions within their own borders affecting

their own nationals. *Republic of Phil. v. Pimentel*, 553 U.S. 851, 866 (2008). Accordingly, this Court recognizes "a comity interest in allowing a foreign state to use its own courts for [such] dispute[s] if it has a right to do so." *Id.* That comity interest aligns with "the basic premise of our legal system": that U.S. law "does not rule the world." *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2100 (2016). That premise "serves to avoid the international discord that can result when U.S. law is applied to conduct in foreign countries." *Id.* That discord grows greater when U.S. law is applied to conduct in foreign countries and the foreign sovereigns themselves are forced to appear in U.S. courts to defend themselves under U.S. law. *See Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493 (1983) ("Actions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States"). There is no question that Germany has such an interest here, where the claims touch and concern the darkest period in Germany's history, as well as Germany's contemporary responses to that history. In retiring comity, the decision below flouts Germany's "unique interest in resolving" disputes over allegations that a German state unlawfully took property from German nationals during the Nazi era. *See Pimentel*, 553 U.S. at 866.

The decision below also threatens the United States' own sovereign immunity in other nations' courts. International comity relies on reciprocity. As *Helmerich* observed, an expansive view of the expropriation exception will "produc[e] friction in our relations with

[other] nations and lead[] some to reciprocate by granting their courts permission to embroil the United States in expensive and difficult litigation." 137 S. Ct. at 1322 (internal quotation marks omitted). This Court has limited the reach of another jurisdictional statute, the ATS, on comity grounds because an expansive "view would imply that other nations . . . could hale our citizens into their courts for alleged violations of the law of nations occurring in the United States, or anywhere else in the world." *Kiobel*, 569 U.S. at 124.

Because the decision below radically expands the reach of the expropriation exception while eliminating comity's check, the D.C. Circuit fundamentally altered how courts handle diplomatically charged cases against foreign sovereigns. The decision below forces courts to pass judgment on a foreign sovereign's conduct toward its nationals within its own borders—without regard to the foreign sovereign's response to the alleged wrong, and without heed to the Executive Branch's view of the diplomatic consequences of passing judgment. *See Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003) (recognizing the Executive's "vast share of responsibility for the conduct of our foreign relations") (internal quotation marks omitted). This seismic shift will gravely affect U.S. foreign relations.

C. The decision strips foreign sovereigns of a protection available to non-sovereign foreign defendants.

The decision below gives foreign sovereigns less protection than private foreign defendants, who can seek dismissal on comity when accused of complicity in governmental human-rights abuses against foreign nationals in foreign nations. *See Sarei v. Rio Tinto, PLC*, 550 F.3d 822, 827–32 (9th Cir. 2008) (en banc) (holding that international comity may require abstention in case brought by Papua New Guineans against a mining company that allegedly violated their human rights in collaboration with the government); *Mujica v. AirScan Inc.*, 771 F.3d 580, 596–97 (9th Cir. 2014) (holding that international comity required abstention from case alleging that private defendants abetted the government's bombing of a Colombian village); *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1237–40 (11th Cir. 2004) (holding that international comity required abstention from claim that German banks abetted Nazi government takings); *see also Jesner*, 138 S. Ct. at 1430–31 (2018) ("Courts . . . can dismiss ATS suits . . . for reasons of international comity.") (Sotomayor, J., dissenting); *Kiobel*, 569 U.S. at 133 (2013) ("[L]imiting principles such as exhaustion . . . and comity . . . and giving weight to the views of the Executive Branch" help to "minimize international friction" in ATS cases.) (Breyer, J., concurring).

The decision below makes foreign sovereigns—alone—unable to invoke comity abstention. In D.C., it has now "become easier to sue foreign sovereigns than

to sue private foreign entities." *Fischer*, 777 F.3d at 859. As Judge Katsas warned, "most modern ATS claims could be recast as FSIA ones," and "after *Philipp*, recasting has significant advantages." App.117–18.

This case illustrates well why courts should retain the ability to abstain on comity grounds in suits against foreign sovereigns. Respondents' claims involve a sale of historical German reliquary art, by German art dealers, to a German state, in Germany. They allege that the sale, early in the Nazi era, occurred under duress. Such claims touch and concern Germany's unique responsibility to victims of the Holocaust. Germany has spent almost 75 years confronting that responsibility—paying reparations, establishing foundations to hold corporations accountable, working with international organizations for survivors, punishing Holocaust deniers, and developing mechanisms, consistent with international principles, to address restitution claims.

Respondents' own words make plain the risks of a world without comity. They attack the very fabric of Germany's restitution efforts, characterizing them as a "sham." Am. Compl. at 2, 54–69, ECF No. 14 (Jan. 14, 2016). They label Germany a "revisionist" nation suffering from a "stunning ignorance of history and a lack of respect for the victims of Nazi terror and the Holocaust." Appellees' Br. at 4, 48, *Philipp v. Fed. Republic of Ger.*, 894 F.3d 406 (D.C. Cir. 2018) (No. 17-7064), 2018 WL 5098952, at *4, *48. They call its Advisory Commission—which then included the nation's former president, former Constitutional Court chief justice,

and former parliamentary leader—a "discredited" body running a "sham" process to "rubber stamp" political desires and call it nothing more than "a political fig leaf to disguise Germany's hostility to bona fide restitution claims." *Id.* at 5, 35, 45. Comity concerns reach their apex when claims "arise from events of historical and political significance." *Pimentel*, 553 U.S. at 866. They are at their apex here.

D. The D.C. Circuit's holding on comity-based abstention is wrong.

The D.C. Circuit's holding that the FSIA "leaves no room" for comity-based abstention in favor of a foreign state's remedial mechanisms is wrong for four reasons. *See* App.20.

First, the court of appeals misunderstood *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250 (2014), which held that the FSIA provides a comprehensive framework for resolving any claim of sovereign immunity. Since the FSIA represents Congress's "comprehensive statement on foreign sovereign immunity," and it does not mention abstention defenses, the panel concluded that the FSIA implicitly foreclosed these defenses. App.17–19.

Yet, as Judge Katsas observed, "foreign sovereign *immunity*—which eliminates subject-matter *jurisdiction*—is distinct from non-jurisdictional defenses such as exhaustion and abstention." App.113. Indeed, *NML Capital* plainly stated that "we have no reason to doubt

that . . . [a court] may appropriately consider comity interests" when a sovereign *not* entitled to immunity must respond to discovery. 134 S. Ct. at 2258 n.6; *see also Altmann*, 541 U.S. at 714 (Breyer, J., concurring) (noting, in expropriation exception case, that "a plaintiff may have to show an absence of remedies in the foreign country sufficient to compensate for any taking").

Second, as Judge Katsas observed, App.110–11, the panel's preclusion of exhaustion and abstention defenses is inconsistent with the text of the FSIA, which provides that "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606. Here, "a private individual under like circumstances" would be a defendant facing ATS or diversity jurisdiction claims of aiding and abetting violations of international human rights. *Id.* As discussed above, this Court and its members have suggested, and two courts of appeals have held, that international comity permits dismissal of such claims against private defendants. *See Sosa*, 542 U.S. at 733 n.21; *Jesner*, 138 S. Ct. at 1430–31 (Sotomayor, J., dissenting); *Kiobel*, 569 U.S. at 133 (Breyer, J., concurring); *Sarei*, 550 F.3d at 827–32; *Mujica*, 771 F.3d at 596–97; *Ungaro-Benages*, 379 F.3d at 1237–40.

Third, this Court has required exhaustion when addressing claims against domestic sovereigns. For example, "considerations of comity direct that tribal remedies be exhausted" before claims can be brought

against a sovereign tribe in federal court. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 15–16 (1987). That's so even though the U.S. has a "well established" and "plenary" power to "restrict the retained sovereign powers of the Indian tribes." *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 500 (1979). It would make no sense to require exhaustion in the courts of domestic tribes whose sovereignty the U.S. can restrict, but not to require it in the courts of foreign nations whose sovereignty the U.S. cannot restrict.

Finally, the FSIA says nothing about the traditional doctrine of comity abstention and should not be read to displace it. *See Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952) ("Statutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles. . . ."). Exhaustion and abstention are common-law doctrines, like forum non conveniens, act of state, and political question. The FSIA mentions none of them, and none were silently swept away. *See, e.g.*, *Hwang Geum Joo v. Japan*, 413 F.3d 45, 48 (D.C. Cir. 2005) (dismissing case brought under FSIA on political question grounds). Moreover, eliminating comity necessarily means eliminating any Executive Branch role in assessing the propriety of suits against foreign sovereigns, a result that Congress should not be presumed to have intended without stating clearly.

III. THIS CASE PRESENTS AN EXCELLENT VEHICLE FOR THE COURT TO ADDRESS TWO INTERRELATED QUESTIONS WITH IMMEDIATE AND RECURRING SIGNIFICANCE FOR FOREIGN RELATIONS.

There are no jurisdictional or procedural issues that would bar the Court's review. The Court's resolution of the jurisdictional question in Petitioners' favor would be case dispositive. Its resolution of the comity abstention question in Petitioners' favor would either be case dispositive or provide critical guidance potentially dispositive on remand.[6]

There is nothing to be gained by waiting. Both questions presented were squarely addressed by the D.C. Circuit and discussed in detail in Judge Katsas's lengthy dissent from denial of rehearing en banc. The Executive Branch has presented its views on the comity abstention question in this case, and on the expropriation exception question in an earlier Second Circuit brief. The Seventh Circuit has addressed both. And because venue over foreign states is always proper in D.C., plaintiffs will gravitate to the D.C. Circuit's red carpet, making further decisions by other circuits unlikely.

[6] The record contains expert opinions showing that Respondents can seek relief in German courts. *See* ECF No. 18-2, reproduced at App.155–192; ECF No. 20-1, reproduced at App.193–214.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JONATHAN M. FREIMAN
Counsel of Record
TAHLIA TOWNSEND
BENJAMIN M. DANIELS
DAVID R. ROTH
WIGGIN AND DANa LLP
265 Church Street
P.O. Box 1832
New Haven, CT 06508-1832
(203) 498-4400
jfreiman@wiggin.com

DAVID L. HALL
WIGGIN AND DANA LLP
Two Liberty Place
50 S. 16th Street
Suite 2925
Philadelphia, PA 19102
(215) 998-8310

Counsel for Petitioners

September 16, 2019