Nos. 19-351 and 19-520

In the Supreme Court of the United States

FEDERAL REPUBLIC OF GERMANY, ET AL., PETITIONERS

v.

ALAN PHILIPP, ET AL.

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v.

FEDERAL REPUBLIC OF GERMANY, ET AL.

ON PETITION AND CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

The Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1330, 1441(d), 1602 *et seq.*, provides that a foreign state and its agencies and instrumentalities are immune from the jurisdiction of federal and state courts in civil actions, subject to limited exceptions. The "expropriation exception" applies in any case "in which rights in property taken in violation of international law are in issue" and there is a specified commercial nexus to the United States. 28 U.S.C. 1605(a)(3).

1. The questions presented in the petition for a writ of certiorari are:

(a) Whether the expropriation exception applies to claims related to a foreign state's violations of international human rights law in connection with the taking of the property of its own nationals.

(b) Whether a court may invoke the doctrine of international comity to abstain from exercising jurisdiction under the FSIA.

2. The question presented in the conditional cross-petition is whether a foreign state is subject to jurisdiction under the expropriation exception based not on any connection between the expropriated property and the foreign state's own commercial activities in the United States, but instead on a connection to the U.S. commercial activities of an agency or instrumentality of the foreign state.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Statutes:

Statute—Continued: Page

Miscellaneous:

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted, and the conditional cross-petition should be denied.

STATEMENT

1. The Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1330, 1441(d), 1602 *et seq.*, provides

the sole basis for jurisdiction in a civil suit in United States courts against a "'foreign state,'" which the Act defines to include "an agency or instrumentality of a foreign state." 28 U.S.C. 1603(a); see *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-435 & n.3 (1989). The FSIA provides that "a foreign state shall be immune" from the jurisdiction of U.S. courts, 28 U.S.C. 1604, unless it falls within one of the limited exceptions described in 28 U.S.C. 1605-1607. If one of those exceptions applies, "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.

This case involves the FSIA's expropriation exception to immunity from suit. That exception provides that a "foreign state shall not be immune from the jurisdiction of" U.S. courts in any case "in which rights in property taken in violation of international law are in issue" and there is a specified commercial nexus to the United States. 28 U.S.C. 1605(a)(3).

2. a. Respondents, who also are conditional cross-petitioners, are the heirs of several Jewish art dealers who owned firms in Frankfurt, Germany in the 1930s. 19-351 Pet. App. (Pet. App.) 2. In 1929, the firms formed a consortium and purchased a valuable collection of medieval relics known as the "Welfenschatz." *Id.* at 2-3. In 1935, the consortium sold a portion of the collection to the Nazi-controlled state of Prussia. *Id.* at 3, 40. After World War II, that portion was seized by U.S. troops and ultimately turned over to the Stiftung Preussischer Kulturbesizt (SPK), an instrumentality of Germany that was created after World War II to pre-

serve Prussia's cultural artifacts. *Id.* at 4. The collection is currently on display in an SPK-administered museum in Berlin. *Ibid.*

In 2014, respondents sought to recover the Welfenschatz, alleging that the consortium was forced to sell the collection to the Nazis at a greatly reduced value as part of the Nazi campaign to deprive Jews of valuable art and destroy Jewish livelihoods. Pet. App. 3-4, 39-41. Respondents first submitted their claim to an Advisory Commission established by Germany pursuant to an international declaration encouraging the development of alternative dispute resolution mechanisms for Nazi-era art claims. *Id.* at 4. After hearing testimony from five experts, the Commission issued a non-binding recommendation that "the sale of the Welfenschatz was not a compulsory sale due to persecution," so it did "not recommend the return of the Welfenschatz." *Id.* at 4-5, 44-45 (citation omitted).

b. Respondents then filed suit against petitioners Germany and the SPK in the District Court for the District of Columbia, asserting several common-law causes of action, including replevin, conversion, unjust enrichment, and bailment. Pet. App. 5. Petitioners moved to dismiss, arguing—among other things—that jurisdiction was improper and that international comity required the court to abstain. *Ibid.* The court denied the motion. *Ibid.*

3. The court of appeals affirmed in part and reversed in part. Pet. App. 24. It first determined that respondents had alleged that their property was "taken in violation of international law" under the FSIA's expropriation exception because respondents asserted that the forced sale of the Welfenschatz was part of the Nazi genocide. *Id.* at 6-15. The court explained that, in

Simon v. *Republic of Hungary*, 812 F.3d 127, 142-143 (D.C. Cir. 2016) (*Simon I*), it had held that the expropriation exception could apply to a claim that a sovereign had taken the property of its own nationals if the taking "amounted to the commission of genocide." Pet. App. 7 (citation omitted). The court determined that respondents' allegations were sufficient to establish that the forced sale of the Welfenschatz amounted to genocide because respondents had alleged that "the Nazis were motivated, at least in part, by a desire 'to deprive [German] Jews of the resources needed to survive as a people." *Id.* at 14 (quoting *Simon I*, 812 F.3d at 143).

The court of appeals next held that the district court lacked jurisdiction over Germany because the expropriation exception's "commercial nexus" requirement is satisfied with respect to a foreign state itself only when the expropriated property or property exchanged for such property is present in the United States. Pet. App. 15 (quoting *de Csepel* v. *Republic of Hungary*, 859 F.3d 1094, 1101 (D.C. Cir. 2017), cert. denied, 139 S. Ct. 784 (2019)). "[B]ecause the Welfenschatz is in Berlin" the court determined that Germany must be dismissed from the suit. *Id.* at 15-16. The court, however, concluded that the suit could continue against SPK, which satisfied the commercial-nexus requirement for agencies or instrumentalities of a foreign state. *Id.* at 16.

The court of appeals then rejected petitioners' contention that the district court should have abstained from exercising jurisdiction because principles of international comity suggest that respondents must first exhaust their claims in the German courts. Pet. App. 16-21. Invoking *Republic of Argentina* v. *NML Capital, Ltd.*, 573 U.S. 134 (2014), the court held that "'any sort of immunity defense" "must stand on the Act's

text,'" and "nothing in the text of the FSIA's expropriation exception requires exhaustion." Pet. App. 17 (citation omitted). The court rejected petitioners' assertion that they were not invoking comity to establish immunity, but rather to support the application of "a non jurisdictional common-law doctrine" favoring "exhaustion." *Id.* at 18 (citation omitted). The court recognized, however, that its position was contrary to that of the Seventh Circuit and the United States, which had recently explained its view that the FSIA "does not foreclose dismissal on international comity grounds." *Id.* at 20 (quoting U.S. C.A. Amicus Br. at 14-15, *Simon* v. *Republic of Hungary*, 911 F.3d 1172 (D.C. Cir. 2018) (No. 17-7146)).

After rejecting petitioners' other arguments, Pet. App. 21-24, the court of appeals remanded to the district court to permit the suit to proceed against the SPK, *id.* at 24.

4. The court of appeals denied rehearing en banc. Pet. App. 96-97, 119-136.

Judge Katsas would have granted rehearing. In his view, the expropriation exception applies only where a foreign state appropriates property in violation of the international law of takings, which does not apply to a state's taking of the property of its own nationals. Pet. App. 101-110. Judge Katsas also would have concluded that exhaustion and abstention are permissible "non-jurisdictional" defenses that may be invoked in FSIA cases. *Id.* at 113. Judge Katsas observed that the panel's decision created a "circuit split on a sensitive foreign-policy question" regarding comity-based abstention; that there was a danger that similar suits

would proliferate in the D.C. Circuit; and that the decision would force courts to inquire into foreign policy issues unsuitable for the Judicial Branch. *Ibid.*

DISCUSSION

The United States deplores the atrocities committed against victims of the Nazi regime, and supports efforts to provide them with remedies for the wrongs they suffered. Since the end of World War II, the United States has worked in numerous ways to achieve some measure of justice, and with the United States' encouragement and facilitation, the German government has provided significant relief to compensate Holocaust survivors and other victims of the Nazi regime. Nevertheless, in permitting respondents to proceed with their suit against the SPK, the court of appeals reached two erroneous conclusions regarding the application of the FSIA. Those erroneous holdings warrant this Court's review of the two questions presented in the petition for certiorari.

Respondents' conditional cross-petition does not, however, present a question warranting certiorari. Respondents challenge the court of appeals' holding that a court may not exercise jurisdiction over a foreign state under the expropriation exception where neither the property at issue, nor property exchanged for that property, is in the United States. The court's decision is correct; this Court denied certiorari review on the same issue last Term, *de Csepel* v. *Republic of Hungary*, 139 S. Ct. 784 (2019); and the conditional cross-petition should be similarly denied.

I. THE FIRST QUESTION REGARDING THE EXPROPRIATION EXCEPTION WARRANTS THIS COURT'S REVIEW

A. The Court Of Appeals' Decision Is Wrong

The FSIA's expropriation exception provides jurisdiction over claims "in which rights in property taken in violation of international law are in issue." 28 U.S.C. 1605(a)(3). To adhere to that text, a court may only exercise jurisdiction under the expropriation exception when it is satisfied that a claim involves an alleged "violation" of the principles of "international law" governing when "property" is unlawfully "taken." *Ibid.* As the "consensus view" has long recognized, a plaintiff cannot establish such a "'violation of international law'" when the property in question "belong[s] to a country's own nationals." *Republic of Austria* v. *Altmann*, 541 U.S. 677, 713 (2004) (Breyer, J., concurring); see also, *e.g.*, *Mezerhane* v. *República Bolivariana de Venezuela*, 785 F.3d 545, 549 (11th Cir. 2015), cert. denied, 136 S. Ct. 800 (2016); *Altmann* v. *Republic of Austria*, 317 F.3d 954, 968 (9th Cir. 2002), aff'd on other grounds, 541 U.S. 677 (2004); *de Sanchez* v. *Banco Cent. de Nicaragua*, 770 F.2d 1385, 1395-1398 (5th Cir. 1985).

1. The principles of the international law of expropriation are well-established. A state may not engage in the discriminatory expropriation of the property of aliens, and it may not expropriate foreign nationals' property without the payment of adequate compensation. See Restatement (Second) of Foreign Relations Law of the United States §§ 165-166, 185-187 (1965); see also Restatement (Third) of Foreign Relations Law of the United States § 712(1) (1987) (explaining that it is unlawful for a state to engage in a "taking" "of the property *of a national of another state*") (emphasis

added); see also Alice Ruzza, Expropriation and Nationalization, *reprinted in* Oxford Public International Law ¶ 2 (updated July 2017). As even the court of appeals below acknowledged, "an 'intrastate taking'—a foreign sovereign's taking of its own citizens' property—does not violate the international law of takings." Pet. App. 7 (citation omitted). A plaintiff therefore cannot establish that her property was "taken in violation of international law" as required by the expropriation exception if she asserts that her property was taken by her own government.

That understanding is reinforced by the House Report accompanying the FSIA, which explains that the expropriation exception was intended to govern "[e]xpropriation claims," involving "the nationalization or expropriation of property without payment" of the "compensation required by international law," as well as "takings which are arbitrary or discriminatory in nature," as when a state targets the property of foreign nationals while leaving the property of its own citizens undisturbed. H.R. Rep. No. 1487, 94th Cong., 2d Sess. 19-20 (1976) (House Report). In other words, the takings exception—like the international law of takings it references—is concerned with a state's treatment of the property of foreign nationals, and not with the treatment of the property of its own citizens.

2. The court of appeals, however, held that respondents could pursue their claims of an intrastate taking under the expropriation exception because they alleged that the forced sale of the Welfenschatz "amounted to the commission of genocide," which is itself a violation of international law. Pet. App. 7 (quoting *Simon* v. *Republic of Hungary*, 812 F.3d 127, 142 (D.C. Cir. 2016)). That conclusion is flawed for several reasons.

First, as Judge Katsas emphasized in his dissent from the denial of rehearing en banc, genocide is about the intentional "extermination of a national, ethnic, racial, or religious group." Pet. App. 102. Yet it is undisputed that the FSIA provides no jurisdiction over claims involving mass murder and the infliction of physical suffering. It would be odd for the FSIA to provide jurisdiction over claims of genocide only when, and to the extent, property is taken in relation to genocide, while extending no jurisdiction to other acts, including killing members of a group or otherwise inflicting conditions of life calculated to bring about a group's destruction. It is unlikely that Congress would have "address[ed] genocide as exclusively a property offense," *ibid.*, particularly because Congress has never enacted a cause of action for the sort of property-based genocide claims at issue in this case. Instead, plaintiffs assert claims such as common law conversion and unjust enrichment. See, *e.g.*, *id.* at 5 (enumerating respondents' common law claims).

Second, the court of appeals' broad reading of the expropriation exception ignores statutory history and context, which demonstrate that the FSIA was primarily intended to codify the "restrictive theory" of foreign sovereign immunity that the Executive Branch had adopted and applied for decades before the FSIA's enactment. *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 487 (1983). Under the restrictive theory, a foreign state is immune for its "public acts," *ibid.*, but not for those that are private or commercial. House Report 14; see also *Victory Transp. Inc.* v. *Comisaria Gen. de Abastecimientos y Transportes*, 336 F.2d 354, 360 (2d Cir. 1964), cert. denied, 381 U.S. 934 (1965). The bulk of the FSIA's immunity exceptions are therefore

"narrow ones[,] covering waiver, commercial activity in the United States," "torts causing injury in the United States, and arbitration." Pet. App. 104 (Katsas, J., dissenting from the denial of rehearing en banc) (citing 28 U.S.C. 1605(a)(1)-(6)).

The expropriation exception is one of the few deviations from the rule because it allows courts to exercise jurisdiction over sovereigns for "public acts" that constitute violations of the international law of expropriation, but that deviation was not intended to be a "radical departure." See *Bolivarian Republic of Venezuela* v. *Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1320 (2017) (citation and emphasis added). The exception therefore should not be understood to cover the claims in this case because, as *Helmerich* observed, "[a] sovereign's taking or regulating of its own nationals' property within its own territory is often just the kind of foreign sovereign's public act (a 'jure imperii') that the restrictive theory of sovereign immunity ordinarily leaves immune from suit." *Id.* at 1321 (emphasis omitted). The *Helmerich* Court did say that "there are fair arguments to be made that a sovereign's taking of its own nationals' property sometimes amounts to an expropriation that violates international law, and the expropriation exception provides that the general principles of immunity for these otherwise public acts should give way." *Ibid.* But the Court did not resolve the issue or address the circumstance in which such a proposition might apply.

Third, the court of appeals determined that the expropriation exception applies in this case in part based on inferences drawn from two post-FSIA statutes. Pet. App. 9-10, 13-14 (citing the Holocaust Expropriated Art Recovery Act of 2016 (HEAR Act), Pub. L. No. 114-308,

§ 2, 130 Stat. 1524, and the Holocaust Victims Redress Act, Pub. L. No. 105-158, Tit. II § 201, 112 Stat. 17). But while those statutes demonstrate Congress's concern with art seizures that occurred as part of the Holocaust, they do not expand the expropriation exception or create a cause of action in U.S. courts for respondents' claims. To the contrary, the HEAR Act expresses the "sense of Congress" that "the use of alternative dispute resolution" mechanisms "established for this purpose" is likely to "yield just and fair resolutions in a more efficient and predictable manner" than litigation. § 2(8), 130 Stat. 1525. Further, while a 2016 amendment to the FSIA exempts "Nazi-era claims" from a general grant of immunity for "certain art exhibition activities" in the United States, the exemption does not purport to broaden the existing statutory basis for jurisdiction over Nazi-era claims. 28 U.S.C. 1605(h)(2)(A). Instead, it states that the new grant of immunity will not apply to cases in which a plaintiff asserts jurisdiction under the expropriation exception *and* "rights in property taken in violation of international law are in issue within the meaning" of that exception. *Ibid.* In other words, the exception merely protects jurisdiction over Nazi-era claims to the extent they were already covered by the expropriation exception. As explained in this brief, the expropriation exception did not already cover claims such as those at issue here, although it would cover a claim based on a violation of the international law of takings by a person who was a national of a country other than the one that took her property.

Fourth, to the extent there is ambiguity in the expropriation exception, it should be resolved against jurisdiction. This Court has recognized the serious "risks of adverse foreign policy consequences" when U.S. courts

attempt to set "limit[s] on the power of foreign governments over their own citizens," *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 727-728 (2004), and it has instructed that "[w]hen foreign relations are implicated, it 'is even more important . . . "to look for legislative guidance before exercising innovative authority over substantive law."'" *Hernandez* v. *Mesa*, 140 S. Ct. 735, 747 (2020) (quoting *Jesner* v. *Arab Bank, PLC*, 138 S. Ct. 1386, 1403 (2018) (opinion of Kennedy, J.)). Those risks are implicated where, as here, Germany, with support from the United States, has provided alternative mechanisms for resolving claims like those at issue here. The expropriation exception cannot be said to provide a "clear mandate" for courts to exercise jurisdiction over such domestic takings claims. *Sosa*, 542 U.S. at 728.

B. The Scope Of The Expropriation Exception Warrants The Court's Review

Both parties acknowledge (19-351 Pet. (Pet.) 23-24; 19-351 Resp. Br. in Opp. (Br. in Opp.) 23 n.10) that the courts of appeals have adopted varying approaches to the application of the expropriation exception. That uncertainty regarding the scope of the exception warrants this Court's intervention. And the issue is important because of the foreign policy implications of the reading of the expropriation exception adopted below.

For decades after the enactment of the FSIA, there was a general "consensus" that the expropriation exception does not cover domestic takings. *Altmann*, 541 U.S. at 713 (Breyer, J., concurring). Multiple circuits endorsed that understanding. See *FOGADE* v. *ENB Revocable Trust*, 263 F.3d 1274, 1294 (11th Cir. 2001) ("[a]s a rule, when a foreign nation confiscates the property of its own nationals, it does not implicate principles

of international law"); *Altmann*, 317 F.3d at 968 (9th Cir.); *de Sanchez*, 770 F.2d at 1395-1398 (5th Cir.).

Then, in 2012, the Seventh Circuit permitted plaintiffs to bring domestic takings claims against an instrumentality of the Hungarian government in connection with the Holocaust. *Abelesz* v. *Magyar Nemzeti Bank*, 692 F.3d 661, 675 (7th Cir. 2012). The Seventh Circuit explained that jurisdiction was permissible because plaintiffs alleged that the takings "effectuated genocide" by providing "fund[ing]" and "impoverish[ing] those who survived." *Ibid.* As the case below reflects, the D.C. Circuit has also recently permitted genocide-related takings claims to proceed, although its reasoning diverges from that of the Seventh Circuit because it holds that jurisdiction is appropriate only where the takings themselves "amounted to the commission of genocide." *Simon I*, 812 F.3d at 142; see also Pet. App. 7.

No other circuit has adopted the reasoning of either the Seventh or the D.C. Circuit,[1] and it is unlikely that other courts of appeals will have many opportunities to do so in the future. Because the D.C. Circuit has both held that it is permissible to exercise jurisdiction over some domestic takings claims and prohibited courts from abstaining under the doctrine of international comity, see Part II, *infra*, plaintiffs may prefer to bring their suits in the District of Columbia going forward. The FSIA's venue provision, 28 U.S.C. 1391(f)(4), which provides that a civil action may always be brought "in

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[1] Indeed, the Eleventh Circuit recently rejected an argument that because "alleged confiscations violated treaty-based 'human rights law,'" they also "violated international law," although it observed that genocide cases are "distinguishable." *Mezerhane*, 785 F.3d at 548, 551.

the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof," facilitates that preference. See Pet. 14. The question is therefore ripe for this court's review.

The question's resolution also has important consequences. As Judge Katsas observed, the D.C. Circuit's understanding of the expropriation exception seems to require federal courts more generally to determine the existence and scope of alleged genocides, embroiling courts in sensitive foreign policy issues that are better left for the political branches. Pet. App. 105 (Katsas, J., dissenting from the denial of rehearing en banc). Moreover, because the D.C. Circuit's interpretation allows courts to consider allegations against a sovereign brought by its own citizens, it may have significant foreign policy implications. See pp. 20-21, *infra*.

Respondents contend (Br. in Opp. 22-24) that this case is not an appropriate vehicle because even if the expropriation exception is interpreted to be consistent with the international law governing takings, jurisdiction would still lie because, at the time of the alleged expropriation, the members of the consortium that sold the Welfenschatz were not recognized as German citizens. But respondents have not previously disputed that the facts alleged would constitute a domestic taking, see, *e.g.*, 19-351 Pet. Reply Br. 8, and in any event, the alleged taking occurred before the members of the consortium would have been deprived of their citizenship. See 19-520 Pet. Supp. App. 59-60.

II. THE COMITY QUESTION WARRANTS THIS COURT'S REVIEW

A. The Court Of Appeals' Decision Is Wrong

1. a. This Court has long recognized the doctrine of international comity, which permits U.S. courts to take account of the "legislative, executive or judicial acts of another nation," giving "due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." *Hilton* v. *Guyot*, 159 U.S. 113, 164 (1895). International comity discourages a U.S. court from "reexamin[ing]" the "validity of the acts of [a foreign] sovereign State" in a way that could "'imperil the amicable relations between governments.'" *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 304 (1918).

One strand of comity is "adjudicatory comity," under which a U.S. court may abstain from exercising jurisdiction in deference to adjudication in a foreign forum. See *Mujica* v. *AirScan Inc.*, 771 F.3d 580, 599 (9th Cir. 2014), cert. denied, 136 S. Ct. 690 (2015); see also, *e.g.*, *GDG Acquisitions, LLC* v. *Government of Belize*, 749 F.3d 1024, 1030-1032 (11th Cir. 2014); *Royal & Sun Alliance Ins. Co.* v. *Century Int'l Arms, Inc.*, 466 F.3d 88, 92–94 (2d Cir. 2006). Adjudicatory comity is typically invoked "when a sovereign which has a legitimate claim to jurisdiction concludes that a second sovereign also has a legitimate claim to jurisdiction under principles of international law." *Mujica*, 771 F.3d at 598 (citation omitted).

b. Like sovereign immunity, the doctrine of international comity helps to ensure that United States courts afford proper respect to foreign sovereigns and their interests. But unlike sovereign immunity, which is afforded in accordance with the statutory mandates set

out in the FSIA, international comity is a doctrine of "prudential abstention," rooted in the "common law," *Mujica*, 771 F.3d at 597-598. Courts therefore have discretion to abstain based on the weighing of interests at stake in a particular case. See, *e.g.*, *Republic of Philippines* v. *Pimentel*, 553 U.S. 851, 866 (2008). Sometimes the Executive Branch may assist the courts by providing its view that abstention is appropriate in a particular case. See *Altmann*, 541 U.S. at 701-702 (recognizing that, when the FSIA does not confer immunity, the State Department's view that exercising jurisdiction would be harmful to foreign policy "might well be entitled to deference"). At other times, a court may itself determine whether international comity favors abstention by examining the factors that are typically relevant in a comity analysis: "the particular facts, sovereign interests, and likelihood that resort to [those] procedures [of the foreign state] will prove effective." *Société Nationale Industrielle Aérospatial* v. *United States District Court*, 482 U.S. 522, 544 (1987).

Adjudicatory comity also differs from sovereign immunity in that the doctrine may be applied even when the sovereign is not itself a party to the litigation. International comity concerns may arise in any "case[] touching the laws and interests of other sovereign states," *Société Nationale*, 482 U.S. at 543 n.27. Accordingly, courts may abstain in favor of a foreign forum even when the litigation is between private parties. *E.g.*, *Ungaro-Benages* v. *Dresdner Bank AG*, 379 F.3d 1227, 1237-1238 (11th Cir. 2004); *Mujica*, 771 F.3d at 614-615. Comity abstention is thus akin to other common-law abstention principles applied by federal courts, such as *forum non conveniens*, and federalism-based abstention. See *Quackenbush* v. *Allstate Ins. Co.*,

517 U.S. 706, 716, 723 (1996) (recognizing that a federal court may decline to exercise jurisdiction in deference to state interests).

c. The FSIA contemplates that these non-immunity defenses will remain available to foreign states even when a U.S. court has jurisdiction because an exception to sovereign immunity applies. Under 28 U.S.C. 1606, a foreign state "shall be liable in the same manner and to the same extent as a private individual under like circumstances" for any claim for which a foreign state is not immune from suit. Because "private individual[s]" may invoke common law non-immunity doctrines, foreign states must be allowed to invoke them as well. Cf. *Verlinden*, 461 U.S. at 490 n.15 (the FSIA "does not appear to affect the traditional doctrine of *forum non conveniens*").

2. The court of appeals therefore erred in concluding that the FSIA "leaves no room" for courts to abstain under the doctrine of international comity. Pet. App. 20. Petitioners should be permitted to invoke that doctrine in support of their assertion that the district court should decline to exercise jurisdiction over respondents' claims until they have been exhausted in the German courts. There are several flaws in the court of appeals' reasoning that led it to conclude otherwise.

a. To begin, the court of appeals was mistaken in its assertion that *Republic of Argentina* v. *NML Capital, Ltd.*, 573 U.S. 134 (2014), precludes the assertion of comity defenses in cases governed by the FSIA. Pet. App. 17-18. In *NML Capital*, the Court addressed "[t]he single, narrow question" of "whether the [FSIA] specifies a different rule [for post-judgment execution discovery] when the judgment debtor is a foreign state." 573 U.S. at 140. The Court held that "any sort of immunity defense made by a foreign sovereign

in an American court must stand on the Act's text," and that the FSIA does not "forbid[] or limit[] discovery in aid of execution of a foreign-sovereign judgment debtor's assets." *Id.* at 141-142. But the Court also expressly recognized that, even where there is jurisdiction under the FSIA, a court "may appropriately consider comity interests" relevant to other non-immunity determinations in the litigation. *Id.* at 146 n.6 (making that point regarding the scope of discovery). Thus, contrary to the court of appeals' understanding, *NML* leaves ample "room" for "common-law" doctrines based on "considerations of comity." Pet. App. 20.

b. The court of appeals also erred in suggesting that Congress was unlikely to have intended for courts to rely on comity principles to require exhaustion because the FSIA terrorism exception sets out specific circumstances in which a plaintiff must "afford[] [a] foreign state a reasonable opportunity to arbitrate" before bringing suit. 28 U.S.C. 1605A(a)(2)(A)(iii). The court reasoned that, by requiring exhaustion in certain circumstances, Congress meant to foreclose it in all others. Pet. App. 18-19. But Congress added the terrorism exception to the FSIA some 20 years after the statute's initial enactment. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221(a), 110 Stat. 1241. There is no reason to think that it enacted a limited pre-litigation arbitration requirement for terrorism cases as an indirect mechanism to foreclose the availability of comity-based exhaustion defenses more generally. Rather, Section 1605A's narrow arbitration requirement comfortably coexists with the principle that courts have discretion to abstain when comity favors exhaustion in a foreign forum.

c. The court of appeals' decision also appears to have been influenced by a broader misunderstanding of the nature of comity abstention. The court rejected the proposition that comity-based abstention draws support from "the well-established rule that exhaustion of domestic remedies is preferred in international law as a matter of comity.'" Pet. App. 19 (quoting *Fischer* v. *Magyar Államvasutak Zrt.*, 777 F.3d 847, 859 (7th Cir.), cert. denied, 135 S. Ct. 2817 (2015)). In the D.C. Circuit's view, that "well-established rule" has no application in a case involving private plaintiffs because—under international law—the rule only applies in "nation vs. nation litigation." *Ibid.* (citations omitted). But comity abstention is a doctrine of *domestic* U.S. "common law" that is not limited to the precise application of *international*-law exhaustion principles. *Mujica*, 771 F.3d at 597. To be sure, the common-law doctrine is informed by principles of international law favoring a litigant's exhaustion of "remedies available in the domestic legal system." *Sosa*, 542 U.S. at 733 n.21. But courts are free to apply comity-based abstention in contexts beyond those contemplated under international law. See Pet. App. 111 (Katsas, J., dissenting from the denial of rehearing en banc) (explaining how exhaustion has been invoked in ATS cases).

B. Whether International Comity Is An Available Defense Under The FSIA Warrants This Court's Review

1. Review is necessary to resolve the "split [of authority] on [this] sensitive foreign-policy question." Pet. App. 115 (Katsas, J., dissenting from the denial of rehearing en banc). As the D.C. Circuit explicitly acknowledged, its rejection of the viability of comity-based abstention in FSIA cases conflicts with the posi-

tion of the Seventh Circuit, which has repeatedly invoked "principles of international comity" in requiring plaintiffs to "exhaust" their "domestic remedies" against foreign sovereigns before pressing their claims in U.S. courts. *Fischer*, 777 F.3d at 852; see *Abelesz*, 692 F.3d at 678-685. Contrary to the decision below, the Seventh Circuit has emphasized that abstaining to allow plaintiffs to take advantage of a foreign forum is not a form of sovereign immunity: "If plaintiffs attempt to bring suit in [a foreign forum] and are blocked arbitrarily or unreasonably, United States courts could once again be open to these claims." *Fischer*, 777 F.3d at 865-866.[2] Moreover, the conflict is ripe for this Court's review because—as is true with respect to the first question presented, see p. 13, *supra*—the FSIA's venue provision, 28 U.S.C. 1391(f)(4), reduces the prospect of substantial further percolation in the courts of appeals.

2. Review is also warranted because the United States has important foreign-policy interests in ensuring that federal courts have the ability to abstain under the doctrine of international comity. Litigation against foreign sovereigns frequently raises foreign-policy concerns, and U.S. interests may be particularly sensitive where the claims allege serious human rights abuses on the part of a foreign state. Moreover, as relevant here,

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[2] The Seventh Circuit, however, mistakenly described its application of comity principles as "impos[ing] an *exhaustion requirement* that limits where plaintiffs may assert their international law claims." *Fischer*, 777 F.3d at 857 (emphasis added). As noted, p. 19, *supra*, international-comity-based abstention is better characterized as a prudential doctrine recognizing that, in a particular case, a foreign sovereign may have a greater interest in resolving the dispute than the United States, and that U.S. interests may be better served by deferring to that foreign sovereign's interests.

the United States has urged foreign partners to establish appropriate redress and compensation mechanisms for Holocaust victims. See, *e.g.*, Bureau of European and Eurasian Affairs, U.S. Dep't of State, *Prague Holocaust Era Assets Conference: Terezin Declaration* (June 30, 2009), https://2009-2017.state.gov/p/eur/rls/or/126162.htm (emphasizing importance of property restitution and compensation, and supporting national programs to address Nazi-era property confiscations). The exercise of jurisdiction by U.S. courts in some such cases may undermine the ability of the United States to advance its foreign-policy objectives.

Indeed, the United States itself sometimes makes a submission to a court to express its view that comity counsels abstention in a particular case, and this Court has suggested that those views "might well be entitled to deference." *Altmann*, 541 U.S. at 701-702. And, while respondents contend (Br. in Opp. 35-39) that this case is not a suitable vehicle because a court would not abstain here, that assertion is premature. No court has yet had an opportunity to consider whether comity counsels in favor of applying a prudential exhaustion requirement in this case, because the lower courts erroneously held that comity abstention was categorically unavailable. Pet. App. 20, 83.

3. The question presented in this case is also raised by petitioners in *Republic of Hungary* v. *Simon*, No. 18-1447 (filed May 16, 2019). The United States recommends that the Court grant the petition for a writ of certiorari in this case and hold the petition in *Simon* because this case is the better vehicle for this Court's review. See U.S. Amicus Br. at 12-13, *Simon*, *supra* (No. 18-1447). Petitioners in *Simon* did not raise the juris-

dictional question of whether a state's taking of property from its own nationals satisfies the requirements of the FSIA's expropriation exception. To ensure that both issues are before the Court, the United States recommends granting review in this case. If, however, the Court decides to instead grant review in *Simon*, the United States recommends holding the petition in this case pending *Simon*'s disposition.

III. THIS COURT SHOULD DECLINE TO REVIEW THE QUESTION PRESENTED IN THE CONDITIONAL CROSS-PETITION

The conditional cross-petition presents the question whether a foreign state is subject to suit under the FSIA's expropriation exception if neither the expropriated property, nor any property exchanged for such property, is present in the United States. This Court declined to grant certiorari on the same question just last term in *de Csepel*, *supra*, and there have been no meaningful developments in the interim. Accordingly, this Court's review is not warranted.

1. The FSIA's expropriation exception offers two distinct tests to determine whether there is an adequate nexus between the defendant and the United States. The first nexus test requires that the property at issue, or property exchanged for the property at issue, be present in the United States in connection with commercial activities "carried on in the United States by the foreign state" itself. 28 U.S.C. 1605(a)(3). The second nexus test is less demanding and requires that a foreign state's agency or instrumentality be "engaged in a commercial activity in the United States," but does not require that the property at issue be in the U.S. or be used in the agency or instrumentality's U.S. commercial activities. *Ibid.*

As the court of appeals correctly recognized, Pet. App. 15-16, and as the United States explained in its invitation brief in *de Csepel*, U.S. Amicus Br. at 8-18, Section 1605(a)(3)'s text and structure are most naturally read to establish two distinct tracks for obtaining jurisdiction, depending on the entity whose immunity is at stake. If that entity is the foreign state itself, then the stricter "foreign state" nexus must be satisfied; if that entity is an agency or instrumentality, then the looser "agency or instrumentality" nexus must be satisfied.

2. As the United States also explained in its brief in *de Csepel*, U.S. Amicus Br. at 18-19, the D.C. Circuit's position on this question does not warrant review because it is consistent with the only other court of appeals decision to discuss the question, albeit in dicta. *Garb* v. *Republic of Poland*, 440 F.3d 579, 589 (2d Cir. 2006). No other court of appeals has issued an opinion on the question in the interim. Rather, in asserting that review is proper (19-520 Pet. 16-17), respondents cite inapposite cases that were decided before this Court denied review in *de Csepel*. See U.S. Amicus Br. at 18-19.

CONCLUSION

The petition for a writ of certiorari should be granted and the conditional cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

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