App. No. ___

In the Supreme Court of the United States

Republic of Hungary, a foreign state, et al.,

Petitioners,

v.

David L. de Csepel, Angela Maria Herzog, and Julia Alice Herzog,

Respondents.

PETITIONERS' APPLICATION TO EXTEND TIME
TO FILE PETITION FOR A WRIT OF CERTIORARI

To the Honorable Chief Justice Roberts, as Circuit Justice for the United States Court of Appeals for the District of Columbia Circuit:

Pursuant to 28 U.S.C. § 2101(c) and Supreme Court Rules 13.5, 22, and 30.3, petitioners Museum of Fine Arts, Hungarian National Gallery, Museum of Applied Arts, and Budapest University of Technology and Economics (the "Museums"), and Magyar Nemzeti Vagyonkezelő Zrt. ("MNV") (collectively "petitioners") respectfully request that the time to file a Petition for a Writ of Certiorari in this case be extended for thirty days to and including September 7, 2022. The court of appeals issued its opinion on March 8, 2022. *See* App. A, infra. The court denied a timely petition for rehearing and rehearing en banc on May 10, 2022. *See* App. B, infra. Absent an extension of time, the petition therefore would be due on August 8, 2022. Petitioners are

filing this application at least ten days before that date. *See* Sup. Ct. R. 13.5. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review this case.

Background

1. This case involves adverse-ownership claims to artworks, once attributed to the collection of Baron Mór Lipót Herzog, that have been in petitioners' possession and on public display in Budapest for approximately fifty to seventy years. Following the death of Baron Herzog (in 1934) and his wife (in 1940), the Herzog collection was divided among their three children: Erzsébet (Herzog) Weiss de Csepel, István Herzog, and András Herzog.

During World War II, in response to widespread looting of Jewish property, the Herzogs "attempted to save their art works from damage and confiscation by hiding the bulk of [them] in the cellar of one of the family's factories." App. A at 4. In March 1944, Germany invaded Hungary. *Ibid.* Shortly thereafter, "the Hungarian government and their Nazi[ ] collaborators discovered the hiding place" and confiscated the artworks. *Ibid.* According to the operative complaint, some artworks were taken Adolf Eichmann's headquarters in Budapest for his inspection and eventual transport to Germany. *Ibid.* The remaining artworks were handed over by the Hungarian government to the Museum of Fine Arts. *Ibid.*

Erzsébet Weiss de Csepel fled Hungary with her children, eventually settling in the United States, where she became a U.S. citizen in 1952. *Ibid.* István Herzog, who had remained in Hungary, died in 1966. App. A at 4-5. András Herzog died on the Eastern Front in 1943. His daughters, Angela and Julia Herzog, fled to Argentina and eventually settled in Italy. *Ibid.*

In the years between the end of World War II and the start of Communist rule (1946-1948), the post-war coalition government in Hungary made efforts to return property confiscated during the Holocaust to its rightful owners. In 1948, a one-party Communist dictatorship came

to power, beginning a period during which Hungary did not recognize individual property rights. After the fall of Communism in 1989, Erzsébet Weiss de Csepel obtained from Hungary several artworks that once belonged to the Herzog Collection. *de Csepel v. Republic of Hungary*, 714 F.3d 591, 595 (D.C. Cir. 2013).

In 1999, Ms. Nierenberg, Ms. Weiss de Csepel's daughter, filed suit in Hungary. To ensure that the interests of all three Herzog heirs were properly represented, the heirs of András and István Herzog were brought into the lawsuit as co-defendants. "The Budapest Metropolitan Court initially found in Martha Nierenberg's favor, ordering that all but one of the artworks be returned to her." *Id.* at 596. After several appeals and many more years of litigation, the Metropolitan Appellate Court dismissed the action in 2008, rejecting Ms. Nierenberg's claims under several different theories, including that: (1) a 1973 bilateral agreement between Hungary and the United States extinguished Ms. Nierenberg's claims, and (2) Hungary was the lawful owner of certain artworks under Hungarian law. *Ibid.*

2. In 2010, plaintiffs David L. de Csepel (grandson of Ms. Weiss de Csepel and nephew of Martha Nierenberg) and Italian citizens Angela and Julia Herzog (collectively "Respondents") filed a complaint, seeking the release of forty-four artworks. Defendants Hungary and the Museums moved to dismiss the complaint, asserting that no exception to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1330 *et seq.* (the "FSIA"), applied to strip them of their presumptive sovereign immunity. The district court granted in part and denied in part petitioners' motion. *de Csepel v. Republic of Hungary*, 808 F. Supp. 2d 113 (D.D.C. 2011). The district court found that the complaint alleged "substantial and non-frivolous" claims of a taking in violation of international law. *Id.* at 130. The court also recognized that international-comity

applied to claims litigated previously in Hungary, dismissing claims to the eleven artworks litigated by Martha Nierenberg. *See id.* at 144-145. Both parties appealed.

The court of appeals reversed the international comity finding as premature. *de Csepel*, 714 F.3d at 598-99. The court affirmed the denial of the remainder of the motion to dismiss, finding that the FSIA's commercial-activity exception might provide jurisdiction. *Id*. at 601.

Following completion of fact depositions and the exchange of thousands of documents by the parties, Hungary and the Museums filed a renewed motion to dismiss the complaint. The district court granted the motion in part, recognizing that it could not take jurisdiction over Hungary and the Museums under the FSIA's commercial-activity exception because Respondents could not demonstrate the requisite "direct effect" in the United States. The district court dismissed claims to two artworks that were not expropriated during World War II and concluded that the FSIA's expropriation exception allows it to take jurisdiction over Hungary and the Museums as to the remaining forty-two artworks. *de Csepel v. Republic of Hungary*, 169 F. Supp. 3d 143, 148 (D.D.C. 2016). Hungary and the Museums appealed.

Affirming the district court in part, the court of appeals found that the expropriation exception's commercial-activity nexus requirement may allow jurisdiction over the Museums. App. A at 6. Recognizing that the district court may lack jurisdiction over claims to artworks: (1) physically and legally returned to the family after the close of World War II, or (2) taken from Ms. Weiss de Csepel after she became a U.S. citizen, the court of appeals directed the district court to consider whether it lacked jurisdiction over certain artworks. App. A at 6.

The court of appeals examined separately whether either clause of the commercial-activity nexus requirement could provide jurisdiction over Hungary. Acknowledging that the first clause could not apply, as the claimed property is not located in the United States, the panel

split as to proper interpretation of the second clause. The majority considered, analyzed, and held that the second clause could not apply to strip Hungary of its presumptive sovereign immunity. *de Csepel v. Republic of Hungary*, 859 F.3d 1094, 1106-07 (D.C. Cir. 2017).

The majority explained that the FSIA and interpretive case law distinguish between sovereigns and their agencies or instrumentalities. *Id.* at 1107. Because Respondents' "expansive reading of the expropriation exception makes little sense given that the provision targets specific expropriated property," *id.* at 1108, and because no other FSIA exception applied, the majority remanded the action with specific instructions for the district court to dismiss Hungary, *id.* at 1110. The court of appeals remanded the action to the district court with specific instructions to allow Respondents leave to amend their complaint in light of the Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, 130 Stat. 1524 (2016). *de Csepel*, 859 F.3d at 1110.

3. On December 18, 2017, Respondents filed an amended complaint. The amended complaint named Hungary, asserting (for the first time in this lengthy litigation) that a court can take jurisdiction over Hungary under a principal/agent theory. Dist. Ct. Dkt. 141. The amended complaint named a new defendant long known to Respondents—MNV, the Hungarian State property manager—but no new allegations.

On February 16, 2018, Respondents file a petition for a writ of certiorari with this Court, seeking review of the court of appeals determination that the FSIA's expropriation exception did not apply to permit it to exercise jurisdiction over Hungary. *de Csepel, et al. v. Republic of Hungary, et al.,* No. 17-1165. Hungary and the Museums filed a brief in opposition on May 21, 2018. This Court invited the Solicitor General to file a brief expressing the views of the United States. *de Csepel v. Republic of Hungary*, 138 S. Ct. 2696 (2018). On December 4, 2018, the

Solicitor General filed a brief recommending that this Court deny the petition because: (1) the court of appeals decision is correct, and (2) this Court's review is not warranted. This Court denied Respondents' petition. *de Csepel v. Republic of Hungary*, 139 S. Ct. 784 (2019).

On February 9, 2018, shortly before Respondents filed their petition with this Court, petitioners moved to dismiss the amended complaint asserting, *inter alia*, that (1) under Federal Rule of Civil Procedure 19, the case cannot proceed because Hungary—the owner of the artworks and the source of Plaintiffs' purported injuries—is a required and indispensable party and (2) that international comity (exhaustion) warranted dismissal. On May 11, 2020, the district court rejected Plaintiffs' argument that it could take jurisdiction over Hungary, but found that MNV was an agency of instrumentality over which the court could exercise jurisdiction. Petitioners appealed the latter finding and on July 27, 2022, the district court certified the remainder of its decision for interlocutory review under 28 U.S.C. § 1292(b).

The court of appeals affirmed the district court, recognizing that Hungary is a "required" party under Rule 19(a)because it "'claims an interest relating to the subject of the action' because it asserts ownership rights over the disputed artworks and seeks to avoid liability on the family's claims that Hungary unlawfully took them." App. A at 16-17. The panel also recognized the very real potential injury to Hungary with respect to *both* Plaintiffs' tort and contract claims. App. A at 17 ("Because Hungary and the family stake out 'opposing irreconcilable claims to the same' property, resolving this litigation in Hungary's absence undoubtedly could impede Hungary's ability to protect its interests in such property."); App. A at 18 ("The contract-based bailment claims have similar potential to affect Hungary's interests…. Impaired in its ability to protect interests…it qualifies as a 'required' party for purposes of Rule 19(a)."). The court of appeals nevertheless reasoned that the action could go forward without Hungary because that

court can exercise jurisdiction over *petitioners*, even though none own the claimed property and any claim against them depends on finding that Hungary's actions were unlawful. App. A 19-30.

The court of appeals denied the petitioners' petition for panel rehearing and rehearing en banc. App. B.

Reasons for Granting an Extension of Time

The time to file a Petition for a Writ of Certiorari should be extended for thirty days, to September 7, 2022, for several reasons:

1. The forthcoming petition is likely to be granted. First, the decision conflicts with this Court's holdings in Republic of *Philippines v. Pimentel*, 553 U.S. 851 (2008). Focusing on the Rule 19(b) factors, the Ninth Circuit found that a class action seeking the recovery of assets could go forward even though the Philippines was an interested, immune sovereign. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. ENC Corp*., 464 F.3d 885, 892-94 (9th Cir. 2006). This Court reversed, holding that "where sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action *must* be ordered where there is a potential for injury to the interests of the absent sovereign." 53 U.S. at 867 (emphasis added). Here, (1) no exception to the FSIA applies to strip Hungary of its sovereign immunity, (2) Hungary has a non-frivolous interest in the case, and (3) there is a potential for injury to Hungary's interests if the action continues without it. Because all three of the requirements articulated by this Court in *Pimentel* are satisfied—as recognized by the panel—this case should be dismissed.

The panel sought, instead, to mitigate the prejudice the prejudice to Hungary by speculating that the prejudice to Hungary could be mitigated and that its absence was excusable because MNV—found to be an agency or instrumentality of Hungary—could adequately "represent" Hungary's interests. But *Pimentel* does not contemplate mitigation. And the court

of appeals *speculation* that MNV can stand proxy for Hungary ignores the juridical distinctions between a sovereign and its agencies or instrumentalities. The court of appeals' failure to apply this Court's precedent properly warrants review.[1]

Second, the court of appeals' decision reinstates a circuit split on a legal issue that this Court has *twice* found worthy of review in recent years. Courts recognize that under principles of international comity, exhaustion may be appropriate and necessary to allow sovereigns to resolve claims against them in their own courts and resolution procedures before being forced to submit to the jurisdiction of U.S. Courts. *See, e.g., Fischer v. Magyar Államvasutak Zrt*., 777 F.3d 847, 854-55 (7th Cir. 2015); *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 679-80 (7th Cir. 2012).

The D.C. Circuit, however, reached a different conclusion. In *Simon v. Republic of Hungary*, 911 F.3d 1172 (D.C. Cir. 2018) and *Philipp v. Federal Republic of Germany*, 894 F.3d 406 (D.C. Cir. 2018), the court of appeals rejected the sovereigns' international comity defenses, asserting that principles of international comity did not survive enactment of the FSIA. *Simon*, 911 F.3d at 1180-82; *Philipp*, 894 F.3d at 415-16; *but see Philipp v. Fed. Republic of Germany*, 925 F.3d 1349, 1355-59 (D.C. Cir. 2019) (Katsas, J., dissenting) (dissenting from denial of rehearing *en banc* and asserting international comity (exhaustion) is a valid defense available to foreign sovereigns). Both sovereigns filed petitions for review with this Court. The Solicitor

[1] Appellate courts recognize that the Rule 19(b) analysis is altered significantly where the required party is an immune sovereign. *See, e.g., White v. Univ. of California*, 765 F.3d 1010, 1028 (9th Cir. 2014); *Seneca Nation of Indians v. New York*, 383 F.3d 45, 48-49 (2d Cir. 2004); *Entertainment Mgmt. Consultants, Inc. v. U.S. ex rel. Hodel*, 883 F.2d 890, 894 (10th Cir. 1989).

The court of appeals' decision in this case failed to acknowledge, much less consider, the import of Hungary's sovereign immunity, relying instead on decisions that where the "required" party was not an immune sovereign. If left to stand, the court of appeal's failure to consider Hungary's sovereign immunity as a factor in its Rule 19 analysis will create a clear circuit split with at least three courts of appeals. That circuit conflict warrants this Court's review.

General agreed with the petitioning sovereigns, advocating to this Court that international comity (exhaustion) *did* survive enactment of the FSIA.[2]

In July 2020, this Court granted review of both petitions. *Federal Republic of Germany v. Philipp*, 141 S. Ct. 185 (2020); *Republic of Hungary v. Simon*, 141 S. Ct. 187 (2020). The Court elected to resolve both petitions, however, on different, narrower legal grounds. *Federal Republic of Germany v. Philipp*, 141 S. Ct. 703, 715 (2021); *Republic of Hungary v. Simon*, 141 S. Ct. 691 (2021).

Petitioners invited the court of appeals to reconsider its international comity holdings in light of this Court's decision to grant review of in both *Philipp* and *Simon* and its decision to vacate both of the court of appeals' decisions. The court of appeals declined, reaffirming its prior holdings that the doctrine of international comity did not survive enactment of the FSIA. App. A at 28-29.

On April 21, 2022, this Court held unequivocally that, in light of Section 1606 of the FSIA, a non-immune foreign sovereign agency or instrumentality must be treated as a private party. *Cassirer v. Thyssen-Bornemisza Collection Found*., 142 S. Ct. 1502, 1508-10 (2022). Thus, the court of appeals' holding in this case conflicts not only with the Seventh Circuit's decisions in *Fischer* and *Abelesz and* the United States' position, as advocated in *Philipp* and *Simon*, it conflicts with this Court's recent decision in *Cassirer*, which holds that a non-immune foreign sovereign agency or instrumentality should be treated differently from a private party, for whom international comity is an available defense. This Court's immediate intervention is

[2] Brief for the United States as *Amicus Curiae* at 15-22 in *Federal Republic of Germany v. Philipp* (2020) (Nos. 19-351, 19-520), available: https://www.justice.gov/sites/default/files/briefs/2020/05/29/19-351_and_19-520_republic_of_germany.pdf; Brief for the United States as *Amicus Curiae* at 9-13 in *Republic of Hungary v. Simon* (2020) (No. 18-1447), available: https://www.justice.gov/sites/default/ files/briefs/2020/05/29/18-1447_republic_of_hungary.pdf.

needed to resolve the entrenched circuit split and clarify the scope of defenses available to a private party-like non-immune sovereign agency or instrumentality.

2. A key member of Petitioners' legal team—Sarah Erickson André (counsel of record before this Court and the court of appeals)—left private practice, to pursue a career in academia. Additional time is necessary and warranted for current and new counsel to, among other things, review the record in this case, research case law in other circuits, and prepare a clear and concise petition for certiorari for the Court's review.

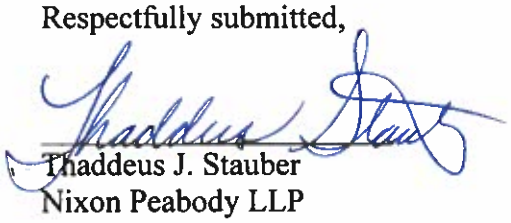
3. No prejudice would arise from the extension. Whether the extension is granted or not, the petition will be considered in the forthcoming term—and, if the petition is granted, the case will be heard and decided in the same term.

4. The press of other matters in this case, which is proceeding in district court, and in other matters proceeding before courts of appeals make the submission of the petition difficult absent an extension.[3]

Conclusion

For the foregoing reasons, the time to file a Petition for a Writ of Certiorari in this matter should be extended for thirty days to and including September 7, 2022.

Respectfully submitted,



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[3] On June 20, 2022, Petitioners filed a motion to stay all activity before the district court pending resolution of Petitioner's forthcoming petition for a writ of certiorari. That motion is pending.