No. _____

In the
Supreme Court of the United States

MUSEUM OF FINE ARTS, ET AL.,
Petitioners,

v.

DAVID L. DE CSEPEL, ANGELA MARIA HERZOG, AND JULIA ALICE HERZOG,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

THADDEUS JOHN STAUBER
Counsel of Record
AARON MICHAEL BRIAN
NIXON PEABODY LLP
300 South Grand Avenue
Suite 4100
Los Angeles, CA 90071
(213) 629-6000
tstauber@nixonpeabody.com

Counsel for Petitioners

September 7, 2022

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

(1) Whether non-immune foreign sovereign entities may raise a defense of international comity (exhaustion) when the defense is not barred by the FSIA, the availability of the defense is important to the United States' foreign policy interests, private parties may raise such a defense, and this Court held last term that non-immune foreign sovereign entities must be treated like private parties, *see Cassirer v. Thyssen-Bornemisza Collection Found.*, 142 S. Ct. 1502, 1508-10 (2022)?

(2) Whether Federal Rule of Civil Procedure 19 and this Court's decision in *Republic of Philippines v. Pimentel*, 553 U.S. 851 (2008), which recognizes that an action must be dismissed where there is a *possibility* that a continued action could harm the interests of an immune foreign sovereign, bar this case from proceeding because the owner of the claimed property and the source of respondents' injuries is an immune sovereign, its interests in the case are not frivolous, and, as acknowledged by the court of appeals, the immune sovereign's interests will be adversely affected if the case continues?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

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") were found by the lower courts to be agencies or instrumentalities of Hungary.

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

STATEMENT OF RELATED PROCEEDINGS

- *de Csepel, et al. v. Republic of Hungary, et al.*, No. 10-CV-01261, U.S. District Court for the District of Columbia. Judgment entered May 11, 2020.
- *de Csepel, et al. v. Republic of Hungary, et al.*, No. 11-7096, U.S. Court of Appeals for the District of Columbia Circuit. Judgment entered April 19, 2013. Petition for rehearing *en banc* denied June 4, 2013.
- *de Csepel, et al. v. Republic of Hungary, et al.*, No. 16-7042, U.S. Court of Appeals for the District of Columbia Circuit. Judgment entered June 20, 2017. Petition for rehearing *en banc* denied October 4, 2017.
- *de Csepel, et al. v. Republic of Hungary, et al.*, No. 20-7047, U.S. Court of Appeals for the District of Columbia Circuit. Judgment entered March 8, 2022. Petition for panel rehearing and rehearing *en banc* denied May 10, 2022.

- *de Csepel, et al. v. Republic of Hungary, et al.*, No. 17-1165, U.S. Supreme Court. Petition for writ of certiorari denied January 7, 2019.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

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 petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

This case concerns the interpretation of the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. §§ 1330, 1441(d), 1602 *et seq.,* and the ability of foreign sovereign defendants to invoke international comity (or international-comity based abstention doctrines) that are available to private litigants. Litigation against foreign states in U.S. courts can have significant foreign-relations implications for the United States, and can affect the reciprocal treatment of the United States in the courts of other nations.

This case also concerns the proper application of Federal Rule of Civil Procedure 19 and whether the court of appeals' finding that the case can continue without Hungary conflicts directly with this Court's 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." *Republic of Philippines v. Pimentel*, 553 U.S. 851, 867 (2008). Because the court of appeals found that Hungary is immune, that

its claims were not frivolous, *and* that there was a very real likelihood for injury to Hungary's interests if the case continued, its holding cannot be squared with this Court's binding precedent.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is reported at 27 F.4th 736. Earlier opinions of the court of appeals are reported at 859 F.3d 1094 and 714 F.3d 591. The most recent opinion and order of the district court (Pet. App. 141a) are available at *de Csepel v. Republic of Hungary*, No. 1:10-CV-01261(ESH), 2020 WL 13348669 (D.D.C. July 27, 2020).

JURISDICTION

The judgment of the court of appeals was entered on March 8, 2022. Pet. App. 1a. The court of appeals denied petitioners' timely petition for rehearing and rehearing *en banc* on May 10, 2022. Pet. App. 156a, 158a. On July 25, 2022, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including September 7, 2022. No. 22A68. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

There are no relevant statutory provisions at issue in this case.

STATEMENT OF THE CASE

The FSIA provides the sole basis for jurisdiction in federal or state court in a civil suit against a foreign state and/or its agencies or instrumentalities. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-435 & n.3 (1989); *see also* 28 U.S.C. § 1603(a). A foreign state is immune from the jurisdiction of a U.S. court unless a claim against it comes within one of the FSIA's limited exceptions. *See* 28 U.S.C. §§ 1604-1605. If an exception applies, "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances," subject to certain limitations on punitive damages not relevant here. *Cassirer v. Thyssen-Bornemisza Collection Found.*, 142 S. Ct. 1502, 1508 (2022) (quoting 28 U.S.C. § 1606).

This action involves the disputed ownership of forty-two individual artworks, once attributed to the collection of Baron Mór Lipót Herzog, that have been in Hungary's ownership 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 the couple's three children: Erzsébet (Herzog) Weiss de Csepel, István Herzog, and András Herzog. Pet. App. 36a.

Respondent David L. de Csepel, a U.S. citizen, is an heir of Erzsébet Weiss de Csepel; respondents Angela Maria Herzog and Julia Alice Herzog, are Italian citizens and heirs of András Herzog. The

Museum of Fine Arts, the Hungarian National Gallery, the Museum of Applied Arts, the Budapest University of Technology and Economics, (the "Museums") and Magyar Nemzeti Vagyonkezelő Zrt. ("MNV") (collectively "petitioners") were found by the lower courts to be agencies or instrumentalities of Hungary. The Museums do not own the claimed artworks; each displays one or more of the claimed artworks at Hungary's direction. MNV does not own the claimed artworks; it is directed by Hungarian law to manage Hungary's property and represent Hungary in actions involving Hungary's property where Hungary is a party. Pet. App. 14a, 22a.[1] Hungary, the owner of the claimed artwork, the bailor in respondents' predecessors' purported bailments, and the entity alleged to have caused respondents' predecessors' injuries, is immune and no longer a party to this case. *de Csepel v. Hungary*, 859 F.3d 1094, 1104-08 (D.C. Cir. 2017).

Respondents allege that during World War II, Hungary took and kept artworks once attributed to Baron Herzog. Some of the artworks were returned to respondents' predecessors after the war, but were retaken by Hungary in connection with smuggling convictions. Pet. App. 39a. In 1999, Martha Nierenberg filed suit in Hungary seeking return of a dozen artworks, some of them claimed here by her

[1] At oral argument, respondents' counsel conceded that Hungary—not petitioners—owns the artworks. Oral Argument Transcript, October 7, 2021 (No. 20-7047+) at 31:22-23 ("Yes. MNV manages artworks on behalf of Hungary. Hungary is the owner.").

nephew, respondent de Csepel, and asserted an interest in artworks attributed to András and István Herzog. 714 F.3d at 596. To ensure all interests were represented, the Hungarian courts brought the heirs of András and István Herzog—including the Herzog Respondents—into the litigation. Pet. App. 40a. The Herzog Respondents advised the Hungarian court they had evidence supporting their ownership claims but would not participate in the litigation. Pet. App. 120a; Joint Appendix (No. 20-7047+) 870-876. In 2008, after two appeals, a Hungarian court issued a judgment, recognizing Hungary as the owner of the litigated artworks. During that litigation, Hungary, the primary defendant, was represented by MNV's predecessor, the Treasury Assets Agency. 714 F.3d at 596. Ms. Nierenberg received back one artwork; it was accepted by her attorney in Hungary in April 2000. Pet. App. 40a.

In 2010, respondents filed suit against Hungary and the Museums. Hungary and the Museums moved to dismiss on a number of grounds, including that no exception to the FSIA applied to permit jurisdiction over Hungary or the Museums. The district court granted the motion in part and denied it in part. *de Csepel,* 808 F. Supp. 2d at 142. The court found the allegations sufficient to satisfy the FSIA's expropriation exception, *see id.* at 128-133, 140-142, but dismissed claims to those artworks attributed to respondent de Csepel where the ownership was previously litigated in Hungary, *id.* at 145.

The D.C. Circuit affirmed the district court's finding that respondents' allegations were sufficient to permit jurisdiction under the FSIA, but on other grounds. Because "the Herzog family seeks to recover not for the original expropriation of the [artworks] but rather for the subsequent breaches of bailment agreements they say they entered into with Hungary," the D.C. Circuit examined whether the FSIA's *commercial activity* exception applied to permit jurisdiction. *de Csepel*, 714 F.3d at 598. The D.C. Circuit found no fault with the district court's international comity analysis, but determined the analysis was premature. *Id.* at 606-608.

Following the close of discovery, Hungary and the Museums again moved to dismiss. The district court found the FSIA's commercial activity exception could not apply to permit jurisdiction because respondents could not demonstrate a "direct effect" in the United States, as required where the purported commercial activity takes place outside the United States. *de Csepel v. Republic of Hungary*, 169 F. Supp. 3d 143, 157-163 (D.D.C. 2016). The court found, however, that the FSIA's expropriation exception might apply to permit jurisdiction, *id.* at 163-166, and rejected Hungary's and the Museums' argument that international comity warranted dismissal of claims that had not yet been exhausted in Hungary, *id.* at 168-169.

On appeal, the D.C. Circuit dismissed Hungary from the case, holding that the FSIA's expropriation exception could not apply to strip Hungary of its sovereign immunity. 859 F.3d at

1104-1108. That court remanded the action to the district court, with instructions that respondents be "allowed to amend their complaint in light of the Holocaust Expropriated Art Recovery Act of 2016, Pub. L. 114-308, 130 Stat. 1524," which was enacted while the appeal was pending. 859 F.3d at 1109.

On remand, respondents amended their complaint. Pet. App. 46a-47a. The amended complaint continued to name Hungary and added MNV—long known to respondents—as a defendant. *Ibid.* Hungary and petitioners then moved to dismiss the amended complaint on numerous grounds, including: (1) that MNV is a political subdivision that, like Hungary, cannot be stripped of its sovereign immunity, (2) that Rule 19 bars the action from going forward without Hungary, and (3) that principles of international comity warranted dismissal to allow Respondents to bring their unexhausted claims in Hungary.

While the motion was pending, respondents filed a petition for a writ of certiorari seeking review of the D.C. Circuit's holding that the FSIA's expropriation exception could not apply to permit a court to exercise jurisdiction over Hungary because the claimed property was not located in the United States. Petition for Writ of Certiorari, *de Csepel v. Republic of Hungary*, 139 S. Ct. 784 (2019) (No. 17-1165) 2018 WL 1028055. The district court stayed all activity before it pending resolution of respondents' petition. Agreeing with the Solicitor General's recommendation, this Court denied the petition. *de Csepel v. Republic of Hungary*, 139 S. Ct. 784 (2019).

The district court lifted the stay, granting in part the motion to dismiss. Pet. App. 46a, 129a. Relevant here, the district court recognized that Hungary must be dismissed and that the FSIA's expropriation exception did not apply to permit jurisdiction over fourteen of the claimed artworks. *Id.* at 48a, 137a. It determined, however, that it could exercise jurisdiction over MNV, the State property manager, after concluding that it was merely an agency or instrumentality. *Id.* 58a. The district court recognized further that, under Federal Rule of Civil Procedure 19, Hungary is a required party to this action. *Id.* at 70a-71a. Relying on inapposite case law and speculating that it *might* be possible to fashion some sort of remedy based on petitioners' *possession* or *management* of the claimed artworks—actions dictated by Hungary—the district court determined that the action could go forward without Hungary. *Id.* at 73a-79a. The district court also rejected the international comity (exhaustion) argument on the ground that "[b]inding circuit precedent forecloses defendants' argument." *Id.* 123a (citing *Simon v. Republic of Hungary*, 911 F.3d 1172 (D.C. Cir. 2018) and *Philipp v. Fed. Republic of Germany*, 894 F.3d 406 (D.C. Cir. 2018)).

The D.C. Circuit affirmed the district court's findings. The panel found that MNV is a commercial entity juridically distinct from Hungary and therefore not entitled to the same level of sovereign immunity. Pet. App. 58a. Like the district court, the D.C. Circuit recognized that Hungary is a "required" party 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." *Id.* at 17a-19a. That court also recognized the likely injury to Hungary's interests with respect to both respondents' tort and contract claims. *Id.* at 19a-20a ("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."); *see also id.* ("The contract-based bailment claims have similar potential to affect Hungary's interests…. Impaired in its ability to protect interests it asserts here, it qualifies as a 'required' party for purposes of Rule 19(a)."). Relying on out-of-circuit precedent that did not involve an immune foreign sovereign—and ignoring the juridical distinctions between Hungary and petitioners—the D.C. Circuit theorized that the action could go forward against the non-owners because "[a]t bottom, both Hungary and the remaining defendants *seek the same result*[.]" *Id.* at 23a.

Acknowledging that this Court vacated its prior decisions in *Simon* and *Philipp*—and fully aware that the United States disagreed with its international comity findings in both decisions—the D.C. Circuit reaffirmed its prior holdings that the doctrine of international comity did not survive enactment of the FSIA. Pet. App. 32a. ("We reaffirm our holdings and rationales in *Simon* and *Philipp* that the FSIA does not require prudential exhaustion in suits against foreign states.").

Of the forty-four artworks identified in the original complaint, claims to sixteen artworks have been dismissed. Of the twenty-eight artworks that remain, only five are attributed to a U.S. citizen plaintiff. Of those five artworks, claims to four were litigated previously in Hungary, and Hungary was found to be the owner under multiple legal theories. Not one of the ownership claims to the artworks attributed to András or István Herzog has been litigated in Hungary.

REASONS FOR GRANTING THE WRIT

Courts' long-recognized authority to decline to exercise jurisdiction where appropriate, the absence of language in the FSIA barring a court from exercising this option, the significant foreign policy considerations which warrant the respectful treatment of foreign sovereign entities, the clear split with the Seventh Circuit, and this Court's recent confirmation that non-immune sovereigns must be treated like private parties, independently favor review of the D.C. Circuit's determination that the defense of international comity did not survive the FSIA's enactment. Taken together, however, they make clear that the D.C. Circuit's continued refusal to allow a non-immune foreign sovereign to raise an international comity defense can no longer be countenanced; this Court's immediate intervention to resolve the international comity issues is necessary.

In *Pimentel*, this Court articulated a clear rule that dramatically altered the application of Rule 19(b) where the required party, under Rule 19(a), is

an immune foreign sovereign. Where, as here, the required immune sovereign has a non-frivolous interest in the case and there is a potential for injury to that interest if the case goes forward, this Court's precedent mandates dismissal of the case. 533 U.S. at 867. Because the D.C. Circuit's decision attempts to sidestep *Pimentel* and wholly fails to "accord proper weight to the compelling claim of sovereign immunity," *id.* at 869, it conflicts impermissibly with this Court's precedent, as well as the decision of other courts of appeals, warranting this Court immediate intervention.

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS AND WITH THE VIEWS OF THE UNITED STATES ON INTERNATIONAL COMITY

A. The Lower Courts Are Irreconcilably Split on the Role of International Comity in FSIA Cases

There is an entrenched, acknowledged conflict among the courts of appeals on whether courts may abstain from exercising FSIA jurisdiction for reasons of international comity. The Seventh Circuit and the D.C. Circuit faced virtually identical lawsuits seeking reparations from the Hungarian government for World War II-era property losses. The Seventh Circuit held twice, in 2012 and again in 2015, that "principles of international comity make clear that these plaintiffs must attempt to exhaust domestic [Hungarian] remedies before foreign courts can

provide remedies for those violations." *Fischer v. Magyar Államvasutak Zrt.*, 777 F.3d 847, 852 (7th Cir. 2015); *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 679-684 (7th Cir. 2012).

Both Seventh Circuit decisions came down before the D.C. Circuit addressed the issue for the first time, and the D.C. Circuit expressly disagreed with them. *See Philipp*, 894 F.3d at 416. And notwithstanding the acknowledged circuit split, the D.C. Circuit denied *en banc* petitions filed in this case, *Simon*, and *Philipp*. Thus, although numerically shallow, the conflict among the circuits is entrenched. And whatever numerical shallowness is of little moment because until this Court reviews petitioners' first question presented, plaintiffs will gravitate toward the D.C. Circuit as the forum with favorable law.

B. The Availability of International-Comity-Based Abstention Is Important to the United States' Foreign Policy Interests

As explained to this Court by the Solicitor General, "[i]f allowed to stand, the court of appeals' categorical rejection of international-comity-based abstention likely would be harmful to the foreign-relations interests of the United States." Brief for the United States as *Amicus Curiae* Supporting Petitioners, *Republic of Hungary v. Simon*, No. 18-1447, 2020 WL 5535982, at 25. That is true for at least two reasons.

First, after acknowledging that "domestic litigation against foreign sovereigns, by its nature, often raises serious foreign-policy concerns," the United States noted that although Section 1606 mandates that foreign states be treated "in the same manner…as a private individual under like circumstances," 28 U.S.C. § 1606, the D.C. Circuit's international comity defense bar treats "foreign states (and their instrumentalities and agencies)…*worse* than private individuals," who *are* able to raise an international comity defense. Brief for the United States as *Amicus Curiae* Supporting Petitioners, *Republic of Hungary v. Simon*, No. 18-1447, 2020 WL 5535982, at 26 (emphasis in original). A foreign sovereign would, after all, be "understandably upset" if a court was forced to exercise jurisdiction over a sovereign's commercial activities, when the same court had the discretion to abstain from exercising jurisdiction over the commercial activities of a similarly situated private defendant. *Ibid.* Accordingly, the United States explained, the D.C. Circuit's reading of the FSIA "would exacerbate the very foreign-relations concerns that the FSIA is intended to mitigate[.]" *Ibid.*

Second, international-comity-based abstention assists the United States' "efforts to persuade foreign partners to establish appropriate redress and compensation mechanisms for human-rights violations, including for the horrendous human-rights violations perpetrated during the Holocaust." *Ibid.* If U.S. courts are powerless to consider and defer to the available and adequate alternative fora that foreign states establish at the United States'

urging, foreign states will have little or no incentive to establish or maintain compensation programs. *See, e.g.,* 2009 Terezin Declaration on Holocaust Era Assets and Related Issues, available at: https://www.state.gov/prague-holocaust-era-assets-conference-terezin-declaration/ ("We encourage states to consider these and other alternative national actions, and we further encourage them to find ways to address survivors' needs."); Washington Conference Principles on Nazi-Confiscated Art (1998), available at: https://www.state.gov/washington-conference-principles-on-nazi-confiscated-art/ (noting that "among participating nations there are differing legal systems and that countries act within the context of their own laws").

C. Although this Court Previously Recognized the Importance of the International Comity Issue, Its Review Is Now Compelled

This Court granted review of two petitions challenging the D.C. Circuit's refusal to recognize that international comity (exhaustion) is a defense available to non-immune sovereign entities. *See Federal Republic of Germany v. Philipp*, 141 S. Ct. 185 (2020); *Republic of Hungary v. Simon*, 141 S. Ct. 187 (2020). Resolving both petitions on a different issue and ignoring the Solicitor General's plea for immediate guidance, this Court left the international comity issue unresolved. *See Federal Republic of Germany v. Philipp*, 141 S. Ct. 703, 705 (2021) (holding that the FSIA's expropriation exception

refers to violations of the international law of expropriation—not alleged human rights abuses—and thereby incorporates the domestic takings rule); *Republic of Hungary v. Simon*, 141 S. Ct. 691 (2021) (remanding case for further proceedings consistent with *Philipp*). This Court's resolution of the international comity issue is more necessary now than when this Court first decided the issue warranted plenary review in *Simon* and *Philipp*.

First, the D.C. Circuit's immediate and decisive action to immediately reaffirm in this case its prior international-comity holdings in *Simon* and *Philipp*—notwithstanding this Court's vacatur of both decisions and the United States' consistent position that foreign sovereigns should be permitted to raise an international-comity defense—make clear that the D.C. Circuit is unwilling to revisit its non-textual determination that international comity did not survive enactment of the FSIA. And the fact that petitioner's international comity question is before this Court for the third time in less than five years, makes clear that the international comity question is likely to be raised again and again, until this Court steps in to provide needed guidance to the appellate courts. Absent this Court's intervention, therefore, the D.C. Circuit's holding will continue to stand and the split of authority with the Seventh Circuit will continue unabated.

Second, one of this Court's recent decisions compels finding that the D.C. Circuit erred. In *Cassirer v. Thyssen-Bornemisza Collection Foundation*, 142 S. Ct. 1502 (2022), this Court

examined whether courts should apply federal common law's choice-of-law test or the forum's choice-of-law test where the FSIA permits a court to exercise jurisdiction over a foreign sovereign defendant. The Solicitor General filed an amicus brief asserting that the FSIA is "clear that, as to the extent of liability, 'the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances.'" Brief for the United States as *Amicus Curiae* Supporting Petitioners, *Cassirer v. Thyssen-Bornemisza Collection Found.*, No. 20-1566, 2021 WL 5513717, at 25 (quoting 28 U.S.C. § 1606). This Court agreed.

Indeed, this Court held that Section 1606 "ensures that a foreign state, if found ineligible for immunity, must answer for its conduct just as any other actor would." 142 S. Ct. at 1508. If the FSIA is merely a "'pass-through' to the substantive law that would govern a similar suit between private individuals," *ibid.* (internal citation omitted), as this Court recognized, then non-immune sovereign entities must be allowed to raise the same defenses "to the substantive law that would govern a similar suit between private individuals," *ibid.* Because a private party "in like circumstances" is entitled to raise a defense of international comity, petitioners and other non-immune sovereign entities must be permitted to do so too.

D. The D.C. Circuit's Reaffirmed Holding Is Incorrect

This Court's decisions in *Republic of Argentina v. NML Capital, Ltd.*, 573 U.S. 134 (2014) and *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983), on which the D.C. Circuit relied, do not support the D.C. Circuit's decision. In *NML Capital*, this Court addressed "[t]he single, narrow question…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. In resolving that question, this Court stated that "any sort of *immunity* defense made by a foreign sovereign in an American court must stand on the Act's text." *Id.* at 141-42 (emphasis added). Because the text of the FSIA does not specifically "forbid[] or limit[] discovery in aid of execution of a foreign-sovereign judgment debtor's assets," this Court found that the FSIA itself conferred no statutory immunity to such discovery on the foreign state, and the foreign state was therefore not entitled to relief. *Id.* at 142.

But the fact that a foreign state lacks a sovereign-specific, *immunity*-based statutory defense to post-judgment discovery is irrelevant to whether courts can apply discretionary, generally applicable common-law abstention doctrines in suits against foreign states. *See Philipp v. Federal Republic of Germany*, 925 F.3d 1349, 1356 (D.C. Cir. 2019) (Katsas, J., dissenting from the denial of rehearing en banc) ("[F]oreign sovereign immunity—which eliminates subject-matter jurisdiction—is distinct from non-jurisdictional defenses such as exhaustion

and abstention."). This Court held that a court "may appropriately consider comity interests" in resolving non-immunity issues relating to post-judgment discovery. 573 U.S. at 146 n.6. These interests should be available to be considered by a court when it is asked to abstain on international comity grounds.

In *Verlinden*, this Court merely recognized that the FSIA "does not appear to affect the traditional doctrine of *forum non conveniens*." 461 U.S. at 490 n.15. Like the doctrine of international comity, forum non conveniens is not explicitly addressed in the FSIA. Like the doctrine of international comity, forum non conveniens may be raised by private defendants. *See Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 429 (2007) (recognizing that a court has the discretion to dismiss a case on forum non conveniens grounds). Yet, unlike international comity, courts—including the D.C. Circuit—recognize that foreign sovereign defendants can move to dismiss on *forum non conveniens* grounds. *See, e.g., Aenergy, S.A. v. Republic of Angola*, 31 F.4th 119, 126 (2d Cir. 2022) (citing *Verlinden* and its proposition that "[t]he traditional doctrine of forum non conveniens is still applicable in cases arising under the FSIA"); *Philipp*, 894 F.3d at 416 (noting that certain defenses "such as forum non conveniens, that are equally available to 'private individual[s]' may be raised by foreign sovereigns") (quoting 28 U.S.C. § 1606); *GDG Acquisitions LLC v. Gov't of Belize*, 849 F.3d 1299, 1312 (11th Cir. 2017).

Like *forum non conveniens*, comity-based abstention was part of the "the common-law background against which the statutes conferring jurisdiction were enacted," *New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350, 359 (1989), including the FSIA. Thus, in order to "abrogate [that] common-law principle," the FSIA would need to "'speak directly' to the question" of adjudicatory comity. *United States v. Texas*, 507 U.S. 529, 534 (1993) (citation omitted). It does not. Instead, the FSIA speaks to the circumstances in which a foreign state is "immune from the jurisdiction of the courts of the United States and of the States." 28 U.S.C. § 1604 (emphasis added). Because neither defense is explicitly barred by the FSIA, this Court can and should presume that Congress intended for both defenses remain available.

E. Courts Have Long Recognized the Importance of International Comity

This Court recognizes the doctrine of international comity, which permits U.S. courts to take account of the "legislative, executive or judicial acts of another nation" in ways that show "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). The doctrine has different categories, including "the comity of courts, whereby judges decline to exercise jurisdiction over matters more appropriately adjudged elsewhere," and "prescriptive comity,"

which reflects "the respect sovereign nations afford each other by limiting the [substantive] reach of their laws." *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 817 (1993) (Scalia, J., dissenting).

It is this type of exhaustion-focused international comity, also referred to as "adjudicatory comity," *Mujica v. AirScan Inc.*, 771 F.3d 580, 599 (9th Cir. 2014), that is at issue here. Adjudicatory comity arises in a variety of contexts and 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." *Id.* at 598 (citation omitted). This Court has explained that in early admiralty cases brought by "foreign seamen suing for wages, or because of ill treatment," a U.S. court "often" sought the consent of the foreign consul "before the court [would] proceed to entertain jurisdiction; not on the ground that it has no jurisdiction; but that, from motives of convenience or international comity, it will use its discretion whether to exercise jurisdiction or not." *The Belgenland*, 114 U.S. 355, 363-364 (1885). In fact, this Court recognized nearly a century ago that "[c]ourts of equity and of law also occasionally decline, in the interest of justice, to exercise jurisdiction, where the suit is between aliens or nonresidents or where for kindred reasons the litigation can more appropriately be conducted in a foreign tribunal." *Canada Malting Co. v. Patterson Steamships, Ltd.*, 285 U.S. 413, 421, 423 (1932)

To determine whether adjudicative comity-based abstention is warranted in a particular case, courts focus on protecting the United States' interests, preserving international harmony, and ensuring fairness for litigants. *See Société Nationale Industrielle Aérospatiale v. United States District Court*, 482 U.S. 522, 543-44 (1987) (explaining "the concept of international comity" requires courts to consider "the respective interests" of the United States and the foreign state, "the particular facts" of the case, as well as whether the foreign state's procedures "will prove effective"). Applying those principles, U.S. courts recognize that international-comity-based abstention, unlike the defense of sovereign immunity, may be appropriate regardless of whether a foreign state is party to the suit. Indeed, because sovereign immunity generally bars U.S. courts from exercising jurisdiction in suits against foreign states, decisions to abstain voluntarily from exercising jurisdiction arise most frequently in suits against private parties.

In cases involving suits against *private* foreign defendants under the Alien Tort Statute, 28 U.S.C. § 1350, several Members of this Court have indicated that courts "can dismiss [such] suits…for reasons of international comity, or when asked to do so by the State Department," if there is concern that entertaining the suit would create "international friction." *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1430-1431 (2018) (Sotomayor, J., dissenting, joined by Ginsburg, Breyer, and Kagan, JJ.); *see also Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 128-129 (2013) (Breyer, J., concurring in the judgment, joined

by Ginsburg, Sotomayor, and Kagan, JJ.); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004) (acknowledging the "strong argument that federal courts should give serious weight to the Executive Branch's view" about the "case-specific…impact on foreign policy" of exercising jurisdiction in a particular case).

Lower courts recognize that comity-based abstention is appropriate where allowing suits against private defendants could frustrate the substantive policies of foreign sovereigns or otherwise have significant implications for the foreign relations of the United States. In *Cooper*, for example, the Ninth Circuit affirmed the district court's dismissal of claims against the owner of the Fukushima Daiichi Nuclear Power Plant on international-comity grounds. *See Cooper v. Tokyo Elec. Power Co.*, 960 F.3d 549, 565-569 (9th Cir. 2020). Although Japan was not a party to the suit, the Ninth Circuit recognized that adjudicating claims against the owner of the plant in a U.S. court could interfere with Japan's interest in administering a comprehensive claims system for victims of the 2011 Fukushima disaster through the *Japanese* courts. *Id.* at 568. In light of those "strong, important policy interests" that favored resolution of the claims in a Japanese forum, that court held that the district court abused no discretion in deciding to abstain from exercising jurisdiction. *Id*. at 569; *see also Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1239 (11th Cir. 2004) (affirming district court's decision to abstain from deciding claims relating to Nazi-era seizures against two private German banks because

Germany had a strong interest in resolving claims and offered an adequate, alternative forum).

F. The FSIA Does Not Foreclose Comity-Based Abstention in Suits Against Foreign Sovereign Entities

Nothing in the FSIA explicitly bars U.S. courts from applying comity-based abstention principles in cases against foreign sovereigns or their agencies and/or instrumentalities. "[F]ar from foreclosing [abstention], the FSIA affirmatively accommodates [it]." *Philipp*, 925 F.3d at 1355 (Katsas, J., dissenting from the denial of rehearing en banc). That is because the FSIA "provides that, for any claim falling within an immunity exception, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances."' *Ibid.* (quoting 28 U.S.C. § 1606). As explained above, a private individual who was named as a defendant in a suit that threatened to create "international friction" could ask a court to abstain from exercising jurisdiction by moving to "dismiss…for reasons of international comity." *Jesner*, 138 S. Ct. at 1430-31 (Sotomayor, J., dissenting). It follows from the straightforward text of the FSIA that a foreign state may also do so. 28 U.S.C. 1606.

At oral argument, Justice Jackson (then a member of the three-judge panel assigned to this appeal) voiced the opinion that judges *must* adjudicate cases in which they are *permitted* to exercise jurisdiction, as though a finding of

jurisdiction trumps any procedural or prudential concerns. *See, e.g.,* Oral Argument Transcript, October 7, 2021 (No. 20-7047+) at 8:23-25 ("[B]ut I'm just confused about why Rule 19 is somehow taking precedence over the FSIA."). But while federal courts may have a "virtually unflagging obligation…to exercise the jurisdiction given to them," *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817 (1976), it is not without significant exceptions. As with other common-law abstention doctrines that this Court has routinely recognized in domestic contexts, international-comity-based abstention reflects the recognition that "federal courts may decline to exercise their jurisdiction, in otherwise 'exceptional circumstances," when "denying a federal forum would clearly serve an important countervailing interest." *Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706, 716 (1996) (internal citation omitted); *see also id.* at 723 ("Federal courts abstain out of deference to the paramount interests of another sovereign, and the concern is with principles of comity and federalism."); *Canada Malting Co.*, 285 U.S. at 422 ("Obviously, the proposition that a court having jurisdiction must exercise it, is not universally true[.]").

A district court may decline to exercise the jurisdiction permitted by other statutes, *see* 28 U.S.C. §§ 1331-33, and there is nothing in the FSIA itself that bars a court from declining to exercise the jurisdiction that the FSIA allows, *see* 28 U.S.C.

§ 1330(a).[2] Absent an explicit limitation, courts retain the same discretionary, common-law authority to abstain from exercising jurisdiction in appropriate cases that they held before Congress enacted the FSIA. Cf. H.R. Rep. No. 1487, 94th Cong., 2d Sess. 20 (1976) (explaining that because the relevant provision of the FSIA "deals solely with issues of immunity, it in no way affects existing law on the extent to which, if at all, the 'act of state' doctrine may be applicable").[3]

---

[2] The district court opined, in a footnote, that even if international-comity-based abstention *were* required, exhaustion could be excused because the Hungarian courts' finding Hungary was the owner of artworks claimed by Martha Nierenberg "suggested that any additional lawsuits filed by the other Herzog heirs would probably have failed" and because Hungary's cultural patrimony laws made "impossible" the return of artworks to Ms. Nierenberg in the U.S. 169 F. Supp. 3d at 169 n.15. But the Herzog respondents claimed to have additional evidence regarding their ownership claims. Supra at 5. And pre-war cultural patrimony do not bar an individual from owning an artwork in Hungary or selling it. 169 F. Supp. 3d at 161 (acknowledging that, under Hungarian law, protected artworks "may not be exported but may be sold in Hungary").

[3] This Court has all but held that comity-based abstention remains available in suits against foreign states following passage of the FSIA. In *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), this Court stated that courts "might well" defer to a "statement of interest[]" filed by the Executive Branch "suggesting that courts decline to exercise jurisdiction in particular cases" in light of "the implications of exercising jurisdiction over particular [defend-ants]," *id.* at 701-702, even when it is clear the FSIA permits a court to exercise jurisdiction over the foreign sovereign entity. This Court's discussion *presumed* that comity-based abstention *is* available in cases where an FSIA exception applies to permit jurisdiction.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENT AND WITH THE DECISIONS OF OTHER CIRCUITS ON THE PROPER APPLICATION OF FEDERAL RULE OF CIVIL PROCEDURE 19, WHERE A REQUIRED PARTY IS AN IMMUNE FOREIGN SOVEREIGN

Federal Rule of Civil Procedure 19 establishes a two-step procedure for determining whether an action must be dismissed because of an absent party. First, the court must determine whether, under Rule 19(a), the party is "required." A party is "required" to be joined if:

> (A) In that person's absence, the court cannot accord complete relief among existing parties; or
>
> (B) That person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
>
> (i) as a practical matter impair or impede the person's ability to protect the interest; or
>
> (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. P. 19(a)(1)(A)-(B). Where, as here, a required party cannot be joined, the action must be

dismissed unless "in equity and good conscience, the action should proceed among the existing parties." Fed. R. Civ. P. 19(b). Rule 19(b) provides a nonexclusive list of factors to be considered in making this second determination, including: (1) the extent to which a judgment rendered in a party's absence might be prejudicial to that party or to existing parties; (2) the extent to which any prejudice could be lessened or avoided by protective provisions in the judgment, shaping of relief, or other measures; (3) whether a judgment rendered in the party's absence "would be adequate," and (4) whether an adequate remedy would be available to the plaintiff if the action were dismissed. Fed. R. Civ. P. 19(b)(1)-(4). If an analysis of these factors counsels that the action should not proceed without the absent party, the action must be dismissed. Fed. R. Civ. P. 19(b).

A. The D.C. Circuit's Holding Conflicts Directly with This Court's Precedent

This Court's decision in *Philippines v. Pimentel*, 553 U.S. 851 (2008), presents a clear, straightforward test to be applied where Rule 19(a) deems an immune foreign sovereign entity to be a required party. As explained below, this test largely obviates the traditional Rule 19(b) analysis and, where satisfied, mandates dismissal of the case.

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.

See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. ENC Corp., 464 F.3d 885, 892-94 (9th Cir. 2006). This Court reversed. In its opinion, this Court analyzed the history of its Rule 19 decisions involving an immune sovereign, providing the following summary:

> The analysis of the joinder issue in those cases was somewhat perfunctory, but the holdings were clear: A case may not proceed when a required-entity sovereign is not amenable to suit. These cases instruct us 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.

Pimentel, 53 U.S. at 867 (emphasis added). In so doing, this Court articulated a clear and inflexible test: where (1) the sovereign is immune, (2) its claims are not frivolous, and (3) there is a potential for injury to the immune sovereign's interests, dismissal is mandated. *Ibid.* Here, the D.C. Circuit recognized that no exception to the FSIA applies to strip Hungary of its sovereign immunity, that Hungary has a non-frivolous interest in the case, and that there is a potential for injury to Hungary's interests if the action continues without it. Pet. App. 7a, 19a-20a. Because all three of the *Pimentel* test

requirements are satisfied, *Pimentel* required that this case be dismissed.[4]

Nonetheless, the D.C. Circuit sought to avoid *Pimentel's* straightforward application, focusing on factual distinctions that have no bearing on *Pimentel*'s test. The D.C. Circuit noted, for example, that unlike this case, *Pimentel* did not involve a defendant sovereign agency or instrumentality and, therefore, there was no entity to (potentially)

---

[4] Indeed, the clarity, simplicity, and impact of this Court's test in *Pimentel* has been repeatedly recognized by the lower courts.

> *Pimentel* stands for the proposition that where a sovereign party should be joined in an action, but cannot be owing to sovereign immunity, the entire case must be dismissed if there is the potential for the interests of the sovereign to be injured. And this result obtains even when no alternative forum exists in which the plaintiff can press its case.

Klamath Tribe Claims Comm. v. United States, 106 Fed. Cl. 87, 95-96 (2012), *aff'd sub nom. Klamath Claims Comm. v. United States*, 541 F. App'x 974 (Fed. Cir. 2013); *see also Florida Wildlife Fed'n Inc. v. United States Army Corps of Engineers*, 859 F.3d 1306, 1320 (11th Cir. 2017) (noting "the *Pimentel* Court's sovereign-immunity analysis leaves little room for any other conclusion [beyond dismissal]" where the sovereign is immune, has a non-frivolous interests, and there is a potential for injury to that interest if the case continues); *White v. Univ. of California*, 765 F.3d 1010, 1028 (2014) *see also Odyssey Marine Expl., Inc. v. Unidentified Shipwrecked Vessel*, 657 F.3d 1159, 1182 (11th Cir. 2011) (acknowledging *Pimentel* is factually distinguishable, but dismissing action because there was "an undeniable potential for injury to Spain's interest" if the case continued).

"mitigate" prejudice to the Philippines. Pet. App. 25a-26a. Mitigation, however, has no relevance to *Pimentel*'s test; mitigation is, instead, a Rule 19(b) factor that *may* be a relevant consideration where the absent required party is not an immune *sovereign*.

It is beyond dispute that it is easier for a U.S. court to take jurisdiction over an agency or instrumentality, as plaintiffs need only demonstrate a commercial activity in the United States, a very low bar. 28 U.S.C. § 1605(a)(3). And, like petitioners, *every* sovereign's agencies or instrumentalities are likely to have the same interest as the immune sovereign in the *outcome* of the litigation. But if by naming a sovereign's agencies or instrumentalities as defendants—even if those entities have little or no connection to the underlying events or claims, have no ownership interests, and/or cannot provide the plaintiffs with the relief sought—plaintiffs can prolong a lawsuit that seeks to adjudicate the immune *sovereign's* liability, then plaintiffs can effectively circumvent the expropriation exception's clear limitation on taking jurisdiction over a sovereign only where the property is located in the United States. In other words, under the D.C. Circuit's reasoning *any* immune sovereign can have its immunity effectively stripped if a plaintiff names as a defendant an agency or instrumentality with *some* commercial activity in the United States and *some* connection to the case even if, as here, that connection is based solely on the agency or instrumentality's obligation to follow the sovereign's directives.

The D.C. Circuit also opined that because this Court referenced the Rule 19(b) factors after it articulated the *Pimentel* test, it must have intended that the Rule 19(b) factors be considered and applied as they would in a traditional Rule 19 analysis. In other words, according to the D.C. Circuit, this Court did not intend that the *Pimentel* test should apply as written, but instead was telegraphing that the *Pimentel* test result was subject to adjustment and manipulation if a judge could *speculate* that it is possible to *lessen* the potential prejudice to the immune sovereign. That interpretation impermissibly engrafts onto the *Pimentel* test limitations that do not exist in the language of this Court's holding. Had this Court's pronouncement been less concrete—for example, had it theorized that the potential prejudice to the absent immune sovereign *may* necessitate dismissal of the action, affording some discretion to the court—the D.C. Circuit's efforts to constrain *Pimentel*'s application might be supportable. But this Court's dramatically altered 19(b) analysis does not leave open for challenge its clear pronouncement, grounded in long-held recognition that the rights and interests of the immune sovereign are of paramount consideration. Because it is beyond dispute that there is a potential for prejudice to Hungary, the required immune sovereign, *Pimentel required* that this case *must* be dismissed.

B. The D.C. Circuit's Holding Conflicts with the Decisions of Other Circuits, Which Recognize that a Foreign Sovereign's Immunity Is Entitled to Significant Weight

1. Courts have long recognized that the Rule 19(b) analysis is dramatically different if the required party is an immune sovereign. In fact, immunity was such a "compelling interest" that the Rule 19 inquiry is "more circumscribed" where an immune sovereign is involved. *Kickapoo Tribe of Indians of Kickapoo Rsrv. in Kansas v. Babbitt*, 43 F.3d 1491, 1496 (D.C. Cir. 1995)

> While Rule 19(b) sets forth four non-exclusive factors . . . this court has observed that "there is *very little room* for balancing of other factors" set out in Rule 19(b) where a necessary party under Rule 19(a) is immune from suit because immunity may be viewed as one of those interests "*compelling by themselves*."

Ibid. (citation omitted) (emphasis added)). That a required party's sovereign immunity upends the Rule 19(b) analysis has long been recognized in the District of Columbia. *Ibid.*; *Wichita & Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765, 777 n.136 (D.C. Cir. 1986); *Detroit Int'l Bridge Co. v. Gov't of Canada*, 192 F. Supp. 3d 54, 69 (D.D.C. 2016), *aff'd*, 875 F.3d 1132 (D.C. Cir. 2017), as amended, 883 F.3d 895 (D.C. Cir. 2018) (recognizing that the court faces

a "more circumscribed inquiry" under Rule 19(b) where the required party is an immune sovereign).

But the D.C. Circuit is not the only appellate court to recognize the Rule 19(b) analysis is altered dramatically where a required party is an immune sovereign. *See, e.g., Florida Wildlife Fed'n Inc.*, 859 F.3d at 1320; *White*, 765 F.3d at 1028 (recognizing the "wall of circuit authority" mandating dismissal of an action where the required sovereign was immune, regardless of whether a remedy was available); *Kescoli v. Babbitt*, 101 F.3d 1304, 1311 (9th Cir. 1996); *Seneca Nation of Indians v. New York*, 383 F.3d 45, 48-49 (2d Cir. 2004) (affirming dismissal for failure to join a required sovereign "particularly in light of the significance sovereign immunity plays in weighing the Rule 19(b) factors"); *Fluent v. Salamanca Indian Lease Auth.*, 928 F.2d 542, 548 (2d Cir. 1991) (affirming the district court's dismissal in light of the "paramount importance accorded the doctrine of sovereign immunity under [r]ule 19"); *Entertainment Mgmt. Consultants, Inc. v. U.S. ex rel. Hodel*, 883 F.2d 890, 894 (10th Cir. 1989).

These holdings come not merely from the independent reasoning of the appellate courts, but from *this Court's* precedent.

> In Rule 19(b) cases where a required party asserts sovereign immunity, the Supreme Court has instructed us to give "[ ]sufficient weight to [the party's] sovereign status" out of recognition that any consideration of the merits in the

> sovereign's absence is "itself an infringement on...sovereign immunity." Taking our cue from the way in which the Supreme Court has applied this concept, we have no choice but to conclude that the [immune sovereign] is, in fact, "indispensable" to this litigation.

Florida Wildlife Fed. Inc., 859 F.3d at 1318 (quoting *Pimentel*, 553 U.S. at 864-865) (internal footnote omitted); *Odyssey Marine Expl., Inc. v. Unidentified Shipwrecked Vessel*, 657 F.3d 1159, 1181 (11th Cir. 2011) (discussing *Pimentel* and this Court's reversal resulting from the lower court's "fail[ure] to give full effect to sovereign immunity and the promotion of the comity interest that underlies that doctrine").

Here, the D.C. Circuit recognized Hungary is a "required" party insofar as 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." Pet. App. 19a. The panel also recognized the very real potential injury to Hungary with respect to both respondents' tort and contract claims. Pet. App. 19a, 20a. But at this point, the D.C. Circuit's reasoning diverges from binding and persuasive precedent.

Instead of conducting a "circumscribed" examination, *Kickapoo*, 43 F.3d at 1496, of the Rule 19(b) factors in light of the "wall of circuit authority," *White*, 765 F.3d at 1028, mandating recognition of the "paramount importance accorded the doctrine of

sovereign immunity under Rule 19," *Fluent*, 928 F.2d at 548, the panel treated Hungary as it might any immune party. In fact, the panel's decision fails to make *any* reference to the altered examination of Rule 19 when an immune sovereign is a required party. In failing to acknowledge, much less apply, the proper test for determining whether Rule 19 mandates dismissal when an absent, immune sovereign is a required party, the panel broke with this Court's precedent, the D.C. Circuit's precedent, and the precedent of other circuits.

Should the lower court's Rule 19 holding be allowed to stand, the D.C. Circuit's decision will create a clear circuit split with numerous appellate courts, including the Second, Ninth, Tenth, and Eleventh circuits, that have long recognized the Rule 19(b) analysis is wholly altered where the absent required party is an immune sovereign. But more importantly, the decision would defy this Court's directive in *Pimentel* that reversal is compelled where a court fails to "accord proper weight to the compelling claim of sovereign immunity." 553 U.S. at 869; *see also id.* at 865 (finding the lower courts "failed to give full effect to sovereign immunity when they held the action could proceed" without the required, immune foreign sovereign entities).

C. The D.C. Circuit's Rule 19 Holding Is Incorrect

The D.C. Circuit's decision improperly disregards the juridical distinctions between Hungary and petitioners as well as their legally and

factually distinct interests. The D.C. Circuit determined that, notwithstanding the acknowledged potential for prejudice to Hungary should this action move forward, "[t]he presence of the remaining defendants with *interests virtually identical* to Hungary's obviates any such risk here." Pet. App. 21a (emphasis added). But Hungary's interest in the property, as the sole owner and a sovereign with distinct considerations for its cultural patrimony, is wholly distinct from that of MNV (managing the property at Hungary's direction) or the Museums (displaying the artworks on the wall). Thus, the assertion that Hungary, a property manager, and state museums have "virtually identical" interests in the claimed property is false.

The panel nonetheless concluded the case could go forward without Hungary because "[a]t bottom, both Hungary and the remaining defendants seek the *same result*: to retain the artwork and avoid any monetary, equitable, or declaratory relief. Defendants thus 'have the incentive to make every argument on the merits that the absent [Hungary] would or could make." Pet. App. 23a (quoting *Two Shields v. Wilkinson*, 790 F.3d 791, 799 (8th Cir. 2015) (internal quotation marks omitted and emphasis added)). But the D.C. Circuit miscomprehended the meaning of the word of "interest" in Rule 19. Rule 19 is explicit that the relevant "interest" relates to "the subject of the action"—here the purported breach of contracts and torts committed by Hungary—not an interest in the "result" of litigation, as the panel's opinion asserts. Rule 19 does not suggest, much less state, that a

shared interest in the *outcome* of litigation—an interest likely shared by *any* co-defendants—allows a party with little direct involvement in the dispute to stand proxy for the party that claims ownership and is the source of respondents' alleged injury.[5]

It is beyond dispute that MNV's interest in the "subject of the action" is limited to its statutory role in managing Hungary's property; there is no allegation that MNV had any role in respondents' injury or a purported breach of contract.[6] And because, with regard to the artworks at issue here, petitioners may act only at Hungary's direction, if this case goes forward, Hungary will be *forced* to actively litigate this action *through* petitioners, impermissibly blurring the juridical distinction between a sovereign and its agencies or instrumentalities and ignoring entirely the *right* to avoid litigation that sovereign immunity imparts.[7]

---

[5] Petitioners are interested in representing their *own* interests, which are very limited in terms of their relationship to the property *and* respondents' injury. Importantly, respondents never argued, and no court has found, that this action can go forward against the Museums alone. And while MNV is empowered to *represent* Hungary in litigation *when Hungary is a party*, as in the Nierenberg litigation, with Hungary dismissed, MNV no longer has the representational obligation the D.C. Circuit foisted upon it.

[6] Forcing MNV to litigate the lawfulness of Hungary's actions and ownership, when Hungary is immune, is analogous to a foreign court allowing a case to go forward against a *representative* of the U.S. Government after the United States has been dismissed as immune.

[7] If MNV is merely a commercial agency, as determined by the D.C. Circuit, it cannot simply assume the role of a juridically

Such disregard of Hungary's sovereign immunity is not permitted. *See Pimentel*, 553 U.S. at 868-869 (explaining the "privilege" of sovereign immunity "is much diminished if an important and consequential ruling affecting the sovereign's substantial interest is determined, or at least assumed, by a federal court in the sovereign's absence and over its objection").

The D.C. Circuit compounded these errors by relying on out-of-circuit precedent that did not involve immune foreign sovereigns. Such cases are readily distinguishable from *Pimentel*—and this case—because they did not involve key "comity and dignity" interests. *Gensetix, Inc. v. Board of Regents of Univ. of Texas Sys.*, 966 F.3d 1316, 1326 (Fed. Cir. 2020) (recognizing lack of "comity and dignity" interests relevant to *Pimentel*, because the case involved *state* sovereign immunity, rather than *foreign* sovereign immunity). Further, were the Hungarian parties' "interests relating to the subject of the action" identical, as in *Gensetix, Inc.*, that case might have some relevance. Instead, it is that court's decision in *A123 Systems, Inc. v. Hydro-Quebec*, 626 F.3d 1213 (Fed. Cir. 2010), which the D.C. Circuit ignored, that is more analogous. There, the immune party and the licensee had "overlapping" but not "identical" interests, because the licensee was granted a limited license. *Id.* at 1221. The court recognized that because the interests were not identical, the immune parties' interests could not be

---

distinct immune sovereign with dramatically different interests "in the subject of the action," simply because it is directed to represent Hungary in actions challenging Hungary's ownership *when Hungary is a party*.

protected if the action continued without the immune party that possessed a greater interest. *Ibid*.

In its prior decision, the D.C. Circuit recognized that the juridical distinctions between Hungary and its agencies and instrumentalities meant that the FSIA's expropriation exception could not permit it to exercise jurisdiction over Hungary. 859 F.3d at 1104-08. Its new finding, that notwithstanding the different interests in the claimed property and roles in respondents' injury, petitioners can stand proxy for Hungary, relies on inapposite decisions that do not involve immune foreign sovereigns and, as a result, impermissibly eviscerates that important distinction. This Court's intervention is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

THADDEUS JOHN STAUBER
Counsel of Record
AARON MICHAEL BRIAN
NIXON PEABODY LLP
300 South Grand Avenue
Suite 4100
Los Angeles, CA 90071
(213) 629-6000
tstauber@nixonpeabody.com

Counsel for Petitioners