No. 22-243

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 A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF IN OPPOSITION

SHERON KORPUS
Counsel of Record
ALYCIA REGAN BENENATI
KASOWITZ BENSON TORRES LLP
1633 Broadway
New York, NY 10019
(212) 506-1700
skorpus@kasowitz.com

Counsel for Respondents

November 14, 2022

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

QUESTIONS PRESENTED

(1) Whether agencies or instrumentalities of a foreign state, who are not immune from suit under the expropriation exception to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(3) ("FSIA"), can assert an international comity-based exhaustion defense allowing United States courts to abstain from exercising that statutorily-conferred jurisdiction when the FSIA contains no exhaustion requirement and the lower courts have held that further exhaustion of remedies in the foreign state would be futile?

(2) Whether this Court's decision in *Republic of Philippines v. Pimentel*, 553 U.S. 851 (2008) mandates dismissal of an action against agencies or instrumentalities of a foreign state who are not immune from suit under the expropriation exception to the FSIA, without consideration of the factors set forth in Federal Rule of Civil Procedure 19(b) that would otherwise allow the action to proceed "in equity and good conscience," when the absent required party is an immune foreign state whose joinder is not feasible?

RELATED PROCEEDINGS

United States District Court (D.D.C.):

- *de Csepel v. Republic of Hungary et al.*, No. 1:10-cv-1261 (May 11, 2020) (order and judgment on motion to dismiss)
- *de Csepel v. Republic of Hungary et al.*, No. 1:10-cv-1261 (March 14, 2016 (order and judgment on motion to dismiss)
- *de Csepel v. Republic of Hungary et al.*, No. 1:10-cv-1261 (September 1, 2011) (order and judgment on motion to dismiss)

United States Court of Appeals (D.C. Cir.):

- *de Csepel v. Republic of Hungary et al.*, No. 20-7047 (March 8, 2022) (order and judgment on motion to dismiss); (May 10, 2022) (denial of petition for panel rehearing and rehearing *en banc*)
- *de Csepel v. Republic of Hungary et al.*, No. 16-7042 (June 20, 2017) (order and judgment on motion to dismiss); (October 4, 2017) (denial of petition for rehearing *en banc*)
- *de Csepel v. Republic of Hungary et al.*, No. 11-7096 (April 19, 2013) (order and judgment on motion to dismiss); (June 14, 2013) (denial of petition for rehearing *en banc*)

United States Supreme Court:

- *de Csepel v. Republic of Hungary et al.*, No. 17-1165 (January 7, 2019) (denial of petition for writ of certiorari)

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
RELATED PROCEEDINGS	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
INTRODUCTION	1
STATEMENT OF THE CASE	3
A. Factual Background	3
B. Proceedings Below	5
REASONS FOR DENYING CERTIORARI	11
I. The First Question Presented Does Not Warrant Review	12
A. There Is No Circuit Split Warranting This Court's Intervention	12
B. The Decision Below Is Correct	16
C. This Court's Decision In *Cassirer* Does Not Provide A Justification For *Certiorari*	18
D. Any Effect On The United States' Foreign Policy Interests Is Entirely Hypothetical	23
II. The Second Question Presented Does Not Warrant Review	26
A. There Is No Conflict With *Pimentel* Or Other Decisions Of This Court	26
B. There Is No Conflict With Other Circuits	31

TABLE OF CONTENTS—Continued

Page

C. The Decision Below Was Correct......... 33

CONCLUSION... 37

TABLE OF AUTHORITIES

Page

CASES

A123 Systems, Inc. v. Hydro-Quebec,
626 F.3d 1213 (Fed Cir. 2010) 36

Abelesz v. Magyar Nemzeti Bank,
692 F.3d 551 (7th Cir. 2012)......................................12

Am. Dredging Co. v. Miller,
510 U.S. 443 (1994) 20

Canada Malting Co. v. Paterson Steamships, Ltd.,
285 U.S. 413 (1932) 20, 21

Cassirer v. Thyssen-Bornemisza Collection Found.,
142 S. Ct. 1502 (2022) 1, 18, 19

Cooper v. Tokyo Elec. Power Co.,
960 F.3d 549 (9th Cir. 2020)......................................23

de Csepel v. Republic of Hungary,
169 F. Supp. 3d 143 (D.D.C. 2016) 6, 7, 13, 14

de Csepel v. Republic of Hungary,
714 F.3d 591 (D.C. Cir. 2013) 6

de Csepel v. Republic of Hungary,
808 F. Supp. 2d 113 (D.D.C. 2011).......................6, 21

de Csepel v. Republic of Hungary,
859 F.3d 1094 (D.C. Cir. 2017) ....*passim*

Enterprise Mgmt. Consultants Inc. v. U.S. ex rel. Hodel,
883 F.2d 890 (10th Cir. 1989)....................................32

TABLE OF AUTHORITIES—Continued

Page

First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba,
462 U.S. 611 (1983) 19

Fischer v. Magyar Államvasutak Zrt.,
777 F.3d 847 (7th Cir. 2015).......................12, 13, 14

Florida Wildlife Fed'n Inc. v. United States Army Corps of Engineers,
859 F.3d 1306 (11th Cir. 2017).................................32

Fluent v. Salamanca Indian Lease Auth.,
928 F.2d 542 (2d Cir. 1991) 32

Gensetix, Inc. v. Bd. of Regents of Univ. of Texas System,
966 F.3d 1316 (Fed. Cir. 2020) 36

Gulf Oil Corp. v. Gilbert,
330 U.S. 501 (1947) 20

Hartford Fire Ins. Co. v. California,
509 U.S. 764 (1993) 20

Jesner v. Arab Bank, PLC,
138 S. Ct. 1386 (2018) 22

Kescoli v. Babbitt,
101 F.3d 1304 (9th Cir. 1996)...................................32

Kickapoo Tribe of Indians of Kickapoo Rsrv. in Kansas v. Babbitt,
43 F.3d 1491 (D.C. Cir. 1995) 31, 32

Kiobel v. Royal Dutch Petroleum Co.,
569 U.S. 108 (2013) 22, 23

Mujica v. AirScan, Inc.,
771 F.3d 580 (9th Cir. 2014)....................................23

TABLE OF AUTHORITIES—Continued

Page

Philipp v. Fed. Republic of Germany,
894 F.3d 406 (D.C. Cir. 2018),
vacated on other grounds,
141 S. Ct. 703 (2021) 10, 11, 14, 15

Piper Aircraft Co. v. Reyno,
454 U.S. 235 (1981) 20

Provident Tradesmans Bank & Trust Co. v. Patterson,
390 U.S. 102 (1968) 28, 29

Quackenbush v. Allstate Insurance Co.,
517 U.S. 706 (1996) 20, 21

Republic of Argentina v. NML Capital, Ltd.,
573 U.S. 134 (2014) 16, 17

Republic of Austria v. Altmann,
541 U.S. 677 (2004) 16

Republic of Philippines v. Pimentel,
553 U.S. 851 (2008) ....*passim*

Seneca Nation of Indians v. New York,
383 F.3d 45 (2d Cir. 2004) 32

Simon v. Republic of Hungary,
911 F.3d 1172 (D.C. Cir. 2018),
vacated per curiam, 141 S. Ct. 691 (2021)......*passim*

Société Nationale Industrielle Aérospatiale v. United States District Court,
482 U.S. 522 (1987) 21

Sosa v. Alvarez-Machain,
542 U.S. 692 (2004) 22

TABLE OF AUTHORITIES—Continued

Page

Temple v. Synthes Corp.,
498 U.S. 5 (1990) 28, 29

The Belgenland,
114 U.S. 355 (1885) 20

Ungaro-Benages v. Dresdner Bank AG,
379 F.3d 1227 (11th Cir. 2004)...............................23

Verlinden B.V. v. Cent. Bank of Nigeria,
461 U.S. 480 (1983) 3, 16, 19

White v. University of Cal.,
765 F.3d 1010 (9th Cir. 2014).................................32

Wichita & Afliated Tribes of Oklahoma v. Hodel,
788 F.2d 765 (D.C. Cir. 1986) 32

STATUTES AND RULES

28 U.S.C. § 1291 9

28 U.S.C. § 1292(b)...9

28 U.S.C. § 1330(a)...4

28 U.S.C. § 1350 21

28 U.S.C. §§ 1602 *et seq.* 3, 16

28 U.S.C. § 1604 3

28 U.S.C. § 1605 3

28 U.S.C. § 1605(a)...17

28 U.S.C. § 1605(a)(3) ....*passim*

28 U.S.C. § 1605A(a)(2)(A)(iii) 18

TABLE OF AUTHORITIES—Continued

Page

28 U.S.C. § 1606 .... 2, 18, 19

28 U.S.C. § 1607 3

Fed. R. Civ. P. 19(a) 2, 9, 29

Fed. R. Civ. P. 19(b) .... *passim*

OTHER AUTHORITIES

Brief of the United States as Amicus Curiae, *de Csepel v. Republic of Hungary*, No. 17-1165 (Dec. 4, 2018) 24, 36

Brief of the United States as Amicus Curiae, *Federal Republic of Germany v. Philipp* (Nos. 19-351 & 19-520) (May 26, 2020)............................ 14

Petition for Cert., *de Csepel v. Republic of Hungary*, No. 17-1165 (Feb. 16, 2018).............................. 8

Stephen M. Shapiro, et al., *Supreme Court Practice*, Ch. 4.4(b) (11th ed. 2019) 13

Video Remarks of Antony J. Blinken, Terezin Declaration Conference, Prague, November 3, 2022 (available at https://www.state.gov/terezin-declaration-conference/, last accessed November 9, 2022) 26

INTRODUCTION

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") are each agencies or instrumentalities of Hungary who have been found to lack sovereign immunity from suit in the United States under the expropriation exception to the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1605(a)(3), with respect to the claims asserted by respondents David L. de Csepel, Angela Maria Herzog, and Julia Alice Herzog (collectively, "respondents") for various artworks that were taken from the Herzog family during the Holocaust and that are currently in petitioners' possession.

Neither Hungary's sovereign immunity nor the petitioners' lack of sovereign immunity is directly at issue on this interlocutory appeal. Petitioners do not seek review of the portions of the decision below that sustained jurisdiction over MNV, Pet. App. 9a–17a, and did not seek review of the D.C. Circuit's prior decision sustaining jurisdiction over the Museums and dismissing Hungary. *See de Csepel v. Republic of Hungary*, 859 F.3d 1094, 1103, 1110 (D.C. Cir. 2017).

Instead, petitioners wrongly seek to bootstrap this Court's decision last term in *Cassirer v. Thyssen-Bornemisza Collection Found.*, 142 S. Ct. 1502, 1508–1510 (2022) into a requirement that non-immune sovereign parties be allowed to assert a comity-based

exhaustion defense that would allow courts to abstain from exercising the jurisdiction otherwise conferred by the FSIA. However, neither *Cassirer* nor Section 1606 of the FSIA supports such a comity-based abstention defense and the D.C. Circuit correctly rejected petitioners' argument as inconsistent with the plain terms of the FSIA and this Court's prior precedent. Nor is there a circuit split that warrants this Court's review.

Petitioners also ask this Court to construe its decision in *Republic of Philippines v. Pimentel*, 553 U.S. 851, 867 (2008) as mandating dismissal of this action under Rule 19(a), because Hungary is an immune sovereign who cannot be joined, without even reaching the factors that would otherwise allow this action to proceed "in equity and good conscience" under Rule 19(b). The D.C. Circuit correctly held that *Pimentel* articulates no such dispositive, bright-line rule that would require dismissal on the sole basis of Hungary's sovereign immunity and agreed with the lower court that the Rule 19(b) factors weigh in favor of allowing this action to proceed against petitioners in Hungary's absence.

The D.C. Circuit's decision below is entirely consistent with this Court's prior precedent and the plain terms of the FSIA and does not give rise to any genuine conflict or foreign policy concerns that merit review. The correct decision below and this case's interlocutory posture make it an unsuitable vehicle in which to decide the questions presented, particularly as petitioners continue to litigate their sovereign immunity in the

district court. For all of these reasons, review is unwarranted.

STATEMENT OF THE CASE

A. Factual Background

This case involves the Herzog family's decades-long struggle to recover a valuable art collection that the World-War-II-era Hungarian government and its Nazi collaborators stole from them during the Holocaust. Pet. App. 2a. The court of appeals held that Hungary itself is immune from this suit pursuant to the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§ 1602 *et seq.* but sustained jurisdiction over the Museums and MNV under the expropriation exception to the FSIA, 28 U.S.C. § 1605(a)(3). *See de Csepel v. Republic of Hungary*, 859 F.3d 1094, 1110 (D.C. Cir. 2017); Pet. App. 16a. Those findings are not at issue on this petition.

The FSIA establishes "a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488 (1983). The Act sets out a general rule that a foreign state and its agencies and instrumentalities "shall be immune from the jurisdiction" of federal and state courts except as provided by certain international agreements and by the exceptions enumerated in the statute. 28 U.S.C. § 1604; *see id.* §§ 1605–1607. It also provides that

federal district courts shall have jurisdiction over "any nonjury civil action against a foreign state as defined in [*id.* § 1603(a)] as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605–1607 of this title or under any applicable international agreement." *id.* § 1330(a).

Respondents represent all of the heirs to the "Herzog Collection," a body of artwork that was once "one of Europe's great private collections of art, and the largest in Hungary." Pet. App. 3a (internal quotation marks omitted). The collection was amassed by Baron Mór Lipót Herzog, a passionate Jewish art collector in pre-War Hungary. Following Herzog's death in 1934 and his wife's death shortly thereafter, their three children inherited the collection. *Ibid.* David L. de Csepel is a United States citizen and the grandson of the late Elizabeth Weiss de Csepel, who became a United States citizen on June 23, 1952 and lived in the United States from 1946 until her death in 1992. Pet. App. 5a, 37a. Angela and Julia Herzog are the daughters and sole heirs of the late András Herzog, who died in 1943 after Hungary and its Nazi collaborators sent him into forced labor at the Russian front. *Ibid*. Angela and Julia Herzog escaped to Italy with their mother in 1944 and became Italian citizens in 1959 and 1960, respectively. *Ibid*. Together, the three respondents also represent the heirs of István Herzog, who died in Hungary in 1966. Pet. App. 36a.

In March 1944, Adolf Hitler sent German troops to occupy Hungary (a member of the Axis Powers), and

SS Commander Adolph Eichmann established a headquarters in Budapest. Pet. App. 3a. Although the Herzogs attempted to safeguard their art collection by hiding it, the Nazis and Hungary seized pieces of the Herzog Collection from the family's factories, homes, safe deposit vaults, and other family properties with the cooperation of the Museum of Fine Arts. Pet. App. 4a. They placed some items in the collection in the Museum of Fine Arts for safekeeping and sent others to Germany. *Ibid.* While some of the artworks taken to Germany were later sent back to Hungary at the end of the war pursuant to Allied restitution policy, the D.C. Circuit previously found that at least 25 of the artworks at issue were never returned to the Herzog family. *de Csepel*, 859 F.3d at 1103.

B. Proceedings Below

In July 2010, after decades of unsuccessful efforts to secure the return of the stolen works of art (including by filing suit for the return of certain works in Hungary), respondents filed this suit in the District Court for the District of Columbia. Pet. App. 41a. Respondents sued the Republic of Hungary,[1] as well as the petitioner museums, seeking the return of (or fair compensation for) 44 stolen works of art that remain in respondents' possession. *Ibid.*

---

[1] In 2012, the Republic of Hungary adopted a new constitution that, *inter alia*, changed the name of the country to Hungary. Magyarország Alaptörvénye, art. A ("The name of OUR COUNTRY shall be Hungary.").

Hungary and the petitioner museums filed a motion to dismiss, arguing that the suit was barred by the FSIA and did not fall within any of the FSIA's exceptions to immunity for foreign states. *Ibid*. The district court denied the motion to dismiss in all respects, except as to eleven paintings that had previously been the subject of litigation in Hungary between Elizabeth Weiss de Csepel's daughter, Martha Nierenberg, and certain of the defendants, on grounds of international comity. *See de Csepel v. Republic of Hungary*, 808 F. Supp. 2d 113, 135 (D.D.C. 2011). The district court sustained jurisdiction against Hungary and the petitioner museums under the expropriation exception to the FSIA, Section 1605(a)(3). *Id.* at 131. Hungary appealed and, "without ruling on the availability of the expropriation exception" in Section 1605(a)(3), the D.C. Circuit held that petitioners' claims satisfied the commercial-activity exception in Section 1605(a)(2). *de Csepel v. Republic of Hungary*, 714 F.3d 591, 598 (D.C. Cir. 2013). (internal quotation marks omitted). The D.C. Circuit further held that the defendants' comity argument was premature and should be addressed at summary judgment and/or trial. *Id.* at 598–601.

On remand to the district court and after the close of fact discovery, Hungary renewed its motion to dismiss. Pet. App. 43a. The district court agreed with Hungary that, based on the post-discovery record, petitioners had not satisfied Section 1605(a)(2)'s commercial-activity exception, but held again that the expropriation exception in Section 1605(a)(3) applies. *See de Csepel v. Republic of Hungary*, 169 F. Supp. 3d

143, 163 (D.D.C. 2016). The court therefore denied Hungary's motion to dismiss, except as to two paintings that Hungary acquired from third parties after the conclusion of the War. *Id.* at 167.

Hungary appealed again, seeking dismissal of the claims relating to the remaining 42 works of art. Pet. App. 7a. The court of appeals dismissed Hungary as a defendant, but sustained jurisdiction over the museums (each an agency or instrumentality of Hungary) under the expropriation exception as to "those twenty-five or so artworks taken by Hungary during the Holocaust and never returned." *de Csepel*, 859 F.3d at 1103. The D.C. Circuit remanded for the lower court to decide if other artworks that had allegedly been returned and repossessed were also subject to jurisdiction and whether any of the paintings were covered by a 1973 executive agreement between Hungary and the United States. *Id.* at 1104, 1008. The Court of Appeals held that it lacked appellate jurisdiction to address defendants' argument that plaintiffs were required to exhaust remedies in Hungary, including through a recently created claims process, and granted plaintiffs leave to amend their complaint in light of the Holocaust Expropriated Art Recovery Act. *Id.* at 1109–1110; Pet. App. 7a.

Respondents filed their Amended Complaint on December 18, 2017 and added Hungary's asset manager, Petitioner Magyar Nemzeti Vagyonkezelő Zrt. ("MNV"), as a defendant. Pet. App. 45a. Respondents also filed a petition for a writ of certiorari with this Court challenging Hungary's dismissal as a defendant.

See Petition for Cert., *de Csepel v. Republic of Hungary*, No. 17-1165 (Feb. 16, 2018). Petitioners moved to dismiss the Amended Complaint and argued for the first time that the entire action should be dismissed because Hungary is an indispensable party under Rules 19 and 12(b)(7). Pet. App. 45a. Petitioners also argued that the Court lacked jurisdiction under the FSIA over MNV and over all defendants in connection with the artworks that were returned to the family after the war and were later repossessed, that plaintiffs' claims to certain artworks were barred by the 1973 Agreement, and renewed their arguments under the act of state doctrine, international comity, exhaustion and statute of limitations as to those artworks for which this Court has jurisdiction. Pet. App. 45a–46a.

On May 11, 2020, the district court granted in part and denied in part defendants' motion to dismiss and sustained jurisdiction over MNV and the Museums. Pet. App. 35a–129a. The court rejected petitioners' Rule 19 argument that the entire action should be dismissed in light of Hungary's dismissal. Pet. App. 63a–79a. The court also sustained jurisdiction as to five out of nineteen artworks that were allegedly returned and later repossessed by defendants in addition to the twenty-five artworks as to which the Court of Appeals had previously sustained jurisdiction. Pet. App. 99a–102a. Finally, the district court once again rejected petitioners' remaining non-jurisdictional defenses, including exhaustion. Pet. App. 115a–129a.

Petitioners appealed the sovereign immunity portion of the district court's decision as of right pursuant

to 28 U.S.C. § 1291 and sought permission, pursuant to 28 U.S.C. § 1292(b), to certify four additional issues for appeal. Pet. App. 141a–152a. On July 27, 2020, the district court granted petitioners' motion in part and denied it in part, finding that only one issue—whether Hungary was an indispensable party under Rule 19—met the criteria for immediate appellate review under 28 U.S.C. § 1292(b). Pet. App. 146a. Petitioners petitioned the Court of Appeals to certify the three remaining issues that this district court rejected for immediate interlocutory appeal and, on October 9, 2020, the Court of Appeals consolidated the appeals and directed the parties to address both the appeal and the petition for permission to appeal in a single set of briefs.

On March 8, 2022, the Court of Appeals affirmed in part the district court's May 11, 2020, Order. Pet. App. 1a–34a. The Court of Appeals agreed with the district court that Hungary was a required party for purposes of Rule 19(a), but also agreed that "this action may proceed among the existing parties 'in equity and good conscience'" after applying Rule 19(b)'s four factors. Pet. App. 17a, 21a. The court observed that the first Rule 19(b) factor "asks whether a party might suffer prejudice not simply from an adverse result, but specifically from the decision being 'rendered in [its] absence.'" Pet. App. 21a. The court concluded that "[t]he presence of remaining defendants with interests virtually identical to Hungary's obviates any such risk here." *Ibid.* The court noted that "at every stage of the case, and even in related litigation twenty years ago,

MNV has made controlling decisions for all defendants, including Hungary" and is thus "'fully able' to 'step into [Hungary's] shoes and protect [Hungary's] interests.'" Pet. App. 22a. The court rejected the defendants' argument that dismissal is compelled by *Pimentel*, holding that "*Pimentel* cannot bear the weight defendants place on it," and noting that this Court did not treat the absent party's sovereign immunity in *Pimentel* as dispositive and instead proceeded to weigh each of the Rule 19(b) equitable factors. Pet. App. 23. Finally, the court found that the other three Rule 19(b) factors similarly weigh in favor of the case proceeding. Pet. App. 30a–31a.

The Court of Appeals also rejected the defendants' argument that principles of international comity require prudential exhaustion of remedies in Hungary and reaffirmed its holdings and rationales in *Philipp v. Fed. Republic of Germany*, 894 F.3d 406 (D.C. Cir. 2018), *vacated on other grounds*, 141 S. Ct. 703 (2021) and *Simon v. Republic of Hungary*, 911 F.3d 1172 (D.C. Cir. 2018)*, vacated per curiam*, 141 S. Ct. 691 (2021) that the FSIA does not require prudential exhaustion in suits against foreign states. Pet. App. 32a–33a. The court noted that Congress expressly intended for the FSIA to replace the old comity-driven system of sovereign immunity that pre-dated the FSIA and did not include an exhaustion requirement in the expropriation exception even though it included one elsewhere in the FSIA for other types of claims. Pet. App. 32a–33a.

On April 7, 2022, petitioners filed a Petition for Panel Rehearing and Petition for Rehearing En Banc

which the Court of Appeals denied on May 10, 2022. Pet. App. 153a–156a.

REASONS FOR DENYING CERTIORARI

The D.C. Circuit correctly held that principles of international comity do not require prudential exhaustion of remedies in Hungary when the Museums and MNV are subject to the jurisdiction of United States courts under Section 1605(a)(3) of the FSIA. Pet. App. 32a–33a. Review is not warranted because there is no genuine circuit conflict at issue, the decision below is consistent with the plain text of the FSIA and this Court's prior precedents, the foreign policy interests of the United States are not implicated and the lower courts agree that further exhaustion of remedies in Hungary would be futile.

The D.C. Circuit also correctly held that this action may proceed against petitioners, each agencies or instrumentalities of Hungary, even though Hungary itself is immune from suit and has been dismissed as a defendant. Pet. App. 17a–31a. Review is not warranted because there is no conflict between the decision below and any decision of this Court or any other circuit, and the lower courts correctly concluded that this action may in equity and good conscience proceed in Hungary's absence.

I. The First Question Presented Does Not Warrant Review.

A. There Is No Circuit Split Warranting This Court's Intervention.

Petitioners misleadingly suggest that 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." Pet. 11. However, only *one* other circuit—the Seventh—has adopted a legal rule in conflict with the decision of the D.C. Circuit below. The decision below reaffirmed the D.C. Circuit's prior holdings in *Philipp* and *Simon* that the FSIA does not require prudential exhaustion in suits against foreign states and their agencies or instrumentalities after those decisions were vacated by this Court on separate jurisdictional grounds. Pet. App. 32a–33a. However, in a decision that pre-dated *Philipp* and *Simon*, and with similar facts to *Simon*, the Seventh Circuit held that "the comity at the heart of international law required plaintiffs either to exhaust domestic remedies in Hungary or to show a powerful reason to excuse the requirement" before bringing suit in the United States. *Fischer v. Magyar Államvasutak Zrt.*, 777 F.3d 847, 858 (7th Cir. 2015).[2]

---

[2] Petitioners also rely on *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 551, 679–684 (7th Cir. 2012) to support the admittedly "numerically shallow" circuit conflict. Pet. 12. However, *Abelesz* rested on a different question of whether a plaintiff can establish that property was "taken in violation of international law" for purposes of the expropriation exception to the FSIA, 28 U.S.C. § 1605(a)(3) that the Seventh Circuit later "clarified" in *Fischer*,

The Seventh Circuit in *Fischer* agreed with the D.C. Circuit that the expropriation exception to the FSIA contains no statutory exhaustion requirement. *See Fischer*, 777 F.3d at 854 ("We rejected the statutory exhaustion argument, finding that nothing in the language of the FSIA expropriation exception suggests that plaintiffs must exhaust domestic remedies before resorting to United States courts. In so doing, we joined the Ninth and D.C. Circuits.") (internal citations omitted).

While the Seventh Circuit disagreed with the D.C. Circuit as to the general principle of whether an international comity-based prudential exhaustion defense can be used to defeat the jurisdiction otherwise authorized by the FSIA, both circuits agree that, even if there is some general requirement to exhaust foreign domestic remedies as a matter of comity, "[t]here is of course no need to exhaust futile or imaginary domestic remedies." *Fischer*, 777 F.3d at 858.[3]

That is precisely the situation in this case. In its 2016 opinion on petitioners' third, post-discovery, motion to dismiss, the district court rejected the prudential exhaustion as a matter of comity theory that petitioners rely on here. *See de Csepel*, 169 F. Supp. 3d at 168–169. Importantly, the district court held that,

---

and which was never directly addressed by the D.C. Circuit below. *See Fischer*, 777 F.3d at 856.

[3] Under the Court's ordinary practice, that narrowest-possible circuit conflict does not warrant certiorari review. *See* Stephen M. Shapiro, et al., *Supreme Court Practice*, Ch. 4.4(b), at 4–16 (11th ed. 2019).

"[e]ven if the Court were inclined to agree with the Seventh Circuit that international comity requires exhaustion of remedies, the Court finds that plaintiffs have adequately shown that further efforts to seek a remedy in Hungary *would have likely proved futile*." *de Csepel*, 169 F. Supp. 3d at 169 n.15 (emphasis added) (citing *Fischer*, 777 F.3d at 858). In 2020, after petitioners renewed their exhaustion argument on their fourth motion to dismiss, the district court again observed that "requiring plaintiffs to litigate in Hungary, defendants' proposed alternative forum, would be futile." Pet. App. 74a. On appeal, the D.C. Circuit agreed. Pet. App. 31a (holding that if respondents could not pursue their claims in a United States court, "the family would be remitted to the administrative and judicial processes available in Hungary. We agree with the district court that those efforts likely 'would be futile.'"). Therefore, both of the lower courts have already considered and rejected any prudential exhaustion requirement that could conceivably apply by finding that, under the particular facts of this case, further exhaustion of remedies in Hungary would be futile.

This is exactly the type of case-by-case exercise of discretion that the United States advocated for in support of the petitions for certiorari in *Philipp* and *Simon* which this Court granted but ultimately resolved on separate jurisdictional grounds without reaching the issue of whether exhaustion may be required as a matter of comity. *See* Brief of the United States as Amicus Curiae 16 in *Federal Republic of Germany v. Philipp*

(Nos. 19-351 & 19-520) (May 26, 2020) ("[I]nternational comity is a doctrine of 'prudential abstention,' rooted in the 'common law.' Courts therefore have discretion to abstain *based on the weighing of interests at stake in a particular case*.") (emphasis added, internal citations omitted).

Therefore, even if this Court were inclined to review the general principle of whether prudential exhaustion may be invoked as a matter of comity in FSIA cases by non-immune defendants, this case is a poor vehicle for that review because there is no actual circuit split implicated by the decision below, and the outcome would not change.

Petitioners misleadingly assert that "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." Pet. 15. However, all three cases arose out of the D.C. Circuit and relied on the same reasoning and this Court ultimately resolved *Philipp* and *Simon* on other grounds. If anything, that is an argument for this Court to wait to intervene until additional courts of appeals have the opportunity to consider the arguments on both sides and a more suitable vehicle emerges. Having elected not to review the issue of exhaustion in *Simon* and *Philipp*, which did not present the same sort of futility findings at issue here, this Court should decline petitioners' request for *certiorari* review.

B. The Decision Below Is Correct.

Review is also unwarranted because the D.C. Circuit correctly rejected the use of comity-based prudential exhaustion to defeat the jurisdiction otherwise conferred by the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1441(d), §§ 1602 *et seq*. Pet. App. 32a–33a.

This Court has frequently described foreign sovereign immunity as a "gesture of comity." *See*, *e.g.*, *Republic of Argentina v. NML Capital*, *Ltd.*, 573 U.S. 134, 140 (2014); *Republic of Austria v. Altmann*, 541 U.S. 677, 696 (2004); *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983). Prior to the enactment of the FSIA, courts evaluating sovereign immunity had to weigh the political concerns and international norms present in particular cases. *See Verlinden*, 461 U.S. at 487 (providing a historical overview). This Court has explained:

> Congress abated the bedlam in 1976, replacing the old executive-driven, factor-intensive loosely common-law-based immunity regime with the Foreign Sovereign Immunities Act's "comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state." The key word there—which goes a long way toward deciding this case—is comprehensive.

NML Capital Ltd., 573 U.S. at 141 (quoting *Verlinden B.V.*, 461 U.S. at 488). "[A]fter the enactment of the FSIA, the Act—and not the pre-existing common law—indisputably governs the determination of whether a

foreign state is entitled to sovereign immunity." *Id.* at 141 (quoting *Samantar v. Yousuf*, 560 U.S. 305, 313 (2010)); *see also id.* at 141–142 ("any sort of immunity defense made by a foreign sovereign in an American court must stand on the Act's text. Or it must fall."). Therefore, if the FSIA provides jurisdiction, Congress has already decided that international comity does not stand in the way of a U.S. court's exercise of that jurisdiction.

It is undisputed that petitioners have been held to be agencies or instrumentalities of Hungary that are not immune from suit under the expropriation exception to the FSIA, 28 U.S.C. § 1605(a)(3). The plain text of the FSIA states that, when the requirements of the expropriation exception are satisfied, the foreign sovereign defendant "*shall not be immune* from the jurisdiction of courts of the United States." 28 U.S.C. § 1605(a) (emphasis added).

Petitioners attempt to cast their comity-based abstention defense as wholly separate from issues of jurisdiction and sovereign immunity and grounded in common-law principles in the same way as the doctrine of *forum non conveniens*. Pet. 17–18. However, their proposed doctrine of prudential exhaustion would have the *de facto* effect of conferring immunity because, once a plaintiff pursued an available remedy in the defendant's courts, the defendant could assert *res judicata* as a defense to an American suit. That is precisely what petitioners hope to do here, as they have already done with respect to the eleven artworks that were previously the subject of litigation in Hungary

two decades ago. As the D.C. Circuit explained in *Simon*, "enforcing what Hungary calls 'prudential exhaustion' would in actuality amount to a judicial grant of immunity from jurisdiction in United States courts" because of the potential *res judicata* effect. 911 F.3d at 1180.

Petitioners argue that because prudential exhaustion is not explicitly barred by the FSIA, it should be permitted. Pet. 18. However, as the D.C. Circuit correctly recognized, "[w]hen Congress wanted to require the pursuit of foreign remedies as a predicate to FSIA jurisdiction, it said so explicitly." Pet. App. 33a (quoting *Simon*, 911 F.3d at 1181). *See*, *e.g.*, 28 U.S.C. § 1605A(a)(2)(A)(iii). It is undisputed that Section 1605(a)(3) contains no such requirement.

C. This Court's Decision In *Cassirer* Does Not Provide A Justification For *Certiorari*.

Petitioners' reliance on this Court's decision last term in *Cassirer v. Thyssen-Bornemisza Collection Found.*, 142 S. Ct. 1502, 1508–1510 (2022) as a basis for granting the petition is misplaced. Pet. 15–16. *Cassirer* involved what choice-of-law rule a court should use to determine the applicable substantive law in an FSIA suit raising non-federal claims. This Court found that Section 1606 of the FSIA "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. Therefore, this Court held that in an FSIA suit raising non-federal claims against a foreign state or

instrumentality, a court should determine the substantive law by using the same choice-of-law rule applicable in a similar suit against a private party. *Id.*

However, as this Court has explained, Section 1606 addresses the substantive law governing liability and the extent and allocation of damages in FSIA cases. *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 620 (1983); *Verlinden*, 461 U.S. at 488–489 & n.12. Section 1606—which is titled "Extent of liability"—states that a non-immune sovereign party "shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606. Nothing in Section 1606 suggests that it limits the circumstances in which a U.S. court should exercise or abstain from jurisdiction over a foreign sovereign defendant, which is effectively what petitioners seek here. When a court abstains from exercising its jurisdiction in deference to another forum, that has no effect on the manner or extent of the defendant's liability—it simply changes the forum in which such matters are adjudicated. Therefore, Section 1606 has nothing to do with the type of comity-based exhaustion defense that petitioners advance here.

Even if it did, petitioners wrongly suggest that they have been deprived of the opportunity to assert an "exhaustion-focused," "adjudicatory comity" defense

that is otherwise available to private litigants. Pet. Br. 16, 20.[4]

Petitioners wrongly rely on this Court's decisions in *The Belgenland*, 114 U.S. 355 (1885)—in which the Court retained jurisdiction over an admiralty dispute between two foreign parties—and *Canada Malting Co. v. Paterson Steamships, Ltd.*, 285 U.S. 413 (1932)—in which the Court affirmed dismissal of a suit between foreign parties in deference to an earlier-filed parallel suit pending in a foreign jurisdiction. Pet. 20. As this Court recognized in later decisions, however, these cases—both of which long-predate the FSIA—applied the doctrine now known as *forum non conveniens*. *See Am. Dredging Co. v. Miller*, 510 U.S. 443, 449 (1994); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 247, 248 n.13 (1981); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 504 (1947). The doctrine of *forum non conveniens* is simply not comparable to the international comity-based abstention petitioners seek here. As the Court explained in *Quackenbush v. Allstate Insurance Co.*, "our abstention doctrine is of a distinct historical pedigree" from *forum non conveniens*, "and the traditional considerations behind dismissal for forum non conveniens differ markedly from those informing the decision to

---

[4] Petitioners wrongly suggest, Pet. 20, that the separate doctrine of "prescriptive comity" is the same as "adjudicatory comity" and is at issue here. It is not. Prescriptive comity involves the "respect sovereign nations afford each other by limiting the reach of their laws." *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 817 (1993) (Scalia, J., dissenting). Here, the FSIA unambiguously applies to conduct that occurred abroad and the doctrine is unapplicable.

abstain." 517 U.S. 706, 722–723 (1996). Indeed, the lower courts in this case have already rejected petitioners' efforts to dismiss this case on the basis of *forum non conveniens*. *See de Csepel*, 808 F. Supp. 2d at 139, *aff'd*, 714 F.3d at 605–606.

Moreover, the Court's dismissal in *Canada Malting* was based on pending parallel litigation in a foreign jurisdiction. 285 U.S. at 417, 419–420. No such parallel proceedings exist here.

None of the other cases relied on by petitioners support their contention that they have been deprived of a comity-based defense that is otherwise widely available to private litigants. *Société Nationale Industrielle Aérospatiale v. United States District Court*, Pet. 21, addressed the role of comity in enforcing discovery requests against a foreign entity. 482 U.S. 522, 524–525, 543–546 (1987). However, the significant discretion district courts have over discovery proceedings is simply not comparable to the abstention from statutorily-conferred jurisdiction that is at issue in this case

Petitioners' reliance on this Court's decisions interpreting the scope of the Alien Tort Statute ("ATS"), which provides district courts with "jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States," 28 U.S.C. § 1350, is also misplaced. Petitioners argue (Pet. 21) that because non-sovereign foreign defendants are sometimes entitled to dismissal of ATS suits based on comity concerns (or exhaustion), foreign

sovereigns should be entitled to the same under Section 1606. However, the ATS—unlike the FSIA—does not specify in clear terms what types of claims fall within its grant of jurisdiction. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 713–714 (2004) ("The grant of jurisdiction" in the ATS is " 'best read as having been enacted on the understanding that the common law would provide a cause of action for [a] modest number of international law violations.' "); *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 115 (2013) (quoting *Sosa*, 542 U.S. at 724) (brackets in original). It therefore falls to the courts to determine which causes of action are encompassed within the ATS's jurisdictional grant. This Court has cautioned that courts should be wary of expanding the substantive scope of the ATS beyond a few limited categories of cases recognized as justiciable when the ATS was enacted in 1789. *Sosa*, 542 U.S. at 720; *Kiobel*, 569 U.S. at 116 ("Because the ATS requires courts to determine whether a cause of action falls within the ATS's grant of jurisdiction, the potential foreign-policy implications of recognizing new causes of action under the ATS 'should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs.' ").

Petitioners rely (at Pet. 21, 23) on Justice Sotomayor's statement in her dissenting opinion in *Jesner v. Arab Bank, PLC* that courts can "dismiss ATS suits" based on "failure to exhaust" or "for reasons of international comity." 138 S. Ct. 1386, 1430–1431 (2018) (Sotomayor, J., dissenting). That is true with

respect to ATS claims precisely because Congress did not define the substantive scope of the ATS, nor "whether a claim may reach conduct occurring in the territory of a foreign sovereign." *Kiobel*, 569 U.S. at 115. However, the opposite is true with respect to the FSIA, which was intended to reflect the scope of comity to be afforded to foreign sovereigns with respect to immunity, including with respect to conduct occurring abroad. *See supra* at I.B.

Mujica v. AirScan, Inc., 771 F.3d 580, 609–614 (9th Cir. 2014), *Cooper v. Tokyo Elec. Power Co.*, 960 F.3d 549, 545–569 (9th Cir. 2020) and *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1238–1240 (11th Cir. 2004), Pet. 20–22, are also inapposite because they involved claims against non-sovereign entities for conduct occurring abroad where the United States expressly sought dismissal on the basis of international comity. No such request has been made here, nor can petitioners show that United States foreign policy interests will be impacted if this case proceeds. *See infra* at I.D.

D. Any Effect On The United States' Foreign Policy Interests Is Entirely Hypothetical.

Petitioners wrongly rely on the brief filed by the Solicitor General in *Simon* to argue that the D.C. Circuit's "categorical rejection of international-comity based abstention likely would be harmful to the foreign-relations interests of the United States." Pet. 12 (quoting Brief for the United States as *Amicus Curiae*

Supporting Petitioners, *Republic of Hungary v. Simon*, No. 18-1447, 2020 WL 5535982 at 25). However, apart from this hypothetical concern, petitioners fail to show that any important United States foreign policy interests are actually implicated by the D.C. Circuit's decision in this case.

Notably, in the twelve years since this action was filed, the United States has never once submitted a Statement of Interest on petitioners' behalf or expressed any foreign-policy concerns whatsoever regarding this litigation. To the contrary, when this Court asked the Solicitor General to file a brief conveying the views of the United States in connection with respondents' 2018 petition for certiorari on the issue of Hungary's sovereign immunity, the United States recommended denying the petition because it believed the D.C. Circuit had correctly dismissed Hungary as a defendant, but emphasized that "[t]he United States deplores the acts of oppression committed against the Herzog family, and supports efforts to provide them with a measure of justice for the wrongs they suffered."[5] Brief of the United States as Amicus Curiae 8 in *de Csepel v. Republic of Hungary*, No. 17-1165 (Dec. 4, 2018). The United States at no point expressed any foreign policy concerns with respect to the action continuing to proceed against the museums. Therefore,

---

[5] Respondents' 2018 petition addressed the D.C. Circuit's dismissal of Hungary under Section 1605(a)(3) of the FSIA and the court's interpretation of that provision as applying different criteria for jurisdiction over foreign states as opposed to their agencies or instrumentalities.

any alleged harm to the foreign-relations interests of the United States resulting from the D.C. Circuit's rejection of petitioners' exhaustion defense is hypothetical at best.

In addition, as discussed *supra* at I.A., there is no "categorical rejection" of a comity defense at issue here because although petitioners barely acknowledge it in a scant footnote, Pet. 25 n.2, both of the lower courts considered petitioners' comity-based exhaustion argument and rejected it on its merits despite their views that it was also precluded by the FSIA.

Moreover, while petitioners quote the United States' observation in *Simon* that "[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," Pet. 13, that is not the case here. This expropriation case does not involve any sovereign entity receiving disparate treatment to a comparably situated private defendant.

Petitioners' suggestion that "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,'" Pet. 13, is particularly galling when Hungary has failed to pay more than mere lip service to the principles announced

at the Washington Conference on Nazi-Confiscated Art and the Terezin Declaration that petitioners tout. Pet. 14. Indeed, Hungary was explicitly named by United States Secretary of State Antony J. Blinken just last week as "among the countries that still have the greatest work ahead" to meet their commitments under the Terezin Declaration. *See* Video Remarks of Antony J. Blinken, Terezin Declaration Conference, Prague, November 3, 2022 (available at https://www.state.gov/terezin-declaration-conference/, last accessed November 8, 2022).

If there is to be any comity-based departure from the FSIA's abrogation of immunity to accommodate the Executive Branch's foreign policy concerns (and there should not be), it should be limited to cases where the Executive Branch has actually requested abstention based on those concerns. This is not such a case.

II. The Second Question Presented Does Not Warrant Review.

A. There Is No Conflict With *Pimentel* Or Other Decisions Of This Court.

Petitioners wrongly assert that this Court's decision in *Republic of Philippines v. Pimentel*, 553 U.S. 851 (2008) mandates dismissal of this case. Pet. 27–31. In *Pimentel*, a class of human rights victims who were awarded a nearly $2 billion judgment against former Philippines President Ferdinand Marcos sought to attach the assets of a company incorporated by Marcos

that were held by a New York broker (Merrill Lynch). The Republic of the Philippines and a government commission established to recover property wrongfully taken by Marcos also sought to recover the same and other property through a pending action in the Philippines. *See Pimentel*, 553 U.S. at 853. After Merrill Lynch brought an interpleader action, the Republic and the commission sought to have the entire action dismissed, arguing that they had sovereign immunity but were also indispensable parties under Rule 19. *See id.* at 859. The lower courts dismissed the sovereign parties, but allowed the interpleader action to proceed to judgment over their objection and awarded the assets to the class. The sovereign parties appealed. *Id.* at 860. This Court stated 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*, 553 U.S. at 867. However, this Court did not treat that statement as an inflexible test that gave dispositive weight to sovereign immunity. Rather, consistent with this Court's prior precedent, this Court carefully weighed each of the Rule 19(b) factors before determining that the action could not proceed without the absent sovereign parties. Moreover, this Court expressly tied its broad statement of principle to "the comity interests that have contributed to the development of the immunity doctrine." *Id.* at 866.

According to petitioners, *Pimentel* established a bright-line test that is "clear and inflexible" and

requires dismissal without consideration of the equitable factors set forth in Federal Rule of Civil Procedure 19(b) whenever "(1) the [absent] sovereign is immune, (2) its claims are not frivolous, and (3) there is a potential for injury to the immune sovereign's interests." Pet. 28.

The D.C Circuit correctly rejected this argument, finding that "*Pimentel* cannot bear the weight defendants place on it. *Pimentel* itself reaffirmed that, in assessing the potential for injury, the equitable character of Rule 19(b)'s non-exhaustive list of factors 'indicates that the determination whether to proceed will turn upon factors that are case specific.'" Pet. App. 24a (quoting 553 U.S. at 863–864). The absent required party in *Pimentel* was an immune sovereign and the court below correctly observed that, "if the Philippine government's sovereign interest in the disputed issues were alone dispositive in *Pimentel*, as defendants assert, the Court would have ended the inquiry there. Instead, it proceeded to weigh each of the Rule 19(b) equitable factors." Pet. App. 24a.

This Court has addressed Rule 19 in significant detail in only two decisions prior to *Pimentel*: *Provident Tradesmans Bank & Trust Co. v. Patterson*, 390 U.S. 102 (1968) and *Temple v. Synthes Corp.*, 498 U.S. 5 (1990) (per curiam). In both cases, the Court overturned decisions in which the lower courts dismissed lawsuits for failure to join an indispensable party and articulated a flexible approach to construing Rule 19.

Neither case involved a foreign sovereign,[6] nor does the text of Rule 19 or any of the Advisory Committee's notes to Rule 19 suggest that any special treatment should be accorded immune sovereigns who are absent parties.

In *Provident Tradesmens*, the Court emphasized that the issue of "whether a particular lawsuit must be dismissed in the absence of a [required] person can only be determined in the context of particular litigation." 390 U.S. at 118. The decision to dismiss "must be based on factors varying with the different cases, some such factors being substantive, some procedural, some compelling by themselves, and some subject to balancing against opposing interests." *Id.* at 119. The Court quoted this language approvingly in *Pimentel* and agreed that Rule 19 is designed so that "the determination whether to proceed will turn upon factors that are *case specific*, which is consistent with a Rule based on equitable considerations." 553 U.S. at 862–883 (emphasis added). Accordingly, petitioners' assertion, Pet. 10–11, that *Pimentel* "dramatically altered the application of Rule 19(b) where the required party, under Rule 19(a), is an immune foreign sovereign," is inaccurate.

---

[6] *Provident Tradesmens* involved a suit over a traffic accident where the bank sued the estate of one vehicle's driver but did not sue the vehicle owner because his presence would have defeated diversity jurisdiction. *Id.*, 390 U.S. at 106. *Temple* held that joint tortfeasors do not quality as parties who "should be 'joined if feasible' " under Rule 19(a) and allowed the case to proceed without reaching the Rule 19(b) factors. *Temple*, 498 U.S. at 8.

Petitioners wrongly suggest that the lower court's decision would allow "*any* immune sovereign [to] 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 . . . that connection is based solely on the agency or instrumentality's obligation to follow the sovereign's directives," Pet. 30. The plain terms of Section 1605(a)(3) of the FSIA do not countenance jurisdiction over a foreign agency or instrumentality of a foreign state unless the property at issue (or property exchanged for that property) is "owned or operated by" the agency or instrumentality—criteria which ensure more than "some" connection to the case.

Pimentel did not involve the expropriation exception to the FSIA, and no court to date has applied *Pimentel* to a case arising under 1605(a)(3) other than the court below. Petitioners' broad construction of *Pimentel* would force federal courts to abstain from exercising the jurisdiction otherwise conferred by Congress through Section 1605(a)(3) over "agencies and instrumentalities" who merely "operate" (i.e., possess) rather than "own" the property at issue in nearly all circumstances. This would eviscerate the second clause of Section 1605(a)(3), and is at odds with the principles—and limitations—of comity that Congress memorialized in the FSIA. Nothing in *Pimentel* suggests that this Court intended such a result.

B. There Is No Conflict With Other Circuits.

Unable to show a conflict with *Pimentel*, petitioners wrongly attempt to manufacture a conflict by suggesting that the decision below conflicts with the D.C. Circuit's own prior precedent and that of other circuits. Pet. 30–35. Even if that were true (which it is not), an intra-circuit split is not a basis for granting certiorari. Nor have petitioners identified any inter-circuit conflict that merits review.

Petitioners focus on the pre-*Pimentel* decision of the D.C. Circuit in *Kickapoo Tribe of Indians of Kickapoo Rsrv. in Kansas v. Babbitt*, 43 F.3d 1491, 1496 (D.C. Cir. 1995), which identified sovereign immunity as one of those interests that may be "compelling by themselves," that results in a "more circumscribed inquiry" of the Rule 19(b) factors. However, nothing in *Kickapoo* suggests that the existence of a "compelling factor," such as sovereign immunity, should preempt Rule 19(b)'s multifactor analysis. Indeed, as in *Pimentel*, the D.C. Circuit in *Kickapoo* considered the Rule 19(b) factors without giving dispositive weight to Kansas's sovereign immunity. That is precisely what the court below did in this case.

None of the other cases cited by petitioners, Pet. 32–35, adopts the bright-line rule advocated by petitioners that an action must be dismissed simply because an immune sovereign cannot be joined, nor did they involve analogous facts where the absent sovereign's interests were adequately protected by other

parties.[7] Rather, those cases stand for the unremarkable proposition articulated in *Kickapoo* that the Rule 19(b) inquiry may be more "circumscribed" when a sovereign defendant is involved.[8] Petitioners' suggestion that the D.C. Circuit somehow ignored "the altered examination of Rule 19 when an immune sovereign is a required party," Pet. 35, is belied by the decision below which discussed *Pimentel* and *Kickapoo*, among other cases, in detail. Pet. App. 23a–27a. There is simply no conflict among the circuits here that merits review.

---

[7] Indeed, *Wichita & Affiliated Tribes of Oklahoma v. Hodel*, holds the opposite. 788 F.2d 765, 771 (D.C. Cir. 1986) ("At the threshold, tribal immunity does not extend to barring suit against a third, non-immune party solely because the effect of a judgment against the third party will be felt by the tribe.").

[8] *See Florida Wildlife Fed'n Inc. v. United States Army Corps of Engineers*, 859 F.3d 1306, 1318 (11th Cir. 2017) (giving "strong consideration" to water district's sovereign immunity in light of *Pimentel* but considering Rule 19(b) factors); *White v. University of Cal.*, 765 F.3d 1010, 1028 (9th Cir. 2014) (affirming lower court's evaluation of Rule 19(b) factors); *Kescoli v. Babbitt*, 101 F.3d 1304, 1311 (9th Cir. 1996) (analyzing Rule 19(b) factors and determining that, although the factors were not clearly in favor of dismissal, the concern for the protection of tribal sovereignty warranted dismissal); *Seneca Nation of Indians v. New York*, 383 F.3d 45, 48–49 (2d Cir. 2004) (noting 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) (weighing Rule 19(b) factors while acknowledging the "paramount importance" of sovereign immunity); *Enterprise Mgmt. Consultants Inc. v. U.S. ex rel. Hodel*, 883 F.2d 890, 894 (10th Cir. 1989) (weighing Rule 19(b) factors and finding that tribal immunity outweighed other interests where no party could adequately represent the tribe's legal position).

C. The Decision Below Was Correct.

Review is also unwarranted because the decision below was correct. The D.C. Circuit recognized that "[t]he key Rule 19(b) factors" identified in *Pimentel* that might protect the foreign sovereign's interest "were the first two—potential prejudice, and measures to mitigate it." Pet. App. 24a. The court observed that "[c]ritically, in *Pimentel* no party with interests aligned with the Philippine government's remained in the case to guard against prejudice in its absence." *Id.* at 25a. The court also noted that in *Pimentel*, there were "[n]o alternative remedies or forms of relief have been proposed to us or appear to be available" that might lessen the prejudice to the absent defendants. *Id.* The D.C. Circuit agreed with the district court that these key facts distinguish *Pimentel* from the case at hand where Hungary's interests are adequately protected by the Museums and MNV (who is obligated under Hungarian law to protect state property) and where monetary damages may be awarded based on defendants' possession of the artworks at issue without affecting Hungary's ownership interests. *Id.* These facts also distinguish this case from the cases relied on by petitioners where no such alignment was present. Pet. 33–38. The D.C. Circuit also correctly found that the remaining Rule 19(b) factors weigh in favor of the suit proceeding. Pet. App. 26a–31a.

Petitioners wrongly contend that the decision below "improperly disregards the juridical distinctions between Hungary and petitioners as well as their legally factually distinct interests," because Hungary

owns the artworks but the Museums merely display them. Pet. Br. 35–36. However, the D.C. Circuit correctly rejected that argument, noting that "defendants have not identified how that distinction could impair Hungary's interests. At bottom, both Hungary and the remaining defendants seek the same result: to retain the artwork and avoid any monetary, equitable, or declaratory relief." Pet. App. 23a. Petitioners identify no issue on which the interests of Hungary and the Museums have not been aligned, nor do they identify any issue on which they are likely to be unaligned in the future. While petitioners attempt to minimize the role of MNV, Hungary's asset manager, Pet. 36–37, it is undisputed that MNV has represented Hungary as its agent in this litigation from day one—long before it was ever made a party—and has been responsible for all relevant decision-making. Pet. App. 22a. Hungary has also authorized MNV to render binding decisions with respect to the ownership of artworks held in the public collections of the Museum and the University. *Ibid*. For all of these reasons, the D.C. Circuit correctly observed that Hungary's sovereign interests here "are so aligned with those of the remaining defendants that the latter will vigorously protect Hungary's interests by pressing their own." Pet. App. 26a. The district court similarly held that "[i]n this case, the remaining defendants and Hungary are not only aligned, they 'share a 'precisely' identical interest in the subject matter of the litigation,' *i.e.*, that Hungary and its agencies and instrumentalities continue their possession of the artwork and pay no damages." Pet. App. 74a.

While petitioners wrongly accuse the D.C. Circuit of "impermissibly blurring the juridical distinction between a sovereign and its agencies or instrumentalities," Pet. 37, it is actually petitioners who seek to blur that distinction by ignoring that the Museums and MNV are each capable of being sued in their own name and may be required to pay damages. Pet. App. 27a–29a.

In its brief submitted at the request of this Court in connection with respondents' prior petition for certiorari, the United States acknowledged that the museums had moved to dismiss this action in the district court under Rule 19 while the petition was pending, but that the Rule 19 issue was not then before this Court. Nevertheless, the United States offered its view that

> Hungary's separateness weighs against its contention that a suit against the museums or university would "as a practical matter impair or impede [Hungary's] ability to protect [its] interest[s]," Fed. R. Civ. P. 19(a)(1)(B)(i), particularly in the context of petitioners' tort claims essentially asserting that those entities have wrongfully profited in the United States from exploitation of the artworks. Under the decision below, Hungary will no longer be a party to this suit, and thus would not be bound by a money judgment against the museums or university. And unlike in *Pimentel*, which was an interpleader action to resolve ownership of a bank account inside the United States, *see* 553 U.S. at 854, 857, resolution of the damages claims here would not have the

> practical effect of depriving Hungary of its ownership interest, because Hungary would not be a party and the artworks are abroad. Hungary's separate status may also be relevant to deciding whether, "in equity and good conscience, the action should proceed" notwithstanding its absence. Fed. R. Civ. P. 19(b).

Brief of the United States As Amicus Curiae 21 in *de Csepel v. Republic of Hungary*, No. 17-1165 (Dec. 4, 2018). Therefore, the United States agreed that Hungary's sovereign interests would be protected by its dismissal even if the action proceeded against the Museums.

None of petitioners' critiques of the D.C. Circuit's decision below rise to the level of abuse of discretion, much less warrant *certiorari* review.[9] The decision below was entirely consistent with *Pimentel* and other

[9] Petitioners wrongfully criticize the D.C. Circuit's reliance on *Gensetix, Inc. v. Bd. of Regents of Univ. of Texas System*, 966 F.3d 1316, 1325 (Fed. Cir. 2020), Pet. 38–39, Pet. App. 22. In *Gensetix*, the court held that "the district court abused its discretion by collapsing the multi-factorial 19(b) inquiry into one dispositive fact: UT's status as a sovereign" and concluded that an action to determine validity of patents could proceed where the licensee would adequately protect UT's interests. Petitioner's contention that the case involved state, rather than foreign, sovereign immunity is irrelevant because, as discussed *supra* at II.B., Pimentel does not require the singular focus on Hungary's sovereign immunity that petitioners wrongly attribute to it. Nor is *A123 Systems, Inc. v. Hydro-Quebec*, 626 F.3d 1213 (Fed Cir. 2010) more "analogous," Pet. 38. In that case, the court of appeals decided the Rule 19 issue for the first time on appeal and found that HQ's "field of use" license did not sufficiently overlap with the interests of UT as patent holder under the facts of that case. Here, both of the lower courts have found otherwise.

prior precedent of this Court and the courts of appeal and turned on the particular facts of this case. For all of these reasons, this Court should decline to review the second question presented.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

SHERON KORPUS
Counsel of Record
ALYCIA REGAN BENENATI
KASOWITZ BENSON TORRES LLP
1633 Broadway
New York, NY 10019
(212) 506-1700
skorpus@kasowitz.com

November 14, 2022