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

REPLY BRIEF

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I. The First Question Presented Warrants Review

A. The Existing Circuit Split is Now Further Entrenched and Warrants Immediate Review

Respondents challenge petitioners' assertion that the conflict between the D.C. and Seventh Circuits on whether courts may discretionarily dismiss a case on international comity grounds is a circuit split. Opp. 12. It is the United States, not petitioners, who first flagged this "circuit split" as worthy of review in two CVSG briefs. Brief of the United States as *Amicus Curiae* 10, *Republic of Hungary v. Simon*, No. 18-1447 (May 26, 2020) ("The decisions below and in *Philipp* [*v. Federal Republic of Germany*, 925 F.3d 1349, 1357 (D.C. Cir. 2019)] thus 'create a circuit split on a sensitive foreign-policy question.'" (internal citation omitted); Brief of the United States as *Amicus Curiae* 19, *Federal Republic of Germany v. Philipp*, Nos. 19-351 & 19-520) (May 26, 2020). This Court granted review of the question presented in *both* cases.

Respondents half-heartedly assert that, notwithstanding the clear "cert-worthy" nature of the question presented, this Court should "wait to intervene until additional courts of appeals have the opportunity to consider the arguments." Opp. 15. Respondents know this assertion is a red herring, having argued to *this Court* that D.C. is the "default venue for suits against a foreign sovereign" and the FSIA "erect[s] material barriers to filing such suits

elsewhere in the country." Supplemental Brief for Petitioners at 5, *de Csepel v. Hungary*, No. 17-1165 (Dec. 18, 2018); *see also* Petition for Writ of Certiorari at 19-23, *de Csepel v. Hungary*, No. 17-1165 (Feb. 16, 2018); Reply Brief for Petitioners at 5, *de Csepel v. Hungary*, No. 17-1165 (June 4, 2018). Thus, there is no reason to delay review of the first question presented.

B. The D.C. Circuit's Decision Improperly Mandates that Non-Immune Foreign Sovereigns Be Treated Worse than Private Parties

The D.C. Circuit read the FSIA to *compel* adjudication of a case if jurisdiction is *permitted*. If that were true, other common law principles—like *forum non conveniens*—would be similarly barred. The FSIA does not bar such discretionary doctrines because it "is a 'pass-through' to the substantive law that would govern a similar suit between private individuals." *Cassirer v. Thyssen-Bornemisza Collection Found.*, 142 S. Ct. 1502, 1508 (2022). In fact, this Court recognized that courts "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, 423 (1932).

This Court made clear that the *FSIA* mandates that non-immune foreign sovereigns be treated *like* private parties:

> As to any claim for relief with respect to which a foreign state is not entitled to immunity under [the FSIA], the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances.

Cassirer, 142 S. Ct. at 1504 (quoting 28 U.S.C. § 1606). Because the D.C. Circuit's holding that a foreign sovereign is barred from raising a legitimate defense subjects that sovereign to *worse* treatment than a "private individual under like circumstances," it conflicts with the FISA *and* this Court's precedent.

C. The D.C. Circuit's Reaffirmed Holding Is Incorrect and Is Premised Largely on a Fundamental Misunderstanding of Law

Respondents contend that Congress "has already decided that international comity does not stand in the way of a U.S. court's exercise of [] jurisdiction," because "any sort of *immunity* defense made by a foreign sovereign in an American court must stand on the [FSIA's] text," Opp. 17 (quoting *Republic of Argentina v. NML Capital, Ltd.*, 573 U.S. 134, 141-142 (2014) (emphasis added)). In conflating principles of abstention and immunity, respondents double-down on the D.C. Circuit's error: that dismissal on sovereign immunity grounds and dismissal on abstention-related grounds are the same thing. But they are not. In fact, they are not even close.

A foreign sovereign's immunity is *presumed*, and a foreign sovereign *must* be dismissed unless one of a few enumerated FSIA exceptions applies to *permit* jurisdiction. 28 U.S.C. §§ 1604-1605. International comity-based abstention, on the other hand, is *discretionary*, its availability as a defense is not limited to foreign sovereigns, and it cannot be applied *unless* a court has jurisdiction. Pet. 20-23; *Philipp v. Federal Republic of Germany,* 925 F.3d 1349, 1356 (D.C. Cir. 2019) (Katsas, J., dissenting from 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."). And comity interests are heightened where, as here, the claims "arise from events of historical and political significance" to the foreign sovereign. *Republic of Philippines v. Pimentel*, 553 U.S. 851, 866 (2008).

Because comity-based abstention is *not* an immunity defense but is, instead, a defense that *presupposes* immunity, nothing in the FSIA, this Court's decisions interpreting the FSIA, or the FSIA's legislative history bars a court from considering a non-immune foreign sovereign's international comity defense to determine whether abstention is appropriate. *See Republic of Austria v. Altmann*, 541 U.S. 677, 701 (2004) (expressing willingness to consider statements of interest from the United States "suggesting that courts decline to exercise jurisdiction"); H.R. Rep. No. 1487, 94th Cong., 2d Sess. 20 (1976) (asserting that the FSIA "deals solely with issues of immunity").

Respondents contend that a court's dismissal of a case against a non-immune sovereign equates to "*de facto*" immunity because "once a plaintiff pursued the available remedy in the defendant's courts, the defendant could assert *res judicata* as a defense to an American suit." Opp. 17. But a foreign judgment is *not* recognized unless "there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice[.]" *Hilton v. Guyot*, 159 U.S. 113, 202-203 (1895); *see also de Csepel v. Republic of Hungary*, 714 F.3d 591, 606 (D.C. Cir. 2013) (discussing *Hilton*). If the Hungarian proceedings violate due process requirements, then the case can go forward in this country. *See, e.g., Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1412 (9th Cir. 1995). But if the foreign litigation and judgment comport with due process standards, then it *should* be recognized—not because the sovereign defendant has "*de facto*" immunity—but because that sovereign's decision is *entitled* to respect. *Hilton*, 159 U.S. at 202-203; Restatement (Second) of Conflict of Laws § 98 cmt. b (1971).

D. The D.C. Circuit's Decision Is a "Categorical Rejection" of a Court's Ability to Discretionarily Abstain from Adjudicating a Case

Confusingly, respondents assert that the D.C. Circuit rejected petitioners' argument that principles of international comity "*require* prudential exhaustion of remedies in Hungary[.]" Opp. 10 (emphasis added). But petitioners argue that international comity is a *discretionary* doctrine, one that a court *may* apply even when it may entertain jurisdiction over the parties.

Acknowledging that the United States has sought dismissal of cases on international comity grounds, Opp. 23, respondents suggest that courts should be permitted to exercise their discretion and abstain where the "Executive Branch has actually requested abstention." Opp. 26. But the D.C. Circuit's decision would not allow this because that court reads the FSIA to *bar* a court from considering such a defense.

Nonetheless, respondents contend that the D.C. Circuit's decision is not a "categorial rejection" of a comity defense. Opp. 25. But, as the United States noted, that is *exactly* what the court's decision does, forbidding abstention even where the litigation "raises serious foreign policy concerns." Brief of the United States as *Amicus Curiae* Supporting Petitioners 25-26, *Republic of Hungary v. Simon*, No. 18-1447 (Sept. 11, 2020). This holding cannot stand.

E. This Case Is a Good Vehicle Through Which to Resolve the Circuit Split

The D.C. Circuit rubber-stamped the district court's passing assertion that respondents' remedies in Hungary "would have likely proved futile." *de Csepel v. Republic of Hungary*, 169 F. Supp. 3d 143, 169 n.15 (D.D.C. 2016). The district court's analysis, however, is based largely on the flawed perception that international comity cannot be advanced by individuals, *see id.* at 169, an erroneous view repeated by the D.C. Circuit, *see Philipp v. Federal Republic of Germany*, 894 F.3d 406, 416 (D.C. Cir. 2018) (asserting that exhaustion under international comity principles applies only in "nation vs. nation litigation"). Other circuits—and the United States—recognize that principles of international comity *can* apply to lawsuits involving private parties. Pet. 20-23; *Fischer v. Magyar Államvasutak Zrt.*, 777 F.3d 847, 859 (7th Cir. 2015); Brief of the United States as *Amicus Curiae* Supporting Petitioners 25, *Republic of Hungary v. Simon*, No. 18-1447 (Sept. 11, 2020).

Moreover, any assertion that respondents' attempts to litigate their unexhausted claims in Hungary is "likely futile" ignores the *facts* in this case—where, over nine years of litigation in Hungary, Hungary returned one artwork to respondent de Csepel's aunt and the Italian respondents refused to participate in the litigation despite claiming to have additional evidence to support *their* ownership—and with other courts' reasonable recognition of remedies in Hungary. *See*

Fischer, 777 F.3d at 861 (discussing judicial remedies in Hungary as "sufficiently promising").

In fact, when petitioners first moved the district court for recognition of the Hungarian court's 2008 judgment, which recognized Hungary as the owner of ten artworks claimed by respondent de Csepel, the district court agreed, finding no evidence of due process violations. *de Csepel v. Republic of Hungary*, 808 F. Supp. 2d 113, 144-45 (D.D.C. 2011). Although the D.C. Circuit reversed that finding as premature at the motion-to-dismiss stage, *de Csepel v. Republic of Hungary*, 714 F.3d 591, 607-08 (D.C. Cir. 2013), a decade later there is no evidence of due process violations and no reason to believe that the Italian respondents would not also receive a fair trial. *Hilton*, 159 U.S. at 202-03.

II. The Second Question Presented Warrants Review

A. The D.C. Circuit Failed to Afford the Requisite Deference to Hungary's Sovereign Immunity

In 2008, four years after its decision in *Altmann*, this Court clarified the application of Federal Rule of Civil Procedure 19 where the absent party was a required, immune foreign sovereign.

> A case may not proceed when a required-entity sovereign is not amenable to suit.... [W]here 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 (emphasis added). This is a very clear and straightforward test. Pet. 27-29.

Respondents contend that petitioners misapprehend the importance of *Pimentel*. But since its issuance, courts of appeal around the country have recognized that *Pimentel* "leaves very little room for any other conclusion" beyond dismissal when the absent defendant is a required, interested, and immune sovereign. *Florida Wildlife Fed'n Inc. v. United States Army Corps of Eng'rs*, 859 F.3d 1306, 1320 (11th Cir. 2017); *see also White v. University of California*, 765 F.3d 1010, 1028 (9th Cir. 2014) (recognizing the "wall of circuit authority" mandating dismissal of an action where the required sovereign was immune). Thus, according to respondents, not only do petitioners misunderstand the plain meaning of *Pimentel,* numerous appellate courts do too.

Minimizing the significance of *Pimentel,* respondents focus on two decisions where this Court reversed lower court determinations that Rule 19 mandated dismissal and, in doing so, articulated a "flexible approach to construing Rule 19," focusing the decision to dismiss on case-specific factors to guide the Rule 19 analysis. Opp. 28-29. Aside from the fact that both cases predate *Pimentel*, neither case involved an immune party, sovereign or otherwise. And neither case involved any of the

international comity concerns that informed this Court's pronouncement in *Pimentel*.

Two years later, in *Samantar v. Yousuf*, 560 U.S. 305 (2010), this Court had the opportunity to distance itself from the straightforward directive in *Pimentel*. Instead, it reiterated the pronouncement at issue here that "[w]here 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." *Samantar*, 560 U.S. at 325 (quoting *Pimentel*, 553 U.S. at 867). But here, despite recognizing Hungary as a required party, the D.C. Circuit failed to conduct, much less acknowledge, the "more circumscribed" Rule 19 inquiry necessitated because the absent required party is an immune sovereign. That court's failure is grounds for reversal.

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

Although all of *Pimentel's* requirements are met in this case, the D.C. Circuit determined that the case could go forward because "[t]he presence of the remaining defendants with interests virtually identical to Hungary's obviates any such risk [of

potential harm to Hungary] here." Pet. App. 21a.[1] The court opined that Hungary and petitioners' "are in complete alignment," Pet. App. 30a, 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." Pet. App. 23a. The D.C. Circuit erred.

Rule 19 is explicit that the relevant "interest" is not in the *outcome* of the litigation, but in the "*subject of the action*." Fed. R. Civ. P. 19(a)(1)(B)(i). The "the subject of the action" is the artwork and Hungary's purported torts and bailment breaches. MNV manages artworks at Hungary's direction; the Museums display the artworks. This means that petitioners have very different interests in the property from Hungary, the property owner. Respondents' claims against MNV and the Museums are different too. Although respondents contend that the Museums may be liable for limited damages for displaying artwork, MNV was not involved in respondents' injuries or purported bailment.

Crucially, the D.C. Circuit cannot explain how Hungary's and petitioners' interests can be "virtually identical" when their interests in the property are different and the only claims against petitioners can

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[1] The D.C. Circuit held that the case could go forward because "*MNV* is both 'capable of and willing to make [all of Hungary's] arguments.'" Pet. App. 22a-23a (emphasis added) (internal citation omitted). MNV represents *Hungary* when it is a party to an action. But with Hungary dismissed, MNV has no role in this case.

exist only if Hungary's actions, sounding in contract or in tort, are found unlawful. Rule 19(b) recognizes that where "the rights of those not before the Court lie at the very foundation of the claim of right by the plaintiffs…a final decision cannot be made between the parties litigant without directly affecting and prejudicing the rights of others not make parties." *Provident Tradesmans Bank & Trust Co. v. Patterson*, 390 U.S. 102, 122 (1968). Because Hungary and petitioners' interests in "the subject of the action" are not "virtually identical," because any claims against petitioners presuppose a finding that Hungary is not the property owner, and because Hungary's actions cannot be tried behind its back, Rule 19 bars this case from going forward. *Ibid.* (discussing Rule 19(b) and recognizing that "there can be no binding adjudication of a person's rights in the absence of that person").

Were Hungary not an immune foreign sovereign, the D.C. Circuit's simple substitution theory might work. Indeed, none of the cases cited by that court as supporting its theory involved an immune foreign sovereign or raised international comity concerns. Moreover, neither *American Trucking Association, Inc. v. New York State Thruway Authority*, 795 F.3d 351 (2d Cir. 2015), nor *Alto v. Black*, 738 F.3d 1111 (9th Cir. 2013) involved an absent party "required" by Rule 19(a), obviating the value of any Rule 19(b) analysis. And in *Gensetix, Inc. v. Board of Regents of University of Texas Systems*, 966 F.3d 1316, 1326 (Fed. Cir. 2020), the appellate court determined that a patent infringement case could go forward without the

university appearing as an involuntary *plaintiff* because the existing plaintiff and the university had "identical"—not merely overlapping"—patent rights and the plaintiff's license obligated it enforce any action for patent infringement. *Id.* at 1326. In going forward, none of these cases posed a risk of harm to the interests of an absent *required* party, much less the interests of a required, immune, foreign sovereign.

But even if Hungary and petitioners' interests were somehow fully aligned, the D.C. Circuit's theory would still fail for a very simple reason: if Hungary and petitioners share "virtually identical" interests in the subject of the litigation, then any harm to petitioners' interests will necessarily result in harm to *Hungary*'s interests. In other words, if a court finds petitioners liable, resulting in prejudice to petitioners' interests, Hungary's "virtually identical" interests will be prejudiced as well. Because *Pimentel* recognizes that a case must be dismissed if there is a *potential* for harm to the absent required sovereign, this case cannot go forward.

Petitioners do not contend that *Pimentel bars* courts from examining Rule 19(b). Opp. 28-29. But the *Pimentel* Court's limited Rule 19(b) discussion recognizes the inevitable conclusion a court must reach where, as here, there is a potential for harm to the interests of the immune sovereign if the case goes forward. If petitioners and Hungary have different "interests" in the "subject of the litigation," then petitioners cannot stand proxy for Hungary. But if petitioners and Hungary have identical interests, as

the D.C. Circuit asserted, then the potential harm to petitioners' interests is a potential harm to Hungary's interests. Either way, Rule 19 and *Pimentel* mandate dismissal.[2]

Respectfully submitted,

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[2] Respondents assert that the United States "agree[s]" that Hungary's interests are protected here. Opp. 35-36. But the United States said only that Hungary's separateness "may" be relevant to deciding whether the case should proceed without it, Brief of the United States as *Amicus Curiae* 21, *de Csepel v. Republic of Hungary*, No. 17-1165 (Dec. 4, 2018), and was made fifteen months before the district court found Hungary to be a *required* party under Rule 19(a).