NO. _____

In the Supreme Court of the United States

REPUBLIC OF HUNGARY AND
MAGYAR ÁLLAMVASUTAK ZRT.,

Petitioners,

v.

ROSALIE SIMON, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May the district court abstain from exercising jurisdiction under the Foreign Sovereign Immunities Act for reasons of international comity, where former Hungarian nationals have sued the nation of Hungary to recover the value of property lost in Hungary during World War II, and where the plaintiffs made no attempt to exhaust local Hungarian remedies?

2. In a *forum non conveniens* analysis, (a) is the district court *required* to defer to plaintiffs' choice of a U.S. forum where the case's sole connection to the United States is that some named plaintiffs (representing a putative worldwide class) became naturalized citizens after the time relevant to the complaint; and (b) is the district court *permitted* to defer to a foreign sovereign defendant's comity interest in hosting claims in its own courts, where plaintiffs allege the sovereign defendant harmed its own nationals on its own soil and plaintiffs have not exhausted local remedies?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioner Hungary is a sovereign nation. Petitioner Magyar Államvasutak Zrt. is the Hungarian national railway company. Magyar Államvasutak Zrt. is 100% owned by Hungary. Magyar Államvasutak Zrt. has no parent corporations. No publicly traded company holds a 10% or greater ownership interest in Magyar Államvasutak Zrt.

Respondents are Rosalie Simon, Helen Herman, Charlotte Weiss, Helena Weksberg, Rose Miller, Magda Kopolovich Bar-Or, Zehava (Olga) Friedman, Yitzhak Pressburger, Alexander Speiser, Ze'ev Tibi Ram, Vera Deutsch Danos, Ella Feuerstein Schlanger, Moshe Perel, Yosef Yogev, Asher Yogev Esther Zelikovitch, and the Estate of Tzvi Zelikovitch.

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PETITION FOR WRIT OF *CERTIORARI*

In recent years, this Court has repeatedly expressed concerns over cases that could have adverse foreign policy consequences if heard in U.S. courts—like foreign-cubed litigation in which foreign plaintiffs allege that foreign defendants injured them on foreign soil. These concerns, the Court has explained, are rooted in international comity. The Court has instructed the lower courts to give "heed to the risks to international comity" and "foreign policy concerns" when assessing personal[1] and subject-matter jurisdiction[2] in international disputes; when asked to provide private civil remedies for extraterritorial conduct;[3] and in other cases implicating foreign interests.[4]

The courts of appeals have mostly heeded these instructions. *See, e.g.*, *Mujica v. AirScan Inc.*,

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[1] *See Daimler AG v. Bauman*, 571 U.S. 117, 141–42 (2014) ("The Ninth Circuit . . . paid little heed to the risks to international comity its expansive view of general jurisdiction posed.").

[2] *See Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 116–17 (2013) (foreign policy concerns "are all the more pressing when the question is whether a cause of action under the ATS reaches conduct within the territory of another sovereign"); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727–28 (2004) ("[T]he possible collateral consequences of making international rules privately actionable argue for judicial caution.").

[3] *See RJR Nabisco, Inc. v. European Cmty.,* 136 S. Ct. 2090, 2106 (2016) ("Providing a private civil remedy for foreign conduct creates a potential for international friction.").

[4] *See, e.g.*, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985) ("concerns of international comity" support enforcing international arbitration agreements, even if they would be unenforceable in domestic disputes).

771 F.3d 580, 615 (9th Cir. 2014) ("[W]e conclude that all of the claims before us are nonjusticiable under the doctrine of international comity."); *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1237–40 (11th Cir. 2004) (abstaining jurisdiction "on international comity grounds").

But not in this case. The comity and reciprocity interests presented by this litigation are of surpassing importance. The plaintiffs have sued the nation of Hungary on behalf of a putative worldwide class of current and former Hungarian nationals. They are seeking class-wide damages for property taken from them when they were Hungarian nationals by other Hungarians in Hungary during World War II. The substantive grounds for recovery arise under U.S. or D.C. common law, with international law violations asserted solely as a jurisdictional hook. The plaintiffs did not attempt to pursue local remedies in Hungary before suing Hungary in the United States.

The Seventh Circuit previously dismissed virtually identical lawsuits on the grounds of international comity and *forum non conveniens*.[5] After calculating that the plaintiffs were seeking damages equal to "nearly 40 percent of Hungary's annual gross domestic product in 2011," it asked "how the United States would react if a foreign court ordered the U.S. Treasury" to pay a group of plaintiffs an equivalent share of U.S. economic output, "which would be roughly $6 trillion." *Abelesz*,

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[5] *See Fischer v. Magyar Allamvasutak Zrt.,* 777 F.3d 847, 852, 866–70 (7th Cir. 2015); *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 682 (7th Cir. 2012).

692 F.3d at 682. After weighing these comity and reciprocity concerns, the Seventh Circuit concluded that "Hungary, a modern republic and member of the European Union, deserves a chance to address these claims." *Id.*

The D.C. Circuit saw it differently. Expressly disagreeing with the Seventh Circuit—and with an amicus brief submitted by the United States—it held that the district court had no authority to abstain from exercising jurisdiction under the Foreign Sovereign Immunities Act (FSIA) for reasons of international comity. *See* Pet. App. 13a–16a; *Philipp v. Federal Rep. of Germany*, 894 F.3d 406, 415–16 (D.C. Cir. 2018). It also held, again contrary to the Seventh Circuit, that the district court erred as a matter of law by relying on *forum non conveniens* as an alternative ground for dismissal. *See* Pet. App. 16a–19a.

As the United States explained in the amicus brief it submitted to the panel, and again in a subsequent brief supporting *en banc* review, the D.C. Circuit's ruling undermines U.S. foreign policy interests. In the government's view, "[d]ismissal on international comity grounds can play a critical role in ensuring that litigation in U.S. courts does not conflict with or cause harm to the foreign policy of the United States."[6] Likewise, in the view of the United States, "forum non conveniens can play an

[6] Brief for the United States as Amicus Curiae at 14, *Simon v. Republic of Hungary*, No. 17-7146 (D.C. Cir. June 1, 2018), Doc. No. 1733875 ("U.S. Amicus Br.").

additional, and critical, role in a case brought against a foreign state defendant."[7]

In the D.C. Circuit, comity-based dismissal is now unavailable as a matter of law in FSIA cases, and *forum non conveniens* is all but foreclosed in cases seeking mass reparations from foreign sovereign defendants. These rulings have profoundly important consequences for international comity, for foreign sovereigns sued in U.S. courts, and for the United States' own foreign policy interests. As the Seventh Circuit observed when dismissing the identical siblings of this case: "If U.S. courts are ready to exercise jurisdiction to right wrongs all over the world, including those of past generations, we should not complain if other countries' courts decide to do the same." *Abelesz*, 692 F.3d at 682.

This Court should grant the petition, reverse the court of appeals' decision, and remand with instructions to affirm the district court's judgment.

OPINIONS BELOW

The opinion of the district court is reported at *Simon v. Republic of Hungary,* 277 F. Supp. 3d 42 (D.D.C. 2017) ("*Simon III*") and reprinted at Pet. App. 48a–95a. The D.C. Circuit's merits opinion is reported at *Simon v. Republic of Hungary,* 911 F.3d 1172 (D.C. Cir. 2018) ("*Simon IV*") and reprinted at Pet. App. 1a–47a. The D.C. Circuit's decision in *Philipp v. Federal Republic of Germany*, which contemporaneously addressed comity-based abstention, is reported at 894 F.3d 406 (D.C. Cir. 2018). The D.C. Circuit's denial of Hungary's *en banc*

[7] U.S. Amicus Br. at 26.

petition is available at *Simon v. Republic of Hungary,* No. 17-7146, 2019 U.S. App. LEXIS 4732 (D.C. Cir., Feb. 15, 2019) and reprinted at Pet. App. 96a–97a.

JURISDICTION

The district court judgment was entered on September 30, 2017. Pet. App. 48a. The D.C. Circuit issued its opinion on the merits on December 28, 2018. *Id.* at 1a. Defendants Hungary and its instrumentality Magyar Államvasutak Zrt. (collectively, Hungary) filed an *en banc* petition on January 11, 2019. The D.C. Circuit denied the *en banc* petition on February 15, 2019. Pet. App. 96a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL OR STATUTORY PROVISIONS INVOLVED

The Foreign Sovereign Immunity Act's expropriation exception, 28 U.S.C. § 1605(a)(3), provides:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
>
> . . .
>
> (3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or

> that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States[.]

STATEMENT OF THE CASE

In 2010, three groups of plaintiffs filed three nearly identical lawsuits against the Hungarian government, two in Chicago and one in Washington, D.C. All sought to represent a worldwide class of current and former Hungarian nationals. All sought to recover the value of property taken from them in Hungary during World War II.[8] And all asserted jurisdiction under the expropriation exception of the FSIA, 28 U.S.C. § 1605(a)(3). From the same beginnings, these cases reached opposite results in the federal courts of appeals.

1. The Seventh Circuit reached the comity and *forum non conveniens* issues first. In two related opinions, it 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." *Fischer v. Magyar Államvasutak Zrt.*, 777 F.3d 847, 858 (7th Cir. 2015); *accord Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 682 (7th Cir. 2012) ("Hungary, a

[8] The complaint in this case alleges common-law claims for property loss, like conversion, unjust enrichment, and restitution. *See* JA 150, 154.

modern republic and member of the European Union, deserves a chance to address these claims.").[9]

The Seventh Circuit emphasized that, in cases like this one, it "cannot overlook the comity and reciprocity between sovereign nations that dominate international law." *Abelesz*, 692 F.3d at 682. The enormous scale of the wrongdoing the plaintiffs sought to bring before the U.S. courts, and the corresponding enormity of the damages they requested, made these reciprocity concerns especially compelling:

> We should consider how the United States would react if a foreign court ordered the U.S. Treasury or the Federal Reserve Bank to pay a group of plaintiffs 40 percent of U.S. annual gross domestic product, which would be roughly $6 trillion, or $20,000 for every resident in the United States. And consider further the reaction if such an order were based on events that happened generations ago in the United States itself, without any effort to secure just compensation through U.S. courts.

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[9] The two suits filed in Chicago, which were consolidated for appeal, were *Abelesz v. Magyar Nemzeti Bank*, No. 11-2387 (against the Hungarian national bank), and *Fischer v. Magyar Államvasutak Zrt.*, No. 11-2791 (against the Hungarian national railway). The Seventh Circuit resolved both cases in *Abelesz*, 692 F.3d at 665. In *Fischer*, it resolved a subsequent appeal involving these same parties as well as private Hungarian bank defendants. *See Fischer*, 777 F.3d at 852.

Id.

The Seventh Circuit also affirmed the application of *forum non conveniens* to dismiss claims against a private successor to a Hungarian bank alleged to have harmed plaintiffs in Hungary during the Holocaust. Indeed, the Seventh Circuit suggested that, in light of the comity interests involved, the district court might have abused its discretion had it *not* dismissed for *forum non conveniens*: "The district court acted well within its discretion in finding that the [*forum non conveniens*] balance favored dismissal. It is hard to see how the district court might have reached any other result here given the weight of international comity concerns in this case." *Fischer*, 777 F.3d at 869.

2. Meanwhile, this case—*Simon*—was proceeding in the D.C. federal courts. In 2016, the D.C. Circuit in *Simon II* reversed a district court order dismissing the case under the FSIA's treaty exception. *See Simon v. Republic of Hungary*, 812 F.3d 127, 141–42 (D.C. Cir. 2016) (*Simon II*). The *Simon II* decision expressly left open the issues that had been dispositive in the Seventh Circuit: "We leave it to the district court to consider on remand whether, as a matter of international comity, it should refrain from exercising jurisdiction over [these] claims until the plaintiffs exhaust domestic remedies in Hungary. The district court may also elect to consider . . . defendants' *forum non conveniens* arguments." *Id.* at 151.

On remand, the district court (Howell, C.J.) held in *Simon III* that comity-based abstention and *forum non conveniens* each provided an independent

basis for dismissal. *See* Pet. App. 48a–95a.[10] The district court found "the Seventh Circuit's opinions" to be "highly persuasive," "[g]iven the significant overlap in facts between *Abelesz/Fischer* and the instant case." *Id.* at 73a. But, on appeal, the D.C. Circuit again rejected the district court's conclusions. It reversed both grounds for dismissal in *Simon IV*, reinstating the case for the second time. *Id*. at 2a–4a.

The *Simon IV* decision on comity-based abstention followed the analysis of another D.C. Circuit panel, in *Philipp v. Federal Republic of Germany*, 894 F.3d 406 (D.C. Cir. 2018), which had recently addressed the same issue. *Philipp* answered "the question" that was then "left open" "[i]n *Simon*." *Id.* at 414. It determined that this Court's decision in *Republic of Argentina v. NML Capital, Ltd*., 573 U.S. 134 (2014), precluded comity-based abstention in FSIA cases. The D.C. Circuit viewed dismissal on the ground of comity as a form of sovereign immunity not provided for by the FSIA, in conflict with *NML*'s instruction that "'any sort of immunity defense made by a foreign sovereign in an American court must stand on the [FSIA's] text.'" *Philipp*, 894 F.3d at 415 (quoting *NML*, 573 U.S. at 141–42).

Philipp acknowledged that its decision conflicted with those of the Seventh Circuit, which had expressly distinguished *NML*: "To be sure, the Seventh Circuit, in a case similar to *Simon*, required the plaintiffs—survivors of the Hungarian Holocaust and the heirs of other victims—to exhaust any

[10] The district court did not reach Hungary's alternative argument that Plaintiffs could not satisfy the FSIA's jurisdictional requirements.

available Hungarian remedies." *Id.* at 416 (quotation marks omitted). But *Philipp* concluded that the Seventh Circuit was mistaken about the requirements of comity and international law. *See id.* ("This court is not willing to make new law by relying on a misapplied, non-binding international legal concept.") (alteration omitted)). In rejecting the result reached by the Seventh Circuit, *Philipp* reiterated the panel's view that the FSIA, as interpreted in *NML*, prohibits any common-law ground for dismissal based on comity. *Id.*

Philipp also considered and rejected "the contrary position advanced by the United States in an amicus brief recently filed" in *Simon IV*. *Id.* The United States had argued that the FSIA "'does not foreclose dismissal on international comity grounds.'" *Id.* (quoting U.S. Amicus Br. at 14–15). Because the court of appeals—unlike the United States—viewed comity-based abstention as a sovereign immunity defense, *Philipp* concluded that the government's "position . . . is flatly inconsistent with *NML Capital*." *Id.*

The *Simon IV* decision came down some five months later, and tracked the analysis in *Phillip*. It stated that "what Hungary calls 'prudential exhaustion' would in actuality amount to a judicial grant of immunity from jurisdiction," because of "the substantial risk" that "any Hungarian remedy" would preclude Plaintiffs "by operation of *res judicata* from ever bringing their claims in the United States." Pet. App. 14a. And, as the court of appeals had "recently held in *Philipp* . . ., nothing in the FSIA or federal law empowers the courts to grant

a foreign sovereign an immunity from suit that Congress, in the FSIA, has withheld." *Id.*

Simon IV acknowledged that "the ancient doctrine of *forum non conveniens* is not displaced by the FSIA," *id.* at 17a—even though *forum non co*nveniens also is not provided for in the FSIA's text and it, too, would prevent Plaintiffs from ever asserting their claims in U.S. courts. But, after agreeing that *forum non conveniens* is available, the *Simon IV* panel majority held that the district court had erred as a matter of law when it relied on this doctrine as an alternative ground for dismissal. The majority determined, among other things, that "the district court erred in assigning such significant weight to Hungary's asserted interest in addressing the [Plaintiffs'] claims." *Id.* at 29a–30a. It also held that the district court erred by "brushing off the United States' own interests in the litigation." *Id.* at 32a. The majority noted that—though all Plaintiffs were Hungarian nationals when they sustained their injuries—four of the fourteen original named Plaintiffs had since become U.S. citizens. According to the majority, "[t]he United States has an obvious interest in supporting their efforts to obtain justice in a timely manner and . . . in ensuring that a United States forum is open" to them. *Id.*

Judge Katsas dissented from the panel's *forum non conveniens* ruling. He observed, among other things, that the United States itself had argued in this case that its interests should be given "less weight" when the challenged conduct "occurred in a foreign country and involved harms to foreign nationals." *Id.* at 46a–47a (Katsas, J, dissenting) (quotation omitted). He would have held that "[t]he

district court correctly stated the governing [*forum non conveniens*] law and reasonably weighed the competing considerations in this case." *Id.* at 47a.

3. Hungary filed a petition for *en banc* review and asked the D.C. Circuit to consider its rehearing request in tandem with a fully briefed *en banc* petition in *Philipp* that had been filed approximately four months earlier. Hungary noted that the United States had submitted yet another amicus brief in the D.C. Circuit, this time supporting *en banc* review in *Philipp*, and Hungary argued that the same considerations supported its petition seeking review of the same issue.

After Hungary's *en banc* petition had been pending for a month, Plaintiffs filed a motion to expedite consideration of it. A few days later, the D.C. Circuit denied Hungary's *en banc* petition and dismissed Plaintiffs' motion to expedite as moot. Pet. App. 96a.[11]

As of the filing of this petition, the D.C. Circuit still has not acted on the *Philipp en banc* petition, which was filed more than seven months ago, in September 2018. But a denial of rehearing in *Philipp* is all but certain given that the court denied Hungary's *en banc* petition, which raised the same issue and asked to be heard in tandem with *Philipp*. The delay in ruling on the *Philipp en banc* petition

[11] After the denial of its *en banc* petition, Hungary moved in the D.C. Circuit to stay the mandate, pending disposition of Hungary's *certiorari* petition to this Court. The D.C. Circuit denied that motion on March 15, 2019. Hungary then filed a stay application with the Chief Justice, who referred it to the Court. The Court denied the stay application on April 3, 2019.

likely signals that members of the court are preparing opinions dissenting from or concurring in an order denying it.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Conflicts with the Law of Other Circuits and the Views of the United States on International Comity

A. The Lower Courts Are Irreconcilably Divided 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 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*, 777 F.3d at 852. The district court in D.C. hearing this case agreed, noting "the significant overlap in facts between *Abelesz/Fischer* and the instant case." Pet. App. 73a. But the D.C. Circuit, in both this case and in *Philipp*, "squarely rejected the asserted comity-based ground for declining statutorily assigned jurisdiction." *Id.* at 3a.

Only this Court's intervention will resolve the conflict. The Seventh Circuit and the D.C. Circuit have now issued four panel opinions analyzing this issue at length—two from each circuit—and reached opposite conclusions. 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. Notwithstanding the acknowledged circuit split, the D.C. Circuit denied *en banc* petitions in this case, and is poised to do so in *Philipp*, even though the United States took the unusual step of submitting an amicus brief supporting *en banc* review in the court of appeals.

Now that the D.C. Circuit has definitively ruled on comity-based abstention, it is unlikely that any other circuit will reach the issue in cases naming foreign states as defendants—the cases where international comity interests are the most pressing. It is not just that plaintiffs will gravitate toward a forum with favorable law. Federal law makes D.C. the preferred—and in many cases the only—forum for actions against a foreign state or political subdivision. *See* 28 U.S.C. § 1391(f)(4). So, unless this Court acts, abstention on the ground of international comity will be a dead letter when it comes to litigation against a foreign state. And claims asserted directly against a foreign state, not just a government instrumentality, are likely to be the most disruptive of international comity and the most consequential for U.S. foreign policy interests. *See* U.S. Amicus Br. 20 ("[T]he fact that the defendant in a case brought under the FSIA's expropriation exception is a foreign state may itself

be a valid consideration in an international comity analysis, as a suit brought directly against a foreign state can cause more international friction than a suit brought against a state-owned commercial entity.").

B. The Decision Below Disagrees With the Views of the United States on a Question that Is Important to U.S. Foreign Policy

In foreclosing comity-based abstention in FSIA cases, the D.C. Circuit disagreed with not only a sister circuit but also with the position of the United States. This discord with the Executive also warrants this Court's attention because the availability of comity-based abstention presents "acute foreign policy concerns involving relationships with our Nation's allies." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2010).

"In the view of the United States," as expressed in its amicus brief in the court of appeals, "a district court may dismiss an action brought under the FSIA's expropriation exception in deference to an alternative available forum as a matter of international comity." U.S. Amicus Br. 14. While the government took no position on whether the district court properly abstained in this case,[12] it emphasized

[12] The government took no position on abstention here because, "in contrast to the United States' involvement in the establishment of [other] Holocaust claims processes," it "has not participated in efforts of the Republic of Hungary toward establishing a claims mechanism" and did not have "a working understanding of [those] mechanisms." U.S. Amicus Br. 11. The district court, however, did understand Hungarian remedies. After considering expert and other evidence, it determined "that

that "[d]ismissal on international comity grounds can play a critical role" in preventing "litigation in U.S. courts" from "harm[ing] . . . the foreign policy of the United States." *Id.*

Philipp, the first D.C. Circuit panel to decide the international comity issue, expressly rejected the "contrary position advanced by the United States" in *Simon*. *Philipp*, 894 F.3d at 416. The United States then filed another amicus brief, this one supporting *en banc* review in *Philipp*. The government reiterated "its view that a district court may, in an appropriate case, abstain on international comity grounds from exercising [FSIA] jurisdiction." Brief for the United States as Amicus Curiae in Support of Rehearing *En Banc*, *Philipp v. Federal Republic of Germany*, No. 17-7064, 2018 WL 4385094, at *2 (D.C. Cir. Sept. 14, 2018). Comity-based abstention, the government explained, "reflects the principle that . . . a foreign sovereign may have a greater interest in resolving a particular dispute than does the United States, and U.S. interests are better served by deferring to that sovereign's interests." *Id.* at *12. The FSIA does not foreclose this abstention doctrine because "[a] court that declines to exercise jurisdiction on international comity grounds is not treating a foreign state as immune." *Id.* at *10. In ruling otherwise, "[t]he panel offered no explanation

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Hungary is both an available and adequate alternative forum." Pet. App. 85a. The district court in *Fischer* reached the same conclusion, which the Seventh Circuit upheld. *See Fischer*, 777 F.3d at 861 ("We agree that these judicial remedies are sufficiently promising that plaintiffs should be required to bring suit in Hungary before their suits may proceed in the United States.").

why federal courts should be able to abstain from exercising jurisdiction in deference to a State's interests, but not in deference to the interests of a foreign sovereign." *Id.* at *7–8.

The foreign interests are especially strong in this case because Plaintiffs allege substantive grounds for liability that arise under U.S. or state common law. In fact, this Court recently commented on this very feature of this case. The Court noted that Plaintiffs here assert "simple common-law claim[s] [like] conversion" and "restitution, . . . the merits of which do not involve the merits of international law." *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1323 (2017) (citing *Simon II*, 812 F.3d at 141–42).

The common-law basis for recovery magnifies "the danger of unwarranted judicial interference in the conduct of foreign policy . . . because the question is not what Congress has done but instead what courts may do." *Kiobel*, 569 U.S. at 116. None of the constraints on judicial lawmaking that this Court deemed essential to foreign policy interests in *Sosa* and *Kiobel* have been applied to FSIA expropriation cases like this one. Yet the comity and reciprocity concerns here are even more pressing. Plaintiffs ask a federal court to apply U.S. or D.C. common law to require Hungary to make reparations to a putative worldwide class of current and former Hungarian nationals for conduct that occurred in Hungary in 1944.

In *Kiobel*, this Court warned of the reciprocity implications when foreign-cubed Alien Tort Statute

claims proceed against foreign *corporations*: "[P]etitioners' view would imply that other nations . . . could hale our citizens into their courts for alleged violations of the law of nations occurring in the United States, or anywhere else in the world." *Id.* at 124. This foreign-cubed case[13] is against a foreign *nation*, so the reciprocal consequences could be visited on the United States or U.S. State governments. *See Helmerich*, 137 S. Ct. at 1322 (noting the United States' warning that a low bar for FSIA jurisdiction would "produc[e] friction in our relations with [other] nations and lead[] some to reciprocate by granting their courts permission to embroil the United States in expensive and difficult litigation" (internal quotation marks omitted)).

The massive scale of this case makes the comity and reciprocity concerns especially compelling. On behalf of a putative worldwide class of victims and their descendants, Plaintiffs lay claim to a substantial portion of Hungarian economic output, which mostly would be distributed outside of Hungary, presumably never to return. Rarely if ever has a judgment rendered by a U.S. court wrought

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[13] Plaintiffs have disputed that this case is "foreign-cubed," since four of the fourteen original named plaintiffs became naturalized U.S. citizens some time after World War II. But all named plaintiffs (and all class members) were Hungarian nationals in 1944, the time relevant to their complaint. As Judge Katsas observed, "[t]his case is 'localized' in Hungary; it involves the taking of Hungarians' property by other Hungarians in Hungary. In addition, claims arising out of the Hungarian Holocaust are plainly a matter of historical and political significance to Hungary." Pet. App. 46a (Katsas, J., dissenting).

such far-reaching effects directly upon a foreign nation and its people. *Cf. Abelesz*, 692 F.3d at 682 ("We should consider how the United States would react if a foreign court ordered the U.S. Treasury . . . to pay a group of plaintiffs 40 percent of U.S. annual gross domestic product.").

The ability to bring cases of this magnitude against foreign governments places enormous weight on the choices of private plaintiffs, who are unlikely to be deterred by the international comity implications of pursuing their claims. "[P]rivate plaintiffs often are unwilling to exercise the degree of self-restraint and consideration of foreign governmental sensibilities generally exercised by the U.S. Government." *F. Hoffman-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155, 171 (2004).

As the United States' amicus briefs in the court of appeals explain, comity-based dismissal is a critical tool to ensure that litigation in U.S. courts does not interfere with international relations. Unless this Court acts, this tool is permanently unavailable in the D.C. Circuit, the preferred forum for cases presenting the most significant comity concerns.

C. The Decision Below Leaves Private Foreign Defendants with More Comity Protections than Foreign Sovereigns

The D.C. Circuit's decision creates another incongruous outcome that also merits this Court's attention: It strips foreign *nations* of comity protections that *private* foreign entities still enjoy in U.S. courts. When appropriate in private foreign-

cubed cases, the courts of appeals have "conclude[d] that . . . the claims . . . are nonjusticiable under the doctrine of international comity." *Mujica*, 771 F.3d at 615; *see also Ungaro-Benages*, 379 F.3d at 1237–41 (affirming an order "dismiss[ing] this case on international comity grounds"); *cf. Fischer*, 777 F.3d at 859 (if the FSIA barred comity-based abstention, "the result would be quite anomalous. It would become easier to sue foreign sovereigns than to sue private foreign entities in a United States court.").

Members of this Court have agreed that international comity is a proper basis to dismiss cases involving private parties when the cases implicate other nations' sovereign interests. *See Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1430–31 (2018) ("Courts . . . can dismiss ATS suits . . . for reasons of international comity . . . .") (Sotomayor, J., dissenting); *Sosa*, 542 U.S. at 761 ("Since enforcement of an international norm by one nation's courts implies that other nations' courts may do the same, I would ask whether the exercise of jurisdiction under the ATS is consistent with those notions of comity that lead each nation to respect the sovereign rights of other nations by limiting the reach of its laws and their enforcement.") (Breyer, J., concurring).

These international comity interests are even stronger when U.S. courts hear suits against foreign sovereigns, instead of foreign citizens. Comity is founded on respect for other sovereigns. It "refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states." *Societe*

Nationale Industrielle Aerospatiale v. U.S. Dist. Court for the S. Dist. of Iowa, 482 U.S. 522, 543 n.27 (1987). Yet, in the D.C. Circuit, sovereign states are now deprived of comity protections that are available to private foreign litigants.

The mine-run of FSIA cases may not present any significant comity or reciprocity concerns. But some FSIA cases, like this one, will. The circumstances supporting comity-based abstention in this case, like its siblings in the Seventh Circuit, bristle with importance: Claims for damages against a foreign sovereign for a substantial portion of its annual gross domestic product. *Abelesz*, 692 F.3d at 682. Conduct by a foreign nation, within its own sovereign borders, affecting its own nationals. Litigation commenced "more than 65 years after the expropriations took place," *id.* at 681, brought not in Hungary but in the courts of the United States. And overhanging all of it, an understanding that comity means what our courts do to foreign sovereigns, foreign courts may do to us. *Id.* at 682.

If any suit against private foreign parties touches sufficiently on sovereign interests to warrant dismissal on the ground of comity, then this suit warrants it, too. The D.C. Circuit has foreclosed comity-based abstention in the cases where it is most needed.

D. This Court Should Be Heard Before a U.S. Court Makes Decisions of This Magnitude for a Foreign Nation

The profound implications of this case for Hungary, a member of the European Union and NATO ally of the United States, provide further reason for this Court to grant review. Plaintiffs ask a U.S. court to sit in judgment of the darkest chapters in Hungary's history and to award remedies that could alter Hungary's future.

Hungary has not turned a blind eye to its anguished past. In the 1990s, as it struggled to transition to a market-based democracy after decades of communist rule, Hungary enacted reparation laws leading to payments of over $200 million in compensation vouchers to victims of government policies during its fascist and communist eras. JA 218–19. These reparation programs applied a principle of parity: Claimants who lost property or endured forced labor or other injuries during World War II and during the communist era were treated the same. *See* J.A. 218 n.96.

This case, however, threatens to override that parity principle. It could redirect significant economic resources to World War II-era victims alone, most of whom appear to reside in neither Hungary nor in the United States. The money to satisfy any such judgment would come from taxes and ultimately taxpayers, including victims of communist-era policies. And any funds paid to class members residing outside Hungary would likely leave the Hungarian economy permanently, to the

detriment of all its current residents, including other class members who continue to live in Hungary.

In the United States today, there is a live and vigorous debate whether our government should pay reparations to the descendants of slaves.[14] But we all assume that *our government* will make the decision. It is for the legislatures and courts of the United States and the several states to decide how best to reckon with unjust government policies carried out on U.S. soil in past generations. If a foreign court, applying its own domestic law, heard a reparations case against the United States, there is no question it would undermine international comity.

And if a foreign nation ever did hale the United States into its courts to answer for the most ignominious events in our history—for slavery, or lynchings, or what have you—we would expect the high court of that nation to hear our government's concerns. Hungary deserves the same solicitude from this Court.

II. The Decision Below Conflicts with the Law of Other Circuits and the Views of the United States on *Forum Non Conveniens*

The D.C. Circuit also split with other courts of appeals on two recurring, important issues

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[14] *See, e.g.*, David Brooks, *The Case for Reparations*, N.Y. Times, Mar. 8, 2019, at A29 (available at https://www.nytimes.com/2019/03/07/opinion/case-for-reparations.html); Opinion, *The Case For—and Against—Reparations*, *Wall St. J.* (Mar. 26, 2019), https://www.wsj.com/articles/the-case-forand-againstreparations-11553641356.

concerning *forum non conveniens*: How much deference is owed to plaintiffs' choice of a U.S. forum when the case has little if any connection to the United States? And, in foreign-cubed cases like this one, how much deference is owed to a foreign sovereign defendant's comity interest in resolving claims in its own courts under its own legal system?

A. The Lower Courts Are Split About How Much Deference to Afford Plaintiffs' Chosen Forum Where the Plaintiff's or Case's Connection to the Forum is Attenuated

As this Court has explained, "[a] citizen's forum choice should not be given dispositive weight." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 n.23 (1981). Although the default rule is that there is a "strong presumption in favor of the plaintiff's choice of forum," that is only because the plaintiff's forum choice is usually a proxy for convenience, which is the "central purpose" of the *forum non conveniens* inquiry. *Id.* at 255–56.

In the lower courts, the prevailing approach to plaintiffs' choice of a U.S. forum—but not the one used by the D.C. Circuit here—is a "sliding scale." *Iragorri v. United Techs. Corp.*, 274 F.3d 65, 71 (2d Cir. 2001) (en banc). First articulated by the Second Circuit sitting *en banc* in *Iragorri*, the sliding scale approach holds that "the greater the plaintiff's or the lawsuit's bona fide connection to the United States," the more deference the plaintiff's forum choice will receive; and conversely, the weaker the plaintiff's or lawsuit's connection to the United States, the less deference it will receive. *Id.* at 71–72. The First,

Third, Sixth, Seventh, and Ninth Circuits have since approved of *Iragorri*'s sliding scale approach.[15]

The district court in this case adopted the same rule. It held that "the deference given to a plaintiff's forum choice is lessened when the plaintiff's ties to the forum are attenuated." Pet. App. 86a. Applying that approach to the facts of this case, the district court held that Plaintiffs' forum choice was entitled to "minimal deference" because "only four of the fourteen named plaintiffs reside in the United States and are U.S. citizens" and "none of the underlying facts . . . relate to the United States in any way." *Id.* at 86a–87a.

The D.C. Circuit, however, embraced a more rigid approach, and held that the district court erred as a matter of law. The D.C. Circuit viewed the

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[15] *See Interface Partners Int'l Ltd. v. Hananel*, 575 F.3d 97, 102 n.9 (1st Cir. 2009) (the fewer the legitimate connections to the plaintiff's chosen forum, "the less deference the plaintiff's choice commands" (quoting *Iragorri*, 274 F.3d at 72)); *Kisano Trade & Invest Ltd. v. Lemster*, 737 F.3d 869, 876 (3d Cir. 2013) ("[T]he greater the plaintiff's or the lawsuit's bona fide connection to the United States . . ., the more it appears that considerations of convenience favor the conduct of the lawsuit in the United States." (quoting *Iragorri*, 274 F.3d at 72)); *Hefferan v. Ethicon Endo-Surgery Inc.*, 828 F.3d 488, 494 (6th Cir. 2016) (*Iragorri*'s "sliding convenience scale explains the disparity in deference that we have accorded the forum choices of differently situated American plaintiffs."); *In re Ford Motor Co.*, 344 F.3d 648, 653 (7th Cir. 2003) (the district court's application of *Iragorri* "was a reasoned and responsible analysis"); *Vivendi SA v. T-Mobile USA Inc.*, 586 F.3d 689, 695 (9th Cir. 2009) ("We hold that such eleventh-hour efforts to strengthen connections with the United States allow the district court to reduce the deference due a plaintiff's choice of forum." (citing *Iragorri*, 274 F.3d at 72)).

question of deference as wholly dependent on current citizenship. For the court of appeals, the fact that four named plaintiffs had become naturalized U.S. citizens automatically triggered "magnified" deference to the U.S. forum. Never mind that most of the named plaintiffs still reside outside the U.S.; or that they seek to represent a putative *worldwide* class of current and former Hungarian nationals; or that all the relevant events occurred in Hungary, when all plaintiffs and putative class members were Hungarian nationals. *See Id.* at 19a. The mere fact that some named plaintiffs are *currently* U.S. citizens means "[t]he starting point is that [their] choice of forum controls." *Id.*

In reaching this conclusion, the D.C. Circuit held that the sliding scale approach applied by the district court was "legal error," which "set the scales wrong from the outset" and led to a "materially distorted" *forum non conveniens* analysis. *Id.* at 18a–19a. The D.C. Circuit also rejected the analysis in Judge Katsas's dissenting opinion. Judge Katsas endorsed the Second Circuit's approach that "the degree of deference given to a plaintiff's forum choice varies with the circumstances." *Id.* at 39a (citing *Iragorri*, 274 F.3d at 71) (Katsas, J., dissenting).

The D.C. Circuit's myopic focus on current citizenship undermines the central purpose of *forum non conveniens*: to screen out cases with only a weak nexus to the United States, when other adequate and available forums are more convenient. The current citizenship of some named plaintiffs is too thin a thread to pull cases with no other connection to the United States into U.S. courts. As members of this Court have noted, *forum non conveniens* "help[s] to

minimize international friction." *Kiobel*, 569 U.S. at 133 (Breyer, J., concurring); *accord Proyecfin de Venezuela, S.A. v. Banco Indus. de Venezuela, S.A.*, 760 F.2d 390, 394 (2d Cir. 1985) (*forum non conveniens* stops U.S. courts from becoming "international courts of claims"). It cannot do so if the U.S. citizenship of a handful of named plaintiffs (acquired long after the events in question) is enough to secure a U.S. forum in foreign-cubed class actions.

If anything, as the United States has previously argued, courts should presumptively dismiss cases like this one under the *forum non conveniens* doctrine. In its amicus brief in *Kiobel*, the United States argued that courts should apply *forum non conveniens* "with special vigor" and "presumptively dismiss" when "the parties and the conduct have little connection to the United States, and an adequate alternative forum exists." Supplemental Brief for the United States as Amicus Curiae, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491, 2012 WL 2161290 (U.S. June 11, 2012). The United States also urged courts "not [to] apply a strong presumption" in favor of a plaintiff's chosen forum in such situations. *Id.* at 25. The plaintiffs' current residence or citizenship did not change this analysis. Like some of the named plaintiffs in this case, the plaintiffs in *Kiobel* "moved to the United States" after "the alleged atrocities" and resided here when they brought the suit. *Kiobel*, 569 U.S. at 113.

A rigid deference requirement based solely on current citizenship, as the D.C. Circuit applied here, is a sharp turn in the wrong direction for *forum non conveniens* law. Once a court defers to a plaintiff's chosen forum, defendants must make a "stronger []

showing of inconvenience . . . to prevail in securing *forum non conveniens* dismissal." *Iragorri*, 274 F.3d at 74. And yet the D.C. Circuit ruled that in cases involving U.S. citizens, a court *must* apply this deference—no matter how attenuated the connection to the U.S. forum is. The D.C. Circuit's approach abandons the convenience-based origins of *forum non conveniens* and all but forecloses the application of the doctrine in large class actions centered on foreign conduct. Locating a single U.S. citizen or resident from a worldwide class is an easy box to check. It makes the U.S. courts tantamount to an "international court of claims." Intervention by this Court is necessary to bring the DC Circuit's approach in line with other courts of appeals and ensure that the doctrine remains focused on "convenience," rather than on the current citizenship of a particular plaintiff.

B. The Decision Below Disagrees With the Seventh Circuit and With the Views of the United States About How to Weigh the International Comity Interest in Hungary Resolving these Claims in its Home Courts

The D.C. Circuit's decision also conflicts with the Seventh Circuit and the United States' position about how to weigh international comity concerns in a *forum non conveniens* analysis.

In affirming the dismissal of a private Hungarian bank on *forum non conveniens* grounds in *Fischer*, the Seventh Circuit concluded that "given the weight of international comity concerns in this

case" it was "hard to see how the district court might have reached any other result." *Fischer*, 777 F.3d at 869.

Faced with essentially the same facts, the district court in this case followed the Seventh Circuit's approach and afforded significant weight to Hungary's "far stronger interest" in resolving these claims in its own legal system. Pet. App. 92a. Like the Seventh Circuit, the district court's decision to defer to Hungary's profound national interest was based on concerns of international comity and reciprocity. The district court based its ruling on this Court's decision in *Pimentel*, which held that where claims "arise from events of historical and political significance . . . [t]here is a comity interest in allowing a foreign state to use its own courts for a dispute if it has a right to do so." *Id.* at 93a. (quoting *Republic of Philippines v. Pimentel*, 553 U.S. 851, 866 (2008)).

In its amicus brief below, the United States similarly noted the "critical" role *forum non conveniens* can play in cases involving foreign sovereigns. U.S. Amicus Br. 26. Indeed, the United States explained that, given the comity interests at stake, *forum non conveniens* can be properly applied "at the threshold stage" to "identifying cases in which an alternative foreign forum has a closer connection." *Id.* This approach would respect international comity by ensuring that, in appropriate cases, foreign sovereigns are spared "intrusive jurisdictional discovery, which can impose substantial burdens on foreign states." *Id.*

The D.C. Circuit, in contrast, brushed aside Hungary's interests in this case and paid no heed to international comity or reciprocity concerns. Instead, it ruled that the district court abused its discretion in affording deference to Hungary because Hungary "had over seventy years to vindicate its interests in addressing its role in the Holocaust." Pet. App. 30a. But this sweeping conclusion ignores the district court's factual finding that Hungary has "provide[d] relief to victims of the Hungarian Holocaust and continues to express strong interest in resolving disputes over its past actions." *Id.* at 92a. And, as the dissent correctly recognized, this Court has noted that a foreign sovereign's interest is "heightened" when the claims "'arise from events of historical and political significance' to the home forum." *Id.* at 46a (Katsas, J., dissenting) (quoting *Pimentel*, 553 U.S. at 866). These sovereign interests do not lapse over time, as the court of appeals suggested.

Beyond splitting with the Seventh Circuit, the D.C. Circuit's *forum non conveniens* analysis is yet another example of the incongruous situation whereby foreign *private* defendants now have greater comity protections than foreign *sovereign* defendants within the D.C. Circuit. So great were the comity interests that the Seventh Circuit suggested it would have been an abuse of discretion not to dismiss a suit against a *private* Hungarian bank. Yet based on virtually identical facts, the D.C. Circuit ruled that the district court erred as matter of law in taking these very same comity interests into account—even though this case is against the nation of Hungary, which raises far greater international comity concerns.

III. This Court Should Overturn the Decision Below

The court of appeals' decision is wrong on the merits, too. Like other prudential abstention doctrines, comity-based abstention is not a form of sovereign immunity from jurisdiction. It simply recognizes that in some cases, even if U.S. courts have jurisdiction, they should defer to a different sovereign with a greater interest in the controversy.

And for similar reasons, the district court could not have abused its discretion in finding that Hungary was an available and more convenient forum to hear this foreign-cubed case. All the alleged conduct occurred in Hungary, all plaintiffs were Hungarian nationals at the time relevant to the complaint, and the issue is of deep historical significance to Hungary. The sole connection to the United States—the subsequent naturalization of some of the named plaintiffs—does not make the United States a more convenient forum for this litigation than Hungary.

A. The D.C. Circuit's Ruling on Comity-Based Abstention Is Incorrect

The court of appeals concluded that comity-based abstention would amount to a "judicial grant of immunity from jurisdiction" untethered to the FSIA. Pet. App. 14a. But international comity is not a jurisdictional immunity. It is a prudential reason for courts to abstain from exercising jurisdiction in appropriate cases.

International comity-based abstention in FSIA cases is a close cousin to other prudential abstention doctrines. Federal courts regularly abstain from exercising jurisdiction in deference to the interests of domestic sovereigns, like state and tribal governments, and in deference to foreign sovereigns, too. No court—except the D.C. Circuit—treats prudential abstention as an immunity from jurisdiction.

Just the opposite. As this Court explained in its seminal *Burford* decision on deference to state governments: "Although a federal equity court *does have jurisdiction* of a particular proceeding, it may, in its sound discretion, . . . refuse to enforce or protect legal rights, the exercise of which may be prejudicial to the public interest." *Burford v. Sun Oil Co.*, 319 U.S. 315, 317–18 (1943) (emphasis added; quotation marks omitted). Thus, the Court later confirmed, a "District Court's [*Burford*] abstention-based remand order . . . is not based on lack of subject matter jurisdiction." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996); *see also City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 174 (1997) ("[T]here may be situations in which a district court should abstain from reviewing local administrative determinations even if the jurisdictional prerequisites are otherwise satisfied.").

Same goes for comity-based abstention in deference to tribal interests. Comity does not make tribal governments immune from federal jurisdiction. It directs the courts to abstain from exercising jurisdiction in appropriate cases. *See Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 n.8 (1987) ("[T]he [tribal] exhaustion rule enunciated in *National*

Farmers Union did not deprive the federal courts of subject-matter jurisdiction. Exhaustion is required as a matter of comity, not as a jurisdictional prerequisite.").

Same too for international comity-based abstention in cases involving private parties. *See Ungaro-Benages*, 379 F.3d at 1237 ("International comity . . . . is an abstention doctrine: A federal court has jurisdiction but defers to the judgment of an alternative forum."); *Sarei v. Rio Tinto, PLC*, 550 F.3d 822, 828–29 (9th Cir. 2008) (en banc) ("Judically-imposed or prudential exhaustion is not a prerequisite to the exercise of jurisdiction."); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1296 (3d Cir. 1979) ("When foreign nations are involved, . . . foreign policy, reciprocity, comity, and limitations of judicial power are considerations that should have a bearing on the decision to exercise or decline jurisdiction.").

The question in all these cases is not whether federal courts have jurisdiction—they do—but whether they should exercise that jurisdiction when other sovereign interests predominate over federal interests. And just as courts sometimes defer to the interests of state governments, tribal governments, and (in cases involving private litigants) foreign governments, they may defer to foreign sovereign interests when foreign nations are named as defendants.

Nothing in the FSIA suggests otherwise. On the contrary, it states expressly that, when a foreign state lacks sovereign immunity, it "shall be liable in the same manner and to the same extent as a private

individual under like circumstances." 28 U.S.C. § 1606. Since courts may abstain from exercising jurisdiction over private individuals in deference to foreign sovereign interests, under the FSIA's plain text courts may abstain from exercising jurisdiction over foreign states too. The court of appeals' ruling incorrectly denies foreign sovereigns comity protections that are available to private foreign litigants.

The D.C. Circuit believed that comity-based dismissal would amount to "immunity from jurisdiction" because "any Hungarian remedy" would likely preclude relitigation of these claims in U.S. courts. Pet. App. 14a. But that test would make virtually all prudential abstention doctrines into jurisdictional immunities. When federal courts abstain to require exhaustion of tribal remedies, for example, "proper deference to the tribal court system precludes relitigation of issues . . . resolved in the Tribal Courts." *LaPlante*, 480 U.S. at 19. As this Court explained, though, tribal court exhaustion is "a matter of comity," not a limitation on federal courts' "subject-matter jurisdiction." *Id.* at 16 n.8.

Other grounds for abstention, like *forum non conveniens* and the political question doctrine, also typically preclude further litigation of the underlying claims in U.S. courts. But, as the D.C. Circuit has acknowledged, the FSIA does not foreclose these prudential defenses. *See* Pet. App. 17a ("*forum non conveniens* is not displaced by the FSIA"); *Hwang Geum Joo v. Japan*, 413 F.3d 45, 48, 52–53 (D.C. Cir. 2005) (the "complaint presents a nonjusticiable political question," and the court "need not resolve . . . whether Japan is entitled to sovereign immunity

under the FSIA."). These prudential grounds for dismissal are, in almost all cases, preclusive. When they apply, the plaintiffs' claims will never be resolved on the merits by a U.S. court. But their preclusive effect does not turn these abstention doctrines into sovereign immunities or make them unavailable in FSIA cases. For the same reasons, comity-based abstention is not a sovereign immunity either.

This Court's *NML* decision also does not support the D.C. Circuit's rule. *NML* held only that "*immunity defense[s]* made by a foreign sovereign . . . must stand on the [FSIA's] text." 573 U.S. at 141–42 (emphasis added). It did not hold that the FSIA precludes consideration of other comity interests apart from sovereign immunity. In fact, it stated the opposite. *NML* expressly clarified that, though the FSIA provides no sovereign immunity from discovery, courts "*may appropriately consider comity interests* and the burden that the discovery might cause to the foreign state." *Id.* at 146 n.6 (emphasis added).

The FSIA, in other words, codifies only the comity interests that give rise to sovereign immunity. It does not provide that foreign states have no comity interests apart from sovereign immunity. Nor, contrary to the decision below, does it prohibit courts from acting to protect those comity interests in appropriate cases.

B. The D.C. Circuit's Ruling on *Forum Non Conveniens* Is Also Incorrect

The D.C. Circuit also should have affirmed the district court's dismissal of this case under the *forum*

non conveniens doctrine. Faced with virtually identical claims, the Seventh Circuit suggested that it may be an abuse of discretion not to dismiss for *forum non conveniens*. The result here should be the same.

The district court properly applied less deference to Plaintiffs' chosen forum because this case has little if any connection to the United States. And, given the profound historical importance of these claims for Hungary, the district court correctly ruled that Hungary had a far greater interest than the U.S. in hearing these claims in its own courts, which the district court found to be adequate and available.

The district court then carefully weighed each of the private and public factors and found that Hungary was the more convenient forum. It did not abuse its discretion when doing so, as Judge Katsas's dissenting opinion persuasively shows. The district court's reasoned conclusion that Hungary was the more convenient forum should have been affirmed.

CONCLUSION

The Court should grant the petition for a writ of *certiorari*, reverse the court of appeals' *Simon IV* decision, and remand with instructions to affirm the district court's decision in *Simon III*.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED DECEMBER 28, 2018

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-7146

ROSALIE SIMON, *et al.*,

Appellants,

v.

REPUBLIC OF HUNGARY AND MAGYAR ALLAMVASUTAK ZRT.,

Appellees.

April 20, 2018, Argued
December 28, 2018, Decided

Appeal from the United States District Court
for the District of Columbia
(No. 1:10-cv-01770).

Before: MILLETT, PILLARD, and KATSAS, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* MILLETT.

Dissenting opinion filed by *Circuit Judge* KATSAS.

Appendix A

MILLETT, *Circuit Judge*: "Nowhere was the Holocaust executed with such speed and ferocity as it was in Hungary." *Simon v. Republic of Hungary*, 812 F.3d 127, 133, 421 U.S. App. D.C. 67 (D.C. Cir. 2016) (internal quotation marks and citation omitted). More than 560,000 Hungarian Jews—68% of Hungary's pre-war Jewish population—were killed in one year. *Id.* at 134. In 1944 alone, a concentrated campaign by the Hungarian government marched nearly half a million Jews into Hungarian railroad stations, stripped them of all their personal property and possessions, forced them onto trains, and transported them to death camps like Auschwitz, where 90% of them were murdered upon arrival. *Id.* at 133-134.

Fourteen of the very few survivors of the Hungarian government's pogrom (collectively, "Survivors"), including four United States citizens, filed suit against the Republic of Hungary and Magyar Államvasutak Zrt. ("MÁV"), Hungary's state-owned railway company. As relevant here, the litigation seeks compensation for the seizure and expropriation of the Survivors' property as part of the Hungarian government's genocidal campaign. *See Simon*, 812 F.3d at 134.

In a prior appeal in this case, we held that Hungary's and MÁV's seizure of the Survivors' property was an act of genocide, and that the Survivors had adequately alleged jurisdiction over MÁV's acts of genocidal expropriation in violation of international law. *See Simon*, 812 F.3d at 142, 147-148. Although the Survivors' first complaint had not sufficiently alleged that jurisdiction existed over Hungary,

we noted that they might yet be able to make that showing. *See id.* at 148.

On remand, the district court dismissed the case on two alternative grounds, both of which are at issue here. First, the court held that, regardless of whether the Survivors' claims against Hungary amounted to expropriation, principles of international comity required that the Survivors first try to adjudicate their claims in Hungary. Second, the court held that, under the doctrine of *forum non conveniens*, a Hungarian forum would be so much more convenient for resolution of the claims as to clearly override the Survivors' choice to litigate the case in the United States.

The district court erred on both fronts. Our recent decision in *Philipp v. Federal Republic of Germany*, 894 F.3d 406 (D.C. Cir. 2018), which post-dated the district court's ruling, squarely rejected the asserted comity-based ground for declining statutorily assigned jurisdiction. With respect to the dismissal on *forum non conveniens* grounds, the district court committed material legal errors at each step of its analysis. A proper application of the relevant factors leaves no basis for designating Hungary the strongly preferred location for this litigation because Hungary is not home to any identified plaintiff, has not been shown to be the source of governing law, lacks a process for remediation recognized by the United States government, and is not the only location of material amounts of evidence. There is, in short, far too little in this record to designate Hungary a more convenient forum than the one chosen by the Survivors. For those reasons,

we reverse and remand for further proceedings consistent with this opinion.

I

A

The terrible facts giving rise to this litigation are recounted at length in our first opinion in this case. *See Simon*, 812 F.3d at 132-134. In brief, Hungary "began a systematic campaign of [official] discrimination" against its Jewish population "as early as 1941." *Id.* at 133. At that time, Hungary began rounding up tens of thousands of Jewish citizens and refugees who had fled from surrounding countries, and sending them to internment camps near the Polish border. *Id.*; Second Amended Class Action Complaint ¶ 105, *Simon v. Republic of Hungary*, No. 10-1770 (D.D.C. June 13, 2016), ECF No. 118 ("Second Am. Compl.").

Then, in 1944, the Nazis occupied Hungary and installed a "fanatically anti-Semitic" regime. *Simon*, 812 F.3d at 133. Over the Summer of 1944, Hungary rounded up more than 430,000 Jews for deportation to Nazi death camps, primarily Auschwitz. Second Am. Compl. ¶ 120. With tragic efficiency, Hungarian government officials, including MÁV employees, created a schedule of deportations, along with planned routes and destinations, with four trains running daily. *Id.* ¶ 117. Seventy to ninety people were packed into an individual freight car, so that each train transported 3,000 to 3,500 Hungarian Jews to almost certain death. *Id.* Before the Jews were

crammed into the trains, MÁV officials robbed them of all their possessions. *Id.* ¶ 112. According to the Survivors, "[w]ithout the mass transportation provided by the Defendant [MÁV], the scale of the Final Solution in Hungary would never have been possible." *Id.* ¶ 133.

B

The United States traditionally afforded foreign sovereign nations immunity from suit in domestic courts as a matter of "grace and comity." *Republic of Austria v. Altmann*, 541 U.S. 677, 689, 124 S. Ct. 2240, 159 L. Ed. 2d 1 (2004). Given the Political Branches' constitutional expertise in foreign affairs, courts would historically "defer[] to the decisions of the political branches—in particular, those of the Executive Branch—on whether to take jurisdiction over particular actions against foreign sovereigns and their instrumentalities." *Id.* (internal quotation marks omitted); *see also United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-320, 57 S. Ct. 216, 81 L. Ed. 255 (1936). But over time, conflicting theories on when immunity should apply created "disarray" in the State Department's immunity decisions. *Altmann*, 541 U.S. at 690.

Congress responded in 1976 by enacting the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 *et seq.* The FSIA is a "comprehensive statute containing a set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities." *Altmann*, 541 U.S. at 691 (internal quotation marks omitted); *see*

also id. ("Congress sought to remedy these problems by enacting the FSIA."). Congress enacted guiding "principles" so that the "courts of the United States" could decide "the claims of foreign states to immunity" on the terms prescribed by Congress. 28 U.S.C. § 1602; *see Altmann*, 541 U.S. at 691 ("The Act * * * transfers primary responsibility for immunity determinations from the Executive to the Judicial Branch.").

The FSIA enumerates specific exceptions to foreign sovereign immunity and confers federal-court jurisdiction over foreign sovereigns in qualifying cases. 28 U.S.C. §§ 1605-1605A. Courts may hear a case only if "one of the exceptions applies" because "subject-matter jurisdiction in any such action depends on that application." *Altmann*, 541 U.S. at 691 (internal quotation marks omitted). Congress was also explicit that, if an exception applies, "[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States." 28 U.S.C. § 1605(a).

This case involves the FSIA's expropriation exception to foreign sovereign immunity. Section 1605(a)(3) waives foreign sovereign immunity in cases asserting that "rights in property [were] taken in violation of international law" if "that property or any property exchanged for such property" either (i) "is present in the United States in connection with a commercial activity carried on in the United States by the foreign state," or (ii) "is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States[.]" 28 U.S.C. § 1605(a)(3).

Application of that exception hinges on a three-part inquiry:

> [1] the claim must be one in which "rights in property" are "in issue";
>
> [2] the property in question must have been "taken in violation of international law"; and
>
> [3] one of two commercial-activity nexuses with the United States must be satisfied.

Simon, 812 F.3d at 140.

C

1

The Survivors are four United States citizens—Rosalie Simon, Charlotte Weiss, Rose Miller, and Ella Feuerstein Schlanger—as well as Helen Herman and Helena Weksberg from Canada; Tzvi Zelikovitch, Magda Kopolovich Bar-Or, Zehava Friedman, Yitzhak Pressburger, Alexander Speiser, Ze-ev Tibi Ram, and Moshe Perel from Israel; and Vera Deutsch Danos from Australia. Second Am. Compl. ¶¶ 5-9, 14, 22, 27, 28, 39, 41, 49, 65, 73, 81.[1] Seeking some measure of compensation for their injuries, the Survivors filed suit against the

1. Plaintiff Tzvi Zelikovitch passed away while the case was pending, but his three children, who are all Israeli citizens, "have succeeded to his rights, interests and entitlements." Second Am. Compl. at 3 n.1.

Republic of Hungary, MÁV, and Rail Cargo Hungaria Zrt., a private railway company that is the successor-in-interest to the former cargo division of MÁV. *Simon v. Republic of Hungary*, 37 F. Supp. 3d 381, 385 (D.D.C. 2014). The Survivors claim that "their possessions and those of their families were taken from them" by the defendants as they boarded trains destined for concentration camps. *Id.* at 386 (internal quotation marks omitted).[2]

There is no dispute that Hungary and MÁV are, respectively, a foreign sovereign and an instrumentality of a foreign sovereign whose claims of immunity are governed by the FSIA. *See Simon*, 812 F.3d at 135 (citing 28 U.S.C. § 1603). Earlier in this litigation, the United States government filed a Statement of Interest recommending that Rail Cargo Hungaria Zrt., now nearly 100% owned by an Austrian company, be dismissed from the case because of the United States' "strong support for international agreements with Austria involving Holocaust claims against Austrian companies—agreements that have provided nearly one billion dollars to Nazi victims." Statement of Interest of the United States of America at 1, *Simon v. Republic of Hungary*, No. 10-1770 (D.D.C. July 15, 2011), ECF No. 42. Given the United States' longstanding collaboration with Austria to "develop funds to compensate victims of the Holocaust," including the Austrian General Settlement Fund, the

2. The Survivors also seek to certify a class composed of Holocaust survivors similarly wronged by the Hungarian government. The district court has not yet addressed the request for class certification. *See* Order, *Simon v. Republic of Hungary*, No. 10-1770 (D.D.C. Nov. 15, 2010), ECF No. 9.

United States maintained that a "suit against [Rail Cargo Hungaria Zrt.] runs contrary * * * to enduring United States foreign policy interests." *Simon*, 37 F. Supp. 3d at 393-394 (internal quotation marks omitted).

The United States government said nothing about any United States policy interest that would support dismissal of the claims against the Republic of Hungary or MÁV. *See generally* United States Statement of Interest.

The district court subsequently dismissed Rail Cargo Hungaria Zrt. as a defendant for lack of personal jurisdiction. *Simon*, 37 F. Supp. 3d at 444. The district court separately dismissed the case against Hungary and MÁV for lack of subject matter jurisdiction. The court reasoned that the Treaty of Peace with Hungary, Feb. 10, 1947, 61 Stat. 2065, 41 U.N.T.S. 135 ("1947 Treaty"), "provide[d] for an exclusive, extrajudicial mechanism to resolve" the Survivors' claims, and so the court was "constrained by the FSIA to recognize [their] sovereign immunity." *Simon*, 37 F. Supp. 3d at 420.

This court reversed. We held that the 1947 Treaty did not preempt the Survivors' suit because there was no express conflict between the Treaty and the Survivors' common-law claims. *Simon*, 812 F.3d at 140. The Treaty established only a "minimum obligation by Hungary" to compensate victims; it did not provide the "exclusive means" by which victims could obtain relief, leaving the Survivors free to pursue other available remedies. *Id.* at 137 (emphasis omitted).

This court also ruled that the FSIA's expropriation exception, 28 U.S.C. § 1605(a)(3), encompassed the types of common-law claims of conversion, unjust enrichment, and restitution asserted by the Survivors. *Simon*, 812 F.3d at 141 ("We make FSIA immunity determinations on a claim-by-claim basis[.]"). More specifically, we held that the expropriation exception "squarely" applied, *id.* at 146, because Hungary's and MÁV's expropriations of the Survivors' property were "*themselves genocide*," in violation of fundamental tenets of international law, *id.* at 142. "The Holocaust's pattern of expropriation and ghettoization" in Hungary was a "wholesale plunder of Jewish property * * * aimed to deprive Hungarian Jews of the resources needed to survive as a people." *Id.* at 143 (internal quotation marks omitted). Systematically stripping "a protected group" of life's necessities in order to "physical[ly] destr[oy]" them is "genocide." *Id.*

Looking to the complaint, this court held that the Survivors had satisfactorily pled a commercial nexus with respect to MÁV because MÁV engaged in commercial activity in the United States by "maintain[ing] an agency for selling tickets, booking reservations, and conducting similar business" here. *Simon*, 812 F.3d at 147 (internal quotation marks omitted). The complaint's pleadings, however, needed more specificityto show the type of commercial nexus that would support exercising jurisdiction over Hungary. We remanded for the district court to address that issue. *Id.* at 148. This court also left it to the district court to decide on remand "whether, as a matter of international comity, it should refrain from exercising jurisdiction over [the remaining] claims until

the plaintiffs exhaust domestic remedies in Hungary," and whether the doctrine of *forum non conveniens* warranted dismissal. *Id.* at 151.

2

Upon their return to district court, the Survivors amended their complaint to allege specific facts regarding Hungary's ongoing commercial activity in the United States, including, among other things, "[t]he promotion of Hungarian businesses through trading houses," the promotion of Hungary as a destination for United States tourists, "[t]he promotion of American investment in Hungarian business[,]" "[t]he acquisition by Hungary of military equipment," Hungary's use of the United States' capital and debt markets to secure financing, and Hungary's acceptance of federal grants and loans from the United States. Second Am. Compl. ¶ 101.

The district court again dismissed the case. The court chose not to address whether the Survivors had adequately pled facts supporting application of the FSIA's expropriation exception. Instead, the district court held that, notwithstanding the jurisdiction expressly granted by the FSIA over properly pled expropriation claims, "principles of international comity" required the Survivors "to exhaust [Hungarian] remedies, except where those remedies are futile or imaginary." *Simon v. Republic of Hungary*, 277 F. Supp. 3d 42, 54 (D.D.C. 2017) (internal quotation marks omitted) (citing *Fischer v. Magyar Államvasutak Zrt.*, 777 F.3d 847, 852, 858 (7th Cir. 2015)). The district court further ruled that, notwithstanding

the Survivors' arguments about the rise of anti-Semitism in Hungary, a "lack of meaningful remedies," and restrictions on the independence of Hungary's judiciary, the Survivors' "pursuit of their claims in Hungary would not be futile." *Simon*, 277 F. Supp. 3d at 57-63.

The district court further decided that dismissal was warranted under the doctrine of *forum non conveniens*. The court reasoned that the Survivors' choice of forum merited "minimal" deference, and that Hungary would be more convenient because of the evidence and many witnesses located there. *Simon*, 277 F. Supp. 3d at 63, 64-65. In applying the *forum non conveniens* doctrine, the court placed particular emphasis on Hungary's interest in resolving the dispute itself. *Id.* at 66.

The Survivors appeal both grounds for dismissal and request that the case be reassigned to a new district court judge. We agree that the district court erred in requiring the exhaustion of Hungarian remedies and in its *forum non conveniens* analysis, but see no basis for assigning a new district court judge to hear the case.

II

Because this appeal arises from a dismissal at the threshold of the case, "we must accept as true all material allegations of the complaint, drawing all reasonable inferences from those allegations in plaintiffs' favor." *Philipp*, 894 F.3d at 409 (internal quotation marks omitted). "[T]he court may [also] consider the complaint supplemented by undisputed facts" of record. *Coalition for*

Underground Expansion v. Mineta, 333 F.3d 193, 198, 357 U.S. App. D.C. 72 (D.C. Cir. 2003). We review *de novo* the statutory question of whether the FSIA allows a federal court, on grounds of international comity, to dismiss a case over which it has jurisdiction (at a minimum as to MÁV) in favor of the defendant's home forum. *Philipp*, 894 F.3d at 410. A district court's *forum non conveniens* determination is reviewed for a clear abuse of discretion. *Agudas Chasidei Chabad of United States v. Russian Fed'n*, 528 F.3d 934, 950, 381 U.S. App. D.C. 316 (D.C. Cir. 2008).

III

A

Hungary and MÁV (collectively, "Hungary") argue first that, even if the FSIA provides jurisdiction, the Survivors were required as a matter of international comity to first "exhaust" or "prudential[ly] exhaust[]" their claims in the Hungarian courts. Hungary Br. 34. According to Hungary, FSIA jurisdiction would attach, if at all, only if Hungary closed its doors to their claims or the Survivors "show[ed] that exhaustion would be futile." *Id.* at 28.

Before addressing that argument, some clarification of language is in order. Exhaustion involves pressing claims through a decisional forum—often an administrative agency or specialized body—whose decision is then subject to the review of a federal court. *See Woodford v. Ngo*, 548 U.S. 81, 90, 92, 126 S. Ct. 2378, 165 L. Ed. 2d 368 (2006)

(describing exhaustion as requiring a plaintiff to "us[e] all steps that the agency holds out, and do[] so *properly* (so that the agency addresses the issues on the merits)," or "requir[ing] a state prisoner to exhaust state remedies before filing a habeas petition in federal court") (internal quotation marks omitted). When exhaustion applies, parties retain the legal right to direct judicial review of the underlying decision.

The doctrine that Hungary invokes omits a crucial element of traditional "exhaustion"—the Survivors' right to subsequent judicial review here of the Hungarian forum's decision. Indeed, while we need not definitively resolve the question, there is a substantial risk that the Survivors' exhaustion of any Hungarian remedy could preclude them by operation of *res judicata* from ever bringing their claims in the United States. *See* Professor William S. Dodge Amicus Br. 15; *de Csepel v. Republic of Hungary*, 714 F.3d 591, 606-608, 404 U.S. App. D.C. 358 (D.C. Cir. 2013).

So understood, enforcing what Hungary calls "prudential exhaustion" would in actuality amount to a judicial grant of immunity from jurisdiction in United States courts. But the FSIA admits of no such bar. As this court recently held in *Philipp v. Federal Republic of Germany, supra*, nothing in the FSIA or federal law empowers the courts to grant a foreign sovereign an immunity from suit that Congress, in the FSIA, has withheld. 894 F.3d at 414-415. To the contrary, the whole point of the FSIA was to "abate[] the bedlam" of case-by-case immunity decisions, and put in its place a

"'comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state.'" *Id.* at 415 (additional internal quotation marks and citation omitted) (quoting *Republic of Argentina v. NML Capital, Ltd.*, 573 U.S. 134, 134 S. Ct. 2250, 2255, 189 L. Ed. 2d 234 (2014)). There is no room in those "comprehensive" standards governing "every civil action," *id.*, for the extra-textual, case-by-case judicial reinstatement of immunity that Congress expressly withdrew. As we explained in *Philipp*—echoing the Supreme Court—the whole point of the FSIA is that, "[g]oing forward, '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.'" *Id.* at 415 (quoting *NML Capital*, 134 S. Ct. at 2256).

Turning then to statutory text, Hungary's exhaustion-cum-immunity argument has no anchor in the FSIA. In fact, as *Philipp* explains, the text points against it. When Congress wanted to require the pursuit of foreign remedies as a predicate to FSIA jurisdiction, it said so explicitly. *Philipp*, 894 F.3d at 415 (citing 28 U.S.C. § 1605A(a)(2)(A)(iii)); *see also* Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 note § 2(b) ("A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred."). More to the point, the FSIA is explicit that, if a statutory exception to immunity applies—as we have squarely held it does at least as to MÁV, *Simon*, 812 F.3d at 147—"[a] foreign state *shall not be immune* from the jurisdiction of courts of the United States or of the States." 28 U.S.C. § 1605(a) (emphasis added). Courts cannot end

run that congressional command by just relabeling an immunity claim as "prudential exhaustion."

Nor is Hungary's form of judicially granted immunity among those historical legal doctrines, like *forum non conveniens*, that Congress chose to preserve when it enacted the FSIA. *Philipp*, 894 F.3d at 416 (citing 28 U.S.C. § 1606). *Forum non conveniens* predates the FSIA by centuries, and it was an embedded principle of the common-law jurisprudential backdrop against which the FSIA was written. *Altmann*, 541 U.S. at 713 (Breyer, J., concurring); *see also Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 248 n.13, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981) (tracing the history of the doctrine). Hungary's theory, by contrast, lacks any pedigree in domestic or international common law. *See Philipp*, 894 F.3d at 416 (citing *Agudas Chasidei Chabad of United States v. Russian Fed'n*, 466 F. Supp. 2d 6, 21 (D.D.C. 2006) ("[T]his court is not willing to make new law by relying on a misapplied, non-binding international legal concept.")).

In short, controlling circuit and Supreme Court precedent give no quarter to Hungary's theory of judicial immunity wrapped in exhaustion clothing. Under the FSIA, courts are duty-bound to enforce the standards outlined in the statute's text, and when jurisdiction exists (as it does at least over MÁV), courts "have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them." *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., Int'l*, 493 U.S. 400, 409, 110 S. Ct. 701, 107 L. Ed. 2d 816 (1990).

B

Unlike Hungary's prudential immunity/exhaustion theory, the ancient doctrine of *forum non conveniens* is not displaced by the FSIA. *See Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 490 n.15, 103 S. Ct. 1962, 76 L. Ed. 2d 81 (1983); *see also Altmann*, 541 U.S. at 713 (Breyer, J., concurring). The doctrine applies when both the United States and a foreign forum could exercise jurisdiction over a case, but the United States proves to be "an inconvenient forum," or the plaintiff is "'vex[ing],' 'harass[ing],' or 'oppress[ing]' the defendant by inflicting upon him expense or trouble not necessary" to the plaintiff's pursuit of a remedy. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508, 67 S. Ct. 839, 91 L. Ed. 1055 (1947).

The *forum non conveniens* doctrine comes with ground rules. The starting point is "a strong presumption in favor" of the plaintiff's choice of the forum in which to press her suit. *Piper*, 454 U.S. at 255-256; *see also Atlantic Marine Constr. Co. v. United States Dist. Court for the W. Dist. of Texas*, 571 U.S. 49, 66 n.8, 134 S. Ct. 568, 187 L. Ed. 2d 487 (2013) (plaintiffs' chosen forum is hard to overcome "because of the 'harsh result' of [the *forum non conveniens*] doctrine," which "requires dismissal of the case * * * and inconveniences plaintiffs in several respects and even makes it possible for plaintiffs to lose out completely") (internal quotation marks and alternations omitted). The plaintiff's choice of forum merits still "greater deference when the plaintiff has chosen [her] home forum." *Piper*, 454 U.S. at 255. For it is reasonable to assume that "this choice is convenient," and convenience

is the lodestar of the *forum non conveniens* doctrine. *Id.* at 256. By the same token, a foreign plaintiff's choice to litigate in the United States "deserves less deference." *Id.*

Because Hungary seeks to strip the Survivors of their chosen forum and to force them to sue on Hungary's home turf, Hungary bears the burden of showing both that an "adequate alternative forum for the dispute" exists, *Chabad*, 528 F.3d at 950, and that it is "the *strongly preferred* location for the litigation," *MBI Grp., Inc. v. Credit Foncier Du Cameroun*, 616 F.3d 568, 571, 392 U.S. App. D.C. 387 (D.C. Cir. 2010) (emphasis added). The court must likewise "ensure that plaintiffs can reinstate their suit in the alternative forum without undue inconvenience or prejudice." *Nemariam v. Federal Democratic Republic of Ethiopia*, 315 F.3d 390, 392-393, 354 U.S. App. D.C. 309 (D.C. Cir. 2003) (citation omitted).

In deciding whether to deny a plaintiff her chosen forum, courts weigh a number of private and public interests. *Piper*, 454 U.S. at 241. At bottom, the "strong presumption in favor of the plaintiff's choice" can be "overcome only when the private and public interest factors *clearly* point" to a foreign forum. *Id.* at 255 (emphasis added).

The district court committed a number of legal errors that so materially distorted its analysis as to amount to a clear abuse of discretion. *See El-Fadl v. Central Bank of Jordan*, 75 F.3d 668, 677, 316 U.S. App. D.C. 86 (D.C. Cir. 1996) ("[T]he district court abuses its discretion when it fails to consider a material factor or clearly errs

in evaluating the factors before it, or does not hold the defendants to their burden of persuasion on all elements of the *forum non conveniens* analysis.") (formatting edited), *abrogated on other grounds by Samantar v. Yousuf*, 560 U.S. 305, 314-315, 130 S. Ct. 2278, 176 L. Ed. 2d 1047 (2010); *see also Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 134 S. Ct. 1744, 1748 n.2, 188 L. Ed. 2d 829 (2014) ("A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence.") (internal quotation marks omitted).

1

The district court committed legal error at the first step by affording the Survivors' choice of forum only "minimal deference." *Simon*, 277 F. Supp. 3d at 63. The starting point is that the Survivors' choice of forum controls, and "unless the balance is *strongly* in favor of the defendant, the plaintiff's choice of forum should *rarely* be disturbed." *Gulf Oil*, 330 U.S. at 508 (emphases added). So it is Hungary that "bears a heavy burden in opposing [the Survivors'] chosen forum." *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430, 127 S. Ct. 1184, 167 L. Ed. 2d 15 (2007). Deference to the plaintiffs' choice is magnified when, as here, United States citizens have chosen their home forum. *See Piper*, 454 U.S. at 255.

The district court set the scales wrong from the outset. It held that only "minimal deference" was due in this case because, although four of the plaintiffs were United States citizens, the other plaintiffs—from Canada

(2), Israel (7), and Australia (1)—"will be required to travel internationally regardless of whether the litigation is in the United States or Hungary." *Simon*, 277 F. Supp. 3d at 63. That analysis misstepped in three respects.

First, the addition of foreign plaintiffs does not render for naught the weighty interest of Americans seeking justice in their own courts. Here, nearly a third of the plaintiffs are from the United States. And there is no claim or evidence that the United States plaintiffs are in the case only as jurisdictional makeweights seeking to manipulate the forum choice. Under these circumstances, the United States' plaintiffs' preference for their home forum continues to carry important weight in the *forum non conveniens* analysis.

Second, the fact that other plaintiffs must travel does nothing to show that it is more convenient for *all* plaintiffs to travel to Hungary rather than for *some* to travel to the United States. The presence of foreign plaintiffs certainly does not justify the preference for a forum—Hungary—in which *no* plaintiff resides. The question, after all, centers on convenience, and forcing every single one of the many elderly plaintiffs to travel internationally is in no way convenient. *See Piper*, 454 U.S. at 256 n.24 ("[C]itizenship and residence are proxies for convenience[.]") (citation omitted); *cf. Iragorri v. United Techs. Corp.*, 274 F.3d 65, 71 (2d Cir. 2001) ("[T]he degree of deference given to a plaintiff's forum choice varies with the circumstances."). Nor is it in any way convenient for every one of the Survivors to return to the country that committed the mass murder of their families and the genocidal theft of their every belonging.

Hungary bears the heavy burden of persuasion here. Yet it made no effort to show how—as a matter of geographic proximity, available transportation options, cost of travel, ease of travel access, or any other relevant consideration—the United States is a less convenient forum than Hungary for the United States and Canadian plaintiffs, or even for the Israeli and Australian plaintiffs, to access and conduct their litigation. To be sure, Hungary need not have engaged in "extensive investigation" to demonstrate that it is the more convenient forum. *Piper*, 454 U.S. at 258. But given its burden of proof, Hungary had to do something to show that its home turf was the more convenient location for the *litigation*, and not just more convenient for the *defendant. See id.* at 256 ("[T]he central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient[.]").

Third, it is indisputably inconvenient to further delay the elderly Survivors' almost decade-long pursuit of justice. *See Schubarth v. Federal Republic of Germany*, 891 F.3d 392, 396, 399 n.5 (D.C. Cir. 2018) (plaintiff waited "nineteen years" for a decision on her restitution application from a foreign nation). That is important because, if a remedy ultimately proves unavailable in Hungary, there is an open question whether that lost time might render the Survivors ineligible for FSIA jurisdiction were they to once again attempt to press their claims here. *See id.* at 399 n.5 (noting, without resolving, the question of whether the foreign nation's or instrumentality's commercial activity must be "contemporaneous to the filing of suit in th[e] [United States], rather than contemporaneous with the alleged expropriation"). District courts must ensure that

a decision to dismiss on *forum non conveniens* grounds will not lead to a foreign sovereign "delaying exhaustion of a plaintiff's remedies under its own laws" in a way that could end up foreclosing the claims altogether. *Id.*

In supplemental briefing before this court, Hungary raises, for the first time in this litigation, an argument that the Survivors seek to represent a class with more Hungarian members than American members. That is too little too late. For starters, that factual argument is forfeited because it has been fully available to Hungary from the onset of this litigation, yet it was not presented to the district court. *See Potter v. District of Columbia*, 558 F.3d 542, 547, 385 U.S. App. D.C. 26 (D.C. Cir. 2009).

In any event, the argument does not hold water. No class has been certified in this case. Hungary's argument rests instead on information derived from a different case in the Southern District of Florida, *see* Settlement Agreement, *Rosner v. United States*, No. 01-01859 (S.D. Fla. April 29, 2005), ECF No. 209. Yet Hungary offers no evidence that the two groups of plaintiffs would be the same or would have significant overlap. Unadorned and tardy speculation carries no weight in the *forum non conveniens* calculus.

In sum, the misplacement of the burden of proof and the resulting material gaps in the district court's legal analysis of Hungary's arguments in favor of a Hungarian forum pull the legs out from under much of the district court's *forum non conveniens* analysis.

The district court misallocated the burden of proof in a second consequential respect. The court tasked the Survivors with proving that Hungary was not a proper forum. Specifically, the district court ruled that its prior finding, for purposes of "prudential exhaustion," that the Survivors' "pursuit of their claims in Hungary would not be futile" equally "satisfie[d]" the requirement "that Hungary [be] both an available and adequate alternative forum." *Simon*, 277 F. Supp. 3d at 63. More specifically, the court earlier found that the Survivors failed to "show convincingly" that Hungarian remedies are "clearly a sham or inadequate or that their application is unreasonably prolonged" in a manner that would render Hungarian remedies "futile." *Id.* at 54 (internal quotation marks omitted). In so ruling, the court noted the Survivors' "heavy burden" to come forward with a "legally compelling reason" why resort to a Hungarian forum would be futile. *Id.* at 57 (internal quotation marks omitted). The court also considered and rejected piece by piece the Survivors' evidence of futility, ultimately deeming their arguments against so-called prudential exhaustion "[un]persuasive." *Id.* at 59-62.

That chain of reasoning does not carry over to the *forum non conveniens* doctrine, where the job of proving the availability and adequacy of a Hungarian forum was Hungary's, not the Survivors'. *See Chabad*, 528 F.3d at 950. On top of that, the question is not whether the alternative forum is a sham, inadequate, or unreasonably slow. Hungary had to affirmatively prove both that

an adequate remedy exists and that the comparative convenience of its home forum was so "strong[]" as to clearly warrant displacing the Survivors' chosen forum. *Gulf Oil*, 330 U.S. at 508.

Hungary dismisses the court's error as an "innocuous" statement, Hungary Br. 15, pointing to the court's later reference to the correct standard in a parenthetical, *id.* (quoting *Simon*, 277 F. Supp. 3d at 62); *see also* Dissenting Op. at 5 (characterizing the misallocation of the burden of proof as "at worst, an obviously harmless error"). But applying the correct burden of proof is not a box-checking exercise. What matters is whether the court's analysis fit those later words. It did not. The district court instead equated its earlier finding of non-futility with proof that "Hungary is both an available and adequate alternative forum." *Simon*, 277 F. Supp. 3d at 63. Those are two very different inquiries. *See Fischer*, 777 F.3d at 867 ("To be sure, the burden of proof differs between the [prudential exhaustion and *forum non conveniens*] inquiries" because, in the latter inquiry, defendants must "establish that the remedies are adequate.") (emphasis omitted).

The proof is in the pudding. Under its inverted analysis, the district court never analyzed the critical question of the availability and adequacy of the Hungarian forum. Bypassing that question was anything but harmless in this case, where even the United States government lacks "a working understanding of the mechanisms that have been or continue to be available in Hungary with respect to such claims." Brief for *Amicus Curiae* the United States at 11. It is hard to understand how a foreign forum can

be so clearly more convenient when the United States government itself does not have a clear understanding of its nature or operation.[3]

In other words, the district court let Hungary off the burden-of-proof hook by transforming the Survivors' failure to prove futility in the "prudential exhaustion" inquiry into proof of Hungary's clear superiority as a forum in the *forum non conveniens* analysis. On this record, that was a consequential legal error. *See El-Fadl*, 75 F.3d at 677 ("[T]he district court abuses its discretion when it * * * does not hold the defendants to their burden of persuasion on all elements of the *forum non conveniens* analysis.") (emphasis added and internal quotation marks omitted).

3

The consequences of the district court's burden-allocation errors snowballed as the court balanced the competing private and public interests in the two fora. The ultimate inquiry, again, puts the onus on Hungary. The law's "strong presumption in favor of the plaintiff's choice of forum," *Piper*, 454 U.S. at 255, can be overridden only if the "private and public interest factors *strongly* favor[] dismissal," *Chabad*, 528 F.3d at 950 (emphasis added). Given the record in this case, the district court's failure to hold Hungary to that task makes this among "the rare case[s]" in which a district court's balancing of

3. To be fair to the district court, it did not have the benefit of this brief from the United States at the time of its decision.

factors amounts to an abuse of discretion. *Morley v. CIA*, 894 F.3d 389, 391 (D.C. Cir. 2018).

a

As relevant here, the private-interest factors include the "relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling [witnesses;] * * * and all other practical problems that make trial of a case easy, expeditious, and inexpensive." *Piper*, 454 U.S. at 241 n.6 (internal quotation marks omitted). It is the defendants' obligation to "provide enough information to enable the District Court to balance" the factors. *Piper*, 454 U.S. at 258. The court's analysis of the relevant record material in this case was too quick to credit Hungary's claims and too slow to value the Survivors' evidence.

In weighing the private-interest factors, the district court reasoned that (i) extensive records are located in Hungary that would require translation into English, (ii) "many witnesses with personal knowledge will be located in Hungary" and unable to travel, and (iii) the Survivors might later choose to bring an action against Rail Cargo Hungaria Zrt., a previously dismissed defendant. *Simon*, 277 F. Supp. 3d at 64-65. None of those reasons stands up to scrutiny.

At best, the location-of-relevant-evidence factor is in equipoise. While there are some records in Hungary, the Survivors showed that an extensive collection of relevant records has been amassed by the United States Holocaust

Memorial Museum in Washington, D.C. *See* Memorandum in Opposition to Hungary's Motion to Dismiss 21, *Simon v. Republic of Hungary*, No. 10-1770 (D.D.C. Oct. 31, 2016), ECF No. 122.[4]

The issue of translation points both ways as well. Given that many of the Survivors speak English, the documents will in all likelihood have to be translated and "digitized" for the parties regardless of which forum hears the case. *See Philipp v. Federal Republic of Germany*, 248 F. Supp. 3d 59, 85 (D.D.C. 2017), *aff'd*, 894 F.3d 406 (D.C. Cir. 2018). Digitization, moreover, has eased the burden of transcontinental document production and has increasingly become the norm in global litigation. *See, e.g., id.* at 85; *Itoba Ltd. v. LEP Group PLC*, 930 F. Supp. 36, 44 (D. Conn. 1996).

The district court placed heavy emphasis on the presence of "many witnesses" in Hungary who cannot or were unwilling to travel. *Simon*, 277 F. Supp. 3d at 65. But that finding resulted from failing to hold Hungary to its burden of proof. Hungary failed to identify a single witness in Hungary that would need to testify at trial. In actuality, the evidence in this case will be largely documentary. *See*

4. The Dissenting Opinion faults the Survivors for not having yet—at this pre-discovery stage—locked down the specific location of documents regarding their "individual cases" of seizure and expropriation. Dissenting Op. at 7. But the Dissenting Opinion offers no justification for visiting upon the Survivors the very duty of "extensive investigation" that it rejects for Hungary at this procedural stage. *Compare* Dissenting Op. at 7, *with* Dissenting Op. at 3.

Oral Argument Tr. 4:17-4:21 ("[Survivors' Attorney]: No, I don't believe any people from Hungary will be called to prove our case. * * * [I]t'll also be proven by reference to some documents[.]"); *id.* at 19:1-19:4 (defendants' listing "bank records," "business records," and "tax records" as the type of evidence the court would evaluate). That makes sense. Because the relevant events occurred more than seventy years ago, the likelihood is low that "many witnesses with personal knowledge" still exist and are able to testify. *Simon*, 277 F. Supp. 3d at 65 (internal quotation marks omitted). Someone who was barely an adult during the war would now be in their mid-90s. To be sure, the Survivors wished to depose *one* elderly witness in Hungary. But that is far too little to tip the balance at all, let alone strongly, in Hungary's favor. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 426-429, 126 S. Ct. 1211, 163 L. Ed. 2d 1017 (2006) (when evidence is "in equipoise," the burden of proof has not been met).

The district court also emphasized that the Survivors might wish to join Rail Cargo Hungaria Zrt. as a defendant. But the ability to implead third-party defendants becomes relevant when the missing defendant is "crucial to the presentation of [the appellee's] defense." *Piper*, 454 U.S. at 259 (explaining that the ability to implead another defendant was significant because the other parties could be relieved of liability). Neither Hungary nor MÁV has argued that Rail Cargo Hungaria Zrt. is crucial to its defense. And the Survivors do not claim that Rail Cargo Hungaria Zrt. is necessary to the presentation of their case. In the absence of a more substantial showing of

relevance or necessity, the district court erred in relying on speculation about the Survivors' possible future litigation strategy as a ground for overriding their chosen forum.

b

As relevant to this case, the public-interest factors include:

> [T]he administrative difficulties flowing from court congestion; the "local interest in having localized controversies decided at home"; the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; [and] the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law[.]

Piper, 454 U.S. at 241 n.6 (quoting *Gulf Oil*, 330 U.S. at 509). The district court concluded that those factors weighed in favor of a Hungarian forum because of Hungary's "stronger" moral interest in resolving the dispute, the likelihood that Hungarian law would apply to the Survivors' claims, and the administrative burden the litigation could impose on the court. *Simon*, 277 F. Supp. 3d at 66-67. That analysis failed to hold Hungary to its burden of proof, misanalyzed the record evidence, and overlooked material omissions in Hungary's claims.

First, the district court erred in assigning such significant weight to Hungary's asserted interest in

addressing the Survivors' claims. *See Simon*, 277 F. Supp. 3d at 66. Hungary has had over seventy years to vindicate its interests in addressing its role in the Holocaust. Yet the scheme Hungary currently has in place has not been recognized by the United States government. *See* United States Statement of Interest at 1 (expressing "the United States' strong support for international agreements with Austria involving Holocaust claims against Austrian companies," without mentioning any of Hungary's laws to compensate victims); United States Br. 11 (United States does not "have a working understanding of the mechanisms that have been or continue to be available in Hungary with respect to such claims").

Beyond that, the district court erred in putting Hungary's and the four American citizens' and other Survivors' interests at cross-purposes. Allowing these claims to go forward and the evidence to be shown in a United States court will in no way impair Hungary's ability to use that same evidence to provide reparations and remediation to the Survivors of its own accord.

The district court relied on *Republic of the Philippines v. Pimentel*, 553 U.S. 851, 866, 128 S. Ct. 2180, 171 L. Ed. 2d 131 (2008), for the proposition that United States courts should respect a foreign sovereign's interest in addressing its own past wrongs. *Simon*, 277 F. Supp. 3d at 66. That mixes apples and oranges. At issue in *Pimentel* was whether a suit that involved the Republic's assets and in which the FSIA did *not* authorize jurisdiction could still proceed *without* including the Republic as a party. *Pimentel*, 553 U.S. at 865. More specifically, the case focused on whether, under Federal Rule of Civil Procedure

19(b), the Republic was an indispensable party whose absence would bar the lawsuit from going forward. *Id.* at 862. All parties agreed that the Republic was a necessary party, but they disagreed over whether the Rule 19(b) factors permitted the action to proceed without it. *Id.* at 863-864.

The Supreme Court held that, when considering the intersection of joinder rules and sovereign immunity, "[a] case may not proceed when a required-entity sovereign is not amenable to suit." 533 U.S. at 867. To hold otherwise, the Court added, would fail to "giv[e] full effect to sovereign immunity" and would offend the very interests that gave rise to the foreign sovereign immunity doctrine and the FSIA in the first place. *Id.* at 866. *Pimentel*, in other words, enforces the immunity lines that the FSIA draws.

That bears no resemblance to this case. This case does not involve necessary-party status under Rule 19; Hungary and MÁV are already parties; and the FSIA's expropriation exception grants jurisdiction over at least one (and perhaps both) of the Hungarian defendants. *See Simon*, 812 F.3d at 147; 28 U.S.C. § 1605(a)(3). It also bears noting that the already certified class in *Pimentel* consisted primarily of Philippine nationals, including "[a]ll *current* civilian citizens of the Republic of the Philippines." *Hilao v. Estate of Marcos*, 103 F.3d 767, 774 (9th Cir. 1996) (emphasis added). By contrast, not one of the named Survivors in this case resides in or is a citizen of Hungary, and Hungary submitted no evidence to the district court identifying a single potential Hungarian class member or even a Hungarian witness.

Hungary additionally argues that other cases have acknowledged a foreign sovereign's interest in resolving disputes internally. But the cases that Hungary cites involved questions of personal jurisdiction and the extraterritorial application of the Alien Tort Statute, 28 U.S.C. § 1350. *See* Hungary Supp. Br. 8-9 (citing *Kiobel v. Royal Dutch Petroleum*, 569 U.S. 108, 133 S. Ct. 1659, 185 L. Ed. 2d 671 (2013), and *Daimler AG v. Bauman*, 571 U.S. 117, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014)). Those cases do not speak to whether a court should, on *forum non conveniens* grounds, refuse to exercise jurisdiction that does exist. Nor do they implicate the heavy burden a defendant carries in overcoming a plaintiff's choice of forum.

The district court's second legal error was brushing off the United States' own interests in the litigation. The district court concluded that the Survivors' claims have no connection to the United States. *Simon*, 277 F. Supp. 3d at 66. That is not correct. For starters, there are four United States citizen plaintiffs in the suit. The United States has an obvious interest in supporting their efforts to obtain justice in a timely manner and, to that end, in ensuring that a United States forum is open to those whose claims fall within the courts' lawful jurisdiction.

Beyond that, the United States government has announced that it has a "moral imperative * * * to provide some measure of justice to the victims of the Holocaust, and to do so in their remaining lifetimes." United States Br. at 9-10. That interest is part of a larger United States policy to support compensation for Holocaust victims,

especially its own citizens. "The policy of the United States Government with regard to claims for restitution or compensation by Holocaust survivors and other victims of the Nazi era has consistently been motivated by the twin concerns of justice and urgency." United States Statement of Interest at 2. For the four citizen plaintiffs in this case, that interest is so compelling that Congress enacted it into law. *See* Justice for Uncompensated Survivors Today Act of 2017, Pub. L. No. 115-171, 132 Stat. 1288, 1289 (2018) (requiring the Secretary of State to compile a report that evaluates other countries' "progress toward the resolution of claims for United States citizen Holocaust survivors and United States citizen family members of Holocaust victims").

The United States has also been actively involved in obtaining justice for Nazi-era victims with countries that have shown themselves willing to provide such redress. *See* United States Statement of Interest at 2, 4-5 (The United States has "assist[ed] in several international settlements which have provided approximately $8 billion dollars for the benefit of victims of the Holocaust"; signed Executive Agreements with countries that had collaborated with the Nazis; and "committed to take certain steps to assist Austria and Austrian companies in achieving 'legal peace' in the United States with respect to Nazi-era forced and slave labor claims[.]"). The United States' strong and longstanding interest in ensuring the *timely* remediation of the claims of Holocaust survivors, especially for its own citizens, carries important weight in the *forum non conveniens* analysis.

Third, Hungary failed to show that the choice-of-law factor favors its forum. The district court reasoned that "Hungarian law would likely apply to the plaintiffs' claims," making a Hungarian forum a better fit. *Simon*, 277 F. Supp. 3d at 66. But neither party argues that current Hungarian law should apply. The Survivors assert that international common law governs their claims. Survivors' Reply Br. 25. If so, United States courts are every bit as adept at applying that law as a Hungarian forum would be.

Hungary argues that historical Hungarian law from the time the property was seized should govern the claims. Oral Argument Tr. 21:22-21:23. That cannot be right. Hungarian law at that time made the genocidal seizures lawful and deprived Jews of all legal rights and status. *See id.* 22:6-22:9. That is the same law that authorized the deportation of Hungarian Jews to death camps. Consigning the Survivors to that legal regime would be the plainest of errors.

Finally, the United States has advised this court that it has no specific foreign policy or international comity concerns that warrant dismissal of this case in favor of a Hungarian (or any other) forum. United States Br. at 11 ("[T]he United States does not express a view as to whether it would be in the foreign policy interests of the United States for plaintiffs to have sought or now seek compensation in Hungary."). Quite the opposite, the United States' brief here emphasized its governmental interest in the timely resolution of the Survivors' claims during their lifetimes. *Id.* at 9-11. Likewise, its statement

of interest filed in the district court gave no reason why this case should be dismissed and sent to Hungary. *See generally* United States Statement of Interest. That silence speaks volumes when contrasted with the federal government's first unprompted Statement of Interest in this case in which it strongly recommended that the third defendant, a privately owned Austrian company, be dismissed because of Austria's ongoing, collaborative efforts to provide reparations to victims of the Holocaust. *See id.* at 1. That defendant has since been dismissed from the case. *Simon*, 277 F. Supp. 3d at 47 n.1.

At bottom, the relevant private and public interests in this case, strengthened by the United States government's views, point strongly in favor of the Survivors' forum choice. They certainly do not tilt decisively in favor of the Hungarian forum. While we accord respectful deference to district courts' *forum non conveniens* determinations, we do not rubber stamp them. Our task is to ensure that district courts' decisions hew to the burdens of proof and enforce the applicable legal presumptions. In this case and on this record, the nature and importance of the district court's legal and analytical errors render its judgment that Hungary met its weighty burden of proof a clear abuse of discretion.

C

Lastly, the Survivors request that their case be assigned to a different district court judge. "[W]e will reassign a case only in the exceedingly rare circumstance that a district judge's conduct is 'so extreme as to display

clear inability to render fair judgment.'" *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 763, 410 U.S. App. D.C. 382 (D.C. Cir. 2014) (citation omitted); *see also Cobell v. Kempthorne*, 455 F.3d 317, 331, 372 U.S. App. D.C. 232 (D.C. Cir. 2006) ("[W]e exercise this authority only in extraordinary cases."). That standard has not remotely been met here. There is no evidence that the district court judge acted with anything but impartiality in this case, and "we have no reason to doubt that the District Court will render fair judgment in further proceedings." *In re Kellogg*, 756 F.3d at 763-764.

* * * *

Winston Churchill described the brutal genocidal expropriations, deportations, and mass extermination of Hungarian Jews at Nazi death camps as "'probably the greatest and most horrible crime ever committed in the history of the world.'" *Simon*, 812 F.3d at 132. The district court erred in declining to exercise statutorily conferred jurisdiction over the Survivors' effort to obtain some measure of reparation for those injuries both by wrongly requiring them to adjudicate their claims in Hungary first, and by misapplying the law governing the *forum non conveniens* analysis. We deny the Survivors' request that the case be reassigned, and remand for further proceedings consistent with this opinion.

So ordered.

KATSAS, CIRCUIT JUDGE, dissenting: The district court concluded that this foreign-cubed case—involving wrongs committed by Hungarians against Hungarians in Hungary—should be litigated in Hungary. In so doing, the court permissibly applied the settled law of *forum non conveniens*.

Our standard of review is narrow. As the Supreme Court has instructed: "The *forum non conveniens* determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion; where the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981). Thus, a reviewing court may not "substitute[ ] its own judgment for that of the District Court." *Id.* Under this narrow standard, reversal here is unwarranted.

The district court correctly stated the relevant legal principles. First, it acknowledged "the 'substantial presumption in favor of a plaintiff's choice of forum.'" *Simon v. Republic of Hungary* (*Simon III*), 277 F. Supp. 3d 42, 62 (D.D.C. 2017) (quoting *Agudas Chasidei Chabad v. Russian Fed'n*, 528 F.3d 934, 950, 381 U.S. App. D.C. 316 (D.C. Cir. 2008)). Then, the court correctly stated the governing rule—"a court 'may nonetheless dismiss a suit for *forum non conveniens* if the defendant shows (1) there is an alternative forum that is both available and adequate and, (2) upon a weighing of public and private interests,' that the alternative forum is 'the strongly

preferred location for the litigation.'" *Id.* (alterations adopted) (quoting *MBI Grp., Inc. v. Credit Foncier du Cameroun*, 616 F.3d 568, 571, 392 U.S. App. D.C. 387 (D.C. Cir. 2010)). Finally, the court correctly identified nine relevant private- and public-interest factors to be considered. *Id.*

My colleagues conclude that the district court gave insufficient weight to the plaintiffs' choice of forum, relieved the defendants of their burden of proof, and unreasonably balanced the relevant factors. Respectfully, I disagree.

A

The district court permissibly assessed the weight owed to the plaintiffs' choice of a United States forum. At the outset, the court repeatedly recognized the "substantial presumption" or "substantial deference" generally due to such a choice. 277 F. Supp. 3d at 62, 63. Then, the court reasoned that the degree of deference was "lessened" in this case because only four of the fourteen named plaintiffs are United States residents, because "none of the underlying facts in this case relate to the United States in any way," and because the named plaintiffs and the putative class that they seek to represent come "from all over the globe," whereas the defendants are based entirely in Hungary. *Id.* at 63.

This analysis is consistent with governing law. As the Supreme Court has explained: "When the home forum has been chosen, it is reasonable to assume that this choice

is convenient," but "[w]hen the plaintiff is foreign, ... this assumption is much less reasonable." *Piper Aircraft*, 454 U.S. at 255-56. And, in either case, the plaintiffs' choice is significant only insofar as it bears on "the central purpose of any *forum non conveniens* inquiry," namely "to ensure that the trial is convenient." *Id.* at 256. Thus, the district court was amply justified in considering the residencies of all parties as well as the disconnect between the plaintiffs' chosen forum and the relevant facts—matters that bear directly on the convenience of litigating this case in a United States court.

My colleagues highlight the district court's single usage of the phrase "minimal deference," which they read as a threshold legal error of "set[ting] the scales wrong from the outset." *Ante* at 11, 17. What the court actually said, *after* flagging the various considerations noted above, was that "[i]n these circumstances, the plaintiffs' choice of forum is entitled to minimal deference." 277 F. Supp. 3d at 63. In context, the statement reflects not a failure to recognize the presumption, but the court's considered conclusion that the "defendants had overcome the presumption" in this case. *Id.* at 64 (quoting *Moscovits v. Magyar Cukor Rt.*, 34 F. App'x 24, 26 (2d Cir. 2002)). That was neither legal error nor an abuse of discretion. *See, e.g., Iragorri v. United Techs. Corp.*, 274 F.3d 65, 71 (2d Cir. 2001) (en banc) ("the degree of deference given to a plaintiff's forum choice varies with the circumstances").

My colleagues object that Hungary made no detailed presentation regarding the plaintiffs' travel options. *Ante* at 18-19. But the Supreme Court has warned that "[r]

equiring extensive investigation would defeat the purpose" of the *forum non conveniens* motion. *Piper Aircraft*, 454 U.S. at 258. The defendants were not required to conduct travel surveys to make the commonsense point that less deference is due to the plaintiffs' choice when most plaintiffs would need to travel internationally regardless of the forum. Nor was evidence necessary to establish that all of the defendants are based, and all of the relevant facts arose, in Hungary. On its face, the complaint makes that clear. *See* J.A. 104-23.

My colleagues also fault the district court for failing to consider whether any litigation delays in Hungary might prevent the plaintiffs from later re-filing in the United States. *Ante* at 19. But the plaintiffs did not raise this argument either below or in their opening brief, so it is twice forfeited. *See, e.g., Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1001, 382 U.S. App. D.C. 78 (D.C. Cir. 2008). Nor did the plaintiffs ask the district court, as a fallback remedy, to attach conditions to any dismissal. And in any event, the whole point of *forum non conveniens* law is to dismiss cases that can more conveniently be adjudicated elsewhere, not to defer adjudications while plaintiffs exhaust claims or remedies in other fora.

B

My colleagues next contend that the district court improperly required the plaintiffs to prove that Hungary was not an available and adequate forum for their claims, rather than requiring the defendants to prove that it was. *Ante* at 20. But, in laying out the "applicable legal

principles" of *forum non conveniens*, the district court explicitly stated that dismissal is appropriate only if "the defendant shows" that "there is an alternative forum that is both available and adequate." 277 F. Supp. 3d at 62. The court did not improperly shift that burden.

My colleagues note that the district court, in addressing whether Hungary was an adequate alternative forum, rested on its conclusion that pursuing claims in Hungary would not be futile for purposes of exhaustion. In the court's own words, "the finding that the plaintiffs' pursuit of their claims in Hungary would not be futile satisfies the first prong of the test for application of the *forum non conveniens* doctrine that Hungary is both an available and adequate alternative forum." 277 F. Supp. 3d at 63.

The district court's statement made good sense in the context of its overall analysis. After all, in setting forth the governing principles on futility, the district court exclusively invoked the adequacy standards of *forum non conveniens* law. *See* 277 F. Supp. 3d at 57-58. My colleagues correctly note that exhaustion and *forum non conveniens* law assign the opposite burden of proof on the question of futility or adequacy. *Ante* at 21-22. But here, both sides presented detailed affidavits regarding Hungarian law and practice, so the burden of production did not matter. Likewise, the district court assessed futility as a matter of law, based on undisputed assertions in both affidavits, so the burden of persuasion did not matter. Nor did the district court even conclude that the competing legal arguments were at or near the point of

equipoise. In context, the district court's cross-reference to its analysis of futility was an appropriate shorthand or, at worst, an obviously harmless error.

The court's analysis makes all of this clear. Among other things, the court explained that the Hungarian constitution "requires that parties be treated fairly and equally in court, prohibits discrimination on the basis of, among other things, race or religion, and creates rights of appeal to various appellate courts." 277 F. Supp. 3d at 58. The court noted that Hungary recognizes and enforces international law and provides damages for the types of property losses alleged here. *Id.* And it stated that these and other considerations, as set forth by the defendants and their experts, "strongly support the conclusion that Hungary is an adequate alternative forum for the plaintiffs' claims." *Id.* The court then considered a "variety" of the plaintiffs' competing arguments and concluded that "[n]one is persuasive." *Id.* at 59-62. Apart from their mistaken argument about a misplaced burden of proof, neither the plaintiffs nor my colleagues challenge any relevant particulars of this analysis.

My colleagues note that the United States declined to take a position on the availability and adequacy of a Hungarian forum. *Ante* at 22. But the government's failure to address that question hardly suggests that the district court, in assessing the detailed submissions made to it on that very point, committed legal error or otherwise abused its discretion.

C

The district court reasonably balanced the private and public interests involved. On these points, my colleagues do not argue that the district court committed any discrete legal error, but only that the court abused its discretion in weighing the relevant factors.

1

With regard to private interests, the district court reasonably concluded that much of the evidence in this case will involve paper records written in Hungarian and located in Hungary. The court cited declarations noting "the extensive documents in the Hungarian Archives related to property taken from Hungarian nationals during World War II." 277 F. Supp. 3d at 64. The court also cited the plaintiffs' own complaint, which repeatedly references "vital" evidence "kept by the defendants in Hungary." *Id.* And the court cited declarations attesting that any pertinent documents were likely written in Hungarian, which would require translation into English if this case were heard in the United States. *Id.* at 64-65.

My colleagues conclude that, "[a]t best, the location-of-relevant-evidence factor is in equipoise," because "some" records are in Hungary, while an "extensive" collection is at the Holocaust Museum in Washington. *Ante* at 23-24. But the defendants' evidence showed that the Hungarian National Archives "have a substantial amount of documentation" regarding the Hungarian Holocaust, J.A. 184, and the plaintiffs' own legal expert confirmed "an

abundance of records of these confiscations in Hungarian archives," J.A. 244. Moreover, while the plaintiffs' expert noted that "[c]opies" of the documents "may be found" at the Holocaust Museum, he did not assert that the museum had somehow managed to compile records as complete or more complete than those of the Hungarian government. J.A. 244-45. Furthermore, the plaintiffs themselves have found no records relevant to their individual cases in the museum, so there is no case-specific reason to discount the defendants' overall submissions on this point. *See Simon v. Republic of Hungary*, No. 10-cv-1770 (D.D.C.), ECF Doc. 122 at 21 n.12. Finally, the examples addressed by the plaintiffs' expert confirm that the pertinent original records are in paper form and written in Hungarian. *See id.*, ECF Doc. 122-1, Exs. 2-6. The district court reasonably assessed the nature and location of the documentary evidence.

The court also reasonably found that there would be "many witnesses" in Hungary who could not or would not travel to the United States. 277 F. Supp. 3d at 65. The plaintiffs had "already sought to depose at least one witness located in Hungary who was unable to travel out of the country," *id.*—an alleged war criminal recently arrested in Budapest, J.A. 79. Given the number and scope of the war crimes alleged in the complaint, and the need for each individual plaintiff to show that any taking of his or her property was done as part of a genocide, *see Simon v. Republic of Hungary* (*Simon II*), 812 F.3d 127, 143-46, 421 U.S. App. D.C. 67 (D.C. Cir. 2016), the district court reasonably treated this consideration as significant.

The district court also reasonably considered the appropriateness of a Hungarian forum in the event of further litigation against Rail Cargo Hungaria Zrt. The plaintiffs had sued RCH in this case, but RCH was dismissed for lack of personal jurisdiction in the United States. *See* 277 F. Supp. 3d at 65. In contrast, RCH might be joined to any future litigation in Hungary, producing one case involving all of the original defendants, rather than parallel lawsuits across two continents.

Finally, the district court noted one important competing consideration—the "emotional burden" to the plaintiffs of returning to Hungary. 277 F. Supp. 3d at 65. The court reasoned: "While acknowledging the profound nature of the emotional weight of bringing this case in Hungary, the Court is hesitant to find that this factor outweighs virtually every other factor weighing in favor of dismissing under *forum non conveniens*." *Id.* I can find no abuse of discretion in the court's recognition and balancing of the competing considerations. For where "factors point in different directions, assuming no abuse of discretion in the district court's analysis of the individual factors, it will be the rare case when we can reverse a district court's balancing of the ... factors" as itself an abuse of discretion. *Morley v. CIA*, 894 F.3d 389, 391 (D.C. Cir. 2018).

2

With regard to public interests, the district court reasonably concluded that Hungary's interest in resolving this controversy was greater than that of the United States. The Supreme Court has long recognized the

"local interest in having localized controversies decided at home." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509, 67 S. Ct. 839, 91 L. Ed. 1055 (1947); *see, e.g.*, *Piper Aircraft*, 454 U.S. at 260; *MBI*, 616 F.3d at 576. Moreover, this interest is heightened when the claims "arise from events of historical and political significance" to the home forum. *Republic of Philippines v. Pimentel*, 553 U.S. 851, 866, 128 S. Ct. 2180, 171 L. Ed. 2d 131 (2008). This case is "localized" in Hungary; it involves the taking of Hungarians' property by other Hungarians in Hungary. In addition, claims arising out of the Hungarian Holocaust are plainly a matter of historical and political significance to Hungary.

My colleagues object that neither *Pimentel* nor the extraterritoriality and personal-jurisdiction decisions stressing the importance of "a foreign sovereign's interest in resolving disputes internally" were *forum non conveniens* cases. *Ante* at 27-28. But the repeated acknowledgment of this interest—in many different contexts—only reinforces the district court's conclusion. In any event, *Gulf Oil* and its *forum non conveniens* progeny, such as *Piper Aircraft* and *MBI*, amply support the district court's judgment.

My colleagues counter that the United States has recognized a "moral imperative" to provide compensation to Holocaust victims. *Ante* at 29. True enough, but the government seeks to further that interest by encouraging parties "to resolve matters of Holocaust-era restitution and compensation through dialogue, negotiation, and cooperation," not by sweeping foreign-centered cases into United States courts. U.S. Br. at 10. Moreover, consistent with *Gulf Oil* and its progeny, the United

States reminds us that "a court should give less weight to U.S. interests where the activity at issue occurred in a foreign country and involved harms to foreign nationals." *Id.* at 16. Likewise, it reminds us that "[a]pplication of the forum non conveniens doctrine can assist in identifying cases in which an alternative foreign forum has a closer connection to the underlying parties and/or dispute." *Id.* at 26. These considerations strongly support the district court's assessment of the public-interest factors.

Finally, the district court reasonably concluded that choice-of-law considerations favor a Hungarian forum. Of course, Hungarian law is the obvious source of law to govern acts committed by Hungarians against Hungarians in Hungary. My colleagues express concern that Hungarian law may have affirmatively authorized the discrimination and genocide committed during the Holocaust. *Ante* at 30. But Hungarian law now outlaws both, 277 F. Supp. 3d at 58, and the defendants affirmatively disavow any defense that genocidal expropriations were lawful in the early 1940s, Oral Arg. Tr. at 22-23, 38. In sum, there is no bar to Hungarian law governing the merits of this case, which will involve "garden-variety common-law causes of action such as conversion, unjust enrichment, and restitution." *Simon II*, 812 F.3d at 141.

* * * *

The district court correctly stated the governing law and reasonably weighed the competing considerations in this case. Because the court did not abuse its discretion by dismissing on *forum non conveniens* grounds, I would affirm its decision.

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, FILED SEPTEMBER 30, 2017

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 10-1770 (BAH)

ROSALIE SIMON, *et al.*, Individually, for themselves and for all others similarly situated,

Plaintiffs,

v.

REPUBLIC OF HUNGARY, *et al.*,

Defendants.

September 30, 2017, Decided

BERYL A. HOWELL, Chief United States District Judge.

MEMORANDUM OPINION

The named plaintiffs in this proposed class action, Rosalie Simon, Helen Herman, Charlotte Weiss, Helena Weksberg, Rose Miller, Tzvi Zelikovitch, Magda Kopolovich Bar-Or, Zehava (Olga) Friedman, Yitzhak Pressburger, Alexander Speiser, Ze-ev Tibi Ram, Vera Deutsch Danos, Ella Feuerstein Schlanger, and Moshe

Perel (collectively, "the plaintiffs"), are fourteen of the approximately 825,000 Hungarian Jews who were subjected to the atrocities and horrors of the Holocaust at the hands of the Hungarian government between 1941 and 1945. Second Am. Compl. ("SAC") ¶¶ 5-9, 14, 22, 28, 39, 41, 49, 65, 73, 81, 131, ECF No. 118. The plaintiffs instituted this suit against the Republic of Hungary ("Hungary") and the Hungarian national railway, Magyar Államvasutak Zrt. ("MÁV"), (collectively, "the Defendants") seeking restitution for the property seized from them as part of Hungary's broader effort to eradicate the Jewish people. SAC ¶¶ 173-215.[1]

In 2014, this Court dismissed the plaintiffs' case, holding that in light of a treaty between the United States and Hungary, the defendants were entitled to sovereign immunity under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1605-07. *Simon v. Republic of Hungary* ("*Simon I*"), 37 F. Supp. 3d 381, 424 (D.D.C. 2014). The case now returns on remand from the D.C. Circuit, which rejected the application of the treaty exception under the FSIA, and held that the FSIA "expropriation exception" may provide a waiver of the defendants' sovereign immunity. *Simon v. Republic of Hungary* ("*Simon II*"), 812 F.3d 127, 149, 421 U.S. App.

1. The plaintiffs' initial complaint named a third defendant, Rail Cargo Hungaria Zrt. ("RCH"), which is a freight rail company that is the successor-in-interest to MÁV Cargo Árufuvarozási Zrt., f/k/a MÁV Cargo Zrt., a former division of MÁV. RCH was dismissed for lack of personal jurisdiction, *see Simon v. Republic of Hungary* ("*Simon I*"), 37 F. Supp. 3d 381, 444 (D.D.C. 2014), a ruling not appealed by the plaintiffs.

D.C. 67 (D.C. Cir. 2016). The D.C. Circuit further held "that the plaintiffs' claims do not constitute non-justiciable political questions falling outside of the Judiciary's cognizance," *id.* at 132; *id.* at 151, but left unresolved the applicability of other prudential doctrines. Instead, "whether, as a matter of international comity, the plaintiffs must first exhaust available remedies in Hungary before proceeding with their claims in United States courts," *id.* at 132-33, as well as "any other arguments" previously raised by the defendants "that [the Court] has yet to reach . . . such as the defendants' *forum non conveniens* arguments," *id.* at 151, were expressly left to this Court to consider on remand.

The defendants now seek to dismiss the plaintiffs' Second Amended Complaint, which was filed after remand. Defs.' Mot. Dismiss SAC ("Defs.' Mot."), ECF No. 120. For the reasons explained below, the plaintiffs are required to exhaust their Hungarian remedies before bringing suit in the United States under the prudential exhaustion doctrine and, since they have not done so, the defendants' motion to dismiss is granted, without prejudice, on that ground as well as under the *forum non conveniens* doctrine.[2]

2. Given the ample papers and accompanying exhibits submitted by the parties, the defendants' request for an oral hearing is denied. Defs.' Mot. at 1, ECF No. 120; *see* LCvR. 7(f) (granting request for oral hearing "shall be within the discretion of the Court").

Appendix B

I. BACKGROUND

The factual background of this case has been extensively reviewed in prior decisions of this Court and the D.C. Circuit, *see generally Simon I*, 37 F. Supp. 3d at 385-95; *see also Simon II*, 812 F.3d at 132-34, and, consequently, that background, as set out in the Second Amended Complaint, will only be briefly summarized below, followed by review of the relevant procedural history.

A. Factual Background

In 1944, "the Nazis and Hungary, knowing they had lost [the war], raced to complete their eradication of the Jews before the Axis surrendered." SAC ¶ 3. As part of their greater plan to eradicate the Jewish people, the defendants stripped Hungarian Jews of their possessions, including cash, jewelry, heirlooms, art, valuable collectibles, and gold and silver, loaded them onto trains, and transported them in squalid conditions to concentration camps where they were either murdered or forced to work as slave laborers. *Id.* ¶¶ 17, 20, 23-26, 32-34, 44-48, 52, 57, 69-71, 76, 81. "In less than two months . . . over 430,000 Hungarian Jews were deported, mostly to Auschwitz, in 147 trains," *id.* ¶ 120; *id.*, Exhibit B (list of deportation trains in 1944, along with "DATES, ORIGIN OF TRANSPORTS AND NUMBER OF DEPORTEES"), and the "vast majority" of the Hungarian Jews sent "to the killing fields and death camps of Nazi Germany-occupied Poland and the Ukraine" died, *id.* ¶ 3. "The overall loss of Hungarian Jewry during the Second World War, excluding those who fled abroad, was 564,507." *Id.* ¶ 131.

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After the armistice agreement ended the hostilities of World War II, *id.* ¶ 137, Hungary signed the "Paris Peace Treaty of February 10, 1947" ("1947 Treaty") that incorporated "a number of provisions relating to the restoration of confiscated property," with promises to undertake the restoration of, and fair compensation for, property, legal rights or interests confiscated from persons "'on account of the racial origin or religion of such persons,'" *id.* ¶ 138 (quoting 1947 Treaty, 61 Stat. 2065, 41 U.N.T.S. 135, art. 27, para. 1). Article 27 and related provisions "were not self-executing (they needed appropriate municipal legislation and enforcement to prevail); and they did not provide for sanction in case of non-compliance, other than the implied possible litigation before an international tribunal." *Id.* (quoting 2 Randolph L. Braham, The Politics of Genocide: The Holocaust in Hungary, 1308-09 (rev. ed. 1994)). The plaintiffs acknowledge that the Hungarian government "implement[ed] an array of legislative enactments and remedial statutes," but Hungarian Jews "saw no tangible results with respect to restitution and indemnification" for their seized property. *Id.* Moreover, "[w]ith the communist party in power in Hungary" after World War II, "'the issue of compensation or restitution was squashed,'" and to the extent the Hungarian government had set aside funds for victims of the Holocaust, "the funds were rarely used for their intended purpose and they were frequently raided by the Communists for financing their own political projects." *Id.* ¶¶ 141-42 (quoting 2 Braham at 1309). In 1992, two years after "the downfall of the Communist regime" in Hungary, the Hungarian government adopted at least two laws to provide remedies to Hungarian Jews victimized in the Holocaust: one of these laws "provid[ed]

compensation for material losses incurred between May 1, 1939 and June 8, 1949," and the other "provid[ed] compensation for those who, for political reasons, were illegally deprived of their lives or liberty between March 11, 1939 and October 23, 1989," but plaintiffs claim that the remedies provided under those programs are "paltry and wholly inadequate." *Id.* ¶ 143.

In sum, the plaintiffs have never been properly compensated for the personal property seized from them by the defendants as the plaintiffs were about to be deported. *Id.* ¶¶ 83-84. The plaintiffs believe that the defendants "liquidated [this] stolen property, mixed the resulting funds with their general revenues, and devoted the proceeds to funding various governmental and commercial operations." *Id.* ¶ 97. Thus, the plaintiffs claim that the "stolen property or property exchanged for such stolen property is owned and operated by Hungary and MÁV," some of which property "is present in the United States in connection with commercial activity carried on in the United States by Hungary," *id.* ¶ 98, including, for example, "fees and payments, offices, furniture, furnishings, bank accounts, artwork, stock and bond certificates, securities held in 'street name' and airplanes," *id.* ¶ 101.

Sixty-five years after the end of World War II and twenty years after the fall of the Hungarian communist regime, the plaintiffs filed the instant action against Hungary and MÁV, seeking, *inter alia*, restitution for the possessions seized from them and their families during the Holocaust, and to certify a class "consist[ing] of [1]

all surviving Jewish victims of the Holocaust" who were residents of Hungary between September 1, 1939 and May 8, 1945, and "[2] the heirs (whether American citizens or aliens) and open estates . . . of the deceased Jewish victims of the Holocaust, whether presently American citizens or aliens," who were residents of Hungary between September 1, 1939 and May 8, 1945. *Id.* ¶ 153. According to the plaintiffs, this class would consist of at least "5,000 survivors" and "countless heirs and estates" of the "approximately 825,000 Jews in Hungary" who were victims of the atrocities committed by the defendants. *Id.* ¶¶ 131, 154.

The plaintiffs' Second Amended Complaint asserts, in ten counts, claims for conversion (Count I), unjust enrichment (Count II), breach of fiduciary and special duties imposed on common carriers (Count III), recklessness and negligence (Counts IV, V), civil conspiracy with Nazi Germany to commit tortious acts (Count VI), aiding and abetting (Count VII), restitution (Count VIII), accounting (Count IX), a demand for a declaratory judgment that plaintiffs and class members are entitled to inspect and copy certain documents, and for injunctive relief enjoining the defendants from tampering or destroying such documents (Count X; Prayer For Relief, ¶¶ 5, 6). *See* SAC. The plaintiffs also assert that subject matter jurisdiction may properly be exercised over their claims, and that the defendants are not immune from suit, pursuant to the FSIA's expropriation exception, 28 U.S.C. § 1605(a)(3), SAC ¶¶ 86-92, which exception permits suit against a foreign sovereign or its agencies or instrumentalities in the courts of the United States to vindicate "rights in

property taken in violation of international law" when an adequate commercial nexus is present between the United States and the defendant, 28 U.S.C. § 1605(a)(3).

B. Procedural History

As noted, the defendants' first motion to dismiss on the grounds of sovereign immunity was granted because the exceptions to such immunity set out in the FSIA, 28 U.S.C. §§ 1605-07, only apply "if allowing a suit against a sovereign to proceed, pursuant to one of those exceptions, does not conflict with 'existing international agreements to which the United States [was] a party at the time of the enactment of' the FSIA." *Simon I*, 37 F. Supp. 3d at 406. Finding "that the 1947 Treaty is an 'existing international agreement[] to which the United States [was] a party at the time of the enactment' of the FSIA, 28 U.S.C. § 1604," the Court held that the 1947 Treaty "trigger[ed] the FSIA's treaty exception to deprive this Court of subject matter jurisdiction over the plaintiffs' claims." *Id.* at 407. In particular, the 1947 Treaty addressed Hungary's disposition of "all property" taken from Holocaust victims, directed how Hungary was to distribute all expropriated property at the end of the war, and provided that "any dispute concerning the interpretation or execution of the treaty" was subject to resolution exclusively through the mechanisms described in the Treaty. *Id.* at 415-16 (quoting 1947 Treaty, art. 40(1)). Based on those treaty provisions, which this Court viewed as defining the contours of Hungary's waiver of its sovereign immunity for claims for property seized during the Holocaust and delineating the exclusive legal regime set up to resolve

the plaintiffs' property claims against Hungary, the Court held that the Treaty precluded review of those claims under a FSIA exception and declined to reach the parties' other arguments concerning the application of the FSIA's "expropriation exception" or prudential reasons to dismiss the case, such as *forum non conveniens*. *Id.* at 397, 418 n.28.

On appeal, the D.C. Circuit affirmed in part and reversed in part. In particular, the Circuit rejected application of the treaty exception, *Simon II*, 812 F.3d at 135, finding that the 1947 Treaty set out only a non-exclusive mechanism for the plaintiffs to obtain compensation, *id.* at 137, and, thus, did not conflict with the FSIA such that "the FSIA's treaty exception does not foreclose jurisdiction over the plaintiffs' claims," *id.* at 140 ("we hold that Article 27 secures one means by which Hungarian victims can seek recovery against Hungary for their wartime property losses, but not to the exclusion of other available remedies."). The Circuit then considered whether the expropriation exception provides a basis for waiver of the defendants' sovereign immunity. *Id.*

The Circuit affirmed the dismissal of the "plaintiffs' non-property claims because they do not come within the FSIA's expropriation exception," and no other FSIA exception provided jurisdiction over the claims. *Id.* at 151. By contrast, the plaintiffs' claims that "directly implicate[d]" their property rights were "claims 'in which rights in property taken in violation of international law'" remained at issue. *Id.* at 140 (quoting 28 U.S.C.

§ 1605(a)(3)).[3] The Circuit acknowledged that a sovereign's expropriation of its own nationals' property was not a violation of international law under the "so-called 'domestic takings rule,'" but construed the plaintiffs' claims as not asserting a "basic expropriation claim" subject to the domestic takings rule. *Id.* at 140-41, 144. Reasoning that "[e]xpropriations undertaken for the purpose of bringing about a protected group's physical destruction qualify as genocide," *id.* at 143, the Circuit saw "the expropriations as *themselves genocide*" committed "'in violation of international law,'" *id.* at 142-43 (emphasis in original), in reliance on "[t]he legal definition of genocide" set out in the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), art. 2, Dec. 9, 1948, 78 U.N.T.S. 277, and other international treaties. *See also id.* at 144 ("[T]he complaint describes takings of property that are *themselves* genocide within the legal definition of the term.").[4]

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3. The D.C. Circuit specifically held that the plaintiffs' "conversion claim," "[t]heir unjust enrichment claim," and their "restitution claim . . . place 'rights in property . . . in issue' within the meaning of the FSIA's expropriation exception," and left to this Court to determine which, if any, of the plaintiffs' other claims involved "rights in property." *Id.* at 142.

4. The D.C. Circuit's articulation of when a sovereign nation's expropriation of property from its own nationals qualify as a violation of international law, has garnered critical comment. *See, e.g.*, RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 455 rep. note 7 (AM. LAW INST., Tentative Draft No. 2, 2016) (noting that "[b]y eliminating the 'domestic takings' rule and permitting claims to proceed on the basis of allegations that the takings occurred in the context of egregious violations of international law, [*Simon*

The Circuit then turned to the "commercial-activity nexus requirement" of the expropriation exception, which, on a "general level . . . require[s]: (i) that the defendants possess the expropriated property or proceeds thereof; and (ii) that the defendants participate in some kind of commercial activity in the United States." *Id.* at 146. The plaintiffs' allegations "that the Hungarian defendants liquidated the stolen property, mixed the resulting funds

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II] appears to expand the scope of [the expropriation exception] significantly, potentially opening courts in the U.S. to a wide range of property-related claims arising out of foreign internal (as well as international) conflicts characterized by widespread human rights violations."); Vivian Grosswald Curran, HARMONIZING MULTINATIONAL PARENT COMPANY LIABILITY FOR FOREIGN SUBSIDIARY HUMAN RIGHTS VIOLATIONS, 17 CHI. J. INT'L L. 403, 430 (2017) ("[I]n *Simon* [*II*] . . .the D.C. Circuit seemed to take yet an additional step beyond both [the Seventh] and [Ninth Circuits], by *equating* Hungary's expropriation of its Jewish population *with* genocide . . . Thus, the FSIA expropriations exception for takings in violation of international law has become a form of universal jurisdiction for the gravest human rights violations under the FSIA.") (emphasis in original); *id.* at 428 ("[I]nstead of applying the domestic takings rule in the manner of established case law, [*Simon II*] created a novel exception to the FSIA, nowhere to be found in the statute's language, that is based on the context of genocide and perhaps other grave violations of human rights."). Notably, the Supreme Court has expressed the view, consistent with *Simon II*, that "there are fair arguments to be made that a sovereign's taking of its own nationals' property sometimes amounts to an expropriation that violates international law, and the expropriation exception provides that the general principle of immunity for these otherwise public acts should give way." *Bolivarian Republic of Venez. v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1321, 197 L. Ed. 2d 663 (2017).

with their general revenues, and devoted the proceeds to funding various governmental and commercial operations" were found to "raise a 'plausible inference' that the defendants retain the [plaintiffs'] property or proceeds thereof," and, thus, the defendants' argument that such allegations were insufficient as a matter of law was rejected. *Id.* at 147. Nevertheless, the Circuit cautioned that the plaintiffs ultimately "may or may not be able to prove the point," and emphasized the limitation of its holding to whether the plaintiffs' allegations were sufficient as a matter of law. *Id.* The Circuit further noted that "[u]pon any factual challenge by the [] defendants—e.g., concerning whether the defendants in fact still possess the property or proceeds thereof—the plaintiffs will bear the burden of production, and the defendants will bear the burden of persuasion to establish the absence of the factual basis by a preponderance of the evidence." *Id.* (internal quotation omitted). Based on the then-record regarding the commercial activity nexus requirement, the Circuit held that "[b]ecause defendants make no attempt to argue that the rail company fails to 'engage[] in a commercial activity in the United States,' the nexus requirement is satisfied as to MÁV," *id.* at 147-48, but that "the complaint's allegations about Hungary's commercial activity fail to demonstrate satisfaction of §1605(a)(3)'s nexus requirement" because the plaintiffs "put forward only [] bare, conclusory assertion[s]" to support their claim, consequently affirming the dismissal of the claims against Hungary, *id.* at 148.

The Circuit concluded by leaving to this Court to consider on remand any remaining issues raised by

defendants' invocation of sovereign immunity "should the defendants assert" them, such as "whether, as a matter of international comity, the court should decline to exercise jurisdiction unless and until the plaintiffs exhaust available Hungarian remedies," *id.* at 149, and "any other arguments that [this Court] has yet to reach and that are unaddressed [by the Circuit], such as the defendants' *forum non conveniens* arguments," *id.* at 151.[5]

C. Second Amended Complaint

On remand, the plaintiffs were permitted to file the operative Second Amended Complaint, s*ee* Scheduling Order, dated April 13, 2016; J. Stip. Regarding Sched. Order, ECF No. 117, which supplements the allegations regarding the defendants' commercial nexus to the U.S., and alleges for the first time, consistent with the D.C. Circuit's holding, that the takings at issue were "themselves genocide," SAC ¶¶ 92-94. The defendants then filed their second Motion to Dismiss, arguing that the Second Amended Complaint should be dismissed, *inter*

5. The D.C. Circuit made clear that "the FSIA itself imposes no exhaustion requirement," *id.* at 148, and rejected the defendants' argument that the plaintiffs cannot show a "violation of international law," as a prerequisite for invoking the expropriation exception, "without exhausting domestic remedies in the defendant state (or showing the absence of any need to do so)," *id.* When the expropriation at issue involves genocidal takings, any statutory exhaustion requirement to show the international law violation is obviated because "[t]he violation is the genocide itself, which occurs at the moment of the taking, whether or not a victim subsequently attempts to obtain relief through the violating sovereign's domestic laws." *Id.* at 149.

alia, for plaintiffs' failure to exhaust Hungarian remedies, Defs.' Mem. Supp. Second Mot. Dismiss ("Defs.' Mem.") at 21-24, ECF No. 120-1, and under *forum non conveniens*, *id.* at 24-35.[6] The defendants' second motion to dismiss is now ripe for review. For the reasons explained below, the defendants' motion is granted on prudential exhaustion and *forum non conveniens* grounds.

II. LEGAL STANDARD

Both *forum non conveniens* and exhaustion are prudential doctrines that fall outside the "standard procedural devices trial courts around the country use

6. Defendants have also sought dismissal on grounds of sovereign immunity, but since the motion is resolved on alternative grounds, those arguments need not be considered. *See Sinochem Intern. Co. Ltd. V. Malaysia Intern. Shipping Corp.*, 549 U.S. 422, 425, 127 S. Ct. 1184, 167 L. Ed. 2d 15 (2007) ("a district court has discretion to respond at once to a defendant's *forum non conveniens* plea, and need not take up first any other threshold objection. In particular, a court need not resolve whether it has authority to adjudicate the cause (subject-matter jurisdiction) or personal jurisdiction over the defendant if it determines that, in any event, a foreign tribunal is plainly the more suitable arbiter of the merits of the case."); *In re Papandreou*, 139 F.3d 247, 255, 329 U.S. App. D.C. 210 (D.C. Cir. 1998) ("[A]lthough subject-matter jurisdiction is special for many purposes . . . a court [may instead] dismiss [] on other non-merits grounds such as forum non conveniens"); *Pub. Citizen v. U.S. Dist. Court for D.C.*, 486 F.3d 1342, 1347, 376 U.S. App. D.C. 222 (D.C. Cir. 2007) ("Any remaining doubt as to whether a federal court may, in appropriate circumstances, dismiss a case on prudential grounds prior to establishing its jurisdiction was put to rest in *Sinochem*.").

every day in service of [Federal Rule of Civil Procedure] Rule 1's paramount command: the just, speedy, and inexpensive resolution of disputes." *Dietz v. Bouldin*, 136 S. Ct. 1885, 1891, 195 L. Ed. 2d 161 (2016). Nevertheless, in considering dismissal of a case on prudential grounds, the norm in reviewing a motion to dismiss under Federal Rule of Civil Procedure 12(b) is followed and the Court "must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. 490, 501, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975); *see also Am. Nat'l Ins. Co. v. FDIC*, 642 F.3d 1137, 1139, 395 U.S. App. D.C. 316 (D.C. Cir. 2011) (noting that in evaluating dismissal under Rule 12(b)(1), court should "assume the truth of all material factual allegations in the complaint and 'construe the complaint liberally, granting [the] plaintiff the benefit of all inferences that can be derived from the facts alleged'" (quoting *Thomas v. Principi*, 394 F.3d 970, 972, 364 U.S. App. D.C. 326 (D.C. Cir. 2005))). At the same time, inferences drawn by the plaintiff that are unsupported by facts alleged in the complaint or amount merely to legal conclusions need not be accepted. *See Browning v. Clinton*, 292 F.3d 235, 242, 352 U.S. App. D.C. 4 (D.C. Cir. 2002). Similarly to evaluating the jurisdictional sufficiency of a complaint, the Court may also consider "materials outside the pleadings." *Jerome Stevens Pharms., Inc. v. FDA*, 402 F.3d 1249, 1253, 365 U.S. App. D.C. 270 (D.C. Cir. 2005); *Belhas v. Ya'Alon*, 515 F.3d 1279, 1281, 380 U.S. App. D.C. 56 (D.C. Cir. 2008) (examining materials outside the pleadings in ruling on a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction); *Coal. for Underground Expansion v. Mineta*, 333 F.3d 193, 198,

357 U.S. App. D.C. 72 (D.C. Cir. 2003) (noting that courts may consider materials outside the pleadings in ruling on a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction).

III. DISCUSSION

The defendants have moved to dismiss the SAC on three independent grounds, which are, unsurprisingly, the grounds highlighted by the D.C. Circuit as left unresolved on appeal: first, the defendants dispute the factual bases on which application of the FSIA's expropriation exception to the plaintiffs' claims depends, Defs.' Mem. at 8-20; second, the defendants argue that, as a matter of international comity, the Court should as, a prudential matter, decline to hear the case until the plaintiffs have exhausted their claims before a court in Hungary, *id.*at 21-24; and third, the defendants reassert, as they did in their first motion to dismiss, that regardless of whether jurisdiction may properly be exercised over the plaintiffs' claims, the Court should decline to hear the case under the doctrine of *forum non conveniens*, *id.* at 24-34. The plaintiffs counter that the facts support the exercise of subject matter jurisdiction under the FSIA's expropriation exception, Pls.' Mem. Opp'n Defs.' Mot. Dismiss ("Pls.' Opp'n") at 2-22, ECF No. 122; that they are not required to exhaust their claims in Hungary, stressing that such efforts would be futile, *id.* at 22-27; and that *forum non conveniens* is unavailable because Hungary is not an adequate alternative forum and other relevant factors do not overcome the plaintiffs' choice of forum, *id.* at 27-44.

As explained below, plaintiffs have not shown that pursuing their claims in Hungary would be futile or that Hungary is an inadequate alternative forum. Thus, the prudential exhaustion and *forum non conveniens* doctrines both provide a compelling basis for "declin[ing] to exercise jurisdiction," *Simon II*, 812 F.3d at 149, and dismissing the plaintiffs' claims.

A. Prudential Exhaustion

1. Applicable Legal Principles

The prudential exhaustion doctrine for FSIA expropriation claims was articulated by the Seventh Circuit first in *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661 (7th Cir. 2012), and later refined by *Fischer v. Magyar Államvasutak Zrt*, 777 F.3d 847 (7th Cir. 2015). As summarized in *Fischer*, the exhaustion inquiry must answer two questions: (1) whether plaintiffs have alleged a taking in violation of international law where "international law favors giving a state accused of taking property in violation of international law an opportunity to 'redress it by its own means, within the framework of its own legal system' before the same alleged taking may be aired in foreign courts," *Fischer*, 777 F.3d at 855 (quoting *Abelesz*, 672 F.3d at 680); and (2) whether the plaintiffs have exhausted domestic remedies in the country where the taking occurred or, if not, whether plaintiffs can "show convincingly that such remedies are clearly a sham or inadequate or that their application is unreasonably prolonged," *Abelesz*, 672 F.3d at 681, such that "it could not be worthwhile to bring suit" there,

Fischer, 777 F.3d at 857. In such cases, "principles of international comity make clear that these plaintiffs must attempt to exhaust domestic remedies," *id.* at 852, except where those remedies are "futile or imaginary," *id.* at 858. Those two factors — comity and futility — are now considered in turn.

a. Comity

In *Abelesz*, the Seventh Circuit reversed the denial of motions to dismiss claims from two related cases brought by "Holocaust survivors and heirs of other Holocaust victims" against the Hungarian national bank and against MÁV, also a defendant in the instant case, for allegedly "participat[ing] in expropriating property from Hungarian Jews who were victims of the Holocaust." 692 F.3d at 665.[7] The *Abelesz* court affirmed the district court's rejection of the FSIA treaty exception, *id.* at 695, and found that the expropriation exception may provide a waiver of sovereign immunity, despite the general principle that plaintiffs may not bring an FSIA suit for uncompensated takings without exhausting domestic remedies, *id.* at 677, because the relevant "violation of international law" was not an uncompensated taking, but expropriation of property "to deprive Hungarian Jews of their wealth and to fund genocide, a long-recognized violation of international law." *Id.* at 677. Nevertheless, the court reversed the denial of the motions to dismiss, holding that the plaintiffs "must exhaust domestic

7. The *Abelesz* plaintiffs apparently did not sue Hungary. *See Abelesz*, 692 F.3d at 664-65.

remedies to assert a claim for expropriation in violation of international law," even if the alleged violation was not an uncompensated taking. *Id.* at 679-82.

The *Abelesz* court explained that "the requirement that domestic remedies for expropriation be exhausted before international proceedings may be instituted is 'a well-established rule of customary international law,'" *Abelesz*, 692 F.3d at 679 (quoting Interhandel (Switz v. U.S.), Preliminary Objections, 1959 I.C.J. 6, 26-27, 1959 ICJ LEXIS 5, *45 (Mar. 21)), and emphasized the "sovereignty and comity concerns underlying the domestic exhaustion rule," *id.* at 680. Noting that the United States itself had invoked this rule in a case before the International Court of Justice, *id.* at 679 (citing Interhandel (Switz. v. U.S.)), the *Abelesz* court expressed concern that the United States invoking the exhaustion doctrine in foreign courts but failing to require exhaustion in domestic courts would conflict with "the comity and reciprocity between sovereign nations that dominate international law." *Id.* at 682. Importantly, the exhaustion requirement is not required by the FSIA, but is "made clear" from the statute's "reliance on international law norms," such as exhaustion. *Fischer*, 777 F.3d at 854-55. "[E]xhaustion of domestic remedies is preferred in international law as a matter of comity," and a plaintiff seeking to overcome that consideration must show that they have exhausted the foreign sovereign's own domestic remedies, or that to do so would be futile. *Id.* at 859.

b. Futility

Several factors are considered when determining whether "'Hungarian courts would be so obviously incapable of providing a fair and impartial hearing' that a United States court should step in." *Id.* at 859-60 (quoting *Abelesz*, 692 F.3d at 684). These are: (1) whether Hungarian law provided sufficiently congruent judicial remedies, *id.* at 860-61; (2) the existence of "procedural obstacles" to those remedies, *id.* at 861, such that "the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all," *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981), a high bar borrowed from "the related context of *forum non conveniens*," *Fischer*, 777 F.3d at 861; and (3) the "adequacy of Hungarian courts" in light of recent "limits on judicial independence," *id.* at 862.

2. Analysis

As noted *supra*, the D.C. Circuit left unresolved whether this Court "should decline to exercise jurisdiction" over the plaintiffs' expropriation claims "as a matter of international comity unless the plaintiffs first exhaust domestic remedies." *Simon II*, 812 F.3d at 149 (citing *Fischer*, 777 F.3d at 857). The D.C. Circuit's approving reference to *Fischer's* application of the prudential exhaustion doctrine "to parallel claims arising from the Hungarian Holocaust," *id.* at 146, and "in closely similar circumstances," *id.* at 149, makes plain that application of this doctrine to the facts of this case, at a minimum, warrants consideration.

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The same considerations that the Seventh Circuit held counseled dismissal for failure to exhaust Hungarian remedies in *Abelesz /Fischer* apply to the instant case, and point to the same result. Here, the plaintiffs argue both that the prudential exhaustion doctrine does not apply to their claims and, more generally, that the prudential exhaustion doctrine should not be adopted at all. As the plaintiffs point out, this doctrine is neither reflected in the text of the FSIA, which displaced "pre-existing common law," Pls.' Opp'n at 26, nor a direct application of recognized international law principles, *id.* at 23-24. Neither of these arguments, however, address the prudential concerns animating the Seventh Circuit's formulation of this doctrine.

As the Seventh Circuit explained, an exhaustion requirement "could serve two distinct roles": either as a necessary part of the violation of international law itself, or imposed as a matter of "customary international law." *Fischer*, 777 F.3d at 857. Since the *Abelesz* "plaintiffs had alleged violations of international law due to the genocidal nature of the expropriations," not because of an uncompensated taking, *Abelesz* did not invoke the "domestic takings" doctrine, but instead "invoked the second form of exhaustion," the "prudential exhaustion" requirement. *Id.* at 857-59. The plaintiffs here do not articulate any reason *not* to adopt the prudential exhaustion doctrine. That Congress did not include an exhaustion requirement in the expropriation exception is certainly relevant, Pls.' Opp'n at 23-24, but the similarity between the prudential exhaustion doctrine and the *forum non conveniens* doctrine, which "remains fully applicable

in FSIA cases" despite lacking a statutory basis, *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 100, 352 U.S. App. D.C. 284 (D.C. Cir. 2002), indicates that the FSIA is not a bar to adopting prudential exhaustion in this case.

That said, the plaintiffs are likely correct that exhaustion is only *required* as a matter of course where a plaintiff seeks to bring a domestic dispute before an international tribunal, rather than to the domestic courts of a different sovereign, which may apply its own domestic laws. Pls.' Opp'n at 23-25 (citing William S. Dodge, International Comity in American Law, 115 Colum. L. Rev. 2071, 2110-11 n.243 (2015) ("[C]ustomary international law requires the exhaustion of local remedies in domestic courts only before a claim is brought in an international tribunal. . . . There is no international law rule requiring the exhaustion of local remedies before a claim is brought in another domestic court.")). The Seventh Circuit's decisions in *Abelesz* and *Fischer*, however, were not based solely on applying existing international law, but on applying the principles that motivated international law norms. The doctrine adopted by the Seventh Circuit is not a direct translation of the exhaustion requirement for international courts, and does not require plaintiffs to exhaust domestic remedies *any* time they seek to sue in a foreign forum.

This is not to say that the prudential exhaustion doctrine avoids all comity problems. The *Fischer* court stressed that dismissal of a lawsuit on prudential exhaustion grounds would be without prejudice and, thus,

"[i]f plaintiffs attempt to bring suit in Hungary and are blocked arbitrarily or unreasonably, United States courts could once again be open to these claims," 777 F.3d at 865-866; *id.* at 852 ("while the doors of United States courts are closed to these claims for now, they are not locked forever. All dismissals are without prejudice. If plaintiffs find that future attempts to pursue remedies in Hungary are frustrated unreasonably or arbitrarily, a United States court could once again hear these claims."). By requiring that plaintiffs exhaust domestic remedies in Hungary, but permitting them to re-file suit in the United States afterward, United States courts may be called upon to decide not only the previously dismissed legal issues, but also to evaluate the fairness and adequacy of the foreign proceeding, effectively placing domestic United States courts in the position of reviewing the sufficiency of another sovereign's judicial or legal regime and, on review of any revived claims, disagree with the outcome in the foreign court.

Nevertheless, despite these drawbacks, the factors counseling application of the prudential exhaustion doctrine here outweigh those against. Perfect judicial procedures for resolving seventy-year-old claims of genocide against a foreign sovereign are elusive. The prudential exhaustion doctrine recognizes the risks of unnecessarily infringing on the sovereignty of a foreign nation while also guaranteeing that the plaintiffs are afforded an adequate forum for their claims. Accordingly, the Court finds that the prudential exhaustion doctrine applies here. The two-pronged inquiry outlined by the *Fischer* Court is addressed next.

Appendix B

a. International Comity Considerations Require Plaintiffs to Exhaust Hungarian Remedies

The Seventh Circuit focused its comity inquiry on principles that the Supreme Court has articulated in recent years, particularly in *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 133 S. Ct. 1659, 185 L. Ed. 2d 671 (2013), where, in addressing the extraterritorial application of the Alien Tort Statute, the Supreme Court highlighted concerns that "other nations, also applying the law of nations, could hale our citizens into their courts for alleged violations of the law of nations occurring in the United States, or anywhere else in the world," *id.* at 124. Such concerns are heightened when foreign sovereigns, rather than just foreign citizens, are potential defendants. The *Fischer* court also drew on Justice Breyer's concurrence, which noted that "limiting principles" such as comity "help to minimize international friction." *Fischer*, 777 F.3d at 859 (quoting *Kiobel*, 569 U.S. at 133 (Breyer, J., concurring)). Moreover, where "claims . . . arise from events of historical and political significance . . . [t]here is a comity interest in allowing a foreign state to use its own courts for a dispute if it has a right to do so." *Philippines v. Pimentel*, 553 U.S. 851, 866, 128 S. Ct. 2180, 171 L. Ed. 2d 131 (2008).[8] The comity considerations that

8. The plaintiffs argue on this point that several cases relied on by the defendants are not relevant because they concerned suits against private foreign entities or did not arise under the *forum non conveniens* doctrine. *See* Pls.' Opp'n at 41-43 nn. 31-34. It is true that some of the cases cited by the defendants concern private business disputes, *see VIP Eng'g & Mktg. Ltd. V. Standard*

led the *Fischer* court to dismiss that suit against MÁV, the Hungarian national railway, apply also to the instant suit against MÁV, and with greater strength to defendant Hungary — itself a foreign sovereign.

b. Hungarian Remedies Would Not Be Futile

After finding that comity considerations counsel in favor of dismissal, the second inquiry is whether "there is a legally compelling reason for plaintiffs' failure to exhaust Hungarian remedies." *Abelesz*, 692 F.3d at 682. As the plaintiffs are required to exhaust their claims, they also bear the burden of demonstrating that attempting to exhaust any of their claims would be futile. *Fischer*, 777 F.3d at 867 ("In the exhaustion analysis, it was up to plaintiffs to point to a legally compelling reason that the remedies might be inadequate."); *see also Tesoro Refining & Marketing Co. v. FERC*, 552 F.3d 868, 874, 384 U.S. App. D.C. 215 (D.C. Cir. 2009) ("The futility exception is quite restricted . . . [e]ven if one were to concede that an unfavorable decision . . . was *highly likely*, that does not

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Chartered Bank, 969 F. Supp. 2d 391 (S.D.N.Y. 2013); *MBI Group v. Credit Foncier du Cameroun*, 558 F. Supp. 2d 21 (D.D.C. 2008), or involve "maritime torts," *Cook v. Champion Tankers AS*, No. 12-cv-01965-JST, 2013 U.S. Dist. LEXIS 54018 (N.D. Cal. Apr. 16, 2013). The Supreme Court has not limited its concerns about the interference of U.S. courts in foreign affairs to a single type of case, however, and concerns about federal courts "triggering serious foreign policy consequences," *Kiobel*, 569 U.S. at 124, apply *a fortiori* when plaintiffs ask the court to exercise jurisdiction over a foreign-sovereign defendant.

satisfy our strict futility standard requiring a *certainty* of an adverse decision." (emphasis in original) (internal quotations and citations omitted)); *Rann v. Chao*, 154 F. Supp. 2d 61, 65 (D.D.C. 2001), *aff'd as modified*, 346 F.3d 192, 358 U.S. App. D.C. 122 (D.C. Cir. 2003) ("[A] plaintiff bears a heavy burden to establish that the futility exception applies to his or her case."). The parties vigorously dispute whether Hungarian courts would provide an adequate alternative forum for the plaintiffs' claims or if bringing the claims in Hungary would be futile. Given the significant overlap in facts between *Abelesz /Fischer* and the instant case, the Seventh Circuit's opinions are highly persuasive.

A foreign forum will "ordinarily" be found adequate so long as "the defendant is amenable to process in [that] jurisdiction." *Piper Aircraft*, 454 U.S. at 254 n.22 (internal quotation marks omitted). "[A]s long as the alternative forum provides some potential avenue for redress, that forum generally will be considered adequate." 17 James Wm. Moore et al., Moore's Federal Practice—Civil § 111.74 (2017) (internal quotation marks omitted). "In rare circumstances . . . where the remedy offered by the other forum is clearly unsatisfactory, the other forum may not be an adequate alternative." *Piper Aircraft*, 454 U.S. at 254 n.22. A foreign forum "is not inadequate merely because it has less favorable substantive law," *El-Fadl v. Central Bank of Jordan*, 75 F.3d 668, 678, 316 U.S. App. D.C. 86 (D.C. Cir. 1996), *abrogated on other grounds by Samantar v. Yousuf*, 560 U.S. 305, 130 S. Ct. 2278, 176 L. Ed. 2d 1047 (2010); *see also* 17 Moore's Federal Practice—Civil § 111.74 ("The possibility that

the foreign tribunal will apply law that is less favorable to the plaintiff or that the damages award may be smaller does not render the forum inadequate."), nor because it employs different adjudicative procedures, *El-Fadl*, 75 F.3d at 678, or because of general allegations of corruption in the judicial system, *see BFI Grp. Divino Corp. v. JSC Russian Aluminum*, 298 Fed. Appx. 87, 91 (2d Cir. 2008) (noting that courts "are reluctant to agree" that a "foreign judicial process is biased or corrupt"); *Leon v. Millon Air, Inc.*, 251 F.3d 1305, 1311-12 (11th Cir. 2001) ("[T]he argument that the alternative forum is too corrupt to be adequate does not enjoy a particularly impressive track record.") (internal quotation marks omitted).

The defendants summarize a number of features of the Hungarian court system to highlight the remedies available to the plaintiffs in Hungary. The defendants note that the Hungarian constitution, called the Hungarian Basic Law, explicitly requires that parties be treated fairly and equally in court, prohibits discrimination on the basis of, among other things, race or religion, and creates rights of appeal to various appellate courts. Defs.' Mem. at 25-26 (citing *id.*, Attach. 25, Decl. of Dr. Pál Sonnevend, Head of the Department of International Law, ELTE Law School Budapest ("Sonnevend Decl."), ¶¶ 7, 9, 39, 48, ECF No. 120-25); *see also* Sonnevend Decl. ¶¶ 39-53 (describing the extensive safeguards in place to ensure the independence of the Hungarian judiciary). The defendants further stress that Hungary "recognizes and enforces international law," Defs.' Mem. at 25 (citing Sonnevend Decl. ¶¶ 32-34, 95), and that Hungarian courts "recognize[] and provide[] damages for the types of loss

of property claims alleged in [the] complaint," *id.* at 25-26 (citing Sonnevend Decl. ¶¶ 92-94). These features of the Hungarian legal system strongly support the conclusion that Hungary is an adequate alternative forum for the plaintiffs' claims.[9]

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9. The defendants also point to a number of cases in which lawsuits have been dismissed on the related ground of *forum non conveniens* predicated on finding that Hungary provides an adequate forum for the resolution of different types of claims, including claims brought by Hungarian holocaust survivors. *See* Defs.' Mem. at 26 (citing *Fischer*, 777 F.3d at 860 (finding Hungary adequate to hear claims from Hungarian Holocaust victims)); *see also de Csepel v. Republic of Hungary*, 808 F. Supp. 2d 113, 138 (D.D.C. 2011) (assuming, based on the strong evidence provided, that Hungary provided an adequate alternative forum for claims brought by Hungarian Jews against Hungary); *Moscovits v. Magyar Cukor Rt.*, No. 00 Civ. 0031 (VM), 2001 U.S. Dist. LEXIS 9252, at *14 (S.D.N.Y. July 9, 2001) (concluding that Hungary offered an adequate alternative forum for business dispute), *aff'd by Moscovits v. Magyar Cukor Rt*, 34 F. App'x 24, 26 (2d Cir. 2002) (same)); *Dorfman v. Marriott Int'l Hotels, Inc.*, No. 99 Civ. 10496 (CSH), 2001 U.S. Dist. LEXIS 642, at *22-23 (S.D.N.Y. Jan. 26, 2001) (same). These cases, while not dispositive on the issue, *see* Pls.' Opp'n at 29 ("In each case, a fact-specific inquiry must be made"), bolster the conclusion that Hungary is an adequate forum. The plaintiffs briefly note that a suit by a Hungarian holocaust survivor, who is not a plaintiff in this case, was recently dismissed by the Hungarian courts, Pls.' Opp'n at 32, but do not dispute the defendants' account of that case, namely, that the "Plaintiff did not make any motions asking the Metropolitan Court of Budapest to collect or hear evidence to support her claims," and "did not appeal" the decision against her, as was her right, Defs.' Reply Attach. 1, Reply Decl. of László Nanyitsa ¶¶ 4-5, ECF No. 124-1. On this record, a single plaintiff's unsuccessful suit in Hungary is wholly insufficient to find that the plaintiffs' exhaustion of their claims in Hungary would be futile.

The plaintiffs bolster their position that they meet the futility requirement with a variety of arguments, ranging from the procedural hurdles and insufficient remedies in Hungary, to the anti-Semitism extant in that country. None is persuasive.

First, as to the procedural hurdles, the plaintiffs claim that their property-based claims have been time-barred since March 1994 under Hungarian law. Pls.' Opp'n at 26 (citing Ex. A, Decl. of András Hanák, Hungarian attorney ("Hanák Decl.") ¶¶ 14, 21, ECF No. 122-1)). The plaintiffs' expert explains that the Hungarian "Second Compensation Act" created an administrative procedure in Hungary through which Holocaust victims could receive money as compensation for property and tort claims, but that the time to file a claim under the act has long since passed. Hanák Decl. ¶¶ 20-21. In addition, the remedy was only "symbolic compensation" to victims and not full compensation, an outcome that the Hungarian Constitutional Court found constitutional. *Id.* ¶ 19. The plaintiffs misleadingly overstate the opinion expressed by this expert by indicating that "under Hungarian law, all property-based claims have been time-barred since March 1994," Pls.' Opp'n at 26 (citing Hanák Decl. ¶ 14), when the expert instead states only that "claims under the Compensation Acts are time-barred," Hanák Decl. ¶ 14. In fact, the plaintiffs' expert concedes that the Compensation Acts do not bar civil litigation by the plaintiffs, although the plaintiffs may ultimately lose on "substantive" grounds. *Id.* ¶ 20. The mere fact that the plaintiffs *may* not be successful on the merits of their claims falls far short of showing futility. In the expert's own words, the receptivity of Hungarian courts to international claims

"seemingly offer[s] to [the] plaintiffs" at least one path by which they could bring their claims in Hungarian court. *Id.*

Notably, the defendants have agreed to waive, and Hungary has waived by constitutional amendment, any statute of limitations for claims related to "crimes visited upon the Hungarian people during World War II." Defs.' Reply Supp. Mot. Dismiss ("Defs.' Reply") at 15, ECF No. 124 (quoting *Abelesz*, 692 F.3d at 682 n. 11); *see also id.* (citing *Fischer*, 777 F.3d at 862 (recognizing that Hungary has waived by constitutional amendment the statute of limitations on such claims)). Other plaintiffs who have recently brought claims in Hungary seeking recovery of property taken by the Hungarian government during the Holocaust have been successful in their cases. Defs.' Reply at 20 (discussing return of property expropriated by Hungary from Hungarian Jews "in four separate litigations in Hungary").

Second, the plaintiffs contend that "[t]he lack of meaningful remedies" available in Hungary "eviscerates Defendants' exhaustion claim." Pls.' Opp'n at 27. Yet, the plaintiffs' expert acknowledges that damages would likely be recoverable in Hungarian courts, though they may be limited to pecuniary damages and "relatively modest" non-pecuniary damages. *Id.* at 31 (quoting First Decl. of András Hanák, Hungarian attorney ("First Hanák Decl.") ¶ 11, ECF No. 24-2). That the plaintiffs' recovery in Hungary may be less than they could recover in the United States does not make Hungary an inadequate forum. As the Seventh Circuit noted, "domestic Hungarian remedies need not be perfectly congruent with those available in the

United States to be deemed adequate." *Abelesz*, 692 F.3d at 685. *See also Saqui v. Pride Cent. America, LLC*, 595 F.3d 206, 212 (5th Cir. 2010) (affirming that "the mere fact that the amount of damages would be more limited under Mexican as opposed to American law, does not provide the basis for finding Mexican courts an inadequate alternative forum." (internal quotation marks omitted)); 17 Moore's Federal Practice—Civil § 111.74 ("If the plaintiff will not be deprived of all remedies in the foreign forum, the court may dismiss on *forum non conveniens* grounds even though the foreign forum does not provide the same array of remedies, or the same magnitude of potential recovery available in the [U.S.] forum.").

Third, the plaintiffs complain about the procedural differences between American and Hungarian courts because there is "no right to pre-trial discovery" in Hungary; "Hungary does not allow class actions"; and, unlike the United States, the losing party usually pays the opposing party's attorney's fees in Hungary. Pls.' Opp'n at 31-33. These concerns are unavailing. Though Hungarian courts do not employ the same discovery methods as United States courts, the defendants point out that "the parties can ask [a Hungarian] court to gather evidence" on their behalf, and the court "can order a party or third party to submit relevant documents in its possession to the court, summon witnesses with relevant knowledge to testify, or require witnesses to produce documents in their possession that the parties wish to rely on for evidence." Defs.' Reply at 22 (citing Sonnevend Decl. ¶¶ 61-62). Though these procedures may not permit the plaintiffs to control the course of discovery as in the United States,

they would nonetheless be allowed to seek, via the court, access to relevant information held by the defendants. Indeed, the Hungarian court may have jurisdiction to compel evidence and testimony in Hungary that is lacking in this Court.

Moreover, while Hungarian courts do not permit class actions in the same manner as American courts, under Hungarian law, plaintiffs may join their lawsuits together if the claims "involve the same cause of action and legal basis." Defs.' Reply at 21 n. 17 (citing Sonnevend Decl. ¶ 57); Pls.' Opp'n at 31 n.18. The lack of availability of "American-style class actions," which "remain uncommon" throughout the rest of the world, *Fischer*, 777 F.3d at 861, also would not deprive the plaintiffs of the ability to bring their claims in Hungary. Indeed, as the *Fischer* court noted in expressly rejecting this same argument, the lack of an "American-style class action" mechanism does not mean "no remedy at all" is provided. *Id.*

Similarly, the American rule that each party presumptively bears its own costs in litigation is, like the "American-style class action," relatively uncommon, and the possibility that the plaintiffs would be required to pay the opposing parties' fees if they are unsuccessful in court is not only speculative, but is simply insufficient to show that a foreign forum is inadequate or that proceeding there would be futile. *See Piper Aircraft*, 454 U.S. at 252 n. 18 (noting that in "most foreign jurisdictions," courts "tax losing parties with their opponents' attorneys' fees"); *Borden, Inc. v. Meiji Milk Products Co., Ltd.*, 919 F.2d 822, 829 (2d Cir. 1990) ("some inconvenience or the

unavailability of beneficial litigation procedures similar to those available in the federal district courts does not render an alternative forum inadequate." (internal quotation marks omitted)).[10]

Fourth, the plaintiffs argue that they would face "manifest religious and ethnic prejudice" in the Hungarian courts, and that despite the "aspirational language" of the Basic Law prohibiting such discrimination, the "toxic anti-Semitic environment in Hungary" makes such prohibitions no more than "wishful thinking." Pls.' Opp'n at 30 (citing First Hanák Decl. ¶¶ 20-21 ("It is well-established . . . that anti-Semitism is on the increase in Hungary.")). The rise of anti-Semitism in Hungary and elsewhere, even close to home, is enormously disturbing. Nonetheless, such concern is insufficient to conclude that bringing the plaintiffs' claims before Hungary's judicial system would be futile. In rejecting the same argument, the Seventh Circuit acknowledged that "anti-Semitism unfortunately has been on the rise throughout Europe and is also present in the United States," but ultimately found the argument of possible bias unpersuasive because, "hold[ing] otherwise would imply that United States courts should presume that the courts of other nations cannot fairly hear claims brought by historically persecuted groups." *Fischer*, 777 F.3d at 865. The Seventh Circuit went on to explain that "[o]ne could easily imagine that Thurgood Marshall and the NAACP Legal Defense and Educational Fund had

10. The plaintiffs also briefly speculate that Hungary might refuse to pay any damages awarded to them by Hungarian courts, Pls.' Opp'n at 33, but have provided no specific evidence that the government would ignore a lawful order of its judiciary.

similar concerns about many United States courts' ability to hear claims by African Americans in 1950 and later. Yet our courts by and large rose to the challenge in the following decades." *Id.* Indeed, the Hungarian judiciary has already demonstrated a willingness to consider fairly the plaintiffs' claims, as the Hungarian courts have assisted the plaintiffs in this case in taking a deposition of a witness located in Hungary, and when that witness was unavailable, the court offered to make transcripts of other proceedings involving the witness available to the plaintiffs for use in this litigation. *See Simon I*, 37 F. Supp. 3d at 395 (discussing plaintiffs' attempt to depose László Csatary).

Finally, the plaintiffs raise concerns about the independence of the Hungarian judiciary due to the effort by the Hungarian parliament to restrict the power of the judiciary through national legislation and the 2013 Fourth Amendment to the Basic Law, which legislative activity prompted criticism by the European community at large. Pls.' Opp'n at 30 & n.16; *see also* Hanák Decl. ¶ 9 & n.1. These legislative efforts to control the judiciary are acknowledged with concern by the defendants' own expert. *See* Sonnevend Decl. ¶¶ 19-21, 53. International organizations have also expressed concerns about these developments. The European Commission for Democracy through Law (the "Venice Commission"), for example, found that "these measures amount to a threat for constitutional justice . . . [and] may negatively affect . . . the separation of powers . . . the protection of human rights and the rule of law." Pls.' Opp'n Attach. 1, Ex. 7, Venice Commission, Opinion on the Fourth Amendment

to the Fundamental Law of Hungary ¶ 145 (dated June 14-15, 2013), ECF No. 122-1; Hanák Decl. ¶ 9(b) (noting that the European Court of Human Rights held that the Chief Justice's removal violated the European Human Rights Convention).

Hungary has responded to many of these concerns by again amending the Basic Law. *See* Sonnevend Decl. ¶ 53; *see also Fischer*, 777 F.3d at 863-64 (noting that concerns about the amendments to the Basic Law have been largely addressed by both the further amendments to the Basic Law and reliance on the decisions of the European Court of Justice). These corrective actions, including to submit to the jurisdiction of international European tribunals, are significant steps indicating that Hungary is, in fact, committed to preserving the rule of law and still seeks to align itself with commonly-accepted legal and moral norms. Presented with the same argument that Hungarian courts had become too politically charged to adjudicate the plaintiffs' claims fairly, the Seventh Circuit also recognized that Hungary had reversed attempted changes to its judiciary that concerned the plaintiffs and emphasized Hungary's willingness to quickly do so in response to criticism from other countries and international bodies. *Fischer*, 777 F.3d at 863-64.

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International comity concerns apply here and warrant dismissal, without prejudice, of the Second Amended Complaint for failure to exhaust the remedies available in Hungary to address the plaintiffs' claims of genocidal

takings during World War II, under the prudential exhaustion doctrine.

B. Forum Non Conveniens

Having determined that this lawsuit must be dismissed, without prejudice, on the ground of prudential exhaustion, no further consideration is necessary of the alternative prudential basis for dismissal. Yet, given the similarities between the prudential exhaustion and *forum non conveniens* doctrines, both dictate the same result. Analysis of the latter basis for dismissal is set out below.

1. Applicable Legal Principles

Despite the "substantial presumption in favor of a plaintiff's choice of forum," *Agudas Chasidei Chabad v. Russian Federation*, 528 F.3d 934, 950, 381 U.S. App. D.C. 316 (D.C. Cir. 2008) (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509, 67 S. Ct. 839, 91 L. Ed. 1055 (1947)), a court "may nonetheless dismiss a suit for *forum non conveniens* if the defendant shows [(1)] there is an alternative forum that is both available and adequate and, [(2)] upon a weighing of public and private interests," that the alternative forum is "the strongly preferred location for the litigation," *MBI Grp., Inc. v. Credit Foncier du Cameroun*, 616 F.3d 568, 571, 392 U.S. App. D.C. 387 (D.C. Cir. 2010) (citing *Chabad*, 528 F.3d 934, 381 U.S. App. D.C. 316); *see also El-Fadl*, 75 F.3d at 676-77 (noting that "the defendant bears the burden of proving" the applicability of the *forum non coveniens* doctrine).

Appendix B

In evaluating whether private interest factors weigh in favor of plaintiff's chosen forum or the foreign forum, a court considers: (1) the relative ease of access to sources of proof; (2) the availability of process for compelling unwilling witnesses; (3) the cost for obtaining attendance of willing witnesses; (4) the possibility of inspecting the premises, if appropriate; and (5) all other practical problems that make trial of a case easy, expeditious, and inexpensive. *Gulf Oil*, 330 U.S. at 508. The relevant public factors to be considered include: (1) "local interest in having localized controversies decided at home"; (2) "the possibility of holding the trial in a forum at home with the law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself"; (3) "avoiding the 'imposition of jury duty' on people of a community which has no relation to the litigation"; and (4) "other 'administrative difficulties' that flow from foreign litigation congesting local courts." *MBI*, 616 F.3d at 576 (quoting *Gulf Oil*, 330 U.S. at 508-09).

Courts do not apply "a rigid rule" to decide a motion to dismiss on the grounds of *forum non conveniens* and "[each] case turns on its facts." *Piper Aircraft*, 454 U.S. at 249-50 (internal quotation marks omitted). "If central emphasis were placed on any one factor, the *forum non conveniens* doctrine would lose much of the very flexibility that makes it so valuable." *Id.; see also Van Cauwenberghe v. Biard*, 486 U.S. 517, 529, 108 S. Ct. 1945, 100 L. Ed. 2d 517 (1988) ("[T]he district court is accorded substantial flexibility in evaluating a *forum non conveniens* motion, and each case turns on its facts." (internal citations and quotation marks omitted)); *Iragorri v. Int'l Elevator, Inc.*,

203 F.3d 8, 12 (1st Cir. 2000) (in reviewing a *forum non conveniens* motion, "flexibility is the watchword").

A defendant is not required to carry out an "extensive investigation" in support of its *forum non conveniens* argument, which "would defeat the purpose of [a *forum non conveniens*] motion," but only must "provide enough information to enable the district court to balance the parties' interests." *Piper Aircraft*, 454 U.S. at 258; *see also SAS Inst., Inc. v. World Programming Ltd.*, 468 F. App'x 264, 266 (4th Cir. 2012) ("A party seeking *forum non conveniens* dismissal is not required to undertake extensive investigation in order to demonstrate that it[] . . . would be adversely impacted by the continuance of the litigation." (internal quotation marks omitted)).

2. Analysis

At the outset, the finding that the plaintiffs' pursuit of their claims in Hungary would not be futile satisfies the first prong of the test for application of the *forum non conveniens* doctrine that Hungary is both an available and adequate alternative forum. Thus, the Court proceeds to consider the remaining factors for application of the *forum non conveniens* doctrine.

a. Plaintiffs' Choice of Forum

The plaintiffs correctly note the "substantial deference" to which their choice of forum is entitled, Pls.' Opp'n at 33-35 (citing *Chabad*, 528 F.3d at 950), but the selection of this Court for the filing of the instant

lawsuit is not dispositive or even controlling in the *forum non conveniens* analysis for several reasons. First, the deference given to a plaintiff's forum choice is lessened when the plaintiff's ties to the forum are attenuated. In this case, only four of the fourteen named plaintiffs reside in the United States and are U.S. citizens. SAC ¶¶ 5, 7, 9, 73; *see Pac. Mar. Ass'n v. NLRB*, 905 F. Supp. 2d 55, 60-61 (D.D.C. 2012) ("[T]he plaintiff's choice of forum is afforded great deference . . . [but] that choice is conferred less deference by the court when a plaintiff's choice of forum is not the plaintiff's home forum." (internal quotation marks omitted)). The remaining ten named plaintiffs are citizens of other countries and do not reside in this country. SAC ¶¶ 6, 8, 14, 22, 27-28, 39, 41, 49, 65, 81; *see Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 717 F.2d 602, 605, 230 U.S. App. D.C. 325 (D.C. Cir. 1983) ("The district court was mistaken in supposing that a foreign plaintiff's choice of a United States forum is entitled to so much deference.").

Moreover, because none of the underlying facts in this case relate to the United States in any way, the plaintiffs' selection of the United States as the forum for their suit carries less force. To the extent the plaintiffs argue that requiring them to travel out of the United States is burdensome, *see* Pls.' Opp'n at 38, the majority of the named plaintiffs will be required to travel internationally regardless of whether the litigation is in the United States or Hungary. Additionally, many of the putative class members also will be required to travel regardless of the forum. Relatedly, requiring the defendants to defend themselves in the courts of another sovereign against

claims brought by plaintiffs from all over the globe weighs against the plaintiffs' choice of forum.

In these circumstances, the plaintiffs' choice of forum is entitled to minimal deference. *See, e.g., Fischer*, 777 F.3d at 871 (noting that plaintiff's choice of forum is given "presumption of convenience," which was "rebutted by the strength of the private and public factors" warranting dismissal); *Moscovits v. Magyar Cukor Rt*, 34 Fed. Appx. 24, 26 (2d Cir. 2002) (agreeing with the trial court that "defendants had overcome the presumption to which [plaintiff's] choice of forum was entitled" given that "'the conduct giving rise to the causes of action never left Hungary's borders'; that nearly all of the relevant evidence is located in Hungary; that all but one of the witnesses are Hungarians who are in Hungary and that many of them are nonparties who are not subject to compulsory process; that the dispute has 'minimal ties' to New York or the United States and . . . that '[i]t is highly likely that Hungarian law would apply.'").

b. Private Factors

Where, as here, an adequate alternative forum exists, a court must next balance enumerated private interest factors to decide whether "trial in the chosen forum would be unnecessarily burdensome for the defendant or the court." *Piper Aircraft*, 454 U.S. at 255 n.23. Each of these considerations weighs in the defendants' favor.

First, regarding the relative ease of access to sources of proof, the defendants argue that "all of the relevant

events alleged in the Complaint took place in Hungary," and "to the extent any records of these events exist, they are most likely archived in Hungary." Defs.' Mem. at 28; *see also id.* Ex. V, Decl. of Lázló Csösz, Chief Archivist of the Statewide Archives of the Hungarian Nat'l Archives, ¶¶ 3-6 (discussing the extensive documents in the Hungarian Archives related to "property taken from Hungarian nationals during World War II"), ECF No. 120-21; *id.* Ex. W, Decl. of Ilona Dávid, President of MÁV ¶ 7 ("As MÁV has only ever maintained and carried on business in Hungary, all documents relevant to the events that form the basis of the present litigation are located in Hungary and are overwhelmingly in the Hungarian language . . . [and] are stored as hard-copy documents."), ECF No. 120-22. Indeed, the plaintiffs themselves assert in their complaint that evidence "vital" to their claims is kept by the defendants in Hungary. SAC ¶ 208 ("Defendants have maintained in their archives, in hard-copy, facsimile and digital form, documents . . . relating to the isolation, ghettoization, enslavement and plundering of Hungarian Jewry and their deportation to the German death camps, as well as evidence of such acts and events . . . [and have] consistently denied access to these records which are vital to the proof of this case."). The plaintiffs' own expert expresses the same view that records relevant to the plaintiffs' claims are located in Hungary. *See* Hanák Decl. ¶ 39 ("I understand from scholarly works and from Hungarian scholars that there is an abundance of records of [confiscation of the property of Hungarian Jews] in Hungarian archives.").

Furthermore, the defendants point out that these documents are likely paper records, written in Hungarian, the production of which would require the defendants to comb through the Hungarian archives to identify relevant paper documents and would then require all documents to be translated in to English before being submitted to the Court. Defs.' Mem. Ex. X, Decl. of Zsuzsanna Mikó, General Director of the National Archives of Hungary, ¶ 4 ("[T]o the extent any documents relevant to the events . . . exist in the archives, they would likely be in hard-copy in the Hungarian language."), ECF No. 120-24. "When documentary evidence is in a language other than English (and that other language is used in the alternative court), the cost of having to translate the documents (as well as trial or deposition testimony) into English if the case were retained militates in favor of dismissal." 17 MOORE'S FEDERAL PRACTICE—CIVIL § 111.74.

Second, regarding the availability of process for compelling unwilling witnesses and the cost for obtaining attendance of willing witnesses, the defendants are correct that "many witnesses with personal knowledge will be located in Hungary," that most Hungarian witnesses will likely "be elderly and may not be willing or able to travel to the United States," and that unwilling witnesses would potentially be outside the jurisdiction of this Court. Defs.' Mem. at 28-29. If the claims are brought in Hungary, however, the defendants note that Hungarian witnesses would not have to travel internationally to participate in litigation, and "unlike this Court, Hungarian courts would have the power to compel testimony and the production of documents from witnesses located in Hungary." *Id.*

at 29; *see also Abelesz*, 692 F.3d at 684 (concluding, in a similar suit brought by Hungarian Jews against Hungary, that "much of the evidence and surviving witnesses are located" in Hungary). Though the parties have not identified a comprehensive list of relevant witnesses, whether in Hungary or elsewhere, *see* Pls.' Opp'n. at 35-37 (arguing defendants have failed to sufficiently assert the location of potential witnesses), the plaintiffs themselves have already sought to depose at least one witness located in Hungary who was unable to travel out of the country.

Additionally weighing in favor of the alternative forum of Hungary is the possibility that the plaintiffs may seek to bring suit against RCH, whose dismissal from the instant case in *Simon I* was based on the lack of personal jurisdiction. *See Simon I*, 37 F. Supp. 3d at 444. This jurisdictional defect would not be present in Hungary. *See* Defs.' Mem. at 30 n. 17 (noting that as a company "incorporated in Hungary and headquartered in Budapest, Hungary," Hungarian courts would have jurisdiction over RCH).

For all of these practical reasons, the private interest factors weigh strongly in favor of dismissing this lawsuit. The plaintiffs protest that "the emotional burden if forced to return to Hungary" should weigh in favor of retaining the case here. Pls.' Opp'n at 38-39; *see also id.* at 31. These feelings about returning to Hungary are understandable, and this concern must be weighed against the factors in the defendants' favor. As the Seventh Circuit aptly stated, "[a]s survivors of the effort of an earlier Hungarian government to exterminate them or their loved ones, plaintiffs have an

understandable fear and reluctance to trust a Hungarian forum to try their claims fairly." *Abelesz*, 692 F.3d at 684. While acknowledging the profound nature of the emotional weight of bringing this case in Hungary, the Court is hesitant to find that this factor outweighs virtually every other factor weighing in favor of dismissing under *forum non conveniens*. While the plaintiffs' emotional distress or even trauma in returning to Hungary should not be discounted, those difficulties are not sufficient to ignore the overwhelming weight of applicable legal factors to hale a foreign sovereign into a U.S. court to answer for its conduct over seventy years ago.[11]

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11. The plaintiffs' brief argument that Hungary cannot complain that the United States is an inconvenient forum because it is "is currently a plaintiff in a lawsuit filed in the U.S." misses the mark. Pls.' Opp'n at 39 n.29 (citing *European Cmty. v. RJR Nabisco, Inc.*, Case. No. 1:02-cv-05771 (E.D.N.Y. filed Oct. 30, 2002)). In *European Cmty.*, Hungary, along with 25 other member-states of the European Community, sued RJR Nabisco and other related defendants, all headquartered in the United States, alleging that the defendants had orchestrated violations of the Racketeer Influenced and Corrupt Organizations Act from within the United States. *See RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2114, 195 L. Ed. 2d 476 (2016) ("All defendants are U.S. corporations, headquartered in the United States, charged with a pattern of racketeering activity directed and managed from the United States.") (Ginsburg, J. dissenting). No such connections exist in this case between the United States and the conduct giving rise to the plaintiffs' claims. Moreover, the factors articulated in *Piper Aircraft* and *Gulf Oil* suggest that the analysis is specific to an individual case: the fact that Hungary is a plaintiff in the United States for one particular action does not mean that it forfeits a *forum non conveniens* claim in a separate case.

c. Public factors

The key public interest factors, including the "'local interest in having localized controversies decided at home'" and "the possibility of holding the trial in a forum 'at home with the law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws,'" *MBI*, 616 F.3d at 576 (quoting *Gulf Oil*, 330 U.S. at 509), strongly favor dismissal of this action. Plainly, the claims at issue involve Hungarians brutally taking the property of other Hungarians in Hungary during World War II, giving, as the defendants point out, Hungary "a far stronger interest than the United States in resolving this dispute." Defs.' Mem. at 32. There simply is "no connection between the allegations of wrongdoing in the Complaint and the United States," *id.* at 31-32, although that does not mean this country has no interest in seeing justice done. In this regard, Hungary has made efforts, feeble as they may have been in the past, to provide relief to victims of the Hungarian Holocaust and continues to express strong interest in resolving disputes over its past actions. *Id.* at 33 (noting that Hungary's interests in this case are "clearly paramount").

The plaintiffs counter that "Hungary's interest, if any, is far outweighed" by the United States' "interest and involvement . . . in violations of international human rights norms and in Holocaust reparation matters." Pls.' Opp'n at 40-41. Given that four of the fourteen named plaintiffs are now U.S. citizens, "and because public policy favors a domestic forum for U.S. citizens to redress wrongs," the plaintiffs discount "Hungary's interest in defending against alleged international human rights violations." *Id.*

Hungary's interest in this case goes beyond merely defending against potential liability for its conduct during World War II. Hungary has an interest in every part of the litigation, and has a moral interest, if not obligation, to hear the plaintiffs' claims and provide them appropriate relief. By contrast, binding Supreme Court precedent cautions federal courts against exercising broad jurisdiction over foreign sovereigns. *See Pimentel*, 553 U.S. at 866 (noting that where "claims . . . arise from events of historical and political significance . . . [t]here is a comity interest in allowing a foreign state to use its own courts for a dispute if it has a right to do so").

Invoking another of the *Gulf Oil* public factors, the defendants next note that Hungarian law would likely apply to the plaintiffs' claims, requiring this Court to interpret and apply Hungarian law to the merits of this case. Defs.' Mem. at 30. Regardless of whether a court ultimately is required to apply the law of a foreign country, the mere issue of "untangl[ing] problems in conflict of laws," supports dismissing this case in favor of the foreign forum." *Gulf Oil*, 330 U.S. at 509; *see also Piper Aircraft*, 454 U.S. at 260 ("[T]he need to apply foreign law point[s] toward dismissal."). At least one court, considering similar claims, held that it was required "to apply Hungarian law to a host of delicate issues, especially those concerning remedies." *Fischer*, 777 F.3d at 871. Indeed, in light of the parties' disputes about the language of the Basic Law, this Court could be required not only to interpret Hungarian law governing property claims, but Hungarian constitutional law as well.

Finally, the defendants note that this case "is not a typical, garden variety lawsuit—it raises significant substantive and procedural issues and challenges that could prove to be a substantial drain on the Court's resources." Defs.' Mem. at 33 (citing *MBI Grp., Inc. v. Credit Foncier du Cameroun*, 558 F. Supp. 2d 21, 34 (D.D.C. 2008) ("The administrative difficulties of trying this case in a forum thousands of miles away from the majority of witnesses and the evidence are obvious." (internal quotations and citations omitted))). The plaintiffs counter that "[t]here is no evidence that Hungarian courts are less congested than this Court," and assert that the defendants "fail to specify why this factor weighs in their favor." Pls.' Opp'n at 40. Given the size of the class the plaintiffs seek to certify, the age of the claims, relevant witnesses and documents, and the location, language, and condition of much of the evidence in this case, the administrative burden posed on this Court is not insignificant. Those burdens would be somewhat lessened on the Hungarian courts, based on Hungary's status as the location where all of the conduct giving rise to this litigation occurred, with familiarity with the language and proximity to archived documents and available witnesses.

Each of the relevant public interest factors weigh strongly in favor of Hungary as the preferred location for this litigation.

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Evaluation of all of the *Gulf Oil* factors weighs uniformly and heavily in favor of Hungary as the more

appropriate forum for this lawsuit. Accordingly, dismissal under the *forum non conveniens* doctrine is warranted.

III. CONCLUSION

The D.C. Circuit authorized this Court on remand to consider the doctrines of prudential exhaustion, which the Seventh Circuit applied to a case on similar facts, along with the doctrine of *forum non conveniens*, if either or both of those grounds for dismissal were raised by the defendants. Both doctrines apply here and warrant dismissal of this action without prejudice. Accordingly, the defendants' motion to dismiss is granted.

An appropriate Order accompanies this Memorandum Opinion.

Date: September 30, 2017

/s/ Beryl A. Howell
BERYL A. HOWELL
Chief Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED FEBRUARY 15, 2019

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-7146

ROSALIE SIMON, *et al.*,

Appellants,

v.

REPUBLIC OF HUNGARY AND MAGYAR ALLAMVASUTAK ZRT., (MAV ZRT.),

Appellees.

September Term, 2018
1:10-cv-01770-BAH
Filed On: February 15, 2019

BEFORE: Garland, Chief Judge, and Henderson, Rogers, Tatel, Griffith, Srinivasan, Millett, Pillard, Wilkins, and Katsas, Circuit Judges

ORDER

Upon consideration of appellees' petition for rehearing *en banc*, and the absense of a request by any member of the court for a vote; and appellants' motion for expedited

consideration and resolution of appellees' petition for rehearing *en banc*, it is

ORDERED that the petition be denied. It is

FURTHER ORDERED that the motion be dismissed as moot.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/_____
Michael C. McGrail
Deputy Clerk