No. 18-1447

IN THE

Supreme Court of the United States

REPUBLIC OF HUNGARY, ET ANO.,

Petitioners,

v.

ROSALIE SIMON, ET AL.,

Respondents.

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

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

May the district court abstain from exercising jurisdiction under the Foreign Sovereign Immunities Act for reasons of international comity?

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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INTRODUCTION

This case alleging that Hungary took property from Hungarians in Hungary does not belong in the courts of the United States. In recent years, this Court has repeatedly expressed concerns over similar, foreign-centered litigations that would have adverse foreign-policy consequences or could expose U.S. interests to reciprocal treatment in foreign courts.[1] The new variation here—that foreign *sovereigns* are the defendants—only makes these concerns more acute.

The international-comity doctrine targets concerns about international friction directly at their source. Like other prudential abstention doctrines, international comity allows district courts, in their sound discretion, to decline to exercise jurisdiction in exceptional cases when a dispute can more appropriately be resolved by a different sovereign.

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[1] *See Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1398 (2018) ("ATS litigation implicates serious separation-of-powers and foreign-relations concerns" and "must be subject to vigilant doorkeeping." (citation omitted)); *RJR Nabisco, Inc. v. European Cmty.,* 136 S. Ct. 2090, 2106 (2016) ("[P]roviding a private civil remedy for foreign conduct creates a potential for international friction."); *Daimler AG v. Bauman*, 571 U.S. 117, 141 (2014) ("The Ninth Circuit . . . paid little heed to the risks to international comity its expansive view of general jurisdiction posed."); *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) ("[V]indicating private interests" by "craft[ing] remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences" and "should be undertaken, if at all, with great caution.").

This Court and the lower federal courts have long turned to principles of comity to dismiss cases with excessive foreign entanglements. As the United States explained in its amicus brief in the court of appeals, "[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."[2]

The comity concerns presented by this litigation are of surpassing importance. Plaintiffs have sued the Hungarian government for Holocaust-era property losses on behalf of a putative worldwide class of current and former Hungarian nationals. In another case with virtually identical facts and claims, the Seventh Circuit calculated that the requested damages would equal 40% of Hungary's annual gross domestic product. Although all the relevant conduct occurred in Hungary when all Plaintiffs and putative class members were Hungarian nationals, Plaintiffs assert claims arising solely under American common law. Plaintiffs did not attempt to pursue local remedies in Hungary before suing Hungary in the United States.

The Seventh Circuit previously dismissed essentially the same claims on international-comity grounds.[3] So did the district court in this case. *See* Pet. App. 82a. But the D.C. Circuit mistakenly reversed

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

[3] *See Fischer v. Magyar Államvasutak Zrt.*, 777 F.3d 847, 852, 859-66 (7th Cir. 2015); *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 682 (7th Cir. 2012).

because it believed the Foreign Sovereign Immunities Act (FSIA) does not permit comity-based abstention in cases against sovereign defendants. In doing so, the court of appeals conflated comity—a prudential ground for declining jurisdiction in particular cases—with sovereign immunity, which eliminates subject-matter jurisdiction altogether. Like *forum non conveniens* and other case-by-case grounds for abstention that are indisputably available in FSIA cases, comity-based abstention is available too.

The international-comity considerations in this case overwhelmingly favor dismissal. If these same Plaintiffs had sued *private* foreign defendants for aiding and abetting the same Holocaust-era property losses, their claims would unquestionably be dismissed due to the risks of international friction. Allowing the claims to proceed because they're asserted against foreign *sovereigns* would withhold the solution just when the problem is most concerning. Cases against sovereign defendants have the greatest potential to harm foreign relations.

This case shows the risks of international discord that will develop if these concerns are ignored. While Plaintiffs have asserted garden-variety common-law claims, their theory of the case is unprecedented: "[T]he nearly existential threat of a $75 billion lawsuit"[4] against another nation, applying American common law to a foreign sovereign's conduct in its own territory that harmed its own nationals

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[4] *Philipp v. Federal Republic of Germany*, 925 F.3d 1349, 1357 (D.C. Cir. 2019) (Katsas, J., dissenting from denial of rehearing *en banc*).

more than sixty-five years before the action was filed, with no attempt to pursue available local remedies. Adjudicating these claims would inevitably disrupt foreign relations and could expose the United States to similar treatment by other nations' judges. As this Court has often admonished, "in the law, what is sauce for the goose is normally sauce for the gander."[5] If this case goes forward, then the United States can hardly complain if it is haled into foreign courts to face analogous claims for historic injustices that occurred in this country.

OPINIONS BELOW

The district court's decision is reported at *Simon v. Republic of Hungary*, 277 F. Supp. 3d 42 (D.D.C. 2017), *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), *reprinted at* Pet. App. 1a-47a. The D.C. Circuit's denial of Hungary's *en banc* petition is available at *Simon v. Republic of Hungary*, No. 17-7146, 2019 U.S. App. LEXIS 4732 (D.C. Cir. Feb. 15, 2019), *reprinted at* Pet. App. 96a-97a.

JURISDICTION

The district court entered judgment on September 30, 2017. Pet. App. 48a. The D.C. Circuit issued its opinion on the merits on December 28, 2018, *id.* at 1a, and denied Hungary's timely *en banc* petition on February 15, 2019, *id.* at 96a. Hungary filed a *certiorari* petition on May 16, 2019, which this Court granted, limited to the first question presented, on

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[5] *RJR Nabisco*, 136 S. Ct. at 2108 (citation omitted).

July 2, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1604, 1605(a)(3), and 1606, are reprinted in the Appendix.

STATEMENT

1.a. In 2010, fourteen former Hungarian nationals filed this case against Hungary and its instrumentality, Magyar Államvasutak Zrt. (MÁV)[6] (collectively, Hungary), in the U.S. District Court for the District of Columbia. On behalf of a putative worldwide class of current and former Hungarian nationals, Plaintiffs seek to recover the value of property taken from them in Hungary many decades ago during World War II. J.A. 125-26, 173. The operative complaint alleges ordinary common-law claims for property loss, including conversion, unjust enrichment, and restitution. *Id.* at 179-84.

It is undisputed that Hungary and MÁV are sovereign entities "immune from the jurisdiction of [U.S.] courts" unless a statutory exception to immunity applies. 28 U.S.C. § 1604. Plaintiffs assert jurisdiction under the FSIA's "expropriation exception," 28 U.S.C. § 1605(a)(3), which deprives sovereign defendants of immunity when "rights in property taken in violation of international law are in issue" and one of two commercial-activity nexuses

[6] MÁV is responsible for maintenance and operations of railway infrastructure in Hungary.

with the United States is satisfied. For a foreign state (like Hungary), the statutory nexus exists if the disputed "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." *Id.* For an instrumentality (like MÁV), the nexus exists if the disputed "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." *Id.*

b. Hungary moved to dismiss. Although the parties focused their initial briefing on whether the expropriation exception applied, the district court (Howell, C.J.) invited additional briefing on the FSIA's "treaty exception." *Simon v. Republic of Hungary*, 37 F. Supp. 3d 381, 406 (D.D.C. 2014), *aff'd in part, rev'd in part*, 812 F.3d 127 (D.C. Cir. 2016). The treaty exception provides that the FSIA is trumped by "existing international agreements to which the United States [was] a party at the time" of the FSIA's enactment. 28 U.S.C. § 1604. After considering the parties' supplemental briefs, the district court held that a preexisting treaty deprived the court of subject-matter jurisdiction over Plaintiffs' claims. *Simon*, 37 F. Supp. 3d at 407.

Specifically, in 1947, Hungary and the Allied powers, including the United States, entered into a peace treaty that covers the same property losses at issue in this case. *Id.* at 390. Under Article 27 of the treaty, Hungary "agreed to 'restore[]' and, if restoration were impossible, to pay 'fair

compensation,' to people 'under Hungarian jurisdiction' whose property was confiscated during the war 'on account of the racial origin or religion of such persons.'" *Id.* (quoting Treaty of Peace with Hungary art. 27(1), Feb. 10, 1947, 61 Stat. 2065 [hereinafter 1947 Treaty], *reprinted at* J.A. 28). "All property" that remained unclaimed six months after the treaty's effective date "shall be transferred by the Hungarian Government to organisations in Hungary representative of" the victimized persons or groups, and "shall be used for purposes of relief and rehabilitation of surviving members of such groups . . . in Hungary." J.A. 52-53.

The treaty does not provide for private, civil litigation in U.S. courts as a means to enforce compliance with treaty obligations. Instead, it establishes a "procedure for resolution of disputes 'concerning the interpretation or execution of the Treaty' . . . starting with 'direct diplomatic negotiations'" and ending, if necessary, with final adjudication by a three-member commission. *Simon*, 37 F. Supp. 3d at 390-91 (quoting 1947 Treaty art. 40(1)). Hungary and the United States previously engaged in diplomatic negotiations over Hungary's treaty obligations. In 1973, they entered into an agreement "settl[ing] all claims 'of nationals and the Government of the United States for . . . property, rights and interests affected by Hungarian measures of nationalization, compulsory liquidation, expropriation, or other taking'" prior to the agreement. *Id.* at 391 (quoting Agreement Regarding the Settlement of Claims art. 2, U.S.-Hung., Mar. 6, 1973, 24 U.S.T. 522 [hereinafter 1973 Agreement], *reprinted at* J.A. 82). Under the 1973 Agreement, Hungary paid

the U.S. government $18,900,000 "as full and final settlement and in discharge of all claims held by United States nationals and the United States government," including claims relating to Hungary's property obligations under the 1947 Treaty. *Id.* (quoting 1973 Agreement art. 1).

Citing the 1973 Agreement as an example of treaty-based dispute resolution, the district court held that the 1947 Treaty "expressly conflicts" with the FSIA and provides "an exclusive, extrajudicial mechanism" for resolving claims relating to the expropriation of property from Hungarian nationals during World War II. *Id.* at 420, 422.

c. On appeal, however, the D.C. Circuit took a different view. The court of appeals did not dispute that the 1947 Treaty covers the same property losses alleged in this case. But it held that extra-treaty claims are also available as an alternative means to seek restitution for those losses: "[W]hile Article 27 [of the treaty] secures one mechanism by which Hungarian victims may seek recovery, it does not establish the *exclusive* means of doing so." *Simon v. Republic of Hungary*, 812 F.3d 127, 137 (D.C. Cir. 2016). "Because the plaintiffs in this case have brought causes of action arising outside of the 1947 Treaty," the court determined that "their action creates no express conflict" with the treaty. *Id.* at 140.

Addressing the jurisdictional requirement that the property be taken in violation of international law, the court of appeals held that the intra-state takings alleged by Plaintiffs are international-law violations. Though acknowledging the clear consensus that the expropriation exception does not cover "domestic

takings"—that is, takings by a foreign sovereign of its own nationals' property—the court nevertheless held that "[t]he domestic takings rule has no application in the unique circumstances of this case, in which . . . *genocide* constitutes the pertinent international-law violation." *Simon*, 812 F.3d at 144-45.[7]

Next, turning to the exception's commercial-nexus requirement, the D.C. Circuit held that Plaintiffs' allegations that Hungary and MÁV "liquidated the stolen property, mixed the resulting funds with their general revenues, and devoted the proceeds to funding various governmental and commercial operations" were sufficient "to raise a plausible inference[] that the defendants retain the property or proceeds thereof." *Id.* at 147 (citation omitted).

The court of appeals then remanded the case to the district court to consider, among other things, the issue that is now before this Court: "[W]hether, 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.

2.a. On remand, the district court again dismissed Plaintiffs' claims—this time holding that comity-based abstention and *forum non conveniens*

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[7] The D.C. Circuit subsequently applied this interpretation of the domestic-takings rule in *Philipp v. Federal Republic of Germany*, 894 F.3d 406, 410-14 (D.C. Cir. 2018). On July 2, 2020, this Court granted Germany's *certiorari* petition to review this domestic-takings issue as well as the comity question that is also presented in this appeal. *See Federal Republic of Germany v. Philipp*, No. 19-351.

each provided an independent basis for dismissal. Pet. App. 50a.

With respect to comity-based abstention, the district court noted that two recent Seventh Circuit decisions that involved nearly identical facts and claims were "highly persuasive." *Id.* at 73a. In those cases, the Seventh Circuit held that "the comity at the heart of international law required plaintiffs either to exhaust domestic remedies in Hungary or to show a powerful reason to excuse the requirement." *Fischer*, 777 F.3d at 858; *see also Abelesz*, 692 F.3d at 682 ("Hungary should first have the opportunity to address these alleged takings, by its own means and under its own legal system, before a U.S. court steps in to resolve claims . . . for these actions taken in Hungary so long ago.").

The Seventh Circuit also emphasized the significant foreign-policy implications at play:

> The sum of damages sought by plaintiffs would amount to nearly 40 percent of Hungary's annual gross domestic product in 2011. . . . 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.

Abelesz, 692 F.3d at 682. "If U.S. courts are ready to exercise jurisdiction to right wrongs all over the world, including those of past generations," the Seventh Circuit observed, then "we should not complain if other countries' courts decide to do the same." *Id.*

Like the Seventh Circuit, the district court 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." Pet. App. 71a. And the district court held that the same "comity considerations that led the *Fischer* court to dismiss that suit . . . apply also to the instant suit." *Id.* at 71a-72a.

Having found that international comity supports dismissal, the district court next considered whether Hungarian remedies would be futile. After reviewing an extensive factual record, including expert submissions from both sides, the district court "conclu[ded] that Hungary is an adequate, alternative forum for the plaintiffs' claims." *Id.* at 75a. Accordingly, the court held that "[i]nternational comity concerns apply here and warrant dismissal, without prejudice, of the Second Amended Complaint for failure to exhaust the remedies available in Hungary." *Id.* at 82a. Separately, the district court determined that *forum non conveniens* provides an "alternative prudential basis for dismissal." *Id.* at 83a.

b. On appeal, a divided D.C. Circuit panel reversed again as to both grounds for dismissal, reinstating the case for the second time. Pet. App. 3a. The panel's decision on comity-based abstention

followed the analysis of another D.C. Circuit panel, in *Philipp v. Federal Republic of Germany*, which had recently addressed the same issue. *See* 894 F.3d 406. *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).

The D.C. Circuit's decision in *Simon* came down some five months later, and, like *Philipp*, it "rejected the asserted comity-based ground for declining statutorily assigned jurisdiction." Pet. App. 3a. In the majority's view, "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." *Id.* at 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.*

Judge Katsas dissented from the panel decision, focusing on the majority's reversal of the dismissal for *forum non conveniens*. *See id.* at 37a-47a. In a

subsequent opinion dissenting from the denial of *en banc* review in *Philipp*, Judge Katsas disagreed with the D.C. Circuit's comity analysis in both *Simon* and *Philipp*. *See Philipp*, 925 F.3d at 1350, 1355-59 (Katsas, J., dissenting) ("These decisions . . . disregard the views of the Executive Branch on a matter of obvious foreign-policy sensitivity, and make the FSIA more amenable to human-rights litigation against foreign sovereigns than the [ATS] is to human-rights litigation against private defendants abetting the sovereigns. Moreover, they clear the way for a wide range of litigation against foreign sovereigns for public acts committed within their own territories.").

Following the *Simon* panel decision, Hungary filed a petition for *en banc* review, which was denied. It then filed a petition for a writ of *certiorari* with this Court seeking review of the court of appeals' rulings on both comity and *forum non conveniens*. On July 2, 2020, this Court granted Hungary's petition, limited to the question concerning abstention on the ground of international comity.

3. Meanwhile, as this Court considered Hungary's *certiorari* petition, the case proceeded in the district court. Hungary moved to dismiss the operative Second Amended Complaint for failing to satisfy the commercial-nexus requirement of the FSIA's expropriation exception. In March 2020, the district court denied Hungary's motion. *Simon v. Republic of Hungary*, 443 F. Supp. 3d 88, 116 (D.D.C. 2020).

Applying what it understood to be the law of the circuit,[8] the district court held that Plaintiffs had established subject-matter jurisdiction over both Hungary and MÁV. *Id.* at 116. It found the commercial-activity nexus satisfied as to Hungary based on Hungary's purchases of military equipment from the U.S. government and Hungarian bond sales in U.S. capital markets. *Id.* at 107-10. It found the nexus satisfied as to MÁV based on the activities of a different entity, purportedly MÁV's agent, in selling tickets and booking reservations in the United States to use the Hungarian rail system. *Id.* at 111-12.

Hungary appealed.[9] On July 21, 2020, the D.C. Circuit granted Hungary's motion to hold that appeal

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[8] The district court observed that the D.C. Circuit's first *Simon* decision had "broadened the scope" of the expropriation exception in two ways. *Id.* at 103 n.10. First, the court of appeals eased the requirement "that property be taken 'in violation of international law'" by defining "genocide to encompass egregious property takings"—the issue that is now before this Court in *Philipp*. *Id.* (quoting 28 U.S.C. § 1605(a)(3)); *see also id.* at 96 n.3 (describing commentators' "concerns" about this "significant expansion" of the exception). Second, the D.C. Circuit eased the requirement "that such property be 'present in the United States in connection with a commercial activity'" by embracing Plaintiffs' theory that "expropriated property commingled in the coffers of a foreign sovereign is sufficient to show the foreign sovereign's ongoing possession." *Id.* at 103 n.10 (quoting 28 U.S.C. § 1605(a)(3)). "Nonetheless," the district court explained, D.C. Circuit precedent "is binding on" it. *Id.*

[9] For purposes of the comity appeal now before this Court, Hungary assumes—but does not concede—that subject-matter jurisdiction is available under the FSIA. *See Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 425 (2007) ("[A] court need not resolve whether it has . . . subject-matter

in abeyance pending this Court's decisions on the merits in this case and in *Philipp*.[10]

SUMMARY OF ARGUMENT

I. Abstention on the ground of international comity is critical to ensure that U.S. litigation does not entangle federal courts in foreign relations. The FSIA does not require courts to disregard comity concerns in cases against foreign sovereigns.

A. Like other jurisdiction-conferring statutes, the FSIA must be interpreted against the background of the common law, "with sensitivity to . . . wise judicial administration." *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 423 (2010) (citation omitted). Since long before the FSIA's enactment, this Court and the lower courts have turned to comity principles to abstain from exercising jurisdiction over cases with particular foreign-policy sensitivities. As Justice Brandeis explained in 1932, federal courts "occasionally decline . . . to exercise jurisdiction" when "the litigation can more appropriately be conducted in a foreign tribunal." *Can. Malting Co. v. Paterson S.S., Ltd.*, 285 U.S. 413, 423 (1932).

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jurisdiction[] . . . if it determines that . . . a foreign tribunal is plainly the more suitable arbiter of the merits of the case.").

[10] On August 2, 2020, Plaintiffs moved to vacate the abeyance order and dismiss the appeal, arguing, among other things, that Hungary waived the right to appeal the denial of sovereign immunity by asking the D.C. Circuit to hold the appeal in abeyance. As of the filing of this brief, the D.C. Circuit has not yet ruled on Plaintiffs' motion.

International comity takes two forms, each of which warrants dismissal of this case. *Adjudicative* comity involves abstention from matters "more appropriately adjudged elsewhere"; *prescriptive* comity involves an interpretive limit on the extraterritorial reach of our laws. *Hartford Fire Ins. v. California*, 509 U.S. 764, 817 (1993) (Scalia, J., dissenting). This case involves adjudicative comity because Hungary clearly has the paramount interest in the dispute. And it involves prescriptive comity because Plaintiffs seek to apply American common law to regulate a foreign nation's conduct within its own territory that harmed its own nationals.

B. There is no dispute that other prudential grounds for declining jurisdiction, like *forum non conveniens*, are available in FSIA cases. Plaintiffs believe (and the court of appeals held) that international comity is the only prudential abstention doctrine that the FSIA eliminated. But there is no reason, textual or otherwise, to think Congress intended to treat international comity differently.

The court of appeals held to the contrary because it mistakenly viewed comity-based abstention as a form of sovereign immunity not found within the FSIA. Because comity-based abstention, like other abstention doctrines, is not an "immunity defense," it need not "stand on the [FSIA's] text." Pet. App. 15a (quoting *NML*, 573 U.S. at 141-42).

Regardless, the FSIA's text *does* confirm the continued vitality of comity-based abstention and other prudential doctrines—it provides that a sovereign's liability under the statute shall be "in the same manner and to the same extent as a private

individual under like circumstances." 28 U.S.C. § 1606. A private individual could obtain comity-based dismissal in a case presenting a risk of international strife. *See, e.g.*, *Can. Malting*, 285 U.S. at 423; *Kiobel*, 569 U.S. at 132 (Breyer, J., concurring). And that risk is only magnified in FSIA cases, like this one, brought against foreign sovereigns by foreign nationals alleging foreign harms.

II. Both adjudicative and prescriptive comity strongly support dismissal in this case.

A. Adjudicative comity applies because Hungary's interests in the controversy far outweigh any U.S. interest in imposing damages on Hungary for historic injustices within its own territory, affecting its own nationals. Hungary should be permitted to address these claims within the framework of its own governmental and legal system, just as the U.S. government would expect to make its own decisions concerning remedies for past injustices committed on U.S. soil.

On the other side of the scale, any U.S. interest in this foreign-centered case is vanishingly small, especially because U.S. interests have already been discharged by the 1973 Agreement, which settled all claims by the U.S. government and U.S. nationals for past expropriations of property in Hungary. The only claimed U.S. nexus arises—decades later and unrelated to the allegations of wrongdoing—from Hungary's purchasing military equipment from the U.S. government, Hungarian bonds' being sold in U.S. markets, and U.S. persons' buying Hungarian railroad tickets. *See supra* pp. 13-14. But the United States shares tenuous contacts like these with nearly every

foreign nation. More is needed for U.S. courts to impose economy-crushing liability on a foreign sovereign for historic wrongs committed against its own nationals in its own territory.

Hungary not only has the paramount interest in the dispute, it is an adequate and available forum for Plaintiffs' claims, as the district court and the Seventh Circuit found. Pet. App. 75a; *Fischer*, 777 F.3d at 859-66. In light of Hungary's predominant interests and sufficiency as an alternative forum, the district court was well within its discretion to abstain from hearing this case on international-comity grounds.

B. Prescriptive comity also supports dismissal of this case. This limiting principle on the reach of U.S. laws applies with special force here, where Plaintiffs ask the federal courts to extend American common law into an alien context to regulate another sovereign's wartime conduct within its own territory that harmed its own nationals. U.S. law "does not rule the world." *RJR Nabisco*, 136 S. Ct. at 2100 (citation omitted). This Court ordinarily seeks to avoid the "international discord that can result when U.S. law is applied to conduct in foreign countries," *id.*, and it should do so here.

Under principles of prescriptive comity, a state may not prescribe law with respect to a foreign activity when doing so would be unreasonable. Reasonableness depends on the strength of the connection between the activity and the regulating state. *See* Restatement (Third) of Foreign Relations Law § 403(1) (Am. Law Inst. 1987). Here, any such connection is weak or nonexistent. Applying American common law to Hungary in these circumstances would

needlessly entangle federal courts in foreign policy and invite reciprocal treatment of the United States in foreign courts, which is anything but reasonable.

ARGUMENT

I. ABSTENTION ON THE GROUND OF INTERNATIONAL COMITY IS AVAILABLE IN FSIA CASES

The FSIA "provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country." *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 393 (2015) (citation omitted). Like other jurisdiction-conferring statutes, the FSIA must be interpreted in reference to the common law, including common-law doctrines, like international comity, that give federal courts discretion to decline jurisdiction in appropriate cases.

A. Federal Courts May Decline to Exercise Jurisdiction over Claims that Implicate the Paramount Interests of Other Sovereigns

1. "It is fundamental that [this Court] construe[s] statutes governing the jurisdiction of the federal courts in light of the common-law background against which the statutes . . . were enacted." *Setser v. United States*, 566 U.S. 231, 235 (2012) (citation omitted). Thus, as this Court has "repeatedly cautioned," "[s]tatutes conferring federal jurisdiction . . . should be read with sensitivity to federal-state relations and wise judicial administration." *Levin*, 560 U.S. at 423 (citation omitted).

In some cases, the wisest and most prudent course of action is for a federal court to decline

jurisdiction, especially when litigation implicates the paramount interests of other sovereigns. Accordingly, as this Court has recognized since long before the FSIA's enactment, "the proposition that a court having jurisdiction must exercise it, is not universally true." *Can. Malting*, 285 U.S. at 422; *see also Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 639 (2009) ("This Court's precedent makes clear that whether a court has subject-matter jurisdiction over a claim is distinct from whether a court chooses to exercise that jurisdiction."). "[F]ederal courts may decline to exercise their jurisdiction, in otherwise exceptional circumstances, where denying a federal forum would clearly serve an important countervailing interest, for example, where abstention is warranted by considerations of proper constitutional adjudication, regard for federal-state relations, or wise judicial administration." *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 174 (1997) (citation omitted).

To be certain, declining jurisdiction is the rare exception, not the rule. Nevertheless, this Court's decisions recognize numerous doctrines affording courts discretion to abstain from exercising jurisdiction in particular cases. These doctrines include abstention due to federalism and comity concerns;[11] *forum non conveniens*;[12] comity with states

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[11] *See Burford v. Sun Oil Co.*, 319 U.S. 315, 317-18 (1943) ("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." (citation omitted)).

[12] *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947) ("The principle of *forum non conveniens* is simply that a court may

and especially state tax administrations;[13] comity with tribes, as reflected in the tribal exhaustion doctrine;[14] discretion in the exercise of this Court's original jurisdiction;[15] and international comity.[16]

For all these doctrines, the question is not whether federal courts have jurisdiction but whether they *should* exercise jurisdiction in the circumstances of a particular case.

2. International comity is a well-established ground to decline jurisdiction that long predates the FSIA's enactment in 1976. The classic definition of comity is found in *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895):

> "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will,

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resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute.").

[13] *See Levin*, 560 U.S. at 421 ("The comity doctrine counsels lower federal courts to resist engagement in certain cases falling within their jurisdiction.").

[14] *See Iowa Mut. Ins. 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.").

[15] *See South Carolina v. North Carolina*, 558 U.S. 256, 267 (2010) ("[W]e exercise our original jurisdiction sparingly and retain substantial discretion to decide whether a particular claim requires an original forum in this Court." (citation omitted)).

[16] *See Can. Malting*, 285 U.S. at 423 (federal courts "occasionally decline . . . to exercise jurisdiction" when "the litigation can more appropriately be conducted in a foreign tribunal").

> upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.

Federal courts' discretion to abstain from exercising jurisdiction for reasons of international comity has a long pedigree. Indeed, "[s]ince the earliest days of the Republic, the Supreme Court has turned to principles of comity to decline or limit the exercise of federal jurisdiction in international cases." N. Jansen Calamita, *Rethinking Comity: Towards a Coherent Treatment of International Parallel Proceedings*, 27 U. Pa. J. Int'l Econ. L. 601, 605-06 (2006). Like *forum non conveniens*—whose origins are intertwined with comity[17]—abstention on the ground of international comity is part of the warp and woof of the common law. "Dismissals for reasons of comity and *forum non conveniens* were commonplace in the 19th

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[17] "[T]he doctrine of *forum non conveniens*" is "rooted in the principles of adjudicatory comity." *Id.* at 615. While it seems the terminology was not sharply defined, at one time the distinction between comity-based abstention and dismissal for *forum non conveniens* may have been simply whether a foreign proceeding was already pending. *See id.* Now, however, the "considerations behind dismissal for *forum non conveniens* differ markedly from those informing the decision to abstain." *Quackenbush v. Allstate Ins.*, 517 U.S. 706, 722-23 (1996). "Federal courts abstain out of deference to the paramount interests of another sovereign," whereas *forum non conveniens* involves broader considerations, "most notably the convenience to the parties and the practical difficulties" of litigating in a particular forum. *Id.* at 723.

century. . . . By 1932, Justice Brandeis was able to cite an 'unbroken line of decisions in the lower federal courts' exercising 'an unqualified discretion to decline jurisdiction in suits in admiralty between foreigners.'" *Am. Dredging Co. v. Miller*, 510 U.S. 443, 464-65 (1994) (Kennedy, J., dissenting) (quoting *Can. Malting*, 285 U.S. at 421-22). Thus, "[c]ontrary to the assumption that the Judiciary Branch has a 'virtually unflagging obligation' to exercise jurisdiction that Congress has given it, the truth is that, at least when it came to foreign relations cases, judicial discretion—often resulting in abstention—was quite commonplace in the early American republic." Samuel Estreicher & Thomas H. Lee, *In Defense of International Comity*, 93 S. Cal. L. Rev. 169, 194-95 (2020) (citations omitted).

Federal courts continue today to rely on international comity to decline jurisdiction, in deference to foreign sovereign interests or to ensure that U.S. litigation does not cause international friction. *See, e.g.*, *Cooper v. Tokyo Elec. Power Co. Holdings*, 960 F.3d 549, 569 (9th Cir. 2020) ("[T]he district court did not abuse its discretion when it dismissed the claims against TEPCO on international-comity grounds."); *EMA Garp Fund, L.P. v. Banro Corp.*, 783 F. App'x 82, 84 (2d Cir. 2019) ("We agree with Appellees that the District Court was within its discretion in declining, based on the principles of international comity, to exercise its jurisdiction in this case."); *Mujica v. AirScan Inc.*, 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"); *cf. Jesner*, 138 S. Ct. at 1430-31 (Sotomayor, J., dissenting) ("Courts . . . can dismiss ATS suits . . . for reasons of international comity."); *Kiobel*, 569 U.S. at 133 (Breyer, J., concurring) ("limiting principles such as exhaustion, *forum non conveniens*, and comity" can "help to minimize international friction").

Courts sometimes distinguish between different types or applications of international comity. Two types are relevant here: "adjudicative" comity and "prescriptive" comity. Adjudicative comity, sometimes called "the comity of courts," is when "judges decline to exercise jurisdiction over matters more appropriately adjudged elsewhere"; prescriptive comity, in contrast, is "the respect sovereign nations afford each other by limiting the reach of their laws." *Hartford Fire Ins.*, 509 U.S. at 817 (Scalia, J., dissenting) (citing J. Story, *Commentaries on the Conflict of Laws* § 38 (1834)); *see also In re Maxwell Commc'n Corp.*, 93 F.3d 1036, 1047 (2d Cir. 1996) ("'[I]nternational comity' may describe two distinct doctrines: as a canon of construction, it might shorten the reach of a statute; second, it may be viewed as a discretionary act of deference by a national court to decline to exercise jurisdiction in a case properly adjudicated in a foreign state, the so-called comity among courts.").

This case involves adjudicative comity because the subject matter of the litigation should be addressed by the courts and government of Hungary. And it involves prescriptive comity too, because Plaintiffs assert substantive claims solely under American common law to impose liability for conduct by Hungary affecting Hungarian nationals in Hungary during World War II. Thus, as the Second

Circuit observed when dismissing a complaint on international-comity grounds, "whether [adjudicative and prescriptive comity] are two distinct doctrines . . . in the context of this case the concepts are not two inconsistent propositions." *Maxwell*, 93 F.3d at 1047.

International-comity-based abstention is similar to abstention in deference to the interests of domestic sovereigns, like states or tribes. But international comity also reflects pressing concerns unique to international relations. Among these are the principle, frequently recognized by this Court, that the treatment of foreign interests in U.S. courts implies consent to analogous treatment of U.S. interests in foreign courts. *See, e.g.*, *Kiobel*, 569 U.S. at 124 ("[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."); *Sosa*, 542 U.S. at 761 (Breyer, J., concurring) ("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 . . . notions of comity."). International comity also helps to avoid "judicial interference in the conduct of foreign policy," *Kiobel*, 569 U.S. at 116, especially when liability is asserted under judge-made common law.

B. The FSIA Did Not Restrain Courts' Power to Abstain from Exercising Jurisdiction on the Ground of Comity

The enactment of the FSIA in 1976 did not extinguish the courts' longstanding discretion to

decline jurisdiction for reasons of international comity. Just as courts abstain from exercising jurisdiction on international-comity grounds in cases involving private defendants, courts can and, in some cases, should abstain when jurisdiction over sovereign defendants is founded on the FSIA. Indeed, litigation against foreign sovereigns may present the most significant comity concerns.

1. Like other jurisdiction-conferring statutes, the FSIA determines only whether federal courts *have* subject-matter jurisdiction, not whether they *should* exercise jurisdiction in particular cases. There is, accordingly, no dispute that the FSIA left intact all *other* prudential grounds for declining jurisdiction—that is, all grounds apart from comity—such as *forum non conveniens* and the political-question doctrine. *See* Pet. App. 17a ("*[F]orum 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").

Plaintiffs' position, and the holding of the court of appeals, is that international comity is the *only* prudential ground for declining jurisdiction that the FSIA proscribed. But there is no textual support in the FSIA for the notion that Congress singled out comity for elimination. When Congress wants to displace comity in addition to withdrawing sovereign immunity, it knows how to do so. *See* 22 U.S.C. § 8772(a)(1) ("notwithstanding . . . any provision of law relating to sovereign immunity," covered foreign

assets "shall be subject to execution or attachment . . . *without regard to concerns relating to international comity*" (emphasis added)).

Nor is there any reason to think Congress would have wanted to treat international comity differently from other case-by-case prudential doctrines that the FSIA undisputedly preserved, like *forum non conveniens*. Both international comity and *forum non conveniens* have deep—and often entangled—roots in the common law. Both comity-based abstention "and the doctrine of *forum non conveniens* proceed from a similar premise: In rare circumstances, federal courts can relinquish their jurisdiction in favor of another forum." *Quackenbush*, 517 U.S. at 722. And both international comity and *forum non conveniens* are "limiting principles" district courts can apply "to minimize international friction." *Kiobel*, 569 U.S. at 133 (Breyer, J., concurring); *see also Jesner*, 138 S. Ct. at 1430-31 (Sotomayor, J., dissenting).

The FSIA certainly did not bar comity-based abstention for the reason the court of appeals believed—that abstention would amount to a "judicial grant of immunity from jurisdiction" because "any Hungarian remedy" would likely preclude relitigation of Plaintiffs' claims in U.S. courts. Pet. App. 14a. That test would turn virtually all prudential abstention doctrines into jurisdictional immunities. As this Court has explained, a "*forum non conveniens* dismissal denies audience to a case on the merits; it is a determination that the merits should be adjudicated elsewhere." *Sinochem*, 549 U.S. at 432 (citation and alteration omitted). Same with the tribal exhaustion doctrine: When federal courts abstain to require

exhaustion of tribal remedies, "proper deference to the tribal court system precludes relitigation of issues . . . resolved in the Tribal Courts." *LaPlante*, 480 U.S. at 19. But tribal exhaustion is not an immunity from jurisdiction. "Exhaustion is required as a matter of comity, not as a jurisdictional prerequisite." *Id.* at 16 n.8.

Like these other prudential doctrines that may prevent adjudication on the merits by U.S. courts, "[i]nternational comity . . . is an abstention doctrine: A federal court has jurisdiction but defers to the judgment of an alternative forum." *Ungaro-Benages*, 379 F.3d at 1237; *see also Mujica*, 771 F.3d at 598 ("International comity is a doctrine of prudential abstention."); *JP Morgan Chase Bank v. Altos Hornos de Mex., S.A.*, 412 F.3d 418, 422 (2d Cir. 2005) ("Declining to decide a question of law on the basis of international comity is a form of abstention."). Because comity-based abstention is not an "immunity defense"—it does not confer sovereign immunity from jurisdiction on foreign states—it need not "stand on the [FSIA's] text." Pet. App. 15a (quoting *NML*, 573 U.S. at 141-42).

Comity-based abstention in FSIA cases parallels similar abstention doctrines available in cases against domestic sovereigns, when the sovereigns are not immune from jurisdiction. In some cases, the states of the United States enjoy sovereign immunity from federal jurisdiction based on "[t]he Eleventh Amendment's background principles of federalism and comity." *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 277 (1997) (Kennedy, J.). Tribes likewise have sovereign immunity based on "[p]rinciples of

comity." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 817-18 (2014) (Sotomayor, J., concurring). But even when states and tribes lack sovereign immunity—that is, even when federal courts *have* jurisdiction over them—courts may decline to exercise jurisdiction in particular cases as a matter of comity, to give another sovereign the first opportunity to address a dispute. *See Levin*, 560 U.S. at 417 ("The comity doctrine, we hold, requires that a claim of the kind here presented proceed originally in state court."); *Nat'l Farmers Union Ins. v. Crow Tribe of Indians*, 471 U.S. 845, 857 (1985) ("Until petitioners have exhausted the remedies available to them in the Tribal Court system . . . it would be premature for a federal court to consider any relief.").

The same principle applies in cases against foreign sovereigns. Even when a foreign state lacks sovereign immunity under the FSIA—meaning a federal court has jurisdiction—the court may abstain on the ground of comity when the dispute can more appropriately be resolved by a different sovereign.

2. In any event, the FSIA's text confirms that comity and other prudential defenses remain available to sovereign defendants. The statute provides 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. Private defendants can and do obtain dismissal on the ground of adjudicative comity in cases with excessive foreign entanglements. This Court has also looked to principles of prescriptive comity to circumscribe the reach of U.S. laws when federal courts are asked to

adjudicate foreign-centered controversies between private litigants. According to the FSIA's plain text, courts may consider these same comity concerns in cases against sovereign defendants.

a. In 1932, this Court described what was already then a settled practice of applying adjudicative comity in cases affecting foreign interests: "Courts of equity and of law . . . occasionally decline, in the interest of justice, to exercise jurisdiction, where the suit is between aliens or nonresidents, or where for kindred reasons the litigation can more appropriately be conducted in a foreign tribunal." *Can. Malting*, 285 U.S. at 423. Thus, in *Canada Malting*, a suit between foreign ship-owners arising from a collision in U.S. waters, the Court determined that "it lay within the discretion of the District Court to decline to assume jurisdiction over the controversy." *Id.* at 419-20.

The lower courts continue to exercise this discretion today in cases involving private litigants, recognizing that "in some private international disputes the prudent and just action for a federal court is to abstain from the exercise of jurisdiction." *Turner Ent. Co. v. Degeto Film GmbH*, 25 F.3d 1512, 1518 (11th Cir. 1994); *see also supra* Point I.A.2 (citing international-comity abstention cases).

Accordingly, four Justices of this Court—without disagreement from any other Justice—recently observed that courts "can dismiss ATS suits . . . for reasons of international comity." *Jesner*, 138 S. Ct. at 1430-31 (Sotomayor, J., dissenting); *see also Kiobel*, 569 U.S. at 132 (Breyer, J., concurring). And since adjudicative international comity is

available in suits between private litigants, under 28 U.S.C. § 1606 it must also be available in suits against sovereign defendants brought under the FSIA.[18]

b. In addition to adjudicative comity, this Court has turned to principles of prescriptive comity to limit the reach of U.S. law when foreign nationals seek remedies for injuries caused by foreign defendants on foreign soil. For instance, in *Kiobel*, an ATS suit, the Court "stressed the need for judicial caution . . . in light of foreign policy concerns"—concerns that "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." 569 U.S. at 116-17; *see also Jesner*, 138 S. Ct. at 1398 ("Modern ATS litigation has the potential to involve large groups of foreign plaintiffs suing foreign corporations in the United States for alleged human-rights violations in other nations. . . . The extent and scope of this litigation in United States courts have resulted in criticism here and abroad.").

The Court addressed these foreign-policy concerns in *Kiobel* by applying the presumption against extraterritoriality—"a canon of statutory interpretation that has developed in close connection

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[18] The D.C. Circuit incorrectly rejected this argument on the ground that "a private individual cannot invoke a sovereign's right to resolve disputes against it." *Philipp*, 894 F.3d at 416. Interpreting language identical to 28 U.S.C. § 1606 in the Federal Tort Claims Act, 28 U.S.C. § 2674, this Court explained that "the words 'like circumstances' do not restrict a court's inquiry into the *same circumstances*, but require it to look further afield" to analogous circumstances. *United States v. Olson*, 546 U.S. 43, 46 (2005).

with the concept of international comity." Estreicher & Lee, *supra*, at 172. The question to which this presumption applied was "not whether a federal court has jurisdiction to entertain a cause of action," but "instead whether the court has authority to recognize a cause of action under U.S. law to enforce a norm of international law." *Kiobel*, 569 U.S. at 119. In *Kiobel*, where "all the relevant conduct took place outside the United States," the Court answered this question in the negative: Courts may not recognize a cause of action applying international norms under the ATS unless the "claims touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application." *Id.* at 124-25 (citation omitted).

These same principles come into play in FSIA cases—especially cases like this one, where courts are asked to apply American common law to impose liability on foreign sovereigns for conduct that harmed foreign nationals in foreign territories. And just as private defendants may obtain dismissal of foreign-centered controversies falling within the jurisdiction conferred by the ATS, sovereign defendants may obtain dismissal in like circumstances when jurisdiction is founded on the FSIA.

3. Indeed, FSIA cases may present the greatest risk of entangling U.S. courts in foreign relations, and therefore raise the most significant comity concerns. Federal courts may decline to hear claims against *private* defendants due to foreign-policy sensitivities; it would be truly bizarre if courts were required to hear the exact same claims when brought against foreign *states*. After all, "comity is about one sovereign

respecting the dignity of another," and its "practical aim" is "allaying friction between sovereigns." *Bay Mills Indian Cmty.*, 572 U.S. at 817-18 (Thomas, J., dissenting). While comity concerns may arise in any "case[] touching the laws and interests of other sovereign states," *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. for the S. Dist. of Iowa*, 482 U.S. 522, 543 n.27 (1987), they have particular force when sovereign states themselves are haled into U.S. courts.

So, as the dissenting D.C. Circuit judge observed, it cannot be right that "ATS claims of abetting atrocities committed by a foreign sovereign within its own territory are impermissibly extraterritorial," but the same claims could proceed directly against the sovereign itself. *Philipp*, 925 F.3d at 1358 (Katsas, J., dissenting). "Such results are perverse, for FSIA actions against foreign sovereigns raise even greater foreign-policy concerns." *Id.*

Ignoring these concerns in FSIA cases would not only harm international relations, it would invite foreign nations to impose reciprocal treatment on the United States in their courts. In *Kiobel*, this Court warned of the reciprocity implications if foreign-centered ATS cases proceed against foreign *corporations*: It "impl[ies] that other nations . . . could hale our citizens into their courts for alleged violations of the law of nations occurring in the United States." 569 U.S. at 124. If U.S. courts hear foreign-centered claims against foreign *sovereigns*, the problem is exponentially worse: The reciprocal consequences could then be visited on the United States or U.S. state governments. Taking this case as an example, foreign

courts might apply their own domestic law to impose liability on the United States for historic injustices that occurred in this country and harmed U.S. nationals. *Cf. Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1322 (2017) (noting that a low bar for FSIA jurisdiction could "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" (citation omitted)).

"[W]hen international friction [like this] arises, a court should respond with the doctrine that speaks directly to the friction's source." *Jesner*, 138 S. Ct. at 1430 (Sotomayor, J., dissenting). That doctrine is prudential abstention on the ground of international comity.

II. THE DISTRICT COURT PROPERLY DISMISSED THIS CASE FOR REASONS OF COMITY

The comity considerations presented by this litigation are of surpassing importance, and they point inexorably to one conclusion: This case does not belong in a U.S. court.

The lower "courts have struggled to apply a consistent set of factors in their [adjudicative] comity analyses." *Mujica*, 771 F.3d at 603. Because adjudicative comity comes down to whether "the litigation can more appropriately be conducted in a foreign tribunal," *Can. Malting*, 285 U.S. at 423, courts should consider the relative strength of U.S. and foreign interests in the dispute and the adequacy of the alternative forum. When a foreign sovereign's

interests predominate over U.S. interests, the foreign nation should be permitted to address the matter within the framework of its own governmental and legal system, unless those alternatives are "clearly a sham or inadequate." *Abelesz*, 692 F.3d at 681.

The standard for prescriptive comity, also relevant here, is set forth in the Restatement (Third) of Foreign Relations Law § 403: "[A] state may not exercise jurisdiction to prescribe law" in regard to foreign persons or conduct "when the exercise of such jurisdiction is unreasonable."

A. Principles of Adjudicative Comity Support Dismissal

Hungary's interests in this controversy clearly outweigh any conceivable U.S. interest in applying American common law to regulate Hungary's conduct within its own territory affecting its own nationals. Because Hungary's interests are paramount and Plaintiffs failed to exhaust available remedies in Hungary, an adequate alternative forum, U.S. courts should not exercise jurisdiction over this dispute.

1.a. Hungary's interests predominate, first, because all relevant conduct occurred in Hungary. Comity's ultimate concern is the respect owed by one sovereign to another. Because sovereignty is bound up with territory, comity is closely linked to territoriality. All the events that give rise to Plaintiffs' claims took place more than seventy-five years ago in Hungary. Hungary, not the United States, has the strongest interest in addressing them. *See Bi v. Union Carbide Chems. & Plastics Co.*, 984 F.2d 582, 586 (2d Cir. 1993) ("[W]ere we to pass judgment on the validity of India's response to a disaster that occurred within its borders,

it would disrupt our relations with that country and frustrate the efforts of the international community to develop methods to deal with problems of this magnitude in the future.").

Not only does this case involve exclusively foreign conduct, all Plaintiffs and all putative class members were Hungarian nationals at the time relevant to the complaint. This Court has emphasized that federal courts must act, "if at all, with great caution," when asked "to craft remedies" that "claim a limit on the power of foreign governments over their own citizens." *Sosa*, 542 U.S. at 727-28. Even if a foreign state's confiscation of property from its own nationals could be deemed a violation of international law—a question this Court will address in *Philipp*—imposing common-law civil liability on another sovereign in these circumstances "would raise risks of adverse foreign policy consequences" that counsel in favor of judicial restraint. *Id.*

The profound historic and political importance of the subject matter of this litigation for Hungary also gives Hungary the paramount interest in the controversy. "[W]here 'claims arise from events of historical and political significance there 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.'" Pet. App. 71a (alteration omitted) (quoting *Philippines v. Pimentel*, 553 U.S. 851, 866 (2008)).

The atrocities committed by Hungary and other Axis powers during World War II were grievous injustices. In the early 1990s, as Hungary transitioned to a market-based democracy after decades of communist rule, it passed Compensation Acts to

redress past, unjust government policies. Under the Second and Third Compensation Acts, Hungary paid approximately $216 million in compensation vouchers to persons victimized during its fascist and communist eras. J.A. 246-47.[19] Hungary has made substantial, additional payments to Holocaust victims and Jewish organizations as well.[20]

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[19] The First Compensation Act provided additional compensation to victims of communist-era harms. The Second Compensation Act was solely for Holocaust-era victims. The third act provided compensation for injuries from both eras. *Id.*

[20] The U.S. State Department's March 2020 JUST Act Report details some of these additional payments. It notes, for example, that "[b]etween 2007 and 2013, the Hungarian government distributed . . . $21 million" in compensation for Holocaust-era property confiscations. U.S. Dep't of State, *The JUST Act Report* 85 (2020), https://www.state.gov/wp-content/uploads/2020/02/JUST-Act5.pdf. Of these funds, $7 million went "to assist survivors currently living in Hungary" and $14 million went "to fund social welfare services for needy survivors living outside of Hungary." *Id.* Hungary also provides annual funding of "approximately $200,000" to the Hungarian Jewish Foundation Public Endowment, which "distributes Holocaust-related compensation to surviving members of the Hungarian Jewish community within Hungary and abroad." *Id.* at 84. And Hungary provides "approximately $550,000" annually to support Jewish cultural organizations and archives. *Id.* at 86-87. Separately, in the decades following World War II, Hungary entered into binational settlement agreements for Holocaust-era property confiscations and other claims. These included the 1973 Agreement with the United States ($18.9 million), a 1950 agreement with France ($914,285), a 1955 agreement with Belgium and Luxembourg (95 million Belgian francs), a 1956 agreement with the United Kingdom (£4.05 million), a 1965 agreement with the Netherlands (925,000 Netherlands guilders), a 1970 agreement with Canada (1.1 million Canadian dollars), and a 1975 agreement with Belgium for supplemental claims (10 million Belgian francs). *See* J.A. 82-96; Joint Appendix at 267-

The sums paid out by Hungary are, of course, well short of the tens of billions of dollars that Plaintiffs seek to recover in this lawsuit. But the damages sought by Plaintiffs would devastate Hungary's economy today,[21] and its nascent market economy in the 1990s, when it enacted the Compensation Acts, was much weaker still. The compensation decisions Hungary made then required it to balance momentous competing interests. Its new government felt compelled to address the injustices committed by prior regimes. At the same time, it had to marshal its scarce resources to successfully transition to a modern democratic state, deprived of Soviet subsidies but free from Soviet control.

The damages Plaintiffs now seek on behalf of a putative worldwide class would redirect vast economic resources to World War II-era victims and, far more often, to their descendants, many of whom appear to reside in neither Hungary nor in the United States. The money used to satisfy any such judgment would

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320, *Simon v. Republic of Hungary*, No. 14-7082 (D.C. Cir. Oct. 8, 2014), ECF No. 1516031.

[21] A January 2019 article about this case quoted Plaintiffs' counsel on their expected damages: "We didn't put a number in this case, but if it goes forward we'll be asking for tens of billions of dollars . . . ." *See* Yaakov Schwartz, *DC Court Says Holocaust Survivors Can Sue Hungary in the US for Huge Reparations*, Times of Isr. (Jan. 16, 2019), https://www.timesofisrael.com/dc-court-says-holocaust-survivors-can-sue-hungary-in-the-us-for-huge-reparations/. According to the U.S. State Department, Hungary's GDP is approximately $156 billion. *See 2019 Investment Climate Statements: Hungary*, U.S. Dep't of State, https://www.state.gov/reports/2019-investment-climate-statements/hungary/ (last visited Sept. 4, 2020).

have to come from taxes and ultimately taxpayers, including victims of communist-era policies. And any funds paid to Plaintiffs or putative class members residing outside Hungary would likely leave the Hungarian economy permanently, to the detriment of all Hungary's current residents, including other class members who continue to live in Hungary.

As this example illustrates, how to address injustices from past generations affecting large groups of people is among the most acutely sensitive decisions that a government must make. The judges of a different country, applying blunt instruments like common-law conversion claims, are ill-equipped to make these decisions for a foreign sovereign nation and its people. *See Von Saher v. Norton Simon Museum of Art at Pasadena*, 897 F.3d 1141, 1156 (9th Cir. 2018) ("Reaching into the Dutch government's post-war restitution system would require making sensitive political judgments that would undermine international comity."), *cert. denied*, 139 S. Ct. 2616 (2019); *Freund v. Republic of France*, 592 F. Supp. 2d 540, 579 (S.D.N.Y. 2008) (Sullivan, J.) ("Refusing to abstain here would imply that federal courts possess greater aptitude than both the Executive and the French government to compensate Holocaust victims for atrocities committed by other foreign states, which occurred outside United States borders.").

In weighing Hungary's comity interests in this case, this Court should consider the question posed by the dissenting judge below: What "if the shoe were on the other foot[?]" *Philipp*, 925 F.3d at 1355 (Katsas, J., dissenting). Judge Katsas described a situation "that is a precise mirror image of *Simon*": "Imagine the

United States' reaction if a European trial court undertook to adjudicate a claim for tens of billions of dollars for property losses suffered by a class of American victims of slavery or systemic racial discrimination." *Id.*; *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 . . . based on events that happened generations ago in the United States itself.").

A growing chorus of voices in this country has called upon the U.S. government to make reparations to the descendants of persons who were enslaved here. The questions that inevitably surround these calls—Who recovers? Who pays? How much?—deserve close consideration by Congress, by state and local governments, and perhaps one day by this Court. No one seriously believes, though, that a Hungarian judge, applying domestic Hungarian law, should decide these sensitive issues and impose liability on the United States. For the same reasons, a U.S. court should not adjudicate this case against Hungary.

b. In contrast to Hungary's compelling interests, the United States has little or no interest in hosting this foreign-centered dispute in its courts or in applying American common law to regulate Hungary's conduct within its own territory affecting its own nationals. As the United States itself explained in its amicus brief in the court of appeals, "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." U.S. D.C. Cir. Amicus Br. 16.

Like the claims in *Kiobel*, Plaintiffs' claims here do not "touch and concern the territory of the United States." 569 U.S. at 124-25. The plaintiffs in *Kiobel* were "Nigerian nationals residing in the United States." *Id.* at 111. Here, the named Plaintiffs (suing for a putative worldwide class) were Hungarian nationals at the time relevant to the complaint and mostly still reside abroad, though four have become U.S. citizens.[22] The *Kiobel* plaintiffs alleged that foreign companies "aided and abetted . . . atrocities" committed by the Nigerian military in Nigeria. 569 U.S. at 113. All the relevant conduct in this case occurred in Hungary during World War II. In *Kiobel*, this Court concluded that the foreign defendants' "mere corporate presence" in the United States was not sufficient to displace the presumption against extraterritoriality. *Id.* at 125. The claimed U.S. nexus in this case is even more remote: More than six decades after World War II ended, Hungary purchased military equipment from the United States, Hungarian bonds were sold in U.S. capital markets, and persons in the United States bought tickets to ride the Hungarian railway. *Simon*, 443 F. Supp. 3d at 106-13. The United States has similar contacts—often

[22] That a handful of Plaintiffs later moved to this country does not give the United States an interest in adjudicating the dispute or in applying domestic law to foreign conduct. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 820 (1985) ("Even if a plaintiff evidences his desire for forum law by moving to the forum, we have generally accorded such a move little or no significance."); *Allstate Ins. v. Hague*, 449 U.S. 302, 311 (1981) ("[A] postoccurrence change of residence to the forum State—standing alone—[i]s insufficient to justify application of forum law.").

much stronger ones—with nearly every foreign nation.[23]

This litigation lies outside the United States' interests for a more specific reason too: The United States and Hungary are parties to the 1947 Treaty, which addresses the same property losses at issue here but does not contemplate private civil litigation as a means to obtain restitution. *See* J.A. 52-53, 61-62. And the United States and Hungary entered into the 1973 Agreement "discharg[ing] . . . all claims of the [U.S.] Government and [U.S.] nationals" against Hungary and its nationals for "property, rights and interests affected by Hungarian measures of nationalization, . . . expropriation, or other taking" prior to the agreement, as well as for Hungary's obligations under the 1947 Treaty. *Id.* at 83. Any U.S. interest in the disposition of property confiscated in Hungary during World War II was fully discharged by this settlement agreement.

More generally, the United States has not supported private litigation against foreign sovereigns as the appropriate means to seek restitution for Holocaust-era losses. Instead, "[t]he United States has advocated that concerned parties, foreign

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[23] For example, the district court held there is jurisdiction over Hungary because Hungary purchased military equipment through the U.S. government's Foreign Military Sales program. *See id.* at 109-10. According to the program's website, "some 189 countries and international organizations [currently] participate in FMS." *Foreign Military Sales FAQ*, Def. Sec. Coop. Agency, https://www.dsca.mil/resources/faq (last visited Sept. 4, 2020). By comparison, 193 countries are members of the United Nations. *See Member States*, United Nations, https://www.un.org/en/member-states/index.html (last visited Sept. 4, 2020).

governments, and non-governmental organizations act to resolve matters of Holocaust-era restitution and compensation through dialogue, negotiation, and cooperation, rather than subject victims and their families to the prolonged uncertainty and delay that accompany litigation." U.S. D.C. Cir. Amicus Br. 10.

2. Because Hungary has the predominant interest in this dispute, it should be permitted to address Plaintiffs' claims within its own governmental and legal system, unless Hungarian alternatives are "clearly a sham or inadequate." *Abelesz*, 692 F.3d at 681. The district court determined, after reviewing the parties' expert declarations and other factual submissions, "that Hungary is an adequate alternative forum for the plaintiffs' claims." Pet. App. 75a. The Seventh Circuit and the district court in Chicago reached the same conclusion in *Fischer*. *See* 777 F.3d at 859-66.

Applying standards drawn from *forum non conveniens* cases, Pet. App. 73a, the district court in this case made a number of findings that show Hungary is an adequate forum. Among them: "Hungarian courts recognize and provide damages for the types of loss of property claims alleged in the complaint"; "Hungary recognizes and enforces international law"; and "the Hungarian constitution, called the Hungarian Basic Law, explicitly requires that parties be treated fairly and equally in court" and "prohibits discrimination." *Id.* at 74a-75a (citations and alteration omitted). The district court also relied on "the extensive safeguards in place to ensure the independence of the Hungarian judiciary," *id.*, and noted that "Hungary has waived by constitutional

amendment[] any statute of limitations for claims related to crimes visited upon the Hungarian people during World War II," *id.* at 77a (citation omitted). In addition, the district court found it significant that "[o]ther 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." *Id.* And the district court observed that a number of other courts, in addition to the courts in *Fischer*, had likewise found "that Hungary provides an adequate forum for the resolution of different types of claims, including claims brought by Hungarian [H]olocaust survivors." *Id.* at 75a n.9 (citing cases).

In reaching this conclusion, the district court carefully considered and rejected the evidence and arguments submitted by Plaintiffs. The court found, for example, that "plaintiffs misleadingly overstate[d]" purported procedural hurdles, and that Plaintiffs' own expert had admitted that "the receptivity of Hungarian courts to international claims seemingly offers . . . at least one path by which [Plaintiffs] could bring their claims in Hungarian court." *Id.* at 76a-77a (citation and alteration omitted). The court likewise rejected Plaintiffs' argument that local remedies would be insufficient, noting that "plaintiffs' expert acknowledges that damages would likely be recoverable in Hungarian courts," though they "may be less than [Plaintiffs] could recover in the United States." *Id.* at 77a. The court also held that Hungary could not be deemed an inadequate forum merely because it lacks procedural devices that are rarely found outside the United States, like "an 'American-style class action' mechanism" and "the American rule

that each party presumptively bears its own costs." *Id.* at 79a. And the court found that Plaintiffs had failed to show Hungarian courts are inadequate due to anticipated "religious and ethnic prejudice" or "concerns about the independence of the Hungarian judiciary." *Id.* at 80a-81a (citations omitted).

These findings concerning judicial remedies in Hungary, together with Hungary's paramount interest in the dispute, are more than sufficient to support the district court's decision to abstain from exercising jurisdiction for reasons of international comity. The record also discloses other measures Hungary has taken to redress unjust government policies from past generations. These include the Compensation Acts passed in the early 1990s, which provide for payments to persons who suffered property losses and other injuries in Hungary during the Holocaust and communist eras. J.A. 246-47. And they include other payments by Hungary to Holocaust victims and Jewish organizations. *See supra* n.20.

3. Hungary's interests in this dispute predominate over U.S. interests, and Plaintiffs have not shown that Hungary's means of addressing the dispute are clearly a sham or inadequate, so this matter should be resolved within the Hungarian legal framework. As the United States observed in the court below: "To reject a principle of exhaustion and to proceed to resolve a dispute arising in another country, centered upon a foreign government's treatment of its own citizens, when a competent foreign court is ready and able to resolve the dispute, is the opposite of the model of 'judicial caution' and restraint contemplated by *Sosa v. Alvarez-Machain*,

542 U.S. 692 (2004)." U.S. D.C. Cir. Amicus Br. 16-17 (citation omitted).

B. Principles of Prescriptive Comity Support Dismissal

In addition to adjudicative comity, prescriptive comity independently warrants dismissal of this case because Plaintiffs seek to apply American common law to foreign conduct by foreign sovereigns affecting foreign nationals. This Court has admonished the lower courts to exercise restraint when applying *federal statutes* in circumstances like these. Here, Plaintiffs assert "garden-variety *common-law* causes of action, such as conversion, unjust enrichment, and restitution." *Simon*, 812 F.3d at 141 (emphasis added). Prescriptive comity precludes this attempt to extend judge-made domestic law to foreign controversies with no connection to the United States.

1. "It is a basic premise of our legal system that, in general, United States law governs domestically but does not rule the world." *RJR Nabisco,* 136 S. Ct. at 2100 (citation omitted). No one doubts that Congress *can* regulate some extraterritorial conduct. But "this Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations." *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004). This "serves to avoid the international discord that can result when U.S. law is applied to conduct in foreign countries." *RJR Nabisco*, 136 S. Ct. at 2100. Accordingly, U.S. courts "assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws." *Empagran*, 542 U.S. at 164. This "rule of construction [is] derived

from the principle of prescriptive comity." *Id.* (citation omitted).

Prescriptive comity counsels that—even when there is a basis for prescriptive jurisdiction—"a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of jurisdiction is unreasonable." Restatement (Third) of Foreign Relations Law § 403(1). "Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors." *Id.* § 403(2). These factors include, for example, whether "the activity takes place within the territory" of the regulating state "or has substantial, direct, and foreseeable effect" there; "the connections" like "nationality, residence, or economic activity, between the regulating state and" the parties to the dispute; and "the character of the activity to be regulated." *Id.* § 403(2)(a)-(c).

The risk of international discord—and therefore the need for prescriptive comity—is heightened in private civil litigations like this one, which lack the ballast of prosecutorial discretion exercised by another sovereign. *See RJR Nabisco*, 136 S. Ct. at 2106 ("[P]roviding a private civil remedy for foreign conduct creates a potential for international friction beyond that presented by merely applying U.S. substantive law to that foreign conduct."); *Empagran*, 542 U.S. at 171 ("[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." (citation omitted)).

Applying prescriptive comity principles, this Court concluded in *Empagran* that it would be unreasonable to apply a federal statute when, as in this case, foreign plaintiffs asserted claims based on foreign injuries:

> We thus repeat the basic question: Why is it reasonable to apply this law to conduct that is significantly foreign *insofar as that conduct causes independent foreign harm and that foreign harm alone gives rise to the plaintiff's claim*? We can find no good answer to the question.

542 U.S. at 166.

2. Prescriptive comity is ordinarily a tool of statutory interpretation. But when foreign-centered claims sound in common law, prescriptive comity is not an assumption about legislative intent but a check against judicial overreach. Courts must then decide, as this Court did in *Kiobel*, whether to recognize domestic causes of action for foreign conduct that harmed foreign nationals in foreign lands. *See* 569 U.S. at 116 (although the ATS, like the FSIA, is "strictly jurisdictional" and "does not directly regulate conduct or afford relief," the comity "principles underlying [the presumption against extraterritoriality] similarly constrain courts considering causes of action that may be brought under the ATS").

The common-law basis for recovery in this case 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." *Id.*; *see also id.* at 115-16 ("For us to run interference in . . . a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed." (citation omitted)); *Hernandez v. Mesa*, 140 S. Ct. 735, 747 (2020) ("When foreign relations are implicated, it is even more important to look for legislative guidance before exercising innovative authority over substantive law." (citation and alteration omitted)).

It is far from clear that common law even could regulate the wartime property confiscations at issue here. *See Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 421 (2003) ("Vindicating victims injured by acts and omissions of enemy corporations in wartime is . . . within the traditional subject matter of foreign policy in which the national, not state, interests are overriding . . . . [T]he consistent Presidential foreign policy has been to encourage European governments and companies to volunteer settlement funds in preference to litigation or coercive sanctions.").

But even assuming common law could apply, it shouldn't. The issue is not whether the conduct described in the complaint was wrongful—of course it was. Nor does it matter for these purposes whether wartime confiscations of property from Hungarian nationals violated international law. In the ATS context, this Court held that courts should not recognize common-law claims "even though the underlying substantive law consisted of well-established norms of international law, which by definition apply beyond this country's borders." *RJR Nabisco*, 136 S. Ct. at 2106.

The problem is that applying substantive common law to adjudicate the merits of this dispute would entangle federal *courts*—not Congress or the President—in foreign relations, and inevitably harm the United States' relationship with Hungary, a NATO ally. *Cf. Jesner*, 138 S. Ct. at 1412 (Gorsuch, J., concurring in part and concurring in the judgment) ("A group of foreign plaintiffs wants a federal court to invent a new cause of action so they can sue another foreigner for allegedly breaching international norms. In any other context, a federal judge faced with a request like that would know exactly what to do with it: dismiss it out of hand.").

To adjudicate this case, federal courts would have to adapt Plaintiffs' "garden-variety" common-law claims to fit a context that is anything but ordinary: Wartime property confiscations by foreign governments from foreign nationals on foreign soil. What significance, if any, would courts afford to the sixty-five years that elapsed between Plaintiffs' losses and the filing of their complaint? What effect would they give to Hungary's Compensation Acts and other local Hungarian efforts to address these historic wrongs? How would they account for the 1973 Agreement and similar settlements with other nations discharging claims against Hungary for these same property losses? And how would U.S. courts balance "the nearly existential threat of a $75 billion lawsuit" by Holocaust survivors and their descendants against the needs of Hungary and its people today? *Philipp*, 925 F.3d at 1357 (Katsas, J., dissenting).

The answers to these questions cannot be divined from a "transcendental body" of common law

"outside of any particular State." *Sosa*, 542 U.S. at 725 (citation omitted). Federal judges would have to make these calls and countless others that would inevitably ensnare them in foreign relations. The obvious "potential for international controversy . . . militates against recognizing foreign-injury claims without clear direction from Congress." *RJR Nabisco*, 136 S. Ct. at 2107.

CONCLUSION

This Court should reverse the court of appeals' decision and remand with instructions to affirm the district court's dismissal on the ground of comity.

Respectfully submitted,

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APPENDIX

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The Foreign Sovereign Immunities Act provides in relevant part:

28 U.S.C. § 1604. Immunity of a foreign state from jurisdiction.

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. § 1605(a)(3). General exceptions to the jurisdictional immunity of a foreign state.

(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 . . . .

28 U.S.C. § 1606. Extent of liability.

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages . . . .