No. 19-351 and No. 18-1447

IN THE

Supreme Court of the United States

FEDERAL REPUBLIC OF GERMANY, ET AL.,

Petitioners,

v.

ALAN PHILIPP, ET AL.,

Respondents.

REPUBLIC OF HUNGARY, ET AL.,

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 MEMBERS OF THE UNITED STATES HOUSE OF REPRESENTATIVES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Amici curiae are Members of the United States House of Representatives. They have a fundamental, institutional interest in safeguarding Congress's legislative prerogative to extend or deny immunity to foreign sovereigns in particular situations and in ensuring that the Foreign Sovereign Immunities Act is faithfully applied by the courts in accordance with Congress's intent. The names of individual *amici* are listed in the Appendix.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

In the decades since World War II, Congress has repeatedly enacted legislation designed "to provide a measure of justice to survivors of the Holocaust all around the world."[2] Congress's decision, as codified in the Foreign Sovereign Immunities Act ("FSIA" or "Act"), to subject foreign nations to suit in United States courts in "any case . . . in which rights in property taken in violation of international law are in issue," 28 U.S.C. § 1605(a)(3), is consistent with, and essential to, that legislative aim. By permitting Respondents here—Holocaust victims and their descendants—to pursue actions seeking recovery of property seized as part of a genocidal campaign

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[1] All parties have consented to the filing of this brief. *Amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] Holocaust Victims Redress Act, Pub. L. No. 105-158, 112 Stat. 15 (1998); *see also infra* Pt. II (detailing various legislation aimed at providing redress for victims of the Holocaust).

against the Jewish population, the D.C. Circuit correctly identified and gave effect to Congress's intent. The decisions below should therefore be affirmed.

Notwithstanding Congress's clear legislative intent, Petitioners seek to avoid litigation in United States courts by urging this Court to endorse a policy of judicial abstention based on considerations of international comity. That position, if adopted, would constitute an impermissible judicial usurpation of Congress's powers. Through enactment of the FSIA, Congress exercised its incontrovertible authority to decide, as a matter of international comity and federal law, "whether and under what circumstances foreign nations [w]ould be amenable to suit in the United States." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493 (1983). Accordingly, federal courts must abide by their "virtually unflagging obligation . . . to exercise the jurisdiction given to them" here. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). Were this Court to adopt Petitioners' argument and authorize ad hoc judicial decisions regarding international comity, it would eviscerate FSIA's uniform framework for determining the bounds of sovereign immunity and revert to the same state of "disarray" that Congress sought to (and did) remedy through enactment of the statute. *Republic of Argentina v. NML Capital, Ltd.*, 573 U.S. 134, 141 (2014).

The Court should respect Congress's clear legislative intent and permit Holocaust victims and their families the opportunity to seek justice in this nation's courts for genocidal takings.

ARGUMENT

I. THE FSIA REPLACED AD HOC FOREIGN SOVEREIGN IMMUNITY DETERMINATIONS WITH A COMPREHENSIVE FRAMEWORK TO BE UNIFORMLY APPLIED BY THE COURTS.

Through enactment of the FSIA in 1976, Congress sought to replace an ad hoc regime of foreign sovereign immunity—which at the time was riddled with uncertainties and subject to the political motivations of the Executive Branch—with an objective framework that could be uniformly applied to determine whether and when foreign sovereigns would be subject to suits by private litigants in United States courts.

A. Prior to Congress's Enactment of the FSIA, the Regime of Sovereign Immunity Was in a State of Disarray.

This Court has long recognized that foreign sovereign immunity is inseparable from, and indeed premised upon, considerations of international comity. As Chief Justice Marshall recognized in the foundational decision of *Schooner Exchange v. M'Faddon*, 7 Cranch 116, 136 (1812), foreign sovereigns have no legal right to immunity in our courts. Rather, "as a matter of comity, members of the international community ha[ve] implicitly agreed to waive the exercise of jurisdiction over other sovereigns in certain classes of cases." *Republic of Austria v. Altmann*, 541 U.S. 677, 688 (2004) (citing *Schooner Exch.*, 7 Cranch at 137). Foreign sovereign immunity is thus not a constitutional command, nor a matter of right, but the product of "grace and comity on the part of the United States." *Verlinden*, 461 U.S. at 486.

In accordance with this conception of foreign sovereign immunity as a "gesture of comity," courts have consistently "resolved questions of foreign sovereign immunity by deferring to the 'decisions of the political branches . . . on whether to take jurisdiction.'" *Altmann*, 541 U.S. at 696 (alteration in original) (citation omitted). Until 1952, this largely meant deferring to the Executive Branch's "policy of requesting immunity in all actions against friendly sovereigns." *Id.* at 689.

That year, the State Department abandoned what effectively had been a regime of "complete immunity from suit" in favor of the "restrictive theory" of foreign sovereign immunity. *Verlinden*, 461 U.S. at 486–87. This evolution in sovereign immunity policy, born of the so-called "Tate Letter" sent by the State Department to the Attorney General in 1952, heralded a regime in which immunity would be reserved for actions involving the foreign sovereign's public acts, but not its "private" commercial acts. *See* Letter from Jack B. Tate, Acting Legal Adviser, Department of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), *reprinted in* 26 Dep't of State Bull. 984, 984–85 (1952) ("Tate Letter"); *see also NML Capital*, 573 U.S. at 140.

This "restrictive theory" of foreign sovereign immunity, however, was not codified into law, *Verlinden*, 461 U.S. at 487, and the Tate Letter, for its part, was "very general in its terms" and did not "provide any criterion to distinguish commercial from public transactions," Hazel Fox & Philippa Webb, *Law of State Immunity* 145–46 (3d ed. 2013). Application of the restrictive theory continued to depend on the State Department's case-by-case "suggestions of immunity," *Verlinden*, 461 U.S. at 487, which "appeared to turn

more on political considerations than legal principle." Fox & Webb, *supra*, at 146. As this Court has noted, "foreign nations often placed diplomatic pressure on the State Department in seeking immunity," leading at times to "suggestions of immunity in cases where immunity would not have been available under the restrictive theory." *Verlinden*, 461 U.S. at 487. Complicating matters further, foreign nations did not always make immunity requests to the State Department, leaving the courts to determine whether immunity existed in a given case, "generally by reference to prior State Department decisions." *Id.*; Fox & Webb, *supra*, at 146 ("The initiative rested with the foreign State whether to plead immunity and whether to pursue it through the courts or to refer it to the State Department, and if so whether to apply diplomatic influence.").

Together, these uncertainties left the regime of sovereign immunity in a state of "disarray." *NML Capital*, 573 U.S. at 141. Decisions were "politically and foreign policy motivated" and "subject to diplomatic pressures," with no clearly-defined nor uniformly-applied governing standards. Michael D. Murray, *Jurisdiction Under the Foreign Sovereign Immunities Act for Nazi War Crimes of Plunder and Expropriation*, 7 N.Y.U. J. Legis. & Pub. Pol'y 223, 254 (2004); *Verlinden*, 461 U.S. at 487. Private litigants were consequently "left in great uncertainty as to whether [their] legal dispute would be decided by 'non-legal considerations through the foreign government's intercession with the Department of State.'" Fox & Webb, *supra*, at 146 (citation omitted).

It was precisely this "bedlam," *NML Capital*, 573 U.S. at 141, which became a "motivating factor for the

codification and standardization of the restrictive theory" through *legislative action*. Murray, *supra*, at 254.

B. Congress Enacted the FSIA to Provide an Objective Set of Legal Standards Governing the Bounds of, and Exceptions to, Foreign Sovereign Immunity.

It is "undisputed" that Congress has the prerogative and power "to decide, as a matter of federal law, whether and under what circumstances foreign nations should be amenable to suit in the United States." *Verlinden*, 461 U.S. at 493. In 1976, Congress exercised that power and brought order to the chaos of foreign sovereign immunity determinations by passing the FSIA. *Id.*

The FSIA sets forth a "comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state." *NML Capital*, 573 U.S. at 141 (citation omitted). Specifically, the FSIA establishes a "general grant of immunity" for foreign sovereigns, then carves out exceptions to immunity for certain types of actions. *Altmann*, 541 U.S. at 691; 28 U.S.C. §§ 1604–07.[3] Congress explicitly stated, in mandatory language, that "[a] foreign state *shall not be immune* from the jurisdiction of courts of the

[3] Exceptions to the general grant of immunity include actions in which the foreign state has waived its immunity, § 1605(a)(1), and actions based on the foreign state's commercial activities in the United States or causing a direct effect in the United States, § 1605(a)(2). Exceptions also exist for certain actions that involve: property taken in violation of international law, § 1605(a)(3); rights in real estate and gifted or inherited property in the United States, § 1605(a)(4); certain torts within the United States, § 1605(a)(5); certain agreements to arbitrate, § 1605(a)(6); maritime liens, § 1605(b); foreclosure of preferred mortgages, § 1605(d); terrorism-related claims, §§ 1605A, 1605B; and certain counterclaims, § 1607.

United States" where any of those exceptions apply. 28 U.S.C. § 1605(a) (emphasis added); *see also Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (recognizing that "shall" is "mandatory" and "normally creates an obligation impervious to judicial discretion"). The FSIA thus grants jurisdiction—and expressly denies immunity—for certain claims, thereby providing a forum for the vindication of those claims in United States federal courts. *See* 28 U.S.C. § 1330(a) (establishing federal subject matter jurisdiction "as to any claim for relief . . . with respect to which the foreign state is not entitled to immunity . . . under sections 1605–1607 of this title").

The FSIA's "comprehensive" scheme shifted determinations of foreign sovereign immunity from a regime of ad hoc, politically-influenced Executive Branch decisions to a system of predictable, judicially-applied legal standards. *See Verlinden*, 461 U.S. at 488. This was not a matter of Congress transferring discretionary, case-by-case decision-making from the Executive Branch to the Judiciary. The FSIA did not empower courts to make foreign policy decisions, to determine sovereign immunity based on their own weighing of diplomatic considerations, or to invent extra-statutory factors to apply, as if judges were simply enrobed State Department officials. Rather, Congress explicitly intended to "reduc[e] the foreign policy implications of immunity determinations and assur[e] litigants that these often crucial decisions are made on purely legal grounds." H.R. Rep. 94-1487, at 7.

In other words, the FSIA was designed to standardize immunity decisions in order to ensure a "uniform body of law." H.R. Rep. 94-1487, at 32. Predictability and uniformity of application was key—the

FSIA was designed to replace case-by-case determinations of the Executive with legislatively-prescribed rules, to be applied consistently by the courts. Fox & Webb, *supra*, at 238–39 (the FSIA "minimize[d] the foreign policy implications," provided "clearer legal standards," and established immunity "as a predictable certain rule, if at times substantively unfavourable" to a sovereign); *Altmann*, 541 U.S. at 737 (Kennedy, J., dissenting) ("With the FSIA, Congress tried to settle foreign sovereigns' prospective expectations for being subject to suit in American courts.").

The FSIA is now the *sole* governing authority over "whether a foreign state is entitled to sovereign immunity." *NML Capital*, 573 U.S. at 141–42; *see also Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 611 (1992) ("The FSIA thus provides the 'sole basis' for obtaining jurisdiction over a foreign sovereign in the United States." (citation omitted)). Indeed, Congress said so expressly in passing the FSIA, directing that "[c]laims of foreign states to immunity should henceforth be decided by courts . . . in conformity with the principles set forth in this [Act]." 28 U.S.C. § 1602. "[A]ny sort of immunity defense made by a foreign sovereign in an American court must stand on the Act's text. Or it must fall." *NML Capital*, 573 U.S. at 141–42.

Because foreign sovereign immunity is and always has been a matter of "grace and comity," Congress, by setting forth the areas for which the United States will and will not afford foreign sovereign immunity, has necessarily considered the scope of the "grace and comity" the United States is willing to extend, and codified those considerations in the text of the FSIA. *Verlinden*, 461 U.S. at 486, 488; *Samantar v. Yousuf*, 560 U.S. 305, 313 (2010) (one of the FSIA's

"primary purposes" is "to endorse and codify the restrictive theory of sovereign immunity"); 28 U.S.C. § 1602; *see also, e.g.*, H.R. Rep. 94-1487, at 7 (the FSIA is intended to "codify" the restrictive principle of sovereign immunity).

II. THE FSIA'S EXCEPTION FOR GENOCIDAL TAKINGS IS CONSISTENT WITH CONGRESS'S REPEATED LEGISLATIVE EFFORTS TO PROVIDE REDRESS FOR VICTIMS OF THE HOLOCAUST.

Congress has repeatedly made clear that it expects U.S. courts to adjudicate claims against foreign sovereigns that fall within an exception to sovereign immunity codified in the FSIA. The FSIA should be interpreted and applied accordingly.

In passing the FSIA, Congress intended to "encourage the bringing of actions against foreign states in Federal courts." H.R. Rep. 94-1487, at 13; *see also* Joseph W. Dellapenna, *Suing Foreign Governments and Their Corporations* v (1998) ("When Congress enacted the Foreign Sovereign Immunities Act of 1976, it intended to encourage suits in U.S. courts against foreign governments and foreign-government-owned corporations."). Thus, jurisdiction extends to "*any claim* with respect to which the foreign state is not entitled to immunity" under the exceptions listed in 28 U.S.C. §§ 1605–07. H.R. Rep. 94-1487, at 13 (emphasis added).

Among those exceptions is the "expropriation exception," under which foreign sovereigns "*shall not be immune* from the jurisdiction of courts of the United States or of the States in any case . . . in which rights in property taken in violation of international law are in issue." 28 U.S.C. § 1605(a)(3) (emphasis added). Per the statute's plain—and mandatory—terms and

Congress's expressly articulated intent, therefore, the FSIA could not be clearer that it expects—indeed, "encourage[s]"—claimants to be able to bring suit against a foreign sovereign in federal court to redress takings "in violation of international law." H.R. Rep. 94-1487, at 13, 19–20.

As the D.C. Circuit recognized below in *Philipp*, although domestic takings of property—that is, a foreign state's taking of its own citizen's property—usually do not violate international law, it can hardly be debated that commission of genocide *does* violate international law,[4] and takings that "amounted to the commission of genocide," even if against a sovereign's own citizens, therefore subject the foreign sovereign and its instrumentalities to the FSIA's expropriation exception. *Philipp v. Federal Republic of Germany*, 894 F.3d 406, 410–11 (D.C. Cir. 2018); *see also Philipp*, Resp. Br. 11–13, 26–28.

The Nazi expropriation of art and other property was a genocidal taking that was part and parcel of that most heinous and unequivocal violation of international law—the Holocaust. Indeed, Congress has repeatedly made this exact finding, and codified it as law, in its consistent and repeated legislative efforts to facilitate redress for victims of the Holocaust.

For example, in the Holocaust Victims Redress Act of 1998, Congress acknowledged that "[t]he Nazis'

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[4] "All U.S. courts to consider the issue" have recognized genocide as "a violation of customary international law." *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 675 (7th Cir. 2012) (collecting cases); *see also* Convention on the Prevention and Punishment of the Crime of Genocide, art. 1, Dec. 9, 1948, 78 U.N.T.S. 277 (affirming that "genocide, whether committed in time of peace or in time of war, is a crime under international law").

policy of looting art was a critical element and incentive in their campaign of genocide." Holocaust Victims Redress Act, Pub. L. No. 105-158, 112 Stat. 15, § 201(4) (1998). That Act further directed that "all governments should undertake good faith efforts to facilitate the return of private and public property, such as works of art, to the rightful owners in cases where assets were confiscated from the claimant during the period of Nazi rule." *Id.* at § 202. That same year, Congress passed the U.S. Holocaust Assets Commission Act of 1998, establishing a presidential commission to study the disposition of assets of Holocaust victims, including art, that passed through U.S. government hands. Pub. L. No. 105-186, 112 Stat. 611 (1998).

In 2016, Congress passed the Holocaust Expropriated Art Recovery Act ("HEAR Act"), which presupposes the viability of, and seeks to facilitate, litigation to recover art and other property that was misappropriated by the Nazis. The HEAR Act stated Congress's finding that "the Nazis confiscated or otherwise misappropriated hundreds of thousands of works of art and other property throughout Europe as part of their genocidal campaign against the Jewish people and other persecuted groups," and extended the statute of limitations for claimants to bring actions for cultural property "lost" between January 1, 1933 to December 31, 1945 "because of Nazi persecution." Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, §§ 2(1), 5(1) 130 Stat. 1524, 1524, 1526.

The HEAR Act unambiguously manifests Congress's intent for Holocaust victims and their heirs, like the Respondents here, to be able to bring their claims for genocidal takings against sovereigns in U.S. courts. By the time that Congress passed the

HEAR Act in 2016, the D.C. Circuit in *Simon v. Republic of Hungary*, 812 F.3d 127 (D.C. Cir. 2016) had already held that genocidal takings claims were subject to the expropriation exception under the FSIA. Had Congress intended the reach of the expropriation exception to be limited by the domestic takings rule, it could and would have so clarified in the HEAR Act; instead, it actively sought to *expand* avenues for the kind of relief sought here.[5]

Another 2016 law further exemplifies Congress's intent to permit certain domestic takings claims to proceed under the expropriation exception. With the Foreign Cultural Exchange Jurisdictional Immunity Clarification Act ("FCEJICA"), Congress amended the FSIA itself by adding subsection (h) to 28 U.S.C. § 1605. Pub. L. No. 114-319, 130 Stat. 1618 (2016). The new subsection (h) provides that the temporary exhibition in the United States of artworks owned by a foreign State is not, under certain circumstances, "commercial activity" by that State for purposes of the FSIA, and thus the exhibition of that artwork will not result in the denial of immunity to the foreign sovereign under the expropriation exception. 28 U.S.C. § 1605(h)(1). However, Congress created an express carve-out for property that is the subject of "Nazi-era" expropriation claims. 28 U.S.C. § 1605(h)(2). Under that exception, immunity will nevertheless be denied

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[5] Indeed, while Petitioners in *Philipp* had originally interposed a statute of limitations defense, they withdrew that argument in light of the HEAR Act. *See Philipp v. Federal Republic of Germany*, 248 F. Supp. 3d 59, 63 n.1 (D.D.C. 2017); *see also, e.g.*, *de Csepel v. Republic of Hungary*, 2020 WL 2343405, at *34 (D.D.C. May 11, 2020) (applying the HEAR Act to Holocaust art recovery claim brought pursuant to the FSIA's expropriation exception).

in cases concerning property taken in violation of international law between January 30, 1933 and May 8, 1945 by the government of Germany or any government in Europe that was occupied by, assisted, or allied with Germany. 28 U.S.C. § 1605(h)(2)(A), (3)(B), (3)(C). Again, like the HEAR Act, Congress passed the FCEJICA after courts had already allowed claims for genocidal takings under the expropriation exception to proceed. The unavoidable implication of the FCEJICA's "Nazi-era claims" exception is that the FSIA has never afforded, and should not now be interpreted to afford, sovereign immunity to genocidal takings claims like the ones alleged here.

Indeed, the FCEJICA goes even further than "Nazi-era claims" and extends its exception broadly to other claims well beyond the limits of the domestic takings rule. In addition to the "Nazi-era claims" exception, the FCEJICA excepts from its "temporary exhibition" rule property that was taken "after 1900" "in connection with the acts of a foreign government as part of a systematic campaign of coercive confiscation or misappropriation of works from members of a targeted and vulnerable group." 28 U.S.C. § 1605(h)(2)(B). This exception reflects Congress's approval of an expansive array of expropriation claims, with no suggestion whatsoever that the "systematic campaign of coercive confiscation or misappropriation" must be carried out only against a *foreign* group of "targeted and vulnerable" people. *Id.* Had Congress intended to limit the expropriation exception and the FCEJICA to the confines of the domestic takings rule, it would have done so. It did not. To the contrary, Congress spoke in capacious terms, consistent with its repeated efforts to facilitate suits under the FSIA and its repeated efforts to facilitate redress for victims of genocidal takings, regardless of

the particular state boundaries within which that genocide occurred.

The *Philipp* Petitioners' contention that "Congress never intended" the expropriation exception to confer a "vast grant of federal jurisdiction over foreign states" ignores this history. *Philipp*, Pet. Br. 2–3. Congress has explicitly sanctioned claims arising from over a century of wrongs carried out by sovereigns against "targeted and vulnerable" groups, repeatedly sought to facilitate redress for Nazi-era takings, and made clear its intent at the genesis of the FSIA to "encourage" claims against sovereigns in federal courts. The D.C. Circuit's decisions below jibes with and furthers that congressional intent.[6]

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[6] Petitioners' contention that the expropriation exception departs from the restrictive theory of sovereign immunity, which the FSIA otherwise intended to codify, is of no moment and certainly not a reason to read the exception narrowly. *See Philipp*, Pet. Br. 33–34. As this Court has stated, "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 Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1321 (2017). The expropriation exception is, in any event, unique—it has "no parallel . . . in the practice of other States." Fox & Webb, *supra*, at 267. There is thus no basis to cram this *sui generis* exception to sovereign immunity into customary conceptions of the restrictive theory; its very existence marks it as a departure. Given Congress's robust support for redressing Holocaust property crimes, and its expansive understanding of the contours of the expropriation exception, *see* 28 U.S.C. § 1605(h)(2), that exception should be read to deny immunity and establish jurisdiction for claims like the ones alleged here.

III. CONGRESS HAS ALREADY DECIDED, AS A MATTER OF COMITY, TO EXCEPT SOVEREIGN IMMUNITY FOR GENOCIDAL TAKINGS, AND COURTS SHOULD NOT NOW SECOND-GUESS THAT LEGISLATIVE COMMAND.

Notwithstanding the FSIA's plain text, Congress's broad conception of the expropriation exception, and its unambiguous intent to facilitate claims like Respondents', Petitioners contend that courts should be free to cast all of that aside and abstain, under "principles of comity," from hearing claims for which Congress has conferred jurisdiction and expressly denied immunity. *Philipp*, Pet. Br. 41; *see also Simon*, Pet. Br. 29 ("Even when a foreign state lacks sovereign immunity under the FSIA . . . the court may abstain on the ground of comity when the dispute can more appropriately be resolved by a different sovereign."). Such a judicial usurpation of Congress's powers is improper under our constitutional framework.

A. The FSIA Reflects Congress's Express Determinations Regarding When Comity Should and Should Not Result in Sovereign Immunity, to Which Courts Should Defer.

This Court has made clear that "federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996); *see also Colorado River*, 424 U.S at 821 (noting the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given to them"). A court's refusal to hear a case properly before it improperly "encroach[es] on Congress's prerogative to set the jurisdiction of the federal courts" and "risks undermining Congress's regulatory goals." Maggie Gardner, *Abstention at the Border*, 105 Va. L. Rev. 63, 68, 83–84

(2019); *see New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 359 (1989) ("Congress, and not the Judiciary, defines the scope of federal jurisdiction.").

Here, Petitioners would have the courts, at their discretion, commit the dual constitutional trespasses of overriding Congress's "undisputed" Article I power to decide "whether and under what circumstances foreign nations should be amenable to suit in the United States" and relinquishing their Article III duty to hear cases properly before them. *Verlinden*, 461 U.S. at 493. This Court should not sanction such a negation and abrogation of the constitutional order.

Congress could not have been clearer that under the FSIA, "[a] foreign state *shall not be immune from the jurisdiction* of courts of the United States or of the States in *any case*" in which an enumerated exception applies, 28 U.S.C. § 1605(a) (emphasis added), and that "[t]he district courts *shall have original jurisdiction* . . . of any nonjury civil action against a foreign state" for any claim not entitled to immunity under the FSIA's exceptions, 28 U.S.C. § 1330(a) (emphasis added). This mandatory language is "impervious to judicial discretion." *Lexecon*, 523 U.S. at 35. Federal courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 376 (2012) (quoting *Cohens v. Virginia*, 6 Wheat. 264, 404 (1821)).

Petitioners contend that none of the foregoing principles matter here because "[c]omity-based abstention differs from jurisdiction." *Philipp*, Pet. Br. 41; *Simon*, Pet. Br. 28 ("comity-based abstention is not an 'immunity defense'"). According to Petitioners, courts should be free to decline to hear cases for which

they indisputably have proper jurisdiction if, in their discretion, the dispute "risk[s] international friction, pose[s] serious concerns to a foreign sovereign, and [has] little connection to the United States," *Philipp*, Pet. Br. 41, or if they simply believe it should be "adjudged elsewhere" or that exercising jurisdiction is "unreasonable," *Simon*, Pet. Br. 24, 35. But this fundamentally misunderstands the nature of international comity and sovereign immunity, as well as the purposes of the FSIA as the embodiment of Congress's categorical comity determinations.

As this Court has repeatedly recognized, sovereign immunity is itself a matter of—and inseparable from—international comity. *See supra*, Part I.A; *see also, e.g.*, *Verlinden*, 461 U.S. at 486 (sovereign immunity is a matter of "grace and comity on the part of the United States"); *Altmann*, 541 U.S. at 696 (the extension of sovereign immunity is a "gesture of comity"). This is precisely why courts have deferred to the political branches in determining questions of sovereign immunity: it is up to the political branches to extend or withhold that comity to foreign powers. *See Bank Markazi v. Peterson*, 136 S.Ct. 1310, 1329 (2016) ("[I]t remains Congress' prerogative to alter a foreign state's immunity," and in so doing, it "act[s] comfortably within the political branches' authority over foreign sovereign immunity and foreign-state assets.").

When Congress passed the FSIA—which this Court has emphasized "comprehensively regulat[es] the amenability of foreign nations to suit"—it necessarily balanced the competing interests involved in deciding which areas should be "grace[d]" with the United States' comity, and set forth its conclusions in the text of the statute. *Verlinden*, 461 U.S. at 493,

486; *see also Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 822 (2018) ("Congress enacted the FSIA in an effort to codify this careful balance between respecting the immunity historically afforded to foreign sovereigns and holding them accountable, in certain circumstances, for their actions."). Petitioners' suggestion that comity concerns are somehow different from "immunity defense[s]" is thus contrary to the very conception of sovereign immunity. *Philipp*, Pet. Br. 48–49; *Simon*, Pet. Br. 28. And as this Court has stated, "any sort of immunity defense . . . must stand on the [FSIA's] text. Or it must fall." *NML Capital*, 573 U.S. at 141–42.

The text of the statute provides no discretion for courts to supplant Congress's foreign policy decisions with their own by refusing, on a case-by-case basis, to adjudicate claims that are properly before them on comity grounds. Congress has, in carving out specifically enumerated exceptions from the FSIA's general grant of immunity, by definition already weighed comity considerations; with respect to the expropriation exception at issue here, it has already decided that when a foreign sovereign expropriates property in violation of international law, the United States will not extend comity toward it and will not abstain from hearing claims against it. Courts should not be permitted to override that decision.

To do so would be wholly contrary to the purposes of the FSIA. In passing the FSIA, Congress sought to ground foreign sovereign immunity decisions in the uniform, categorical, *legal* standards provided by statute, moving away from the prior regime of foreign policy-based, ad hoc executive discretion. *Id.* at 141; H.R. Rep. 94-1487, at 7 (FSIA intended to "reduc[e] the foreign policy implications of immunity determinations

and assur[e] litigants that these often crucial decisions are made on purely legal grounds"); Fox & Webb, *supra*, at 249 ("The FSIA itself speaks loudly against a discretionary view of sovereign immunity."). Vague, discretionary considerations of "comity" are decidedly *not* "legal" standards. *Pravin Banker Assocs., Ltd. v. Banco Popular Del Peru*, 109 F.3d 850, 854 (2d Cir. 1997) (comity is a "rule of practice, convenience, and expediency, rather than of law"); *see also In re Picard, Tr. for Liquidation of Bernard L. Madoff Inv. Sec. LLC*, 917 F.3d 85, 101 (2d Cir. 2019), *cert. denied sub nom. HSBC Holdings PLC v. Picard*, 140 S. Ct. 2824 (2020) ("Adjudicative comity abstention . . . concerns a matter of judicial discretion."); *JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V.*, 412 F.3d 418, 423 (2d Cir. 2005) ("[T]he doctrine [of international comity] is not an imperative obligation of courts but rather is a discretionary rule of practice, convenience, and expediency."). Subjecting each case to a court's own comity analysis would negate Congress's intent and simply replace ad hoc executive discretion with ad hoc judicial discretion. Instead of the State Department making politicized, case-by-case foreign policy decisions to determine immunity, it would now be courts doing so.

For example, Petitioners in *Simon* would have courts wade through a panoply of extra-statutory factors in each case, including, under the rubric of "adjudicative comity," the "historic and political importance of the subject matter" to the foreign sovereign; other laws it may have passed to "redress past, unjust government policies"; how much the sovereign may have already paid to others individuals for other wrongs; the size of any potential recovery and its impact on the sovereign's economy; the degree of the United States' interest in the litigation and the nature of its economic

and diplomatic relationship with the foreign sovereign; and the adequacy of local remedies. *Simon*, Pet. Br. 36–39. But that is not all. Separately, under the rubric of "prescriptive comity," courts must also consider whether hearing a case otherwise properly before it is "unreasonable," which is determined by "evaluating all relevant factors." *Id.* at 47.

This kind of free-wheeling judicial factor-hunting is not only inconsistent with, but is in fact diametrically opposed to, the FSIA's "comprehensive" scheme. *NML Capital*, 573 U.S. at 141. Indeed, permitting courts to graft a discretionary comity determination onto every case before them would be even worse than the "bedlam" that predated the FSIA; the judiciary is simply not equipped to make these kinds of policy decisions. *See Hernandez v. Mesa*, 140 S. Ct. 735, 749 (2020) ("Foreign policy . . . decisions are delicate, complex, and involve large elements of prophecy for which the Judiciary has neither aptitude, facilities, nor responsibility."). "The political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns." *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1403 (2018).

Courts should not be free to effectively shield sovereigns from liability for wrongs that Congress has already decided are redressable in United States courts. Congress expressly conferred jurisdiction over such claims, and it is "[t]he duty of the judiciary is to exercise th[at] jurisdiction." *Burford v. Sun Oil Co.*, 319 U.S. 315, 348 (1943) (Frankfurter, J., dissenting).

B. The Expropriation Exception Remains Subject to Numerous Constraints.

Although courts should not refrain, on comity grounds, from adjudicating claims that fall under the

expropriation exception, that exception remains subject to—and, as appropriate, limited by—numerous limitations, including statutory constraints, an exacting pleading standard, federal common-law doctrines such as forum non conveniens, and other procedural hurdles such as class certification requirements. To prevail, any plaintiff will also bear the burden of proving his or her claims on the merits. Petitioners' purported concern regarding a potential cascade of litigation against foreign sovereigns is entirely overblown.

In order to avail itself of the FSIA's expropriation exception, a plaintiff must establish not only that her rights in the subject property were "taken in violation of international law," but also that there is an adequate nexus between that property and a commercial activity (or activities) in the United States. *See* 28 U.S.C. § 1605(a)(3); *de Csepel v. Republic of Hungary*, 859 F.3d 1094, 1101 (D.C. Cir. 2017) (expropriation exception requires "an adequate commercial nexus between the United States and the defendants").

Further, this Court has held that a plaintiff's mere assertion of a "nonfrivolous" expropriation claim is insufficient to support jurisdiction under the FSIA. *See Helmerich*, 137 S. Ct. at 1316. Instead, a plaintiff's "relevant factual allegations must make out *a legally valid claim*," and courts "should normally resolve [] factual disputes and reach a decision about immunity as near to the outset of the case as is reasonably possible." *Id.* at 1316–17 (emphasis added); *see also Rukoro v. Federal Republic of Germany*, 2020 WL 5666695, at *4 (2d Cir. Sept. 24, 2020) (holding that although the "conclusory allegations in the amended complaint" might "satisfy a plausibility standard," they did not satisfy *Helmerich*'s "valid argument standard").

Finally, common-law doctrines such as forum non conveniens remain applicable as limiting principles for FSIA claims, *see Verlinden*, 461 U.S. at 490 n.15 (recognizing the applicability of other "traditional" federal common law doctrines like forum non conveniens in FSIA cases), as do rules governing the certification of class actions, *see generally* Fed. R. Civ. P. 23. Those doctrines and rules remain wholly within the judiciary's power to employ and enforce before an action proceeds to the merits. And in order to prevail on the merits, any plaintiff would have to prove each element of the underlying causes of action asserted.

Petitioners' arguments concerning the international relations consequences of affirmance are, thus, greatly exaggerated. And regardless, they "are better directed to that branch of government with authority to amend the Act"—Congress. *NML Capital*, 573 U.S. at 146.

CONCLUSION

The judgments of the United States Court of Appeals for the District of Columbia Circuit should be affirmed.

Respectfully submitted.

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APPENDIX A:

Amici Curiae Members of the United States House of Representatives

The following Members of the United States House of Representatives respectfully submit the foregoing brief as *amici curiae*.

Rep. Jim Banks
(R-IN-3)

Rep. Josh Gottheimer
(D-NJ-5)

Rep. Deborah Wasserman Schultz
(D-FL-23)

Rep. Steve Chabot
(R-OH-1)

Rep. Brian Fitzpatrick
(R-PA-1)