Nos. 18-1447 & 19-351

IN THE
Supreme Court of the United States

REPUBLIC OF HUNGARY, ET AL.,
Petitioners,
v.

ROSALIE SIMON, ET AL.,
Respondents.

FEDERAL REPUBLIC OF GERMANY, ET AL.,
Petitioners,
v.

ALAN PHILIPP, ET AL.,
Respondents.

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

BRIEF OF PROFESSORS WILLIAM S. DODGE AND MAGGIE GARDNER AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici are law professors who have written extensively about doctrines of international comity, including the new doctrine of abstention that petitioners and the United States urge this Court to adopt.

William S. Dodge is Martin Luther King, Jr. Professor of Law and John D. Ayer Chair in Business Law at the University of California, Davis, School of Law. He served from 2011 to 2012 as Counselor on International Law to the Legal Adviser at the U.S. Department of State and from 2012 to 2018 as a Reporter for the Restatement (Fourth) of the Foreign Relations Law of the United States (Am. Law Inst. 2018).[2] His writings include *International Comity in American Law*, 115 Colum. L. Rev. 2071 (2015).

Maggie Gardner is Associate Professor of Law at Cornell Law School. Her article *Abstention at the Border*, 105 Va. L. Rev. 63 (2019), provided the first comprehensive treatment of abstention based on international comity.

Amici draw on their expertise to explain several key points: First, the doctrine of prudential comity abstention urged by petitioners and the United States is not well-established but was developed only recently

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they and *amici* authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), counsel for *amici* also represent that all parties have consented to the filing of this brief.

[2] Professor Dodge files this brief in his personal capacity, and the views expressed here should not be taken to represent the views of the Amercian Law Institute.

by the Ninth and Eleventh Circuits. Second, that discretionary doctrine, which is in tension with the limits this Court has placed on other doctrines of restraint, would necessarily apply to private parties if adopted here, with unpredictable consequences. Third, this Court need not take that leap in the dark because existing doctrines already address comity concerns in cases like these.

SUMMARY OF ARGUMENT

I. Chief Justice John Marshall observed nearly two hundred years ago that federal courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821). Since then, this Court has repeatedly emphasized "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976); *see also W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., Int'l*, 493 U.S. 400, 409 (1990) ("Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them."). Although there are limited exceptions to this fundamental obligation, *see Colorado River*, 424 U.S. at 813-19, petitioners' prudential comity abstention doctrine is not one of them.

A. Petitioners' argument is based on the false premise that prudential comity abstention has "a long pedigree." Hungary Br. 22; *see also* Germany Br. 3; U.S. *Hungary* Br. 8. Many doctrines of international comity do have a long history in American law, some stretching back to the Founding. But no doctrine allowing a federal court to decline jurisdiction based

on balancing U.S. interests, foreign government interests, and the adequacy of the foreign forum appeared before 2004.

Hungary's assertion (at 23) that abstention was common in the early Republic rests on an article written by other *amici* who discuss only a single case: *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812). *Schooner Exchange* is, of course, not an abstention case but rather this Court's seminal decision on foreign sovereign immunity, a doctrine now comprehensively codifed in the Foreign Sovereign Immunities Act of 1976 ("FSIA"). Hungary and the United States also invoke *Canada Malting Co. v. Patterson Steamships, Ltd.*, 285 U.S. 413 (1932). *See* Hungary Br. 15; U.S. *Hungary* Br. 12-13. But, as the United States acknowledges, *Canada Malting* is a *forum non conveniens* case, not a prudential comity abstention case. U.S. *Hungary* Br. 12 n.2.[3]

Once one disentangles the "multiple strands" of international comity, *id.* at 11, it becomes clear that the doctrine petitioners and the United States urge this Court to adopt is very new. They rely primarily on the Ninth Circuit's decision in *Mujica v. AirScan Inc.*, 771 F.3d 580, 598 (9th Cir. 2014). *See* Germany Br. 43; Hungary Br. 23, 28; U.S. *Hungary* Br. 14. *Mujica* itself relied on a 2004 Eleventh Circuit decision, *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227 (11th Cir. 2004), that the Eleventh Circuit has

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[3] Anticipating this objection, the United States points to *Hilton v. Guyot*, 159 U.S. 113 (1895), to show that "adjudicatory comity extends beyond *forum non conveniens* doctrine." U.S. *Hungary* Br. 12 n.2 (citing *Hilton*, 159 U.S. at 164). *Hilton*, however, was a case about the enforcement of foreign judgments and contains no discussion of abstention.

since cabined, *see GDG Acquisitions, LLC v. Government of Belize*, 749 F.3d 1024, 1030-31, 1034 (11th Cir. 2014). *Amici* know of no case adopting such a doctrine before *Ungaro-Benages* in 2004. In contrast to *forum non conveniens*, prudential comity abstention was not part of the "'background of common-law . . . principles'" when the FSIA was enacted in 1976. *Samantar v. Yousuf*, 560 U.S. 305, 320 n.13 (2010) (quoting *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991)) (alteration in original).

B. This novel abstention doctrine is incompatible with the limits this Court has imposed on abstention. Petitioners do not explain how dismissing respondents' state-law damages claims can be squared with this Court's instruction that "federal courts have the power to dismiss or remand cases based on abstention principles *only* where the relief being sought is equitable or otherwise discretionary." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 731 (1996) (emphasis added). Instead, petitioners invoke this Court's decisions under the Alien Tort Statute ("ATS"), but those cases deal not with abstention but rather with defining a federal-common-law cause of action. They signal no retreat from the longstanding obligation of federal courts to exercise the jurisdiction Congress has given them.

Indeed, petitioners' prudential comity abstention doctrine would undermine limits this Court has carefully placed on other comity doctrines. In *Kirkpatrick*, the United States similarly argued for an interpretation of the act-of-state doctrine that would turn on the case-specific views of the State Department, 493 U.S. at 408, but this Court unanimously refused the invitation to convert act of state into a "vague doctrine of abstention," *id.* at 406. In *RJR Nabisco, Inc. v.*

European Community, 136 S. Ct. 2090 (2016), the European Community urged this Court to forgo the presumption against extraterritoriality in deference to its views of international comity, *id*. at 2107-08, but this Court rejected "a case-by-case inquiry that turns on or looks to the consent of the affected sovereign," *id*. at 2108. Petitioners' proposed doctrine overlaps significantly with *forum non conveniens*, but without the limitations this Court has placed on that doctrine, such as the requirement of an alternative foreign tribunal and the presumption in favor of the plaintiff's choice of forum. Such warnings and limitations would become irrelevant if district courts could dismiss cases based on U.S. and foreign government interventions and discretionary balancing.

C. Petitioners' "vague doctrine of abstention," *Kirkpatrick*, 493 U.S. at 406, would have unpredictable and potentially far-reaching consequences because prudential comity abstention could not be limited to FSIA cases. The FSIA provides that a foreign state that is not immune from jurisdiction "shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606. As petitioners and the United States acknowledge, any doctrine adopted here must be equally available to private parties. *See* Germany Br. 48; Hungary Br. 29; U.S. *Hungary* Br. 8. And, as district court cases in the Ninth Circuit illustrate, a wide range of private defendants can be expected to invoke it. Because the doctrine is both new and discretionary, it is difficult to predict what the consequences of adopting it nationally might be. This Court should not open that Pandora's box.

II. Petitioners initially litigated this question as one of prudential exhaustion rather than abstention,

and it is not clear whether they have abandoned that argument. *See* Hungary Br. 35; Germany Br. 53. But no doctrine of exhaustion supports dismissal here. No one disputes that the customary international-law rule requiring exhaustion of local remedies applies only to international proceedings, not to proceedings in domestic courts. Nor does any exhaustion doctrine in our domestic law apply to these cases. This Court has recognized the possibility of an exhaustion requirement for cases brought under the ATS. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 (2004). But this Court's authority to shape the ATS cause of action includes the power to impose limitations there that it does not have under the FSIA. *See Republic of Argentina v. NML Capital, Ltd.*, 573 U.S. 134, 141-42 (2014).

III. Rejecting prudential comity abstention will not leave federal courts powerless to dismiss cases that would be better heard abroad. *Forum non conveniens*, which *was* part of the common-law background against which the FSIA was enacted, permits dismissal when a foreign court or compensation mechanism provides a more appropriate forum. In some cases, the act-of-state doctrine may require U.S. courts to accept the validity of a taking of property within a foreign state's territory, while choice-of-law rules typically will direct application of foreign law to claims that arise abroad. When a foreign proceeding produces a judgment, *res judicata* will prevent relitigation in the United States. American law already contains doctrines of international comity to handle cases like these. This Court need not manufacture a new one.

ARGUMENT

I. THIS COURT SHOULD NOT RECOGNIZE THE NEW ABSTENTION DOCTRINE URGED BY PETITIONERS

Amici agree with petitioners and the United States that, by virtue of 28 U.S.C. § 1606, foreign states that are not immune under the FSIA may invoke the same —and only the same—defenses in U.S. courts as private parties. *See* Hungary Br. 29; Germany Br. 47-48; U.S. *Hungary* Br. 8. But the abstention doctrine they invoke is not available to private parties outside of two circuits. Nor should it be. Recognizing abstention based on a district court's assessment of the risk of "international friction," Hungary Br. 23; Germany Br. 41, would undermine the limits this Court has placed on other doctrines of restraint. *See* Maggie Gardner, *Abstention at the Border*, 105 Va. L. Rev. 63 (2019) (documenting novelty of prudential comity abstention and its conflict with separation-of-powers principles). Precisely because any new abstention doctrine recognized in these cases would have to apply equally to private parties—with unpredictable consequences—this Court should refuse to adopt it.

A. Prudential Comity Abstention Is Novel

Petitioners assert that their prudential comity abstention doctrine has "a long pedigree" that "predates the FSIA's enactment in 1976." Hungary Br. 21-22; *see also* Germany Br. 3; U.S. *Hungary* Br. 8. But they can cite no cases to establish that pedigree. The cases they cite that predate 2004 (and most that post-date 2004) address other comity-based doctrines.

The confusion stems in part from misleading references to "[t]he international-comity doctrine," Hungary Br. 1, "comity-based abstention," Germany Br. 49, or "the doctrine of international comity," U.S.

Hungary Br. 8. International comity is not a doctrine, but a principle of deference to foreign states that informs a range of different doctrines. *See* William S. Dodge, *International Comity in American Law*, 115 Colum. L. Rev. 2071, 2099-2119 (2015) (reviewing doctrines). Comity doctrines fall into three categories: those that defer to foreign governments as litigants ("sovereign party comity"), those that defer to foreign lawmakers ("prescriptive comity"), and those that defer to foreign courts ("adjudicative comity"). *Id.* at 2078-79. Within each of these categories, positive comity doctrines use comity as a principle of recognition, while negative comity doctrines use comity as a principle of restraint. *See id.* Almost all the cases petitioners and other *amici* cite to support their novel prudential comity abstention doctrine in fact address one of these other, more established comity doctrines. Once the doctrines are disentangled, it is clear that the only precedents on which petitioners can rely are recent Ninth Circuit decisions and one Eleventh Circuit decision that has since been cabined.

Sovereign Party Comity. As a principle of recognition, U.S. courts allow foreign governments to appear as plaintiffs. *See*, *e.g.*, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 408-09 (1964) ("Under principles of comity . . . , sovereign states are allowed to sue in the courts of the United States."). As a principle of restraint, U.S. courts give foreign states and government officials some immunity from suit. *See*, *e.g.*, *Dole Food Co. v. Patrickson*, 538 U.S. 468, 479 (2003) ("[f]oreign sovereign immunity" is "a gesture of comity between the United States and other sovereigns").[4]

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[4] *Amici* Foreign Scholars correctly note that international law requires sovereign immunity in some cases. *See* Foreign Int'l Law Scholars Br. 7; *see*, *e.g.*, *Jurisdictional Immunities of the*

This Court first recognized foreign sovereign immunity as a matter of comity in *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812). Contrary to the representations of some *amici*, *see* Estreicher & Lee Br. 7, *Schooner Exchange* did not establish a broad abstention doctrine, *see Opati v. Republic of Sudan*, 140 S. Ct. 1601, 1605 (2020) (discussing *Schooner Exchange* and subsequent development of foreign sovereign immunity in the United States). In 1976, Congress established a "'comprehensive framework'" governing foreign-state immunity that leaves no room for further common-law development by federal courts. *Republic of Argentina v. NML Capital, Ltd.*, 573 U.S. 134, 141 (2014) (quoting *Republic of Austria v. Altmann*, 541 U.S. 677, 699 (2004)).

Petitioners argue that U.S. courts should not judge "the propriety of [a nation's] actions within its own borders toward its own nationals." Germany Br. 50. That concern is addressed through the law of sovereign immunity and is raised by the first question

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State (Germ. v. It.), 2012 I.C.J. 99, 135 (Feb. 3) (holding that states are immune from suit for torts by armed forces during armed conflict). When states grant more immunity than international law requires, they do so as a matter of international comity. *See* Restatement (Fourth) of the Foreign Relations Law of the United States, pt. IV, ch. 1, intro. note (Am. Law Inst. 2018) ("International comity . . . is deference to foreign states that is not required by international law."). Contrary to Foreign Scholars' assertion (at 8-9), customary international law does not presume that states are immune unless state practice has established an exception. Rather, the International Court of Justice has required state practice establishing immunity with respect to the specific activity for which immunity is claimed. *See Jurisdictional Immunities*, 2012 I.C.J. at 127-35 (examining state practice with respect to armed forces during armed conflict). The U.N. Convention on which Foreign Scholars principally rely has not entered into force or been ratified by the United States. *See* Restatement (Fourth) § 451 reporters' note 1 (discussing status of U.N. Convention).

presented in *Germany v. Philipp*, a statutory question on which *amici* take no position. Concern about reciprocal denial of immunity for the United States may inform the interpretation of the FSIA—or its amendment. It does not justify creating a new abstention doctrine.

Prescriptive Comity. As a principle of recognition, U.S. courts give effect to foreign law through choice-of-law rules, *see*, *e.g.*, *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 589 (1839) ("the laws of the one [country], will, by the comity of nations, be recognized and executed in another"), and the act-of-state doctrine, *see*, *e.g.*, *Oetjen v. Central Leather Co.*, 246 U.S. 297, 303-04 (1918) (noting that the act-of-state doctrine "rests at last upon the highest considerations of international comity and expediency").[5] As a principle of restraint, this Court has adopted rules of statutory interpretation—such as the presumption against extraterritoriality and reasonableness in interpretation—limiting the reach of federal statutes. *See RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2100 (2016) (presumption against extraterritoriality "serves to avoid . . . international discord"); *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 169 (2004) (basing reasonableness on "principles of prescriptive comity").[6]

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[5] Germany invokes (at 42) *Oetjen* to support a broader absention doctrine, but *Oetjen* is clearly an act-of-state case. *See Sabbatino*, 398 U.S. at 416-17 (describing *Oetjen* as "reaffirm[ing] in unequivocal terms" the act-of-state doctrine).

[6] This Court has also invoked prescriptive comity concerns underlying the presumption against extraterritoriality to limit implied *federal* causes of action. *See Hernandez v. Mesa*, 140 S. Ct. 735, 747-48 (2020) (*Bivens* cause of action); *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 116-17 (2013) (ATS cause of action). Respondents have brought only state-law claims.

In its opening brief (at 46-51), Hungary raises various prescriptive comity arguments, apparently for the first time. Hungary invokes the presumption against extraterritoriality and *Empagran*'s principle of reasonableness.[7] These doctrines are principles of *federal* statutory interpretation that have no application to state-common-law claims like those brought by respondents. *See* Restatement (Fourth) § 404 reporters' note 5 (noting that "the geographic scope of State statutes is a question of State law").[8]

The answer to Hungary's concern about applying state common law to events in Hungary lies in state choice-of-law rules. *See*, *e.g.*, *Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3, 4-5 (1975) (per curiam) (directing federal court to apply Texas conflicts rules pointing to Cambodian law). The choice-of-law question in these cases, however, has not yet been briefed and argued below.[9]

Adjudicative Comity. As a principle of recognition, U.S. courts recognize and enforce foreign-court judgments. *See*, *e.g.*, *Hilton v. Guyot*, 159 U.S. 113, 163

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[7] Hungary also quotes Section 403 of the Restatement (Third) of the Foreign Relations Law of the United States (Am. Law Inst. 1987) without noting that Section 403 has been superseded by Section 405 of the Restatement (Fourth), which adopts a narrower principle of reasonableness based on *Empagran*. *See* Restatement (Fourth) § 405 cmt. a.

[8] Although some states have their own presumptions against extraterritoriality, no state applies such a presumption to its common law. *See* William S. Dodge, *Presumptions Against Extraterritoriality in State Law*, 53 U.C. Davis L. Rev. 1389, 1411-13 (2020).

[9] In extreme cases, state law also may be subject to foreign-affairs preemption. *See American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 416-20 (2003). Although Hungary cites (at 49) *Garamendi*, it made no foreign-affairs preemption argument below.

(1895) (noting that recognition of foreign judgments depends on "the comity of nations"). Because *Hilton* provides an early pronouncement by this Court about the importance of comity, it is often mistakenly invoked to support the extension of other comity-based doctrines. True to form, petitioners quote it here. *See* Hungary Br. 21-22; Germany Br. 42. But *Hilton*'s discussion of comity addressed the recognition of foreign judgments, not abstention.

As a principle of restraint, U.S. courts limit the exercise of their own jurisdiction through the doctrine of *forum non conveniens*. *See American Dredging Co. v. Miller*, 510 U.S. 443, 467 (1994) (Kennedy, J., dissenting) (noting that "the *forum non conveniens* defense promotes comity"). They also limit discovery requests for evidence located abroad, *see Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court*, 482 U.S. 522, 543-44 (1987) (noting that "international comity" requires "particularized analysis" of discovery requests), and the use of antisuit injunctions, *see China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 37 (2d Cir. 1987) (noting "the retraint and caution required by international comity" when considering an antisuit injunction).

Hungary (at 30, 34) and the United States (at 12-13) rely heavily on *Canada Malting Co. v. Patterson Steamships, Ltd.*, 285 U.S. 413 (1932), to support their broad abstention doctrine. But, as this Court has repeatedly noted, *Canada Malting* is a *forum non conveniens* case. *See American Dredging*, 510 U.S. at 449-50; *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 247-49 (1981); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 504 (1947); *see also* U.S. *Hungary* Br. 12 n.2 (noting that *Canada Malting* is a "precursor[]" of *forum non conveniens*).

A number of circuits have recognized a different doctrine of comity-based abstention solely as a tool for deferring to parallel litigation abroad. For these circuits, "international comity abstention" is an extension of *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), that permits district courts to dismiss in favor of a pending and parallel foreign proceeding upon a showing of exceptional circumstances. *See Answers in Genesis of Kentucky, Inc. v. Creation Ministries Int'l, Ltd.*, 556 F.3d 459, 467-69 (6th Cir. 2009); *Royal & Sun All. Ins. Co. of Canada v. Century Int'l Arms, Inc.*, 466 F.3d 88, 92-97 (2d Cir. 2006); *AAR Int'l, Inc. v. Nimelias Enters. S.A.*, 250 F.3d 510, 517-23 (7th Cir. 2001); *Al-Abood v. El-Shamari*, 217 F.3d 225, 232 (4th Cir. 2000); *Philadelphia Gear Corp. v. Philadelphia Gear de Mexico, S.A.*, 44 F.3d 187, 191-94 (3d Cir. 1994). The cases currently before this Court present no opportunity to decide whether and how *Colorado River* abstention extends to foreign litigation because in neither *Philipp* nor *Simon* is there a parallel proceeding pending abroad.[10]

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[10] Hungary and the United States also cite a number of bankruptcy cases that defer to pending foreign proceedings. *See EMA Garp Fund, L.P. v. Banro Corp.*, 783 F. App'x 82, 84 (2d Cir. 2019); *JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V.*, 412 F.3d 418, 424 (2d Cir. 2005); *In re Maxwell Commc'n Corp.*, 93 F.3d 1036, 1046-53 (2d Cir. 1996). Bankruptcy is a special situation where U.S. courts long have recognized the need for deference to foreign proceedings to ensure "the equality of distribution of assets among creditors." *Cunard S.S. Co. v. Salen Reefer Servs. AB*, 773 F.2d 452, 459 (2d Cir. 1985). In 2005, Congress added Chapter 15 to the Bankruptcy Code, which expressly authorizes stays and other relief upon recognition of foreign bankruptcy proceedings. *See* 11 U.S.C. § 1521. Congress has not authorized deference to parallel foreign proceedings more generally.

In only three decisions—*Mujica v. AirScan Inc.*, 771 F.3d 580 (9th Cir. 2014); *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227 (11th Cir. 2004); and *Cooper v. Tokyo Electric Power Co. Holdings, Inc.*, 960 F.3d 549 (9th Cir. 2020) ("*Cooper II*")—have courts of appeals dismissed lawsuits based on the doctrine of prudential comity abstention urged here. The Eleventh Circuit has since emphasized how "rare" such abstention should be, *GDG Acquisitions, LLC v. Government of Belize*, 749 F.3d 1024, 1034 (11th Cir. 2014), while other circuits have rejected petitioners' proposed abstention doctrine, *see*, *e.g.*, *Gross v. German Found. Indus. Initiative*, 456 F.3d 363, 393-94 (3d Cir. 2006).[11]

While it is true that Congress passed the FSIA against the background of the common law, *see Samantar v. Yousuf*, 560 U.S. 305, 320 n.13 (2010), prudential comity abstention was not part of that background. *Amici* know of no cases predating the FSIA's enactment in 1976 that even acknowledged, much less applied, the abstention doctrine that petitioners and the United States urge this Court to adopt.

B. Prudential Comity Abstention Would Undermine This Court's Efforts To Limit Doctrines of Restraint

Petitioners ignore the limits this Court has placed on prudential doctrines, particularly those related to foreign affairs. Indeed, they and other *amici* propose the vaguest of tests, like those this Court has

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[11] The two times the Second Circuit has considered prudential comity abstention, it has declined to apply it. *See Jota v. Texaco Inc.*, 157 F.3d 153, 159-61 (2d Cir. 1998); *Bigio v. Coca-Cola Co.*, 448 F.3d 176, 178-80 (2d Cir. 2006); *see also Bi v. Union Carbide Chems. & Plastics Co.*, 984 F.2d 582, 584-86 (2d Cir. 1993) (dismissing for lack of standing without discussing abstention).

expressly warned against in similar contexts. Such broad-ranging discretion to decline jurisdiction based on international friction would undermine "the undisputed constitutional principle that Congress, and not the Judiciary, defines the scope of federal jurisdiction." *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 359 (1989) ("*NOPSI*").

1. Petitioners' proposed abstention doctrine would extend to non-discretionary relief

As this Court recently and unanimously reaffirmed, "[i]n the main, federal courts are obliged to decide cases within the scope of federal jurisdiction." *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 72 (2013); *see also W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., Int'l*, 493 U.S. 400, 409 (1990); *Colorado River*, 424 U.S. at 817; *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821). This Court has recognized limited exceptions that permit federal district courts to stay actions in favor of other federal or state courts or to dismiss them where the requested relief is equitable or discretionary. *See*, *e.g.*, *Colorado River*, 424 U.S. at 813-19 (describing abstention doctrines). Those exceptions, however, are carefully circumscribed. *See*, *e.g.*, *Sprint*, 571 U.S. at 81-82 (demarcating the "exceptional circumstances" justifying abstention under *Younger v. Harris*, 401 U.S. 37 (1971)).

Most significantly, "federal courts have the power to dismiss or remand cases based on abstention principles only where the relief being sought is equitable or otherwise discretionary." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 731 (1996).[12] Petitioners do not

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[12] *Quackenbush* acknowledged that federal courts have authority to stay proceedings in favor of state courts. 517 U.S. at 721. Federal courts also may stay proceedings in favor of other federal courts. *See Landis v. North Am. Co.*, 299 U.S. 248, 254

explain how dismissing respondents' damages claims pursuant to prudential comity abstention can be squared with *Quackenbush*'s directive. *Quackenbush* turned on Congress's authority to define the jurisdiction of the federal courts, a rationale that does not depend on whether the alternative forum is a state court or a foreign court. Indeed, declining jurisdiction in favor of foreign courts presents greater concerns because it excludes cases covered by congressional grants of jurisdiction from *any* U.S. court. *Quackenbush* acknowledged that international cases could be dismissed for *forum non conveniens*, but only because of that doctrine's "distinct historical pedigree." *Id.* at 721-23. Prudential comity abstention has no such pedigree.

Petitioners also invoke this Court's decisions in ATS cases as support for abstention. *See* Hungary Br. 1 n.1 (citing *Jesner v. Arab Bank PLC*, 138 S. Ct. 1386 (2018); *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013); and *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004)); Germany Br. 44 (same). Those ATS decisions do not create a broad absention doctrine for cases raising foreign-relations concerns. The "discretion" to which *Sosa* referred was the discretion to shape the ATS cause of action as federal common law. *Sosa*, 542 U.S. at 725. This Court has exercised that discretion by limiting the ATS cause of action to international-law norms that are definite and well-accepted, *see id.* at 732, by requiring that ATS claims "touch and concern" the United States, *Kiobel*, 569 U.S. at 124-25, and by excluding foreign corporations from the scope of the ATS cause of action, *see Jesner*, 138 S. Ct. at 1403.

(1936). Whether similar discretion should extend to foreign courts is not raised here because petitioners have sought dismissals rather than stays.

This Court has also suggested that it would consider other "limiting" principles in ATS cases. *Sosa*, 542 U.S. at 733 n.21. In *Sosa*, the Court said it would "consider [an exhaustion] requirement *in an appropriate case*." *Id.* (emphasis added). *Sosa* also noted a "*possible* limitation" of "case-specific deference to the political branches." *Id.* (emphasis added). But this Court has not adopted either suggestion even for ATS cases, much less as a doctrine generally applicable outside the context of the ATS.

Some members of this Court have referred to these possibilities, in addition to existing doctrines, to argue that comity concerns may be met without limiting the ATS cause of action. *See*, *e.g.*, *Jesner*, 138 S. Ct. at 1430-31 (Sotomayor, J., dissenting) ("Courts also can dismiss ATS suits for a plaintiff's failure to exhaust the remedies available in her domestic forum, on *forum non conveniens* grounds, for reasons of international comity, or when asked to do so by the State Department."); *Kiobel*, 569 U.S. at 133 (Breyer, J., concurring in the judgment) (similar). Petitioners and the United States point to these statements to argue that prudential comity abstention is well-established. *See* Hungary Br. 27; Germany Br. 45; U.S. *Hungary* Br. 15. Certainly, *forum non conveniens* is well-established. But exhaustion and case-specific deference can only have been referred to as possibilities for future consideration because, as noted, this Court has not yet adopted them. The same is true of references to comity; this Court has not adopted a doctrine of prudential comity abstention in ATS cases or in any other context.

This Court's ATS decisions are not about abstaining from deciding claims for damages. They are about whether a claim for damages should be permitted under federal common law in the first place. Those

decisions signal no retreat from the longstanding obligation of federal courts to exercise the jurisdiction that they have been given.

2. Prudential comity abstention undermines the limits this Court has placed on other doctrines

Because prudential comity abstention is so vague and discretionary, it threatens to swallow up the more narrowly tailored doctrines this Court has developed. Petitioners and the United States propose a standard, adopted by the Ninth Circuit, that would weigh the strength of U.S. interests, the strength of foreign interests, and the adequacy of the alternative forum. *See* U.S. *Hungary* Br. 14 (urging adoption of *Mujica*'s test); Hungary Br. 35-46 (discussing same three factors); Germany Br. 43 (citing *Mujica*). That test repackages the foreign "embarrassment" arguments this Court has rejected as excuses for abdicating judicial responsibility.

In *Kirkpatrick*, the United States argued for a similarly discretionary interpretation of the act-of-state doctrine. It urged this Court to recognize that a future case might "'sufficiently touch on "national nerves" that the act-of-state doctrine or related principles of abstention would appropriately be found to bar the suit,'" and it asked the Court to resolve the case based on the State Department's views. 493 U.S. at 408 (quoting Brief for the United States as Amicus Curiae 40, No. 87-2066 (U.S. filed Oct. 5, 1989)). Writing for a unanimous court, Justice Scalia refused to convert the act-of-state doctrine into a "vague doctrine of abstention." *Id.* at 406. "The act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments," he wrote, "but merely requires that, in the process of deciding,

the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid." *Id.* at 409.[13]

In *RJR Nabisco*, the European Community urged this Court to defer to its views on international comity and to forgo the presumption against extraterritoriality in suits by foreign governments. 136 S. Ct. at 2107-08. This Court declined that invitation as well, rejecting "a case-by-case inquiry that turns on or looks to the consent of the affected sovereign." *Id.* at 2108. *Cf. Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865 (2018) (holding that federal courts are not bound to defer to a foreign government's construction of its own law).

Meanwhile, the third factor in petitioners' proposed test overlaps with *forum non conveniens*, *see Cooper v. Tokyo Elec. Power Co.*, 860 F.3d 1193, 1210 (9th Cir. 2017) ("*Cooper I*") (acknowledging that the two inquiries are "the same"), but without the limitations this Court has placed on that doctrine. *Forum non conveniens* makes the availability of an adequate alternative forum a *precondition*, rather than merely a factor to be weighed. *Compare Piper*, 454 U.S. at 254-55 & n.22, *with Cooper I*, 860 F.3d at 1205, 1208-10. *Forum non conveniens* also starts with a "strong presumption in favor of the plaintiff's choice of forum," although the presumption may be weaker for foreign plaintiffs. *See*

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[13] This Court previously suggested that it might defer to the views of the State Department on the foreign-policy consequences of particular FSIA cases. *See Altmann*, 541 U.S. at 701-02; *see also* U.S. *Hungary* Br. 19 (noting that *Altmann* "did not decisively resolve the deference question"). Case-specific deference to the executive branch "raises serious separation-of-powers concerns." *Altmann*, 541 U.S. at 734 (Kennedy, J., dissenting). But *Altmann* deference limited to FSIA cases would still be a narrower ground for resolving these cases than a new abstention doctrine that applies to FSIA and non-FSIA cases alike.

Piper, 454 U.S. at 255-56 & n.23. Prudential comity abstention gives no deference to the plaintiff's choice of forum—even if the plaintiff is a U.S. citizen. *Compare Cooper I*, 860 F.3d at 1211 (affirming rejection of *forum non conveniens* because "Plaintiffs are U.S. citizens, and their decision to sue in the United States must be respected"), *with Cooper II*, 960 F.3d at 566-69 (affirming dismissal of same claims based on prudential comity abstention without presumption in favor of U.S. servicemembers' choice of U.S. forum).

The tripartite test urged by the United States not only undermines the limits this Court has placed on other doctrines, but also fails to provide meaningful guidance for the exercise of discretion. Even the Ninth Circuit in *Mujica* acknowledged a lack of "substantive standards for assessing [these] three factors." 771 F.3d at 603. It therefore articulated a nonexclusive list of 13 subfactors, variously drawn from *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976), Section 403 of the Restatement (Third), and cases involving the enforcement of foreign judgments. *See Mujica*, 771 F.3d at 604-08. But multiplying vague factors only amplifies the problem. *See* Maggie Gardner, *Parochial Procedure*, 69 Stan. L. Rev. 941, 961-67 (2017) (describing problems arising from complex tests). Notably, no one here recommends adopting *Mujica*'s 13 factors. Other *amici* propose alternative tests, but they suffer from the same vagueness as the tripartite standard.[14] The danger

[14] *Amici* Professors Estreicher and Lee criticize "the free-form, multivariate balancing test that lower courts are currently using," Estreicher & Lee Br. 7, but their proposed test would fare no better. It invokes "applicable U.S. statutes or treaties" (which if applicable would displace any need for prudential comity abstention); "whether parallel proceedings have been commenced or concluded" (which are not at issue in cases like these); "the

of such vagueness would be compounded by abuse-of-discretion review on appeal. *See Mujica*, 771 F.3d at 589 (reviewing for abuse of discretion); *see also* Henry J. Friendly, *Indiscretion About Discretion*, 31 Emory L.J. 747, 754-55 (1982) (critiquing abuse-of-discretion review as applied to discretionary doctrines like *forum non conveniens*).

Prudential comity abstention threatens to become the doctrine that swallows the rest. Courts will no longer have to defer to a plaintiff's choice of forum under *forum non conveniens*, *see Piper*, 454 U.S. at 255-56, or to ask whether a case implicates the validity of a foreign sovereign's official act under the act-of-state doctrine, *see Kirkpatrick*, 493 U.S. at 409. Instead, courts will simply be able to dismiss such cases by invoking this "vague doctrine of abstention." *Id.* at 406.[15]

This Court has consistently rejected arguments in recent Terms to decline jurisdiction on various

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reciprocal practice of any nation directly implicated" (a reciprocity requirement now rejected in the enforcement of judgments context from which it derived); and "the well-considered views of the Executive branch" (which is identical to the vague tripartite standard they criticize). *Id.* at 21.

The United States alludes to another vague tripartite standard that has failed to provide meaningful guidance for international discovery. *See* U.S. *Hungary* Br. 13-14 (citing *Aérospatiale*, 482 U.S. at 543-44); Gardner, *Parochial Procedure*, 69 Stan. L. Rev. at 973-78 (describing lower-court struggles with *Aérospatiale*'s standard).

[15] Prudential comity abstention might also have mooted this Court's recent decision in *Animal Science Products*. There, the Court unanimously held that federal courts are not bound to defer to a foreign government's interpretation of its own law. 138 S. Ct. at 1869. But the lower court could have avoided the foreign-law question entirely, simply by abstaining based on an objection from the Chinese government.

prudential grounds. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 167 (2014) (rejecting prudential ripeness argument); *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125-28 (2014) (rejecting prudential standing argument); *Sprint Commc'ns*, 571 U.S. at 78 (rejecting extension of *Younger* abstention); *Zivotofsky v. Clinton*, 566 U.S. 189, 194-95 (2012) (rejecting broad interpretation of political-question doctrine). It should do so again here.

C. Any Doctrine of Prudential Comity Abstention Could Not Be Limited to Cases Involving Foreign Sovereigns

If this Court were to recognize some form of prudential comity abstention, it could not limit that doctrine to sovereign defendants like Germany and Hungary. The FSIA provides that foreign states that are not entitled to immunity "shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606. Because prudential comity abstention is not grounded in the text of the FSIA, it must exist—if at all—as a doctrine equally available to sovereign defendants and private parties. Indeed, petitioners and the United States argue that prudential comity abstention is available to foreign states under the FSIA precisely *because* they believe it is already available to private parties. *See* Hungary Br. 29; Germany Br. 48; U.S. *Hungary* Br. 8. Although *amici* have explained that this premise is incorrect, the doctrine *would* apply to private parties if the Court were to accept petitioners' invitation to adopt it here. That expansion of judicial discretion could have far-reaching and unpredictable consequences for the power of the federal courts vis-à-vis Congress.

Allegations of foreign-relations concerns can and do arise frequently in private disputes. Cases like *Kirkpatrick* and *Animal Science Products* illustrate how private defendants can readily invoke foreign sensitivities or leverage foreign-state intervention. Since the Ninth Circuit decided *Mujica* in 2014, private defendants have repeatedly raised prudential comity abstention arguments in district courts.[16] Indeed, concerned that the doctrine was becoming "a forum-selection tool . . . in common breach of contract actions," the Eleventh Circuit has cautioned that *Ungaro-Benages* was *sui generis*. *GDG Acquisitions*, 749 F.3d at 1030-31, 1034. There is also a risk that courts will accept the invitation to decline their jurisdiction too readily, despite "the undisputed constitutional principle that Congress, and not the Judiciary, defines the scope of federal jurisdiction." *NOPSI*, 491 U.S. at 359. But ultimately it is imposible to predict the full consequences of adopting this doctrine because it is so new and currently used in just two circuits. The Court need not, and should not, run that national experiment.

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[16] *See*, *e.g.*, *Lawson v. Klondex Mines Ltd.*, 450 F. Supp. 3d 1057 (D. Nev. 2020) (shareholder derivative suit against Canadian mining corporation with principal place of business in Nevada); *Stoyas v. Toshiba Corp.*, 424 F. Supp. 3d 821 (C.D. Cal. 2020) (securities class action against Japanese corporation); *Cooper v. Tokyo Elec. Power Co.*, No. 12cv3032-JLS (JLB), 2019 WL 1017266 (S.D. Cal. Mar. 4, 2019) (tort suit against Japanese utility company), *aff'd*, 960 F.3d 549 (9th Cir. 2020); *Ryanair DAC v. Expedia, Inc.*, No. C17-1789RSL, 2018 WL 3727599 (W.D. Wash. Aug. 6, 2018) (Computer Fraud and Abuse Act claims against U.S. corporation); *Updateme Inc. v. Axel Springer SE*, No. 17-cv-05054-SI, 2017 WL 5665669 (N.D. Cal. Nov. 27, 2017) (trademark-infringement and breach-of-contract claims against German companies).

II. EXHAUSTION DOES NOT PROVIDE AN ALTERNATIVE GROUND FOR DISMISSAL

In the lower courts, petitioners argued for dismissal on grounds of prudential exhaustion, not abstention. *See* 18-1447 Pet. App. 50a (*Simon*) (dismissing under "prudential exhaustion doctrine" and *forum non conveniens*); 19-351 Pet. App. 83 (*Philipp*) (rejecting "prudential exhaustion requirement"). It was not until the D.C. Circuit panel in *Simon* requested the views of the United States that prudential comity abstention was introduced into these cases. *See* Brief for Amicus Curiae the United States 14-21, *Simon v. Republic of Hungary*, 911 F.3d 1172 (D.C. Cir. 2018) (No. 17-7146; filed June 1, 2018) (first raising abstention). The D.C. Circuit rejected the U.S. abstention argument along with petitioners' exhaustion argument. *See* 19-351 Pet. App. 16-21 (*Philipp*); *see also* 18-1447 Pet. App. 13a-16a (*Simon*) (rejecting exhaustion argument without discussing abstention). Hungary did not embrace prudential comity abstention until its petition for rehearing en banc, and Germany did not do so until its petition for certiorari.

It is not clear whether petitioners have abandoned their exhaustion arguments. *See* Hungary Br. 35 (arguing that "U.S. courts should not exercise jurisdiction over this dispute" because "Plaintiffs failed to exhaust available remedies in Hungary"); Germany Br. 53 ("Respondents' failure to exhaust available remedies in Germany also supports abstention here."). But no exhaustion requirement provides an alternative ground for dismissing respondents' claims, either as a matter of international law or as a prudential doctrine of domestic law.

In dismissing similar claims based on "a prudential exhaustion requirement," the Seventh Circuit asserted

that international law requires exhaustion of local remedies before expropriation claims may be heard in the domestic courts of another state. *Fischer v. Magyar Allamvasutak Zrt.*, 777 F.3d 847, 858-59 (7th Cir. 2015). Customary international law contains no such requirement. As the Restatement (Fourth) of Foreign Relations Law explains, "under customary international law, and subject to modification by treaty, the exhaustion of local remedies is a precondition only to espousal of a claim by the injured party's government or the filing of a claim in an international tribunal." Restatement (Fourth) § 424 reporters' note 10; *see also Interhandel Case (Switz. v. U.S.)*, 1959 I.C.J. 6, 27 (Mar. 21) ("[t]he rule that local remedies must be exhausted before *international proceedings* may be instituted is a well-established rule of customary international law") (emphasis added). On this point, the *amicus* brief joined by three former State Department Legal Advisers agrees. *See* Robinson et al. Br. 12-13.

In contrast to defendants in the Seventh Circuit, petitioners argued in the D.C. Circuit for a doctrine of prudential exhaustion under U.S. domestic law, which the D.C. Circuit correctly rejected. *See* 18-1447 Pet. App. 13a-16a (*Simon*); *see also* 19-351 Pet. App. 16-21 (*Philipp*). Prudential exhaustion does not provide a ground for dismissing claims against foreign states under the FSIA because there is no general prudential exhaustion requirement applicable to suits against private parties. *See* 28 U.S.C. § 1606. The limited exhaustion doctrines this Court has recognized do not apply to respondents' claims.

This Court has recognized a "doctrine of exhaustion of administrative remedies" as a matter of judicial discretion even when exhaustion is not mandated by

Congress. *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992). Administrative exhaustion is grounded in deference to Congress's delegation of authority to administrative agencies, *id.* at 145, a justification that does not extend to foreign governments. Nor would requiring exhaustion of foreign remedies serve the purpose of "produc[ing] a useful record for subsequent judicial consideration." *Id.* To the contrary, such a requirement would likely preclude subsequent consideration by federal courts because of the doctrine of *res judicata*. *See* 18-1447 Pet. App. 14a (*Simon*). The recognition of foreign judgments in the United States is generally governed by state law. *See* Restatement (Fourth) § 481 cmt. a. Like many states, the District of Columbia has adopted the 2005 Uniform Foreign-Country Money Judgments Recognition Act, under which a foreign judgment entitled to recognition is "[c]onclusive between the parties to the same extent as the judgment of a sister state entitled to full faith and credit." D.C. Code § 15-367(1).

For suits under the ATS, this Court has said it would "consider [an exhaustion] requirement in an appropriate case." *Sosa*, 542 U.S. at 733 n.21. In that context, an exhaustion requirement might rest on the federal courts' authority, discussed above, to shape the federal-common-law cause of action. But this Court has made clear that federal courts have no similar authority to limit claims under the FSIA. *See NML Capital*, 573 U.S. at 141-42. Because no domestic doctrine requiring exhaustion of foreign remedies is available to private parties (with the possible exception of ATS claims), no such doctrine is available to foreign states under the FSIA.

III. EXISTING DOCTRINES OF INTERNATIONAL COMITY ADDRESS PETITIONERS' CONCERNS

Rejecting a doctrine of prudential comity abstention in these cases will not leave federal courts powerless to dismiss claims that would be better heard abroad. U.S. courts already have the authority to defer to foreign courts and compensation mechanisms under *forum non conveniens*. *See Piper*, 454 U.S. at 254 n.22. Nothing in this Court's decisions suggests that the alterative forum must be judicial, and lower courts repeatedly have held that *Piper*'s threshold requirement of an alternative forum may be met by an administrative scheme. *See Imamura v. General Elec. Co.*, 957 F.3d 98, 110-12 (1st Cir. 2020); *Veljkovic v. Carlson Hotels, Inc.*, 857 F.3d 754, 756 (7th Cir. 2017); *Jiali Tang v. Synutra Int'l, Inc.*, 656 F.3d 242, 250-51 (4th Cir. 2011); *Lueck v. Sundstrand Corp.*, 236 F.3d 1137, 1144-45 (9th Cir. 2001).

Indeed, both Germany and Hungary argued below that respondents' claims should be dimissed on grounds of *forum non conveniens*. In *Philipp*, Germany did not appeal the district court's refusal to dismiss on *forum non conveniens* grounds. *See* 19-351 Pet. App. 83-92. In *Simon*, Hungary sought review of the D.C. Circuit's *forum non conveniens* decision, *see* 18-1447 Pet. App. 17a-35a, but this Court denied its request, *see Hungary v. Simon*, No. 18-1447, 2020 WL 3578676 (U.S. July 2, 2020) (limiting grant to question 1). Although *forum non conveniens* is not before the Court in these cases, it remains available in other cases where foreign courts or administrative compensation schemes provide an adequate alternative forum.

Other doctrines of international comity, discussed in Part I.A, may also be relevant in similar cases. In

some cases, the act-of-state doctrine will bar a U.S. court from questioning the validity of an expropriation within a foreign state's territory. *See Sabbatino*, 376 U.S. at 428.[17] When claims go forward in U.S. courts, choice-of-law rules likely will direct application of the law of the place where the taking occurred rather than U.S. common law. *See*, *e.g.*, *Oveissi v. Islamic Republic of Iran*, 573 F.3d 835, 842 (D.C. Cir. 2009) (applying D.C. conflicts rules to hold that French law governed claims arising from assassination in France).[18] And, when a foreign court renders a final judgment, the rules governing foreign judgments typically will bar relitigation. *See*, *e.g.*, D.C. Code § 15-367(1).

In these two cases, petitioners were free to argue—and did argue—for dismissal in favor of German and Hungarian forums under the doctrine of *forum non conveniens*. Having failed to convince the courts below, they now ask this Court to adopt a new abstention doctrine and give them a second bite at the apple. But this Court does not exist to correct errors, particularly those of the parties themselves. Denying petitioners' wish would likely allow these two suits to continue. Granting their wish, however, will have broad and unpredictable implications, as litigants

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[17] The act-of-state doctrine is limited to acts "by a foreign sovereign government, extant and recognized by this country at the time of suit," *Sabbatino*, 376 U.S. at 428, which would presumably prevent its application to the expropriations in these cases. In the 1950s, the U.S. government also took the position that the doctrine should not bar suits based on Nazi expropriations. *See* Restatement (Fourth) § 441 reporters' note 13 (discussing *Bernstein* letter).

[18] The widely adopted public-policy exception would prevent application of foreign law that discriminates on the basis of race or religion. *See Oveissi*, 573 F.3d at 842 n.3 (noting public-policy exception in D.C. conflicts rules).

rush to take advantage of a vague and discretionary doctrine permitting federal judges to abstain from deciding actions at law over which Congress provided jurisdiction—a power they never had or required before.

CONCLUSION

The court of appeals was correct to reject prudential comity abstention as a basis for dismissal.

Respectfully submitted,

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