No. 18-1447

In the Supreme Court of the United States

REPUBLIC OF HUNGARY, ET AL., PETITIONERS

v.

ROSALIE SIMON, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

The Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1330, 1441(d), 1602 *et seq.*, provides that a foreign state and its agencies and instrumentalities are immune from the jurisdiction of federal and state courts in civil actions, subject to limited exceptions. Where one of those exceptions applies, the foreign state, instrumentality, or agency "shall be liable in the same manner and to the same extent as a private individual under like circumstances," subject to certain limitations on punitive damages. 28 U.S.C. 1606. The question presented is whether, when one of the exceptions to the FSIA applies, a court is barred from invoking the doctrine of international comity to abstain from exercising jurisdiction.

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INTEREST OF THE UNITED STATES

This case concerns the interpretation of the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1330, 1441(d), 1602 *et seq.*, and the ability of foreign sovereign defendants to invoke abstention doctrines that are available to private litigants. Litigation against foreign states in U.S. courts can have significant foreign-relations implications for the United States, and can affect the reciprocal treatment of the United States in the courts of other nations. At the Court's invitation, the United States filed a brief as amicus curiae at the petition stage of this case.

Although the United States agrees with petitioners that the court of appeals erred in holding that the FSIA bars the application of international-comity-based abstention, the United States deplores the atrocities committed by the Nazi regime and its allies, and supports

efforts to provide their victims with remedies for the egregious wrongs they have suffered. Since Hungary's transition from Communism, the United States has worked in numerous ways to achieve a measure of justice for Holocaust victims and their heirs, and—with the United States' encouragement—the Hungarian government has provided some relief to compensate Holocaust survivors and other victims of the Nazis. See Office of the Special Envoy, Bureau of European and Eurasian Affairs, U.S. Department of State, *The JUST Act Report* 84-88 (Mar. 2020), https://www.state.gov/wp-content/uploads/2020/02/JUST-Act5.pdf. The United States has a paramount interest in ensuring that its foreign partners establish appropriate domestic redress and compensation mechanisms for Holocaust victims, and therefore seeks to prevent litigation in U.S. courts that could undermine that objective.

STATEMENT

1. The Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1330, 1441(d), 1602 *et seq.*, provides the sole basis for jurisdiction in federal or state court in a civil suit against a foreign state (including an agency or instrumentality of a foreign state). See *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-435 & n.3 (1989); see also 28 U.S.C. 1603(a) (defining "foreign state" to include "an agency or instrumentality of a foreign state"). Under the FSIA, a foreign state is immune from the jurisdiction of a U.S. court in a civil action unless a claim against it comes within one of the limited exceptions to immunity described in 28 U.S.C. 1605-1607. See 28 U.S.C. 1604. If one of those exceptions applies, "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances," subject

to certain limitations on punitive damages not relevant here. 28 U.S.C. 1606.

2. Respondents are 14 Jewish survivors of the Hungarian Holocaust, all of whom were formerly Hungarian nationals but have since obtained citizenship in other countries. Pet. App. 2a, 48a-49a. Four of the respondents are now U.S. citizens. *Id.* at 2a.

Respondents filed suit in the United States District Court for the District of Columbia against petitioners—the Republic of Hungary and the state-owned Hungarian railway, Magyar Államvasutak Zrt. (MÁV)—on behalf of a putative class of Hungarian Holocaust survivors and their heirs. Pet. App. 2a, 53a-54a. Respondents alleged that Hungary had collaborated with the Nazis to exterminate Hungarian Jews and expropriate their property, and that MÁV had assisted that effort both by transporting Hungarian Jews to death camps and by stripping them of their personal property at the point of embarkation. *Id.* at 51a-54a. As relevant here, respondents sought "compensation for the seizure and expropriation of [their] property as part of the Hungarian government's genocidal campaign." *Id.* at 2a. To that end, their complaint asserted common-law property torts, including conversion and unjust enrichment, as well as other claims. *Id.* at 54a.

The district court originally dismissed the case under Section 1604, which provides that, "[s]ubject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune * * * except as provided in sections 1605 to 1607 of this chapter." 28 U.S.C. 1604; see 37 F. Supp. 3d 381, 408. The court reasoned that an article of the 1947 Hungary-U.S. Peace Treaty, which obligated Hungary to provide restitution for Holocaust-

era takings, deprived the court of subject-matter jurisdiction. 37 F. Supp. 3d at 407-424; see Treaty of Peace with Hungary, Feb. 10, 1947, T.I.A.S. No. 1651, 41 U.N.T.S. 135 (1947 Treaty).

The court of appeals affirmed in part and reversed in part. 812 F.3d 127. The court first determined that the mechanism provided under the 1947 Treaty was not "the exclusive means by which Hungarian Holocaust victims can seek compensation for (or restoration of) property taken from them during the War." *Id.* at 137 (emphasis omitted). Accordingly, the court held that the 1947 Treaty did not foreclose respondents' claims. *Id.* at 140.

Nevertheless, the court of appeals recognized that respondents "still must overcome the FSIA's default rule granting immunity to the Hungarian defendants." 812 F.3d at 140. It concluded that respondents could not do so with respect to their "non-property-based causes of action," and therefore affirmed the district court's dismissal of those claims. *Id.* at 141. But the court held that respondents' common-law property claims fall within the so-called "expropriation exception" to the FSIA. *Id.* at 142; see *id.* at 142-151. That exception provides that "[a] foreign state shall not be immune from the jurisdiction of courts of the United States" in certain cases "in which rights in property taken in violation of international law are in issue." 28 U.S.C. 1605(a)(3). The court acknowledged that a sovereign's expropriation of its own nationals' property ordinarily is not a violation of international law, but held that "[e]xpropriations undertaken for the purpose of bringing about a protected group's physical destruction qualify as genocide" and for that reason do violate international law. 812 F.3d at 143. On that basis, the

court then further concluded that respondents had adequately alleged takings that were "in violation of international law" within the meaning of the expropriation exception and that the district court therefore had jurisdiction over respondents' common-law property claims. 28 U.S.C. 1605(a)(3); see 812 F.3d at 143-145.

The court of appeals remanded for the district court to consider any remaining arguments for dismissal, including "whether, as a matter of international comity, the court should decline to exercise jurisdiction unless and until the plaintiffs exhaust available Hungarian remedies." 812 F.3d at 149.

3. On remand, petitioners again moved to dismiss. Pet. App. 60a. As relevant here, they contended that the district court should abstain from exercising jurisdiction as a matter of international comity until respondents exhausted their remedies in Hungary and, relatedly, that the court should dismiss the case on *forum non conveniens* grounds because respondents' claims would be more appropriately litigated in Hungary. *Id.* at 60a-61a.

The district court agreed with both contentions. Pet. App. 48a-95a. The court first determined that "'[e]xhaustion of domestic remedies is preferred in international law as a matter of comity'" and that respondents were therefore required to show that they had "exhausted [Hungary's] own domestic remedies, or that to do so would be futile." *Id.* at 66a (quoting *Fischer* v. *Magyar Államvasutak Zrt.*, 777 F.3d 847, 859 (7th Cir.), cert. denied, 576 U.S. 1006 (2015)) (first set of brackets in original). Because respondents acknowledged that they had not pressed their claims in Hungary, the court proceeded to the futility inquiry. *Id.* at 67a. The court found that "Hungary is an adequate alternative forum

for [respondents'] claims," concluding that Hungarian courts enforce international law and provide damages for the types of property claims asserted here. *Id.* at 75a; see *id.* at 74a-75a. The court then determined, in the alternative, that the doctrine of *forum non conveniens* would "dictate the same result." *Id.* at 83a. The court relied on its prior finding that "Hungary is both an available and adequate alternative forum," *id.* at 85a, and reasoned that the private- and public-interest factors weighed in favor of adjudicating the dispute there, *id.* at 85a-95a.

4. A divided panel of the court of appeals reversed. Pet. App. 1a-47a. The court held that the FSIA foreclosed the exercise of international-comity-based abstention, *id.* at 13a-16a, and that the district court had abused its discretion in dismissing the action on *forum non conveniens* grounds, *id.* at 17a-35a.

a. The court of appeals' comity analysis followed that court's recent holding in *Philipp* v. *Federal Republic of Germany*, 894 F.3d 406 (D.C. Cir. 2018), cert. granted, No. 19-351 (July 2, 2020), and cert. denied, No. 19-520 (July 2, 2020), that the FSIA "leaves no room for a common-law exhaustion doctrine based on * * * considerations of comity." *Id.* at 416; see Pet. App. 14a-16a. The court in this case further reasoned that a "substantial risk" existed that respondents' "exhaustion of any Hungarian remedy could preclude them by operation of *res judicata* from ever bringing their claims in the United States," and that abstention would thus "amount to a judicial grant of immunity from jurisdiction in United States courts." Pet. App. 14a. And because "'any sort of immunity defense made by a foreign sovereign in an American court must stand on the [FSIA]'s text,'" the court believed that permitting comity-based

abstention would amount to "judicial reinstatement of immunity that Congress expressly withdrew." *Id.* at 15a (quoting *Philipp*, 894 F.3d at 415). The court also believed that the comity doctrine on which petitioners relied was not among the historical legal doctrines that Congress intended to preserve when it enacted the FSIA because, in the court's view, such a doctrine "lacks any pedigree in domestic or international common law." *Id.* at 16a.

The court of appeals acknowledged, by contrast, that "the ancient doctrine of *forum non conveniens* is not displaced by the FSIA." Pet. App. 17a. But the court held that the district court had abused its discretion in applying that doctrine here. *Id.* at 18a-19a. The court of appeals determined that the district court had accorded insufficient deference to respondents' choice of forum and had otherwise misallocated the burden of proof. *Id.* at 19a-25a. The court of appeals also reassessed the relevant public- and private-interest factors, finding that each weighed in favor of litigating the case in the United States. *Id.* at 25a-35a.

b. Judge Katsas dissented. Pet. App. 37a-47a. He did not discuss the comity question, on which he dissented from the denial of rehearing en banc in *Philipp*. See *Philipp* v. *Federal Republic of Germany*, 925 F.3d 1349, 1355-1357 (D.C. Cir. 2019) (per curiam) (Katsas, J., dissenting from the denial of rehearing en banc) (concluding that "far from foreclosing" an "exhaustion or comity-based abstention defense, * * * the FSIA affirmatively accommodates" such defenses). Instead, he focused in this case on his view that the district court "permissibly applied the settled law of *forum non conveniens*" to conclude that "this foreign-cubed case—involving wrongs committed by Hungarians against

Hungarians in Hungary—should be litigated in Hungary." Pet. App. 37a.

SUMMARY OF ARGUMENT

This Court has long recognized the doctrine of international comity, under which U.S. courts may in appropriate cases voluntarily defer to the "legislative, executive or judicial acts of another nation" as a means of showing "due regard * * * to international duty and convenience." *Hilton* v. *Guyot*, 159 U.S. 113, 164 (1895). One manifestation of that doctrine involves the choice by a U.S. court to abstain from exercising its jurisdiction over a controversy that implicates substantial interests of another nation, so that the controversy can instead be addressed in an alternative forum provided by that nation. Such comity-based abstention has long been applied by the courts.

Contrary to the view of the court of appeals, the FSIA does not bar comity-based abstention in suits against foreign states that come within the FSIA's exceptions to sovereign immunity. To the contrary, when the FSIA allows a suit against a foreign state to be brought at all, it provides that the foreign state "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 U.S. courts can engage in comity-based abstention in suits against private individuals that implicate substantial foreign interests, it follows that U.S. courts can do so in suits against foreign states as well. And at the very least, the FSIA does not express any intent to foreclose comity-based abstention with the sort of clarity that would be necessary "[i]n order to abrogate a common-law principle." *United States* v. *Texas*, 507 U.S. 529, 534 (1993) (citation omitted).

This Court's decision in *Republic of Argentina* v. *NML Capital, Ltd.*, 573 U.S. 134 (2014), on which the court of appeals relied, is not to the contrary. In that case, the sole basis offered by the foreign state for its asserted immunity from discovery was the FSIA itself. This Court held that the FSIA provided no such immunity, but expressly noted that a court "may appropriately consider comity interests" in resolving non-immunity issues relating to post-judgment discovery. *Id.* at 146 n.6. These interests may similarly be considered by a court when it is asked to abstain on comity grounds.

Accordingly, while the United States takes no position as to whether the district court's dismissal of this particular suit was warranted on international-comity grounds, the Court should reverse the court of appeals' categorical holding that the FSIA leaves "no room" for a court to consider abstention on grounds of international comity in suits against foreign states, Pet. App. 15a.[1]

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[1] As the United States discussed in its amicus brief at the certiorari stage, see U.S. Amicus Br. 9, 13-14, respondents' allegations in this case implicate the jurisdictional question of whether a state's taking of property of its own nationals can ever amount to a taking "in violation of international law" for purposes of the FSIA's expropriation exception, 28 U.S.C. 1605(a)(3). See 812 F.3d at 140-143. This Court has granted certiorari to address that question in *Federal Republic of Germany* v. *Philipp*, No. 19-351 (July 2, 2020). Even if the Court's decision in *Philipp* suggests that the district court in this case lacked jurisdiction over respondents' claims, it may still be appropriate to address the international-comity-based abstention question on which the Court granted certiorari here, because abstention is a threshold issue that can be appropriately addressed without first establishing subject-matter jurisdiction. See *Sinochem International Co.* v. *Malaysia International Shipping Corp.*, 549 U.S. 422, 431 (2007) (Because "a federal court has leeway

ARGUMENT

Since long before Congress's enactment of the FSIA, U.S. courts have held and exercised the power to abstain from deciding cases that fall within their proper jurisdiction on the ground that adjudicating them would undermine international comity. Nothing in the FSIA abrogates that authority. Indeed, "far from foreclosing [comity-based abstention]," the text of the "FSIA affirmatively accommodates [it]." *Philipp* v. *Federal Republic of Germany*, 925 F.3d 1349, 1355 (D.C. Cir. 2019) (per curiam) (Katsas, J., dissenting from the denial of rehearing en banc). And even if the text leaves any doubt on the question, the "presumption favoring the retention of long-established and familiar principles," *United States* v. *Texas*, 507 U.S. 529, 534 (1993) (citation omitted), requires reading the statute to preserve courts' longstanding authority to abstain based on international comity. The court of appeals' contrary conclusion lacks any sound basis in the statutory text or this Court's precedents, and would meaningfully harm the foreign-relations interests of the United States.

'to choose among threshold grounds for denying audience to a case on the merits,'" "a federal court [need not] decide whether the parties present an Article III case or controversy before abstaining under *Younger* v. *Harris*, 401 U.S. 37 (1971).") (citation omitted). At the very least, if this Court chooses to resolve both *Philipp* and this case on jurisdictional grounds, it should make clear that the court of appeals' holdings on the comity-based abstention issue in both cases would no longer have precedential force. Cf. *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U.S. 18, 21-22 (1994).

A. United States Courts Have Discretion In Appropriate Cases To Abstain On Comity Grounds From Exercising Jurisdiction

1. This Court has long recognized the doctrine of international comity, which permits U.S. courts to take account of the "legislative, executive or judicial acts of another nation" in ways that show "due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." *Hilton* v. *Guyot*, 159 U.S. 113, 164 (1895). The doctrine has multiple strands, including "the comity of courts, whereby judges decline to exercise jurisdiction over matters more appropriately adjudged elsewhere," and "prescriptive comity," which reflects "the respect sovereign nations afford each other by limiting the [substantive] reach of their laws." *Hartford Fire Insurance Co.* v. *California*, 509 U.S. 764, 817 (1993) (Scalia, J., dissenting).

This case involves the former strand, which is also sometimes referred to as "adjudicatory comity." *Mujica* v. *AirScan Inc.*, 771 F.3d 580, 599 (9th Cir. 2014), cert. denied, 136 S. Ct. 690 (2015). Adjudicatory comity arises in a variety of contexts, and is typically invoked "when a sovereign which has a legitimate claim to jurisdiction concludes that a second sovereign also has a legitimate claim to jurisdiction under principles of international law." *Id.* at 598 (citation omitted). This Court has explained, for example, that in early admiralty cases brought by "foreign seamen suing for wages, or because of ill treatment," a U.S. court "often" sought the consent of the foreign consul "before the court [would] proceed to entertain jurisdiction; not on the ground that it has not jurisdiction; but that, from motives of convenience or international comity, it will use

its discretion whether to exercise jurisdiction or not." *The Belgenland*, 114 U.S. 355, 363-364 (1885); see *Canada Malting Co.* v. *Patterson Steamships, Ltd.*, 285 U.S. 413, 421 (1932) ("The rule recognizing an unqualified discretion to decline jurisdiction in suits in admiralty between foreigners appears to be supported by an unbroken line of decisions in the lower federal courts."). And while early examples of federal courts abstaining from the exercise of jurisdiction on grounds of international comity arose "most frequently * * * in suits by foreign seamen against masters or owners of foreign vessels," this Court recognized nearly a century ago that "[c]ourts of equity and of law also occasionally decline, in the interest of justice, to exercise jurisdiction, where the suit is between aliens or nonresidents or where for kindred reasons the litigation can more appropriately be conducted in a foreign tribunal." *Canada Malting Co.*, 285 U.S. at 421, 423.[2]

Of course, federal courts have a "virtually unflagging obligation * * * to exercise the jurisdiction given to

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[2] This Court has recognized *The Belgenland* and *Canada Malting Co.* as early precursors of modern *forum non conveniens* doctrine. See *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 248 (1981) (treating *Canada Malting Company* as a *forum non conveniens* case, but noting that "the doctrine of *forum non conveniens* was not fully crystalized until [the Court's] decision" in *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501 (1947)); see also *American Dredging Co.* v. *Miller*, 510 U.S. 443, 449 (1994) (describing "the origins of [*forum non conveniens*] doctrine in Anglo-American law" as "murky," but citing *The Belgenland* as an early example of its application in admiralty). As *Hilton* illustrates, however, adjudicatory comity extends beyond *forum non conveniens* doctrine. See *Hilton*, 159 U.S. at 164; see also *Mujica*, 771 F.3d at 597-598 (noting that "[t]he federal common law doctrine of international comity * * * shares certain considerations with * * * judicial doctrines such as *forum non conveniens*").

them." *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800, 817 (1976). But like other common-law abstention doctrines that this Court has routinely recognized in the domestic context, international-comity-based abstention reflects the recognition that "federal courts may decline to exercise their jurisdiction, in otherwise 'exceptional circumstances,'" when "denying a federal forum would clearly serve an important countervailing interest." *Quackenbush* v. *Allstate Insurance Co.*, 517 U.S. 706, 716 (1996) (quoting *Colorado River Water Conservation District*, 424 U.S. at 813); see *id.* at 723 ("Federal courts abstain out of deference to the paramount interests of another sovereign, and the concern is with principles of comity and federalism."); *Canada Malting Co.*, 285 U.S. at 422 ("Obviously, the proposition that a court having jurisdiction must exercise it, is not universally true; else the admiralty court could never decline jurisdiction on the ground that the litigation is between foreigners."). Indeed, this Court has made explicit that abstention doctrines reflect "the common-law background against which the statutes conferring jurisdiction were enacted." *New Orleans Public Service, Inc.* v. *Council of City of New Orleans*, 491 U.S. 350, 359 (1989).

2. To determine whether international-comity-based abstention is warranted in a particular case, courts focus on protecting the United States' interests, preserving international harmony, and ensuring fairness for litigants. This Court addressed those considerations in *Société Nationale Industrielle Aérospatiale* v. *United States District Court*, 482 U.S. 522 (1987), where it faced a related question of when U.S. courts should decline to apply U.S. discovery procedures to cases involving foreign interests. The Court explained

that "the concept of international comity" requires courts to consider "the respective interests" of the United States and the foreign state, "the particular facts" of the case, as well as whether the foreign state's procedures "will prove effective." *Id.* at 543-544; see *id.* at 544 n.28.

In the decades since *Société Nationale*, the lower courts have used those same three considerations as the framework for deciding whether to abstain from exercising jurisdiction in individual cases on grounds of international comity. Their decisions have largely cohered around an approach that weighs "(1) the strength of the United States' interest in using a foreign forum, (2) the strength of the foreign government's interests [in addressing matters arising within its territory], and (3) the adequacy of the alternative forum." *Cooper* v. *Tokyo Electric Power Co.*, 860 F.3d 1193, 1205 (9th Cir. 2017) (citations and internal quotation marks omitted); see *Mujica*, 771 F.3d at 599 (considering (1) the location and character of the conduct at issue, (2) the nationality of the parties, and (3) the U.S. foreign- and public-policy interests in the litigation); *Ungaro-Benages* v. *Dresdner Bank AG*, 379 F.3d 1227, 1238 (11th Cir. 2004) (considering (1) the strength of the U.S. interest in affording a foreign forum, (2) the strength of the foreign government's interests, and (3) the adequacy of the forum); see also *Royal & Sun Alliance Insurance Co. of Canada* v. *Century International Arms, Inc.*, 466 F.3d 88, 94 (2d Cir. 2006) ("In the context of parallel proceedings in a foreign court, a district court should be guided by the principles upon which international comity is based: the proper respect for litigation in and the courts of a sovereign nation, fairness to litigants, and judicial efficiency.").

3. In applying those principles, U.S. courts have recognized that comity-based abstention, unlike the defense of sovereign immunity, may be appropriate whether or not a foreign state is party to the suit before them. Indeed, because sovereign immunity generally bars U.S. courts from exercising jurisdiction in suits against foreign states, decisions to abstain voluntarily from exercising jurisdiction arise most frequently in suits against private parties. For example, as this Court observed in *Canada Malting Company*, many of the early admiralty cases discussed above involved claims "by foreign seamen against masters or owners of foreign vessels," 285 U.S. at 421, not against a foreign sovereign. Similarly, in recent cases involving suits against private foreign defendants under the Alien Tort Statute, 28 U.S.C. 1350, several Members of this Court have indicated—without any noted disagreement on the point—that courts "can dismiss [such] suits * * * for reasons of international comity, or when asked to do so by the State Department," if there is concern that entertaining the suit would create "international friction." *Jesner* v. *Arab Bank, PLC*, 138 S. Ct. 1386, 1430-1431 (2018) (Sotomayor, J., dissenting, joined by Ginsburg, Breyer, and Kagan, JJ.); see *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U.S. 108, 128-129 (2013) (Breyer, J., concurring in the judgment, joined by Ginsburg, Sotomayor, and Kagan, JJ.) (similar); see also *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004) (acknowledging the "strong argument that federal courts should give serious weight to the Executive Branch's view" about the "case-specific * * * impact on foreign policy" of exercising jurisdiction over a particular case).

Lower courts have likewise determined that comity-based abstention is appropriate where entertaining

suits against private defendants could frustrate the substantive policies of foreign sovereigns or otherwise have significant implications for the foreign relations of the United States. In *Cooper* v. *Tokyo Electric Power Co. Holdings, Inc.*, 960 F.3d 549 (2020), for instance, the Ninth Circuit held that the district court had appropriately dismissed claims against the owner of the Fukushima Daiichi Nuclear Power Plant on international-comity grounds. See *id.* at 565-569. Although Japan was not a party to the suit, adjudicating claims against the owner of the plant in a U.S. court could have interfered with Japan's interest in administering a comprehensive claims system for victims of the 2011 Fukushima disaster through the Japanese courts. *Id.* at 568. In light of those "strong, important policy interests" that favored resolution of the claims in a Japanese forum, the Ninth Circuit held that the district court had not abused its discretion in deciding to abstain from the exercise of jurisdiction. *Id.* at 569.

Similarly, in *Ungaro-Benages*, *supra*, the Eleventh Circuit held that the district court had appropriately abstained from deciding claims against two private German banks arising from their alleged participation in Nazi-era seizures of property from German Jews. It held that Germany had, with the encouragement of the United States, established a specialized forum for adjudicating such claims, and that the district court's abstention in favor of that forum was appropriate "based on the strength of our government's interests in using

the [alternative forum,] the strength of the German government's interests, and the adequacy of the * * * alternative forum." 379 F.3d at 1239.[3]

B. The FSIA Does Not Foreclose Comity-Based Abstention In Suits Against Foreign States

1. The FSIA does not bar U.S. courts from applying these comity-based abstention principles in cases against foreign states. Indeed, "far from foreclosing [abstention], the FSIA affirmatively accommodates [it]." *Philipp*, 925 F.3d at 1355 (Katsas, J., dissenting from the denial of rehearing en banc). That is because the FSIA "provides that, for any claim falling within an immunity exception, 'the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances.'" *Ibid.* (quoting 28 U.S.C. 1606). As explained above, a private individual who was named as a defendant in a suit that threatened to create "international friction" could ask a court to abstain from exercising jurisdiction by moving to "dismiss * * * for reasons of international comity." *Jesner*, 138 S. Ct. at 1430-1431 (Sotomayor, J., dissenting); see pp. 15-17, *supra*. It follows from the straightforward text

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[3] Other examples include, for example, *Mujica*, 771 F.3d at 599; *JP Morgan Chase Bank* v. *Altos Hornos de Mexico, S.A. de C.V.*, 412 F.3d 418 (2d Cir. 2005); *Turner Entertainment Co.* v. *Degeto Film GmbH*, 25 F.3d 1512 (11th Cir. 1994); *Bi* v. *Union Carbide Chemicals & Plastics Co.*, 984 F.2d 582 (2d Cir.), cert. denied, 510 U.S. 862 (1993); *Sequihua* v. *Texaco, Inc.*, 847 F. Supp. 61 (S.D. Tex. 1994). And in numerous other cases, courts have recognized the possibility of abstention but found it inappropriate on the particular facts before them. See, *e.g.*, *Bigio* v. *Coca-Cola Co.*, 448 F.3d 176, 178-179 (2d Cir. 2006), cert. denied, 549 U.S. 1282 (2007); *Jota* v. *Texaco, Inc.*, 157 F.3d 153, 159-161 (2d Cir. 1998).

of the FSIA that a foreign state may also do so. 28 U.S.C. 1606.

That conclusion is consistent with this Court's recognition that the FSIA "does not appear to affect the traditional doctrine of *forum non conveniens*." *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 490 n.15 (1983); accord Pet. App. 17a ("[T]he ancient doctrine of *forum non conveniens* is not displaced by the FSIA."). Like comity-based abstention, the doctrine of *forum non conveniens* is not directly addressed in the FSIA. But motions to dismiss on *forum non conveniens* grounds are available to private defendants, and the FSIA likewise preserves their availability in suits against foreign states as well. See 28 U.S.C. 1606. Neither the court of appeals nor respondents have identified any persuasive basis on which the FSIA's text can be read to allow application of *forum non conveniens* doctrine, but not adjudicatory comity, in suits against foreign states.

2. Even if the statutory text could plausibly be understood to displace adjudicatory comity, interpreting the FSIA to do so would conflict with the "longstanding * * * principle that '[s]tatutes which invade the common law * * * are to be read with a presumption favoring the retention of long-established and familiar principles.'" *Texas*, 507 U.S. at 534 (citation omitted; brackets in original); see, *e.g.*, *Fairfax's Devisee* v. *Hunter's Lessee*, 11 U.S. (7 Cranch) 603, 623 (1813).

As discussed, see pp. 11-13, *supra*, comity-based abstention was part of the "the common-law background against which the statutes conferring jurisdiction were enacted," *New Orleans Public Service, Inc.*, 491 U.S. at 359, including the FSIA. The FSIA would need to "'speak directly' to the question" of adjudicatory comity

in order to "abrogate [that] common-law principle." *Texas*, 507 U.S. at 534 (citation omitted). The FSIA indisputably does not do so. While it speaks to the circumstances in which a foreign state is "*immune* from the jurisdiction of the courts of the United States and of the States" on grounds of sovereign immunity, 28 U.S.C. 1604 (emphasis added), nothing in the FSIA specifically addresses the distinct question of whether a district court may in appropriate circumstances decline to exercise the jurisdiction that the FSIA confers upon it, see 28 U.S.C. 1330(a), just as it can in appropriate circumstances decline to exercise jurisdiction conferred by other statutes, see 28 U.S.C. 1331-1333. Courts thus retain the same discretionary, common-law authority to abstain from exercising jurisdiction in appropriate cases that they held before Congress enacted the FSIA. Cf. H.R. Rep. No. 1487, 94th Cong., 2d Sess. 20 (1976) (explaining that because the relevant provision of the FSIA "deals solely with issues of immunity, it in no way affects existing law on the extent to which, if at all, the 'act of state' doctrine may be applicable").

3. This Court has strongly suggested that comity-based abstention remains available in suits against foreign states following passage of the FSIA. Specifically, in *Republic of Austria* v. *Altmann*, 541 U.S. 677 (2004), this Court indicated that even where an exception to the FSIA applies, courts "might well" defer to a "statement of interest[]" filed by the Executive Branch "suggesting that courts decline to exercise jurisdiction in particular cases" in light of "the implications of exercising jurisdiction over particular [defendants]." *Id.* at 701-702. While the Court did not decisively resolve the deference question there, its discus-

sion necessarily presumed that comity-based abstention remains available in suits that come within one of the FSIA's exceptions; if such abstention were categorically foreclosed by the statute itself, after all, there would be no occasion even to consider the possibility of deference.

C. The Court Of Appeals' Contrary Conclusion Is Incorrect

The court of appeals, in the decision below and in its earlier *Philipp* decision, offered several justifications for its conclusion that the FSIA categorically precludes international-comity-based abstention in suits against foreign states. See Pet. App. 14a-16a; *Philipp* v. *Federal Republic of Germany*, 894 F.3d 406, 414-416 (D.C. Cir. 2018), cert. granted, No. 19-351 (July 2, 2020), and cert. denied, No. 19-520 (July 2, 2020). None is persuasive.

1. The court of appeals placed primary reliance on this Court's decision in *Republic of Argentina* v. *NML Capital, Ltd.*, 573 U.S. 134 (2014), which it described as "[t]he key case" in this area, *Philipp*, 894 F.3d at 416. But the decision in *NML Capital* does not preclude courts from weighing international-comity considerations in determining whether to exercise jurisdiction under the FSIA. Rather, this Court addressed there "[t]he single, narrow question * * * whether the [FSIA] specifies a different rule [for post-judgment execution discovery] when the judgment debtor is a foreign state," displacing the Federal Rules of Civil Procedure applicable in cases between private parties. *NML Capital*, 573 U.S. at 140. The Court stated, in resolving that question, that "any sort of immunity defense made by a foreign sovereign in an American court must stand on the Act's text." *Id.* at 141-142. Because the text of the FSIA does not "forbid[] or limit[] discovery in aid of

execution of a foreign-sovereign judgment debtor's assets," the FSIA itself conferred no statutory immunity to such discovery on the foreign state, and the foreign state was therefore not entitled to relief. *Id.* at 142.

The fact that foreign states lack a sovereign-specific, immunity-based statutory defense to post-judgment discovery has no bearing on whether courts can apply discretionary, generally applicable common-law abstention doctrines in suits against foreign states. See *Philipp*, 925 F.3d at 1356 (Katsas, J., dissenting from the denial of rehearing en banc) ("[F]oreign sovereign *immunity*—which eliminates subject-matter *jurisdiction*—is distinct from non-jurisdictional defenses such as exhaustion and abstention."). Indeed, the Court in *NML Capital* expressly recognized that, even where there is jurisdiction under the FSIA, a court "may appropriately consider comity interests" relevant to other non-immunity determinations in the litigation. 573 U.S. at 146 n.6 (citations omitted) (expressing the Court's expectation that "'other sources of law' ordinarily will bear on the propriety of discovery requests" to foreign sovereigns) (citations omitted). Thus, contrary to the court of appeals' understanding, *NML Capital* leaves ample "room" for the type of common-law abstention that the district court deemed appropriate under considerations of comity here. Pet. App. 14a-15a.

2. The court of appeals also expressed concern that abstaining to facilitate "'prudential exhaustion' would in actuality amount to a judicial grant of immunity from jurisdiction in United States courts" because respondents' "exhaustion of any Hungarian remedy could preclude them by operation of *res judicata* from ever bringing their claims in the United States." Pet. App. 14a. That, too, is incorrect.

One would not ordinarily describe a private foreign defendant as being "immun[e] from jurisdiction in United States courts," Pet. App. 14a, merely because a U.S. court abstains from the exercise of jurisdiction on the basis of case-specific considerations, and that description is no more apt for a foreign state that benefits from such a case-specific ruling. That is true for several reasons. In the first place, the requirement that a plaintiff attempt to exhaust foreign remedies will not necessarily foreclose the plaintiff from invoking the assistance of U.S. courts at a later date. As this Court has explained, "the preclusive effect of a foreign judgment in civil litigation * * * is not uniformly accepted in this country," *Gamble* v. *United States*, 139 S. Ct. 1960, 1975 (2019), so *res judicata* principles may not preclude a plaintiff from re-litigating a claim in the United States. See *id.* at 1975 n.12 (contrasting treatises, which largely endorse recognition of foreign judgments, against federal court of appeals decisions, which hold that such recognition is itself a form of international comity and thus committed to case-specific judicial discretion); *Bank of Augusta* v. *Earle*, 38 U.S. (13 Pet.) 519, 589 (1839) (noting the capacity of the U.S. reviewing court to set aside foreign judgments "repugnant to the laws or policy of" the United States); *Fischer* v. *Magyar Államvasutak Zrt.*, 777 F.3d 847, 852 (7th Cir.) ("If plaintiffs find that future attempts to pursue remedies [in a foreign forum] are frustrated unreasonably and arbitrarily, a United States court could once again hear these claims."), cert. denied, 576 U.S. 1006 (2015). In this case, for example, the district court noted that "dismissal of a lawsuit on prudential exhaustion grounds would be without prejudice," such that the court "may

be called upon to * * * evaluate the fairness and adequacy of the foreign proceeding," and potentially "revive[] claims" and "disagree with the outcome" reached in Hungary. Pet. App. 69a-70a.

Even assuming that a particular plaintiff might be precluded from relitigating a particular claim in the United States, moreover, it does not follow that prudential abstention amounts to a grant of sovereign immunity outside the limits of the FSIA framework. Abstaining from jurisdiction on international-comity grounds no more confers immunity on a foreign defendant than does dismissing a suit on grounds of *forum non conveniens* or abstaining on the basis of some other type of comity, which may also "preclude[] relitigation of issues raised * * * and resolved" in the alternative forum. *Iowa Mutual Insurance Co.* v. *LaPlante*, 480 U.S. 9, 19 (1987). Instead, those doctrines—like comity-based abstention—simply reflect case-specific assessments of the "proper deference [owed] to the [separate] court system" with concurrent jurisdiction over a claim. *Ibid.*

3. The court of appeals also suggested that because the FSIA sets out specific terrorism-related circumstances in which a plaintiff must always "afford[] [a] foreign state a reasonable opportunity to arbitrate" before bringing suit, 28 U.S.C. 1605A(a)(2)(A)(iii), Congress must not have intended for courts to rely upon comity-based abstention principles to require exhaustion of an arbitral or other forum in other contexts. See *Philipp*, 894 F.3d at 416. That suggestion is misplaced.

Congress's choice in Section 1605A(a)(2)(A)(iii) to require that U.S. courts *always* afford foreign states an opportunity to arbitrate certain types of terrorism-related claims does not suggest that U.S. courts may

never require exhaustion based on case-by-case considerations in other types of cases, consistent with the longstanding principles discussed above. And that is especially true given that Congress added the terrorism exception to the FSIA, along with its requirement of an opportunity for arbitration, some 20 years after the statute's initial enactment. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221(a), 110 Stat. 1241. It is highly unlikely that Congress would have used the enactment of a new prelitigation arbitration requirement targeted to a limited set of claims as an indirect means by which to foreclose the availability of discretionary, comity-based exhaustion defenses more generally.

Indeed, when Congress wants to preclude courts from engaging in their ordinary consideration of international comity, it has made that intent clear. In the National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, Div. A, Tit. XII, § 1226, 133 Stat. 1645, Congress amended 22 U.S.C. 8772(a)(1), providing that Iran's assets are "subject to execution or attachment in aid of execution * * * without regard to concerns relating to international comity." 22 U.S.C. 8772(a)(1). The absence of any comparable language in the FSIA confirms that the FSIA does not displace courts' ordinary consideration of comity-based concerns.

4. Finally, the court of appeals also appears to have been influenced by a broader misunderstanding of the nature of international-comity-based abstention in U.S. courts. While acknowledging "the well-established rule that exhaustion of domestic remedies is preferred in international law as a matter of comity," *Philipp*, 894 F.3d at 416 (quoting *Fischer*, 777 F.3d at 859), the court of

appeals believed that because that rule under international law applies only in "nation vs. nation litigation," *ibid.* (citation omitted), the private plaintiffs here could not be required to exhaust their remedies in Hungary. See *ibid.* (discussing Restatement (Fourth) of Foreign Relations Law of the United States § 455, Reporters' Note 9 (Tentative Draft No. 2, 2016)).

As the discussion above illustrates, however, comity-based abstention in U.S. courts is a doctrine of *domestic* U.S. common law that is not limited to the precise application of international-law exhaustion principles. See pp. 11-17, *supra*; see also *Mujica*, 771 F.3d at 597. To be sure, the common-law doctrine is informed by the principles of international law favoring a litigant's exhaustion of "remedies available in the domestic legal system." *Sosa*, 542 U.S. at 733 n.21. But U.S. courts have long applied the doctrine in suits brought by private plaintiffs, and nothing in the FSIA purports to deprive U.S. courts of the discretion to continue doing so in appropriate cases.

D. Preserving The Availability Of Comity-Based Abstention Is Important To The Foreign-Policy Interests Of The United States

If allowed to stand, the court of appeals' categorical rejection of international-comity-based abstention likely would be harmful to the foreign-relations interests of the United States. That is true for at least two reasons.

First, domestic litigation against foreign sovereigns, by its nature, often raises serious foreign-policy concerns. To be sure, Congress has determined that not all such suits are inappropriate, and has identified in the FSIA certain limited categories of cases in which foreign states will be treated "in the same manner * * * as a private individual under like circumstances." 28 U.S.C.

1606. Under the court of appeals' interpretation of the FSIA, however, foreign states (and their instrumentalities and agencies) would be treated *worse* than private individuals, unable to invoke ordinary rules of comity-based abstention. That reading of the FSIA would exacerbate the very foreign-relations concerns that the FSIA is intended to mitigate: even if foreign states have no right to demand "immun[ity] from the jurisdiction of [U.S.] courts insofar as their commercial activities are concerned," 28 U.S.C. 1602, for example, they would be understandably upset if they were subjected to that jurisdiction by virtue of their sovereign status even as a U.S. court abstained from exercising jurisdiction over otherwise similarly situated private defendants.

Second, comity-based abstention aids in the United States' efforts to persuade foreign partners to establish appropriate redress and compensation mechanisms for human-rights violations, including for the horrendous human-rights violations perpetrated during the Holocaust. See, *e.g.*, Bureau of European and Eurasian Affairs, U.S. Dep't of State, *Prague Holocaust Era Assets Conference: Terezin Declaration* (June 30, 2009), https://2009-2017.state.gov/p/eur/rls/or/126162.htm (emphasizing importance of property restitution and compensation, and supporting national programs to address Nazi-era property confiscations). If U.S. courts were powerless to consider and defer to the availability and adequacy of the alternative fora that foreign states establish at the United States' urging, those foreign states would have less incentive to establish compensation

mechanisms in the first place or to maintain their adequacy once established.[4] No reason exists to conclude that the FSIA mandates that counter-productive result.

[4] The Executive Branch sometimes advises courts of its view that international comity counsels abstention in a particular case, especially where the United States has worked closely with the foreign state to establish the alternative forum in which the plaintiff's claims could be considered. In other cases, such as this one, the United States lacks "a working understanding of the mechanisms that have been or continue to be available in [the foreign nation] with respect to [the] claims" at issue and, "[a]ccordingly, * * * does not express a view as to whether it would be in the foreign policy interests of the United States for plaintiffs to have sought or now seek" redress in the foreign sovereign's courts. U.S. C.A. Amicus Br. 11; see *ibid.* ("The United States therefore takes no position on the particular facts and circumstances of this case as to whether the district court properly applied the doctrines of prudential exhaustion and forum non conveniens to dismiss plaintiffs' claims in favor of litigation in Hungarian courts.").

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed and the case remanded for an assessment whether abstention based on international comity is appropriate.

Respectfully submitted.

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