No. 18A942

In the Supreme Court of the United States

REPUBLIC OF HUNGARY *ET AL.*,

Applicants,

v.

ROSALIE SIMON, *ET AL.*, INDIVIDUALLY AND FOR ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Application to Stay or Recall the Mandate of the U.S. Court of Appeals for the District of Columbia Circuit

RESPONDENT-SURVIVORS' OPPOSITION TO APPLICATION FOR STAY PENDING THE FILING AND DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

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SURVIVORS WOULD BE HARMED BY A STAY, AND HUNGARY HAS FAILED TO MAKE THE REQUIRED STRONG SHOWING THAT A STAY IS WARRANTED UNDER APPLICABLE STANDARDS

With good reason, the D.C. Circuit denied the motion by the Republic of Hungary and its national railway company, Magyar Államvasutak Zrt. ("MÁV," and both together, "Hungary"), for a stay of the court's mandate pending Hungary's petition for a writ of certiorari to this Court. Yet, in its present application, Hungary does not even address the important reason why that stay was already denied and should again be denied. When properly weighed, the equities lean overwhelmingly against the stay Hungary seeks.

Hungary has failed to sustain its heavy burden to establish good cause for such a stay.[1] *See Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam) (describing what "an applicant *must show*" "[t]o obtain a stay pending the filing and disposition of a petition for a writ of certiorari") (emphasis supplied). The

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[1] In addition, Hungary has mischaracterized what few facts it has presented. For example, it refers to this as a "foreign-cubed" case, using that term four different times for emphasis. Application at 1, 2, 12, & 20. But this is *not* a "foreign-cubed" case. It involves "four United States citizens—Rosalie Simon, Charlotte Weiss, Rose Miller, and Ella Feuerstein Schlanger" — among the original fourteen Survivors who brought this suit. *Simon v. Republic of Hungary*, 911 F.3d 1172, 1177 (D.C. Cir. 2018) (*Simon IV*). The term "foreign-cubed" describes cases with "purely foreign facts," *i.e.*, "cases where the plaintiffs are foreign, the defendants are foreign, and all the relevant conduct occurred abroad." *RJR Nabisco, Inc. v. European Community*, 579 U.S. —,136 S.Ct. 2096, 2116 (2016) (Breyer, J., concurring in part, dissenting in part, and dissenting from the judgment), citing *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 283, n. 11 (2010) (Stevens, J., concurring in judgment).

Court has identified the factors to be considered in determining whether to issue a stay:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Nken v. Holder, 556 U.S. 418, 434 (2009), quoting *Hilton v. Braunskill,* 481 U.S. 770, 776 (1987); *accord*, *Chafin v. Chafin*, 568 U.S. 165, 179 (2013) (describing these as "the four traditional stay factors"). These factors strongly disfavor further delay of this case. Especially during the limited time needed for the Court to consider whether to grant or deny a petition for writ of certiorari, Hungary faces no harm from resumed district court proceedings. Survivors, by contrast, face irreparable harm should the Court issue a stay.

1. More than nine years have already passed since Survivors brought this suit. *See Simon IV*, 911 F.3d at 1183-84 (referring to "the elderly Survivors' almost decade-long pursuit of justice"). It had taken over six and one-half decades after the traumatic, heinous events of the Holocaust for Survivors to muster the strength to assert their rights to justice against the perpetrators. Since they brought suit in 2010, three of the 14 elderly Survivors have died. Every passing day poses an increasing risk that more Survivors will not see justice achieved in their lifetimes. The injury to Survivors if a stay were granted is palpable.

2. a. By contrast, Hungary has not shown that it would suffer any legally cognizable prejudice if proceedings go forward in the district court while the Court considers the preliminary issue whether it will even grant certiorari. Hungary says that only a "relatively short time [is] needed for certiorari proceedings." Application at 3. Hungary will suffer no irreparable injury during that "relatively short time." *Id.* And, of course, even in the absence of a stay, the amount of time needed to act on Hungary's certiorari petition is entirely dictated by Hungary: Hungary has the power to minimize any purported injury to itself by filing its petition for certiorari in time for the Court to decide before its summer recess whether to grant or deny the petition, but gave no indication in its stay application that it plans to do that, even though Survivors raised that issue in the stay briefing in the court of appeals.[2]

If a stay were granted and the Court then denied the petition for certiorari, the delay would have harmed the elderly Survivors, unmitigated by any benefit to Hungary or the courts. On the other hand, if the stay were denied and the Court then granted the petition for certiorari, Hungary would not have incurred any

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[2] If Hungary were to file its petition for certiorari not later than April 19, 2019, pursuant to Supreme Court Rule 15.5, the petition, opposing brief, and any reply brief would be distributed to the Justices on June 4, 2019, 14 days after the filing of Survivors' opposing brief, for consideration at the Court's conference on June 20, 2019, the last scheduled conference of the current Term. *See* https://www.supremecourt.gov/filingandrules/rules_guidance.aspx to access the Case Distribution Schedule.

serious exposure by the proceedings in the district court during the "relatively short time" at issue.

Hungary is wrong in its exaggerated suggestion that during that "relatively short time," Survivors "will press Hungary to file an answer, to produce discovery, and, as quickly as possible, to advance to a disposition on the merits." Application, at 3, 20. The D.C. Circuit's mandate issued on March 21, 2019, and the district court the same day directed the parties "to submit jointly, by April 1, 2019, a proposed schedule to govern further proceedings in this case." Minute Order, filed March 21, 2019, Exhibit A hereto. The parties agree that those proceedings will, in the words of Hungary's counsel, "first deal with the remainder of the motion to dismiss (the sovereign immunity issues) that the Court did not decide last time." Email from K. Cailteaux to C. Fax, March 18, 2019, Exhibit B hereto. Thus, all that Hungary will likely need to do in the interim will be to reiterate the remaining, unresolved jurisdictional portion of its previously filed motion to dismiss.

Further, contrary to the Application, at 20, resuming the motion-to-dismiss proceedings in the district court does not compromise comity interests in a manner prejudicial to Hungary. That is because Hungary has already stated that it plans to renew its motion to dismiss on sovereign immunity grounds, where it can continue to air and protect fully any comity concerns it may be entitled to under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 *et seq*. Moreover, should

the petition for certiorari be granted, the district court, the court of appeals, or this Court could then consider whether such circumstances warrant a stay of further proceedings below, pending the Court's determination of the question or questions as to which the Court grants certiorari.

b. Hungary claims that irreparable harm to it will result, not from its actual efforts pursuing the unresolved portions of its motion to dismiss, but from comity concerns. "The comity interests that will be compromised by proceeding with foreign-cubed litigation of this scale against a foreign sovereign," Hungary asserts, "are sufficiently important—and the court of appeals' reasoning sufficiently dubious—that a stay is warranted until this Court can consider Hungary's certiorari petition." Application at 20.

This argument is unavailing. The first reason is that Hungary forfeited it. Hungary failed to assert the argument when seeking a stay of the mandate from the D.C. Circuit. *See* Motion to Stay Issuance of Mandate Pending Disposition of Certiorari Petition, filed February 21, 2019, Exhibit C hereto. It appears that Hungary raised this argument for the first time now, because in the D.C. Circuit, Survivors challenged Hungary's failure to point to any irreparable harm to it if the stay is denied. This Court recently cautioned, "it is generally unwise [for the Court] to consider arguments in the first instance...." *Byrd v. United States*, 584 U.S. —, 138 S.Ct. 1518, 1527 (2018) (Court declined to consider contention not raised

below). *See United States v. Jones*, 565 U.S. 400, 413 (2012) ("The Government did not raise it below, and the D.C. Circuit therefore did not address it. … We consider the argument forfeited."), citing *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56, n. 4 (2002). This is one of those "cases with sensitive diplomatic implications" in which the Court most recently stated that "the rule of law demands adherence to strict requirements" of the FSIA "even when the equities of a particular case may seem to point in the opposite direction." *Republic of Sudan v. Harrison*, No. 16-1094, 587 U. S. —, slip op. at 17 (Mar. 26, 2019). All the more so here, where the equities do not point in the opposite direction.

Apart from being forfeited, Hungary's argument fails. Its premise is that by pointing to comity concerns Hungary has fulfilled its burden to show that it will suffer irreparable harm if no stay is granted. This is factually and legally wrong for several reasons. First, as noted above, Hungary can still fully protect its comity interests by arguing and proving—if it can—that it is entitled to sovereign immunity, a determination not yet made by the district court. Moreover, as already stated, this is *not* "foreign-cubed" litigation.[3] Because four of the Survivors are United States citizens, the putative international comity interest is diminished in this case.

[3] See note 1, *supra*.

Furthermore, Hungary must show that irreparable injury will likely occur independent of the merits of the case, that is, irrespective of the outcome of its petition for writ of certiorari, solely by virtue of the events that will transpire until the petition is decided. But that is not what Hungary has claimed as irreparable injury. Hungary's claimed irreparable injury depends upon Hungary's prevailing on the merits. For if Hungary loses on the merits, there will have been no legally cognizable injury to international comity. Hungary's approach merely restates the merits issue as one of irreparable harm and conflates the latter with the former even though Hungary must show *both* that it is likely to prevail on the merits *and* that it will experience irreparable injury in the interim. Hungary has pointed to no injury, reparable or not, other than that it claims to be right on the merits. This is a legally inadequate showing. "To prevail here the applicant must meet a heavy burden of showing *not only* that the judgment of the lower court was erroneous on the merits, *but also* that the applicant will suffer irreparable injury if the judgment is not stayed pending his appeal." *Williams v. Zbaraz*, 442 U.S. 1309, 1311 (1979) (Stevens, J., in chambers) (denying stay) (emphasis supplied, internal quotation marks omitted), quoting *Whalen v. Roe,* 423 U.S. 1313, 1316 (1975) (Marshall, J., in chambers).

c. Even more than the Republic, Applicant MÁV can cite no prejudice to it if the Application is denied. The D.C. Circuit has twice held, in 2016

and again in 2018, that jurisdiction over the railroad has been established. *See Simon v. Republic of Hungary*, 812 F.3d 127, 147 (D.C. Cir. 2016) (*Simon II*) ("we find that the plaintiffs' allegations suffice to withstand dismissal as to the claims against MÁV"); *Simon IV*, 911 F.3d at 1181 ("a statutory exception to immunity applies—as we have squarely held it does at least as to MÁV"; "jurisdiction exists (as it does at least over MÁV)"). The Application is silent about MÁV's seeking the Court's review of this aspect of the decision below. Thus, appearance by MÁV in district court proceedings while the Court considers the certiorari petition entails no prejudice to MÁV. Instead, the remaining jurisdictional issues under the FSIA that will be the subject of the renewed motion-to-dismiss proceedings in the district court, will concern only the Republic, not the railway. MÁV will merely be a spectator.

d. Both Applicants' prior conduct belies any prejudice to them should this Court deny the requested stay. After the *Simon II* reversal in 2016, neither Applicant sought rehearing or rehearing *en banc*, and neither petitioned this Court for certiorari review. Thus, while Hungary has asserted in conclusory fashion that it "should not be required to engage in further litigation in the U.S. courts while the Supreme Court considers its forthcoming certiorari petition," Exhibit C, p.6, Hungary has failed to provide facts explaining why that is so or why, if it were so, it was not equally so when Hungary chose not to seek this

Court's review in 2016. Clearly, Hungary has failed to show that it will suffer any injury, much less irreparable injury, if the stay is denied.

3. The public has an interest in avoiding further delay of this case. As Rule 1 of the Federal Rules of Civil Procedure recites, court procedures should be employed "to secure the just, speedy, and inexpensive determination of every action and proceeding." With the motion-to-dismiss stage of this case still incomplete after more than nine years of litigation, this public interest reinforces Survivors' interest in seeing justice achieved in this case during their remaining lives. As the D.C. Circuit recognized, "[t]he United States has an obvious interest in supporting [the four U.S. citizen-Survivors'] efforts to obtain justice in a timely manner and, to that end, in ensuring that a United States forum is open to those whose claims fall within the courts' lawful jurisdiction." *Simon IV*, 911 F.3d at 1188.

In the face of its horrific violations of international law during the Holocaust, Hungary asserts that "[t]he magnitude of the wrongdoing … does not create any unique interest in the United States in resolving claims for these historic injuries …" Application, at 15. Again, Hungary is wrong. The D.C. Circuit concluded that the United States has a strong interest in the just and urgent compensation of Holocaust Survivors. The court quoted explicit statements by the United States:

> [T]he United States government has announced that it has a "moral imperative * * * to provide some measure of justice to the victims of the Holocaust, and to do so in their remaining lifetimes." United States Br. at 9-10. That interest is part of a larger United States policy to support compensation for Holocaust victims, especially its own citizens. "The policy of the United States Government with regard to claims for restitution or compensation by Holocaust survivors and other victims of the Nazi era has consistently been motivated by the twin concerns of justice and urgency." United States Statement of Interest at 2.

Id. at 1188-89.[4]

4. Contrary to Hungary's contention, *Simon IV* is not "wrong on the merits." Application at 17. Hungary has failed to make the required strong showing that the Court will likely grant certiorari. Hungary cites two Seventh Circuit decisions, rendered at different stages in the same case, and argues that the resulting circuit split, bolstered by an *amicus* brief of the United States, qualifies this case for the grant of certiorari.

But Hungary exaggerates the import of that *amicus* brief to this case. In doing so, Hungary omits the inconvenient (for Hungary) fact that, from the outset

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[4] Not even willing to use the word "Holocaust," Hungary shockingly argues that Survivors' case is somehow unworthy both because compensation to Survivors might result in diminished compensation to later victims of Hungary's conduct under its Communist regime, *see* Application, at 14 ("This case … threatens to redirect significant economic resources to fascist-era victims alone …"), and because that compensation to non-Hungarian Survivors will harm Hungary's economy "to the detriment of its current residents, including other class members who continue to live in Hungary." *Id.* at 14-15. These arguments not so subtly attempt to transform Survivors, who are Hungary's victims, into wrongdoers for seeking justice. The Court should not countenance such an approach.

of this case, the United States disclaimed any concern for international comity or other matters related to the Republic or MÁV. In its official Statement of Interest filed in the district court the United States expressly took "no position on the merits of the underlying legal claims or arguments advanced by plaintiffs or by defendants," except as related to Rail Cargo Hungaria Zrt., a third defendant that subsequently was dismissed from the litigation.[5] Statement of Interest of the United States of America ("Statement"), Document No. 42 in the district court, filed July 19, 2011, at 1. Even the *amicus* brief on which Hungary relies was careful to note that the United States took no position on whether comity concerns required dismissing *this* case, and went out of its way to underscore that the United States strongly favors the speedy and just resolution of Holocaust claims such as this. United States *Amicus* Br. at 11, 9.

Hungary sprinkles arguments based on the D.C. Circuit's findings concerning *forum non conveniens* throughout its petition, as though that issue were also somehow worthy of review on certiorari. However, it is not. There is no split among the circuits, and there is no important federal question presented there, nor is there any novel or extreme application of *forum non conveniens* doctrine. The D.C. Circuit simply corrected the errors of law made by the district court, as any court of appeals would.

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[5] *See Simon II*, 812 F.3d at 134.

Even assuming that there is a bona fide split between two circuits concerning the separate "prudential exhaustion" issue, meeting the minimum traditional criteria for certiorari review is not the same as a strong showing that the Court is likely to grant the petition. Indeed, the Court frequently does not grant certiorari review even when there is a circuit split, *see, e.g.*, *E.I. du Pont de Nemours & Co. v. Smiley*, 138 S.Ct. 2563 (2018) (mem.) (Gorsuch, J., respecting denial of certiorari although "[t]here is a well-defined circuit split on the question" presented). "Substantial numbers of circuit splits exist and remain unresolved for long periods of time." Michelle R. Slack, *Separation of Powers and Second Opinions: Protecting the Government's Role in Developing the Law by Limiting Nationwide Class Actions Against the Federal Government*, 31 REV. LITIG. 943, 965 and n.117 (2012). They "go unresolved until the issue is sufficiently mature to warrant Supreme Court review." *Id.* at 970. Thus, unresolved splits existing only between two circuits are commonplace. *See, e.g.*, *Rowan County, N.C. v. Lund*, 138 S.Ct. 2564, 2567 (2018) (mem.) (Thomas, J. dissenting from denial of certiorari, noting split between Fourth and Sixth Circuits); *Lormand v. Aries Marine Corp.*, 484 U.S. 1031, 1032 (1988) (White, J. dissenting from denial of certiorari, noting split between two circuits). Hungary has provided no reason, much less a strong showing, to believe that the apparent split between the D.C.

Circuit and the Seventh Circuit is sufficiently mature to warrant this Court's review at this time.

On the contrary, the Seventh Circuit ruling on "prudential exhaustion" was and remains an outlier and so clearly wrong—unprecedented before and never since followed—that it barely rises to the level of a cognizable "split" between the circuits. *Fischer v. Magyar Allamvasutak Zrt.*, 777 F.3d 847 (7th Cir. 2015) and *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661 (7th Cir. 2012) were actually only one case in two different iterations. The Seventh Circuit had to revisit the issue and write a second opinion, on the same facts, in an attempt to rectify the faulty reasoning of the earlier opinion.

Meanwhile, two different panels of the D.C. Circuit—in this case and in *Philipp v. Federal Republic of Germany*, 894 F.3d 406 (D.C. Cir. 2018)—have come to the same conclusions on the disputed issues, and the D.C. Circuit denied Hungary's petition for rehearing *en banc* without a single member of that court having requested a vote on the petition. Unlike the Seventh Circuit, the D.C. Circuit has remained faithful to Congress's chosen statutory language and followed this Court's direction concerning it:

> [E]nforcing what Hungary calls "prudential exhaustion" would in actuality amount to a judicial grant of immunity from jurisdiction in United States courts. But the FSIA admits of no such bar. As this court recently held in *Philipp v. Federal Republic of Germany*, *supra*, nothing in the FSIA or federal law empowers the courts to grant a foreign sovereign an immunity from suit that Congress, in the FSIA,

> has withheld. 894 F.3d at 414-415. To the contrary, the whole point of the FSIA was to "abate[ ] the bedlam" of case-by-case immunity decisions, and put in its place a "'comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state.'" *Id.* at 415 (additional internal quotation marks and citation omitted) (quoting *Republic of Argentina v. NML Capital, Ltd.*, 573 U.S. 134, 134 S.Ct. 2250, 2255, 189 L.Ed.2d 234 (2014)). There is no room in those "comprehensive" standards governing "every civil action," *id.*, for the extra-textual, case-by-case judicial reinstatement of immunity that Congress expressly withdrew. As we explained in *Philipp*—echoing the Supreme Court—the whole point of the FSIA is that, "[g]oing forward, 'any sort of immunity defense made by a foreign sovereign in an American court must stand on the Act's text. Or it must fall.'" *Id.* at 415 (quoting *NML Capital*, 134 S.Ct. at 2256).

Simon IV, 911 F.3d at 1180-81. The best Hungary can say is that, while the Seventh Circuit "expressly distinguished" its cases from this Court's *NML Capital* decision in order not to be compelled to follow it, the D.C. Circuit supposedly applied a "mistaken understanding" of this Court's decision in following it. Application, at 8, 11. On the contrary, the D.C. Circuit was faithful to the FSIA's language, to its purpose, and to this Court's jurisprudence concerning it.

Accordingly, the likely outcome of Hungary's petition for a writ of certiorari is that it will be denied. At the very least, Hungary has failed to make a strong showing otherwise.

CONCLUSION

As set forth above, Hungary has failed to sustain its heavy burden to justify the requested stay, which will cause great harm to Survivors. The Application should therefore be denied.

Dated: March 28, 2019

Respectfully submitted,

/s/ *Charles S. Fax*

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EXHIBIT A

From: DCD_ECFNotice@dcd.uscourts.gov
Sent: Thursday, March 21, 2019 11:40 AM
To: DCD_ECFNotice@dcd.uscourts.gov
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U.S. District Court

District of Columbia

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Case Number: 1:10-cv-01770-BAH
Filer:
WARNING: CASE CLOSED on 10/02/2017
Document Number: No document attached

Docket Text:
MINUTE ORDER (paperless) REOPENING this matter and DIRECTING the parties to submit jointly, by April 1, 2019, a proposed schedule to govern further proceedings in this case. Signed by Chief Judge Beryl A. Howell on March 21, 2019. (lcbah3)

1:10-cv-01770-BAH Notice has been electronically mailed to:

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1:10-cv-01770-BAH Notice will be delivered by other means to::

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EXHIBIT B

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Sent: Monday, March 18, 2019 7:07 PM
To: Charles S. Fax; Silbert, Gregory
Subject: RE: Rosalie Simon, et al. v. Hungary
Attachments: simon app to stay.pdf

Chuck,

Hope all is well with you. As you probably gathered, we will be filing a Cert. Petition with the Supreme Court. You should be receiving tomorrow our motion asking the Supreme Court to stay the DC Circuit's Mandate pending our Cert. Petition, but I have attached a copy to my email as well. If the Supreme Court denies our stay motion and we do head back to the District Court, we believe it would make sense to jointly ask the District Court to stay the case until the Supreme Court decides our cert petition – but I would guess that you may not share our view. ☺ Barring a stay, we think the District Court should first deal with the remainder of the motion to dismiss (the sovereign immunity issues) that the Court did not decide last time. Happy to set up a call to discuss all this if you would like.

Regards,

Konrad

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Subject: Rosalie Simon, et al. v. Hungary

Gentlemen, its been a while. I trust that all is well with both of you. In *Simon v. Hungary* it looks like we are headed back to the District Court. I assume that Judge Howell's first order of business will be to ascertain the posture of the parties and next steps. It would be great if Hungary were to file an answer so that we could convene our Rule 26(f) conference, schedule the class certification motion and commence discovery . . . but that's me talking. Could you please advise as to what you contemplate doing next? We may then be able to discuss a schedule on which we can agree, and which we can present to the judge jointly. Thanks, and I look forward to hearing from you. Chuck

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EXHIBIT C

No. 17-7146

In The United States Court Of Appeals For The District Of Columbia Circuit

ROSALIE SIMON, et al., INDIVIDUALLY
AND FOR ALL OTHERS SIMILARLY SITUATED
Plaintiffs-Appellants,

v.

REPUBLIC OF HUNGARY, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the District of Columbia

The Honorable Beryl A. Howell

MOTION TO STAY ISSUANCE OF MANDATE PENDING DISPOSITION OF CERTIORARI PETITION

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PRELIMINARY STATEMENT

In this case and in *Philipp v. Rep. of Germany*, 894 F.3d 406 (D.C. Cir. 2018), the Court ruled that district courts have no authority to abstain from exercising FSIA jurisdiction as a matter of international comity. *Simon v. Rep. of Hungary*, 911 F.3d 1172, 1181 (D.C. Cir. 2018) ("*Simon II*"). The Court also ruled that the district court erred as a matter of law and abused its discretion in dismissing this case on *forum non conveniens* grounds. *Simon II*, 911 F.3d at 1190.

The Court's rulings conflict with the decisions of the Seventh Circuit in a case virtually identical to this one, involving another putative class of former Hungarian nationals seeking remedies for the same World War II-era injuries that Plaintiffs seek to redress here. The Court's rulings also concern issues of profound importance to international comity and to the United States' foreign policy interests, as shown by the United States' *amicus* brief in this case and its *amicus* brief supporting *en banc* review in *Phillip*.

The Court should stay issuance of the mandate until the Supreme Court has the opportunity to act on Defendants' forthcoming *certiorari* petition. *See* Fed. R. App. P. 41(d)(2)(B); D.C. Cir. R. 41(a)(2). When the *Phillip* panel decided the comity issue then "left open" in this case, it expressly disagreed with the Seventh Circuit's ruling "in a case similar to *Simon*." *Philipp*, 894 F.3d at 414, 416. This

Court also explicitly disagreed with "the contrary position advanced by the United States" in its *amicus* brief in this case. *Id.*

These conflicting views and the importance of the issues involved make this case a more than viable candidate for Supreme Court review. This litigation on behalf of a putative worldwide class of former Hungarian nationals seeking substantial damages from the Hungarian government should not go forward until the Supreme Court has the opportunity to consider Defendants' *certiorari* petition.

STATEMENT OF THE CASE

The panel rendered its decision in this case on December 28, 2018. Defendants Hungary and MÁV subsequently sought *en banc* review of the panel decision. Defendants requested that the Court consider their petition in tandem with the pending *en banc* petition in *Philipp*, which raised the same issue. On February 11, 2019, Plaintiffs moved to expedite consideration of the *en banc* petition, noting that "motion-to-dismiss proceedings have still not concluded," and "neither defendant has yet filed an answer, and discovery has not commenced." ECF No. 1772789 at 2. Shortly thereafter, on February 15, 2019, this Court denied Defendants' *en banc* petition and dismissed Plaintiffs' motion to expedite the petition as moot. The *Philipp en banc* petition remains pending.

REASONS FOR GRANTING THE STAY

To obtain a stay of the mandate from this Court pending a petition for *certiorari*, the movant "must show that the 'petition would present a substantial question and that there is good cause for a stay.'" *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Grp.*, No. 02-5355, 2003 WL 22319584, at *1 (D.C. Cir. Sept. 30, 2003) (Edwards, J., concurring) (citation omitted); *see also* D.C. Cir. R. 41(a)(2) (movant must provide "facts showing good cause for the relief sought"). Both factors are present here.

I. Defendants' *Certiorari* Petition Presents a Substantial Question

There is a substantial ground for Supreme Court review in this case because this Court's rulings in *Simon II* and *Philipp* conflict with both (1) the conclusion twice reached by the Seventh Circuit in a virtually identical case, and (2) the position of the United States in matters affecting foreign policy. *See* Sup. Ct. R. 10 (grounds for *certiorari* include "a decision of another United States court of appeals on the same important matter").

Faced with both the same legal issue and the same underlying facts as *Simon*, the Seventh Circuit has twice held that "the comity at the heart of international law required plaintiffs either to exhaust domestic remedies in Hungary or to show a powerful reason to excuse the requirement." *Fischer v. Magyar Allamvasutak Zrt.*, 777 F.3d 847, 852 (7th Cir. 2015); *accord Abelesz v.*

Magyar Nemzeti Bank, 692 F.3d 661, 682 (7th Cir. 2012) ("Hungary, a modern republic and member of the European Union, deserves a chance to address these claims.").

The United States' *amicus* brief in this case underscores the importance of this comity-based abstention doctrine to its foreign policy interests: "Dismissal on international comity grounds can play a critical role in ensuring that litigation in U.S. courts does not conflict with or cause harm to the foreign policy of the United States . . . ." U.S. Amicus Br., ECF No. 1733875 at 14. It further argued that "[t]he fact [that] the FSIA itself does not impose any exhaustion requirement for expropriation claims . . . does not foreclose dismissal on international comity grounds." *Id.* at 14–15 (citing *Mujica v. AirScan Inc.*, 771 F.3d 580, 598 (9th Cir. 2014) and *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1238 (11th Cir. 2004)).

This Court's opinions in *Simon II* and *Philipp* expressly disagree with these positions. While acknowledging that the Seventh Circuit case was "similar to *Simon*," the *Philipp* panel reached the opposite conclusion. *Philipp*, 894 F.3d at 416. It held that courts may not abstain from exercising jurisdiction on the ground of international comity because "the FSIA, Congress's comprehensive statement of foreign sovereign immunity, which is, and always has been, a matter of grace and comity, leaves no room for a common-law exhaustion doctrine based on the very

same considerations of comity." *Philipp*, 894 F.3d at 416 (internal quotation marks and citations omitted).

The Court also rejected "the contrary position advanced by the United States," believing it to be "flatly inconsistent with *NML Capital*. . . ." *Philipp*, 894 F.3d at 416. Illustrating the importance of the issue, the United States subsequently filed another *amicus* brief, this time supporting *en banc* review in *Philipp*.

The acknowledged circuit split, this Court's rejection of the United States' position, and the important comity and foreign policy interests that are involved all provide substantial grounds for granting *certiorari*.

II. There Is Good Cause for a Stay of the Mandate

Good cause to stay the mandate exists because this case implicates issues of profound historical and current importance for another sovereign nation, and it raises larger questions about the role of the U.S. courts in cases affecting foreign affairs.

The conduct Plaintiffs endured some seventy-five years ago in Hungary was, without qualification, reprehensible. The effort to rectify those historic wrongs today in the courts of the United States presents issues of comity and reciprocity that must be fully resolved before the case proceeds.

Plaintiffs are understandably eager to press forward in the district court, as their recent motion to expedite consideration of Defendants' *en banc* petition

shows. But the proceedings they hope will occur, including that Hungary "file[] an answer" and that "discovery [] commence[s]," ECF No. 1772789 at 2, should not be required by any U.S. court if Defendants' arguments are correct. It will not take long for the Supreme Court to determine whether these questions merit review. Hungary should not be required to engage in further litigation in the U.S. courts while the Supreme Court considers its forthcoming *certiorari* petition.

CONCLUSION

For these reasons, the Court should stay the issuance of the mandate pending the disposition of Defendants' petition for *certiorari*.

Dated: February 21, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 27(d) and 32(a).

1. Exclusive of the exempted portions of the brief, the brief includes 1,218 words. The undersigned has relied upon the word count of this word-processing system in preparing this certificate.

2. The brief has been prepared using Microsoft Word 2016 in 14 point Times New Roman font.

/s/ Konrad L. Cailteux
Konrad L. Cailteux

Dated: February 21, 2019

CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2019, I caused a true and correct copy of the foregoing Motion To Stay Issuance Of Mandate Pending Disposition Of Certiorari Petition to be served on Plaintiffs-Appellants' counsel via this Court's electronic filing system.

/s/ Konrad L. Cailteux
Konrad L. Cailteux