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This *Report* summarizes opinions issued on July 6, 2020 (Part I); and cases granted review on July 2, 2020 (Part II).

I. Opinions

● *Chiafalo v. Washington*, 19-465. Without dissent, the Court held that "[t]he Constitution's text and the Nation's history both support allowing a State to enforce an elector's pledge to support his party's nominee—and the state voters' choice—for President." Washington is one of 32 states that require their presidential electors to pledge to cast their ballot for their party's presidential and vice-presidential candidates. And it is one of 15 states that sanctions an elector who breaks (or would break) that pledge. Most of those 15 states immediately remove such a "faithless elector" from his position, substituting an alternative elector in his stead; Washington is one of a few states that imposes a monetary fine on a faithless elector. In the 2016 presidential election, Washington's voters chose Hillary Clinton. But three electors, petitioners here, broke their pledge and voted for someone else (Colin Powell) in the apparent hope of convincing other electors to do the same, including those from states Donald Trump carried. Washington fined petitioners $1000 apiece for breaking their pledges. Petitioners challenged their fines in state court, asserting that the Constitution empowers electors to vote however they please. The Washington trial court rejected their claim, and the Washington Supreme Court affirmed. In an opinion by Justice Kagan, the Court affirmed.

The Court noted that it "has considered elector pledge requirements before"—in *Ray v. Blair*, 343 U.S. 214 (1952). In *Ray*, an Alabama elector challenged the state's requirement that he pledge to vote for the Democratic presidential candidate. The Court rejected his challenge, holding that neither Article II, §1—which provides that "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, ..."—nor the Twelfth Amendment prohibits a pledge requirement. Notably, the Court found that history supported the practice: "'History teaches that the electors were expected to support the party nominees' as far back as the earliest contested presidential elections." *Ray*, however, reserved whether states could enforce the pledges through legal sanctions. Here, the Court took up that question and upheld Washington's sanctions "for reasons much like those given in *Ray*."

First, found the Court, "Article II, §1's appointments power gives the States far-reaching authority over presidential electors, absent some other constitutional constraint." The Court had previously found the Article II, §1 phrase "in such Manner as the Legislature thereof may direct" to convey broad power over who becomes an elector. "And nothing in the Constitution expressly prohibits States from taking away presidential electors' voting discretion as Washington does. The Constitution is barebones about electors." Petitioners insisted that the word "electors" in Article II, §1, and the Twelfth Amendment's provision that electors shall "vote" by "ballot" means electors must have "freedom of choice." The Court disagreed, noting that "those words need not always connote independent choice"—as seen by the example of proxy voting or voting the way one's "spouse, or pastor, or union tells him to." "In those cases, the choice is in someone else's hands, but the words still apply because they can signify a mechanical act." Petitioners also argued that the Framers "expected the Electors' votes to reflect their own judgments." Even if so, said the Court, that wouldn't suffice for "the Framers did not reduce their thoughts about electors' discretion to the printed page."

The Court next found that our Nation's experience and history supports Washington's position. "Electors have only rarely exercised discretion in casting their ballots for President. From the first, States sent them to the Electoral College—as today Washington does—to vote for preselected candidates, rather than to use their own judgment. And electors (or at any rate, almost all of them) rapidly settled into that non-discretionary role." That was so during the first contested presidential election in 1796. And "[t]he Twelfth Amendment embraced this new reality—both acknowledging and facilitating the Electoral College's emergence as a mechanism not for deliberation but for party-line voting." As the Court had earlier explained, the Twelfth Amendment—to cure flaws that emerged in the prior two presidential elections—provided that electors would vote separately for President and Vice President. "By allowing the electors to vote separately for the two offices, the Twelfth Amendment made party-line voting safe. . . . An elector would promise to legislators or citizens to vote for their party's presidential and vice presidential candidates—and then follow through on that commitment." The Court said that state laws reinforced that development: over time, "States listed only presidential candidates on the ballot, on the understanding that electors would do no more than vote for the winner." Faithless voting, found the Court, was rare and anomalous—180 votes out of over 23,000. And while Congress counted those 180 votes, only one had ever been challenged—hardly a basis upon which to rest a claim of historical tradition. In the end, held the Court, Washington and other states' direction to their electors "accords with the Constitution—as well as with the trust of a Nation that here, We the People rule."

Justice Thomas filed an opinion concurring in the judgment, which Justice Gorsuch joined in part. In Justice Thomas' view, neither Article II, §1 nor the Twelfth Amendment speaks to the issue. He would therefore resolve the "case by simply recognizing that '[a]ll powers that the Constitution neither delegates to the Federal Government nor prohibits to the States are controlled by the people of each State.' *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 848 (1995) (Thomas, J., dissenting)." Justice Thomas reads Article II, §1 as imposing a duty, not granting a power. And the Court's reliance on that provision is further flawed because its language gives states discretion about the "Manner" of appointment of electors, a term that meant (at the time) the "form" or "method" of appointment, not "substantive limitations on whom may become an elector." In Part II of his opinion (which Justice Gorsuch joined), Justice Thomas wrote that "[w]hen the Constitution is silent, authority resides with the States or the people. This allocation of power is both embodied in the structure of our Constitution and expressly required by the Tenth Amendment. The application of this fundamental principle should guide our decision here." And "[a]s the Court recognizes, nothing in the Constitution prevents States from requiring Presidential electors to vote for the candidate chosen by the people."

● *Barr v. American Ass'n of Political Consultants Inc*., 19-631. The Telephone Consumer Protection Act of 1991 (TCPA) generally prohibits robocalls. 47 U.S.C. §227(b)(1)(A)(iii). In 2015, Congress amended the TCPA to create an exception for calls "made solely to collect a debt owed to or guaranteed by the United States." The Court held that this exception makes the statute content based, and that the exception cannot survive heightened scrutiny. The Court further held that the proper remedy is to sever the 2015 government-debt exception from the remainder of the statute, leaving the basic

robocall restriction in place. Plaintiff-respondents are the American Association of Political Consultants and three other organizations that call citizens for political purposes. They filed a declaratory judgment action against the U.S. Attorney General and the FCC, claiming that §227(b)(1)(A)(iii) violates the First Amendment. The district court held that the government-debt exception made the law content based, but that it survived strict scrutiny. The Fourth Circuit agreed that the law was content based, but held that it could not withstand strict scrutiny and was therefore unconstitutional. It then concluded that the government-debt exception was severable from the underlying robocall prohibition and therefore invalidated only the government-debt exception. Through a plurality opinion by Justice Kavanaugh, the Court affirmed.

In a portion of the opinion joined by Chief Justice Roberts and Justices Thomas and Alito, the plurality ruled—citing *Reed v. Town of Gilbert*, 576 U.S. 155 (2015)—that "[c]ontent-based laws are subject to strict scrutiny." The plurality had little difficulty concluding that the law, with the government-debt exception, was content based, "A robocall that says, 'Please pay your government debt' is legal. A robocall that says, 'Please donate to our political campaign' is illegal. That is about as content-based as it gets." The plurality rejected the government's counter-arguments, most notably its contention (echoed in Justice Breyer's dissent) that "if this statute is content-based because it singles out debt-collection speech, then so are statutes that regulate debt collection, like the Fair Debt Collection Practices Act." The plurality said this "slippery-slope argument is unpersuasive," for "courts have generally been able to distinguish impermissible content-based speech restrictions from traditional ordinary regulation of commercial activity that imposes incidental burdens on speech." The plurality then noted that the government concedes it cannot satisfy strict scrutiny, and said that it agrees. There is no sufficient justification to permit government-debt collection speech but not "other important categories of robocall speech, such as political speech, charitable fundraising, issue advocacy," and so on.

The plurality then devoted the bulk of its opinion (now joined only by Chief Justice Roberts and Justice Alito) to the issue of severability. Plaintiffs first argued that the entire 1991 robocall restriction is unconstitutional because "Congress's willingness to enact the government-debt exception in 2015 betrays a newfound lack of genuine congressional concern for consumer privacy." The plurality disagreed, noting that "[t]his is not a case where a restriction on speech is littered with exceptions that substantially negate the restriction." The plurality then found that, under ordinary severability principles, "we must invalidate the 2015 government-debt exception and sever that exception from the remainder of the statute." The plurality disavowed the Court's cases holding that courts should sever the offending provision unless "'the statute created in its absence is legislation that Congress would not have enacted.'" The plurality described that approach as a "dead end" for "courts are not well equipped to imaginatively reconstruct a prior Congress's hypothetical intent." The better approach, found the plurality, is the Court's developing "a strong presumption of severability," a presumption amplified if a statute contains a severability clause. The plurality traced that approach to *Marbury v. Madison*, 1 Cranch 137 (1803), where the Court invalidated part of §13 of the Judiciary Act but left the rest of the Judiciary Act untouched. In short, "[t]he Court's precedents reflect a decisive preference for surgical severance rather than wholesale destruction."

The plurality then applied those principles to this case. First, the 1934 Communications Act, to which the TCPA is an amendment, contains a severability clause, which requires severing the unconstitutional government-debt exception. The plurality next found that, even absent the severability provision, it would apply the presumption of severability. "With the government-debt exception severed, the remainder of the law is capable of functioning independently and thus would be fully operative as a law. Indeed, the remainder of the robocall restriction did function independently and fully operate as a law for 20-plus years before the government-debt exception was added in 2015." The plurality then address a "wrinkle": "When the constitutional violation is unequal treatment, as it is here, a court theoretically can cure that unequal treatment either by extending the benefits or burdens to the exempted class, or by nullifying the benefits or burdens for all." The plurality found that it "need not tackle all of the possible hypothetical applications of severability doctrine in equal-treatment cases. The government-debt exception is a relatively narrow exception to the broad robocall restriction, and severing the government-debt exception does not raise any other constitutional problems." Finally, the plurality responded to Justice Gorsuch's concern that its decision "provides 'no relief' to plaintiffs," who had wanted to be allowed to place robocalls. The plurality disagreed. "[T]he First Amendment complaint at the heart of their suit was unequal treatment. Invalidating and severing the government-debt exception fully addresses that First Amendment injury." The plurality criticized Justice Gorsuch's approach: "His proposed remedy of injunctive relief, plus *stare decisis*, would in effect allow all robocalls to cell phones—notwithstanding Congress's decisive choice to prohibit most robocalls to cell phones. That is not a judicially modest approach but is more of a wolf in sheep's clothing."

Justice Sotomayor filed an opinion concurring in the judgment. She agreed with Justice Breyer's partial dissent (described below) "that strict scrutiny should not apply to all content-based distinctions." But she concluded that the government-debt exception fails intermediate scrutiny "because it is not 'narrowly tailored to serve a significant government interest." She agreed, though, that the government-debt exception is severable.

Justice Breyer filed an opinion concurring in the judgment with respect to severability and dissenting in part, which Justices Ginsburg and Kagan joined. Justice Breyer criticized the plurality's view that all content-based speech distinctions are subject to strict scrutiny as "divorced from First Amendment values." He expressed particular concern "that courts not use the First Amendment in a way that would threaten the workings of ordinary regulatory programs posing little threat to the free marketplace of ideas enacted as result of that public discourse." With that in mind, he concluded that strict scrutiny is inappropriate here: regulation of debt collection "has next to nothing to do with the free marketplace of ideas or the transmission of the people's thoughts and will to the government." Rather, it involves "government response to the public will through ordinary commercial regulation." And he expressed concern that the plurality's strict-scrutiny approach ignores how content-based speech distinctions are commonplace in ordinary commercial regulation, such as "the regulation of securities sales, drug labeling, food labeling, false advertising, workplace safety warnings, automobile airbag instructions, consumer electronic labels, tax forms, debt collection, and so on." In Justice Breyer's view, "[a] proper inquiry should examine the seriousness of the speech-related harm,

the importance of countervailing objectives, the likelihood that the restriction will achieve those objectives, and whether there are other, less restrictive ways of doing so." Applying that approach here, he would uphold the government-debt exception: the "speech-related harm . . . is modest"; it serves the important governmental interest of protecting the public fisc; and it is limited in scope. Justice Breyer closed by saying that, because a majority of the Court has concluded to the contrary, he must address severability. On that issue, he agrees with the plurality's "conclusion that the provision is severable."

Justice Gorsuch filed an opinion concurring in the judgment in part and dissenting in part, which Justice Thomas joined in part. He agreed with the plurality "that the provision of the [TCPA] before us violates the First Amendment" but he "disagree[d] about why that is so and what remedial consequences should follow." Justice Gorsuch concluded that "the TCPA's rule against cellphone robocalls is a content-based restriction . . . because it allows speech on a subject the government favors (collecting its debts) while banning speech on other disfavored subjects (including political matters)." It is subject to, and fails, strict scrutiny "because the government offers no compelling justification for its prohibition against the plaintiffs' political speech." (Note that Justice Gorsuch is a fifth vote for the rule that all content-based speech distinctions are subject to strict scrutiny.) He then turned to the issue of remedy, in the section of his dissent that Justice Thomas joined. He would enjoin the TCPA's general prohibition on robocalls, for that is what "unconstitutionally infringes" plaintiffs' speech. Justice Gorsuch noted that the plaintiffs did not challenge the government-debt exception; indeed, it's not clear they would have standing to do so. Further, "[j]ust five years ago, Congress expressly authorized robocalls to cell phones to collect government-backed debts. Yet, today, the Court reverses that decision and outlaws the entire industry. It is highly unusual for judges to render unlawful conduct that Congress has explicitly made lawful[.]" On top of that, he said, the plurality's approach leads to an odd result: "in the name of vindicating the First Amendment, our remedial course today leads to the unlikely result that not a single person will be allowed to speak more freely and, instead, more speech will be banned."

II. Cases Granted Review

● *Department of Justice v. House Committee on the Judiciary*, 19-1328. The Court will address whether the House Judiciary Committee can obtain grand jury materials that were redacted in the version of the Mueller report that DOJ released to Congress and the public. The specific question presented is "[w]hether an impeachment trial before a legislative body is a 'judicial proceeding' under Rule 6(e)(3)(E)(i) of the Federal Rules of Criminal Procedure." Special Counsel Robert Mueller issued a redacted version of his report in March 2019. The Department of Justice authorized specified members of the House and Senate Committees on the Judiciary (the so-called "Gang of Eight") and staff to review an unredacted version of the report—except for the grand-jury information. DOJ claimed that Federal Rule of Criminal Procedure 6(e)—which provides that any "matter occurring before the grand jury" must be kept secret—barred release of the grand-jury information. In June 2019, the House authorized the Committee to seek a judicial order allowing disclosure of that material for

use in its ongoing impeachment investigation. The House claimed that the "redacted grand-jury material bears on whether the President committed impeachable offenses by obstructing the Special Counsel's investigation." In July 2019, the Committee petitioned a district court, invoking an exception to Rule 6(e)—Rule 6(e)(3)(E)(i)'s exception which allows courts to disclose grand jury materials "preliminarily to or in connection with a judicial proceeding." The House claimed that impeachment trials are "judicial proceedings" within the meaning of the rule. The district court granted the petition in relevant part, holding that "impeachment trials are judicial in nature and constitute judicial proceedings" under Rule 6(e). And it found that the House demonstrated a particularized need for the material. The D.C. Circuit affirmed. 951 F.3d 589.

In addition to relying on circuit precedent, the D.C. Circuit stated that the "constitutional text confirms that a Senate impeachment trial is a judicial proceeding" and that the Framers "understood impeachment to involve the exercise of judicial power." The court also pointed to the "historical practice" of Congress's having "repeatedly obtained grand jury material to investigate allegations of election fraud or misconduct by Members of Congress." And although the Senate had already acquitted the President by the time the court issued its opinion, the court stated that "if the grand jury materials reveal new evidence of impeachable offenses, the Committee may recommend new articles of impeachment." The House Judiciary Committee asserts in its brief in opposition that the D.C. Circuit decision "accords with the decisions of every judge who has ever considered the issue. It is also consistent with the position DOJ had maintained for nearly half a century before this case."

The Department of Justice, in its petition, maintains that "the ordinary meaning of 'judicial proceeding' is a proceeding before a judge in a court. The other uses of 'judicial proceeding' in Rule 6(e) itself and elsewhere in the Federal Rules of Criminal Procedure indisputably refer to court proceedings. And historical practice before the adoption of Rule 6(e) likewise confirms that the traditional and limited exceptions to grand-jury secrecy, which the Rule codified, did not extend to disclosure in connection with an impeachment proceeding." The Department also asserts that the D.C. Circuit ruling creates serious separation-of-powers concerns, for it is "constitutionally doubtful whether a federal court could impose on the Representatives or Senators involved in an impeachment proceeding any of the 'protective limitations on the use of the disclosed material' that th[e] Court contemplated" in past cases. Finally, the Department insists that the D.C. Circuit opinion is "in serious tension with this Court's precedents," which hold "that exceptions to grand-jury secrecy should be construed narrowly."

● *Nestle USA, Inc. v. Doe I,* 19-416; *Cargill, Inc. v. Doe I*, 19-453. The Court granted both petitions and consolidated the cases. The petitions present similar issues. This summary will focus on Cargill's petition. In its words, the two questions presented are: (1) "Whether the presumption against extraterritorial application of the Alien Tort Statute [ATS] is displaced by allegations that a U.S. company generally conducted oversight of its foreign operations at its headquarters and made operational and financial decisions there, even though the conduct alleged to violate international law occurred in—and the plaintiffs' suffered their injuries in—a foreign country." (2) "Whether a domestic corporation is subject to liability in a private action under the Alien Tort Statute."

Plaintiffs are Malians who allege that as children they were trafficked from Mali into Côte d'Ivoire, beaten, and forced to work on three cocoa plantations. They filed suit against petitioners Cargill and Nestle and other American companies, asserting a federal common law claim under the ATS for aiding and abetting forced labor in violation of international law. Specifically, plaintiffs alleged that the defendants aided and abetted these international-law violations by, among other things, purchasing cocoa beans from farms that used child slaves and providing those farms with technical assistance. Plaintiffs also alleged that "Cargill . . . regularly had employees from [its] U.S. headquarters inspecting [its] operations in Côte d'Ivoire and reporting back to the U.S. headquarters so that the U.S.-based decision-makers had accurate facts on the ground." Twice the district court dismissed the case and twice the Ninth Circuit reversed. 929 F.3d 623; 906 F.3d 1120.

The Ninth Circuit first held, in its most recent opinion, that domestic corporations may be sued under the ATS. Although *Jesner v. Arab Bank PLC*, 138 S. Ct. 1386 (2018), held that foreign corporations are not amenable to suit under the ATS, the Ninth Circuit held that *Jesner*'s holding "did not eliminate all corporate liability under the ATS." The Ninth Circuit panel next held that plaintiffs' allegations regarding conduct within the United States are sufficient to displace the presumption against extraterritoriality. The court pointed to plaintiffs' allegations that Cargill provided "personal spending money to maintain the farmers' and/or the cooperatives' loyalty" and "had employees from their United States headquarters regularly inspect operations in the Ivory Coast and report back to the United States offices," where their financing decisions "originated."

On its first question presented, Cargill argues that the Ninth Circuit "here effectively neutered the presumption against extraterritoriality by holding that even if all of the acts violating international law occur outside the United States, an ATS aiding-and-abetting claim nonetheless is not extraterritorial whenever the defendant's corporate headquarters is located in the United States and the plaintiff alleges that headquarters personnel had oversight of the company's operational and financial activities in foreign nations. Because those general allegations can be made with respect to any company headquartered in the United States, the panel's holding means ATS claims may be asserted against U.S. businesses for aiding and abetting international law violations anywhere in the world—'essentially eliminat[ing] the presumption against extraterritoriality' with respect to claims against U.S. companies." On the second question presented, Cargill argues that, although "[t]he *Jesner* Court limited its holding of non-liability to foreign corporations, [ ] its rationale extends to domestic corporations." The *Jesner* Court's finding that there is no clearly defined, universal norm of corporate liability under customary international law controls. The United States agrees with Cargill on both issues.

● *Federal Republic of Germany v. Philipp*, 19-351. The Foreign Sovereign Immunities Act of 1976 (FSIA) 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. One of those exceptions is the "expropriation exception," which applies in any case "in which rights in property taken in violation of international law are in issue" and there is a specified commercial nexus to the United States. 28 U.S.C. §1605(a)(3). The two questions presented here are (in the United States' words): (1) "Whether the expropriation exception applies to claims related to a foreign state's viola-

tions of international human rights law in connection with the taking of the property of its own nationals." (2) "Whether a court may invoke the doctrine of international comity to abstain from exercising jurisdiction under the FSIA."

Respondents are the heirs of several Jewish art dealers who owned firms in pre-World War II Germany. In 1929, the firms formed a consortium and purchased a valuable collection of medieval relics known as the "Welfenschatz." In 1935, after the Nazi takeover of power in Germany, the consortium sold a portion of the collection to the Nazi-controlled state of Prussia. The heirs allege that the consortium did so following "two years of direct persecution" and "physical peril to themselves and their family members," and for "barely 35% of its actual value." Hermann Goering, a "legendary art plunderer," was behind the sale and later presented the Welfenschatz to Hitler as a gift. After World War II, the Welfenschatz was turned over to the Stiftung Preussischer Kulturbesizt (SPK), an instrumentality of Germany that was created after World War II to preserve Prussia's cultural artifacts. The collection is currently on display in an SPK-administered museum in Berlin. In 2014, respondents sought to recover the Welfenschatz, alleging that the consortium was forced to sell the collection as part of the Nazi's genocide. Respondents first went before the German Advisory Commission for the Return of Cultural Property Seized as a Result of Nazi Persecution, Especially Jewish Property, which rejected their claim. They then filed suit in the U.S. District Court for the District of Columbia against the Federal Republic of Germany and the SPK, asserting several common-law causes of action, including replevin, conversion, unjust enrichment, and bailment. Germany and SPK moved to dismiss, arguing (as relevant here) that it enjoyed immunity from suit under the FSIA and that international comity required the court to decline jurisdiction until the heirs exhaust their remedies in German courts. The district court denied their motion, and the D.C. Circuit affirmed. 894 F.3d 406.

The D.C. Circuit first ruled that respondents had alleged that their property was "taken in violation of international law" under the FSIA's expropriation exception because they asserted that the forced sale of the Welfenschatz was part of the Nazi genocide. The Court relied on circuit precedent holding that the expropriation exception could apply to a claim that a sovereign had taken the property of its own nationals if the taking "amounted to the commission of genocide." The D.C. Circuit further ruled that respondents did not, as a matter of comity, have to exhaust their claims in German courts, finding that "nothing in the text of the FSIA's expropriation exception requires exhaustion."

Germany and SPK argue that the expropriation clause's phrase "taken in violation of international law" "refer[s] to the established body of international law addressing states' responsibility for economic injuries to foreign nationals, often referred to as the international law of takings. Because that body of law addresses states' actions toward foreign nationals only, it is not implicated by a state's alleged taking of its own nationals' property, which remains the concern of the state's domestic law." (Citation omitted.) On the issue of comity, Germany and SPK agree with the Seventh Circuit, which "has twice held that 'principles of international comity make clear' that plaintiffs alleging takings in violation of international human-rights law 'must attempt to exhaust domestic remedies before foreign courts can provide remedies.'" The United States filed an amicus brief at the invitation of the Court which agrees with Germany and SPK on these two issues.

● *Republic of Hungary v. Simon*, 18-1447. The Court limited the grant of certiorari to the first question presented, which is similar to the second question presented in *Federal Republic of Germany v. Philipp*: "May the district court abstain from exercising jurisdiction under the Foreign Sovereign Immunities Act for reasons of international comity, where former Hungarian nationals have sued the nation of Hungary to recover the value of property lost in Hungary during World War II, and where the plaintiffs made no attempt to exhaust local Hungarian remedies?"

This case arises from the murder of two-thirds of Hungary's 800,000 Jews during the Holocaust. Respondents are 14 survivors of the Hungarian Holocaust, four of whom are now American citizens. They sued 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. Respondents allege that the Hungarian government collaborated with the Nazis to kill Hungarian Jews and expropriate their property, and that MÁV assisted that effort by transporting Hungarian Jews to death camps and by stripping them of their personal property at the point of embarkation. Respondents filed suit in federal district court against Hungary and MÁV seeking restitution for the possessions taken from them. Respondents claimed jurisdiction under the FSIA's expropriation exception. After one trip to the D.C. Circuit and back, the district court dismissed the case on two grounds. As relevant here, the court held that "'[e]xhaustion of domestic remedies is preferred in international law as a matter of comity'" and that respondents were required to show they had "exhausted [Hungary's] own domestic remedies, or that to do so would be futile." 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. The D.C. Circuit reversed. 911 F.3d 1172.

The D.C. Circuit followed its holding in *Philipp v. Federal Republic of Germany*, 894 F.3d 406, discussed above. The court additionally reasoned 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"—*i.e.*, to "judicial reinstatement of immunity that Congress expressly withdrew." The court also stated that the comity doctrine "lacks any pedigree in domestic or international common law." Petitioners Hungary and MÁV assert that—in addition to creating a circuit conflict and a conflict with the United States government's expressed position—the D.C. Circuit decision "strips foreign nations of comity protections that private foreign entities still enjoy in U.S. courts." More fundamentally, they agree with the Seventh Circuit that American courts "cannot overlook the comity and reciprocity between sovereign nations that dominate international law." Petitioners quote the Seventh Circuit's statement: "We should consider how the United States would react if a foreign court ordered the U.S. Treasury or the Federal Reserve Bank to pay a group of plaintiffs 40 percent of U.S. annual gross domestic product, which would be roughly $6 trillion, or $20,000 for every resident in the United States. And consider further the reaction if such an order were based on events that happened generations ago in the United States itself, without any effort to secure just compensation through U.S. courts."

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