No. 17-1165

IN THE

Supreme Court of the United States

DAVID L. DE CSEPEL, ANGELA MARIA HERZOG, AND JULIA ALICE HERZOG,

Petitioners,

v.

REPUBLIC OF HUNGARY, A FOREIGN STATE, HUNGARIAN NATIONAL GALLERY, MUSEUM OF FINE ARTS, MUSEUM OF APPLIED ARTS, BUDAPEST UNIVERSITY OF TECHNOLOGY AND ECONOMICS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DC CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF FOR *AMICI CURIAE* AJC (FORMALLY THE AMERICAN JEWISH COMMITTEE), B'NAI B'RITH INTERNATIONAL AND THE RAOUL WALLENBERG CENTRE FOR HUMAN RIGHTS IN SUPPORT OF PETITIONERS

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Pursuant to this Court's Rule 37.2(b), AJC (formally the American Jewish Committee), B'nai B'rith International and The Raoul Wallenberg Centre for Human Rights respectfully move for permission to file the attached *amici curiae* brief supporting petitioners. At least ten days before the filing deadline, counsel for *amici* provided notice to all parties of *amici's* intent to file. Petitioners consented in writing to the filing of this brief. Respondents withheld consent in writing without specifying any reason, but stated that they "do not intend to file a formal written objection."

Amici are organizations that strongly advocate for Jewish causes and generally for human rights around the world. Their interests in this case, which are more fully detailed in their brief, stem from their dedication to assisting victims of the Holocaust and their families to recover artworks looted from them

by the Nazis. As fully set forth in their brief, they urge this Court to grant certiorari because the Court of Appeals decision in this case would prevent claimants from asserting jurisdiction under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 et seq., over foreign sovereigns who control such artworks.

In a letter to the Clerk of this Court dated February 26, 2018, counsel for respondents requested (and ultimately was granted) a one-month extension of time to file their brief in opposition to the petition, specifically indicating that "the extension requested will allow Respondents time to consider and, if necessary, respond to the briefs of *amici curiae* expected to be filed in this case . . . ." Nevertheless, respondents — the Republic of Hungary and its state-owned museums and other agency — have expressly and for no apparent reason

withheld their consent to the filing of a brief submitted by Jewish advocacy groups. Respondents have therefore compelled *amici* to make this motion, even though they apparently do not intend to oppose it.

Amici respectfully request that their motion for leave to file the attached brief be granted.

Respectfully submitted,

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BRIEF OF *AMICI CURIAE*[1]

Amici curiae AJC (formally the American Jewish Committee), B'nai B'rith International and The Raoul Wallenberg Centre for Human Rights respectfully submit this brief in support of petitioners, and urge that the writ of certiorari be granted.

INTERESTS OF *AMICI CURIAE*

The AJC has been a leading global Jewish advocacy organization for more than a century. With offices across the United States and around the globe, and partnerships with Jewish communities worldwide, AJC works to enhance the well-being of

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[1] Pursuant to Supreme Court Rules 37.2 and 37.6, *amici* state that (a) counsel for record for all parties have been notified of *amici's* intent to file this brief, (b) counsel for petitioners has consented to its filing, and counsel for respondents has withheld consent, and (c) no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici* and their counsel, made any monetary contribution towards the preparation or submission of this brief.

the Jewish people and to advance human rights and democratic values for all. The AJC is dedicated to assisting the victims of Nazi art looting during the Holocaust. It has an interest in this litigation because the Court of Appeals decision will seriously impede the efforts of Jewish families to reclaim artworks looted during the Nazi era.

B'nai B'rith International has advocated for global Jewry and championed the cause of human rights since 1843. With a presence in countries all around the world, B'nai B'rith is the global voice of the Jewish community. It has played a key role in the efforts to provide restitution for victims of the Holocaust and their heirs since the early days of the post-war era. It has an interest in this litigation because the Court of Appeals decision may hinder continuation of these efforts.

The Raoul Wallenberg Centre for Human Rights is a unique international consortium of parliamentarians, scholars, jurists, human rights defenders, NGOs, and students united in the pursuit of justice, inspired by and anchored in Raoul Wallenberg's humanitarian legacy – including his rescue of some 100,000 Jews in six months in Hungary in 1944. The Centre is devoted to respecting the legacy of victims and survivors of the Holocaust and therefore promotes the restitution of Nazi-looted artworks to the families of their original owners. It has an interest in this litigation because the Court of Appeals decision would hinder such restitution.

SUMMARY OF ARGUMENT

If left to stand, the interpretation of the Foreign Sovereign Immunities Act ("FSIA"),

28 U.S.C. § 1602 *et seq.*, by the Court of Appeals in this case would severely undermine the extensive efforts of nations all over the world to try to remedy the horrific wrongs committed by Nazi Germany and its allies before and during World War II. These nations, led by the United States, joined together to adopt various agreements and declarations that firmly placed the responsibility upon sovereign governments to deal with claims against them to return Nazi-looted artworks in their control to the original owners. These agreements and declarations comprise key tenets of U.S. policy on the restitution of Nazi-looted art.

Interpreting the FSIA as limiting that responsibility to claims for artworks being held in the United States, while providing for immunity from claims to recover artworks controlled by the

governments themselves in their home countries, would make a mockery of these world-wide efforts, and subject the United States to criticism for not following the very precepts that it has strenuously promulgated for other countries. Furthermore, such an interpretation flies in the face of other Congressional statutes that reflect the U.S. policy to place responsibility upon foreign sovereigns to return Nazi-looted artworks to their original owners. By ignoring U.S. policy and Congressional intent, the D.C. Circuit's decision makes it appear that the U.S. is not acting uniformly in an important area of foreign relations, which, enhanced by the conflict among the circuits on the interpretation of a critical portion of the FSIA, creates a serious impediment to U.S. dealings with foreign nations. Review by this

Court is therefore critically important, and the petition for certiorari should be granted.

The widely-accepted principles enshrined in these international agreements and declarations and federal statutes, which comprise U.S. policy on the restitution of Nazi-looted art, also warn against imposing technical impediments upon claimants who seek to recover their artworks. Deviating from the plain language of the FSIA to construct a bar to subjecting foreign governments to jurisdiction is just such a technical impediment.

If the D.C. Circuit's decision is not reviewed and reversed, it will have wide-ranging consequences. The Nazis stole hundreds of thousands of artworks from museums and private collections throughout Europe before and during World War II — the greatest displacement of art in

human history. An untold number of works ended up in the control of the governments of the countries whose citizens had been looted. The families of these victims have brought numerous claims to reclaim their artworks from these governments and will continue to attempt to do so. The D.C. Circuit's decision would prevent the assertion of these claims. If the decision is reviewed and reversed, however, it would likely encourage foreign governments to resolve these claims without extensive litigation, rather than to ignore them by hiding behind a purported lack of jurisdiction under the FSIA.

Most importantly, since Hungary actively participated in the horrific crimes committed against its Jewish citizens during the Nazi era, it should be held accountable for its continuing control of

artworks that were obtained due to its wrongful conduct.

ARGUMENT

THE D.C. CIRCUIT'S CONSTRUCTION OF THE FSIA'S OPERATIVE PROVISION CONFLICTS WITH U.S. POLICY ON THE RESTITUTION OF NAZI-LOOTED ART AS REFLECTED IN INTERNATIONAL AGREEMENTS AND FEDERAL STATUTES

The United States has adopted certain principles that comprise federal policy on the restitution of Nazi-looted art. This policy firmly places upon sovereign governments the responsibility to resolve issues relating to such art in their control, which they typically maintain in their state-owned museums or other agencies, as in the instant case. The D.C. Circuit's interpretation of the FSIA, starkly contradicting the statute's plain language, would negate this policy and therefore cannot stand.

The federal policy on Nazi-looted art is reflected in the Washington Conference Principles on Nazi-Confiscated Art (the "Washington Principles"), produced at the Washington Conference on Holocaust-Era Assets in 1998 (the "Washington Conference"), the proceedings of which are set forth at https://1997-2001.state.gov/regions/eur/holocaust/heac.html (the "Proceedings"). *See Von Saher v. Norton Simon Museum of Art at Pasadena*, 754 F.3d 712, 721 (9th Cir. 2014) (in which the Ninth Circuit sets forth the sources and tenets of federal policy on Nazi-looted art); *accord, Philipp v. Fed. Rep. of Ger.*, 248 F. Supp. 3d 59, 75-76 (D.D.C. 2017).

The reason for and purpose of the Washington Conference was presented in the Opening Ceremony Remarks by Miles Lerman, Chairman of the United States Holocaust Memorial Council:

> What really shocked the conscience of the world was the discovery that even after the war, some countries tried to gain materially from this cataclysm by refusing to return to the rightful owners what was justly theirs. The refusal to respond to these rightful claims was a great injustice, a moral wrong which cannot be ignored.
>
> And this is what brings us together today.

Proceedings at 3.

In order to remedy the refusal by sovereign nations to "return to the rightful owners what was justly theirs," the 44 nations who participated in the Conference, including the United States and Hungary, adopted the Washington Principles. These Principles provide that "[p]re-War owners and their heirs should be encouraged to come forward and

make known their claims to art that was confiscated by the Nazis and not subsequently restituted," and that governments faced with such claims for art in their control should take steps "expeditiously to achieve a just and fair solution." Proceedings, Appendix G. It is therefore a key tenet of U.S. policy on Nazi-looted art that sovereign nations be held accountable for Nazi-looted art in their control. This principle was adopted by all of the nations that participated in the Washington Conference, including Hungary: "The Hungarian Government is fully committed to the restitution or compensation of Holocaust victims concerning cultural assets." Delegation Statement of Hungary, Proceedings at 271.

Two years after the Washington Conference, the participating nations, including the U.S. and

Hungary, convened once more under the auspices of the Council of Europe in Vilnius, Lithuania "as a follow-up to the Washington Conference." *See* www.lootedart.com/MFV7EE39608. They issued the Vilnius Forum Declaration on October 5, 2000, in which they asked "all governments to undertake every reasonable effort to achieve the restitution of cultural assets looted during the Holocaust era to the original owners or their heirs." *Id.* Again, responsibility was placed by the United States and the other signatories upon these sovereign nations to restitute cultural property in their control.

In 2009, the participating nations, including the U.S. and Hungary, met again to reiterate this core principle. They adopted the Terezin Declaration on Holocaust Era Assets and Related Issues, at the Prague Holocaust Era Assets Conference. In this

Declaration, the participating nations "urge[d] that every effort be made to rectify the consequences of wrongful property seizures, such as confiscations . . . ." *See* www.holocausteraassets.eu/program/conferenc e-proceedings/declarations. *See also Von Saher*, 754 F.2d at 721.

Despite these clear pronouncements of U.S. policy on Nazi-looted art, which hold sovereign nations accountable to the original owners for looted art in these nations' control, the D.C. Circuit's decision in this case has eliminated the ability of claimants to follow the dictates of this policy by bringing suit under the FSIA. The relevant FSIA section, 28 U.S.C. § 1605(a)(3), however, provides for such actions:

> [a] foreign state shall not be immune from the jurisdiction of courts of the United States . . . in any

> case — . . . in which rights in property . . . are in issue and . . . that property . . . is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.

This plain statutory language should be construed as it is written. *See Bates v. United States,* 522 U.S. 23, 29 (1997) ("[W]e ordinarily resist reading words or elements into a statute that do not appear on its face.")

The statutory language comports perfectly with U.S. policy on Nazi-looted art in the control of a sovereign nation, providing the means by which U.S. courts may be utilized to permit claimants to hold foreign sovereign nations accountable for the return of Nazi-looted art to its original owners. Since the D.C. Circuit's decision not to follow the plain

language of the FSIA directly contradicts U.S. policy, it cannot stand.

Moreover, the D.C. Circuit's decision — apparently based on its own technical interpretation of the statute in contravention of the statute's clear intent — would fly in the face of U.S. policy in another way. As Ambassador Stuart E. Eizenstat, the head of the American delegation to the Washington Conference and to the ones that followed, explained at the Prague Conference, "I am . . . concerned by the tendency for holders of disputed art to seek refuge in technical defenses to avoid potentially meritorious claims." *See* Opening Plenary Session Remarks (June 28, 2009), www.holocausteraassets.eu/en/conference-proceedings. As a result of this concern, the Terezin Declaration specifically urges:

> all stakeholders to ensure that their legal systems . . . facilitate just and fair solutions with regard to Nazi-confiscated and looted art, and to make certain that claims to recover [Nazi-looted] art are resolved . . . based on the facts and merits of the claims . . . . *Governments should consider all relevant issues when applying various legal provisions that may impede the restitution of art and cultural property*, in order to achieve just and fair solutions . . . .

Terezin Declaration on Holocaust Era Assets and Related Issues (June 30, 2009), www.holocausteraassets.eu/program/conference-proceedings/declarations (emphasis added). By imposing its own technical construction of the plain operative language of the FSIA, the D.C. Circuit has impeded the restitution of art in this case,

contradicting the dictates of the Terezin Declaration and hence U.S. policy. It also will potentially subject the United States to criticism for urging other nations in the world to see to it that their legal systems provide for the resolution of claims against them to recover Nazi-looted art, while failing to provide a means for such resolution in its own legal system.

Furthermore, several federal statutes provide that foreign sovereigns are responsible for returning Nazi-looted artworks to their original owners. The D.C. Circuit's decision in this case cannot be reconciled with these statutes.

Section 202 of the Holocaust Victims Redress Act, Pub. L. No. 105-158, 112 Stat. 15 (1998) states:

> It is the sense of the Congress that . . . all governments should undertake good faith

> efforts to facilitate the return of private and public property, such as works of art, to the rightful owners in cases where assets were confiscated from the claimant during the period of Nazi rule and there is reasonable proof that claimant is the rightful owner.

It would make no sense for Congress to have set forth the obligation of sovereign nations to return Nazi-looted art to claimants with "reasonable proof," while preventing claimants from presenting such proof in an action against such sovereigns under the FSIA, as the D.C. Circuit has held in this case.

Similarly, the recently-enacted Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, 130 stat. 1524 (the "HEAR Act"), which provides for a federal statute of limitations to permit claimants a greater opportunity to bring claims to

recover Nazi-looted art without fear of having them dismissed as untimely, states that one of its purposes is "to ensure that laws governing claims to Nazi-confiscated art and other property further United States policy as set forth in the Washington Conference Principles on Nazi-Confiscated Art, the Holocaust Victims Redress Act, and the Terezin Declaration." HEAR Act, Sec. 3. The D.C. Circuit's decision, however, interprets the FSIA as preventing the assertion of such claims against foreign governments.[2]

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[2] Besides being contrary to U.S. policy, permitting suits only against an agency of the foreign sovereign, like a museum, as the D.C. Circuit decision would contemplate, rather than the government itself, would not provide sufficient relief to claimants. For example, in the instant case, the defendant museums and other agency argue that the case cannot proceed even against them, because Hungary is a necessary party under Federal Rule of Civil Procedure 19. Dist. Ct. Doc. 148, at 22-29 (Feb. 9, 2018). Also, the Hungarian government is in the position of controlling where the artworks are maintained and could easily remove them from the museum or other agency, or otherwise render them judgment-proof.

Thus, the D.C. Circuit's construction of the FSIA would cause a substantial lack of uniformity between the FSIA on the one hand, and federal policy on Nazi-looted art and other federal statutes, on the other, not to mention agreements entered into between the U.S. and over forty other countries. This violates a basic tenet of statutory construction. "[I]n construing the meaning and scope of statutory provisions in order to determine the legislative intent or purpose, the entire legislative subject should be examined and every effort made to construe legislation so it will be consistent with other expressions of legislative intent and purpose. . . . " *L. Heller & Son v. FTC*, 191 F.2d 954, 956-57 (7th Cir. 1951); *see Get Oil Out! Inc. v. Exxon Corp.*, 586 F.2d 726, 729 (9th Cir. 1978) ("It is our obligation to so construe federal statutes so that they are consistent

with each other, as by this means congressional intent can be given its fullest expression.").

Indeed, even if the operative FSIA language could fairly be construed in two different ways, including the interpretation adopted by the D.C. Circuit in this case, only the construction that is consistent with U.S. policy as reflected in other statutes should be adopted by the courts. *See United States v. Handley*, 678 F.3d 1185, 1189 (10th Cir. 2013) ("'If the statute's plain language is ambiguous as to Congressional intent, we look to the . . . underlying public policy of the statute,'" *citing United States v. Manning*, 526 F.3d 611, 614 (10th Cir. 2008). "When considering the language employed by Congress, 'we read the words of the statute in their context and with a view to their place in the overall statutory scheme' and thereby

'ordinarily resist reading words or elements into a statute that do not appear on its face.' *United States v. Sturm*, 673 F.3d 1274, 1279 (10th Cir. 2012).").

Following the D.C. Circuit's interpretation would also potentially impose a serious impediment upon U.S. foreign relations. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n. 25 (1964) (stressing the significance of "uniformity in the country's dealings with foreign nations"); *Patrickson v. Dole Food Co.*, 251 F.3d 795, 802 (9th Cir. 2001), *aff'd in part, cert. dismissed in part*, 538 U.S. 468 (2003) (the Supreme Court in *Sabbatino* "stressed the need for national uniformity" in foreign relations).

Moreover, this lack of uniformity and the uncertainty caused by the split among the circuits creates an untenable situation for both claimants

and foreign governments alike, who cannot predict with any confidence whether the U.S courts may assert jurisdiction over sovereign nations in restitution cases brought in conformity with U.S. policy. Claimants in particular would be faced with the difficult choice of committing resources and time to such cases, which may be futile, or foregoing any opportunity to hold foreign sovereigns liable for wrongfully acquired property under their control.

Because of the remarkably large number of looted artworks that have still not been returned to their original owners or their heirs, the D.C. Circuit's decision will have wide-ranging consequences well beyond the instant case. Congress made the following findings in the HEAR Act:

> (1) It is estimated that the Nazis confiscated or otherwise misappropriated hundreds of thousands of

> works of art and other property throughout Europe as part of their genocidal campaign against the Jewish people and other persecuted groups. This has been described as the "greatest displacement of art in human history."
>
> (2) Following World War II, the United States and its allies attempted to return the stolen artworks to their countries of origin. Despite these efforts, many works of art were never reunited with their owners. . . .

HEAR Act, Sec. 2. The huge number of Nazi-looted artworks has led to several actions already brought in the United States under the FSIA, some of which are still pending. *See, e.g.*, *Rep. of Austria v. Altmann*, 541 U.S. 677 (2004); *Simon v. Rep. of Hung.*, 812 F.3d 127 (D.C. Cir. 2016); *Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1022 (9th Cir.

2010); *Agudas Chasidei Chabad v. Russian Fed'n*, 528 F.3d 934 (D.C. Cir. 2008); *Whiteman v. Dorotheum GmbH & Co. KG,* 431 F.3d 57 (2d Cir. 2005); *Garb v. Rep. of Pol.*, 440 F.3d 579 (2d Cir. 2006); *Philipp v. Fed. Rep. of Ger.*, 248 F. Supp. 3d 59 (D.D.C. 2017); *Hammerstein v. Fed. Rep. of Ger.*, No. 09-CV-443 ARR RLM, 2011 WL 9975796, at *1 (E.D.N.Y. Aug. 1, 2011); and *Freund v. Rep. of Fr.*, 592 F. Supp. 2d 540 (S.D.N.Y. 2008), *aff'd sub nom.*, *Freund v. Societe Nationale des Chemins de fer Francais*, 391 F. App'x 939 (2d Cir. 2010).

One can reasonably predict that there will be many more such claims asserted in the future as claimants discover the existence of artworks and other property looted by the Nazis from their families and currently in the control of nations all over the world. *See, e.g.*, *Art Looted by Nazis Gets a New*

Space at the Louvre. But is it Really Home?, N.Y. Times, Feb. 8, 2018, www.nytimes.com/2018/02/08/world/europe/louvre-nazi-looted-art.html (France places Nazi-looted paintings on display at the Louvre). Indeed, only about half of all the art looted by the Nazis has reportedly been returned to their owners or their heirs. *See* Stuart E. Eizenstat, *Imperfect Justice: Looted Assets, Slave Labor, and the Unfinished Business of World War II*, at 194 (2003). Furthermore, the HEAR Act, by enacting a claimant-favorable federal statute of limitations, will strongly encourage the assertion of such claims.

If the FSIA were construed in accordance with the D.C. Circuit's interpretation, however, these claims may never be brought, or foreign governments would simply ignore them by hiding behind the purported lack of jurisdiction under the FSIA. If the

D.C. Circuit decision is reviewed and reversed, however, it would likely encourage foreign governments to resolve these claims without the need for extensive litigation, in accordance with the Washington Principles and the other international declarations and agreements to which these governments subscribed.

Most importantly, the D.C. Circuit's misconstruction of the FSIA would permit nations like Hungary, who actively participated in the terrible wrongs committed against its Jewish citizens during the Nazi era, to escape liability for continuing to keep the very artworks under their control due to their wrongful actions. "Winston Churchill described the brutal, mass deportation of Hungarian Jews for extermination at Nazi death camps as 'probably the greatest and most horrible crime ever committed in

the history of the world.'" *Simon*, 812 F.3d at 132. The United States Holocaust Memorial Museum, which extensively studied and reported on the Holocaust in Hungary in two leading publications (s*ee* Braham, ed., *The Geographical Encyclopedia of the Holocaust in Hungary* (2013); Vagi, Csosz, Kadar, *The Holocaust in Hungary: Evolution of a Genocide* (2013)), set forth its scholarly conclusions on this subject at www.ushmm.org/research/scholarly-presentations/conferences/the-holocaust-in-hungary-70-years-later/the-holocaust-in-hungary-frequently-asked-questions. It included the following findings:

> [4]. . . . Hungarian authorities murdered Jews on several occasions before the German occupation.
>
> . . .
>
> [7]. Nazi Germany's chief deportation expert SS Lieutenant-Colonel Adolf

> Eichmann arrived in Budapest on March 19, 1944, together with the German troops who occupied Hungary unopposed. Eichmann was surprised at how actively and enthusiastically Hungarian authorities collaborated to achieve what was clearly a common purpose, initiating many anti-Jewish measures on their own. As a result, Hungarian Jews were identified, plundered, ghettoized, deported, and murdered with a speed and efficiency virtually unparalleled in the history of the Holocaust.

Id.

Of course, all of the horrific actions of the Hungarian government during the Nazi era cannot be rectified in an action to recover looted artworks. But Hungary's continued possession of artworks in its state-owned museums and agency that it

wrongfully confiscated during the Nazi era is a constant reminder to Holocaust victims and their families of the horrors they suffered during that terrible period. To deny them the ability to bring an action against Hungary to recover their wrongfully confiscated property would permit one of the perpetrators of the Holocaust to escape liability for some of its terrible crimes.

The Washington Principles were adopted to avoid just such a result:

> We are here to acknowledge and bring to the attention of the world the fact that the Holocaust was not limited to mass murder.
>
> With the Holocaust also came the greatest theft in human history — the theft of money, art, gold, precious manuscripts, insurance policies, and a host of other victims' assets.

> It was not merely about murder and theft; it was also about the destruction of a way of life. Indeed, the collective culture of the Jewish people of Europe was devastated. Communal Jewish life in Eastern Europe was totally shattered and irreparably eviscerated.

Opening Remarks at Washington Conference by Miles Lerman, Chairman of the United States Holocaust Memorial Council, Proceedings at 19-20.

Amici respectfully urge this Court to permit claimants to help right this terrible wrong.

CONCLUSION

For the foregoing reasons and those stated in the Petition, the Petition for a Writ of Certiorari should be granted.

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