No. 17-1165

IN THE
Supreme Court of the United States

DAVID L. DE CSEPEL; ANGELA MARIA HERZOG; 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 District of Columbia Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF AMBASSADOR STUART E. EIZENSTAT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Simon J. Frankel
Counsel of Record
Andrew J. Vaden
COVINGTON & BURLING LLP
One Front Street
San Francisco, CA 94111
sfrankel@cov.com
(415) 591-6000

Counsel for Amicus Curiae

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Respondents.

MOTION OF AMBASSADOR STUART E. EIZENSTAT FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Ambassador Stuart E. Eizenstat hereby seeks leave, pursuant to this Court's Rule 37.2, to file the attached brief as *amicus curiae* in support of Petitioners David L. de Csepel, Angela Maria Herzog, and Julia Alice Herzog. Counsel of record for all parties received notice of Ambassador Eizenstat's intent to file a brief more than ten days before the due date.[1]

[1] Petitioners have consented to the filing of this brief, but Respondents have declined to consent to the filing of this brief. In seeking an extension of time to file their brief in opposition to the petition, however, Respondents cited the need to "consider and, if necessary, respond to the briefs of *amici curiae* expected to be filed

As Under Secretary of State and then as Deputy Secretary of Treasury, among other senior positions, Ambassador Eizenstat was, for nearly fifteen years, charged with responsibilities for the United States related to the resolution of Holocaust-era claims.

In that capacity, Ambassador Eizenstat represented the United States government in a variety of efforts to bring some measure of justice to the victims of the Holocaust and their families. First, Ambassador Eizenstat was instrumental to the adoption, by dozens of States, of the Washington Conference Principles (1998), which encouraged foreign States and private parties to identify and facilitate the restitution to the rightful owners of artwork stolen during the Nazi era. Second, Ambassador Eizenstat oversaw a series of negotiations between claimants' representatives, foreign States, and foreign companies to resolve a wide range of slave and forced labor, property, insurance, and other claims arising from the Holocaust. His work on a German settlement of this nature was noted by this Court in *American Insurance Association v. Garamendi*, 539 U.S. 396, 405 (2003).

Ambassador Eizenstat believes that the attached brief, based on his years of experience as the chief U.S. negotiator for Holocaust-era claims, will assist the Court in evaluating the importance of the issues presented by the Petition. As an initial matter, Ambassador Eizenstat's work on an international framework for identifying confiscated property and facilitating the compensation of victims makes him well situated to describe and explain the principles underlying the

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in this case." Respondents' Motion to Extend the Time to File (Feb. 26, 2018).

multilateral declarations governing this area. In addition, his experience mediating negotiations between States and private parties on these delicate matters makes him uniquely qualified to address the factors that must be present for lasting agreements to be reached.

For reasons explained in Ambassador Eizenstat's brief, the D.C. Circuit's decision in this case runs contrary to the international consensus regarding the responsibility of States for returning looted property to victims of the Holocaust and their families. As a practical matter, the decision below also would make it more difficult for such worthy claimants to achieve some measure of justice. As such, he believes the decision presents an important issue for review by this Court.

Accordingly, Ambassador Eizenstat respectfully seeks the Court's leave to file the attached brief supporting Petitioner.

Respectfully submitted,

Simon J. Frankel
Counsel of Record
Andrew J. Vaden
COVINGTON & BURLING LLP
One Front Street
San Francisco, CA 94111
sfrankel@cov.com
(415) 591-6000

Counsel for Ambassador Stuart E. Eizenstat

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INTEREST OF AMICUS CURIAE[1]

Ambassador Stuart E. Eizenstat devoted much of his long career in public service to seeking belated justice for survivors of the Holocaust and the families of victims. He was instrumental in placing this issue on the agenda of the United States government, and governments in Europe and Latin America, decades after the end of World War II.

Ambassador Eizenstat held a number of senior positions in the U.S. government, including Chief White House Domestic Policy Adviser (1977-1981), U.S. Ambassador to the European Union (1993-1996), Under Secretary of Commerce for International Trade (1996-1997), Under Secretary of State for Economic, Business and Agricultural Affairs (1997-1999), and Deputy Secretary of the Treasury (1999-2001).

In addition to serving in four Senate-confirmed positions, he also served as Special Envoy of the State Department on Holocaust-Era Property Restitution (1995-1997); Special Representative of the President and the Secretary of State on Holocaust-Era Issues (1997-2001); and Special Advisor to the Secretary of State for Holocaust Issues (2009-2017). Since 2009, he has been the chief negotiator for the Conference on

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* or his counsel made any monetary contributions intended to fund the preparation or submission of this brief. Counsel of record for all parties received notice at least ten days prior to the due date of *amicus*' intention to file this brief; counsel for Petitioners has consented to the filing of this brief, but counsel for Respondents declined to consent. Accordingly, *amicus* has filed a motion for leave to file this brief.

Jewish Material Claims Against Germany in its annual negotiations with the German government. He has negotiated well over $10 billion in benefits for Holocaust survivors and the families of victims. He submits this brief in his individual, private capacity.

As a senior government official, Ambassador Eizenstat was responsible for the formulation and implementation of U.S. policy with respect to the resolution of Holocaust-era expropriation claims. As Under Secretary of State, he chaired an interagency committee examining the role of the government of Switzerland and other professed neutral States, like Portugal and Turkey, during World War II. With the direct encouragement of Ambassador Eizenstat and the U.S. government, over twenty States formed historical commissions to examine their wartime roles.

Ambassador Eizenstat played a leading role, as head of the U.S. delegation, at the 1997 London Conference on Nazi Gold. There, the parties agreed that six metric tons of previously undistributed Nazi gold claimed by ten States would be distributed to Holocaust survivors and families of victims.

He also played a leading role in the negotiation, drafting, and adoption of a number of declarations relating to the restitution of Nazi-confiscated assets. These declarations included the Washington Conference Principles on Nazi-Confiscated Art (1998), the Vilnius Declaration of 2000 on Cultural Property and Art, and the Terezin Declaration on Holocaust Era Assets and Related Issues (2009).

Separately, Ambassador Eizenstat successfully negotiated major agreements with the Swiss (1998),

Germans (2000), Austrians (2001), and French (2001) covering payment for slave and forced laborers, restitution of looted art, bank accounts, and payment of insurance policies. He also concluded additional agreements as a U.S. government representative with the governments of Lithuania (2011) and France (2014) for the benefit of Holocaust survivors and the families of survivors. In almost all of these negotiations, his principal negotiating partners were representatives of European states.

In 2003, Ambassador Eizenstat published *Imperfect Justice: Looted Assets, Slave Labor and the Unfinished Business of World War II*, an account of his role developing consensus on the Washington Conference Principles and leading U.S. efforts to achieve a prompt and fair resolution of Holocaust-related claims against private industry in Switzerland, Germany, Austria, and France, and European insurance companies.

Ambassador Eizenstat has devoted much of his career to building consensus among foreign governments, private parties, and claimants on the principles governing the resolution of claims involving the expropriation of art and other assets by the Nazis. He submits this brief to provide his views regarding the importance of the participation of foreign States as sovereigns, and not just their agencies or instrumentalities, for the just and fair resolution of such claims.

INTRODUCTION AND SUMMARY OF ARGUMENT

More than seventy years after the end of World War II, tens of thousands of artworks looted during the Nazi era have not been returned to their rightful owners. For decades, the United States has sought to build consensus in the international community around the principle that States should be held accountable for these failures. Unfortunately, the decision below runs counter to these efforts by according foreign States sovereign immunity even when property that was taken in violation of international law is owned or operated by a State's agency or instrumentality and that agency or instrumentality is engaged in a commercial activity in the United States. The Petition demonstrates that that ruling is contrary to the plain text of the Foreign Sovereign Immunities Act and misinterprets the statute to render only the agency or instrumentality subject to suit, not the State itself. The ruling also cemented a division of authority among the Circuits. *See* Pet. 14-23. This *amicus* brief explains how that ruling immunizing foreign States also is contrary to longstanding international agreements and disregards the responsibility and role of States in the restitution process, and thus raises an important issue meriting review by this Court.

I. Beginning over two decades ago, the United States government focused on the problem of looted artworks and re-energized efforts to bring some measure of justice to victims of the Holocaust and their families. In negotiations led by Ambassador Eizenstat, the United States secured agreement by dozens of nations to the Washington Conference

Principles (1998), which call for States and private parties to facilitate the identification and return of looted art. Successive declarations in Vilnius (2000) and Terezin (2009) reaffirmed these principles and intensified calls for States to ensure that claims to looted art and other property are resolved justly and fairly, on their merits. A broad international consensus developed that States bear this important responsibility, due both to their historical role in the theft and coerced sales of art during this period, as well as their unique ability to facilitate the identification and return of looted property. During this period, a series of congressional enactments confirmed the role and responsibility of States in this regard.

The decision below is at odds with this important recognition of the role of States. By its terms, the decision would allow foreign States to evade responsibility for their failure to return looted artworks and other property in an important category of cases where the property in issue is currently owned by an agency or instrumentality of a foreign State rather than by the foreign State itself. For this reason, the D.C. Circuit's opinion presents an important issue meriting review by the Court.

II. A decision to immunize foreign States from suit in this important category of cases would have significant practical consequences. During Ambassador Eizenstat's time in public service, he presided over a series of negotiations between various claimants, European governments, and European industry. Almost without exception, foreign States played a crucial role, encouraging broad participation from the private sector in their nations, balancing

competing interests, and contributing their government funds to the settlement. In the German settlement alone, the German State and private industry contributed DM 10 billion (approximately $4.5 billion) to address claims of slave and forced labor during the Nazi period. Similar agreements were reached with Austria in 2000 and 2001 for various labor and property claims, and with France in 2001 for various banking claims.

The decision below, unfortunately, would reduce the incentive for States to participate in such negotiations in the future and make it harder for litigants to receive a meaningful recovery. Much of the remaining art and other cultural objects taken during the Nazi era and not yet returned to victims is held by museums and other institutions affiliated with foreign States, not by foreign States themselves. And while the decision below would still allow suits against such institutions to proceed, as a practical matter the ability to execute judgments against such entities may be sharply limited if the foreign State itself is not subject to suit. The Court should grant this petition to consider whether this troubling result is required by the Foreign Sovereign Immunities Act.

ARGUMENT

I. The Immunization of Foreign States from Suit When Their Agencies and Instrumentalities Own Expropriated Works of Art Raises an Issue Warranting Review Because It Deviates from the Framework Underlying Multilateral Declarations that Have Governed the Resolution of Holocaust-Era Claims.

For decades, the U.S. government has lent the weight of its authority, and considerable resources, to urging foreign States to help bring justice to victims of the Holocaust and their heirs. One area of particular focus has been the restitution of art and other cultural objects stolen by the Nazis. The decision below is a regrettable departure from this recognition of State responsibility—a recognition that is reflected in the text and purpose of the Foreign Sovereign Immunities Act—and presents an important issue for review.

A. The United States' Longstanding Efforts and Multilateral Declarations Recognize That States Bear Ultimate Responsibility for Unlawful Holocaust-Era Takings.

"During World War II, the Nazis stole hundreds of thousands of artworks from museums and private collections throughout Europe, in what has been termed the greatest displacement of art in human history." *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 957 (9th Cir. 2010) (internal quotation marks and citation omitted). Hungary, "a wartime ally of Nazi Germany," was no

exception to the rule. *Simon v. Republic of Hungary*, 812 F.3d 127, 133 (D.C. Cir. 2016). There, "Hungarian Jews were subjected to anti-Semitic laws restricting their economic and cultural participation in Hungarian society and deported to German concentration camps." Pet. App. 2a. A commission established by the Hungarian government required Jews to register their art objects, which were then "sequestered and collected centrally" by the Commission. Pet. App. 3a. Indeed, throughout Europe, Nazi confiscation of art was widespread. *See, e.g.*, *Republic of Austria v. Altmann*, 541 U.S. 677, 681-84 (2004).

Efforts by the United States and its allies to address this problem began while the war was still underway. On January 5, 1943, the Allies issued the London Declaration, calling on neutral countries not to trade in art looted by the Nazis. *Von Saher*, 592 F.3d at 961-62. The U.S. government created a special unit in the U.S. Army called the "Monuments, Fine Arts, and Archives" section, whose members—the "Monuments Men"—were tasked to find, catalogue, and preserve the huge amount of Nazi-looted art and cultural objects encountered by U.S. forces, and place them in collecting points. President Truman ordered the looted objects to be repatriated by the U.S. military as quickly as possible. Stuart E. Eizenstat, *Imperfect Justice* 188-89 (2003).

In accordance with a military directive and international legal precedent, the U.S. and British commands returned the objects to the governments of their countries of origin and relied upon each government to trace the owners and ultimately return the stolen property. Unfortunately, almost none did

so; most gave the objects to their State-owned museums. Eizenstat, *supra*, at 189. Even to this day, scholars estimate that tens of thousands of works have not been returned to their rightful owners. *See* Donald S. Burris, *From Tragedy to Triumph in the Pursuit of Looted Art:* Altmann, Benningson, Portrait of Wally, Von Saher *and Their Progeny*, 15 J. Marshall Rev. Intell. Prop. L. 394, 401 (2016).

The United States has long recognized, through multilateral declarations, that foreign States bear important responsibility to ensure that stolen artworks are returned to victims of the Holocaust and their heirs. The first of these declarations was issued in December 1998 at the conclusion of a multilateral conference in Washington, D.C. in which forty-four countries, including the United States and Hungary, and thirteen non-governmental organizations participated. *Von Saher*, 592 F.3d at 958. The conference was held to explore the extent to which artworks looted during the Nazi era had not yet been returned to their rightful owners, and to build consensus as to how nations should approach the identification and restitution of these artworks. Ambassador Eizenstat helped organize the conference and was head of the U.S. delegation. Eizenstat, *supra*, at 196-99.

The resulting declaration, of which he was the principal drafter and negotiator, is known as the Washington Conference Principles. Although such declarations are not legally enforceable, this declaration and those that followed reflect the recognition by the signatories of the responsibilities that States bear in the process of returning artworks to their rightful owners. At the closing ceremony,

chaired by federal judge and former congressman Abner Mikva, Phillippe de Montebello, the director of the Metropolitan Museum of Art, declared that the art world would never be the same. *Concluding Statements*, *in Proceedings of the Washington Conference on Holocaust-Era Assets* 83, 127 (1999), https://1997-2001.state.gov/regions/eur/holocaust/heac.html. The declaration called on States to facilitate the identification of Nazi-confiscated art that had not yet been restituted to its rightful owner and the opening of archives to assist in the identification of such art. The declaration also urged State parties to find a just and fair solution for pre-war owners of looted art in cases where restitution had not yet taken place. Critically, the declaration also "encouraged" States "to develop national processes to implement" the foregoing principles. 1 *Digest of United States Practice in International Law 1991-1999*, at 1062-63 (Sally J. Cummins & David P. Stewart eds., 2005), https://www.state.gov/s/l/c17852.htm; *see also Statement of Hungary*, *in Proceedings of the Washington Conference*, *supra*, at 271, 273 ("The Hungarian government is fully committed to the restitution or compensation of Holocaust victims concerning cultural assets."). Some states, such as Austria and Russia, enacted binding laws that embodied the Washington Conference Principles.

In October, 2000, the Vilnius Forum Declaration was issued, following a conference held under the auspices of the Council of Europe. Ambassador Eizenstat headed the U.S. delegation and had a major hand in negotiating the Declaration. In that declaration, the thirty-eight signatory States

(including the United States and Hungary) called specifically on States "to undertake every reasonable effort to achieve the restitution of cultural assets looted during the Holocaust era to the original owners or their heirs" and to implement the Washington Conference Principles. Vilnius Forum Declaration, *Commission for Looted Art in Europe* (Oct. 5, 2000), http://www.lootedartcommission.com/vilnius-forum; *see also* Agnes Peresztegi, *Recovery, Restitution or Renationalization*, *in Holocaust Era Assets Conference Proceedings* 807, 814 (Jiri Troskov et al., eds. 2009) ("*Prague Conference Proceedings*") (describing Hungary's participation in Vilnius conference).

Nine years later, a multilateral conference organized by the Prime Minister of the Czech Republic in Prague and Terezin reaffirmed and clarified the role of nations in ensuring that just and fair solutions are found for the return of Nazi-confiscated and looted art. The Terezin Declaration on Holocaust Era Assets and Related Issues was affirmed by forty-six States, including the United States and Hungary. Again, Ambassador Eizenstat headed the U.S. delegation and was a central figure in drafting and negotiating the agreement. It urged stakeholders, including national governments, to ensure that "their legal systems or alternative processes, while taking into account the different legal traditions, facilitate just and fair solutions with regard to Nazi-confiscated and looted art, and to make certain that claims to recover such art are resolved expeditiously and based on the facts and merits of the claims." *Terezin Declaration on Holocaust Era Assets and Related Issues*, U.S. Dep't of State (June 30, 2009), https://www.state.gov/p/eur/rls/or/126162.htm; *see also Von Saher v. Norton*

Simon Museum of Art at Pasadena, 754 F.3d 712, 721 (9th Cir. 2014).

In the intervening years, the broad international consensus that States must play a fundamental role in efforts to return stolen art has persisted. For example, the Netherlands, Germany, Austria, and the United Kingdom have established panels to adjudicate conflicting claims between private claimants to Nazi-looted art and their State-owned museums. Georg Heuberger, *Annex to Presentation by Georg Heuberger on 'Holocaust Era Looted Art: A Worldwide Overview,' in Prague Conference Proceedings* 1210, 1213-14, 1224-25, 1233-34; U.K. Spoliation Advisory Panel, https://www.gov.uk/government/groups/spoliation-advisory-panel. And to underscore the crucial role of sovereign States in dealing with their State museums on Nazi-looted art, German Cultural Minister Monika Grütters obtained an additional €4 million in State funding in 2015 to perform provenance research to determine if the country had any Nazi-looted art in its collections. Melissa Eddy, *German Panel Defends Effort to Trace Owners of Nazi-Looted Art*, N.Y. Times (Dec. 2, 2015), https://www.nytimes.com/2015/12/03/world/europe/germany-nazi-looted-art-cornelius-gurlitt.html. Germany will also hold a "stock-taking" conference this year for signatories of the Washington Conference Principles, to assess the progress made by States twenty years after its adoption.

The U.S. government undertook a number of measures to put the Washington Conference Principles into practice. It encouraged its private museums and the National Gallery of Art to return Nazi-looted art in their collection, and worked with

the U.S. art museum directors association as the U.S. museums investigated the provenance of their art collections in the search for Nazi-looted art. *See Heuberger*, *supra*, at 1246-48.

Congress, for its part, adopted and furthered the approach embodied by these declarations. In 1998, for example, Congress passed the Holocaust Victims Redress Act, which expressed the sense of 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." Pub. L. No. 105-158, 112 Stat. 15, § 202 (1998). That same year, it passed the U.S. Holocaust Assets Commission Act of 1998, establishing a presidential commission to study the disposition of assets of Holocaust victims, including art, that passed through U.S. government hands. Pub. L. No. 105-186, 112 Stat. 611 (1998).

In 2016, Congress made a further effort to facilitate the resolution of Holocaust-era claims on their merits by passing the Holocaust Expropriated Art Recovery Act, which provided six years after discovery of a claim to bring suit "to recover any artwork or other property that was lost during the covered period because of Nazi persecution." Pub. L. No. 114-308, 130 Stat. 1524, § 5 (2016).

Later that year, Congress enacted the Foreign Cultural Exchange Jurisdictional Immunity Clarification Act. That law amended the Foreign Sovereign Immunities Act (FSIA) by adding subsection (h) to 28 U.S.C. § 1605. Pub. L. No. 114-319, 130 Stat. 1618 (2016). The new subsection (h) provides that the temporary exhibition in the United

States of artworks owned by a foreign State is not "commercial activity" by that State for purposes of the FSIA if the President determines in advance that the work is of "cultural significance" and the display of the work is in the "national interest." 28 U.S.C. § 1605(h)(1). Congress created an express carve-out, however, for works subject to "Nazi-era claims," for which the President is not empowered to make such a determination. 28 U.S.C. § 1605(h)(2). Although this does not decide the question presented by the Petition, it illustrates that Congress has legislated in this area with the importance of resolving these Holocaust-era claims in mind.

The Washington, Vilnius, and Terezin declarations embody the recognition by signatories, including the United States, that States have a responsibility to facilitate the return of confiscated art and ensure that the claims of Holocaust survivors and the families of victims are resolved fairly. And unless supported by the States themselves, such efforts cannot be consistently implemented. Museums, universities, and other cultural institutions generally lack the resources to identify potentially looted artworks and undertake a systematic and coordinated effort to do justice for Holocaust survivors and the families of victims. For this reason, foreign States play a vital role in addressing the problem of expropriated art.

B. The Framework of These Multilateral Declarations Is Undermined by the Decision Below's Immunization of Foreign States from Suit When the Expropriated Art Is Owned by the State's Agency or Instrumentality.

The D.C. Circuit's immunization of a foreign State when expropriated art is owned by its agency or instrumentality (rather than by the State itself) is inconsistent with the broad international consensus reflected in the multilateral declarations discussed above that States play a key role in facilitating just and fair solutions for victims of Holocaust-era expropriation. By immunizing the foreign State from suit, the decision runs contrary to the acknowledgment by the signatories to the Washington Conference Principles and successive declarations of this key role for sovereign States. Those declarations emphasize the importance of State participation in addressing these injustices. What is more, the 2009 Terezin declaration expressed the signatories' sense that these claims should be "resolved . . . based on the facts and merits of the claims," and not on technicalities.

The D.C. Circuit's departure from this broad consensus is all the more striking when the plain text of the statute is considered. The Foreign Sovereign Immunities Act (FSIA) provides that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States" unless a statutory exception applies. 28 U.S.C. § 1604. At issue here is the FSIA's "expropriation exception," which provides that

> *[a] foreign state shall not be immune* from the jurisdiction of the courts of the United States or of the States *in any case—*
>
> * * *
>
> (3) *in which rights in property taken in violation of international law are in issue and* that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or *that property* or any property exchanged for such 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.*

28 U.S.C. § 1605(a)(3) (emphasis added).

Despite this plain text, the decision below holds that the foreign State itself *is* immune from the jurisdiction of courts of the United States *even when* artwork taken in violation of international law is in issue, the artwork is owned by an agency or instrumentality of that State, and that agency or instrumentality is engaged in a commercial activity in the United States. Pet. App. 16a-25a. As the dissent below observed, this "transforms the governing jurisdictional statute to mean the opposite of what it says." Pet App. 30a.

II. The Decision Below Creates a Significant Practical Hurdle To Resolution of Remaining Holocaust-Era Expropriation Claims.

Long experience in negotiations to resolve Holocaust-era expropriation claims teaches that the participation of foreign sovereigns is vital to fairly and finally resolving these claims. The decision below, by immunizing States from suit in a significant class of cases, would deprive claimants of an important mechanism for holding foreign States accountable for restoring to the claimants their property that was expropriated as part of Nazi-era crimes.

A. Experience Demonstrates that Participation of Foreign States Facilitates Fair and Prompt Resolution of Holocaust-Era Expropriation Claims.

In the late 1990s and early 2000s, the U.S. government facilitated negotiations between various claimants and a number of foreign States, State institutions, and foreign companies responsible for expropriation and slave labor during the Nazi era. One common element uniting these successful negotiations was the participation of the foreign State, which facilitated the broad participation of the private sector in the negotiations.

From 1998 to 2000, for example, Ambassador Eizenstat co-chaired talks between claimants' representatives, the German government, and German industry focused on compensation for victims of slave and forced labor and others who suffered at the hands of German companies during the Nazi era. These negotiations led, in July 2000, to an agreement providing for passage of a German law creating the

foundation "Remembrance, Responsibility and the Future," to address these claims. The German government and German industry contributed equally to the DM 10 billion (approximately $4.5 billion) settlement. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 405-06 (2003); *In re Nazi Era Cases Against German Defendants Litig.*, 198 F.R.D. 429, 432-34 (D.N.J. 2000); *see also In re Austrian, German Holocaust Litig.*, 250 F.3d 156, 159 (2d Cir. 2001) (per curiam).

As provided in that agreement, the plaintiffs in litigation against German companies then pending in federal court sought to voluntarily dismiss their suits. The United States filed a Statement of Interest, supported by a declaration of Ambassador Eizenstat, emphasizing the "foreign policy interests" advanced by the agreement and supporting the dismissal of the suits "on any valid legal ground." *In re Nazi Era Cases*, 198 F.R.D. at 435 & n.13. This agreement achieved "legal peace" for German industry, and resulted in the dismissal of all pending Holocaust-era litigation against Germany companies in U.S. courts. *Id*. at 430.

Claims against Austrian companies were resolved in a similar manner. In October 2000, a similar series of negotiations—also led by Ambassador Eizenstat—resulted in an agreement between claimants' representatives, the Austrian State, and various Austrian companies. Ambassador Eizenstat negotiated an initial agreement with the Austrian government of $150 million for movable property, such as furniture, artworks, and valuable effects stolen by the Nazis. A second agreement negotiated with the State established a Reconciliation

Fund to provide payments to forced and slave laborers who worked on the territory of present-day Austria during the Nazi era, endowed with AS 6 billion (approximately $415 million) in funds. The agreement was effectuated by a Joint Statement issued by claimants' representatives and the governments of the United States and Austria as well as a bilateral agreement between the United States and Austria concluded the same day. *Digest of United States Practice in International Law 2001*, at 394 (Sally J. Cummins & David P. Stewart eds., 2002) ("*2001 Digest*"), https://www.state.gov/s/l/c8184.htm; *Whiteman v. Dorotheum GmbH & Co. KG*, 431 F.3d 57, 64-65 (2d Cir. 2005); Eizenstat, *supra*, at 293-314.

A follow-on agreement regarding property claims was concluded in January 2001, with a State-run claims process for some 20,000 property claimants supported by a General Settlement Fund (GSF). The GSF was funded by $210 million in contributions largely from the government of Austria. As part of the agreement, the government of Austria also undertook to change certain social benefits laws. And as with the German agreement, the Austrian agreements sought to provide "legal peace" for Austrian companies in U.S. courts. The agreement took the form of a joint statement issued by the parties and an exchange of diplomatic notes between the United States and Austria. *2001 Digest* 394-95; *see Whiteman*, 431 F.3d at 65. The Austrian agreements were achieved only because of the direct involvement and financial contribution of the Austrian government.

Talks between claimants' representatives, the French government, and French banks followed in

January 2001. Again, Ambassador Eizenstat led the U.S. government's efforts to facilitate these talks. Although the funds in question were in private French banks, his negotiating partner was a former French ambassador to the United States, named by the French government. These negotiations yielded new claims-processing rules and supplemental funding of $22.5 million to address the expropriation by French banks of Jewish assets during the Nazi era, augmenting the French government's earlier efforts in this regard. As with the German and Austrian agreements, this agreement involved the claimants' representatives and the two States, and included measures to ensure that the plaintiffs' claims in related litigation were dismissed. *2001 Digest* 406-08.

These efforts with Germany, Austria, and France contrast with efforts to settle with Swiss banks during this same period. Although the private Swiss banks were willing to engage in negotiations, they insisted that Ambassador Eizenstat and the U.S. government mediate the talks, which were later concluded under the auspices of U.S. District Court Judge Edward Korman. *See In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139, 141-43 (E.D.N.Y. 2000). The Swiss government's refusal to participate directly in the settlement made the agreement between the parties more difficult to achieve. But Ambassador Eizenstat frequently urged the Swiss government, through the Swiss Federal Council, then headed by Flavio Cotti, to encourage their private banks to negotiate in good faith. Mr. Cotti indicated to Ambassador Eizenstat that he would do so. *See* Eizenstat, *supra*, at 87-88, 132. Still, a more direct negotiation with the Swiss government, together with

its private banks, might have led to a more prompt settlement of the lawsuits.

Ambassador Eizenstat's efforts on behalf of the U.S. government to facilitate resolution of Holocaust-era claims continued again later, including a $10 million agreement with the government of Lithuania, which he and U.S. Ambassador Anne Derse negotiated in 2011. In 2014, Ambassador Eizenstat negotiated with the French government, which settled claims on behalf of its state-owned railroad, SNCF, for those deported on SNCF during the War to concentration camps outside of France, the spouses of those deported, and the heirs of those who were killed. The State contributed a $60 million settlement. Separately, the SNCF made an additional $4 million voluntary contribution for projects of remembrance. *Digest of United States Practice in International Law 2014*, at 313-15 (CarrieLyn D. Guymon, ed.), https://www.state.gov/s/l/2014/.

Although the exact contours of the agreements with German, Austrian, and French parties varied, each had a structure that was similar in important respects. The claimants' representatives agreed to voluntarily dismiss their legal claims, while the foreign States and private parties agreed to adjudicate, on favorable terms, the victims' claims. Crucially, the operation of the newly established foreign foundations was subject to requirements negotiated and agreed to by the foreign States.

The participation of foreign States in these negotiations was vital, for several reasons.

First, the foreign States were Ambassador Eizenstat's principal interlocutors, with Germany,

Austria, and France appointing negotiating partners, and provided significant financial contributions to the respective settlements. Germany, for example, contributed DM 5 billion (approximately $2.3 billion), half of the total value of the German settlement. Austria contributed the vast majority of the $765 million estimated value of its 2000 and 2001 commitments. France, for its part, contributed much of the $22.5 million in supplemental funding agreed in the 2001 negotiations. Eizenstat, *supra*, at 325.

Second, the participation of the foreign States helped secure broad participation by responsible private parties in their respective countries. In the German negotiations, German Federal Chancellor Schroeder appointed Count Otto Lambsdorff, a former federal economic minister in the government of Chancellor Schmidt, as his personal representative. Eizenstat, *supra*, at 236. Ambassador Eizenstat negotiated with Count Lambsdorff and with the German private corporations. Without his pressure on the private corporations and a fifty-percent contribution by the German government, the agreement would have been impossible. In the Austrian negotiations, Chancellor Schuessel appointed the former head of the Austrian Central Bank, Maria Schaumayer, as his envoy for the slave labor portion of the negotiations, and Ernst Sucharipa, a former Austrian government diplomat, for the property negotiations. Ambassador Eizenstat also negotiated the final agreement directly with Chancellor Schuessel, who was able to gain the support of the private sector for the agreement. *Id*. at 285-86, 294, 298-300. The French prime minister at the time, Lionel Jospin, and other French officials

were likewise deeply involved in the French talks and helped ensure broad participation by the French private sector. Ambassador Eizenstat's negotiating partner was the former French ambassador to the U.S., named by the French government. *Id*. at 321, 332.

Third, each settlement succeeded only because the foreign State agreed to establish binding legal rules for the payment process and the adjudication of claims. The German, Austrian, and French agreements each depended upon undertakings by those States to establish legal bodies and otherwise codify the agreement into their domestic law. These sovereign undertakings were vital to securing the confidence of the claimants' representatives in the agreements.

Fourth, the States participated both because of reputational concerns and to right the injustices of the past.

In sum, efforts to resolve Holocaust-era expropriation claims depend to a large degree on the willingness of foreign States to participate in negotiations, involve private parties, and support a resolution of such claims. Efforts to resolve substantial claims rarely succeed without such support by the States.

B. The Decision Below Would Discourage State Participation in Negotiations of Comprehensive Settlements.

The D.C. Circuit's holding, by its terms, bars suit against a foreign State in an important category of cases: those involving takings in violation of

international law where the property is located outside the United States, and the property is owned by an agency or instrumentality of the foreign State. By shielding the foreign sovereign itself from liability in this important class of cases, the decision below would deprive the claimants and the U.S. government of a key source of leverage that would help encourage recalcitrant states to resolve remaining Holocaust-era claims.

This concern is not merely theoretical, as much of the remaining art and other assets taken during the Nazi era and not yet returned to victims is held by museums and other institutions affiliated with foreign States, not by foreign States themselves. *See* Georg Heuberger, *Holocaust Era Looted Art: A Worldwide Overview*, *in Prague Conference Proceedings* 940, 941. Experts believe perhaps the greatest repository of Nazi-looted art is the Hermitage in Russia. *See* Steve Erlanger, *Hermitage, In Its Manner, Displays Its Looted Art*, N.Y. Times (Mar. 30, 1995), https://www.nytimes.com/1995/03/30/arts/hermitage-in-its-manner-displays-its-looted-art.html (describing exhibition of "art looted from Nazi Germany at the end of the war").

To be sure, *agencies and instrumentalities* of a foreign State would remain amenable to suit in certain cases under the D.C. Circuit's interpretation of the FSIA. And as a theoretical matter, property of such entities located in the United States may not be immune from attachment in aid of execution upon a judgment. *See* 28 U.S.C. § 1610(b)(2). But as a practical matter, agencies or instrumentalities of a foreign State may not have sufficient assets in the United States that are subject to attachment to satisfy

a judgment, even if such entities are "engaged in a commercial activity in the United States." 28 U.S.C. § 1605(a)(3); *see First Nat. City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 626-28 (1983) (recognizing presumption that instrumentalities established by foreign state are independent from the sovereign). In such cases, the plaintiffs' only recourse would likely be to attempt to enforce the judgment against the entity in its home country, where the plaintiffs may confront legal or political obstacles. *See, e.g.*, Hungary 2016 Human Rights Report, U.S. Dep't of State 11-13, https://www.state.gov/documents/organization/265640.pdf (describing "attempts to exert political influence over the judiciary" and a report suggesting that "independence of the judiciary and the rule of law were under threat" in Hungary). Consequently, agencies or instrumentalities can more readily avoid the execution of judgments than can foreign States themselves, thus frustrating attempts to achieve a measure of justice.

In sum, because the D.C. Circuit's decision would remove an important incentive for States to participate in the restitution of expropriated property, it presents an important issue for the Court to review.

CONCLUSION

For the foregoing reasons, the Court should grant certiorari to address the issues presented in the Petition.

Respectfully submitted,

Simon J. Frankel
Counsel of Record
Andrew J. Vaden
COVINGTON & BURLING LLP
One Front Street
San Francisco, CA 94111-5356
sfrankel@cov.com
(415) 591-6000

Counsel for amicus curiae

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